3. AGENCY AND PARTNERSHIP LAW

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AGENCY

Creation of agency

3.1 The question whether a wife was, merely by virtue of the marital relationship, an agent of her husband was considered in *Ng Hock Kon v Sembawang Capital Pte Ltd* [2010] 1 SLR 307. The issue arose in the context of an attempt by a creditor to enforce a mortgage. Ng owed Sembawang Capital some $4m. He agreed to repay the outstanding amount by an instalment plan detailed in a deed of arrangement ("Deed"). In addition, he granted, pursuant to the Deed, a mortgage over his property for the purposes of securing his liabilities. The Deed provided for full payment of all outstanding sums to be accelerated upon the occurrence of stipulated events of default (including the failure to make payment of an instalment in a timely manner), provided Sembawang Capital gave Ng two weeks' notice in writing to rectify the default. Ng did default on his instalment payments. The notice of default was, however, given to Ng's wife, Yu, and not Ng, who was apparently in hospital at that time. Ng failed to rectify his default and Sembawang Capital sought to terminate the Deed and exercise its rights as mortgagee. Attempts by Ng to get Sembawang Capital to forgive his defaults were unsuccessful and proceedings were initiated by the latter for possession against Ng.

3.2 A central issue before the court in *Ng Hock Kon v Sembawang Capital Pte Ltd* [2010] 1 SLR 307 was whether there was proper service of the notice of default. On the evidence, Yu had accepted and acknowledged receipt of the notice at a meeting with Sembawang Capital which she had requested in order to discuss Ng's liabilities under the Deed. The trial judge was of the view that the handing of the notice

to and its receipt by Yu at this meeting constituted delivery of the notice to Ng, as the former had received the same as Ng's agent. On appeal, the Court of Appeal disagreed with the judge. V K Rajah JA, who delivered the judgment of the court, stated that the evidence merely constituted Yu an agent of Ng for the *limited* purpose of negotiating a possible settlement with Sembawang Capital. As the notice of default had significant legal consequences, the court was of the view that cogent evidence was needed before it could be concluded that Yu was authorised to receive the notice on Ng's behalf. The fact that Yu was Ng's wife did not give rise to any presumption that she was Ng's agent, and did not justify any assumption that authority had been expressly or impliedly conferred on Yu to accept service of the notice of default on Ng's behalf.

3.3 In *Yuen Chow Hin v ERA Realty Network Pte Ltd* [2009] 2 SLR(R) 786 (see also "Duties of the agent" at para 3.11 below), a property agent was held an agent of the housing agency under whose name and banner the former operated even though the agreement between them expressly declared that nothing in the agreement was to "constitute or create a partnership or employment" between them. ERA was sued, for breach of contract, by a couple who had employed the services of one Ang in the sale of their flat. Ang was a property agent who worked as a subordinate to one Mike, both of whom used ERA's name and logo. It was the plaintiffs' case that, as a result of Ang's and Mike's misconduct, they had failed to obtain the best price for their flat. This, argued the plaintiffs, was a breach of the implied term that ERA would use its best endeavours to obtain the best price for the plaintiffs. It was ERA's defence that Ang, and his superior, Mike, were independent contractors whose conduct did not bind them. Choo Han Teck J rejected the defence. Ang had used ERA's name and logo in his dealings with the plaintiffs, and there was a commission-sharing arrangement between ERA, Mike and all the property agents operating under Mike (including Ang). His Honour was therefore of the view that the relationship between the parties was one of agency and that ERA must bear responsibility for the conduct of Ang and Mike.

3.4 In *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 (see also "Duties of the agent" at para 3.13 below), a sale committee ("SC") appointed in a collective sale of the strata units in a condominium housing development was held the agent of *all* the subsidiary proprietors collectively. The case involved the collective sale of the leasehold condominium, Horizon Towers. The SC was appointed at an extraordinary general meeting of the subsidiary proprietors, which launched the formal collective sale process. A collective sale agreement signed subsequently by the consenting subsidiary proprietors ratified the appointment of the SC and provided that the SC "shall be the agents of the Consenting Subsidiary Proprietors for the purpose of negotiating

and finalising the Collective Sale". The Court of Appeal held that as the SC was the agent of the proprietors collectively, there was no point at which the SC could act solely in the interests of any group of subsidiary proprietors, consenting or otherwise. The court observed that the SC's role was one of an "impartial agent" acting for both consenting and objecting proprietors, and it must therefore "hold an even hand" between these differentiated interests (at [107]). As for the validity of the provision in the collective sale agreement, the court deferred comment but raised the possibility that the provision could be null and void as being repugnant to the duty of the SC as agent for all the subsidiary proprietors (at [116]).

Implied authority

3.5 In *DBS Vickers Securities (Singapore) Pte Ltd v Chin Pang Joo* [2009] SGHC 248, the court had to consider whether, on the facts, actual authority could be implied from the conduct of the alleged principal. The plaintiff, DBSV, was claiming against Chin in respect of contra losses incurred on Chin's securities trading account and interest thereon. Instructions for trades on Chin's account were given by one Tang to DBSV's remisier, Tay. Chin disputed the trades done on his account, claiming that he did not appoint Tang as his agent with the authority to trade on his account. Indeed, Chin had not signed DBSV's mandate to confer authority on any other person to trade on his account. The court, however, found sufficient evidence of a continuing arrangement between Chin and Tang that constituted Chin's conferment of implied authority on Tang to trade on the former's DBSV account. The following findings of fact supported the court's conclusion (at [20]–[21]):

> (a) Chin had given Tang the authority and discretion to trade on his behalf on his other trading accounts;
>
> (b) Chin had settled the trading losses incurred on another trading account even though he similarly did not sign any mandate authorising Tang to trade in respect of that account;
>
> (c) Chin had given Tang his internet trading passwords to a number of other trading accounts; and
>
> (d) Chin had received DBSV's contract notes and statements, as well as statements from the Central Depository (Pte) Ltd ("CDP") in respect of the relevant trades and did not query the same.

3.6 The court observed in addition that by his admission that he had received DBSV's and CDP's statements coupled with his failure at any material time to object to DBSV in respect of the trades reported in

those statements, Chin could also be said to have held out to DBSV that Tang was authorised to trade on Chin's account (at [28]). Liability on the basis of *apparent* authority could thus also be made out.

Holding out and apparent authority

3.7 In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788, the court had to consider whether the defendant company ("APBS") was bound by the fraudulent acts of its "finance manager". Chia, the finance manager, managed to obtain credit and loan facilities purportedly for the company's purposes, from the plaintiff banks, by providing the latter with forged documents, including forged copies of board resolutions. The banks claimed against the company for the repayment of these sums on the basis that Chia had actual or ostensible authority to enter into the relevant transactions on APBS's behalf.

3.8 On the issue of actual authority, the plaintiffs placed reliance on a couple of APBS documents which described the job scope for the position of "finance manager" and the company's treasury policy. The court, however, held that these documents did not assist the plaintiffs' case. Specifically, Belinda Ang J held that Chia's fraud on APBS was necessarily determinative of the issue as "Chia's actual authority (express or implied), if any, is impliedly subject to a condition that it is to be exercised honestly and on behalf of the principal" (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788 at [46]). Thus, even if Chia was actually authorised to transact on APBS's behalf, his fraud took the transactions out of the scope of any grant of actual authority. With this holding, the plaintiffs' further assertion that Chia also had the implied actual authority to represent the authenticity of the forged documents was therefore untenable.

3.9 Interestingly, the court, in the resolution of this issue of *actual* authority, placed particular emphasis on the *plaintiffs*' requirement, before granting the credit facilities, for the provision of certified extracts of relevant board resolutions authorising the entry into the transactions. Of this cautionary requirement, Ang J stated (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788 at [69]):

> From this standard requirement, it is … plain that Chia as Finance Manager did not have actual authority (express or implied) to open bank accounts or borrow on behalf of [APBS] unless so empowered by the board.

3.10 Ang J then proceeded to consider whether APBS was nonetheless bound by Chia's acts by the operation of the doctrine of apparent authority. Her Honour affirmed the need for the plaintiffs to establish the four factors stipulated by Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788 at [80]). Dealing with the requirement for a representation by the principal that the agent had the authority to enter on, the principal's behalf, into a transaction of the kind sought to be enforced, her Honour held, on the evidence, that APBS was not estopped from denying the forgery as there had been no representation as to Chia's authority by APBS (at [102]). Chia's appointment to the position of finance manager of itself was of little assistance to the plaintiffs unless there was evidence of the sort of matters such a finance manager was usually authorised to do. Further, the plaintiffs' standard requirement for certified extracts of the authorising board resolutions meant that they did not rely on Chia's appearance of authority. On the evidence, the court found that the plaintiffs had willingly assumed the risk of Chia's lack of authority. Accordingly, the court concluded that Chia had neither actual nor ostensible authority to bind APBS and the plaintiffs' claims in contract were therefore dismissed (at [171]).

Duties of the agent

3.11 In *Yuen Chow Hin v ERA Realty Network Pte Ltd* [2009] 2 SLR(R) 786 (see also "Creation of Agency" at para 3.3 above), Choo Han Teck J held that when a property agent was engaged to sell or buy real property, he was thereby an agent (in the legal sense) of the person who engaged him. This subjected the agent to fiduciary obligations which obliged the agent to act only in his principal's interests, and prohibited the agent from acting in his own interests or in the interests of persons other than his principal. The case involved a property agent who was engaged to sell a flat by the plaintiffs. The property agent did not disclose to the sellers that the purchaser was in fact the wife of his superior, Mike. The flat was then almost immediately sold at a significantly higher price, reaping Mike a tidy profit. This, the court held, created a conflict of interest between the sellers and the agent, and was in breach of the agent's fiduciary duties. In his Honour's words (at [13]): When a person has been appointed an agent of another, he becomes an extension of that other and so far as his endeavours are for the benefit of his principal he cannot create benefits for himself or his friends without due disclosure … The relationship that an agent has with his principal is fiduciary in nature; that is to say, it is one founded in trust. When a farmer negotiates with the fox on behalf of the chicken for its safe passage the farmer cannot have a personal interest in the deal

or the chicken might be doomed for it has given its trust to the farmer and placed its safety in his hands."

3.12 The case of *Areco International Pte Ltd v Lam Cheng Yee* [2009] SGHC 9 also involved an estate agent accused of wrongdoing for allegedly being less than forthcoming in her replies to the vendor with regard to certain information about the purchaser of the property. Specifically, the vendor argued that the agent ought to have disclosed the fact that the purchaser was the owner of the property adjacent to the one being sold. The vendor claimed that the failure to so disclose led to her losing the opportunity to obtain a higher price for the property. The court, however, rejected the claim as no evidence had been adduced to show that the agent owed the vendor any duty to disclose the identity of the purchaser.

3.13 The duties imposed on a collective sale committee ("SC") appointed in a collective sale of the strata units in a condominium housing development were considered at length in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 (see also "Creation of Agency" at para 3.4 above). The Court of Appeal held that, as an agent of all the subsidiary proprietors, the SC owed fiduciary obligations to these subsidiary proprietors. In the peculiar context of a collective sale, standards of accountability and conduct more exacting than those expected of ordinary agents must be imposed on the SC. This is because collective sales are subject to a statutory scheme which, subject to there being a qualifying majority who consent, allows the sale of strata units in spite of their owners' objections. In addition, an inherent inclination on the part of the SC to achieve a sale existed as members of the SC were likely to be themselves part of the consenting majority. This placed the objecting subsidiary proprietors in an especially vulnerable position. The court examined the nature of the relationship between the SC and the subsidiary proprietors and concluded that the SC owed obligations which were akin to those of a trustee with a power of sale. Thus, the SC's duties *qua* agent, fiduciary and trustee of the power of sale included, *inter alia*, (a) the duty of loyalty or fidelity; (b) the duty of even-handedness; (c) the duty to avoid any conflict of interest; (d) the duty to make full disclosure of relevant information; and (e) the duty to act with conscientiousness (at [134]–[169]).

3.14 In *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, the Court of Appeal opined (at [40]) that an agency relationship did not *always* give rise to a fiduciary duty. The presumption that a fiduciary relationship existed in many types of agency relationships could be rebutted by the peculiar facts of each case. In addition, the court observed that the extent of any existing fiduciary duty might vary depending on the particular fact situation.

PARTNERSHIP LAW

3.15 In the field of partnership law, the year under review was perhaps more noteworthy for legislative rather than judicial developments: the coming into force of the Limited Partnerships Act introduced a variation on the ordinary partnership, based largely on the model first adopted in the UK a century earlier. Like a partnership (but unlike the limited liability partnership introduced in 2005), the limited partnership does not have legal personality and is subject to the general law of partnership. On the other hand, the High Court had to decide only a few cases, and the Court of Appeal none, which raised partnership law issues of interest.

Relationship of partners to third parties

3.16 In *Orix Capital Ltd v Estate of Lim Chor Pee* [2009] 4 SLR(R) 1062, the liability to a third party creditor of both a "salaried partner" and a former ostensible partner was in question. The facts involved the fairly common practice of a law firm leasing its photocopiers from a leasing company. The firm, Chor Pee & Partners, originally took a lease of Canon-manufactured copiers from Newcourt, a company specialising in leasing out office equipment. In August 2004, the plaintiff, Orix, offered to replace the Newcourt lease with a new arrangement on more favourable terms. This arrangement involved a four-way deal whereby Canon paid off the substantial early-termination payment due to Newcourt under its lease, that payment being reimbursed by Orix to Canon and, in effect, added to the sums payable under the new Orix lease. The Orix lease was signed by the firm's principal, Lim Chor Pee ("LCP") and by his son Marc Lim ("Marc") who was a salaried partner; it also named, but was not signed by, Rebecca Yeo ("Rebecca"), who had been practising with the firm under a profit-sharing arrangement since 2003. In July 2005, the firm failed to make rental payments, and Orix gave notice of termination of the lease. Following a request by LCP, in August 2005, Orix wrote to the defendants offering to "reinstate the lease" on condition of payment of the arrears and certain other amounts, which were duly paid. A further default occurred in 2007 and Orix terminated the agreement and brought proceedings for breach of contract. Liability was not contested by the estate of LCP (who had died in the meantime) but was denied by Marc and Rebecca.

3.17 An important preliminary question was whether the August 2005 agreement putatively "reinstating" the lease did have that effect in law or whether it amounted to a new agreement. Judith Prakash J held that Orix's termination of the lease had the effect of discharging it so that the agreement in August 2005 amounted to a fresh

agreement on slightly different terms from the original lease. The judge also dismissed various arguments that the lease, and consequently the August 2005 agreement, were a sham or an unconscionable bargain or procured by misrepresentation, or were void under the Moneylenders Act (Cap 188, 1985 Rev Ed); these issues are beyond the scope of this chapter (see chapter 11 of this issue).

3.18 The claim against Marc was based on his status as a salaried partner; *ie*, that he held himself out as a partner even though he did not, within the firm, share profits and losses and therefore was not a true partner. Liability of a person held out as a partner arises at common law and under s 14 of the Partnership Act (Cap 391, 1994 Rev Ed), both of which require reliance by the plaintiff on the holding out. The court considered that the fact that Marc appeared in the Law Society's records as a partner in the firm was sufficient holding out. Orix's search of those records before the lease was entered enabled it to rely on this holding out, clearly distinguishing the case from *Nationwide Building Society v Lewis* [1998] Ch 482. That case, accepted by Prakash J as correct, held that reliance could not be presumed and had not been proven as Nationwide was unaware of the salaried partner's existence when it dealt with the firm. In addition, here the firm's manager had confirmed that Marc was a partner to the Canon representative arranging the lease transaction who had passed it on to Orix. Thus, it was unnecessary for Orix to have independently verified Marc's status with the firm. And although Orix's claim was treated as made under the August 2005 agreement rather than the original lease, there had been no change in Marc's status as at August 2005; LCP's actions in requesting reinstatement of the lease were within the latter's authority and so bound the firm and, by extension, Marc. (See *Orix Capital Ltd v Estate of Lim Chor Pee* [2009] 4 SLR(R) 1062 at [42]–[45].)

3.19 The claim against Rebecca was more complicated. As she did share profits, albeit only on the files on which she worked, there was an argument that she was in law a (true) partner. However, Prakash J rejected this conclusion (with respect, correctly so) on the basis that there was no common intention for her to be a partner, despite her participation in some profits: she had no say in the management of the firm or access to its accounts, nor did she share in its assets and liabilities. Nevertheless, liability on the basis of holding out was applicable to her, at least in respect of the 2004 lease. Like Marc, her status had been confirmed to Orix via the Canon representative, and she was named as a partner in the lease itself. The reliance requirement was thus also fulfilled. (See *Orix Capital Ltd v Estate of Lim Chor Pee* [2009] 4 SLR(R) 1062 at [95]–[99].)

3.20 Although not a signatory to (or indeed aware of) the lease, Rebecca would be liable on it "as a partner" so long as it fell within

LCP's implied authority, *eg*, under s 5 of the Partnership Act (Cap 391, 1994 Rev Ed). She argued that it exceeded his authority as it was not entered "in the usual way" in the course of the firm's business because the amounts due under it included sums equating to the substantial early-termination payment made by Canon to Newcourt. This amount was in fact a multiple of the value of the copiers themselves, and the judge was clearly troubled by the fact that Rebecca would not have been liable on the actual payment due to Newcourt since it arose before she joined the firm. Nevertheless, the court concluded that the lease was entered in the ordinary course of business, on the basis that the procurement of photocopiers was part of a law firm's business and there was evidence that both Orix and the firm regarded the transaction as being usual. (See *Orix Capital Ltd v Estate of Lim Chor Pee* [2009] 4 SLR(R) 1062 at [100]–[104].).

3.21 However, while Rebecca would thus have been liable on the original lease, the plaintiff's claim ultimately depended on the replacement agreement entered in August 2005, shortly before which Rebecca had ceased to be involved with the firm. The judge accepted that she did not know of, much less consent to be bound by, that agreement, so her liability if any must arise from some prior authority given by or attributable to her. As Rebecca had ceased to be a partner at the latest by the end of July 2005, any actual authority given by her to LCP would have ceased at that point and, it was held, LCP had not thereafter represented her to be a partner. Orix, therefore, argued that s 36 of the Partnership Act (Cap 391, 1994 Rev Ed) applied, which requires an outgoing partner to give actual notice of her retirement to existing creditors of the firm; no such notice had been given. This was rejected, in part on the basis that s 36 does not apply to salaried (as opposed to true) partners, although there was little discussion of this interesting question (*Orix Capital Ltd v Estate of Lim Chor Pee* [2009] 4 SLR(R) 1062 at [111]). Alternatively, the judge opined that Orix entered into the August 2005 agreement only with LCP and those whom he then represented, which did not include Rebecca (at [111]). But (assuming for the moment that s 36 does apply to salaried partners), with respect, it is somewhat difficult to see how Rebecca's withdrawal of her authority was relevant where it was not notified to existing creditors who had been aware of her involvement with the firm. After all, s 36 is based on the underlying principle that existing creditors may assume that there has been no change in the firm until told otherwise. In the result, however, Rebecca was held not liable to the plaintiff.

3.22 In *Faber Image Media Pte Ltd v Patrician Holdings Pte Ltd* [2009] SGHC 16, an issue also arose under s 36 of the Partnership Act (Cap 391, 1994 Rev Ed). Patrician Holdings Pte Ltd ("Patrician") and Rajeev had formed a partnership to operate restaurants and pubs. The partnership, which had leased pub premises from a landlord until

31 December 2006, had sub-leased part of the premises to the plaintiff company until the same date. In March 2006, Rajeev withdrew from the partnership, which was de-registered under the Business Registration Act (Cap 32, 2004 Rev Ed) in September 2006. A new company (in which Rajeev was a shareholder and director) was established by Patrician as intended successor to the partnership. In September 2006, the plaintiff notified the exercise of its right to renew the sub-lease. However, when the landlord became aware of the partnership's demise and the "succession" by the new company, it terminated the main lease for breach of contract, and the plaintiff eventually vacated the sub-premises. The main question for determination was whether the partnership was in breach of its obligation to renew the sub-lease; the court held that it was not because the plaintiff had during negotiations actually withdrawn its renewal notice. But the judge went on to consider whether, had the partnership been found liable, Rajeev would have been liable despite his retirement before the date of the assumed breach.

3.23 The partnership law issue was, therefore, whether the plaintiff had received sufficient notice of Rajeev's withdrawal from the partnership, so as to negate any liability of Rajeev that might have arisen under s 36(1) of the Partnership Act (Cap 391, 1994 Rev Ed). The court held that, although formal notice had not been given (and was unnecessary), on the evidence, it was likely that the plaintiff had been told of Rajeev's retirement (*Faber Image Media Pte Ltd v Patrician Holdings Pte Ltd* [2009] SGHC 16 at [84]). After March 2006, the plaintiff had dealt with one Ramu as representative of the partnership and not with Rajeev, who had not thereafter been seen by the plaintiff on the premises. Its failure to question Ramu's status implied that the plaintiff knew Ramu had stepped into Rajeev's shoes. Even so, it is submitted that this finding should not be treated as imposing the burden of proving lack of notice under s 36(1) on the creditor.

Relationship of partners between themselves

3.24 *Poh Lian Development Pte Ltd v Hok Mee Property Pte Ltd* [2009] SGHC 153 illustrates the fiduciary duty of good faith owed by each partner to his co-partners. The law was straightforward: what was notable about the case was the fact that *all* the partners were held to be in breach of their fiduciary and/or contractual duties, giving rise to a complicated quantification and set-off exercise of the damages and accountable sums owing.

3.25 The partnership was established between a property developer, a construction company and a Buddhist temple (a registered society) to develop a columbarium. Expecting a huge profit from the project, all the partners took advantage (with varying degrees of culpability, according

to Lee Seiu Kin J) of opportunities to benefit themselves. The various breaches included: secretly procuring sham bids in the construction contract tender; procuring over-payments for building materials to a partner's related company; failing to account for sales proceeds; and using partnership funds to make loans (not repaid) to directors of a partner.

Capacity to be a partner

3.26 Finally, although (with respect) not a decision of great importance to the law of partnership, one cannot part from 2009 without noting the Dickens-worthy facts of *Kor Beng Shien v Lee Poh Lee* [2009] SGHC 267. In that case, the defendant, Lee Poh Lee, purported to enter into a partnership with Ko Him Kock some three hours *after* the death of the latter. Unsurprisingly, Tan Lee Meng J had no difficulty in finding that no partnership had been created notwithstanding registration of the "firm" under the Business Registration Act (Cap 32, 2004 Rev Ed) (or, one might add, the fact that it took place during the seventh lunar month).