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28. TORT LAW

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I. Introduction

28.1 This review examines the ten most significant decisions in tort law for 2020. It was an interesting year for the range of significant decisions in tort law handed down by the courts on matters including limitation period, medical negligence, the scope of duty in negligence, breach of confidence, conspiracy, and defamation.

II. Negligence

28.2 *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd*[1] involved a claim in negligence by the plaintiff, a former director and chief executive officer ("CEO") of SBI Offshore Limited ("SBI"), against the defendant, which was engaged by SBI to conduct a fact-finding review of certain impugned transactions involving the plaintiff. SBI had acquired a 35% stake in another entity, Jiangyin Neptune Marine Appliance Co Ltd ("NPT"), which was 65% owned by Jiangyin Wanjia Yacht Co Ltd ("Wanjia"). Two acquisition equity transfer agreements ("ETAs") were entered into. The first was signed by the former CEO and the second by both the former CEO and the plaintiff. Both ETAs related to the same transaction, but there was a discrepancy: the first ETA stated that the consideration was US$1.75m while the second ETA stated that it was US$350,000.

28.3 When SBI was listed on the Singapore Exchange Securities Trading Ltd ("SGX-ST"), its 35% stake in NPT was disclosed as US$1.75m in SBI's offer document. Subsequently, SBI entered into an agreement to dispose of its 35% stake in NPT. Again, two ETAs were entered into for

1 [2021] 3 SLR 823.

the disposal. The first was to dispose the stake at the price of US$3.5m to Hua Hanshou, the father of Ollie Hua, a representative of NPT, who had advised the plaintiff on SBI's acquisition of the 35% stake. The purchaser insisted that the purchase price be paid in two halves, with US$1.75m paid out of Hong Kong and US$1.75m paid out of the People's Republic of China ("PRC"). Ollie Hua then advised SBI that the PRC tax for the transaction would be calculated on the basis of a capital gain of US$1.4m, being the difference between US$1.75m (purchase price paid out of the PRC) and US$350,000 (price stipulated in the second acquisition ETA). SBI's chief financial officer responded, stating that the correct figures were US$3.5m for the disposal and US$1.75m for the acquisition, giving a capital gain of US$1.75m to be taxed.

28.4 Subsequently, Hua Hanshou proposed to the plaintiff that a second disposal ETA be executed between SBI and Wanjia for the transfer of the 35% stake in NPT to Wanjia for the sum of US$1.75m. Hua claimed that this was necessary due to Chinese laws prohibiting ownership of joint ventures and to account for the US$1.75m paid out of the PRC. The plaintiff brought this proposal to the SBI Board ("the Board") which rejected it. The plaintiff nevertheless went ahead and signed it on behalf of SBI. Meanwhile, SBI approved a novation agreement to replace Hua with Wanjia as the purchaser of the 35% stake.

28.5 SBI then appointed the defendant to review the acquisition and disposal of its 35% stake in NPT and to investigate allegations against another party (irrelevant to the negligence action by the plaintiff). Following its review, the defendant made several factual findings and noted that the conflicting acquisition ETAs meant that SBI could have violated the Securities and Futures Act[2] ("SFA") and the SGX-ST Catalist Rules ("CR") or Chinese tax laws. The disposal ETAs were equally problematic, exposing SBI to potential violations of the SFA and CR or having ETAs that were not valid as they were not approved by the Board. SBI sought legal advice and subsequently lodged a report with the Commercial Affairs Division of the Singapore Police Force ("CAD"). The CAD investigated and dismissed the matter. Based on its legal advisers' findings, SBI made an announcement stating that it potentially faced a tax levy risk and that the plaintiff and another individual had committed breaches of statutory duties and obligations to SBI.

28.6 The plaintiff sued the defendant in negligence, claiming for loss of employment with SBI, loss of business reputation, deterioration of the value of his shares in SBI, and emotional and psychological trauma. See Kee Oon J dismissed the action, holding that the plaintiff had failed to

2 Cap 289, 2006 Rev Ed.

prove duty, breach, or causation of damage. The case is noteworthy for its application of the duty of care test set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[3] ("*Spandeck*") and for its apparent treatment of damage. See J held that it was plainly foreseeable that the plaintiff could be affected by the defendant's conduct. See J then went on to consider whether there was a proximate relationship between the parties. In doing so, he adopted an incremental approach, identifying three categories of cases that were most closely related. The first involved cases in which investigators were held to owe a duty of care to suspects under investigation ("Negligent Investigation Cases"). The second involved cases in which an employer was held to owe a duty to existing or former employees ("Negligent Employer Referral Cases"). The third involved cases of professionals who were sued by third parties who had relied on their published reports ("Negligent Advice Affecting Third Party Cases").

28.7 See J distinguished the first two categories and held that the third category was the closest. This category, represented by cases in the vein of *Caparo Industries plc v Dickman*[4] ("*Caparo*"), involved third parties who had engaged the defendants whose advice affected the plaintiffs. However, there is a difference between this category and the present case: in the Negligent Advice Affecting Third Party cases, *the plaintiffs had acted in reliance on the statements provided by the defendants* to the third parties. In this case, the plaintiff was affected by the actions of the *third parties who had acted in reliance on the defendant*. It is suggested that instead of the third category, it is the second category (Negligent Employer Referral Cases) that is most closely related to the facts in this case. Having said that, it is noted that the Court of Appeal in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd*[5] had stressed that proximity was made out in the Negligent Employer Referral cases partly because the defendant had special knowledge of, and implied authority from, the former employee, unlike in this case, where there was no such knowledge or implied authority.

28.8 To determine whether there was sufficient proximity, See J noted that courts would consider "physical, circumstantial and causal proximity, as well as the 'twin criteria of voluntary assumption of responsibility and reliance'".[6] Taking into account the contractual matrix and the defendant's own disclaimer of responsibility, See J held that the

3 [2007] 4 SLR(R) 100.
4 [1990] 2 AC 605.
5 [2016] 4 SLR 1124.
6 *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] 3 SLR 823 at [66].

defendant had not voluntarily assumed responsibility. This is a subjective approach to voluntary assumption of responsibility that arguably is inappropriate in the context of the proximity inquiry under *Spandeck*. The UK has adopted a pluralist approach to the duty of care, drawing on assumption of responsibility, the *Caparo* approach, and incrementalism.[7] Assumption of responsibility as a standalone test is subjectively assessed, while assumption of responsibility and reasonable reliance as part of the *Caparo* inquiry are objectively assessed.[8] Singapore has rejected the pluralist approach to the duty of care in preference of a single, universal test (*Spandeck*). Thus, assumption of responsibility should be assessed objectively. In any case, the mere fact that the defendant disclaimed responsibility does not mean that a judge cannot find that there was assumption of responsibility on the facts. The House of Lords decision in *Smith v Eric S Bush*[9] is illustrative.

28.9 Having dealt with assumption of responsibility, See J went on to find that the plaintiff had not relied on the defendant. The plaintiff argued that while it had not relied on the defendant in the sense of taking action based on the defendant's advice, it was nonetheless dependent on the defendant acting with due care. See J's treatment of this argument requires close reading. His Honour held that there was no real distinction to be drawn between reliance and dependence, noting that the closest concept of dependence was to be found in *White v Jones*[10] ("*White*"). In See J's view, this point in *White* has not been accepted in Singapore. With respect, this conception of dependence in *White* was based on notions of general or imputed reliance.[11] In the modern context, this concept is viewed through the lens of vulnerability, a concept that has been accepted as a relevant proximity factor in Singapore.[12]

28.10 See J then considered the relevant policy factors that militated against recognising a duty of care, including potential inconsistency with the law of defamation, potential conflict with the contractual matrix, and perhaps most significantly, a chilling effect on professional fact finding. Having found that there was no duty, See J nonetheless went on to consider breach and causation of damage, finding that there was no breach of duty on the facts and that the plaintiff had failed to prove that the defendant had caused any of the losses claimed. There did not appear to be any submission by counsel on whether the loss of business reputation as well

7 See *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181.
8 *White v Jones* [1995] 2 AC 207.
9 [1990] 1 AC 381.
10 [1995] 2 AC 207.
11 *Cf Bryan v Maloney* (1995) 182 CLR 609.
12 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 4 SLR 762 at [28] and [40]; *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [154].

as emotional and psychological trauma were recognised forms of damage to ground a negligence action.[13]

28.11 *Seto Wei Meng v Foo Chee Boon Edward*[14] raised a host of interesting issues on factual findings, the burden of proof, and causation with respect to the duty to inform and loss of chance in medical negligence. The plaintiffs were the estate and dependants of the deceased who died following a liposuction and fat transfer procedure. The deceased had two prior liposuction procedures (in 2010 and 2011). The third, and fateful, procedure occurred on 28 June 2013, following which she suffered a pulmonary fat embolism and died. It was agreed by all parties that the deceased had suffered from the fulminant form of fat embolism, which was rarer and had a much poorer prognosis than ordinary fat embolism. Choo Han Teck J noted that "fulminant fat embolism is almost always fatal" unlike ordinary fat embolism.

28.12 The Singapore General Hospital and the companies that owned the clinic at which the surgery was performed were initially joined as defendant but in the end the case proceeded against the surgeon only. The plaintiff alleged the trifecta of medical negligence: pre-operative failure to advise of material risks; performance of the surgery; and postoperative care:

> (a) *Failure to advise*: The defendant argued that he had provided the necessary advice on 28 May 2013. However, there was no documentary evidence to support this and his clinical notes did not include any reference to this. The only documents were the consent forms signed by the deceased on 28 June 2013, the day of the surgery. The plaintiffs alleged that the defendant did not personally advise the deceased and any information contained in the forms was conveyed by his staff.
>
> The forms included information on risks of serious complications. Choo J found that the information in the forms was sufficiently detailed to discharge the defendant's duty if the risks had been explained to her or if the forms had been given to her with adequate time for her to read and digest the information, and to raise any questions with the doctor. Choo J found that the forms were given on the day of the surgery itself, which did not

13 The Court of Appeal dismissed the appeal by the plaintiff in an *ex tempore* judgment delivered by the Chief Justice (*Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] SGCA 20. Sundaresh Menon CJ dismissed the appeal on causation, but noted that there were some unsettled issues on duty of care and recognised loss in negligence. The Court of Appeal decision will be noted in the next issue.

14 [2020] SGHC 260.

give the deceased sufficient time to read them and understand the risks. Thus, the defendant was found to have breached his duty to provide information and advice. However, Choo J went on to hold that even if there were a breach, the plaintiffs failed on causation as there was no evidence that the deceased would have refused the surgery even if informed. She had previously undergone two similar procedures without being informed of the risk and therefore it was safe to conclude that she would have proceeded with the surgery in this case.

However, Choo J's conclusion that the deceased would have gone ahead regardless of the failure to inform because she had proceeded with the same operation on two previous occasions may be open to challenge. Choo J acknowledged that there was no evidence that the deceased had been given proper advice prior to her two previous operations.[15] Thus, the question remains unanswered as to what she would have done had she been given proper advice. Choo J noted that the risk of a fat embolism in repeat liposuction is higher; it is therefore plausible that had the plaintiff been properly advised she may have reconsidered her decision to proceed. The case raises the important question as to whether Singapore should adopt the approach to causation set out in *Chester v Afshar*[16] for the duty to inform cases.

(b) *Performance of the surgery*: Part of the procedure involved transferring fat from the deceased's abdomen to her thigh to smoothen some unevenness from previous procedures. Choo J found that "it was more likely than not that the defendant had inadvertently punctured a blood vessel as he was injecting the fat in [the deceased's] thigh".[17] Choo J noted that there was no other explanation for the fat embolism and, because it was an unacceptable risk for this to occur, "the inference must be that the surgeon was negligent".[18] There are echoes of *res ipsa loquitur* here. While this reasoning may be logical, it is important to note that the burden of proof lies on the plaintiff. Where the evidence is equivocal, the burden is not discharged, and the court should find in favour of the defendant. It was also accepted by the court that there was a 2% to 22% risk of fat embolism occurring during this procedure. Therefore, it is possible that the fat embolism occurred as a non-negligent incident of this procedure.

15 *Seto Wei Meng v Foo Chee Boon Edward* [2020] SGHC 260 at [17].
16 [2005] 1 AC 134.
17 *Seto Wei Meng v Foo Chee Boon Edward* [2020] SGHC 260 at [37].
18 *Seto Wei Meng v Foo Chee Boon Edward* [2020] SGHC 260 at [35].

(c) *Postoperative care*: At the end of the procedure, the deceased's oxygen saturation level fell precipitously from 100% to 72% before recovering to about 92%, a level that was still considered unacceptable and requiring emergency treatment. The defendant and other doctors attempted to raise her blood oxygen level while trying to diagnose the cause of the problem. After 45 minutes, there was consensus that the deceased had suffered a collapse and an ambulance was called, which arrived promptly. Unfortunately, it was too late for the deceased to be saved. Choo J found the defendant negligent in failing to diagnose the fat embolism earlier and for failing to call for an ambulance as soon as her oxygen levels dropped and failed to recover above 92%.

28.13 The defendant's counsel argued that the deceased had fulminant fat embolism, which was nearly always fatal. As fat embolism was a known risk of this procedure, the fact that it occurred did not necessarily mean the defendant was negligent. Further, even if the defendant had been negligent, the delay in postoperative treatment could not be said to have caused the death as death would likely have occurred despite urgent care due to the fatal nature of fulminant fat embolism. Choo J disagreed, holding that it must have been the defendant's negligence that caused the fat embolism and that the defendant could not hide behind the difficulties of causation when "the very chance of causation was snatched from her by the tortfeasor's act of negligence".[19] This reintroduces the controversial issue of recovery for loss of chance in medical negligence, championed by Choo Han Teck J in *Armstrong, Carol Ann v Quest Laboratories Pte Ltd*.[20] The recoverability for loss of chance was left open by the Court of Appeal.[21]

28.14 The plaintiff in *Poh Chiak Ow v United Overseas Bank Ltd*[22] had invested a total of S$1m in a company ("PixelTrade") and lost it all. He sought to hold his relationship manager ("RM") and bank ("UOB") liable, alleging that the RM had made false representations about the investment and that UOB should be vicariously liable, or, in the alternative, liable in the tort of negligence. The plaintiff alleged that the RM had made various false allegations, all of which hinged on the first allegation, namely that PixelTrade was one of UOB's approved investment products. Andre Maniam JC found on the facts that the plaintiff had failed to prove that the RM had made any false representation. The RM was simply acting on

19 *Seto Wei Meng v Foo Chee Boon Edward* [2020] SGHC 260 at [34].
20 [2020] 3 SLR 211.
21 *Carol Ann Armstrong v Quest Laboratories Pte Ltd* [2020] 1 SLR 133.
22 [2020] SGHC 275.

the plaintiff's instruction to transfer his money for the investment. Even if the RM had been liable, Maniam JC held, on the authority of *Ong Han Ling v American International Assurance Co Ltd*[23] that UOB would not be vicariously liable on the facts as it would not be fair, just and reasonable. There was also no basis to find UOB liable in negligence.

28.15 *Daisho Development Singapore Pte Ltd v Architects 61 Pte Ltd*[24] involved a claim for fraudulent misrepresentation. The plaintiff had bought a hotel from Asia Square Tower 2 Pte Ltd ("AST2"). Subsequently, the plaintiff alleged that AST2 had fraudulently represented that certain of the hotel's facilities would be accessible to the public when in fact Urban Redevelopment Authority ("URA") had not permitted these facilities to be used by the public. The plaintiff took the matter to arbitration and lost. The plaintiff then unsuccessfully sought to set aside the award in the High Court and Court of Appeal. Following these failures, the plaintiff brought an action against the defendant, Architects 61 Pte Ltd, alleging that the defendant had negligently provided advice on the usage conditions of the hotel's facilities to AST2 and thus indirectly to the plaintiff. The defendant denied that it had provided any such advice to AST2, let alone the plaintiff, arguing that AST2 was in direct communication with URA and it had advised AST2 to comply with all URA regulations.

28.16 Tan Siong Thye J accepted the defendant's evidence and dismissed the action on the ground that the plaintiff had not discharged its burden of proving that the representation had been made. Having made that finding, Tan J went on to consider whether a duty would have been owed assuming that the alleged misrepresentation had been made. Applying *Spandeck*,[25] Tan J found that the threshold question of factual foreseeability was not met as it was not foreseeable to a reasonable architect that a party such as the plaintiff would rely on the advice. On proximity, Tan J held that there was neither circumstantial proximity nor the twin criteria of assumption of responsibility and reliance. On policy considerations, Tan J observed that recognising a duty would risk indeterminate liability and undermine the rule of *caveat emptor*.

28.17 To complete the analysis, Tan J went on to examine whether there was a causal link, assuming there had been a negligent misrepresentation. The plaintiff's failure to carry out any due diligence and to rely blindly on the advice constituted actions that were so unreasonable that they broke the chain of causation. Tan J rightly noted that it would be rare for a plaintiff's action to break the chain of causation although it might form

23 [2018] 5 SLR 549.
24 [2020] SGHC 16.
25 See para 28.6 above.

the basis of the defence of contributory negligence. This was one of those rare cases, as the plaintiff could easily have acquired information about the use of the premises by reviewing the letters of undertaking or URA's final grant of written permission.[26]

III. Limitation

28.18 *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat*[27] ("*IPP*") is an important Court of Appeal decision on limitation. The main appellant was a financial advisory company and the two other appellants were its managing partner ("Moi") and financial services consultant ("Quek"). The respondent was a client of the appellant who, on the advice of Moi and Quek, had invested in the foreign exchange market. He had opened a trading account with a company ("SMLG") that used algorithms to perform automated trades. The respondent alleged that Moi and Quek had represented that his capital would be guaranteed and that he would receive his capital and profits of 40% within a year. Instead, he lost his investment. The respondent succeeded at trial, with the judge holding the two individual appellants liable for negligent misrepresentation and the main appellant vicariously liable. The issue at appeal was whether the respondent's claim should have been defeated on limitation.

28.19 The timeline of key events is as follows:

(a) Between January and April 2011: Moi and Quek made representations to the respondent which induced him to invest his money.

(b) 11 April 2011: The respondent opened the trading account.

(c) 27 April 2011: The respondent transferred US$80,300.

(d 17 June 2011: The respondent transferred US$240,300.

(e) 3 February 2012: The respondent transferred US$300,300.

(f) May 2012: Moi and Quek informed the respondent that his trading account has been wiped out and they requested a US$200,000 loan to restart trading.

26 *Daisho Development Singapore Pte Ltd v Architects 61 Pte Ltd* [2020] SGHC 16. The letters of undertaking provided by Asia Square Tower 2 Pte Ltd to the Urban Redevelopment Authority and the latter's final grant of written permission clearly set out the restrictions on the use of the premises.

27 [2020] 2 SLR 272.

(g) 17 May 2012: The respondent provided the loan to SMLG to be repaid on 24 June 2012.

(h) June to September 2012: The respondent kept seeking repayment of his moneys.

(i) 17 September 2012: On Moi and Quek's advice, the respondent entered into three separate settlement agreements with SMLG to repay the investment sum and loan sum by 21 September 2012.

(j) 21 September 2012: No repayment of the moneys owed to the respondent.

(k) November to December 2012: Following non-payment, the respondent continued seeking repayment of his moneys (the loan was eventually repaid but the investment was not).

(l) 1 August 2014: The respondent, through his lawyers, issued a letter of demand to all three appellants.

(m) 21 July 2018: The respondent commenced legal action against the appellants.

28.20 The trial judge found that the respondent had only suffered losses on 21 September 2012, the agreed settlement date, at which point he had not been repaid. As such, his action, which commenced on 21 July 2018, was within the six-year limitation period. The appellants argued that the action was time barred, and the main appellant argued that it should not be vicariously liable. As a procedural point, the court reaffirmed that the burden of raising a limitation defence was on the defendant, but once this defence was raised, the burden was on the plaintiff to prove that the action was not time barred.

28.21 The substantive issue was the commencement of the limitation period. The relevant provision is s 24A of the Limitation Act:[28]

> **24A.**—(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).
>
> (2) An action to which this section applies, where the damages claimed consist of or include damages in respect of personal injuries to the plaintiff or any other person, shall not be brought after the expiration of —
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> (*a*) 3 years from the date on which the cause of action accrued; or

28 Cap 163, 1996 Rev Ed.

> (*b*) 3 years from the earliest date on which the plaintiff has the knowledge required for bringing an action for damages in respect of the relevant injury, if that period expires later than the period mentioned in paragraph (*a*).
>
> (3) An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of —
>
> (*a*) 6 years from the date on which the cause of action accrued; or
>
> (*b*) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (*a*).

28.22 Under s 24A(3), the limitation period would be either six years from the date on which the cause of action accrued or three years from the earliest date on which the plaintiff had knowledge of the damage and of a legal claim. Steven Chong JA, who gave the court's judgment, noted that s 24A(3)(*b*) would not assist the plaintiff as he clearly had the relevant knowledge more than three years before commencing legal action. The question thus centred on whether s 24A(3)(*a*) disbarred the claim, and to answer that, the court had to determine the date at which the cause of action accrued.

28.23 In an erudite judgment, Chong JA reviewed the authorities in the UK, Australia and Singapore. Two strands were identified. In the English case of *Forster v Outred & Co*,[29] the plaintiff had entered into a mortgage of her house on her solicitor's advice to guarantee her son's loans. The son went bankrupt and the plaintiff lost money when she had to repay the loan. She sued the solicitor who relied on the limitation defence. The issue was whether the cause of action accrued when she entered into the mortgage or when she repaid the loan. The court held that the cause of action accrued when she entered into the mortgage as that was the time when her property became encumbered with a legal charge and she had suffered a loss, although the loss only materialised later.

28.24 In the Australian case of *Wardley Australia Ltd v Western Australia*[30] ("*Wardley*"), the plaintiff had executed an indemnity in favour of a bank based on the tortious conduct of the defendant. The bank was allowed to call on the indemnity if the primary debtor failed to satisfy its liability. The High Court of Australia held that any loss would only

29 [1982] 1 WLR 86.
30 (1992) 109 ALR 247.

be suffered when the plaintiff was in a worse position than that prior to entering into the transaction. This occurred only when the plaintiff was required to make payment under the indemnity, which depended on the contingency – in this case the primary debtor's failure to pay. Until that event was determined, the plaintiff would have no cause of action.

28.25 Subsequent English cases distinguished the two categories as "no transaction" cases and "flawed transaction" cases. Chong JA, observing that these categories were obfuscating and unhelpful, reaffirmed the Singapore authority of *Wiltopps (Asia) Ltd v Emmanuel & Barker*[31] ("*Wiltopps*") which had preferred the *Wardley* approach. Where the plaintiff's loss depended on a contingent event, the date of accrual of the action would be the date when the contingency causing loss to the plaintiff occurred. The *Wiltopps* test was endorsed: [32]

> … to determine whether a cause of action in tort has accrued is to ask whether a plaintiff would have succeeded if he had sued at any time after the occurrence of the negligent act complained of.

28.26 Applied to the facts, Chong JA found that the respondent had not suffered any loss when he entered into the SMLG investment. The loss only occurred when the payments under the investment became due, which was one year after the funds were transferred. As the funds were transferred in three instalments, there were three dates in play – 27 April 2012, 17 June 2012 and 3 February 2013. Chong JA emphasised that the determination of when the cause of action accrued must "necessarily be *with reference to the pleaded cause of action*" [emphasis in original].[33] Here, there was only the act of negligence, namely the misrepresentation by Moi and Quek. The cause of action therefore accrued to the respondent on 27 April 2012 when the first tranche of payments was not made. At that point, the respondent had suffered a loss that gave him a cause of action. The later dates were irrelevant as they all related to the same negligent act giving rise to the cause of action. Having found that the accrual date was 27 April 2012, Chong JA held that the action failed as it was brought on 21 July 2018, outside the six-year limitation period.

28.27 While the judgment states the rule clearly, it raises a question of fairness. In this case, the appellants had prevaricated and encouraged the respondent to negotiate and attempt to settle. The respondent did so in apparent good faith. Yet, time had begun to run against him. Would this not encourage defendants in similar cases to keep potential plaintiffs

31 [1998] 2 SLR(R) 778.
32 *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat* [2020] 2 SLR 272 at [83].
33 *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat* [2020] 2 SLR 272 at [53].

negotiating to run down the clock? Perhaps, the facts in *IPP*[34] warrant an exception to the *Wiltopps* rule whereby the accrual date is delayed in cases where the defendant has encouraged the plaintiff to continue negotiations and the plaintiff has acted in good faith.

IV. Breach of confidence

28.28 The landmark case of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*[35] ("*I-Admin*") arose from disputes in an employment context that prompted changes to the legal requirements for breach of confidence in Singapore. The appellant company was engaged in the business of providing payroll administrative data processing services. The first and second respondents were former employees of the appellant. They set up the third respondent company, left the appellant and became directors of the third respondent. The appellant sued for breach of confidence and copyright infringement.[36] In this review, the focus will only be on the appeal in respect of the claim for breach of confidence.

28.29 Prior to *I-Admin*, there were three legal requirements for breach of confidence:[37]

> (a) The information must possess the quality of confidentiality.
>
> (b) The information must have been imparted in circumstances importing an obligation of confidence.[38]
>
> (c) There must have been some unauthorised use of information to the detriment of the party from whom the information originated.

28.30 The respondents had accessed, downloaded and circulated the appellant's confidential materials. The materials were also referenced and reviewed by the respondents. In the High Court decision of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*,[39] the learned judge found that though the first two requirements were satisfied, there had been no unauthorised use of confidential information under the third requirement.

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34 See para 28.18 above.
35 [2020] 1 SLR 1130.
36 The claim in copyright infringement was dismissed by the High Court and this was subsequently affirmed by the Court of Appeal: *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [42].
37 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.
38 See *Adinop Co Ltd v Rovithai Ltd* [2019] 2 SLR 808 at [88] (that the "obligation of confidence in equity may arise by applying principles of good faith and conscience").
39 [2020] 3 SLR 615.

28.31 On appeal, the Court of Appeal in a judgment delivered by Sundaresh Menon CJ, decided to broaden the scope of breach of confidence to encompass situations where the defendants had wrongfully accessed or acquired the confidential information without the need to show unauthorised use or disclosure. This conclusion was supported by three considerations namely: (a) the interests sought to be protected by the cause of action; (b) the threats to these interests; and (c) the remedies that should be made available when these interests are infringed.[40]

28.32 The Court of Appeal noted that the law, in requiring unauthorised use and detriment, had prioritised the interests in preventing the defendant's wrongful gains. Yet, there are other interests, including the plaintiff's interest to avoid a wrongful loss and the significance of the defendant's "conscience" in such a cause of action. The threats to such interests are now more pronounced with technological advancements that facilitate access, copying and dissemination of confidential materials. Given these developments, the Court of Appeal was of the view that the law should not merely focus on wrongful gain interests but also consider wrongful loss interest. Moreover, in terms of remedies, the plaintiff may in practice find it difficult in a claim for breach of confidence to prove monetary loss or detriment.

28.33 The requirement of actual use and detriment in breach of confidence was already relaxed in the prior English case of *Imerman v Tchenguiz*,[41] and the Australian decision in *SmithKline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health*.[42] *Dicta* in the local case of *Clearlab SG Pte Ltd v Ting Chong Chai*[43] had also suggested that accessing, acquiring or threatening to abuse confidential information may amount to breach of confidence.

28.34 The proper approach to breach of confidence, according to the Court of Appeal in *I-Admin*, should be as follows:[44]

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40 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [45].

41 [2011] 2 WLR 592 at [69]:

> … a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant …

Cf [68] which referred instead to the defendant appreciating that the claimant had "an expectation of privacy". It appeared that there was no clear distinction made between confidential *versus* personal and private information.

42 (1990) 17 IPR 545 at 593 ("equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information").

43 [2015] 1 SLR 163 at [205].

44 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].

> [A] court should consider whether the information in question 'has the necessary quality of confidence about it' and if it has been 'imparted in circumstances importing an obligation of confidence'. An obligation of confidence will also be found where confidential information has been accessed or acquired without a plaintiff's knowledge or consent. Upon the satisfaction of these prerequisites, an action for breach of confidence is presumed. This might be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it. Whatever the explanation, the burden will be on the *defendant* to prove that its conscience was unaffected. [emphasis in original]

28.35 The respondents had *prima facie* breached confidence by acquiring, circulating and referencing the appellant's confidential materials without permission. Knowing that they had no right to possess the appellant's materials, the respondents could not displace the presumption that their conscience was negatively affected.

28.36 The usual remedies of injunction and delivery up order do not apply to allow recovery of past losses arising from the defendant's breach. Account of profits and equitable compensation were also not applicable to the appellant as there was no unauthorised use of confidential information. However, the appellants were entitled to claim for equitable damages in lieu of injunction.[45] The Court of Appeal remitted the task of assessing damages to the High Court judge with directions to consider the additional costs that would be incurred by the third respondent to develop the payroll system without reference to the appellant's materials, and the reduction in the time taken to set up the third respondent's business.

28.37 This new approach to breach of confidence in *I-Admin* has been applied in two local cases involving similar employment contexts, namely, *BAFCO Singapore Pte Ltd v Lee Tze Seng*[46] and *Tree Art International Pte Ltd v Colour Moon Pte Ltd*.[47] In both cases, the first two legal requirements of breach of confidence were satisfied and, as the presumption of breach of confidence remained unrebutted by the defendants, the plaintiffs successfully obtained injunctions to restrain the defendants from, amongst others, dealing with the plaintiffs' confidential information.

28.38 It is pertinent to note that shortly before *I-Admin* was decided, the Singapore Court of Appeal had in *LVM Law Chambers LLC v Wan Hoe Keet* [48] the occasion to apply breach of confidence principles to

45 See para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and s 18(2).
46 [2020] SGHC 281 at [21], [24] and [31].
47 [2020] SGDC 150 at [18], [36] and [61].
48 [2020] 1 SLR 1083.

determine whether a law firm ("appellant") should be restrained from acting for a litigant against the respondents. The respondents argued that the appellant had previously acted for another litigant in an earlier lawsuit against the respondents which involved settlement negotiations and therefore owed the latter obligations of confidentiality. In addition to the first two requirements of the equitable duty of confidence, namely, (a) the information concerned had the necessary quality of confidence about it; and (b) that information was received by the lawyer (or law firm) concerned in circumstances importing an obligation of confidence, the Court of Appeal highlighted a third requirement: (c) whether there was a "real and sensible possibility" of the information being "misused".[49] This modified third requirement of equitable duty of confidence was drawn from case precedents for a materially different context (that is, the circumstances in which a lawyer may act for a party against the same counterparty in a prior action) compared to disputes concerning breaches of confidence by ex-employees towards their employers.

28.39 A final point to make is that the tort of misuse of private information in England – which is based on the presence of personal or private information and the plaintiff's reasonable expectation of privacy[50] – does not require proof of unauthorised use or detriment. Though developed from breach of confidence, the tort elements are distinct. Such a distinction may be important where the information in question has entered into the public domain and is no longer confidential but remains as private information.[51] The *I-Admin* decision, in not requiring actual use and detriment in breach of confidence, suggests a closer linkage with the tort. In this regard, commentators have recently called for a new tort of misuse of private information in Singapore.[52] A similar view was expressed in a recent report issued by the Singapore Academy of Law's Law Reform Committee[53] which recommended introducing a statutory tort of misuse of private information.

49 See the Australian Federal Court decision of *SmithKline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 87.

50 *Campbell v MGN Ltd* [2004] 2 AC 457.

51 *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081.

52 Saw Cheng Lim, Samuel Chan Zheng Wen & Chai Wen Min, "Revisiting the Law of Confidence in Singapore and the Proposal for a New Tort of Misuse of Private Information (2020) 32 SAcLJ 891.

53 Singapore Academy of Law, Law Reform Committee, *Report on Civil Liability for Misuse of Private Information* (December 2020).

V. Conspiracy

28.40 The High Court in *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd*,[54] examined the tort of unlawful means conspiracy with a focus on the issues relating to the defendants' knowledge of illegality, the requirement of an intention to injure and damage. (There were other legal issues concerning agency, trusts, equity and contract which will not be specifically discussed in this review.)

28.41 The plaintiffs – formerly International Healthway Corp Ltd ("IHC") and its wholly-owned subsidiary, IHC Medical Re – claimed against all the defendants for conspiring to injure the plaintiff by causing the latter to enter into a credit facility and to use the funds to acquire its own shares indirectly. The credit facility was declared void in contravention of s 76A(1)(*a*) of the Companies Act[55] by the Singapore Court of Appeal in *The Enterprise Fund II v OUE Lippo Healthcare Ltd*.[56]

28.42 The first and second defendants were Crest Capital, a fund administration company, and its subsidiary Crest Catalyst, also a fund management company. Both of them administered and managed three funds (third to fifth defendants). The sixth defendant ("Fan") and eighth defendant ("Lim") were the officers of IHC. The seventh defendant ("Aathar") was a substantial shareholder of IHC.

28.43 In addition to conspiracy, the plaintiffs alleged breaches of duty owed by Fan and Lim to IHC; against the first to fifth defendants (collectively "the Crest entities"), Aathar and Lim, the plaintiffs claimed for dishonest assistance in the breach of duties by Fan. Hoo Sheau Peng J found the Crest entities, Fan and Aathar (but not Lim) liable as conspirators to injure the plaintiffs. Fan and Lim were found in breach of their duty to IHC. The Crest entities and Aathar were held to have dishonestly assisted Fan in breach of his duties towards IHC.

28.44 With respect to the claim for unlawful means conspiracy, the unlawful acts were the entry into and drawdowns on the credit facility in contravention of s 76(1A) of the Companies Act as well as the breaches of Fan's fiduciary duties owed to IHC. None of this was disputed by the parties.

28.45 What was more controversial was the argument by the Crest entities that the plaintiffs had to prove that the Crest entities had actual

54 [2020] SGHC 142.
55 Cap 50, 2006 Rev Ed.
56 [2019] 2 SLR 524.

knowledge of the illegal nature of the credit facility. Following a review of relevant precedents, Hoo J disagreed, holding that knowledge of illegality was not a distinct requirement of unlawful means conspiracy.[57] The learned judge observed that ignorance of the illegality of the act is not a defence in unlawful means conspiracy, citing the Singapore High Court decision of *Multi-Pak Singapore Pte Ltd v Intraco Ltd*[58] ("*Multi-Pak*") and the English case of *Belmont Finance Corp Ltd v Williams Furniture Ltd*.[59] Further, in *Multi-Pak*,[60] which is a case involving unlawful means conspiracy, the court stated that the conspirators' knowledge that their acts were illegal (as opposed to their knowledge of relevant facts) was irrelevant to the tort. There were *dicta* in the Singapore High Court decision in *Beckett Pte Ltd v Deutsche Bank AG*[61] ("*Beckett*") that might suggest otherwise but Hoo J interpreted them as related to the question of the existence of a combination/agreement rather than the intention to injure. Moreover, *Beckett* did not mention the principle in *Multi-Pak*.

28.46 The learned judge went on to find that the Crest entities, Fan and Aathar had formed an agreement to cause IHC to enter into and draw down on the credit facility to purchase IHC shares, and had taken steps to procure IHC's entry into and subsequent drawdowns on the credit facility. There was no evidence, however, that Lim was aware of the purpose of the credit facility or had acted in combination with them.

28.47 On the requirement of an intention to injure the plaintiff, her Honour took the view that as the Crest entities knew or ought to have known that the credit facility was used by IHC to acquire its own shares in contravention of the Companies Act, that in itself was sufficient to constitute an intention to injure IHC. Hoo J stated that the "intended injury" was the imposition of the liability including the standby fees on IHC for the purchase of its own shares.[62] In similar vein, Fan and Aathar also intended to injure IHC. As for the proof of damage, IHC had already paid standby fees and amounts towards the principal.

57 See subsequent majority decision in *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [139] which adopted a similar position.

58 [1994] 1 SLR(R) 513 at [51], citing Buckley LJ in *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 404–405.

59 [1979] 1 Ch 250.

60 *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1994] 1 SLR(R) 513. Cited in *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [180].

61 [2008] 2 SLR(R) 189 at [121]–[122], cited in *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [182].

62 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [196].

VI. Deceit

28.48 In *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd*,[63] the appellant company JTrust Asia Pte Ltd ("JTA") claimed in the tort of deceit against the first and second respondents, Group Lease Public Company ("GLH") and MK (a director of GLH and chairman of Group Lease Public Co Ltd ("GL Thailand"), the parent company of GLH. The appellant alleged that it had made investments in GL Thailand relying on fraudulent representations made by the respondents about the financial position and profitability of GL Thailand. In addition, the appellant alleged that all seven respondents had conspired to defraud the appellant. The High Court had dismissed both claims in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd*.[64]

28.49 The Court of Appeal, in a judgment delivered by Steven Chong JA, held that both deceit and conspiracy were established. The claims were supported by evidence of GLH's sham loans to borrowers and MK's beneficial ownership and control of the borrowers. GLH had issued sham loans to inflate their financial figures in which the interest was repaid using the loan principals via a round-tripping scheme. The interest payments were falsely accounted as income instead of loan repayments. The borrowers did not have any means to repay the loans. Moreover, the loans were not for the purpose as stated by MK to JTA (that is GL Thailand's business of retail financing in Southeast Asia). The argument by GLH and MK that the loans were made to the borrowers on a "goodwill" basis was not supported by objective evidence.

28.50 The legal elements of the tort of deceit in *Panatron Pte Ltd v Lee Cheow Le*[65] are as follows: (a) a representation of fact made by words or conduct; (b) the representation must be made with the intention that it should be acted on by the plaintiff or by a class of persons which included the plaintiff; (c) the plaintiff had acted upon the false statement; (d) the plaintiff suffered damage as a result; and (e) the representation was made with the knowledge that it was false or made in the absence of any genuine belief that it was true.

28.51 GLH's representations, made by the publication of GL Thailand's financial statements, suggested that the GLH loans were legitimate arm's-length transactions generating income for GL's Thailand's retail financing business. The statements were false due to the sham loans that inflated GL Thailand's profits. MK also made false representations

63 [2020] 2 SLR 1256.
64 [2020] SGHC 29.
65 [2001] 2 SLR(R) 435.

to two directors of JTA that GLH and GL Thailand were profitable companies and that JTA's investments were targeted at expanding GL Thailand's retail financing business.

28.52 Relying on MK's representations and GL Thailand's consolidated financial statements, JTA converted debentures into shares under the first investment agreement, entered into the two other investments with GL Thailand, and made purchases on the open market. The respondents could not raise a defence to the tort of deceit on the basis that the directors of JTA failed to take prudent or reasonable steps to verify the consolidated financial statements in detail.[66]

28.53 One interesting issue was whether the tort of deceit could apply to communications made to the general public. GL Thailand's financial statements were prepared to comply with listing requirements on the Stock Exchange of Thailand. Nonetheless, they were, according to the Court of Appeal, representations to a class of potential public investors which included JTA. It suffices for the tort of deceit that the representation was communicated to a class of persons including the plaintiff; it need not be communicated directly and solely to the plaintiff.[67] As such, the tort arose based on GLH's and MK's intention for the false representations to be communicated to the general public including potential investors such as JTA which was, as noted by the Court of Appeal, the largest and most prominent institutional investor of GL Thailand. MK's dishonest intentions was based on his false representations of fact targeted at JTA.

28.54 The claim in unlawful conspiracy rested on the presence of an agreement amongst the respondents to fabricate GL Thailand's accounting records, inflate operating results and conceal the GLH sham loans in order to defraud JTA. Given the evidence on the round-tripping scheme, the borrowers were aware of GLH's sham loans and the inflated figures in GL Thailand's financial statements. The borrowers were acting under the control of MK. Furthermore, the respondents intended to cause financial loss to JTA in reliance on GL's and MK's false representations. The fact that GL Thailand was not made a defendant to these proceedings did not prevent the claim in conspiracy from being established against all the respondents jointly and severally. The plaintiff is not required to pursue claims against every alleged conspirator.[68]

28.55 Based on the claims in both deceit and conspiracy, JTA successfully recovered losses for the conversion of the convertible

66 *Panatron Pte Ltd v Lee Cheow Yeow* [2001] 2 SLR(R) 435 at [24].
67 *Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44 at [32].
68 *Chan Kern Meng v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 at [20].

debentures under the first investment agreement, losses under the third investment agreement and from the open market purchases, and costs and expenses associated with the investment agreements and conversion of the convertible debentures. JTA had not proved losses under the second investment agreement as it was only entitled to be repaid the principal sum of those investments in 2021.

VII. Defamation

28.56 The case of *Terrence Fernandez v Lim Shao Ying Genevieve*[69] examined a number of important torts: defamation, conspiracy, harassment and negligence. A work-related complaint was made by the membership relations manager of a country club ("Lim") against the plaintiff, who was then the chairman of the membership relationship department ("MRD") and later became the president of the country club. The plaintiff sued Lim in defamation, conspiracy to injure by defamation, and harassment. In addition, the plaintiff claimed against the general manager of the club ("Goh") for conspiracy together with Lim to injure the plaintiff as well as negligence in dealing with the complaint.

28.57 The working relationship between the plaintiff and Lim was poor. In 2017, Lim wrote a letter of complaint to Goh criticising the plaintiff's "damaging and disruptive behaviour," and stating that working with him was "painful, [frustrating], stressful, and on several occasion[s] belittling".[70] In 2018, Lim filed a formal complaint about the plaintiff's "insulting, threatening remarks and comments against [her]" in relation to a specific incident concerning a non-member in the club's premises ("the 2018 complaint"). There was an exchange of correspondence on this matter between the plaintiff and the then president of the club ("Sng"). Despite several requests, the plaintiff failed to attend meetings with the club. The plaintiff was later removed as the chairman of the MRD and a disciplinary committee ("DC") of the club filed formal charges against him. As part of the investigations, a summary was prepared by Lim containing information of 29 incidents as examples of workplace harassment, victimisation and sabotage. However, before the completion of the disciplinary process, the plaintiff was elected into office as the president of the club with a new General Committee ("GC"). The charges against the plaintiff were subsequently dismissed by a new disciplinary committee.

69 [2020] SGHC 278.
70 *Terrence Fernandez v Lim Shao Ying Genevieve* [2020] SGHC 278 at [7].

28.58 The defamation claim involved legal issues relating to defamatory meaning, the defence of qualified privilege and express malice, and the defence of justification. On the question of whether the 2018 complaint was defamatory of the plaintiff, Valerie Thean J opined that the readership consisted of "select office-bearers in the Club, who would have approached the issue on the basis of a workplace complaint" and that "the 'ordinary reasonable person' would be someone occupying such a position of leadership with the general knowledge and perspective attendant to it".[71] The natural and ordinary meaning of the words in the 2018 complaint that the plaintiff was "damaging and disruptive" or that he "micromanaged" was, in her Honour's view, not defamatory. This was because of the context in which the complaint was made, that is, as part of a workplace complaint that "necessarily entails levying allegations" and would "attract a certain degree of fair-minded scepticism" from the ordinary reasonable reader so as to "[neutralise] the sting of the publication".[72]

28.59 The test of the "right-thinking member of society" or ordinary reasonable reader may be (and indeed, has been) adapted to take account of the representative reader of the specific defamatory material in question.[73] This can result in a change in the perspective adopted by the reasonable reader (and, importantly, impact the interpretation of the alleged defamatory content) by virtue of the representative reader possessing more general knowledge about the context in which the defamatory material was made compared to the ordinary member of the public.

28.60 Here, the 2018 complaint led to the convening of the disciplinary processes against the plaintiff. The question is whether the context in which the alleged defamatory communication was made can render non-defamatory words which would otherwise be regarded as defamatory. In this regard, the learned judge cited *Segar Ashok v Koh Fonn Lynn Veronica*[74] ("*Segar Ashok*") as an example of words uttered by the plaintiff's enemy that would be treated with scepticism by the third party audience. It should be noted that this legal proposition in *Segar Ashok* was applied in the context of mitigation of damages in the defamation action and not for the purpose of determining defamatory meaning. Furthermore, instead of the 2018 complaint giving rise to the imputation that the plaintiff's behaviour was in fact "damaging and disruptive", it is

71 *Terrence Fernandez v Lim Shao Ying Genevieve* [2020] SGHC 278 at [38].
72 *Terrence Fernandez v Lim Shao Ying Genevieve* [2020] SGHC 278 at [40].
73 *Lord McAlpine v Sally Bercow* [2013] EWHC 1342 (QB) at [58]; *Channing v South African Financial Gazette Ltd* 1966 (3) SA 470 (W) at 474.
74 [2010] SGHC 168 at [100].

plausible, in view of the specific context, to proffer an alternative (natural and ordinary) meaning of the words eg, that there were reasonable grounds to suspect or grounds for investigating whether the plaintiff's conduct was "damaging and disruptive". This stance would be in line with the principle in English case of *Chase v Newsgroup Newspapers Ltd*[75] on the different levels of defamatory meanings; the principle has also been applied locally.[76] If so, the words might still be defamatory though at a lower level of defamatory meaning.

28.61 Moving on to the defence of qualified privilege, as mentioned by the learned judge, this was a clear case of Lim protecting her self-interest in making the complaint and to air her grievances with the club as a recipient having a corresponding interest in receiving such information in order to ensure safety in the workplace. Further, her Honour found that Lim was, in making the complaint, genuinely seeking redress for her grievances. Under the law, the plaintiff can counter the defence of qualified privilege by showing that the defendant made the statements maliciously. In this regard, the plaintiff argued that malice is presumed, citing Bankes J's exposition in *Smith v Streatfeild*:[77]

> The principle upon which the law of qualified privilege rests is, I think, this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and … the plaintiff has to prove express malice on the part of the person responsible for the publication.

28.62 As correctly pointed out by the learned judge, the plaintiff's argument was misplaced as Bankes J's statement in fact suggested that the onus remained with the plaintiff to prove express malice. Reference may also be made to *Low Tuck Kwong v Sukamto Sia*[78] in which the Singapore Court of Appeal stated as follows:[79]

> In the modern law of libel and slander, the concept of presumed *malice* no longer holds much sway, and today, it is simpler to just say that a defendant is liable for the publication of a defamatory statement without cause or excuse … Nevertheless, it remains that the issue of *malice* is one posterior to the issue of qualified privilege attaching. [emphasis added]

75 [2003] EMLR 218 at [45].
76 *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860 at [16]; *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639.
77 [1913] 3 KB 764 at 769–770.
78 [2014] 1 SLR 639.
79 *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 at [52].

28.63 With respect to the defence of justification, Thean J held that based on the defendant's pleading, the sting in Lim's 2018 complaint was that the plaintiff had micromanaged in relation to the specific incident of the non-member in the club premises and victimised Lim. As mentioned above, the judge did not regard such words, as seen from the ordinary reader's lens, to be defamatory. Moreover, the evidence showed that the statements about micromanagement and victimisation were in substance true.

28.64 The claim in conspiracy can be briefly discussed. As there was no cause of action in defamation, no unlawful act existed and the only possible cause of action would be based on lawful means conspiracy. The latter tort, however, requires the proof of a predominant motive to harm the plaintiff. Lim's intention or motives to file the 2018 work complaint did not satisfy such a high threshold of predominant motive to harm. Moreover, as there was no evidence of collusion amongst the defendants, the claim was dismissed.

28.65 The claim in harassment was similarly dismissed. Sections 3 and 4 of the Protection from Harassment Act[80] ("POHA") prohibit the use of "insulting" words, behaviour or communications that cause or are likely to cause harassment, alarm or distress. The learned judge appeared to imply that the word "insulting" read in the context of the statutory language ("harassment, alarm or distress") would not apply to the case at hand.[81] Moreover, her Honour was of the view that they amounted to "reasonable conduct" which is a statutory defence.

28.66 It is not entirely clear why the words that the plaintiff was "damaging and disruptive" could not be said to be "insulting" so as to cause or be likely to cause "distress" to the plaintiff based on a common-sense meaning of "distress".[82] Given that the plaintiff had micromanaged and victimised Lim,[83] and the specific context of a formal work complaint in response to the plaintiff's actions at the workplace, however, Lim's conduct in filing the complaint was probably "reasonable" in the circumstances. Factors relevant to assessing "reasonable conduct" may include the nature and context of the offending acts and their effect on the victim.[84]

80 Cap 256A, 2015 Rev Ed.

81 *Terrence Fernandez v Lim Shao Ying Genevieve* [2020] SGHC 278 at [78]: "While aspects of the Complaint or Summary can be said to be insulting, the particular word must be understood in its statutory context of harassment, alarm or distress."

82 *Benber Dayao Yu v Jacter Singh* [2017] 5 SLR 316 at [31].

83 See paras 28.58 and 28.63 above.

84 *Benber Dayao Yu v Jacter Singh* [2017] 5 SLR 316 at [43].

28.67 For the claim against Goh based on negligence in the handling of the 2018 complaint, the plaintiff pleaded that Goh had: (a) failed to take any or reasonable care to ascertain the merits of the complaint; (b) failed to take any or reasonable care in the conduct of the "main investigative, and administrative burdens of … a DC hearing"; and (c) failed to take any or reasonable care in the presentation of the results of the investigation to the DC. This claim was dismissed by Thean J, who found that there was no duty of care or evidence of any lack of care as Goh was essentially following the instructions of the then president of the club and GC in dealing with the complaint.

VIII. Inducing breach of contract

28.68 *iVenture Card Ltd v Big Bus Singapore Sightseeing Pte Ltd*[85] concerned the tort of inducing breach of contract, breach of confidence, and conspiracy. The iVenture group of companies comprising iVenture (first plaintiff), iVenture International (second plaintiff) and iVenture Travel (subsidiary of iVenture) were engaged in the business of developing and marketing tourist packages. The first and second defendants ("Ducktours" and "Big Bus") were part of the "Duck and Hippo" group engaged in tourism business. Ducktours operated a local tourist attractions pass that allowed its holders to access tourist attractions at discounted prices. Big Bus was granted a licence to operate the pass and use the iVenture brand in Singapore whilst iVenture would sell the passes on its online website. iVenture and another company would supply Big Bus, in exchange for fees, technical services and access to its transaction systems to operate the passes under a service level agreement. iVenture and iVenture International were entitled to resell the passes on behalf of the defendants under a reseller arrangement.

28.69 iVenture alleged that Big Bus had breached the licence and service level agreements, as well as the reseller arrangement. They also asserted that Ducktours, James and Low (the shareholders and directors of Ducktours) had induced the breaches of contract by Big Bus. In addition, the plaintiffs claimed against the defendants in breach of confidence, and for unlawful means conspiracy to injure them. Choo Han Teck J decided that Big Bus had repudiated the licence agreement and reseller arrangement. Big Bus successfully counterclaimed against iVenture for repudiation of the service level agreements, and against iVenture for payments of outstanding invoices under the reseller arrangement. This review will focus on the tort claims.

85 [2020] SGHC 109.

28.70 With regard to the claim for inducing breaches of contract against Ducktours, James and Low, the main elements of the tort are that (a) the defendant must have known of the existence of the contract; (b) there was a breach of the contract; (c) the defendant intended the breach of the contract; (d) the defendant had by direct inducement or persuasion procured the breach of the contract; and (e) the plaintiff suffered economic loss. In so far as the reseller arrangement was concerned, the High Court determined that the reseller arrangement was an "oral agreement" and that iVenture (but not iVenture Travel) was the "proper contracting party" under the reseller arrangement. Thus, iVenture Travel's claim against Bus Big for inducing breach was dismissed.

28.71 Focusing on iVenture's claim for inducing breach of contract, the High Court judge referred to the "knowledge, actions and intentions" of certain officers of Ducktours in inducing Big Bus's contractual breaches, which the learned judge treated as attributable to Ducktours.[86] There was, however, no separate analysis of whether and how the officers had intended the breach of contract and procured the breach by direct inducement or persuasion.

28.72 James and Low, as directors of Big Bus, were acting *bona fide* within their scope of authority with respect to the contractual breaches by Big Bus. As they did not breach their legal duties to Big Bus, James and Low were absolved from personal liability in tort for the contractual breaches by Big Bus. This was consistent with the Court of Appeal's decision in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[87] ("*PT Sandipala*") on the principle in *Said v Butt*.[88] In *PT Sandipala*, the Court of Appeal had explained that implicit in the principle is the recognition that a director acts in the capacity of the company when he exercises his functions as a director within the scope of authority, and that the director should not be deterred by the fear of personal liability when he acts in the company's interests.[89]

28.73 With respect to the claim for breach of confidence, Choo J appeared to have taken cognisance of the new approach in *I-Admin* discussed above.[90] His Honour stated that the defendants had not "misused" the confidential information (that is, product development, pricing, operating processes and marketing) or acted "unconscionably"

86 *iVenture Card Ltd v Big Bus Singapore Sightseeing Pte Ltd* [2020] SGHC 109 at [25].
87 [2018] 1 SLR 818.
88 [1920] 2 KB 497.
89 See SAL *Annual Review of Torts* (2018), paras 26.5–26.7; *cf Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 (also discussed in (2018) 19 SAL Ann Rev 756 at 759–760, paras 26.8–26.11).
90 See paras 28.28–28.39 above.

in any other way.[91] Focusing on the third legal requirement in *Coco v AN Clark (Engineers) Ltd*,[92] the learned judge stated that there was no misuse of the confidential information to set up the pass business. This was because the defendants had independently developed the information technology ("IT") system for the passes at least a year before the dispute arose. The judge then concluded that as there was no evidence of misuse or that the defendants had acted unconscionably, the plaintiffs' claim for breach of confidence was dismissed.

28.74 Though the eventual outcome was arguably consistent with the application of the new approach in *I-Admin*, the learned judge did not specifically refer to the circumstances giving rise to the presumption of breach of confidence and the shifting of the burden of proof to the defendant to show that their conscience was unaffected. Strictly speaking, the abovementioned evidence that the defendants had independently developed the IT system was not one of the examples given in *I-Admin*[93] for displacing the presumption. It is argued, however, that such evidence should be sufficient to show that the defendants' conscience was unaffected. In any event, the examples for displacing the presumption were not meant to be exhaustive.

28.75 The final claim related to conspiracy. The alleged unlawful means were the breaches of the licence agreement and reseller arrangement respectively by Big Bus. His Honour held that Big Bus and Ducktours (through its officers acting on their behalf) had agreed and intended to commit the acts of suspending the pass business on two occasions with the intention of injuring iVenture by pressuring them to comply with certain demands by Big Bus and Ducktours in relation to payments under the reseller arrangement. As for proof of damage, Choo J computed the loss of profits suffered by iVenture arising from the suspensions of the pass business. It should also be mentioned that James and Low were absolved from personal liability for the conspiracy based on the aforementioned principles in *PT Sandipala* and *Said v Butt*.[94]

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91 *iVenture Card Ltd v Big Bus Singapore Sightseeing Pte Ltd* [2020] SGHC 109 at [27].

92 [1969] RPC 41.

93 That the "defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it": *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [61].

94 See para 28.72 above.