Lim Hsi-Wei Marc *v* Orix Capital Ltd and another and another appeal
[2010] SGCA 24

Case Number	: Civil Appeals Nos 124 and 127 of 2009
Decision Date	: 28 June 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Maniam Andre Francis SC and Koh Swee Yen (Wong Partnership LLP) for the appellant in CA 124 of 2009; Tan Siah Yong and Ng Hui-Li Felicia (ComLaw LLC) for the first respondent in CA 124 of 2009 and the appellant in CA 127 of 2009; Michael Khoo Kah Lip SC, Josephine Low Mew Yin and Chiok Beng Piow (Michael Khoo & Partners) for the second respondent in CA 124 of 2009 and the respondent in CA 127 of 2009.
Parties	: Lim Hsi-Wei Marc — Orix Capital Ltd and another

Partnership

Legal Profession

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2009] 4 SLR(R) 1062.]

28 June 2010 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 Civil Appeal No 124 of 2009 ("CA 124") which is brought by Lim Hsi-Wei Marc ("ML") and Civil Appeal No 127 of 2009 ("CA 127") which is brought by Orix Capital Limited ("Orix") arise from the decision of a High Court judge ("the Judge") in *Orix Capital Ltd v Personal Representative(s) of the Estate of Lim Chor Pee (deceased) and others* [2009] 4 SLR(R) 1062 ("the HC Judgment").

2 The appeals raise knotty issues with respect to the authority of a partner or sole proprietor to bind his salaried partners, and the extent to which a retired salaried partner may continue to be held responsible for liabilities of a firm. More specifically, an issue arises as to whether a partner or sole proprietor of a law firm has the apparent authority to bind his salaried partners when he borrows a substantial amount of money not just to finance the lease of office equipment but largely for the purpose of easing the firm's cash flow problems. In the course of determining these issues, we would also have to consider what acts are within the course of the usual business of a law firm.

The facts

3 Chor Pee & Partners ("CPP") was founded in 1997 by Lim Chor Pee ("LCP"). At all material times, he practised as an advocate and solicitor under that name. He was also, until his demise in 2006, CPP's principal decision maker – administering it with a firm hand, usually without reference to his other colleagues.

4 ML, LCP's son, joined CPP as a legal assistant on its inception and continued working under that name until its dissolution following LCP's demise. In 2001, he was elevated to the status of a "salaried partner" by a letter of appointment signed by LCP. The terms of appointment stipulated that except for the remuneration set out in a schedule attached to the letter, ML's new status was to be "*without any other participation in the profits or loss and assets and liabilities of the firm*" [note: 1] [emphasis added]. ML testified that he only handled legal work and was never involved in the administrative and financial affairs of the firm. Orix does not dispute this.

5 In 2003, Rebecca Marie Stephanie Tai-Yeo Hsiu Erh ("RY") joined CPP on a special "profit sharing" basis. She did not receive a fixed salary from the firm. Instead, she received a percentage of profits on files that were: (a) handled wholly or partly by her; (b) referred by her to the firm; and/or (c) referred by the firm to her. She also contributed to the payment of the salaries of the staff that worked with her, with CPP paying the balance. She affirmed that her arrangement with CPP was akin to that of a "consultant" but at the material time, she did not have the requisite number of years of post-qualification experience required for consultant status under the professional guidelines. She, therefore, joined CPP as a nominal salaried partner instead. There was no partnership agreement entered into between RY and LCP. Instead, a document captioned "PROFIT SHARING AGREEMENT BETWEEN CHOR PEE & PARTNERS (CPP) & REBECCA TAI-YEO ("PARTNER")" was e-mailed by LCP to her [note: 2]. The document provided that she, like ML, would be a salaried partner "*without participation in the assets and liabilities*" [note: 3] [emphasis added] of the firm. Unlike ML, however, RY did not remain with CPP until it was dissolved. By 18 May 2005, RY ceased to work on a profit-sharing basis and assumed the position of a senior associate of the firm. She left CPP entirely on 31 July 2005.

The Newcourt Agreement

6 On 1 August 2001, prior to the appointment of ML and RY as salaried partners, CPP had entered into a lease agreement ("the Newcourt Agreement") with Newcourt Financial (Singapore) Pte Ltd ("Newcourt") for the use of four black-and-white copiers ("the Newcourt copiers") [note: 4]. The terms of the Newcourt Agreement provided that CPP was to pay 60 monthly instalments of $2,955 between 1 August 2001 and 31 July 2006. The total amount due under the Newcourt Agreement was $177,300. Pursuant to Art 26 of the Newcourt Agreement, in the event of early termination, CPP would pay, *inter alia*, "the total amount of the rent payable under [the Newcourt Agreement] for the entire term" and a sum of $46,640 as "agreed liquidated damages".

The Amended Newcourt Agreement

7 Presumably because of a default (or at least a request) by CPP, the parties amended the Newcourt Agreement by a letter dated 5 February 2004 [note: 5]. This took place after ML had been appointed a salaried partner (see [4] above), though he denied any contemporaneous knowledge of the amendment, claiming that he had only learnt of it in 2007. In consideration of a payment of $300 by CPP, Orix extended the lease to 4 February 2010 ("the Amended Newcourt Agreement"). Also, in addition to the rent of $88,650 that had already been paid under the Newcourt Agreement (*ie*, the original agreement) over the last 30 months, further payments were due from 5 February 2004 onwards in accordance with the following amended schedule [note: 6]:

LEASE TERM RENTALS:

Month 01-12: S$1,800.00 monthly rental,

Month 13-24: S$2,000.00 monthly rental,

Month 25-36: S$2,200.00 monthly rental,

Month 37-48: S$2,400.00 monthly rental,

Month 49-60: S$2,600.00 monthly rental and

Month 61-72: S$2,653.76 monthly rental.

(plus any applicable taxes and duties)

The amendment to the payment schedule increased CPP's overall liability under the Newcourt Agreement by a further $75,195.12, while reducing, in the short term, the amount of rent payable monthly from $2,955 to $1,800 for the first 12 months of the amended payment schedule. Plainly, the new payment schedule was purely intended to ease CPP's short-term cash flow, as it, at the same time, resulted in a not insignificant increase of the firm's overall liability in the medium to long term.

The Original Agreement with Orix

8 On the evidence, it would seem that CPP was, for several years preceding its eventual dissolution, in dire financial straits. Susanna Soh ("Soh"), the office manager of CPP, testified that "[LCP] was worried about his overheads". [note: 7] There is also evidence that on at least one occasion, LCP desperately asked RY for contributions towards the salary of an employee (who was not working with or for her) because he could not afford to retain that employee without a financial contribution from RY. LCP, however, never had any candid discussions with ML and RY on the state of CPP's financial problems. That CPP had serious cash flow difficulties is an important consideration in this matter as it helps explain why in 2004 LCP was willing to enter into the subject transaction with Orix (we will elaborate on this in the immediate paragraphs below) which was otherwise commercially insensible.

9 Sometime in July 2004, Dora Loh ("Loh"), a senior sales consultant of Canon Singapore Pte Ltd ("Canon"), proposed to Soh, that the four pre-existing copiers (*ie*, the Newcourt copiers) be replaced by two new Canon copiers (one model was to be black-and-white, and the other was to be a colour copier) ("the Canon copiers"). After ascertaining from Newcourt that CPP would have to pay a sum of $164,144.34 to prematurely terminate the Amended Newcourt Agreement, Loh secured an agreement between Canon and Orix in which the latter would essentially provide financing for the Canon copiers. This agreement had the following key features: (a) Canon would sell to Orix the Canon copiers for $231,500 (excluding Goods and Services Tax ("GST")); and (b) in turn, Orix would lease the Canon copiers to CPP over a period of six years. To add some perspective to this transaction, *it is noteworthy that the ordinary sale price of the (two) Canon copiers was just $65,025.66*. This transaction would eventually result in CPP undertaking a liability to Orix which was almost four times more than the ordinary sale value of the Canon copiers. At the trial, an internal credit approval document, belatedly disclosed by Orix, revealed that the true purpose of the facility of $231,500 was twofold – to purchase the Canon copiers as well as to permit a "rollover" of $120,000 payable by CPP. The relevant portions of that document state [note: 8] :

CREDIT PROPOSAL – LEASING			2 STARS
1 Borrower	:	Chor Pee & Partners	GST 5%

2 Amount of Loan	:	$231,500 (eqv. of 100% of $243,075.00 (w/Gst) Purchase Price)
3 Period of Loan	:	72 Months
4 Interest Rate	:	3.600% pa Flat Effective after 7.21% pa commis
5 Total Payable	:	$305,400
6 Monthly Installment	:	24 x $1,800
		Gst $90.00
	:	24 x $3,500
		Gst $175.00
	:	24 x $5,450 and 1 final rental of $47,400.00
		Gst $272.50 Gst $2,370.00

…

11 Personal Guarantee	:	[LCP] S2088197F
		[ML] S1601047B
		[RY] S1660081D

…

16 RECOMMENDED CREDIT LINE	:	$ 250,000.00

…

1. **<u>Purpose of facility</u>**

- Purchase of 01 unit of iRC6800 & 1 unit of iR3320j Canon Copier for the company.
- *There is a rollover of **S$120,000** for this application.*

..

3. **<u>Credit Consideration</u>**

a. Background

- The firm was set up as a practicing legal firm in 1964 by [LCP].
- Principal Activity – Legal consul and litigation.
- [LCP] is a well-known practicing lawyer in the legal community and has been practising since 1962.
- His partners in the firm are [ML] who started practising in 1993 and [RY] who has been

practising since 1996.

4. **Financial positions**

- No financials were submitted.

i. **Security Analysis**

Products have short life span of probably about 5-6 years.

iii. **Comments**

- The firm was set up as a practicing legal firm in 1964 by [LCP].
- Principal Activity – Legal consul and litigation.
- [LCP] is a well-known practicing lawyer in the legal community and has been practising since 1962.
- His partners in the firm are [ML] who started practising in 1993 and [RY] who has been practising since 1996.
- Based on the profile and long history of the firm, the client is able to service the loan.

In view of the above, this application is recommended for approval.

[emphasis added in italics]

Danny Lee ("Lee"), a former sales executive with Orix, who administered this transaction, acknowledged during cross-examination that Orix had known that Loh's proposal to extend financing to CPP based on the sum of $231,500 included a large amount to be paid to a prior financier. In fact, Lee also revealed that Loh had informed him that the estimated amount that had to be settled was $110,000. The arrangement, in short, was that Orix would pay $231,500 to Canon for the Canon copiers and Canon would in turn settle the early termination sum payable to Newcourt.

10 Having secured Orix's agreement to extend the facility of $231,500, Loh conveyed the proposal to Soh. As CPP was then paying Newcourt $1,800 each month, Loh proposed that the rental payments under the lease from Orix ought to initially remain at $1,800 per month but would subsequently be increased after the lapse of every two-year period. She was well aware from her prior discussions with Soh that CPP was anxious to improve its cash flow and was unlikely to agree to upgrade its copiers if this would result in additional monthly expenditure for the firm. Her proposal from an immediate cash flow point of view would have been extremely attractive to the financially beleaguered LCP as over the next three to four years it would require even smaller rental payments than the existing Newcourt arrangement. Moreover, certain minimum copying charges payable under the existing Newcourt arrangement would also be dispensed with under the proposal.

11 After discussing the proposal with only LCP, Soh signed an agreement dated 15 July 2004 with Canon on behalf of CPP. Loh signed on behalf of Canon. The key terms of this agreement mirrored those Loh secured from Orix on behalf of Canon (see [9] above).

12 Thereafter, Orix prepared a lease agreement in respect of the Canon copiers. While there might

have been in all a few reasons prompting LCP to sign this lease, it clearly emerged in cross-examination that the key consideration was an acute desire to keep overheads down while replacing the dated Newcourt copiers.

13 The new lease agreement prepared by Orix and dated 27 August 2004 ("the Original Agreement") [note: 9] provided for payment in accordance with the following terms [note: 10] :

> IV. INITIAL PERIOD OF LEASE
>
> SEVENTY TWO (72) months from 01 September 2004 to 31 August 2010 and a final payment on 01 September 2010
>
> V. INITIAL MONTHLY LEASE RENTAL RATE
>
> (1) TWENTY FOUR (1–24) monthly lease rental of S$1,800.00 plus GST, and
>
> (2) TWENTY FOUR (25–48) monthly lease rental of S$3,500.00 plus GST, and
>
> (3) TWENTY FOUR (49–72) monthly lease rental of S$5,450.00 plus GST, and
>
> (4) ONE (1) final payment of S$47,400.00 plus GST
>
> The above are due and payable through GIRO deduction on the first day of each month during the Initial Period of Lease.
>
> [emphasis in underline in original]

The total rent payable over six years was $305,400 (excluding GST). A pertinent feature of this arrangement was the substantial increase in the rental amounts due over time even as the Canon copiers depreciated in value. Upon the expiration of the lease, the printers would be returned to Orix at the lessee's expense. The lessee also bore the burden of maintaining the copiers and repairing any malfunction. In this document, the lessee was described as follows [note: 11] :

> II. LESSEE
>
> Name: LIM CHOR PEE (I/C: S2088197F),
>
> LIM HSI-WEI MARC (I/C NO: S1601047B) &
>
> REBECCA MARIE STEPHANIE TAI-YEO HSIU ERH (I/C NO: S1660081D) *PRACTISING UNDER FIRM OF CHOR PEE & PARTNERS*.
>
> Address: 3 KILLINEY ROAD
>
> #07-01 WINSLAND HOUSE 1
>
> SINGAPORE 239519
>
> [emphasis added]

LCP and ML were the only signatories to the lease, and their designation was stated as "Partners" [note: 12] . *RY was not a signatory*. Neither was she ever informed by LCP or Orix of the existence of this lease that included her name.

14 Between July and August 2004, the Canon copiers were delivered to CPP. Meanwhile, on 3 August 2004, after Orix paid it, Canon made payment of $172,351.56 (inclusive of GST) for the early termination of the Newcourt arrangement, settling CPP's outstanding obligations under the Amended Newcourt Agreement.

15 CPP kept up with the monthly rental due under the Original Agreement until April 2005 before defaulting. This led Orix to issue a letter of demand for the entire unpaid rental on 7 July 2005 [note: 13]. The amount claimed was $306,632.59. In the letter, addressed only to CPP, the firm was notified that the unpaid rent constituted an "event of default", pursuant to which the agreement was "*deemed to have been repudiated*" [note: 14] [emphasis added]. On 22 July 2005, Orix's solicitors sent a second letter of demand, reiterating that the Original Agreement had been repudiated, and that Orix accepted that repudiation. A demand was made for a larger sum of $307,627.98, taking into account, *inter alia*, interest due. This letter, unlike the first letter issued by Orix, was addressed to LCP, ML and RY. There is no evidence, however, that ML or RY ever received this letter or were aware of its contents. Further, it is significant that well before the subject demands had been sent, RY had ceased to work as a salaried partner of CPP (see [5] above).

Reinstatement of the Original Agreement - A new contract

16 It is common ground that RY had no knowledge of the Orix leasing arrangements and CPP's difficulties in servicing the monthly instalments. ML was also unaware of the defaults. LCP continued, after RY's departure, to be solely involved in negotiations with Orix regarding the unpaid rent and the reinstatement of the Original Agreement. Further, it does not appear that either ML or RY received a letter dated 5 August 2005, which Orix's solicitors sent to CPP. This letter was addressed to both of them and LCP. In that letter, Orix agreed to the lease being "reinstated" provided, *inter alia*, that the outstanding amounts were paid and that monthly payments were made by GIRO thereafter [note: 15]. On 29 August 2005, Orix received payment of the outstanding amounts and from then on, it treated the Original Agreement as having been reinstated. No official letter was sent confirming the reinstatement. Orix claimed that it was then not aware that RY had left the firm. Be that as it may, it did not take any steps to ensure that ML and RY had consented to, or at least were aware of, this new arrangement.

Events leading to the trial

17 After LCP's demise on 5 December 2006, another default in the payment schedule occurred on 1 January 2007. Orix promptly treated the default as repudiatory conduct and terminated the lease on 18 January 2007. In a letter addressed to the personal representatives of LCP, ML and RY, it demanded payment of $263,589.80 [note: 16]. On 24 April 2007, the Canon copiers were repossessed by Orix and later sold for the paltry sum of $3,150. Soon after, Orix commenced these proceedings to recover the losses and damages arising from the repudiation of the lease. The estate of LCP, ML and RY were named as defendants. The estate of LCP has accepted liability and final judgment has already been entered against it. It does not appear that the estate has sufficient funds to satisfy Orix's claim, hence the determined pursuit of its claims against ML and RY.

The decision below

18 On the basis that once a contract has been terminated it ends and is not capable of being revived even by the parties' agreement, the Judge below held that the Original Agreement with Orix could not be "reinstated" post-termination. Instead, a fresh contract had been created ("the August

Agreement") (see the HC Judgment at [30]–[31]). It was found by the Judge that (the HC Judgment at [30]):

> what [Orix] called the "Reinstatement Agreement" actually became part of the *new contract* for the lease of the [Canon copiers] and [the August Agreement] comprised the new terms set out in [Orix's] solicitors' letters and the other terms contained in the terminated lease [*ie*, the Original Agreement]. [emphasis added]

She held that it was the August Agreement that Orix was suing on, and not the Original Agreement concluded in 2004 (see the HC Judgment at [33]). All the parties in both CA 124 and CA 127 have accepted this approach as correct. Because of this consensus and Orix's pleadings, we will accept this view of the August Agreement for the purposes of the present appeals, although the legal proposition that a contract once terminated cannot be revived, even by agreement, might be questionable.

Vis-à-vis ML

19 Regarding the issue of ML's liability, the Judge held that at the time of the conclusion of the August Agreement, ML was still being held out as a partner of the firm. Therefore, when LCP spoke to Orix's representatives, he was still acting on ML's behalf. As ML's status as a salaried partner had not changed, he had not withdrawn from LCP the authority to represent him as a partner of the firm. The August Agreement that LCP had contracted in the name of the firm therefore bound ML (see the HC Judgment at [45]).

20 The Judge did not accept any of ML's defences. She did not agree that the Original Agreement and the August Agreement were sham transactions and were therefore null and void (see the HC Judgment at [52]). This was because although the repayment obligation was disproportionate to the value of the Canon copiers considered in isolation, the parties had intended and did in fact create a legal relationship between them and had acted according to the apparent purpose and tenor of their concluded agreement, which was for a lease (see the HC Judgment at [59]–[60]). Further, none of the parties were deceived as to the terms of the transaction between them (the HC Judgment at [60]). She also did not agree that the Original Agreement and the August Agreement were harsh and oppressive transactions, and therefore unconscionable (see the HC Judgment at [69]). She declined to take the view that Orix was exploiting CPP's allegedly precarious financial position on the basis that there was no evidence that Orix was apprised of this fact. The Judge also did not accept that the Original Agreement and the August Agreement were in fact money-lending transactions (see the HC Judgment at [76]). She pointed out that despite allegations regarding the exorbitant nature of the rent agreed to, it ought to be borne in mind that there was already a pre-existing liability in the form of the Amended Newcourt Agreement (the early termination of which would cause CPP to have to pay a substantial sum (see [6] above)). Orix was in the business of leasing out office equipment and the lease was part and parcel of its usual business and could not be considered a money-lending transaction.

21 In CA 124, ML appeals against the Judge's decision to hold him liable for Orix's claim.

Vis-à-vis RY

22 Having found that ML was liable, the Judge turned to the issue of RY's liability. The Judge held that RY could have been held liable under the Original Agreement (see the HC Judgment at [104]). RY had consented to be held out as a partner and ought to have been aware that she would become liable for the transactions of the firm in the course of its usual business. However, in relation to the

August Agreement, which was the subject of the claim, the Judge found that RY had no liability (see the HC Judgment at [110]). As she had left the firm before the August Agreement was concluded, LCP had no authority to act as her agent and to bind her to the August Agreement. Even if LCP made representations that she was still a partner, Orix's remedy lay in suing him (or his estate) for the misrepresentation, and not in a claim against RY who had not authorised the representation.

23 The Judge also held that s 36 of the Partnership Act (Cap 391, 1994 Rev Ed) ("PA"), which governs the rights of persons dealing with a firm against apparent members of the firm, did not make RY liable to Orix (see the HC Judgment at [111]). She based her decision on two grounds. First, RY had only been at best an ostensible partner. She was at no time in law a true partner of the firm. As such, even when she left, there was no change in the constitution of the firm; as this is one of the elements required under s 36 of the PA, that provision could not apply to render RY liable. Second, the Judge held that as the Original Agreement had been terminated and Orix was not continuing to do business with CPP on the "old basis" but on the basis of a fresh agreement (the HC Judgment at [111]), RY did not have to give notice of her withdrawal from the firm in order to be relieved of liability.

24 In CA 127, Orix appeals against the dismissal of its claim against RY.

Issues arising out of the present appeals

25 Although a number of other peripheral questions had been raised during the proceedings below, the real issues that surfaced in the present appeals were just the following three issues:

(a) whether the intended lessee of the Original Agreement and, more crucially, the August Agreement, was CPP as a firm or LCP, ML and RY in their personal capacities;

(b) whether the Original Agreement and the August Agreement were transactions entered into in the usual course of business of CPP; and

(c) whether RY, after having left CPP, was liable under the August Agreement pursuant to s 36 of the PA.

We will now address each of these issues in turn.

Our decision

Issue 1: Who were the parties to the Original Agreement and the August Agreement?

26 The description of the lessee in the Original Agreement has already been set out above at [13]. On a literal reading, the words used in the description give rise to an ambiguity as to whether the intended lessee was CPP as a firm, or LCP, ML and RY in their personal capacities. The words "practicing under" suggest that Orix might not have been contracting with CPP as a firm, but rather directly with the three individuals named who all happened to be "practising under" the same firm at the material time. For the purpose of comparison, if the more common expression "practising *in the name of* (or "*as*") [firm's name]" had been used instead, it would have been clear that it was CPP as a firm that was the intended lessee and not just the three individuals named.

27 After carefully considering the available evidence as a whole, we think it likely that the Original Agreement was intended to be with CPP as a firm whose composition could change from time to time rather than directly with LCP, RY and ML in their personal capacities, though we also acknowledge

that this view has been arrived at with some difficulty.

28 *First*, it is a trite rule of construction that contracts are to be construed *contra proferentum* if an ambiguity arises. RY and ML are entitled to have any inherent ambiguities in the language employed by Orix resolved in their favour. *Second*, the description of the lessee in the Original Agreement is to be contrasted with a letter dated 16 July 2004, where Orix originally informed Canon of its intention to enter into a lease transaction concerning the Canon copiers, in which the name of the intended lessee was clearly spelt out as "CHOR PEE & PARTNERS" [note: 17]. *Third*, and perhaps most significantly, it is not the ordinary practice in Singapore for all the names of the partners in a firm to be spelt out in a contractual agreement. Usually, a reference to the firm name alone is the method of describing the group of persons associated together in business who have entered into the contract. Pertinently, even Orix's assistant general manager, Goh Hock Leong, acknowledged that it would be quite remarkable for a larger law firm, with say 50 partners, to laboriously list out the names of all its partners whenever it enters into contractual arrangements [note: 18]. Instead, in practice, the managing partner would usually alone sign an agreement on behalf of the partnership. To ensure that the contract binds the firm (and all the partners), the counterparty would require sight of a copy of the partnership agreement to ensure that the managing partner has the requisite authority. In the Newcourt Agreement, for example, no mention of the names of the supposed partners of CPP was made. CPP alone was cited as the lessee. This oddity in the Original Agreement warrants inquiry into why the names of the partners needed to be spelt out if it were CPP as a firm that Orix intended to bind to the lease. Orix, we note, had never required LCP to produce a partnership agreement. Apparently, there was none but Orix did not then know this. We pause to note, had Orix taken this usual commonsense precaution, the extent of LCP's actual authority to bind his colleagues (or the lack of thereof) would have been readily apparent. Perhaps, to Orix, the benefit of an arrangement of contracting with each of the named individuals would have been the certainty of knowing which parties it had remedies against in the event of default. This reading is arguably buttressed by the fact that in the credit proposal mentioned above at [9], under the heading of "Personal Guarantee", the names of the three individuals were inserted. However, we accept that it could also be said, with some force, that it was Orix's intention from the outset to hold all three individuals liable. But how was this communicated to CPP and the three individuals concerned? There is a troubling sparseness of written communications on this.

29 Lastly, it also bears highlighting that even though the names of all three individuals were listed as lessees, RY was not asked to sign the Original Agreement. Could this apparent "oversight" be understood in the light of the disquieting results revealed to Orix (just prior to the entering into of the Original Agreement) by the Enhanced Individual Searches ("EIS") run on QuestNet (an information portal giving access to company and individual records and reports from multiple public sources) on the three individuals? The EIS showed that RY had not only recent bankruptcy proceedings initiated against her for the sum of $14,742.79 (albeit those were withdrawn at the time of the checks) but was then still facing earlier court proceedings for: (a) claims relating to personal overdrafts and credit facilities for the sum of $8,993.54; and (b) a motor insurance claim of $3,514.10. We note that Orix has not given any satisfactory response why it did not insist on RY's signature despite naming her as a lessee.

30 Nevertheless, notwithstanding the difficulties mentioned and given the reasons above, the Original Agreement was likely to have been entered with CPP as a firm and would certainly bind LCP and ML (who were both signatories to the Original Agreement) though its reach *apropos* RY appears to us more ambiguous as she was named as a signatory but never signed it. However, we need not definitively resolve this problematic issue as the Original Agreement is no longer of any legal relevance. As mentioned earlier, Orix terminated this and substituted it with the August Agreement

which is the contract it now relies on in these proceedings (see [18] above). Turning then to the August Agreement, there is no evidence that ML and RY were aware of the termination of the Original Agreement, let alone the entry into of the August Agreement. In particular, the Judge made no ruling on whether Orix's letters of demand and the agreement to reinstate were received by all three parties and not just LCP. It was for Orix to prove this. In the absence of their assent, in our view, the August Agreement entered into with CPP by LCP could not bind ML and RY (see also [56]–[57], [59]–[61] and [62]–[64] below).

Issue 2: Whether the Original Agreement and the August Agreement were transactions entered into in the usual course of business

31 We are also of the view that it could be of no real consequence that the intended lessee all along was CPP and not some combination of the three individuals directly because: (a) the Original Agreement and the August Agreement were not transactions made with actual authority; and (b) further, they could not bind RY if they were not transactions entered into in the usual course of business. This reasoning applies with the same force to ML as regards the August Agreement.

The applicable law

(1) Section 5 of the PA

32 A partner, acting with authority in the same manner as an authorised agent, can bind the firm comprising of all the partners (see generally Yeo Hwee Ying, *Partnership Law in Singapore* (Butterworths Asia, 2000) ("*Yeo*") at p 102). This position is encapsulated by s 5 of the PA, which provides:

> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for *carrying on in the usual way business of the kind carried on by the firm* of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner. [emphasis added]

The PA is actually the Partnership Act 1890 (c 39) (UK) that has been incorporated into Singapore by virtue of the Application of English Law Act (Cap 7A, 1994 Rev Ed). The English legislation is essentially a codification of existing common law at the date of enactment. We note that several common law jurisdictions such as Australia, New York and Hong Kong have statutes that are in *pari materia* to the PA as their provisions have also been adopted from the same landmark English legislation.

33 Essentially, s 5 comprises two distinct limbs. As observed by the Australian High Court in *Construction Engineering (Aust) Proprietary Limited v Hexyl Proprietary Limited and Others* [1984–1985] 155 CLR 541 at 547:

> The first deals with actual authority. It provides not that every partner is *deemed to be* an agent of the firm and his other partners for the purposes of the partnership business but that every partner *is* an agent of the firm and his other partners for that purpose. The actual authority to which it refers is, however, but prima facie in that it may be negated or qualified by contrary agreement of the partners ...
>
> The second limb of s. 5 deals with ostensible authority. Even though actual authority be lacking,

> the act of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member binds the firm and his partners unless the other party "either knows that he has no authority, or does not know or believe him to be a partner".
>
> [emphasis in original]

The first limb applies as between actual partners with actual authority to act such that the partner is the agent of the firm and his other partners for the purpose of the business of the partnership. An act done by a partner on behalf of the firm and within the scope of his *actual* authority will bind the firm, whether or not the act was done in carrying on the partnership business in the usual way (see R C I'Anson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 18th Ed, 2002) ("*Lindley*") at para 12-10). The second limb applies to situations of *ostensible* (also known as *apparent*) authority where persons are in partnership but have acted beyond the actual authority that has been conferred on them for the purpose of the business of the partnership. The classic articulation of ostensible or apparent authority is found in the judgment of Diplock J in *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd and Another* [1964] 2 WLR 618 at 636:

> An "apparent" or "ostensible" authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In other words, the second limb embraces situations where the members of a firm have conducted themselves in a way that leads a third party to believe that a partner has the authority to act on their behalf, even though the partner has in reality exceeded the actual authority conferred upon him by the partnership. An act done by a partner on behalf of the firm in the course of carrying on the partnership business in the usual way will *prima facie* bind the firm, even if the partner acted without actual authority, unless the third party with whom he dealt knew of that lack of authority or did not know or believe him to be a partner (see *Lindley* at para 12-10). *However, if the act is not done in the usual way, and the partner had no actual authority, the other partners of the firm will not be bound if they do not subsequently ratify that act* (see also *Lindley* at para 12-10). *In such a matter, the partner who carried out the transaction will alone be personally liable to the third party*.

the second limb of s 5 of the PA

34 In *Bank of Scotland v Henry Butcher & Co and others* [2003] 1 BCLC 575 at [89], Chadwick LJ opined:

> The inquiry under the second limb — in a case where it is necessary to invoke that limb — is whether A's act is an 'act for carrying on in the usual way business of the kind carried on by the firm'. That requires consideration of two elements: (i) what business is 'business of the kind carried on by the firm'; and (ii) is A's act 'an act for carrying on in the usual way' that business. Where those two elements are present, the person with whom A is dealing is entitled to treat the act as done for the purpose of the business of the partnership unless he knows that A has in fact

no authority, or does not know or believe A to be a partner.

However, whether a transaction is "an act for carrying on in the usual way" requires not just consideration of the *nature* of the business of the firm, but also the *manner* in which the act is carried out. In other words, showing that a partner's act is in the "usual way" of "business of the kind carried on by the firm" such that the other partners of the firm are *prima facie* liable under the second limb of s 5 of the PA requires inquiry into:

(a) what business is "business of the kind carried on by the firm";

(b) whether the act of the partner falls within the usual *nature* of the business of the firm; and

(c) even if the act falls within the usual nature of the business of the firm, whether the *manner* in which the act is carried out is usual of the kind of business carried on by the firm.

The second and third inquiries are but constituent parts of the second element referred to by Chadwick LJ.

35 The inquiries above are clearly questions of fact and law. In *Lim Kok Koon v Tan Cheng Yew and another* [2004] 3 SLR(R) 111 at [34], it was correctly observed:

> [W]hether a particular act is done "in the ordinary course of business" of the partnership, is a question of law. If the act is legally capable of being performed within the ordinary course of the partnership business, the next question of whether the act was so performed was a question of fact.

This applies equally to the question of whether an act is in the "usual way" of "business of the kind carried out by the firm". In determining whether an act is in the "usual way" of "business of the kind carried out by the firm", it must be considered whether on the facts represented, a reasonably careful and competent person of the same kind as the third party would have concluded that the act appeared usual (*United Bank of Kuwait Ltd v Hammoud and Others* [1988] 1 WLR 1051 ("*United Bank of Kuwait*") at 1059 and *JJ Coughlan Ltd v Ruparelia* [2004] PNLR 4 ("*Coughlan*") at [22]).

(A) The nature of the kind of business carried on by the firm and acts falling within the usual nature *of the business of the firm*

36 While there are no hard and fast rules, it must be borne in mind that the nature of businesses may evolve over time and old decisions in this regard must be read cautiously in the light of modern developments (see *Shannon and Others v Whiting and Another* (1901) 7 ALR 49 at 57 and *United Bank of Kuwait* at 1063). Nevertheless, some typical transactions are, as a matter of law, generally regarded as capable of and commonly falling within the "usual" nature of the business of most if not all partnerships. For example, it is generally not unusual for a partner to render an account in respect of a partnership transaction that will bind the firm (see *John Hutchinson Fergusson v David Fyffe and Another* (1840–41) 8 Cl & F 121). Partners also have authority to purchase goods reasonably incidental to the business (see *Bond v Gibson and Jephson* (1808) 1 Camp 185), although as *Lindley* incisively points out with its accustomed clarity, the mere fact that a partner has authority to obtain goods or services on credit does not, of itself, authorise him to borrow money, since the two acts are quite different. Lord Lindley himself had long ago emphasised (see *Lindley* at para 12-55):

> The difference consists in this, that he who possesses power to borrow on the credit of another,

has a much more extensive, and therefore more easily abused, trust reposed in him that one who is empowered only to pledge the credit of another for value received, when the pledge is given. *A power, therefore, to incur debt, which is necessarily incidental to almost every partnership, by no means involves a power to borrow money*. [emphasis added]

In addition to the above, it is generally not unusual for partners to receive performance of obligations due to the partnership such as the payment of a partnership debt (see *Jacaud v French* (1810) 12 East 198, but the rule does not apply if the debt was owed not to the firm but to one of the partners unless the firm has been authorised by the partner to receive the money (see *Powell v Brodhurst* [1901] 2 Ch 160)) and to open a bank account in the firm's name (see *The Alliance Bank, Limited v Kearsley* (1871) LR 6 CP 433). The commonality between these acts is that they are generally necessary, and not just convenient, for the smooth running of a partnership of any nature.

37 Conversely, it is not usual for a partner to bind the firm by deed (see *Harrison v Jackson, Sykes and Rushforth* (1797) 7 TR 207, 101 ER 935) though it might be said given the less venerated view of deeds prevailing today, this line of cases may merit reconsideration. Neither is it usual for partners generally to give a guarantee in the firm's name in the absence of a trade custom (see *Hirst v Etherington and Anor* [1999] Lloyd's Rep PN 938 ("*Hirst*")), accept shares in lieu of money as satisfaction of a debt due to the firm (see *Niemann v Niemann* (1889) LR 43 Ch D 198) or unilaterally submit a dispute to arbitration (see *Bannatyne v D & C MacIver* [1906] 1 KB 103), although, in the context of the last case, it has been suggested in *Lindley* at para 12-44 that a distinction should now be drawn between contractual and *ad hoc* references (the former would refer to a situation where a partner properly enters into a contract in the usual way of business, under which it is provided that all disputes arising from the contract are to be resolved by arbitration) and that, in the former case, the firm would be bound.

38 Additionally, in relation to the acts of a partner that are in the usual nature of business of the firm, a traditional bright line has been drawn between what is typical to the nature of trading partnerships and what is typical to non-trading partnerships. Partners in trading partnerships have a much wider ostensible authority than partners in non-trading partnerships.

39 While, there is no exhaustive definition of a trading firm, in *Wheatley v Smithers* [1906] 2 KB 321 at 322, Ridley J suggested that trading necessarily implies a buying or selling (although Ridley J's decision was reversed on appeal, this definition was not disapproved of by the Court of Appeal (see *Wheatley v Smithers* [1907] 2 KB 684)). Similarly, in *Higgins v Beauchamp* [1914] 3 KB 1192, Lush J held that a trading business was one which depended on the buying and selling of goods and concluded that a firm carrying on the business of cinematographic theatre was not a trading firm. The ambit of the term "trading firm", however, appears to have been given a more generous interpretation locally, so as to include businesses giving credit and not just those that buy and sell. In *Chettinad Bank Limited v Chop Haw Lee and Chop Lee Chan* (1931) 7 FMSLR 31, the meaning of a trading firm was also interpreted to include businesses such as banking, money-lending and pawnbroking – all of which involve the extension of credit.

40 In addition to the transactions above at [36], a partner in a trading partnership, unlike one in a non-trading firm, may generally pledge or sell the partnership property, buy goods on account of the partnership, borrow money, contract debts and pay debts on account of the partnership. He may also draw, make, sign, indorse, accept, transfer, negotiate and procure to be discounted promissory notes, bills of exchange, checks and other negotiable paper, in the name of and on account of the partnership (see *The Bank of Australasia v Thomas Chaplin Breillat, Chairman of the Bank of Australia* (1847) 6 Moo PC 152 at 193–199, 13 ER 642 at 658–659 and *Chop Cheong Tuck v Chop Tack Loong and others* [1934] MLJ 176). The rationale behind this distinction is that the sudden exigencies of a

trading firm involved in the buying and selling of goods require constant inventory purchases, which have to be funded by credit facilities. Hence, it would be the life blood of the trading firm's usual business to borrow money and create debts. For non-trading firms, however, borrowing money and giving negotiable papers are not considered necessary or ordinary incidents of the business (*Yeo* at p 116). It must be said though, that some of the older cases dealing with this issue merit critical reconsideration, as it is not uncommon these days for non-trading firms to borrow for business reasons. This, however, if the amount is substantial, will ordinarily be a partnership decision rather than that of a single or minority group of partners.

41 One classic form of a non-trading partnership is the law firm. A law firm's business is to provide legal services. It does not buy, sell or trade in goods; neither does it engage in the business of extending credit. Although like other partnership businesses in general, it is usual for a partner to buy goods reasonably incidental to the law firm's business, *the individual partners of a law firm (or even the managing partner) generally have no ostensible authority to, inter alia, borrow money, enter into financial commitments or give guarantees*. Such a power must be expressly conferred by the partnership articles to bind the firm and its partners or impliedly given by clear and incontrovertible conduct. The borrowing of money by a partner in a non-trading firm is not usual conduct unless the firm's business is of such a kind that it cannot be carried on in the usual way without such a power (see *Lindley* at para 12-52). Plainly, a law firm does not satisfy this criterion.

42 In relation to the services provided by a law firm, it is generally unusual for a partner to accept an appointment as a trustee (or act as to make himself a constructive trustee) (see *Re Bell's Indenture* [1980] 3 All ER 425 at 437). It is also unusual for him to give guarantees, even though the giving of investment advice may in special circumstances be part of the firm's business (see *Polkinghorne v Holland and Another* (1934) 51 CLR 143). *Neither is it generally usual for a partner to compromise a debt owing to the firm without receiving payment (see* Lindley *at para 12-62). As a corollary, it must follow that it is not usual for a partner to settle or compromise a claim that may prejudice his other partners*. Furthermore, while undertakings can also fall within the ambit of a law firm's business (see *United Bank of Kuwait* at 1059 and 1063–1064), a mere assurance by a solicitor that his undertaking is given in the usual course of business is not sufficient to bind his partners where, on an objective view, the undertaking had not been given in relation to an underlying transaction of a kind which was part of the usual business of a solicitor (see *Hirst* at 945).

43 The party seeking to make the partners of the firm liable under the second limb of s 5 of the PA bears the onus of showing, as a matter of fact, that the act is usual in relation to the kind of business carried on by the firm. However, once a certain act is established as a typical activity of the kind of business carried on by the partnership (such as by reference to the categories above), the burden will then fall on the party asserting otherwise to show that the act is unusual in nature (see *Yeo* at pp 110–111). Thus, in *Lek Peng Lung v Lee Investments (Pte) Ltd and others* [1991] 2 SLR(R) 635 at [30]–[31], Warren L H Khoo J took cognisance of the fact that the loan business was a common activity of pawnbrokers before 1989 and the defendants were not able to escape liability by a bare allegation that the particular partner had not been given the authority to undertake that activity.

(B) The manner of the act carried out by the partner

44 It must be stressed, however, that even if a partner's actions are *ex facie* within the scope of the usual nature of the business of the firm, the transaction will not bind the partnership unless the *manner* in which it is carried out would also appear to a reasonably careful and competent person of the same kind as the third party to be in the "usual way" (see [34]–[35] above). An extreme example of when the manner in which a transaction is carried out would not appear to be usual is the case of

Coughlan. There, the proposed transaction was that in return for the transfer of $500,000 and without risk to that sum, the claimants would within one month receive $2,500,000. The conditions of the transaction, which were described by a judge as "preposterous" (*Coughlan* at 67 and 68), took the partner's actions out of the ambit of the usual manner in which the business of the partnership firm was carried out such that the court did not even go on to consider whether the partner's actions could fall within the nature of the firm's business.

45 In addition to the above, *for the manner of an act to be usual in a particular kind of business, it must be reasonably necessary and not just convenient for the carrying on of that type of business*. Thus, in *The Union Bank of Australia v Fisher and Others* (1893) 14 LR (NSW) Eq 241, the contention that it was in the usual course of a solicitor's business in acting for a vendor in the sale of a property for a member of a firm to borrow the original documents of title to land from the mortgagee's solicitor so as to prepare an abstract of title was rejected on the ground that although solicitors might find such a practice convenient, the usual *method* of effecting such a transaction was for the vendor's solicitor to obtain copies or extracts taken from the original deeds from the mortgagee's solicitor without disturbing the mortgagee's possession of the original deeds (at 248).

46 As with showing that the act is usual in nature (see [43] above), the party invoking the second limb of s 5 bears the burden of proof to show that an act was carried out in a usual manner. In order to discharge the burden of proof, expert evidence on what is usual in a particular business is ordinarily adduced. The party seeking to uphold the transaction can also show that it made the appropriate enquires to reasonably assure itself that the manner of the transaction was in the "usual way" although, as Pill LJ rightly observed in *Hirst* at 945, what enquiry is appropriate depends on all the circumstances. If the partner is not forthcoming with information that the third party is entitled to, the third party has to draw his own conclusion and either not proceed or take a risk with the transaction. The third party is not always entitled to rely on the unsubstantiated assertions of the partner (see *United Bank of Kuwait* at 1065–1066). Therefore in *Hirst* (at 945), the "contracting" party was held not to be entitled to rely on the bare assertion of a partner of a law firm that the undertaking given was in the normal course of the firm's business. It was held that features of the transaction, including the high rate of interest on the loan, ought to have given cause for concern, and this would have warranted the making of further enquiries (see *Hirst* at 945).

(C) The relevance of benefit to the firm to liability under the second limb of s 5 of the PA

47 For the avoidance of doubt, we would add, at this juncture, that for the purposes of establishing whether or not the act of a partner was in the "usual way" of "business of the kind carried on by the firm", it is immaterial that the firm may have received either a direct or indirect benefit from a contract that is outside the scope of the actual or ostensible authority of the partner entering into it. The typical cases where this is an issue are the borrowing of money or the procurement of the supply of goods or services. *Lindley* at paras 12-201–12-202 notes:

> When considering liability in respect of a contract entered into by a partner *otherwise* than on behalf of the firm, it is wholly irrelevant that the firm may have received some direct or indirect benefit under or by virtue of the contract …
>
> If a partner borrows money without the actual or implied authority of his co-partners, he and not the firm will enter into the contract of loan and the nature of that contract will not be altered or affected by the manner in which he chooses to apply the money borrowed. Accordingly, the lender cannot seek repayment from the firm merely because the money has been applied for its benefit; however, he may enjoy an equivalent right by way of an equitable form of subrogation.

[emphasis in original]

Any rights of the lender arising from subrogation are entirely distinct from the issue of the partnership's liability pursuant to s 5 of the PA.

(D) The knowledge and belief of the party dealing with the partner

48 As mentioned at [33], even if the partner's act was "usual" to the kind of business carried on by the firm, the other partners of the firm will not be bound if:

(a) the third party the partner dealt with knew that the partner had no authority to act;

(b) the third party the partner dealt with did not know that the partner was a partner; or

(c) the third party the partner dealt with did not believe that the partner was a partner.

49 As the above were not points of particular controversy in these proceedings, it will suffice to say that the exceptions can be explained by the reasoning that in these situations, the third party did not place any reliance on the partner's position in the firm and thus cannot look to the other partners of the firm to remedy the actions of the partner that he dealt with. These exceptions do not apply to LCP in relation to CPP. The sole question here is whether his dealings with Orix bound ML and RY.

(2) The nexus between ss 5 and 14 of the PA

50 In addition to s 5, s 14 of the PA also provides that persons who hold themselves out or who allow themselves to be held out as partners can be held liable as if they were in truth partners of the firm. Section 14 of the PA reads as follows:

Persons liable by "holding out"

14. Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made:

Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name, or of the deceased partner's name as part thereof shall not of itself make his executors or administrators, estate or effects liable for any partnership debts contracted after his death.

This provision is to be distinguished from the second limb of s 5. Section 14 applies to circumstances where a person is not a partner in truth but has held himself out or has allowed to be held out as a partner. Like the second limb of s 5, it is premised on ostensible authority. Thus, if a person has held himself out or allowed himself to be held out as a member of the firm, he will be liable as a partner *vis-à-vis* third parties who have relied on such holding out even though he is not a true partner. However, if, for example, a legal associate has been held out as a partner of the firm (without his consent), he cannot be held liable as a member of the firm under s 14 of the PA. If it is established pursuant to s 14 of the PA that a person has held himself out or allowed to be held out as a partner of a firm, then he can be held liable for the acts of a (true) partner of that firm if the act of the latter falls under one of the two limbs of s 5 of the PA.

51 It ought to be explained at this juncture that while a person does not automatically become liable under s 14 of the PA just by virtue of being a "salaried partner", those who style themselves "salaried partners" would do well to bear in mind the risk that they may be exposing themselves to liability as if they were true partners of the firm. As was correctly pointed out in *Stekel v Ellice* [1973] 1 WLR 191 ("*Stekel*"), a "salaried partner" cannot, as a matter of law, be said necessarily to be, or not to be, a partner in the true sense, for the term is not a term of art and the question depends on what was the substance of the relationship on the facts of each particular case. Megarry J opined at 199–200:

> If, then, there is a plain contract of master and servant, and the only qualification of that relationship is that the servant is being held out as being a partner, the name "salaried partner" seems perfectly apt for him; and yet he will be no partner in relation to the members of the firm. At the other extreme, there may be a full partnership deed under which all the partners save one take a share of the profits, with that one being paid a fixed salary not dependent on profits. Again, "salaried partner" seems to me an apt description of that one: yet I do not see why he should not be a true partner, at all events if he is entitled to share in the profits on a winding up … there could well be cases in which a salaried partner will be a true partner … . *It may be that most salaried partners are persons whose only title to partnership is that they are held out as being partners; but even if "salaried partners" who are true partners, though at a salary, are in a minority, that does not mean that they are non-existent*. [emphasis added]

A person, liable under s 14 is jointly liable with the actual partners of the firm on the implied promise of personal liability as a partner. Therefore if it is established that a person is a "salaried partner" who has held himself out or allowed himself to be held out within the meaning of s 14 of the PA, he will be liable for the acts of the other members of the firm under s 5 of the PA but only in an identical manner that a true partner of the firm would be. The provision has the effect of attaching but not enhancing liability as a "partner".

Application of the law to the facts

52 Would and could a reasonable entity in the same business as Orix (*ie*, a leasing company), have come to the conclusion that LCP's and ML's actions *vis-à-vis* the Original Agreement (as mentioned, both LCP and ML were signatories to this agreement (see [13] above)) and LCP's actions *vis-à-vis* the August Agreement were "usual" to the type of business carried on by CPP (*ie*, a law firm)? The issue here is not one of merely giving a label to the transaction but rather of examining the substance of it and assessing whether it can be fairly said to be the type of transaction that a law firm would usually enter into. Even if we assume that ML and RY had held themselves out as ostensible partners of CPP pursuant to s 14 of the PA (see [50] above), we are not persuaded that the Original Agreement and, subsequently, the August Agreement with Orix could be construed as being simply an ordinary lease transaction entered into as part of the usual business of a law firm.

(1) Whether the Original Agreement was "usual" in nature

53 In our view the Original Agreement was in substance a *composite* arrangement that encompassed both substantial borrowings creating a very significant financial liability for CPP as well as a lease transaction for the use of the Canon copiers. Orix would certainly have been aware that it was not an ordinary lease of equipment. In coming to the conclusion that the Original Agreement effectively included an arrangement for significant borrowings, we took into account a number of facts. *First*, and foremost, we consider the difference between the real value of the Canon copiers and the total amount payable under the Original Agreement to be crucial (see [9] above). *Second*, Orix was well aware that a large part of the borrowings (at least between $110,000–$120,000) was

going towards the repayment of amounts due to Newcourt rather than towards the purchase price of the Canon copiers, even assuming *arguendo* it did not have detailed knowledge of the precise nature of the cash flow problems CPP was facing at the material time. *Third*, we note as pointed out earlier (see [13] above), under the Original Agreement the rent payable would substantially increase even as the Canon copiers significantly depreciated in value. A final payment of $47,400 was scheduled for September 2010 when the Canon copiers would be practically worthless, assuming that they were still usable. It must have been readily apparent to Orix that CPP already had prior problems servicing the outstandings to Newcourt as despite the fact that the Newcourt copiers had already reached the end of their working life, a large amount remained due. The even larger facility extended by Orix could only increase the overall financial burden of (what would have been obvious to any objective lender) a firm with apparent cash flow problems. *Fourth*, we note that that was a very different arrangement from the leasing arrangements some equipment manufacturers/distributors directly enter into with end users incorporating as part of the lease, upgrades and repairs. We note that the Judge had held that Orix did not have "knowledge" of CPP's cash flow problems (the HC Judgment at [69]). With respect, we have to disagree. First, we are of the view that Orix which is in the business of leasing, *inter alia*, equipment, must have known the real cost of the Canon copiers, and even if it did not, it would have been prudent of Orix to have checked. Second, it would have been aware that the lion's share of the base sum of $231,500 less the real cost of the Canon copiers was going towards satisfying CPP's obligations to Newcourt upon terminating the Amended Newcourt Agreement with the remainder going towards Canon as profit. It seems to us rather obvious that the fact that CPP was seeking even more advantageous cash flow arrangements (even at the cost of incurring rather substantial outstandings due to Newcourt) would have both loudly and clearly signalled to any objective lender that CPP was suffering from financial distress.

54 Having determined that the Original Agreement was a composite agreement of a loan arrangement of substantial borrowings and a lease transaction, the question remains as to whether such an arrangement was "usual" in nature for a law firm.

55 The transactions "usual" to the business of a law firm are naturally not confined to the provision of legal services. Law firms necessarily have to enter into other routine transactions to create the proper infrastructure to support the provision of legal services. Such transactions are incidental to its main business of providing legal services. Thus, the purchase of office equipment necessary for its operational needs would be usual to the business of a law firm. By extension, we are also prepared to accept that the typical straightforward leasing of office equipment necessary for the proper administration of a law firm is also likely to be assessed as usual to a law firm's business.

56 Having considered the above, however, the question here is not whether a direct lease transaction is usual to a law firm but whether a composite loan-cum-lease is "usual". Whether a usual transaction has been modified to such an extent as to make it unusual is always a question of fact. *At the risk of stating the obvious, when specially customised rather than standard arrangements are entered into, it is likely that the transaction will not be considered as part and parcel of the "usual" business of a partnership*. In such a case, the onus is on the party asserting "usualness" to establish the prevalence of such transactions (see [43] above). In our view, Orix has not discharged its burden of proof of showing that the composite loan-cum-lease transaction in the present instance is usual to the business of a law firm. It failed to adduce any evidence that showed it is usual or commonplace for law firms to enter into such kinds of transactions, *ie*, similar composite loan-cum-lease transactions incorporating a very substantial loan facility, as part of their usual business.

5 7 *In our view, the transaction in the present case could not be said to be usual for the simple reason that it incorporated substantial borrowings that were effectively several times the value of the equipment leased and this was known to Orix*. As the Judge pertinently pointed out, the

repayment obligation under the transaction was "*disproportionate*" [emphasis added] to the value of the Canon copiers (see the HC Judgment at [52]). It is trite that a partner in a law firm has no ostensible authority to borrow money on behalf of the firm or to impose through borrowings liability on it (see [41]–[42] above). Here, ML and RY had never conferred on LCP authority to borrow money for CPP on their behalf. The truth of the matter is that CPP was a sole proprietorship and LCP was not obliged to consult the others. He did as he pleased when he pleased. As LCP ran CPP in an opaque manner, it is no surprise that ML and RY were in the dark in so far as CPP's ongoing difficulties with Newcourt and Orix were concerned.

58 In fairness to the Judge, we would point out at this juncture that ML's and RY's submissions below appear to have been incorrectly focused on the "*sham*" nature of the transaction rather than its *unusual* features *apropos* s 5 of the PA. We note that the very stark difference between the value of the Canon copiers in relation to the total amount of rental due under the Original Agreement "*did concern*" [emphasis added] the Judge (see the HC Judgment at [52]) but she was not properly assisted in developing this line of enquiry. This explains why this aspect of the transaction was not adequately considered by the Judge. As an aside, we ought to mention that we also agree with the Judge that ML's and RY's contentions that the Original Agreement and the August Agreement were unenforceable for a variety of imaginative reasons ranging from unconscionability to contravention of the Moneylenders Act (Cap 188, 1985 Rev Ed) were entirely misguided.

(2) Whether the manner in which the Original Agreement was transacted was unusual

59 Even if we were to hold that the Original Agreement was just a plain vanilla lease transaction, we, nonetheless, think it is doubtful that a reasonably careful and competent leasing company would have reasonably concluded that the manner the transaction was entered into was in the "usual way". We doubt that the manner in which the Original Agreement was transacted was reasonably necessary and not merely convenient for the carrying out of CPP's business as a law firm (see [45] above). In ascertaining whether an action was carried out in the "usual way" the court can look at the particular business and at the actions of others in similar businesses (see *Mercantile Credit Co Ltd v Garrod and Another* [1962] 3 All ER 1103 at 1106). Even if the action by the partner is within the scope of the business carried on by the firm, if it is carried on in an unusual manner, the other partners may not be bound. Therefore, in *Goldberg v Jenkins & Law* (1889) 15 VLR 36, the actions of a partner who purported to borrow money for the firm at over 60% interest when the comparable rates at the time were 6%–10% were considered not to be in the usual way of business.

60 Besides the disparity in the value of the Canon copiers and the facility being extended (see [57] above), there were several other peculiar features of the Original Agreement that Orix was aware of that takes it outside the ambit of s 5 of the PA. For instance, CPP did not procure any insurance to cover risks of breakdown, quite certainly to save money, even though cl 11 of the Original Agreement obliged the lessee to insure the Canon copiers [note: 19]. Orix, for its part, did not enforce the requirement of insurance. Furthermore, if even a default of a single instalment took place, the entire amount initially scheduled to be paid over six years would be accelerated and become immediately due. This could have resulted in the entire amount due under the Original Agreement, *viz*, the sum of $305,400, being immediately payable if there was a default on the very first instalment even though the interest on the principal loaned had not been earned. This, in particular, was a remarkable term even after taking into account the supposed short-term advantages CPP would gain as pointed out in [10] above. Orix is a well established entity in the business of leasing. It has, nevertheless, not adduced any satisfactory evidence to establish that that the structure of this transaction was usual for law firms (or indeed other professional service firms) (see [43] above). Further, it has not been explained why Orix did not require CPP to produce its financial statements (see [9] above) beyond the bare assertion that it did not feel the need to as its previous experience with financing lawyers and

professionals had been good. [note: 20] Had this elementary (and obvious) precaution been taken, Orix quite certainly would not be confronted with its present predicament. Apparently, Orix ultimately made its decision to extend the facilities merely on the basis of the "profile and long history of the firm" [note: 21] that CPP could service the loan (see [9] above). This was a far from convincing reason to make a substantial loan to a law firm quite obviously facing cash flow problems.

61 In light of the above, even if RY had held herself out as a partner for the purposes of s 14 of the PA, LCP and/or ML could not have concluded the Original Agreement on behalf of RY without first seeking her consent. They had no authority to do so (even under s 5 of the PA) as it was not an arrangement that could be objectively said to be in the usual course of a solicitor's business. Only LCP and ML, who both signed the Original Agreement, were bound by it.

(3) Whether the August Agreement was "usual" to the business of a law firm such as CPP

62 As a corollary, the August Agreement could only bind LCP and not ML or RY as the latter two had not given actual consent to the reinstatement of this unusual financing arrangement after Orix had unilaterally terminated it. As we had pointed out earlier (see [18] above), the parties have accepted that the August Agreement was a new contract and that it is the only contract Orix now seeks to enforce. In addition, we would state that as a matter of general principle, once a substantial claim is made against a partnership, in the absence of specific provisions in the partnership agreement, the express consent of its partners would have to be sought to resolve the claim if this would prejudice them in any way (see also [42] above). This is because once a claim is made against the firm the prior business relationship with the claimant morphs from the ordinary into the extraordinary – *it becomes an adversarial one*. It is no longer business as usual. On the contrary, the very fact that the business relationship has soured and resulted in a claim with potentially adverse consequences to the partners takes it outside the usual course of business. It surely cannot be argued that the receipt of an adverse claim is in the usual course of a responsible law firm's business.

63 On the facts, it is clear that LCP had not informed or involved ML and RY about Orix's claim or the negotiations to resolve it. The claim itself was a joint and several one for the sum of $307,627.98 (the initial sum claimed was $306,632.59) (see [15] above). Orix was dealing with the three individuals and the firm on an entirely different footing once it terminated the Original Agreement. Before entering into the August Agreement, it ought to have ensured that all three persons had consented to the agreement if it wanted to hold all of them jointly and severally responsible. The August Agreement had two components. It was to settle the personal claims that Orix had made against the three individuals as well as to resolve the status of the Canon copiers and outstandings due under the Original Agreement. In short, it would be a stretch to say that the entry of the August Agreement was business as usual.

64 We also note that even though the reinstatement letter of 5 August 2005 was addressed to all three individuals (see [16] above), Orix did not ensure it was delivered and brought to the attention of each of them. Orix has now to accept the consequences of its rather cavalier approach in dealing only with LCP despite its professed intention to bind ML and RY as well. *If Orix is to be believed, it buried its head in sand throughout its dealings with CPP never once asking for the relevant financial statements and partnership documents*. It did not even take the elementary precaution of ensuring through direct enquiries who the actual partners of CPP at the material points of time were. Was it concerned about offending LCP by making direct enquiries? Why did it not know that CPP was a sole proprietorship? Why did it not attempt to ascertain why such a large sum was due to Newcourt? We do not know the answers to all these questions because Orix has not made its position clear in the proceedings below. We can, nevertheless, deduce that Orix took no obvious precautions or made any relevant enquiries, beyond making some cursory credit searches (see [75] below), before it entered

into the new contract, *viz*, the August Agreement. As mentioned a t [46], what enquiries are appropriate depends in each case on all the circumstances. Here, Orix has not demonstrated that it reasonably believed that this was the type of transaction a law firm usually enters into (see [43] and [46] above). It has not adduced any evidence, let alone expert evidence, to discharge its burden of proof. Neither has it shown that it made reasonable enquiries. In *Hirst*, the third party was not entitled to rely on the bare assertion of a partner of a law firm that the undertaking given was in the normal (or usual) course of the firm's business (see [46] above). In our view, Orix has in presenting its case fallen well short of establishing that it behaved reasonably in purporting to rely on LCP's representations. Pertinently, it also failed to adduce any objective or independent evidence of industry practice to show that it had acted reasonably. It merely relied on the bare assertions of its staff to feebly assert that such transactions were not unusual. Orix cannot therefore now complain that ML and RY are not legally bound by an unusual borrowing arrangement that LCP entered into without reference to the other members of his firm, particularly when it had all along decided to turn a blind eye to the actual goings-on in CPP.

Issue 3: Whether RY could be bound to the August Agreement under s 36 of the PA

65 Having dealt with the above, we turn now to Orix's main argument in CA 127 against RY that as she had not given notice of her retirement from CPP, it was entitled to treat her as still being a member of the firm as at the time of the August Agreement pursuant to s 36 of the PA. For completeness, we would state that Orix could not have succeeded on this ground as well.

The applicable law

66 A partner is liable for the debts acquired by the partnership during the period of his participation in the firm. He may even be liable for debts incurred after he retires. The ambit of his liability in this respect is encapsulated in s 36 of the PA, which provides:

> **36**. —(1) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.
>
> (2) An advertisement in the *Gazette* shall be notice as to persons who had no dealings with the firm before the date of the dissolution or change so advertised.
>
> (3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement, respectively.

67 Sub-sections (1) and (2) of the provision address the possible liability of persons who were partners at one time but who have ceased to be partners at the time of the dealing upon which it is sought to make them liable. Sub-section (3) provides some limits to that liability. It provides that a partner has no liability for debts contracted after the event of his death or bankruptcy, or after his retirement if he was unknown to the creditor that is bringing a claim against the firm in respect of debts contracted after he retired.

68 In order to establish the liability of a retired partner under s 36(1) of the PA, it must first be shown that the claimant had dealings with the firm prior to the change in its constitution. Having crossed that threshold, the second requirement is that at the time of those prior dealings, the partner must have been an apparent member of the firm. In *Tower Cabinet Co Ld v Ingram* [1949] 2 KB 397

at 403, the term "apparent members" has been explained as meaning:

> members who are apparently members to the person who is dealing with the firm, and they may be apparent either by the fact that the customer has had dealings with them before, or because of the use of their names on the notepaper, or from some sign outside the door, or because the customer has had some indirect information about them.

It ought to be noted that dormant or silent partners would usually not appear to third parties as apparent members of the firm (see also [69] below). Third, it must be shown that the partner gave no or insufficient notice of his withdrawal prior to the dealings upon which it is sought to make him liable.

69 There is no general rule as to what constitutes notice except as provided in sub-section (2). However, as Prichard J, quoting from *Lindley on Partnership* (Sweet & Maxwell, 9th Ed, 1924) at pp 291–293, observed in *Re Siew Inn Steamship Co; Ex Parte Ho Hong Bank, Ltd (In Voluntary Liquidation) In The Issue; Tan Boon Cheo v Ho Hong Bank, Ltd* [1934] MLJ 180:

> *When a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith*.
>
> *But when an apparent partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary. And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer. An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all; and in considering whether notice of dissolution or retirement is or is not sufficient, a distinction must be made according as the person sought to be affected by notice was or was not a customer of the old firm*.
>
> [emphasis in original]

In other words, creditors who have had dealings with the partnership are entitled to actual notice of the reconstitution of the firm, those who have had no previous dealings with the firm but who were aware of the firm's reputation (in that they had known of the apparent partners) would be entitled to notice via an appropriate announcement in the Singapore Gazette or a similar publication; and new creditors who had never known of the retiring partner's position until after the reconstitution are not entitled to notice.

70 Liability imposed under s 36 of the PA is no more than the application of a facet of agency law – the agent/partner's authority continues until revoked and notice of revocation has been received by the third party. An alternative explanation is based on the doctrine of estoppel. As the retired partner has been known to be a partner of the firm, this state of affairs amounts to a holding out that the retiree continues to be a partner. The onus is therefore upon the retiree to notify others that he is no longer a partner, failing which third parties are entitled to assume that he is still a partner.

Application of the law to the facts

71 While it is settled law that a retiring partner may continue to be held liable for the firm's

transactions if he does not give notice to the firm's existing customers, we do not think that s 36 means that the retiring partner's exposure is without limit as long as no notice has been given. For example, it would be absurd if a retired partner could continue to be liable for the negligent acts of an employee of his former firm years after his withdrawal just because he had for one reason or another not given notice of his retirement.

72 That being said, we do not agree with the Judge's reasoning that RY could not be held liable under s 36 of the PA because when she left the firm, there was no real change in the constitution of the firm as she was never in truth a partner. The purpose of s 36 of the PA is clearly to protect the interest of third party creditors who rely on the partner's continuing relationship with the firm. To adopt a literal reading of the phrase "a change in its constitution" would go against the purpose of the provision. As held in *Stekel* (at 198):

> Quoad the outside world it often will matter little whether a man is a full partner or a salaried partner; for a salaried partner is held out as being a partner, and the partners will be liable for his acts accordingly.

We would add that the converse is also true, and a salaried partner will be accordingly liable for the acts of the actual partners *quoad* the outside world so long as the holding out provisions under s 14 of the PA are fulfilled. Once a person is established to have held himself out or allowed to be held out as a partner under s 14 of the PA, the other provisions of the statute would also apply to him as if he were in truth a partner unless the statute provides otherwise.

73 We, however, agree with the Judge's alternative ground for finding that RY should not be held liable, *ie*, because Orix was dealing with the firm on the basis of the August Agreement, which was a *new* contract. It could not thereafter rely on s 36 to render RY liable. The present matter is easily distinguishable from cases such as *Wood v Fresher Foods Ltd* [2008] 2 NZLR 248, where the debt of the firm was incurred after the partner retired but the distribution agreement upon which the debt was founded was concluded *before* the partner's retirement. As mentioned above, the traditional rationale underlying the liability imposed under s 36 is that as a rule of the law on agency, the partner's authority continues until revoked. While the retired partner may be liable for debts accruing after his withdrawal in respect of contracts entered into while he was a partner, it does not follow that the retired partner is also liable for debts arising from contracts concluded after he left the firm. This is because by retiring from the firm, the partner has terminated the authority of his fellow partners to continue concluding agreements that would bind him.

74 A remaining partner in the firm (in this case LCP) can have no basis on which to make new agreements on the retiring partner's (in this case RY) behalf except in extenuating circumstance such as where the partner has retired but somehow knowingly continues to allow himself to be held out as being still a part of the firm (which was not the case here). Similarly, applying the estoppel analysis, by retiring from the firm, RY has ceased to hold herself out as a partner and subsequent contracts concluded on the misrepresentation that she is a partner should not bind her. Although Orix might have had prior dealings with CPP, it was suing on a fresh contract entered into *after* RY's retirement. Orix should not have simply assumed that the composition of CPP remained the same. In fact, it never inquired into whether CPP was still made up of the same partners as when the Original Agreement was entered into. As such, Orix cannot succeed against RY on this ground.

75 In addition, one other point of interest is that even prior to the Original Agreement being entered into, none of the searches Orix made were targeted at establishing that LCP, ML and RY were partners of CPP. Orix inspected CPP's website which did not give the names of the firm's partners. It also searched for the names of the three individuals on the Law Society's website which confirmed

that they worked at CPP but made no mention of their designation. In addition to the EIS, it ran property searches to assess the financial status of the three individuals. Yet, it *never* ran any search, or more, importantly made direct enquiries with CPP, that might reveal who the partners of CPP were. Instead, it relied entirely on an email from Loh, an employee of Canon and not CPP, to establish that LCP, RY and ML were partners of CPP. This was confirmed in the cross-examination of Lee [note: 22]. *Orix had precipitately made its bed. It was without any solid underpinning. Now, it must lie in it*.

Some observations

76 Given our findings on the three issues above, there is no need to go further to consider issues relating to representation and reliance. There are nevertheless some other concerns that have arisen that we think merit comment.

77 First, pursuant to r 9 of the Legal Profession (Naming of Law Firms) Rules (Cap 161, R 16, 1997 Rev Ed) ("the LP(NLF)R"), "[t]he name of a firm … shall not … be … misleading". We think that sole proprietorships registering themselves as "[name] & Partners" and holding out as partnerships are likely to be in breach of the above rule. Such registration allows a sole proprietorship to mislead the public into thinking that it is something other than what it really is. We note that pursuant to the LP(NLF)R, quite rightly, the firm name can contain the name of a former proprietor or partner only with the approval of the Council (r 6). However, it appears that there is no requirement to seek the Council's approval to maintain the firm name when a firm that starts out as a partnership between two or more persons and is registered as "[name] & Partners" subsequently becomes a sole proprietorship so long as the person whose name the firm bears remains a part of the firm. Why should a sole proprietorship be permitted under any circumstances to masquerade as a partnership? If it has not done so, it is necessary that the Law Society resolve this unsatisfactory anomaly to ensure that only true partnerships can hold themselves out as such.

78 Second, we note that, even today, third parties have to write in to the Law Society to ascertain who the partners of a law firm are. One would now expect that such information is readily accessible to the public and kept up to date on the website of the firm or the Law Society's website to facilitate background checks by members of the public or those who deal with law firms. The Law Society should consider maintaining a public register, accessible to the public through the Internet, of all partners of a law firm or limited liability law partnership as well as directors of a law corporation.

79 Third, the quaint requirement in s 36 of the PA for notices in relation to partnerships to be published in the Government Gazette seems to be rather out of step with present day business practices. A more practical and convenient means of publicising partnership changes ought to be stipulated.

Conclusion

80 For the above reasons, we allow CA 124 with costs to ML and dismiss CA 127 with costs to RY. We also order that ML is only entitled to half of the costs of the proceedings below in view of the unnecessary time spent on several unmeritorious defences. The usual consequential orders are to follow.

[note: 1] Joint Record of Appeal ("JRA") (Vol V) at p 1605.

[note: 2] See the Appellant's Core Bundle of Documents ("ACB") (Vol II) of Civil Appeal No 124 of 2009 ("CA 124") at pp 60–66.

[note: 3] ACB (Vol II) of CA 124 at p 61.

[note: 4] See JRA (Vol V) at pp 1607–1608.

[note: 5] See JRA (Vol V) at pp 1622–1623.

[note: 6] JRA (Vol V) at p 1622.

[note: 7] Transcript of cross-examination of Susanna Soh on 2 February 2009 at p 101, JRA (Vol III Part E) at p 1009.

[note: 8] ACB (Vol II) of CA 124 at pp 89–90.

[note: 9] ACB (Vol II) of CA 124 at pp 93–96.

[note: 10] ACB (Vol II) of CA 124 at p 93.

[note: 11] ACB (Vol II) of CA 124 at p 93.

[note: 12] See ACB (Vol II) of CA 124 at p 96.

[note: 13] See ACB (Vol II) of CA 124 at p 99.

[note: 14] ACB (Vol II) of CA 124 at p 99.

[note: 15] ACB (Vol II) of CA 124 at pp 103–104.

[note: 16] See ACB (Vol II) of CA 124 at pp 107–108.

[note: 17] JRA (Vol V) at p 1644.

[note: 18] JRA (Vol III Part D) at pp 644–545.

[note: 19] ACB (Vol II) of CA 124 at p 94.

[note: 20] Transcript of cross-examination of Goh Hock Leong on 3 July 2008 at pp 13–14, ACB (Vol II) of CA 124 at pp 122–123.

[note: 21] ACB (Vol II) of CA 124 at p 90.

[note: 22] See the transcript of cross-examination of Danny Lee on 3 July 2008 at p 120, JRA (Vol III Part D) at p 694.