Yeo Nai Meng v Ei-Nets Ltd and Another
[2003] SGHC 110

Case Number : Suit 1279/2001, 1308/2001

Decision Date : 09 May 2003

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Rey Foo (K S Chia Gurdeep and Param) for the plaintiff; Lim Chor Pee and Dwayne Tan (Chor Pee and Partners) for both defendants

Parties : Yeo Nai Meng — Ei-Nets Ltd; Liau Beng Chye

Tort – Defamation – Qualified privilege – Defamatory material circulated to company's directors and other persons – Whether defence of qualified privilege applied

1 Yeo Nai Meng ("Yeo"), the plaintiff in both these suits, was a shareholder and director of Plan-B Technologies Pte Ltd ("Plan-B"), a company in the business of starting and/or incubating technology-related companies. Plan-B Speed.com Pte Ltd ("Speed") was a wholly-owned subsidiary of Plan-B with a paid-up capital of 600,000 shares of $1 each. Yeo was the Managing Director of Speed. Speed had a subsidiary called Suntze Communications Engineering Pte Ltd ("Suntze") in which Speed held 74% of the issued and paid-up capital. The Managing Director of Suntze was one Lawrence Tan Wai Liang ("Tan"), one of its minority shareholders. I will refer to Speed and Suntze together as "the Speed Group".

SPS Agreement

2 In late 1999, Strike Engineering Ltd ("Strike") – a company listed on the Singapore Stock Exchange – became interested in investing in Speed. On 18 November 1999, a Sale, Purchase and Subscription Agreement ("SPS Agreement") was entered into between Plan-B, Strike and Speed. Under the SPS Agreement, Plan-B and Strike were to end up by each owning 4.6 million shares in Speed. This was to be achieved in two stages.

3 Under the first stage, Plan-B was to transfer all its 600,000 ordinary shares in Speed to Strike for a consideration of $5 million which was to be fulfilled by Strike issuing to Plan-B on completion date 11,574,000 new ordinary shares of $0.05 each in Strike. On completion date, Strike was to subscribe for 2 million new shares at par in Speed for $2 million. Completion of the first stage was to take place within seven days of approval being obtained from the Stock Exchange for the listing of the consideration shares or approval of the SPS Agreement by the shareholders of Strike, whichever happened later.

4 Under the second stage of the of the SPS Agreement, 30 days from completion of the first stage, Plan-B was to subscribe for 2.6 million new shares in Speed for $2.6 million. 60 days from the said completion date Strike and Plan-B were to subscribe for 2 million shares each in Speed at par. The completion of the second stage was therefore dependent on when completion of the first stage was effected.

Memorandum of Understanding

5 Soon after the SPS Agreement was entered into, Strike and Plan-B (together referred to as the "Vendors") entered into negotiations with ArmorCoat International Pte Ltd ("ArmorCoat") and its wholly-owned subsidiary Ei-Nets.Com Ltd ("Ei-Nets") for Strike, Plan-B and ArmorCoat to jointly seek the public listing of Ei-Nets. Towards this end, the parties, on 7 January 2000, entered into a

Memorandum of Understanding ("MOU") wherein it was envisaged that the Vendors would inject all their shares in Speed – which would be 9.2 million shares assuming the SPS Agreement was fully completed – into Ei-Nets in exchange for shares of Ei-Nets.

6 The MOU recognised that the Vendors did not as yet have the 9.2 million shares in Speed to inject into Ei-Nets. This is evident from Recital B to the MOU which stated:

> Speed *will have* an issued and paid up share capital of $9.2 million divided into 9.2 million ordinary shares of $1 each all of which *will be fully paid and will be legally and beneficially owned* by the Vendors in the following proportions:
>
> Strike – 4,600,000 shares
>
> Plan-B – 4,600,000 shares.

[Emphasis added]

The MOU also provided in cl 1.8 that "the cash that Speed will bring to Ei-Nets will remain the property of Speed until Ei-Nets is listed on the Singapore Stock Exchange".

SE Agreement

7 Under the MOU, the parties were to use their best endeavours to enter into a formal Share Exchange Agreement ("SE Agreement") as soon as possible and in any event not later than 31 January 2000. This deadline proved to be too optimistic. There were many delays and, in the event, the SE Agreement was entered into only on 22 May 2000.

8 As at 22 May 2000, only the first stage of the SPS Agreement had been completed. This occurred on 9 May 2000. The fact that the Vendors still did not have 9.2 million shares in Speed was recognised in the SE Agreement by Recital B of the MOU being repeated in the SE Agreement. Clause 1.8 of the MOU referred to above was also repeated (as cl 7.6) in the SE Agreement.

9 It was stipulated in cl 2.1 of the SE Agreement that the share exchange was conditional upon:

> (c) the acquisition by Strike of shares in [Speed] in the proportion set out in Recital B hereof having been completed and
>
> (i) [Speed] having S$8.6 million cash injection in the form of equity in [Speed] and
>
> (ii) [Speed] having Net Tangible Asset ("NTA") value of not less than S$6 million on 15 June 2000."

I will refer to the conditions in cl 2.1(c) of the SE Agreement as the "conditions precedent". The date – 15 June 2000 – specified in the conditions precedent was the completion date provided for in the SE Agreement.

Completion of the SPS Agreement

10 The Vendors, by 15 June 2000, had not completed the second stage of the SPS Agreement. They were therefore not in a position to complete the SE Agreement by that date. ArmorCoat and Ei-Nets also faced difficulties in meeting the deadline of 15 June 2000. The parties therefore mutually

agreed to postpone completion and, in the event, completion took place only on 19 July 2000.

11 On 28 June 2000, completion of the second stage of the SPS Agreement took place. On that day the Board of Directors of Speed approved the issue of 2 million new shares to Strike and 4.6 million new shares to Plan-B for a consideration of $6.6 million. Strike paid for the 2 million shares by way of a cheque for $2 million handed to Speed on that day. Plan-B paid for the 4.6 million shares by handing to Speed on that day two cheques (one for $2 million and the other for $675,585) and by capitalising the inter-company outstanding of $1,924,415. To effect the capitalising, inter-company loans between Suntze and Plan-B were transferred to Speed. It is the alleged improprieties in this capitalisation and the transfers of inter-company loans in connection therewith that forms the nub of the dispute in this case.

12 The three cheques were cleared by 13 July 2000. The delay in clearance, according to Yeo, was because the directors of Speed were undecided whether, in view of cl 7.6 of the SE Agreement, the proceeds of the cheques should be paid directly into a separate deposit account or whether it should go into the general account of Speed. The audited accounts of Speed treated these cheques as received by 30 June 2000.

The inter-company loans

13 Plan-B, as the holding company of Speed had, from time to time, advanced funds for the activities of Speed and its subsidiary Suntze. As such, both Speed and Suntze owed moneys to Plan-B. There was no formal agreement between Plan-B and Speed/Suntze in respect of these advances. The audited accounts of both Speed and Suntze noted that there were no fixed terms of repayment in respect of these advances.

14 In January 1999, Suntze had entered into a contract with the owners of a motor-vehicle trading centre to build, own and operate an IT and telecommunications portal related to the automotive industry ("the automotive portal"). The automotive portal was successfully built and Suntze was generating revenue therefrom.

15 In a memo to the Board of Suntze dated 29 September 1999, Tan proposed the sale of the automotive portal to Speed. The reasons given by Tan in this memo for the proposed sale were:

(a) repay all authorised loans due; and

(b) provide working capital for Suntze.

The formula for arriving at the sale price was also spelt out in the memo. It was estimated, at that time, that the sale price would be in the region of $2.5 million.

16 It is relevant to note that the memo originated from Tan who was a minority shareholder in Suntze and was not a shareholder in Speed. This indicates that the price was satisfactory to a minority shareholder and the transaction was probably on an arm's length basis.

17 Tan's proposal was accepted by all the directors of Suntze and the sale was effected. It is relevant to note that, except for Tan, the directors of Suntze were also the directors of Speed and Plan-B. Speed made payments to Suntze for the automotive portal and as at 30 May 2000 there remained a sum of $1,390,448 still payable by Speed to Suntze in respect of this acquisition.

18 As at 30 May 2000 the inter-company balances between Plan-B, Speed and Suntze stood as

follows:

	Plan-B	Speed	Suntze	Total
Amount due from/(to)	$	$	$	$
Plan-B	–	850,000	1,349,524	2,199,524
Speed	(850,000)	–	(1,390,448)	(2,240,448)
Suntze	(1,349,524)	1,390,448	–	40,924
	(2,199,524)	2,240,448	(40,924)	– .

19 Yeo held discussions with Tey Hui Choo ("Tey"), an accountant with the Speed Group, on the mechanics of injecting funds into Speed from Plan-B to complete the second stage of the SPS Agreement. Tey, in an e-mail of 23 May 2000 to Yeo, pointed that the injection could be achieved by offsetting inter-company loans and advances. She suggested that the amount of $1,074,415 owed by Suntze to Plan-B could be offset in the books of Speed against the amount of $1,390,448 that Speed owed to Suntze. She also suggested that an additional amount of $275,109 that Suntze owed Plan-B be transferred.

20 Yeo reviewed the recommendations of Tey, and approved only the transfer of the loan of $1,074,415. The final effect of the transfer/offsetting of inter-company balances were:

	Plan-B	Speed	Suntze	Total
Amount due from/(to)	$	$	$	$
Plan-B	–	1,924,415	275,109	2,199,524
Speed	(1,924,415)	–	(316,033)	(2,240,448)
Suntze	(275,109)	316,033	–	40,924
	(2,199,524)	2,240,448	(40,924)	– .

The effect of the inter-company transfer was to reduce the amount owing by Speed to Suntze by $1,074,415 and increase the amount owing to Plan-B by the same amount. As a result only a sum of $275,109 remained in the books of Suntze as payable to Plan-B. It is obvious that these inter-company transfers did not have any effect on the NTA of Speed as the amount owing to related companies remained at $2,240,448 before and after the transfers. The $1,924,415 that Speed owed to Plan-B as a result of these transfers was capitalised.

Completion of the SE Agreement

21 Upon completion of the second stage of the SPS Agreement, the Vendors were in a position to complete the SE Agreement. However, there were further delays and completion of the SE Agreement only took place on 19 July 2000. It is important to note that by 19 July 2000 the three cheques received by Speed on 28 June 2000 from Strike and Plan-B totalling $4,675,585 had been cleared by Speed's bankers and, assuming the capitalisation of the loans was in order, the NTA of Speed as at 19 July 2000 would satisfy the minimum requirement of $6 million specified in the

conditions precedent.

Listing of Ei-Nets

22 There was considerable work to be done by all the parties in connection with the preparation for the listing. It was originally envisaged that listing would be effected by July 2000 but in the event listing took place only on 22 January 2001. The Head of the Working Committee responsible for the listing arrangements, including preparation of the prospectus, was the 2nd defendant Liau Beng Chye ("LBC"). LBC was a shareholder of ArmorCoat and was the representative of ArmorCoat on the Board of Ei-Nets. Like Yeo, LBC was an engineer by training.

23 The SE Agreement had envisaged that upon completion, Ei-Nets, being the new holding company of Speed, would re-constitute the Board of Directors of Speed. Ei-Nets, however, did not do this immediately: the same Board of Directors with Yeo as Managing Director continued to manage Speed even after completion. According to Yeo, this was because the parties had agreed that in order to keep all their options open, it was agreed that Ei-Nets would take over the management of Speed only when public listing of Ei-Nets was imminent.

24 It was only in early January 2001, when arrangements for the public listing of Ei-Nets were at an advanced stage, that Ei-Nets re-constituted the Board of Speed. Yeo, at that stage, ceased to be Managing Director of Speed and instead assumed office as an Executive in Ei-Nets. The terms of his employment were set out a contract of employment dated 3 January 2001. It was at about this time too that LBC was appointed President and Chief Executive Officer ("CEO") of Ei-Nets. As an Executive of Ei-Nets, Yeo was required to report to LBC. Yeo was not appointed to the Board of Ei-Nets or any of its subsidiaries.

LBC's misgivings on Yeo

25 In May 2001, one Wan Tuck Wah, an employee of Ei-Nets, handed to LBC the results of the internal audit that Wan – for reasons not disclosed – had conducted on Speed ("the Wan Report"). The Wan Report was not disclosed by the defendants during the discovery process and it was not produced in court. It was, however, alleged by LBC that the contents of the Wan Report led him (LBC) to have misgivings about the accounts of Speed and he therefore approached Mr Lim Chor Pee ("Mr Lim") of Chor Pee & Partners for a legal opinion on the matter.

26 It was decided between LBC and Mr Lim that before Mr Lim gave his legal opinion, an outside accountant should be instructed to inquire into the matter and give his professional findings: Deloitte & Touche ("Deloittes") were the independent auditors of Speed, Suntze and even of Ei-Nets. As such, if there were issues raised in the Wan Report that needed investigation, one would have expected Mr Lim and LBC to have referred the matter to Deloittes but, for some reason this was not done. The accountant chosen to do the investigation was one JK Medora ("Medora") of JK Medora & Co. On 8 May 2001, Chor Pee & Partners instructed Medora on the matter. That letter to Medora was also not disclosed to Yeo or produced in evidence.

27 LBC, on being asked why he had not sought the views of Deloittes on the matter, replied to the effect that as Deloittes were the auditors of Speed they had their self-interest to protect. He therefore wanted an outside accountant.

The Medora Report

28 On 14 May 2001, Medora rendered his report ("the Medora Report") to Chor Pee & Partners.

In this report, Medora stated his terms of reference to be:

(a) Whether the conditions precedent set out in cl 2.1(c) read with cl 8.4 of the SE Agreement had been satisfied, viz cash injection of $8.6 million in the form of equity into Speed and the NTA of Speed as at 15 June 2000 to be not less than $6 million.

(b) Whether an amount of $351,388 owed by Suntze to Plan-B was transferred, on or about 31 July 2000, to Speed so that Suntze ended up owing Speed $351,388 and in turn Speed owed that amount to Plan-B.

29 After setting out what he considered to be the relevant background information and findings, Medora arrived at the following conclusions:

(a) As at 31 March 2000, Suntze owed Plan-B $1,447,827. Out of this amount $1,074,415 was on 31 May 2000 transferred from Speed's account to Plan-B's account in the financial records of Speed. This resulted in Speed owing Plan-B the amount of $1,924,415 ($1,074,415 + $850,000). The whole of this amount was capitalised, against which shares were issued by Speed to Plan-B. Medora concluded that the journal entries effecting the transfers were fictitious and the assumption of the loan by Speed to Plan-B was "an artificial transaction".

(b) The capitalisation of $1,074,415 resulted in the NTA of Speed being overstated by the same amount.

(c) NTA of Speed as at 30 June 2000 was only $1,267,147. Medora arrived at this amount in the following manner:

NTA per audited accounts as at 30 June 2000 $6,867,147

Deduct:

Capitalisation of loans due to Plan-B by Speed	(1,924,415)
Cheques banked after 30 June 2000	
But taken as banked in on 30 June 2000	(4,675,585)
Adjusted NTA	$1,267,147

(d) On 31 July 2000, a transfer of $351,388 was effected in the financial records of Suntze by showing that this amount was now owed to Speed instead of to Plan-B. Medora had not sighted any documents to support the basis of the transfer and concluded that this too was an artificial transaction.

30 Medora was of the view that the treatment in the audited accounts of Speed for the year ending 30 June 2000 of the three cheques given to Speed on 28 June 2000 as payments received as at 30 June 2000 was wrong as these cheques were not cleared till 13 July 2000. Medora testified that the audited accounts would have to be adjusted to correct this error. He said that if this was done the NTA, as at 30 June 2000, would fall short of the required $6 million.

The Chor Pee Report

31 On 21 May 2001, Mr Lim, after studying the Medora Report, submitted his report ("the Chor Pee Report") to LBC. The Chor Pee Report, like the Medora Report, was highly relevant to these proceedings as it was the basis on which Yeo was dismissed from Ei-Nets and its contents constituted a substantial part of the claim against the defendants in defamation. However, unlike Medora, Mr Lim – who appeared as counsel for Ei-Nets and LBC in these proceedings – did not testify.

32 In his report, Mr Lim arrived at the following conclusions:

(a) it would be necessary for the accounts of Speed to be fully investigated by Medora in order to understand the present accounts and cash balance in Speed;

(b) the fictitious journal entries highlighted by Medora appeared to be a fraudulent device to misappropriate the sum of $1,074,415 by the person or persons who authorised the transaction;

(c) the transaction amounted to a fraud on the part of the persons concerned;

(d) the debt of $351,388 created in the financial records of Speed as owing to Plan-B was without legal basis and was done surreptitiously: the entries appear to be fictitious and artificially created; and

(e) the entire device constituted a breach of s 76(1)(a) of the Companies Act which prohibits a company from giving financial assistance for the purpose of the acquisition of its own shares. By creating a debt (albeit non-existent) from Speed to Plan-B, the directors of Speed were in fact financing Plan-B to subscribe for shares in Speed. This amounted to fraud on the part of the persons concerned.

In his report, Mr Lim emphasised the criminality of the conduct of Yeo and Tey by adding that the false entries could also amount to a possible offence of criminal misappropriation under the Penal Code by the persons who authorised the journal entries.

33 Mr Lim ended his report by advising Ei-Nets that Speed initiate legal proceedings against:

(a) Plan-B for money had and received resulting from the payment of non-existent loans.

(b) Lim Soon Hock, Then Khek Koon, Yeo Nai Meng (the directors of Speed at the relevant time) and Tey Hui Choo for damages for conspiracy to misappropriate the sum of $1,074,415 and $351,388 (totalling $1,425,803) and to commit a breach of Section 76 of the Companies Act.

The counterclaim by Ei-Nets against Yeo in Suit 1308/2001 for the sum of $1,425,803 referred to in para 51 herein was clearly a consequence of the above advice.

The Audit Committee: PricewaterhouseCoopers Report

34 On receipt of the Chor Pee Report, LBC called for a meeting of the Audit Committee of Ei-Nets to which Yeo was also invited. The Medora and Chor Pee Reports, together with a third (unsigned) document which Yeo who had not had sight of the Wan Report thought was the internal audit report, were distributed to the Audit Committee members at the meeting. Prof Cham Tao Soon ("Prof Cham"), an independent director of Ei-Nets and a member of the Audit Committee, on realising that

Yeo had not had an opportunity to study the reports to give a meaningful response to the allegations therein, had the meeting postponed. Prof Cham also recommended that instead of relying on reports by accountants instructed separately, who may tend to be partisan, a neutral firm of accountants, such as PricewaterhouseCoopers ("PWC"), be appointed to inquire objectively into the matter.

35 Prof Cham followed up on his recommendation by sending an e-mail to LBC, which stated:

> It appears there is now an agreement to approach a third party (TP) to resolve the disputed issues. I suggest the following steps to be observed in order not to foul up the settlement:
>
> (1) A clear decision as to which are the parties in contest. To me it is really ArmorCoat vs PlanB.
>
> (2) Both parties have to agree on the issues of dispute.
>
> (3) Both parties have to agree on the selection of the Third Party.
>
> (4) The Chairman of the Audit Committee will make the appointment of the TP after discussion on the terms of appointment. The cost of engaging the TP is to be covered by Ei-Nets.
>
> (5) Both parties to have easy access to ALL documents to prepare their cases for presentation to the TP.
>
> (6) Both parties have to agree that decision of the TP will be final.

He ended that e-mail by cautioning LBC that: "Unless you observe the procedures carefully, you may end up with a dispute within a dispute".

36 LBC, however, made no effort to conform with the recommendations of Prof Cham. Without consulting Plan-B or even the Audit Committee on what the terms of reference should be, LBC asked PWC for their opinion on:

(a) whether capitalisation of loans would come within the meaning of "cash injection"; and

(b) the NTA of Speed as at 15 June 2000.

LBC explained that he was unable to act on Prof Cham's recommendation because he received Prof Cham's e-mail after he had instructed PWC. He did not satisfactorily explain why the fact that he had already approached PWC made compliance with Prof Cham's recommendations impractical.

37 PWC in its report dated 27 June 2001 (the "PWC Report") confirmed the following:

(a) Cash injection includes the capitalisation of loans only if these are short-term loans with no fixed terms of repayment, ie the loan is repayable on demand.

(b) Significant cash payments and capitalisation of loans took place after 15 June 2000 and therefore the NTA of Speed on 15 June 2000 was only $376,741.

As PWC had not been asked to evaluate the NTA as at 19 July 2000 there was no reference in the PWC Report of the NTA as at that date.

38 It was clear – and indeed even PWC noted this fact at (b) in the paragraph above – that the injection of cash and the capitalisation of the loans did not take place on 15 June 2000. It took place on 28 June 2000 and completion of the SE Agreement took place only on 19 July 2000. The relevant question therefore was the NTA of Speed as at 19 July 2000: the date of completion. LBC knew that completion took place on 19 July 2000 and yet his instructions to PWC (and indeed even to Medora) was to evaluate the NTA as at 15 June 2000.

39 Yeo stated in his affidavit of evidence-in-chief that the Audit Committee, after receipt of his explanations of the matters contained in the Medora and Chor Pee Reports and after discussions with Deloittes and PWC, concluded that the SE Agreement was in order. That decision, Yeo testified, was also noted in the minutes of the Board of Directors of Ei-Nets held on 21 September 2001. Yeo's evidence in this regard was consistent with the evidence of Prof Cham whom Yeo called as a witness. Prof Cham further testified that the termination of Yeo's services was not at any time discussed by the Board of Directors of Ei-Nets.

Termination of employment of Yeo

40 Yeo's employment with Ei-Nets, although signed on 3 January 2001, was for a fixed term of three years with effect from 3 June 2000. Thereafter his employment was to continue on a year-to-year basis unless terminated by either party giving the other six months' notice in writing. The following terms were also contained in the contract:

(a) Ei-Nets may, with the consent of Yeo, second Yeo to any of its subsidiaries upon terms to be agreed between Ei-Nets and Yeo; and

(b) Yeo's services may be immediately terminated if Yeo, in the reasonable opinion of the Board, was guilty of any misconduct or neglect in the discharge of his duties.

On 18 June 2001, LBC handed to Yeo a letter informing Yeo that he was, with immediate effect, transferred back to Plan-B.

41 Yeo's "transfer" to Plan-B was a breach of the terms stated in (a) above for two reasons: (i) Plan-B was not a subsidiary of Ei-Nets; and (ii) Yeo's consent to the "transfer" had not been obtained. Yeo, by letter dated 19 June 2001, replied as follows:

> I note that there is an unseemly haste in the alleged transfer. No notice was given of this intention to transfer me before yesterday.
>
> I have advised Liau Beng Chye that I do not accept the alleged "transfer".
>
> For the avoidance of doubt, I consider that I am still an executive officer of Ei-nets and as such, I am prepared to return to work on the same terms as before, upon your confirmation by telefax at Fax No. 3235030 or Email at :yeonm@pacific.net.sg that I may do so. Please confirm that I may do so within 7 days hereof. If you do not do so, I will take it that the letter alluding to the purported "transfer" in fact amounts to a notice of termination, in which case I would be entitled to receive pay in lieu of notice under the terms of my employment.

There was no response from Ei-Nets to Yeo within the stipulated period of seven days.

DC Suit 2505/2001: Suit 1308/2001
Wrongful dismissal

42 On 27 June 2001, Yeo filed proceedings in the Subordinate Courts (vide DC Suit 2505/2001) against Ei-Nets for repudiatory breach of his employment contract. On the same day that Yeo filed DC Suit 2505/2001, he received a letter from LBC informing him that his services with Ei-Nets were terminated with immediate effect. The letter read:

> As you are aware, J K Medora & Co have prepared a Report dated 14 May 2001 highlighting instances of irregularities in the accounts of Speed ei-Nets Pte Ltd ("Speed") of which you were the managing director at the relevant period.
>
> We have been advised by our solicitors that Speed has a cause of action against you and others for damages.
>
> In view of the above, we hereby terminate your employment with immediate effect.

The date of this letter – 27 June 2001 – was, incidentally, the same date as the PWC Report. It would therefore appear that LBC dismissed Yeo from Ei-Nets even before the Audit Committee (or the Board of Ei-Nets) considered the PWC Report.

43 In the Defence filed in DC Suit 2505/2001, Ei-Nets denied the claim of repudiatory breach and claimed that Ei-Nets was entitled to terminate the services of Yeo by reason of Yeo's misconduct. The misconduct alleged was that Yeo was a party to irregularities and fraudulent manipulation of the accounts of Speed and that he had conspired with Tey to misappropriate the sums of $1,074,415 and $351,388 (totalling $1,425,803) from Speed as stated in the Medora Report.

44 I would note here that although Yeo's contract of employment stipulates (see para 40(b) above) that Yeo's services may be terminated if, in the reasonable opinion of the Board of Ei-Nets, Yeo was guilty of misconduct or neglect of duty, no evidence was led to show that the Board of Ei-Nets made any such finding. Indeed the evidence indicated that the Board did not, at any stage, discuss the dismissal of Yeo.

45 The misconduct referred to in para 43 above also formed the basis of Ei-Nets' counterclaim for the sum of $1,425,803. As the amount of the counterclaim exceeded the jurisdiction of the District Court, the defendants procured the transfer of DC Suit 2505/2001 to the High Court where it was re-numbered as Suit 1308/2001. Subsequently, when Yeo filed a further suit (Suit 1279/2001) for defamation, an order was obtained for the two suits to be consolidated and heard together.

Board meeting of Ei-Nets: 4 July 2001

46 Ei-Nets held a meeting of its Board of Directors on 4 July 2001 at which the PWC Report was presented to the Board. The Board suggested (much as the Audit Committee had) that the management of Ei-Nets and Yeo should work together with PWC to review the relevant documents and conclude their report. No further reports from PWC were produced in evidence.

47 However, soon after this Board meeting, in a letter dated 20 July 2001, LBC wrote to Yeo as follows:

> I refer to the Minutes of the 4th Board Meeting held on 4th July 2001 and confirm that the management issue has been resolved.

Yeo was not a director of Ei-Nets. He had not been invited to the Board meeting on 4 July 2001 and was not privy to the minutes of Board meetings. He therefore wrote to LBC to say that he was not

sure what the "management issue" referred to was and asked LBC for the relevant extracts from the minutes. LBC's response was:

As our letter to you of even date was requested by Mr Lim Soon Hock, please refer to him to obtain the relevant clarification that you need.

That response was certainly not helpful in understanding what exactly was the "management issue" that had been resolved.

48 At the Board Meeting held on 4 July 2001 only four "management issues" had been discussed. In cross-examination, LBC conceded that three of these issues related to the management matters which had no bearing on Yeo. The fourth issue, however, concerned the capitalisation by Speed of the loans due to Plan-B on which PWC had been asked to liaise with Yeo and the management of Ei-Nets. That was a "management issue" that clearly involved Yeo. The letter of 20 July 2001 to Yeo therefore appeared to me to be a clear indication by Ei-Nets to Yeo that the capitalisation of the loans by Speed was no longer a contentious issue: a position that accorded with the view taken by the Audit Committee.

49 It also accorded with the view expressed in the PWC Report (para 37 above) that the capitalisation of loans would amount to a cash injection if these were short-term loans repayable on demand. The effect of the notes to the accounts referred to in para 13 above is that these amounts due to Plan-B were treated as short-term loans repayable on demand. Speed could therefore properly capitalise these loans and such capitalisation would amount to a cash injection.

Suit 1279/2001: defamation

50 On 9 October 2001, Yeo commenced Suit 1279/2001 against Ei-Nets and LBC for defamation. In this suit, Yeo complained that in their natural and ordinary meaning (and by innuendo) certain parts of the Medora and Chor Pee Reports and an unidentified audit report were defamatory in that they meant and were understood to mean that Yeo was guilty of –

(a) fraud against Speed;

(b) gross misconduct against Speed;

(c) breach of s 76 of the Companies Act;

(d) manipulating the accounts of Speed and Suntze;

(e) breach of his fiduciary duties to the Speed Group;

(f) manipulating the bank reconciliation statements of Speed;

(g) committing the offence of criminal misappropriation,

and, together with others, abusing the powers of his office for personal gain and enrichment. The Medora and Chor Pee Reports and the unidentified audit report, Yeo alleged, had been published and distributed by LBC and Ei-Nets to members of the Board of Ei-Nets and to other persons and had seriously damaged his reputation.

51 LBC did not, in these proceedings, seek to deny that the language used in the reports that were circulated had the defamatory meanings alleged but relied on the defences of justification and

qualified privilege. LBC also admitted that the Medora and Chor Pee Reports and a "separate legal opinion" had been circulated to members of the Board of Directors of Ei-Nets and shown to one Christopher Chong Meng Tak ("Chong").

52 The "unidentified audit report" and the "separate legal opinion" referred to in the pleadings caused some confusion. It was not in dispute between the parties that, together with the Medora and Chor Pee Reports, an unsigned third document was also circulated. Yeo, who had never seen the Wan Report, assumed that this unsigned document was the report of an internal auditor to which reference had been made. It was only after the trial commenced, when Mr Lim identified this third document as a draft of the Chor Pee Report, that Yeo realised that his assumption was wrong.

53 LBC, under cross-examination, told the court that as there were differences of view amongst the directors of Ei-Nets about the conduct of Yeo, he prevailed upon Lim Teck Hui – an associate of Mr Lim in the firm of Chor Pee & Partners who was drafting the Chor Pee Report – to let him have a copy of the draft Lim Teck Hui was working on in order to show the draft to the directors. I will refer to this draft as "the Chor Pee (draft) Report".

The accounting issue

54 The main issue for consideration in this consolidated hearing was the accounting issue, namely whether:

> (a) the inter-company transfer of $1,074,415 in the accounting records of Speed, resulting in Speed owing its holding company Plan-B an additional amount of $1,074,415 and reducing the amount it owed to its subsidiary Suntze by the same amount; and
>
> (b) the inter-company transfer of $351,388 in the financial records of Speed resulting in Speed owing Plan-B this amount and resulting in settling the amount of $266,597 due to its subsidiary Suntze in full and creating a debt of $84,791 from Suntze,

were irregular transfers and, in particular, whether they were fraudulent, artificially created, resulted in loss to Speed, or whether Speed's directors were in breach of s 76 of the Companies Act (Cap 50) by assisting Plan-B to purchase the shares of Speed.

56 The claim for wrongful dismissal and the counterclaim against Yeo for the sum of $1,425,803 would, in large measure, depend on how the accounting issues are decided. So too would the defence of justification that was raised in the action for defamation.

Evidence of Yeo Nai Meng

57 I will not set out here Yeo's rather lengthy testimony recounting the events that led to the accounting entries that I have earlier referred to. The cross-examination of Yeo was intense but did not materially affect the thrust of his testimony. The impression I was left with at the end of the hearing was that Yeo did not fit the picture, so vividly painted in the Medora, Chor Pee and Chor Pee (draft) Reports (together referred to as "the 3 Reports") of a person involved in surreptitious and dishonest activities including criminal misappropriation of funds. Even if the accounting entries impugned in the Medora Report were in some way irregular – a proposition which I do not accept – I was satisfied that Yeo, in causing those entries to be made, was acting honestly and in the best interests of Speed. I found no merit in Mr Lim's submissions that Yeo was in breach of his fiduciary duties.

58 Yeo was cross-examined at length about the "secretive" manner in which he had allegedly managed Speed's affairs since the signing of the SE Agreement on 22 May 2000 and even after Speed became a wholly-owned subsidiary of Ei-Nets on 19 July 2000. It was also suggested that Yeo did not disclose the SPS Agreement to Ei-Nets. Yeo denied these allegations. He maintained – and at the conclusion of the hearing I accepted his evidence in this regard – that he had kept Ei-Nets fully informed of the affairs of Speed and provided Ei-Nets with whatever information Ei-Nets sought.

59 Yeo pointed out that when Speed became a subsidiary of Ei-Nets, the preparatory work for the listing of Ei-Nets was stepped up and a great deal of information relating to the history, operations and financial affairs of Speed had to be and was provided by Speed to the Working Committee of Ei-Nets for inclusion in the prospectus. In addition, there were regular management meetings between the Speed Group and Ei-Nets after Speed became a subsidiary of Ei-Nets at which the affairs of the Speed Group were discussed and all relevant information provided.

60 Yeo also pointed out that Ei-Nets had appointed Matrix Venture Consulting Pte Ltd ("Matrix") to carry out a due diligence exercise of the Speed Group. Yeo pointed out that the audited accounts of Speed clearly stated that Speed had issued 8,600,000 ordinary shares of $1 each at par for a cash consideration of $6,675,585 and by capitalisation of a loan of $1,924,415 payable to Plan-B. The details of this, Yeo told the court, could not have escaped the notice of Matrix.

Evidence of Liau Beng Chye

61 LBC had little or no primary knowledge about the alleged irregularities in the accounts of Speed and the capitalisation of the loans by Plan-B. In terminating the services of Yeo, LBC was acting almost entirely on the Medora and Chor Pee Reports. To what extent he was also acting on the Wan Report is difficult to say as the Wan Report was not disclosed to the court and its contents were not before the court. It would, however, be fair to say that if the Wan Report had been critical of Yeo, it would not only have been disclosed but Wan would have been called to testify on behalf of the defendants.

62 LBC's evidence related, in the main, to difficulties allegedly encountered by Ei-Nets in getting Yeo to provide information to Ei-Nets relating to the financial affairs of Speed. In this context, LBC implied that Ei-Nets was not aware of the SPS Agreement at the time the SE Agreement was signed and he came to know of it only when PWC showed the SPS Agreement to him in July 2001.

63 LBC's evidence that Ei-Nets did not know of the SPS Agreement until July 2001 was difficult to accept. Even if LBC did not himself sight the SPS Agreement until July 2001, the professionals advising ArmorCoat/Ei-Nets in the SE Agreement would, as a matter of routine, have sighted the SPS Agreement. This would be especially so since Recital B of the SE Agreement would have put everyone on notice that the Vendors did not, at the time of the SE Agreement, have the required number of shares in Speed to exchange for shares in Ei-Nets.

64 I found it unusual and somewhat high-handed, especially as Ei-Nets was a public listed company, that although

(a) the Audit Committee, was still considering Yeo's explanations and awaiting the PWC Report on the matter;

(b) the Board of Ei-Nets had yet to discuss the matter; and

(c) by his contract of employment Yeo's services could only be terminated if, in the

reasonable opinion of the Board of Directors of Ei-Nets, Yeo was guilty of any misconduct or neglect of duty,

LBC, without awaiting the decision of the Audit Committee or the Board, proceeded to dismiss Yeo. In so doing, LBC was also ignoring the advice contained in the Chor Pee Report that it would be necessary for Medora to do a "full investigation".

Deloitte & Touche

65 Mr Rey Foo, counsel for Yeo, realising that the defendants were not calling Deloittes to testify at this trial, sought an interview with Aric Loh Siang Khee ("Loh"), the partner in charge of the audit of the Speed Group. Loh, however, refused to be interviewed. Mr Foo, in spite of not knowing what exactly Loh would say, caused a subpoena to be issued to compel Loh's attendance in court and obtained leave of court to adduce evidence-in-chief from Loh by oral testimony.

66 The financial statements of Speed for the six months ending 30 June 2000 included the following note:

> 6(a) During the financial period, the company:
>
> > (ii) issued 8,600,000 ordinary shares of $1 each at par for a cash consideration of $6,675,586 where the proceeds were used as working capital, and by way of capitalisation of a loan payable to Plan-B Technologies Pte Ltd of $1,924,414.

The audit opinion in respect of that financial statement signed on 15 September 2000 was a standard "true and fair" opinion confirming that Speed had complied with the relevant provisions of the Companies Act. It made no reference to the note. It would follow from this that Deloittes had found nothing remiss in the issue and payment of the 8.6 million shares of Speed.

67 Yeo wrote to Deloittes on 9 July 2001 asking Deloittes to confirm whether the capitalisation by Speed of the loan due to Plan-B was illegal and be construed as (i) breach of s 76 of the Companies Act, (ii) misappropriation of funds, (iii) manipulation of accounts. In asking this question, Yeo was tracing the language used in the Medora and Chor Pee Reports.

68 To this query, Deloittes, by fax dated 10 July 2001 had replied as follows:

> As you are aware, we have issued an unqualified audit opinion on the financial statements of Speed for the 6 months ended June 30, 2000. Our audit opinion stated that the financial statements show a true and fair view of the state of affairs of Speed as at June 30, 2000 and of the profit and loss of Speed for the 6 months ended June 30, 2000 in accordance with the Singapore Statement of Accounting Standards and the Singapore Companies Act.

Mr Foo asked Loh, in examination-in-chief, whether Loh stood by what was stated in that fax. Loh confirmed that he did.

69 Mr Foo referred Loh to ss 207(9) and 207(9A) of the Companies Act – which obliged auditors to report a breach or non-observance of the provisions of the Act or fraud or dishonesty committed by officers of the company against the company – and asked whether, after getting to know from the Medora Report about the alleged irregularities, he saw any need to review his audit of Speed with a view to reporting the matter to the authorities, Loh replied that he did not.

70 In the light of that answer, I asked Loh why, in view of such strong criticisms in the Medora and Chor Pee Reports of the accounting entries of Speed, he did not conduct a review of the audit. Loh's reply was:

> I am a professional. I have been in Deloitte & Touche for 15 years. When I glanced through the Medora Report, I knew it had no basis – it would make no difference to the audit – and I did not see any reason to conduct a review of the audit of Speed and Suntze.

It was apparent from this answer that Loh clearly and unequivocally rejected the conclusions arrived at by Medora in the Medora Report. Loh told the court that he was satisfied that the NTA of Speed as at 30 June 2000 was $6,867,147, as stated in the audited accounts.

71 Under cross-examination by Mr Lim, Loh told the court that at the time he conducted the audit he was aware that the three cheques handed to Speed on 28 June 2000 in connection with the share-issue on that day were cleared by the bank only by 13 July 2000. Mr Lim did not press the issue any further with Loh.

72 The evidence of Loh, especially as he was the partner in Deloittes in charge of the audit of Speed (and Ei-Nets), was very damaging to the defendants' case. Mr Lim did not, however, seek to put to Loh exactly why the defendants took the view that Deloittes were wrong in their audit opinion. Having heard the evidence of Loh and having heard the evidence of all the other accountants who testified in this case, I saw no reason to dismiss the evidence of Loh – as LBC did – as that of a person who was merely protecting his own self-interest. To the contrary, I found Loh to be credible, honest and professional in his approach and testimony.

Kaka Singh: the CLA Report

73 Yeo, for the purposes of this litigation, had instructed Chio Lim & Associates ("CLA"), a firm of public accountants in Singapore, to look into and report on matters raised in the Medora Report. That report ("the CLA Report") was prepared by Kaka Singh ("Singh"), a partner in CLA and a public accountant of many years standing.

74 The CLA Report was prepared after inspection of the relevant records of the Speed Group and after interviewing the relevant personnel responsible for the impugned entries. In the CLA Report, Singh entirely disagreed with the views expressed by Medora: Singh's conclusion was that there was nothing remiss in the accounting records of Speed in respect of the impugned inter-company transfers or the capitalisation of the loans due to Plan-B. Singh, under cross-examination, also stated that the "economic substance" of the transaction in this case was that completion of the SE Agreement did not take place on 15 June 2000 but took place on 19 July 2000. 19 July 2000 was therefore the relevant date by which the conditions precedent had to be complied with and Singh told the court that by that date the NTA of Speed was in excess of $6 million.

75 Medora, in his Report, had stated that the NTA of Speed had been "overstated" by $1,074,415 by the transfer of that amount from Suntze to Speed. Singh's comment on this in the CLA Report was:

> With due respect to my fellow practitioner, NTA of the Speed Group is not increased by mere transfer of funds within the Group.

Singh told the court that if Medora was right, then Speed would have issued its shares to Plan-B for nothing, which was just not true.

76 On the transfer in July 2000 of the $351,388 owed by Suntze to Plan-B, Singh stated:

> At the end of July 2000, Suntze owed Plan-B $351,388. Speed owed Suntze $266,597. The balances were offset. The net result was that Speed owed Plan-B $351,387 and Suntze owed Speed $84,791 (i.e. $351,388 less $266,597). There were no resources leaving the Speed Group.

Singh saw no reason to consider these entries as irregular.

77 It was suggested to Singh, in the course of cross-examination, that because the total equity of Suntze as at 31 December 1999 was negative (to the extent of $132,959), Suntze was an insolvent company. Singh disagreed. Insolvency, Singh told the court, was not as simple an issue as that. Singh explained that when an auditor saw a negative figure for equity, the auditing standards required that the auditor evaluate whether the company can be regarded as a going concern. For that purpose the auditor would have to look at various factors including the profitability of the company and the plans that the directors had for the company. If the auditors considered the company's plans and projections to be viable, they would accept the company as a going concern. Otherwise, they will qualify the report. In the present case, the auditors – quite correctly in Singh's view – had not considered Suntze to be insolvent and had therefore not qualified their report.

78 Singh's attention was drawn to the fact that Yeo in his affidavit of evidence-in-chief had stated that Suntze did not have the means to pay the $1,074,415 that Suntze owed to Plan-B and he was asked if he agreed that this showed that Suntze had no cash to meet its liabilities. Singh's response was that although Suntze was cash poor it was asset rich. Suntze's resources, he pointed out, was in the form of assets and receivables. Suntze was not, in Singh's view, an insolvent company at that time in spite of its shortage of cash.

79 As for the three cheques that were cleared in July 2000, Singh told the court that accounting practice allowed for cheques received in one month but cleared in the subsequent month to be treated as cash received in the first month. Singh was of the view that so long as the treatment of the cheques in the accounts was not "window dressing", it would be in order for the accounts to reflect these sums as received in June 2000. Singh was of the view that the accounting treatment of the three cheques in this case, having regard to the circumstances, was not window dressing and Deloittes were entitled to treat the three cheques in this case in the way they did.

Kon Yuen Kong ("Kon")

80 The defendants, for the purposes of these proceedings, had also obtained a report from Kon Yuen Kong (" the Kon Report"), a senior partner of Foo Kon Tan Grant Thorton, a firm of public accountants. Kon, in preparing that report, did not carry out any investigations. He relied entirely on the investigations and findings made by Medora and assumed that those were accurate. That being so, the value of Kon's testimony was limited. No greater weight could be given to his testimony than the weight given to Medora's testimony.

81 Kon noted, from Suntze's financial statements as at 31 December 1999 and 30 June 2000, that Suntze's liabilities exceeded its assets and opined that in view of this Suntze "in the absence of financial support from its holding company" was technically insolvent. Although Kon had qualified his opinion with the words "in the absence of financial support from its holding company", he did not draw attention to the fact that the accounts he was referring to in fact noted that the directors were satisfied that the holding company would provide the necessary financial support when required.

82 In cross-examination, Kon agreed that there were matters other than what appeared in the

financial statements of the company that needed to be considered before it could conclusively be said that the company was insolvent. He conceded that in saying that Suntze was insolvent he had looked only at the financial statements and nothing else.

Medora

83 Medora, in his affidavit of evidence-in-chief, stated that in preparing his report he only looked at the entries in the relevant cash books, general ledgers, journal entries, returned cheques, bank deposit slips and the bank statements of Speed relating to the matters he was looking into. Medora specifically admitted that he had no knowledge of and had not inspected any of the records of Suntze. Under cross-examination, Medora admitted that he did not know anything about the composition of the Boards of Suntze, Speed and Plan-B; did not know of the existence of the SPS Agreement; did not know anything about the background of the SE Agreement; and did not know that the parties were preparing for the public listing of Ei-Nets. Medora also admitted that he was not told and he did not know that the SE Agreement was not completed on 15 June 2000. This latter admission explains why in the Medora Report the emphasis is on the NTA of Speed as at 15 and 30 June 2000; and no mention is made of 19 July 2000.

84 Medora, in cross-examination, also admitted that he had not interviewed any of the staff in the Speed Group. When asked whether it would be routine practice in conducting an investigation or audit to interview key personnel in charge of the accounts in order to try and understand the accounts, Medora's response was:

> Not necessarily. I was relying on documentary evidence.

When it was then suggested to him that by relying on documentary evidence he would not have been fully aware of the relevant background, his response was:

> I would not agree. My assignment was to ascertain facts according to documents of Speed. I was not acting as a judge where I was to listen to both sides."

That response by Medora was very telling. It would appear from that response that his brief – or at least his understanding of his brief – was to give his professional views by looking only at what was in the documents of Speed (not even of Suntze) and he was not to clarify the documents he saw by speaking to the persons involved.

85 From Medora's response, quoted above, it appeared that Medora did not see his role as one that required impartiality: he did not want to act as a judge; he did not want to listen to both sides. This "blinkered" approach on the part of any investigator must give rise to serious misgivings about his impartiality and hence the veracity of his findings.

86 The above are serious shortcomings in the Medora Report. They indicate that Medora's investigations were (a) cursory and (b) not objective. On these grounds alone it would not be safe to accept Medora's testimony. In addition, it can be demonstrated that because Medora did not consider all the relevant facts, his conclusions were, in fact, flawed.

87 Medora, in his Report, had opined that there was no commercial justification for the transfer of the debts from Suntze to Speed. There was at that time a sum of about $1.4 million owing from Speed to Suntze (arising principally from the sale of the automotive portal) which, as a result of that transfer was correspondingly reduced. This was not mentioned in the Medora Report. Had Medora looked into the books of Suntze he would have come across the memo of Lawrence Tan dated 29

September 1999 to the Board of Suntze seeking authorisation for the sale of the AML-Suntze contract to Speed for a sum in excess of $2 million. He would also have noted from that memo that it was intended that the proceeds of that sale were to be used, inter alia, to pay the loans of Suntze. He would also have realised this if he had discussed the matter with the relevant officers of the Speed Group.

88 Had Medora been aware of this debt to Suntze arising from the sale of the automotive portal to Speed, Medora would not have stated in para 2(b) of his report:

> Therefore, the assets had been increased by the loan owing by Suntze of $1,074,415 whilst the liability of the same amount (the loan owing to Tech [meaning Plan-B] had been erased by capitalising it. Hence, the NTA had been overstated by $1,074,415.

This omission to recognise the debts between Speed and Suntze is a serious defect in the Medora Report because the transfer of the loan of $1,074,415 to Speed did not result in the increase of the loan as concluded by Medora but a decrease in the liability that Speed owed to Suntze. I find that this transaction had no impact on the NTA of Speed as demonstrated by the tables set out in paras 18 and 20 of this judgment.

89 This critical omission resulted in Medora coming to the conclusion that the transfers were artificial and unwarranted and led Medora to make an error of considerable magnitude in his computation of the NTA. The events that followed, namely, the Chor Pee Report and the dismissal of Yeo, all arose from this error.

90 Medora as a professional accountant asked for his views as an expert should, in my opinion, have been much more thorough in his investigations: he should have made himself aware of all aspects of the transactions before giving his report. This would be especially so when – as in this case – his conclusions were so damning of the character and reputation of so many people.

Mr Lim Chor Pee

91 It appears from the Chor Pee Report that Mr Lim, unlike Medora, knew that the Plan-B debt transferred by Suntze to Speed was set off by Speed against sums due by Speed to Suntze in respect of its purchase of the automotive portal from Suntze. It would appear that Mr Lim realised, when he read the Medora Report, that Medora had not taken these factors into account and Mr Lim therefore saw a need for further investigations. This is apparent from the following paragraph of the Chor Pee Report:

Further, we also understand that the debt owing by Suntze to Speed that had been artificially created in the first place had been repaid by Suntze through payments charged by Suntze to Speed in respect of *the cost of the Portal* acquired by Speed from Suntze prior to the Share Exchange Agreement. *It would appear necessary for the accounts of Speed to be fully investigated by Mr J K Medora in order to understand the present accounts and cash balance in Speed*. [Emphasis added]

Mr Lim's advice that it would be necessary for Medora to carry out a "full" investigation into the accounts of Speed was, however, not acted upon. Medora was not asked to and did not carry out any further investigations.

92 Surprisingly, the absence of such a "full" investigation by Medora did not deter Mr Lim from accepting the Medora Report in toto and advising – as detailed in paras 32 and 33 above – not only that the impugned accounting entries were fictitious but that Yeo and Tey were involved in a

conspiracy to misappropriate the funds of Speed. I have criticised Medora for having, without conducting a sufficiently thorough investigation, tarred the reputation of so many people. A similar criticism may be made of Mr Lim as Mr Lim, having recognised that Medora's investigations were not thorough enough, proceeded, without the benefit of a full investigation, to draw conclusions from the Medora Report even more damaging to Yeo and the others than those reached by Medora. It must however be noted that the defendants did not call Mr Lim as a witness. Mr Lim therefore did not have the opportunity of explaining the above paragraph from the witness box.

Findings on the accounting issues

93 The Medora Report had some serious shortcomings. These shortcomings were not present in the CLA Report. The CLA Report was written after taking into consideration all aspects of the transactions and after interviewing the relevant officers. Singh in fact told the court that he considered it to be his duty, in carrying out such an investigation, to be as professional and objective as possible. I found this approach very refreshing.

94 I accept the thrust of the CLA Report and I accept the expert testimony of Singh that there was nothing improper in the accounting records of the Speed Group relating to the transfers of the inter-company loans and the subsequent capitalisation of the amounts due to Plan-B. That there was nothing improper in the accounts of the Speed Group was also the view of Deloittes and the Audit Committee. It also accorded with the view – as discussed in para 49 above – of PWC. We would, of course, not know this for sure because PWC, for reasons not explained, were not called upon to testify in these proceedings.

95 I have no difficulty in finding that LBC and Ei-Nets have not discharged the burden that is on them of establishing that Yeo was guilty of the kind of fraudulent misconduct suggested in the 3 Reports. LBC and Ei-Nets have not even established that the accounting entries in Speed's books were irregular let alone fraudulent.

96 I find no substance in the allegation by the defendants that Suntze at the relevant time was insolvent. As the inter-company transfers and the subsequent capitalisation of the loans from Plan-B were in order and as Suntze was not at the material time insolvent, there was no basis for the submission that s 76 of the Companies Act had been infringed. I therefore see no reason to embark on the exercise of considering the various authorities on s 76 of the Companies Act that Mr Lim cited.

97 I also find that when Strike, ArmorCoat, Plan-B and Ei-Nets agreed to postpone the completion of the SE Agreement, they had impliedly (if not expressly) postponed the date by which the conditions precedent had to be met. As completion took place on 19 July 2000, that would be the relevant date for compliance with the conditions precedent. The three cheques had been cleared well before that date. Accordingly, even if the audit treatment of the three cheques as being received on 28 June 2000 was in error, that error would not be material to the question whether the conditions precedent had been fulfilled at the time of completion.

Wrongful dismissal (Suit 1308/2001)

98 I agree with the submission of Mr Foo that the unilateral transfer of Yeo to Plan-B was a breach of the contract of employment and constituted a repudiatory breach. I also agree with Mr Foo that, under the terms of his contract, Yeo can be dismissed for misconduct only if the Board of Directors so determine. In this case, not only was there no determination by the Board that Yeo had misconducted himself it could even be said, by reason of the letter dated 20 July 2000 (referred to in paras 48 and 49 above), that Ei-Nets had exonerated Yeo of the misconduct alleged.

99 In view, however, of the findings I have made that there was no merit in the criticisms of Yeo contained in the Medora and Chor Pee Reports, it would follow that even if the Board had resolved that Yeo be dismissed because of misconduct, that dismissal would have been wrongful as the Board could not reasonably have come to such a conclusion.

100 I therefore grant judgment with costs to Yeo in Suit 1308/2001 and order that the 2nd defendants (Ei-Nets) pay to Yeo the sum of $308,000 claimed therein (with interest thereon at 4% per annum from the date of the writ) as damages for the wrongful termination of his contract of employment. For the same reason, I dismiss with costs the counterclaim by the defendants for the sum of $1,425,803.

Defamation (Suit 1279/2001)

101 The defendants did not dispute that the 3 Reports contained libellous statements and that the reports were circulated to all the directors of Ei-Nets as well as to Chong. The defences raised were justification and qualified privilege. As I have found that the misconduct alleged against Yeo in the 3 Reports has not been established, I must necessarily reject the plea of justification. What remains to be considered is the plea of qualified privilege.

Qualified privilege

102 The law on qualified privilege is summarised by Lord Atkinson in *Adam v Ward* [1917] AC 309 at 334 as follows:

… a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Both Mr Lim and Mr Foo accepted that summary of the law.

103 Mr Foo submitted that the defence of qualified privilege was not available to the defendants in this case for the following reasons:

(a) the 3 Reports had been communicated to persons other than the directors of Ei-Nets; and

(b) the communication to the directors of Ei-Nets was motivated by express malice.

I will deal with each of these submissions in turn.

(a) Communication to persons other than directors

104 In their Defence, LBC and Ei-Nets had pleaded that the 3 Reports were circulated only to the directors of Ei-Nets. In the course of cross-examination, however, LBC conceded that three staff members of Ei-Nets (who were not directors) were in attendance at the Board meetings when the 3 Reports were discussed. The defendants did not, through cross-examination or otherwise, seek to show that communication to these staff members fell within the protection of qualified privilege.

105 Yeo had also traced one other person – Chong – to whom LBC had shown the Medora and Chor Pee Reports and Chong, who was called as a witness, testified to that effect. LBC did not

challenge Chong's evidence but sought, through cross-examination, to establish that Chong was a professional advisor to Ei-Nets and that the communication to Chong was on a privileged occasion.

106 Chong agreed that he had been a professional advisor to Ei-Nets for the purposes of the public listing of Ei-Nets. It was clear, however, that those professional services had ended when LBC showed the reports to Chong. I agree with the submissions of Mr Foo that this conversation between LBC and Chong was more in the nature of a friendly chat than a consultation with a professional advisor. Accordingly, I find that that communication to Chong as well as the communication to the staff members were not covered by qualified privilege.

(b) Communication to the directors

107 The Medora and Chor Pee Reports had concluded that the inter-company transfers between Suntze and Speed were artificial and effected in order to enable Speed to capitalise non-existent loans from Plan-B in breach of s 76 of the Companies Act. The Chor Pee Report had even gone so far as to suggest that Yeo and Tey may have committed criminal misappropriation in respect of the sums involved and had suggested that Speed commence legal proceedings against Plan-B, Tey and the relevant directors of Speed for conspiracy to misappropriate the sum of $1,074,415 and $351,388.

108 The Medora and Chor Pee Reports – containing views so strikingly opposed to the views of the Audit Committee and Deloittes and coming as they did from a senior accountant and a senior lawyer respectively – were reports that LBC, as CEO of Ei-Nets, was duty-bound to bring to the attention of the Board of Directors of Ei-Nets and there was a corresponding interest on the part of the directors to receive those 3 Reports. In communicating the 3 Reports, LBC would, prima facie, be covered by the defence of qualified privilege. For this defence to be displaced, Yeo would have to prove that LBC was motivated by express malice.

109 Gatley on *Libel and Slander* (9th Ed), in discussing what a plaintiff alleging "express malice" will have to prove, states at 427:

> The plaintiff will succeed in proving the existence of express malice if he can show that the defendant was not using the occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege.

As proof that LBC was actuated by an indirect motive, Mr Foo highlighted a whole list of matters that showed how unfair LBC had been towards Yeo and submitted that LBC in circulating the 3 Reports was motivated, primarily, by ill-will towards Yeo.

110 Amongst the matters that Mr Foo highlighted in this context were: the instructions to Medora and PWC to evaluate the NTA as at 15 June 2000 when LBC knew that completion in fact took place on 19 July 2000; LBC's anxiety to "share with the directors" the adverse views in the Chor Pee (draft) Report even though the document was only a draft; inviting Yeo to attend before the Audit Committee but refusing to give Yeo a copy of the Medora and Chor Pee Reports; refusing to grant Yeo access to the books of the Speed Group for Yeo to respond to the Audit Committee on the Medora and Chor Pee Reports; failure to heed the advice of Prof Cham in the appointment of PWC; refusing to show Yeo a copy of the Wan Report; the unfounded allegations that Yeo withheld information from Ei-Nets; refusing to give credence to the views of Ei-Nets' own Audit Committee and independent auditors; and the complete disregard of Yeo's contractual rights in first "transferring" Yeo to Plan-B and then dismissing Yeo.

111 I agree with much of Mr Foo's submissions. I find that LBC had been unfair and ungracious

towards Yeo. I also agree that LBC's conduct showed that he harboured considerable ill-will towards Yeo. But existence of such ill-will is not, by itself, sufficient to conclude that in forwarding the 3 Reports to the Board of Directors, LBC was motivated by express malice. As Lord Diplock said in *Horrocks v Lowe* [1975] AC 135 at 151:

> Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it.

To prove express malice, Yeo will have to satisfy the court that the ill-will was the dominant reason why LBC caused the 3 Reports to be circulated to the directors.

112 On a careful review of the evidence, it seemed to me, on balance, that the dominant reason why LBC distributed the 3 Reports to the Board of Directors was because as CEO of Ei-Nets he was duty-bound to bring to the attention of the Board the very disturbing conclusions reached in the Medora and Chor Pee Reports. The fact that by so doing he would be furthering his private agenda against Yeo was, in my view, incidental. Accordingly, I find that the communication by LBC of the 3 Reports to the directors of Ei-Nets was covered by qualified privilege.

113 As the defendants have not succeeded in their plea of qualified privilege in respect of communication of the 3 Reports to persons other than directors, I give judgment with costs to Yeo on his claim in defamation against the defendants in Suit 1279/2001.

Damages

114 A number of precedents were cited to me for guidance as to the damages that ought to be awarded. As is to be expected, the factual background, the sting of the defamatory words; the context in which the words were uttered; the occupation and professional standing of the person defamed, the degree of harm caused by the defamatory words and the degree of aggravation/mitigation present will vary from case to case and care is needed in applying those precedents.

115 The Court of Appeal in *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 3 SLR 337 at 362 has recognised that such precedents can provide a broad guideline on the damages to be awarded. In criticising the trial judge in that case for not having paid sufficient attention to such precedents, the learned Chief Justice delivering the judgment of the Court of Appeal said:

> Lastly, notwithstanding that the trial judge correctly identified that each defamation case must be taken on its own facts, we are of the view that insufficient regard was paid to the precedents established in case law. A broad framework of awards has emerged from past cases and these cases serve as a guide in determining the appropriate amount of damages to be awarded.

116 The picture painted of Yeo in the 3 Reports was that of a dishonest person who had conspired with others to make fictitious journal entries in the books of Speed with a view to misappropriating the funds of Speed. These allegations, needless to say, are severely defamatory. Their sting was the greater because they purported to be the considered opinions of a senior lawyer and a senior accountant. The fact that the defendants, instead of mitigating the damage by apologising, pleaded justification and pressed on with the allegations of misconduct in the cross-examination of Yeo, aggravated the injury to Yeo's reputation.

117 The 3 reports, however, were communicated to only a limited number of persons: on the evidence available, the 3 reports were communicated to three staff members of Ei-Nets and two of the reports were shown to Chong. The question which I have to consider is the extent to which such limited circulation of defamatory material would affect the amount of damages to be awarded.

118 That question arose for consideration by the Court of Appeal in the case of *Tang Liang Hong v Lee Kuan Yew and another* [1998] 1 SLR 97. That case dealt with claims by a number of plaintiffs against Tang Liang Hong ("Tang") for various defamatory statements that Tang had made. One of the defamatory statements was a police report lodged by Tang on 1 January 1997, the eve of polling day. In that police report, Tang had complained that certain leaders of the People's Action Party ("PAP") had, without factual basis, been making statements that Tang was a Chinese chauvinist and anti-English educated. The report went on to suggest that there was a conspiracy by the PAP leaders against Tang. Arising from this police report, three defamation suits were brought against Tang by three prominent PAP leaders, namely, Lee Hsien Loong, Tony Tan and Lee Yock Suan ("the three plaintiffs").

119 The three plaintiffs in that case had, in their respective statements of claim, averred that in making the police report Tang intended the re-publication of the police report by the media or that the re-publication by the media was a natural and probable consequence of his report. They claimed damages for the publication to the police officers as well as damages for re-publication by the media. The trial judge, not aware that the police report had been released to the media for publication by the PAP leadership and not by Tang, accepted the accuracy of the averments in the statements of claim and awarded damages on the basis that Tang had also caused the said re-publication. This error was, on appeal, brought to the attention of the Court of Appeal. The three plaintifs did not dispute that that was an error.

120 The Court of Appeal held that as Tang was not responsible for the re-publication, the damage occasioned by such re-publication could not be attributed to Tang: Tang could only be liable for the publication of the report to the police officers. In this respect, the Court of Appeal held at para 164:

> … damages would still be awarded for the publication of the report to the police officers, although a relevant consideration on the issue of damages is the very limited circulation involved.

Bearing in mind that Tang was not responsible for the re-publication but only for the very limited circulation of the report to the police officers, the Court of Appeal set aside the awards made by the trial judge and made fresh awards instead.

121 In respect of Tony Tan and Lee Yock Suan, the trial judge had awarded $350,000 and $300,000 respectively. The Court of Appeal awarded $150,000 and $130,000. In respect of Lee Hsien Loong, the trial judge had awarded $350,000. The Court of Appeal (taking into account the fact that Lee had already been awarded $220,000 in a related suit) awarded $130,000. In its judgment, the Court of Appeal also endorsed the comment by the trial judge that the standings of the parties was a pertinent consideration in the assessment of damages in defamation.

122 Mr Foo pointed out that even though the report to the police in the *Tang* case was circulated to very few police officers, the damages awarded by the Court of Appeal were very substantial. Mr Foo submitted that whilst his client, not being a leading public figure, was not expecting damages of the same magnitude as in the *Tang* case, the amount awarded should be sufficient compensation to vindicate the damage to his reputation caused by the very serious nature of the allegations in the Medora and Chor Pee Reports.

123 Taking into account the serious nature of the allegations; the lack of contrition on the part of LBC and Ei-Nets; the amounts awarded in recent cases; the need for damages in defamation cases to be compensatory and not punitive; and the fact that publication was only to a limited number of people, I assess the damages payable to Yeo at $80,000 and order the defendants to pay this amount to Yeo with interest thereon at 4% per annum from the date of the writ.

Plaintiff's claim in Suit 1279/2001 and Suit 1308/2001 allowed.
Defendants' counterclaim in Suit 1308/2001 dismissed.

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