Firstlink Energy Pte Ltd v Creanovate Pte Ltd and Another Action
[2006] SGHC 240

Case Number : Suit 521/2005, 523/2005

Decision Date : 22 December 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Low Chai Chong, Loh Kia Meng and Joanna Yeo (Rodyk & Davidson) for the plaintiff; Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the defendant in Suit 521/2005 and the second defendant in Suit 523/2005; Chopra Sarbjit Singh and Suja Michelle Sasidharan (Lim & Lim) for the first defendant in Suit 523/2005

Parties : Firstlink Energy Pte Ltd — Creanovate Pte Ltd

Companies – Directors – Duties – Directors of plaintiff also having interest in defendant-company – Whether directors breaching fiduciary duties to plaintiff and breaching ss 162 and 163 Companies Act by causing plaintiff to advance moneys to defendant-company such that plaintiff suffering loss as result – Sections 162, 163 Companies Act (Cap 50, 1994 Rev Ed)

Contract – Contractual terms – Conditions – Whether defendant-company's failure to fulfil conditions precedent under agreement with plaintiff-company amounting to total failure of consideration – Whether plaintiff entitled to refund of moneys advanced to defendant on ground of such total failure of consideration

22 December 2006

Andrew Ang J:

1 This case concerns two actions which were consolidated by a court order dated 28 December 2005. In the first action, the plaintiff commenced suit against Creanovate Pte Ltd ("Creanovate") alleging that the latter had breached the terms and conditions of an agreement ("the Subscription Agreement"). In its re-amended statement of claim, the plaintiff alleged the following breaches by Creanovate:

(a) Failure to fulfil the conditions precedent in the Subscription Agreement on or before the cut-off date for satisfaction of the same; and

(b) Breach of warranty, representation or undertaking in the Subscription Agreement.

The plaintiff thus sought to recover the aggregate sum of $3.26m which it had advanced to Creanovate. The plaintiff demanded a refund on the basis that Creanovate's breach had caused it to suffer loss and/or that there had been a total failure of consideration under the Subscription Agreement. In addition, the plaintiff sought to recover another sum of $1m lent by the plaintiff to Creanovate which the latter failed to repay despite the plaintiff's demands.

2 The plaintiff's second action was against Ngu Tieng Ung ("Ngu") and Tang Kok Heng ("Tang"), who were formerly directors of the plaintiff. In its re-amended statement of claim, the plaintiff alleged the following breaches by Ngu and Tang:

(a) Breach of fiduciary duties and breach of trust in permitting the plaintiff to advance a total of $4.26m to Creanovate and/or Tang; and

(b) Breach of ss 162 and 163 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Companies Act") in permitting a total of $4.26m to be advanced to Creanovate and/or Tang.

3 At the close of the plaintiff's case, all three defendants made a submission of no case to answer.

4 Having considered the case in its entirety, I am of the view that there is a case to answer with respect to each of the defendants.

The facts

5 The plaintiff is a wholly-owned subsidiary of Firstlink Investment Corporation ("FICL"), a public company listed on the Singapore Exchange, and served as a vehicle for FICL in respect of its venture into the coal industry.

6 Creanovate is an exempt private limited company, whose main business activities are those of general wholesale trade. The directors of Creanovate at the material time were Tang and May Wijaya. Tang was also the majority and controlling shareholder in Creanovate.

7 Ngu is a Malaysian businessman who became a substantial shareholder of FICL sometime in November 2003 and was appointed to the Executive Committee of FICL in or about July 2004. He officially became a director of FICL on 22 December 2004 and of the plaintiff on 15 September 2004.

8 Prior to August 2004, the plaintiff had no experience whatsoever in the coal trading business. It was a dormant company and had only two directors – Darren Kee Chit Huei ("Kee") and Joe Wong Siu Kay ("Wong"). Kee was the executive director of FICL at that point in time. Wong was also a director of FICL at the material time.

9 In July 2004, Tang approached Ngu with a business proposal for coal trading. Ngu introduced Tang to Kee. Shortly after, on 19 August 2004, the plaintiff, Creanovate and Tang entered into a Joint Venture Agreement ("JVA"). The decision to enter into the joint venture was made by Ngu, Kee and Wong, and the JVA was only presented to the FICL board of directors on 24 August 2004.

10 The JVA was stated to be for the purposes of coal trading. Tang and Creanovate supposedly had ready access to a supply of coal and agreed to "exclusively supply" coal to the plaintiff under the JVA. Pursuant to cl 3 of the JVA, the plaintiff was required to advance $171,000 to "set up basic communications, living and transport infrastructure at the stock pile site prior to the start of the business". The plaintiff therefore disbursed $170,000 to Creanovate. Those moneys appear to have been lost and have since been written off entirely in FICL's accounts for the financial year ending 31 December 2004. They do not form part of the present actions.

11 On or about 1 September 2004, even before the coal trading venture under the JVA had commenced, Tang started to request for more advances from the plaintiff. In his letter of 1 September 2004, Tang sought an advance of $30,000 as he "need[ed] the money urgently to settle some urgent outstanding matters". This sum would purportedly be treated as an advance of investment in Creanovate for coal mining.

12 On 6 September 2004, Tang wrote to the plaintiff once again inviting the latter to participate in a coal mining investment in Indonesia. In the letter, Tang wrote:

To show your interest in such investment, we require you to advance us a total of SGD 2 million

> as we need the money to pay expenses related to mine acquisition in Indonesia. The advancement of SGD 2 million should be disbursed to us as and can (*sic*) the needs (*sic*) arise (*sic*). However, we will require SGD 940,000 by tomorrow to meet our financial obligations.

This "investment" in coal mining would later form the basis of a Subscription Agreement between Creanovate, the plaintiff and PT Perdana Andalan Coal ("PT PAC"). PT PAC was an Indonesian company formed recently by Tang.

13 The plaintiff duly complied with Tang's request and advanced the sum of $940,000 to Creanovate on 7 September 2004.

14 At the same time, Tang proposed to be appointed as a director of the plaintiff in order to acquire a higher standing in Indonesia and thereby facilitate the alleged intended and ongoing coal investments. Tang was appointed as a director of the plaintiff on 9 September 2004 while Ngu was similarly appointed shortly after on 15 September 2004.

15 Thereafter, Ngu and Tang took full control in managing the plaintiff, where coal-related activities were concerned. Wong and Kee, on the other hand, dealt with the other existing businesses of FICL.

16 Further monetary advances to Creanovate followed shortly thereafter. On 3 November 2004, a further sum of $500,000 was advanced to Creanovate by the plaintiff. On 17 November 2004, $280,000 was advanced. They were stated to be part of the $2m which Tang and/or Creanovate required.

17 The advances were made before the parties' entry into the Subscription Agreement. It was only on 8 January 2005 that the plaintiff, Creanovate and PT PAC entered into the Subscription Agreement.

18 The Subscription Agreement was the product of discussions between Ngu and Tang. Tang had represented on various occasions that PT PAC had a 60% equity interest in PT Kencana Artha Buana ("PT KAB"), which in turn had a 72.5% equity interest in PT Senamas Energuido Mula ("PT SEM"). PT KAB purportedly had rights to exploit coal with various companies in southern Kalimantan. Tang also represented that PT SEM owned concessions to extract coal from mines in Kota Bahru, South of Kalimantan.

19 Under the terms of the Subscription Agreement, the plaintiff was to advance a sum of $2m to Creanovate, the aggregate of $1.72m which had already been advanced in anticipation of the Subscription Agreement being taken into account. Subject to the satisfaction of the conditions precedent described below, the plaintiff would subscribe for $3.5m of exchangeable bonds (which could be converted into a 30% equity interest in PT PAC) using the $2m advance and an additional $1.5m payable at completion. (This was a modification of the original proposal, where the parties had envisaged the investment to take the form of a 25% share in Creanovate's subsidiary.) The conditions precedent, which had to be satisfied by 22 February 2005 ("the deadline"), were: the receipt by the plaintiff of confirmations from qualified sources that PT PAC's group structure was indeed as represented in the Subscription Agreement, as well as confirmation with regard to "the rights of the coal concessions" of PT SEM and PT KAB. In the event that the conditions precedent were not fulfilled by the deadline, the advanced sum of $2m would be returned to the plaintiff and the Subscription Agreement terminated.

20 The Subscription Agreement was approved by the FICL board by a circular resolution dated

8 January 2005.

21 The plaintiff subsequently advanced even more moneys to Creanovate. Over a period of three days, from 18 to 20 January 2005, the sums of $250,000, $300,000 and $280,000 were advanced to Creanovate. On 3 February 2005, a further sum of $710,000 was advanced, bringing the total advances to $3.26m. The aggregate sum advanced was far in excess of the $2m contemplated under the Subscription Agreement. A breakdown of the sums advanced is as follows:

No	Date	Mode of Payment	Amount ($)
1	07.09.04	Telegraphic transfer	940,000
2	03.11.04	Telegraphic transfer	500,000
3	17.11.04	Cheque No 680668	280,000
4	18.01.05	Cheque No 515047	250,000
5	19.01.05	Cheque No 515048	300,000
6	20.01.05	Cheque No 515064	280,000
7	03.02.05	Cheque No 515096	710,000
		TOTAL:	3,260,000

22 After the Subscription Agreement was signed, Wong and Kee repeatedly asked Ngu and Tang about the conditions precedent since they saw each other daily at the office. Ngu and Tang gave constant reassurances that the conditions precedent were being attended to. Despite those assurances, the conditions precedent were not fulfilled by the deadline.

23 On 7 March 2005, the plaintiff wrote to Creanovate to remind the latter of its obligations as to the conditions precedent. Tang replied, setting out the reasons for the delay and requesting an extension of the deadline to 15 March 2005.

24 The plaintiff agreed to the extension. However, it stipulated that if the conditions precedent remained outstanding by 15 March 2005, it would require Creanovate to refund all the advances which had been made under the Subscription Agreement.

25 On 15 March 2005, Tang wrote to the plaintiff purporting to attach a legal opinion on the Indonesian coal mines structure. Tang indicated that more work would have to be done. As at that date, the conditions precedent had still not been satisfied.

26 At this juncture, the possibility of restructuring the Subscription Agreement was floated. On 5 April 2005, the FICL board resolved to cancel the Subscription Agreement and convert the plaintiff's interest into a 51% direct equity interest in PT PAC, where such interest would be held by Firstlink Coal Pte Ltd. This would be done with no additional investment cost. In theory, the arrangement would effectively transform PT PAC into a FICL subsidiary and thereby give FICL better control over the operations of PT PAC. The FICL board also authorised the management "to proceed with the proposed changes in the structuring of the investment …".

27 This resolution culminated in a Settlement Agreement dated 8 April 2005 which Ngu purported to have signed on the plaintiff's behalf. It is not clear when the date of the Settlement Agreement was actually inserted, this being in dispute between the parties. (The plaintiff appeared not to have been aware of its execution until 19 May 2005. Hence, its letter of 18 May 2005 (referred to in [30] threatening to terminate the Subscription Agreement.)

28 Under the Settlement Agreement, it was provided that upon its execution the Subscription Agreement would be terminated and of no effect whatsoever. The Settlement Agreement also provided that the sums advanced by the plaintiff to Creanovate pursuant to the Subscription Agreement would be settled by the transfer of 51% of the shares in PT PAC from Creanovate to the plaintiff ("the Settlement Shares"). The Settlement Agreement was conditional upon the fulfilment of the condition precedent that the relevant Indonesian authority approved the transfer of the Settlement Shares, failing which Creanovate had to immediately refund the advanced sum of $3.26m.

29 Taking the position that Ngu did not have authority to enter into the Settlement Agreement on the plaintiff's behalf, the plaintiff's re-amended statement of claim in Suit No 521 of 2005 made no mention of the Settlement Agreement. However, after Creanovate referred to it in its amended defence and counterclaim, the plaintiff replied taking the position, firstly, that the Settlement Agreement was unauthorised and, secondly, that even if it was valid, the condition precedent therein had not been fulfilled with the result that the advances became repayable.

30 It is indisputable that the conditions precedent in the Settlement Agreement were not met. Tang was dismissed as a director on 19 April 2005, and the FICL board met on 3 May 2005, 6 May 2005 and 18 May 2005. On 18 May 2005, the FICL board decided that Tang would be given one week to come up with a satisfactory scheme to find a replacement mine (to make up for the loss of an important coal mine which PT SEM had sold off despite the Subscription Agreement), failing which FICL would terminate the Subscription Agreement and commence legal action to recover the advances made to Creanovate.

31 As it turned out, no replacement mine was tendered and the plaintiff commenced suit.

32 Apart from the advances of $3.26m under the Subscription Agreement, a further $1m advance was made by the plaintiff to Creanovate.

33 This was pursuant to a request on 21 February 2005 from Ngu and Tang for a $1m advance to Creanovate, purportedly for the coal mining business in Indonesia. By this time, only Ngu and Tang were the directors of the plaintiff. On the same day, FICL transferred $1m into the plaintiff's bank account and the plaintiff promptly advanced the said sum to Creanovate. This sum was withdrawn by Creanovate on 23 February 2005 via a cash cheque.

34 On 5 May 2005, FICL wrote to Ngu and Tang for the return of the $1m advance. By a letter dated 11 May 2005, Creanovate wrote to FICL stating that it would return $700,000 by 13 May 2005 in relation to the advance of $1m for coal trading purposes. However, the remaining $300,000 would be treated as balance of settlement for the purposes of the subscription for the Exchangeable Bonds in Creanovate.

35 Creanovate did not return the $700,000 by 13 May 2005, or at all. The plaintiff thus commenced legal action.

Preliminary point on pleadings

36 A preliminary point raised by both counsel for the defendants was that the pleadings put forth by the plaintiff were defective and incomplete, such that the plaintiff's claim should be dismissed. Indeed, the pleadings put forth by the plaintiff appeared somewhat bare.

37 While the poorly drafted pleadings did not ultimately prove fatal to the plaintiff's case altogether, I would like to highlight the importance of proper pleadings to a party's case. It is obvious that a plaintiff ought to draft its pleadings clearly and include all material facts. After all, a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard and tell them what the case is which they will have to meet: *Philipps v Philipps* (1878) 4 QBD 127. A fact is "material" in this context if it is necessary for the purpose of formulating a complete cause of action, such that if any one material statement is omitted, the statement of claim would be bad: *Bruce v Odhams Press Ltd* [1936] 1 KB 697.

38 While properly drafted pleadings do not necessarily result in the success of a claim, improperly drafted pleadings may sound the death knell for an otherwise deserving claim. Even though the court may be inclined to grant redress for a wrong suffered, inadequate pleadings may prove to be a stumbling block to such an end. After all, as Rajendran J aptly noted in *MFH Marine Pte Ltd v Asmoniah bin Mohamad* [2000] 4 SLR 368 at 375:

> That motivation [not to allow poorly drafted pleadings to deprive a party of his rights] is laudable but it has to be balanced against the requirement in our system of justice that issues for determination by the court should be carefully framed and all parties should have the opportunity to address the court on those issues before the court adjudicates thereon.

39 Viewed thus, it is axiomatic that counsel should exercise care and caution in the drafting of pleadings.

Suit No 521 of 2005

40 I shall first consider the plaintiff's claim against Creanovate for a refund of the $3.26m. Creanovate sought to resist the claim on three grounds, all of which I reject as untenable.

(a) Binding effect of the Settlement Agreement

41 Counsel for Creanovate, Mr Tan Teng Muan, submitted that by virtue of the Settlement Agreement the plaintiff was precluded from recovering the sum of $3.26m on the basis of money had and received. Mr Tan argued that the plaintiff was bound by the terms of the Settlement Agreement because it had entered into the Settlement Agreement and/or ratified it. This was denied by the plaintiff.

42 The plaintiff claimed that Ngu lacked authority to enter into the Settlement Agreement because the board meeting, which decided on the cancellation of the Subscription Agreement and the acquisition of a 51% direct equity interest in PT PAC, did not specifically authorise Ngu to execute a Settlement Agreement on behalf of the company.

43 In my view, even if the Settlement Agreement bound the plaintiff, this did not exempt Creanovate from its liability to refund the advances as we shall see.

(b) Whether action should be for money had and received or repayment pursuant to the Settlement Agreement

44 Assuming that the parties did indeed enter into the Settlement Agreement, two questions arise:

(a) Whether the Subscription Agreement was terminated; and

(b) Whether the plaintiff's right to claim a refund of the sums of money advanced under the Subscription Agreement was extinguished.

45 In his submissions, Mr Tan suggested that the Subscription Agreement was devoid of effect for two reasons. First, the Subscription Agreement was terminated by the parties' execution of and entry into the Settlement Agreement. Mr Tan sought to rely on cl 1 and Recital E of the Settlement Agreement which provided as follows:

> **Clause 1**. Termination of Subscription Agreement
>
> The parties hereto agreed [*sic*] that upon the execution of this Agreement, the Subscription Agreement mentioned in Recital (D) hereof is hereby terminated and is of no effect whatsoever.
>
> **Recital (E)**
>
> As at the date hereof, at the request of Creanovate and the Company, the parties hereto agree to restructure the settlement of the Advance Sum and as such has [*sic*] also agreed to terminate the Subscription Agreement mentioned in Recital (D) above.

46 He further submitted that the conditions precedent in the Settlement Agreement was not a condition precedent to its formation but to its further performance. This was because cl 3(2) of the Settlement Agreement provided that:

> In the event that the condition precedent are [*sic*] not fulfilled on or before the Cut Off Date, Creanovate shall immediately refund to Firstlink the Advance Sum free of interest and thereafter this Agreement shall be terminated and be null and void and of no effect whatsoever and neither party shall have any rights or claims against the other save for antecedent breach.

I am inclined to agree that the Subscription Agreement was superseded by the Settlement Agreement by reason of cl 1 of the Settlement Agreement.

47 Accordingly, a claim for recovery of the advances on the strength of provisions under the Subscription Agreement for refund of the advances cannot succeed. Neither is it possible for the plaintiff to sue for moneys had and received on the basis that there was a total failure of consideration. This is because under the Settlement Agreement it was agreed that subject to satisfaction of the conditions precedent, the same advances would be treated as payment for certain

"Settlement Shares".

48 Therefore a claim for refund of the advances can only be made upon failure of the conditions precedent set out in cl 3(1) of the Settlement Agreement. In its amended reply and defence to counterclaim, the plaintiff did plead in paras 6 and 7 that even if the Settlement Agreement was valid, under cl 3(2) thereof, in the event the conditions precedent was not fulfilled –

> … Creanovate shall immediately refund to Firstlink the Advance Sum free of interest …

The plaintiff further pleaded the non-fulfilment of the conditions precedent in para 8 of the amended reply and defence to counterclaim and added that:

> In the circumstances, the Defendant was bound to refund to the Plaintiff the Advance sum (of $3.5 million) and the Settlement Agreement was terminated and became null and void and of no effect whatsoever.

Therefore, regardless of whether the Settlement Agreement did supersede the Subscription Agreement, either way the plaintiff did adequately plead a case for the refund of the Advances.

Suit No 523 of 2005

49 I now turn to consider the plaintiff's claim against Ngu and Tang for $4.26m. For the purposes of clarity, I propose to segregate the total sum advanced into four parts:

(a) $940,000 paid on 7 September 2004 ("the first payment");

(b) $500,000 and $280,000 (a total of $780,000) paid on 3 November 2004 and 17 November 2004 respectively ("the second series of payments");

(c) $250,000, $300,000, $280,000 and $710,000 (a total of $1,540,000) paid from 18 January 2005 to 3 February 2005 ("the third series of payments"); and

(d) $1m paid on 21 February 2005 ("the fourth payment").

(a) The first payment

50 The plaintiff conceded that the first payment fell outside the ambit of the prohibitions in ss 162 and 163 of the Companies Act because Ngu and Tang were not directors of the plaintiff at the time that the sum of $940,000 was advanced. However, the plaintiff submitted that the first payment could be recovered on the basis of knowing receipt.

51 The defendants made much of the plaintiff's failure to specifically plead dishonesty on the part of Ngu and Tang. In para 9 of its amended statement of claim against Ngu and Tang, the plaintiff had pleaded:

> Further or alternatively, the 1st and 2nd Defendants are liable to account to the Plaintiff for the said sum of S$4,260,000.00 as a constructive trustee on the ground of knowing receipt.

No mention was made as to the state of mind of Ngu and Tang.

52 Counsel for the plaintiff, Mr Low Chai Chong, had submitted that the element of dishonesty did

not have to be pleaded because dishonesty was not a requisite element of a claim for knowing receipt. Predictably, both counsel for the defendants took the contrary view and asserted that the plaintiff's failure to plead dishonesty was fatal to its claim. Mr Tan sought to rely on the decision of the Court of Appeal in *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241 ("*Caltong*") which he said set out the local position definitively. *Caltong* was cited in support of the view that dishonesty is an essential element of an action for knowing receipt.

53 Contrary to what Mr Tan urged, I am of the opinion that dishonesty is not essential. In *Caltong*, the Court of Appeal by way of *obiter* had cited *El Ajou v Dollar Land Holdings plc* [1994] 1 BCLC 464 for the proposition that three elements had to be proved before liability for knowing receipt would arise:

(a) a disposal of the plaintiff's assets in breach of fiduciary duty;

(b) beneficial receipt by the defendant of assets which were traceable as representing the plaintiff's assets; and

(c) knowledge on the defendant's part that the assets he received were traceable to a breach of fiduciary duty.

The Court of Appeal in Caltong did not go further to stipulate a requirement of dishonesty.

54 The local position expressed in *Caltong* is consistent with that in England. English courts have, in recent years, premised the action in knowing receipt on the basis of unconscionability. This was first propounded in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 448 ("*Akindele*") where Nourse LJ held that the receipient's state of knowledge had to be such as to make it unconscionable for him to retain the benefit of the receipt. Nourse LJ's test was further explained in *Criterion Properties plc v Stratford UK Properties LLC* [2002] 2 BCLC 151, where Hart J opined that it would be unconscionable for a defendant to retain the benefit of the receipt where he had actual knowledge of the circumstances which made the payment a misapplication.

55 English courts have subsequently further interpreted the test in *Akindele*. In *Papamichael v National Westminster Bank plc* [2003] 1 Lloyd's Rep 341 ("*Papamichael*"), the Queen's Bench Division (Commercial Court) construed the *Akindele* test as follows – while dishonesty was not necessary to a finding of knowing receipt, the defendant must have had actual knowledge that the assets received were traceable to the breach of duty: at [247].

56 In the light of this, it could be said that both the English and local authorities are agreed on the need for some form of knowledge on the defendant's part that the assets were traceable to a breach of duty and that such knowledge need not be as high as actual dishonesty. Nevertheless, the plaintiff faced two difficulties. Firstly, it failed to plead that Ngu and Tang knew that the moneys they received were traceable to a breach of fiduciary duty.

57 Secondly, although in para 6 of the amended statement of claim in Suit No 521 of 2005, the plaintiff alleged breach of fiduciary duty and/or of trust in relation to the aggregate sum of $4.26m (and therefore of the $940,000) there was no pleading of any material facts to show how Ngu or Tang could be said to owe such duties in relation to the $940,000 when they were not on the board of the plaintiff at the time of its advance. There was no averment by the plaintiff that Ngu was a shadow director. In fact, as noted in [50], the plaintiff conceded that the first payment of $940,000 fell outside the ambit of the statutory prohibitions in ss 162 and 163 of the Companies Act because the defendants were not directors of the plaintiff at the time the first payment was advanced. There

was no pleading as to breach of duty by anyone else vis-à-vis the plaintiff.

58 I am therefore of the view that the omission in the plaintiff's pleadings is fatal to the case against Ngu and Tang in so far as the $940,000 is concerned.

(b) The second and third series of payments, and the fourth payment

59 The plaintiff alleged that the above payments had been made to Creanovate and/or Tang in breach of ss 162 and 163 of the Companies Act.

60 The defendants contended that whether ss 162 and 163 of the Companies Act had been contravened depended on whether the sums paid by the plaintiff were loans or merely advances. According to the defendants, only the former fell within the ambit of the prohibition in ss 162 and 163 of the Companies Act.

61 Section 162(1) prohibits a company (other than an exempt private company) from making a loan to a director of the company (or of a company related to the first company) except for certain purposes set out in sub-ss (a) to (d). Section 163(1) goes beyond s 162(1), by prohibiting a company from giving a loan to another company if one or more directors of the former company is or are interested in 20% or more of the total number of equity shares in the latter company. Section 163(1) is apposite because, at the material time, Tang was a director of the plaintiff and a majority shareholder in Creanovate which received the various sums of money disbursed by the plaintiff.

62 In its submissions, the plaintiff characterised the entire $4.26m as being in the nature of loans. Both counsel for the defendants refuted this argument strenuously. In relation to the sum of $3.26m (*ie*, the entire $4.26m less the last payment of $1m), Mr Chopra Sarbjit Singh (counsel for Ngu) asserted that there was never an intention for any part of this sum to be a loan because the whole sum was paid by way of advances in relation to the Subscription Agreement. Mr Tan, likewise, argued that with respect to $2.32m (*ie*, $3.26m less the first payment of $940,000) the plaintiff's claim which was based on a breach of ss 162 and 163 had to fail because the payments could not be characterised as loans but were payments "made pursuant to the Subscription Agreement". (The first payment of $940,000 having been dealt with earlier, the amount under consideration is rightly $2.32m.) The defendants' argument was premised on the word "loan" in ss 162 and 163 being narrowly interpreted as a loan *simpliciter*.

63 Admittedly, the defendants' argument did have a superficial attraction to it. *Chitty on Contracts*, vol 2, (Sweet & Maxwell, 29th Ed, 2004) at page 840 (para 38-223) defines a loan thus:

> A contract of loan of money is a contract whereby one persons lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest.

An "advance" on the other hand, has been defined as in the Shorter Oxford English Dictionary, vol 1 (Oxford University Press, 5th Ed) more widely to include:

(a) a payment beforehand or on security;

(b) an anticipatory payment; and

(c) a loan.

64 Assuming for the moment that the entire amount of $2.32m constituted advances under the Subscription Agreement, it is arguable, if we were to adopt the definition of "loan" given by the editors of *Chitty on Contracts*, that ss 162 and 163 would not apply. However, a closer study of the statutory provisions will show that the word "loan" therein is not confined to a loan *simpliciter*. Section 162(1)(a) sets out an exception to the prohibition against a company making a loan to its director. The exception covers "anything done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company".

65 Clearly, where expenditure has been or is to be incurred by a director for the purposes of the company, the funds made available to him for such purposes would not be repayable. Such expenditure therefore falls outside *Chitty's* definition of "a loan" which requires a promise of repayment of the same whether on demand, at a fixed or determinable future time, or conditionally upon an event which is bound to happen. Instead, such funds made available by the company would fall squarely within the definition of an advance.

66 The fact that such an exception has been included in s 162(1)(a) leads inexorably to the conclusion that the prohibition in s 162(1) is not limited to loans *simpliciter* but includes advances as well. If it were otherwise, there would be no need for the exception.

67 Section 163 is an extension of s 162 in that it prohibits a loan made, not directly to a director but to a company in which he alone or together with other directors is interested, that interest being in 20% or more of the total number of equity shares in the latter company. Such an extension was necessary if directors were to be prevented from circumventing s 162 by hiding behind a borrowing company. There is no reason why a narrower meaning of "loan" should be adopted for s 163 when it was intended as an extension of the prohibition in s 162. It seems to me that a purposive interpretation is called for. To read the provisions restrictively would allow the prohibitions in ss 162 and 163 to be easily circumvented and defeat the legislative intent.

68 Mr Singh next argued that as the second series of payments had been made before the Subscription Agreement was entered into, the plaintiff had failed to prove its pleaded case (in so far as the second series of payments was concerned) that the payments were made notwithstanding that the conditions under the Subscription Agreement had not been fulfilled. Whilst I would agree that the pleadings had not been drafted with the care they deserved, it was clear from a reading of paras 6.1 and 6.3 of the amended statement of claim (in Suit No 523 of 2005) that the plaintiff could not have been implying that at the time the payments were made, the Subscription Agreement was already in existence. Shorn of that implication, it was inexact, but not wrong for the plaintiff to have pleaded in para 6.3 that the defendants authorised the release of the advances before the conditions precedent in the Subscription Agreement were fulfilled.

69 The next objection raised was that the payments were made by the plaintiff's parent company, FICL, and not by the plaintiff. This argument, if it succeeded, would mean that the plaintiff was the wrong party to seek recovery. Whilst it is true that the funds came from the plaintiff's parent company, I was satisfied that the payments were made on behalf of the plaintiff which had been used by FICL as the vehicle for the JVA and, subsequently, the Subscription Agreement.

70 As noted in [11] and [12], Tang addressed his requests for advances to the plaintiff. Moreover, I note that in recital E to the Subscription Agreement, Creanovate acknowledged that the $2m was advanced by the plaintiff.

71 The argument that the payments were not from the plaintiff also contradicted Ngu and Tang's

contention that the payments were advances made under the Subscription Agreement; if so, the party advancing was the plaintiff.

72 Finally, the defendants argued that the plaintiff had not pleaded that the coal investment was a sham or that the Subscription Agreement was in substance a loan transaction masquerading as a subscription for exchangeable bonds. The reason why this argument was raised is not hard to find. In the course of the trial, the plaintiff had called as witness a bank officer from Overseas-Chinese Banking Corporation with whom Creanovate had a bank account. His evidence showed that money which the plaintiff had advanced to Creanovate had, after they were banked in, been diverted to Ngu and Tang, and in several instances for payment to Ngu's stockbrokers. It was also shown that the withdrawals were by cash cheques. I surmised that this was done to avoid detection of the real use of the money. I formed this impression because initial withdrawals by cheque for the purpose of purchasing cashier's orders in favour of Ngu's stockbrokers were reversed as if to correct an error but the cashier's orders were subsequently obtained nevertheless using withdrawals by cash cheques instead! The reversal of the initial withdrawals appeared to be a devious attempt to mislead.

(c) Whether the advances under the Subscription Agreement had to be applied in a particular manner

73 In his submissions, Mr Singh suggested that the defendants were not obliged to apply the advances received from the plaintiff in any specific manner. In his view, the Subscription Agreement did not contain any terms requiring the advances to be applied in any particular manner, nor did the plaintiff plead the existence of an implied term, collateral contract or representation as to the use of the money.

74 To my mind, this is a wholly untenable argument.

75 The evidence showed that the parties had envisaged that the advances made under the Subscription Agreement would be used for an investment in coal mining. This was seen in the evidence adduced by the plaintiff, which the defendants had not rebutted at trial. Reference may be had to the evidence given by Kee in his affidavit of evidence-in-chief:

> 41. In a letter dated 6 September 2004 from Mr Tang and/or Creanovate to the Plaintiff, Mr Tang and/or Creanovate asked for an advancement of $2,000,000 in return for a 25% share of Creanovate's subsidiary, which they claimed had coal mines and had signed joint venture agreements with other coal mine owners. In the same letter, they requested that $940,000 of the $2,000,000 be advanced to them the next day in order for them to "meet (their) financial obligations". This investment in coal mining would later form the basis of a subscription agreement between Creanovate, the Plaintiff and PT Perdana Andalan Coal ("PTPAC").

76 In the 6 September 2004 letter, Tang had stated that the advance of $2m was needed to pay "expenses related to mine acquisition". This was consistent with Kee's affidavit of evidence-in-chief where he further noted:

> On 2 November 2004 and 3 November 2004, Mr Tang wrote two separate letters to the Plaintiff requesting for advances of $250,000 each. These were stated to be pursuant to the $2,000,000 which Mr Tang and/or Creanovate required as part of the earlier agreement to acquire a 25% interest in coal mines.

77 Having regard to the evidence, it is clear that the sums had been advanced to Creanovate on the basis of a common understanding – that they would be applied towards expenses related to mine

acquisition and were not merely for the purposes of meeting Tang and/or Ngu's personal financial obligations. Accordingly, it did not lie in the defendants' mouth to claim that they were not obliged to apply the advances received from the plaintiff in any specific manner.

78 On the view I have taken, that the word "loan" in s 163 is to be read as including an advance, it is not necessary to show that the coal investment was a sham or that the payments under the Subscription Agreement were loans masquerading as advances. I should perhaps add that Tang (if not Ngu as well) must have known that the conditions precedent in cl 2(1)(b) could never be satisfied as PT SEM had sold the coal mine referred to in [30]. Despite this, further advances were made purportedly for the purposes of the Subscription Agreement.

79 This in itself was a breach of fiduciary duty at least on Tang's part. Given Ngu's complicity in the withdrawal of funds from Creanovate for his personal use, an inference might even be drawn that Ngu, likewise, was in breach of fiduciary duty towards the plaintiff. In fact, it bears noting that the sum total of advances significantly exceeded the $2m envisaged in the Subscription Agreement. However, I did not make a finding as to Tang and Ngu's breach in this particular regard as the plaintiff's pleadings were silent thereon.

80 I now consider the fourth payment. It patently fell foul of the prohibitions in ss 162 and 163. It was not disputed that the payment of $1m had been made for the purposes of coal trading pursuant to Ngu and Tang's request. In my view, the payment of $1m clearly was a loan in excess of the payments contemplated under the Subscription Agreement. At the very least, Tang himself (acting on Creanovate's behalf) had admitted that he would return $700,000 of the $1m advance while treating the balance of $300,000 as balance of settlement under the Subscription Agreement. Moreover, Ngu himself had admitted, during a board meeting on 3 June 2005, that he would discuss the repayment of the $1m loan (see [69] of Kee's affidavit of evidence-in-chief). Accordingly, it does not lie in the mouths of Ngu and Tang to now deny that the $1m payment constituted a loan.

81 Ngu and Tang relied on the evidence of Kee to suggest that the $1m payment was intended to be an advance from FICL directly to Creanovate. In my view, the cited portions of the cross-examination of Kee did not establish this. It was pointless to rely on an unclear extract of Kee's evidence to show that the loan of $1m was from FICL to Creanovate when the contemporaneous documents showed otherwise.

82 The most damaging document to Ngu and Tang's plea was the letter of 21 February 2005 from the plaintiff to FICL. That letter was signed by Ngu and Tang. They asked from FICL an advance of $1m. They made the request as directors of the plaintiff. "The advancement [*sic*] will be utilised to commence coal trading in Indonesia. We undertake to the Board of Directors of FL that the Advancement [*sic*] will be repaid back to FL no later than two months from the date of this letter". So, clearly, the plaintiff was requesting for the moneys to be advanced to Creanovate. It was not a request from Creanovate to FICL. The moneys flowed from FICL to the plaintiff. On the same day, it went from the plaintiff's account to Creanovate's account where it was converted ultimately into a cashier's order for Ngu's own purposes.

83 Ngu and Tang were the only two directors of the plaintiff at that time. Yet the $1m payment did not go directly from FICL to Creanovate – it passed through the plaintiff's account. Only Ngu and Tang could have authorised the transfer of $1m from the plaintiff to Creanovate on 21 or 22 February 2005.

84 The evidence is therefore clear that it was a loan from the plaintiff to Creanovate. There can be no other explanation why the moneys went to the plaintiff's account first – an event fully under

the control of Ngu and Tang. It is untenable to suggest that this was not a loan from the plaintiff to Creanovate.

85 The authorisation of the second and third series of payments and the fourth payment in breach of s 163 constituted a breach of fiduciary duty on the part of Ngu and Tang. It is established law that directors who breach their fiduciary duties to the company may be required to indemnify the company for its losses. The observations of the High Court in *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [2000] 2 SLR 501 at [35] are pertinent in this regard:

> 1 If a breach of a fiduciary obligation has been committed then the fiduciary is liable to make restitution — that is restore the wronged person in the same position as he would have been if no breach had been committed. Consideration of causation, foreseeability and remoteness do not readily enter into the matter.
>
> 2 The test of liability is whether the loss would have been if there had been no breach. In other words, the fiduciary can escape liability only if he can demonstrate that the loss or suffering would have happened even if there been no breach.
>
> 3 The right to restitution and compensation of a beneficiary or sufferer which the Court of Equity have imposed on an errant fiduciary is more of an absolute nature than the common law of obligation to pay damages for tort or breach of contract.
>
> 4 *The beneficiary or sufferer under the concept of restitution or equitable compensation is entitled to full indemnity* and equity will award such interest as may be necessary to create full restitution and compensation. [emphasis added]

86 I found that, except in respect of the $940,000, a *prima facie* case was made out against all three defendants.

87 As they had chosen to submit that there was no case to meet, I gave judgment for the plaintiff against all three defendants as follows:

In respect of Suit No 521 of 2005 –

(a) I gave judgment against the defendant for:

(i) the sum of $3.26m together with interest thereon from 31 May 2005 until payment at the rate of 6% per annum;

(ii) the sum of $1m together with interest thereon from 19 May 2005 until payment at the rate of 6% per annum; and

(iii) costs to be taxed unless agreed.

(b) I dismissed the defendants' counterclaim with costs to be taxed unless agreed.

In respect of Suit No 523 of 2005 –

(c) I declared that the first and second defendants were liable to account to the plaintiff for the aggregate sum of $3.32m (being the aggregate sum of $4.26m less $940,000) together with interest (on $2.32m from 31 May 2005 and on $1m from 19 May 2005 in each case until payment in full).

(d) I ordered that to the extent that Creanovate shall fail to pay in full the aggregate sum of $4.26m and interest thereon as ordered under Suit No 521 of 2005, the first and second defendants shall pay such shortfall up to the amount of $3.32m and interest thereon as provided in para (c) above.

(e) Costs to be taxed unless agreed.