Family Food Court (a firm) v Seah Boon Lock and Another (trading as Boon Lock Duck and Noodle House)
[2008] SGCA 31

Case Number : CA 75/2007

Decision Date : 16 July 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Tan Cheng Han SC and Timothy Ng (David Siow Chua & Tan LLC) for the appellant; Harpreet Singh Nehal SC and Kelly Fan (Drew & Napier LLC) for the respondents

Parties : Family Food Court (a firm) — Seah Boon Lock; Wee Lay Teng

Agency – Principal – Undisclosed – Whether first respondent acted as agent for undisclosed principal when he entered into licence agreement for use of food stall – Whether substantial damages recoverable by agent for losses suffered only by undisclosed principal and not by agent

Civil Procedure – Parties – Joinder – Power of court to order joinder – Purpose of joinder – Whether undisclosed principal should be made party to proceedings – Order 15 rule 6(2)(b) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Contract – Breach – Wrongful repudiation of licence agreement for use of food stall – Exceptions to general rule that plaintiff/promisee could only recover nominal damages for breach of contract where no loss suffered – Whether exceptions available to agent in situation involving undisclosed principal – Undisclosed principal suffering losses due to wrongful repudiation of contract for which undisclosed principal not party to – Whether substantial damages recoverable by agent for losses suffered only by undisclosed principal and not by agent

Damages – Measure of damages – Exceptions to general rule that plaintiff/promisee could only recover nominal damages for breach of contract where no loss suffered – Whether exceptions would apply to avail agent in situation involving undisclosed principal – Whether substantial damages recoverable by agent for losses suffered only by undisclosed principal and not by agent

16 July 2008

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The appellant, Family Food Court, is an operator of several food courts, including one at Block 642, Choa Chu Kang Street 62, Singapore 689142 ("the Yew Tee Food Court") and one at 55 Sungei Kadut Street 1, Singapore 729358 ("the Sungei Kadut Canteen"). The appellant is a partnership between two brothers, Lim Chye Teng and Lim Chai Kwee.

2 The respondents are a husband-and-wife team who manage and operate the "Yu Kee" chain of duck rice stalls island-wide. The first respondent is Mr Seah Boon Lock, who was originally the sole plaintiff at the trial below. The second respondent is Mdm Wee Lay Teng, who was added as the second plaintiff on the second day of the trial. The respondents operated Stall No 10 at the Yew Tee Food Court ("the Yew Tee Stall") and Stall No 14A at the Sungei Kadut Canteen ("the Sungei Kadut Stall").

3 In the court below, the respondents succeeded in their claim against the appellant for

wrongful repudiation of the licence agreement entered into between the appellant and the first respondent for the use of the Yew Tee Stall ("the Agreement") and were awarded damages to be assessed (see *Seah Boon Lock v Family Food Court* [2007] 3 SLR 362 ("the Judgment")). The appellant's counterclaim for $31,201.45 for sums alleged to be owing by the respondents in respect of the Sungei Kadut Stall was dismissed (*ibid*).

4 At the end of the hearing before this court, we dismissed the appeal with each party bearing its own costs of the appeal and with the usual consequential orders. We now give the detailed grounds for our decision.

The facts

5 On or about 10 March 2003, one Lim Fah Choy ("Lim"), who was the first respondent's operations manager and brother-in-law, entered into a tenancy agreement with the appellant for the Sungei Kadut Stall ("the Tenancy Agreement"). On or about 1 April 2003, the first respondent signed a letter of offer prepared by the appellant confirming his intention to enter into a three-year fixed term licence agreement (*ie*, the Agreement) in respect of the Yew Tee Stall ("the Letter of Offer"). Clause 5 of the Letter of Offer stated that:

> [T]he Licensee [*ie*, the first respondent] shall pay to the Licensor [*ie*, the appellant] a monthly licence fee equivalent to **EITHER**
>
> (a) **TWENTY-ONE (21)% of S$29,000 TO**
>
> **MAXIMUM TARGET @ S$48,000**
>
> whichever shall be the greater amount …
>
> [emphasis in bold in original]

(We shall refer to the above limit on the licence fee of the Yew Tee Stall as "the Licence Fee Cap" in these grounds of decision.) The Agreement was subsequently signed on 10 July 2003 by the first respondent and business at the Yew Tee Stall commenced on 22 August 2003.

6 The appellant later sent the first respondent a letter dated 21 October 2003 confirming that the licence period for the Yew Tee Stall had commenced on 22 August 2003. This letter was acknowledged by the first respondent on 1 November 2003.

7 In the meantime, the first respondent was facing problems at the Sungei Kadut Stall. On 5 May 2003, the first respondent informed the appellant that he would be terminating the Tenancy Agreement and that the last day of operations at the Sungei Kadut Stall would be 30 June 2003. However, the first respondent continued to operate that stall beyond 30 June 2003 until January 2004.

8 In a letter to the first respondent dated 15 August 2003, the appellant stated that:

> The "CCK 624" licensed food stall [*ie*, the Yew Tee Stall] was given to you as a special privilege because of your present support and cooperation with us at [the] above[-]mentioned Sungei Kadut outlet [*ie*, the Sungei Kadut Stall]. The management requires … the above[-]mentioned agreements to be tied-up with immediate effect.

However, should you terminate the business at the Sungei Kadut outlet prior to the expiry of the CCK 624 licensed agreement, the management reserves [the] right to terminate the CCK 624 licensed agreement without further negotiation.

Notwithstanding the above letter, on 5 September 2003, Lim wrote to the appellant again to inform the latter that they would be terminating the Tenancy Agreement and that operations at the Sungei Kadut Stall would cease with effect from 30 September 2003. Operations at that stall eventually ceased in January 2004. Lim wrote to the appellant on 11 February 2004 informing the latter that the Tenancy Agreement would be terminated on that day itself (*ie*, 11 February 2004) and that the tenancy of the Sungei Kadut Stall would be taken over by one Teo See Han.

9 The appellant proceeded to inform the first respondent that it was going to lift the Licence Fee Cap in respect of the Yew Tee Stall. In, *inter alia*, a letter dated 18 March 2004, the appellant stated that it would "left [*sic*] up the minimum rental target from S$29,000 to **S$40,000**"[note: 1] [emphasis in bold in original] for that stall and that the Licence Fee Cap would be removed.

10 Nothing further occurred for almost a year until 30 March 2005, when the appellant sent a letter titled "Notice to Quit" to the first respondent informing him to cease all operations at the Yew Tee Stall by 15 April 2005. The first respondent's solicitors informed the appellant on 12 April 2005 that any attempt to prematurely evict the first respondent from the Yew Tee Stall before the expiry of the three-year licence term in August 2006 would be unlawful. Nonetheless, the appellant proceeded to terminate the electricity supply to the Yew Tee Stall and retained the sales proceeds from that stall for the period 1 March 2005–15 April 2005. The appellant also purported to forfeit the security deposit of $18,000 under the Agreement and retained the equipment, goods and effects at the Yew Tee Stall. In a letter to the first respondent's solicitors dated 15 April 2005, the appellant's then solicitors alleged that the appellant had validly terminated the Agreement pursuant to a tie-up arrangement entered into between the parties ("the Tie-Up Arrangement").

11 The Tie-Up Arrangement concerned an oral agreement allegedly entered into between the appellant and the first respondent, whereby the former would grant a licence to the first respondent to operate the Yew Tee Stall provided the first respondent took up a concurrent lease of the Sungei Kadut Stall. According to the appellant, in consideration of the first respondent taking up a concurrent lease of the Sungei Kadut Stall, the appellant also agreed to the Licence Fee Cap on the Yew Tee Stall. More importantly, the termination of business at the Sungei Kadut Stall by the first respondent entitled the appellant to terminate the licence in respect of the Yew Tee Stall without any further negotiation and/or to lift the Licence Fee Cap.

12 The first respondent vehemently denied the existence of the Tie-Up Agreement and brought an action against the appellant seeking the following reliefs:

(a) damages in the sum of $204,914.98 for repudiation of the Agreement in respect of the period 16 April 2005–21 August 2006;

(b) an account of the sales proceeds collected by the appellant from the Yew Tee Stall for the period 1 March 2005–15 April 2006 after deduction of the relevant charges under cl 7.7 of the Agreement;

(c) a refund of the security deposit of $18,000;

(d) the sum of $30,574.73, being the overcharged licence fees in respect of the Yew Tee Stall for the period from February 2004 till February 2005;

(e) damages for conversion of the equipment, goods and effects which the first respondent had brought to the Yew Tee Stall in connection with his business; and

(f) interest and legal costs.

As mentioned earlier (at [2] above), the second respondent was subsequently joined as a co-plaintiff to the first respondent's suit.

13 The appellant in turn counterclaimed for the sum of $31,201.45 which it claimed was owing in respect of the Sungei Kadut Stall.

The decision below

14 The trial judge ("the Judge") found in favour of the respondents (see [3] above). Central to his decision were two issues which he resolved in the respondents' favour. First, he held, *inter alia*, that the appellant had wrongfully repudiated the Agreement as the appellant's case at the trial in relation to the Tie-Up Arrangement was riddled with inconsistencies. He reasoned that, considering that the appellant had access to lawyers at all material times (see [37] of the Judgment):

> [O]ne would have expected that the most fundamental terms amongst the [Tie-Up Arrangement] would be reflected in the contractual documents. Inexplicably, they were not.

15 Second, the Judge had to consider whether the respondents had the requisite *locus standi* to sue for the alleged losses claimed in the action. This issue arose in the course of the trial when it transpired that the first respondent might not be the owner of the business at the Yew Tee Stall. This resulted in the first respondent applying to join the second respondent in the action as his undisclosed principal (which application the Judge allowed). The statement of claim was accordingly amended by the inclusion of the following paragraph:[note: 2]

> 19A. The [first respondent] (as agent for the [second respondent], an undisclosed principal) is the proper party to sue and [is] entitled to claim for all the losses set out above. If, which is denied, the [first respondent] is not the proper party to sue for the losses claimed in this Statement of Claim, and/or such losses are not the [first respondent's] losses, the [second respondent] maintains all the said claims and relief.

16 Subsequently, a further complication arose when the Judge found that the second respondent was not the owner of the business at the Yew Tee Stall either. Faced with this predicament, the Judge held that the first respondent had acted as an agent for an undisclosed principal. He explained (at [65] of the Judgment):

> I believe that the essence of [the first respondent's] claim, which is that he is the agent of some undisclosed principal, remains intact whether or not it is shown that [the second respondent] in particular is that principal. To read the pleadings in this broad manner would not cause injustice to [the appellant] in regard to liability as that has been determined purely on the basis of the contract between [the first respondent] and [the appellant].

This led the Judge to embark on a detailed discussion on the law relating to an undisclosed principal, dealing mainly with the question of whether the first respondent could claim for losses that were not suffered by him personally but only by the undisclosed principal. The Judge held in the affirmative.

17 Having decided these two issues in favour of the respondents, it followed, almost as a matter

of course, that the Judge ultimately found in favour of the respondents.

The issues on appeal

18 The appellant appealed, *inter alia*, against the following aspects of the Judge's decision:

(a) that the appellant had wrongfully repudiated the Agreement;

(b) that the first respondent, as the contracting party and agent for an undisclosed principal, was legally entitled to claim damages arising from the appellant's repudiation of the Agreement; and

(c) the costs awarded.

In our view, these stated issues could be resolved into two main issues, which we will deal with in the following sequence:

(a) whether the Judge's findings of fact in respect of the appellant's repudiation of the Agreement were correct; and

(b) if those findings were correct, whether the respondents had the requisite *locus standi* to sue for damages arising from such repudiation.

Our decision

Whether the appellant had wrongfully repudiated the Agreement

19 In respect of whether the appellant had wrongfully repudiated the Agreement, counsel for the appellant, Prof Tan Cheng Han SC ("Prof Tan"), in the course of his oral submissions, made several points suggesting that the Judge had not arrived at the right inferences of fact in this regard. He argued that the evidence showed that the first respondent had initially approached the appellant with the intention of entering into a licence agreement for the Yew Tee Stall alone. However, the first respondent decided to enter into a tenancy agreement for the Sungei Kadut Stall as well. Prof Tan submitted that it was logical to infer from this that, although the first respondent had not been keen on operating the Sungei Kadut Stall, he had nevertheless commenced operations there because the appellant had promised to grant him a licence for the Yew Tee Stall if he agreed to operate the Sungei Kadut Stall. Prof Tan went on to refer to the failure on the first respondent's part to respond to the appellant's letter dated 15 August 2003 (see [8] above) as an indication that there was some truth in the arrangement set out in that letter.

20 Counsel for the respondents, Mr Harpreet Singh Nehal SC ("Mr Singh"), argued, on the other hand, that the burden of proving that the Judge's findings of fact were plainly wrong based on the totality of the evidence available rested on the appellant, and that the appellant had failed to discharge that burden. Mr Singh pointed to inconsistencies arising from the appellant's version of the facts at the trial. The appellant had alleged, *inter alia*, that the discussion concerning the licences for the Sungei Kadut Stall and the Yew Tee Stall respectively had occurred concurrently and that, sometime in January 2003, an oral agreement (*ie*, the Tie-Up Arrangement) had been reached whereby, among other things, the appellant was entitled to terminate the licence of the Yew Tee Stall if the first respondent ceased operations at the Sungei Kadut Stall. Mr Singh submitted that the fundamental problem with this version was that the terms of the Tie-Up Arrangement were nowhere to be found in any of the contractual documents. One would, he argued, have expected such crucial

terms to be reflected in at least one contemporaneous document. An obvious example was the Tenancy Agreement, which had been prepared by the appellant: Mr Singh pointed out that no credible explanation had been proffered by the appellant as to why there was no mention of the existence and/or the terms of the Tie-Up Arrangement in that document.

21 Since the case put forth by the appellant was that it was entitled to terminate the Agreement pursuant to the Tie-Up Arrangement, the onus was on the appellant to prove the existence of the latter. As Prof Jeffrey Pinsler SC pointed out in his book, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed, 2003), at pp 250–251 with regard to the burden of proof in civil cases:

> If the defendant raises defences or exceptions to liability which are refuted by the plaintiff, these will be facts in issue which the defendant is required to prove to the requisite standard. … [I]f the defendant has the legal burden to establish a defence, he would have to do so by adducing evidence showing the defence on a balance of probabilities ...

22 We found that the evidence presented by the appellant was not strong enough to show that the Judge was wrong in arriving at his conclusion that the appellant had wrongly repudiated the Agreement. The reasoning of the Judge on this particular issue was both logical and persuasive. We were therefore of the view that the parties had not entered into the Tie-Up Arrangement and that the appellant had wrongfully repudiated the Agreement.

Whether the respondents had the requisite locus standito sue

23 The other main issue at the trial was who the actual owner of the business at the Yew Tee Stall was. The Judge held that the first respondent was not the owner and had instead acted as an agent for the undisclosed owner when he entered into the Agreement, but, for the purposes of the respondents' suit, it was not necessary to identify the undisclosed principal as that was immaterial to the question of damages (see the Judgment at [65]; see also above at [16]). With respect, we found both conclusions surprising.

24 As regards the first, the Judge had in fact observed (at [70] of the Judgment) that:

> The evidence shows that [the first respondent] owns or operates a chain of duck rice stalls in Singapore as well as several duck supply related companies, including Yu Kee Management Pte Ltd, Yu Kee Duck & Noodle House Pte Ltd and Yu Kee Retail Pte Ltd. Of the many stalls, some are owned by private limited companies of which [the first respondent] and/or [the second respondent] are shareholders and others are sole proprietors under [the first respondent's] or [the second respondent's] name.

He also observed thus (*id* at [71]):

> It is evident that the arrangements between [the first respondent] and [the second respondent] in relation to the business they ran were highly convoluted. The informal nature of these arrangements was reflective of the fact that this was a relatively small family business rather than a large corporation.

Having also observed that "the true owner of [the business at] the Yew Tee [S]tall [was] very likely to be [the first respondent] and [the second respondent] under a different legal persona" (*id* at [93]), he said (*id* at [99]):

> In the instant case, it would have been clear to [the appellant] even from the start that breaching the [Agreement] in the manner it did would inflict such manner of damages upon the person whom the [Agreement was] designed to benefit. [The appellant] may have thought it was [the first respondent] personally who would suffer such losses; it turned out that it was not [the first respondent] but his undisclosed principal. But it cannot be said that the losses were not in the contemplation of [the appellant] when it entered into the [Agreement]. This case turns on the fact that [the appellant] knew that it was dealing with a family business unit and those losses would be suffered by that unit.

25 In our view, these observations clearly indicated that the first respondent had contracted with the appellant as a "family business unit" (*ibid*) in the sense that he had merely been using different names for different entities to carry on the business of his family. The business was really his. Indeed, that this was what the first respondent had tried to convey to the court below could be seen in his answers when cross-examined by the appellant's counsel on this issue, as follows:[note: 3]

Q Now, in respect of stalls listed under items 1 to 24, can you confirm that none of these stalls are owned by you in your personal capacity?

A The rest are owned by private limited companies and *I'm a shareholder of these companies.*

Q Okay. So what about Choa Chu Kang, the stall at Choa Chu Kang, Yew Tee? Yew Tee. This Yew Tee stall, is it owned by your company also or –

A Yes.

Q So it's owned by your company, not owned by you? The Yew Tee stall lah. Company?

A Yes.

Q Which company? Which company own [*sic*] Yew Tee stall?

A Yes, it's owned by Boon Lock Noodle House and this noodle house is registered in both my name and my wife's name.

Q Okay.

[emphasis added]

26 In our view, the Judge should have found, since there was ample evidence on which he could have done so, that there was no undisclosed principal and that the first respondent had in fact acted for himself when he signed the Agreement. As a matter of principle, the court should not accept a situation where, as in this case, the appellant is allowed to allege that the first respondent is not the principal, but it (the appellant) cannot identify who the principal is. In such a situation, the court should reject the allegation and find the first respondent to be the only licensee (and, hence, the principal) under the Agreement. In our view, there can be no halfway house as was decided in the court below. The situation should not be any different from that where a plaintiff alleges that he entered into an agreement as an agent acting for an undisclosed principal. When such a plaintiff sues for breach of the agreement and claims damages for his undisclosed principal, he must identify the principal.

27 Accordingly, in our view, this case should have been decided on a simple finding of fact that the first respondent was the only party to the Agreement *vis-à-vis* the appellant. Such a finding would have made it unnecessary for the Judge to consider the question of whether the first respondent could sue the appellant for damages suffered by an undisclosed and unidentifiable principal.

The legal position if there had been an undisclosed principal

28 As we have mentioned earlier (see [16] and [23] above), the Judge held that the first respondent was entitled to sue the appellant for losses suffered by his undisclosed principal. Although, given the views which we have expressed in the preceding paragraph, it is not necessary for us to consider the law in this respect, we think that it is desirable for us to summarise the current legal position under the common law as decided by the English courts. This is an area of law that is complex and thorny, and the last word on it, as we shall see (especially at [56] below), has not been laid down by either the English courts or our courts. Indeed, there is a dearth of case law in the local context, save for the leading decision of this court in *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484 ("*Prosperland (CA)*"), which we will discuss in more detail below.

The doctrine of the undisclosed principal

29 The doctrine of the undisclosed principal is described by Prof M P Furmston in *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) ("*Cheshire, Fifoot and Furmston*"), as follows (at pp 575–576):

> [I]f A has made a contract with B, C may intervene and take A's place if he can show that A was acting throughout as his agent, and it is irrelevant that B entered into the contract in ignorance of this fact.

This intervention by C, the undisclosed principal, has been heavily criticised as it offends against many contractual principles, including (most notably) the principle of privity of contract. Yet, the undisclosed principal has become a familiar (and, more importantly, an established) concept in the law of agency. It is now well accepted as a general principle that the undisclosed principal *can* sue and be sued on a contract made by its agent, although it is not a party to the contract (see the decisions of this court in *Hongkong & Shanghai Banking Corp v San's Rent A-Car Pte Ltd* [1994] 3 SLR 593 at 599–600, [23] and *The Rainbow Spring* [2003] 3 SLR 362 at [24], where the doctrine of the undisclosed principal was endorsed locally). This unique state of affairs with regard to the doctrine of the undisclosed principal is well summarised by F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) ("*Bowstead and Reynolds*") at para 8-071 as follows:

> The proposition that such a principal, someone of whose existence or connection with the transaction the third party was totally unaware, can in appropriate circumstances sue and be sued on a contract made by his agent may be surprising, but is well established. … Such a conclusion is certainly difficult to accommodate within standard theories of contract, which emphasise, even though under objective criteria, the consent of the parties. … It is difficult to deny that the undisclosed principal is really a third party intervening on a contract which he did not make …
>
> If it [*ie*, the doctrine of the undisclosed principal] were treated as an exception to the rules [on] privity of contract, the doctrine would still be unusual, since the third party is not mentioned, nor indeed contemplated by one of the parties, and furthermore takes liabilities as well as rights. …

> The doctrine is probably best explained simply as one of commercial convenience, and its justice is disputable.

Essentially, the doctrine comes into play "[w]here an agent, having authority to contract on behalf of another, makes the contract in his own name, concealing the fact that he is a mere representative" (see *Cheshire, Fifoot and Furmston* at p 621).

30 The undisclosed principal has also been described, albeit in a slightly different manner from the perspective of the third party, by Prof G H L Fridman in *The Law of Agency* (Butterworths, 7th Ed, 1996) ("Fridman"), as follows (at p 253):

> An undisclosed principal is one of whose existence the third party is unaware, so that the third party does not know that the person with [w]hom he is dealing is anybody's agent. As far as he is concerned, the agent is really a principal, dealing on his own behalf, and in his own name, with the third party.

The existence of the principal does not have to be known by the third party, and the third party has no obligation or duty to inquire as to whether there is an undisclosed principal (see, for example, *Butterworths Common Law Series: The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 2nd Ed, 2003) ("*Butterworths Common Law Series*") at para 6.19 as well as Fridman at p 253). Since the third party is of the view that he is dealing only with the agent, and since the agent does not contract in a representative capacity, the agent clearly assumes personal liability under the contract. So long as the agent executes a deed or enters into a contract in his own name, he is personally liable upon it, regardless of whether he discloses the name and the existence of his principal (see *Butterworths Common Law Series* at para 6.160). Therefore, the agent can sue or be sued on the agreement since the agent contracts personally in the situation of an undisclosed principal and the principal's existence is, *ex hypothesi*, unknown to the third party (see the Privy Council decision of *Siu Yin Kwan v Eastern Insurance Co* [1994] 2 AC 199).

Whether an agent can recover substantial damages for losses suffered by his undisclosed principal

General observations

31 The primary question is whether an agent can claim substantial damages for losses suffered, not personally by him, but only by his undisclosed principal who has not intervened. This question is especially important when viewed from the perspective of justice and fairness as a negative answer could result in the party who breached the contract ("the defendant/promisor") escaping with, in effect, no legal liability (save, perhaps, for nominal damages) – in other words, as Lord Keith of Kinkel put it graphically in the House of Lords decision in the Scottish case of *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* (1982) SLT 533 ("*GUS Property Management*") at 538, the claim of the party injured by the breach of contract ("the plaintiff/promisee") "would disappear … into some *legal black hole*, so that the wrongdoer escape[s] scot-free" [emphasis added]. Implicit in the question raised is the difficulty that the plaintiff/promisee – where he is the agent of an undisclosed principal – faces in seeking to recover substantial damages. This difficulty has been aptly stated as follows (see *Bowstead and Reynolds* ([29] *supra*) at para 9-013):

> The fact that the agent of the *undisclosed* principal appears to be and is regarded as a party to the contract can raise serious problems in the law of damages. The agent can certainly sue for specific performance, at any rate in his own favour: but if he sues for damages he may be met by the fact that in general the victim of a breach of contract (or indeed a tort) can in general only

recover his own loss. [emphasis in original]

To this end, the English courts have formulated *two exceptions*, which we will refer to as "the narrow ground" and "the broad ground" respectively, to the general rule that the plaintiff/promisee can only recover nominal damages for a breach of contract where it has suffered no loss (for instance, where the substantial loss is suffered by the third party who is the intended beneficiary of the contract). These exceptions may possibly avail the agent (who is the plaintiff/promisee) in a situation involving an undisclosed principal. The narrow ground permits the plaintiff/promisee to recover substantial damages on behalf of *the third party*. In *contrast*, the broad ground permits the plaintiff/promisee to recover substantial damages for its own benefit on the basis that it is recovering for *its own* loss. "Substantial damages" in this context simply means damages which are more than nominal damages. It should also be noted that it may be a misnomer to describe the broad ground as an "exception" since it is in fact consistent with the basic rationale of contract law.

32 Both the narrow ground and the broad ground (collectively referred to as "the two exceptions") figured prominently in two House of Lords decisions (*viz*, *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 ("*Linden Gardens*") and, more recently, *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*")), as well as in the English Court of Appeal decision of *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 ("*Darlington*").

The two exceptions

(1) Overview

33 As already mentioned (at [32] above), the two exceptions were considered in, *inter alia*, *Linden Gardens*, *Darlington* and *Panatown*. They are not new. Indeed, as we shall see, the narrow ground can be traced as far back as 1839 to the English decision of *Williams Dunlop v George Anthony Lambert* (1839) 6 Cl & Fin 600; 7 ER 824 (commonly cited as *Dunlop v Lambert*) ("*Dunlop*"). Its more modern restatement is to be found in the House of Lords decision of *The Albazero* [1977] AC 774, which we will be considering in a moment (see especially [36] below; see also generally Norman Palmer & Gregory Tolhurst, "Compensatory and Extra-compensatory Damages: The Role of the 'The Albazero' in Modern Damages Claims" (1997) 12 JCL 1 (Part I) and (1997) 12 JCL 97 (Part II)).

34 The broad ground constitutes an integral part of the common law of contract where protection of the performance interest – *ie*, the plaintiff/promisee's interest in the contract being performed and (consequently) his receiving the benefit which he had contracted for – is concerned. It is a relatively recent development which can be traced to the influential judgment of Lord Griffiths in the House of Lords decision of *Linden Gardens*, where the two exceptions were discussed in some detail. The subsequent English Court of Appeal decision of *Darlington* not only *endorsed* the *broad* ground, but *also extended* the *narrow* ground. This extension of the narrow ground appears to have been endorsed in *Panatown*, which, as the current leading decision in this area of the law, has been the subject of much learned academic commentary (see, in particular, Prof Ewan McKendrick, "The Common Law at Work: The Saga of *Alfred McAlpine Construction Ltd v Panatown Ltd*" (2003) 3 OUCLJ 145 ("The Common Law at Work"), which is an expanded and revised version of an inaugural lecture delivered at the University of Oxford on 4 March 2002).

(2) The first exception: the narrow ground

35 The narrow ground is (as mentioned above at [33]) of rather ancient origin, having its roots in the context of *the carriage of goods*, and is commonly known as "the rule in *Dunlop v Lambert*"

(referring to the seminal decision of *Dunlop* ([33] *supra*)). It has since been restated in *The Albazero* ([33] *supra*), and was extended in *Linden Gardens* ([32] *supra*) , *Panatown* ([32] *supra*) and (especially) *Darlington* ([32] *supra*) to the context of *construction contracts*.

36 From a strictly historical perspective, the rule in *Dunlop v Lambert* is flawed inasmuch as it is now clear that the court in *Dunlop* did not intend to state that rule in the way that it has now come to be understood (see, for example, Brian Coote, "*Dunlop v Lambert*: the Search for a Rationale" (1998) 13 JCL 91; *The Albazero*, especially at 844 *per* Lord Diplock; as well as *Panatown*, especially at 523–529 (*per* Lord Clyde) and 563–565 (*per* Lord Jauncey of Tullichettle)). However, as alluded to above (at [35]), this rule has since been given its modern imprimatur and restatement in *The Albazero* – in particular, in the oft-cited words of Lord Diplock, as follows (*id* at 847):

> The only way in which I find it possible to rationalise the rule in *Dunlop* v. *Lambert* so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance upon goods, that in *a commercial context* concerning goods where it is *in the contemplation of the parties* that *the proprietary interests* in the goods *may be transferred from one owner to another after* the contract has been entered into *and before* the breach which causes loss or damage to the goods, *an original party to the contract*, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into. [emphasis added]

3 7 It will be seen that the rule in *Dunlop v Lambert* (as restated by Lord Diplock in the above quotation) is a *very specific one, surrounded by very specific and clear parameters as well as prerequisites*. It may be noted that this classic formulation was cited by this court in *Prosperland (CA)* ([28] *supra*) at [12].

38 However, notwithstanding the very specific parameters in which the narrow ground was confined via Lord Diplock's formulation in *The Albazero* ([33] *supra*), it was nevertheless *extended* in another House of Lords decision – namely, *Linden Gardens* ([32] *supra*) – to the *construction context*. In that case, Lord Browne‑Wilkinson observed thus (at 114–115):

> In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation [the plaintiff/promisee] and McAlpine [the defendant/promisor], was *going to be occupied, and possibly purchased, by third parties* and not by Corporation itself. Therefore it could be *foreseen* that damage caused by a breach would *cause loss to a later owner and not merely to the original contracting party*, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and [who] might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it." [emphasis added; emphasis in original omitted]

39 The narrow ground was extended *even further* in *Darlington* ([32] *supra*), where it was applied (also in the construction context) even though proprietary interest in the contractual subject matter in that case had always been vested in – and remained with – the third party (and not the plaintiff/promisee). This extension was endorsed by the House of Lords in *Panatown* ([32] *supra*), although the majority held that the narrow ground did not apply on the *particular facts* of the case. Lord Browne‑Wilkinson also described the narrow ground in that case, taking the hypothetical scenario of the plaintiff/promisee (referred to as "A" in the quotation below) contracting with the defendant/promisor ("B") for the erection of a building on land which, as at the date of the contract, belonged to A but which, before the date of the breach, was transferred to the third party ("C"), as follows (at 575):

> The [narrow] ground starts by accepting the basic proposition that A, not owning the land at the date of breach, can show no compensatable loss and therefore no substantial damage suffered by A. However, the majority of the members of the Committee extended the reasoning in *The Albazero* … to cover the case so as to hold that where A enters into a contract with B relating to property *and it is envisaged by the parties that ownership of that property may be transferred to a third party, C, so that the consequences of any breach of contract will be suffered by C, A has a cause of action to recover from B the loss suffered by C. However, two points* are clearly established by the decision in both *The Albazero* and the *St Martins* case [*ie*, *Linden Gardens*]. *First, A is accountable to C for any damages recovered by A from B as compensation for C's loss*: *The Albazero*, at p 888D. *Second, the exceptional principle does not apply (because it is not needed) where C has a direct remedy against B*: see the *The Albazero*, at p 848, and the decision itself which, whilst recognising the exception, held that it did not apply to that case since the consignee of the goods had a direct claim; *St Martins* case ... [at] 115E–F. [emphasis added]

40 The restatement by Lord Browne‑Wilkinson set out in the preceding paragraph is very similar to his statement (again of the narrow ground) in *Linden Gardens* (reproduced above at [38]) (it should be noted that Lord Millett's formulation of the narrow ground in *Panatown* at 583 was likewise in similar terms). This is significant because, despite the apparent endorsement in *Panatown* of the extension made to the narrow ground in *Darlington*, this particular restatement by Lord Browne‑Wilkinson in *Panatown* (as reproduced in the preceding paragraph) *still* appears to endorse the key elements which were first stated by Lord Diplock in *The Albazero* ([33] *supra*) and subsequently reiterated (albeit in an extended context) by Lord Browne‑Wilkinson in *Linden Gardens* (as set out at [38] above) – in particular, it emphasises the requirement that "it [be] *in the contemplation* of *the parties* that *the proprietary interests* in the goods *may be transferred from one owner to another after* the contract has been entered into *and before* the breach which causes loss or damage to the goods" [emphasis added] (*per* Lord Diplock in *The Albazero* at 847 (see the quotation reproduced at [36] above)).

41 Turning to the other elements of the narrow ground, it is important to note the condition that the plaintiff/promisee, where it recovers substantial damages which represent the *third party's* loss, *must account to* the third party for such damages (see, for example, *Panatown* at 532 (*per* Lord Clyde), 544 (*per* Lord Goff of Chieveley), 575 (*per* Lord Browne‑Wilkinson) and 579 (*per* Lord Millett)).

42 Finally, it is also important to note that the *rationale* underlying the rule in *Dunlop v Lambert* (from which the narrow ground is derived (see [35] above)) is to ensure that, in the words of Lord Keith in *GUS Property Management* ([31] *supra*) at 538 (reproduced at [31] above), there is no "legal black hole" into which the plaintiff/promisee's claim disappears (see also *Panatown* ([32] *supra*) at 529 *per* Lord Clyde). Put simply, there would be such a legal black hole if the plaintiff/promisee

were allowed to claim only nominal (as opposed to substantial) damages, whilst the third party is disallowed from recovering damages on the basis that it is not privy to the contract between the plaintiff/promisee and the defendant/promisor.

43 Of course, the legal black hole itself will cease to exist if the third party is given a direct cause of action against the defendant/promisor (see *The Albazero* ([33] *supra*) at 847–848 *per* Lord Diplock, *Linden Gardens* ([32] *supra*) at 115 *per* Lord Browne‑Wilkinson and *Panatown* at 575 (reproduced above at [39])). Indeed, this was the crux of the majority's decision in *Panatown*, where the duty of care deed entered into between the defendant/promisor and the third party ("the DCD") was found to constitute precisely such a direct cause of action.

44 The *scope* of this particular qualification – *ie*, the inapplicability of the rule in *Dunlop v Lambert* where the third party has a direct cause of action against the defendant/promisor – which is, in fact, also the scope of the applicability of the narrow ground, was considered recently by this court in *Prosperland (CA)* ([28] *supra*) (see also the commentary on the case in Alexander F Loke, "The 'Broad Ground' and the Not-so-narrow Ground in Singapore: *Chia Kok Leong v Prosperland Pte Ltd*" (2007) 23 JCL 148 ("The 'Broad Ground' and the Not-so-narrow Ground in Singapore")). In *Prosperland (CA)* itself, the narrow ground (*inter alia*) was applied. In that case, the developer of a condominium ("Prosperland") sued the building contractor ("Civic") and the architects (collectively referred to as "the Defendants") for damages for breach of contract and/or negligence in connection with the construction of the condominium. At the time of the action, Prosperland did not have any interest in the development as it had sold all the condominium units and the common property had vested in the relevant management corporation of the condominium ("the MCST"). Prosperland had also not incurred the costs of rectifying the defects in the condominium in respect of which its claim was brought; nor had it been sued by the MCST in respect of the defects (see the decision at first instance, *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129 ("*Prosperland (HC)*"), at [59]; see also *Prosperland (CA)* at [5]). The defence was therefore, *inter alia*, that Prosperland had suffered no loss and was not entitled to recover substantial damages arising from the breach of contract, although it had the contractual right to sue as it was the party who had contracted with the Defendants for the construction of the condominium (see *Prosperland (HC)* at [59]).

45 At first instance, Judith Prakash J, after a careful examination of the English authorities, held that Prosperland was entitled to sue the Defendants for substantial damages. She acknowledged that the legal position in Singapore on the correct principle to be applied to the specific instance before her was still open, but she preferred the broad ground and, in fact, held the Defendants liable for substantial damages on that ground (*id* at [64]). Prakash J further held, alternatively, that Prosperland's claim fell within the narrow ground (*id* at [64]–[65]), and rejected the Defendants' contention that the Court of Appeal's decisions in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 ("*Ocean Front*") and *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v MCST Plan No 1075* [1999] 2 SLR 449 ("*Eastern Lagoon*") had provided the MCST with an action in tort against the Defendants, such that there was no legal black hole that required the application of the narrow ground to prevent injustice. The learned judge reasoned as follows (see *Prosperland (HC)* at [64]):

> In the alternative, I also think that, as submitted by Prosperland, its situation does fall within the narrow ground enunciated by Lord Browne‑Wilkinson in *St Martins* [*ie*, *Linden Gardens* ([32] *supra*)] and the majority in *Panatown*. The [D]efendants argued that because of the decisions of our Court of Appeal in … *Ocean Front* … and … *Eastern Lagoon* … and the powers vested in [the MCST] by s 33(2) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed), the MCST could maintain an action in tort against Civic and the architect[s]. Thus, there was no legal black hole that required the application of *The Albazero* exception to prevent injustice. I would point out,

however, that unlike the situation in [the] *St Martins* case, the remedy which the [D]efendants here are relying on is not a remedy which they themselves had provided to the MCST by way of a bond or other enforceable undertaking. They are relying on a tortious remedy which requires the establishment of negligence and this is something which may limit recovery as not all breaches of contract are negligent. Further, the tortious remedy may be defeated by defences (for instance, that the defective tiling was the work of an independent subcontractor, or that the glass blocks were supplied by a reputable manufacturer and met specifications except for the existence of latent defects that were not discoverable at the time of installation) that are not available to a party who defends an action for breach of specified contractual obligations. If Prosperland is not permitted to sue Civic and the architect[s] for their respective breaches of contract, the latter may very well escape having to make compensation for loss which they have caused.

46 Civic did not appeal against Prakash J's decision, but the architects did. On appeal, the architects (again) argued that Prosperland could not sue them for substantial damages as it had not suffered any loss, and as the MCST had, following *Ocean Front* and *Eastern Lagoon*, a direct remedy in tort against them. This court similarly rejected this argument and upheld Prakash J's decision in respect of the narrow ground for the following reasons (see *Prosperland (CA)* ([28] *supra*) at [43]–[45]):

> 43 [T]he appellants relied on a statement of Lord Browne-Wilkinson in *St Martins* [*ie*, *Linden Gardens* ([32] *supra*)] (at 115) where he said that the *Dunlop v Lambert* exception provided "a remedy where *no other* would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it", emphasising in particular the words "no other". ***But immediately before this sentence, Lord Browne-Wilkinson was referring to the building employer being entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who "under the terms of the contract, could not acquire any right to hold [the contractor] liable for breach". It seems to us that Lord Browne-Wilkinson had in mind a contractual remedy***. [If] the person who in fact suffers the loss should eventually sue for the loss in tort, he would not be enforcing contractual rights. It would be for the more limited purpose of obtaining damages due to negligence. …
>
> 44 In *Panatown*, the majority of the law lords did not think that Panatown Ltd [the plaintiff/promisee in that case] should be permitted to claim for substantial damages because of the existence of the DCD [see [43] above]. In the context there, they felt that there was no legal black hole. The parties had addressed the question of UIPL [the third party], and its successors, having a remedy against McAlpine [the defendant/promisor], and had expressly provided for it by way of the DCD. ***As the DCD was an integral part of the contractual arrangement, there was really no room for the application of the [rule in] Dunlop v Lambert or The Albazero exception***.
>
> 45 In contrast, in our present case, there was no such deed emanating from Civic or the appellants in favour of any potential purchasers of the units in the condominium. The fact that under general law, following *Ocean Front* and *Eastern Lagoon*, the subsequent purchasers have a limited right to claim in tort against Civic and the appellants, cannot justify the taking away of the contractual rights of the building employer under *The Albazero* exception. ***Such a limited right does not remove the legal black hole completely. A claim in tort is not a "provision of a direct entitlement" and it is subject to establishing proximity and foreseeability and defences such as independent contractors. Thus, we agree with Prakash J [in Prosperland (HC)] that the present case falls within the narrow ground of the exception expounded by Lord Browne-Wilkinson in St Martins and affirmed by the majority of the***

House of Lords in Panatown. To deprive a building employer of *The Albazero* exception, there has to be an express contractual right in favour of [the] third party or something akin to it, as in the case of an indorsee of a bill of lading under the [Bills of Lading Act 1855 (c 111) (UK)].

[emphasis added in bold italics]

47 Two points are made patently clear from the above passage. First, the narrow ground is *only* applicable in the context of a *breach of contract*; specifically, where the person who suffers loss as a result of the breach of contract (*ie*, the third party) has no *contractual* remedy to recover substantial damages against the defendant/promisor (this point is, in fact, implicit in our discussion thus far above). It does not apply in every other (non-contractual) situation where a person sustains loss but has no recourse against the person who caused it. Second, an *alternative* cause of action in *tort* that may be available to the third party does not mean that the "legal black hole" mentioned at [31] above is eradicated or filled up. A claim in tort (subject to all the usual limitations and defences in tort) is not the same as a claim in contract, and, thus, the existence of an alternative cause of action in tort does not render the narrow ground inapplicable.

(3) The second exception: the broad ground

48 We have earlier mentioned (at [34] above) that the performance interest (sometimes also referred to as the "expectation interest" (see, *eg*, *Panatown* ([32] *supra*) at 546 *per* Lord Goff)), which lies at the very heart and soul of the broad ground, is an integral part of the common law of contract, and that it may be a misnomer to label the broad ground as an "exception". Proponents of the performance interest approach to claims for damages for breach of contract include Prof Daniel Friedmann (see "The Performance Interest in Contract Damages" (1995) 111 LQR 628); Prof Brian Coote (see "Contract Damages, *Ruxley*, and the Performance Interest" [1997] CLJ 537 ("Contract Damages") and "The Performance Interest, *Panatown*, and the Problem of Loss" (2001) 117 LQR 81 ("The Performance Interest")); I N Duncan Wallace (see "Third Party Damage: No Legal Black Hole?" (1999) 115 LQR 394 ("Third Party Damage")) and Prof McKendrick (see "The Common Law at Work" ([34] *supra*) in the specific context of *Panatown* ([32] *supra*)).

49 As mentioned earlier (likewise at [34] above), the broad ground first found expression in the judgment of Lord Griffiths in *Linden Gardens* ([32] *supra*). In that case, the learned law lord observed thus (at 96–97):

I cannot accept that in a contract of this nature, namely for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract is dependent upon the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach. In everyday life contracts for work and labour are constantly being placed by those who have no proprietary interest in the subject matter of the contract. To take a common example, the matrimonial home is owned by the wife and the couple's remaining assets are owned by the husband and he is the sole earner. The house requires a new roof and the husband places a contract with a builder to carry out the work. *The husband is not acting as agent for his wife, he makes the contract as principal because only he can pay for it. The builder fails to replace the roof properly and the husband has to call in and pay another builder to complete the work. Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by … [getting the second builder to complete] the roof repairs properly* … To put this simple example closer to the facts of this appeal – at the time the husband employs the builder he owns the house but

> just after the builder starts work the couple are advised to divide their assets so the husband transfers the house to his wife. This is no concern of the builder whose bargain is with the husband. If the roof turns out to be defective the husband can recover from the builder the cost of putting it right and thus obtain the benefit of the bargain that the builder had promised to deliver. It was suggested in argument that the answer to the example I have given is that the husband could assign the benefit of the contract to the wife. But what if, as in this case, the builder has a clause in the contract forbidding assignment without his consent and refuses to give consent [as was the case in *Linden Gardens*] ... It is then said that neither husband nor wife can recover damages; this seems to me to be so unjust a result that the law cannot tolerate it. [emphasis added]

50 Although the other law lords in *Linden Gardens* took a relatively more cautious approach in this regard, what, in substance, was a majority of the House of Lords in *Panatown* endorsed the broad ground. Both Lord Goff and Lord Millett (who were the dissenting minority in holding that the plaintiff/promisee in *Panatown* could recover substantial damages from the defendant/promisor notwithstanding the existence of the DCD (see [43] above)) clearly relied upon the broad ground for their respective decisions. Indeed, Lord Goff was of the view that Lord Griffith's approach in *Linden Gardens* was "*not* ... a departure from existing authority" [emphasis added] (see *Panatown* at 552), but was, instead, "a reaffirmation of existing legal principle" (*ibid*). Lord Goff added that he "[knew] of no authority which [stood] in its way" (*ibid*). In comparison, Lord Millett adopted a more cautious approach, and stated that the broad ground should be restricted to "building contracts and other contracts for the supply of work and materials where the claim [was] in respect of defective or incomplete work or delay in completing it" (see *Panatown* at 591). Lord Browne-Wilkinson *assumed* that the broad ground was "sound in law" (*id* at 577), although he disagreed with both Lord Goff and Lord Millett with respect to the application of that ground on the facts of the case; in particular, he was of the view that the existence of the DCD resulted in the plaintiff/promisee not having suffered any damage to its performance interest (*id* at 578). It should also be noted that whilst Lord Clyde and Lord Jauncey did not expressly disapprove of the broad ground, they adopted a much more restricted approach to the plaintiff/promisee's right to recover substantial damages. Lord Clyde was of the view that there must be an obligation on the part of the plaintiff/promisee to account to the third party for any damages awarded (*id* at 534), while Lord Jauncey was of the view that there could be no recovery where the plaintiff/promisee had "neither spent money in entering into the contract nor intend[ed] to do so in remedying the breach and ha[d] therefore suffered no loss thereby" (*id* at 574).

51 There thus appears, *on balance*, to be an *endorsement* of the broad ground in the *English* context. The broad ground has also been endorsed in the *Singapore* context both by Prakash J in *Prosperland (HC)* ([44] *supra*) at [64] (see [45] above) and, upon appeal from that decision, by this court in *Prosperland (CA)* ([28] *supra*) at [52] and [59]. Indeed, although this court decided in *Prosperland (CA)*, first, that the narrow ground applied (*id* at [33]–[45]; see also [46] above), it proceeded nevertheless to consider the broad ground and held that it applied "in principle" as well in that case (*Prosperland (CA)* at [59]). Chao Hick Tin JA, who delivered the judgment of this court in *Prosperland (CA)*, expressed the view that "the broad ground [was] probably more consistent with principle" (*id* at [52]). Strictly speaking, the views expressed by Chao JA in respect of the broad ground in *Prosperland (CA)* were *obiter*. It should also be noted that a significant factor which influenced this court's view as to why the broad ground should also (apart from the narrow ground) be of avail to Prosperland was that the MCST was, in fact, contemplating an action against Prosperland in respect of the defects in the condominium (*id* at [58]):

> *[T]here is evidence that the MCST intended to carry out the repairs and it was also looking towards Prosperland (the developer) for relief*. The MCST also expected Prosperland to carry out

> the rectifications. Moreover, there is evidence that Prosperland intended to use the damages recovered for that purpose. *Prosperland and the present owners of the condominium are related*. [emphasis added]

In other words, Prosperland was technically facing a potential claim for loss suffered by the MCST in respect of the defects in the condominium and was, in fact, prepared to make good those defects using the damages recovered in its suit against the Defendants. Thus, arguably, the "fact" that Prosperland had suffered no substantial loss was not entirely accurate.

52 Further, notwithstanding that the application of the broad ground to the facts of *Prosperland (CA)* did not, strictly speaking, form part of the *ratio decidendi* of that case, it is noteworthy that Chao JA reaffirmed the performance interest approach to contractual damages as the foundation of the broad ground, as follows (*id* at [53]):

> [T]he basis on which a plaintiff is entitled to claim for substantial damages under the broad ground is that he did not receive what he had bargained and paid for. It has nothing to do with the ownership of the thing or property. As to the value of this performance interest, it seems to us that the observation of Lord Scarman in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, that the fact that a contracting party has required services to be supplied at his own cost to a third party is at least *prima facie* evidence of the value of those services to the party who placed the order, is a useful pointer.

Hence, unlike the narrow ground, the broad ground is not concerned with filling up any legal black hole (see *Prosperland (CA)* at [55]):

> [T]he main ground upon which the appellants sought to argue that Prosperland could not claim for substantial damages was that, as the MCST was entitled to sue the appellants in tort, there was no legal black hole. It was also pointed out that if Prosperland were to be allowed to claim for substantial damages, it would expose the appellants to double liability. *In our opinion, these arguments miss the fundamental premise upon which the broad ground is based. It has nothing to do with the "filling up" of a legal black hole*. We can do no better than quote the following passage of Steyn LJ (as he then was) in *Darlington* … (1994) 69 BLR 1 at 24:
>
> > The rationale of Lord Griffiths' wider principle is essentially that if a party engages a builder to perform specified work, and the builder fails to render the contractual service the employer suffers a loss. *He suffers a loss of bargain or of expectation interest*. And that loss can be recovered on the basis of what it would cost to put right the defects.
>
> [emphasis added]

The fact that the broad ground is grounded in protection of the plaintiff/promisee's performance interest would mean that it applies only in the context of a breach of contract, just like the narrow ground (see [47] above), the key difference being (as mentioned at [31] above) that, under the broad ground, the plaintiff/promisee is recovering substantial damages for its *own* loss, and not on behalf of the third party. Thus, in *Prosperland (HC)*, although Prosperland's action against the Defendants was founded in contract and/or negligence (*id* at [4]; see also [44] above), it is clear from a reading of both the judgment of Prakash J and the judgment of this court (in *Prosperland (CA)*) that the passages therein relating to the two exceptions dealt only with the breach of contract by the Defendants.

53 It should further be noted that the performance interest claimed by the plaintiff/promisee

must be a genuine one (see, for example, the oft-cited English High Court decision of *Radford v De Froberville* [1977] 1 WLR 1262). In this regard, the court will apply an *objective* test of *reasonableness* to the performance interest claimed so as to curb what would otherwise be a windfall accruing to the plaintiff/promisee (see the leading House of Lords decision of *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 ("*Ruxley*")). There has hitherto been some controversy as to whether or not the plaintiff/promisee must demonstrate that it has an intention to utilise the damages sought to realise the performance interest which was the subject matter of the contract (see, for example, John Cartwright, "Damages, Third Parties and Common Sense" (1996) 10 JCL 244 at 253–254; "Contract Damages" ([48] *supra*) at 560–563; Alexander F H Loke, "Cost of Cure or Difference in Market Value? Toward a Sound Choice in the Basis for Qualifying Expectation Damages" (1996) 10 JCL 189 at 204–210; and "The Common Law at Work" ([34] *supra*) at 174–175; see also the observations of Lord Lloyd of Berwick in *Ruxley* (at 372) and those of Lord Goff, Lord Jauncey and Lord Millett in *Panatown* ([32] *supra*) at 556, 571 and 592–593, respectively). In *Prosperland (CA)* ([28] *supra*), Chao JA said (at [57]) in relation to this particular issue:

> A related matter raised is whether it must be shown by the building employer that he has already carried out the repairs or intends to do so before he is entitled to claim for substantial damages. *On the basis of the broad ground that a plaintiff recovers substantial damages for the loss in not getting what he contracted for, that should not be a prerequisite before such damages may be claimed*. If, for example, an owner of a house were to engage a contractor to erect a koi pond and it was so badly done that it was of no use and the owner decided to abandon the project, there is no reason why he must have proceeded with the repairs, or intended so to do, before he may claim for substantial damages. *At the end of the day, the entire circumstances of the case must be considered to determine whether the claim made was reasonable or was made with a view to obtaining an uncovenanted benefit*. [emphasis added]

The above approach is calculated to arrive at a just and fair result between the parties. How these principles are to be translated for application in an actual assessment of damages remains to be seen, with the precise facts concerned being (as mentioned above) of the first importance. Suppose, in the example given in *Prosperland (CA)* at [57], the contract value of the koi pond is $50,000, but the koi pond is so badly built that it has to be abandoned. The owner will recover his $50,000 for total failure of consideration. Presumably, he can also recover damages for loss of the enjoyment of keeping koi, and need not ask another contractor to construct another koi pond in order to recover such damages; otherwise, the original contractor would have an unmerited windfall (*viz*, not having to pay damages for the owner's loss of enjoyment). The question of the owner receiving "an uncovenanted benefit" (*per* Chao JA at [57] of *Prosperland (CA)*) would not arise as he would have lost the enjoyment of keeping koi.

54 Returning, more *generally*, to the objective test of reasonableness laid down in *Ruxley*, it is clearly a legal constraint on recovery by the plaintiff/promisee for loss of the performance interest. Indeed, writers have emphasised the role that this test can play as a legal control mechanism in so far as claims for loss of the performance interest are concerned (see, for example, "Third Party Damage" ([48] *supra*) at 404 and 410, and Alexander F H Loke, "Damages to Protect Performance Interest and the Reasonableness Requirement" [2001] Sing JLS 259, especially at 259–260 and 263–266).

55 It should, in fact, be pointed out that, apart from the principle of objective reasonableness laid down in *Ruxley*, the traditional legal control mechanisms relating to contractual claims would *also* apply, and these mechanisms are both general as well as significant. They include the principles of causation, remoteness of damage (as to which see also *Bowstead and Reynolds* ([29] *supra*) at para 9-013), mitigation of loss and the requirement of certainty of loss. It should be mentioned that,

in so far as the doctrine of remoteness of damage is concerned, this is separate and distinct from the element of contemplation or foreseeability contained in the narrow ground (see the passages quoted at [36], [38] and [39] above); to this extent, a learned author's attempt to correlate the broad ground with the first limb in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145 and the narrow ground with the second limb in that same case (see "Third Party Damage" at 396–397 and 406) is, with respect, erroneous.

(4) The relationship between the narrow ground and the broad ground

56 An extremely important point to emphasise is that the two exceptions, are *conceptually inconsistent* with each other (this is a point that has not gone unnoticed by either the Judiciary (see, for example, *Panatown* ([32] *supra*) at 587 (*per* Lord Millett)) or academics (see, for example, "The 'Broad Ground' and the Not-so-narrow Ground in Singapore" ([44] *supra*)). Hence, although the two exceptions are commonly discussed together in the same case (as in *Linden Gardens* ([32] *supra*) and *Panatown*, for instance), they *cannot apply simultaneously*. The crucial issue that arises, as a result, is whether – and, if so, how – the two exceptions can be *applied* in a *consistent and coherent* manner. To this end, there ought to be an objective legal point which, when reached, will result in the broad ground being applied in place of the narrow ground. One approach might be to stipulate that, in order for the narrow ground to apply, the plaintiff/promisee must originally have possessed a proprietary interest in the contractual subject matter, which interest was contemplated by the contracting parties as possibly being passed or transferred to a third party; if not, the broad ground would potentially apply. However, this approach would entail holding that the extension of the narrow ground in *Darlington* ([32] *supra*) was erroneous and should not be followed. Another possible approach is the principle of "transferred loss" suggested by Prof Hannes Unberath (see generally his book, *Transferred Loss: Claiming Third Party Loss in Contract Law* (Hart Publishing, 2003) ("*Transferred Loss*"), and, by the same author, "Third Party Losses and Black Holes: Another View" (1999) 115 LQR 535). Put simply, this particular principle is as follows (see *Transferred Loss* at p 192):

> In short this principle [*ie*, the principle of "transferred loss"] seeks to explain the cases *on the basis that the loss is suffered by a third party instead of the promisee by reason of a special relationship between [the] third party and [the] promisee.* The 'special relationship' is the key to understanding when it is appropriate to award damages on behalf of a third party and avoid the 'black hole.' It also helps to clarify the third party's rights as against the promisee. [emphasis added]

The principal difficulty with Prof Unberath's approach is that it would entail discarding the broad ground. As can be seen, the relationship between the broad ground and the narrow ground is a thorny legal problem. However, since it does not arise – as a live issue – before us in the present appeal, we will say no more about it at the present time. What *is* relevant is the applicability (if any) of the two exceptions in a situation involving an undisclosed principal.

Whether the two exceptions are applicable to a situation involving an undisclosed principal

57 The doctrine of the undisclosed principal (as described briefly at [29]–[30] above) is a well-established one, despite the fact that its origins are far from clear and continue to be the subject of academic commentary even today (see *Bowstead and Reynolds* ([29] *supra*) at para 8-071). The precise jurisprudential justification for the doctrine need not detain us in the present appeal. It is also important to note that the analysis which follows is premised on the doctrine of the *undisclosed* principal, as opposed to the doctrine of the *unnamed* principal (see generally F M B Reynolds, "Practical Problems of the Undisclosed Principal Doctrine" (1983) 36 CLP 119, especially at 120–122,

for an overview of the distinction between the two). This is an important point since, where the former doctrine applies, the very *existence* of the undisclosed principal would, *ex hypothesi*, be *unknown* to the defendant/promisor at the time it enters into the relevant contract with the plaintiff/promisee. In order to avoid possible terminological confusion, we will regard the undisclosed principal as the third party in the ensuing discussion, although, in common legal parlance in the context of the law of agency, it would be the defendant/promisor who would be referred to as the third party. For ease of exposition, we will also refer to the agent who is the plaintiff/promisee as the "plaintiff/agent".

(1) Applicability of the narrow ground

58 It will be recalled that the narrow ground applies where it is in the contemplation of the contracting parties that the proprietary interest in the contractual subject matter may be transferred from one owner to another after the contract has been entered into and before the breach occurs (see [36] and [40] above). As noted, however, in the preceding paragraph, in a situation involving an undisclosed principal, the very existence of the undisclosed principal would be unknown to the defendant/promisor (in the present case, the appellant, assuming that this appeal did involve an undisclosed principal). It follows, therefore, that the narrow ground would *not* be applicable. Indeed, how would it be possible to argue that the loss of the plaintiff/agent (here, the first respondent) is that of the third party (here, the alleged undisclosed principal) when the defendant/promisor (*ie*, the appellant) was not even aware that a third party existed in the first place? More specifically, it would be impossible for the contracting parties to have contemplated any transfer of the proprietary interest in the contractual subject matter simply because one of the parties (here, the appellant) was *totally unaware of the existence of the third party*. The present appeal is, in fact, a straightforward case in so far as the applicability of the narrow ground is concerned, and does not bring into play the various possible difficulties which we alluded to briefly (at [56] above) with respect to the relationship between this ground and the broad ground.

(2) Applicability of the broad ground

59 Notwithstanding the fact that the narrow ground is inapplicable in the present appeal (on the assumption that an undisclosed principal was indeed involved), this is not the end of the matter. The *broad* ground might still apply in order to enable the plaintiff/agent (here, the first respondent) to obtain substantial damages. However, *unlike* the narrow ground (which allows the plaintiff/agent to obtain substantial damages for the loss of the undisclosed principal (who is the third party)), the broad ground allows the plaintiff/agent to obtain substantial damages based, instead, on *its own* loss.

60 Before this court, Prof Tan argued against the application of the broad ground. He submitted that the undisclosed principal, if it wished to recover damages for loss which it had suffered, must sue in its own name (the doctrine of the undisclosed principal gives the principal a direct claim against the defendant/promisor (see [29] above)), and that the plaintiff/agent could not recover damages for what was essentially the principal's loss, relying, in the main, on *Panatown* ([32] *supra*) (see also Tan Cheng Han, "Undisclosed Principals and Contract" (2004) 120 LQR 480 at 486, fn 32). Prof Tan argued, further, that the defendant/promisor might be entitled to defences that could be raised against the undisclosed principal (*ie*, the third party) but not against the plaintiff/agent (but *cf* Fridman ([30] *supra*), especially at p 271). All this set the stage for what was, in effect, a potentially controversial application (in the context of the doctrine of the undisclosed principal) of legal principles (namely, those relating to the broad ground) that were *themselves* potentially controversial (see, for example, *Transferred Loss* ([56] *supra*), especially at pp 169–175 and *Bowstead and Reynolds* ([29] *supra*) at para 9-013).

61 Suffice it to say here that the state of law in this area is still very much in a state of flux, and that there are arguments both for as well as against the application of the broad ground in the context of an undisclosed principal. The main arguments against the application of the broad ground are already reflected in the arguments raised by Prof Tan in this appeal (see the preceding paragraph). On the other hand, a plausible argument for the application of the broad ground would be that, *unlike* the fact situation in *Panatown* – and this is a significant point – the law *mandates* that the *plaintiff/agent* (*as a fiduciary*) is *accountable* to the undisclosed principal for all damages recovered in an action brought in the plaintiff/agent's own name to enforce the contract on behalf of the principal (see, for example, *Alexander Corfield v David Grant* (1992) 59 BLR 102 at 111; *Garnac Grain Company Incorporated v H M F Faure & Fairclough Ltd* [1966] 1 QB 650 at 685; and *The World Era* [1992] 1 Lloyd's Rep 45 at 52). This being the case, it is clear that any damages recovered by the plaintiff/agent would have to be handed over to the undisclosed principal, and it is equally clear that the undisclosed principal cannot recover damages from the defendant/promisor twice over for the law clearly does not, as a matter of both principle and fairness, allow double recovery for the same loss. Thus, strictly speaking, no unfairness would arise in allowing a plaintiff/agent to recover substantial damages on the basis of the broad ground. Another argument for the application of the broad ground would be that there may be situations where the undisclosed principal *cannot* bring an action in its own name, such as when it is precluded from doing so by virtue of the terms of the contract between the defendant/promisor and the plaintiff/agent (see *Bowstead and Reynolds* ([29] *supra*) at paras 8–081 and 9–011). This may arise because the contract may contain an express term that the plaintiff/agent is the only party to it, or the plaintiff/agent could have impliedly contracted on the basis that he alone was the principal (such implication being derived from "the interpretation of words [in the contract] descriptive of the agent himself, and of the contract as a whole, that he [*ie*, the agent] alone answers the description in question") (*id* at para 8–081)). In such situations, the proposition to the effect that the plaintiff/agent should be entitled to recover substantial damages would, *a fortiori*, apply (in order to prevent, in effect, a legal black hole from occurring, although, arguably, the broad ground is only concerned with the protection of the performance interest (see [52] above)).

62 Notwithstanding the conflicting arguments both for as well as against the application of the broad ground in the context of an undisclosed principal, we are of the view that there is no need to determine conclusively which set of arguments should prevail and, in the process, descend into the legal controversy surrounding the application of the broad ground. The relevant rules of civil procedure render the potential difficulties *vis-à-vis* the extent of recovery of damages available to a plaintiff/agent a moot point in most cases in the light of the fact that these rules permit the court to order the undisclosed principal to be joined as a party to the proceedings if the latter chooses not to intervene of its own accord. Indeed, Prof Tan himself referred to the requirement of joinder, although (as can be seen from [60] above) this was not the main thrust as such of his arguments before this court. It is to these rules and their effect that our attention must now turn.

The procedural solution: joining the undisclosed principal as a party

63 If the undisclosed principal cannot be identified (which was the Judge's finding in the present case (see [16] above)), he cannot be joined as a co-plaintiff to the plaintiff/agent's action. However, assuming that the undisclosed principal is identifiable on the evidence, it seems obvious to us that, in order to do justice between the parties and to avoid a multiplicity of proceedings, the undisclosed principal should be made a party to the proceedings. Once the undisclosed principal has been made a party to the proceedings, the court will simply award to the undisclosed principal itself the *full* measure of damages that it is entitled to. The court has the power to order joinder under O 15 r 6(2) (*b*) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") (see *Singapore Supreme Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) ("*Pinsler*") at para 15/6/1, as well as

Singapore Civil Procedure 2007 (G P Selvam gen ed) (Sweet & Maxwell Asia, 2007) at para 15/6/2), whether or not the relevant parties have effected joinder under O15 r 4. Indeed, it may even be possible for the court to exercise the power of joinder pursuant to its *inherent jurisdiction*, albeit subject (not surprisingly) to the *strict* criterion of "*need*" [emphasis added] (see the decision of this court in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 4 SLR 25 at [27]; see also *Pinsler* at para 15/6/10). This simple procedural solution would obviate all the difficulties referred to above. Indeed, there would no longer be any need to invoke the broad ground in a situation involving an *identifiable* undisclosed principal.

64 The underlying purpose of O 15 r 6(2)(*b*) of the ROC is "to bring all parties to disputes relating to one subject matter before the court at the same time so that the dispute may be determined without the delay, inconvenience and expense of separate actions and trials" (*per* K S Rajah JC in the Singapore High Court decision of *Abdul Gaffar v Chua Kwang Yong* [1994] 2 SLR 645 (at 654–655, [48]) in the context of O 15 r 6(2)(*b*) of the Subordinate Courts Rules 1986, which is *in pari materia* with O 15 r 6(2)(*b*)(i) of the ROC). In a similar vein, Lai Kew Chai J observed, in the (also) Singapore High Court decision of *Lee Kuan Yew v Tang Liang Hong (No 1)* [1997] 2 SLR 819, as follows (at 822) in relation to O 15 r 6(2)(*b*) of the Rules of Court 1996 (which is likewise *in pari materia* with O 15 r 6(2)(*b*) of the ROC):

> In litigation it happens sometimes that issues or matters can arise which may affect the interest of a person who is not a party to the proceedings. *It is desirable that all issues and matters are adjudicated and determined in the same proceedings by adding all necessary parties who would thereafter be bound by a judgment. The joinder of a third party would prevent a multiplicity of proceedings.* In those circumstances, a procedure has been evolved to achieve those objectives. The procedure in the proceedings before me is provided under O 15 r 6(2)(b) of the Rules of Court 1996. [emphasis added]

In the Privy Council's decision in the Malaysian case of *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52, Lord Diplock, delivering the judgment of the Board, observed thus (at 55):

> In their Lordships' view one of the principal objects of the rule [*ie*, the then Malaysian equivalent of O 15 r 6 of the ROC] is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.

And, in *Prosperland (CA)* ([28] *supra*), Chao JA observed thus (at [56]):

> Clearly, if the court, in a particular case, should think it expedient or just, it could always, pursuant to O 15 r 6 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), join a third party to the proceedings (see *Panatown* at 561 and 596 *per* Lord Goff and Lord Millett respectively).

65 It should also be noted that if a person who has an interest in the proceedings decides not to be a party, he is bound by the court's decision in those proceedings and cannot seek to re-open the case. As Lord Penzance observed in the English High Court decision of *Wytcherley v Andrews* (1871) LR 2 P & D 327 at 328–329:

> [T]here is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the [courts] ... held, that if a person, knowing what was passing, was content to stand by and see

> his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the Court that everything has been done bon[a] fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.

Reference may also be made, in this regard, to the Singapore High Court decision of *Sheriffa Zeinab v Syed Hood Al Joffree* (1910) 2 MC 12.

66 In *Panatown* ([32] *supra*), Lord Millett (with whom Lord Goff agreed at 561) suggested (at 595) that, where the *undisclosed principal itself* wished to intervene, it should be allowed to do so, and, in such a situation, the court should normally stay the plaintiff/agent's action in order to allow the undisclosed principal to bring its own proceedings. In our view, this may not even be necessary given the scope of O 15 r 6(2)(*b*) of the ROC. There is no reason why the undisclosed principal should not simply be joined as a co-plaintiff with the plaintiff/agent. The effect would be that if the plaintiffs (*ie*, the undisclosed principal and the plaintiff/agent) are successful, they would only be entitled to recover the damages suffered by the undisclosed principal, but, if the defendant/promisor is successful, it would be entitled to costs against both plaintiffs. Further, if the defendant/promisor has a counterclaim against the plaintiffs and succeeds in its counterclaim, it is likewise entitled to damages against both plaintiffs (assuming, of course, that there is no double-recovery and subject to any other applicable legal limitations such as remoteness of damage and mitigation of loss).

67 What, then, about the situation where an undisclosed principal exists but this is not brought to the attention of the court? In such a situation, the plaintiff/agent would necessarily be treated as the *principal* and would therefore be awarded the full measure of damages accordingly (assuming that a breach of contract is proved). And, the undisclosed principal would be precluded from later re-opening the matter in accordance with the principles set out above (at [65]). This does not, however, preclude the undisclosed principal from asking the plaintiff/agent to account (as a fiduciary) for the damages recovered from the defendant/promisor (see [61] above).

Conclusion

68 For the reasons given above (at [21]–[22] and [25]–[27]), we dismissed the appeal with the usual consequential orders to follow.

69 On the question of costs, the bulk of the appeal was focused on a question of law, *viz*, whether an agent could recover substantial damages on behalf of his undisclosed principal if the former suffered no loss. However, given our finding that there was no undisclosed principal on the evidence, we ordered that, in so far as the costs of this appeal were concerned, each party should bear its own costs. However, we reserved the costs below and in connection with the assessment of damages to the discretion of the Judge.

[note: 1]See Exhibit "SBL-9" of the first respondent's affidavit of evidence-in-chief filed on 3 January 2006.

[note: 2]See "Statement of Claim (Amendment No 3)" filed on 18 July 2006 (at vol 2, pp 128–146 of the appellant's core bundle ("ACB")).

[note: 3]See ACB, vol 2 at pp 165–166.