IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 8

Civil Appeal No 14 of 2021

Between

Dong Wei

… *Appellant*

And

(1) Shell Eastern Trading (Pte) Ltd
(2) Lim Ming Way

… *Respondents*

In the matter of Suit No 373 of 2018

Between

Dong Wei

… *Plaintiff*

And

(1) Shell Eastern Trading (Pte) Ltd
(2) Lim Ming Way

… *Defendants*

GROUNDS OF DECISION

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[Employment Law — Contract of service — Breach]
[Employment Law — Contract of service — Termination with notice]
[Employment Law — Disciplinary procedures — Investigations]
[Employment Law — Disciplinary procedures — Suspensions]
[Employment Law — Employers' duties — Mutual trust and confidence]
[Tort — Conspiracy]
[Tort — Inducement of breach of contract]
[Tort — Malicious falsehood]
[Tort — Negligence — *Res ipsa loquitur*]

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Dong Wei
v
Shell Eastern Trading (Pte) Ltd and another

[2022] SGHC(A) 8

Appellate Division of the High Court — Civil Appeal No 14 of 2021
Belinda Ang Saw Ean JAD, Woo Bih Li JAD, See Kee Oon J
3 November 2021

24 February 2022

Belinda Ang Saw Ean JAD (delivering the grounds of decision of the court):

Introduction

1 At first instance, the appellant, Dong Wei (the "Appellant"), sought relief against the respondents in respect of multiple alleged breaches of contract (specifically, a contract of employment with the first respondent, Shell Eastern Trading (Pte) Ltd ("Shell Eastern")), as well as their alleged commission of various torts. The High Court judge (the "Judge") dismissed all of the Appellant's claims, and on 3 November 2021, we heard his appeal. After hearing submissions by counsel for both sides, we dismissed the appeal in its entirety. These are the detailed grounds of our decision.

The background facts

2 The facts are set out more fully in the Judge's grounds of decision (the "GD"), *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123, and as such, we will only restate, in brief, the salient facts.

3 The Appellant was, from 2006 until the termination of his employment on 10 January 2018, an employee of Shell Eastern. At the time of termination, he held the position of "Senior Freight Trader", and one of his primary responsibilities was selling freight space in ships owned and/or chartered by Shell Eastern or its affiliates. The second respondent, Lim Ming Way ("Mr Lim"), was also an employee of Shell Eastern. At the relevant time, he held the position of "Regional Team Leader (Freight)" and was the Appellant's line manager.

4 The events leading to the Appellant's lawsuit against the respondents were triggered on 29 September 2017, when the Appellant made a phone call to one Jason Balota ("Mr Balota"), a gas oil trader with Vitol Asia Pte Ltd ("Vitol"), an energy and commodities trading company. His evidence was that this call was entirely innocent and that he had contacted Mr Balota merely to obtain information on a cargo he had heard about from certain sources. However, from the perspective of Mr Balota's chartering manager, Ben Jones ("Mr Jones"), the call did not appear so innocent. Once Mr Balota informed Mr Jones about the call, the latter was under the impression that something was amiss. Specifically, he thought that the Appellant had asked Mr Balota to charter a cheaper ship for the cargo. This, in turn, led to Mr Jones calling the Appellant to rebuke him for contacting Mr Balota directly. The Appellant tried to explain that this was not the case, but his explanation – that he did not even have a ship to offer – invited questions as to what reason he then had to break with market

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practice by calling a trader directly, instead of contacting his chartering manager.

5 Following this, the Appellant informed Mr Lim about his conversation with Mr Jones, seemingly to give him notice of what had transpired. Thereafter, on 12 October 2017, Mr Jones and Mr Lim met in person regarding the Appellant's call with Mr Balota. Mr Lim took notes of the conversation and recorded the complaints allegedly made by Mr Jones. Based on Mr Lim's record, these complaints were twofold. First, the Appellant had attempted to market a third-party vessel to Mr Balota, circumventing the proper practice of contacting a trader's chartering manager, rather than a trader directly. Further, Mr Jones allegedly stated that this vessel belonged to the Appellant's "friend's company", seemingly suggesting that the Appellant had been acting against the interest of Shell Eastern.

6 Second, this was not the first time in which an incident of this nature had taken place. Mr Jones allegedly raised an incident in 2016, where a third-party shipbroker had contacted Vitol to market a vessel for a cargo in circumstances where information about the cargo had been made known to the Appellant only. The third-party named by Mr Jones was a company called "First Fleet". It is pertinent to note that in 2015, Shell Eastern investigated an allegation that the Appellant had shown favouritism to First Fleet. Again, in 2016, it conducted another investigation into allegations that the Appellant had received gifts from First Fleet. Though these investigations respectively concluded that the allegations were unsubstantiated, the Appellant was, in the first instance, nevertheless cautioned against such behaviour, and in the second instance, issued a warning for failing to disclose his close friendship with an employee of First Fleet who was in ship chartering.

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7 Mr Lim conveyed these alleged complaints to Stavros Kokkinis ("Mr Kokkinis"), the General Manager for Freight and Oil Specialities, Trading and Supply Products in Shell International Trading and Shipping Company Limited ("STASCO"), an affiliate of Shell Eastern. This was followed by internal discussions, and on 20 October 2017, an investigation was commenced to ascertain the truth of Mr Jones' alleged complaints against the Appellant. The investigation was conducted by Sumitra Balasundaram ("Ms Balasundaram") of Shell Eastern's Business Integrity Department ("BID"), and she was required to submit her report to four senior staff of Shell Eastern and STASCO who formed the members of the distribution list in respect of this investigation: (a) Mr Kokkinis; (b) Greg Marten, Vice President of Finance and Trading Regulation and Compliance in STASCO; (c) Marc Cornelius, STASCO's Regional Head of Compliance (EU, Africa and East); and (d) Colin Shanks, the head of Shell Eastern's BID.

8 The chronology of events after the commencement of the investigation is as follows. Ms Balasundaram first interviewed the Appellant on 23 October 2017, and thereafter, he met with one of Shell Eastern's human resource staff, who handed him a notice which stated that he was being placed on mandatory leave with salary. The notice expressly provided that the Appellant would be told the outcome of the investigation upon its conclusion.

9 From 24 October to 9 November 2017, Ms Balasundaram continued to interview individuals relevant to the investigation, including Mr Balota, Mr Jones, and Mr Lim. On 21 November 2017, she completed her investigation and released her report to the members of the distribution list. She concluded that the allegations were "inconclusive"; specifically, in the sense that though there was no positive proof of wrongdoing, there was no valid explanation as to why the Appellant would knowingly depart from market practice to contact Mr

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Balota directly to obtain information about Vitol's cargo, when Shell had no vessel available to offer freight space.

10 The completion of the investigation then takes us into the most salient background fact underlying this case. On 29 November 2017, S&P Global Platts ("Platts") contacted Shell Eastern to seek its comments on rumours that it had been investigating its employees for, *inter alia*, corruption, and that one such employee was the Appellant (the "Platts Query"). The editor from Platts sought details on the investigation, but the spokesperson for Shell Eastern declined to comment specifically. She simply stated that it was not appropriate to comment on matters relating to personnel, though generally, employees were expected to comply with Shell Eastern's code of conduct and that investigations would be conducted into alleged breaches of such code. In essence, the answer she gave was a non-answer.

11 On 12 December 2017, Platts then published an article (the "Platts Article") stating that Shell Eastern had been investigating claims of "unethical dealings including charges of corruption in its tanker chartering team". The article did not name the Appellant specifically, or indeed any employee, but it did identify the chartering team and remarked that "at least one employee has been asked to take leave pending further investigation". The Appellant was the only one in the team placed on leave at the time.

12 During this time, the Appellant remained on suspension with full pay and – despite multiple requests from him – he was not told the outcome of the investigation. Then, on 10 January 2018, he met with Shell Eastern's representatives, where he was informed that his employment would be terminated immediately with pay in lieu of notice. Even at this point, he was still not told of the outcome of the investigation. Shell Eastern declined to

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disclose the outcome on the basis that: (a) it was under no obligation to do so; and (b) its termination of the employment relationship was not a result of the outcome of the investigation.

13 Following the termination of his employment, the Appellant purportedly applied to four freight transport companies for comparable positions. On his account, these companies were aware from the Platts Article that there were unresolved allegations of impropriety against him, and thus declined to consider his application further until those allegations had been formally cleared. Thus, the Appellant, who claimed to have been unable to find employment in the shipping industry on the basis of these incidents, sought alternative means of earning a livelihood by operating early childhood education and art education businesses, neither of which he claimed has yet been profitable. Accordingly, in 2018, he sued the respondents to recover the damages he claimed to have suffered as a result of the whole series of events leading to the termination of his employment, and separately, the publication of the Platts Article.

The Appellant's pleaded causes of action and relief sought

14 To recover damages, the Appellant pursued many causes of action in contract and tort at trial, as well as on appeal. This included actions brought against: (a) Shell Eastern for numerous breaches of his contract of employment as well as its negligence in failing to protect the confidence of the investigation, which the Appellant averred led to the publication of the Platts Article; (b) Mr Lim for inducing Shell Eastern to breach his contract of employment as well as malicious falsehood; and (c) both respondents for their participation in an unlawful means conspiracy to cause him harm.

15 The breaches of ***contract*** alleged against Shell Eastern were as follows. One, that Shell Eastern misused its power to suspend the Appellant and keep

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him on suspension. Two, that it mismanaged the investigation into the Appellant's alleged conduct. Three, that it failed to disclose the outcome of the investigation to the Appellant. Four, that it failed to protect the confidentiality of the investigation. Last, that its termination of the Appellant's employment was arbitrary, capricious and/or carried out in bad faith, and therefore wrongful. As we will explain shortly, many of the Appellant's causes of action relied on the same factual premises. Suffice it to now give an example, the fourth of the alleged contractual breaches overlapped with the claim in negligence. Therefore, where the Appellant failed to establish the facts needed for one action to succeed, the viability of his alternative, connected action(s) were, naturally, also compromised.

16 Given these overlaps, it is in our view, more straightforward and far less repetitive to focus on the ***losses*** which the Appellant sought to recover by these causes of actions. In essence, they were directed at recovering three heads of loss.[1] First, damages flowing from his allegedly wrongful suspension and Shell Eastern's mismanagement of the investigation. For ease of reference, we will call this the "First Head of Loss". Second, cash bonuses and share options he would have received or retained had he not been wrongfully terminated, or had his termination not been wrongfully brought about (the "Second Head of Loss"). Third, damages flowing from the stigmatisation he faces in the freight industry which has prevented him from securing new, comparable employment (the "Third Head of Loss"). In our analysis below, we will address the actions connected to the First and Second Heads of Loss as one group, as both arise from the same liability, and those connected to the Third Head of Loss as a separate group.

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[1] Statement of Claim (Amendment No 6) (25 Aug 2020) ("SOC") at paras 39A and 39E.

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17 As stated at the outset, the Judge dismissed all of the Appellant's claims seeking to recover these losses. In the appeal before us, all three heads of loss were still in issue. However, it is important to emphasise that the Appellant did not challenge the Judge's dismissal of *every* of his causes of action. Instead, he appealed every cause of action *save for two*, and the upshot of his decision not to appeal two causes of action is that the Judge's findings of fact substantially undermined his claims for the First and Second Heads of Loss, to which we turn next.

First and second heads of loss

18 As our summary of the facts above shows, it was Mr Jones' complaint against the Appellant which set in motion the investigation into the Appellant's conduct, led to his suspension, and eventually, his termination with pay in lieu of notice. Though the Appellant was not *dismissed* with cause, the events and concerns which were triggered by his call to Mr Balota were, as a whole, not well received by Shell Eastern. As stated above, the Appellant had been the subject of two earlier investigations, and he was given a warning in 2016 for failing to disclose the existence of a relationship which could give rise to the perception of a conflict of interest. As Shell Eastern's decision to terminate shows, it did not consider it to be in its interest to have such a problematic employee onboard. By contrast, the Appellant naturally did not think that there was anything problematic about his conduct, and instead took the view that everything from the commencement of the investigation to his termination was wrongful. Thus, it was for these wrongs allegedly committed by the respondents in connection with this sequence of events, that the Appellant claimed the First and Second Heads of Loss.

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19 Chronologically, these alleged wrongs were: (a) Mr Lim's fabrication of the complaints made by Mr Jones; (b) Shell Eastern's decision to suspend the Appellant and commence the investigation on the basis of Mr Lim's fabricated complaints; (c) Shell Eastern's mismanagement of the investigation; (d) Shell Eastern's decision to keep the Appellant suspended despite having no basis to do so once the investigation found that the allegations were "inconclusive"; (e) both respondents' procurement of false and/or alternative bases on which the Appellant's "dismissal" could be justified following the "inconclusive" investigation report; and last, (f) Shell Eastern's arbitrary, capricious, and bad faith termination of the Appellant.

The absence of any loss

20 We must state from the outset that, even if the Appellant had been able to prove the commission of these wrongs, it was apparent that he did not suffer any loss. First, he was paid a full salary for the entire period of his suspension, and second, as stated, he received pay in lieu of notice pursuant to an express right of termination in his contract of employment.

21 It is well-established that employers may terminate employees without cause, in accordance with an express right of termination, so long as sufficient written notice or pay in lieu of notice is given. This principle imposes a limit on a claim for damages for wrongful termination by way of the "minimum legal obligation rule" (see, *eg*, *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 at [13] and more recently, *Wong Sung Boon v Fuji Xerox Singapore Pte Ltd and another* [2021] SGHC 24 at [120]–[121]). This rule provides that, where an employee is wrongfully *terminated* (as opposed to dismissed with cause), the normal amount of damages he can claim is that which he would have been able to earn under his contract

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of employment, for the period it would take for his employer to lawfully terminate it. Typically, this is the amount of notice which the employee is entitled to receive. Here, it was not disputed that the Appellant received sufficient pay in lieu of notice. In addition, counsel for the Appellant, Mr Choo Zheng Xi ("Mr Choo"), has not pointed to any statement of principle allowing a departure from the minimum legal obligation rule.

22 For this reason, we dismissed the Appellant's causes of action that went towards the First and Second Heads of Loss, primarily, because he suffered no such losses as a matter of law.

23 Counsel for the Appellant, Mr Choo, urged us to change the law in this regard, by finding that an employer's express right to terminate an employee without cause and with notice or pay in lieu of notice, was limited by a requirement that the employer not act arbitrarily, capriciously, or in bad faith in exercising such right. Therefore, if an employer had acted arbitrarily, *etc*, in terminating an employee, this termination would be wrongful and could ground a claim for damages beyond that recoverable in accordance with the minimum legal obligation rule. At [83]–[93] below, we explain why we rejected this legal argument.

24 In any case, even though the Appellant had failed to establish the First and Second Heads of Loss as a matter of law (see [22] above) and his causes of action could thus be dismissed on this basis, we concluded that the various wrongs he alleged against both Shell Eastern and Mr Lim had not, in any event, been made out on the facts. Therefore, even if he had been able to establish that he suffered legally recoverable losses, his pleaded case would not have enabled him to recover any such losses. With this in mind, we turn next to the Appellant's failure to establish his various causes of action.

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Consequence of unappealed causes of action

25 As stated at [17], the Appellant did not challenge the Judge's decision to dismiss two of his numerous causes of action.

26 First, he did not challenge the Judge's dismissal of his claim that Mr Lim had induced Shell Eastern to breach his contract of employment. By this cause of action, the Appellant made four allegations against Mr Lim. One, that Mr Lim concocted the two complaints purportedly made by Mr Jones (see [5]–[6] above) so as to induce Shell Eastern to suspend the Appellant without proper basis, in breach of the latter's contract of employment. Two, that Mr Lim prejudiced the fair conduct of the investigation and thus induced Shell Eastern to breach its contractual obligation not to mismanage the investigation. Three, that Mr Lim induced Shell Eastern to conceal the outcome of the investigation from the Appellant so as to procure the latter's continued suspension. Four, that Mr Lim induced Shell Eastern to terminate the Appellant arbitrarily, capriciously or in bad faith, and in breach of the latter's contract of employment.

27 Second, the Appellant also did not challenge the Judge's decision on one aspect of his contractual claim against Shell Eastern, namely, that Shell Eastern had breached his contract of employment by mismanaging the investigation, by allowing Mr Lim to influence and prejudice its fair conduct. It will be noticed that this is the contractual counterpart to one aspect of the above-described claim against Mr Lim for the tort of inducing breach of contract (see [26] above).

28 To be clear, the upshot of the Appellant's decision not to challenge these two matters on appeal meant that the Judge's findings of fact could – and as we will explain, did – adversely bear on the rest of the causes of action which he *did* take up on appeal. In particular, though it did not bear on his claim for the

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Third Head of Loss – which failed for other reasons (see [48]–[64] below) – it affected the causes of actions by which he sought to recover the First and Second Heads of Loss.

Inducing breach of contract

29 As stated at [5]–[6] above, the investigation into the Appellant's conduct was set into motion by the two complaints recorded by Mr Lim, allegedly made by Mr Jones. These, the Appellant averred, were not in fact complaints made by Mr Jones, but rather falsehoods concocted by Mr Lim to procure his suspension which led to his eventual termination. On this basis, the Appellant sought to impugn the commencement of the investigation and his suspension using three causes of action: (a) an action against Mr Lim for inducing Shell Eastern's breach of contract; (b) a related action against Shell Eastern for breach of his employment contract, specifically, suspending him without proper basis; and (c) an action against Mr Lim for malicious falsehood.

30 The Appellant did not challenge the Judge's decision in respect of (a), that is, the claim against Mr Lim for inducing Shell Eastern to breach his contract of employment. On this cause of action, the Judge stated that he "did not find that there was anything that showed that [Mr Lim] possessed an intention to cause the [Appellant] to act in breach of the implied term of mutual trust and confidence, below the base level of fairness required" (see the GD at [144]). We pause to emphasise that we will deal with the law on the implied term of mutual trust and confidence ***separately*** at [69] below. For present purposes, the salient *factual* import of the Appellant's failure to challenge the Judge's finding, is that he accepted that Mr Lim *did not* act unfairly. Ultimately, the dismissal of the tort of inducing breach of contract means that there is

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nothing in evidence to suggest that Mr Lim acted to get the Appellant sacked in the sense that he *intended* to interfere with the Appellant's contractual rights.

31 That Mr Lim did not act unfairly had a significant impact on the Appellant's action for malicious falsehood. Even if the Appellant had established the falsity of the two complaints recorded by Mr Lim, he would not have been able to prove the third element of the tort of malicious falsehood, *ie*, that Mr Lim had acted with malicious intent (see *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 ("*Lee Tat Development*") at [169(c)]). The upshot of a finding that Mr Lim did not intend to induce Shell Eastern to act in breach of contract is that it could not concurrently lie in the Appellant's mouth to maintain that Mr Lim was acting maliciously.

32 In *Lee Tat Development*, the Court of Appeal stated that malice is made out if a defendant: (a) in publishing the falsehood, was motivated by a dominant and improper intention to injure the plaintiff; or (b) did not honestly believe that the statement was true or acted with reckless disregard as to its truth (at [182]). This mental ingredient is harder to establish than that for inducing a breach of contract. As held in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*") at [17] (restated in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [311]), so far as the mental element for the tort of inducing a breach of contract goes, it only needs to be established that the alleged tortfeasor *knew* of the existence of the contract and that he *intended* to interfere with the plaintiff's contractual rights, in the sense of doing so knowingly, rather than with specific intent. More saliently, no malice is required (see *Tribune Investment* at [18]).

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33 On this basis, seeing as how the Appellant accepted the Judge's decision, we did not see how Mr Lim's state of mind could satisfy that for the tort of *malicious* falsehood, when it did not even satisfy the threshold in *Tribune Investment* in respect of the tort of inducing breach of contract. This was, in fact, supported by the manner in which Mr Lim framed his email to Mr Kokkinis on 12 October 2017 in particular with reference to the possible courses of action. After setting out what Mr Jones purportedly told him, Mr Lim proposed three possible courses of action for Mr Kokkinis' consideration: (a) to issue a warning letter to the Appellant; (b) to consider suspending the Appellant "for a period of time to remove him from market"; or (c) to terminate "all business relationship with the related vessel or company immediately" (see [5] above). In our view, his presentation of options is relevant as it did not give the impression that Mr Lim acted with any malice. It is typical for those in middle management to propose different courses of action for senior management to take, and it could not be said that Mr Lim had been pushing for Shell Eastern to commence an investigation into the Appellant's conduct, much less to terminate him. Indeed, the option he put upfront was for a warning letter to be issued, and he even went on to say, "a repeat will result in termination as our reputation is again affected". If he had intended, *maliciously*, to cause the Appellant injury, this suggestion would not have been included.

34 In any event, we also agree with the Judge that the way in which the Appellant sought to prove the falsity of the two complaints, was unsatisfactory. He did not call either Mr Jones or Mr Balota to give evidence. Instead, to establish his case, the Appellant relied on the fact that, during Ms Balasundaram's interview of Mr Jones, the latter did not raise either complaint in the exact terms recorded by Mr Lim. The differences could be seen in Ms Balasundaram's final investigation report. On this basis, the Appellant submitted that the "grave inconsistency" between Mr Jones' alleged account to

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Mr Lim on 12 October 2017 and his account to Ms Balasundaram on 3 November 2017 sufficiently proved the falsity of Mr Lim's record. We did not accept this. Although the account given by Mr Jones on the face of the investigation report was not exactly the same as that which he purportedly gave to Mr Lim, the distinctions were not so stark as to lead inexorably to the conclusion that Mr Lim's account was false (see the GD at [148]–[151]).

35 This brings us next to the impact of the Appellant's failure to appeal the dismissal of the action against Mr Lim for inducing breach of contract on his contractual action against Shell Eastern for suspending him without proper basis (see [29] above). In this regard, the Appellant's failure to bring an appeal, and his connected failure to establish a claim for malicious falsehood against Mr Lim, also carried an impact. Taking the complaints as having been made by Mr Jones – as the Appellant failed to prove otherwise – it was clear to us that Shell Eastern had sufficient basis to suspend the Appellant. Two reasons stood in support of this.

36 First, Shell Eastern's code of conduct expressly states that employees should consult their line managers, Shell Ethics & Compliance Office, or Shell Legal, if they are unsure if a conflict exists or might be perceived. Given that the Appellant's conduct was not in accordance with market convention – coupled with his own evidence that he did not have a vessel to offer Vitol – it should have occurred to him that his conduct would at least have been *perceived* to be questionable. Consequently, he also ought to have known to first contact Mr Lim to check if he should proceed with the call to Mr Balota. The fact that he did not, in the eyes of Shell Eastern, would have raised valid concerns, especially in light of the Appellant's apparent history. This incident was not the first time the Appellant had been investigated for matters concerning a potential conflict of interest, and this background fact would naturally have bolstered

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Shell Eastern's suspicions that a breach of its code of conduct might have taken place.

37 Second, and more importantly, the Appellant was not immediately suspended by Shell Eastern upon it receiving Mr Lim's report of the allegations made by Mr Jones. Formal steps were taken to ascertain that there were sufficient grounds for suspension. As stated at [8], he was interviewed by Ms Balasundaram *before* he was suspended. During the interview, the Appellant informed her that he had called Mr Balota *directly* rather than Vitol's chartering manager, Mr Jones. Even though the Appellant explained that he did so because he had a good relationship with Mr Balota and would have been able to gather information about the cargo from him, his confirmation of the exchange, in contravention of market convention, was sufficient reason to suspect that something might have been amiss. This thus confirmed that there were valid grounds to place the Appellant on suspension.

Breach of contract: Mismanagement of investigation

38 We turn next to the impact of the Appellant's failure to bring an appeal against the Judge's decision to dismiss his claim for breach of contract, on the grounds that Shell Eastern had mismanaged the investigation. Specifically, the Judge found: (a) that there was no evidence that Shell Eastern had allowed Mr Lim to unduly influence or prejudice the fair conduct of the investigation (see the GD at [68]–[78]); (b) that neither the outcome nor the fact-finding process showed signs of pre-judgment on the part of Ms Balasundaram (GD at [79]–[87]); (c) that the Appellant had been afforded a fair opportunity to respond to the allegations against him (GD at [88]–[99]); and (d) that there were no undue delays to the investigation process which prejudiced the Appellant (GD at [100]).

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39 We would highlight further that, in connection with the claim against Mr Lim for inducing Shell Eastern's breach of contract, the Judge found that – though Mr Lim may have been "[overzealous] in pursuing his version of events" – there was nothing which suggested that he had an intention to induce Shell Eastern to act in breach of its contract of employment with the Appellant (see the GD at [144]). This finding was salient.

40 As stated at [26] above, there were various means by which the Appellant averred Mr Lim had sought to induce Shell Eastern's breach of contract. These means overlapped quite substantially with the Appellant's claim in conspiracy against both respondents, as well as his claim against Shell Eastern for breach of contract, specifically, for keeping him suspended after the conclusion of the investigation. The Appellant's failure to contest the above findings therefore had an impact on these two actions.

41 In particular, the consequence of his failure to challenge these findings was that he accepted four crucial facts: (a) that Mr Lim did not act improperly during the investigation process; (b) that Mr Lim had no intention to induce Shell Eastern's breach of contract, much less an intention to combine with Mr Kokkinis as well as others in Shell Eastern and STASCO to cause him injury; (c) that the process of the investigation was fair; and (d) that the outcome of the investigation was not preordained. Given the state of affairs, we did not consider it possible for the Appellant to maintain his plea against Shell Eastern for breach of his employment contract, or against the respondents for conspiracy. We take each in turn.

42 First, given the above-stated findings of fact, Ms Balasundaram can be said to have concluded *fairly* that the allegations made by Mr Jones were "inconclusive" rather than "unsubstantiated". Though an "inconclusive" finding

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was not grounds for Shell Eastern to dismiss the Appellant with cause, this was in our view, sufficient basis for it to consider on a more general basis whether it wished to continue working with the Appellant in light of his risky behaviour. This was entirely permissible given that the Appellant's employment contract contained, as virtually all such contracts do, an express termination clause which could be validly invoked by giving notice or pay in lieu of notice.

43 The decision-making process for whether to continue or terminate the Appellant's contract of employment was a serious one, and Shell Eastern needed time to consider it. If Shell Eastern had lifted the suspension pending a decision whether to terminate his employment, this might have created confusion as the lifting of the suspension might have suggested that no further step would be taken. There was, therefore, a legitimate basis for Shell Eastern to keep the Appellant on suspension so long as the continuation of that suspension was not unduly long, while determining whether its express right to terminate should be invoked. There was no suggestion that it was unduly long.

44 Second, we turn to the Appellant's conspiracy claim. By failing to contest the finding that Mr Lim did not act improperly and did not have an intention to induce Shell Eastern to act in breach of contract, it followed that the Appellant's conspiracy claim could not succeed. Indeed, on the Appellant's case, the leading parties to the alleged conspiracy were Mr Lim and Mr Kokkinis. Once Mr Lim fell out of the picture, the conspiracy between Mr Kokkinis and other members of Shell Eastern and STASCO, which we emphasise were ***not specified*** in the Appellant's pleadings, was far too vague to be made out. A conspiracy requires a combination between at least two persons. Without Mr Lim, or at least some other named individual, such combination certainly cannot be found.

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45 The nebulous character of the Appellant's alleged conspiracy was also clear from the documents on which he relied to prove its existence. A key piece of evidence on which the Appellant relied to show that Mr Kokkinis and other members of Shell Eastern and STASCO were involved in a conspiracy, was an email Mr Kokkinis had sent to other senior members of the two companies on 17 December 2017. This email was equivocal. Therein, Mr Kokkinis set out, in a poor light, the Appellant's relationship with Shell Eastern over the last two years at that point. The Appellant's case was that this indicated a combination between Mr Kokkinis and the email's recipients, their intention being to concoct a basis to terminate him. It is important to note that there were seven recipients and the only person to reply was Mark Quartermain ("Mr Quartermain"), Vice President of Products Trading and Supply in STASCO. Mr Lim was not one of the seven recipients.

46 Admittedly, Mr Quartermain seemed to have picked up on an allegation raised by Mr Kokkinis, which was unrelated to those being investigated by Ms Balasundaram. On that basis, he suggested that Mr Kokkinis quickly conduct an interview with the Appellant to determine whether a "non-assisted exit from Shell", as opposed to an "assisted exit from Shell (*ie*, with financial support)", was in play. By "non-assisted", he seemed to have meant dismissal with cause. Although we appreciated why the Appellant was aggrieved by Mr Kokkinis' email and Mr Quartermain's response, we were unable to conclude that this exchange evidenced a combination in connection with a conspiracy to concoct justifications for his termination. Mr Kokkinis did not take up Mr Quartermain's suggestion and ultimately did not interview the Appellant. If there had been a combination between the parties to find a means to dismiss the Appellant with cause – thus, denying him any financial benefits upon severance – one would expect such an interview at least to have been conducted.

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47 Thus, for the above reasons, the Appellant's contractual claim against Shell Eastern for keeping him suspended despite the conclusion of the investigation, as well as his conspiracy claim against both respondents, both failed. The failure of these complaints, in turn, undermined the Appellant's claim that his contract of employment was terminated arbitrarily, capriciously, or in bad faith. Without Mr Lim's malicious falsehood, or even his intent to induce Shell Eastern's breach of contract; without the conspiracy; and without any breach on Shell Eastern's part in respect of the investigation or the Appellant's suspension, there was simply no hook on which the Appellant could hang his claim of arbitrariness, capriciousness, or bad faith. We therefore also dismissed his appeal in this regard.

Third Head of Loss

48 We now turn to the Third Head of Loss, *ie*, reputational damage, which the Appellant claimed to have suffered as a result of the Platts Article, as well as his consequent inability to find new, comparable employment in the shipping industry. In this regard, we emphasise that there was inconsistency between the case pleaded by the Appellant, and that which he sought to advance before us on appeal.

49 His pleaded case comprised two causes of action. First, that he suffered the Third Head of Loss as a result of Shell Eastern's negligent failure to protect the strict confidence of the investigation. This failure, he suggested, led directly to the publication of the Platts Article which affected his reputation. Second, that Shell Eastern refused, in breach of contract, to disclose the outcome of the investigation to him. Thus, he was unable to use that information to clear his name and obtain new employment. In our view, neither cause of action was made out.

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Leak of confidential information

50 As a preliminary point, we note that the Appellant couched his claim in respect of Shell Eastern's alleged leak of information, both in terms of tortious negligence as well as a breach of contract (see [14]–[15] above). In our view, this was unnecessary. Whether premised on a tortious or contractual duty, the Appellant's core complaint was that Shell Eastern had been negligent in failing to protect the confidentiality of the fact and content of the investigation.

51 To establish this, the Appellant simply pointed to the fact that there *was* a leak, and relied on the maxim *res ipsa loquitur*. The Judge held that: (a) *res ipsa loquitur* only applied to accident and injury cases; and (b) even if it did apply to leaks of confidential information, it would not have been satisfied given that there were loose ends as to who might have leaked the information.

52 On appeal, the Appellant's complaint was that the Judge erred in both of these findings on *res ipsa loquitur*. However, counsel for the Appellant, Mr Choo, did not refer the court to any authority to support his proposition that *res ipsa loquitur* could extend beyond the established category of personal injury and accident cases, to cases concerning the leak of confidential information. He therefore failed even to get past hurdle (a).

53 In our view, the Judge was correct in finding that *res ipsa loquitur*, as a form of evidential inferential reasoning, only comes into play in cases where there is insufficient direct evidence to establish the cause of an *accident or injury*, and where the alleged tortfeasor was in control of the circumstance attendant on the accident (*ie*, the fact of control was the cause of the harm). Indeed, in our survey of some key textbooks, we did not find any cases which could support Mr Choo's proposition. The Singapore cases cited by Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy

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Publishing, 2nd Ed, 2016) at paras 06.088 to 06.097, expectedly, only concerned *physical* accidents and injury. Similarly, two leading texts dedicated specifically to the law of negligence, *Charlesworth & Percy on Negligence* (Christopher Walton gen ed) (Sweet & Maxwell, 14th Ed, 2018) ("*Charlesworth & Percy*") and Richard A Buckley, *Buckley: The Law of Negligence and Nuisance* (LexisNexis, 6th Ed, 2017) ("*Buckley*"), do not cite any case with an allegation similar to the present case (see *Charlesworth & Percy* at paras 6-29 to 6-41 and *Buckley* at para 2.32). The cases cited by the authors were all concerned with physical harm, accidents, and injuries.

54 In any event, we also agreed with the Judge that, even if *res ipsa loquitur* could apply to cases concerning the leak of confidential information, the Appellant had not shown that the presumption ought to be engaged. In *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 ("*Grace Electrical*"), the Court of Appeal restated the requirements for the presumption to apply (at [39]). Applying them here, the Appellant would have needed to show: (a) that Shell Eastern had been in control of the situation which resulted in the accidental leak of confidential information (the "accidental leak"); (b) that the accidental leak would not have occurred in the ordinary course of things had proper care been taken; and (c) that the cause of the accidental leak was unknown.

55 We agree with the Judge's assessment that it was plausible that Mr Balota or Mr Jones could have been the source of the leak. The Appellant submitted that these individuals were highly unlikely to have been the source, but this somewhat missed the point. *Who* leaked the information is an unknown fact, and without that evidence, the court could not eliminate them as potential sources. This necessarily took away the element of control over the situation out

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of Shell Eastern's hands, and the first requirement of *Grace Electrical* was therefore not satisfied.

56 In fact, even if Mr Balota and Mr Jones had given evidence that they did not disclose the fact of the investigation to Platts, that still may not have been enough to satisfy the first requirement. During the meeting on 10 January 2018, the Appellant candidly stated that he "told many people that [he had been] abused by the Vitol charterer" (*ie*, Mr Jones), and so "many people knew about that case [*sic*]". This suggested that there may even have been other potential sources of the leak.

57 On these bases, we dismissed the appeal in respect of the Appellant's claims that Shell Eastern ought to be held liable – whether in tort or contract – for the losses he suffered as a result of the Platts Article, because of its failure to protect the confidentiality of the fact and content of the investigation.

Failure to inform Appellant of investigation outcome

58 Next is the Appellant's claim that Shell Eastern failed, in breach of his contract of employment, to disclose the outcome of the investigation to him. Given that Shell Eastern's notice of suspension expressly provided that he would be informed of the outcome of the investigation, it appeared to us that Shell Eastern resiled from its earlier position and refused to honour its promise despite the Appellant's repeated requests for disclosure.

59 That said, the promise was to "inform" the Appellant of the outcome. Such information, even if verbally conveyed to him but without any formal written verification, was not, as Mr Choo suggested at the appeal, what the Appellant required to dispel the misinformation in the Platts Article during his job search. We elaborate on this at [63] below.

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The Appellant's unpleaded claims

60 The two claims which the Appellant raised in the appeal before us, which he did not plead in his statement of claim were as follows.

61 First, on the basis that Shell Eastern was contractually obliged, as his employer, to correct misinformation so as to protect him from reputational harm, the Appellant argued that Shell Eastern *should* have informed the Platts representative who made the Platts Query, that the investigation had concluded with the finding that all allegations were "inconclusive". This, the Appellant claimed, would have nipped the query in the bud, and prevented the publication of the Platts Article.[2] This, in our view, was a point which *should have* been pleaded. Indeed, when pressed on this gap at the hearing before us, Mr Choo, conceded that complaints pertaining to Shell Eastern's *response* to the Platts Query did not constitute part of the Appellant's pleaded case.

62 This was fatal because, as we noted at [10] above, the answer given by Shell Eastern's spokesperson was essentially a non-answer. If it had been the Appellant's case that such an answer was inaccurate, misleading, or that it had the effect of encouraging Platts to publish the article, that must have been put to witnesses for Shell Eastern, who in our view, deserved an opportunity to justify its response to Platts in the circumstances. We were mindful that, in the court below, the Judge nevertheless considered the point. However, this did not aid the Appellant because the Judge ultimately found that Shell Eastern was justified in responding to the Platts Query in the way it did (see the GD at [112]–[122]). This left us with a factual finding adverse to the Appellant, and no pleadings and evidence against which the veracity of that finding could be

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2 Appellant's Case (10 Aug 2021) ("AC") at paras 68–70.

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measured or tested. Therefore, on these bases, we dismissed the Appellant's attempt to raise this issue on appeal.

63 The Appellant's second unpleaded claim was that Shell Eastern was also contractually obliged to provide him a formal document which stated the outcome of the investigation. This would have cleared up the false allegations made against the Appellant in the Platts Article, and he would then have been able to use this document in applications for comparable roles in the shipping industry.[3]

64 Not only did the Appellant fail to plead this claim, his counsel, Mr Choo informed us that no such letter was ever requested as a matter of fact. Mr Choo attempted to save the point by explaining to us that the Appellant had made clear to Shell Eastern during the meeting on 10 January 2018 (see [12] above) *why* he needed to know the outcome of the investigation against him. However, this was not in our view, sufficient. It is one matter for the Appellant to say why he needed to know the outcome; it is another matter whether he had even requested a written statement of the outcome. Furthermore, the Appellant did not establish that if he had received a written statement stating that the outcome was inconclusive, that would have made a material difference to the prospective employers.

Conclusion

65 The foregoing analysis deals with all causes of action the Appellant put before us. In the circumstances, we dismissed his appeal in its entirety on the facts. Costs of $50,000 inclusive of disbursements were awarded to the respondents, and the usual consequential orders followed.

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[3] AC at paras 59–65.

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66 Despite our conclusion on the appeal, however, we wish to call attention to one aspect of the earlier position taken by Shell Eastern to "inform" the Appellant of the outcome of the investigation. To repeat, in the notice given to the Appellant when he was suspended, it was *expressly* provided that he would be informed of the outcome of the investigation upon its conclusion. Despite many requests from the Appellant in the months leading up to his termination, such information was *never* communicated to him. It took the process of general discovery in the proceedings below for him to obtain the investigation report, and thus learn that Ms Balasundaram had found the allegations made by Mr Jones "inconclusive". In fact, *even at the hearing before us*, counsel for the respondents, Ms Goh Seow Hui ("Ms Goh"), continued to maintain two submissions. First, that as a matter of law, Shell Eastern was not under an obligation to make such disclosure to the Appellant. Second, at the point of termination, that disclosure to the Appellant was neither meaningful nor productive given that Shell Eastern had, in any event, decided to terminate the Appellant's contract of employment without cause, and with pay in lieu of notice.

67 Even though, as we had found, this non-disclosure did not give rise to any legally remediable claim, we were disappointed to hear Ms Goh's submissions. If Shell Eastern wished to keep the Appellant's contractual termination separate from the investigation, it could have done so whilst still subsequently informing the Appellant of the investigation's outcome. Putting aside the issue of a formal letter evidencing the outcome (see [63]–[64] above), we see no reason for Shell Eastern to have insisted upon non-disclosure *to the Appellant*, who was the very subject of the investigation.

68 Employment is a two-way relationship and quite unlike most other wholly commercial contractual relationships. Yet, all we heard when Ms Goh

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made her submissions, was what *Shell Eastern* thought to be meaningful and productive and what *Shell Eastern* considered its legal obligations to be. The focus was only from Shell Eastern's point of view. It did not appear that Shell Eastern paused to think what the *Appellant* might have found meaningful, productive, or cathartic to be told. It seemed to us that it would only be fair for Shell Eastern to inform the Appellant of the outcome since he was the subject of the investigation, whether or not Shell Eastern was legally obliged to do so. This was all the more so when Shell Eastern's *own notice* provided that the Appellant would be informed of the outcome. In the circumstances, we were not impressed by Shell Eastern's subsequent conduct and approach, both of which lacked sense and sensibility. In our view, employers will do well to consider with greater circumspection, how to treat their employees with dignity and respect even upon the parting of ways.

Postscript: Observations on the law

69 We have, in our analysis above, approached the Appellant's case entirely on the facts. In particular, we have been careful not to address the specific legal basis on which he claimed Shell Eastern acted in breach of contract (see [15] above), that is, as we alluded to at [30] above, the implied term of mutual trust and confidence. We take the opportunity to state that it is not settled by the Court of Appeal that this implied term forms a part of Singapore law. It was thus proper to disentangle the failure of the Appellant's case *on the facts*, and the existence of this implied term *at law*, to which we now turn.

Status of the implied term of mutual trust and confidence

70 The general form of the Appellant's case relied heavily on the existence of the implied term of mutual trust and confidence. Indeed, in the court below,

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the Judge's decision turned substantively not only on the existence of this implied term, but its scope. From [40]–[43] of the GD, he considered some local cases and concluded that the implied term "has been accepted" into Singapore law not only on the authority of the High Court's decision in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 ("*Cheah Peng Hock*"), but also the Court of Appeal's decision in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 ("*Wee Kim San*"). We accept that, in *Cheah Peng Hock*, Quentin Loh J (as he then was) stated in clear terms that, "unless there are express terms to the contrary or the context implies otherwise, an implied term of mutual trust and confidence, and fidelity, is implied by law into a contract of employment under Singapore law" (at [59]).

71 We are also aware that a number of other High Court cases have alluded to or implicitly accepted the term. Apart from those discussed by the Judge, namely, *Cheah Peng Hock*, *Wong Wei Leong Edward and another v Acclaim Insurance Brokers Pte Ltd and another suit* [2010] SGHC 352 ("*Edward Wong*"), and *Brader Daniel John and others v Commerzbank AG* [2014] 2 SLR 81 (see the GD at [40]–[42]), there were others such as *Tullett Prebon (Singapore) Ltd and another v Chua Leong Chuan Simon and others and another suit* [2005] 4 SLR(R) 344 ("*Tullett Prebon*"), *Leong Hin Chuee v Citra Group Pte Ltd and others* [2015] 2 SLR 603 ("*Leong Hin Chuee*"), and to a lesser extent, *Arul Chandran v Gartshore and others* [2000] 1 SLR(R) 436 ("*Arul Chandran*").

72 In *Tullett Prebon*, Choo Han Teck J allowed an application to injunct five employees from working for a third party. The employees had argued that they ought not to have been injuncted on the basis that their previous employer had breached the implied term and thus, that they were constructively dismissed (at [5]). Choo J rejected this argument and held that whether there had in fact

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been such a breach, was more appropriately determined at trial, thus implicitly accepting that such a term existed and could therefore have been breached. Second, in *Leong Hin Chuee*, Tan Siong Thye J directly affirmed *Cheah Peng Hock* (at [149]). Lastly, in *Arul Chandran*, G P Selvam J alluded to the consequences of *Malik and Mahmud v Bank of Credit and Commerce International SA (in Compulsory Liquidation)* [1998] AC 20 ("*Malik*") in relation to claims *in contract* (as opposed to tort) for damage to one's reputation, without accepting or rejecting the existence of the implied term that gave rise to such a claim in *Malik* (at [20]–[23]).

73 We are, however, less certain of this proposition on the authority of *Wee Kim San*. Though there appears to be ample High Court authority which appears to have accepted the implied term, the Court of Appeal in *Wee Kim San* did not formally endorse the implied term as Loh J did in *Cheah Peng Hock*. In fact, the Court of Appeal's discussion of the term was, in our view, limited substantially by the factual and procedural context of the case before it.

74 The court was only asked to decide whether the appellant's claim for damages (the appellant being the employee and plaintiff in this matter), which relied on breaches of the implied term, ought to be summarily struck out. On this basis, it analysed the boundaries of the implied term and reached the conclusion that the heads of damages which the appellant sought to recover, were "legally unsustainable" (see *Wee Kim San* at [21]–[36]). This, in our view, does not support any firm conclusion that the court had accepted the implied term into Singapore law. At its highest, it can only be said to have been giving the appellant's case the fullest possible consideration in determining whether his claim for damages should be allowed to proceed further. The appellate court did not accept the proposition that breaches of different types of terms which result in identical consequences can nonetheless give rise to different measures

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of damages. Where the consequences of breaches of different types of terms are the same (*ie*, damages for financial loss arising from the premature termination of employment), there is no legal reason to recompense an employee-plaintiff differently, based on the particular type of term that has been breached. On this basis, the Court of Appeal determined that the appellant in *Wee Kim San* had no legally sustainable basis to claim anything more than what he had already received. If the facts had been such that the Court of Appeal had found his claim to be legally *sustainable* (in a manner akin to *Tullett Prebon*), that would have been a different matter. However, that was not the case. There was, for example, no claim for post termination losses. We therefore do not see *Wee Kim San* as clear authority for the acceptance of the implied term.

75 Indeed, the Court of Appeal was cognisant that *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 – then in the Federal Court of Australia – was on appeal to the High Court of Australia ("HCA") (*Wee Kim San* at [30]). It noted in passing that there was a "strong dissent" by Jessup J suggesting that the implied term should not form part of Australian law. Since then, the HCA has unanimously vindicated Jessup J's view (see *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356 ("*Barker*")), holding that the implied term of mutual trust and confidence did not form a part of Australian employment law (at [26]). The HCA reasoned that the implied term had arisen *specifically* within the context of the United Kingdom's ("UK") legislative framework, and that outside that framework, the term itself was not necessary to secure the effective operation of employment contracts (at [91]–[110]). The court even remarked at the very outset of its decision, that the implication of such a term "is a step beyond the legitimate law-making function of the courts" (at [1]).

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76 We are, like the HCA, very mindful of the specific context in which the implied term was developed. That is, within the UK's legislative framework which introduced an action for "unfair dismissal" in 1971. When the legislation was first enacted, it only accommodated claims resulting from ordinary, outright dismissals (*ie*, "you're fired" cases). It was later amended, however, to include cases where an *employee* is the one to terminate his own contract of employment "in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct" (see s 95(1)(*c*) of the Employment Rights Act 1996 now; it was then enacted in Schedule 1, para 5(2)(*c*) of the Trade Union and Labour Relations Act ("TULRA") 1974). The question which this change gave rise to, expectedly, was *when* an employee would be so entitled to terminate. In 1977, the English Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 ("*Western Excavating*") preferred to answer this question by reference to the employer's repudiatory breach (see 769 *per* Lord Denning MR). In other words, an employee would only be "entitled to terminate" if his employer had first committed a repudiatory breach of the contract of employment. It was in these circumstances that the implied term was formulated.

77 The classic formulation of the implied term is that laid down by Lord Nicholls in *Malik*. There, his Lordship held that the term places a "portmanteau, general obligation" on the parties "not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages" (at 35A). On this view, the implied term operates to secure the *continued functioning* of the employment relationship, and though the term entails the potential imposition of a wide range of specific obligations, those obligations must go towards that purpose, and cannot extend past the subsistence of the employment relationship. In fact, if we view Lord Nicholls' formulation through the lens of *Western*

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Excavating and the historical development of the implied term, we can easily understand why his Lordship spoke specifically of "trust and confidence" as is necessary for the employment relationship "*to continue*".

78 Notwithstanding this, as the Court of Appeal in *Wee Kim San* observed, though the implied term has its origins within the concept of "constructive dismissal", it is no longer so narrowly cast, and a breach of the implied term can also give rise to *common law* claims for premature termination losses or other financial losses flowing from the loss of employment prospects (see *Wee Kim San* at [24]–[35]).

79 As the law stands in the UK, the implied term is not merely relevant to the finding that an employee has been "constructively dismissed" such that he satisfies one of the prerequisites necessary to bring an unfair dismissal claim under the Employment Rights Act 1996 (as presently enacted). We accept that the very significance of *Western Excavating* is the connection which the Master of the Rolls draws between the statutory unfair dismissal regime and the common law of employment contracts. By this link, he rendered the application of the statutory regime subject to an analysis framed by common law principles. However, it is not self-evident that the common law principles developed in support of the application of the statutory regime (*ie*, the implied term) can only be understood in the legislative context in which they were developed (*ie*, the TULRA 1974). Ultimately, the form which the analysis has taken is an implied term in law, and such a term can, in our view, exist in and of itself, independent of the specific and unique legislative backdrop against which it was developed. As long as the court is able to precisely delineate the scope of the implied term; and elucidate the appropriate remedial consequences which should follow from a breach of such term (as the Court of Appeal did in *Wee Kim San*), we do not

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see its historical origin as a fundamental and insurmountable objection to its acceptance.

80 Nevertheless, in light of the strong rejection of the implied term by the HCA, and the potential cogency of the court's reasoning in Singapore's context (given that we too, do not have a legislative framework akin to that of the UK), the Court of Appeal may, in an appropriate case, revisit its decision in *Wee Kim San*. As explained at [73] above, the Court of Appeal there was not called to and therefore did not specifically analyse whether the term *should* form a part of Singapore law, as the HCA had done in *Barker*. As stated at [74] above, it simply considered the issue of damages in the context of whether there was any legal basis to compensate an employee-plaintiff differently, in circumstances where: (a) certain types of terms have been breached; and (b) identical consequences have arisen as a result of the breaches of different types of terms.

81 Our view is supported both by academic commentators as well as, it appears, the Court of Appeal itself. Associate Professor Ravi Chandran suggests in his article "Fate of Trust and Confidence in Employment Contracts" (2015) 27 SAcLJ 31, that it is unclear whether *Wee Kim San* can be construed as support for the existence of the implied term (at [10]). More saliently, however, in *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695, the Court of Appeal – whilst rejecting the existence of a general implied duty of good faith in Singapore contract law – observed that "the law in this particular sphere … continues to be in a state of flux". The court, noting that the HCA in *Barker* had since rejected the House of Lords' decision in *Malik*, then went on to indicate (at [44]) that *Wee Kim San* left the status of the implied term open for decision in a future case:

> 44 … [The Court of Appeal discussed possible formulations of the duty of good faith and then states:] Whether or not the

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> formulation in this last-mentioned decision is too vague and general is a question which is (fortunately) outside the purview of the present appeal – ***as is the (more specific) issue as to whether or not the implied term of mutual trust and confidence ought to apply in the employment context such that a term ought to be implied in law that neither party will, without reasonable cause, conduct itself in a manner that is likely to destroy or seriously damage or undermine the relationship of trust and confidence between employer and employee*** (this principle being first established in the leading House of Lords decision of *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1998] AC 20, which was, however, *not* followed in the recent High Court of Australia decision in *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 (***with the position in Singapore still left open for decision in a future case*** (see the decision of this court in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357))).
>
> [Emphasis added]

82 By this remark, it appears to us that the Court of Appeal's own reading of *Wee Kim San* is that the question has yet to be determined. We therefore take this opportunity to state that the status of the implied term of mutual trust and confidence has not been clearly settled in Singapore. It remains an open question for the Court of Appeal to resolve in a more appropriate case, ideally with facts capable of bearing out a claim based directly on the existence of the implied term.

Limitations of contractual discretions

83 We turn next to another point of law raised by the Appellant.

84 As mentioned at [23] above, the Appellant's counsel sought to persuade us that the law ought to apply a prohibition against arbitrariness, capriciousness, and bad faith, so as to restrict an employer's exercise of his express contractual right to terminate an employee without cause, either with notice or pay in lieu of notice. He advanced that the juridical basis of this prohibition could either be

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the implied term of mutual trust and confidence, or an independent limitation on contractual discretions.[4] However, as Mr Choo did not elaborate on the extent to which an express contractual right to terminate should be restricted on either of the two bases he proposed, it was not meaningful to consider either.

85 Be that as it may, we offer some observations. As regards the first basis proposed, Mr Choo's failure to address the interaction between an express right to terminate and the implied term was fatal. Even if the implied term had been accepted in Singapore, its very character is an *implied* term, not a non-derogable norm which the law superimposes on employment contracts. Indeed, in *Cheah Peng Hock*, Loh J only accepted that *Malik* formed a part of Singapore law *in these terms*:

> 59 In my judgment ***unless there are express terms to the contrary or the context implies otherwise***, an implied term of mutual trust and confidence, and fidelity, is implied by law into a contract of employment under Singapore law. As stated in [*Malik*] at 45, ***the implied term of mutual trust and confidence operates as a default rule. Parties may thus exclude or modify them to limit its content***. It also follows that express terms may modify the scope of the implied term.
>
> [Emphasis added]

86 In respect of the proposition that contractual discretions are subject to independent limitations, Mr Choo again did not elaborate on the extent to which the contractual right was to be restricted. Nevertheless, as this proposed basis does not rely on the rather established interaction between implied and express contractual terms, we will address some cases on which he relied.

87 Mr Choo relied on the case of *Leiman, Ricardo and another v Noble Resources Ltd and another* [2018] SGHC 166 ("*Leiman*"), which he submitted,

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4 AC at para 90.

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should be extended to an employer's contractual discretion to terminate an employee pursuant to an express termination clause. In *Leiman*, George Wei J held that an employer's contractual discretion to determine whether an employee was entitled to receive severance payments and benefits was subject to the requirements of rationality, good faith, and consistency with the contractual purpose of the discretion (at [112]–[114]). In support of his view, Wei J referred to the decision of *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661 ("*Braganza*") at [30], as well as *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 ("*MGA*") at [104].

88 We do not accept that the line of cases from which *Leiman* stems, extends to restrict the contractual right to terminate with notice. The starting point for this conclusion is the case of *Braganza* itself. Here, the plaintiff's husband disappeared at sea whilst serving as chief engineer on the first defendant's vessel. He was, however, engaged by the second defendant, and his contract of employment therewith provided for a death-in-service benefit, save where his death was found to have resulted from his own wilful act. The second defendant set up an investigation team and found: (a) that there was no foul play; (b) that the husband did not have a good reason for going out onto the vessel's deck that night, though it did not take steps to rule out the possibility; and (c) that the husband had committed suicide, in light of messages he exchanged with the plaintiff showing that he had been troubled by financial, amongst other worries. Based on its finding, the second defendant declined to pay out the death-in-service benefit.

89 The plaintiff challenged this decision, and in the UK Supreme Court, it was found that the second defendant was obliged to undertake its investigations, and thus reach its conclusion on the cause of death, in good faith, without being

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arbitrary, capricious, or irrational in the sense used when reviewing decisions of public authorities (at [19] *per* Baroness Hale; [57] *per* Lord Hodge; and [103] *per* Lord Neuberger, though he dissented on the facts). The majority held that the conclusion that the husband committed suicide required "cogent evidence" to form the "positive opinion" that it took place (at [36] *per* Baroness Hale and [60] *per* Lord Hodge), and found on the facts that there was an absence of such evidence. Pointing to factors which they found rendered the conclusion of suicide an "improbability", they concluded that the second defendant's team of investigators did not have the evidential basis to reach their conclusion.

90 In *MGA*, the discretion pertained to one contracting party's ability to decide its own remuneration or commission for providing trade finance services. In *Leiman*, the discretion was that of the employer to determine whether, and if so, how much, annual bonus should be paid to the employee. Though these cases suggest that contractual discretions are not wholly unfettered, the threshold for judicial intervention is not low. As observed in *MGA* at [106], the courts will not generally intervene unless the contracting party's exercise of such discretion is "so outrageous in its defiance of reason that it can be properly categorised as perverse" (citing *Ludgate Insurance Co Ltd v Citibank* [1998] Lloyd's Rep IP 221 at [35]).

91 At any rate, it will also be noticed from *Braganza*, *MGA*, and *Leiman*, that the contractual discretions in question relate to rights subsisting *within* the contours of their respective contracts. The restrictions in those cases served to ensure that a party's contractual discretion was not exercised in a manner which deprived its counterparty of its contractual rights, or which warped their contractual bargain. The courts there certainly did not limit the right to bring their respective contracts *to an end*. This is a crucial distinction which, in our

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view, powerfully undercuts Mr Choo's argument that *Braganza*, *MGA*, and *Leiman* should be extended.

92 Where the termination of a contract is concerned, especially where there is an express clause permitting termination by way of notice, considerations of the parties' freedom of contract (and conversely, to exit contracts) come into play. If the court applies the restriction in *Braganza* to the termination clause in this case, it would effectively be limiting such freedom. Nothing in Mr Choo's submissions satisfied us that there are sufficient reasons to alter so fundamental a premise of contract law in Singapore. Furthermore, in the case of employment contracts, the right to terminate with notice or pay in lieu of notice tends to cut both ways. This was, in fact, the case here. Clause 5 of the Appellant's contract of employment read, "You, or the Company [Shell Eastern], shall have the right to terminate your employment herein by giving the other party three months' notice in writing". Thus, if the restrictions in *Braganza* are applied to limit an employer's right to terminate, it is difficult to see why the employee's contractual discretion to quit would not likewise be limited. That, however, would seem to be a particularly unpalatable proposition in the field of employment law, where it is trite that employers cannot be compelled to hire or retain, but more importantly, that employees cannot be forced to work.

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93 We therefore suggest, albeit only in *obiter*, that the position advanced by Mr Choo was not an acceptable direction in which the law of contracts ought to be developed.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

See Kee Oon
Judge of the High Court

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