

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 264

Suit No 453 of 2016

Between

Tuitiongenius Pte Ltd

... Plaintiff

And

- (1) Toh Yew Keat
- (2) Economics at Tuitiongenius
Pte Ltd

... Defendants

And

- (1) Toh Yew Keat
- (2) Economics at Tuitiongenius
Pte Ltd

... Plaintiffs in Counterclaim

And

- (1) Tuitiongenius Pte Ltd
- (2) Keng Jun Hao
- (3) Keng Yew Huat

... Defendants in Counterclaim

JUDGMENT

[Tort] — [Passing off]
[Companies] — [Directors] — [Duties]
[Contract] — [Breach]
[Contract] — [Waiver]
[Tort] — [Conspiracy] — [Lawful means]

TABLE OF CONTENTS

INTRODUCTION	1
THE PARTIES	2
FACTS	3
INCORPORATION OF TGPL	4
THE EMPLOYMENT AGREEMENT	4
THE OPERATIONS OF TGPL AND ASSOCIATED ENTITIES	5
JUN HAO'S INVOLVEMENT IN TGPL	7
EUGENE'S EXIT FROM TGPL	8
THE PHONE CONVERSATIONS BETWEEN KENG AND EUGENE	10
THE ISSUES	10
THE ANALYSIS	11
JOINT VENTURE AGREEMENT	11
<i>Choa Chu Kang joint venture</i>	11
<i>The oral agreements</i>	14
<i>The Entire Agreement Clause</i>	20
<i>Breaches of the Employment Agreement</i>	23
BREACH OF FIDUCIARY DUTIES	26
<i>Defendants' defence</i>	29
<i>Analysis</i>	31
WAIVER OR ESTOPPEL	40
PASSING OFF	42

<i>Plaintiff's case</i>	42
<i>Defendants' case</i>	43
ANALYSIS OF PASSING OFF CLAIM	46
<i>Issue 1: Goodwill</i>	46
<i>Issue 2: Ownership and Assignment</i>	47
<i>Issue 3: Misrepresentation and Damage</i>	47
COUNTERCLAIMS BY THE DEFENDANT	47
PASSING OFF	48
COPYRIGHT	49
CONSPIRACY	50
CONCLUSION	57

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Tuitiongenius Pte Ltd
v
Toh Yew Keat and another

[2019] SGHC 264

High Court — Suit No 453 of 2016

Lee Seiu Kin J

2, 3, 8–11, 15, 18, 23, 24 May, 6, 11, 13 June 2018; 28 February, 4–8 March,
24 May 2019

5 November 2019

Judgment reserved.

Lee Seiu Kin J:

Introduction

1 This is an action by the plaintiff company, Tuitiongenius Pte Ltd (“TGPL”), against its former managing director, Toh Yew Keat, also known as Eugene (“Eugene”), and a company controlled by him, Economics at Tuitiongenius Pte Ltd (“ETGPL”) (collectively “the defendants”) for breach of contract, breach of fiduciary duties and passing off. The defendants in turn have counterclaimed against TGPL, Keng Yew Huat (“Keng”), and his son, Keng Jun Hao (“Jun Hao”) in conspiracy, passing off, and copyright infringement. The plaintiff may be referred to as either the plaintiff or TGPL in this judgment.

The parties

2 TGPL is in the business of providing academic tutoring services.¹ It was incorporated in April 2009 by Eugene and Keng. They were the only two directors of the company with each of them holding half its shares. At the commencement of this suit, the sole director and shareholder of TGPL was Jun Hao.

3 ETGPL is a company, also in the educational services business, incorporated by Eugene in April 2014.² Eugene is its sole director and shareholder. Eugene had, in November 2010, registered a sole proprietorship called Economics at Tuitiongenius (“ETG”).³ He terminated ETG’s registration on the day ETGPL was incorporated.⁴

4 Eugene is a 31-year-old tutor working at ETGPL. He holds a bachelor’s degree in economics from the National University of Singapore (“NUS”) and a master’s degree in economics from the Singapore Management University.⁵ Jun Hao is a 26-year-old working full-time at TGPL. He holds a diploma in chemical and biomolecular engineering from Ngee Ann Polytechnic.⁶

¹ Eugene’s Affidavit of Evidence-in-Chief (“AEIC”), TYK-1 at p 114.

² Eugene’s AEIC, TYK-1 at p 129.

³ Eugene’s AEIC, TYK-1 at p 133.

⁴ Eugene’s AEIC at para 10.

⁵ Keng Jun Hao’s (“Jun Hao”) AEIC at para 13

⁶ Jun Hao’s AEIC at para 3.

5 Keng is a 51-year-old Chinese-educated businessman. He is in the business of construction and trading, and runs a construction company. He also has a daughter, Keng Xiang Qi (“Xiang Qi”).⁷

6 Keng has known Eugene since the latter was about 12 years old. Keng and his wife were friends of Eugene’s parents and it is undisputed that their families had been close.⁸ Keng said that he used to give Eugene presents like school shoes, paid for various expenses and even gave him pocket money.⁹ According to Keng, Eugene was intelligent and he thought of him like a nephew or a foster son. From this part of the evidence, it is obvious that Keng was fond of Eugene. Keng visited Eugene’s home often, even after Eugene’s parents were divorced sometime in 2003 or 2004. He regularly went to Eugene’s flat in the evenings to drink in the company of his mother. This association only stopped after a series of events in October 2015 that will be described below.

Facts

Eugene’s tuition business in 2007 and 2008

7 Eugene first started giving private tuition classes after he completed his A-levels examinations in 2007, while he was serving his National Service. It was a means of earning extra income to support his family which was in dire financial straits. Eugene’s mother had been declared a bankrupt and the family had to move into a hostel so that they could rent out their Housing and Development Board flat in Choa Chu Kang (“the CCK flat”) to earn some

⁷ Keng’s AEIC at paras 5–7.

⁸ Eugene’s AEIC at para 39; Keng’s AEIC at para 10; Jun Hao’s AEIC at para 9.

⁹ Keng’s AEIC at para 10.

income.¹⁰ By giving tuition classes at night, Eugene was able to help his mother with the family finances. As a result, Eugene's family was able to move back to the CCK flat in 2008.¹¹ Eugene continued to give tuition classes and became increasingly popular as a tutor.

Incorporation of TGPL

8 In April 2009, Eugene and Keng incorporated TGPL with the two of them as directors and equal shareholders. Keng made various capital injections to TGPL. After premises were secured at Clementi ("Clementi Centre"), TGPL commenced business operations in January 2010.¹²

The Employment Agreement

9 On 20 August 2009, Eugene signed an employment agreement with TGPL ("Employment Agreement"),¹³ in which he was to serve as Managing Director of TGPL for a period of five years. This Employment Agreement contained, *inter alia*, the following clauses:

5. DEVOTION OF TIME TO EMPLOYMENT

The Executive shall devote the Executive's best efforts and substantially all of the Executive's working time to performing the duties on behalf of the Company. The Executive shall provide services during the normal business hours of the Company as determined by the Company. Reasonable amounts of time may be allotted to personal or outside business, charitable and professional activities and shall not constitute a violation of this Agreement provided such activities do not materially interfere with the services required to be rendered hereunder ...

¹⁰ Eugene's AEIC at paras 21–24.

¹¹ Eugene's AEIC at para 25.

¹² Eugene's AEIC at para 56.

¹³ Agreed Bundle vol 1 ("AB") at pp 82–86.

...

7.1 Salary

Executive shall be paid the amount of SGD \$2,000 monthly for his services as a managing director. (The salary payment will **only commence after all initial startup capital has been recovered**). This shall be reviewed on or before 20th August of each year...

...

7.4 Director Fee

Executive shall be paid the amount of SGD \$5,000 monthly for his services as a director. (The salary payment will **only commence after all initial startup capital has been recovered**). ...

...

11. EXCLUSIVE EMPLOYMENT

During employment with the Company, Executive will not do anything to compete with the Company's present or contemplated business; nor will he or she plan or organize any competitive business activity. Executive will not enter into any agreement which conflicts with his duties or obligations to the Company. Executive will not during his employment or within ONE year after it ends, without the Company's express written consent, directly or indirectly, solicit or encourage any Executive, agent, independent contractor, supplier, customer, consultant or any other person or company to terminate or alter a relationship with the Company.

...

[emphasis in original]

The operations of TGPL and associated entities

10 In September 2009, TGPL registered a sole proprietorship business called REAL Education Centre ("REC"). There is some dispute as to the nature of this entity in relation to TGPL which will be set out below. Be that as it may, it is not disputed that the signboards at the Clementi Centre displayed the name "REAL Education Centre" and not "Tuition Genius". The Clementi Centre

offered tuition in various subjects to primary, secondary and junior college (“JC”) students. Eugene taught economics classes for second year JC (“JC2”) students.¹⁴ However, he also continued to teach students at the CCK flat outside the ambit of TGPL or REC. Other tutors provided tuition at the Clementi Centre for economics as well as for other subjects. Tuition fees were collected by TGPL and the tutors were paid by TGPL in accordance with the number of students in their classes. The fees from Eugene’s students at the Clementi Centre were initially paid into TGPL. However, in 2012, the fees from Eugene’s classes at the Clementi Centre were paid directly to Eugene. Eugene explained that he had initially paid the fees he earned personally into the plaintiff’s bank accounts in order to assist the plaintiff’s cash flow situation in the first few years after its incorporation.

11 In November 2010, Eugene registered ETG as a sole proprietorship.

12 In June 2011, TGPL opened a second branch at Bedok (“Bedok Centre”). The signage there referred to it as “REAL Education Bedok”.¹⁵ Eugene also conducted economics classes at the Bedok Centre. It was closed sometime in May 2014.¹⁶

13 In September 2012, Thinktank Learning Centre Pte Ltd (“ThinkTank”) was incorporated with Eugene, Keng and Xavier Tong, a friend of Eugene, as its directors.¹⁷ A tuition centre at Choa Chu Kang was opened in November 2012

¹⁴ Eugene’s AEIC at [70]–[73].

¹⁵ Eugene’s AEIC at [75].

¹⁶ Eugene’s AEIC at [78].

¹⁷ Eugene’s AEIC at [86].

and it operated under the name ThinkTank. Keng attended the opening ceremony of this centre.¹⁸

14 TGPL’s tuition business was conducted by Eugene, along with various full-time staff and temporary staff, including Lim Gim Siong (“Gim Siong”), Eugene Koh Joon Shih, Teoh Shin Fung, Ang Lee Theng and Wong Jing Yong. Jun Hao also started working at TGPL, and specifically at the Clementi Centre, towards the end of 2014.

15 Keng and Eugene were joint signatories of TGPL’s and REC’s bank accounts with United Overseas Bank and Overseas Chinese Banking Corporation.¹⁹ Keng regularly signed claim forms and cheques that were presented to him for the conduct of the business of TGPL.

16 Eugene also conducted economics classes at ETG and, after its incorporation, ETGPL. The different tuition entities (TGPL, ETG/ETGPL and ThinkTank) sometimes conducted joint marketing activities, for instance the designing, printing and distribution of flyers.

Jun Hao’s involvement in TGPL

17 Jun Hao first worked at TGPL for a brief period of time in 2010, during which time he was informally regarded as an administrator.²⁰ He subsequently became a full-time staff of TGPL in 2014.²¹ Keng claimed that in 2013 he

¹⁸ Notes of Evidence (“NE”), 2 May 2018, p 39, lines 22–25.

¹⁹ Eugene’s AEIC at paras 51–53; Keng’s AEIC at para 31; NE, 2 May 2018, p 12, lines 16–19.

²⁰ Jun Hao’s AEIC at para 22.

²¹ Jun Hao’s AEIC at para 31.

suspected that Eugene was siphoning money from TGPL and sent Jun Hao to work in TGPL in order to gather information about how the business was doing.²²

18 There is some dispute between both sides as to the degree of involvement which Jun Hao had in TGPL. Keng's impression was that Eugene would not give Jun Hao access to computers and records, and had made sure that Jun Hao would only be assigned menial tasks such as the distribution of flyers. While Jun Hao accepted that Eugene purported to teach him about handling finance-related matters for TGPL, he claimed not to have access to TGPL accounts, and was not shown any information about money being paid to Eugene.²³ According to Eugene, starting from 2014, Jun Hao was expressly informed in the course of training by the other staff in TGPL that REC and ETG were separate business entities with different owners, and that the revenue generated by REC and ETG classes were to be kept and recorded separately.²⁴ Jun Hao also handled the registration of new students and prepared TGPL's daily reports.

Eugene's exit from TGPL

19 On 1 October 2015, Eugene resigned as a director of TGPL, and transferred his shareholding in TGPL to Keng.²⁵ Keng in turn transferred his entire shareholding in TGPL to Jun Hao on 25 November 2015, and Jun Hao

²² Keng's AEIC at para 35.

²³ Jun Hao's AEIC at para 33.

²⁴ Eugene's AEIC at para 171.

²⁵ Eugene's AEIC at para 6, TYK-1 at p 118.

was appointed a director of TGPL.²⁶ The transfer form signed by Keng included a purported liability exclusion clause, which stated “all company related matters & accounts have been handed over as of 1st October 2015 to [Keng]. The company indemnifies [Eugene] of any liabilities”.

20 Both sides provided different explanations as to why Eugene left TGPL. According to Jun Hao, Eugene left because of Keng and Jun Hao’s growing suspicions about him siphoning money away from TGPL, in that Eugene announced his decision to leave after Jun Hao started questioning him about TGPL accounts.²⁷

21 Eugene’s position was that the relationship between the parties began deteriorating in late 2014 due to the rumours that Keng was involved in an extramarital affair with Eugene’s mother. On 9 September 2015, Xiang Qi was involved in a car-chase incident with Eugene’s mother (“Car-Chase incident”). Video footage played in court showed that Xiang Qi drove her car into the path of Eugene’s mother’s car, and at times reversed slowly towards Eugene’s mother. For this, Xiang Qi was prosecuted and sentenced to five days’ imprisonment.²⁸ As a result of this incident, Eugene claimed to have felt the need to expedite his exit from TGPL to prevent any further escalation.²⁹

²⁶ Eugene’s AEIC at para 7, TYK-1 at pp 121–124.

²⁷ Jun Hao’s AEIC at para 47.

²⁸ Eugene’s AEIC at paras 228–229.

²⁹ Eugene’s AEIC at para 230.

The phone conversations between Keng and Eugene

22 After Eugene left TGPL, he received a letter of demand from the plaintiff's solicitors. Eugene contacted Keng and recorded conversations between them dated 1 April 2016 and 14 December 2016. The defendants rely on these phone conversations in their counterclaim for conspiracy.

The issues

23 The issues arising in relation to the plaintiff's claims are as follows:

- (a) Whether Eugene committed breaches of contract of the Employment Agreement.
- (b) Whether the breaches, if any, are subject to waiver and/or estoppel.
- (c) Whether Eugene committed a breach of fiduciary duties owed to the plaintiff.
- (d) Whether Keng agreed for Eugene to perform acts which would otherwise be in breach of his fiduciary duties owed to the plaintiff.
- (e) Whether the plaintiff can make out a passing off claim against Eugene and ETGPL.

24 The issues arising in relation to the defendants' counterclaims are as follows:

- (a) Whether the defendants can make out a passing off claim against TGPL, Keng and/or Jun Hao.

- (b) Whether TGPL, Keng and/or Jun Hao have infringed Eugene’s copyright in course materials prepared by him (“Course Materials”).
- (c) Whether TGPL, Keng and/or Jun Hao are liable in lawful means conspiracy for commencing Suit No 453 of 2016 (“Suit 453”) against Eugene.

The analysis

Joint Venture Agreement

Choa Chu Kang joint venture

25 The parties agree that a joint venture agreement was reached at the time when TGPL was incorporated on 19 April 2019. Before I examine the nature of this joint venture, and whether Eugene breached the Employment Agreement, I will preliminarily consider whether there was a business agreement that predated the joint venture. Keng and Eugene presented completely different accounts of how TGPL was set up, as well as the nature of the agreement between them.

26 The plaintiff’s case is that the business agreement between the parties predated the incorporation of TGPL, and originated with Eugene’s tutoring activities in the CCK flat in 2008. As Eugene did not have sufficient space to hold group tuition classes, Keng proposed to invest in the renovation of the CCK flat so that one of the bedrooms could be converted into a classroom.

27 Keng said that he then spent about \$20,000 to \$30,000 renovating the flat and buying furniture, as well as paying for an air-conditioning system.³⁰ According to him, the agreement between the parties was to treat the CCK flat tuition business as a joint venture (“CCK joint venture”), with both he and Eugene splitting the monthly profits equally after Eugene deducted \$2,000 as his salary.³¹ Keng also claimed that Eugene failed to record this initial CCK joint venture agreement in writing as promised, and did not distribute any of the profits to him.³²

28 On the defendants’ case, there was never any agreement in relation to Eugene’s tutoring activities at the CCK flat. Eugene said that his joint venture with Keng only arose in 2009 shortly before the incorporation of TGPL. Prior to that, all that Keng did was to give Eugene advice on how to develop his tuition business.³³

29 From the evidence before me, I find that there was no CCK joint venture. Keng’s evidence on this does not accord with the factual matrix. Firstly, I find Keng’s claim that he had sunk in \$20,000 to \$30,000 to the business in terms of renovation to the CCK flat and the purchase of furniture to be incredible. Eugene had used only one room for his tuition classes. From the photograph of the room, it appears to be a simple air-conditioned room with plain furniture.³⁴ It is difficult to comprehend why such a large sum would be required. The only supporting document that Keng provided in support of the amount he spent was

³⁰ Keng’s AEIC at para 18.

³¹ Keng’s AEIC at para 16; NE, 3 May 2018, p 16, lines 16–17.

³² Keng’s AEIC at para 22.

³³ Eugene’s AEIC at para 41.

³⁴ Defendants’ Bundle of Documents (“DB”) vol 1, pp 468–472.

a receipt for the supply and installation of a “Toshiba Sys 4 Inverter” air-conditioning system from Gain City dated 5 July 2008 for the sum of \$3,619 after a \$400 trade-in for the existing air-conditioning unit in the flat.³⁵ However, it is apparent on the face of the receipt that this was a split unit system that cooled more than one room. Eugene gave evidence that the kitchen and bathrooms of the CCK flat were renovated in 2008 and that his mother, who was an undischarged bankrupt at the time, had paid for it although he did not know how she did it.³⁶ He recalled that the Toshiba air-conditioner was Keng’s gift to the family.³⁷

30 Secondly, the numbers do not add up. At the time, Eugene was earning a considerable sum providing group tuition in the CCK flat. I find it difficult to believe that he would limit himself to a salary of \$2,000 per month and split the rest with Keng in return for an unnecessary expenditure of \$20,000 or more to the room. Furthermore, Eugene’s evidence was that the room was already air-conditioned is supported by the Gain City receipt which shows that there was a trade-in involved. Again, there is no reason that Eugene would forgo part of his tuition receipts for an unnecessary upgrade of the air-conditioner. This further supports Eugene’s evidence that the Toshiba air-conditioner was a gift from Keng.

31 Thirdly, Keng said that he had not looked at the room used for the tuition after its renovation.³⁸ If he had indeed invested more than \$20,000 in the

³⁵ Keng’s AEIC, KYH-2 at pp 26–29.

³⁶ NE, 24 May 2018, p 24 line 24 – p 25 line 3.

³⁷ NE, 24 May 2018, p 27, lines 25–27.

³⁸ NE, 3 May 2018, p 8, lines 25–31.

venture, this disinterest is rather puzzling especially since he was making regular social visits to the CCK flat at the time. This was not the only part of his investment that Keng was not interested in. His evidence was that he did not ask Eugene for his share of the profits until much later.

32 In my view, if Keng had spent any money on the CCK flat, this was because of the close ties between Keng and Eugene's family. This is consistent with the evidence of Keng himself who said that he was close to Eugene and his family and often gave them financial support.³⁹ I therefore find that there was no agreement for Keng to invest in the tuition business conducted by Eugene in the CCK flat.

The oral agreements

33 The plaintiff claims against Eugene for breach of the following clauses of the Employment Agreement which was signed in August 2009 (see [9] above):⁴⁰

(a) Clause 5, as Eugene did not devote his best efforts and substantially all of his working time to performing his duties as an employee of TGPL.

(b) Clause 11, as Eugene engaged in activities which were in competition with TGPL's business.

(c) Clause 12, as Eugene, during his employment with TGPL and/or within one year after his employment ended with TGPL, attempted to

³⁹ NE, 2 May 2018, p 55 line 25 – p 56 line 6.

⁴⁰ Statement of Claim (Amendment No 1) at paras 17–19.

hire executives or independent contractors of TGPL and/or encouraged or attempted to encourage executives or independent contractors of TGPL to leave TGPL's employ.

34 The central plank of Eugene's defence is that there were two oral agreements that modified the terms of the Employment Agreement. These were termed the "Continuation of TG Business Agreement" and the "Joint Marketing Activities Agreement". The first agreement permitted Eugene to carry on his personal tuition business, as well as his economics classes with ETG and ETGPL. The second agreement allowed Eugene to use TGPL's resources to carry out joint promotional and marketing activities together with ETG and ETGPL. The defendants' case is that these two oral agreements meant that Eugene was not in breach of cll 5 and 11 of the Employment Agreement. I therefore first deal with the issue of whether those two oral agreements had been made.

35 As I have already said, while both parties agree there was a joint venture agreement reached at the time of TGPL's incorporation, they disagree on its contents.

36 The defendants' version of events is as follows. Eugene began specialising in JC economics tuition in or around 2007.⁴¹ He soon became extremely popular, and demand for his classes increased from 2007 to 2009. He marketed these classes under the name "TuitionGenius" from 2007 to 2009.⁴² Keng then approached Eugene in early 2009 and proposed to enter into a joint

⁴¹ Defendants' Opening Statement at para 13.

⁴² Defendant's Opening Statement at para 14; Eugene's AEIC at para 26.

venture to leverage on the reputation of the “TuitionGenius” business (“TG Business”).⁴³ Eugene had certain reservations on the proposed joint venture, namely that he had no capital to invest in the joint venture, and he wanted to ensure that he had enough money for his future wedding and to start a family.⁴⁴ Keng informed him that he could, *inter alia*, continue to run his TG Business, retain the revenue from this business after the incorporation of the joint venture company, TGPL, and conduct joint marketing activities together with it. Eugene’s TG Business referred to the economics classes he taught privately and, after the incorporation of TGPL, the classes he taught in ETG and ETGPL.

37 The defendants adduced the following evidence in support of the existence of the oral agreements. These are the testimony of Eugene and Gim Siong, documentary evidence forming part of TGPL’s records, transcripts of conversations between Eugene and Keng, WhatsApp conversations between Xiang Qi and Zi Hao, as well as various other instances of conduct displayed by Eugene. I analyse each of these in turn.

38 The direct evidence relied on by the defendants consists of the testimony of Eugene and Gim Siong. I find Eugene generally to be a credible witness and his testimony on this aspect of his case to have withstood the scrutiny of cross-examination. I therefore accept his evidence that he reached an oral agreement with Keng for him to continue his existing TG Business, as well as an oral agreement that his TG Business would undertake joint promotional activities with TGPL. I also accept Gim Siong’s evidence that he was at the meetings

⁴³ Defendants’ Opening Statement at para 17.

⁴⁴ Eugene’s AEIC at para 43.

where the Continuation of TG Business Agreement was entered into⁴⁵, and find that his evidence corroborates Eugene's testimony. Although he was Eugene's friend and acquaintance, I do not find that this undermines the reliability of his evidence. His evidence remains credible.

39 The defendants also state that contemporaneous documentary evidence, in the form of transcripts of conversations between Eugene and Keng, show that Keng knew all along about the Continuation of TG Business Agreement. This was why he did not query Eugene on the purported breaches of director duties even after the letter of demand was sent to Eugene on 5 February 2016.⁴⁶ Although the transcripts do not show unequivocally that an agreement existed between both parties for Eugene to carry on with his TG Business⁴⁷, they do lend support to the contention Keng knew that Eugene would carry on his TG Business at the time TGPL was incorporated. This supports the existence of an oral agreement for Eugene to carry on his TG Business after TGPL was incorporated.

40 The strongest argument raised by the plaintiff against the existence of the Continuation of TG Business Agreement is that it did not make commercial sense for TGPL or for Keng to enter into such an agreement.⁴⁸ However, according to Eugene, Keng was hoping to leverage on Eugene's popularity as a tuition teacher as well as his domain knowledge of the tuition industry.⁴⁹ The fact that the business did not turn out as well as Keng had hoped does not mean

⁴⁵ Lim Gim Siong's ("Gim Siong") AEIC at paras 9 and 14.

⁴⁶ Defendants' Closing Submissions ("DCS") at para 65(a); Eugene's AEIC at para 256.

⁴⁷ DB3 287-288, 299-302.

⁴⁸ Plaintiff's Closing Submissions ("PCS") at paras 211–220.

⁴⁹ Eugene's AEIC at paras 42(b), 44(b).

that he did not see sufficient potential in it to make the investment at the time. Eugene also said that given his close ties with Keng, the terms surrounding the incorporation of TGPL could not solely have been assessed as a commercial joint venture.⁵⁰ This was evident from the close ties shared between both families, as well as the father-son relationship they both shared. In my view, it is consistent with the nature of their relationship in 2009 for Keng to have permitted Eugene to carry on his existing TG Business.

41 I turn to the remaining arguments by the plaintiff against the existence of the oral agreements. This turns on the lack of documentary evidence supporting the oral agreements, as well as the fact that Eugene signed the Employment Agreement with TGPL on 20 August 2009, in which he was appointed as Managing Director. Given the close relations between Eugene, Keng, and the trust and confidence which both were likely to have shared, it is not surprising that the agreements were undocumented. Indeed, on Keng’s own evidence, a few of the other agreements alleged to have taken place between the two of them were similarly undocumented: for instance, the agreement for Eugene to continue teaching the 20 students in the CCK flat, as well as the alleged profit-share agreement in relation to the Choa Chu Kang joint venture. In view of my finding on the Employment Agreement at [51] below, I also do not agree with the plaintiff’s argument that the signing of the Employment Agreement evidences that the oral agreements did not take place.

42 I turn to the plaintiff’s evidence on this aspect. At para 24 of his affidavit of evidence-in-chief (“AEIC”), Keng said as follows:

As it turned out, [Eugene] did not give me any financial information about the business. Eventually, I asked [Eugene]

⁵⁰ NE, 24 May 2018, p 61 lines 6–11.

directly to account for the profits made by our business. [Eugene] apologised. He said that he had spent all the profit on himself. I was annoyed. When I questioned [Eugene], he was able to calm me down, and then he quickly changed the subject. He said that we should grow our current business by opening tuition centres around Singapore. He explained his plans for expansion. He said that we should incorporate a company for this expanded business. He promised he would not spend all the profit on himself again, and said he would sign a contract to prove his sincerity.

43 Therefore, the plaintiff's position is that it was Eugene, and not Keng, who proposed to set up TGPL for the purpose of opening tuition centres around Singapore. This arose out after Keng berated Eugene for his failure to account for the profits of the tuition business at the CCK flat. Keng said that Eugene subsequently prepared a contract, which is the Employment Agreement, which they both signed. Keng said that under the fresh joint venture agreement, Eugene was expressly prohibited from carrying on any other tuition business in competition with the joint venture.⁵¹ The sole exception to this prohibition was that Eugene would be allowed to continue teaching his 20 existing students in the CCK flat, and retain the fees from those students until they graduated from junior college.

44 I have already dismissed the plaintiff's version of events in relation to the CCK joint venture above at [32]. Given that I do not believe Keng's account of the CCK joint venture, it follows that his version of how the "fresh joint venture agreement" came into being cannot be believed. It is also difficult to understand how Keng could have been persuaded to sink in more money after realising, as he claimed, that Eugene had not only not paid Keng his share but did not even undertake to re-pay what was owed.

⁵¹ Keng's AEIC at para 27.

45 Thus, I find that the two oral agreements existed.

46 The plaintiff argues that, even if the Continuation of TG Business Agreement and the Joint Marketing Activities Agreement existed, the Employment Agreement effectively “varied or terminated” them.⁵² The plaintiff submits, *inter alia*, as follows:⁵³

(a) The entire agreement clause in the Employment Agreement shows that the Employment Agreement comprehensively sets out Eugene’s employment obligations to TGPL.

(b) Pursuant to ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed), Eugene is not allowed to adduce evidence to vary the Employment Agreement.

The Entire Agreement Clause

47 I set out briefly the principles governing entire agreement clauses and their effect (see *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 (“*Lee Chee Wei*”) at [25] and [35]):

25. Entire agreement clauses appear as a smorgasbord of variously worded provisions. *The effect of each clause is essentially a matter of contractual interpretation and will necessarily depend upon its precise wording and context.* Generally, such clauses are conducive to certainty as they define and confine the parties’ rights and obligations within the four corners of the written document thereby precluding any attempt to qualify or supplement the document by reference to pre-contractual representations.

...

⁵² Plaintiff’s Reply Submissions (“PRS”) at para 17.

⁵³ PCS at para 195(a)–(b).

35. Although these cases considered the purported effect of differently framed clauses, it can be cogently asserted that an appropriately worded provision would be acknowledged and upheld if it is clearly purports to deprive any pre-contractual or collateral agreement of legal effect, whether from the perspective of evidential admissibility or contractual invalidation. Ultimately, whether the agreement in its final form is *intended* to constitute the entire agreement, thereby superseding and replacing all representations that might have inspired and culminated in such an agreement in the first place, but which never actually incorporated in the written agreement, is a ***matter of construction***.

[emphasis in bold italics]

48 Thus, the Court of Appeal in *Lee Chee Wei* made it clear that an entire agreement clause does not in all instances preclude a pre-contractual or collateral agreement from having contractual effect. As stated above, the effect of each clause is essentially a matter of contractual interpretation and necessarily depends on its precise wording and context.

49 I turn to examine the parties' evidence with regard to the Employment Agreement. Keng said that this arose out of the failure of Eugene to account for his share of the profits of the tuition conducted by Eugene at the CCK flat, in which he had invested more than \$20,000 for its expansion. Keng said that he was very annoyed with Eugene but the latter quickly changed the subject and at this point proposed the TGPL business venture to him.⁵⁴ Keng said that Eugene promised that he would properly account for the profit in this new business and as proof of his sincerity, Eugene would sign a contract. Keng exhibited the Employment Agreement as the contract that Eugene signed pursuant to this discussion.

⁵⁴ Keng's AEIC at para 24.

50 Eugene's evidence was that he wanted to get the plaintiff's employees to sign an employment agreement in order to protect the interest of the plaintiff. To this end, he found a template agreement from a website on the internet and modified it for the plaintiff's use⁵⁵. Eugene said that he wanted to lead by example and signed the Employment Agreement which had the same terms as that for all the other employees of the plaintiff. He did not think of the conflicts in the Employment Agreement with his prior oral agreements with Keng. It is clear from the evidence that the Employment Agreement was adapted from a template off the internet. Furthermore, the evidence shows that Keng had no knowledge of this aspect of the administration of the plaintiff's affairs as he had left it entirely to Eugene. But what is clear is that, given the oral agreements Keng had subscribed to, I am left with no doubt that, had it been brought up at the time, Keng would have agreed with Eugene that the terms of the Employment Agreement would be varied to make it consistent with the oral agreements.

51 As I disbelieve Keng's claim that he had a share in Eugene's tuition business conducted in the CCK flat (see [454] above), it follows that Keng's version of the genesis of the Employment Agreement cannot be believed. I also find that Eugene's version is consistent with the general evidence of the circumstances in which the TGPL business was born. I therefore accept Eugene's evidence on this issue and find that it was not the intention of the plaintiff, at the time represented by Eugene and Keng, to enforce any term of the Employment Agreement against Eugene that was inconsistent with the oral agreements.

⁵⁵ Eugene's AEIC at paras 62 and 64, TYK-1 pp 284–286.

Breaches of the Employment Agreement

52 The finding above disposes of the plaintiff’s claim with regard to the breach of cll 5 and 11 of the Employment Agreement. I turn to the claim with regard to the breach of cl 12 of that agreement, which provides as follows:

The Executive agrees that during the Executive’s employment with the Company and for a period of ONE years [sic] following the termination of this Agreement ... the Executive will not attempt to hire any other Executive or independent contractor of the Company or otherwise encourage or attempt to encourage [that person] to leave the Company’s employ

53 The plaintiff claims that Eugene breached cl 12, as he solicited Xavier, Timothy Lim (“Timothy”), and Sean Lim (“Sean”) to terminate their employment with TGPL for the benefit of himself and ETGPL.⁵⁶ The only evidence from the plaintiff was from Jun Hao. He said this in [96] of his AEIC:

After [Eugene] left, he set up a joint business with two other ex-employees of TGPL: Timothy Lim (**Lim**) and Xavier Tong (**Tong**). Lim teaches Mathematics and Tong teaches General Paper. Now shown to me and marked **KJH-45**’ is a copy of a flyer which shows that [Eugene], Lim and Tong jointly market their services under the business name ‘Academy of Superheroes’, and their classes are all at the same locations in Bukit Timah, the CCK Centre and the Bedok Centre. TGPL paid for the renovation, furniture and equipment at the Bedok Centre. [Eugene] then claimed that the Bedok Centre was unprofitable and closed it down. [Eugene] then took over the Bedok Centre for himself, and is still using the premises, taking the benefit of the renovation, furniture and equipment.

[emphasis in original]

54 There is no evidence from the plaintiff pertaining to Sean and he was not called to give evidence. Accordingly, the plaintiff has not proved its claim relating to Sean.

⁵⁶ Statement of Claim (Amendment No.1) at para 19.

55 Xavier and Timothy gave evidence for the defendants. He stated that he was a schoolmate of Eugene at NUS and was approached by Eugene sometime in December 2009 to provide general paper (“GP”) tuition services for TGPL.⁵⁷ He was offered a one-year contract, which was subject to renewal at the end of the year. However, he also had his own students to whom he gave tuition classes independently of the plaintiff. According to Xavier, the final year that he worked for TGPL was 2013.⁵⁸ He said that he believed that the non-renewal of his contract in 2014 was “due to the rising popularity of (another GP tutor by the name of) Jaryl George Solomon”.⁵⁹ He said that he had no other memory of the circumstances of his non-renewal at the end of 2013. He said that Eugene did not solicit nor encourage him to terminate his employment with the plaintiff.

56 Timothy gave evidence that he was a good friend of Eugene and started teaching with TGPL around December 2010.⁶⁰ After he graduated from NUS in 2012, he joined the Inland Revenue Authority of Singapore (“IRAS”) but continued to tutor at TGPL in the evenings. He said that he did not renew his contract with TGPL at the end of 2014 because he was unable to conduct tuition classes on a full time basis with it,⁶¹ combined with his work commitments at IRAS.⁶² Timothy said that Eugene did not solicit or encourage him to terminate his employment with the plaintiff⁶³. He also stated that he did not at any time

⁵⁷ NE, 8 March 2019, p 7, lines 16–18.

⁵⁸ NE, 8 March 2019, p 12, lines 20–22.

⁵⁹ Tong Xiu Zhi, Xavier’s (“Xavier”) AEIC, at para 10. NE, 8 March 2019, p 28, lines 25–26.

⁶⁰ Lim Soo Peng, Timonthy’s (“Timothy”) AEIC at para 5.

⁶¹ Timothy’s AEIC at para 7.

⁶² NE, 6 March 2019, p 58 lines 27–29.

⁶³ Timothy’s AEIC at para 9.

work for Eugene or any of the ETG entities⁶⁴. The evidence shows that Timothy signed a contract with ThinkTank in May 2014.⁶⁵ When confronted with this inconsistency in his evidence, Timothy said that he had no memory of the circumstances of the non-renewal of his contract in the end of 2014.⁶⁶

57 The plaintiff is faced with the problem that Xavier and Timothy are Eugene's witnesses. The plaintiff had to resort to circumstantial evidence and submit that during the material time, it was only reasonable that Xavier and Timothy would have asked Eugene for the reason(s) behind the non-renewal of their contracts at the end of 2013 and 2014 respectively. The plaintiff also submits that, as Eugene had said they were good tutors⁶⁷, it would follow that Eugene was behind the non-renewal of their contracts in order to get them to work for him. However, I find that this is not the only inference that can be drawn from the evidence, as there can be a whole range of events behind the non-renewal. I cannot make a finding on the evidence before me that Eugene had encouraged Xavier or Timothy to leave the employment of the plaintiff.

58 However, the prohibition in cl 12 covers more than mere solicitation. Clause 12 of the Employment Agreement prohibits Eugene against attempting to hire, which would include actually hiring, any other executive or independent contractor of the plaintiff. As Xavier had already left the plaintiff's employ by 2014, when ETGPL was incorporated, there is no breach by Eugene in respect of him. However, Timothy only left the plaintiff at the end of 2014, but was

⁶⁴ Timothy's AEIC at para 11.

⁶⁵ Timothy's AEIC, pp 19–27.

⁶⁶ NE, 6 March 2019, pp 67 – 68.

⁶⁷ NE, 4 March 2019, p 45, lines 5–7.

engaged by Eugene in ThinkTank in May 2014. I therefore find that Eugene was in breach of cl 12 of the Employment Agreement in the case of Timothy.

Breach of fiduciary duties

59 The plaintiff also claims that Eugene had committed the breaches of the following fiduciary duties, *inter alia*, under common law or under ss 157(1) and 157(2) of the Companies Act (Cap 50, 2006 Rev Ed):⁶⁸

- (a) to act honestly and use reasonable diligence;
- (b) to not make improper use of his position as director to gain an advantage for himself;
- (c) to act in the best interests of the company;
- (d) to avoid conflicts of interest; and
- (e) the duty of loyalty to the company.

60 There are three main acts, or series of acts, on which the plaintiff relies to argue that Eugene had committed a breach of fiduciary duties:

- (a) Carrying on the TG Business and private tuition lessons while he was the managing director of TGPL;⁶⁹
- (b) Diverting TGPL's business to Eugene's ETG Business by training TGPL's staff to specifically promote Eugene's classes, using

⁶⁸ PCS at para 172.

⁶⁹ PCS at pp 60 – 65.

ThinkTank to take over TGPL’s Bedok Centre at no cost,⁷⁰ and using TGPL’s staff to create marketing materials for Eugene’s ETG Business as well as to handle administrative work.

(c) Retaining revenues earned from the ETG Business as well as from tuition classes personally taught.⁷¹

61 The facts giving rise to the plaintiff’s allegation of breach were largely not in dispute, save for the following:

(a) Whether Thinktank’s taking over of the Bedok branch was “proper”.⁷²

(b) Whether there was sufficient evidence to show that Eugene trained TGPL’s staff to specifically promote Eugene’s classes.⁷³

62 The plaintiff’s allegation against the defendants in respect of the Bedok Centre is that Eugene had imposed the operational costs of his own businesses on TGPL by using ThinkTank to take over the Bedok Centre from TGPL in April 2014 at no cost.⁷⁴ The plaintiff claims that it was Eugene who first suggested that TGPL open a branch in Bedok, but subsequently told Keng that the branch was failing to make any money.⁷⁵ After Eugene left TGPL, Keng found out that Eugene was using the Bedok Centre premises for ThinkTank.

⁷⁰ PCS at pp 79 – 80.

⁷¹ PCS at pp 91 – 104.

⁷² DCS at p 109.

⁷³ Defendants’ Response Submissions (“DRS”) at pp 45 – 58.

⁷⁴ PCS at para 231.

⁷⁵ Keng’s AEIC at para 36.

According to Keng, he would not have allowed ThinkTank to take over the Bedok Centre free of charge, as the Bedok Centre was an operational venue that could immediately be used as a tuition centre, without ThinkTank having to spend any time or money on renovations.⁷⁶ The plaintiff also claims that the Bedok Centre had a ready pool of TGPL students who could be transferred to ThinkTank, relying on Xavier's testimony at trial.⁷⁷

63 The defendants claim that the plaintiff still received payments from Thinktank after it took over the Bedok Centre.⁷⁸ However, this is unsupported by documentary evidence or anywhere in the defendants' affidavits. After considering the totality of the evidence, and in particular Xavier's evidence at trial, I accept the plaintiff's submission that Eugene and the ThinkTank business benefitted in at least two ways: obtaining a renovated premise in which no additional sums of money were required to be spent to make the premises suitable for a tuition business, and a ready pool of students from TGPL who could be transferred over to Thinktank. In my view, Eugene's acts of transferring the students from TGPL to Thinktank, as well as using the Bedok Centre facilities for Thinktank without Keng's consent, constitute a breach of the fiduciary duties owed to TGPL.

64 I now turn to the question of whether there is sufficient evidence that Eugene trained the administrative staff of TGPL to specifically promote his classes. In claiming against the defendants for diversion of business from TGPL, the plaintiff relies primarily on a document known as the "Intern's Phone

⁷⁶ Keng's AEIC at para 38.

⁷⁷ NE, 8 March 2019, p 48, lines 5–30.

⁷⁸ DCS at para 98; NE, 5 March 2019, p 43, lines 2–7; p 49 lines 3–22.

Guide”,⁷⁹ which was an instruction manual for interns at TGPL to follow when handling phone calls. The Intern’s Phone Guide included prompts to the interns, who would assist in marketing, like “there are also other econs tutors at RealEdu. Always try to push for Mr Toh’s classes when signing up”.⁸⁰ The defendants disagreed that this document showed that Eugene was diverting TGPL’s business to his ETG business or his personal classes, and provided various explanations, which in my view made little sense.⁸¹ It is clear to me that based on the available evidence, that Eugene had directed his interns to “push” for his classes, thereby diverting TGPL’s potential business to ETGPL or his own classes. This constitutes a breach of the fiduciary duties owed to TGPL.

65 Assuming that none of the defendants’ defences are applicable, I am also satisfied that the acts listed above constitute a breach of all the fiduciary duties pleaded by the plaintiff.

Defendants’ defence

66 The crux of the defendants’ defence against the plaintiff’s claim for breach of fiduciary duties hinges on the case of *Zolton Techs Singapore Pte Ltd v Tan Chew Sim (Chow Hoo Siong, third party)* [2018] SGHC 160 (“*Zolton Techs*”). The defendants rely on *Zolton Techs* for the proposition that there would be no breach of director’s duties if there was an “agreement between all of the directors of a company in relation to the carrying of business outside of

⁷⁹ Plaintiff’s Bundle of Documents (“PB”) 4, pp 1472–1480.

⁸⁰ PB4 p 1472.

⁸¹ DRS at pp 45 – 58.

the company's business, as well as any diversion of business opportunity that belonged to the company".⁸²

67 In *Zolton Techs*, the plaintiff company claimed against the defendant director, *inter alia*, for breach of fiduciary duties. The defendant director had diverted a business opportunity of the plaintiff company for the supply of mashed potato machines to a company controlled by the defendant. It was argued by the defendant director that there was no breach of fiduciary duties as the only other director (and majority shareholder) had orally consented to the taking of this business opportunity and retention of the profits.

68 Although not explicitly stated in *Zolton Techs*, the decision can be rationalised as an application of the *Duomatic* principle. This principle states that where all of the company's shareholders assent to a particular course of conduct, such assent is as binding as a resolution in a general meeting, notwithstanding that there was no actual resolution passed in a general meeting (*In re Duomatic Ltd* [1969] 2 Ch 365; *Blindley Health Investments Ltd and another v Bass and others* [2015] EWCA 1023 at [108]). The nature of the *Duomatic* principle and its attendant limitations was described by the Court of Appeal in *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 174 at [25] ("*Panweld*"):⁸³

When the case was argued before us, Dr Tang Hang Wu ("Dr Tang"), who appeared together with Mr Retnam for Mr Yong and Mdm Lim in the appeal, had finessed the argument and presented it as one founded on implied assent. Dr Tang relied on the principle stated in *Duomatic* ([8] *supra*) and in *Tokukon* ([15] *supra*) which is that subject to the usual limitations concerning the rights of third parties who deal with a company,

⁸² DCS at para 13.

⁸³ Plaintiff's Supplementary Bundle of Authorities, tab 5.

where all the shareholders, particularly in a closed private company with a track record of informality in their dealings, assent to a particular course of dealing, even in relation to the disposal of assets, this may be effective to bind the parties. However, there are limits to this. ***In particular, the conduct between the parties must be such that there is sufficient basis for a court to infer: (a) that there was in fact an agreement; and (b) what the key contents of that agreement were.***

[emphasis added in bold italics]

69 Thus, the question which arises in this case is whether there is “sufficient basis” for the court to infer that there was in fact an agreement to engage in conduct which would otherwise constitute a breach of fiduciary duties. It is also incumbent on me to detail the key contents of that Employment Agreement, in order to make clear which conduct constitutes a breach of fiduciary duties and which do not.

70 In my view, the evidence adduced by the defendants is sufficient to infer that an agreement existed between Keng and Eugene for Eugene to carry on his TG Business on the side, retain the revenues earned and conduct joint marketing campaigns with TGPL.

Analysis

71 The defendants’ case is as follows. TGPL first commenced business in January 2010 under the brand name “REAL Education”, from the Clementi Centre, and offered various subjects across primary, secondary and JC levels.⁸⁴ At the time, Eugene taught two economics classes on Tuesdays at the Clementi Centre, under the course codes “J2EC01” and “JCEC02”. Thereafter, allegedly on Keng’s suggestion, a second centre was opened at Bedok, the Bedok Centre.

⁸⁴ Eugene’s AEIC at para 71.

Sometime later, as the Bedok Centre was not profitable, Keng suggested (sometime in January 2014), at a meeting wherein Gim Siong was also present, to shut down the Bedok Centre.⁸⁵

72 Eugene registered ETG as a sole proprietorship in November 2010 in an attempt to organise his TG business in a more professional manner, and obtained Keng's blessing and encouragement to do so.⁸⁶ The TGPL staff were informed of the registration of ETG as a sole proprietorship as it affected how they handled payments for Eugene's classes, particularly when Eugene's students attended make-up lessons at the Clementi Centre.⁸⁷ ETG's sole proprietorship registration was terminated in April 2014 when ETGPL was incorporated. Keng equally approved of Eugene's decision to corporatise the TG business in such a manner.⁸⁸ According to Eugene, the existence and operation of ETG and ETGPL were at all times known to Keng as well as the staff at TGPL.⁸⁹

73 At the outset, I observe that TGPL was a closed private company which operated with a degree of informality. It consisted of two shareholders during the material time of the dispute, Keng and Eugene. Despite Eugene's Employment Agreement existing in written form, I do not think it likely, or realistic, for the parties to have penned down the various informal arrangements which existed between them throughout the course of the business.

⁸⁵ Eugene's AEIC at para 78.

⁸⁶ Eugene's AEIC at paras 79–81.

⁸⁷ NE, 13 June 2019, pp 5 – 6.

⁸⁸ Eugene's AEIC at para 82.

⁸⁹ Eugene's AEIC at para 85.

74 I now detail my reasons why I find that an agreement existed between Keng and Eugene.

75 First and foremost, Eugene’s conduct in relation to the setting up of the ETG Entities was completely transparent. He did not seek to hide the registration of the ETG Entities at any time from Keng, Jun Hao, or any of the TGPL staff. I accept Eugene’s evidence that the separate name cards for ETG Entities were given to Keng, and placed at the front desk of the Clementi Centre.⁹⁰ It seems very unlikely for Eugene to have set up the ETG Entities in such an open manner *unless* there was an agreement of some kind between Eugene and Keng to do so. There are also the transcripts of conversations between Eugene and Keng on 5 February 2016, which are consistent with the defendants’ case that Keng knew of the existence of the ETG Entities.

76 I also accept Eugene’s evidence that Keng signed off and approved TGPL’s cheques in favour of Eugene for his ETG classes at the Clementi Centre and the Bedok Centre.⁹¹ Although Keng claimed that he signed these cheques blindly, or that he was too busy to ask for more details, this is inconsistent with evidence that shows that Keng had in fact written down queries in some payment vouchers. For instance, in one claim signed off by Keng on 19 July 2011,⁹² he wrote “[w]hat are the claims on this sheet for?” On another claim form for tutor allowance for Clement Tan, then a relief tutor, Keng wrote a question mark.⁹³ On a claim dated 15 November 2014 for tutor allowance,

⁹⁰ Eugene’s AEIC at pp 56–57.

⁹¹ Eugene’s AEIC at para 136.

⁹² 1AB 261.

⁹³ 1AB 292.

Keng went to even greater detail in his queries, writing “Why are there different hourly rates of \$74, \$95 and \$125? Please let me know how much each student is charged per month?”.⁹⁴ The overall impression I gather from these claim forms is that Keng had meticulously perused them, contrary to his blanket assertion that he signed the cheques blindly. It seems to me very unlikely that Keng would have been unaware as to how the ETG Entities were being run. For completeness, I also state that I do not believe Keng’s explanations on the stand that he signed blindly or was too busy to ask when signing Eugene’s claim forms.

77 The evidence also shows that an agreement existed between Eugene and Keng for Eugene to retain the revenues earned from tuition classes which he personally taught. An administrative form entitled “List of Bank Accounts”⁹⁵ stated as follows:

Economics At TuitionGenius Pte Ltd
All Mr Toh’s classes
OCBC 686-476078-001

That the bank accounts were separated for different classes, and openly indicated to be so, was consistent with Eugene’s version of events, *ie*, that “the existence and operations of the ETG Entities were always known to Keng and the finance staff / general administrators of TGPL”.⁹⁶ Although Jun Hao claimed that he was unaware for the reason for the dichotomy in bank accounts between REC and ETGPL, the fact remained that Jun Hao was trained by Eugene and

⁹⁴ DB2 635.

⁹⁵ DB1 346–347.

⁹⁶ Eugene’s AEIC at para 85.

the finance staff of TGPL to channel fees for Eugene's classes to the ETGPL account. There were several indications of this. Jun Hao's testimony at trial indicated that he, for instance, knew how to update the cash deposit tracking sheet for moneys deposited into ETGPL's bank account⁹⁷ and also handled registration forms for students of ETGPL. On these forms, it is stated under the terms and conditions that "the cheque should be made payable to Economics at TuitionGenius Pte Ltd".⁹⁸ Although Jun Hao strenuously denied that some of these forms were handled by him, I do not think this to be likely in light of his testimony at trial. Jun Hao eventually conceded that he had handled at least one such registration form for ETGPL.⁹⁹ This manner of entrusting Jun Hao to handle payments to ETGPL and his registrations of students for ETGPL indicates to me that Eugene was completely lacking in secrecy in retaining the revenue collected from the economics classes taught at ETGPL and ETG. On account of this, I find that an agreement existed between Keng and Eugene for the latter to retain the said revenues.

78 Such a finding also makes sense in the light of the overall evidence, in particular the Employment Agreement signed by Eugene. Clauses 7.1 and 7.5 of the Employment Agreement provided that no salary or director fees were to be paid to Eugene until "all initial start-up capital has been recovered". Assuming that TGPL's business was Eugene's only source of income, this would mean that Eugene would have had no income until the full initial start-up capital of \$90,000 was recovered. I do not think this to be likely, especially since Eugene was a relatively well-established economics tutor at the time of

⁹⁷ NE, 11 May 2018, p 107, lines 21–22.

⁹⁸ PB2 1031.

⁹⁹ NE, 18 May 2018, p 7, line 24 to p 8 line 19.

TGPL's incorporation and must have been used to earning fairly substantial sums of money. An agreement between Keng and Eugene for Eugene to retain the revenues earned from his classes was likely, and indeed logical under such circumstances.

79 For completeness, I also highlight two other aspects of the defendants' evidence which I find consistent with its case. The first is the careful and elaborate partition between Jing Yong's employment contracts signed in or around 26 August 2013 with ETG,¹⁰⁰ TGPL,¹⁰¹ and Think Tank.¹⁰² This suggests that Eugene's business in ETG was regarded as distinct and separate from TGPL's business. The "Admin Guide" used by the financial and administrative staff of TGPL also clearly set out the various partners and different branches. The partners of the Clementi Centre of the plaintiff's business was listed as "Mr Keng and Eugene" while the partner of Economics at TuitionGenius was listed as "Eugene".¹⁰³ The organised and transparent manner in which the ETG business was shown to be separate from TGPL, through separate contracts and a separate payment mode also supports the conclusion that Keng had the knowledge, and had agreed to Eugene running his ETG business whilst retaining revenues from classes which he personally taught.

80 I also find that the evidence of Gim Siong and Jing Yong broadly corroborates the defence's case. Their evidence was consistent and credible. I believe Gim Siong's evidence that he trained Jun Hao on the finance procedures

¹⁰⁰ 3AB 1258.

¹⁰¹ 3AB 1266.

¹⁰² 3AB 1270.

¹⁰³ 2AB 750.

that were required to be followed for TGPL, and that he had emphasised that the revenues received for the ETG Entities and REC were to be kept separate, as well as Jing Yong's evidence of the same.¹⁰⁴ Both witnesses also corroborated Eugene's evidence that Keng would on most occasions review the claim forms and pay slips for payments to the tutors and to Eugene.¹⁰⁵ While I do note that certain aspects of their evidence was lacking, and these were pointed out by the plaintiff in its written submissions,¹⁰⁶ I do not think that this detracts from their overall reliability and consistency.

81 I now address the submissions made by the plaintiff on why the *Duomatic* principle is inapplicable on the present facts. Briefly summarised, the plaintiff contends that the defendants' evidence pertains only to Jun Hao's knowledge of the Continuation of the TG Business Agreement and the ETG Entities, and not Keng's knowledge of the same.¹⁰⁷ As Jun Hao was never a shareholder of TGPL during Eugene's tenure in TGPL from 2009 to 1 October 2015, *Duomatic* is inapplicable. The plaintiff also attempts to distinguish *Zolton Techs* from the present case, arguing that Keng lacked knowledge of Eugene's competing businesses, *ie*, the ETG Entities.¹⁰⁸ I understand the plaintiff to be saying that because Keng lacked knowledge of Eugene's competing businesses, *etc*, there is insufficient basis on which the court can infer that there was in fact an agreement between the parties (*Panweld* at [25]).

¹⁰⁴ Gim Siong's AEIC at para 36.

¹⁰⁵ Wong Jing Yong's ("Jing Yong") AEIC at para 15; Gim Siong's AEIC at para 25.

¹⁰⁶ PCS at paras 296–297.

¹⁰⁷ PCS at paras 37–39.

¹⁰⁸ PCS at paras 52–53.

82 Although I do not directly rely on Jun Hao’s knowledge of the existence of the ETG Entities and his knowledge that Eugene retained the revenues from his own classes, I find it likely, given the circumstances under which Jun Hao was sent to work in TGPL, that whatever knowledge that Jun Hao had would eventually be relayed back to Keng. On Keng’s own evidence, Jun Hao was sent to work with TGPL so that Keng could “investigate” and “find out more information about the business”.¹⁰⁹ Logically, it follows that if Jun Hao knew that money was being deposited into Eugene’s ETG bank account, Keng would find out as well. In any case, even without evidence of Jun Hao’s knowledge, I find that there is sufficient basis to infer the existence of an agreement between Keng and Eugene. This was premised largely on circumstances which showed that Eugene did not act in a surreptitious manner, as well as Keng’s knowledge of the ETG Entities and Eugene’s receipt of payments from his classes. I elaborate further on the latter reason at [92] – [94].

83 The plaintiff’s case that Keng lacked knowledge rests on two limbs. First, that little or no weight should be placed on the defendants’ reliance on the transcripts of the conversation with Eugene as Keng was not specifically cross-examined on whether he had such knowledge. Next, none of the documents relied on by the defendants show that Keng had carefully reviewed Eugene’s claim forms from TGPL; and in any case the only reason why Keng signed such claim forms was because he trusted Eugene.

84 I do not believe Keng’s explanation that the only reason why he signed the claim forms was because he trusted Eugene. This is clearly an afterthought designed to advance the plaintiff’s case. As for the transcripts of the

¹⁰⁹ Keng’s AEIC at para 35.

conversation with Keng, I agree that there is no *direct* statement to that effect that Keng had knowledge of Eugene’s TG Business. Nonetheless, the tenor of the conversation suggested that Keng believed that TGPL’s claims, and whatever action Jun Hao was taking in respect of this claim, was completely unmeritorious. For instance, Keng said:¹¹⁰

It’s because they confirm will not be able to win. They don’t stand a chance. What are they if they have no chance of winning at all? Like what you’ve said, it’s no big deal at all, then so be it, you have nothing to be worried about, why do you have to lose your temper?

85 Keng must have certainly known of the nature of the claims TGPL was making against Eugene. Earlier in the conversation, Eugene had said:¹¹¹

...But he is saying that I had set up a new company called ‘ETG’. The company was already in existence but he affirms that I had set up this new company with the intention to conduct Economics classes for JC students.

...And then he said that in 2014, I had set up at new private limited company which has the primary activity of conducting Economics class for JC students. So, he is saying that ETG and ETG Pte Ltd was fundamentally snatching business opportunities from REC.

86 The fact that Keng, far from refuting Eugene’s claims of “innocence”, had instead chosen to agree with him and speak dismissively of TGPL’s claims very strongly suggests that Keng did know of the ETG Entities.

87 I also disagree with the plaintiff’s attempt to distinguish *Zolton Techs*. The *Zolton Techs* case is clearly one example of a specific application of the *Duomatic* principle which requires the court to find a “sufficient basis” to infer

¹¹⁰ DB3 299.

¹¹¹ DB3 289–290.

an agreement between all the shareholders for a director to carry out activities which would otherwise be in breach of his fiduciary duties owed to a company (*Panweld* at [25]). This is necessarily a fact-specific and context-dependent inquiry. It is not necessary for the defendant to show that the present case is all on fours with *Zolton Techs*.

88 Therefore, I find that there is sufficient basis for me to conclude that Keng and Eugene arrived at an agreement for Eugene to do the following:

- (a) Set up ETG in 2010, and incorporate ETGPL in 2014, and run its business.
- (b) Carry on teaching economics with the ETG Entities.
- (c) Retain revenue for classes which he taught as part of the ETG Entities.

89 This is also consistent with my finding that there was an oral agreement between Keng and Eugene that the latter could carry on with his personal tuition business (see [45] above).

90 As a result, I find that there was no breach of fiduciary duties in respect of the above acts.

Waiver or Estoppel

91 I return to the issue of whether the various contractual breaches committed by Eugene are subject to the defences of waiver and/or estoppel.

92 A party waives a contractual right when it makes an unequivocal representation to its counterparty, whether by words or by conduct, that it gives

up that right: *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [54]; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The “Kanchenjunga”)* [1990] 1 Lloyd’s Rep 391 at 397-398. Although the defendant failed to address me specifically on the evidence on which it relies on for waiver to operate in its written submissions, I rely substantially on the same evidence which I relied on to conclude that the *Duomatic* principle applies. However, the focus in the doctrine of waiver by election is not an *agreement* between the parties, but words or *conduct* by the party not in breach which unequivocally represents to the counterparty that it gives up that right.

93 I summarise the various forms of conduct displayed by Keng, which in my view, demonstrate unequivocally that any rights in relation to cll 5 and 11 of the Employment Agreement were given up:

- (a) Signing of cheques in favour of Eugene for his ETG classes at the Clementi Centre and the Bedok Centre.
- (b) Receiving name cards of the ETG Entities.
- (c) Review of claim forms which made references to the ETG business.¹¹²
- (d) Silence in the face of knowledge, either communicated to him by Jun Hao or directly, that Eugene was receiving sums of money for classes in which he personally taught, as well as running the ETG Entities’ businesses.

¹¹² 1AB 293-296.

94 It is not necessary for me to deal with the defendants’ submissions on estoppel by convention, and waiver by estoppel.

Passing off

Plaintiff’s case

95 To succeed in a claim for passing off, the plaintiff has to prove three elements of goodwill, misrepresentation, and damage (*Novelty Pte Ltd v Amanresorts Ltd and another* [2009] 3 SLR(R) 216 at [36]–[37]).

96 The plaintiff’s case is as follows:

(a) TGPL provided economics tuition lessons for JC students under its brand “TuitionGenius” (the “TG mark”) out of several locations in Singapore between 2009 and 2015.¹¹³ TGPL had 90 students in 2009, 70 students in 2010, and approximately 200 students per year from 2011 to 2015. For these reasons, TGPL acquired valuable goodwill in the TG Mark when used for the conduct of economics lessons for JC students.

(b) On or around 2010, Eugene and/or ETGPL created the brand “Economics @ TuitionGenius” (the “ETG Mark”) to conduct economics lessons for JC students separate from those conducted by TGPL. Eugene and/or the ETG Entities conducted these lessons in Jurong West, Bukit Timah and Choa Chu Kang.¹¹⁴ The ETG Mark is likely to be taken by the public as the TG Mark.¹¹⁵

¹¹³ Statement of Claim (Amendment No 1) at para 5.

¹¹⁴ Statement of Claim (Amendment No 1) at para 23.

¹¹⁵ Statement of Claim (Amendment No 1) at para 24.

(c) The distinctive elements in the TG Mark are the words “Tuition” and “Genius” used in conjunction.¹¹⁶

(d) By using the phrase “TuitionGenius” in the ETG Mark, the public is likely to be deceived or confused into misunderstanding that Eugene and/or the ETG Entities’ businesses are that of TGPL’s and/or vice-versa, and/or that TGPL has licensed the use of the TG Mark.

(e) The deception and confusion damages the goodwill of TGPL, including but not limited to, the loss of exclusive control by TGPL over the TG Mark.¹¹⁷

(f) The ETG Mark was adopted by Eugene and/or the ETG Entities with the deliberate object of causing deception and confusion.

97 The plaintiff’s position is that the TG mark belongs to TGPL, as TGPL invested time, money and effort to promote the mark and to associate it with TGPL’s business.¹¹⁸ In support of this, the plaintiff relies on the fact that TGPL paid for advertisements on Facebook and Google, and that Eugene would claim such advertising expenses from TGPL if he had paid for them first.¹¹⁹

Defendants’ case

98 The defendants’ case, *inter alia*, is as follows:

¹¹⁶ Statement of Claim (Amendment No 1) at para 25.

¹¹⁷ Statement of Claim (Amendment No 1) at para 26.

¹¹⁸ Jun Hao’s AEIC at para 62.

¹¹⁹ Jun Hao’s AEIC at paras 63–64.

- (a) TGPL did not at any time provide economics tuition lessons for JC students under the TG Mark. At all material times, TGPL’s tuition lessons were carried out by REC under the brand name of “REAL”.¹²⁰
- (b) The name “Tuitiongenius” and/or the TG Mark belonged to Eugene.¹²¹
- (c) TGPL did not at any time promote its economics classes in association with the TG Mark.

99 According to Eugene, he had been marketing his tuition classes under the brand name of TuitionGenius from sometime in 2007.¹²² Eugene pointed to his registration of the email account tuitiongenius@gmail.com,¹²³ and the purchase and registration of the domain name tuitiongenius.com in October 2007.¹²⁴ Eugene also showed that he had set up a Facebook page on www.facebook.com/tuitiongenius/.¹²⁵ Other evidence of the use of the TG Mark in 2007 include the following:

- (a) Eugene advertised his tuition business on online forums and distributed physical flyers bearing the same mark, referring all the while to his new website.¹²⁶

¹²⁰ Defence and Counterclaim (Amendment No 2) at para 6.

¹²¹ Defence and Counterclaim (Amendment No 2) at para 8.

¹²² Eugene’s AEIC at para 26.

¹²³ 1AB 5; Eugene’s AEIC at para 27(a).

¹²⁴ 1AB 6; Eugene’s AEIC at para 27(b).

¹²⁵ Eugene’s AEIC at para 27(c).

¹²⁶ Eugene’s AEIC at para 28; DB1 275–289.

(b) Eugene also referred to his economics notes prepared for his students which included the header “Economics @ TuitionGenius”. The first version of this document found in Eugene’s AEIC¹²⁷ did not feature this header, supposedly due to a printing error. Eugene subsequently tendered another copy of the same notes which bore the header.¹²⁸ Eugene testified that it might be possible for students to print the notes without the header, for example if they deliberately deleted the header or configured their printer settings in a particular way.¹²⁹

(c) Eugene testified that he had about 40 students in 2008, and that he had valuable goodwill in the TuitionGenius mark because he had a reputation for economics tuition at the JC level.¹³⁰

100 Following from this, the defendants make the following arguments:

(a) The actual relevant date for the complained conduct is 2007, which is when Eugene first started to use the TG Mark to advertise for his tuition business conducted at the CCK flat. As at 2007, TGPL did not even exist and could not have any goodwill to speak off.¹³¹ TGPL does not successfully establish that it had the requisite goodwill as at the relevant date.¹³²

¹²⁷ Annex 17 of Eugene’s AEIC.

¹²⁸ DB1 1–6.

¹²⁹ NE, 24 May 2018, p 39, lines 26–31.

¹³⁰ NE, 24 May 2018, p 54, lines 1–8.

¹³¹ DCS at para 100.

¹³² DRS at para 25.

- (b) The TG Mark does not satisfy the requirement that it is distinctive of TGPL’s business (*Singsung Pte Ltd v LG 26 Electronics Pte Ltd (trading as L S Electrical Trading)* [2016] 4 SLR 86 at [36] – [37]).¹³³
- (c) Even if goodwill existed in relation to the TG Mark, it was not assigned by Eugene to TGPL.¹³⁴
- (d) There was no “joint venture” prior to the incorporation of TGPL.¹³⁵
- (e) The relevant public would associate the TG and ETG Marks with Eugene’s business and not TGPL’s business.

Analysis of passing off claim

Issue 1: Goodwill

101 The issue turns on the nature of the TG Mark. Jun Hao¹³⁶ exhibited printouts of advertisements placed on social media which is relied on by the plaintiff to show that money had been invested in that mark. But what stands out from those advertisements are the words “Real Education Centre” and not the phrase “Tuition Genius”. The plaintiff did exhibit documents in which the name of the company, TuitionGenius Pte Ltd, is printed prominently. Further, these were internal company documents. They were not marketing documents in respect of which resources had been expended to promote the mark. The

¹³³ DCS at para 104.

¹³⁴ DRS at para 26.

¹³⁵ DRS at para 32.

¹³⁶ Jun Hao’s AEIC at para 63.

plaintiff seems to be relying on the fact that the phrase “Tuition Genius” constitutes its name. But there is no evidence that it was used a mark to promote its services. Eugene’s uncontroverted evidence was that he has used the mark “Tuition Genius” to promote his own tuition business even before the plaintiff was incorporated. Eugene gave evidence that he had only agreed with Keng to use it in the name of plaintiff when they incorporated the company, but had had taken care to promote its services on a different and distinct identity. This is borne out by the evidence. I therefore find that the plaintiff did not have any goodwill in the TG Mark.

Issue 2: Ownership and Assignment

102 It follows that the plaintiff cannot claim ownership of the phrase “Tuition Genius” as a trade mark.

Issue 3: Misrepresentation and Damage

103 It also follows that there was no misrepresentation in the defendants’ use of the phrase “Tuition Genius” in their marks.

Counterclaims by the defendant

104 As the plaintiffs in the counterclaim are the same parties as the defendants, I continue to refer to them as the defendants. The defendants in the counterclaim, are TGPL and two additional parties: Keng and Jun Hao. I will refer to them by their names where appropriate, or as the defendants in the counterclaim when referred to collectively.

Passing off

105 The crux of the defendants' counterclaim is that even though TGPL and Jun Hao "never used" the TG Mark to market its business prior to 1 October 2015, they started to do so after Eugene left TGPL. The defendants claimed that as the TG Mark is distinctive of Eugene's tuition business, the continued use by TGPL and Jun Hao of the TG Mark would have caused the public to wrongly believe that Eugene's business was still related to REC's business, constituting an actionable passing off.¹³⁷ The defendants also claimed that the continued use of Eugene's TuitionGenius email as REC's contact email on the Ministry of Education's ("MOE") list of private schools would have caused the public to wrongly believe that Eugene's business was still related to REC's business, and this would be an actionable passing off.¹³⁸

106 In response, the defendants in the counterclaim assert that the goodwill associated with the TG Mark is vested in TGPL and there is therefore no basis for the passing off claim. They also contend that the listing of the email on MOE's list did not cause the public to wrongly believe anything, and that there was in any case no damage suffered by the defendants.

107 As I have stated above at [95], in order to make out a successful passing off claim, it is necessary to prove all three elements of goodwill, misrepresentation, and damage. Based on the evidence before me, it is clear that the defendants did not make a serious attempt to meet the threshold required for proof of goodwill. No evidence was cited in its written submissions of the defendants' goodwill in the TG mark save for an unsupported allegation that

¹³⁷ DCS at para 128.

¹³⁸ DCS at para 129.

“[a]s at 1 October 2015, it is undisputable that Eugene enjoyed goodwill in its tuition business”.¹³⁹

108 In light of the complete lack of evidence in this regard, I think it unnecessary to address the remaining elements of misrepresentation and damage in the defendants’ passing off counterclaim.

Copyright

109 Eugene’s case is that TGPL had infringed his copyright in his course materials. Eugene argues that, under s 130 of the Copyright Act (Cap 63, 2006 Rev Ed) (“CA”), copyright is presumed to subsist in the work in question and he is presumed to be the owner of such copyright where the subsistence and ownership of the copyright are not challenged. Eugene further argues that TGPL infringed his copyright in the Course Materials when it used the same on REC’s website without Eugene’s consent or permission.¹⁴⁰

110 In response, the defendants in the counterclaim argue that Eugene created the Course Materials when he was an employee and director of TGPL, and therefore, pursuant to s 30(6) of the CA, TGPL is the owner of the copyright in these works.¹⁴¹

111 Eugene raises two objections in relation to these arguments.¹⁴² First, it was not pleaded that Eugene’s Course Materials were created in pursuance of

¹³⁹ DCS at para 126.

¹⁴⁰ Eugene’s AEIC at, pg 102, para 247(c).

¹⁴¹ PCS at paras 385–388.

¹⁴² DRS at paras 55–58.

his employment, and secondly, this question was not put to Eugene during cross-examination; the only question that was put to Eugene was when the Course Materials were uploaded onto REC’s website.¹⁴³

112 In my view, Eugene’s counterclaim for copyright infringement should be dismissed.

113 The burden of proof rests on Eugene to prove that TGPL had used the Course Materials on the REC website without his consent or permission. Eugene failed to put this question to any of the witnesses at trial. It is difficult under such circumstances to make a conclusive finding that TGPL used the Course Materials without Eugene’s consent or permission. Furthermore, based on the available evidence before me, it appears that the Course Materials were in fact produced by Eugene in the course of his employment. Applying s 30(6) of the CA, TGPL, as the employer of Eugene at the material time when the materials were produced, is the owner of the copyright. Accordingly, Eugene’s copyright infringement claim is dismissed.

Conspiracy

114 The elements of lawful means conspiracy are as follows (see *Visionhealzone Corp Pte Ltd v HD Holdings Pte Ltd* [2013] SGCA 47 at [44] (“*Visionhealzone*”); *EFT Holdings Inc v Marineteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [112] (“*EFT Holdings*”)):

- (a) There must be a combination of two or more persons and an agreement between them and amongst them to do certain acts.

¹⁴³ NE, 4 March 2019, p 35, lines 4–8.

- (b) The predominant purpose of the conspirators must be to cause damage or injury to the claimant.
- (c) The acts were performed in furtherance of the agreement.
- (d) The claimant suffered loss as a result of the conspiracy.

115 In lawful means conspiracy, the alleged conspirators must have the requisite intention to injure when they undertake actions knowing that any gain to themselves cannot be brought about without a corresponding loss to the plaintiffs. In *OBG Ltd v Allan; Douglas v Hello! Ltd (No.3); Mainstream Properties Ltd v Young* [2008] 1 AC 1, Lord Nicholls stated at [167] (cited with approval by the Court of Appeal in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 at [63] (“*Raffles Town Club*”)):

Taking a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant’s gain and the claimant’s loss are, to the defendant’s knowledge, inseparably linked. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort.

116 The defendants argue that TGPL, Jun Hao and Keng are liable in conspiracy to injure Eugene and ETGPL through the commencement of the present suit. First, they submit that the use of a corporate vehicle to commence legal action against a party with the predominant purpose of causing financial harm to the party amounts to an “actionable conspiracy” in tort, citing *Raffles*

Town Club.¹⁴⁴ Secondly, they argue that there is sufficient evidence to show that the commencement of the present suit was to cause injury to Eugene and ETGPL.¹⁴⁵

117 In my view, *Raffles Town Club* is authority that the use of a corporate vehicle to commence legal action against a party with the predominant purpose of causing financial harm is an actionable conspiracy in tort.

118 The only question is whether the defendants have proven the four elements required for a successful action in “lawful means conspiracy” (*Visionhealthone* at [44]).

119 The crux of the case refuting the defendants’ counterclaim is that there is insufficient evidence to show that the predominant intention behind the present suit was to cause damage and injury, and that the predominant intention instead was for the benefit of TGPL. The defendants in the counterclaim also argue that the case of *Said v Butt* [1920] 3 KB 497 (“*Said v Butt*”) applies such that Jun Hao is immune from liability in tort.

120 The following subsidiary issues therefore arise.

121 The first issue is whether the predominant intention or purpose behind the plaintiff’s decision to sue was to cause financial harm. The second issue is, assuming that lawful means conspiracy is made out, whether *Said v Butt* applies to immunise Jun Hao from personal liability.

¹⁴⁴ DCS at p 123.

¹⁴⁵ DCS at p 124.

122 I address each issue in turn.

123 The first subsidiary issue turns on the strength of the defendants’ evidence. I briefly summarise the evidence relied on by the defendants to show that the “predominant intention” of the present suit is to cause financial harm to Eugene and ETGPL.

(a) Whatsapp conversations between Xiang Qi and one Zi Hao, which allegedly showed Xiang Qi “emotionally affected and distressed” and “[wanting] to harass Eugene’s mother by spreading rumours”.¹⁴⁶ The defendants claim that this is corroborated by Eugene’s Whatsapp conversations with Jun Hao.¹⁴⁷

(b) Eugene testified that there were various instances of harassment carried out by the Keng family against Eugene’s family.¹⁴⁸

(c) The Car-Chase incident between Xiang Qi and Eugene’s mother. This was allegedly another act of harassment manifesting the resentment that the Keng family had towards Eugene’s family.¹⁴⁹

(d) Conversations between Keng and Eugene which allegedly show that Keng was being pressured to cooperate with Jun Hao to pursue Suit 453 against Eugene as another act of harassment towards Eugene and his family.¹⁵⁰

¹⁴⁶ DCS at para 112; DB1 180–184

¹⁴⁷ DB3 238.

¹⁴⁸ NE, 4 March 2019, p 24 lines 8–31.

¹⁴⁹ DCS at para 117.

¹⁵⁰ DCS at para 120.

(e) The circumstances subsequent to Eugene’s departure from TGPL, *ie*, the manner in which Jun Hao had caused himself to be in full control of TGPL.¹⁵¹

(f) Keng, Jun Hao and Xiang Qi’s testimony on the stand. During cross-examination, Keng had said that Jun Hao directed and controlled the proceedings, even though Keng had (earlier) claimed that the decision to sue was a joint decision.¹⁵²

124 The defendants also argue that, given that Xiang Qi would engage in “criminal acts” to express resentment towards Eugene’s mother, it is not unthinkable that Jun Hao, with the cooperation of Keng, would use the present suit as another act of harassment towards Eugene’s family.¹⁵³

125 In my view, the strongest evidence in favour of the defendants was the conversation which took place on 5 February 2016 between Keng and Eugene, as well as the conversation on 1 April 2016.¹⁵⁴ I reproduce the material portions of what Keng had said on 1 April 2016:

[Jun Hao] won’t listen to me. Currently, all of them are against me. After this, you just listen to your lawyer and see what you have to do.¹⁵⁵

I know about this (referring to the lawsuit)...**this is bullshit**.¹⁵⁶

¹⁵¹ DCS at para 121.

¹⁵² NE, 11 May 2018, p 8 line 28 – p 10 line 10.

¹⁵³ DCS at para 118.

¹⁵⁴ DB1 231.

¹⁵⁵ DB3 293.

¹⁵⁶ DB3 299.

...Let me know if you need any form of assistance. If it's financial matter, you can me know as well. **Their stuff will be invalid lah.**¹⁵⁷

I need to clarify that I'm not the one instructing them to do these. Will I instruct them? Whether you use your brain or your butt to think, you'll know that I'll never instruct them to do anything of this sort. Like I've mentioned, it's meat on the left and it's also meat on the right. I will never ask them to do anything like this. So, right now, I'm in horh, a loyalty dilemma.

All tries to force me to do this and that, force until I'm giddy already. Let's say what we need is money, very simple mah, I really don't have the funds with me. Whatever tricks you guys want to play, just go ahead and do your things. Half way through, they will realise. **They will realise that whatever they're picking up on is unreasonable.** They will, for sure, only believe what their mother tells them. Do you understand? So assure your wife that everything's alright.¹⁵⁸

[emphasis added in bold]

126 In the conversation between Eugene and Keng on 1 April 2016, Eugene also mentioned that Keng had told him “in the beginning that [the other members of the Keng family] only had one purpose by doing this, that is, to sow dissension between [Keng and Eugene]; to make [Eugene] dislike [Keng] and [Keng] dislike [Eugene]....”¹⁵⁹

127 In my view, I do not think that the conversations between Eugene and Keng show that the “predominant purpose” behind the commencement of Suit 453 was to cause financial harm or injury to Eugene. All it seems to suggest is that Keng was stuck in between a rock and a hard place in having to balance his competing loyalties between his own family, and Eugene, someone he considered as a godson. At the time of the conversations, the relationship

¹⁵⁷ DB3 302.

¹⁵⁸ DB3 319.

¹⁵⁹ DB1 231.

between Eugene and Keng was still good. It was therefore understandable that Keng was seeking to assuage Eugene's fears that the present lawsuit would, in his words, "be invalid". While Keng may have implied that his son Jun Hao's motivations for commencing the suit were less than noble, namely, that it was procured to sow discord between Keng and Eugene, I am not convinced that the "predominant" purpose behind the suit was to cause financial damage to the defendants. The conversation also suggests that Keng may have believed, at the time of the conversation with Eugene, that the lawsuit against him was unmeritorious. This is self-evident from his saying "[the lawsuit] is bullshit", "their stuff (referring to the lawsuit) will be invalid", and "[Jun Hao and Xiang Qi] will realise whatever they're picking up on is unreasonable". I do not think that this alone is sufficient to prove that the *predominant* purpose behind the suit was to cause financial harm to Eugene. A decision to commence an unmeritorious lawsuit is not in every instance motivated by an intention to cause financial harm. In any case, even if the conversation showed that Jun Hao's predominant purpose for commencing the suit against Eugene was to cause him financial harm, the conversation at the same time showed that this purpose was not shared by Keng. This can be seen from his reluctance to participate in the lawsuit against Eugene.

128 For completeness, I also address the remaining pieces of evidence relied on by the defendants. I agree with the defendant that the Whatsapp conversations between Xiang Qi and Zi Hao, and those between Eugene and Jun Hao, showed that a great deal of animosity and resentment existed towards Eugene's mother. However, I also take into account that this arose from their belief that she was having an affair with Keng. I also believe Eugene that his family was subjected to various instances of harassment by Keng's family – the Car-Chase incident in which Xiang Qi drove into Eugene's mother's car being

one such instance of this. Nonetheless, I think that it is a stretch to suggest that the instances of harassment by Keng's family against Eugene's mother, must lead me inescapably to the conclusion that Suit 453 was commenced with the predominant purpose of causing financial harm to Eugene. I also do not think that the circumstances under which Jun Hao came to be in control of TGPL, as well his prompt commencement of Suit 453 against Eugene, show that the predominant intention behind the suit was to cause financial harm.

129 Although not argued by either side, another issue which I find problematic in the defendants' case is that I could not identify a "combination of two or more persons and an agreement between them and amongst them to do certain acts", a requirement set out by the Court of Appeal in *EFT Holdings* at [112]). Taking the evidence of the transcripts between Eugene and Keng at face value, it is clear that even if a conspiracy did exist to cause Eugene financial harm, there is no evidence that Keng was a party to it. Under such circumstances, I hold that the defendants have not proved lawful means conspiracy against Keng, Jun Hao, and TGPL on a balance of probabilities.

Conclusion

130 For the reasons above, I dismiss all the plaintiff's claims except the claim for breach of cl 12 of the Employment Agreement in respect of Timothy. I will hear counsel on whether an order for assessment of damages in respect of this breach should be issued.

131 I dismiss the defendants' counterclaims in their entirety.

132 I will hear counsel on the issue of costs.

Lee Siu Kin
Judge

Adrian Tan Gim Hai, Ong Pei Ching, Michelle Chew Wai Yin and
Yeoh Jean Ann (TSMP Law Corporation) for the plaintiff;
Ng Lip Chih, Beatrice Chiang Sing Hui and Goh Hui Hua (NLC Law
Asia LLC) for the defendant.
