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28. TORT LAW

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I. Assessment of damages

28.1 *Lo Kok Jong v Eng Beng*[1] ("*Lo Kok Jong*") involved the assessment of damages arising out of a motor car accident. In particular, the Court of Appeal had to clarify the rule against double recovery. By way of background, the deputy registrar ("DR") had awarded damages amounting to $36,484.64 to cover general damages and some special damages for medical and transport expenses. The DR rejected a further claim for special damages for additional medical expenses amounting to $39,515.08 as those expenses were covered by government grants and subsidies, including:[2]

> (a) generic government subsidies of $19,211.57 ("Generic Government Subsidies");
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> (b) Pioneer Generation subsidies of $148.88 ("PG Subsidies"); and
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> (c) government grants for Community Hospital Services and medical drugs ("Community Grants") of $20,155.16.

28.2 To award the claimant damages for these expenses would violate the rule against double recovery. The DR held that the subsidies and grants did not come within the two exceptions to the double recovery rule, namely, the insurance exception and the benevolence exception. The rationale for the insurance exception was to avoid penalising claimants for their own "thrift and foresight"[3] while the rationale for the benevolence exception was that the moneys given was for the claimant's enjoyment and not as compensation for the injury suffered.[4] On appeal,

1 [2024] 1 SLR 964.
2 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [7].
3 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [8].
4 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [8].

the DR's decision was affirmed by the district judge ("DJ"). The General Division of the High Court ("General Division") allowed the claimant's appeal against the DJ's decision, holding that the subsidies and grants fell within the benevolence exception and were not intended to compensate the claimant or relieve the defendant of its liability. However, the General Division went on to direct the claimant to return the sum awarded to the Ministry of Health for its determination whether to claw back the subsidies and grants or to allow the claimant to retain them.[5]

28.3 The appellant appealed to the Appellate Division of the High Court ("Appellate Division"), which transferred the appeal to the Court of Appeal in view of the important legal question to be determined. Stephen Chong JCA, delivering the Court of Appeal's judgment, restored the district judge's award, holding that the subsidies and grants did not come within either of the two exceptions. Chong JCA reviewed the jurisprudence on the exceptions, noting that "it would defeat the point of insurance payouts and benevolent donations if they were not provided over and above damages payable by a tortfeasor".[6] Chong JCA then reviewed the previous attempts to articulate a general principle for the exception to the rule against double recovery. Three approaches were identified: one based on causation; one based on collateral or remote matters; and one based on an intuitive sense of justice.

28.4 Under the causation approach, the collateral benefit is viewed as not being caused by the tort but by some external factor, including the claimant's employment contract, payment of insurance premiums, or benevolence of others.[7] Chong JCA rejected this reasoning as it obscured the real reason for recognising an exception. Both the external cause and the tort are contributing factors to the benefit; to designate one as the main cause without articulating the reasons why, did not provide a workable principle. Under the collateral matters approach, the benefit is viewed as too remote from the tort. This approach too was rejected as being too vague and not providing a practical test.[8] The intuitive sense of justice approach was rejected as it tended to focus more on whether the defendant should be morally liable instead of whether the claimant was being doubly compensated.[9]

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5 See Kumaralingam Amirthalingam & Gary Chan Kok Yew, "Tort Law" (2023) 24 SAL Ann Rev 820 at paras 28.61–28.65 for the discussion of the judgment of the General Division of the High Court.

6 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [17].

7 This approach was first articulated in *Bradburn v Great Western Railway Co* [1874–1880] All ER Rep 195, cited in *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [17] and [21].

8 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [27].

9 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [28].

28.5 Chong JCA then referred to the Australian case of *National Insurance Co of New Zealand Ltd v Espagne*[10] ("*Espagne*"), endorsing the approach set out there based on the objective intended purpose test. The focus is on the benefactor's intended purpose, namely, whether the payments "are *intended* for the plaintiff's enjoyment independent of any right of redress against others" [emphasis in original].[11] Emphasising that the purpose was to be determined objectively, Chong JCA set out several *indicia* to help make that determination. The first is whether the claimant had contributed to the relevant payment. This is particularly relevant to the insurance exception. The second is whether the payment is targeted at the particular loss. If yes, then it would be treated as a substitute for damages and would not come within any exception to the double recovery rule. Thus, for example, unemployment benefits would not be exempt from the double recovery rule.[12]

28.6 The third indicator is the source of the payment. If it were the tortfeasor, then most likely it would be viewed as a substitute for damages and would be deducted.[13] If the source were a third party, an inference could be drawn that the payment was meant to be over and above damages, usually as a matter of benevolence.[14] However, when the source is the government, closer attention must be paid to determine whether the payment should be exempted from the double recovery rule. Unlike private benevolence, government payments are drawn from public funds, and it is less likely that the intention is to provide payments for the enjoyment of claimants. Government payouts are generally for the purpose of providing for needs that arise and as such indicate that the intention is to compensate the claimant and therefore act as a substitute to damages.[15]

28.7 The fourth indicator is the group of persons who benefitted from the payout. If the group of persons is limited to victims of torts, as is the case with insurance and benevolent payments, the inference is that the payment is intended to be enjoyed above and beyond damages. However, if the group is at large, and the personal circumstances of the victims are not considered, the inference is that the payment is not meant to be on top of damages but as a substitute for damages.[16] This is often the case with general government benefits.

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10 105 CLR 569; [1961] Qd R 277.
11 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [31].
12 See cases cited in *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [40]–[41].
13 See *Hussain v New Taplow Paper Mills Ltd* [1987] 1 WLR 336.
14 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [45].
15 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [49].
16 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [50].

28.8 Having explained the objective intended purpose test, Chong JCA went on to consider public policy considerations. A common consideration of fairness to the tortfeasor was rejected as the focus should not be on the moral desert of the tortfeasor but on the fair compensation of the victim. A second policy consideration was that the exceptions provided incentives for benevolent payments and for individuals to protect themselves through insurance. This too was rejected by Chong JCA as speculative, who went on to caution against relying on policy considerations to decide whether a payment should be exempted from the double recovery rule.[17] The preferred approach was to apply the objective intended purpose test.

28.9 Applying the principles to the facts of the case, Chong JCA held that the government subsidies and grants did not come within the insurance exception as the claimant had not paid any premium and therefore had not made any contribution toward the payment. The objective intended purpose test was applied to determine whether the grants and subsidies should be treated as coming within the benevolence exception or be exempted for any other reason. Applying the four *indicia*, Chong JCA held that there was no contribution made by the claimant; the subsidies and grants were targeted at the medical expenses and hence intended as a substitute for damages; the source of the payment was government funds; and the group of persons was not targeted but included all citizens who qualified for the grants and subsidies.[18]

28.10 The General Division in *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd*[19] ("*Noor Azlin*") had previously treated government subsidies as coming within an exception to the rule against double recovery, analogising such payments with insurance payments. Chong JCA took the opportunity to clarify that in so far as *Noor Azlin* stood for the proposition that general government subsidies were exempt from the rule against double recovery, the decision should not be followed.[20] Finally, Chong JCA disagreed with the General Division's approach of making an order for repayment to the Ministry of Health, holding that it would be inappropriate for the court to make such an order as it would impinge on executive function.[21]

28.11 The claim in *Crapper Ian Anthony v Salmizan bin Abdullah*[22] ("*Crapper Ian*") arose out of a motor vehicle accident in which the

17 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [66].
18 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [80].
19 [2021] SGHC 10.
20 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [86].
21 *Lo Kok Jong v Eng Beng* [2024] 1 SLR 964 at [99].
22 [2024] 1 SLR 768.

appellant, riding a motorcycle, collided with the respondent's car, causing damage to the vehicle and personal injury to the appellant. The parties entered into an interlocutory judgment by consent, with liability assessed at 90% against the appellant and issues of damages and causation to be assessed later at a hearing ("AD Stage"). During the hearing, the appellant disputed that the negligence caused the respondent's pain and suffering for neck and back pain. The DR, referring to *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd*[23] ("*Tan Woo Thian*"), took the view that in a bifurcated trial on liability and assessment, the claimant had to establish causation at the liability stage and could not dispute it at the assessment stage. The matter was transferred to the General Division to determine some preliminary questions of law, which were framed by the General Division as follows:[24]

> (a) whether causation can be reserved *in toto* to the AD Stage; and
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> (b) if causation cannot be reserved *in toto* at the AD Stage, to what extent can it be challenged at the AD Stage?

28.12 Goh Yihan JC considered three options.[25] The first was to allow causation to be reserved *in toto* ("Total Causation Approach"). Under this approach, the claimant need not prove causation at the liability stage. The second was to allow causation to be reserved partially ("Partial Causation Approach"). Under this approach, the claimant would have to prove causation with respect to *some* damage at the liability stage. The third was to deny reservation of causation at the AD Stage ("No Causation at AD Stage Approach"). Goh JC preferred the No Causation at the AD Stage Approach, arguing that liability could not be determined without proof of causation in a negligence claim, and therefore questions of causation had to be resolved and could not be reserved to the AD Stage.

28.13 In the Court of Appeal, Chong JCA disagreed with the General Division's position, highlighting that the General Division had considered cases involving interlocutory judgments that were obtained in default or through the failure to comply with an order of court. Such cases were distinguishable from the present, which involved a *consent* interlocutory judgment. Chong JCA noted that interlocutory judgments were not final. Thus, it was entirely possible for a court to enter interlocutory judgment on liability by determining duty and breach, but not causation. An interlocutory judgment is "an intermediate judgment that determines a preliminary or subordinate point but does not finally

23 [2021] 1 SLR 1166.
24 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [11].
25 *Salmizan bin Abdullah v Crapper, Ian Anthony* [2024] 5 SLR 257.

decide the case".[26] Thus, an interlocutory judgment could be entered to resolve some but not all disputes between the parties. As Chong JCA put it, "a clear distinction should be drawn between an interlocutory judgment on *issues* and an interlocutory judgment on *liability*" [emphasis in original].[27]

II. Breach of confidence

28.14 The dispute in *Farm to Fork Sdn Bhd v Adamas Sg Pte Ltd*[28] arose from a consultancy agreement entered into by the plaintiff ("Farm to Fork") and the first defendant ("Adamas"). The second defendant ("Mr Kim") was the CFO and the sole shareholder and director of Adamas. Farm to Fork purported to terminate the consultancy agreement with immediate effect but cl 3.2 of the consultancy agreement required the giving of notice of not less than three months. Farm to Fork acknowledged the sum of $66,660 (representing three months of consultancy fees) as payment in lieu of notice. Farm to Fork, however, failed to pay the sum.

28.15 Andre Maniam J ruled that the consultancy agreement had been terminated due to Farm to Fork's wrongful repudiation through the termination notice; or alternatively, that it was terminated when Adamas accepted the repudiation as terminating the agreement. As such, Adamas would be entitled to the sum of $66,660 as damages for wrongful termination. Farm to Fork claimed, *inter alia*, that Adamas had breached confidentiality obligations under the consultancy agreement by making certain disclosures to investors and employees. The defendants responded that the founders of Farm to Fork had misstated the company's financial position and that disclosing this information did not amount to a breach of confidence. Maniam J found there was indeed a misstatement of Farm to Fork's financial position though not amounting to accounting fraud.

28.16 The defendants pleaded that they had made disclosures to investors and employees in the proper course of Adamas' duties and/or was "required by law" under the consultancy agreement. The court noted Lord Denning MR's judgment in *Initial Services Ltd v Putterill*[29] ("*Initial Services*") that there is a universal obligation "which lies on every member of society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare".[30] Furthermore, it has been observed that information is not protected by the law of confidence

26 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [47].
27 *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 at [51].
28 [2024] SGHC 286.
29 [1968] 1 QB 396 at 405.
30 See *Farm to Fork Sdn Bhd v Adamas Sg Pte Ltd* [2024] SGHC 286 at [92].

"where there is a reasonable suspicion that it relates to crimes, frauds or misdeeds, or misconduct of such a nature that ought in the public interest be disclosed to others".[31] The public interest exception could be relied on even when there was no *legal* obligation, as long as there was a moral obligation.

28.17 Maniam J held that the defendants should be allowed to rely on the public interest exception even though it was not specifically pleaded. This was because the defendants had pleaded the disclosure to interested parties of accounting fraud or misrepresentation and the learned judge could not discern any evidence that Farm to Fork could conceivably adduce to prove that disclosure of accounting misrepresentation to interested parties would *not* be in the public interest, and Farm to Fork had not made such a submission in court.

28.18 As for the application of the legal principles to the facts, however, it is difficult to discern a clear distinction between the exceptions to confidentiality whether disclosures are required by law or justified in the public interest. For example, the learned judge found that the disclosures by Mr Kim to an investor (Mr Ahn) were required by law. They were needed to prevent potential investors from investing moneys based on misrepresentations as to Farm to Fork's financial position. Maniam J explained that Mr Kim and Adamas were "obliged to take steps to correct representations that they had found to be untrue, or to prevent investments from being made in reliance on those representations"[32] albeit without reference to any specific legal requirement. The learned judge then opined that the disclosures could also be justified in the public interest as a potential investor was about to invest based on the accounting misrepresentation discovered by Mr Kim. Maniam J added that the disclosure of the accounting misrepresentation must be made to a person who has a proper interest in receiving that information,[33] and that Mr Kim has a reasonable suspicion of accounting fraud.

III. Breach of statutory duty

28.19 The claimant in *Chen Qiming v Huttons Asia Pte Ltd*[34] ("*Chen Qiming*") was a national of the People's Republic of China, planning to invest in and relocate to Singapore. He was introduced by a mutual friend to the second defendant, a real estate agent employed by the first defendant. Following a few viewings, the claimant decided to purchase

31 See *Farm to Fork Sdn Bhd v Adamas Sg Pte Ltd* [2024] SGHC 286 at [93].
32 *Farm to Fork Sdn Bhd v Adamas Sg Pte Ltd* [2024] SGHC 286 at [134].
33 *Farm to Fork Sdn Bhd v Adamas Sg Pte Ltd* [2024] SGHC 286 at [135].
34 [2024] SGHC 103.

a unit valued at over $5m. He paid 10% of the purchase price for an Option to Purchase ("OTP") that was valid for 24 months before paying a further sum bringing his total payments to 30% of the purchase price. The claimant failed to exercise the option and forfeited the sums paid, amounting to over $1.5m. The claimant alleged that he had been assured that he could move into the property after paying the 10%, but the second defendant alleged that there was a tenancy clause in the OTP that only permitted occupation after payment of 30%. The claimant alleged that this information was only disclosed by the second defendant much later. Despite that, the claimant agreed to proceed with the purchase on renegotiated terms. The second defendant maintained that the claimant was aware of the tenancy clause from the beginning.

28.20 The claimant brought an action against the second defendant for fraudulent/negligent misrepresentation, breach of contract, negligence and breach of statutory duty. He sought to hold the first defendant vicariously liable. The court found that the claimant had not proved that the second defendant had made a representation that he could move in after paying 10%. Further, the judge held that even if such a representation had been made, the claimant failed to prove that it had caused his loss because the claimant agreed to the new conditions before paying the remainder sum. A second disputed representation concerned the ability to create a loft. Again, the judge found against the claimant, holding that the second defendant had not misrepresented the facts.

28.21 A third allegation related to the second defendant's representation that the property could easily be resold. The judge held that this was merely a statement of opinion and not fact. A statement of opinion could be treated as including a statement of fact if the representor genuinely believed it to be true or had reasonable grounds to believe it to be true. However, in this case there was no evidence that the second defendant held such a belief or had reasonable grounds for that belief. It was merely his own estimation of what could happen, which did not give rise to an action for misrepresentation. Having dismissed the claims for fraudulent misrepresentation, the judge went on to dismiss the claims for negligent misrepresentation on the same grounds.[35] A small point to note is that a claim for negligent misrepresentation may be based on a misrepresentation of opinion, and this should have been clarified even if the judge found that the claim was not meritorious.

28.22 Of more interest is the claimant's bold argument that the second defendant was liable for breach of statutory duty under the Estate Agents

35 *Chen Qiming v Huttons Asia Pte Ltd* [2024] SGHC 103 at [142].

Act 2010[36] ("EAA"). Specifically, the claimant referred to the agent's standard of performance set out in the Code of Ethics and Profession Client Care under the First Schedule of the Estate Agents (Estate Agency Work) Regulations 2010 ("Regulations"). The defendants argued that breach of the EAA did not give rise to a private right of action. While the legislation did not confer an express private right, the claimant argued that it was implied, relying on the statement of Judith Prakash J in *Loh Luan Choo Betsy v Foo Wah Jek*:[37]

> [T]he basic rule is that in the ordinary case, breach of a statutory duty does not in itself give rise to a private law cause of action for damages. It is only when construction of the statute in question establishes "that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty" (see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731) that such a cause of action will arise. The court therefore has to look at the provisions of the statute that has been breached to determine what private rights, if any, accrue from such breach.

28.23 Whether a private right of action for breach of statutory duty arose therefore depended on whether the legislation was intended to protect a limited class of persons and whether Parliament intended to confer on that class of persons a private right of action. The judge held that the EAA was not intended to protect a limited class of persons, but a general class of persons, *viz*, "all persons relying on estate agents in dealing with property".[38] Further, the judge held that even if the legislation intended to protect a limited class of persons, there was no evidence that Parliament intended to create a private right of action. The primary aim of the legislation was to regulate estate agents to maintain professional standards. The legislation itself contained enforcement provisions, with a complaints process and sanctions that included fines, disciplinary action, and criminal punishment. Thus, a private action was not necessary to enforce the legislation.

IV. Conspiracy

28.24 The facts in *Kapital Fund SPC v Lee Tze Wee Andrew*[39] are quite complicated, involving various parties and transactions. What follows is a selective summary of facts that are relevant to the pleadings and submissions. Kapital was a portfolio company managed by Kredens

36 2020 Rev Ed.
37 [2005] 1 SLR(R) 64 at [25]. See *Chen Qiming v Huttons Asia Pte Ltd* [2024] SGHC 103 at [147].
38 *Chen Qiming v Huttons Asia Pte Ltd* [2024] SGHC 103 at [153].
39 [2024] SGHC 289.

Capital Management Pte Ltd ("KCM"). Adam was the Chief Executive Officer and a director of KCM. Under a consultancy agreement of 2020, KCM agreed to pay Ambrosia Management Pte Ltd ("Ambrosia") a monthly consultancy fee and commission fees for Ambrosia's services. According to a supplemental agreement ("Supplemental 5"), KCM agreed to pay additional commissions to Ambrosia. Andrew was the sole director of Ambrosia.

28.25 In 2022, Kapital agreed to provide a loan to Zeta One Management Pte Ltd ("ZOMPL") with interest at 15% per annum ("Loan Agreement"). Stephanie was the sole director and shareholder of ZOMPL and a director of Zeta Global (Private) Limited ("ZGPL"). Andrew invested in a Sri Lankan company ("Lankaila") through ZOMPL and ZGPL. Under the arrangement, Lankaila would pay interest on the loan from ZOMPL and/or ZGPL at 20% per annum, and ZOMPL and/or ZGPL would pay Kapital interest at 15% per annum according to the Loan Agreement. ZOMPL drew down on the principal sum under the Loan Agreement and invested the money into ZGPL via an equity injection and loaned the sum onward to Lankaila. In May 2023, KCM terminated Supplemental 5 with Ambrosia ("Trigger Event"). As a result of the termination, Ambrosia would no longer receive the additional commissions. In June 2023, ZOMPL (Stephanie's company) breached the Loan Agreement by defaulting on its interest payment obligations to Kapital (related to Adam).

28.26 Kapital claimed in both inducement of breach of contract and conspiracy. Upon the application for striking out by the defendants, the learned assistant registrar ("AR") struck out the statement of claim. Kapital appealed against the AR's decision and Hri Kumar Nair J eventually dismissed the appeal. This section focuses on conspiracy, and the claim in inducing breach of contract will be discussed in paras 28.51–28.56 below.

28.27 In respect of unlawful means conspiracy, Kapital pleaded that Andrew and Stephanie, with intent to injure Kapital and/or to cause loss to Kapital by unlawful means, conspired and/or combined together to injure and/or to cause loss to Kapital by procuring ZOMPL to breach the Loan Agreement and by causing ZOMPL to fail to make repayment of the principal sum and payment of the interest sum. As for the claim in lawful means conspiracy, Kapital pleaded that Andrew and Stephanie conspired and combined together to do the same with "the sole or predominant intention" of injuring Kapital and/or of causing loss to Kapital. To be precise, for lawful means conspiracy, the mental element refers to a predominant *purpose* to injure.[40] Whilst the element of intention may be

40 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [73].

satisfied whether as a means to an end or as an end, the threshold for the element of predominant purpose is higher requiring the defendant to target, as an end in itself, the injury of the plaintiff.

28.28 Nair J raised two related questions:

> (a) Where the act done pursuant to the conspiracy is the breach of a contract, in what circumstances can a non-party or "stranger" to that contract be said to be involved in the conspiracy? ("Combination Question"); and
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> (b) In order to establish a non-party's or "stranger's" involvement in the conspiracy, what particulars of that party's participation must be pleaded? ("Particularisation Question").

28.29 Question (a) was answered in the affirmative. Upon consideration of local and UK case precedents, the learned judge concluded that it is plausible for a non-party or stranger to a contract to be regarded as having conspired with the party who breached the contract provided there was "active and meaningful participation" by the non-party or stranger to facilitate the breach.[41]

28.30 As for question (b), the General Division opined that the claimant must plead particulars of how the alleged conspirators combined, including the role of each conspirator and his or her participation. Evidence of the actions taken by the alleged conspirators would be necessary in addition to the presence of an agreement to conspire.[42] In the present case, particulars of Andrew's participation in the alleged conspiracy were absent in Kapital's pleadings. They did not mention how the breach of the Loan Agreement by ZOMPL could be procured by Andrew, not being an agent, employee or director of ZOMPL.

V. Conversion – damages

28.31 The General Division judgment in *Dways International Pte Ltd v Lim Seow Hui Ratna Irene*,[43] on appeal from the decision of the AR, focuses on the assessment of damages for the claims in conversion and defamation respectively. Audrey Lim J had previously determined liability for the claims in the earlier decision of *Dways International Pte*

41 *Kapital Fund SPC v Lee Tze Wee Andrew* [2024] SGHC 289 at [77]. See *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529; and *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at [130].

42 *Kapital Fund SPC v Lee Tze Wee Andrew* [2024] SGHC 289 at [86], citing *Syed Ahmad Jamal Alsagoff v Harun bin Syed Hussain Aljunied* [2017] 3 SLR 386 at [60]–[61].

43 [2024] 5 SLR 172.

Ltd v Lim Seow Hui Ratna Irene.[44] For the conversion claim, the first and second defendants, Irene and Justin (collectively, "Lims"), were found to have conspired to remove the plaintiff's (Dways's) nutritional products with the intent to cause damage or injury to Dways. In respect of the defamation claim, Irene was held liable for sending certain defamatory statements (namely, WhatsApp messages and two letters) to three persons under the alias "Lisa Chew". This section examines the assessment of damages for the conversion claim whilst the claim in defamation will be discussed in paras 28.36–28.50 below.

28.32 The AR awarded $86,154 in damages to Dways as compensation for their losses by reference to the wholesale price of the misappropriated products based on the existence of a relevant market for the sale of products at the wholesale price. The Lims contended that the measure of damages should be the cost price and sought to reduce the award to US$4,555.28 on the ground that Dways did not suffer any loss of sales from the misappropriation since there were sufficient stocks and Dways could also have replenished them.

28.33 Lim J cited the Court of Appeal decision in *Marco Polo Shipping Co Pte Ltd v Fairmacs Shipping & Transport Services Pte Ltd*,[45] which stated that the market value as at the date of conversion will typically be used to determine the value of the goods as it is "the best approximate of the loss suffered by the plaintiff who has been deprived of his goods".[46] However, in the event the market value is not ascertainable, the courts may resort to the cost of replacement.

28.34 Reference was also made to *YCT Import & Export Pte Ltd v FG Food Industries Pte Ltd*[47] involving a stockist where the relevant market was the market in which the stockist purchases the stock and the measure of damages for the lost stock was held to be the replacement cost. Lim J also cited *Furness v Adrium Industries Pty Ltd*[48] in which the Supreme Court of Victoria Appeal Division held that the loss of the plaintiff (a wholesaler) was to be assessed on the basis of the replacement cost of the goods rather than the selling price.

28.35 In the present case, Lim J adopted a similar position that the relevant market is that in which Dways would have obtained replacements from the manufacturer for the misappropriated products, and that the

44 [2022] SGHC 158.
45 [2015] 5 SLR 541.
46 *Dways International Pte Ltd v Lim Seow Hui Ratna Irene* [2024] 5 SLR 172 at [27(b)].
47 [2021] SGHC 190 at [23]–[24].
48 [1996] 1 VR 668 at 680 and 682.

measure of damages would be the cost price (which is the price Dways would have to pay to purchase the replacement products). Moreover, there was no evidence of any consequential loss (*eg*, loss of profits) arising from the conversion. The fact that Dways could have the opportunity to sell the misappropriated products at a profit was not regarded by Lim J as relevant to the claim for compensation for loss.

VI. Defamation – damages

28.36 With respect to the claim in defamation in *Dways International Pte Ltd v Lim Seow Hui Ratna Irene*,[49] the AR had awarded $20,000 in general damages to Dways based on the gravity of the defamatory statements relating to the quality and safety of the products that Dways had conducted business for only a short period at the relevant time of publication, Irene's misuse of information obtained as a director of Dways in making the publications, Irene's lack of remorse upon making the statements, and the publication to Dways's distributors or customers.

28.37 Lim J agreed with the AR's approach, on taking account of the abovementioned factors, for determining the quantum of damages except for the factor relating to the extent of publication to distributors and customers for which Dways had failed to discharge the burden of proof. Furthermore, the learned judge was of the view that Irene did not genuinely believe in her statements and thus acted maliciously. There was no honest belief on the part of Irene about her statements concerning the country of manufacture of the products, whether the products were made from a country that complied with the "World Hygiene Standard" and the safety of the products for consumption. In addition, Irene was malicious in pretending to be "Lisa Chew" (as a former Dways distributor or customer who had been cheated and was therefore legitimately concerned with the safety or manufacturing origins of the products).

28.38 Lim J eventually reduced the AR's award from $20,000 to $15,000. The judge compared the present case with the assessments in case precedents (namely, *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd*[50] and *ATU v ATY*[51]), particularly on the factors related to the gravity for the defamatory allegations and the business standing of the plaintiff company at the time of the defamatory publication.

49 [2024] 5 SLR 172.
50 [2015] 2 SLR 751.
51 [2015] 4 SLR 1159.

28.39 The next case is *Shanmugam Kasiviswanathan v Lee Hsien Yang*[52] on the quantification of damages arising from a defamation lawsuit initiated by the Minister for Law (also the Minister for Home Affairs) of Singapore and the Minister for Foreign Affairs of Singapore. Both are lessees of two black-and-white colonial bungalows at 26 and 31 Ridout Road. The judgment clarifies the meaning and scope of some of the factors relevant for assessing damages in defamation.

28.40 The defendant published a Facebook post on 23 July 2023 about trust in the Prime Minister being "squandered" and that "[t]wo ministers have leased state-owned mansions from the agency that one of them controls, felling trees and getting state-sponsored renovations" ("offending words").[53] A correction direction was issued under the Protection from Online Falsehoods and Manipulation Act 2019[54] to the defendant concerning untrue statements in the post: that the State paid for the renovations to the Ridout properties because the properties were leased by the claimants and that trees at the properties were allowed to be felled because the properties were leased by the claimants. The correction notice stated as follows:[55]

> This Facebook post contains false statements of fact relating to the 26 Ridout Road and 31 Ridout Road matter, and to SPH Media Trust. For the correct facts, click here: https://www.gov.sg/article/factually250723

28.41 The defendant edited the post on 25 July 2023 to comply with the correction direction but did not remove the offending words. As the defendant did not file and serve his notice of intention within the required period after substituted service of process outside the jurisdiction, judgment was granted on 2 November 2023 in default of a notice of intention to contest or not contest. Goh Yihan J also ordered the defendant be restrained from publishing or disseminating the defamatory words.[56] On 10 November 2023, the defendant edited the post to remove the offending words.

28.42 Moving on to the assessment of damages, the pleaded meanings of the offending words, not challenged by the defendant, were that the Ministers had acted corruptly and for personal gain by having the Singapore Land Authority (in Shanmugam's case, an agency under his control) give them preferential treatment by felling trees without approval and illegally, and give the Ministers preferential treatment by

52 [2024] 5 SLR 194.
53 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [7].
54 2020 Rev Ed.
55 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [10].
56 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 4 SLR 580.

paying for renovations to their properties at Ridout Road. Goh J opined that the defendant's defamatory allegations which were directed at the Ministers' "personal integrity, professional reputation, honour and core attributes of their personalities" are of "the gravest kind".[57]

28.43 Goh J took pains to consider the possible arguments the defendant might have made if he were present in court. The defendant might have argued that he had edited the post to include reference to the correction direction and that readers of the post would know that the offending words were false assuming they read the article embedded in the link in the edited post. Goh J stated, however, that such an argument would not have reduced the gravity of the defamatory allegations.

28.44 First, Goh J stated that "the fact that there may be countervailing information provided does not reduce or negate a defamation, especially if such information does not originate from the party which is responsible for the defamation". The reference is from the case of *Lee Hsien Loong v Leong Sze Hian*[58] in which various third parties had countered the defamatory allegations published by the defendant in that case. The present case is arguably more nuanced in that it was the defendant who had edited the post albeit in compliance with the correction direction issued under the instruction of the Minister for Culture, Community and Youth and Second Minister for Law. Be that as it may, the important evidence, as noted by the learned judge, was that the defendant had stated in a "comment" posted on his Facebook post of 25 July 2023 that the correction direction he had received was "misleading" and that "I stand by what I said".[59] Hence, it was clear that the gravity of the defamatory allegations remained. The factors concerning the claimants' high standing as Cabinet Ministers and Members of Parliament and public leaders and the defendant being well known in Singapore and active on social media with "89K followers"[60] were relevant to the assessment of damages.

28.45 On the next factor concerning the mode and extent of publication and republication, counsel for the claimants cited the High Court's decision of *Lee Kuan Yew v Chee Soon Juan*[61] for the proposition that "[t]he defendant's knowledge or intention that his defamatory statements would be repeated and republished and that the defamatory statements were so repeated and republished is also relevant to the question of damages".[62] Upon examining the cited decision, Goh J questioned whether it was

57 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [34].
58 [2021] 4 SLR 1128 at [63].
59 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [35].
60 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [40].
61 [2005] 1 SLR(R) 552 at [72].
62 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [42].

in fact related to the defendant's knowledge or intention of publication. Another decision, the Kuala Lumpur Court decision of *Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad*,[63] was cited by counsel for the proposition that "if the publication is timed so as to influence a greater number of people, damages should be increased".[64] In both cases, Goh J explained that the defendant's state of mind was not relevant to the factor on the mode and extent of publication. However, whether the defamatory statements are likely to be republished extensively would be relevant. Nevertheless, the defendant's state of mind may be analysed under the factor of the defendant's conduct and malice for the determination of the quantum of damages in defamation.

28.46 The learned judge found there was substantial publication of the offending words within Singapore based on the numerous reactions and comments to the post, the "89K followers", the privacy setting of the Facebook post to "public" as well as the defendant's conduct of drawing attention to the offending post through his subsequent Facebook postings. Goh J added that the offending words have been republished substantially as a "natural and probable consequence" of the initial publication based on the Court of Appeal decision of *Tang Liang Hong v Lee Kuan Yew*.[65] The offending post had been republished on the "news feeds" of the "friends" and/or "followers" of those "followers", shared by numerous Facebook users which in turn attracted other reactions and comments, and was republished through blogs, websites and media which are accessible to readers in Singapore.

28.47 The Singapore High Court has in *ATU v ATY*[66] also referred to the test of "foreseeable consequence" that the defamatory statement would be republished.[67] The High Court had also cited the English Court of Appeal decision in *McManus v Beckham*[68] on the test of whether "a reasonable person in the position of the defendant should have appreciated that there was a significant risk that what she said would be repeated". In any event, regardless of the legal tests, the outcome would likely be the same. Given the evidence adduced about the defendant's conduct and the

63 [1984] 1 MLJ 97.

64 *Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad* [1984] 1 MLJ 97 at 99E–99G. See also *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [43].

65 [1997] 3 SLR(R) 576 at [180]. See also *Low Tuck Kwong v Sukamto Sia* [2013] 1 SLR 1016; and *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1997] 3 SLR(R) 46 at [127].

66 [2015] 4 SLR 1159 at [38]. Applied in *Continental Steel Pte Ltd v Nippon Steel & Sumitomo Metal Southeast Asia Pte Ltd* [2023] 5 SLR 445 at [171]–[174].

67 See *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1997] 3 SLR(R) 46 at [129]–[130].

68 [2002] 1 WLR 2982.

"public" setting on Facebook, it is likely that the defendant had reasonably foreseen the republication of the offending post.

28.48 Turning to a different factor, Goh J clarified that the factor of "the natural indignation of the court at the injury caused to the claimants", as argued by counsel for the claimants, was not a separate factor on its own but related to the factor regarding the nature and gravity of the defamatory allegations.[69] As for the factor regarding the defendant's conduct, the learned judge observed that the defendant did not apologise to the claimants when presented with the opportunity but instead alleged in a Facebook post that the claimants had demanded a false apology from him which attracted many "reactions", comments and "shares". The defendant subsequently made other Facebook posts that drew attention to the offending post. In the above instances, the privacy settings of these posts were set to "public".

28.49 With regards to malice, Goh J opined that the defendant made the statement knowing that the offending words were false and yet published them recklessly and/or without considering or caring whether they were true or not. In this regard, the judge noted that the CPIB's investigations had not revealed evidence of preferential treatment given to the claimants with respect to the Ridout properties nor any abuse of authority for personal gain.

28.50 Goh J eventually awarded each claimant $150,000 in general damages and $50,000 in aggravated damages. Goh J calibrated the quantum of damages by comparing mainly with the awards in *Lee Hsien Loong v Leong Sze Hian*[70] ($133,000) and the *Lee Hsien Loong v Xu Yuan Chen*[71] ($210,000) taking into account the serious and grave nature of the defamation, the standing of the claimants and the defendant, the extent of publication and republication, and the defendant's conduct and malice.

VII. Inducement of breach of contract

28.51 In *Farm to Fork Sdn Bhd v Adamas Sg Pte Ltd*,[72] discussed above, there was another allegation by Farm to Fork that Mr Kim, the CFO, had induced Adamas's breach of the consultancy agreement. This claim

69 *Shanmugam Kasiviswanathan v Lee Hsien Yang* [2024] 5 SLR 194 at [56]–[57], citing *Cassell & Co Ltd v Broome* [1972] 1 AC 1027 and *Lee Hsien Loong v Leong Sze Hian* [2021] 4 SLR 1128 at [122].
70 [2021] 4 SLR 1128.
71 [2022] 3 SLR 924.
72 [2024] SGHC 286.

failed as Adamas did not breach the consultancy agreement to begin with. A second reason for dismissing the claim was because Farm to Fork could not show that Mr Kim had breached his personal legal duties to Adamas. *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[73] stood for the proposition that a director may be liable for inducing the company's breach of contract only if the plaintiff can discharge the burden of showing that the director had breached his personal legal duties to the company (*eg*, breach of a fiduciary duty to act in the best interests of the company). Third, as Mr Kim had not even considered if he was contravening the consultancy agreement, there was no intention on his part to interfere with the plaintiff's contractual right.[74] As such, the intentional requirement of the tort was not satisfied. In sum, all of Farm to Fork's claims against Adamas and Mr Kim were dismissed.

28.52 The next case is *Kapital Fund SPC v Lee Tze Wee Andrew*[75] which was discussed in section IV, Conspiracy, above. As mentioned, the Trigger Event, *ie*, the termination by KCM (Adam's company) of a supplemental agreement led to the loss of additional commissions to Ambrosia (Andrew's company). Kapital pleaded that Andrew retaliated by influencing and/or persuading Stephanie (in her capacity as director of ZOMPL) to cause ZOMPL to breach its obligations to Kapital under the Loan Agreement and thereby causing ZOMPL not to make repayment of the principal sum and payment of the interest sum.

28.53 Specific to Stephanie as the director of ZOMPL, Kapital argued she was in breach of her duties owed to ZOMPL on the ground that Stephanie caused ZOMPL to invest the principal sum into ZGPL "via an equity injection, instead of a back-to-back loan agreement between ZOMPL and ZGPL on terms similar to the Loan Agreement"; and that, as a result, ZOMPL was not entitled to receive periodic payments from ZGPL and would be unable to meet its interest payment obligations owed to Kapital.

28.54 With respect to the element of inducement, the issue was whether the breach of the Loan Agreement arose from the alleged act of inducement of the defendant or rather the inevitable circumstances flowing from some prior (re)structuring of corporate transactions. This involved the application of existing tort principles to a fairly novel corporate context. The Singapore High Court cited the English Court

73 [2018] 1 SLR 818.
74 *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [16]–[18].
75 [2024] SGHC 289.

of Appeal decision in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd*[76] ("*Kawasaki*") for the proposition that in order to satisfy the element of inducement, it must be shown that the defendant was capable of influencing the choice of whether or not to breach the contract.

28.55 In *Kawasaki*, the plaintiff entered into a contract with the first defendant, which was the indirect subsidiary of the second defendant, for the road haulage of containers within the UK. Due to a joint venture, the defendants' group of companies ceased to operate its own container liner business, and they could not offer any haulage jobs to the subsidiary. As a result, the subsidiary could not offer road haulage jobs to the plaintiff leading to a breach of the contract. Nair J drew an analogy between *Kawasaki* and the present case. The defendant (Andrew) was not in a position to influence the breach of the Loan Agreement by ZOMPL and was not involved in the structuring of the investment. The breach was "an inevitable consequence of the circumstances which were in place well before the Trigger Event".[77]

28.56 The second legal issue confronting the High Court was whether Stephanie would be shielded from liability under the *Said v Butt* rule.[78] The Court of Appeal in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[79] ruled that directors would generally be absolved of personal liability for the contractual breaches of their company whether in inducement of breach of contract or unlawful means conspiracy. This rule would apply unless Kapital could show that Stephanie, in her capacity as director of ZOMPL, was in breach of any duties owed to ZOMPL. However, Kapital failed to show that Stephanie was obligated to implement the back-to-back loan arrangement or explain how the equity injection in ZGPL amounted to a breach of fiduciary duties. Thus, Stephanie was absolved of liability under the *Said v Butt* rule.

VIII. Misrepresentation: fraudulent and negligent

28.57 The case of *Chan Pik Sun v Wan Hoe Keet*,[80] which arose from the operation of a Ponzi scheme resulting in losses suffered by an investor ("Sandra") in the scheme, has generated differing judicial views within the Appellate Division. It turned largely on the question as to whether the first and second respondents ("Ken" and "Sally"), who were themselves

76 [2021] 3 All ER 978 at [38].
77 *Kapital Fund SPC v Lee Tze Wee Andrew* [2024] SGHC 289 at [61].
78 *Said v Butt* [1920] 3 KB 497.
79 [2018] 1 SLR 818; applied in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655.
80 [2024] 1 SLR 893.

investors in the scheme, had made fraudulent misrepresentations to Sandra. The third respondent was Sally's brother, Sebastian, who invested in the scheme and the fourth respondent was Strategic Wealth Consultancy Pte Ltd, a company in which Ken and Sally held their assets and earnings from the scheme.

28.58 The scheme known as "SureWin4U" was founded by Peter and Philip, and designed on the basis that the investments would be utilised by professional gamblers to gamble at baccarat at casinos using two gambling methods supposedly reflecting their supposed success rates (namely, "100% method" and "98% method") in order to generate "profits". In fact, it was part of a multi-level marketing strategy in which the "profits" would come from investments placed by new investors. To maintain the scheme, existing investors had to recruit new downline investors. The investors purchased packages of differing values and attended classes to learn about the gambling methods.

28.59 Ken and Sally were not ordinary investors. They were also involved in the running and marketing of the scheme and contributed substantially to the scheme's earnings. They had themselves cashed out $7m to $10m from the scheme. Sandra was introduced to the scheme and to Ken and Sally in 2014 and purchased investment packages between April to August 2014. In September, the scheme collapsed. Sandra sought help from Ken and Sally. In October, Ken and Sally formed a group of ten investors including Sandra and gave them a sum of money to recoup their investments at the casinos using the gambling methods but to no avail. Ken and Sally made police reports against Peter and Philip in October and November 2014 claiming that they were victims of a scam. In June 2018, however, the *Macao Daily* newspaper reported that Peter was distributing cash from his winnings with a photograph of Ken and Sally together with Peter and others holding wads of cash.

28.60 Sandra initiated a lawsuit in 2018 alleging fraudulent, negligent and innocent misrepresentations against the respondents. She alleged four misrepresentations: (a) that the scheme was safe and profitable ("Safe and Profitable Representation"); (b) that investors who purchased a US Property Package would "receive a title deed to a house in Detroit" ("US Property Representation"); (c) that the "funds would be used to buy over a company that was going to be listed on the Singapore Stock Exchange in October 2014" ("Share Investment Representation"); and (d) that Sandra would become a "Seven-star Agent" and Hong Kong's number one salesperson ("Hong Kong No 1 Representation"). There was also a claim in conspiracy by lawful or unlawful means. The trial

judge in *Chan Pik Sun v Wan Hoe Keet*[81] (case reviewed in a prior issue of the *Singapore Academy of Law Annual Review of Singapore Cases*)[82] had dismissed the claims.

28.61 Ultimately, the majority judges (Steven Chong JCA and Debbie Ong JAD) allowed the appeal in respect of Sandra's claim for fraudulent misrepresentation against Ken and Sally based on the Safe and Profitable Representation and the Share Investment Representation. There were two main points of contention between the majority and minority judges in the Appellate Division. The first point was related to the first alleged misrepresentation concerning Sandra's understanding of what "safe and profitable" meant. Sandra argued that she understood the words to mean that the scheme was legitimate and not a scam, *ie*, that professional gamblers would use the gambling formulas to generate returns for investors. To the majority judges, if the scheme was represented as being "safe", then the scheme must be legitimate and could not be a scam.

28.62 The majority judges acknowledged the absence of direct evidence in the present case but inferred that Ken and Sally had colluded with Peter and Philip on the scheme and possessed the requisite knowledge at the time they made the Safe and Profitable Representation. This brings us to the second point of contention regarding certain WeChat messages between Ken and Sally and Peter and Philip in respect of the scheme. Sandra applied for the discovery of the messages, but Ken and Sally stated they had changed phones and did not keep any backup of the messages. The majority judges drew an adverse inference from Ken and Sally's failure to produce the missing messages and their "wholly unconvincing" explanations for the failure based on their interpretation of s 116 illustration (*g*) of the Evidence Act 1893:[83]

> 116. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> …

81 [2023] SGHC 96.

82 Kumaralingam Amirthalingam & Gary Chan Kok Yew, "Tort Law" (2023) 24 SAL Ann Rev 820 at paras 28.1–28.12.

83 2020 Rev Ed. See also *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 and *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (both cited by the Appellate Division of the High Court in *Chan Pik Sun v Wan Hoe Keet* [2024] 1 SLR 893 at [115]–[116]).

> (*g*) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it; …

28.63 The majority judges also referred to "independent evidence" of fraud from Ken and Sally's meeting with Peter in Macau in 2018 when they were pictured together with Peter indicating their close relationship with Peter and their knowledge of the fraudulent nature of the scheme. The judges opined that the police reports lodged against Peter and Philip and the giving of money to a group of ten investors to recoup their investments at the casino in 2014 were merely a façade.

28.64 Aside from the adverse inference concerning Ken and Sally's knowledge of the false representation, the majority observed that Ken and Sally were reckless in that they merely repeated the communications from the scheme's promotional materials, including making the Safe and Profitable Representations without taking any steps to verify the information. There was no concrete evidence from Ken and Sally about meeting any of the professional gamblers nor their knowledge of the gamblers' winnings at the casinos.

28.65 Furthermore, the majority were of the view that Sandra relied on the Safe and Profitable Representation. The fact that Sandra was concerned with the scheme's gambling methods and their success rates did not detract from her reliance on the scheme being legitimate, *ie*, through professional gamblers using those gambling methods to generate returns. Indeed, according to the majority judges, her belief in those gambling methods would have validated her decision to invest based on her understanding of the scheme. As a result, she suffered losses represented by the total price of the investment packages she purchased.

28.66 Notwithstanding the ruling of the majority, Sandra's case against Ken and Sally is, admittedly, not straightforward. In contrast to the majority judgment, the minority judge (Woo Bih Li JAD) was of the view that Sandra understood the Safe and Profitable Representation to mean that the gambling methods were viable. Sandra had expressly mentioned her interest in the gambling methods in her repeated communications with her downlines. Woo JAD opined that the majority view of Sandra's understanding of the Safe and Profitable Representation that it pertained to the legitimacy of the scheme was not supported by the evidence. At the time of Sandra's investments in the scheme, there was no evidence indicating her reliance on the representation in so far as it related to the legitimacy of the scheme. Furthermore, evidence of Ken and Sally's conduct in continuing to reinvest in the scheme until its collapse and their own losses from the reinvestments would not be entirely consistent with their purported knowledge that the scheme was fraudulent. That the group of investors (including Sandra) used the 100% method to recoup

their investments after the scheme's collapse pointed towards her belief in the viability of the gambling methods.

28.67 With respect to the missing messages, Woo JAD felt that any adverse inference about the conclusions that may be drawn would be equivocal as to whether Ken and Sally had actual knowledge that the scheme was fraudulent, or if they were reckless or negligent. In addition, the adverse inference would not clearly address the issue regarding the point in time when Ken and Sally discovered that the scheme was false. As for the alternative allegation that Ken and Sally were reckless, Woo JAD disagreed, observing that both of them, though gullible, may have honestly believed in the legitimacy of the scheme or the viability of the gambling methods. Evidence showed that Ken and Sally had sight of images of cheques representing purported winnings and were convinced about the viability of the gambling methods given the evidence of returns made by fellow investors.

28.68 Moving on to the Share Investment Representation, as Ken and Sally did not honestly believe that the scheme was legitimate, the majority judges opined they would also not have any honest belief about the plans to acquire a listed company. Hence, the misrepresentation was actionable. In addition, Sandra did not properly plead the US Property Representation with sufficient particularity and the Hong Kong No 1 Representation was a promise or a statement as to the future and were therefore not actionable. The claim in unlawful conspiracy failed as the respondents had no intention to injure Sandra. *A fortiori*, there was no predominant motive to injure Sandra for the alternate claim in lawful conspiracy.

28.69 Finally, Woo JAD commented on the claim for negligent misrepresentation. On the duty of care issue, whilst there was factual foreseeability that Sandra would suffer loss from the allegedly negligent Safe and Profitable Representation, there was insufficient legal proximity between the parties for a duty to arise. Unlike the defendant bank in *Zillion Global Ltd v Deutsche Bank AG, Singapore Branch*,[84] Ken, Sally or Sebastian, not being founders or operators of the scheme, did not assume any advisory role towards Sandra or provide any guarantee about the viability of the gambling methods. Neither was there any reliance by Sandra on the representation.

84 [2020] 4 SLR 425.

IX. Negligence

28.70 *CIX v DGN*[85] raised an important question as to whether an expert witness in an arbitration dispute could be liable in negligence to one of the parties if the expert had negligently misled the arbitral tribunal, resulting in loss to that party. The claimant sold a company to the buyer under a Sale and Purchase Agreement ("SPA") which provided for the purchase price to be adjusted based on the final valuation defined in the SPA. The final valuation was to be calculated based on the compensation costs of key management roles based on market benchmarks to be determined by a consultant appointed by mutual agreement between the claimant and the buyer. The defendant was appointed by the buyer as the consultant.

28.71 Instead of providing a fixed figure for the benchmarks, the defendant provided a range of figures representing the 25th, 50th and 75th percentiles. The buyer argued that the 50th percentile was the appropriate figure. The claimant disagreed, putting forward figures provided by its own independent expert, Falcon, which acknowledged that it used different data than that used by the defendant and did not take into account the headcount. The tribunal rejected Falcon's figure and relied on the defendant's report setting the benchmark at the 50th percentile.

28.72 Unhappy with the tribunal's decision, the claimant applied to have it set aside, alleging that the valuation was incorrect and further alleging that the defendant had acted corruptly. Both applications to set aside the award were dismissed. The claimant then brought an action against the defendant alleging that it had made misrepresentations leading up to its appointment and that it had been negligent in preparing the valuation report. The defendant denied both allegations and alleged that the claimant was abusing the court process to undermine the tribunal's award. The court's decision on the abuse of process allegation will not be discussed, except to note that the court agreed with the defendant that the claimant had indeed abused the court's process.

28.73 On fraudulent misrepresentation, the claimant alleged that the defendant had falsely represented that there was no conflict of interest by declaring that it had no substantial dealings with the buyer at the time of the Committee of Inquiry declaration, and further that the defendant had falsely represented that it was engaged solely by the buyer. The judge found that although the defendant had a prior substantial dealing, that had ceased by the time of the Committee of Inquiry declaration. Another small ongoing project with the buyer was deemed not to be substantial

85 [2025] 3 SLR 639.

and thus the defendant had not made a fraudulent misrepresentation. The second allegation about sole engagement by the buyer was in fact accurate as the contract was only between the buyer and the defendant, although the selection of the defendant was with the agreement of the claimant.

28.74 The negligence claim raises some interesting questions. The judge acknowledged that although the defendant was engaged by the buyer, he could also owe a duty of care to the claimant seller. This may appear contrary to the general principle that a professional engaged by one party does not owe a duty of care to a party on the opposing side of the client.[86] However, finding a duty of care in this case was justified as there was a commonality of interest between buyer and seller. As the judge noted, both buyer and seller had agreed on the expert and the expert knew that the report was prepared for both parties who would rely on and act on the report.[87] Thus, foreseeability and proximity were made out and there were no policy reasons to negate the duty. An attempt by the defendant to rely on a disclaimer clause failed as the judge found that the clause had been included at a late stage and in any case, it fell afoul of the Unfair Contract Terms Act 1977.[88]

28.75 Having found a duty of care owed to the claimant, the judge went on to find that the claimant had failed to prove that the defendant had breached the duty. This part of the judgment contains some ambiguous statements of legal principles that perhaps may have been caused by the nature of the claimant's pleadings and arguments. The judge emphasised that the contractual matrix was relevant to the scope of duty and hence would be relevant to whether the defendant had breached the duty. The judge stated:[89]

> If a plaintiff sues in negligence about the performance of a contract that he is not a party to, if there is no breach of contract (or if performance was otherwise to the satisfaction of the other contracting party) there would ordinarily not be a breach of a tortious duty either.

28.76 This statement may be interpreted as treating the tortious duty to the claimant as derivative of the contractual duty to the buyer.[90] Whether the defendant is in breach of the contractual duty is not relevant to whether the defendant is in breach of the tortious duty to a third party. The judge observed that the contracting parties were free to vary the

86 *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560.
87 *CIX v DGN* [2025] 3 SLR 639 at [133]–[135].
88 2020 Rev Ed.
89 *CIX v DGN* [2025] 3 SLR 639 at [140].
90 *Cf*, inducing breach of contract. See, *OBG Ltd v Allan* [2008] 1 AC 1.

contract and the performance standards. In this case, if the buyer waived strict compliance with the contract, the defendant's performance of the contractual obligation would naturally vary accordingly. However, the claimant is not privy to any variation and is in a vulnerable position. The claimant relied on the defendant providing a fair and reasonable final valuation, not the varied contractual arrangement.

28.77 Imagine if the buyer separately informs the defendant that it would be happy to be given a final valuation at the lowest end of the range. This would clearly be disadvantageous to the claimant. While the defendant would not have breached his contract with the seller, he should be held accountable to the claimant unless he puts the claimant on notice of the variation in the contract and hence the variation in the method of valuation. Breach of duty is a question of fact, and the issue is whether the defendant was negligent in preparing the final valuation. Given that both buyer and seller agreed to accept the valuation of the defendant, it would be unfair to allow the buyer to vary the contract and unilaterally bind the claimant.[91]

28.78 *Golden Pacific Shipping & Holdings Pte Ltd v Arc Marine Engineering Pte Ltd*[92] ("*Golden Pacific*") involved a claim in negligence for economic loss following defective repairs of a ship's engine. The claimant owned a ship ("Vessel") which was chartered to Bravely International Private Ltd ("Bravely") under a bareboat charter. Bravely contracted with MSI Ship Management Service Pte Ltd ("MSI") to act as the ship managers of the Vessel. The Vessel suffered damage to its engine during a voyage and MSI, with Bravely's consent, appointed the defendant to repair the engine. Following completion of the repair works and test runs, Bravely returned the Vessel to the claimant. The claimant found the Vessel to be in unsatisfactory condition and appointed Metalock Engineering (Qingdao) Ltd ("Metalock") to inspect the main engine. Metalock found defects in the engine. The claimant then entered into a bareboat charter with Joint Merchants Corp Ltd ("JMC") and authorised JMC to carry out the necessary repairs to the engine. The claimant agreed that the cost of repairs borne by JMC would be offset against the charter hire. The Vessel then sailed to Vietnam before proceeding to China for repairs. The engine was damaged beyond repair by the time the Vessel arrived in China.

28.79 The claimant brought an action against the defendant for defective repair work on the engine. As there was no contract between the claimant and the defendant, the action was brought in negligence.

91 See *CIX v DGN* [2025] 3 SLR 639 at [142].
92 [2024] 6 SLR 555.

An alternative claim in bailment, on the ground that the defendant was a sub-bailee, was dismissed by the judge as there was no evidence to establish that the defendant was a sub-bailee. Lee Seiu Kin J observed that the negligence claim raised issues of the existence of a duty of care, breach of duty, mitigation of damage and assessment of damages. Lee J began by referring to the duty of care approach set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[93] ("*Spandeck*"), based on an inquiry into foreseeability, proximity and policy. Lee J also reiterated *Spandeck's* emphasis on incrementalism, highlighting that "it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy".[94]

28.80 The two significant authorities considered by Lee J were *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd*[95] ("*Jet Holding*"), which was relied on by the claimant and *Man B&W Diesel SE Asia Pte Ltd v PT Bumi International Tankers*[96] ("*PT Bumi (CA)*"), relied on by the defendant. In *Jet Holding*, the first defendant and its subcontractor, the second defendant, were held liable for the negligent fabrication and installation of a slip joint on a vessel, which cracked and damaged equipment on the vessel. The first claimant was the owner of the vessel, who had chartered it to the second claimant under a bareboat charter. The High Court in *Jet Holding*, treating the loss as physical damage,[97] distinguished *PT Bumi (CA)* and held that the defendants owed a duty to the first claimant.

28.81 Lee J in *Golden Pacific* reiterated that *Spandeck* had laid down a general approach to duty of care that was unaffected by the nature of loss. This was reaffirmed in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*[98] ("*NTUC Foodfare*"), in which Steven Chong JA, in the Court of Appeal, held that "it is no longer necessary to characterise the nature of the plaintiff's loss before examining whether a duty of care arises in tort".[99] Nonetheless, the nature of the loss remains relevant to the existence and scope of the duty of care. Different considerations are called on depending on whether the loss involves purely psychiatric injury or purely economic loss. In these cases, the risk of indeterminate liability looms large, unlike in cases involving physical injury.

93 [2007] 4 SLR(R) 100.
94 [2007] 4 SLR(R) 100 at [73], cited in *Golden Pacific Shipping & Holdings Pte Ltd v Arc Marine Engineering Pte Ltd* [2024] 6 SLR 555 at [22].
95 [2005] 4 SLR(R) 417.
96 [2004] 2 SLR(R) 300.
97 *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2005] 4 SLR(R) 417 at [128].
98 [2018] 2 SLR 588.
99 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [4].

28.82 *Golden Pacific* also raises the question whether defective repairs resulting in economic loss should be treated as physical damage.[100] The claim was framed as one for the costs associated with defective repair work,[101] not loss flowing from physical damage. In cases involving a positive act causing physical damage, courts have routinely held that proximity will easily be satisfied. Almost by definition, there will be physical proximity and because there is no risk of indeterminate liability, the restrictive proximity factors of the defendant's knowledge of the claimant, determinate class, assumption of responsibility and reasonable reliance are unnecessary. Yet, Lee J went through these classic proximity factors that are usually relevant to cases where liability may be indeterminate,[102] citing economic loss cases.[103]

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100 This runs counter to established authority: *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113; *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449; *Man B&W Diesel SE Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR(R) 300; *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Bryan v Maloney* (1995) 182 CLR 609; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185.

101 *Golden Pacific Shipping & Holdings Pte Ltd v Arc Marine Engineering Pte Ltd* [2024] 6 SLR 555 at [11].

102 *Golden Pacific Shipping & Holdings Pte Ltd v Arc Marine Engineering Pte Ltd* [2024] 6 SLR 555 at [31].

103 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588; *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761.