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## Case Note

# REFORMULATING THE RULES ON DIRECTOR LIABILITY EXCLUSIONS IN *SAID V BUTT*

*PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* **[2018] 1 SLR 818**

In *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818, the court reformulated the rules concerning the imposition of personal liability on directors for breaches of contract by their companies. As the law now stands, directors are protected from personal liability for their companies' breaches of contract in so far as they had acted in their capacity as directors and had not breached any personal legal duties owed to their companies. However, the judgment left the position on personal liability for a company's tortious acts significantly different. This note argues that the position in tort should be brought in line with that for contract.

Jarret **HUANG***
*BA (Law) (Cambridge), LLM (Harvard).*

## I. Introduction

1 The bedrock of much of modern company law is the notion that a company has a separate legal personality distinct from that of its directors and members.[1] From this premise stems the ability of the company to hold property, sue or be sued, and enter into legally binding contracts. In the recent case of *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[2] ("*Sandipala*"), the Singapore Court of Appeal examined the law in this seminal area. Steven Chong JA, giving the judgment of the court, focused on the requirements of the *Said v Butt*[3] rule, under which directors could avoid personal liability for procuring breaches of contract by their companies.

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1 Tan Cheng Han, *Walter Woon on Company Law* (Singapore: Sweet & Maxwell, 3rd Ed 2014).

2 [2018] 1 SLR 818.

3 [1920] 2 KB 497.

2 Ultimately, affirming the robustness of the company's separate legal personality, the Court of Appeal held that directors would not be personally liable for breaches of contract by their companies so long as they had acted in their capacity as directors and were not in breach of any personal legal duties owed to their companies.[4] However, the court also affirmed existing case law holding that directors whose companies committed tortious acts would not be similarly protected from personal liability. The court, while noting the inconsistency, chose not to definitively pronounce on it.

3 In this context, this note seeks to outline the Court of Appeal's reasoning and clarification of the law on the personal liability of directors. It also hopes to make some contribution to the debate on personal liability of directors in a tortious context and the inconsistency with the position in contract. It will argue that (a) contractual privity is an inadequate reason for a jurisprudential division between tort and contract in this sphere; (b) on grounds of doctrine, policy and economic efficiency, directors should be in a similar position for tortious acts; and (c) the *Sandipala* test ought to be applied in tortious situations as well.

## II. Facts of case

4 PT Sandipala Arthaputra ("Sandipala"), an Indonesian company, entered into a supply contract with Oxel Systems Pte Ltd ("Oxel"), a Singapore company, for Oxel to supply Sandipala with microchips. These microchips were produced by STMicroelectronics Asia Pacific Pte Ltd ("ST-AP") and encoded with Oxel's software. Sandipala was to use the completed chips to produce physical electronic "e-KTP" identity cards for the Indonesian government.

5 Oxel's operating system, which had been encoded onto the chips, turned out to be incompatible with the Indonesian government's requirements. Sandipala thus refused delivery of around three-quarters of the microchips delivered and only paid for one-sixth of them. Sandipala sued ST-AP and Oxel for breach of contract for the incompatibility, and in tort for fraudulent misrepresentation. Oxel counterclaimed against Sandipala in contract for wrongfully rejecting the microchips, and against Sandipala and its directors, Tannos and his daughter, for conspiracy to cause Oxel loss by attempting to unlawfully extricate themselves from their contractual obligations without paying compensation.

4 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [65].

6 In the court below, George Wei J found, as a matter of fact, that Tannos (and by extension Sandipala) "knew at all times that the Oxel chips would not be compatible with the existing e-KTP system".[5] Sandipala had nonetheless ordered the Oxel microchips because Tannos had (wrongly) believed that he would be able to convince the Indonesian government to change their requirements. The learned judge thus dismissed all of Sandipala's claims and found that it had breached the supply contract by wrongfully declining receipt of the microchips. The judge also found, most pertinently for present purposes, that Sandipala and the Tannoses (in their capacity as directors) had unlawfully conspired to cause loss to Oxel by seeking to extricate Sandipala from the contract without compensating Oxel.[6]

7 On appeal, Sandipala challenged the findings that (a) it had been aware of the incompatibility from the very beginning; and (b) Oxel had not made fraudulent misrepresentations to it. In relation to Oxel's counterclaims, the appellants made two arguments: First, they averred that the Tannoses, as directors of Sandipala, were acting *bona fide* within the scope of their authority when directing Sandipala's breach of contract, and should thus not be personally liable. Second, they challenged the quantum of damages assessed on grounds of the contractual duty to mitigate.

## III. Court of Appeal's decision

8 The Court of Appeal dismissed all of the appellants' bases of appeal except with regard to the personal liability of the Tannoses as directors. The dismissed claims were fairly straightforward and fact-specific, with secret recordings of Tannos proving instructive in revealing his awareness of the incompatibility from the very beginning.[7] The bulk of the court's reasoning centred on the question of personal liability for directors.

### *A. Personal liability for company's breaches of contract*

9 The court opened its analysis by outlining the three potential causes of action under which directors may be held personally liable for the consequences of their company's breaches of contract:

5 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [20] (High Court decision at [2017] SGHC 102).

6 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2017] SGHC 102 at [215].

7 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [44].

(a) the tort of inducement of breach of contract, where the director induces his company to breach its contract with a third party;

(b) the tort of unlawful means conspiracy as between the directors, where the directors conspire to procure their company to breach its contract. In *Chong Hon Kuan Ivan v Levy Maurice*[8] ("*Chong Hon Kuan*"), the court found that the underlying "unlawful means" in such cases could be the tort of inducement of breach of contract; and

(c) the tort of unlawful means conspiracy as between a director and his company, where the director conspires with the company to cause the company to breach the contract.

While it might appear odd that a director could in effect conspire with himself (acting as the *alter ego* of the company), this was affirmed in *Nagase Singapore Pte Ltd v Ching Kai Huat*[9] ("*Nagase*"), where a director, acting on behalf of the company, fraudulently overcharged the plaintiff in breach of his company's contract with the plaintiff and the plaintiff brought a successful claim for unlawful means conspiracy against the director and his company.

10 There was a tacit recognition in the court's approach to *Chong Hon Kuan* and *Nagase* that Lee Pey Woan's broader and contextual approach ought to be adopted in approaching these cases.[10] In an article in this journal, Lee suggested that the reasoning of both these cases had been too narrow, focusing overwhelmingly on examining *whether* liability could arise without an in-depth examination of *why* it should arise for directors.[11] Lee drew attention to this hitherto under-analysed area of the law and called for the introduction of "some constraining principle" to prevent the director from being "potentially liable for tortious conspiracy every time he makes a decision on the company's behalf that result[s] in damage to a third party".[12] In *Sandipala*, the court recognised that both *Chong Hon Kuan* and *Nagase* had to be assessed in light of the "constraining principle" Lee raised. The crux of the approach to these cases thus subtly shifted from focusing primarily on *whether* the tort was successfully made out to the broader issue of when personal liability *ought* to arise. Crucially, in *Sandipala*, the court, while not

8 [2004] 4 SLR(R) 801.
9 [2008] 1 SLR(R) 80.
10 Lee Pey Woan, "The Company and Its Directors As Co-conspirators" (2009) 21 SAcLJ 409.
11 Lee Pey Woan, "The Company and Its Directors As Co-conspirators" (2009) 21 SAcLJ 409 at 420–421.
12 Lee Pey Woan, "The Company and Its Directors As Co-conspirators" (2009) 21 SAcLJ 409 at 411.

adopting the same terminology, sought in effect to refine and reformulate the "constraining principle" Lee called for.

### *B. Existing law in the field:* Said v Butt *and its progeny*

11 The court's starting point in its search for the "constraining principle" was the venerable case of *Said v Butt*. In the case, the plaintiff, a theatre reviewer, asked a friend to purchase a theatre ticket for him. He had previously cast aspersions on the theatre's members and knew that he would be denied a ticket in his own name. When he turned up with the purchased ticket, the theatre's managing director refused admission and the plaintiff thus sued the theatre director for procuring the theatre's breach of contract. McCardie J held that "if a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable" for breach of that contract.[13] This "constraining principle" was *obiter* as McCardie J had already found that no contract existed between the plaintiff and theatre, but it has become the *fons et origo* of the law pertaining to personal liability of directors for a company's breaches of contract.[14]

12 After *Said v Butt*, the jurisprudence in the field diverged in three main ways: (a) what "*bona fide*" entails;[15] (b) whether an "additional factor" is needed to remove a director's immunity from personal liability for the company's breach of contract;[16] and (c) whether the *bona fides* are owed to the director's company or to the third party with whom the company had contracted.[17] There were significantly conflicting views across the Commonwealth jurisdictions[18] and the court noted that *Said v Butt* was often "consistently endorsed" even as its content was being amended.[19]

13 Singapore's case law on the matter leading up to *Sandipala* was also found not to have subjected the principle to piercing normative inquiry, especially on the ambit of the "*bona fide*" requirement.

13 *Said v Butt* [1920] 2 KB 497 at 504.
14 Tan Cheng Han, *Walter Woon on Company Law* (Singapore: Sweet & Maxwell, 3rd Ed 2014) at p 344.
15 *Imperial Oil Ltd v C&G Holdings Ltd* (1989) 62 DLR (4th) 261.
16 *Imperial Oil Ltd v C&G Holdings Ltd* (1989) 62 DLR (4th) 261 at 266.
17 *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 328.
18 *Knights Capital Group Ltd v Bajada and Associates Pty Ltd* [2016] WASC 69.
19 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [54].

A somewhat convoluted interpretation of *Said v Butt* was reached in *Chong Hon Kuan*:[20]

> … [comprising] two conjunctive requirements: (a) acting *bona fide*; and (b) acting within the scope of the director's authority, and to apply only to 'protect persons in authority within corporate entities who genuinely and honestly endeavoured to act in the company's best interests'.

Woo Bih Li J's formulation of the requirements in *Chong Hon Kuan* was recently approved in *M+W Singapore Pte Ltd v Leow Tet Sin*[21] ("*M+W*"). However, *M+W* sat uneasily with Andrew Ang J's observation in *Lim Leong Huat v Chip Hup Hup Kee Construction*[22] that an intention to injure the third party would take the director outside the *Said v Butt* principle, regardless of the test in *Chong Hon Kuan*. The uncertain position in Singapore mirrored the state of authority overseas.

### *C.* Said v Butt *reformulated*

14 The court in *Sandipala* expressly sought to clarify this uncertainty. It held that:[23]

> … the *Said v Butt* principle should be interpreted to exempt directors from personal liability for the contractual breaches of their company … if their acts, in their capacity as directors, [were] not in themselves in breach of any fiduciary or other personal legal duties owed to the company.

Moreover, the principle was held to operate as a requirement of liability and not a defence, placing the onus on the plaintiff to prove that the defendant-directors were in breach of their personal legal obligations to their company. This interpretation largely coheres with that of Waller J in *Ridgeway Maritime Inc v Beulah Wings Ltd and Dr Tunji Braithwaite*[24] and was also the conclusion reached by Lee in her above-mentioned article.

15 Three reasons were forwarded by the court in support of its interpretation. First, this interpretation avoids difficulties such as what "*bona fide*" entails and the above-mentioned uncertainties. It links the

20 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [55], citing *Chong Hon Kuan Ivan v Levy Maurice* [2004] 4 SLR(R) 801 at [49] and *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [9].

21 [2015] 2 SLR 271.

22 [2009] 2 SLR(R) 318.

23 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [62].

24 [1991] 2 Lloyd's Rep 611.

field of personal liability with a known quantity, the body of law that already regulates the obligations of a director to his company, and thereby supports commercial certainty.

16 Second, this interpretation emphasises that where a director is acting within the confines of his personal duties to his company, his acts should properly be regarded as attributed to the company. In practical terms, it is also helpful to avoid placing a director in a conflict between acting in the best interests of his company and potentially engendering personal liability to a third party.

17 Third, this interpretation satisfactorily explains the past cases concerning a director's personal liability for his company's breach of contract. In *Nagase*, the director who fraudulently overcharged in breach of the company's contract breached his fiduciary obligations owed to the company and was thus not immune. Similarly, in *Tembusu Growth Fund Ltd v ACATek*,[25] the director was not entitled to immunity from personal liability because he had acted improperly by paying his own salary in breach of the company's loan obligations.

### *D. Application of rule to tort*

18 Having reformulated the law on personal liability *vis-à-vis* contract, the court also took pains to comment on how it would operate in tort. It observed that "[t]he *Said v Butt* principle only applies to … breach of contract, and not … torts or unlawful means".[26] The court also recognised as an "established principle" the overarching proposition that directors would be liable for the torts of their companies if they had directed or procured the commission thereof, *per* Yong Pung How CJ in *Gabriel Peter & Partners v Wee Chong Jin*[27] ("*Gabriel Peter*").

19 This inconsistent treatment of permitting immunity for directors in relation to breaches of contract by their companies, but not for other torts, was recognised by the court. It posited two options for addressing this tension:

> (a) It could find that a "jurisprudential division" exists between contract and tort in the form of the contractual privity rule, thereby justifying the disparate treatment.[28] *Per* Lee:[29]

25 [2015] SGHC 206.
26 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [73].
27 [1997] 3 SLR(R) 649.
28 *ADGA Systems International Ltd v Valcom Ltd* [1999] OJ No 27 at [17].
29 Lee Pey Woan, "The Company and Its Directors As Co-conspirators" (2009) 21 SAcLJ 409 at 427, para 37.

> Since a contract is made between the company and a third party, the third party's recourse in the event of breach is ordinarily limited to the company alone. But a person injured by a company's tort … has not in any meaningful sense consented to deal with the company and there is thus no obvious reason for confining responsibility to the company.

Following this view, the inconsistency is one that is justified and should continue.

(b) The position in tort could be adjusted such that a director would be likewise protected from personal liability if he had acted properly in the discharge of his duties to the company. This would bring the position for tort in line with that in contract.

While the court chose not to express a concluded view on the matter, it did recognise that there were "compelling arguments in support of both views". This question will be engaged with below.[30]

### *E. Application of law to facts*

20 Applying the reformulated *Said v Butt* principle, the court ultimately found that there was "no evidence that [the directors] had acted in breach of their personal legal duties to the company".[31] Tannos's knowledge of the incompatibility was not deemed such a breach given the finding of fact that he only did so in the belief that he could convince the Indonesian government to grant the necessary adjustments. The director-appellants thus were within the ambit of the *Said v Butt* principle, and the court thus allowed the appeal against Oxel's counterclaim for unlawful means conspiracy. In practical terms, this meant that although Sandipala was still liable for the consequences arising from the breach of the supply contract, the Tannoses were not personally liable for them.

## IV. Analysis

21 While *Sandipala* was largely decided on its facts, it nonetheless provided an apropos opportunity for the court to reconsider the venerable if under-examined *Said v Butt* principle. The clarification it provides in the context of personal liability for breaches of contract is welcome, as is its strong affirmation of the separate legal personality of the company as a cornerstone of modern company law. However, the

30 See paras 21–39 below.

31 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [83].

case discloses a perplexing question as to the relationship between immunity from personal liability for directors in contract and the absence of immunity in tort. The court did not express a firm view on the question of whether this disparate treatment should continue, merely noting that presently, there was no immunity from personal liability for the company's torts.[32] This inconsistency with the position in contract will form the bulk of this note's analysis.

### *A. Reconciling disparate treatment*

22 The court acknowledged the potential use of privity to explain the disparate treatment of breaches of contract from tortious conduct. This approach suggests that contractual privity between the third party and company precludes actions against the company's directors, and that by extension, where there is *no* contract between the third party and company, actions ought to be permitted against the directors. With respect, it is suggested, and even noted by the court, that this explanation is not wholly compelling.

23 First, this explanation of privity appears to warp the very concept of privity. Contractual privity between the third party and company should not, and does not, utterly preclude actions outside the scope of the contract.[33] It seems odd to suggest that simply because a contractual relationship of privity exists between the third party and the company, that contractual relationship must claim the field and define the *entirety* of the interactions between the parties. This is the implication if one were to assert that the third party has to "accept the consequences … [of choosing] not to"[34] seek further guarantees and will thus only have actions under that particular contract against the company.[35] The existence of a contractual relationship does not preclude the existence of other (legally enforceable) rights and obligations between the contracting parties, and this applies *a fortiori* to directors. If the existence of the contract between the third party and company does not preclude the third party seeking other remedies against the company which are not contemplated by the contract, it illustrates that privity does not fully dictate the legal terrain between them. If this is so, that logic should similarly apply between the third parties and directors.

32 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [79].

33 Edwin Peel, *Treitel on the Law of Contract* (London: Sweet & Maxwell, 14th Ed, 2015).

34 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [76].

35 Lee Pey Woan, "The Company and Its Directors As Co-conspirators" (2009) 21 SAcLJ 409 at 427–428, para 38.

Privity is neither here nor there: it does not mean that contractual rights and obligations are the *only* ones the parties can rely on.

24 Second, the privity-based explanation does not explain why the tort is seen as an independent act of the director for which he is personally liable when a breach of contract committed under similar circumstances is not deemed a personal act. Lee termed this the "identification doctrine", in that the actions are "identified" as being the company's instead of the director's.[36] Contractual privity between the company and third-party claimant should not operate on the identification doctrine, which determines the attributability of an act as between company and director.

25 Third, even if the conceptual difficulties of privity as a justification for disparate treatment are overlooked, it creates the practical effect of potentially over-deterring directors. A director may genuinely deem the committing of a tort (and paying of compensation) to be in the best interests of the company, and would be deterred from doing so by the spectre of personal liability. As V K Rajah JC (as he then was) noted in *Vita Health Laboratories v Pang Seng Meng*,[37] "directors should not be coerced into exercising defensive commercial judgment".[38] Apart from the potential distorting of directors' business decisions, the risk of personal liability may even dissuade qualified individuals from taking up directorships. Accepting privity as a conceptual explanation potentially gives rise to undesirable practical consequences.

26 Fourth, privity as an explanation for the disparity runs into particular difficulties when faced with situations of concurrent liability in tort and contract. On the privity argument's logic, there should be *no* liability in tort in so far as the contract dictates the *entirety* of the legal rights and responsibilities between the parties. The court in *Sandipala* noted, in explaining the privity argument, that the third party should have to "accept the consequences" of not seeking further contractual guarantees from the company. One might question why this logic should not apply to concurrent liability in tort.[39] Explained rhetorically, if the reason for claims in tort giving rise to personal liability is because there is no contract between the tortfeasor company and the third party, what happens when there is such a contract? Presumably, the *Said v Butt* rule would apply, even for tortious claims.

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36 Lee Pey Woan, "The Company and Its Directors As Co-conspirators" (2009) 21 SAcLJ 409 at 412–413, para 6.

37 [2004] 4 SLR(R) 162.

38 *Vita Health Laboratories v Pang Seng Meng* [2004] 4 SLR(R) 162 at [17].

39 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [77].

27 If *Said v Butt* applies in such situations of concurrent liability in tort and contract, one may validly question whether the rule would still apply if there was a relationship between the parties which fell short of contract. There would then need to be clarity on how robust the nexus of relationship must be between the parties before *Said v Butt* can be said to apply in precluding personal liability for tortious claims against the company. Carthy JA suggested that "assent" might be a potential determinant in this regard: parties who have voluntarily dealt with the company and "assented" to the limited liability may be said to have lost the opportunity to seek personal liability from directors.[40] However, even this "assent"-based approach does not address the other difficulties above, and does not provide guidance as to how merely voluntary dealing with the company can be construed as "assenting" to limited liability operating to *wholly* insulate the directors from claims the third party may not have foreseen.

### *B. Ending disparate treatment*

28 Having outlined the difficulties with attempting to justify immunity from personal liability for directors in contract but not in tort, it is apposite to consider the arguments for extending immunity to tortious situations as well. There are three arguments for this which, if accepted, would place tort on the same footing as contract in such situations.

29 First, to immunise directors from personal liability for tortious conduct engaged in by the company would further affirm the separate legal personality of the company and underscore the doctrinal integrity of this fundamental tenet of company law.[41] In so far as the director is acting in compliance with the *Said v Butt* requirements, there does not appear any reason to pierce the corporate veil and attribute tortious liability to his person, as opposed to that of the company. This situation may be distinguished from cases (a) where the director is personally committing a tort; and (b) where the director breached some kind of duty owed to the company in authorising or procuring the tort, thereby bringing his action *outside* the aegis of the company and into the realm of his own acts.

40 Lee Pey Woan, "The Company and Its Directors As Co-conspirators" (2009) 21 SAcLJ 409 at 428, para 39.

41 Tan Cheng Han, "Tortious Acts and Directors" (2011) 23 SAcLJ 816.

30 An example of category (a) is that cited by Tan Cheng Han of:[42]

> … a director who enters another person's land that he mistakenly believes the company has an easement over … in good faith that he was acting properly in the best interests of the company.

In such cases, Tan rightly suggests that the director is personally involved in the *elements* of the tort, as opposed to merely being involved in procuring the tort to be brought about. This distinction thus places (a) outside the ambit of this proposed immunity. In respect of (b), the logic here is similar to that of the court's in *Sandipala*, and is well illustrated by *Wah Tat Bank Ltd v Chan Cheng Kum*.[43] In that case, the managing director of a shipping company had a secret contract with a shipper that permitted him to convert goods which had been consigned to the shipper. His breach of fiduciary duties to his shipping company and making of secret profit made these actions his own, as opposed to those of the company, and opened him to personal liability for the tort of conversion. These distinctions are important because they outline that only in the specific and narrow sphere where the director's actions cohere with his duties to the company will personal liability be precluded. This goes some way towards answering the concerns in *Gabriel Peter* that people should be made to answer for their tortious acts. If *Said v Butt* is expanded to tort, the doctrinal integrity of the company's separate legal personality is properly upheld. Simultaneously, the principle that persons, whether natural or legal, should answer for their tortious acts remains respected.

31 Second, immunising directors from personal liability for the tortious acts of their companies would avoid placing them in a position of conflicted obligations and incentives. As the court recognised in *Sandipala*, albeit in the context of breaches of contract, "there is a compelling policy imperative in not [placing] a director in a conflict between acting in the best interests of the company and having to face the prospect of … liability to a third party".[44] The incentive to avoid personal liability may distort their otherwise sound business judgment. There is no reason why this logic should not apply to tortious situations as well. If anything, immunising directors from personal liability for the tortious acts of their companies *only if* they acted properly in compliance with the *Said v Butt* requirements might incentivise them to behave judiciously and with utmost propriety in their capacity as directors so as not to lose this immunity.

42 Tan Cheng Han, "Tortious Acts and Directors" (2011) 23 SAcLJ 816 at 817.
43 [1975] 1 AC 507.
44 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [69].

32 Third, from an economic perspective, there is a net economic gain if companies are able to breach certain obligations in order to better allocate scarce resources. In practice, this might take the form of a director permitting some form of nuisance to continue on land his company owns, if any loss that neighbours suffered could be compensated while the company still makes a profit. In such situations, *per* Coase,[45] there is a net welfare gain in so far as the profit made from permitting the nuisance is greater than any loss which needs to be compensated. This would produce more economic good than if such behaviour was precluded altogether, which would likely be the case if directors faced personal liability for such acts. It is suggested that this notion of "efficient breach" is, at least partially, the *raison d'être* of immunising directors from personal liability for breaches of contract by their companies.[46] In so far as directing tortious conduct (as in the example of nuisance above) can cause a net welfare gain, there is a compelling argument why this rationale should also apply to tort. Granted, information asymmetry may render it harder to precisely ascertain the loss a third party might suffer from tortious conduct (and by extension the compensation payable), but there should be no reason why companies should be wholly precluded from engaging in their own approximations.[47] Bringing tort onto the same footing as contract in this regard would allow for the net economic gains that "efficient breach" offers.

### *C. Mechanism for ending disparate treatment*

33 Tan's proposal, which was expressly considered by the court, centred on a two-stage test to ascertain (a) if the director had been involved in a "material" way in the company's tort; and (b) whether the directors had been acting properly in the discharge of their duties to the company.[48] Limb (b) was deemed to entail the full ambit of "*bona fide* in the best interests of the company, for proper purposes … within the scope of their authority".[49] If the director had been involved in a material way but was acting properly *vis-à-vis* his company, he would be protected from personal liability under this proposal.

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45 Ronald Coase, "The Problem of Social Cost" (1960) 3(1) JLE 1 at 24.

46 Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules, and Inalienability" (1972) 85 HLR 1089.

47 Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules, and Inalienability" (1972) 85 HLR 1089 at 1097.

48 Tan Cheng Han, "Tortious Acts and Directors" (2011) 23 SAcLJ 816.

49 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [78], citing Tan Cheng Han, "Tortious Acts and Directors" (2011) 23 SAcLJ 816 at 830–831, para 26.

34 In *Sandipala*, the court raised two points that this proposal might have difficulty with. First, the court noted that where a director personally *participates* in a tort, "there may well be good reason to hold him personally liable". Second, "where a director authorises … a tort on behalf of the company … the victim may view him as equally culpable".[50] Adding to these difficulties with the benefit of hindsight, one might note that the second limb of this test includes the "*bona fide*" reference with which there has been some uncertainty. Further, adopting Tan's proposal *verbatim* would create inconsistency with the position in contract post-*Sandipala*.

35 None of these difficulties, however, are insurmountable. Instead of a two-limbed test, it is proposed that the test as reformulated in *Sandipala* apply in tort as well. This addresses the above-mentioned difficulties: It leaves directors who personally participate in the elements of the tort still personally liable (since the tortious act is attributable to them and not the company). It also avoids the "*bona fide*" reference and the uncertainty which *Sandipala* has cleared, and brings the position in tort in line with that in *Sandipala*. The victim viewing the director as nonetheless equally culpable should not prove decisive: a contracting third party may well feel the same way were a director to procure breach of a contract. His feelings against the director in this case are subjugated to the broader legal principle of the company's separate legal entity.

36 A final issue that arises is whether the *Sandipala* position should apply across the board for *all* torts. In principle, the position should apply regardless of the type of tort. It would be inconsistent to permit personal liability in some torts but not others, and the spectre of personal liability for a director should not depend precipitously on how an act is framed in pleading. That said, two caveats qualify this broad position.

37 First, as Tan emphasised, a proper application of the attribution doctrine is necessary in order to strike the appropriate balance between maintaining the integrity of the separate legal personality, and the principle that one ought to be responsible for one's wrongs.[51] The doctrine is outlined above,[52] and underscores a key distinction between, *per* Tan, "instances where a director commits the tort personally" and

50 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [79].

51 See Tan Cheng Han, "Tortious Acts and Directors" (2011) 23 SAcLJ 816. See further Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) ch 11 and *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3rd) 195.

52 See para 28 above.

"a director being responsible for a tort committed by the company".[53] It is the latter to which *Sandipala* (and *Said v Butt*) is applicable.

38 Second, a proper application of the sham doctrine is similarly necessary. Conaglen's identification of the unique characteristic of a sham being the intentional illegitimate use of an otherwise apparently proper form of conveyance to defeat a substantive legal prohibition underscores the need for the courts to be vigilant against such attempts.[54] *TV Media Ltd v de Cruz Andrea Heidi*[55] may, in part, be explained on this basis.[56] As Yong Pung How CJ noted:[57]

> … Semon represented Health Biz in all significant dealings with third parties …
>
> … [he] was the only person who had any form of contact with the manufacturer …
>
> … rather than approaching [potential clients] in his capacity as director … Semon presented his personal portfolio and *curriculum vitae* …

Semon's "absolute control" of the company was such that "nothing was done without [his] knowledge" and his involvement was "not merely very great, but was total".[58] In such contexts, the court's scrutiny of the corporate veil should be redoubled.

39 Ultimately, examining each species of tort for its congruence with the *Said v Butt* doctrine would be a mammoth endeavour beyond the scope of this note. What this note has sought to do instead is to canvass the arguments on *Said v Butt*'s expansion into tort, set out a broad position on principled and policy grounds and provide a useful starting point for closer study of the amenability of particular torts to the *Said v Butt* approach.

## V. Conclusion

40 The court promulgated a clear and logical reformulation of the longstanding *Said v Butt* test. The restatement provided a forceful restatement of a fundamental aspect of company law and aligned

53 See, for instance, *Standard Chartered Bank v Pakistan National Shipping Co (Nos 2 and 4)* [2003] 1 AC 959 at 968.

54 Matthew Conaglen, "Sham Trusts" (2008) 67 Camb LJ 176. See also Susan Bright, "Beyond Sham and into Pretence" (1991) 11 OxJLS 136 at 140 and *Shalson v Russo* [2003] EWHC 1637 (Ch).

55 [2004] 3 SLR(R) 543.

56 *TV Media Ltd v de Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [136]–[140].

57 *TV Media Ltd v de Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [136]–[138].

58 *TV Media Ltd v de Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [140].

Singapore's position in this area with that of English Law.[59] Following *Sandipala*, parties seeking to bring claims against directors for procuring their companies' breaches of contract will have to prove that the directors breached some personal legal duty to their companies in doing so. This upholds the separate legal personality of companies and prevents the undue fettering of directors in their decision-making.

41 It is submitted that the *Sandipala* test should also apply in the field of claims against directors for their companies' tortious acts. To change the law thus would better protect doctrinal integrity, optimise director incentives and maximise economic gains from efficient breach.

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59 *Ridgeway Maritime Inc v Beulah Wings Ltd and Dr Tunji Braithwaite* [1991] 2 Lloyd's Rep 611.