Chong Hon Kuan Ivan v Levy Maurice and Others (No 2)
[2004] SGHC 217

Case Number : Suit 766/2002, RA 163/2004

Decision Date : 28 September 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Irving Choh and Alan Thio (Rajah and Tann) for plaintiff; Prakash Mulani and Aftab A Khan (M and A Law Corporation) for first defendant

Parties : Chong Hon Kuan Ivan — Levy Maurice; Salomon Salto; Jean-Paul Morin; Publicis Worldwide B.V.; Publicis Groupe SA; Publicis Eureka Pte Ltd

Civil Procedure – Pleadings – Amendment – Application by plaintiff for leave to amend Statement of Claim – Amendments including allegations that defendant directors acting outside scope of office – Whether amendment to Statement of Claim should be allowed

Civil Procedure – Pleadings – Striking out – Application by first defendant to strike out part of Statement of Claim – Whether court could decide on difficult or important point of law at stage of striking-out application

Companies – Directors – Liabilities – Action against directors for conspiracy to induce and inducing company to terminate employment agreement – Whether directors can be liable in tort for inducing breach of contract by company if conspiring to induce board as a whole to break contract takes place before board meeting

28 September 2004

Woo Bih Li J:

Background

1 The sixth defendant, Publicis Eureka Pte Ltd ("Publicis Singapore"), is a company incorporated in Singapore. Prior to 20 December 1996, Publicis Singapore was owned by the plaintiff, Chong Hon Kuan Ivan ("Chong"), and two others, *ie* Chang Hong Kaye Jimmy ("Chang") and Neo Kee Choon Thomas ("Neo") (collectively "the Original Shareholders"). It was then known as Eureka Advertising Pte Ltd.

2 The fifth defendant, Publicis Groupe SA ("Publicis France"), was and is a public listed company incorporated in France. On or about 20 December 1996, Publicis France acquired 60% of the issued shares in the capital of Publicis Singapore from the Original Shareholders who retained 40%. Following a corporate restructuring, the shares held by Publicis France were transferred to the fourth defendant, Publicis Worldwide BV ("Publicis Netherlands"), a company incorporated in the Netherlands.

3 As part of the acquisition by Publicis France, various agreements were entered into, including employment agreements between Publicis Singapore and each of the Original Shareholders. In the case of Chong, he was employed as the managing director and chief executive officer of Publicis Singapore for five years commencing 1 January 1997, with a provision for renewal for another five years from 1 January 2002 if Chong was not guilty of any gross negligence or wilful misconduct in respect of the business of Publicis Singapore and the Publicis group.

4 The first defendant Maurice Levy ("Levy") was at all material times the chairman and chief executive officer of Publicis France. He was also a director of Publicis Singapore from 15 January 1997 to 9 February 2002.

5 The second defendant Salomon Salto ("Salto") was at all material times Senior Vice-President of Publicis Netherlands and a director of Publicis Singapore.

6 The third defendant Jean-Paul Morin ("Morin") was at all material times the chairman and chief executive officer of Publicis Netherlands and the chief financial officer and/or corporate secretary of Publicis France. At all material times he was also a director of Publicis Singapore.

7 As a result of disputes arising, a board meeting of Publicis Singapore was held on 9 February 2002 in which Morin proposed a resolution to terminate Chong's employment with Publicis Singapore and, exercising his vote and the votes of Levy and Salto, Morin voted in favour of the resolution. The resolution was carried as only Chong and Chang voted against it. Neo abstained.

8 Consequently, Chong commenced the present action against all six defendants. The claim against Levy, Salto and Morin was for conspiracy to induce and inducing Publicis Singapore to terminate his employment agreement. The claim against Publicis Singapore was for breach of his employment agreement. The action also included claims against Publicis Netherlands, Publicis France and Publicis Singapore for breaches of his employment agreement and other agreements which I need not elaborate on.

9 In these circumstances, Levy applied to strike out paras 18 and 19 of the Statement of Claim, which alleged the conspiracy and the inducement and alleged damages as a result thereof. Levy relied on the principle that:

> [A] company can only act by its officers, servants or agents and if the individual defendant was acting within the scope of her employment, and therefore as the company's alter ego, the claim of conspiracy must fail.

10 At the hearing before an assistant registrar on 14 May 2004, the assistant registrar allowed Levy's application. However, Chong's counsel then raised further arguments and applied for leave to amend the Statement of Claim relying on certain exceptions to the principle which Levy relied on. The assistant registrar then reversed her decision on striking out and allowed Chong to amend the Statement of Claim.

11 Levy then appealed to a judge in chambers. I heard the appeal and allowed it, in that I refused to allow the amendment and struck out that part of paras 18 and 19 of the Statement of Claim in so far as they contained a claim against Levy.

12 I now set out my reasons in writing. I will deal first with the principle raised by Levy so that the application to strike out and the proposed amendments may be better understood.

The various cases and arguments

13 Mr Prakash Mulani, counsel for Levy, cited various cases. I need refer to some of them only. The *classicus locus* is the case of *Said v Butt* [1920] 3 KB 497. The headnote thereof states:

> The plaintiff desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious and unfounded charges against some members of the theatre staff, an application for a ticket in his own name would be refused. He therefore obtained a ticket through the agency of a friend who bought the ticket at the theatre without disclosing that it was for the plaintiff. By order of the defendant, the managing director of the

theatre, the plaintiff was refused admission to the theatre on the night in question. The plaintiff claimed damages from the defendant for maliciously procuring the proprietors of the theatre to break a contract for the admission of the plaintiff to the theatre, alleged to have been made by them with the plaintiff by the sale of the ticket:-

Held, that the non-disclosure of the fact that the ticket was bought for the plaintiff prevented the sale of the ticket from constituting a contract as alleged, the identity of the plaintiff being in the circumstances a material element in the formation of the contract; and that the action therefore failed.

Semble, a servant who, acting bona fide within the scope of his authority, procures the breach of a contract between his employer and a third person, is not liable to an action of tort at the suit of that third person.

14 McCardie J said at 504 to 507:

... It is well to point out that Sir Alfred Butt possessed the widest power as the chairman and sole managing director of the Palace Theatre, Ld. He clearly acted within those powers when he directed that the plaintiff should be refused admission on December 23. I am satisfied, also, that he meant to act and did act bona fide for the protection of the interests of his company. If, therefore, the plaintiff, assuming that a contract existed between the company and himself, can sue the defendant for wrongfully procuring a breach of that contract, the gravest and widest consequences must ensue. This is the more apparent when it is remembered that it is not necessary to prove actual malice against a defendant in order to establish a cause of action against him for knowingly procuring the breach of a third person's contract with the plaintiff, whereby the plaintiff suffers pecuniary damage: see *Pratt v British Medical Association*, citing *South Wales Miners' Federation v Glamorgan Coal Co*.

If the plaintiff is right in his contention, it seems to follow that whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages, upon the principle of *Lumley v Gye*, as for a tortious act. So, too, with the manager or other agent of a private firm, who does the like thing. This far-reaching result of the principle here suggested by the plaintiff is emphasized, when it is remembered that in an ordinary action for breach of contract the plaintiff recovers his pecuniary loss only; whereas in an action for wrongfully procuring a breach of contract the damages against the wrongdoer are at large, and may vastly exceed the sum recoverable in a mere claim for breach of contract against the contractor: see *Pratt v British Medical Association* and *Exchange Telegraph Co v Gregory*.

Mr Disturnal for the plaintiff argued with great vigour that though the results may be remarkable, yet the principle asserted by the plaintiff is sound. He points out the breadth of the language employed in the well-known cases on the subject from *Lumley v Gye* to the present time. I agree that the language is wide in its scope. The proposition is stated with unrestricted diction: that a person who without just cause knowingly procures a man to commit a breach of his contract with another, whereby the latter suffers pecuniary damage, is liable to an action for tort. But I conceive that none of the judges was thinking of such a case as the present. I have searched in vain for any decision which indicates that a servant is liable in tort for procuring a breach of his master's contract with another. If such a cause of action existed, I imagine that it would have been successfully asserted ere this. The explanation of the breadth of the language used in the decisions probably lies in the fact that in every one of the sets of circumstances before the Court the person who procured the breach of contract was in fact a stranger, that is a third person,

who stood wholly outside the area of the bargain made between the two contracting parties. If he is in the position of a stranger, he will be prima facie liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another: see the decisions cited in *Pratt's Case* and the *Glamorgan Coal Case*.

But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v Gye* principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer to the ingenious arguments of Mr Disturnal on behalf of the plaintiff upon this point. To hold otherwise might create at least three actions whenever a managing director or other authorized agent knowingly procured a breach of the employer's contract. First, an action based on contract against the employer for the pecuniary loss caused by the breach of contract; secondly, an action for tort against the agent who had procured the breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and thirdly, an action against the employer himself for the tortious wrong committed by his authorized agent in procuring the employer to break his contract with the plaintiff. This extraordinary result shows, I think, that the contention of the plaintiff in this case cannot be sound. If the plaintiff here be right in his submission, then the flood-gates of litigation would indeed be widely opened.

I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. I abstain from expressing my opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person. Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorize such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong. This point was incidentally dealt with by the Court of Appeal in the recent case of *Belvedere Fish Guano Co v Rainham Chemical Works*.

[emphasis added]

15 The principle enunciated by McCardie J ("the Principle") appears to have two conjunctive qualifications. First, the servant must be acting *bona fide* and secondly, he must be acting within the scope of his authority.

16 The next case was *De Jetley Marks v Greenwood (Lord)* [1936] 1 All ER 863 ("*De Jetley Marks*"). In this case, the plaintiff commenced action against Lord Greenwood who was the managing director of a company and other defendants who were the chairman and other directors of a company for procuring a breach of his contract with the company.

17 Porter J said, at 872–873:

It was further contended that the cause of action was the conspiracy and that, even though the breach occurred after the writ was issued, the plaintiff had a good cause of action, provided the breach was induced by the defendants. I do not agree. The breach is, I think, an integral part of the cause of the action and must take place before the issue of the writ. But, in any case, in my opinion, the plaintiff was never dismissed; he dismissed himself by his ill-advised resignation from

his directorship on May 21. This view is decisive of the action; but in case I should have come to the conclusion that there was a wrongful dismissal by the company, Mr Birkett argued that the servants or agents of a company could never be guilty of conspiracy to dismiss one of the company's servants. As supporting this contention he cited *Said v Butt* and *Scammell v Hurley*. There is force in this argument, and I think it is true that directors in a board meeting could not induce or conspire to induce that meeting to break a contract – at any rate, not without malice. But I think that some at any rate, if not all, of the directors could conspire, before the board meeting was held, to induce the board as a whole wrongfully to break a contract by dismissing one of the company's servants. The matter, however, is a difficult one and I prefer to express no final opinion upon it.

18 Latching onto the penultimate sentence, Mr Thio, who was the counsel for Chong at the time arguments were submitted before me, argued that directors are liable for conspiracy to induce and inducement of breach of contract if the discussions of the directors culminating in the board decision took place before the board meeting where the decision was made. He also relied on the case of *Schmeichel v Lane, Thatcher and Bernston* (1982) 28 Sask R 311 ("*Schmeichel*"). I will come back to this case later.

19 In *O'Brien v Dawson* (1942) 66 CLR 18, the plaintiff commenced an action against a company and two of its directors Doyle and Dawson for conspiracy to injure him as a result of the company breaking certain contracts with him. Dawson also had an employment with the plaintiff which Dawson terminated. The jury returned a verdict for the plaintiff but the verdict was set aside by the Supreme Court of New South Wales (see *O'Brien v Dawson* (1941) 41 SR (NSW) 295). The plaintiff's appeal to the High Court of Australia was dismissed without prejudice to his bringing any action other than one based upon combination or conspiracy of the defendants to injure him.

20 Jordan CJ of the Supreme Court of New South Wales said at 307–308:

> The next question is whether, if an ordinary limited liability company is a party to a contract, and its directors acting as such, and in the course of conducting the company's business at a Board meeting, resolve that the company shall refuse to perform a contract to which it is a party, the directors knowing that the refusal cannot be legally justified, and effect is given to this resolution, the directors concerned are guilty of the tort – and presumably also of the crime – of conspiracy. I am of opinion that in such a case it is entirely artificial to speak of the directors as "procuring" the company to break its contract in the sense in which this word is used in the *Lumley v Gye* type of case. An incorporated company is a figment of the law. It is incapable of acting except through agents. Its directors are persons who have been authorised by the constituent members of the corporation to cause acts to be done on its behalf. They are its agents who have power to control its acts. It cannot act at all except through them or through some other authorised agents. They are not in the position of outsiders who are influencing the independent volition of a contracting party who is capable of exercising volition for himself. It is their volition and theirs only which determines the making, the performance, or the breach of the company's contracts. In my opinion, on the state of acts assumed, they stand in the same position as regards liability to a charge of conspiracy as do joint contractors. This is not to say that every board room constitutes an Alsatia in which persons may conspire to their heart's content and with complete impunity so long as they do so in the character of directors of a company and employ the machinery of their company for carrying their conspiracy into effect. It means only that the mere fact that the directors who determine whether or not a company shall perform the obligations of a contract are several in number makes them no more subject to the law of conspiracy than would be a single managing director if it were he who determined it: *G Scammell & Nephew Ltd v Hurley*; *De Jetley Marks v Greenwood.* Directors of a company are,

however, personally responsible for any torts committed by their company in the procuring of which they are personally implicated: *Rainham Chemical Works Ltd. v Belvedere Fish Guano Co*; *Performing Rights Society v Ciryl Theatrical Syndicate*; *British Thomson-Houston Co v Sterling Accessories Ltd*; cf Street, Doctrine of Ultra Vires, 315-8. But there is authority for the proposition that the fact that one or more directors of a company, acting as such, are the instruments by which the company, without just cause, refuses to perform a contract does not confer on the other party to the contract a right to sue the directors in tort on the footing that they have procured a breach of contractual rights: *Said v Butt*; *G Scammell & Nephew Ltd v Hurley.*

21 Starke J of the High Court of Australia said at 32 to 33:

> … A company "cannot act in its own person for it has no person" (*Ferguson v Wilson*). So it must of necessity act by directors, managers, or other agents. The company, if it were guilty of a breach of its contracts in this case, acted through its director the respondent Doyle, but it is neither "law nor sense" (*Lagunas Nitrate Co v Lagunas Syndicate*) to say that Doyle in the exercise of his functions as a director of the company combined with it to do any unlawful act or become a joint tortfeasor. Again, it is equally fallacious to assert that Doyle knowingly procured the company to break its contract. The acts of Doyle were the acts of the company and not his personal acts which involved him in any liability to the plaintiff. But I would add that it does not follow that a director of a company would escape personal liability under cover of the company's responsibility if he himself became an actor and invaded the plaintiff's rights, as by trespassing on his land, or seizing his goods and so forth. And for similar reasons the contention is equally untenable that Doyle and the respondent Dawson combined together or engaged in common in knowingly procuring a breach by the company of its contracts. Dawson if he is guilty of a breach of his contract with the plaintiff is of course liable in damages. And here, I think, there is some evidence that the company knowingly, through its director Doyle, procured the breach of Dawson's contract with the plaintiff. Doyle was I think, acting within the scope of his functions as director of the company in procuring Dawson to terminate his employment with the plaintiff and to enter into an agreement with the company. It was an unlawful act of the company done through its director Doyle. But Doyle is not involved in the act otherwise than as a director. It was again the company's act.

22 The next case was *Katz v Tannenbaum* (1982) 13 ACWS (2d) 103 ("*Katz*"). This was a decision of the Ontario High Court of Justice regarding a striking out application. Reid J said at [6]:

> I have had the advantage of an extensive and capable argument on behalf of Mr Prentice for the applicant/defendant and on behalf of Mr Herschorn for the plaintiff/respondent. They have referred to many authorities in support of their contentions. As I read those authorities they are that no action lies against a corporate officer or director for inducing the breach of a contract if that person were acting within the scope of his authority. The rationale is that when he is so acting the officer or director is the alter ego of the company. It is logical that an individual may not conspire with himself. In support of that contention Mr Prentice referred to, in particular; Said v Butt [1919] 3 KB 497; O'Brien v Dawson and others [1942] 66 CLR 18 and, as well, although not to support his contention De Jetley Marks v Greenwood (Lord) and others ...

23 Mr Mulani submitted that *De Jetley Marks* was cited in *Katz* without endorsing Porter J's possible distinction but, on the other hand, I noted that *Katz* also did not disapprove of that possible distinction.

24 *Desimone v Herrmann Group Limited* (1991) 27 ACWS (3d) 192 ("*Desimone*"), followed *Katz*.

Desimone itself was followed in *Kuhn v American Credit Indemnity Co* (1992) 33 ACWS (3d) 37 ("*Kuhn*").

25 In *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, some doubt was expressed over the reasoning in *Said v Butt* by Dillon LJ but he accepted that *Said v Butt* had stood the test of time. After referring to *Said v Butt* and some other textbooks and cases including *O'Brien v Dawson*, Dillon LJ said at 173:

> Personally, I have grave reservations over the reasoning of McCardie J in *Said v Butt* [1920] 3 KB 497, [1920] All ER Rep 232. Since the agent or employee is normally personally liable for any tortious acts he does to third parties in the course of his agency or employment, I would not find any conceptual difficulty in holding that an employee or agent who, in the course of his employment or agency, wrongfully causes a breach of a contract between his employer or principal and a third party is liable in tort to the third party for his tortious act of wrongfully causing a breach of contract, notwithstanding that the liability of his employer or principal for the agent's wrongful acts lies in breach of contract rather than in tort.
>
> But the reasoning and conclusions of McCardie J have stood for so long and been so widely accepted that it is not for this court, in my judgment, to interfere with that.

26 Subsequently, in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 328 ("*Idoport*"), the Supreme Court of New South Wales endorsed the principle that a director is not liable in tort for a company's breach of contract if the director was acting within the scope of his authority. After referring to *O'Brien v Dawson*, Einstein J said at [22] and [27] to [29]:

> I take it as clear law that so long as a director is acting within the scope of his authority, the company is responsible for the acts of the director. In other words, the director's acts are the acts of the company. If the director could by acts within the scope of his authority, induce the company to breach a contract, then the invidious situation which would result would be that the company would be inducing a breach of its own contract.
>
> …
>
> The essential proposition ["the *O'Brien v Dawson* principle"] is then that directors are not liable for the tort of inducing breach of contract where, in exercising their functions as directors and in acting within authority, they have caused the company to breach its contract. Hodgson CJ in Eq. [a]s his Honour then was, had occasion in the recent decision *Tsaprazis v Goldcrest Properties* 2000 18 ACLC 285 at 288 to accept and apply this basal proposition.
>
> Although as the defendants point out, it is correct that *O'Brien v Dawson* did not concern procurement of breach of contract but rather conspiracy, courts in Australia since that time have clearly treated what was said in *O'Brien* on the subject of procurement of breach of contract as binding in terms of principle. The significance of the claim being one for conspiracy demonstrates that the doctrine extends to acts of the officer which caused his or her company to commit a tort.
>
> Although the plaintiffs cited a number of authorities said to support their submissions as to the appropriate principles, in my view the *O'Brien v Dawson* principle is binding upon a court of first instance in this country.

27 As I mentioned at [18] above, Mr Thio brought my attention to *Schmeichel*, a decision of the

Saskatchewan Court of Queen's Bench. In that case, one of the defendants applied to strike out a claim of conspiracy against him. Kindred J said at [8] and [9]:

> Applicant's counsel argued that no action [*sic*] tort is maintainable against W Colin Thatcher, who as minister in charge of SMDC acted within the scope of his authority and that if it were otherwise, every employee alleging wrongful dismissal would be entitled to join every officer and servant of the dismissing corporation in an action for inducing a breach of contract and an action for conspiracy to induce that breach of contract. In support of this contention counsel cited Einhorn v Westmount Investments Ltd et al (1970), 73 WWR (NS) 161, a case in many respects similar to the present one.
>
> In Einhorn, Maguire, JA, who delivered the judgment of the Court of Appeal, had this to say at p 163:
>
> > "The appellants' submission, briefly stated, is that directors or servants of a limited company acting within the scope of their authority are not liable in tort for inducing or procuring a breach of contract by their employer or principal: 6 *Halsbury* (3rd Ed), p 307, para 615; *Salmond on Torts* (13th Ed), p 663; *Said v Butt* (1924), 3 KB 497; 90 LJKB 239.
> >
> > This general principle may be subject to certain qualifications, even assuming the appellants can be said properly to have here acted within the scope of their authority. McCardie, J, in *Said v Butt* supra, stated the principle as follows at p 506:
> >
> > > 'I hold that if a servant *acting bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.' (The italics are mine.)
> >
> > Porter, J, in *De Jetley Marks v Greenwood* (Lord), 80 Sol J 613; (1936), 1 All ER 863, at 872, states:
> >
> > > '… Mr Birkett argued that the servants or agents of a company could never be guilty of conspiracy to dismiss one of the company's servants. As supporting this contention he cited *Said v Butt* (supra) and *Scammell & Nephew Ltd v Harley* (1929), 1 KB 419; 98 LJKB 98. There is force in this argument, and I think it is true that directors in a board meeting could not induce or conspire to induce that meeting to break a contract – at any rate, not without malice. *But I think that some at any rate, if not at all, of the directors could conspire, before the board meeting was held, to induce the board as a whole wrongfully to break a contract by dismissing one of the company's servants.* The matter, however, is a difficult one and I prefer to express no final opinion upon it.'
> >
> > Pars 10 and 11, above, specifically plead mala fides and fraud allegedly perpetrated by these defendants on the plaintiff. The personal liability, if any, of such officers or servants, arising from lack of bona fides, mala fides or fraud, attributable to them under circumstances as alleged in these pleadings, requires judicial consideration. This can be properly determined only after the nature and extent of the lack of bona fides, mala fides or fraud has been found on the evidence at trial. These pleadings thus, in my opinion, raise issues requiring to be adjudicated. Par 12 has caused me some concern. *It does not expressly incorporate the prior claims of mala fides or fraud. It does, however, allege a 'wrongful and unlawful act' causing damage to the plaintiff, which impliedly may raise an issue of bona fides*."

[emphasis in original]

28 Kindred J continued at [10]:

> In my opinion the above excerpt from the judgment of Maguire, JA strengthens rather than weakens the plaintiff's position to retain the statement of claim as pleaded. While it is a general rule that the directors or servants of a corporation acting within the scope of their authority are not liable in tort for inducing or procuring a breach of contract by their employer, there is, nevertheless an exception to this rule. That exception is where "some … of the directors … conspire, before the board meeting … to induce the board as a whole wrongfully to break a contract by dismissing one of the company's servants" (Porter, J, in De Jetley Marks v Greenwood (Lord), supra).

29 Mr Thio therefore submitted that in Singapore, directors may be liable for conspiracy or inducement for steps taken before the board meeting. He also submitted that, in any event, I should not decide on this point in an application to strike out, relying on *Pacific Internet Ltd v Catcha.com Pte Ltd* [2000] 3 SLR 26 ("*Pacific Internet*"). The second holding as reported in the (unedited) headnote of the SLR (Reissue) of that case stated:

> (2) The fact that a pleading revealed an "arguable, difficult or important point of law" could not justify striking out part of the statement of claim. On the contrary, where a statement of claim revealed a difficult or important point of law, it might well be critical that the action be allowed to continue to develop the common law jurisprudence in that area of law.

30 In response, Mr Mulani argued that directors do not conduct a company's business only at board meetings and if their pre-board meeting discussions can render them liable, then they may as well be liable for discussions at board meetings.

31 As for Kindred J's judgment, Mr Mulani submitted that the case of *Einhorn v Westmount Investments Ltd* (1970) 11 DLR (3rd) 509 ("*Einhorn*") which Kindred J had relied on was one in which the pleadings mentioned *mala fides* and fraud. He submitted that Kindred J then made a jump to adopt the possible distinction mentioned by Porter J in *De Jetley Marks* when Porter J did not say that such a distinction was an exception. No other case had adopted the possible distinction as an exception to the principle in *Said v Butt* and there was no logic in the possible distinction. Mr Mulani submitted that I could and should decide the point as to whether the possible distinction applied in Singapore.

32 Mr Thio also had another argument which was that since the amended para 18 had pleaded that the individual defendants had acted with the sole or predominant intention of injuring Chong, this was a plea of malice which took Levy out of the *bona fide* qualification mentioned in *Said v Butt*.

33 However, Mr Mulani submitted that if this argument were correct, then every plea of conspiracy of that sort would amount to malice. He submitted that there must be an allegation of fraud.

34 Mr Thio also contended that since the amended pleadings alleged that the individual directors had acted outside of their office, the claim against Levy should not be struck out. In response, Mr Mulani submitted that the amended pleadings did not show how the individual defendants had acted outside the scope of their office.

35 I now come to the original para 18 of the Statement of Claim and the amended para 18. Paragraph 19 of the Statement of Claim merely pleaded the consequence of para 18 and was not

amended.

Paragraph 18 of the Statement of Claim

36 The original para 18 of the Statement of Claim stated:

> 18. In response the 1st, 2nd and 3rd Defendants, wrongfully and with intent to injure the Plaintiff, conspired and agreed to induce and did induce the 6th Defendant to terminate the employment of the Plaintiff in breach [*sic*] the Employment Contract.
>
> Particulars
>
> (1) On 4 February 2002, the 3rd Defendant called for a meeting of the 6th Defendant's Board of Directors ("Board of Directors Meeting") to consider and take appropriate action on the following interalia [*sic*]:
>
> > "(2) the conduct of Ivan Chong as Managing Director and Chief Executive Officer of the Company as set out in the letter of 6 November 2002 from Publicis Worldwide to Ivan Chong;"
>
> (3) No discussion took place at the Board of Directors Meeting in respect of the Plaintiff's conduct as managing director and chief executive officer of the 6th Defendant.
>
> (4) At the adjourned Board of Directors Meeting on 9 February 2002, the 3rd Defendant on behalf of the 1st and 2nd Defendant proposed and resolved, in breach of the Clause 4 of the Employment Contract, to terminate the Plaintiff's employment.
>
> (5) Save for a bare reference no discussion took place at the adjourned Board of Directors Meeting in respect of the Plaintiff's conduct as managing director and chief executive officer of the 6th Defendant.
>
> (6) On 9 February 2002, the 3rd Defendant, purportedly for and on behalf of the 6th Defendant sent a letter to the Plaintiff confirming the termination of the Plaintiff.

37 The amended para 18 read:

> 18. As an immediate response, the 1st, 2nd and 3rd Defendants, wrongfully and with the intention, *or alternatively with the sole or predominant intention*, of injuring the Plaintiff, conspired and agreed to induce and did induce the 6th Defendant to terminate the employment of the Plaintiff in breach [*sic*] the Employment Contract.
>
> (1) On or before 4 February 2002, two or more of the 1st, 2nd and 3rd Defendants agreed amongst themselves that they would procure the termination of the Plaintiff's employment with the 6th Defendant as a direct response to his actions in commencing the 216A action *and did so outside the scope of their office or employment with the 6th Defendant*.
>
> (2) Pursuant to this agreement/conspiracy, on 4 February 2002, the 3rd Defendant called for a meeting of the 6th Defendant's Board of Directors ("Board of Directors Meeting") to be held on 8 February 2002 under the pretence of considering and taking appropriate

action on:

> "(2) the conduct of Ivan Chong as Managing Director and Chief Executive Officer of the Company (the 6th Defendant) as set out in the letter of 6 November 2002 from Publicicis [*sic*] Worldwide to Ivan Chong."

(4) No discussion took place at the Board of Directors Meeting on 8 February 2002 in respect of the Plaintiff's conduct as managing director and chief executive officer of the 6th Defendant.

(5) *Prior to* the Board of Directors Meeting on 8 February 2002 and the adjourned Board of Directors Meeting on 9 February 2002, two or more of the 1st, 2nd and 3rd Defendants *further conspired and agreed to procure the termination of the Plaintiff and in particular, on 8 or 9 February 2002, the 3rd Defendant informed the Plaintiff that the 4th Defendant had a new settlement proposal and also that if he did not accept this new offer, he would be dismissed at the adjourned Board of Directors Meeting on 9 February 2002 and did so outside the scope of their office or employment with the 6th Defendant*.

(6) The terms of the new offer were considerably worse than that of the Settlement Agreement that the 4th and 5th Defendants had reneged upon and the Plaintiff did not accept this offer.

(7) At the adjourned Board of Directors Meeting on 9 February 2002, the 3rd Defendant, on behalf of the 1st and 2nd Defendants and in furtherance of the above agreement/conspiracy, proposed a resolution to terminate the Plaintiff's employment and sought to influence Neo Kee Choon, Thomas to vote in favour of or to abstain from voting on this resolution.

(8) Neo Kee Choon, Thomas abstained from voting on this resolution.

(9) The resolution to terminate the Plaintiff's employment was passed by a 3-2 majority, namely the 3 votes cast by the 1st to 3rd Defendants in favour of the resolution, the 2 votes against cast by the Plaintiff and his brother Chang Hong Kaye Jimmy and with Neo Kee Choon Thomas abstaining from the vote.

(10) Save for a bare reference, no discussion took place at the adjourned Board of Directors Meeting in respect of the Plaintiff's conduct as managing director and chief executive officer of the 6th Defendant.

(11) On 9 February 2002, the 3rd Defendant, purportedly for and on behalf of the 6th Defendant, sent a letter to the Plaintiff confirming the termination of the Plaintiff.

[emphasis added]

38 The material differences in the amended para 18 were as follows:

(a) Paragraph 18 referred to the sole or predominant intention of Levy, Salto and Morin to injure Chong.

(b) Paragraph 18(1) alleged that there was an agreement among these three individual defendants which was outside the scope of their office or employment with Publicis Singapore. This agreement was on or before 4 February 2002, *ie* prior to the adjourned board meeting on 9 February 2002.

(c) Paragraph 18(5) alleged that prior to the board meeting on 8 February 2002 and the adjourned meeting on 9 February 2002, two or more of the individual defendants further conspired and agreed to procure the termination of Chong's contract. In particular, Morin informed Chong that Publicis Netherlands had a settlement proposal and if Chong did not accept this proposal, he would be dismissed. The conveyance of this proposal to Chong was outside the scope of the office of the individual defendants.

The court's decision

39 It was not disputed that I had the jurisdiction to rule on a question of law under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) even if neither party had hitherto asked for such a ruling. I was of the view that *Pacific Internet* was not authority for a general proposition that a court should not decide on a point of law which was difficult or important at the stage of a striking-out application. Whether such a decision should be made depended on the circumstances. In *Johannes Budisutrisno Kotjo v Ng Wei Teck Michael* [2001] 4 SLR 232, *Pacific Internet* was also raised to persuade the court to allow an appeal against the striking out of a claim. Choo Han Teck JC, as he then was, was not persuaded that he should defer his decision on a question of law although it is true that he considered the answer to the question before him to be clear.

40 Furthermore, although *Said v Butt* and *O'Brien v Dawson* were cases where a trial had been undertaken, the Principle has been applied in other cases to an application to strike out a claim before a trial such as in *Katz, Desimone* and *Kuhn* or to refuse an amendment of a statement of claim as in *Idoport*.

41 Mr Thio was not arguing that the Principle should not apply in Singapore. He was arguing that the Principle was subject to the distinction adopted by Kindred J in *Schmeichel*. I was of the view that it was not necessary for me to await a trial before giving a ruling thereon.

42 As regards the distinction adopted by Kindred J, I agreed with Mr Mulani that Porter J in *De Jetley Marks* did not say that there was such a distinction but merely mentioned it as a possibility. Indeed, Porter J had said that the possible distinction was a difficult one and he had preferred not to express any final opinion on it. I was also of the view that in *Einhorn*, Maguire JA was not actually endorsing the distinction and had mentioned it only as a possible qualification too. Furthermore, in *Einhorn*, *mala fides* and fraud were specifically pleaded although not in all the paragraphs of the Statement of Claim.

43 In any event, I accepted Mr Mulani's argument that the business of a company is not conducted by directors at board meetings only. There may be, and often are, discussions between or among directors outside of board meetings. For many companies, a formal board meeting is not necessary and a decision of directors may be made by a circulating resolution. I saw no reason why there should be a different legal consequence depending on whether directors' discussions or agreements were entered into or made before or at a board meeting. Such a distinction is artificial. In my view, the question should simply be whether what was done by the directors was outside the scope of their office, leaving aside for the time being the other qualification in *Said v Butt*, *ie* that the servant must have acted *bona fide*.

44 As for the allegation that the three individual defendants had acted outside the scope of their office, it will be recalled that the original para 18 did not even allege that the acts of the three individual defendants were outside the scope of the office of director. That was probably why Levy's application was not supported by an affidavit and relied on the ground only that there was no cause of action against him. When the amendments were proposed to stave off a striking out, the burden was on Chong's counsel to persuade the court why the amendments should be allowed.

45 The new allegations that certain conduct was outside the scope of the office of the individual defendants were mainly bare allegations. As for the alleged reference by Morin to a proposal by Publicis Netherlands to Chong in the context of resolving a dispute between Chong and Publicis Singapore, this was not, without more, outside the scope of office of a director of Publicis Singapore.

46 I was also of the view that I need not await a trial to decide whether it was sufficient for Chong to plead that the individual defendants had acted with the sole or predominant intention of injuring him in respect of the *bona fide* qualification. The allegation of a sole or predominant intention to injure is a standard requirement in any allegation raising the tort of conspiracy to injure where the tortious act is not done by illegal means. It was my view that if such an allegation were sufficient to deprive a defendant director from the protection of the Principle, then the Principle would become emasculated. I should add that while I was writing my grounds of decision, I noticed that in *Idoport*, Einstein J also cited a judgment of the Newfoundland Court of Appeal in *Imperial Oil Ltd v C&G Ltd* (1989) 62 DLR (4th) 261 where Marshall JA said at 266:

> A director will be immune from liability for procuring the breach where he or she acts *bona fide* within the scope of his or her authority in the best interests of the company. When not so acting, the director does not attract automatic liability unless the circumstances show that his or her dominating concern was focused upon depriving the complainant of its contractual benefits.

4 7 *Imperial Oil Ltd v C&G Ltd* was a case in which the matter went to trial. So the Principle might not have been considered in the context of a striking out. Although the passage cited from Marshall JA could be construed to mean that a director is liable for a company's contractual breach if his predominant intention was to injure the plaintiff, I am still of the view that that should not be and is not the position in Singapore for the reason I have stated.

48 There must be something more alleged against the individual defendants and in particular Levy. Nothing more was alleged. In the circumstances, it is not necessary for me to say whether only fraud would take a servant out of the *bona fide* qualification. I would only note that in *Katz*, Reid J did not think that the word "malicious" amounted to an allegation of *mala fides* or lack of *bona fides* and in *Idoport*, Einstein J found the words "*bona fide*" quite difficult if they were meant to add something to an unlawful act.

49 Einstein J also mentioned (at [56]) that the Principle could give rise to a question as to whether it should be read as:

> (i) acting bona fide *and* within the scope of his authority ... or
>
> (ii) acting bona fide *or* within the scope of his authority ...
>
> [emphasis in original]

As I have said, the Principle appears to have two conjunctive qualifications. As Mr Mulani did not argue that the requirements were disjunctive, the arguments and my decision were on that basis.

50 Accordingly, I allowed the appeal with costs.

Appeal allowed.