Neo Kok Eng v Yeow Chern Lean and Another Suit
[2008] SGHC 151

Case Number : Suit 136/2007, 137/2007

Decision Date : 15 September 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Philip Ling Daw Hoang and Hwa Hoong Luan (Wong Tan & Molly Lim LLC) for both plaintiffs; Edmund Jerome Kronenburg and Adrian Ng Kia Whye (Tan Peng Chin LLC) for the defendant

Parties : Neo Kok Eng — Yeow Chern Lean

Restitution

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 157 of 2008 (Suit No 136 of 2007) was allowed and the appeal to this decision in Civil Appeal No 157 of 2008 (Suit No 137 of 2007) was allowed in part by the Court of Appeal on 26 June 2009. See [2009] SGCA 27 .]

15 September 2008 Judgment reserved.

Lai Siu Chiu J:

The parties

1 These two consolidated actions relate to claims by Neo Kok Eng ("Neo") and Chip Hup Hup Kee Construction Pte Ltd ("the Company") against Yeow Chern Lean ("the defendant") for various sums of money.

2 In Suit 136 of 2007 ("the first suit"), Neo's claim against the defendant was for damages for conversion of three cheques in the amounts of $80,000, $100,000 and $260,000, alternatively for moneys had and received by the defendant to the use of Neo of the aforesaid sums. Additionally, Neo claimed a declaration that a property at No. 189, Eng Kong Garden, Singapore 599287 ("the property") purchased by the defendant was held by the defendant on trust for Neo and the defendant in the proportion of their contributions towards the purchase price alternatively in such proportion as the Court determined.

3 In Suit No. 137 of 2007 ("the second suit"), the Company's claims against the defendant were for (i) $306,580; (ii) for breach of fiduciary duties and (iii) for overpayment of salary in the sum of $5,320. By the time of this trial, the first two claims had been discontinued with leave of court and the only claim remaining was that in (iii) for $5,320. (Hereinafter, Neo and the Company will be referred to collectively as "the plaintiffs").

The facts

4 Neo is the managing-director as well as the majority shareholder of the Company which is in the building and construction business. The defendant was employed as a project manager of the Company on 1 November 1994. He was later promoted to general manager ("GM") on 1 May 2002, which post he held until his employment was terminated by Neo and/or the Company on 1 February 2007.

5 As the Company's GM, the defendant was paid a monthly salary of $6,800 and was given in addition a transport allowance of $600 every month plus a meal allowance of $100. In his capacity as the GM, the defendant had access to the documents, accounts and financial records of the Company.

6 In the course of his employment with the Company, the defendant took instructions from one Lim Leong Huat ("Lim") who, until the termination of his employment on 29 November 2006, was the GM as well as project director and executive director of the Company. Lim was also the majority shareholder and effectively thereby the owner of a company called AZ Associates Pte Ltd ("AZ").

7 According to Neo, Lim would meet with him on a regular basis and report to Neo on the progress of various projects undertaken by the Company. Such updating included the Company's cash flow position having regard to what was received and paid out by the Company.

8 As he was not involved in the day-to-day management of the Company's accounts or funds and had little contact with the accounts department, Neo accepted whatever Lim told to him was the financial position of the Company.

9 Consequently, between 1999 and 2003, whenever Lim represented to him that the Company had cash flow problems and the Company required funds to meet the shortfall, Neo would issue personal cheques which he handed to Lim for credit to the Company's bank account. Neo left it to Lim to properly record these loans in the books of the Company.

10 On 21 November 2006 before his departure from the Company, Lim sued the Company in Suit No. 779 of 2006 ("the Suit") for $7,205,000 allegedly for interest-free friendly loans Lim had extended to the Company between July 2003 and September 2006 at Neo's request. Lim further alleged that Neo had issued him undated cheques drawn on United Overseas Bank ("UOB") for sums totalling $6,405,000 which upon his presentation for payment were dishonoured, for the reason "payment stopped".

11 Surprised how an ex-employee could have advanced such large sums to the Company, Neo said the Company conducted an investigation into its finances and discovered therefrom that that Lim had misappropriated various sums of money from the Company in particular $6,084,741.06 which was the total value of the cheques Neo had handed to Lim supposedly for the Company's use. It was further discovered that some of Neo's cheques were diverted as follows:

(a) credited into Lim's bank account;

(b) credited to the bank account of Lim's wife Tan Siew Lim (Lim's wife");

(c) credited to the bank accounts of AZ;

(d) drawn out as cash by Lim;

(e) credited into the Company's bank accounts but recorded as loans made by Lim to the Company and

(f) credited into the Company's bank account but recorded as loans made by AZ.

12 As a consequence of the above discoveries, the Company filed a defence in the suit denying Lim's claims and counterclaimed against Lim, Lim's wife and AZ moneys which Lim had misappropriated from the Company. The Company subsequently obtained summary judgment against Lim on its

counterclaim in the sums of $347,030 and $426,740, after it successfully appealed to a judge in chambers against the decision of an Assistant Registrar ("the AR"), who had granted Lim conditional leave to defend the counterclaim. Lim's cross-appeal against the AR's refusal to grant him summary judgment on his claim for $7,205,000 was dismissed.

13 Lim appealed (in Civil Appeal No. 142 of 2007) to the Court of Appeal. At the hearing before the appellate court on 11 July 2008, the judgment against Lim was set aside by consent but on terms *viz* that the Company could retain the two judgment sums he had paid and was at liberty to deal with the sums. In the event that Lim (and/or Lim's wife) succeeded in the respective defences to the Company's counterclaim at the trial of the suit, the sums would then be refunded to Lim and/or to Lim's wife on such terms as the trial judge may direct.

14 In the course of the Company's investigations, Neo purchased from UOB cheque images of the personal cheques he had handed to Lim. He discovered therefrom that: (i) cheque no. 378730 for $80,000 ("the $80,000 cheque") and (ii) cheque no. 634684 for $100,000 ("the $100,000" cheque") had been cashed by the defendant on 22 November 2000 and 4 April 2002 respectively. Neo recognised Lim's handwriting in the insertions of the defendant's name and the word "cash" as the payee respectively in the $80,000 and $100,000 cheques as well as the insertion of the dates and amounts in both cheques. Neo had not handed the two cheques to the defendant nor had the defendant approached him for his consent to use the same.

15 As for the defendant's misappropriation of UOB cheque no. 788740 for $260,000 ("the $260,000 cheque"), this was fortuitously discovered when the Company's employees were clearing out Lim's office on 29 November 2006 after Lim's departure from the Company. The employees found an invoice of AZ no. AZ/EKG/PC/03 ("AZ's invoice") dated 1 April 2003 issued to the defendant for $260,000 in respect of the property in [2] with the word PAID stamped thereon against which was handwritten "UOB 788740". Neo recognised the note as a reference to one of the personal cheques he had handed to Lim around April 2003 for credit to the Company's bank account. The cheque image that Neo obtained from UOB revealed that the $260,000 cheque had been deposited into the bank account of AZ, not the Company. (Henceforth, the cheques for $80,000, $100,000 and $260,000 will be referred to collectively as "the three cheques").

16 Upon receipt of the three cheque images in [14] and [15], Neo summoned the defendant to his office on 1 February 2007 to give the defendant an opportunity to explain how the three cheques came to be used for the defendant's benefit. Neo said he questioned the defendant repeatedly but the defendant gave no explanation for his actions. However, the defendant did not deny but in fact admitted taking the $80,000 and $100,000 cheques. Consequently, Neo decided to and did, terminate the defendant's employment with the Company immediately, for dishonesty and misconduct. The defendant was handed a formal letter of termination the same day together with a cheque in payment of his outstanding salary up to that day.

17 Unbeknownst to Neo, the defendant used his mobile telephone to record their conversation on 1 February 2007, which conversation the defendant disclosed in these proceedings (together with the transcript).

18 The second suit arose out of a mistake on the part of the Company's accounts staff, one Khoo Choon Yean ("Khoo") who had inadvertently overpaid the defendant the sum of $5,320 as the defendant's salary for the month of November 2006, thinking the salary was $11,920 when it was actually $6,800 per month. The overpayment was only discovered by Khoo in January 2007. Although the defendant was aware that his salary was $6,800 and not $11,920, he had refused or neglected to return the overpaid amount, despite a letter of demand from the Company's solicitors dated 27 April

2007.

The pleadings

19 Earlier at [2], I had alluded to the claims of Neo and the Company in the first and second suits respectively. As Neo's statement of claim essentially repeated the allegations set out in [5], [9], [13] and [14] above, it would not be necessary to repeat them. I should point out that Neo's second claim to a beneficial share in the property (which reconstruction the defendant had completed by the date of the trial) was based on the defendant's utilisation of the $100,000 and $260,000 cheques towards the cost of its construction.

20 The Company's remaining claim in the second suit was for the sum of $5,320 as money had and received by the defendant to the use of the Company.

21 In the defence that he filed for the first suit, the defendant averred that in November 2000, he needed money for his purchase of the property. He approached his then superior Lim to borrow $80,000 to which Lim agreed. A few days later, Lim handed the defendant the $80,000 cheque which the defendant cashed on or about 22 November 2000. The $80,000 cheque was not blank as Neo had alleged but contained the defendant's name as the payee. The defendant contended that he treated the $80,000 cheque as a loan from Lim as he was unaware that the proceeds of the $80,000 cheque were not meant for his personal use and/or benefit. Neither was he told by anyone to deposit the $80,000 into the Company's bank account for its use and benefit.

22 In the alternative, the defendant pleaded that Neo's claim on the $80,000 cheque was time-barred under the Limitation Act (Cap 163, 1996 Rev Ed) ("The Limitation Act").

23 As for the $100,000 cheque, the defendant averred that in April 2002, he needed money for the construction works on the property. He had demolished the existing house and had engaged AZ to build a new house thereafter. He approached Lim to borrow $100,000 to which Lim agreed. A few days later, Lim handed to him the $100,000 cheque which the defendant cashed on or about 4 April 2002. The defendant repeated his defences in [21] on the $100,000 cheque.

24 Similarly, in relation to the $260,000 cheque, the defendant repeated his defence in [21] and averred that he needed more money for construction works carried out by AZ on the property. He had approached Lim for a loan of $260,000 to meet AZ's progress claim. The defendant claimed that Lim agreed and had told the defendant that as a director of AZ, Lim would arrange for the loan to be applied towards payment of AZ's claim. The defendant averred that until his receipt of the letter dated 6 January 2007 from the Company's solicitors, he was not aware that Neo had issued nor had he seen, the $260,000 cheque.

25 For the second suit, the defendant claimed that the Company was aware at all times that the defendant was concurrently employed by various companies for various periods as follows:-

Company	Approximate start	Approximate end
The Company	November 1994	1 Feb 2007
AZ	Sometime in 1998	1 Feb 2007
Chippel Construction Pte Ltd	Sometime in 1998	Sometime in 1998

Hiap Hoe & Co Pte Ltd	End 1996	End 1998
Hor Kew Private Ltd	About March 2003	February 2005

The defendant alleged that the Company had consented to his concurrent employment as set out above. Neo in particular was fully aware of and had consented to the defendant's employment by AZ as the defendant was appointed the project manager of Neo's construction of a house at Joan Road for Neo's wife, which project was undertaken by AZ.

26 Further, the Company and AZ occupied the same premises and shared the same accounting, administrative staff and other employees including contracts and purchasing departments.

27 The defendant contended that he did not procure moneys from the Company to pay his salary (he had no power to do so) but believed that there was an internal arrangement between AZ and the Company whereby the Company would pay the defendant's monthly salary from AZ and it would then be reimbursed by AZ.

28 The defendant alleged that the Company had breached his employment contract dated 29 March 2006. He had tendered his resignation on 7 December 2006 giving the requisite three months' notice and his last day of employment would have been on 7 March 2007. The Company wrongfully terminated his employment summarily on 1 February 2007 and further refused to pay the defendant his monthly salary, transport and meal allowances up to 7 March 2007. The defendant counterclaimed for his salary, CPF contributions, transport and meal allowances totalling $10,990.64 for the period 1 December 2006 to 7 March 2007. The claim figure was the net balance of the defendant's original claim of $26,080.64 after he had taken into consideration and deducted therefrom, his receipt of $11,920 in [18] from the Company, employer's and employee's CPF contributions thereon as well as another payment of $2,000 he had received from the Company on 1 February 2007.

29 Consequently, if the defendant was liable to the Company (which was denied), the defendant sought to set-off against such liability any sums he may be awarded by way of his counterclaim.

The applications

30 Before the commencement and on the second day of the trial, the parties made a number of applications to the court.

31 In Summons No. 980 of 2008, the plaintiffs applied to strike out paras 6-11 of Lim's AEIC ("the striking-out application") pursuant to Order 41 Rule 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Edn) ("the Rules"). In Registrar's Appeal No. 69 of 2008 ("the plaintiffs' appeal"), the plaintiffs appealed against the order made by the Assistant Registrar below in granting the defendant's application in Summons no. 889 of 2008 ordering Neo to give discovery of a list of documents ("the discovery application").

32 In Summons No. 1003 of 2008, the defendant applied for leave to file a Rejoinder ("the Rejoinder application") and to call one Lim Kok Khuang as an additional witness. In Summons No. 1107 of 2008, the defendant applied for leave to amend his defence in respect of the first suit ("the amendment application").

33 I granted the striking-out application and also allowed the plaintiffs' appeal (in part) on the

discovery application but dismissed both the Rejoinder and the amendment applications of the defendant. As he has filed Notices of Appeal against all my decisions (in Civil Appeals Nos. 42 to 45 of 2008), it would be appropriate at this juncture to set out the grounds for my decisions before I proceed to review the evidence adduced during the trial.

34 In the striking-out application, the plaintiffs sought (and which I did) to expunge the following paragraphs in the AEIC of Lim filed on 26 February 2008:

> **The S$80,000 and S$100,000 cheques**
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> 6. Neo gave me his S$80,000 and S$100,000 cheques as a partial repayment of money that I had placed with him for the purpose of investing in shares. I will explain how this came to be: On or about 10 August 2000. I placed the sum of S$204,076.23 with Neo for purposes of investing in certain Chip Eng Seng shares. My money was pooled together with money from other investors. The amount of investment money to be managed by Neo at that time came up to S$1,632,610.69. My investment of S$204,076.23 amounted to 12.5% of the total investment managed by Neo. Neo and I were on very close terms at that time, and I trusted him to invest my money properly. Now produced and shown to me, annexed hereto and marked "LLH-1" and "LLH-2" respectively are true copies of my Overseas Union Bank Limited cheque no. 071888 made out in Neo's favour for the sum of S$204,076.23 and a table made by Neo showing my investment forming a larger pool of funds managed by Neo amounting to S$1,632,610.69.
>
> 7. By November 2000, I heard from Neo that the investment was not performing as well as expected. Neo wanted to sell the shares. I disagreed – I wanted to hold on to the shares to ride out the bad patch. Neo said that he could not do this as the other investors wanted him to sell the shares.
>
> 8. As such, we agreed that Neo would buy out my investment and return me the money that I had put in. We agreed that I could obtain repayment of my investment from Neo as and when I needed it. The S$80,000 and S$100,000 cheques that Neo handed to me were part of this repayment to me.
>
> 9. In fact, Neo knew that S$80,000 and S$100,000 in question were going to be used by me to make loans to Yeow. I say this for the following reasons:-
>
> (a) When Neo signed the S$80,000 cheque in front of me, Yeow's name had already been written on it. I expressly explained to Neo that this was because I would be using Neo's S$80,000 cheque to make an equivalent loan to Yeow.
>
> (b) The S$100,000 cheque was a cash cheque. I knew that the bank would seek authorization from Neo when the cheque was presented. As such, I telephoned Neo and told him that Yeow would be presenting the cheque and that this was because I was using the cheque to make a loan to Yeow in the sum of S$100,000. Neo said he could clear the payment to Yeow if and when the bank sought confirmation from him.
>
> 10. As such, when I handed the S$80,000 and S$100,000 cheques to Yeow, I told him that I was handing him Neo's cheques because Neo and I had a private arrangement and that the monies from the cheques were mine, to do with as I pleased. I certainly never told him that the cheques were intended by Neo to be deposited into CHHK's bank account or that the money was for the use and/or benefit of CHHK. This was because Neo had no such intention. Neo never said anything of the sort when he handed me these cheques.

The S$260,000 cheque

11. As for the S$260,000 cheque, I confirm that it never came into Yeow's hands. The cheque was used to pay Yeow's third progress payment for construction works at the Eng Kong Property. The proceeds of the said cheque were part of a separate arrangement between Neo and me. Neo and I had agreed that this sum of S$260,000 would facilitate a partial reimbursement for various other payments that I had procured in favour of Neo's companies, CHHK and Chippel Construction Pte Ltd. As such, it was understood between Neo and me that the money was mine to do as I deemed fit. I chose to use the money to extend a loan to Yeow, to effect his third progress payment for the Eng Kong Property.

35 The striking-out application was grounded on O 41 r 6 of the Rules which states:

The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

36 Counsel for the plaintiffs submitted that the offending paragraphs in Lim's affidavit were not part of the defendant's pleaded case (which based on the existing pleadings was indeed the case). His opponent Mr Kronenburg ("Kronenburg") argued that if the defendant succeeded in the Rejoinder application, the striking-out application would not be necessary. In any case (Kronenburg pointed out), it was Neo himself who deposed in his written testimony that he had extended loans to the Company by way of the three cheques; Lim's AEIC merely answered that allegation. I acceded to Kronenburg's request and consequently dealt with the Rejoinder application first before dismissing it and then granted the striking-out application.

37 The Rejoinder application was supported by an affidavit filed by the defendant who deposed that he needed to file a Rejoinder to answer the Reply of Neo in the first suit filed on 29 February 2008 with leave of court. The defendant claimed that the Reply raised new allegations not previously pleaded by either Neo or the Company. The defendant referred in particular to paras 4 to 9 of the Reply which were as follows:

4. Further and/or in the alternative, the Plaintiff avers that between the years 1999 to 2003, one Lim Leong Huat, who was at the material time the General Manager and/or Project Director and/or Executive Director of CHHKC, had informed him that CHHKC had urgent cash flow problems because the monies received by CHHKC from the various projects were less than the monies that would have to be paid out at the time. Consequently, CHHKC would require loans to see through its cash flow problems and these loans would be repaid by CHHKC as and when CHHKC's cash flow position allowed it.

5. In reliance upon what Lim had told him, the Plaintiff gave Lim his personal cheques as loans to CHHKC with instructions for the same to be credited into CHHKC's accounts and/or be applied for CHHKC's use and/or benefit. The S$80,000 cheque was one of the personal cheques which the Plaintiff had given to Lim.

6. On several occasions, Lim had in turn handed the personal cheques issued by the Plaintiff to another employee of CHHKC. The Plaintiff had agreed and consented to the same, on the basis and assumption that the proceeds thereof would ultimately go into CHHKC's account and/or be applied for CHHKC's use and/or benefit in accordance with the Plaintiff's instructions.

7. In the present case, the Plaintiff had handed the S$80,000 cheque to Lim, with the same instructions for the latter to deposit into the bank account of CHHKC for the use and/or benefit

of CHHKC.

8. The Plaintiff avers that even if he had agreed and/or consented to Lim handing the S$80,000 cheque to the Defendant, this was only on the basis and assumption that, as the Defendant was at the material time a Project Manager of CHHKC, he would ensure that the proceeds thereof would ultimately go into CHHKC's account and/or be applied for CHHKC's use and/or benefit in accordance with the Plaintiff's instructions.

9. It was only when the Plaintiff subsequently discovered that the Defendant had encashed the S$80,000 cheque and utilized the proceeds thereof for his own use and/or benefit, that he had, by his solicitors' letter to the Defendant dated 2 February 2007, made a demand on the S$80,000 cheque. On 9 February 2007, the Defendant's solicitors replied rejecting and refusing the Plaintiff's said demand. By such refusal, the Defendant converted the S$80,000 cheque to his own use.

38 Kronenburg sought to justify the lateness of the Rejoinder application on the basis that the amended pleadings up to the trial did not address the issue of the loans from Lim to Neo.

39 Counsel for the plaintiffs Mr Ling ("Ling") not unexpectedly opposed the Rejoinder application. He disagreed with the defendant's contention that Neo had raised fresh allegations in the Reply. Ling pointed out that paras 4 to 9 of Neo's Reply were in direct response to the defence of limitation on the $80,000 cheque (raised in para 3(vii) of the defence and based on ss 6(1) and 22(2) of The Limitation Act while paras 10 and 11 of the Reply addressed the change of position argument raised in para 5 of the defence. I should add that paras 3(vii) and 5(a) to (e) were added to the amended defence (Amendment No.1) filed on 25 February 2008.

40 Ling pointed out that para 3 of the (original) statement of claim (read with the Further and Better Particulars of that paragraph filed on 5 April 2007) pleaded the $80,000 cheque had been handed by Lim to the defendant. Consequently, the defendant should have included in his original defence or the amended defence the plea in para 6 of the proposed Rejoinder which was as follows:

Paragraph 5 of the Reply is denied. The Defendant avers that both the $80,000 cheque and the $100,000 cheque were a partial repayment from [Neo] of money that Lim had placed with [Neo] for the purpose of investing in shares.

(a) On or about 10 August 2000, Lim had placed the sum of $204,076.23 with [Neo] for purposes of investing in certain Chip Eng Seng shares.

(b) By November 2000, [Neo] had wanted to sell the shares as the investment was not performing as well as expected. Lim did not agree.

(c) [Neo] and Lim agreed that Neo would buy out Lim's investment and return the money that Lim had put in. They agreed that Lim could obtain repayment of his investment from [Neo] as and when Lim needed it.

(d) The $80,000 cheque and $100,000 cheque referred to in paragraph 3 of the Defence (Amendment No. 1) herein were part of this repayment from Neo to Lim.

41 Paragraph 11 of the proposed Rejoinder stated:

Further and/or in the alternative to all of the foregoing, by reason of the matters pleaded in

> paragraphs 4 to 9 of his own Reply, after [Neo] had handed his personal cheques to Lim allegedly intending that they be deposited in the bank account of [the Company] or for the use and/or benefit of [the Company] (as pleaded in paragraph 5 of the Reply), [Neo] had no title to, nor any immediate right to possession of, nor actual possession of any of the said personal cheques, including but limited to the $80,000 cheque, the $100,000 cheque and $260,000 cheque set forth at paragraphs 3 and 7 of the statement of claim (amendment No. 1) filed herein.

Ling similarly argued that the defendant should have pleaded Neo's lack of title in his defence or amended defence but had failed to so do. He surmised (which surmise the court had already put to Kronenburg who denied it) that the Rejoinder application was to pre-empt and defeat the striking-out application.

42 As for the additional witness that the defendant sought to call, Kronenburg explained that Lim Kok Khuang ("LKK") was the Company's auditor. The purpose of calling LKK to testify was to challenge Neo's claim on the issue of whether Neo's cheques handed to Lim were meant to be loans to the Company. The defendant wanted LKK to testify on whether Neo took this position every year.

43 As with the application to file a Rejoinder, the plaintiffs objected to calling LKK to testify on the basis it was irrelevant to the first suit, whether Neo did or did not lend moneys to the Company. The first suit was confined to the three cheques which the defendant had already admitted taking (both in his pleadings and in his AEIC) for the purchase of and construction of, the property.

44 I dismissed the Rejoinder application of the defendant and conversely granted the plaintiffs' striking out application because counsel for the defendant failed to give any explanation let alone a satisfactory explanation for the lateness of the former application. Further, the defendant's excuse that Neo's Reply raised new allegations was not borne out. Indeed, para 6 of the proposed Rejoinder referred to the defendant's own amended defence while para 11 (see [41]) referred to the amended statement of claim which had been filed a year earlier on 12 March 2007. Granting the Rejoinder application therefore would be tantamount to giving the defendant a second bite at the cherry, a danger which the appellate court in *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR 1730 had warned against.

45 As for calling LKK to testify, I accepted the plaintiffs' submission that it was unnecessary as the auditor was not a material witness, contrary to the argument of the defendant's counsel. If Lim did not deposit into the Company's bank account the cheques handed to him by Neo, those loans would not be reflected in the Company's audited accounts.

46 In the amendment application, the defendant sought to introduce (as para 6A) the same defence set out in para 11 (at [41] above) of the proposed Rejoinder, *viz* that Neo had no right to possession of the three cheques after he transferred possession of the same to Lim, relying on s 21(5) of the Bills of Exchange Act (Cap 23 2004 Rev Ed) ("the Act").

47 As I had rejected the application to raise this new defence in the Rejoinder, I similarly disallowed the amendment application (which was heard on the second day of the trial). In regard to amendment of pleadings, the court is guided by the principles laid down by the House of Lords in *Ketteman v Hansel Properties Ltd* [1987] AC 189 and which our Court of Appeal approved and followed in *Wright Norman v OCBC Ltd* [1994] 1 SLR 513. Lord Griffiths held (at p 220):

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to

enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other.

48 In the same case, Lord Brandon summarised the principles governing the discretion to allow or disallow amendments under O 20 r 5 of the Rules as follows (at p 212):

> First all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them; it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

49 Whilst a court has a discretion to allow amendment of pleadings at any stage of the trial under O 20 r 5(1) of the Rules, the later such an application is made, the more likely it will result in an injustice which cannot be compensated by way of costs (see *Hong Leong Finance Ltd v Famco (S) Pte Ltd* [1992] 2 SLR 1108). No doubt as counsel for the defendant argued, amendments have been allowed in the midst of trial (*Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2006] 2 SLR 173), or after close of the plaintiff's case (*Alrich Development v Rafiq Jumabhoy* [1994] 3 SLR 1) or even after trial, at the submissions stage (*Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594). However, it was for the defendant to persuade the court to exercise its discretion in his favour when an amendment was applied for at the eleventh hour. The only explanation given by the defendant's counsel Ng Kia Whye Adrian in this regard (in the supporting affidavit he filed on the defendant's behalf) was in his paras 5 and 6 where he said:

> 5 The reason the defendant seeks to plead this point of law [s 21(5) of the Act] only became obvious as a result of research we had done shortly before the Summons No. 1003/2008 filed on 4 March 2008, for *inter alia,* leave to file a Rejoinder.
>
> 6 Sometime in late February 2000, in the course of our research, we located the case of *Surrey Asset Finance Ltd v National Westminster Bank plc* The Times, November 30, 2000. It was the case of *Surrey* where we had located the point of law on the English equivalent of section 21(5) of the [Act] which was not obvious to us prior to this. Now produced and shown to me, annexed hereto and marked **AN-2** are true copies of the above case.

(I shall refer to Surrey Asset Finance Ltd v National Westminster Bank plc [2000] TLR 852 as "*Surrey's* case".)

50 I noted from the above two paragraphs that counsel for the defendant was *not* relying on a recent court decision that had been released *after* his client had filed the amended defence, as was the situation in *Wright Norman v OCBC Ltd* [47]. Rather, *Surrey's* case was reported in 2000 but counsel for the defendant only recently discovered it. To quote Lord Griffith again in *Ketteman v Hansel Properties Ltd* (at p 220):

There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

51 Even if *Surrey's* case was applicable (and in my view it was not), it was no answer to the objections raised by counsel for the plaintiff that the proposed amendment:

(a) was an attempt to relitigate the Rejoinder application.

(b) could and should have been raised earlier if not at the defence stage, then at the very least before the parties exchanged their AEICs.

(c) would severely prejudice Neo -- he had already been cross-examined that he had passed the three cheques to Lim in the latter's capacity as a director of the Company. Had the application been made earlier, Neo's counsel could have prepared Neo for the possible line of cross-examination counsel for the defendant had already taken. No amount of costs could compensate Neo for the prejudice he would suffer.

52 As the defendant failed to satisfactorily explain the lateness of the Rejoinder and amendment applications which were essentially one and the same, I dismissed both applications with costs to the plaintiffs in any event. As the amendment application was disallowed, I disregarded the defendant's closing submissions where he resurrected the new defence under the Act.

53 The last application the court dealt with on the first day of trial was the plaintiffs' appeal. Ling informed the court that he was confining his clients' appeal to one aspect of the AR's order – if the defendant confined his discovery to the three cheques, the plaintiffs had no objections to the discovery requested. As Kronenburg confirmed that the cheques were the documents he wanted, I limited the plaintiffs' discovery obligation accordingly and made no costs order on the plaintiffs' appeal save that the defendant would reimburse the plaintiffs the disbursements incurred for the appeal.

54 I adjourned the Company's appeal in Registrar's Appeal No. 64 of 2008 ("the appeal on costs") until the conclusion of the trial. This related to the order made by the court below ordering the Company to pay costs on an indemnity basis to the defendant for withdrawing the Company's claim for $306,580 against the defendant referred to in [3] above.

The evidence

55 Neo was the principal witness for the plaintiffs in both suits. The plaintiffs' other witnesses were Khoo [18], Ang Kia Hwee who was from Chippel Overseas Supplies Pte Ltd as well as a representative from UOB by the name of Eric Koh Boay Ling. The defendant's only other witness was Lim.

The plaintiffs' case

56 As I have set out Neo's version of events in [4] to [18] above, I shall turn my attention to his testimony adduced under cross-examination.

57 Neo (PW1) revealed that the $80,000 cheque was meant to be a cash cheque to enable Lim to withdraw and credit the cash into the Company's bank account. He understood from Lim this procedure was necessary because the Company needed to pay one of its suppliers urgently and Lim could not wait for the $80,000 cheque to be credited to the Company's bank account first before the Company issued its own cheque to the supplier. Neo gave the same explanation for the issuance of

the $100,000 and $260,000 cheques. He believed what Lim told him regarding the Company's urgent need for funds to pay its suppliers urgently.

58 In his AEIC, Neo had deposed (in para 18) that he was aware of Lim's practice of cashing Neo's personal cheques as sometimes Neo would receive telephone calls from UOB inquiring whether he had issued particular cheques for particular amounts. Occasionally, the caller from UOB would even identify the person who presented the cheque for payment out. Neo said he was not concerned even if the person withdrawing cash was not Lim so long as it was an employee of the Company, including the defendant. Neo would authorise UOB to pay out the cash as he assumed the money withdrawn would be deposited into the Company's bank account.

59 It was also adduced from Neo that besides Lim, Neo had also handed his personal cheques on several occasions to another employee of the Company on the assumption that the proceeds of those cheques would ultimately be credited to the Company's bank account. The amounts would be treated as Neo's loans to the Company in its books of accounts. (This testimony was corroborated by Khoo (PW3) who testified that she was instructed by Neo to record and reflect the payments in the cash book of the Company as loans owing to Neo).

60 Kronenburg drew Neo's attention to the fact that in the suit at [12], the Company had counterclaimed from Lim the $260,000 sum whereas in these proceedings, Neo took the position that the $260,000 cheque was his personal cheque. Neo then said the Company would withdraw its counterclaim for the $260,000 in the suit. (Ling clarified that the Company was not counterclaiming from Lim the $260,000 as such; its counterclaim was for a declaration that Lim had breached his fiduciary duties to the Company and was liable to account for the $260,000 cheque).

61 Cross-examined on why he trusted Lim so implicitly, Neo explained it was because of Lim's ability to bring in a lot of business for the Company coupled with the fact that Lim managed the Company well and had increased the Company's staff and its annual turnover (N/E 41 on 11 March 2008). Because of Lim's good performance and their close relationship, Neo felt he had to support the Company financially whenever Lim asked him for funds starting from 1999. Neo revealed that the Company did not do well in 2000 but that was due to the economic downturn. In fact, Neo said he supported the Company even more during those difficult times in order to maintain the livelihood of its 1,000 odd employees. If the Company was in trouble, it meant he was also in trouble

62 Neo revealed that in 2000 Lim had asked him to buy over some of Lim's shares in the Company. Neo agreed and paid Lim the sum of $160,800 for the latter's shares because Lim wanted an auspicious sounding number (in Chinese). Apart from this cheque for $160,800 Neo insisted he had never meant Lim (or anyone else) to personally receive the moneys in the many cheques Neo issued over the years as they were all meant for the Company's use. Neo said he always issued cheques in round figures.

63 When he confronted the defendant on 1 February 2007, Neo said he demanded that the defendant repay the two sums totalling $180,000. Kronenburg drew Neo's attention to the letter of demand dated 2 February 2007 (at 1AB 69) from the Company's lawyers to the defendant. In that letter, it was the Company that had demanded the sum of $180,000 from the defendant. The same lawyers then sent a separate letter on Neo's behalf to the defendant on 7 February 2007 demanding the sum of $260,000. Neo replied that he left all matters relating to his claim/the Company's claim to his lawyers. As far as Neo was concerned, he would sue whoever took his money. After he had obtained the cheque images from UOB, Neo realised it was the defendant not Lim, who had cashed the $80,000 and $100,000 cheques. Hence, the Company demanded back these sums from the defendant as the moneys were supposed to have been deposited into the Company's bank account.

Neo believed Lim and the defendant colluded to deceive and take his money. However, he denied that he sued the defendant as a vendetta because the latter refused to help him in Neo's action against Lim.

64 Neo revealed it was because of his complete trust in Lim that he was unaware that Lim had paid himself and the defendant salaries on behalf of AZ using the Company's moneys. Hence, the Company's original claim in the second suit against the defendant for $306,580 for overpayment of salaries for seven years between October 1998 and October 2006. The additional salaries of Lim and the defendant were paid via GIRO arrangements through another bank *viz* Development Bank of Singapore (" DBS"). The documents produced in court (see 3AB 1692 and 1694) showed that Neo himself signed and authorised the GIRO payments for July and August 2005. Neo explained that because of his trust in Lim, he did not check documents before he signed them either at Lim's request or at the request of the Company's accounts department, which would act on Lim's instructions.

65 Neo explained that the Company withdrew its claim of $306,580 against the defendant not because the defendant was innocent but because it did not have sufficient evidence (N/E 36 on 12 March 2008) against him. Another reason was the Company's decision to proceed against Lim for the amount.

66 Neo was referred to the transcript of his conversation with the defendant on 1 February 2007 which, as stated earlier at [17], Neo was unaware had been recorded by the defendant. Neo contended that more was said in their conversation than had been recorded by the defendant. According to Neo, his main purpose in confronting the defendant was to find out whether the defendant took the three sums. When the defendant denied taking the moneys, Neo inquired who had taken the sums but the defendant refused to tell him. Neo said he did not specify who had taken his money not the amounts. As the defendant refused to implicate anyone else, Neo told the defendant that in that case, he (Neo) would take it that it was the defendant who had taken the sums. However at one stage (see 1AB 288) during their conversation, the defendant admitted he had taken the two cheques for $80,000 and $100,000 but not the $260,000 cheque. (The transcript showed that the defendant wanted to explain that he did not put the money [presumably the $180,000] into his pocket but Neo did not give him the opportunity to do so). Neo said he disbelieved the defendant's claim that the defendant knew nothing about the $260,000.

67 It appeared from the transcript that Neo was persuading the defendant to stay on in the Company (even though the defendant had already tendered his resignation) and not associate with 'bad guys' (presumably Lim). What was obvious from the transcript (and which Neo admitted) was that Neo was very angry at that meeting. What was equally obvious was that as the defendant recorded the conversation, the defendant could be selective in what extracts of the conversation he wanted to be recorded and which Neo estimated lasted about an hour (with Khoo going in and out of his room).

68 Nothing much turns on the testimony of Khoo (PW4), whose evidence related to the Company's claim in the second suit. As noted earlier at [29], the defendant's stand on this claim was to set it off against his counterclaim.

The defendant's case

69 I turn now to the written testimony of the defendant (DW1). The defendant (who is a civil engineering graduate from Nanyang Technological University) described Lim as his superior and friend with whom he had worked for some time. He deposed that in 2000 he saw an opportunity to make some money out of the Singapore property market which was recovering from its doldrums. He

intended to buy a property at a low price and sell it at a profit later. That factor prompted him to buy the property. However, the defendant had insufficient cash to meet the purchase price ($1,588,000) even taking into account a housing loan he had secured, so he decided to approach Lim in August 2000 for assistance. Lim not only agreed to lend the defendant two sums of $80,000 and $100,000 but even stood as the sole personal guarantor for the defendant's housing loan of $1,270,000 from DBS.

70 In the course of his cross-examination on 13 March 2008 (at N/E 108-110), the defendant gave the following breakdown (see exhibit D1) of how he funded the purchase price:-

Purchase price	$1,588,000.00
10% down payment	158,800.00
Bank loan	1,270,000.00
Balance	159,200.00
Add: stamp/legal fees	(no figures given)
He needed	210,000.00
Defendant had cash	130,000.00
Shortfall:	80,000.00

71 In cross-examination it was established that the defendant did not even pay the cash component of $130,000 let alone the shortfall of $80,000. The defendant revealed that Lim lent him another $80,000 (on 22 November 2000) over and above the first $80,000 cheque and the $100,000 cheque for the completion of his purchase on 23 November 2000. The defendant also borrowed $50,000 from Jean Khoo, who was the contracts manager before her dismissal by Neo (after Lim's departure) from the Company for misappropriation of funds. Apart from the initial 1% ($15,880) and a further $7,920, the defendant made no other payments towards the purchase of the property as the $210,000 he needed in [70] above came partly from Lim ($160,000) and partly from Jean Khoo ($50,000), not counting legal and stamp fees. The defendant revealed that if Lim had not agreed to lend him the necessary funds, he would not have taken an option to buy the property

72 It was also in evidence from the defendant's cross-examination that he knew the $80,000 and $100,000 cheques came from Neo. Indeed, the defendant testified, he had actually inquired of Lim why (on recognising Neo's signature on the $80,000 cheque) Neo was involved. Lim replied that the money was actually Lim's and that he (Lim) had a private arrangement with Neo. The defendant found Lim's response entirely believable because he was aware that Neo and Lim (at that time) were extremely close, not to mention that the Company and AZ shared the same telephone numbers, office premises and employees including accounting staff.

73 After his purchase, the defendant rented out the property for a while. He then decided to demolish the existing house (which was very old) and build a new house so as to improve rental returns. It was a good time to rebuild because construction costs were at an all time low. He approached Lim to inquire how much AZ would charge for demolition of the existing house and construction of a new house. Lim quoted the defendant $400,000 to $500,000. As Lim's estimate was

lower than what he expected, the defendant was keen to proceed with his plan. However the defendant did not have the means to pay for the construction costs. He asked Lim for financial assistance. The defendant offered to repay Lim's loan when the property market improved and the property was sold; Lim agreed.

74 In early 2002, AZ started construction works on the property. Around late March 2002, the defendant was informed by the accounts personnel of AZ (whom he identified in court as Khoo but which the plaintiffs disputed) that the first progress claim of around $100,000 was due for payment. The defendant informed Lim who replied he would take care of the payment

75 In early April 2002, Lim handed the defendant the $100,000 cheque. The defendant noticed it was a cash cheque from Neo. When he queried Lim on Neo's involvement, Lim said the $100,000 was his and he had a private arrangement with Neo in that regard. The defendant did not probe further in view of the close relationship between Lim and Neo.

76 In late February 2003, the defendant was again informed by AZ's accounts staff that the third progress claim for $260,000 was due. The defendant spoke to Lim who said he (Lim) would settle the payment direct and the defendant could repay him (without interest) once the property was sold. Until he had sight of it in court, the defendant claimed he had not seen AZ's invoice no. AZ/EKG/PC/03 for $260,000 (in [15] above), nor the $260,000 cheque.

77 The defendant deposed that Lim had also lent him the funds to pay for the second and fourth progress claims on 2 October 2002 and 16 April 2003 respectively. The defendant said he had borrowed $555,000 altogether from Lim *viz* $80,000 for the purchase followed by $475,000 for the construction costs of, the property.

78 After the property market improved in 2007, the defendant found a buyer and sold off the property for $2,550,000. Prior thereto, from the time the new house was completed (in September 2003) until its sale, the property was rented out by the defendant. He said he honoured his agreement with Lim and repaid in full from the sale proceeds what he had borrowed. As far as the defendant was concerned, the $555,000 was borrowed from Lim. I should point out at this stage that the figure $555,000 was incorrect and was subsequently increased to $635,000, as the defendant had omitted to include the second sum of $80,000 that he borrowed from Lim on the eve of completion [71]. When the defendant was recalled to the stand at Ling's behest, it was discovered that even $635,000 was an incorrect figure. It should have been $735,000 as Lim had also funded $100,000 of the balance 10% deposit ($158,800). The defendant had to borrow another $35,000 from a church friend to help him to meet the 10% down-payment. Altogether, the defendant paid $23,800 on a property purchased at $1,588,000.

79 The defendant gave his own version of the meeting with Neo on 1 February 2007. He said he was told a day earlier by Khoo that Neo wanted to see him. The defendant sensed something was wrong – Neo and Lim had a falling out in late 2006, Neo had terminated Lim's employment with the Company, the tension in the Company's office was high and the defendant had not received his January 2007 salary. Consequently, the defendant thought it prudent to record his conversation with Neo.

80 The defendant claimed that he did not want to "inflame" matters and merely responded with answers like "uh-huh" but that did not mean he agreed with what Neo said; the defendant merely acknowledged that he heard what was being said. Ultimately, Neo asked for the defendant's assistance against Lim and when he refused, the defendant was summarily dismissed. Questioned why he did not inform Neo what Lim had said (that there was a private arrangement between Lim and Neo

on use of Neo's cheques), the defendant claimed he was "confused" (see N/E 93 on 14 March 2008). Neither did the defendant deny Neo's accusation that he (the defendant) had taken the $80,000 when the cheque image was shown to him. When Neo repeatedly asked whether he owned the property, the defendant instead of stating "yes" replied "Eng Kong is in my name", a strange answer which I shall return to later, in my findings.

81 In his AEIC, the defendant also asserted that Neo was aware he worked for AZ concurrently with his employment by the Company. The defendant deposed he was the project manager when AZ constructed the house at No. 10, Joan Road for Neo's wife in late 1999 or early 2000. At that time, he frequently liaised with Neo during the construction works. Since he was employed by both companies, the defendant never questioned the "internal arrangement" (as he described it) whereby both the Company and AZ paid his monthly salary. In cross-examination however, the defendant admitted he did not have an employment contract with AZ, unlike his employment by the Company. Ling also drew the defendant's attention to cl 9 (at AB16) of his employment contract dated 1 October 2000 with the Company. Under that clause, the defendant was prohibited from engaging in any other work or business without its prior consent while working for the Company. The defendant however disagreed that he was in breach of his employment contract by working for AZ. He repeated his testimony that he believed the Company and AZ shared everything (see [72] above) but he took no steps to and never did verify his belief. The defendant's claim that the Company and AZ shared employees was rebutted by Ling as the Company's GIRO statements from the bank showed that no other employees except the defendant and Lim received two salaries. (In re-examination of the defendant, his counsel drew the court's attention to the fact that Neo himself drew two salaries, one from the Company and the other from Chippel Construction Pte Ltd ["Chippel"]).

82 The defendant also disputed Neo's claim that he held the property on trust for Neo. The defendant pointed out that he personally took the risk in purchasing the property and rebuilding on it. He had also taken on the risk of damage to the property and of its price falling. Additionally, he undertook the obligation of servicing the bank loan and repaying Lim's loan. However he agreed that ultimately he incurred no risk at all since he was able to sell the property at $2,550,000 and made a profit after paying off the bank and Lim's loans. Not taking into account legal fees or interest payments on the bank loan and assuming the sales commission was 1% ($25,500), the defendant should have grossed a profit of $461,500 after paying off Lim's loans, as can be seen from the following computation:

Sale price:		$2,550,000
Less		
Purchase price	1,588,000	
Construction cost	475,000	
Sales commission	25,500	2,088,500.
		$ 416,500

83 Neo had lodged a caveat on the property and it was only after the defendant applied to court in Originating Summons No. 1790 of 2007, that the caveat was lifted in exchange for the plaintiffs' solicitors being allowed to hold $440,000 of the sale proceeds in escrow, pending the final

determination of these suits. The reason for the figure $440,000 will be explained later.

84 The defendant's testimony that he relied on what Lim told him with regards to the $80,000 and $100,000 cheques (that the moneys belonged to Lim who had a private arrangement with Neo) was vigorously challenged during cross-examination. Ling reminded the defendant that he had every opportunity, when he was the project manager of No. 10 Joan Road, to have verified with Neo the truth of what was said by Lim, bearing in mind that the defendant had cashed the $80,000 cheque himself on 22 November 2000. The defendant acknowledged he could have but he did not, choosing instead to accept at face value what Lim told him. He gave the same answer to a similar question on the $100,000 cheque. Apart from Neo's signatures, the defendant testified he recognised Lim's handwriting in the filling in of all the particulars on the two cheques.

85 As for the $260,000 cheque, the defendant also agreed that by early March 2003, he was aware that Lim had already passed him two cheques ($80,000 and $100,000) from Neo to pay for the purchase and then the first progress claim for rebuilding of, the property. Yet, it did not cross the defendant's mind that Lim may again use Neo's cheque to pay AZ its third progress claim. The defendant gave the same stock answer when questioned, that it did not occur to him to request Lim to issue cheques to him from Lim's own personal bank account.

86 In regard to the construction of the new house on the property, it was adduced from the defendant during cross-examination that no building contract was signed with AZ. He merely accepted Lim's word that the cost was estimated to be around $400,000 and would not exceed $500,000. Questioned by the court how he would know the work reflected in progress claims was done, the defendant explained there was a budget and he was on-site to verify that work billed by AZ was indeed carried out. The defendant was unable to produce as he did not keep a copy of, the budget. He acknowledged that in his experience in the construction industry, he had never come across any project where there was no construction contract signed between an owner and a contractor. However when it was put to the defendant and Lim by Ling, both denied that the real owner of the property was Lim.

87 It emerged during the defendant's cross-examination that if Lim had not increased his monthly salary by $4,000 (ostensibly paid by AZ but charged to the Company) in January 2001, he would have been unable to service the initial monthly instalments of $5,149 on his mortgage (after refinancing) from Overseas Union Bank on his $6,800 salary.

88 Despite his tight financial situation, the defendant was able to purchase another property at No. 17 Jalan Jitong, Singapore ("the Jalan Jitong property") earlier (in May 2000) for $1,245,000, which purchase he completed in September 2000. He explained that he funded his purchase partly with a bank loan of $905,000 and partly from his CPF savings. In cross-examination, the defendant revealed he had borrowed $194,000 from Lim and $120,000 from his own father. As at the date of trial, the defendant still owed Lim $94,000 on the borrowed sum. The defendant had similarly engaged AZ to carry out construction works on the Jalan Jintong property at a cost of $250,000. Unlike the property which was always rented out (the total rent collected over the years was said to be $284,000), the defendant actually lived at the Jalan Jitong property for a period of time.

89 Lim was the defendant's only witness. A large portion of Lim's AEIC was expunged pursuant to the striking out application in [33] and what was left were paragraphs where Lim confirmed what had been stated in the defendant's AEIC. It serves little purpose therefore to look at Lim's AEIC. I turn my attention instead to his cross-examination.

90 It was Lim's testimony that he was in charge of collecting moneys from third parties for the

Company and he would update Neo regularly on the progress of projects undertaken by the Company. However, he denied reporting to Neo on the Company's cash flow position or that he was in charge of the Company's accounts department.

91 Questioned on the sums he had lent the defendant for purchase of the property, Lim eventually agreed it was $555,000 plus $80,000. As in the defendant's case, Lim did not mention in his AIEC nor take into account the second $80,000 loan he extended to the defendant (in two tranches of $40,000) which had come from the joint account of Lim and Lim's wife; he claimed there was no need since the defendant had repaid this amount by the time Lim affirmed his AEIC (on 20 February 2008). It was only after repeated questioning by Ling that Lim agreed he had lent a total of $635,000 for the defendant's purchase of the property. This figure was also incorrect as when the defendant was recalled to the stand [78], it was discovered that Lim's loans actually totalled $735,000.

92 As for the $80,000 cheque, Lim denied he had handed Neo's money to the defendant as a matter of convenience when the defendant told him (at the eleventh hour) that the defendant needed another $80,000 and Jean Khoo's cash cheque to the defendant of $50,000 could not be cashed in time. (Lim claimed in re-examination that he had told Neo about the defendant's need to borrow money $80,000 urgently, had obtained Neo's agreement to insert the defendant's name in the $80,000 cheque and that was why Neo signed the cheque).

93 Ling suggested to Lim that instead of taking the circuitous route of lending the defendant money ($100,000 and $260,000) to pay AZ, Lim should have allowed the defendant to defer payment to AZ for construction of the new house on the property until the same was sold. Lim explained that was not possible – it was a construction project and certain formalities had to be adhered to; AZ treated the defendant like any of its clients. Yet, as the plaintiffs' counsel and submissions pointed out, Lim did not insist on the formality of a construction contract between the defendant and AZ. Lim's ready answer for this omission was that the defendant was a colleague whom AZ's staff worked with and saw everyday and who was in charge of the project; hence a contract was unnecessary. For the same reason, there was no 5% retention moneys withheld upon completion nor was there a defects liability period after completion.

94 Lim confirmed he had also paid progress claims no. 2 ($25,000) and No. 4 ($90,000) for the property. Together with the $100,000 and $260,000 cheques, this meant Lim paid the entire construction cost of $475,000 on the defendant's behalf. It was noted that progress claim no. 4 (the final claim) was dated 16 April 2003, about 5 months before actual completion. Lim explained that was because the contract price was fixed at $475,000 and it was a small project for which AZ would usually collect payment before starting work. He disagreed that invoices could only be rendered after services were provided.

95 One observation I would make was the difference in the manner in which Lim described his relationship with the defendant. While the defendant considered Lim his superior who was also a friend, Lim (in re-examination) described the defendant as "a good friend". Lim claimed to have an inheritance from his late father. Since he had the means, he said he was willing to help the defendant to buy a property which venture he considered a low risk investment. Further, he trusted the defendant who had since repaid all the moneys Lim lent to him. (This statement is incorrect since it was the defendant's own evidence that he still owed Lim $94,000 on the Jalan Jintong property).

The issues

96 The issues that need to be determined in the first suit are:

(a) Did the defendant wrongfully convert all three cheques?

(b) Alternatively, can Neo claim against the defendant for moneys had and received for the three cheque?

(c) Does Neo have a beneficial interest in the property because the $100,000 and $260,000 cheques were used to pay for the construction cost of the new house?

(d) Is Neo's claim on the $80,000 cheque time-barred in any event under s 6(1)(a) read with s 22(2) of The Limitation Act?

(e) Did the defendant change his position so as to defeat Neo's claim for moneys had and received even if Neo succeeds?

97 The only issue for determination in the second suit is whether the defendant was overpaid $5,320 by the plaintiffs or the defendant was entitled to the same as part of his salary. The finding on this issue will determine the fate of the defendant's counterclaim in the second suit.

The findings

98 Before addressing the issues, I shall first make my findings on the evidence, starting with the defendant's testimony. It was obvious that the defendant was happy to accept as the gospel truth whatever Lim told him particularly on the "private arrangement" Lim said he had with Neo on the three cheques. He knew the $80,000 and $100,000 cheques were Neo's but he chose to believe that the moneys belonged to Lim. Further, the defendant obeyed Lim's instructions without question. When the court queried him at one stage, the defendant agreed that if (contrary to what was told to him) Lim had no basis to let him to use the three cheques for the property, then Lim had lied to him. Consequently, if the court should find that Lim was not a credible witness, the defendant's evidence would like wise be discredited.

99 The plaintiffs' closing submissions focussed on the defendant's conduct at the meeting with Neo on 1 February 2007. They argued that if indeed there was a private arrangement between Neo and Lim over the three cheques as the defendant claimed he was told by Lim, the most logical thing for the defendant to have done when confronted by an angry Neo was to have told the latter what Lim said to the defendant. The plaintiffs submitted that the defendant's failure to do so established beyond doubt that there was no such private arrangement between Neo and Lim, and that the defendant knew the proceeds of the three cheques were not Lim's moneys but Neo's. I am in full agreement with this argument.

100 I would go further to observe that unlike Neo whose conduct and reaction (to what the defendant said) at the meeting was spontaneous, the defendant's responses were guarded because he was taping their conversation using his mobile telephone. Even so, it spoke volumes that when Neo repeatedly accused him of taking the three cheques for his own use without Neo's consent, the defendant admitted that he could not ran away from the fact that he took the $80,000 and $100,000 cheques. As the recording done by the defendant of his conversation with Neo could well have been selective (either deliberate or due to incoming calls), I do not find the transcripts of what was said particularly helpful (save for the defendant's aforementioned admission).

101 It bears mentioning that it would have been so easy for the defendant to have asked Neo about the $80,000 cheque when the defendant was appointed the project manager by AZ for the construction of Neo's (wife's) house at No. 10 Joan Road. It defies belief that it never occurred to

the defendant to ask Neo.

102 Contrary to the denials of both the defendant and Lim, I agree with the plaintiffs' submission that all the evidence point to Lim being the beneficial owner of the property although the defendant was the registered owner. The evidence adduced in court which bears out this conclusion is overwhelming, as can be seen from the following facts:

(a) the defendant only paid $23,800 of the purchase price of $1,588,000;

(b) the defendant could not even service the initial monthly instalments ($5,419) for his mortgage on the property, on his salary of $6,800 until Lim increased his salary (by $4,500, from AZ but paid by the Company);

(c) Lim paid $735,000 towards the purchase price and stood as a sole personal guarantor for the defendant's housing loan;

(d) the defendant told Lim that he would repay the loan when the property was sold at a profit. Lim's loan was unsecured, interest-free and without any fixed repayment date;

(e) AZ constructed a new house for the defendant without a building contract being signed and Lim paid the entire construction cost of $475,000 (using the $100,000 and $260,000 cheques for two progress payments);

(f) questioned repeatedly by Neo on 1 February 2007 on whether he owned the property, the defendant said "Eng Kong is in my name" when the most natural answer would either have been "Yes, it is my property" or, "No, I don't own the property";

(g) the defendant had purchased the Jalan Jintong property *before* the property. He borrowed from the bank, his father and Lim and used CPF savings to fund the purchase price of $1,245,000. How could the defendant afford to buy two properties on his monthly salary of $6,800 when (according to Neo) he had three children to support? and

(h) based on the profits calculated in [82] for his sale of the property, the defendant could easily have paid off the balance $94,000 he still owned Lim on the Jalan Jitong property. He did not because it was Lim who pocketed the profits from the sale of the property.

103 However good a friend Lim may have regarded the defendant, no business man like Lim would take on the role of a guarantor for a borrower like the defendant, who had no assets or substantial assets to speak of. The only conclusion that I can draw therefrom is that Lim was the true purchaser of the property. Why did Lim buy the property using the defendant as his nominee? It was quite likely for tax considerations. Lim was a building contractor. If he bought and sold properties, it would be considered by the tax authorities as income arising from a trade under s 10(1) of the Income Tax Act (Cap 134, 2004 Rev Edn); Lim would have been taxed on the profits he made.

104 I agree with the plaintiffs' submission that Lim's overall credibility was highly suspect. When it suited him to say so [93], Lim said AZ could not defer payment and it had to be paid for the construction of the defendant's new house on the property because formalities had to be observed. Yet in the next breadth because it suited him to say otherwise, Lim said a construction contract was not necessary between the defendant and AZ since AZ knew the defendant very well. The question that arises is, why did Lim have to go through the circuitous route of passing to the defendant the three cheques of Neo when he could simply have issued three cheques from his own personal bank

account? In this connection, I prefer Neo's version of why the three cheques were issued and handed to Lim. For the reasons that follow, I disagree with and reject the defendant's submission that Neo's testimony cannot be believed.

105 In cross-examination of Neo as well as in the defendant's closing submissions, much was made of the fact that there was no evidence of Neo's loans to the Company other than the three cheques themselves. I had pointed out to Kronenburg time and again that there could be no evidence of Neo's loans in the books of the Company if Lim did not credit those loans to the Company's bank account. Equally, the auditors would have had no knowledge of the loans and hence did not reflect them in the Company's audited accounts.

106 The defendant's submission appeared to have completely overlooked an important aspect of Neo's testimony which came up in the course of his re-examination. Questioned by the court on 12 March 2008, Neo testified (see N/E 104) that Lim had deposited some but not all of his personal cheques into the Company's bank account. That evidence was not challenged by the defendant. It was also in evidence from Neo that sometimes Lim would present Neo with a slip of paper or some calculation (example 3AB 681) when he wanted Neo to issue cheques to the Company, sometimes Lim's request was purely verbal.

107 Further, it was testimony of Khoo that the accounts department dealt with Lim not Neo (from the time she took charge of the accounts in 2003). Indeed, it was Lim who managed the accounts of the Company (as well as those of Chippel) and it was Lim that Khoo consulted when preparing the Company's payroll. She revealed that it was on Lim's instructions that the defendant was paid another salary on behalf of AZ. Khoo did not question this even though she did not think it was right, because it was an arrangement she inherited from her predecessor and she reported to Lim anyway. She added that it was only with his approval that she would send the payroll for GIRO payment. As for the fact that Neo himself received another salary from Chippel [81], Khoo explained the latter company also belonged to Neo and there would have been some internal adjustment between the Company and Chippel.

108 Khoo had further deposed in her supplemental AEIC (paras 7 and 8) that there were occasions when Lim handed either to her or to another accounting staff bank-in slips with instructions to record the payments in the Company's books as loans from Neo, after Lim had deposited Neo's cheques into the Company's bank account or cashed the cheques and credited the proceeds to the Company's bank account. On other occasions, Lim had handed to Khoo (or other employees of the Company) cheques given to him by Neo with instructions to deposit them into the Company's bank account or, where cash was needed urgently, to cash the cheques and credit the proceeds into the Company's account. Khoo's testimony was similarly not challenged by the defendant. Consequently, the defendant cannot contend that there was no evidence to prove that Neo extended loans to the Company. Neither do I accept the defendant's submission that Neo's suit against him was not for legitimate reasons but prompted by the defendant's refusal to join Neo in his campaign against Lim – it was Lim who initiated proceedings first, not the Company or Neo.

109 On the evidence adduced from Khoo (who came across as honest and reliable), I cannot see how the defendant's defence in the second suit is sustainable – that Neo knew and had consented to his working for AZ concurrently with his employment by the Company, bearing in mind his contract of employment with the Company contained a specific clause prohibiting conflict of interest [81].

110 There was little doubt that Neo and Lim were as thick as thieves before they fell out. This must be true since the defendant's testimony in this regard was never challenged by the plaintiffs. That relationship would explain why Neo had absolute faith and trust in Lim until his discovery of Lim's

alleged improprieties, which are now the subject of the Suit [10]. After the falling-out, it was Lim who fired the first salvo by filing the Suit against the Company, only to be met by a counterclaim, on which the Company partially succeeded in obtaining some payment, notwithstanding Lim's successful appeal to the Court of Appeal [13] to set aside the summary judgment against him.

The law

111 Now for the law. What constitutes conversion is succinctly set out in *Halsbury's Laws of Singapore* (2004 Reissue, vol 18 at p 444 para 240.606)

> …. there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights and an intention in so doing to deny the owner's rights or to assert a right inconsistent with them. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there be any positive intention to challenge the true owner's rights. The action is not one in which fraud is a necessary ingredient. Physical possession of the goods is not a necessary element, nor is physical handling of the goods. What must be shown is that the defendant's act deprives the plaintiff of his right to possession or amounts to a substantial interference with that right.

112 In a claim for money had and received, D must be under a liability to account to P in respect of a benefit which D received from C. One instance of such liability would be where D is an employee or agent of P (see *Halsbury's Laws of England* 4th edition Reissue Vol 9(1) at p 849 para 1137-1138).

113 According to *Goff & Jones' Law of Restitution* (7th edition 2007 Sweet & Maxwell at p 3 para 1-002), an action for money had and received was also appropriate when the claimant's claim was in respect of money paid, not to the defendant, but to a third party, from which the defendant had derived a benefit. The learned authors added that in such an action, the claimant could also recover money which the defendant had acquired from the claimant by a tortious act and, in the rare cases, where the defendant had received money which the claimant could identify as his own at the time of receipt and for which the defendant had not given consideration, the claimant could assert his claim by means of this action.

114 To succeed in the defence of change of position against a claimant, a defendant must be able to show that he believed in good faith, that the asset/money which he received was his to keep (see *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 ALL ER 512 ["*Lipkin's* case"]).

The decision

115 Applying the principles in [111] to our facts, there is little doubt that the defendant had indeed converted the two cheques of $80,000 and $100,000 to his own use without the consent of Neo. At law, it is no answer to liability for conversion for the defendant to contend that he had not intended to convert the two cheques because of his belief that the proceeds therein belonged to Lim. As noted earlier, he was aware that the two cheques came from Neo. He could have/should have inquired further of Lim or verified Lim's information with Neo.

116 Both in cross-examination by his counsel and in his closing submissions (p 38), the defendant raised the fact that Neo never made a demand on him for the return of the $80,000 cheque; it was the Company's solicitors who made the demand on 2 February 2007. A demand is a precondition to a right of action for conversion (see *Clerk & Lindsell on Torts* 19th edition Sweet & Maxwell 2006 p 1015 para 17-22). Relying on the Canadian case of *Baud Corp NV v Brook* (1974) 40 DLR 418 (which was

followed by the Malaysian courts in *The Taveechai Marine* [1995] 1 MLJ 413), the plaintiffs countered that it was clear beyond any doubt from the defence that even if such a demand had been made by Neo, it would not have been acceded to by the defendant. Consequently, the formal making of such a demand was not a necessary part of Neo's cause of action.

117 It would be more correct to say that a demand was made of the defendant for the return of the $80,000 but it was not made by the suing party Neo. Was this omission fatal to Neo's case? I think not as *Halsbury's Laws of England* 4th edition Reissue vol 45(2) p 364 para 556) states:

> Conversion may be established by methods other than demand or refusal, even where goods are detained, but in most cases a refusal will constitute the best means of establishing a conversion of goods withheld by the defendant. A demand and refusal is sufficient evidence of conversion only if at the time of the demand the party who refuses has it in his power to deliver up the article in the condition in which the article is demanded. *However, if the party has wrongfully parted with the article, the wrongful parting will in itself have constituted a conversion* (emphasis added).

A demand from Neo in February 2007 would have been futile since the defendant had long since parted with the proceeds of the $80,000 cheque.

118 As for the $260,000 cheque, I accept the closing submission (at p 7) of the defendant that he could not have converted the same as the cheque never came into his hands, Lim having applied the proceeds directly towards payment of the third progress claim of AZ for construction of the property.

119 Notwithstanding that the defendant did not convert the $260,000 cheque, can Neo succeed in his alternative claim for money had and received against the defendant? It would appear from the requirements for such an action in [113] that he can, not only for the $260,000 cheque but also for the other two earlier cheques. An action for money had and received is a claim in quasi-contract and is a restitutionary remedy founded on the principle of unjust enrichment.

120 With the above principles in mind, it is noteworthy that Lim admitted that he took the cheques for $80,000 and $100,000. Further, he did not deny that the $260,000 cheque was applied towards payment of the invoice of AZ for $260,000 [15]. The cheque image Neo obtained from UOB confirmed that the cheque was actually deposited into AZ's bank account. The defendant not having seen AZ's invoice and/or the $260,000 cheque before these proceedings, was in no position to disagree with or challenge Neo's testimony.

121 What of the plea of change of position raised by the defendant? To look at this defence in its proper perspective, I turn to the landmark decision of the House of Lords in *Lipkin's* case (*infra* [114]) which our Court of Appeal followed in *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 1 SLR 17.

122 There, Cass ("C") a partner in the plaintiff firm of solicitors was a compulsive gambler who regularly and frequently gambled at a casino at the first defendant's club. In order to finance his gambling, C resorted to drawing cheques on the firm's clients' accounts which as a partner, he was authorised to do on his signature alone. By the time C's theft from the clients' accounts was discovered. almost £223,000 was missing and at least £154,695 of that had been lost by C at the casino. C's *modus operandi* was to persuade the firm's cashier to make out a cheque payable to cash drawn on the client's account, which C then signed. The cashier would cash the cheque and hand the proceeds to C who then changed the money for gaming chips at the casino. On one occasion, C procured the issue of a banker's draft for £3,735 in favour of the firm by issuing a cheque in favour of the bank drawn on the client's account and then presented the cashier's order to the club which

accepted it.

123 On discovering the fraud, the plaintiffs brought an action against the club to recover the loss incurred by them, claiming for money had and received under a contract which was void under s 18 of the Gaming Act 1845, for conversion of the banker's draft of £3,735 and as constructive trustee by being the knowing recipient of trust property. The plaintiffs succeeded in their claim for conversion of the banker's draft and appealed against the Court of Appeal's dismissal of their claim for money had and received. The club filed a cross-appeal against the finding of conversion.

124 In allowing the plaintiffs' appeal and in dismissing the club's cross-appeal, their Lordships *inter alia* held:

> Where the true owner of stolen money sought to recover it from an innocent third party in an action for money had and received, the recipient of the stolen money was under an obligation to restore an equivalent sum to the victim if he had not given full consideration for it and thus had been unjustly enriched by it at the expense of the true owner unless he could show that he had altered his position in good faith so that it would be inequitable to require him to make restitution or restitution in full.

125 In the course of his judgment, Lord Goff of Chieveley had this to say on the defence of change of position (at p 533g):

> ….where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who then gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these.

126 Further on (at p 534b) his Lordship added:

> I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. *It is of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer*….(emphasis added).

127 With the above caveats in mind, I return to the defendant's position. In the light of my findings on the facts, it cannot in all honesty be said that the defendant accepted the three cheques in good faith, let alone that it would be inequitable to require him to make restitution to the extent of his change in position. He provided no consideration for the three cheques but has been unjustly enriched. In any event, it was the defendant's evidence that he did not change his position and did not rely on the three cheques in his purchase and reconstruction of the property. Rather, he committed himself to the purchase and reconstruction because he had Lim's full financial support. The defendant relied on Lim because (as I found earlier) he regarded Lim as the beneficial owner. Even if the defendant relied on the three cheques to help fund his purchase, I accept the plaintiffs' closing submissions (at para 116) that by his own admission at [71], the defendant said he would not have

taken an option to purchase on the property had Lim not agreed to extend loans to him.

128 Consequently, the defendant could not have changed his position to his detriment relying on any of the three cheques. The plaintiffs also submitted that for a change of position to be relied upon as a defence, as a general rule, it must occur *after* the receipt of the payments in question (citing *Goff & Jones* [*supra* 112] at p 856 para 40-009 and *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545), which was not the case here.

129 Even if the defendant is liable, was Neo's claim on the $80,000 cheque time-barred as the defendant alleged? I turn now to s 6(1)(a) of The Limitation Act which states:

> Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.
>
> (a) actions founded on a contract or on tort.

130 As Neo's alternative claim against the defendant on the $80,000 cheque was for money had and received which was not a claim in tort or contract, I accept the plaintiffs' submission that s 6(1)(a) of The Limitation Act has no application (see *MCST No. 473 v De Beers Jewellery Pte Ltd* [2001] 4 SLR 90).

131 Earlier at [83], I had referred to the sum of $440,000 being held in escrow by the plaintiffs' solicitors pending the determination of these suits. The sum comprised of the three cheque amounts ($80,000 + $100,000 + $260,000) and was used by the plaintiffs' solicitors for Neo's last head of claim – *viz* a declaration that the defendant held the property on trust for Neo and the defendant in the proportion of their contributions. The plaintiffs arrived at a figure of $604,440.13 (see para 100 of their closing submissions) in this regard as follows:

Purchase price + construction cost $1,588,000 + $475,000	= $ 2,063,000
Proceeds of sale = $440,000 ÷ $2,063,000 x $2,550,000	= $ 543,868.15
Rental income = $440,000 ÷ $2,063,000 x $284,000	= $ 60,571.98
	$ 604,440.13

132 While I accept the defendant's argument that there was no fiduciary relationship between him and Neo so as to make him a constructive trustee, what Neo sought by this head of claim was to rely on the proprietary remedy of tracing and follow the proceeds of the three cheques into the property (see *Lewin on Trusts* 18th edition Sweet & Maxwell 2008 p 1657 para 41-05). I can see no obstacle to Neo's claim for this relief, based on the reasoning in *Foskett v McKeown* [2000] 3 All ER 97. There, Lord Millet held (at p 119f):

> Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances…

His lordship added (at p 120g):

> Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset.

133 In this connection, I should also refer to s 22 of The Limitation Act which states:

> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –
>
> > (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
> >
> > (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

Section 22(1)(b) above would be the applicable section and would stop the time-bar from running against Neo's claim to trace his $440,000 into the property.

134 There will therefore be judgment for Neo in the first suit in the sum of $440,000. As for the declaratory relief sought in prayer 3 of the amended statement of claim and dealt with in [131] above, an inquiry should be conducted by the Registrar to ascertain the exact contribution (and percentage) the $440,000 made towards the profits and rental income derived from the property.

135 In the light of my findings and my comment in [109] above, I find that the defendant was indeed overpaid his salary in February 2007 by an honest mistake of fact on the part of Khoo. Consequently, there will be judgment for the Company with costs against the defendant in the second suit, in the sum of $5,320; the counterclaim is dismissed with costs.

136 The only outstanding matter would be the appeal on costs of the Company touched on earlier at [54]. Unlike the court below, I had the advantage of seeing and listening to the parties' witnesses. I conclude therefrom that it was not unreasonable of the Company to have commenced proceedings against the defendant for overpayments of salary to him totalling $306,580. The claim was withdrawn because of lack of evidential proof and not because it had no merits. Consequently, I allow the appeal on costs. I reverse the order made below and award costs to the defendant on a standard basis for the Company's withdrawal of the claim (in summons no. 668 of 2008), both for the application itself as well as for the costs in the second suit.

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