Nganthavee Teriya alias Gan Hui Poo v Ang Yee Lim Lawrence and Others (Lim Eng Hock Peter and Another, Third Parties)
[2003] SGHC 86

Case Number : Suit 693/2002, RAS 303/2002, 304/2002

Decision Date : 10 April 2003

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Engeline Teh SC for the Third Party; Josephine Chong for the Third Party; Harry Elias SC (Harry Elias Partnership) for 1st and 2nd Defendants; Michael Palmer (Harry Elias Partnership) for 1st and 2nd Defendants; Chentil Kumarasingam (Harry Elias Partnership) for 1st and 2nd Defendants

Parties : Nganthavee Teriya alias Gan Hui Poo — Ang Yee Lim Lawrence; Tan Leong Ko William; Foo Jong Long Dennis — Lim Eng Hock Peter; Tan Buck Chye

Civil Procedure – Striking out – Third party proceedings – No reasonable cause of action – No common issues to be determined

Civil Procedure – Third party proceedings – Whether wrongdoer entitled to claim contribution from third party if it would result in wrongdoer retaining part of wrongful gain – Civil Law Act (Cap 43, 1994 Rev Ed) s 11(2)

1 The plaintiff, Ms Teriya Nganthavee, and her husband, Mr Tan Buck Chye ('BC Tan'), were, until June 1997, shareholders and directors of two Singapore companies, Europa Holdings Pte Ltd ('Europa') and Erasmia Pte Ltd ('Erasmia'). The defendants, Ang Yee Lim Lawrence, Tan Leong Ko William and Foo Jong Long Dennis were also shareholders and directors of the two companies. Subsequently, the plaintiff and BC Tan sold their shares in the companies to the defendants.

2 This action was commenced in June 2002. In it, the plaintiff claimed against all three defendants damages for misrepresentation and/or breach of an oral agreement and/or breach of fiduciary duties and/or conspiracy. She also claimed the costs of and expenses of investigating their conspiracy. There was a further or alternative claim for an account of all monies and benefits allegedly received by the defendants arising out of their alleged fraud of the plaintiff. Finally, she wanted a declaration that the defendants each held all sums received by them in fraud of the plaintiff as resulting or constructive trustees for her and an order that they pay those sums to her.

3 The disputes between the parties arose after Europa embarked on what it called the RTC project. This project involved the construction and management of a private recreation club to be known as the Raffles Town Club. To obtain land to be used for the club's premises, Europa successful tendered for a 30 year leasehold interest in a piece of vacant land at the junction of Dunearn Road and Whitley Road. The tender price was $100 million. In view of this large sum, one Lim Eng Hock Peter ('Peter Lim') was brought in as another investor in the RTC project.

4 According to the plaintiff, following Peter Lim's entry, the three defendants embarked on a conspiracy to defraud her and her husband by, first, diluting their respective shareholdings in Europa and Erasmia and, secondly, by procuring the sale of the plaintiff's and BC Tan's shares in the two companies at an undervalue. The conspiracy was effected by a series of overt acts that included:

(i) a series of fraudulent misrepresentations by Lawrence Ang and William Tan to induce the plaintiff and BC Tan to consent to a rights issue exercise for Europa on 13 November 1996, the object of which was the dilution of their shares in Europa. Pursuant to this rights issue their

shares were in fact diluted by half and this eventually resulted in their entitlement to shares in Erasmia being similarly halved;

(ii) a series of fraudulent misrepresentations by each of the defendants, in breach of their fiduciary duties, as to the success of the RTC project and a deliberate suppression of material information from the plaintiff and BC Tan, thereby inducing the sale of all the plaintiff's and BC Tan's shares in Europa and Erasmia at an undervalue.

It should be noted that by Suit 288 of 2002, BC Tan commenced action against the same three defendants as those sued here on the same bases as those set out here and for similar reliefs.

5 Lawrence Ang and William Tan appointed the same lawyer to defend the claim on their behalf. They filed a joint defence denying liability and disputing the plaintiff's claim. Subsequently, they filed a third party notice against two third parties, the first being Peter Lim and the second being BC Tan. This was followed up by a third party statement of claim. Basically, they wanted the third parties to indemnify them against any liability in respect of the plaintiff's claim and the costs of the action or for a contribution to the plaintiff's claim and the costs of the action to such extent as the court deemed fit. In relation to the third party action, I will refer to Lawrence Ang and William Tan jointly as 'the claimants'.

6 BC Tan then applied to strike out the statement of claim in the third party proceedings. At the first hearing of that application on 1 October 2002, the assistant registrar agreed with the submissions made by his counsel that the claimants' statement of claim against BC Tan disclosed no cause of action and ought to be struck out. Counsel for the claimants argued, however, that they should be given the opportunity to amend their statement of claim. The court adjourned the hearing of the striking out application to give them this opportunity.

7 The claimants then filed an application to amend their third party notice and statement of claim against BC Tan and this application was fixed to be heard at the same time as the adjourned summons in chambers for striking out. The two applications were heard together on 29 October 2002. At the end of the hearing, the assistant registrar granted BC Tan's application to strike out the statement of claim and dismissed the claimants' application for amendments of the third party notice and statement of claim. The claimants appealed against both decisions. I heard both appeals and dismissed them.

Reasons

8 BC Tan was successful in his application and in resisting the appeals against the registrar's decisions because I considered that the proposed amended third party statement of claim to be filed by the claimants did not disclose any basis on which they could claim an indemnity or any contribution from BC Tan in respect of any liability they had to his wife, the plaintiff. The original statement of claim had already been found wanting by the assistant registrar and their counsel had therefore put up a proposed amended draft in order to rectify the deficiencies of the original. In my view, the proposed amendments could not cure the fundamental flaws in their case against BC Tan. The proposed statement of claim is, however, a long and rather complicated document. The claims against BC Tan are stated at various paragraphs of the document. I will go through each relevant section of the pleading and indicate in relation thereto why I did not accept the contentions of Mr Elias, counsel for the claimants, that they had sustainable claims against BC Tan. Before doing so, however, I should refer to the relevant law.

The law

9 The right of a defendant who is sued in a civil action to claim an indemnity or contribution from a third party in respect of his liability to the plaintiff is conferred on him by the provisions of the Civil Law Act (Cap 43) ('the Act'). At the time that the events giving rise to the plaintiff's alleged right to sue the defendants herein took place, the relevant section of the Act was s 11. This has now been amended but the new version does not apply to events occurring before 1 January 1999.

10 The relevant portions of s 11 read as follows:

Proceedings against, and contribution between, joint and several tortfeasors.

11.(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) –

(a) …

(b) …

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

11 It would be noted that the right of one tortfeasor to recover a contribution from another tortfeasor depends only on whether the second tortfeasor would also have been responsible to the plaintiff for the damages sustained by the plaintiff if the plaintiff had sued him. Thus, the right of contribution does not depend on any contractual or tortious relationship between the two tortfeasors. However, the right conferred on one tortfeasor by s 11(1)(c) is not an absolute right. It is subject to the power given to the court by s 11(2) to exempt any person from liability to make a contribution.

12 During the course of the argument before me, I was somewhat perturbed by the notion that s 11 gave a tortfeasor who was a party to a conspiracy and who had been sued by the victim of that conspiracy for damages, the right to claim a contribution from a fellow conspirator. It seemed to me that allowing such a claim would be tantamount to allowing a party in an action to rely on his own illegality to recover damages from another and that this would be contrary to the ex turpi causa maxim. Mr Elias then cited *K and Another v P and Others* [1993] CH 140 that dealt with this very problem.

13 The plaintiffs in *K v P* brought an action against the defendants for, inter alia, conspiracy to defraud the plaintiffs by the obtaining of inflated fees and commission payments in relation to transactions conducted by the defendants on the plaintiffs' behalf. The third defendant issued a third party notice against the plaintiffs' accountant claiming an indemnity or contribution in the event of the third defendant being held liable to the plaintiffs, on the ground that the accountant had

negligently failed to warn the plaintiffs of the risks inherent in the defendants' transactions. The accountant sought to have the third party notice struck out. The master held that the claim was capable of falling within s 11 of the Civil Liability (Contribution) Act, 1978 ('the English Act') and dismissed the application. The third party's appeal was dismissed. It was held that the liability imposed under s 11 of the English Act was intended by Parliament to enable claims for contribution to be made as between parties who had no claim to contribution under the general law, and applied whenever a plaintiff had a cause of action against a third party in respect of the same damage as gave rise to his cause of action against a defendant, irrespective of the legal basis of the liability; and that accordingly, the defence of ex turpi causa non oritur actio could not be relied on in answer to a claim for contribution under the English Act.

14 The relevant provisions of the English Act are in the following terms:

> 1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise) …
>
> 2(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.
>
> (2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
>
> 6(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

I would point out that the English section 2(1) is in almost identical terms to s 11(2) of the Act as it was prior to 1998 and that all the sections of the English Act cited above have been incorporated as part of the amendments made to the Act in 1998 in relation to rights of contribution.

15 Ferris J who heard *K v P* had to consider whether the ex turpi causa maxim and its related rules (which he referred to as the 'ex turpi causa defence') afforded a defence to a claim for contribution under the English Act and secondly, if it was capable of so applying, whether it could be said with the degree of certainty necessary for a striking out order to be made, that the defence would exclude any contribution from the third party in the circumstances of that case. In the course of argument Mr Whitaker, counsel for the third defendant there, submitted that he was asserting a statutory cause of action under the English Act, the only necessary ingredient of which were that persons, namely the plaintiffs, had against the third party a cause of action in respect of the same damage as gave rise to those persons' cause of action against the third defendant. It did not matter that the plaintiffs' cause of action against the third defendant arose from conspiracy or fraud whereas the cause of action against the third party arose from breach of a contractual or tortious breach of care. Mr Whitaker also pointed out that s 6(1) of the 1970 Act had replaced s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 which created a right of contribution between joint tortfeasors: 'Where damage is suffered by any person as a result of a tort (whether a crime or not) …'. [It should be noted that these are the opening words of s 11(1) of the Act.] As the judge noted, at p 148, Mr Whitaker contended:

> The concluding words showed that a claim to contribution might arise under the Act of 1935 out of tortious conduct committed by two or more persons even though one or both of them may have committed a crime in the course of such conduct. In relation to such a claim the ex turpi causa defence could have had no application. The Act of 1978 extends the potential for contribution beyond joint tortfeasor to joint contractors, joint trustees and others who are liable in respect of the same damage … Apart from other considerations it is manifest that the words of section 6(1) of the Act of 1978 are intended to be interpreted widely …

The judge accepted that argument although he did not accept that passages from an authority cited by Mr Whitaker were relevant. The judge then concluded at p 148-149:

> I do, however, accept the other parts of Mr Whitaker's argument. In my judgment, the ex turpi causa defence is not available as an answer to a claim for contribution under the Act of 1978. The specific purpose of that Act, as of the Act of 1935 before it, was to enable claims for contribution to be made as between parties who had no claim to contribution under the general law. To permit the ex turpi causa defence to be relied upon as an answer to such a claim would, in my view, narrow to a substantial extent the deliberately wide wording of section 6(1) of the Act of 1978 and would, in effect, make a claim for contribution subject to a condition precedent which is not to be found in the Act. Moreover section 2(1) and (2) give the court ample power to fix the amount of the contribution at a level, including a zero level, which takes account of all the factors which, in relation to common law claims, are available to the ex turpi causa defence.

I point out here that the same power was available to the Singapore court under s 11(2) of the Act.

16 The judge then turned to consider whether it could be said with certainty that the court would under s 2(2) exempt the third party from liability to make a contribution. In this connection he observed at p 149:

> In so far as the plaintiffs are seeking to recover from the third defendant money which he has obtained for his own benefit or for the benefit of companies which are, in effect, his alter ego, I can see that the third party would have an overwhelming argument that it cannot be just and equitable to require him to contribute to whatever the third defendant is ordered to pay to the plaintiffs. Contributions, if ordered, would enable the third defendant or his fellow conspirators to retain part of the proceeds of their conspiracy or fraud. Similar considerations would, it appears to me, be applicable to any claim that the third party should contribute to any exemplary damages which the third defendant may be ordered to pay to the plaintiffs, for exemplary damages would never be recoverable by the plaintiffs direct from the third party. Indeed it may well be that a claim for contribution in respect of exemplary damages is not within section 1(1) on the facts of this case, so that one never gets to section 2 in relation to such a claim.

17 Having read this case and heard the arguments of counsel, I took the view, rather regretfully, that I was precluded by the words of the legislation from disallowing the third party claim against BC Tan only on the basis that the claimants were asking for relief against damages that they would have to pay to the plaintiff because they were found liable to her in conspiracy and BC Tan was a party to such conspiracy. It appeared from s 11(1) that as long as the claimants could establish that they and BC Tan were joint tortfeasors then, if damage had been suffered by the plaintiff as a result of that tort (even though it was a crime), they were permitted by s 11(2) to institute an action to recover a contribution from BC Tan towards any liability they had to the plaintiff since BC Tan, if also sued by the plaintiff, would have been liable to her in respect of the same damage.

18 At the same time, however, the situation before me was different from that before the judge in *K v P*. There, the plaintiffs' cause of action against the defendants was in conspiracy whereas their cause of action against the third party would have been in negligence. In this case, the plaintiff's cause of action against the claimants was in conspiracy and breach of duty and her cause of action against BC Tan, if any, would also have been in conspiracy and breach of duty. Further, BC Tan did not derive any benefit from this conspiracy since he, like the plaintiff, had not taken up the rights issue in Europa and had sold all his shares in Europa and Erasmia at the same alleged undervalues as the plaintiff. If there had been a conspiracy therefore, any benefits derived from it would have been derived solely by the claimants and the third defendant. Accordingly, if BC Tan had been added as a third party and had been found to be a co-conspirator, the effect of allowing the third party action against him would have been to allow the claimants to recover from him a contribution towards the damages they would have been found liable to pay the plaintiff and this would have meant in effect that they would retain part of their ill gotten gains from the conspiracy. This could not be right as was also recognised by Ferris J. Accordingly, as I told counsel when I dismissed the appeals, one of my reasons for the decision was that I considered that as a matter of law that where a plaintiff succeeds in recovering from one tortfeasor the benefits he has derived from a deliberate tort committed against the plaintiff, that tortfeasor would or should not be able to get a contribution from a co-tortfeasor such that he is enable to retain part of his wrongfully acquired benefit. In effect, I decided that in the circumstances of this case, the court hearing the third party action would exercise its powers under s 11(2) to exempt BC Tan from liability to make any contribution at all to the damages to be paid by the claimants to the plaintiff.

Proposed amended statement of claim – (1) paragraphs and claim relating to the rights issue

19 In ¶ 41 to ¶ 69 of the proposed amended statement of claim, details were given of the plan put forward by Peter Lim for a rights issue and also of the events leading up to that rights issue. In early November 1996, Peter Lim produced documentation necessary for the rights issue. These documents were circulated to all the directors of Europa including the plaintiff and BC Tan. BC Tan became upset and said a rights issue was not necessary. The claimants, however, relying on reasons given to them by Peter Lim as to the necessity for a rights issue, agreed to and approved Peter Lim's plan for the rights issue.

20 On 13 November 1996, an extraordinary general meeting of Europa was held to approve the rights issue. The claimants averred that the plaintiff and BC Tan both approved the rights issue in their capacities as both shareholders and directors of Europa. Subsequently, both of them executed a formal renunciation of their right to take up the rights shares that would otherwise have been allotted to them. As a result, the number of shares allotted to each of the claimants and the third defendant was increased.

21 In her statement of claim, the plaintiff had alleged that in order to induce her to consent to the rights issue, the claimants had, on 12 November 1996 orally made certain representations to BC Tan. Further, they had made these representations with the intention that he should and/or contemplating that he would pass on such representations to her. Further, or alternatively, such representations were made to BC Tan as agent for the plaintiff.

22 In ¶ 70 of the proposed third party statement of claim the claimants averred that BC Tan was the person who represented to the plaintiff that the claimants had made the representations in respect of the rights issue (though they denied that they had in fact made those representations). Further, by ¶ 71, the claimants averred that BC Tan was the person who persuaded and/or induced the plaintiff to consent to the rights issue. By ¶ 72, they pleaded that in the event the court found that some or all of the rights issue representations were made by the first claimant and/or the second

claimant, then they averred that BC Tan had aggravated and/or embellished these representations so as to persuade the plaintiff to consent to the rights issue. By ¶ 73, the claimants averred that by reason of the matters pleaded in ¶ 70, 71 and 72, BC Tan was a joint and/or concurrent tortfeasor and claimed that he indemnify them against the plaintiff's claim and for judgment for any amount that may be found due from them to the plaintiff or for the amount of such contribution.

23 Ms Teh, counsel for BC Tan, submitted that the substance of the defence filed by the claimants to the plaintiff's claim was that they had not made the alleged representations in relation to the rights issue. In their statement of claim against BC Tan, however, their claim was based both on their denial that they had made the rights issue representations and their allegation that the plaintiff had been induced or persuaded by BC Tan to approve the rights issue. Counsel submitted that if the claimants succeeded in their defence that they had not made these representations to BC Tan (who was the plaintiff's agent), the plaintiff's claim against them on the representations would fail and there would not be any issue of indemnity or contribution between them and BC Tan. If, on the other hand, they failed in this defence, which would mean that the court found that they had made those representations upon which the plaintiff acted, then whether the plaintiff was induced or persuaded by BC Tan to approve the rights issue could not give them a right of indemnity or contribution as the plaintiff's damage would result from representations made to BC Tan as the plaintiff's agent.

24 I accepted Ms Teh's argument. I also considered that in fact what the claimants were alleging was that BC Tan was a co-conspirator with them (assuming of course that they were to be found to have been engaged in a conspiracy to persuade the plaintiff not to take up the rights issue so that they would benefit from an increased entitlement to the new shares). I found such an allegation to be at odds with the probabilities of the situation. Why would the plaintiff's husband conspire with his co-directors to tell her untruths in order to persuade her to do something to her detriment when he himself knew it was to her detriment and also was intending to do the same thing himself ie not take up his entitlement under the rights issue? In any case, if he had been a co-conspirator, since it was admitted that he was her agent, she would not be able to succeed in her action against the claimants. Once this point was brought up as a point of defence and proved it would completely defeat the plaintiff's claim and there could be no issue between the claimants and the third party. As Ms Teh submitted, because BC Tan was the plaintiff's agent and alter ego in the matters relating to Europa, there was no separate issue to be tried whether of indemnity or contribution or otherwise between the claimants and BC Tan. Finally, as I stated in ¶ 18, in this situation I could not accept that any court would allow the claimants to obtain a contribution from BC Tan so as to lessen their liability to the plaintiff as such contribution would result in them retaining some of the benefit derived from their unlawful conduct.

(2) Paragraphs 74 to 76

25 In ¶ 74, it was averred that BC Tan as a registered and beneficial shareholder and/or director, and as the chief operating officer, of Europa and Erasmia owed the following fiduciary duties to the plaintiff:

(1) a duty to act bona fide in her interests;

(2) a duty not to place himself in a position where his duty to the plaintiff conflicted with his own interests;

(3) a duty to exercise his duties as a director bona fide and not for any improper purpose.

Particulars of this allegation were given and under these particulars it was asserted that the duties

arose because BC Tan was the plaintiff's agent. As a matter of law, this pleading was gravely flawed as BC Tan's position as shareholder/director/chief operating officer of the two companies did not impose any of the fiduciary duties listed on him vis-à-vis the plaintiff. As her agent, however, he had the first and second duties listed above.

26 In ¶ 75, the claimants averred that BC Tan had breached his fiduciary duties by telling the plaintiff that the rights issue representations were made by the claimants and/or by persuading her to approve the rights issue and/or by aggravating or embellishing the representations made by the claimants so as to cause the plaintiff to approve the rights issue. They also asserted that BC Tan no longer wished to be a director or shareholder of the companies and therefore he approved the rights issue and exercised undue influence over the plaintiff to cause her to approve the rights issue as well.

27 I had difficulties with ¶ 75. First as they related to the rights issue representations, those assertions were subject to the same objections that I have detailed in ¶ 23 above. Secondly, there were no particulars at all of the allegation of undue influence and it was thus a bare assertion. Thirdly, there was an assertion that BC Tan had placed himself in a position where his interests and the plaintiff's interests conflicted. As Ms Teh pointed out, they had failed to state how he had done so. Further, even if he no longer wanted to be a shareholder or director of the two companies, why would this have made him interested in allowing the dilution of his own shares or having the plaintiff's shares similarly diluted? The undisputed facts showed that the plaintiff's interests and BC Tan's interests were the same and therefore this averment was not logical.

28 In ¶ 76, it was pleaded that in the premises BC Tan was a joint and/or concurrent tortfeasor and the claimants were entitled to claim from him an indemnity against the plaintiff's claim and/or a contribution to it.

29 It appeared to me that these paragraphs were simply a repetition of the claim made by ¶ 70 to 73 and, for the same reasons, could not be allowed.

(3) Paragraphs 77 to 83 and 93 to 96

30 These paragraphs related to the alleged representations which induced the sale by the plaintiff of her shares in Europa and Erasmia at an undervalue. In ¶ 77 to 83, the claimants set out the events between early 1997 and April 1997 leading to the sale of BC Tan's and the plaintiff's shares in the two companies. Negotiations were carried on between the claimants and BC Tan who was acting for himself and the plaintiff. The claimants averred that BC Tan was the person who approved the sale price of $10.7 million. They also averred that BC Tan knew that the first claimant would be purchasing the shares for himself and for Peter Lim. The sale was completed in June 1997 and upon the execution of the transfer forms, the legal title to BC Tan's and the plaintiff's shares was transferred to the first claimant whereas beneficial ownership was distributed amongst the claimants and Peter Lim.

31 In ¶ 93 the claimants averred that it was BC Tan who represented to the plaintiff that certain representations set out in the plaintiff's statement of claim which induced her to sell her shares were made by the claimants. They denied making these sales representations but stated that in the event the court found that the claimants made some of them, BC Tan made the remaining representations. In ¶ 94, the claimants averred that BC Tan had aggravated and/or embellished the sales representations so as to cause the plaintiff to sell the shares. In ¶ 95, they averred that he was the person who persuaded her to enter into the sale and purchase agreement and in ¶ 96 they averred that by reason of the matters pleaded in ¶ 93 to 95 BC Tan was a joint and/or concurrent tortfeasor

and liable to indemnify them.

32 From the above recital, it can be seen that ¶ 93 to 96 of the proposed amended statement of claim followed the form and substance of ¶ 70 to 73 and therefore failed for the same reasons.

(4) Paragraph 97

33 In this paragraph, it is pleaded that BC Tan 'was the person who took control of and directed the launch of the Raffles Town Club and thereby knew and/or had notice actual or otherwise, of the actual number of membership applications received or likely to be received' and followed this immediately by a claim against BC Tan for an indemnity against the plaintiff's claim arising from the sale of her shares in the companies and/or any alleged conspiracy to defraud or injure her by unlawful means or a contribution to such liability. Ms Teh submitted this paragraph was unintelligible and I agreed. It could not be allowed. By itself it did not establish any basis for a claim against BC Tan.

(5) Paragraphs 98 to 100

34 These paragraphs largely followed the form and substance of ¶ 74 to 76 of the proposed amended statement of claim except that they related to breach of fiduciary duty on the part of BC Tan in relation to the sale of the shares. There were two additional particulars that made little difference to the substance of the objections to these paragraphs. They failed for the same reasons as ¶ 74 to 76 did. Further, with respect to the allegation that BC Tan had placed himself in a position of conflict or had acted mala fide against the interests of the plaintiff in the context of the sale of shares, the pleading failed to state how BC Tan's own interests would be served by his causing the plaintiff to sell her shares as well.

(6) Paragraph 101

35 This paragraph set out in sub-paras (a) to (s) 20 issues that the claimants required to be determined not only as between the plaintiff and themselves but also as between either or both of them and BC Tan. This paragraph was formulated in relation to O 16 r 1(1)(c) of the Rules of Court.

36 Order 16 r 1(1)(c) of the Rules of Court provides that a defendant may commence third party proceedings where, in any action, he 'requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action'.

37 It is clear from the wording of r 1(1)(c) that the issues on which it is sought to have a determination between the defendant and the proposed third party must already be issues in the action between the plaintiff and the defendant. If they are not, then the third party cannot be joined for the purpose of determining those issues.

38 I took the view that none of the issues formulated by the claimants justified joining BC Tan as a third party. First, some of the issues related to questions that were not in issue between the plaintiff and the claimants. One example was issue j that read:

Whether [BC Tan] had manufactured evidence to inform the plaintiff of what did or did not occur in relation to the sale and purchase of the plaintiff's Europa and Erasmia shares.

Secondly, some of the issues were repetitions of each other and also were re-formulations of the main claims set out in the preceding paragraphs of the third party statement of claim which I had disallowed. Finally, and most importantly, there was no necessity to join BC Tan as a third party to this action in order to obtain a determination of any issues between him and the claimants as well as between the claimants and the plaintiff. This was because there was already an existing action (Suit No 288 of 2002) brought by BC Tan against the claimants arising out of the same facts as the plaintiff's action herein and claiming similar relief. Any questions that the claimants needed to have determined between themselves and BC Tan could be determined in Suit 288 of 2002 and it was therefore redundant to join him as a third party to this action to determine the same issues. It should be noted also that by the time the application was heard before me, it had already been decided that this action and Suit 288 of 2002 would be heard one after another.

Request for further arguments

39 After I made my decision, the claimants wrote in to ask for further arguments. I did not agree to the claimants' request for further arguments. I considered that the further arguments put forward had no merit.

40 One of the arguments that they wished to put forward related to the position of an agent vis-à-vis his principal. They contended that the tenet that the knowledge of an agent may be imputed to his principal is not of absolute application. It is not certain in every case that an agent's knowledge can be so ascribed to his principal, or that an agent's act are to be construed as the acts of his principal:

(a) if knowledge is obtained outside the agency, it may not be capable of being imputed to the principal; or

(b) if the agent is committing a fraud on or is breaching his fiduciary duties towards his principal his knowledge will not be imputed to the principal. This would be the case, for example, where BC Tan had wished to cease his involvement in Europa and Erasmia and pursuant to that made additional misrepresentations to the plaintiff that induced her to give up the rights issue.

41 The claimants went on to argue that the implications of this were that if they were found to have made the alleged misrepresentations to BC Tan but that he knew the true facts due to his position as CEO of Europa, then he would have no claim against them because he was not induced by any such representations. However, if either of the circumstances set out in sub-paragraphs 40(a) or 40(b) above was proved, then it would be possible that the plaintiff would not be deemed to have knowledge of those facts which BC Tan knew as CEO, and therefore might still have been induced by the claimants' misrepresentations. They submitted further that if that proved to be the case then, any fraud, non-disclosure or other breach of fiduciary by BC Tan to the plaintiff relating to her agreement to the rights issue or the sale of shares would form the basis for an order requiring BC Tan to contribute to any damages payable by the claimants in respect of the losses suffered by the plaintiff.

42 I disagreed. First, in the circumstances of this case where the plaintiff agreed that BC Tan was acting for her in relation to all matters concerning Europa and Erasmia, there was no question of any knowledge obtained by him in relation to those companies' affairs being outside the scope of the agency. Secondly, there was no allegation by the plaintiff that she should not be imputed with knowledge acquired by BC Tan because he was acting in fraud of her. That being the case, the plaintiff could hardly argue as between herself and the claimants that even though her agent had certain knowledge of the true circumstances she could still prosecute her claim. Thirdly, even if it

was possible that BC Tan had been acting in fraud of a wife with whom he appeared to have a reasonable relationship (there was no whisper in the pleadings of any breakdown of the relationship) since, as the claimants admitted, his failure to disclose the true facts to her would have resulted in her relying on the misrepresentations they had made with the intention that she should rely on them, they would still be liable to her for her claim. Their liability would be to compensate her for what she lost from the course of action she pursued in reliance on the representations. I took the view that the measure of what the plaintiff lost and thereby the measure of damages payable to her would be what the claimants gained from the misrepresentation. In those circumstance, the claimants would still not be able to recover any contribution from BC Tan towards such damages.

43 The second argument in the letter of request was that the damages claimed and the account sought in the alternative by the plaintiff may not be identical in all circumstances and therefore that any contribution obtained from BC Tan would not necessarily result in the claimants retaining any ill gotten gains. The claimants submitted and I quote:

> It is possible that the trial court may find that [the claimants] did not fully extract from the Company a sum proportional to the extent of the loss suffered by the Plaintiff. Alternatively, the trial court might consider that the parties' relative wrongdoing (if any) were not in proportion to their shareholdings or to any benefit obtained by them and/or that the particular facts of the case required that a compensatory rationale should inform the Plaintiff's remedy instead of one that was based on restitution alone.

44 I did not completely understand this argument. I could not conceive of any way of ascribing a ratio between wrongful acts and the number of shares held in a company. Further, I considered that whatever the arguments on damages that might be put forward at the trial, in the circumstances of this case, the plaintiff's loss had to be equal to the amount of the claimants' gain. This was because essentially the plaintiff had to be put back in the position she would have been in if she had not given up her rights to take up the rights issue shares and if she had not sold the other shares to the claimants. What the plaintiff lost by these actions the claimants gained and would have to cough up if the plaintiff proved her case of misrepresentation and fraud. In this case compensation and restitution would in effect be the same relief.