Orix Capital Ltd v Personal Representative(s) of the Estate of Lim Chor Pee (deceased) and Others
[2009] SGHC 201

Case Number : Suit 540/2007

Decision Date : 07 September 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Felicia Ng Hui-Li (Piah Tan & Partners) for the plaintiff; Oommen Mathew (Haq & Selvam) for the second defendant; Michael Khoo Kah Lip SC, Josephine Low Miew Yin and Andy Chiok Beng Tiow (Michael Khoo & Partners) for the third defendant

Parties : Orix Capital Ltd — Personal Representative(s) of the Estate of Lim Chor Pee (deceased); Lim Hsi-Wei Marc; Rebecca Marie Stephanie Tai-Yeo Hsiu Erh

Contract – Breach – Repudiation – Whether acceptance of repudiatory conduct could be withdrawn by parties' agreement – Whether contract could be revived after repudiation had already been accepted by innocent party

Contract – Contractual terms – Whether circumstances of lease were such that it was unfair, oppressive and unconscionable – Whether party acted in a "morally reprehensible manner"

Contract – Misrepresentation – Inducement – Whether there was duty to disclose features of transaction

Contract – Sham transaction – Test – Whether lease was sham transaction

Contract – Undue influence – Undue influence – Whether parent had undue influence over his adult child

Credit and Security – Money and moneylenders – Moneylenders Act (Cap 188, 1985 Rev Ed) – Whether party was moneylender under s 3 – Whether transaction was disguised moneylending transaction

Partnership – Partners and third parties – Cessation of partnership – Whether partner who left firm could be bound by actions of remaining partners

Partnership – Partners and third parties – Salaried partner – Partners liable for acts of partner in normal course of business – Whether partners were party to contract – Whether salaried partner held out to world as partner of firm

7 September 2009 Judgment reserved.

Judith Prakash J

Introduction

1 The plaintiff, Orix Capital Limited, is a leasing company and grants leasing facilities to customers in respect of office equipment which it purchases from suppliers like Canon Singapore Pte Ltd ("Canon") and then leases to the end-users. In this case, the plaintiff claims amounts arising under a lease agreement involving two photocopiers on the basis that the persons liable under the lease were Lim Chor Pee ("LCP"), his son, Lim Hsi-Wei Marc ("Marc Lim"), the second defendant herein, and the third defendant, Rebecca Marie Stephanie Tai-Yeo Hsiu Erh ("Ms Yeo"). LCP died before this action

was commenced and his estate (the "Estate") was made the first defendant in the action. The Estate did not defend the action and the plaintiff has obtained judgment against it. The other defendants, however, contested the claim. Hereafter when, for convenience, I refer to "the defendants" I should be understood as referring to the second and third defendants only.

Undisputed facts

2 At all material times LCP was a lawyer in private practice practising under the name and style of Chor Pee & Partners ("the firm"). He was the principal administrator of the firm and the person who made most, if not all, of the administrative decisions required by the firm. The office manager of the firm who implemented such decisions was one Ms Susanna Soh.

3 Marc Lim joined the firm as a legal assistant on 1 January 1997 and was made a salaried partner with effect from 1 January 2001. Under the appointment letter signed by LCP dated 19 January 2001, Marc Lim's appointment as salaried partner was "without any other participation in the profits or loss and assets and liabilities of the firm". Marc Lim averred that he handled legal work and did not participate in the administrative or financial affairs of the firm.

4 Ms Yeo joined the firm on 1 April 2003 to practise with it on a profit sharing basis without participation in the profits of the firm as a whole or in its assets and liabilities. The basic arrangement for Ms Yeo's remuneration was that the firm and she would share profits in various proportions on files (a) handled by her in whole or in part, (b) referred by her to the firm, and (c) referred by the firm to her. There was no signed contract between Ms Yeo and the firm but the agreed terms of her practice were set out in a document which was e-mailed to Ms Yeo by LCP. This document was entitled "Profit Sharing Agreement Between Chor Pee & Partners (CPP) and Rebecca Tai-Yeo ("Partner")" and its first clause stated that Ms Yeo would practise with CPP on a profit sharing basis without participation in the assets and liabilities of CPP pending the corportisation of CPP.

5 The background to the plaintiff's claim is not straightforward. The story started on 1 August 2001 when the firm entered into a lease agreement ("the Newcourt agreement") with a company called Newcourt Financial (Singapore) Pte Ltd ("Newcourt") for four photocopiers supplied by Canon ("the Newcourt copiers"). Under the Newcourt agreement, the firm was to pay a monthly rental of $2,955 for the Newcourt copiers for a period of 60 months ending on 31 July 2006. In February 2004, the Newcourt agreement was varied. Under the variation, the lease period was extended to 4 February 2010 and the monthly lease payments were reduced to $1,800 per month for the first 12 months of the extended period, $2,000 per month for the next year, $2,200 per month for the third year, $2,400 for the fourth year, $2,600 per month for the fifth year and $2,653.76 per month for the sixth year.

6 In July 2004, one Ms Dora Loh, who was then employed as senior sales consultant by Canon, approached Susanna Soh with a view to concluding a deal through which the firm would acquire new photocopiers. She recommended two new models (the "Copiers") to Susanna Soh and ascertained that the firm was then paying $1,800 per month for the Newcourt copiers. At the same time Dora Loh ascertained from Newcourt that in order to procure an early termination of the Newcourt agreement, the firm would have to pay Newcourt $164,144.34 plus GST ("the termination sum"). Having done further calculations, Dora Loh worked out that Canon's sale price for the Copiers (taking account of the termination sum which Canon would have to pay Newcourt), would be $231,500 plus GST. Dora Loh was aware from her discussions with Susanna Soh that the firm would not be interested in upgrading its copiers if this project resulted in an additional monthly expenditure for the firm since the firm was keen to reduce its cash flow. Before putting her proposal to the firm therefore, Dora Loh approached Danny Lee, an employee of the plaintiff, and asked him whether the plaintiff would be

able to purchase the Copiers for $231,500 plus GST and then lease the same to the firm for $1,800 per month.

7 After doing his calculations, Danny Lee informed Dora Loh that the plaintiff would buy the Copiers at the price stated and it would then be willing to lease them to the firm for approximately six years at the following monthly rentals:

(a) for months 1 to 24, $1,800;

(b) for months 25 to 48, $3,500;

(c) for months 49 to 72, $5,450; and

(d) a final payment of $47,400.

8 Based on the figures set out above, Dora Loh prepared a proposal for the firm for the lease of the Copiers which were to replace the Newcourt copiers. The proposal showed that for the first two years, the firm would pay less under the new lease than under the Newcourt agreement as varied. As part of the proposal, Canon was to pay the termination sum to Newcourt. This proposal was accepted by Susanna Soh. On or about 17 July 2004, she signed a document called a Sales Agreement ("the Sales Agreement") issued by Canon which set out the main terms of what was described as the "Lease Purchase".

9 The plaintiff then prepared lease agreement number OC/LA/0804/005169 ("the Lease") in respect of the two Copiers. The date of the Lease was 27 August 2004. The lessee was described in the schedule to the Lease as follows:

LESSEE

Name : LIM CHOR PEE (I/C NO: S2088197F),
LIM HSI-WEI MARC (I/C NO: S1601047B) &
REBECCA MARIE STEPHANIE TAI-YEO HSIU-ERH
(I/C NO: S1660081D) PRACTISING UNDER FIRM OF
CHOR PEE & PARTNERS

Address: 3 KILLINEY ROAD
#07-01 WINSLAND HOUSE 1
SINGAPORE 239519

The Lease was signed by LCP and Marc Lim. Their signatures appeared above the stamped name of the firm and their designation was typed in as "Partners".

10 Canon delivered the Copiers to the firm on 29 July 2004 and 2 August 2004. Canon then invoiced the plaintiff and the plaintiff paid Canon the agreed price for the Copiers.

11 The firm paid the monthly rental due under the Lease up till April 2005. Thereafter, the rentals due under the Lease went unpaid. On 7 July 2005, the plaintiff wrote a letter of demand to the firm in respect of the unpaid rental and by this letter notified the firm as follows:

Please note that this constitutes an event of default under the Lease Agreement. Pursuant to this, the Lease Agreement is therefore deemed to have been repudiated by you, which repudiation we accept.

Hence this agreement is terminated as at 07 July 2005. We hereby demand full payment of the sum of S$306,632.59 detail *(sic)* of which are shown below:-

…

Please note that if the said sum of S$306,632.59 together with default interest of S$199.22 per day from 08 July 2005 is not paid within seven (7) days from the date of this Demand Notice, we will institute legal proceedings against you …

12 On 22 July 2005, the plaintiff's solicitors, Messrs Piah Tan & Partners, sent a letter of demand to LCP, Marc Lim and Ms Yeo at the firm's address. The letter stated inter alia that the three addressees had repudiated the Lease by default in payment of the monthly rental and that repudiation had been accepted by the plaintiff and the Lease had been terminated on 7 July 2005. As at 7 July, the amount due was $306,632.58 but on 19 July 2005, the firm had sent the plaintiff a cheque for $1,890 which the plaintiff was accepting in diminution of the debt due but without prejudice to the termination of the Lease and the plaintiff's rights in respect of the same. The letter went on to demand payment of the balance of $307,627.98 due as at 22 July 2005.

13 After receipt of the letter of demand, LCP spoke to the plaintiff's credit manager one Ms Vivian Lim ("Ms Lim") regarding the matter and, as a result, on 5 August 2005, Messrs Piah Tan & Partners wrote to LCP and the defendants, at the firm's address, in the following terms:

We refer to our letter dated 22 July 2005.

We are instructed by our clients that subsequent to our letter, Mr Lim Chor Pee had requested for *(sic)* a reinstatement of the Lease Agreement and agreed with our clients' Ms Vivian Lim that the outstanding rental for June and July 2005 ($1,890-00 per month) would be paid on 29 July and 5 August 2005 respectively and that the rental sum from August 2005 would be paid via GIRO.

Our clients instruct that they have to date received payment of only a sum of $945-00 on 2 August 2005.

On a without prejudice basis, our clients are prepared to give you a further opportunity to have the Lease Agreement reinstated on condition that:-

(1) You make payment of a sum of $4,725-00 (being the outstanding rental from June to August 2005) to our clients.

(2) You make payment of a sum of $200-00 being our clients' legal costs to date on an indemnity basis via cheque in favour of "**Piah Tan & Partners**" to be delivered to our office by **10 August 2005**.

(3) You shall make payment for future rental via GIRO provided that if you are unable to effect the GIRO payments by 1 September 2005, you shall pay the rental due on 1 September 2005 to our clients no later than 2 September 2005.

We trust that you will make prompt payment to avoid legal proceedings being commenced.

14 By its solicitors' letters dated 23 August 2005 addressed to LCP, Marc Lim and Ms Yeo and delivered by hand to the office of the firm, the plaintiff granted an extension of time to 26 August 2005 in which to comply with the requirement for payment of the unpaid rental due up to August 2005. The plaintiff received the outstanding payment on 29 August 2005 and thereafter it treated the Lease as having been reinstated.

15 On 1 January 2007, there was a default in payment of the monthly rental due. By a letter dated 18 January 2007 addressed to the Estate, the defendants and the firm, the plaintiff terminated the Lease and demanded payment of the sum it claimed was due and payable consequent on that termination. That letter of demand led to the plaintiff's present claim. On 24 April 2007, the Copiers were repossessed by the plaintiff and sold.

16 It should be noted that, according to Ms Yeo, on 17 May 2005, the terms of her practice with the firm changed. From 18 May 2005, she was no longer working on a profit sharing basis but became a senior associate with the firm until 17 July 2005 when she physically left the firm. Her position as senior associate officially ended on 31 July 2005.

The plaintiff's claim and the defences

17 This action was commenced on 23 August 2007. On 2 July 2008, the first day of the trial, the plaintiff applied to amend its statement of claim.

18 The salient features of the amended statement of claim are as follows:

(a) first, by paragraphs 1 to 3, the plaintiff averred that at all material times, LCP and the defendants were partners practising under the name and style of the firm; that the plaintiff had leased the Copiers to LCP and the defendants for a period of 72 months from 1 September 2004 at the various rental rates specified in the Lease and that the material terms of the Lease were as set out in para 3;

(b) second, in para 4 the plaintiff averred that by reason of its default in payment of rental from April 2005, the lessee had repudiated the Lease and the plaintiff had accepted the repudiation and terminated the Lease on 7 July 2005;

(c) third, by the new para 5, the plaintiff pleaded:

In or about late July/early August 2005 Lim Chor Pee acting for himself and/or as agent for and on behalf of the 2nd and/or 3rd Defendants requested the Plaintiffs to reinstate the Agreement. Lim Chor Pee had represented to the Plaintiffs for himself and/or as agent for and on behalf of the 2nd and/or 3rd Defendants that the Agreement if reinstated would continue to bind Lim Chor Pee and/or the 2nd and/or 3rd Defendants. The Plaintiffs agreed to reinstate the Agreement (on terms) in that the lessee continued with the lease of the Copiers on the same terms and conditions as the Agreement and abided and be bound by the terms and conditions of the Agreement ("the Reinstatement Agreement").

Particulars

…

Relying on the said representation of Lim Chor Pee, the Plaintiffs forebore commencing legal proceedings against Lim Chor Pee and the 2nd and 3rd Defendants consequent to the termination of the Agreement and/or waived their rights arising from the termination of the Agreement and reinstated the Agreement. Pursuant to the Reinstatement Agreement, the Agreement continued as if it had never been terminated and the parties continued to abide by the terms and conditions of the Agreement.

(d) by para 6, the plaintiff pleaded the default in payment of the rental due on 1 January 2007 and averred that this was a repudiation of the Lease and/or of the "Reinstatement Agreement" and in para 7 the plaintiff set out the particulars of the loss and damage that it alleged it had sustained by reason of the said repudiation. This amounted to $298,276.47 and interest thereon at 0.065% per day from 24 August 2007 to the date of payment.

19 In the interests of clarity, I shall hereafter refer to the original contract signed by LCP and Marc Lim with the plaintiff as the "Lease" and to the agreement reached pursuant to the correspondence of August 2005 as the "August Agreement". I note that the plaintiff's position is that the August Agreement resulted in a revival of the Lease whereas the position taken by the defendants is that the Lease ended on 7 July 2005 and that the August Agreement was a new lease agreement in respect of the Copiers and that the same was only between LCP and the plaintiff.

20 The defences run by the second defendant, Marc Lim, to the amended claim of the plaintiff are as follows:

(a) that the Lease terminated on 7 July 2005 and thereafter was not capable of being reinstated and the August Agreement could not bind him because he was not a partner of the firm;

(b) in any event, the Lease and the August Agreement reflect a sham transaction which should be rendered null and void;

(c) the Lease and the August Agreement are null and void as being contrary to the Moneylenders Act (Cap 188, 1985 Rev Ed);

(d) the Lease was vitiated by misrepresentations made to Marc Lim; and

(e) the Lease was vitiated by reason of undue inference or unconscionable dealing operating on

Marc Lim.

21 The defences run by the third defendant, Ms Yeo, to the amended claim of the plaintiff are as follows:

(a) the Lease did not bind Ms Yeo since she had no knowledge of and was not a signatory to the same;

(b) the Lease was unusual and it was not in the course of the firm's ordinary course of business in that it involved the settlement of the Newcourt agreement;

(c) the Lease was a sham transaction and was null and void; and

(d) Ms Yeo could not be bound by the August Agreement as she was no longer in the firm when it was made.

22 It can be seen from the above that there are some common issues which both defendants have raised *viz* whether the Lease was a sham transaction and what the legal effect of the termination of the Lease on 7 July 2005 was. In relation to the other defences raised by the respective parties, these arise from their individual and particular circumstances and therefore have to be considered separately.

The case of the second defendant

Is the plaintiff's claim made pursuant to the Lease or to the August Agreement?

23 The plaintiff accepted the position that because of the breach of its terms, the Lease was terminated in July 2005. It submitted that as a result, the plaintiff could have repossessed the Copiers and made a claim against the firm for the loss and damage sustained. Before this happened, however, the firm had requested the plaintiff to continue with the leasing, *ie*, not to repossess the Copiers and not to claim its loss. The plaintiff then agreed to accede to the firm's request if the firm complied with the conditions set out in its solicitors' letter of 5 August 2005 as slightly amended by the subsequent letter of 23 August 2005 ("the August 2005 conditions"). The firm accepted the August 2005 conditions and there was therefore an agreement that if they were fulfilled, the Lease would be revived or reinstated.

24 The plaintiff further submitted that pursuant to the August Agreement:

(a) if the August 2005 conditions were not fulfilled, then the Lease remained terminated and the plaintiff would repossess the Copiers and claim against the firm;

(b) if the August 2005 conditions were fulfilled, then the Lease would be revived or reinstated and the plaintiff would not repossess the Copier nor claim against the firm.

Since, in the event, the August 2005 conditions were fulfilled, the Lease was revived and it continued to govern the parties' relationship.

25 The second defendant submitted that the plaintiff's position was not tenable at law. What had really transpired by way of the plaintiff's solicitors' letters in August 2005 was the offer of fresh terms to LCP in order to ensure that the Copiers would not need to be repossessed. Although the solicitors used the phrase "reinstatement of the Lease Agreement" in their letters, this phrase did not reflect an existing legal concept. What had happened, the second defendant submitted, was that by its own

letter of 7 July 2005 and its solicitors' letter of 22 July 2005, the plaintiff had unequivocably accepted the repudiatory breach of contract which arose when the lessee did not make timely payment of the instalments due under the Lease. At law, once the repudiatory conduct had been accepted, the acceptance could not be withdrawn.

26 In support of this submission, the second defendant quoted the following passage from *Chitty on Contracts*, (Sweet & Maxwell, 29th Ed, 2004) para 24-013:

> Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation". An act of acceptance of a repudiation requires no particular form. It is usually done by communicating the decision to terminate to the party in default … *Once a repudiation has been accepted, the acceptance cannot be withdrawn. If the parties thereafter resume performance of the contract, their rights are governed by a new contract, even if the terms remain the same*. [emphasis added]

27 The second defendant further submitted that the terms of the Lease differed significantly from the terms of the August Agreement. Under the Lease, the lessee was to make instalment payments in the following manner:

(a) $1,800 (before GST) for the 1st-24th months;

(b) $3,500 (before GST) for the 25th-48th months;

(c) $5,450 (before GST) for the 49th to 72nd months and a final payment of $47,400 (before GST) on 1 September 2010.

By the August Agreement, however, the payment terms were as follows:

(a) the rental arrears in the sum of $4,725 were to be paid forthwith;

(b) the sum of $200 being the plaintiff's legal costs was to be paid by 10 August 2005;

(c) all future rental instalments were to be paid by Giro; and

(d) the instalments from September 2005 onwards would be in accordance with the previous terms of payment under the Lease.

Quite clearly, the second defendant submitted, new terms were imposed and if these had not been complied with, the plaintiff's position would have been that the Lease was still in default.

28 The third defendant supported the submission that on 7 July 2005 the plaintiff had clearly accepted and communicated its acceptance of the repudiation of the Lease arising from the failure to make payment of rentals when due. She agreed that after communication of its acceptance of the repudiation, the Lease came to an end and was not capable of any revival or reinstatement. She cited another well known text, Cheshire, Fifoot & Furmston's Law of Contract (Butterworths, 2nd Singapore and Malaysia Ed, 1998) which states at p 905:

> If the innocent party elects to treat the contract as discharged, he must make his decision known to the party in default. However, the innocent party must comply with all the requirements stipulated in the contract itself. *Once he has done this, his election is final and cannot be retracted*. The effect is to terminate the contract for the future from the moment when the acceptance is communicated to the party in default. [emphasis added]

29 The plaintiff responded to the submissions of the defendants by arguing that it was the firm that had requested the plaintiff to continue with the Lease *ie* not to repossess the Copiers and not to make a claim against the firm. The plaintiff had agreed to accede to the firm's request on the basis of the August 2005 conditions. The agreement to reinstate was like any other contract – there was offer, acceptance and consideration. If parties agreed to revive a terminated contract on terms that it should continue as if it had never been terminated, there was, the plaintiff submitted, no reason why the court would not uphold the parties' agreement.

30 I do not accept the plaintiff's submissions. It is clear from the texts and also accords with commonsense that once a contract has been terminated, it comes to an end and is not capable of being revived, even by the parties' agreement. Instead, when there is such an agreement, what the parties create is a new contract. In this case, the Lease ended on 7 July 2005 when the plaintiff exercised its right of election and chose to terminate the Lease rather than to allow it to continue to run. Having done this, the plaintiff was then entitled to exercise all its remedies accruing under the Lease. The plaintiff chose not to do this. Instead, at LCP's request and on the basis that certain new terms were agreed to, it entered into a new contract in respect of the lease of the Copiers. The plaintiff may have thought that it was reviving the Lease but this was not the legal consequence of its action. The plaintiff sought to distinguish between the Lease which it said was revived and the August Agreement which it said was the contract formed by LCP's request to it and its counteroffer containing the conditions that had to be complied with before it would allow the rental of the Copiers to continue. However, what the plaintiff called the "Reinstatement Agreement" actually became part of the new contract for the lease of the Copiers and this contract comprised the new terms set out in the plaintiff's solicitors' letters and the other terms contained in the terminated Lease.

31 The August Agreement came into effect when the August 2005 conditions were complied with. The plaintiff took no legal action at that stage against any of the defendants to recover the sums due as at 7 July 2005. Nor did it take any action to recover the Copiers. The Copiers remained in the possession of the firm for a further 20 months or so. The next default of payment of rental took place in January 2007 and the Copiers were repossessed in April 2007.

32 In its statement of claim, the plaintiff averred that it had reinstated the Lease pursuant to the August Agreement (or, in its terminology, the "Reinstatement Agreement") and that the Lease had continued as if it had never been terminated. It pleaded that in breach of the Lease and/or the Reinstatement Agreement the lessee had defaulted in payment of the rental due on 1 January 2007 and by reason thereof had repudiated the Lease and/or the August Agreement. It then claimed damages arising as a consequence of the repudiation of the Lease and/or of the August Agreement. In my judgment, this pleading while endeavouring to have things both ways actually showed that the plaintiff was not taking a consistent stand. If it was the plaintiff's position that the Lease had been revived and was the legal contract between the parties in January 2007, then the plaintiff should not have pleaded that there was a breach of the August Agreement. In its submissions the plaintiff had said that the August Agreement had been complied with and that had led to the revival of the Lease. This argument was not consistent with a pleading that the August Agreement had been breached. Perhaps the plaintiff recognised the possibility that the August Agreement was actually the new contract combining the terms of the Lease and of the August 2005 conditions. This would explain why

the plaintiff pleaded that the August Agreement had been breached.

33 In any case, I am satisfied that when the plaintiff started this action in August 2007, it was suing on the basis of the new contract to lease out the Copiers that was concluded in August 2005. It was this contract that was breached when the instalment due on 1 January 2007 was not paid and it was this breach which constituted a repudiation of the new contract. The plaintiff accepted this repudiation and terminated this new contract on 18 January 2007 and then took action to enforce its remedies by repossessing the Copiers and, subsequently, commencing this suit. Thus, the plaintiff's claim herein was not made pursuant to the Lease.

Who were the parties to the new contract?

34 The plaintiff's contention was that the new contract was entered into between the plaintiff and all three defendants. In its amended statement of claim at [5], the plaintiff pleaded that the offer for reinstatement came about because LCP:

> acting for himself and/or as agent for and on behalf of the 2nd and/or 3rd Defendants requested the Plaintiffs to reinstate the Agreement. Lim Chor Pee had represented to the Plaintiffs for himself and/or as agent for and on behalf of the 2nd and/or 3rd Defendants that the Agreement if reinstated would continue to bind Lim Chor Pee and/or the 2nd and/or 3rd Defendants.

35 I first consider the position of the second defendant and will deal with the third defendant's position later when I come to her defences. The second defendant stated that he was unaware that LCP had made any representation to reinstate the Lease. Even if LCP had done so, he did not do so as agent of the second defendant or on the latter's behalf. Nor did the second defendant consent to the new contract. He therefore took the position that he was not a party to it.

36 It is common ground that the second defendant had no direct dealings with the plaintiff either when the Lease was first concluded or in July or August 2005. It was accepted that LCP himself had spoken in July 2005 with Ms Lim of the plaintiff and had asked her to "reinstate" the Lease.

37 The second defendant contended that he had never held himself out to the plaintiff as a partner of the firm in July/August 2005 and if the plaintiff had agreed to enter into a new contract, it had done so relying purely on LCP and had not relied on the fact of the second defendant's position in the firm. He said that since he did not hold himself out as a partner of the firm and because he was not a true partner and the plaintiff did not rely on any such holding out, he could not be liable for the claim as a partner. In effect, the second defendant contended, that for the plaintiff to succeed, it would have to show that first, he had held himself out as a partner and second, acting on that representation, the plaintiff had acted to its detriment.

38 At all material times, the second defendant was a "salaried partner" of the firm. He admitted this status in his pleadings. Further, the Law Society confirmed that its records showed that the partners of the firm as at 27 August 2004 were LCP, the second and the third defendant. There was no change in the second defendant's position as at July/August 2005 and there is no evidence that during that period he informed the Law Society of any change in his status *vis-à-vis* the firm. The actions taken to inform the Law Society of the second defendant's position in the firm show a holding out to the world at large of his status.

39 Whilst between themselves LCP and the second defendant knew that the latter was a "salaried

partner" rather than a full equity partner, this distinction was not made known to the world at large. As Megarry J said in *Stekel v Ellice* [1973] 1 WLR 191 at 198:

> The term "salaried partner" is not a term of art … it is a convenient expression which is widely used to denote a person who is held out to the world as being a partner, … *Quoad* the outside world it often will matter little whether a man is a full partner or a salaried partner; for a salaried partner is held out as being a partner …

40 The following passage from *Lindley and Banks on Partnership* (Sweet & Maxwell, 18th Ed, 2002) at p 95 is instructive:-

> A person held out as a partner will be liable whether or not he shares the profits or losses of the business, and there would seem to be no logical reason why his liability should be negatived or in any way affected merely because the third party knows that he shares neither and, indeed, (if such be the case) that he is entitled to a full indemnity from the persons who make use of his name. … On this basis, a "salaried" partner could not reasonably expect to escape liability in the face of evidence of reliance merely by showing that the third part was aware that he enjoyed that status.

41 The plaintiff submitted that it had relied on the fact that the second defendant was a partner in the firm. The plaintiff was informed that he was a partner and thereafter made searches on him and he was subsequently referred to in the plaintiff's credit proposal as a partner. This process of reliance culminated in the second defendant being specifically named as a party to the Lease in his capacity as a partner. I accept that the plaintiff knew that the second defendant was a partner of the firm before the Lease was issued and consequently inserted his name in the Lease as one of the partners of the firm. The second defendant signed the Lease and did not object to this description in any way. If he had thought about it, he would have realised that the plaintiff was entering into a Lease with the persons whom they considered to be the partners of the firm.

42 The second defendant relied on the case of *Nationwide Building Society v Lewis* [1998] Ch 482 ("*Nationwide*") for the proposition that reliance cannot be presumed and must be proven. That proposition is correct but the present case is distinguishable on the facts. In the *Nationwide* case the court found as a fact that the plaintiff, Nationwide, only knew of the existence of the partner it was trying to hold liable, one Mr Williams, after it had entered into the contract. On that basis, the court necessarily found that the plaintiff did not rely on Mr Williams being a partner at the time of the contract. As pointed out above, the plaintiff here made enquiries and ascertained that the second defendant was a partner before it drew up the Lease and thereafter inserted his name in the Lease as a partner of the firm.

43 I find that on the facts of this case there was a holding out by the second defendant that he was a partner of the firm. This holding out came from the records of the Law Society and, specifically in relation to this transaction, from information given by Susanna Soh to Dora Loh of Canon when the latter asked her who the partners of the firm were. Susanna Soh was the administrative manager of the firm and authorised to give out information about it in the ordinary course of business. This information was duly passed on to the plaintiff and, in my opinion, it is not detrimental to the plaintiff's case that it accepted the information from Dora Loh and did not make an independent enquiry with the firm or the second defendant. It must be remembered that it was Dora Loh who was trying to set up the transaction for the hire of the new Copiers and who acted as intermediary between the plaintiff and the firm. In this commercial situation, one that had arisen many times over the years between the plaintiff and Canon, it was reasonable for the plaintiff to act in this way. That

acceptance was subsequently shown to have been justified when the second defendant signed the Lease without demur. I also accept that the plaintiff relied on this holding out as to the second defendant's status even if it was were mainly influenced by LCP's attributes as indicated by the evidence of one of its witnesses.

44 The reliance adverted to above was in relation to the Lease. The issue now before me relates to the parties to the August Agreement. As stated above, there had been no change in the second defendant's position in the firm by then. He was still being held out to the world as a partner of the firm. LCP was still running the firm and when he spoke to the plaintiff's representative and asked the plaintiff not to take enforcement action but to continue to lease the Copiers to the firm, he must have been acting not only on his own behalf but also on behalf of the second defendant. It is worth noting in this respect that LCP was responding to the letters of 5 July 2005 and 22 July 2005 addressed to himself, the second defendant and the third defendant which letters demanded repayment of the amount due on the Lease. As the second defendant's status in the firm had not changed, he had not withdrawn from LCP the authority to represent him as a partner of the firm. It is settled law that a partner is an agent for his partners (see s 5 of the Partnership Act (Cap 391, 1994 Rev Ed) ("Partnership Act"). Accordingly when LCP asked the plaintiff to continue the Lease he was acting on behalf of (and was seen by the plaintiff as acting on behalf of) the second defendant as well. The plaintiff in responding to LCP's request was clearly intending to deal with all three persons whom it considered partners of the firm. It's solicitors' letter of 5 August 2005 in which it laid down the terms for "reinstatement" of the Lease was addressed to all three of them.

45 In my judgment, as far as the second defendant was concerned, the contract that subsequently that came into existence with the plaintiff was a contract which bound him. It was made on his behalf with the plaintiff by LCP and as a partner in the firm he was bound by his partner's/agent's agreement. LCP's actions were directed, if not wholly, at least substantially, at procuring the continued availability of the Copiers for the use of the firm and therefore were effected for the purpose of the business of the firm. The second defendant testified that all administrative matters relating to the business of the firm were handled by LCP and that he was content to leave such matters to LCP. On the facts of this case, no argument could be made that LCP had in fact no authority to act for the firm in relation to the Copiers. The plaintiff, having clearly considered the second defendant to be one of the persons liable to it for the default in the payment of rental for the Copiers, continued to rely on the second defendant's position as a partner of the firm when it made its offer to reinstate the Lease.

Was the Lease (and consequently the new contract) a sham transaction that was void?

46 The next defence taken by the second defendant was that the Lease was a sham transaction and therefore was null and void and not binding on him. He submitted that the plaintiff was fully aware that it was not simply financing the lease of the Copiers but was also refinancing an existing debt owed by the firm and the repayment of a sum which included an exorbitant amount as interest. In the second defendant's submission the plaintiff knew that the transactions were sham because:

(a) The plaintiff's Goh Hock Leong gave evidence in chief that the plaintiff had no knowledge of the details of the transaction save that the purchase price of the Copiers was $231,500 (before GST).

(b) Danny Lee also gave evidence that he was informed by Dora Loh that Canon was prepared to sell the Copiers to the plaintiffs at $231,500 (before GST) and that he was asked to work out the monthly rental payable by the firm starting at $1,800.

(c) During cross examination of Mr Goh and Danny Lee they wanted to insist that all they knew was that the purchase price of the Copiers was $231,500 but after some pressing Mr Goh was forced to admit that there was a credit approval document that the plaintiff had not disclosed earlier. When this was produced subsequently, it clearly stated that the purpose of the facility to the firm was to:

(i) purchase the Copiers;

(ii) cater for a rollover of $120,000 payable by the firm.

(d) Mr Goh had maintained that the rollover amount was just an estimate of $120,000 from his experience in the industry but this assertion was shown to be a lie when Danny Lee conceded in cross examination that Dora Loh had told him that the estimated amount that had to be settled was $110,000 and that the plaintiff knew that the sum of $231,500 included an amount that had to be paid to another financial institution;

(e) Dora Loh's evidence was that she had informed Danny Lee that there was an outstanding sum due to Newcourt and that she had faxed the Sales Agreement that Susanna Soh had signed with Canon on behalf of the firm to Danny Lee before the plaintiff's Release Letter was issued. The Sales Agreement stated that "Canon will early settle the existing lease contract with NewCourt Financial for the old Copiers".

47 The second defendant found it suspicious that the plaintiff's witnesses had repeatedly insisted that the value of the Copiers was $231,500. Mr Goh had insisted that the price of the Copiers was this sum whilst Danny Lee maintained under cross-examination that the plaintiff's management never asked about the value of the Copiers and even claimed that the plaintiff did not know the exact worth of the same. The second defendant contended that as the owner of the equipment, the plaintiff should be concerned about the value of the Copiers if the transaction it was entering into with the firm was a true and straightforward lease. The fact that the plaintiff claimed not to be bothered by the value of the Copiers was startling since this was the only collateral that it had. In the second defendant's submission, the fact that the plaintiff was not concerned about the Copiers was telling because what it showed was that the plaintiff had in mind a disguised transaction where the firm would be "lent" money up to certain limit to ostensibly enjoy the use of the Copiers but in effect to also repay the outstanding sum owing to the earlier financier.

48 The second defendant drew my attention to the case of *Orix Capital Ltd v Symrise Holding Pte Ltd* [2008] SGHC 79 where the same plaintiff had sued the defendant Symrise Holding Pte Ltd ("Symrise") for breach of an agreement to lease nine copiers. The third defendant in that case was a supplier of office equipment who sold the plaintiff the nine copiers. Symrise denied the claim on the basis that not a single copier had been delivered to it and this was a leasing scam perpetuated by the plaintiff and the supplier. Further, an inflated price of $919,794.50 was paid for the nine copiers which were worth only $18,000 each. The plaintiff's claim against Symrise was dismissed. The judge found that the leases in question were not genuine leases. He also found that the perpetrator of the scam was the supplier and that there were enough unusual features in the transaction to have put the plaintiff on enquiry.

49 The second defendant submitted that the plaintiff knew that the deal that Canon was bringing to it was not a straightforward transaction. The total sum repayable by the firm under the Lease was $304,500. This was a huge premium over and above the true value of the Copiers which Dora Loh had testified were sold for about $65,025.66. The plaintiff's management imposed a credit limit of $250,000 for the transaction with the firm and this showed that it was fully aware of the true nature

and value of the transaction. As a financing company specialising office equipment, the plaintiff would have known the market value of the Copiers and therefore must have known that it was involved in a sham and not a true lease of just copiers. The second defendant did not know any of these matters and the transaction was unconscionable insofar as he was concerned. His evidence was that all he was told was that he had to sign the Lease. He did so without knowing the true position and the terms of repayment which meant that he would become liable to pay a sum of $304,500 over six years for two machines worth around $65,000 were clearly harsh, unfair and oppressive.

50 From the above submissions, it can be seen that there are two arguments in this part of the second defendant's case. The first is that the transaction was a sham and not binding on him. The second was that in any case the terms of the transaction were harsh, unfair and oppressive and he should not be obliged to pay them.

51 Dealing first with the sham transaction argument, I must observe that the facts in this case cannot be equated with those in the case that the plaintiff brought against Symrise. In the latter case, the office equipment concerned was never leased to Symrise and the transaction was completely bogus. In this case, the firm was supplied with the Copiers and had the use of them right up to April 2007. So here, there was an underlying commercial purpose for the transaction and that purpose was achieved.

52 I must admit that during the course of the trial it did concern me that whilst the market value of the Copiers was around the $65,000 mark, the Lease obliged the lessees to pay a total of $304,500 for it. Upon considering the plaintiff's submissions and the pertinent facts relating to the transaction, however, I have come to the conclusion that although the repayment obligation was disproportionate to the value of the Copiers considered in isolation, this did not render the transaction a sham.

53 In *TKM (Singapore) Pte Ltd v Export Credit Insurance Corporation of Singapore Ltd* [1993] 1 SLR 1041 ("*TKM Singapore*") at 1056, a sham transaction was defined as one which is "good in form but false in fact". In *Yorkshire Railway Wagon Co v Maclure* (1882) 21 Ch D 309 ("*Yorkshire Railway*"), the Cornwall Minerals Railway Co ("the railway company") needed to raise £30,000 and approached the plaintiffs ("the wagon company") to loan them that sum. If the borrowing had materialised it would have infringed a statutory limit on borrowing imposed on the railway company. The railway company eventually agreed with the wagon company to sell part of its rolling stock to the wagon company and at the same time entered into a hire-purchase agreement with the wagon company in respect of the rolling stock sold. The directors of the railway company gave personal guarantees for the due payment of the hire. Upon default in payment of the hire by the railway company, the wagon company sued the railway company and the guarantors who argued that the sale and hire-purchase transactions were a sham to conceal a borrowing which was illegal.

54 The Court of Appeal upheld the sale and hire-purchase transactions as real transactions and found that they were not a cloak for another transaction. In the words of Lindley LJ at p 317:

> I am satisfied that the purchase and hire transaction was the real transaction, in this sense – *that the parties meant it to operate according to its tenor as comprised in the deeds*. It was *not* intended by them as a *mere blind or cloak for something behind*, it was a transaction substituted for another, but bona fide substituted, and intended to be acted upon according to its purport and apparent effect. [emphasis added]

Lindley LJ had also observed at p 318:

> … the original idea was bona fide dropped and another method was had recourse to, not for effecting the loan, but for effecting a different transaction, which would answer the purpose of the Railway Company just as well. All they wanted to do was to get the £30,000. That was the real transaction between the parties, and that transaction was one which was embodied in the deeds upon which this action is brought. If we look on that transaction as the real transaction, upon what ground can we treat it as illegal? If it were a mere cloak or screen for another transaction one could see through it, but once come to the conclusion that it was the bona fide real transaction between the parties, intended by both sides to operate according to its tenor, there is no mode that I know of holding it illegal unless you find it prohibited by some Act of Parliament or void by reason of some principles of law. [emphasis added]

55 In the *Yorkshire Railway* case, notwithstanding that:

(a) the railway company had asked for a loan from the wagon company;

(b) the loan if made would be illegal; and

(c) the parties substituted the loan transaction with a sale and hire-purchase transaction so that the railway company obtained the funds it originally wanted, the court held that the sale and hire-purchase transaction was *not* a sham transaction. This was because the parties' intention was to enter into the sale and hire-purchase transaction and the parties acted according to such intention.

56 In *TKM Singapore*, the parties entered into an agency agreement which one party subsequently claimed was a sham. GP Selvam JC followed the *Yorkshire Railway* case and formulated the test to ascertain whether a transaction is a sham: whether the documents were intended to create legal relationships and whether the parties did actually act according to the apparent purpose and tenor of the documents.

57 Applying the test to the case before him, Selvam JC upheld the agency agreement and said at p 1058:

> I therefore have no hesitation in finding *that the documents were intended to create a legally binding arrangement* and that no other covert arrangement was intended. The parties to the underlying transaction acted on the documents on the basis of TKM-UK being the agent. Those on the side of the plaintiffs acted in an open fashion and hid nothing from the defendants. There was no reason for any sham or pretence. *Everyone acted according to the purport and tenor of the arrangement*. [emphasis added]

58 Applying the test formulated in the *TKM Singapore* case to determine whether the Lease here is a sham transaction, I must therefore ascertain whether, first, the Lease was intended to create a legal relationship; and secondly, whether the parties acted according to the apparent purpose and tenor of the Lease.

59 I agree with the plaintiff's submission that the Lease was intended to and did create a legal relationship between the plaintiff and the lessees named therein under which both parties had rights and obligations. There is no evidence to support any other finding.

60 The "purpose and tenor" of the Lease was the leasing of the Copiers by the plaintiff to the firm

for which the firm had agreed to pay rental. The parties acted according to this purpose and tenor – the plaintiff purchased the Copiers from Canon at the price of $231,500 for the specific purpose of leasing the same to the firm, the Copiers were delivered to the firm and the firm paid the rental as set out in the Lease. One consequence of entering into the Lease was that the pre-existing indebtedness to Newcourt was fully settled by Canon. Applying the test in the *TKM Singapore* case, that consequence would not be relevant in determining whether the Lease was a sham transaction. The payment to Newcourt was incidental to the Lease. The plaintiff did not agree to and did not pay Newcourt. The agreement regarding the payment to Newcourt was between Canon and the firm. If for any reason Canon had failed to pay Newcourt, any recourse that the partners of the firm might have had would have been against Canon and not against the plaintiff. The plaintiff had no legal obligation to anyone to pay Newcourt and the plaintiff's only relationship with the firm arose when the Lease was signed.

61 Further, it is a necessary corollary to a sham transaction that the parties to the sham intended to practice deception or some form of covert arrangement. In the present case, each party – the plaintiff, the firm (in the person of LCP) and Canon – knew the terms of each transaction between them and willingly entered into it. None of the parties had any intention to deceive, no one was deceived and the Lease was not designed to be a "mere blind or cloak for something behind".

62 As noted above, the second defendant made much of the fact that the plaintiff had not disclosed its credit approval document. He claimed that that document showed the plaintiff's knowledge that the price of $231,500 included a sum needed to refinance the outstanding debt to Newcourt and hence showed that the plaintiff knew the "sham" nature of the transaction. I do not agree. Even though the plaintiff might have known that Canon was selling the Copiers to it at $231,500 because Canon was going to settle the firm's debt, that knowledge did not transform the Lease into a sham transaction. There was no evidence that the plaintiff in fact knew who the other financier was. Dora Loh maintained that she did not give such information to the plaintiff nor did she inform the plaintiff of the breakdown of the price of $231,500. The plaintiff must have known that this price was much above the market value of the Copiers but it was willing to pay the same to Canon because there was an intended lessee which was prepared to lease the Copiers for six years at a total rental of $304,500.

63 The plaintiff submitted that it was a leasing company and its business was to buy machines to lease out. If there was no intended lessee, the plaintiff would not purchase any machines. The value of the Copiers as viewed from the plaintiff's perspective it said must have direct reference to the total rental that the intended lessee was prepared to pay. It was not correct to equate "value" with "retail price". The main component for a leasing company in determining value would be the rate of return and the main criterion for determining whether to enter into leasing arrangements with a particular individual or company was creditworthiness. This appeared to me to be a reasonable submission, justifying the plaintiff paying more than the retail price of the equipment before leasing out the same as long as the intended lessee was not deceived in any way as to the value of this equipment and knew what it was paying for.

64 In this case, the evidence available showed that LCP and Susanna Soh were fully aware of what the transaction entailed and were agreeable to it. In July 2005, the firm was not using two of the Newcourt copiers and was seeking to manage its cash flow. LCP's main concern at that time appeared to be cash flow. The firm was aware that if it returned those copiers to Newcourt, it would be liable to pay Newcourt a substantial termination sum. Further, if the firm continued with the arrangement with Newcourt, the monthly rental of $1,800 would be increased to $2,000 per month in the not too distant future. The plaintiff's offer meant being able to maintain the monthly rental at the $1,800 level for a further 24 months. I accept that Canon's proposal appeared attractive to the firm

(although it might not have been so to persons using a more long term perspective) because it met the following requirements of the firm namely:

(a) it would have two new copiers as opposed to four older ones;

(b) the current rental rate would be maintained for at least two years; and

(c) the liability to pay Newcourt the termination sum would be settled by Canon.

65 The plaintiff submitted that there was benefit to the firm in entering into the Lease, at least in the short term. Susanna Soh acknowledged that she considered Canon's proposal attractive. Furthermore, all parties had equal bargaining power; all parties had a choice. No one forced the firm into the Lease. If the proposal from Canon was not attractive to the firm, it could easily have been rejected and the firm could have carried on with the Newcourt copiers and paid Newcourt the monthly rental due to it. The Sales Agreement and the Lease which follows it were in accordance with the intentions of the parties and the lease terms were as stated in the Sales Agreement.

66 Moving to the allegation that the Lease was harsh and oppressive, the second defendant relied on *Multiservice Bookbinding v Marden* [1979] 1 Ch 84 ("*Multiservice*"), where the plaintiff company and its two sureties executed a mortgage over the business premises as security for a loan from the defendant. There was a clause in the mortgage which stated that any sum payable by way of principal or interest was to be increased or decreased proportionately if at the close of business on the day preceding payment day, the rate of exchange between Sterling and the Swiss Franc was to vary by more than three percent. On the facts, the plaintiff there failed, but what the second defendant here relied on were the following observations of the judge, Browne-Wilkinson J. He said at p 110:

> … in order to be freed from the necessity to comply with all the terms of the mortgage, the plaintiff must show that the bargain, or some of its terms, was unfair or unconscionable … In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience …

67 Further, Browne-Wilkinson J went on to say at p 111:

> … However if, as in the *Cityland* case [1968] Ch. 166, there is an unusual or unreasonable stipulation the reason for which is not explained, it may well be that in the absence of my explanation, the court will assume that unfair advantage has been taken of the borrower. In considering all the facts, it will often be the case that the borrower's need for the money was far too pressing than the lenders need to lend: if this proves to be the case, then circumstances exist in which an unfair advantage could have been taken …

68 The second defendant submitted that it was unfair and oppressive of the plaintiff to take advantage of a situation in which the firm was facing a financial crunch and was attempting to get out of that position as evidently was the case here. The surreptitious manner in which Mr Goh sought to hide the credit approval document, the evidence in chief of all the plaintiff's witnesses which completely glossed over any knowledge of the true value of the Copiers and Mr Goh's and Danny Lee's evasiveness and reluctance to acknowledge that they knew the market value of the Copiers combined with the firm's precarious situation must, the second defendant said, lead to the irresistible inference that the circumstances were such that it was an unfair, oppressive and unconscionable transaction that the plaintiff had foisted upon the second defendant and therefore it should be rendered null and

void.

69 I must reject the above submissions. There was no evidence at all that the plaintiff knew about the firm's "precarious" financial position. The firm was not forced in any way to enter into the transaction and the transaction was structured in the way that it was because of the firm's request that the monthly rentals be reduced to $1,800 for the first two years. The transaction enabled the firm to get new machines and also eased its cash flow situation. The plaintiff never met with the second defendant and had no idea that he was not fully aware of the firm's situation. As far as the plaintiff was concerned, the second defendant was a partner of the firm and should have known its situation and been able to assess whether the Lease was beneficial for the firm or not. The second defendant signed the Lease and did not at any time communicate his ignorance to the plaintiff. The plaintiff had no responsibility to ensure that the second defendant, a qualified lawyer in private practice for many years, understood the transaction. In fact, the second defendant was even more qualified than the normal lessee to know what he was getting into in signing the Lease. His protestations of the plaintiff acting unfairly and oppressively ring hollow. The transaction was taken to the plaintiff by Canon. There was no direct dealing between the firm and the plaintiff and there was nothing to indicate that the plaintiff had acted in the "morally reprehensible manner" that would be required for me to find that the bargain was unfair and unconscionable.

Is the Lease void for being contrary to the Moneylenders Act?

70 The Moneylenders Act (Cap 188, 1985 Rev Ed) ("the MLA") provides that any person who lends money in consideration of a larger sum being repaid shall be presumed, until the contrary is proved, to be a moneylender (see s 3). The second defendant argued that the plaintiff was a moneylender. He accepted that there was no direct loan by the plaintiff to the firm. Rather, he said, the money was paid by the plaintiff to Canon who in turn made repayment of the sum outstanding from the firm to Newcourt. In effect, however, this meant that the plaintiff was repaying the sum due from the firm to Newcourt. Canon was just the entity through which the payment was made and the plaintiff stood in the shoes of Newcourt and acted as the financier for the Copiers. The plaintiff had therefore advanced moneys to repay the outstanding indebtedness to Newcourt as well as to finance the lease of the Copiers. The actual value of the Copiers was $65,000 but the amount payable by the firm under the Lease was $304,500 in total and this reflected that the plaintiff had lent a sum in consideration of a greater sum being repaid. Further, the excess sum to be repaid was exorbitant and akin to exorbitant interest. The transaction was a disguised moneylending transaction and should be avoided as being contravention of the MLA. This was an argument that was echoed by the third defendant.

71 The plaintiff's response was that the essence of a moneylending transaction is a loan of money and if there is no loan there can be no moneylending. It cited the case of *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR 733 ("*City Hardware*") in support.

72 In *City Hardware*, the plaintiff and the defendant entered into a trading relationship whereby the defendant would order goods from suppliers in the name of the plaintiff. The goods were delivered by the suppliers directly to the defendant. The plaintiff paid for the goods using its banking facilities and then sold the goods to the defendant at a mark-up. The defendant sought to avoid the transactions as constituting moneylending in contravention of the MLA. The defendant did not have money to pay for the goods which it wanted to buy. The defendant thus got the plaintiff to buy and pay for the goods and on-sell them to the defendant with a mark-up.

73 VK Rajah J held that the transactions were not moneylending. Each transaction involved the purchase of real goods by the defendant. The transactions were not structured or intentionally

disguised to evade the MLA. The highest mark-up tagged on by the plaintiff was about nine percent more than the original price, which would have included a reasonable profit after taking into account the charges and interest that the plaintiff had to pay its bank. It should be noted that this decision was reached in a situation where one party had available bank facilities which the other party wanted to use and the parties had discussed this and agreed to an arrangement where there would be "loan" of one party's credit facilities to the other with the "lender" receiving a gain in terms of commission or profit margin.

74 The MLA was also considered in the subsequent Court of Appeal case of *Donald McArthy Trading Pte Ltd v Pankaj s/o Dhirajlal* [2007] 2 SLR 321. The Court of Appeal approved the decision in *City Hardware*. It made the following pertinent observation at [9]:

> The provisions of the MLA are not intended to apply to transactions made at arm's length between commercial entities. It has never been the objective of the MLA to prohibit or impede legitimate commercial intercourse between commercial persons. Indeed, Rajah J [in *City Hardware*] pointed out that the courts should not adopt an over-extensive application of the MLA even though its provisions may be *literally* construed to cover most commercial situations, as that would not advance the *legislative purpose* of the Act.

75 In the present case, the second defendant admitted in cross-examination that the firm wanted to upgrade its copiers and therefore entered into the Sales Agreement with Canon. He further agreed that the firm had agreed with Canon to acquire the Copiers by lease and then admitted that the genesis of the Lease was the desire of the firm to upgrade the Copiers. It was apparent to me that there was never any intention on the part of the firm to borrow money from the plaintiff. Nor did the plaintiff intend to lend money to the firm. The firm wanted new copiers and it wanted to regulate its outlay on rental for a further period. Canon which was interested in selling the Copiers proposed a scheme whereby both its interests and the firm's interests could be served. Canon then agreed to sell the Copiers to the plaintiff at an agreed price for the purpose of leasing the Copiers to the firm and the plaintiff entered into the Lease with the firm. The Copiers were delivered and used by the firm. Canon then paid off Newcourt.

76 In my judgment, the above transaction was not a moneylending transaction. It was a commercial decision made by commercial parties at arm's length. There were benefits to the firm from accepting Canon's proposal in relation to the acquisition of the Copiers and although on the face of it, it may have appeared that the firm was going to pay an exorbitant price for the Copiers, this was not in fact the case bearing in mind that there was already a liability on the second defendant who was a partner of the firm at the time of the Newcourt transactions to pay Newcourt rental for the Newcourt copiers. Even if the contract was not terminated, the second defendant would have remained liable to pay Newcourt rental. In entering into the Lease, he was not, therefore, taking on an entirely new liability. The plaintiff was in the business of leasing out office equipment and the Lease was part and parcel of its usual business and could not be considered a moneylending transaction.

Was the Lease vitiated by misrepresentations made to the second defendant?

77 The second defendant submitted that he was induced to enter the Lease by reason of misrepresentation. His evidence was that the first time he came to know of the Sales Agreement was in 2007 after LCP's death. It was only after he read that document that he came to know of the obligation to Newcourt. The plaintiff had not revealed to him in July 2004, at the time he signed the Lease, that there was another debt obligation due to Newcourt which had to be settled. He asserted that the plaintiff's management procured the second defendant's signature to the Lease through Canon's Dora Loh and the firm's Susanna Loh and LCP without disclosing those material facts and

thereby led him to believe that he was signing for the lease of the Copiers only and for nothing else.

78 In the second defendant's submission, the plaintiff was under a duty of good faith to disclose that the $231,500 was being paid in reality not only to purchase the Copiers but also to settle the Newcourt obligation. Since the plaintiff did not make such disclosure, it was in breach of duty and could not rely on the second defendant's signature of the Lease.

79 I have no hesitation in rejecting those arguments. The second defendant has not satisfied me that there was a legal duty on the part of the plaintiff to inform him that there was a sum due and payable to Newcourt. To the outside world, the second defendant was a partner of the firm and as such could be reasonably assumed to be familiar with the firm's affairs and its obligations. It was not for the plaintiff which was a third party trying to conduct business with the firm to tell the second defendant that if the contract with Newcourt was to be terminated, there would be a termination sum payable to Newcourt. Secondly, the Sales Agreement stated that Canon would make payment to Newcourt and it was signed by Susanna Soh as the office manager after LCP accepted Canon's proposal. The second defendant may have been unaware of this but the persons who had a duty to inform him of it would have been within the firm rather than the plaintiff.

80 In any event, the second defendant was given a copy of the Lease before he signed it and he admitted to reading at least the first page and querying LCP on, *inter alia*, why the Copiers would cost so much and whether it was necessary to get two new and expensive copiers. There was no evidence from the second defendant as to LCP's response to this query but to me the second defendant's conduct confirmed that he knew that he ought to have obtained his answers from within the firm. The second defendant as a lawyer must have known that he had no basis on which to impose on the plaintiff any duty to tell him what the features of the transaction were.

Was the Lease vitiated by reason of undue inference operating on the second defendant or unconscionable dealing?

81 The second defendant's position was that he had initially resisted signing when he noted that the sum to be repaid under the Lease was a hefty one. Only the plaintiff would have benefited from a second signatory and Susanna Soh and LCP were its instruments for arranging for the second defendant to be the second signatory. He further contended that he had been subjected to pressure from LCP and signed the Lease because of undue influence.

82 To establish the undue influence, the second defendant asserted that his father and employer had admonished him that it was not his decision to make by withholding his signature and that the situation in the firm was such that litigation lawyers were threatening to resign unless there were better copiers for their workload. LCP further told him that the document was one that was standard and originating from the plaintiff who wanted it returned immediately. In these circumstances, the second defendant averred, he had no alternative but to sign the Lease. In his mind, had he not obliged, his employer would have seen the imminent departure of one or more key litigation lawyers. Such loss would have seriously affected the firm. Since there had been several other departures leading to the decline of the firm in terms of numbers and earnings, he was concerned that another departure would be the final straw. The second defendant was concerned for his father who had a persistent cough and, as a dutiful son and employee, was left with no choice but to sign the document.

83 The second defendant further submitted that it was immaterial that the plaintiff and Canon did not know exactly what was happening within the firm. It was sufficient to draw an appropriate inference that the plaintiff required a second signature on the Lease and Dora Loh knew this

agreement and therefore through her and Susanna Soh, the plaintiff arranged for and was content for LCP to be its instrument to exert pressure on the second defendant to sign the Lease.

84 There is, in my judgment, no merit in the above submissions. The evidence was not sufficient to establish undue influence, duress or pressure. It must be remembered that:

(a) the second defendant was a trained and qualified lawyer at the time he signed the Lease;

(b) the second defendant had considerable work experience by the time he signed the Lease, having worked at a lawyer from 1993 before joining the firm in 1997;

(c) the second defendant was 41 years old at the time he signed the Lease and, given his professional training and work experience, he was a mature adult able to exercise his own will; and

(d) when the third defendant asked the second defendant at LCP's wake why he had signed the Lease, the second defendant did not mention undue influence. About a month later, when he was thinking of possible defences, he did not mention undue influence either. He was more concerned with arguing that the firm was a sole proprietorship of LCP.

85 I do not doubt that the second defendant was a concerned and dutiful son to LCP. This cannot by itself establish undue influence. By the time a man reaches 41, he should be able to think for himself and hold on to a position that he believes to be correct even in the face of disapproval from his parent. All the more in the case of a man who has been professionally trained and working as a legal adviser for many years. The facts relied on to establish undue influence were weak and unconvincing. I agree with the plaintiff that the defence of undue influence is clearly unsustainable.

Conclusion on the position of the second defendant

86 Having considered the various defences put forward by the second defendant, I find that none of them affords him a valid defence to the action. Accordingly, as against the second defendant, there shall be judgment for the plaintiff for the following:

(a) the sum of $298,276.47;

(b) interest on the sum of $257,460 at 0.065% per day from 24 August 2007 until date of payment;

(c) costs on an indemnity basis pursuant to cl 18(b) of the Lease.

The case of the third defendant

87 The third defendant's pleaded case is as follows:

(a) the Lease which described the "Lessee" as LCP and the second and third defendants, did not bind her since she had no knowledge of and was not a signatory to the same. The third defendant only learnt of the Lease when a letter of demand dated 18 January 2007 was received by her. She had stopped working in and left the firm on 17 July 2005;

(b) the Lease was unusual and was not in the firm's ordinary course of business in that it involved the settlement of an existing lease contract between the firm and Newcourt;

(c) the Lease was a sham transaction and was null and void; and

(d) the Lease was terminated by the plaintiff on or about 7 July 2005 and was allegedly "reinstated" sometime in August 2005 and since the third defendant had left the firm before the reinstatement of the Lease, she was not bound by the reinstated lease.

88 As far as the pleading that the Lease was a sham transaction is concerned, I have dealt with that in [51] to [65] above and need not repeat those arguments and conclusions here. As for the other averments, they broadly raise the issue of whether the third defendant was a party to either the original Lease or the August Agreement.

Was the third defendant bound by the Lease?

89 There are several sub-issues arising under this heading. They are as follows:

(a) on the true construction of the Lease, was it intended to be made with the third defendant as an individual so that she would only be liable thereunder if she signed it?

(b) if the Lease was with the partnership of the firm, was the third defendant a partner?

(c) was there any representation on which the plaintiff relied that the third defendant was a partner?

(d) if the third defendant was a partner and was represented as such to the plaintiff, would s 5 of the Partnership Act apply to bind her to a contract of which she was ignorant?

90 I accept the third defendant's evidence that she did not know about the execution of the Lease in August 2004 and only learnt of it in January 2007. Though the second defendant stated that in December 2006 the third defendant had asked him why he had signed the Lease, he must have made a mistake as to the date of her query since it was clear from her e-mail to him of 20 January 2007 that she knew nothing about the Lease until that day itself when she had received the letter of demand from the plaintiff's solicitors.

91 The third defendant submitted that the Lease could not be an agreement between the plaintiff and herself because first she did not know of its existence until January 2007 and secondly there was no evident intention that she was to be bound by the Lease as a "partner" of the firm. While LCP and the second defendant executed the Lease as "partners", this designation was not ascribed to the third defendant under the description of the lessee in the Schedule of the Lease. That schedule stated against the name of the lessee the three names of LCP, the second and third defendants followed by the description "Practising under firm of Chor Pee & Partners". There was no specific description of the third defendant as a partner and the execution portion of the Lease showed that it was signed by LCP and the second defendant whose respective designations were stated as "partners" of the firm, but "for and on behalf of the Lessee". In this regard, she submitted that any contention that LCP and/or the second defendant had intended to represent that the third defendant was a partner could not be substantiated on a true construction of the Lease.

92 The third defendant contended that on a true construction of the Lease, it was intended to be an agreement between the plaintiff and the three persons named as "Lessee". The evidence pointed to the fact that the plaintiff was quite happy to contract only with LCP a person who the plaintiff's senior management was comfortable with. Mr Goh said LCP was known to the plaintiff's chief executive officer as "a very long veteran" and that he considered that LCP's "business was a very

strong business". The plaintiff was, it was submitted, even prepared to disregard the third defendant's history of bankruptcy proceedings because of its reliance on LCP's reputation and business. Furthermore, the plaintiff was prepared to have only LCP and the second defendant sign as "Lessee". The third defendant's signature was neither required nor sought and the irresistible conclusion must be that the plaintiff was prepared to contract with only LCP and his son. In any event, if there was any ambiguity in the construction of the Lease as to whether the third defendant was to be a contracting party, as the plaintiff drafted the Lease, the *contra proferentum* rule ought to be applied in the third defendant's favour.

93 The plaintiff submitted that the Lease was entered into between the plaintiff and the partnership of Chor Pee & Partners, in other words, with all the partners of the firm. The third defendant was bound by the Lease because she was a partner of the firm and also because she was named as a partner in the Lease. If it was the plaintiff's intention that the Lease was to be between the plaintiff and the three persons named as "Lessee", there would have been no need to mention "Chor Pee & Partners" in the Lease. It would simply have stated the names of those three persons. The plaintiff was prepared to contract with LCP who was a senior member of the bar since the legal profession was given a high credit rating by the plaintiff. It did not follow from this, however, that the plaintiff was happy to contract with LCP alone or that it did contract with LCP alone. As a partner of the firm, the third defendant was bound by the Lease notwithstanding that she did not sign it.

94 I accept the plaintiff's submission that the Lease was between the plaintiff and the ostensible partners of the firm as partners of the firm. I do not think there was any ambiguity in the way that the lessee was described. All three names were set out in the Lease and the relationship of the three persons to the firm was specified. As far as the execution of the document was concerned, the plaintiff had accepted that it would be signed by LCP and the second defendant as partners for "for and on behalf of the lessee". The issue that arises is whether the third defendant was bound by that signature and this depends on the other issues discussed below.

95 First, was she a partner of the firm? The third defendant's submission was that she was not a partner because there was only a profit sharing agreement between her and LCP and under this agreement, it was clear that she would not have any participation in the assets and liabilities of the firm. The third defendant had testified that the original intention was that she was to be a consultant rather than a partner in the firm but this was not possible because she did not have the requisite years of practice to qualify as a consultant. Once she joined the firm, she had no voice in the administration or management of the firm or access to its accounts. All management functions were discharged by LCP.

96 The third defendant also alleged that there was no representation to the plaintiff that she was a partner. At the outset, the plaintiff's check with the Law Society did not shed any light on whether she was a partner of the firm. There was an e-mail dated 12 July 2004 from Dora Loh to Danny Lee in which Dora Loh gave the latter the names and NRIC numbers of LCP, the second and third defendants as being those of the three partners of the firm. Dora Loh testified that she had obtained this information from Susanna Soh as Danny Lee required it. The third defendant submitted that there was no evidence of Dora Loh being authorised by any of LCP, the second or third defendants to communicate this representation that they were the three partners of the firm to the plaintiff. Susanna Soh had given evidence that her main duty as office manager was to oversee the procurement of the office equipment for the firm. The third defendant therefore contended that given this role, Susanna Soh was in no position to provide accurate information on the status of the third defendant in the firm to Dora Loh and the latter was reckless to have accepted such information from Susanna Soh.

97 The evidence showed a situation in which the third defendant, although she had no interest in the assets of the firm and was only entitled to participate in the fees earned from certain categories of files, basically those that she handled, was held out to the world as a partner. The Law Society's records reflected her as a partner of the firm and she was also described as "Partner" in the Profit Sharing Agreement which set out the terms of her practice with the firm. This agreement also provided for LCP to indemnify her against any claims by third party brought against the firm as a result of transactions or acts of lawyers arising from the practice of the firm. Further, the third defendant's own evidence was that in her discussions with LCP, she had agreed to be known as a partner to the outside world. The questions and answers were as follows:

> Q: It would have been possible for you to have been a legal assistant and received a share of the cases handled by you, would it not?
>
> A: Your Honour, when I discussed this with Mr Lim he felt that in order for me to be able to generate more business for the firm, and for the clients to allow me to handle their cases, without his assistance, it would be better for me to be known as or described as a partner.
>
> Q: And so this was an informed decision made by you, that you would be known to be a partner of the firm as opposed to being a legal assistant or a senior legal assistant? It was a matter that was specifically discussed between you and Mr Lim and agreed that you would be known as a partner of the firm?
>
> A: Mr Lim agreed that I would be described as a partner, yes.

Having consented to be held out as a partner, the third defendant should have been aware that she would become liable for the transactions of the firm in its usual business. It was for this reason that she was given the indemnity against third party liabilities reflected in the Profit Sharing Agreement.

98 It should also be noted that the third defendant herself arranged for the printing of three or four boxes of name cards in which she described herself as a partner of the firm. Further, her solicitors in their correspondence with Canon subsequently stated that she was "one of the partners" of the firm at the time the Lease was executed. When it came to this case, the third defendant in her affidavit of evidence-in-chief referred to her cessation of partnership at the firm in the following terms:

> 18 … I was not a partner of the Firm (having adopted senior associate status from April 2005 until I left the firm on or about 15 July 2005), when the Lease Agreement was "reinstated" sometime after 5 August 2005. I subsequently learnt from the pleadings in this action that the Plaintiff claims that it was not notified of my *cessation of partnership* or departure from the Firm. [emphasis added]

All in all even though the third defendant was not in law a partner of the firm, she was willing to be represented as such. I should state here that in my view the third defendant was never a partner in law *vis-à-vis* LCP and the second defendant since the evidence was plain that there was no intention on the part of either LCP or the third defendant that she should ever have such a status in relation to him and the second defendant.

99 In relation to the plaintiff, the representation that the third defendant was a partner came first from Susanna Soh and secondly, from the Lease itself. I do not accept the third defendant's

arguments that Susanna Soh was not authorised to inform third parties that she was a partner. She had agreed with LCP that she was to be described as a partner and that meant not only to clients of the firm but also to its staff and to other third parties. As office manager, Susanna Soh had the authority from LCP to deal with third parties in relation, at the least, to the acquisition of office equipment and therefore to give such third parties all information that they required regarding the firm and its personnel in connection with the supply of the equipment. The Lease itself stated that LCP, the second defendant and the third defendant were practising under the name of the firm and by signing this document, LCP and the second defendant acknowledged, as the plaintiff submitted, that the third defendant was a partner. I also accept that, as in the case of the second defendant, the plaintiff relied on the fact of the third defendant being a partner in making its decision to grant the Lease even though it may have been primarily influenced by LCP's reputation. This was shown from the fact of the inclusion of the third defendant's name under the description of the lessee in the schedule.

100 Since the third defendant did not sign the Lease, was she nevertheless bound by it? The answer to this question depends on s 5 of the Partnership Act. I have referred to this section before but in relation to the third defendant's position, I need to consider it more carefully. The section states:

> **Power of partner to bind firm.**
>
> 5. Every partner in an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does *any act for carrying on in the usual way business of the kind carried on by the firm* of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner. (emphasis added)

101 The third defendant's case was that the hire or lease of the Copiers and, given the true nature of the Lease, the entry into it with the plaintiff were not acts for "carrying on in the usual way business of the kind carried on by the firm" under s 5 and therefore such acts by either LCP or the second defendant did not bind her. She elaborated that while the Lease was purportedly for the lease of the Copiers, the entire transaction was not a simple lease but in reality a part of it involved the adoption of the firm's debt by the plaintiff. The Lease was a transaction whereby the plaintiff purchased the debt owing by the firm to Newcourt and then made a profit by entering into the Lease with the firm.

102 I do not accept the third defendant's categorisation of the Lease as a purchase of a debt. It was not the plaintiff that had the obligation to pay the debt but rather Canon. The plaintiff's role in the transaction was to buy the Copiers from Canon and lease them to the firm. No doubt it did agree to a purchase price which was calculated by reference not only to the "retail" price of the Copiers but also by reference to the amount which Canon was going to pay Newcourt. This, however, did not make the plaintiff the purchaser of the Newcourt debt. The plaintiff was not concerned with the Newcourt debt as such. What concerned it was whether the firm was willing to lease the Copiers from it on the basis of the purchase price that it would have to pay Canon. The firm made it plain that it was willing to do this and that was why the Lease was concluded. It is relevant that it was the firm that approved the payment plan in respect of the Lease. There were separate transactions that each party had with the others. The plaintiff's obligation was to pay Canon, not Newcourt. Canon's obligation was to pay Newcourt. Both sets of obligations were separate and distinct and not dependant on each other – the fulfilment of the plaintiff's obligation to pay Canon did not automatically mean that Canon's obligation (to the firm) to pay Newcourt was thereby fulfilled.

103 Although I accept that the plaintiff was not acting as a moneylender and that despite its knowledge that the price of the Copiers included an amount to be paid to the lessor of the old copiers, the Lease was entered into in the normal course of its business and was a genuine commercial transaction from its point of view, there were features of the transaction that disturbed me in relation to the third defendant's position. Unlike the second defendant, the third defendant was not a member of the firm at the time the leasing arrangements with Newcourt were originally concluded in August 2001. Thus, when she first joined the firm in April 2003, the third defendant had no liability to Newcourt and did not acquire any simply by entering the practice of the firm. These arrangements were amended in February 2004 and since there is no evidence that the third defendant was aware of the change and consented to it and was willing to assume liability, there is considerable doubt whether she thereafter became liable to Newcourt in the same way as LCP and the second defendant were. Accordingly, until the Lease was signed, the third defendant was, most likely, free of any legal liability in respect of the rental of any photocopiers. If the Lease were held to be binding on her, the effect of this holding would be to make the third defendant assume an indebtedness (the Newcourt indebtedness) for which she had not hitherto been responsible.

104 I have found that the third defendant was unaware of the Lease. Not only did she not sign it but she was not consulted on it by either LCP or the second defendant. As an ostensible partner of the firm, if the Lease was entered into in the ordinary course of business, the third defendant would be bound by the Lease as signed by LCP and the second defendant. She would thus, unknowingly, have been subjected to a substantial financial liability. Whilst I am sympathetic to the third defendant's position, I think that in the circumstances I have to accept that this Lease was concluded in the firm's normal course of business. It was clear from the evidence that the firm generally obtained its photocopiers on lease and that the terms of such leases were adjusted, where possible, to accommodate the cash flow needs of the firm. Susanna Soh who was the firm's manager from the time it commenced until October 2004 confirmed that there was nothing unusual about the Lease and she was familiar with the Newcourt documentation as well. This evidence must have some weight. The plaintiff submitted that the leasing of the Copiers from the plaintiff by the firm was a transaction that was entered into in the course of the firm carrying on the partnership business in the usual way. It was a fact that the firm was a law practice. It was a further fact that law practices require photocopiers. In cross-examination the second defendant had agreed that photocopiers were necessary for the business of the firm and that the Lease was entered into in the ordinary course of business of the firm. I accept these submissions made on behalf of the plaintiff and therefore hold that the third defendant was bound by the Lease.

Was the third defendant bound by the contract made in August 2005?

105 As I have stated above, the Lease terminated on 7 July 2005. The plaintiff sent letters of demand addressed to all three partners of the firm but these letters were sent to the firm's address and the third defendant's evidence was that she did not see any of the letters, either those from the plaintiff itself or those from the plaintiff's solicitors. The third defendant's evidence on this point has not been controverted or shown to be unreliable.

106 The evidence as to what happened after 7 July 2005 is not in dispute. It was LCP who applied to the plaintiff for the Lease to be "reinstated" and the letters accepting this arrangement on fulfilment of the August 2005 conditions were sent to the three erstwhile partners at the firm's address. By the time these letters were sent out and received, however, the third defendant was no longer working at the firm in any capacity. She ceased to share in the earnings from any file in May 2005 and at the end of July 2005 she left the firm completely. The question is then who contracted with the plaintiff for the "reinstatement" of the Lease, or to put it more accurately, for the new contract whereby the Copiers continued to be leased to the firm and the plaintiff agreed not to take legal action against the

partners.

107 The third defendant made the following submission in this respect. She said that it was clear that the "reinstatement" took place between 22 July 2005 and 5 August 2005 when LCP spoke to Ms Lim of the plaintiff and the plaintiff's solicitors' letter was sent to the firm or, perhaps, later in or about late August 2005 when LCP implemented the condition for Giro payment of the Lease instalments. The plaintiff had pleaded that when it agreed to the "reinstatement", LCP was "acting for himself and/or as agent for and on behalf of the second and/or third defendants". The third defendant submitted that there was no evidence of any representation by LCP that he was in fact acting as such because:

(a) Mr Goh's affidavit of evidence-in-chief is silent on the reinstatement issue;

(b) Mr Goh's supplemental affidavit of evidence-in-chief filed shortly after the trial (in response to the second defendant's amendments to his defence) deposed that:

> 21. When LCP subsequently requested for the Lease to be reinstated, he did not inform the Plaintiffs that there was any change in the constitution of the Firm. All negotiations were on the basis that LCP, the 2nd Defendant and the 3rd Defendant were still the Lessees. In fact, the Plaintiffs' solicitors wrote to LCP, the 2nd Defendant and the 3rd Defendant on 5 and 23 August 2005 concerning the reinstatement and sent the letters individually to them. Copies of the letters and the respective acknowledgement are on pages 17 to 26.

(c) these letters were sent to the third defendant at the firm's address and there was no evidence that she actually received them;

(d) the letter of 5 August 2005 referred to LCP's dealing with the plaintiff's credit manager, Ms Lim, and did not mention any alleged representation by LCP of his agency capacity;

(e) Ms Lim who could have given evidence as to what representations were made by LCP was not called to testify;

(f) it is clear that there was no express representation by LCP that he was an agent and the plaintiff was merely relying on LCP's alleged omission to inform it that the third defendant was no longer in the firm.

108 The third defendant submitted that this was an error by the plaintiff because it had not appreciated the law that there could be no "reinstatement" of the Lease and that any "continuation" would be an entirely new agreement. Since it was a new agreement, the plaintiff would have to take steps as it had done in 2004 to ascertain the partners of the firm. The plaintiff failed to do so because it assumed that the partnership had not changed. By 5 August 2005, the third defendant was no longer working in the firm and it would have been factually impossible for LCP when he entered into the August Agreement with the plaintiff to bind the third defendant to the August Agreement. The only conclusion must be that the plaintiff contracted with LCP (and perhaps with the second defendant) insofar as the new lease contract was concerned.

109 The plaintiff's response to the above argument was that under s 36 of the Partnership Act, there was a continuing liability on the part of a withdrawing partner *vis-à-vis* third parties who had had previous dealings with the partnership if such third parties did not have actual notice of the

withdrawal. The plaintiff was not notified of the third defendant's withdrawal as a partner of the firm and therefore continued to deal with the firm for the reinstatement. The correspondence from the plaintiff's solicitors was addressed to all three partners. Under s 36 of the Partnership Act, the onus was on the withdrawing partner to give actual notice of withdrawal to all people who dealt with the firm during that person's partnership, failing which the withdrawing partner remained liable to such persons for the partnership's debt. The third defendant had not given any such notice to the plaintiff.

110 In relation to this issue, I find the third defendant's contentions to be the more convincing. Once the third defendant ceased to be a partner of the firm, LCP no longer had the authority to make contracts that would bind her. When he made the August Agreement with the plaintiff he was acting on behalf of himself and the second defendant. He could not have acted on the third defendant's behalf. There is no evidence that he made any representation that she was still a partner of the firm and, as the third defendant submitted, it was the plaintiff who assumed that she was still in the firm. If on the other hand there was such a representation by LCP and the plaintiff relied on it to its detriment, the plaintiff would have an action against LCP for misrepresentation. It could not, however, have any action against the third defendant since LCP was no longer an agent for her under s 5 of the Partnership Act and had no actual or ostensible authority from her to hold her out as a partner.

111 As for s 36 (1) of the Partnership Act, this provides:

> **36.** – (1) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

It appears to me that this section does not apply to the third defendant's position for two reasons. The first is that in fact there was no change in the constitution of the firm when the third defendant left since she had never been, in law, a partner. Secondly, even if I am wrong on this, the plaintiff had already terminated the Lease which bound the third defendant and it was not continuing to do business with the firm on the old basis. Instead, when it negotiated with LCP for what it called the "reinstatement" of the Lease, it was entering into a new contract with him and those whom he represented. The third defendant was, as I have stated above, not one of those persons.

112 The third defendant made a submission as to the effect of the August Agreement on the Lease. She pointed out that it was the plaintiff's own case that it had given consideration for the August Agreement by forbearing to commence legal proceedings against LCP and the defendants under the Lease. The third defendant's point was that this forbearance had the effect of releasing her of any liability under the Lease. In my judgment, the plaintiff's suit herein was based on the August Agreement and not on the Lease. As the third defendant was not a party to the August Agreement, she could not be sued on it. It is also strongly arguable that by agreeing to substitute the obligations under the Lease with the obligations under the August Agreement, the plaintiff released the third defendant and the other parties to the Lease from their obligations thereunder.

Conclusion on third defendant's position

113 I have therefore come to the conclusion that the third defendant's defence must succeed because she was not bound by the August Agreement and this contract was the only contract on which the plaintiff could sue. The plaintiff's claim against the third defendant is dismissed with costs.