WBL Corporation Ltd *v* Lew Chee Fai Kevin and another appeal
[2012] SGCA 13

Case Number : Civil Appeals Nos 149 and 150 of 2010

Decision Date : 10 February 2012

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Yeo Khirn Hin Andrew, Aaron Lee Teck Chye, Tay Yong Seng and Chang Ya Lan (Allen & Gledhill LLP) for the appellant in Civil Appeal No 149 of 2010 and the respondent in Civil Appeal No 150 of 2010; Thio Shen Yi SC, Leow Yuan An Clara Vivien and Charmaine Kong (TSMP Law Corporation) for the respondent in Civil Appeal No 149 of 2010 and the appellant in Civil Appeal No 150 of 2010.

Parties : WBL Corporation Ltd — Lew Chee Fai Kevin

Contract – Illegality and public policy – Whether performance of contract illegal – Section 47 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed)

Criminal law – Statutory offences – Corruption, Drug Trafficking and Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed)

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 4 SLR 774.]

10 February 2012 Judgment reserved.

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

Introduction

1 This appeal and cross-appeal (collectively, "the present appeals") arose out of the judgment of the trial judge ("the Judge") in Suit No 129 of 2008 ("Suit 129") (see *Lew Chee Fai Kevin v WBL Corp Ltd* [2010] 4 SLR 774 ("the Judgment")). For ease of reference in the present appeals, we will refer to Kevin Lew Chee Fai as "Lew" and WBL Corporation Limited as "WBL" instead of as "the appellant" and "the respondent" in their respective appeals.

2 Lew was, at the material time, the Group General Manager of WBL's Enterprise Risk Management Group. He commenced proceedings against WBL, seeking, *inter alia*, specific performance of WBL's obligation to issue him a total of 167,500 shares in WBL ("the Relevant Shares") under an Executive Share Options Scheme ("ESOS"). WBL had refused to issue the Relevant Shares to Lew because he had purportedly paid for them using the proceeds from share transactions that were alleged to constitute insider trading. WBL's defence was that it was not in breach of its obligation under the ESOS to issue the Relevant Shares to Lew (referred to hereafter as WBL's "contractual obligation under the ESOS to issue the Relevant Shares" where appropriate) because it would have been illegal under either the common law or s 44 or s 47 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("the CDSA") to issue those shares. Suit 129 was heard before the Judge together with Suit No 71 of 2009 ("Suit 71").

3 Suit 71 was the action by the Monetary Authority of Singapore ("MAS") against Lew for

violating the insider trading provisions of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA"), the alleged insider trade being Lew's sale of 90,000 shares in WBL on 4 July 2007 ("the Transaction"). Suit 71 was a *civil* action and MAS sought a civil penalty under s 232(2) of the SFA. The Judge found Lew liable for insider trading under s 218 of the SFA and therefore liable to pay a civil penalty. We dismissed Lew's appeal against that decision in Civil Appeal No 123 of 2010 ("CA 123") and delivered our grounds in *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] SGCA 12 ("*Kevin Lew v MAS*").

4 For the purposes of this judgment, we will proceed on the basis of the facts established in *Kevin Lew v MAS*, together with the relevant additional facts below.

The material facts

Background to the dispute

WBL's ESOS

5 WBL operated an ESOS under which its senior executives were offered share options, *ie*, the right to be issued shares in WBL (referred to hereafter as "WBL shares") at a specific purchase price.

6 The terms of the ESOS central to the dispute between WBL and Lew are cll 6, 8 and 19, which are reproduced below: [note: 1]

> **6. Right to Exercise Option**
>
> (a) Subject as provided in this Rule 6 and in Rule 7, an Option shall be exercisable, in whole or in part, at any time during the Option Period.
>
> (b) An Option shall, to the extent unexercised, immediately lapse without any claim against the Company:-
>
> (i) subject to Rules 6(c) and (d), upon the Participant ceasing to be in the full-time employment of the Group for any reason whatsoever; or
>
> (ii) upon [the] bankruptcy of the Participant.
>
> …
>
> **8. Exercise of Options, Allotment and Listing of Stock Units**
>
> (a) An Option may be exercised, in whole or in part, by a Participant giving notice in writing to the Company in or substantially in the form set out in Appendix C … Such Notice must be accompanied by a remittance for the Aggregate Subscription Cost. An Option shall be deemed to be exercised upon receipt by the Company of the said notice duly completed and the remittance for the Aggregate Subscription Cost.
>
> (b) The Company shall, as soon as practicable after the exercise of an Option, allot the relevant Shares to the Participant and shall apply to the SES and any other stock exchange on which the Stock Units are quoted, for permission to deal in and for quotation of such Stock Units. Subject to such consents or other required action of any competent authority under regulations or enactments for the time being in force as may be necessary and subject to compliance with

the Rules of the Scheme, the Shares shall be allotted and issued not later than ten (10) Market Days after the exercise of the Option.

…

19. Conditions of Option

Every Option shall be subject to the condition that no Shares shall be issued pursuant to the exercise of an Option if such issue would be contrary to any law or enactment, or any rules or regulations of any legislative or non-legislative governing body for the time being in force in Singapore or any other relevant country.

Lew's participation in the ESOS

7 Lew was one of the senior executives of WBL who participated in the ESOS. Between 2000 and 2004, Lew was granted several share options to purchase WBL shares pursuant to the ESOS at various purchase prices.

8 The following share options remained unexercised by Lew as at 9 July 2007:

	Date of Grant	**No. of shares granted**	**Exercise Price**	**Option Period**
(a)	21 January 2000	37,5000	$2.720	21 October 2002 – 20 December 2009
(b)	6 January 2004	146,000	$2.947	6 October 2006 – 5 December 2013
(c)	17 December 2004	153,000	$3.220	17 September 2007 – 16 November 2012

Lew's exercise of his ESOS share options with proceeds from the Transaction

9 As stated in *Kevin Lew v MAS* at [1], 2 July 2007 was the date on which Lew allegedly acquired confidential, price-sensitive information about WBL at an internal executive meeting. 4 July 2007 was the date of the Transaction, *ie*, the date on which Lew sold 90,000 of his WBL shares. On 9 July 2007, Lew submitted two notices to WBL pursuant to cl 8(a) of the ESOS for the Relevant Shares to be issued to him pursuant to the options granted on, respectively, 21 January 2000 and 6 February 2004 ("the Options").

10 Lew raised a total of $446,773.26 from the Transaction and he tendered two cheques totalling $485,110 ("the Cheques") as payment for the Relevant Shares. It is not disputed that the Cheques were drawn from the proceeds received from the Transaction.

11 Pursuant to WBL's obligation under s 39 of the CDSA to make a report if it had knowledge or reasonable grounds to suspect that any property represented the proceeds of criminal conduct, WBL lodged a Suspicious Transaction Report with the Commercial Affairs Department ("CAD") on 17 July 2007 with regard to the Transaction.

WBL declines to issue the Relevant Shares

12 Lew resigned from WBL on 19 July 2007. In his resignation letter, he reminded WBL that he had applied to exercise the Options and sought confirmation that he was entitled to do so. WBL did not respond to Lew's question on the Options.

13 Lew thus wrote again on 27 December 2007 seeking a response. WBL's reply on 8 January 2008 was that it was "bound by legal restrictions" [note: 2] from taking any action with respect to Lew's purported exercise of the Options using the proceeds from the Transaction. WBL took the position that it was entitled to decline to issue the Relevant Shares to Lew because the Options had been exercised using the proceeds of the Transaction.

14 Lew then commenced the proceedings below seeking, *inter alia*, specific performance of WBL's contractual obligation under the ESOS to issue the Relevant Shares.

The decision below and the parties' respective appeals

15 The Judge held that WBL would have contravened s 44 of the CDSA if it had issued Lew the Relevant Shares pursuant to his purported exercise of the Options on 9 July 2007. However, the Judge also held that there was a means by which WBL could have legally performed its contractual obligation to issue those shares to Lew, *ie*, by obtaining the consent of CAD under s 44(3) of the CDSA for the shares to be issued. Section 44(3) of the CDSA provides as follows:

> (3) Where a person *discloses to an authorised officer* his knowledge or belief that any property, funds or investments are derived from or used in connection with criminal conduct or any matter on which such knowledge or belief is based —
>
> (a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he shall not be guilty of an offence under this section if the disclosure is made in accordance with this paragraph, that is —
>
> (i) it is made before he does the act concerned, being an act done with the *consent of the authorised officer*; or
>
> (ii) it is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it;
>
> (b) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by law, contract or rules of professional conduct; and
>
> (c) he shall not be liable in damages for any loss arising out of —
>
> (i) the disclosure; or
>
> (ii) any act done or omitted to be done in relation to the property, funds or investments in consequence of the disclosure.
>
> [emphasis added]

Under cl 8(b) of the ESOS, WBL was obliged to avail itself of this means of legally performing its contractual obligation under the ESOS to issue the Relevant Shares. The Judge therefore directed WBL to seek the consent of CAD to issue those shares to Lew.

16 As we stated at the outset, the present appeals consist of an appeal and a cross-appeal against the Judge's decision. Civil Appeal No 149 of 2010 ("CA 149") is WBL's appeal against the Judge's direction that it must apply to CAD for consent to issue the Relevant Shares to Lew. WBL also appealed against the Judge's order awarding Lew costs. Civil Appeal No 150 of 2010 ("CA 150") is Lew's appeal against the Judge's decision in so far as it was held that WBL would have contravened s 44(1) of the CDSA had it issued the Relevant Shares to Lew pursuant to his exercise of the Options on 9 July 2007.

Overview and issues arising in these appeals

17 In order for Lew to be granted specific performance of WBL's contractual obligation under the ESOS to issue the Relevant Shares, it must be proven that WBL was under a contractual obligation to do so. There is no dispute that the WBL was under such an obligation unless performing it was contrary to law by virtue of Condition 19 of the ESOS. WBL's main argument was that it was contrary to law for it to issue the new WBL shares to Lew by virtue of either s 44 *or s* 47 of the CDSA.

Our decision

Illegality under section 44 of the CDSA

18 Section 44(1) of the CDSA ("s 44(1)") provides as follows:

> **44.**—(1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement, knowing or having reasonable grounds to believe that, by the arrangement —
>
> (*a*) the retention or control by or on behalf of another (referred to in this section as that other person) of that other person's benefits of criminal conduct is facilitated (whether by concealment, removal from jurisdiction, transfer to nominees or otherwise); or
>
> (*b*) that other person's benefits from criminal conduct —
>
> (i) are used to secure funds that are placed at that other person's disposal, directly or indirectly; or
>
> (ii) are used for that other person's benefit to acquire property by way of investment or otherwise,
>
> and knowing or having reasonable grounds to believe that that other person is a person who engages in or has engaged in criminal conduct or has benefited from criminal conduct shall be guilty of an offence.

19 Section 44(1), if it applies to the present facts at all, would make it illegal on WBL's part to issue the Relevant Shares.

20 However, it is unnecessary for us to even consider the applicability of s 44(1) because s 44 of the CDSA does not apply at all to WBL in the first place. In the course of argument, counsel for WBL drew our attention to s 40 of the CDSA which, he conceded, could undermine entirely his argument based on s 44(1)(*b*)(ii). We would agree.

21 Section 40 of the CDSA provides as follows:

Protection where information given under section 39

40. Where a person or his officer, employee or agent, gives information under subsection (1) of section 39 as soon as practicable after having the knowledge referred to in that subsection, the person or his officer, employee or agent shall be taken, for the purposes of sections 43, 44, 46 and 47, not to have been in possession of that information at any time.

This provision effectively exonerates the relevant party against the application of s 44 once that party discharges its obligation under s 39 to make a Suspicious Transaction Report. There is no dispute here that WBL lodged a Suspicious Transaction Report in respect of the Transaction on 17 July 2007 (see above at [11]) pursuant to its obligation under s 39 of the CDSA. The application of s 44 is therefore precluded.

22 In the circumstances, it is not, strictly speaking, necessary for us to assess the correctness of the reasoning of the Judge in the court below. However, given the general significance of the various holdings in the court below, some observations by this court might be appropriate.

23 In so far as s 44(1) was concerned, WBL had argued in the court below that, in allotting and issuing the Relevant Shares, (a) it would be entering or into or otherwise concerned in an "arrangement" with Lew; (b) with knowledge or reasonable grounds to believe that, by that arrangement, Lew's benefits of criminal conduct were being used for his benefit to acquire the Relevant Shares and (c) with knowledge or reasonable grounds to believe that Lew had engaged in "criminal conduct" or had "benefited from criminal conduct".

24 The Judge accepted WBL's defence and held that all the three elements set out in the preceding paragraph were made out on the facts. Her reasons for her findings are as follows (see the Judgment at [22]–[29]):

> 22 I accept WBL's submission that it would have entered into an "arrangement" with Lew by issuing the shares to Lew. Lew's argument was basically that an "arrangement" within the meaning of the CDSA had to involve an *agreement* between the accused person and the perpetrators of criminal conduct. It is noted that the term "arrangement" has been "frequently used in statute to describe the widest possible class of action in a particular context" (see *Jowitt's Dictionary of English Law* vol 1 (Greenberg gen ed) (Sweet & Maxwell, 3rd Ed, 2010) at p 159). If Parliament had intended only for agreements to be caught, it would have used express words to that effect. In any case, if WBL was to issue those shares to Lew, there would have been an agreement between the two. I therefore take the view that the first element had been made out.
>
> 23 Lew did not dispute that WBL knew that he had used the proceeds from the Insider Trade to fund the exercise of his share options. WBL also knew that Lew was in possession of information that was not generally available at the time of the Insider Trade. As such, if the proceeds Lew received from the Insider Trade were his "benefits from criminal conduct", …. the second element would be made out.
>
> 24 In respect of the third element, Lew argued that the Insider Trade was not criminal conduct within the meaning of the CDSA. Lew highlighted that he was sued by MAS in a *civil* action (for payment of a civil penalty under s 232 of the SFA) and was never *charged* under s 221 for an offence. Under s 2 of the CDSA, "criminal conduct" is defined as doing or being concerned in a "serious offence". In turn, a serious offence is defined any of the predicate offences set out in Schedule 2 of the CDSA ("the List"). The List provides that "Section 221 for contravention of

s 218" is a serious offence. However, the List does not refer to an action brought under s 232 read with s 218 of the SFA as a serious offence. As a result, Lew contended that since MAS had chosen to proceed under s 232 of the SFA, WBL could not maintain that he *could* have been punished under s 221 of the SFA. WBL's response was that there was no requirement for the perpetrator to be charged before it can amount to a "serious offence", and whether there was a "serious offence" would depend on whether an offence had been *committed* instead.

25 I agree with WBL's submissions. The objectives of the CDSA would be defeated if the perpetrator needs to be charged before the CDSA provisions can apply. It would allow a person to knowingly deal with the tainted property of a criminal until he is charged. I cannot accept that the Parliament could have intended for a person who assists a criminal, who is successful in evading arrest from the authorities and is never charged for the predicate offence, to fall outside the purview of s 44(1) of the CDSA. Notably, s 44(1) merely requires a person to know or have reasonable grounds to believe that the other person is engaging or has *engaged* in criminal conduct. It does not provide that a person must know or have reasonable grounds to believe that the other person has been *charged* for criminal conduct. In my view, where a person knows or has reason to believe that another person has committed an offence, it would fall squarely within the purview of s 44(1), and that person could be liable for assisting the other person in money laundering if the other elements are made out.

26 The present case is unique, as a person who infringes the rules prohibiting insider trading under the SFA can face either civil or criminal proceedings. This is distinguishable from the other offences which attract criminal consequences only. On 9 July 2007, when Lew exercised the two share options, it would not have been possible for WBL or even Lew himself to know if he would be charged for criminal insider trading or sued for payment of a civil penalty instead. However, given the present circumstances, WBL knew that Lew had sold shares while in possession of material non-public information. It would, at the very least, have had reasonable grounds to believe that Lew had committed an offence and could be punished under s 221 of the SFA. In those circumstances, I am of the view that WBL would (at least) have reasonable grounds to believe that Lew had engaged in criminal conduct within the meaning of the CDSA. If, however, the issue relating to these share options were to arise today (*ie*, after Lew has been found liable by this court for the payment of a civil penalty under s 232 of the SFA), it would not be possible to classify the money that Lew received from the Insider Trade as being the benefits of his criminal conduct, since s 221(2) of the SFA provides that no criminal proceedings can be instituted against him once the court has ordered him to pay a civil penalty under s 232 of the SFA.

27 Another point raised by Lew was that the quantum of the "benefits of criminal conduct" should be assessed with reference to s 8 of the CDSA, which states:

Assessing benefits derived from criminal conduct

8.-(1) Without prejudice to section 28, for the purposes of this Act -

(*a*) the benefits derived by any person from criminal conduct, shall be any property or interest therein (including income accruing from such property or interest) held by the person at any time, whether before or after 13th September 1999, being property or interest therein disproportionate to his known sources of income, and the holding of which cannot be explained to the satisfaction of the court; and

(*b*) the value of the benefits derived by him from criminal conduct, shall be the

aggregate of the values of the properties and interests therein referred to in paragraph (*a*).

28 Lew took the position that under s 8 of the CDSA, his benefits from criminal conduct, *ie*, the income disproportionate to his known sources of income and which cannot be explained to the court's satisfaction, were limited to the $27,000 loss that he avoided from the Insider Trade. WBL however maintained that the benefits of Lew's criminal conduct were the entire $446,773.26 he received from the Insider Trade. Even if the benefits were limited to the $27,000 loss that Lew avoided, WBL argued that an offence under s 44(1) of the CDSA would likewise be made out.

29 I accept WBL's submission. Notably, s 44(2) of the CDSA states:

> In this section, references to any person's benefits from criminal conduct include a reference to any property which, *in whole or in part*, directly or indirectly, represented in his hands his benefits from criminal conduct. [emphasis added]

In turn, s 2 of the CDSA defines property as including "money". It is not disputed that the money received from the Insider Trade was used by Lew to fund the exercise of share options. As such, at least a part of the money which WBL received for the exercise of the share options represented Lew's benefits from criminal conduct, whether such benefits referred to the entire $446,773.26 proceeds he received or the $27,000 loss he avoided. As a result, I find that Lew had used his benefits from criminal conduct to exercise the two share options on 9 July 2007. I would therefore hold that WBL has satisfied the third element of the offence under s 44(1) of the CDSA. Therefore, it would have been illegal for WBL to have allotted and issued its shares to Lew on 9 July 2007.

[emphasis in original]

25 Having decided that s 44(1) rendered it illegal for WBL to issue the Relevant Shares on 9 July 2007, the Judge went to hold (as noted above) that s 44(3) of the CDSA (reproduced above at [15]) provided an avenue for WBL to issue the Relevant Shares legally, and given that, under cl 8(b) of the ESOS, WBL had a contractual obligation to seek "such consents or other required action of any competent authority under [any] regulations or enactments… as may be necessary", WBL should apply to the Commercial Affairs Department for its consent to issue the Relevant Shares. She accordingly directed WBL to do so.

26 Turning, first, to the Judge's reasoning in relation to s 44(1) (as set out above at [24]), the first reason given by the Judge for accepting WBL's submission that the latter would have committed an offence under s 44(1) had it issued the Relevant Shares to Lew was that the word "arrangement" had a wide meaning and did not necessarily require an agreement between the parties to do the act contemplated. If an agreement were required, Parliament would have said so. In any case, the issue of the Relevant Shares by WBL would, by itself, have constituted an agreement.

27 Counsel for WBL has drawn our attention to two decisions on similar legislation in the United Kingdom and Hong Kong where an English court and Hong Kong court have given a wide meaning to the words "enters into or is otherwise concerned in an arrangement" having the effect of assisting a person to use the benefits of his criminal conduct to acquire property by way of investment. In the English High Court decision of *Lars Wester v Euan Cecil Santhagens Borland* [2007] EWHC 2484, Norris J observed as follows ([23]):

> The second line of Defence related to the trustee's concerns that he was exposed to liability

under the Proceeds of Crime Act. The provisions of this far-reaching statute are sufficiently familiar for me simply to summarise them. By section 328, a person commits an offence if he becomes concerned in an arrangement which he suspects will facilitate the use of criminal property by another person. A transfer of the money in the Swiss bank account by the Defendant to the Claimant would be such an arrangement. That would depend upon the contents of the Swiss bank account being criminal property. "Criminal property" is defined in section 340 of the Act as "property which constitutes a person's benefit from criminal conduct", "criminal conduct" being defined as "conduct which constitutes an offence in any part of the United Kingdom or would constitute an offence if it occurred there". The only relevant offence could be an offence under New Zealand law for wrongly claiming off-set relief on the grounds that legal ownership of the 49% shareholding did not suffice as a foundation for the claim.

28 In *The Queen v Lo Chak Man and Tsoi Sau Ngai* [1996] HKCU 172, the Hong Kong Court of Appeal held that the words "a person who enters into or is otherwise concerned in an arrangement" in s 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance ("HK/DT(RP)") which provides that:

> …a person who enters into or is otherwise concerned in an arrangement whereby …the retention or control by or on behalf of another ('the relevant person') of the relevant person's proceeds of drug trafficking is facilitated…knowing or having reasonable grounds to believe that the relevant person … has benefitted from the drug trafficking, commits an offence[;]

are wide enough to apply to the conscious act of "uplifting" on four occasions the money in the relevant person's bank account if that person has knowledge that it will facilitate the relevant person's control of the proceeds of drug trafficking.

29 Accordingly, we agree with the Judge that the first element of s 44(1) was satisfied in the present case.

30 The second reason for accepting WBL's defence pursuant to s 44(1) was that the proceeds Lew received from the Insider Trade were his "benefits from criminal conduct", which were $446,773.26, and not $27,000 (being the amount of loss avoided (see *Monetary Authority of Singapore v Lew Chee Fai Kevin* [2010] 4 SLR 209 at [131]). The Judge relied on s 44(2) to justify this conclusion.

31 With respect, we disagree with this reasoning. The CDSA is an anti-money laundering statute. Its principal object is to prevent ill-gotten gains from being laundered into other property so as to avoid detection and confiscation by the enforcement agencies. The "benefits" in the present case were $27,000 which was the loss avoided by Lew as a result of his insider trades in WBL shares. The Judge, with respect, misconstrued s 44(2) as a reference to the proceeds of criminal conduct (*ie*, $446,773.26) when it actually refers to "property which … in whole or in part … represented in his hands his benefits from criminal conduct." What these words mean, in the context of this case, is that if WBL has issued the Relevant Shares at the price of $485,110, only $27,000 out of $485,110 would be "benefits" from criminal conduct. Section 44(1) of the CDSA is very specific. It targets the "benefits" from criminal conduct, not "the proceeds from criminal conduct" (*cf s* 43 of the CDSA and s 25 of the HK/DT(RP) which refers to "proceeds of drug trafficking"). For these reasons, s 44(1) applies to WBL only with respect to the $27,000, being Lew's benefits from insider trading, and therefore WBL was not justified in refusing to issue the Relevant Shares less the number to the value of $27,000.

32 The third reason relied upon by the Judge in the court below to the effect that Lew's insider trading was criminal conduct was also, with respect, flawed. The expression "criminal conduct" is

defined in s 2(1) of the CDSA principally as "a serious offence (other than an offence under section 44 or 47)". The definition of "serious offence" refers to the offences specified in the Second Schedule of the CDSA. Under Pt III of the Second Schedule, a "serious offence" in the context of insider trading under the SFA is not defined as "Section 218" *per se*, but is, instead, defined as "Section 221 for contravention of section 218". In the present case, the Public Prosecutor did not prosecute Lew for an offence under s 218. Instead, the Public Prosecutor permitted MAS to pursue a civil claim against Lew for insider trading. The Judge mistakenly assumed that it was sufficient without more for WBL to plead that such a predicate offence had been committed. With respect, we cannot agree with this (see *Ang Jeanette v PP* [2011] 4 SLR 1 at [57] and [58]).

33 In the circumstances, therefore, quite apart from the legal effect of s 40 of the CDSA on the facts of the present case (see above at [21]), it could not, in any event, be said that s 44(1) would have applied in the context of the present case.

34 There is another aspect of the Judge's reasoning in the court below which is, with respect, unsatisfactory. This relates to her decision on the applicability of s 44(3) (that WBL was obliged to seek CAD's consent under the subsection to issue the Relevant Shares to Lew).

35 As we have mentioned earlier, the Judge directed WBL to seek the consent of CAD to issue the Relevant Shares to Lew. This direction was given on the basis that WBL had a contractual duty to obtain consent from "any competent authorities" under cl 8(b) of the ESOS (see above at [6]), and this extended to seeking the consent of the relevant authorities under s 44(3) of the CDSA for the Relevant Shares to be issued to Lew (Judgment at [34]). The Judge reasoned (at [34] of the Judgment) that "[q]uite plainly, the ESOS contemplated the situation whereby WBL would need to obtain the consent of *any of the authorities* before it could issue shares" [emphasis added].

36 In our view, this reasoning is, with respect, wrong because the parties would hardly have contemplated an *illegal* performance of WBL's contractual obligations to Lew under the ESOS. In reality, they would not have contemplated that at all. Furthermore, under the ESOS, WBL did not have any obligation, contractual or otherwise, to obtain any permission from CAD or the competent authority under the CDSA to issue the Relevant Shares. As far as Lew was concerned, WBL had an obligation to issue the Relevant Shares to him unless it was contrary to law. If the issue of the Relevant Shares was contrary to law, the question of WBL having a continuing duty to issue the Relevant Shares, for example, by seeking the consent of the relevant authorities (if applicable in the present case) would not arise. WBL has no obligation to remedy an illegal act on the part of Lew.

Illegality under section 47 of the CDSA

37 We consider next WBL's argument that s 47 of the CDSA made it illegal for Lew to convert his monies, which included the proceeds from the insider trading transaction, through the Options into WBL shares.

38 Section 47(1) renders a person guilty of an offence if he:

> (*a*) conceals or disguises any property which is, or in whole or in part, directly or indirectly, represents, his benefits from criminal conduct; [or]
>
> (*b*) converts or transfers that property or removes it from the jurisdiction …

39 Section 47(1) criminalises what is known as "primary" money-laundering, *ie*, a defendant's laundering of the proceeds of his *own* crime. In comparison, s 47(2), which is not applicable in the

present case, criminalises "secondary" money-laundering, *ie*, a defendant's laundering of the proceeds of someone else's crime. Section 47(2), prior to its amendment in 2010, reads as follows:

> Any person who, knowing or having reasonable grounds to believe that any property is, or in whole or in part, directly or indirectly, represents, another person's benefits from criminal conduct —
>
> (*a*) conceals or disguises that property; or
>
> (*b*) converts or transfers that property or removes it from the jurisdiction,
>
> for the purpose of assisting any person to avoid prosecution for a serious offence or a foreign serious offence or the making or enforcement of a confiscation order shall be guilty of an offence.

Only s 47(1) is relevant here, in particular, s 47(1)(*b*), which we now turn to consider. This provision is directed against illegality *on the part of Lew* and not on the part of WBL as it would have been under s 44(1) had s 44(1) been applicable (see above at [19]). Nevertheless, s 47(1) illegality is still relevant for the purposes of determining whether WBL is obliged to perform its contractual obligations to Lew under the ESOS. Performance of a contract is illegal if it would be illegal for *either* party to perform because the contract itself is prohibited, and the innocent party is entitled to refuse performance on that basis even if performance would be *legal on its part* (see the leading English decision of *Re Mahmoud and Ispahani* [1921] 2 KB 716). In this regard, an important threshold issue is whether or not there was any criminal conduct in the first place.

Was there any criminal conduct on the part of Lew?

40 For the reasons set out above (at [32]), we are of the view that Lew's conduct cannot be characterised as criminal conduct for the purposes of s 47 of the CDSA.

41 In conclusion, WBL's argument that its contractual obligation to issue the Relevant Shares to Lew was extinguished *because the performance of this contractual obligation would have been illegal under s 44 or s 47 of the CDSA* is clearly wrong. In so far as WBL's defence of common law illegality is concerned, WBL must prove that Lew's claim for specific performance of its contractual obligation under the ESOS to issue the Relevant Shares is *premised upon* an illegality. As explained above, there was no illegality to begin with and, hence, this defence fails. Therefore, WBL remains under a contractual obligation under the ESOS to issue the Relevant Shares. It follows from this finding that WBL was in breach of contract for failing to issue the Relevant Shares to Lew in accordance with the terms of the ESOS. The next question is what damages are Lew entitled to, since the Relevant Shares have yet to be issued to Lew.

What damages are Lew entitled to?

42 The facts relevant to this issue are as follows: (a) Lew exercised two options on 9 July 2007 pursuant to cl 8(a) of the ESOS for the Relevant Shares to be issued to him pursuant to the options granted on, respectively, 21 January 2000 and 6 February 2004 ("the Options"); and (b) WBL was under an obligation to issue the Relevant Shares within 10 Market Days (ie, by 19 July 2007) from the date of the exercise of the two option, but has failed to do so on the ground (now proven to be erroneous) that it was contrary to law to do so.

43 The unusual feature in the present case is that at the time when WBL raised the issue of illegality, it was not certain whether as a matter of law Lew's insider trading was or was not contrary

to law as the matter was still under investigation by the relevant authorities. Once MAS instituted the civil proceedings against Lew on 19 November 2008, WBL's defence of illegality was extinguished (unless it applied for a fiat to prosecute Lew for the offence of insider trading).

44 The question that arises is whether in these circumstances WBL could argue that it was not in breach of its contractual obligation under the ESOS until 19 November 2008. In our view, the answer is in the negative. Under Condition 19 of the ESOS, WBL must issue the Relevant Shares by 19 July 2007. The fact that it had a potential defence of illegality does not postpone the time of performance. It does not matter that the illegality relied upon whether or not the Public Prosecutor decided to charge Lew for the offence of insider trading. The decision of the Public Prosecutor is irrelevant to the contractual obligations of WBL. The point can be easily appreciated if one were simply to imagine the Public Prosecutor prosecuting Lew for insider trading and failing to prove a case against him. There is no defence of "wait and see" in the performance of a contractual obligation unless it has been expressly provided for in the contract. Having elected to withhold performance of its contractual obligations on the basis of illegality, WBL took the risk of this basis being proven untrue. Indeed, there would have been no prejudice to WBL *even if* it had issued the Relevant Shares and it subsequently turned out that there *was* illegality. As we explained above at [21], any illegality on WBL's part (*ie*, under s 44(1)) was precluded once it had made a Suspicious Transaction Report. Any illegality arising from the issue of the Relevant Shares could only have been under s 47, *ie*, on Lew's part, in the event that Lew was later convicted for insider trading. In such a scenario, however, it would have been for the Public Prosecutor in his discretion to follow up on the consequences of Lew's criminal conduct, for example by applying for an order to confiscate Lew's benefits of criminal conduct under Part II of the CDSA.

45 In our view, WBL was in breach of contract in failing to issue the Relevant Shares to Lew on 19 July 2007. In the circumstances, should Lew decide to pursue the matter, he would be entitled to damages which he is able to prove (and which are to be assessed by the Registrar) – subject, of course, to the relevant legal principles such as remoteness and mitigation.

Conclusion

46 For the above reasons, we allow WBL's appeal in CA 149 in part (see [34]–[36] above) and also allow Lew's appeal in CA 150 (see [16] above), in both cases, with the usual consequential orders. We also dismiss WBL's appeal against the Judge's costs order below as that costs order was, in our view, fair given the arguments proffered in the proceedings below. In the circumstances, we find it appropriate to make no order as to the costs of the appeals.

[note: 1] Appellant's Core Bundle (vol 2) for CA 149 of 2010, at pp 95-96, 97-98 and 101.

[note: 2] Core Bundle (vol 2) in CA 150 of 2010, at p 54.

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