

## CASE UPDATE

### CONTROLLING DIRECTOR MAY BE LIABLE IN CONSPIRACY WITH COMPANY

*Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd [2009] SGHC 2*

#### Executive Summary

The Singapore High Court has held that a company director may, in principle, be liable in conspiracy with a company of which he is the “*moving spirit and controlling mind*” under circumstances where they have established an arrangement which benefits the company to the detriment of third parties.

Randolph Khoo and Johnson Loo of Drew & Napier LLC successfully represented the plaintiff (the “**Plaintiff**”) in the proceedings leading to the decision.

#### Background

The defendant (the “**Defendant**”) was a wholly-owned subsidiary of a company controlled by the managing director (the “**MD**”) of the Defendant. The MD owned almost all of the issued share capital of the Defendant’s parent company.

The Plaintiff applied to add the MD as a defendant to the action on the grounds that he had conspired with the Defendant to cause loss and damage to the Plaintiff by wrongfully depriving the Plaintiff of the payment of moneys advanced by the Plaintiff to the Defendant.

#### Decision

The court held that, in principle, a cause of action in conspiracy against both the MD and the Defendant was available and granted the Plaintiff’s application to add the MD as a co-defendant in the action.

#### *Conspiracy: Two or more persons required*

A claim in conspiracy cannot succeed unless (among other things) a combination of two or more persons is proven.

It is trite law that, even where a business is managed solely by one person, he and the company are, in law, separate legal entities. Because a director and the company are separate legal entities, the law does not preclude a combination between that director and the company, even where that director is the controlling mind of the company.

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### *Conspiracy between controlling director and company*

A controlling director may, in principle, be liable in conspiracy with the company where they are in an established arrangement which benefits the company to the detriment of third parties.

The controlling director must, however, not have acted in a *bona fide* manner within the scope of his authority. If he had acted in good faith and within the scope of his authority, it “*cannot be easily said ... that he had the requisite intention or purpose to injure or damage the plaintiff*” (such intention being a prerequisite to establishing a claim in conspiracy) (at paragraph 35 of the decision).

The court also took pains to stress that a company does not become a co-conspirator with its directors where it is a *victim* of an alleged conspiracy of its directors and sues its directors for breach of duties. The reason for this is to prevent the company’s errant directors from escaping liability by contending that, as co-conspirator, the company cannot bring an action against them.

### **Comment**

There are currently no reported English judgments which explicitly deal with the issue decided in this case. However, Justice Andrew Ang was, in this decision, able to draw support from the outcomes and principles in established English and Commonwealth authorities like *Belmont Finance (No 1) v Williams Furniture* [1979] Ch 250, *Catherine Lee v Lee’s Air Farming Ltd* [1960] 3 WLR 758, *Said v Butt* [1920] 3 KB 497 and *Salomon v A Salomon & Co* [1896] AC 22 to distill the following points:

- if a company and its controlling director could enter validly into contracts of services, there was no reason why the company and its controlling mind could not enter into an agreement or understanding to constitute a conspiracy; and
- the “separate legal entity” doctrine afforded by incorporation alone did not operate to confer immunity against liability for an errant controller of a company who enters into an agreement with the company (to benefit the company and himself): (i) with the intent to harm a third party; or (ii) beyond the scope of his authority.

The decision was rendered on an amendment application by the Plaintiff to add the MD as a party to the action. As such, the High Court did not express any opinion on the actual liability of the Defendant or the MD for conspiracy and reserved that question for trial.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the Litigation and Dispute Resolution lawyers in Drew & Napier LLC (please refer to the Directors’ Profiles on our [website](#)), or:

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The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

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