WONG PARTNERSHIP

LITIGATION & DISPUTE RESOLUTION HIGHLIGHTS 2018

APRIL 2019

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Litigation & Dispute Resolution Highlights 2018 | In Brief

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Litigation & Dispute Resolution Highlights 2018

2018 was another landmark year for our litigation and dispute resolution practice.

We remain ranked in Tier 1 in Dispute Resolution by *The Legal 500: Asia-Pacific 2019.* We are also recognised for our expertise in Dispute Resolution and International Arbitration in *Chambers Asia-Pacific & Chambers Global 2019*, *Asian-Mena Counsel's Firms of the Year 2018*, and *Benchmark Litigation Asia-Pacific 2018.*

In addition, we are recognised as one of the Top 100 Arbitration Firms in the world by *Global Arbitration Review (GAR) 100, 2019* (for the ninth year running) and won the *Asialaw & Benchmark Litigation Asia-Pacific Dispute Resolution Awards 2018* for Best Domestic Arbitration Firm of the Year and Matter of the Year (acting against the Kingdom of Lesotho in an investment treaty arbitration involving claims in excess of US$1.9 billion for expropriation of diamond mining leases and in an application to set aside an investment treaty award finding the State liable for denial of justice in relation to its role in the shuttering of the South African Development Community Tribunal), and the *IFLR Asia-Pacific Awards 2019* for Deal of the Year: Restructuring (Noble Group).

Among other highlights, we acted in:

- the landmark decision of ***Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301*** [2018] SGCA 50, where the Court of Appeal held that the tort of malicious prosecution is not extended to civil proceedings generally, and that the tort of abuse of process is not recognised in Singapore.
- ***Teng Wen-Chung v EFG Bank AG, Singapore Branch*** [2018] SGCA 60, where the Court of Appeal affirmed the summary judgment in respect of a US$200 million claim over an indemnity agreement in spite of claims that the agreement was unenforceable as a result of foreign illegality, and questioned the continued application of the test relating to contractual illegality laid down in the English case of *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1.
- ***Thio Syn Kym Wendy and others v Thio Syn Pyn and another*** [2019] SGCA 19, where the Court of Appeal agreed with the High Court on legal principles on the applicability of minority discounts, particularly where the company is not a quasi-partnership.
- the significant decision of ***Bumi Armada Offshore Holdings Limited and Ors v Tozzi Srl (formerly known as Tozzi Industries SpA)*** [2018] SGCA (I) 05, where the Court of Appeal's decision against a first instance decision of the Singapore International Commercial Court ("**SICC**") in clarifying the requirements for proving a tort of inducement in the context of a parent company's alleged inducement of a breach by its subsidiary, has added significantly to the jurisprudence of the SICC.
- ***Koh Keng Chew & Ors v Liew Kit Fah & Ors*** [2018] SGHC 262, where the High Court affirmed that discounts to share valuations under buyout orders are to be applied only where just and equitable; a discount for lack of control or lack of free transferability cannot be justified as just and equitable simply on the ground that it is common in transactions between willing buyers and willing sellers.
- ***Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and others*** [2018] SGHC 263 where the High Court dealt with contractual provisions, in particular, whether certain provisions in call option agreements constituted unenforceable penalties.

We are pleased to share with you some highlights of 2018 which have contributed to our continued recognition in the market.

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COMPANIES

Court of Appeal agrees with High Court that there is no general rule in cases involving companies that are not quasi-partnerships, and no presumption or "baseline" that a discount should be applied if the company is not a quasi-partnership

***Thio Syn Kym Wendy and others v Thio Syn Pyn and another* [2019] SGCA 19**

The High Court articulated legal principles on the applicability of minority discounts, particularly where the company is not a quasi-partnership. In summary:

(a) There is no general rule in cases involving companies that are not quasi-partnerships, and no presumption or "baseline" that a discount should be applied if the company is not a quasi-partnership.

(b) The court must look at all the facts and circumstances when determining whether a discount should be applied in any case. The court would be more inclined to not order a discount where the majority's oppressive conduct was directed at worsening the position of the minority as shareholders so as to compel them to sell out, or where the majority was entirely responsible for precipitating the breakdown in the parties' relationship. In contrast, the court would be likely to order a discount where the conduct of the minority contributed to their exclusion from the company or the oppressive conduct complained of.

Background

In *Thio Syn Kym Wendy and others v Thio Syn Pyn and others* [2017] SGHC 169 ("**Earlier Judgment**"), the High Court granted the plaintiffs judgment on their minority oppression claim and ordered the defendants to buy out the plaintiffs' shares in a company. In that Earlier Judgment, the Court also found that, although most of the directors of certain companies were members of the same family, those companies were neither quasi-partnerships nor companies akin to quasi-partnerships because the directors did not operate on the basis of a relationship of mutual trust and confidence in relation to how the companies were run.

High Court

In the High Court, the outstanding issue of share valuation was dealt with. The defendants wanted the shares to be valued on a fair market value basis, which would allow for a discount to be applied to the valuation of the shares. The plaintiffs argued that the general rule is that no discount should be applied in court-ordered buyouts and that their shares should be valued *pro rata* according to the value of all the shares in the company.

The Court noted that the legal principles on the applicability of minority discounts were not fully settled. While it is clear that a presumption of no discount exists where the company is a quasi-partnership, the position is far less certain as to whether the converse is true, i.e. that there would be a presumption of a discount for shares in companies that are not quasi-partnerships.

The Court held that no minority discount should apply to the sale of the plaintiffs' shares, as the group companies were family-run and family-owned, even if this did not amount to a quasi-partnership or import any obligations of mutual trust and confidence between the shareholders. The family-run nature and the way in which the various parties had come into their shareholdings suggest that the defendants were always meant to ensure that the interests of the companies and their siblings would be protected or at least not harmed. It is not a strong factor, but it is nonetheless one that the Court believed deserved consideration as

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part of the overall circumstances of the case. A valuation of the plaintiffs' shares with no minority discount applied would be an outcome that is fair and equitable to all of the parties, especially in light of the defendants' commercially unfair and oppressive actions and the plaintiffs' lack of culpability as minority shareholders in causing the breakdown of the relationship between the parties.

Court of Appeal

On appeal, the Court of Appeal agreed with the decision of the High Court, upholding the valuation of clients' shares on an undiscounted and full value basis.

Our Comments

This is the first reported decision setting out the legal principles on the applicability of minority discounts in a buyout order where a company is not a quasi-partnership. Prior to this case, the order that there be no minority discount be applied was often given as a matter of course by the courts in Singapore, without setting out detailed reasons for the same or considering whether the company was a quasi-partnership.

Both the High Court and Court of Appeal have clarified that while the presumption that no discount should be applied in the case of a *quasi-partnership* is a legal position that appears to be firmly established in the Singapore context, there is no overarching principle or legal policy that justifies (as a general rule) the raising of a presumption of a discount in the context of non-quasi-partnerships.

This case thus has relevance where a buyout order is made in respect of a non-quasi-partnership. Notwithstanding that the shareholder subject to the buyout order is a minority shareholder of the company, this does not automatically result in a presumption that a minority discount ought to be applied in respect of his shares (nor would the court order that no minority discount be applied as a matter of course). Ultimately, the court would look into all the facts and circumstances of the case in arriving at its decision as to whether a minority discount ought or ought not to be applied.

Our **Alvin YEO, SC**, **Joy TAN**, **HO Wei Jie**, **Jeremy TAN**, and **WANG Chen Yan** acted for the successful plaintiffs in the High Court and respondents in the Court of Appeal, *Thio Syn Kym Wendy and others*.

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High Court affirms that discounts to share valuations under buyout orders to be applied only where just and equitable; a discount for lack of control or lack of free transferability cannot be justified as just and equitable simply on the ground that it is common in transactions between willing buyers and willing sellers

***Koh Keng Chew & Ors v Liew Kit Fah & Ors* [2018] SGHC 262**

The High Court held that, where a buyout order is made under section 216 of the Companies Act, the overriding principle is that any terms attached to the buyout order (including whether a discount for lack of control or lack of free transferability should be applied), must be just and equitable. This principle applies equally to both quasi-partnership and non quasi-partnership cases.

It is for the party asserting that a discount should be applied to show that it would be just and equitable on the facts of the case to do so. The fact that discounts are common in freely-negotiated commercial transactions is not a sufficient reason to justify the application of a discount to the minority's shares.

The decision emphasises that buyout orders made under section 216 must be just and equitable and holds that the mere fact that the case involves a quasi-partnership or non quasi-partnership are not determining factors as to the general applicability of a discount for a minority shareholding.

Background

The minority shareholders of the Samwoh group of companies ("**Samwoh Group**") had brought an action under section 216 of the Companies Act against the majority shareholders. As parties agreed that the relationship of mutual trust and confidence had broken down, parties recorded a consent order that the Court need only decide on the sole issue of who should buy out whom. The High Court ordered the majority shareholders to purchase the minority shareholders' shares in the Samwoh Group. As parties disagreed as to whether a discount should be applied to the value of the minority shareholders' shares, the High Court examined the principles underlying the application of a discount in the context of a buyout order made under section 216.

The High Court's Decision

The High Court has affirmed that, when making a making a buyout order under section 216(2) (a "**Buyout Order**"), the overriding principle is that the Buyout Order, and any terms attached to it (including whether a discount for lack of control or lack of free transferability should be applied), must be just and equitable. Further, the High Court held that this principle applies equally to both quasi-partnership and non quasi-partnership cases.

Endorsing the views expressed in a number of English and local cases that a discount for minority shareholding should not be factored in the valuation unless it is shown that it is just and equitable to do so, the High Court reasoned (said reasons applying with equal force to the issue of discount for lack of transferability):

- it is generally fair that the price for shares that are subject to a Buyout Order should be fixed *pro rata* according to the value of the shares in the company as a whole. A Buyout Order provides an innocent shareholder an exit from his investment in the company and it is only fair that the shareholder recovers

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the full value of his interest in the company. The party asserting a discount will need to show that adjustments to the value are necessary to achieve a just and equitable result.

- a discount for lack of control reflects the realities of a freely-negotiated transaction, i.e. a transaction between a willing seller and a willing buyer. A Buyout Order, on the other hand, is an exercise of the court's coercive power. Where the innocent shareholder is essentially forced to exit the company because of the majority shareholder's conduct, it would be unfair that he be bought out on the basis of a willing seller and willing buyer when this is clearly not the case. In any event, even as between a willing seller and willing buyer, discounts are nonetheless a matter for negotiation and agreement.
- applying a discount to a minority shareholding gives the delinquent shareholder an undeserved reward, which does not square with the purpose of a Buyout Order intended to provide a remedy for the innocent shareholder.

The High Court further held that the party asserting that a discount should be applied has to show that applying the discount is just and equitable on the facts of the case; applying a discount (whether for lack of control or for lack of free transferability) cannot be considered to be just and equitable merely on the ground that such discounts are common in freely-negotiated commercial transactions.

The High Court rejected the majority shareholders' argument that the purpose of a valuation exercise is to determine the "fair value" of the shares under valuation and that the valuer should factor in "commercial realities". Since a buyout pursuant to a Buyout Order is not a freely negotiated commercial transaction, the minority shareholders were not willing sellers. It was insufficient for the majority shareholders to invoke "commercial realities" to justify applying a discount to the minority shareholders' shares for lack of control and lack of free transferability.

In this case, the majority shareholders were unable to show why it would be just and equitable to apply discounts for lack of control and lack of free transferability. The High Court therefore directed that such discounts were not to be applied to the valuation of the minority shareholders' shares.

Our **LIM Wei Lee** and **Daniel TAN Shi Min** acted for the successful plaintiff minority shareholders**.**

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CONTRACT

High Court deals with contractual principles, in particular whether certain provisions in call option agreements constituted unenforceable penalties

Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and others **[2018] SGHC 263**

The High Court applied principles of contractual interpretation and ruled that certain provisions in call option agreements did not amount to penalties, and were therefore enforceable.

Background

The plaintiff and first and second defendants entered into a share sale agreement for the sale and purchase of shares in a company incorporated by the first and second defendants as a corporate vehicle for running a private plastic surgery practice ("**third defendant**"). Subsequent to the share sale agreement, the parties had also entered into a shareholders agreement, two separate put option agreements ("**POA**") and two separate call option agreements ("**COA**").

The plaintiff sought an order of specific performance to compel the first and second defendants to purchase its shares in the third defendant, claiming that it had exercised its put options in respect of these shares and based on the POAs, the first and second defendants were obliged to purchase its shares. The defendants denied the validity of the put option notices, claiming that they had notified the plaintiff of the occurrence of a Default Event as defined in the COAs, the consequence of which entitled the first and second defendants to exercise their respective call options to purchase the plaintiff's shares in the third defendant for S$1, which they eventually did. The effect of this exercise by the two defendants of their call options was to terminate the POAs. The defendants counterclaimed for specific performance to compel transfer of the plaintiff's shares to the first and second defendants.

The issues included whether the first and second defendants could have validly issued call option notices to purchase the plaintiff's shares for S$1 ("**default call options**"); and whether the clauses in the COAs amounted to unenforceable penalty clauses.

The High Court acknowledged that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, i.e., whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law.

Having observed that the *locus classicus* on the issue of penalties, *Cavendish Square Holding BV v Makdessi and another appeal* [2016] AC 1172, was endorsed by the High Court in *Allplus Holdings Pte Ltd and others v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144 and *iTronic Holdings Pte Ltd v Tan Swee Leon & Anor* [2016] 3 SLR 663, the High Court concluded that the provisions in question were not unenforceable penalties, and were thus valid.

Our **Melanie HO**, **Alvin LIM** and **CHIA Shi Jin** acted for the successful defendants.

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Court of Appeal affirms summary judgment in respect of a US$200 million claim over an indemnity agreement in spite of claims that the agreement was unenforceable as a result of foreign illegality and questions the continued application of the test relating to contractual illegality laid down in the English case of *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1

Teng Wen-Chung v EFG Bank AG, Singapore Branch **[2018] SGCA 60**

In this landmark case, the Court of Appeal affirmed a summary judgment for a US$200 million claim over an indemnity agreement notwithstanding claims that the indemnity agreement was unenforceable as a result of foreign illegality.

The Court of Appeal affirmed that the defendant had failed to discharge his burden of establishing a reasonable probability that he had a real or *bona fide* defence. The Court of Appeal agreed with the court below that nothing on the face of the loan facility or the indemnity agreement revealed any intention to do an illegal act in a foreign country or to circumvent the law of that country.

The Court of Appeal also examined the application of the English case of *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 concerning contractual illegality, which was previously applied in Singapore and considered that there were "significant difficulties" with the principles laid down in the case which would need to be reconsidered.

Euro-Diam established the principle that, in certain circumstances, a contract may be unenforceable not because it is itself illegal, but because it bears a connection with some other illegal transaction sufficient to render it unenforceable. Where the taint is alleged to have arisen from a foreign illegal transaction, the first step is to ascertain whether the transaction is enforceable locally. If the answer is negative, the next step is to ascertain whether the foreign transaction is sufficiently proximate to the contract such that the latter is unenforceable. To do this, a Court is to apply the *Bowmakers* and *Beresford* principles. In brief, the *Bowmakers* principle provides that a claim is unenforceable for illegality if the claimant has to plead or prove the illegality to make out his claim. The *Beresford* principle, which has been described as a "conscience test", states that a claimant will not be allowed to claim a benefit from his crime.

In its analysis of *Euro-Diam*, the Court of Appeal stated that the *Bowmakers* principle had to be re-examined in light of its recent decisions in *Ting Siew May v Boon Lay Choo* [2014] 3 609 and *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363, and that the "public conscience test" was clearly not part of Singapore law.

The Court of Appeal reversed the High Court's "*unqualified acceptance of Euro-Diam*", indicating that the applicability of *Euro-Diam* would need to be reconsidered.

Background

EFG Bank AG, Singapore Branch ("**Bank**") had extended two loan facilities to a borrower. Both loan facilities were governed by Singapore law and were secured by, among other things, an indemnity agreement ("**Indemnity Agreement**") executed by Teng Wen-Chung, a Taiwanese citizen ("**Teng**") and certain pledges over assets beneficially owned by a Taiwanese insurance company. The Indemnity Agreement and pledges were similarly governed by Singapore law.

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The Bank commenced legal proceedings to, among other things, enforce the Indemnity Agreement against Teng.

Teng argued that one of the loan facilities was part of a fraudulent scheme to defraud the Taiwanese insurance company and because of that, the loan facility breached Taiwanese law and was void and/or unenforceable by reason of foreign illegality. This in turn allegedly caused the Indemnity Agreement to be tainted with illegality and therefore also void and/or unenforceable.

The High Court's Decision

The High Court Judge found that neither the loan facility in question nor the Indemnity Agreement revealed an intention to do an illegal act in Taiwan or to circumvent Taiwanese law, and were valid and enforceable. He found that they were not directly affected by foreign illegality and, applying the principles in *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, held that they were also not tainted by foreign illegality.

WongPartnership acted for the successful party, EFG Bank AG, Singapore Branch at the High Court. A detailed note on the case is available here.

Teng appealed against the decision.

The Court of Appeal's Decision

In dismissing Teng's appeal against summary judgment, the Court of Appeal observed that Teng had failed to show how the Indemnity Agreement was part of a fraudulent scheme. The existence of such an alleged scheme was not supported by the objective evidence. The Court of Appeal agreed with the High Court Judge in that, nothing on the face of the loan facility or the Indemnity Agreement revealed an intention to do an illegal act in Taiwan or to circumvent Taiwanese law.

However, the Court of Appeal differed from the Judge below in finding that the principles of law enunciated in *Euro-Diam* did not even apply in the first place given Teng's inability to show that the Indemnity Agreement was part of a fraudulent scheme.

It is important to note some of the observations that the Court of Appeal highlighted regarding the principles laid down in *Euro-Diam*:

In summary:

(a) Since the decision in *Euro-Diam* was handed down over three decades ago, the law relating to contractual illegality has developed quite significantly in the Singapore context and the current position is found in *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 and *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363.

(b) In *Ting Siew May* and *Ochroid Trading*, the Court of Appeal recognised that, with regard to contracts that were not themselves illegal but that were entered into to achieve an illegal purpose or object, there are degrees of illegality that militated against a blanket prohibition of such contracts, and that there should be a balancing exercise to determine whether the contract in question is enforceable despite the illegal object underlying it.

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(c) In addition, in *Ochroid Trading*, the Court of Appeal elaborated on the concept of "reliance" in the context of contractual illegality and drew a distinction between "reliance" in a formal or procedural sense (i.e., when a party has to assert the illegal acts and literally rely on the illegal contract) and "reliance" in a normative or substantive sense (i.e., when a party seeks to enforce and profit from the illegal contract through his claim).

(d) The principles in *Euro-Diam* would therefore need to be re-examined in light of these developments in Singapore and, in particular, this distinction drawn between procedural and substantive reliance in *Ochroid Trading*. Further, the "public conscience test" which is the second part of the test laid down in *Euro-Diam* is not part of Singapore law.

Our **Andre MANIAM, SC**, **CHOU Sean Yu**, **Lionel LEO** and **Russell PEREIRA**, acted for the successful party, EFG Bank AG, Singapore Branch.

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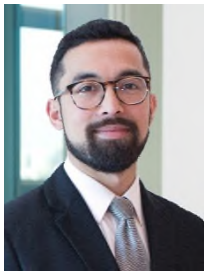

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CONTRACT | TORT

Court of Appeal clarifies requirements for tortious claim for inducement of breach of contract against a parent company

***Bumi Armada Offshore Holdings Limited and Ors v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2018] SGCA(I) 05**

The respondent in the appeal, Tozzi Srl ("**Tozzi**"), brought an action in the Singapore International Commercial Court ("**SICC**"), claiming damages for breach of a right of first refusal to provide engineering, procurement and construction services relating to certain modules for a gas processing facility in a Floating Production, Storage and Offloading unit in an Indonesian gas field project. The first appellant, Bumi Armada Offshore Holdings Limited ("**BAOHL**"), was the main contractor for the gas processing facility project. The second appellant, Bumi Armada Berhad ("**BAB**"), was BAOHL's parent company.

The SICC was held that:

(a) A binding agreement had been reached that Tozzi would be granted a right of first refusal by BAOHL;

(b) The right extended to, and was breached in respect of, the supply of seven modules; and

(c) BAB was liable to Tozzi for inducing BAOHL to breach its contract to grant Tozzi the right of first refusal.

On appeal, the Court of Appeal allowed the appeal in part and:

(a) Affirmed that Tozzi was granted a right of first refusal;

(b) Reversed the SICC's finding on breach and held that the right was only breached in relation to three of the seven modules; and

(c) Overturned the SICC's finding that BAB was liable for inducing BAOHL's breach of contract.

Besides reiterating two other key legal principles, the Court of Appeal affirmed the basic elements of the tort of inducing breach of contract that Tozzi had to show that BAB (a) acted with the requisite knowledge of the existence of the contract; and (b) intended to interfere with Tozzi's contractual rights, with such intention to be objectively ascertained; adding that in cases where it is contended that a parent company is liable for inducing a breach of contract by its subsidiary, a court has to also focus on two additional issues: (i) whether the relevant employees are acting for the subsidiary and/or the parent, and, (ii) if they were acting for the parent, whether the circumstances are such that the parent can properly be held liable for inducing its subsidiary's breach of contract.

The Court of Appeal's decision in clarifying the requirements for proving a tort of inducement in the context of a parent company's alleged inducement of a breach by its subsidiary is especially welcome as it provides important clarity on what is permissible conduct for a parent company in making decisions concerning its subsidiary.

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Our **CHOU Sean Yu**, **Alvin TAN** and **Daniel LEE** acted for the appellants. A detailed note on the Court of Appeal's judgment is available here**.**

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TORT

Tort of malicious prosecution not extended to civil proceedings and tort of abuse of process not recognised in Singapore

Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301 **[2018] SGCA 50**

In a landmark decision, the Court of Appeal has held that the tort of malicious prosecution should not extend to civil proceedings generally, and that the tort of abuse of process is not recognised in Singapore.

Background

In 1974, the first of several court actions spanning several decades were commenced by the appellant property developer ("**Lee Tat**") against the developer of the Grange Heights condominium, Hong Leong Holdings Ltd ("**HLH**") to deny HLH and purchasers of the Grange Heights condominium development a right of way over a narrow strip of land owned by Lee Tat ("**Right of Way**"). After the Management Corporation of Grange Heights Strata Title No 301 ("**MCST**") was constituted on 12 August 1976, the residents of Grange Heights were represented in the court actions by the MCST.

In 2005, the Court of Appeal held that the residents had the Right of Way ("**2005 Decision**") but that decision was overruled in 2008. Although the Right of Way issue had by 2008 been settled by the court, in 2012 Lee Tat commenced a new set of court proceedings against the MCST, claiming damages for:

- Malicious prosecution of two earlier actions to assert the Right of Way;
- Abuse of the court's process by asserting the Right of Way in four earlier actions;
- Malicious expression on two occasions of the falsehood that the residents possessed the Right of Way; and
- Trespass on Lee Tat's property by using Lee Tat's strip of land until the 2008 decision was handed down in December that year.

The Decisions

The High Court ruled in favour of the MCST, resulting in an appeal to the Court of Appeal. In the Court of Appeal, the decision of the High Court judge was upheld, and all four claims brought by Lee Tat were dismissed.

The Court of Appeal declined to extend the tort of malicious prosecution to civil proceedings generally and to recognise the tort of abuse of process, highlighting reasons of principle and legal policy for its position.

Our Comments

By its decision in *Lee Tat Development Pte Ltd v MCST No 301* [2018] SGCA 50, the Court of Appeal has departed from the English position, and settled an area of law which, until now, has not been conclusively been determined in Singapore.

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Our **TAN Chee Meng, SC** acted for the successful respondent, both at the trial before the High Court and at the appeal before the Court of Appeal. A detailed note on the Court of Appeal's judgment is available here.

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