

NAUTILUS TUG & TOWAGE SDN BHD v. NAUTICAL
SUPREME SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE J
[SUIT NO: WA-22NCC-163-05-2017]
27 JANUARY 2022

Abstract – *An attempt by the directors of a company to achieve proper corporate governance is not compatible with a conspiracy to injure, nor could it be said that the directors had breached their duties and had acted in variance with one another when they had acted in the interest of the company and its shareholders. Concern for a company’s finances, assets and management could not be seen to be contrary or injurious to its interest.*

TORT: *Conspiracy – Conspiracy to injure – Joint venture partners – Dispute between shareholders – Whether attempt to achieve proper corporate governance compatible with alleged intention to injure – Whether directors caused strife and disharmony – Whether directors acted in interest of company – Whether alleged conspiracy to injure by lawful or unlawful means made out – Whether tort of conspiracy established*

COMPANY LAW: *Directors – Duties – Breach – Allegation of overt acts amounting to conspiracy to injure – Motive and purpose – Whether attempt to achieve proper corporate governance compatible with alleged intention to injure – Whether directors acted in variance with one another – Whether directors caused strife and disharmony – Whether directors acted in interest of company – Concern for company’s finances, assets and management – Whether contrary or injurious to its interest – Whether there was breach of duty on directors’ part*

The disputes were between the plaintiff, Nautilus Tug & Towage Sdn Bhd (‘NTT’) and one of its minority shareholders, Nautical Supreme Sdn Bhd (‘NSSB’) as the first defendant, and two of NTT’s directors, namely, the second defendant Dato’ Seri Timor Shah Rafiq (‘Timor’) and the third defendant Dato’ Wan Mohamed Yaacob Wan Salaidin (‘Wan’). The background facts were that Vale Malaysia Minerals Sdn Bhd (‘Vale’) was a subsidiary of a large multi-national mining company, Vale International SA. In Malaysia, the Maritime Terminal of Teluk Rubiah in Perak was one of Vale’s projects. In respect of this project, Vale required the use of harbour tugboats to assist with the berthing and unberthing of very large ore carriers and other vessels that would call at the Maritime Terminal. Timor was a director in some of the companies belonging to Dwitasik Group of Companies. Dato Sri Captain Suresh Emmanuel Abishegam (‘Suresh’) was

A with the Azimuth Group of Companies. The ultimate holding company of
the Azimuth Group of Companies was East India Shipping Corporation Sdn
Bhd of which Suresh was the majority shareholder. In the course of
negotiations, Vale changed the requirements. Instead of Vale acquiring and
owning the tugboats it required, Vale now wanted to charter them. This
B change called for a much higher financial commitment, as it now required
the construction and ownership of the tugboats required by Vale. As a result,
a venture company, NTT, was established and used to pursue the Vale
contract; a joint venture company where NSSB would instead take a smaller
share as it did not want the larger financial exposure. NTT first began as a
C joint venture company consisting of two shareholders namely Azimuth
Marine Sdn Bhd ('AMSB') and NSSB. AMSB was part of the Azimuth Group
of Companies while NSSB was part of the Dwitasik Group of companies. To
cement the relationship among the entities and to capture the terms and
conditions upon which their relationship was based, a shareholders
agreement dated 15 March 2013 was entered into among NTT, AMSB and
D NSSB ('shareholders agreement'). Consequent upon the shareholders'
agreement, AMSB became the majority shareholder holding 80% of NTT's
share capital which amounted to 800,000 NTT shares. NSSB became the
minority shareholder holding 20% of NTT's share capital which amounted
to 200,000 NTT shares. Subsequently, however, AMSB transferred 100,000
E of its NTT shares to an individual by the name of Sudhir and these shares
were registered in Sudhir's name sometime in April 2016. For the purposes
of representation on the Board of Directors of NTT, each shareholder of
NTT had their own representatives. In the case of AMSB, it was represented
on the Board of NTT by Suresh, Dato Ahmad Johari Abdul Razak, Ajaib
F Hari Dass and Dato' Latiff Ahmad. With the agreement of the parties, Sudhir
was subsequently appointed to the Board of Directors of NTT in 2016. As
for NSSB, its nominated directors on the Board of NTT were Timor and
Wan. As for NTT's business relationship with Vale, as indicated, NTT was
required to acquire and own seven harbour tugboats which were to be
G chartered to Vale. These tugboats had to be built because Vale required that
they possess certain special specifications. The terms and conditions of the
charter by Vale of NTT's tugboats and the services to be provided were set
out and agreed upon by Vale and NTT in a written agreement described as
the Harbour Tugs services agreement which the parties executed ('Harbour
Tugs services agreement'). To operate and manage the seven tugboats to be
H chartered to Vale, NTT appointed Azimuth Ship Management Sdn Bhd
('ASM'), which was another company in the Azimuth Group of Companies.
The terms and conditions in respect of the services to be provided were set
out in a written contract entered into between NTT and ASM, which was
a Baltic and International Maritime Council Standard Ship Management
I agreement ('BIMCO agreement'). At the same time, NTT entered into a sale

and purchase agreement with Shin Yang Shipyard Sdn Bhd for the purchase of the seven harbour tugboats to be chartered to Vale ('Shin Yang SPA'). Subsequently, NTT entered into an agreement for advisory services with NSSB in recognition of the help that NSSB provided in securing the Harbour Tugs services agreement with Vale and in establishing and maintaining goodwill with Vale and the Vale Group of Companies and all relevant Government authorities for the operations of NTT's business. This agreement for advisory services was to continue in force until the delivery of the seventh tugboat to NTT by the shipbuilder, Shin Yang Shipyard Sdn Bhd. Under this agreement, NTT was to pay NSSB a monthly sum of USD7,000. NTT's claim against NSSB and Timor was founded upon the tort of conspiracy to injure NTT by lawful and/or unlawful means. As against Wan, the claim concerned his participation as a co-conspirator. As for Timor and Wan specifically, NTT's claim against them both was for alleged breaches of their fiduciary and other duties owed to NTT as directors.

Of the alleged conspiracy, it was contended that Timor and NSSB had conspired to injure NTT by placing NTT in a position of jeopardy. This was done allegedly to achieve one of the following objectives which were (i) to displace AMSB and ASM from the project ('plan to exclude') and 'hijack' the project for themselves without having to pay the full value for AMSB's 80% shareholding; or alternatively, (ii) to force AMSB to buy NSSB's 20% stake at an extortionate sum far in excess of the true value. The term 'project' was used by counsel for NTT to describe NTT's project with Vale that required NTT's ownership, charter and operation of the seven tugboats referred to. According to NTT, the conspiracy was evidenced by a series of overt acts (i) that there was an attempt by Timor and NSSB to oust Suresh and to remove ASM from continuing as the manager and operator of the tugboats under the BIMCO agreement; (ii) that there were continued attacks against Suresh and the NTT directors, causing strife and disharmony among the directors; (iii) that the quest for NTT's accounting records and information was incessant to the point of being oppressive towards NTT's management and that the real purpose was to carry out a forensic audit so that blame could be laid on Suresh and the management of NTT, which was a breach of Timor's duties owed to NTT and an abuse of his powers as a director of NTT; (iv) in relation the incident where one of the tugboats chartered to Vale, NTT Lumut, sank, Timor wanted Suresh to obtain Board approval for the measures he wanted to take to manage it. Timor was interfering with the management matters of NTT and went to the extent of accusing Suresh and ASM of negligence in relation to the sinking of NTT, which was an attempt to find some wrongdoing against Suresh; (v) in relation to the sinking of NTT Lumut, Timor had insisted on NTT appointing an independent investigation despite the fact that investigations had been carried out by the insurers and the Marine Department, hence jeopardising the insurance claim; (vi) when

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A Vale decided that it had no use for two of the seven tugboats namely NTT
Lumut and NTT Larut, it was unanimously agreed that Suresh be authorised
to negotiate with Vale but Timor insisted that NSSB be included in all the
discussions with Vale, which indicated that Timor was looking to entrench
NSSB's position with Vale and circumvent NTT's board's decision; (vii) the
B demands, complaints, queries and accusations by Timor and NSSB were all
part of a systematic attack in furtherance of a conspiracy to injure NTT. NTT
alleged that these attacks were stage-managed and choreographed by NSSB's
lawyers to lay a paper trail to aid in intended litigation and that these legal
proceedings were driven by a collateral purpose to injure NTT by disrupting
and destabilising operations. NTT's case against Wan essentially stemmed
C from Wan's support of Timor and that Wan failed to exercise any
independent judgment as a director and that he was facilitating Timor and
NSSB in their objectives. In relation to the allegation of breaches of directors'
duties against Timor and Wan, these allegations were predominantly
D predicated upon their alleged purpose and motives for the overt acts
identified by NTT. It was also contended that Timor and Wan had failed to
exercise reasonable care, skill and diligence in breach of s. 213(2) of the
Companies Act 2016 ('CA'). The defendants, however, contended that these
allegations were afterthoughts concocted to exert pressure on the defendants.
E It was maintained that as directors, Timor and Wan's acts and omissions
were in the discharge of their duties as directors 'triggered by the acts and/
or omissions of NTT, AMSB and/or Captain Suresh'.

Held (dismissing action with costs):

- F (1) This was plainly a case concerning disputes between shareholders. From
the timelines in the sequence of disputes between the parties and the
overt acts relied upon by NTT, the overt acts did not exist *in vacuo* but
occurred in circumstances where there already existed loss of trust and
bitter disputes between the parties. Of the plan to exclude, the actual
overt acts were, in fact, acts directed at Suresh. Timor's expressed
concern was with Suresh and the issue of corporate governance. To try
G to achieve proper corporate governance in NTT was not compatible
with the alleged intention to injure it. (paras 150-154)
- H (2) Timor's emails to the other directors of NTT disclosed the measures he
had proposed for NTT including putting in place and implementing
policies that would improve corporate governance, appointment of a
firm of accountants to conduct a forensic audit on NTT's financial
statements; replacing the company secretary to undertake a legal and
financial review of the BIMCO agreement 'to ensure that it is fully
above board', pay Shin Yang Shipyard Sdn Bhd the balance owed to it
I by NTT and to appoint additional bank signatories. These were all

concerns that had been raised by Timor. To somehow colour these concerns with an objective of injuring NTT seemed to be somewhat disingenuous. (paras 156-157)

- (3) It was ASM and Suresh who had the required expertise to provide the services required by Vale, not NSSB. If ASM were to be terminated, NTT would not be able to hold up the end of its contract with Vale. Such would only spell damage not only to NTT but ultimately to both AMSB as well as NSSB and this could not have been a probable objective of Timor. On record, Timor's concern with AMSB was whether the BIMCO agreement was fully above board. This was in line with his concern that there was a conflict of interest. In the circumstances, to suggest that it was Timor's design to oust ASM because of the alleged conspiracy would seem unlikely. (para 160)
- (4) Although clearly not conclusive was the fact that leave to commence a derivative action was granted by the Court of Appeal in respect of OS 392 which was filed subsequent to Timor's meeting with Sudhir. OS 392 involved queries relating, *inter alia*, to a payment supposedly made by AMSB to Shin Yang Shipyard Sdn Bhd in respect of the Shin Yang SPA of a sum in excess of USD20 million, on behalf of NTT, and the lack of documentation supporting the payment. In respect of this payment, there was an entry in NTT's accounts of debt in excess of USD20 million owed by NTT to AMSB. Although OS 392 was filed subsequent to Timor's meeting with Sudhir, the fact was it did relate to the financial affairs of NTT, which was a matter that Timor had had issues with back in the third quarter of 2015. This fact would tend to support or was at the very least consistent with the view that Timor's concern with corporate governance in NTT was not imaginary or concocted in the pursuit of a conspiracy for the objectives alleged by NTT. (para 161)
- (5) What might have begun as suspicion of there being something amiss in respect of the financials of NTT could not have been allayed by Suresh's initial non-response to Timor's queries about NTT's accounts. This, coupled with the persistent refusal to allow for copies of the financial records to be provided, no doubt induced Timor's need for a court order to allow him, as a director, to inspect and to have copies of NTT's accounts and financial statements. What was alleged by NTT as causing strife and disharmony was ultimately a continuation of Timor's concern and Suresh's manner of management and the transparency he did not seem to be able to secure. The situation was hostile. It would not be unreasonable to expect Timor, as the representative of a minority shareholder on the board of NTT, to take umbrage at the fact that the

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- A other Board members did not appear to share his concern about the
accounts of NTT or corporate governance. It was not a case of causing
strife among directors who were independently appointed to the Board.
This was in effect the continuation of a conflict merely between two
entities – the joint venture partners, with their respective nominee
B directors acting and behaving as two separate groups within the Board.
(paras 162-164)
- (6) Being a representative of one of the two joint venture companies, surely
Timor had a legitimate reason to be concerned when he insisted on
participating and wanting to be consulted on the issue of the lay-up of
C the tugboats. The opportunity to contract with Vale and to participate
in its project came through NSSB. As for AMSB, it had no real reason
to be concerned as it had control of both the Board and shareholding in
NTT. As for Wan, his support of Timor could be said to be no more
D mischievous than the support that the other directors gave to Suresh.
There could be no doubt that in seeking to draw the inferences sought
by NTT, the alleged overt acts ought not to be examined in isolation.
Regard must be given to the prevailing circumstances at the material
time and also to other facts and factors that may throw additional light
on the events in question. (paras 171-175)
- E (7) The overt acts, from which inferences were to be made of a conspiracy
to injure, occurred in circumstances where there had already existed an
atmosphere of distrust. The overt acts, *per se* and without more, were not
in themselves indicative of the probable existence of a conspiracy. They
could all be attributed directly or indirectly to Timor's concerns which
F included concerns for the lack of financial transparency traceable to Shin
Yang Shipyard Sdn Bhd's demand for payment, the difficulty that Timor
encountered in seeking access to NTT's accounting and financial
documents, the alleged conflict of interest on Suresh's part, ASM's
refusal to pay the daily fees due to NSSB, the transfer of shares in NTT
G to Sudhir and the reasons and bases upon which Timor secured leave
from the Court of Appeal to commence a derivative action. The
measures undertaken by Timor and NSSB were not in any way by means
of stealth. They turned to the courts in many instances. They were steps
taken under the full sight of the law such that any impropriety could not
H be said to have passed without the opportunity for legal scrutiny.
(paras 179 & 180)
- (8) The alleged conspiracy to injure NTT, whether by lawful or unlawful
I means, was not made out. Whether taken as a whole, or even in
isolation, the overt acts including the hosts of associated acts and some
omissions relied upon by NTT in advancing its case, when set against

the prevailing circumstances at the relevant times, did not establish on a balance of probabilities that there existed the conspiracy alleged of NSSB, Timor and/or Wan of intending to injure NTT, whether such was a predominant intention or otherwise. Such a conclusion could not fairly and justly be inferred from the overt acts relied upon by NTT when the case was viewed and examined in its entirety, having regard to the proven facts, the context and prevailing circumstances that existed at the time of the overt acts. NTT failed in proving that there was any intention to injure NTT, whether by lawful or unlawful means. As such, an important ingredient of the tort of conspiracy was not established. The claim in conspiracy must therefore fail. (para 191)

- (9) The damages, if they were to be regarded as damage caused to NTT, were not caused by any of the defendants or by any conspiracy. The payment of indemnity by NTT to their directors for their legal expense, the storing of NTT Lumut and not selling it earlier as scrap could not have occurred without the intervening act and decision of the Board of NTT. Nothing was done by the defendants that actually prevented NTT from selling the NTT Lumut as scrap. That they chose not to do so in light of the litigation was a decision no doubt made by the Board of NTT and which Board was controlled by Suresh together with the directors installed by AMSB. In addition, the alleged damages suffered were either the direct consequence of legal proceedings brought in court or the consequence of decisions made by the Board. The expenses incurred and the administrative disruption that probably flowed from the enforcement of the order of court obtained by Timor in OS 179 could not properly be regarded as damage or injury caused to NTT. Had the documents that Timor was entitled to been provided without the need for legal action, all could have been avoided. The expenses and administrative disruption that were consequent upon legitimate legal proceedings could not be regarded as damages caused to NTT. There may have been expenses incurred and management time wasted but it was really a case of *damnum sine injuria*. (paras 194-196)

- (10) Clearly, both Timor and Wan were not acting in variance with one another in as much as it could be said that the directors installed on the Board of NTT by AMSB had not acted at variance among themselves. That in itself was not necessarily a breach of any director's duty owed to a company, even though these directors were separately appointed as directors of NTT to also represent the interests of AMSB and NSSB, save perhaps for Sudhir. Insofar as Wan and Timor were concerned, as nominee directors, it could not be said that they had exercised any powers *qua* individual nominee directors of NTT. Unless specifically authorised to do so, directors on their own have no power to bind the

A company. Directors operate as a body and decisions are made by that
body, the Board of Directors. The alleged breach of s. 213(1) in essence
related to the motive and purpose ascribed to NSSB and Timor for the
overt acts and also to Wan for supporting it. The contention that the true
or dominant purpose of Timor and Wan's actions was improper was not
proved as there was no intention to injure NTT and the inferences
sought of the overt acts were not warranted and not made out. The
concern throughout was, among other things, possible financial
impropriety on the part of Suresh in his management of NTT. This, in
so far as Timor was concerned, and Wan included, was in the interest
of both NSSB as a shareholder of NTT and NTT itself. There was no
conflict of interest. After all, it was the possibility of NTT being sued
by Shin Yang Shipyard Sdn Bhd that Timor was concerned with and,
subsequently, NTT's financial position and whether and how Shin Yang
Shipyard Sdn Bhd was actually paid. The surrounding circumstances and
the fact that there was no evidence that either Timor or Wan had any
personal interest in NSSB (and clearly not in NTT) also did not lend
support to the contention that they had acted to advance their self-
interest as alleged. (paras 201-204)

(11) As nominee directors of NTT, Timor and Wan held no executive
position. On the Board of NTT, given that they were in the minority,
they were in no position to make any decision, *qua* directors, on behalf
of NTT without the agreement of Suresh and AMSB's nominee
directors. There was no inconsistency or incompatibility between the
interest of NTT and NSSB as a shareholder. The issues involved were
in both their interests. It was obvious that there could be no conflict of
interest if both the interest of NTT and NSSB were congruent and not
at variance. While Timor's concerns were probably associated with the
interest of MSSB, it did not follow that this was necessarily in conflict
with NTT's interest. NSSB's interest was synonymous with NTT's
interest. The factual scenario was such that NSSB's interest, as a
shareholder in NTT, would be served by ensuring that NTT, as the joint
venture vehicle, was managed properly and its finances and assets were
not compromised in any way. Concomitantly, this too was necessarily
in the interest of NTT. Thus, there was no subordination or
compromising of NTT's interest in favour of NSSB by Timor or Wan
in their role as directors of NTT. There was no breach of duty on the
part of either Timor or Wan. Concern for NTT's finances, assets and
management could not be seen to be contrary or injurious to its interest.
(paras 208-215)

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(12) Under s. 348 of the CA, the court has to be satisfied that the applicant seeking leave to bring a derivative action on behalf of a company was acting in good faith and that it appears *prima facie* in the best interest of the company that leave be granted. Conversely, there was no evidence led by NTT that was sufficient to conclude on a balance of probabilities that Timor, including Wan, had acted with ulterior motives to harm or to act to the detriment of NTT, or for the benefit of NSSB at the expense or detriment of NTT. What was presented to the court were inferences that the court should draw from the overt acts, of a conspiracy to injure NTT and motives and purposes that were at variance with the interests of NTT or not to its best interests. For the reasons already given, the inferences sought were not made out or warranted. (para 219)

(13) The element of trust is no less important between joint venture partners than they are between persons in any business relationship. In fact, it can be said that the need for trust is even more crucial. There is often a need for interdependence and an expectation of candour and integrity. Indeed, there are cases that have concluded that the nature of a joint venture, depending on the facts, may be such as to even give rise to a fiduciary duty between the joint venture partners. The circumstances presented arose initially from queries about financial propriety which then resulted in a sequence of events that ultimately brought about a breakdown of trust and the souring of relationship between the parties. It was unfortunate that what appeared to be a joint venture with a very viable and profitable business had been allowed to be marred by so much controversy and conflict. NTT's claims against the defendants, upon the causes of action pleaded, were not made out. (paras 227-229)

Case(s) referred to:

Behan v. Park [2014] BCSC 1982 (*refd*)

Bennetts v. Board Of Fire Commissioners Of New South Wales & Others (1967) 87 WN (Pt 1) (NSW) 307 (*refd*)

Bristol And West Building Society v. Mothew (t/a Stapley & Co) [1998] Ch 1 (*refd*)

British Motor Trade Association v. Salvadori [1949] Ch 556 (*dist*)

Chirnside and Anor v. Fay [2007] 2 LR 407 (*refd*)

Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd [2016] 3 CLJ 676 CA (*refd*)

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2018] 2 CLJ 103 HC (*refd*)

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2019] 1 LNS 1452 HC (*refd*)

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2019] 4 CLJ 491 HC (*refd*)

Deepak Jaikishan Jaikishan Rewachand & Anor v. Intrared Sdn Bhd (previously known As Reetaj City Centre Sdn Bhd And Formerly Known As KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437 (*refd*)

- A *Earl of Selborne In The Privy Council In Hirsche And Others v. Sims And Another* [1894] AC 654 (*refd*)
Formis Resources Bhd & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals [2016] 9 CLJ 169 CA (*refd*)
Foster Bryant Surveying Ltd v. Bryant And Another [2007] EWCA Civ 200 (*refd*)
Heller Factoring (M) Sdn Bhd v. Metalco Industries (M) Sdn Bhd [1995] 3 CLJ 9 CA (*refd*)
- B *Howard Smith Ltd v. Ampol Petroleum Ltd & Ors* [1974] AC 821 (*refd*)
Kumagai Gumi Co Ltd v. Zenecon Pte Ltd [1995] 2 SLR(R) 304 (*refd*)
Kuwait Oil Tanker Co SAK And Another v. Al Bader And Others [2000] 2 All ER (Comm) 271 (*refd*)
- C *Lonrho Ltd And Another v. Shell Petroleum Co Ltd And Another (No 2)* [1982] AC 173 (*refd*)
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA (*refd*)
Meretz Investments NV And Another v. ACP Ltd And Others [2008] Ch 244 (*refd*)
Nautical Supreme Sdn Bhd v. Azimuth Ship Management Sdn Bhd [2019] 1 LNS 1842 HC (*refd*)
- D *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833 FC (*refd*)
OBG Ltd And Another v. Allan And Others; Douglas And Another v. Hello! Ltd And Others (No 3); Mainstream Properties Ltd v Yong And Others [2007] 4 All ER 54 (*refd*)
R v. Siracusa (Francesco) (1990) Cr App R 340 (*refd*)
R v. Taylor, Weaver And Donovan (1928) 21 Cr App Rep 20 (*refd*)
- E *Scottish Co-Operative Ltd Wholesale Society v. Meyer And Another* [1958] 3 All ER 66 (*refd*)
Sinclair Investments (UK) Ltd v. Versailles Trade Finance Ltd (In Admin) [2011] 4 All ER 335 (*refd*)
Super-Max Offshore Holdings v. Malhotra And Another [2017] EWHC 3246 (Comm) (*dist*)
- F *Sweeney v. Coote* [1907] UKHL 1004 (*refd*)
Taz Logistics Sdn Bhd v. Taz Metals Sdn Bhd & Ors [2019] 2 CLJ 48 CA (*refd*)
The Board Of Trustees Of The Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 3 CLJ 221 FC (*refd*)
- Legislation referred to:**
- G Companies Act 1965, ss. 133A, 167
Companies Act 2016, ss. 213(1), (2), 214(1), 217(1), 218, 347, 348
Rules of Court 2012, O. 52
For the plaintiff - David Mathews, Olivia Loh & Lai Ann Xing; M/s Gananathan Loh
For the defendants - Pang Kong Leng, Chok Zhin Theng, Jonathan Lim & Hazel Ling;
M/s Cheah Teh & Su
- H *Reported by Suhainah Wahiduddin*
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JUDGMENT

Darryl Goon Siew Chye J:

[1] This was yet another in what now appears to be a series of legal disputes arising out of a joint venture company by the name of Nautilus Tug & Towage Sdn Bhd ('NTT').

[2] In this suit, the disputes presented to court were between NTT, as the plaintiff, and one of its minority shareholders, a company by the name of Nautical Supreme Sdn Bhd ('NSSB') as the first defendant, and two of NTT's directors namely, the second defendant Dato' Seri Timor Shah Rafiq ('Timor') and the third defendant Dato' Wan Mohamed Yaacob bin Wan Salaidin ('Wan').

[3] NTT's allegations against the defendants in this suit were twofold. They were founded upon causes of action in the civil tort of conspiracy and breaches of directors' duties.

Background

[4] Vale Malaysia Minerals Sdn Bhd ('Vale') is a subsidiary of a large multi-national mining company known as Vale International SA. In Malaysia, the Maritime Terminal of Teluk Rubiah in Perak was one of Vale's projects. In respect of this project, Vale required the use of Harbour Tugboats to assist with the berthing and un-berthing of very large ore carriers and other vessels that would call at the Maritime Terminal.

[5] Timor is a director in some of the companies belonging to the Dwitasik Group of Companies. The ultimate holding company of the Dwitasik Group of Companies is Dwitasik Sdn Bhd. It is not in dispute that the beneficial owners of the Dwitasik Group of Companies are members of a royal family.

[6] Dato' Sri Captain Suresh Emmanuel Abishegam ('Suresh') is with the Azimuth Group of Companies. The ultimate holding company of the Azimuth Group of Companies is East India Shipping Corporation Sdn Bhd ('EISC'). Suresh is the majority shareholder of EISC.

[7] As for the joint venture, initially, a company by the name of Nautilus Perak Marine Services Sdn Bhd ('NPMS') was established and intended as the joint venture vehicle to bid for and undertake the services required by Vale. The plan was that Dwitasik Group would have a 70% stake in NPMS while the Azimuth Group would have the balance of 30%.

[8] However, in the course of negotiations Vale changed its requirements. Instead of Vale acquiring and owning the tugboats it required, Vale now wanted to charter them. This change called for a much higher financial commitment, as it now required the construction and ownership of the

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A tugboats required by Vale. As a result, another joint venture company was established and used to pursue the Vale contract; a joint venture company where NSSB would instead take a smaller share as it did not want the larger financial exposure. That joint venture company was NTT.

B [9] NTT first began as a joint venture company consisting of two
shareholders namely, Azimuth Marine Sdn Bhd ('AMSB') and NSSB. As the
name suggests, AMSB is part of the Azimuth Group of Companies while
NSSB is part of the Dwtasik Group of Companies. To cement the
relationship among the entities and to capture the terms and conditions upon
C which their relationship was based, a shareholders agreement dated
15 March 2013 was entered into among NTT, AMSB and NSSB
(‘shareholders agreement’).

D [10] Consequent upon the shareholders’ agreement, AMSB became the
majority shareholder holding 80% of NTT’s share capital which amounted
to 800,000 NTT shares. NSSB became the minority shareholder holding
20% of NTT’s share capital which amounted to 200,000 NTT shares.

E [11] Subsequently, however, AMSB transferred 100,000 of its NTT shares
to an individual by the name of Jaya Sudhir a/l Jayaram ('Sudhir') and these
shares were subsequently registered in Sudhir’s name sometime in April
2016. That became the subject matter of litigation between the parties in two
separate suits namely Kuala Lumpur High Court Suit No. WA-22NCC-165-
05-2017 ('Suit 165') and Kuala Lumpur High Court Suit No. WA-22NCC-
113-03-2018 ('Suit 113').

F [12] For the purposes of representation on the Board of Directors of NTT,
each shareholder of NTT had their own representatives. Board
representation was a term agreed upon under cl. 10.1 of the shareholders’
agreement. Broadly, subject to the unanimous agreement of the parties, it was
agreed that there should be no more than six directors, including the
Chairman, on the Board of NTT. AMSB had the right to nominate four
G directors while NSSB had the right to nominate two. This right to nominate
directors was subject to certain conditions but which conditions are of no
particular relevance to the issues in this case.

H [13] In the case of AMSB it was, at all material times, represented on the
Board of NTT by Suresh, Dato’ Ahmad Johari bin Abdul Razak ('Johari'),
Ajaib Hari Dass ('Hari Dass') and Dato’ Abd. Latiff bin Ahmad ('Latiff').
Johari was the Chairman of the Board and is also a shareholder in AMSB.
With the agreement of the parties, Sudhir was subsequently appointed to the
Board of Directors of NTT in 2016.

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[14] On record, Suresh is the owner of the majority of the shares in AMSB. Suresh is also the Chief Executive Officer and Managing Director of NTT. There is, however, some controversy as to whether the shares held by Suresh in AMSB were, in fact, beneficially owned by Sudhir and held in trust for him by Suresh and, if so, to what extent. A

[15] As for NSSB, its nominated directors onto the Board of NTT were Timor and Wan (with one Syed Feisal Alhady as his alternate). B

[16] As for NTT's business relationship with Vale, as indicated, NTT was required to acquire and own seven harbour tugboats which were to be chartered to Vale. These tugboats had to be built because Vale required that they possess certain special specifications. C

[17] The terms and conditions of the charter by Vale of NTT's tugboats and the services to be provided were set out and agreed upon by Vale and NTT in a written agreement described as the Harbour Tugs services agreement which the parties executed on 11 April 2013 ('Harbour Tugs services agreement'). It was a contract that was to last for a duration of 15 years. D

[18] To operate and manage the seven tugboats to be chartered to Vale, NTT appointed Azimuth Ship Management Sdn Bhd ('ASM'), which was another company in the Azimuth Group of Companies. The terms and conditions in respect of the services to be provided were set out in a written contract entered into between NTT and ASM dated 12 April 2013, which was a Baltic and International Maritime Council Standard Ship Management agreement ('BIMCO agreement'). Insofar as the maritime aspects of the services to be provided to Vale were concerned, the expertise lay with Suresh and his company. Suresh, also known as Captain Suresh, is a master mariner and has over 30 years of experience in the maritime industry. E F

[19] At the same time, on 12 April 2013, NTT entered into a sale and purchase agreement with Shin Yang Shipyard Sdn Bhd for the purchase of the seven harbour tugboats to be chartered to Vale ('Shin Yang sale and purchase agreement'). The total price for the seven tugboats under this agreement was USD68,500,000. G

[20] On 22 April 2013, NTT entered into an agreement for advisory services with NSSB ('agreement for advisory services'). Based on its recital 4, the agreement for advisory services was entered into in recognition of the help that NSSB provided in securing the Harbour Tugs services agreement with Vale and in establishing and maintaining goodwill with Vale and the Vale Group of companies and all relevant Government authorities for the operations of NTT's business. H

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A [21] This agreement for advisory services was to continue in force only until the delivery of the seventh tugboat to NTT by the shipbuilder, Shin Yang Shipyard Sdn Bhd. Under this agreement, NTT was to pay NSSB a monthly sum of USD7,000.

B [22] NTT's claim against NSSB and Timor was founded upon the tort of conspiracy to injure NTT by lawful and/or unlawful means. As against Wan, the claim was against him in participating as a co-conspirator.

[23] As for Timor and Wan specifically, NTT's claim against them both was for alleged breaches of their fiduciary and other duties owed to NTT as directors.

C **The Alleged Conspiracy And Breaches Of Directors' Duties**

[24] Of the alleged conspiracy, it was contended that Timor and NSSB had conspired to injure NTT by placing NTT in a position of jeopardy. This was done allegedly to achieve one of the following objectives which were, in the words used in the written submissions on behalf of NTT:

D 6.1 to displace AMSB and ASM from the Project ("Plan to Exclude") and 'hijack' the Project for themselves without having to pay the full value for AMSB's 80% shareholding; or

E 6.2 alternatively, to force AMSB to buy NSSB's 20% stake at an extortionate sum far in excess of the true value.

The term 'project' was used by counsel for NTT to describe NTT's project with Vale that required NTT's ownership, charter and operation of the seven tugboats referred to.

F [25] To achieve the objective of the conspiracy, it was contended that Timor and NSSB had launched a series of systematic attacks by lawful and/or unlawful means, carried out with the predominant purpose of injuring NTT. The premise of the contentions was cast widely to include both species of the civil tort of conspiracy, *ie*, a conspiracy to injure by unlawful means and also by lawful means.

G [26] According to NTT, the conspiracy is evidenced by a series of overt acts, which learned counsel for NTT had grouped together in batches. There were, in total, seven groups or batches of these overt acts and they are addressed below.

H [27] These overt acts pointed to by NTT were also the acts, some of which were omissions, upon which the allegation of breaches of fiduciary and directors' duties against Timor and Wan were based.

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Plan to Exclude (January 2016)

[28] This alleged ‘plan to exclude’ was listed as the first among the overt acts of the alleged conspiracy. It was also an allegation pleaded in NTT’s amended statement of claim.

[29] According to NTT, there was an attempt by Timor and NSSB in 2016 to oust Suresh and to remove ASM from continuing as the manager and operator of the tugboats under the BIMCO agreement. This, it was alleged, was undertaken with an intention to injure NTT.

[30] Sometime in November 2015, Sudhir had asked that AMSB transfers to him up to 10% of the shares in NTT, from the NTT shares held by AMSB. Following this, there was a meeting held in Singapore among Timor, Sudhir and one Paul Xavier Kelly (‘Paul Kelly’), a British citizen residing in Singapore, on the 16 January 2016 at the Swissotel.

[31] Paul Kelly testified for NTT as PW2. He described himself as an investment advisor. He also claimed to be a business associate of Sudhir and had acted as an independent adviser to Sudhir. During the meeting at the Swissotel, Paul Kelly testified as follows in his witness statement at para. 7:

7. Q: Why was this meeting called?

A: Sudhir had wanted to regularise his investment in NTT rather than having it being held on trust by Azimuth Marine Sdn. Bhd. (“AMSB”). Sudhir’s intent for this meeting was to see how he could regularise his interest so that the shares that he owned in NTT could be transferred into his name. At that time, there were some concerns of how Captain Suresh was handling matters. We were there also to hear Timor out and explore possible solutions.

[32] According to Paul Kelly, Timor had grouses against Suresh and was seeking to oust Suresh from NTT. Paul Kelly’s testimony noted that there were concerns about how Suresh was handling matters. A ‘road map’ was said to have been discussed at this meeting and it included the removal of Suresh. In his witness statement, Paul Kelly set out the ‘road map’ to be as follows:

- (a) First, that Sudhir finalises the transfer of 10% in NTT into Sudhir’s name. Timor knew that the Sudhir was an investor and had an interest in NTT’s shares. He knew Sudhir was taking the transfer of the 10% shares in NTT. He did not raise any objection to Sudhir taking the transfer. This is reflected in point 1 of the roadmap to my email of 18 January 2016.
- (b) Second, there was a discussion as an option that Sudhir’s balance interest in NTT be reflected through a change in shareholding in AMSB, with Sudhir and Dato’ Johari Razak securing 28.6 % each in AMSB. This is in point 2 of the roadmap.

- A (c) Once the transfers were completed, then Captain Suresh and Azian could be removed from their respective roles at NTT subject to unanimous approval of the shareholders. This is in point 3 of the road map.
- B (d) Concurrent with points 1 to 3, a legal analysis of various contracts would need to be done to see if the ship management contract could be terminated. This is in point 4 of the roadmap.

Paragraphs (a) and (b) of Paul Kelly's testimony seemed to suggest that Sudhir had an interest in the shares in both AMSB and in NTT through AMSB. This was an issue of much significance in Suit 165 and Suit 113.

- C [33] According to Paul Kelly, Timor's complaints about Suresh were threefold. First, Timor had posed questions to Suresh to which Timor had received no response. Second, Timor had corporate governance issues with Suresh. In particular, there were issues of conflict of interest with Suresh. Thirdly, there was a complaint that payments of commission by ASM to
- D NSSB were not prompt and this affected Timor personally in the payment of his salary by NSSB. There was then a follow-up meeting on 18 January 2016 at NSSB's solicitors' office.

- E [34] On 29 January 2016, Timor sent an email to Sudhir and all the directors of NTT save for Suresh, to explain that Sudhir had disclosed that he was a substantial beneficial owner of the shares in AMSB and that Sudhir had made certain proposals that Timor and Wan supported. This email points to Timor's understanding of where Sudhir's interest in NTT lay, at the level of AMSB, as the beneficial owner of shares in AMSB, and not directly in NTT as the beneficial owner of shares held by AMSB in NTT.
- F Such an understanding would be consistent with the express terms and express intent of the shareholders' agreement.

- G [35] Following this email, Timor issued a notice on 30 January 2016 calling for a board meeting of NTT to be held on 3 February 2016, with the following agenda and proposed resolutions:

1. To review and approve the Minutes of the Board of Directors' Meeting held on 19 August 2015.
2. Matters Arising.
- H 3. To put in place and implement policies that will improve on the corporate governance of the Company.
4. To appoint a firm of accountants to undertake a forensic audit on the Company's financial statements.
5. To replace the existing Company Secretary.
- I 6. To undertake a legal and financial review of the ship management agreement (BIMCO) so as to ensure that it is fully above board.

7. To pay off the shipyard on the balance owing by the Company by drawing down on the balance of the loan undrawn. A
 8. To appoint Jaya Sudhir to the Board as an alternate director.
 9. To appoint Syed Feisal Alhady to the Board as an alternate director.
 10. To appoint additional bank signatories. B
 11. To amend the Company's M&A to reflect the Shareholders' Agreement dated 15th March 2013 as per clause 8 of the said Agreement.
 12. To mandate Dato' Seri Timor Shah Rafiq to negotiate and resolve the issue of the 2 tugboats with Vale. C
and
 13. To appoint Dato' Seri Timor Shah Rafiq to implement and or execute resolutions (3) to (12) above.
- [36]** On the appointed day, only Timor and Wan turned up for the meeting. The minutes of the board meeting recorded that Timor presided as Chairman. It also recorded that while there was a quorum, the meeting was adjourned to 2 March 2016. D
- [37]** On 2 March 2016, again, only Timor and Wan attended. The minutes of this board meeting also recorded that Timor presided as Chairman and that while there was a quorum, the Chairman decided not to proceed with the meeting as most of the board members had decided not to attend. It would therefore appear that Timor did not seek to exploit the situation presented by the absence of the other directors. E
- [38]** It was contended that there was no doubt that Timor was determined to persuade Sudhir and the other NTT directors to support his agenda. It was also contended that Timor's motive was to promote his interest and that of NSSB. Timor's assertion of wanting to promote good corporate governance was said to be untrue particularly since it was accepted that NTT was profitable and there were no real complaints about ASM's performance. F
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- [39]** Based on Timor's proposed resolutions, it was contended that there was no reason to remove the company secretary and no legitimate basis for any legal and financial review of the BIMCO agreement.
- [40]** The purpose ascribed to Timor's meeting with Sudhir by NTT was to garner support and the motive behind the proposed resolutions was to oust Suresh. It was, as NTT alleged and puts it, 'part of Timor's covert campaign aimed at getting rid of Captain Suresh, ASM and the existing management of NTT'. It was asserted for NTT that it could not be said that Timor was doing all these in the best interest of NTT or that he was doing so in the I

- A exercise of independent judgment as a director. Although why this was necessarily so was not quite put forth, but it was asserted that the irresistible conclusion was that Timor was doing this in furtherance of the conspiracy.
- [41] It merits comment at this juncture that the focus of any intended injury was, in fact, on Suresh and/or ASM and not NTT.
- B *Causing Strife And Disharmony (From March 2016)*
- [42] Under this rubric of ‘causing strife and disharmony’, five measures allegedly undertaken by the defendants, particularly Timor, in furtherance of the alleged conspiracy, were identified by NTT.
- C [43] The first was labelled ‘continued attacks against Captain Suresh’. Here, NTT pointed to emails sent by Timor to Sudhir in which Timor had complained about Suresh. This was in early 2016, around the time of Timor’s meeting with Sudhir in Singapore. Timor’s complaints were about Suresh’s management in NTT and inaccuracies in the minutes of NTT’s
- D board meetings. It was pointed out by learned counsel for NTT that, under cross-examination, Timor had agreed that at that time he believed that Sudhir would be able to influence the other directors, Johari, Hari Dass and Latiff. This allegation was in substance related to the alleged ‘plan to exclude’.
- E [44] The second was titled ‘attacks against the other NTT directors (March 2016)’. It was alleged that when none of the other directors turned up for the board meeting summoned by Timor for 3 February 2016. Timor then decided to target the other directors namely Johari, Hari Dass and Latiff. In support of this contention, reference was made to a letter dated 3 March 2016 that Timor wrote to Messrs Cecil Abraham & Partners, the then solicitors
- F for AMSB, Johari, Hari Dass, Latiff and Suresh.
- [45] It needs to be pointed out that Timor’s letter of 3 March 2016 was in reply to Messrs Cecil Abraham & Partners’ letter of 25 February 2016 which was addressed to Timor personally. In this letter from Messrs Cecil Abraham & Partners it was, among other things, alleged that Timor’s attempts to
- G convene a meeting of the Board of Directors of NTT scheduled for 2 March 2016 (the adjourned board meeting) was in breach of the shareholders’ agreement. This was somewhat odd as Timor was never personally a party to the shareholders’ agreement.
- H [46] In his reply to the letter from Messrs Cecil Abraham & Partners, Timor, who wrote in the first person but under the letterhead of NSSB, denied that he had acted in breach of the shareholders’ agreement. In the process, Timor instead alleged that it was ‘Azimuth’ who had repeatedly breached the shareholders’ agreement and the Companies Act 1965 and that
- I Johari, Latiff, Hari Dass and Suresh were in breach of their fiduciary and statutory duties as directors. No reason how or particulars of these allegations were actually set out in Timor’s letter.

[47] When Timor was questioned at the Board meeting of NTT of 7 March 2016, Timor replied that by not attending the Board meetings that Timor had attempted to convene on 3 February 2016 and 2 March 2016, the other directors had committed a breach of their fiduciary duties. Although requested by Hari Dass, Timor refused to withdraw his allegation, saying it was based on legal advice.

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[48] It was NTT's contention that the allegation of breach of duty on the part of the other directors only arose when it became clear that Timor did not have the support of Sudhir and the other directors to oust Suresh.

[49] The third was headed 'Events at the BODM on 7 March 2016 – Timor and Wan were not excluded'. It was pointed out that at the Board of Directors meeting on 7 March 2016, neither Timor nor Wan was precluded from raising their issues. This was agreed to by Wan under cross-examination.

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[50] It was alleged that on the other hand, Timor was adamant on 'instigating disaffection towards Captain Suresh and creating strife among the directors. This was demonstrated by Timor's proposed motion of no confidence in Suresh, requesting that NSSB's advisor accompany Suresh to meetings and discussions with Vale regarding commercial and unresolved operational matters and Timor's proposal to replace Fazarina, the Company Secretary, due to her lack of impartiality and failure to recognise Timor's instruction to convene a Board of Directors' meeting.

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[51] At the Board of Directors' meeting of 7 March 2016, Timor had asked that Suresh and Azian (the Chief Financial Officer of Azimuth International Group who was present by invitation) leave the meeting. This was when Timor wanted to make his proposals, which included a proposal that NTT adopt s. 167 of the Companies Act 1965 relating to making available financial records to directors of the company and that the Chief Executive Officer, *ie*, Suresh, should be accompanied by an NSSB advisor to meetings and discussions with Vale.

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[52] It was contended by NTT that if there was a genuine desire to promote good corporate governance, there was no need for the Chief Executive Officer and the Financial Controller to leave the meeting when the issues raised by Timor were to be discussed by the board. This, it was contended, was yet another indication of Timor and NSSB's scheme to oust Suresh.

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[53] The fourth was headed 'Further attacks & causing strife (from April 2016 onwards)'. It was asserted that when Timor's proposals made at the Board of Directors meeting of 7 March 2016 were not agreed to, Timor continued his attacks against the other directors, causing strife and disharmony among the directors. This, it was contended, was done by consistently bombarding them with complaints and accusations against Suresh and NTT and dragging the other directors into the fray.

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A [54] In regard to this contention, it was pointed out that Timor started to complain to Johari about Suresh and Timor's concerns relating to NTT's accounts. Learned counsel in his written submissions put it thus, 'He (Timor) wanted Johari as Chairman of the Board to intervene and interfere in management matters'. Timor again complained about Suresh and his delay in permitting inspection of NTT's accounts. Evidence of Timor seeking to inspect NTT's accounts were in exchanges of emails between Timor and Suresh and this was in April 2016. It was contended that Timor's complaints against Suresh in this regard were again circulated to the other directors of NTT.

C [55] It was maintained by NTT that Timor's conduct and actions were driven to hold AMSB's nominee directors on the board of NTT equally liable together with Suresh. It was also a subject of complaint that Timor had constantly threatened legal action if the demands he made were not met. This, it was alleged, 'stemmed from his (Timor's) dislike over the majority's decision and started once it was clear to him that they would not side with him on his agendas'.

E [56] The fifth was headed 'attacks against Fazarina, the company secretary (From March 2016)'. Here, it was alleged that Timor and NSSB had unfairly accused Fazarina of not undertaking her duties properly and impartially as a company secretary. The allegations against Fazarina were largely based on alleged inaccuracies in the minutes of the board. It was also said that Timor had wrongly accused Fazarina of not issuing a notice to the shareholders to convene an Annual General Meeting on 31 March 2016. The evidence in fact showed that Fazarina had issued the notice on 16 March 2016 and had also issued a reminder as well. These were said to be acts directed at causing disruption and destabilisation.

Incessant Queries Into The Accounts And Inspection

G [57] There were several issues raised in respect of the allegation under this heading. The first was queries into the accounts of NTT in October of 2015 by Timor. This was said to be shortly after NSSB's requests for payment of further tribute.

H [58] Upon the delivery of the seventh tugboat, Timor had wanted the agreement for advisory services to be extended. AMSB, however, did not agree to any extension of the agreement for advisory services. From Timor's email to Suresh dated 11 October 2015 on issues to be discussed at an upcoming NTT shareholders' meeting on 12 October 2015, it is clear that an extension was sought but Timor was informed that Azimuth was not agreeable to the request. This email was copied to the other directors of NTT. It was submitted by NTT that although Timor claimed that NSSB was prepared to render 'advisory services' without payment, these were

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described as 'hollow words'. This was because of Timor's persistence in seeking an extension of the agreement for advisory services, which thus demonstrated how badly NSSB wanted the payments to continue. A

[59] It was contended that NSSB's quest for NTT's accounting records and information was 'incessant to the point of being oppressive towards NTT's management'. It was alleged that NSSB persisted even though NSSB's queries had been answered and invitations were also extended to Timor and Wan as directors of NTT to view the accounting records and documents at NTT's office. B

[60] NTT pointed out that the insistence in querying NTTs accounts was notwithstanding Timor's acknowledgment that the audited accounts for 2013 and 2014 and the seven-month management accounts for 2015 had all been approved by Timor and NSSB. C

[61] Despite querying the accounts, when an annual general meeting was held on 31 March 2016 at which NTT's auditor had been arranged to be present to answer any questions pertaining to NTT's accounts, neither Timor nor any corporate representative for NSSB attended. At the adjourned meeting of 7 April 2016, NTT's auditor was again present and made available to answer queries on the accounts, yet again, neither Timor nor any corporate representative attended on behalf of NSSB. D E

[62] On 22 April 2016, Timor and Syed Feisal attended NTT's office to inspect the accounting records and documents. It was alleged that Timor was not interested in any explanation and all he wanted was to have copies of the records and documents. The objective was to have a forensic investigation carried out. F

[63] It was NTT's contention that Timor had used his powers as a director of NTT to further the conspiracy. It was further pointed out that Timor (i) admitted that NSSB had sought to obtain NTT's accounting records and documents through Timor as a director and (ii) admitted that the objective of the forensic investigation proposed at the Board meetings of 3 February 2016 and 2 March 2016 was for the interest of NSSB. The real purpose, it was contended by NTT, was to carry out a forensic audit so that blame could be laid on Suresh and the management of NTT. This, it was contended, was a breach of Timor's duties owed to NTT and an abuse of his powers as a director of NTT. G H

[64] The second issue raised by NTT pertains to Crowe Horwath, an accounting firm. That NSSB had appointed Crowe Horwath to assist in conducting a forensic audit was not really in dispute. However, it was contended that NSSB had instructed the accounting firm as early as in October 2015. Under cross-examination, Timor had agreed that Crowe I

A Horwarth was to carry out a forensic audit pursuant to an inspection order of the court that was obtained. From this, it was contended, what was really intended was to find fault with Suresh and the management of NTT.

[65] The third issue was in the enforcement of that inspection order of the court that Timor obtained pursuant to s. 167 of the Companies Act 1965, for the inspection of NTT's accounting and financial records relating to NTT's financial transactions and financial position. NTT's contention here relates to the manner in which the order of the court was enforced by Timor.

[66] In order to enforce the order, Timor had the assistance of personnel from Crowe Horwarth to undertake the task of examining and taking copies of the records in question. This was undertaken between January to March of 2017. NTT's contention was that Timor had orchestrated the process such as to harass, intimidate and to engineer a breach of the court order. Photographs were taken by personnel from Crowe Horwarth which caused Suresh to intervene to ensure the confidentiality of sensitive information. Timor was also accused of confronting and interrogating Azian who was then eight months into her pregnancy. It was contended that unreasonable demands were made by Timor and his lawyers. The demands were said to be incessant and 'nitpicking'. Despite having provided what was required, it was alleged that Timor was never satisfied and would threaten the other directors and NTT's management with committal proceedings.

[67] The fourth issue was the committal proceedings initiated by Timor. Timor had obtained leave to commence committal proceedings against Johari, Latiff, Hari Dass and Sudhir for alleged breaches of the order obtained by Timor. The leave granted was subsequently set aside by the High Court on 10 July 2018 due to a material non-disclosure of NTT's efforts to comply with the court order. Although committal proceedings were never actually filed, it was contended that the seeking of leave to file committal proceedings was a deliberate and malicious move by Timor. The reason ascribed was that Timor had wanted to bring pressure to bear upon the other directors in furtherance of the conspiracy.

[68] The fifth issue raised was headed 'harassing other parties/professionals'. It was here contended by NTT that Timor had also harassed NTT's auditor, one Mr Stanley Hiew, who finally resigned as NTT's auditor. Timor was alleged to have threatened the General Manager of NTT in relation to explanations about NTT's accounts and had even lodged disciplinary complaints against several of the partners of Messrs Chooi & Company, the firm of advocates & solicitors who had acted as supervising solicitors in the enforcement of the order of court made pursuant to s. 167 of the Companies Act 1965. All these actions of Timor were, as maintained by learned counsel for NTT, to be intended to bring undue pressure to bear on any party perceived to be 'supporting or siding with NTT'.

The Mishap – Making Captain Suresh And ASM Scapegoats

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[69] Sometime in September 2016, one of the tugboats chartered to Vale, NTT Lumut, sank while it was berthed at a jetty in Vale's Teluk Rubiah Maritime Terminal. The vessel was managed by ASM pursuant to the BIMCO agreement. In relation to this incident, Timor wanted Suresh to obtain board approval for the measures he wanted to take to manage the incident. It was contended that rather than merely wanting to be involved in matters pertaining to Vale, Timor was in fact interfering with management matters of NTT. Timor, it was alleged, went to the extent of accusing Suresh and ASM of negligence in relation to the sinking of NTT Lumut. Timor also went to the extent of seeking leave pursuant to ss. 347 and 348 of the Companies Act 2016, to commence a derivative action on behalf of NTT against ASM in respect of the sinking of NTT Lumut upon an allegation of negligence. This was Kuala Lumpur High Court Originating Summons No. WA-24NCC-151-03-2018 ('OS 151'). Leave, however, was not granted by the High Court, which decision has since been upheld by the Court of Appeal.

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[70] In respect of this incident, Timor was said to have repeatedly harassed NTT's management and made incessant demands for documents. This was alleged to have been under the pretext of Timor wanting to get a better understanding of NTT's potential exposure and the loss of the vessel. This, it was contended, was Timor's attempt to find some wrongdoing against Suresh.

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The Mishap – Jeopardising The Insurance Claim

[71] In relation to the sinking of NTT Lumut, Timor had insisted on NTT appointing an independent investigation despite the fact that investigations had been carried out by the insurers and the Marine Department. When the Board of Directors agreed to an independent investigation and authorised Johari to appoint a surveyor to conduct the investigations, Timor objected. Timor instead proposed that the minority directors appoint an independent expert while the majority appoint their own independent expert.

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[72] The Board of Directors finally appointed Captain Mike Meade of M3 Marine Expertise Pte Ltd to investigate the sinking of NTT Lumut and to report. Timor had also made allegations of financial loss arising from the incident and in response, the Board of Directors appointed Parker Randall, an accounting firm, to determine the financial impact on NTT arising from the sinking of NTT Lumut. Despite these efforts, Timor filed proceedings in court to obtain leave to commence a derivative action on behalf of NTT against ASM. In the process, Timor had also appointed his own experts in the form of a Master Mariner, one Alan Loynd of Brandscombe Marine Consultant Ltd, Hong Kong and Ferrier Hodgson, an accounting and business advisory firm. As mentioned, Timor's application for leave to commence a derivative action in respect of this incident was dismissed.

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- A [73] From this episode, it was NTT's contention that it demonstrated that Timor was finding every opportunity to displace and exclude Suresh and ASM from NTT's contract with Vale. Timor's conduct was alleged to have harmed NTT, caused division amongst its Board members, caused management to divert its attention to fending off legal suits and placed the contract with Vale in jeopardy. In this context, it was contended that Timor knew of NTT's dependence on ASM to perform the Harbour Tugs services agreement with Vale.

Continuous Interference On The Lay-up Of Two Tugs

- C [74] Sometime in July 2015, Vale decided that it had no use for two of the seven tugboats namely NTT Lumut and NTT Larut. As a result, Vale had proposed that they be redeployed to Mozambique. This was not acceptable to NTT because it had no office in Mozambique and it was of the view that a bareboat charter would not ensure that the tugboats would be adequately cared for.

- D [75] In the circumstances, Suresh suggested that the two tugboats be sold to Vale plus payment of compensation for loss of revenue as the charter for those tugboats would have to be terminated. Timor was of a different view. Timor suggested that Vale be asked to propose their options instead. NTT's Board of Directors, however, unanimously agreed that Suresh be authorised to negotiate with Vale and that all discussions with Vale were not to be put in writing. Timor, however, insisted that NSSB be included in all the discussions with Vale.

- F [76] From this, it was NTT's contention that Timor was looking to entrench NSSB's position with Vale and circumvent NTT's board's decision in authorising Suresh to deal with the matter with Vale. Timor was also said to be interfering with the management and day to day affairs of the company.

- G [77] Also criticised by NTT was Timor's email of 8 October 2015, in which Timor expressed to Suresh and Johari that 'we should find a fair and equitable solution with Vale' and to 'be fair to them'. Timor was said to be doing this without exercising independent business judgment and without due regard for the best interest of NTT. NTT also contended that Timor was not concerned with promoting the interest of NTT with Vale but rather to promote his and NSSB's interest and relationship with Vale.

- H *Attacks Stage-managed In Aid Of Litigation*

[78] It was also NTT's contention that the demands, complaints, queries and accusations by Timor and NSSB were all part of a systematic attack in furtherance of a conspiracy to injure NTT.

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[79] NTT alleges that these attacks were stage-managed and choreographed by NSSB's lawyers to lay a paper trail to aid in intended litigation. Reference was then made to Timor's reliance on lawyers and in wanting their involvement. These preparations were then followed by what was described as an 'avalanche of legal proceedings'.

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[80] These legal proceedings, it was contended, were not meant to protect NTT's interest but were designed to harass and intimidate the directors and management and to bring pressure to bear. It was asserted that these legal proceedings were driven by a 'collateral purpose to injure NTT by disrupting and destabilising operations'.

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Wan Enlisted In The Conspiracy

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[81] NTT's case against Wan essentially stems from Wan's support of Timor in all that Timor was accused of by NTT. Wan, it was said, must have been aware of the affairs of NSSB and the circumstances surrounding NSSB's actions. Wan was also copied on all the relevant correspondences. In his own words, Wan stated that '... I'm playing a supporting role. All these issues are all handled by Timor.' In this, it was alleged that Wan failed to exercise any independent judgment as a director and was willing merely to accept Timor's position uncritically. Wan was said to be willing to support Timor even in the latter's attacks against Suresh and the other directors of NTT and even though he was personally unaware of the basis of the attacks. Wan was also present in the enforcement of the order to inspect NTT's accounting records despite the fact that he was not personally involved and this was said by NTT to be facilitating Timor and NSSB in their objectives.

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[82] Wan's excuse for failing to attend the Annual General Meeting held on 31 March 2016 and the adjourned meeting held on 7 April 2016 as a corporative representative of NSSB, due to a prior engagement, was said to be contrived and wholly unconvincing. Under cross-examination, when put that he did not attend the Annual General Meeting because he would not know what to ask NTT's auditor who was told to make himself available for questions, Wan answered 'Because he (Timor) is the lead player, My Lord'. NTT contended that it was clear Wan did not attend the Annual General Meeting at Timor and/or NSSB's behest and his actions were clearly intended to frustrate the process.

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[83] As a signatory, Wan also refused to sign certain cheques of NTT for payment of operational expenses to ASM. On this, it was contended that it was Timor who expressed that NSSB was not going to sign any cheques for such payments even though Timor himself was not a signatory. Therefore, NTT contended, Wan was clearly acting on the instructions of Timor. NTT also contended that it was obvious that not signing the cheques for payment

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- A to ASM would jeopardise NTT's operations as NTT was dependent on ASM for NTT's compliance with the Harbour Tug services agreement. The refusal to sign the cheques for payment of operational expenses was thus said to have been calculated to injure NTT's interest.
- B [84] Wan was also accused of putting NTT's relationship with its financier EXIM Bank in jeopardy when he and Timor went to the bank and caused a fracas of sorts. This controversy arose out of EXIM Bank's concern about a change in NSSB's status, from a private exempt company to a non-exempt company, and that it may contravene s. 133A of the then Companies Act 1965 which would result in an event of default under EXIM Bank's financing facility. Timor's response to EXIM Bank's concerns was criticised by NTT as being confrontational. In this episode, NTT contended that Timor and Wan were aware that an event of default could lead to a termination of NTT's financial facility and would thus destroy NTT. However, no default was called by EXIM Bank.
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- D [85] NTT was critical of what it described as Wan's subservience to Timor. Under cross-examination, Wan, however, asserted that what Timor did must be in the interest of NTT as there was no other interest.
- E [86] Wan also failed to attend NTT's Board meetings after the Board of Directors' meeting of 31 March 2017.
- [87] In all this, it was NTT's contention that Wan had acted in furtherance of the alleged conspiracy and supported Timor and NSSB in whatever position they took, regardless of whether they were in the interest of NTT.
- Breach Of Directors' Duties*
- F [88] In relation to the allegation of breaches of directors' duties against Timor and Wan, these allegations were predominantly predicated upon their alleged purpose and motives for the overt acts identified by NTT.
- G [89] Both fiduciary duties and statutory duties imposed on Timor and Wan in their capacity as directors were relied upon. In respect of their statutory duties, the statutory provisions relied upon included ss. 213(1), 213(2), 214(1), 217 and 218 of the Companies Act 2016 ("CA 2016").
- H [90] Consistent with common law principles and now found in s. 213(1) is the duty of a director to exercise his powers for a proper purpose and in good faith, in the best interest of the company. It was contended that Timor and Wan had, throughout the course of the events that constituted the overt acts promoted the interest of NSSB, at the expense of NTT.
- [91] It was contended that Timor's actions:
- I (i) in seeking to preserve and enhance Timor's and NSSB's relationship with Vale;

- (ii) in meeting with Sudhir with the intention to exclude Suresh; A
- (iii) in causing strife and disharmony with NTT;
- (iv) in refusing to attend annual general meetings;
- (v) in the manner of enforcing the court's order obtained to inspect NTT's accounts; B
- (vi) in calling for an independent investigation into the sinking of NTT Lumut;
- (vii) in interfering with issues concerning Vale;
- (viii) in the manner he dealt with EXIM Bank; and C
- (ix) in stopping the Board of Directors' meeting of 31 March 2017 by his lawyers' letter;

were all not for proper purposes or in the best interest of NTT. Wan had also been a party to all this. In addition, Wan had also refused to sign cheques in respect of NTT's operational expenses. In effect, these allegations were really based on the motive and purpose that were advanced by NTT in respect of the claim in conspiracy. D

[92] In respect of all these allegations, it was also contended that Timor and Wan had failed to exercise reasonable care, skill and diligence in breach of s. 213(2) of the CA 2016 and cannot be said to have exercised any business judgment under s. 214 of the CA 2016, because their actions were not for a proper purpose or in good faith. Again, in support of this contention was a reference back to the motive and purpose alleged of the overt acts complained of. E F

[93] In all this, it was additionally contended that Timor had acted in the interest of NSSB, whose nominee he was, contrary to the interest of NTT. Section 218 of the CA 2016 was also invoked. It was contended that Timor's motive for seeking to inspect the accounting documents of NTT was solely in the interest of NSSB or himself or to cause detriment to NTT. Even the use of the information obtained from NTT in order to secure a professional report, it was alleged, was a breach of statutory duties. G

[94] It was contended that Timor and Wan had a duty to uphold the decision of the board and not to cause strife and disaffection. It was alleged that in all their actions and omissions complained of, they had also breached this duty. H

The Defence

[95] The allegations against the defendants were categorically denied. The defendants contended that these allegations were afterthoughts concocted to exert pressure on the defendants. It was maintained that as directors, quite I

A to the contrary of NTT's allegations, Timor and Wan's acts and omissions were in the discharge of their duties as directors 'triggered by the acts and/or omissions of NTT, AMSB and/or Captain Suresh'.

B [96] Contrary to what was urged by NTT, the defendants maintain that ultimately this was unequivocally a dispute between shareholders in a joint venture company.

[97] It was the defendants' case that the evidence disclosed the following:

- (i) that Suresh had and continues to have absolute control of NTT;
- C (ii) that AMSB's nominees dominated the board of NTT;
- (iii) that Suresh was in a position of conflict of interest due to his ownership of AMSB and ASM and thus there was a need for improving NTT's corporate governance;
- D (iv) that Timor had valid reasons to query NTT's accounts after NTT started full operations; and
- (v) that Timor and Wan found themselves in a hostile board dominated by AMSB's nominee directors said to be beholden to Suresh.

E [98] In the context of the foregoing, it was contended that Suresh did not fully accommodate queries made about NTT's finances or permit Timor, as a director, to have copies of NTT's accounting and other records, refused to allow *verbatim* transcripts or audio recordings of board meetings, had AMSB transfer part of its shares in NTT amounting to 10% of NTT's share capital to Sudhir, in breach of the shareholders' agreement and impeded Timor and NSSB's attempt to secure an independent investigation into the sinking of NTT Lumut.

F [99] The Shin Yang Sale and purchase agreement in respect of the seven tugboats was in April 2013. Pending the construction of the tugboats, NTT was fairly dormant. During this period, NTT did not have any revenue, although it did incur administrative expenses.

G [100] It was only in 2015, after the tugboats had been delivered, that NTT started to generate revenue. On 12 August 2015, Suresh caused to be circulated to the board members of NTT the income statements and balance sheet of NTT as of 31 July 2015. NTT's revenue was shown to be H USD6,415,117 with costs of sales at USD2,045,739. Following this, Timor started to request for NTT's records to review the amounts disclosed.

I [101] Also, on 12 August 2015, Suresh circulated to the Board of Directors, a letter from Shin Yang Shipyard Sdn Bhd dated 3 August 2015 demanding payment of a sum of USD21,439,421.72 owing under the Shin Yang sale and purchase agreement. By this time, the seven tugboats had already been

delivered and operating and full payment to Shin Yang Shipyard Sdn Bhd was supposed to have been made under the terms of the sale and purchase agreement. A

[102] Thus, this demand by Shin Yang Shipyard Sdn Bhd was said to have come as a surprise, as the payment demanded ought to have been made, in full, upon delivery of the tugboats. B

[103] Timor, in an email to Suresh dated 12 August 2015, requested for copies of various accounting records such as NTT's cash flow statement, trial balance report and general ledger.

[104] On 17 September 2015, in a long email to Suresh which was copied to the other directors, Timor among other things, requested for further documents including the balance sheet and profit and loss statement for the period from January to August 2015. Specific questions were also posed by Timor and there were also requests for financial data. These were set out in Timor's email. C D

[105] In this email of 17 September 2015, Timor expressed the view that 'because NTT is dealing with a multinational company and because we have a contract that is worth about USD250 million over a 15-year period, it is critical that the business of NTT be carried out with due regard to solid corporate governance procedures and that we have full transparency in terms of the decision-making process and oversight over expenses'. E

[106] Despite reminders, Timor's request for these accounting records was ignored by Suresh. Timor's complaint was that as a director, he was being denied his statutory right to NTT's accounting records. It was also Timor's contention that this refusal to provide the records sought gave rise to much concern. F

[107] It was also around this time, but earlier in August 2015, that Timor sought to extend the agreement for advisory services. That agreement was to end upon the delivery of the seventh tugboat. That Timor had sought to extend the agreement was not disputed. However, according to Timor, Suresh had indicated that an extension of the agreement for advisory services would be discussed among the shareholders. In support of this contention, reference was made to an email that Timor wrote on 11 October 2015. Upon closer examination, what Timor had alleged in his email was that Suresh had asked Timor not to raise the extension at the Board of Directors meeting in May 2015, as Suresh wanted to bring the issue before ASM's shareholders. What was not disputed was that Suresh subsequently informed Timor that there was no agreement to any extension. G H

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- A [108] On 23 October 2015, Suresh circulated NTT's final draft accounts for the financial year ended 30 September 2015. To this, Timor sent an email dated 30 October 2015 seeking documents, accompanied by a list of questions headed 'NSSB Preliminary Comments', querying the figures provided in the final draft accounts. However, no answers were forthcoming.
- B As a result, Timor, through his solicitors by a letter dated 18 December 2015, sought to be supplied with the accounting records of NTT. Attached to this letter of 18 December 2015 was what were described as the final questions pertaining to the draft final accounts.
- C [109] It was around this time, 16 January 2016, that Timor had his meeting with Sudhir and Paul Kelly in Singapore. As far as Timor was concerned, his meeting with Sudhir was precipitated by several factors. There was the Shin Yang Shipyard Sdn Bhd's demand for payment of USD21,439,421.72 that was made on 3 August 2015, well after the seven tugboats had been delivered. There was also Timor's request for accounting records and documents to which he had not received all the records that he had sought.
- D There were then Suresh's negotiations with Vale on the redeployment of two of the tugboats NTT Lumut and NTT Larut to Mozambique and which issue had not been resolved. According to Timor, there was concern as the redeployment of these two tugboats may have significant impact on the income revenue of NTT.
- E [110] It was in light of the circumstances prevailing at the time that Timor claimed that he had legitimate concerns about Suresh's management and the need for proper corporate governance. Proper corporate governance was also required, in Timor's view, because Suresh was in a position of conflict of interest. The conflict of interest stems from the fact that Suresh is the majority shareholder of AMSB, he also owns the majority of the shares in ASM, he is the Chief Executive Officer and a director of NSSB and he is also a director of AMSB and ASM.
- F [111] According to Timor, the meeting with Sudhir was appropriate as Sudhir was believed to be the beneficial owner of a majority of the shares in AMSB. Therefore, Timor wanted to hear Sudhir's views on the need to improve corporate governance in NTT. Timor maintained that there was nothing wrong with this at all. In fact, in an email from Sudhir to Timor dated 1 February 2016, Sudhir stated in para. 2, 'I started the meeting by saying that we shared some concerns on the corporate governance of NTT'.
- G Then, in para. 6 Sudhir stated, 'There was some concern about how Capt Suresh would behave. I assured all of you that I will do my best as we have other matters with him and he is like an employee of ours'. This, Timor contended, reinforced his view about Suresh and his management and who was actually in control of AMSB. Sudhir's email was also copied to Johari and Hari Dass. Suffice to say, the point made was that even Sudhir had expressed concern about Suresh's management.
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[112] As for Timor's queries regarding the final draft accounts of NTT circulated by Suresh on 23 October 2015, it was only on 12 February 2016 that Suresh provided his reply to the queries set out in Timor's email of 30 October 2015. On 11 March 2016, Suresh provided his reply to Timor's final questions. On 1 April 2016, Timor sent follow-up questions on the accounts and reiterated the request for documents.

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[113] On 12 April 2016, Suresh replied stating that the accounting records would be made available for inspection. When Timor and Wan attended at NTT's office on 22 April 2016, they were not allowed to make any recordings and had to hand over their handphones. They were also refused copies of the accounting records. No answers were provided to Timor's follow-up questions.

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[114] In consequence, on 27 April 2016, Timor filed Kuala Lumpur High Court Originating Summons WA-24NCC-179-04-2016 ('OS 179') against NTT. Timor invoked s. 167 of the, then, Companies Act 1965; essentially seeking an order to inspect and make copies of NTT's financial records and for the appointment of an auditor to assist him in doing so. Timor's application was allowed by the High Court.

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[115] In OS 179, the learned judge held that the right to make copies of financial documents was integral to and intertwined with the very concept of the right of a director to inspect the financial records of a company (see *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2018] 2 CLJ 103; [2018] 8 MLJ 394). The learned judge also held that he did not find evidence of any pressure brought to bear by NSSB or Timor on NTT to continue to make any payments to NSSB. This was in relation to the agreement for advisory services which had by then expired, though it was acknowledged that NSSB, through Timor, had sought an extension of it. The learned judge also found that the allegations made against Timor, of improper and ulterior motives were not made out.

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[116] Timor in his witness statement testified that it was from one of the affidavits filed by Suresh that Timor discovered that AMSB had transferred part of its shares in NTT to Sudhir. In OS 179, Suresh had exhibited a copy of an adjourned Annual General Meeting of NTT held on 7 April 2016. It was recorded that Paul Kelly had attended the meeting as a proxy to the shareholder, Sudhir. Timor and Wan were not present at this adjourned Annual General Meeting. Timor claimed that upon further investigation at NTT's registered office, he found that NTT's Register of Substantial Shareholders had recorded Sudhir as a shareholder of NTT holding 100,000 ordinary shares since 16 December 2015 and AMSB's shareholding in NTT was reduced to 700,000 ordinary shares. There was also a note stating that the transfer of NTT shares to Sudhir by AMSB was 'entered in register on 1 April 2015'. The consideration stated was RM100,000 at RM1 a share. There did not appear to be any board resolution authorising the transfer.

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- A [117] This discovery eventually gave rise to Suit 165 and Suit 113 which essentially turned on whether the transfer of NTT shares to Sudhir was in breach of the shareholders' agreement. Suit 113 was originally filed as Civil Suit WA-22NCVC-544-08-2016 but the reference in its intitlement was changed after an order of court was made that it be tried together with Suit
- B 165.
- [118] Suit 113 was commenced in August of 2016. It was a suit brought by NSSB against Sudhir to challenge the transfer of the NTT shares to him on grounds, *inter alia*, of a breach of the shareholders agreement by AMSB and also that Sudhir had wrongfully induced a breach of contract.
- C [119] Suit 165 was brought by Sudhir against Timor, NSSB, AMSB and NTT. It was only filed in May of 2017, some nine months after Suit 113. Sudhir in this Suit 165, although not a party to the shareholders' agreement asserted that there was a 'collateral understanding and/or an implied condition' among Sudhir, NSSB and AMSB that he would participate in the
- D equity of NTT as an investor. The delay in filing Suit 165 gave rise to allegations that Sudhir's claim and basis given for it in Suit 165 was an afterthought and not *bona fide*.
- [120] Both suits were tried together. The High Court found in favour of NSSB in Suit 113. As for Sudhir's Suit 165, Sudhir only succeeded in
- E securing a declaration that his appointment to the Board of NTT was valid but the rest of his claim pertaining to his right to the shares in NTT was dismissed. These decisions of the High Court are now the subject matter of pending appeals before the Court of Appeal.
- F [121] There was also another originating summons that was brought by NSSB against AMSB and NTT in March of 2017 to restrain further dealings with NTT's shares pending a proposed arbitration. Through their solicitors, AMSB and NTT on 22 March 2017, undertook in terms of the injunction sought, pending the arbitration between the parties.
- G [122] What was pointed out was that the apparently surreptitious transfer of NTT shares to Sudhir, in breach of the shareholders' agreement, also contributed to causing grave distrust in Suresh and added to the controversy and friction between the parties. This factor too became part of the circumstances that existed in the course of the time that the overt acts
- H occurred.
- [123] The order of the High Court in OS 179 was made on 16 January 2017. On 8 February 2017, at a Board of Directors meeting, AMSB's nominee directors resolved to call an Extraordinary General Meeting of NTT to remove Timor as a director with immediate effect.
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[124] After Suit 113 was commenced in August of 2016, there was the sinking of NTT Lumut in September of 2016. The criticism of Timor insisting on an independent investigation despite the fact that the insurers and the Marine Department were conducting their investigations and attempting to seek leave to bring a derivative action against ASM, were met with the response that the sinking of NTT Lumut was damage caused to a valuable asset of NTT that cost some USD8 million. It was contended that to Timor, and with the advice that he was given by Alan Lyond, there were many unanswered questions, the sinking of NTT Lumut could have been avoided and the tugboat was all the while under the charge of ASM.

[125] Ultimately, Timor's attempt to obtain leave to commence a derivative action against ASM failed at the High Court (See *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2019] 1 LNS 1452; [2019] 10 MLJ 693). It is not for this court to re-examine the merit or otherwise of Timor's attempt to obtain leave for a derivative action in respect of the sinking of NTT Lumut. Suffice to say that it is the motive for Timor's attempt that NTT's claim in this action is concerned with.

[126] In addition, in the midst of these controversies, there was ASM's attempt to deprive NSSB the payment of agreed daily fees, even though ASM had been paid their full rates by NTT.

[127] This daily fee was payable pursuant to an agreement entered into between ASM and NSSB by way of a letter dated 9 February 2015 which was signed by Suresh ('Daily Fee Agreement'). The daily fee agreement was such that ASM would pay NSSB, on a monthly basis, a sum of USD100 per day per tugboat within seven days of ASM receiving its management fee from NTT under the BIMCO agreement.

[128] ASM, and thus essentially Suresh, reneged in making payment of the daily fee agreed for the months of May to October 2016. This resulted in NSSB having to file suit in the Sessions Court to enforce the payment of the daily fee which were in arrears. This was Sessions Court Civil Suit No. WA-B52NCVC-483-11-2016 filed in November of 2016. The suit was, pursuant to an order of the High Court dated 19 January 2017, transferred to and tried in the High Court as Kuala Lumpur High Court Suit No. WA-22NCVC-196-04-2017. Following the trial, judgment was entered in favour of NSSB (See *Nautical Supreme Sdn Bhd v. Azimuth Ship Management Sdn Bhd* [2019] 1 LNS 1842). ASM had in fact filed a counterclaim but its counterclaim was dismissed. In its defence and counterclaim, ASM had sought to declare the daily fee agreement void and had claimed that it was executed under undue influence.

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- A [129] On 13 February 2017, AMSB wrote to NSSB inviting NSSB to propose a candidate to replace Timor as a director of NTT. NSSB in its reply of 15 February 2017, declined, maintaining *inter alia* that this would be a breach of the shareholders' agreement.
- B [130] As for the enforcement of the order in OS 179, there were a host of allegations and counter-allegations; some petty, some not so petty. Timor's allegations against Suresh and NTT's management included an allegation that they were obstructive. Suresh, it was said, had insisted on service of the sealed order of court before he would permit the inspection to take place. He had also disallowed the auditors, who were in attendance, to take photos or
- C make copies of the required documents.
- [131] Based on Timor's allegation, after some ten occasions attending on the premises of NTT, he was still not able to access all the accounting records. Timor then applied to court for leave to commence committal proceedings. Leave to commence committal proceedings against NTT, Suresh and Azian
- D was granted by the High Court on 4 April 2017. However, it was subsequently set aside on 10 July 2017. Leave had also been granted for committal proceedings to be filed against the other directors of NTT but the proceeding was withdrawn and struck out on 23 April 2017.
- E [132] Based on the grounds of judgment of the learned judge, the leave granted was set aside on the grounds that the order of the court was against NTT to do an act but no time was stipulated within which it must be done; that there was no personal service of the order of court on either Suresh or Azian; that the order of court itself was vague and open-ended; that there was
- F no full material disclosure of the facts surrounding the accusations of non-observance of the order of the court particularised in the amended statement made pursuant to O. 52 of the Rules of Court 2012 and in the case of Azian, that she was not included in the penal notice to the order of the court (see *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2019] 4 CLJ 491; [2019] 7 MLJ 724).
- G [133] On 7 August 2018, Timor again applied for leave to commence a derivative action in the name of NTT. This was Kuala Lumpur High Court Originating Summons WA-24NCC-392-08-2018 ('OS 392'). The derivative action to be brought was targeted at Suresh, Johari, Hari Dass, Latiff, Sudhir, Azian and included NTT and AMSB.
- H [134] The reason for this application was this. In August 2015, Shin Yang Shipyard Sdn Bhd had demanded for payment of an outstanding sum of USD21,439,421.72. As mentioned, Suresh had informed the Board of NTT of this on 12 August 2015. This also led Timor to request for accounting
- I documents.

[135] On 16 January 2017, the High Court granted Timor the order to inspect NTT's accounting and other records in OS 179. On 15 February 2017, Crowe Horwath produced a preliminary report stating, among other things, that there were no supporting documents in respect of the payment of a sum of USD19.9 million by AMSB to Shin Yang Shipyard Sdn Bhd on behalf of NTT, purportedly as an advance to NTT. NTT's accounts recorded a debt in excess of USD20 million owed to AMSB. There was also a query as to the absence of supporting documents and why out of USD1.57 million paid by NSSB to NTT towards payment to Shin Yang Shipyard Sdn Bhd, only USD649,390 was entered in NTT's General Ledger. There was also no documentary support as to why the last drawdown and payment by NTT's financier to Shin Yang Shipyard Sdn Bhd was as late as in February 2016, well after the delivery of the seven tugboats.

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[136] There was also no documentary evidence provided of the actual payment made by AMSB to Shin Yang Shipyard Sdn Bhd. Thus, at the heart of OS 392 was what was said to be a lack of evidence or documentary support of the payment made to Shin Yang Shipyard Sdn Bhd. There was, however, written confirmation from Shin Yang Shipyard Sdn Bhd that it had received the payment due to it. It would appear that the actual paper trail in respect of the payment made was never provided.

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[137] The High Court in OS 392 dismissed Timor's application. However, on appeal to the Court of Appeal, Timor's appeal against the decision of the High Court was allowed and leave was granted for a derivative action to be brought by Timor. That Timor was successful in obtaining leave to commence a derivative action in relation to payments to Shin Yang Shipyard Sdn Bhd was, in a limited sense, a vindication of Timor's concerns. Whether Timor would ultimately succeed in his derivative action is still yet to be determined.

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[138] As for the allegations of breaches of duty as directors on the part of Timor and Wan, they contended to the contrary. It was Timor and Wan's contention that in respect of the allegations of breaches of duty on their part, they were in fact discharging their duty as directors to ensure that the interest of NTT and also of its shareholders were protected.

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[139] Set against the background and the entire circumstances of the case and having regard to the concerns expressed by Timor, the improper motives or intentions attributed to Timor and Wan were said to be untrue. It was contended that Timor and Wan had also done nothing to commit NTT to its detriment nor were they, as minority on NTT's Board, able to do so.

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A **The Claim In Conspiracy**

[140] The tort of conspiracy relied upon by NTT were of both species; the one involving a combination to do an unlawful act or a lawful act unlawfully and the other where no unlawful act is involved but the combination is with a predominant intention to injure NTT. In either case, actual damage or injury must be caused.

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[141] A clear explanation of the civil tort of conspiracy and the two species recognised by law is to be found in the judgment of Nourse LJ in the decision of the Court of Appeal in *Kuwait Oil Tanker Co SAK And Another v. Al Bader And Others* [2000] 2 All ER (Comm) 271 at pp. 311-313. Although somewhat extensive, it merits reproduction in full as it is both lucid and highly instructive:

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107. It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means. The first is sometimes described simply as a conspiracy to injure and the second as a conspiracy to use unlawful means (see eg *Clerk and Lindsell on Torts* (17th edn, 1995) pp. 1267-1268, paras 23-76). In our view they are both conspiracies to injure and their ingredients are the same, with one crucial difference. In both cases there must be conspiracy to injure the claimant, but in the first case (in which the means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant whereas in the second case, although the defendant must intend to injure the claimant, injury to the claimant need not be his predominant purpose.

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108. We shall treat them as different torts, although, as it seems to us, they are better regarded as species of the same tort. It matters not. For present purposes we would define them as follows. (1) A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant. (2) A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so. We shall call them a 'lawful means conspiracy' and an 'unlawful means conspiracy' respectively.

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109. Those principles seem to us to be consistent with the authorities, including in particular *Lonrho Ltd v. Shell Petroleum Co Ltd (No 2)* [1981] 2 All ER 456, [1982] AC 173 and *Lonrho plc v. Fayed* [1991] 3 All ER 303, [1992] 1 AC 448, which analyse the leading cases. (See also for example *Rookes v. Barnard* [1964] 1 All ER 367 at 400, [1964] AC 1129 at 1209 where Lord Devlin drew a clear distinction between the two types of conspiracy.)

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110. It is important to note that the tort of conspiracy to injure by unlawful means is different in significant respects both from the crime of conspiracy and from the law of contract. A criminal conspiracy is in essence an agreement to commit a crime and, as such, is complete when the agreement is made, whether or not it is carried out. For this reason care must be taken in considering decisions in criminal cases where (as here) the question is whether the tort of conspiracy was committed. Lord Diplock put it in this way in the *Shell Petroleum* case:

Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted, the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement. (See [1981] 2 All ER 456 at 463, [1982] AC 173 at 188.)

In that passage Lord Diplock appears to have been referring to both types of conspiracy. The essence of the unlawful means conspiracy is injury to the claimant as a result of an unlawful act or acts where two or more people have combined to cause the injury. It is not necessary that every overt act is done by every conspirator, but the act must be done pursuant to the conspiracy or combination.

111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out (at p. 124), it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, *albeit* tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in *R v. Siracusa* (1990) 90 Cr App R 340 at 349 is of assistance in this context:

Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.

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A Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were ‘in it together’. That may be
B a helpful question to ask, but we agree with Mr Brodie that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in pursuance of the conspiracy.

112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or
C otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself. (emphasis added)

(See also *Deepak Jaikishan Jaikishan Rewachand & Anor v. Infrared Sdn Bhd (Previously Known As Reetaj City Centre Sdn Bhd And Formerly Known As KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437).

D [142] The tort and its variants have also been the subject of analysis and application by our courts in many cases. In *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676 at pp. 683-684, a decision of this court, Mohd Zawawi Salleh JCA (as His Lordship then was) explained:

E [10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the “economic torts”. There are four elements to a conspiracy claim:

- F (i) a combination or agreement between two or more individuals;
(ii) an intent to injure;
(iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and
G (iv) resulting loss and damage to the claimant.

(See *Khoo Teng Chye v. Cekal Berjasa Sdn Bhd & Anor*, Civil Appeal No: P-02-542-03-2015 (CA) [2015] 6 CLJ 449 (CA)).

[11] There are two kinds of conspiracy, the elements of which are distinct:

H (i) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and

I (ii) lawful means conspiracy: a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole predominant purpose of injuring the claimant – it is in the fact of the conspiracy that the unlawfulness resides. (See *Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393 (CA)).

[12] The distinction between the two was succinctly elucidated by Lord Bridge in *Lonrho Plc v. Fayed & Others* [1991] 3 All ER 303 as follows:

Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[13] The elements required to bring an action for unlawful means conspiracy and lawful means conspiracy are as follows:

A combination or agreement between two or more individuals. It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. The court looks at the overt acts of the conspiracy and infers from those acts that there was agreement to further the common object of the combination. It is sufficient that two or more persons combine with the necessary intention or that they deliberately co-operate, *albeit* tacitly, to achieve a common end (*R v. Siracusa* [1990] 0 Cr App R 340). Neither is it necessary that all those involved should have joined the conspiracy at the same time; but all those said to be parties to the conspiracy should be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design. (*R v. Simmonds* [1969] 1 QB 691).

It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that they join the conspiracy; they are not liable retrospectively for the damage that has been suffered prior to their joining (*O'Keefe v. Walsh* [1903] 2 IR 681).

[143] As has been pointed out, it is often the case in respect of claims of this nature that there would be an absence of direct evidence of the agreement that is the integral part of an alleged conspiracy. In such cases, and understandably, evidence of the conspiracy would be circumstantial and, as in this case, the plaintiff would often have to point to various discernible acts and/or omissions of the defendants upon which it would be contended that the defendants were acting in concert pursuant to a conspiracy for an ascribed motive or purpose. Such is similarly the case where the conspiracy is a

- A crime. The law has long recognised this and it bears reiterating O'Connor LJ's observation in *R v. Siracusa (Francesco)* (1990) Cr. App. R. 340 at pp. 349:
- B ... , the origins of all conspiracies are concealed and it is usually quite impossible to establish when and where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable; it can be active or passive.
- C [144] A similar observation was made in *Behan v. Park* [2014] BCSC 1982 at p 28, by Voith J of the Supreme Court of British Columbia:
- D [102] The various elements of a civil conspiracy claim invariably make this a difficult cause of action. The fact that there was no direct evidence of any agreement between the defendants, without more, is not, however, remarkable. Conspiracy claims are rarely based on any direct evidence of an agreement to injure.
- E [145] It has been said of circumstantial evidence by Lord Hewart LCJ, in *R v. Taylor, Weaver and Donovan* (1928) 21 Cr App Rep 20 at p. 21:
- ... that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.
- F [146] Equating it to mathematics is perhaps, with respect, overstating the precision of circumstantial evidence, but its ability to prove a proposition on the standards imposed by law cannot be disputed. However, in my view, great care and circumspection must be taken by a court of law when interpreting the conduct of parties and in seeking to draw inferences from them. The process of assessing conduct and inferring from such conduct that it was for a particular ascribed reason or purpose, in furtherance of a
- G conspiracy, is necessarily a process of induction rather than deduction. Such being the case, the court must be wary of the fact that it is often all too easy to colour a variety of overt acts and to portray them as conduct with an ascribed motive or reason, often with the aid of an array of collateral facts arranged and cast in a particular light.
- H [147] It is in such cases that the court must view the overt acts carefully, illuminated by the prevailing circumstances at the material time, to examine if the alleged motive or purpose for the overt acts are made out. At all times, the court would be faced with competing reasons for the overt acts or omissions of the alleged conspirators but ultimately the court will be mindful
- I of the principle that the burden of proof is squarely upon the party making the allegations and the standard that has to be met is well settled and is one upon a balance of probabilities.

[148] It is at this juncture pertinent, and in my view important, to bear in mind the caveat imposed by Lord Nicholls in *OBG Ltd and another v. Allan and others*; *Douglas and another v. Hello! Ltd and others (No. 3)*; *Mainstream Properties Ltd v Yong and others* [2007] 4 All ER 545 at p. 593, of an intention to injure:

[166] *Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant.* The defendant's conduct in relation to the loss must be deliberate. In particular, *a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct,* in the words of Cooke J in *Van Camp Chocolates Ltd v. Aulsebrooks Ltd* [1984] 1 NZLR 354. The majority of the Court of Appeal fell into error on this point in the interlocutory case of *Millar v. Bassey* [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.
(emphasis added)

[149] The *OBG* case was not concerned specifically with the civil tort of conspiracy. There were three appeals in that case and they were described by Lord Hoffmann, generally, as being cases principally concerned with claims in tort for economic loss caused by intentional acts. In *Meretz Investments NV and another v. ACP Ltd and others* [2008] Ch 244 at p. 284, however, Arden LJ pointed out that:

146 ... The *OBG* case did not concern liability for conspiracy but no counsel suggested that any distinction could be drawn between what was held in the *OBG* case about intention to cause loss by unlawful means and conspiracy.

(See also the case of *Deepak Jaikishan* cited above at p. 475 at para. [105] where Nallini Pathmanathan J (as Her Ladyship then was) also made the same observations).

[150] It would be erroneous to suggest that this is not a case concerning disputes between shareholders. It plainly is. NTT is merely the vehicle that was used, as a joint venture, to pursue a venture agreed upon by its shareholders. Insofar, as the shareholders are concerned, the line is quite firmly drawn. It is between AMSB of the Azimuth Group of companies, led on record, by Suresh on the one hand and NSSB of the Dwtasik Group of companies led by Timor, on the other.

[151] There is then Sudhir. The evidence, especially in the emails, disclosed that Sudhir at one point in time appeared to display willingness to collaborate with Timor but that was not to be and it would appear quite apparent from the evidence that Sudhir's interest was in fact in line with that of Suresh. This is clearly suggested by AMSB's transfer of part of its NTT shares to Sudhir.

A [152] From the meeting in Swissotel in Singapore, it seems to me that Sudhir was willing to collaborate with Timor only because he wanted his interest in AMSB to be elevated to a direct shareholding in NTT. Without desiring to revisit the issue, Sudhir's alleged direct interest in NTT, rather than being an indirect interest in NTT through AMSB, was the subject matter of Suit B 165 and Suit 113.

[153] From the timelines in the sequence of disputes between the parties and the overt acts relied upon by NTT, it is clear to me that the overt acts did not exist *in vacuo* but occurred in circumstances where there already existed loss of trust and bitter disputes between the parties.

C [154] Of the 'plan to exclude', the actual overt acts were in fact acts directed at Suresh. Timor's expressed concern was with Suresh and the issue of corporate governance. The meeting that Timor had with Sudhir, on which much importance was placed, was in fact about Suresh and issues of corporate governance in NTT. To try to achieve proper corporate D governance in NTT is not compatible with the alleged intention to injure it.

[155] The circumstances then prevailing were that Sudhir had, in November E 2015, sought to be able to hold shares directly in NTT. There were also indications, including what Sudhir had claimed in his email, that he was really the man behind AMSB. No doubt this must have presented an opportunity for Timor to deal with the 'real' joint venture partner. That Timor might have believed Sudhir's apparent willingness to address the issue of corporate governance would not be surprising. Sudhir had also seen it fit to put in writing in his email to Timor of 1 February 2016, that he shared F concerns about corporate governance in NTT and also that Suresh was like an employee to him.

[156] From Timor's email to the other directors of NTT, other than Suresh, G of 29 January 2016, Timor had understood and reported that Sudhir had, '... disclosed to us that he is a substantial beneficial owner of the shares in Azimuth Marine Sdn Bhd'; not the beneficial owner of the shares held by AMSB in NTT. That Timor may wish to seek an alliance with Sudhir does not seem illogical or surprising. This is simply because NSSB is a minority shareholder in NTT. If Timor's concern with corporate governance is to gain traction with the board of NTT, particularly if it concerns Suresh, securing the support of someone who claims to be a substantial beneficial owner of H AMSB would make logical sense.

[157] Timor's email of 29 January 2016 also discloses the measures that he I had proposed for NTT. These proposals included putting in place and implementing policies that will improve corporate governance, appointment of a firm of accountants to conduct a forensic audit on NTT's financial

statements; replacing the company secretary, undertaking a legal and financial review of the BIMCO agreement 'to ensure that it is fully above board', pay Shin Yang Shipyard Sdn Bhd the balance owed to it by NTT and to appoint additional bank signatories. These were all concerns that had been raised by Timor. To somehow colour, these concerns with an objective of injuring NTT seems to me to be somewhat disingenuous.

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[158] These proposals do not seem to me to have emerged for no good reason. By this time, in early January 2016, the issue of NTT failing to pay Shin Yang Shipyard Sdn Bhd had already arisen. Shin Yang Shipyard Sdn Bhd's demand for payment had been circulated by Suresh on 12 August 2015.

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[159] Timor's meeting with Sudhir and his proposals relating to corporate governance were also preceded by his requests for NTT's accounting and financial records. Timor's request for NTT's financial and accounting records began in August 2015, repeated in September 2015 through October 2015. Surely, the more resistance one encounters, the greater the concern. Crowe Horwath was appointed by Timor. Therefore, it was not such that there was merely a litany of ill-informed allegations or accusations made by Timor as a layperson. Professionals were appointed to advise. This issue persisted through to the filing of OS 179 by Timor and which application for inspection of NTT's accounts was granted by the High Court.

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[160] It is of some significance that there was no evidence that there was someone else or some other company waiting in the wings, as it were, to step in to provide the services that ASM was providing under the BIMCO agreement. As was always understood, it was ASM and Suresh who had the required expertise to provide the services required by Vale, not NSSB. If ASM were to be terminated, NTT would not be able to hold up its end of its contract with Vale. Such would only spell damage not only to NTT but ultimately to both AMSB as well as NSSB and this could not have been a probable objective of Timor. On record, Timor's concern with AMSB was whether the BIMCO agreement was 'fully above board'. This was in line with his concern that there was a conflict of interest. In the circumstances, to suggest that it was Timor's design to oust ASM because of the alleged conspiracy, would, to my mind seem unlikely.

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[161] Also of some relevance, although clearly not conclusive, is the fact that leave to commence a derivative action was granted by the Court of Appeal in respect of OS 392. OS 392 involved queries relating, *inter alia*, to a payment supposedly made by AMSB to Shin Yang Shipyard Sdn Bhd in respect of the Shin Yang sale and purchase agreement of a sum in excess of USD20 million, on behalf of NTT, and the lack of documentation supporting the payment. In respect of this payment, there was an entry in NTT's

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A accounts of debt in excess of USD20 million owed by NTT to AMSB. Although OS 392 was filed subsequent to Timor's meeting with Sudhir in Singapore, the fact is it does relate to the financial affairs of NTT, which was a matter that Timor had had issues with back in the third quarter of 2015. This fact would tend to support or is at the very least consistent with, the view that Timor's concern with corporate governance in NTT was not imaginary or concocted in the pursuit of a conspiracy for the objectives alleged by NTT.

[162] What might have begun as a suspicion of there being something amiss in respect of the financials of NTT could not have been allayed by Suresh's initial non-response to Timor's queries about NTT's accounts. This, coupled with the persistent refusal to allow for copies of the financial records to be provided, no doubt induced Timor's need for a court order to allow him, as a director, to inspect and have copies of NTT's accounts and financial statements. With the seeds of such distrust sowed, it would be difficult to imagine how the relationship between the representatives of the two joint venture companies might progress without any attrition. Having seen and heard Timor and Suresh as witnesses, they appear to me to be strong-willed individuals. Neither seemed to be a person who would countenance being perceived to be dictated to by the other.

E [163] What was alleged by NTT as causing strife and disharmony, was in my view, ultimately a continuation of Timor's concern with Suresh's manner of management and the transparency he did not seem to be able to secure. Even in the written submissions by learned counsel for NTT, the contention that Timor caused strife and disharmony began with the subheading 'Continued attacks against Captain Suresh'.

[164] Timor had also accused the directors who were representatives of AMSB on NTT's Board of Directors of breach of duty when they failed to turn up for the adjourned Board meeting on 2 March 2016. Again, this allegation has to be set against the prevailing circumstances at that time. The concerns in respect of NTT's accounts had already arisen. In addition, the transfer of NTT shares by AMSB to Sudhir had taken place. There were also disputes as to the accuracy of minutes of meetings; a matter that could easily have been resolved by recording the Board meetings, but was not. Learned counsel for Timor described the situation as hostile. Clearly, AMSB's representatives on the Board of NTT had acted in support of Suresh. It would not be unreasonable to expect Timor, as the representative of a minority shareholder on the Board of NTT, to take umbrage at the fact that the other Board members do not appear to share his concern about the accounts of NTT or corporate governance. It was not, in my view, a case of causing strife among directors who were independently appointed onto the Board. This

was in effect the continuation of a conflict merely between two entities – the joint venture partners, with their respective nominee directors acting and behaving as two separate groups within the Board.

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[165] NSSB and Timor’s queries into the accounts of NTT were said to be incessant. However, this must surely be seen in the light of what had induced the queries, the subsequent order of the court allowing for inspection of the accounting and financial documents of NTT and also the subsequent order of the Court of Appeal granting leave for Timor to commence a derivative action in OS 392. While I caution myself that this decision of the Court of Appeal does not prove Timor’s allegations, suffice it that it is nevertheless indicative that NSSB and Timor’s concerns were not frivolous, or obviously concocted, or necessarily interpreted as being pursuant to the alleged conspiracy.

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[166] As for the appointment of Crowe Horwath, it was contended by learned counsel for NTT that, ‘Although at first blush it may appear legitimate for a director to engage a professional to assist him in his duties, it was not the case here. Crowe Horwath was engaged to carry out NSSB’s bidding. Their appointment under the s. 167 Order was a camouflage, as they were not engaged to assist Timor but to carry out a forensic audit.’ This contention might be interpreted as suggesting some element of want of professionalism on the part of Crowe Horwath. Suffice to say, there was no evidence of this and any such suggestion would be clearly unwarranted. Apart from that, and without more, there cannot be said to be any element of mischief in Crowe Horwath’s appointment and which appointment would be perfectly reasonable in light of the continuing concern that NSSB and Timor had in respect of the financial affairs of NTT under the management of Suresh.

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[167] As for the allegations made regarding the mode of enforcement of the order of the court granting Timor the right to inspect NTT’s accounting and financial records, this was a controversy that arose in the execution of the order. That there were disagreements and accusations made by both sides cannot be denied. This, however, was unlikely to have been planned. If Suresh had facilitated what Timor had wanted to do, without allowing for any perceived obstruction, the disputes that arose in the enforcement of the order of the court would not have arisen. Timor had merely reacted to what was encountered at the time when the order was sought to be enforced.

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[168] Of some significance was the attempt at enforcement by way of committal proceedings. That Timor sought to invoke a formal legal process for enforcement, *ie*, committal proceedings, cannot itself be the subject of complaint. That was a legal manner of proceeding that Timor had the right to invoke and it was not as if that process was struck out as an abuse of the court’s process, though ultimately, it was not pursued. As Gopal Sri Ram JCA

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A stated in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425 at p. 352 (CLJ); pp. 434 to 435 (MLJ):

B *Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.*
C (emphasis added)

[169] In relation to the sinking of NTT Lumut, Timor's attempt to secure leave to bring a derivative action against ASM failed in the High Court and in the Court of Appeal. Timor had maintained, with the advice of an expert, that the sinking of NTT Lumut could have and should have been prevented.
D The loss of NTT Lumut as an asset of NTT was a matter of concern for him. Again, this too has been viewed in light of the ongoing disagreements between the two factions.

[170] It was also contended by NTT that the actions of Timor jeopardised NTT's insurance claim. Ultimately, however, NTT's insurance claim was not affected.
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[171] Timor was then said to have interfered with the lay-up of the two tugboats. This was in essence based on Timor's insistence on participating and wanting to be consulted on the issue. The lay-up of the two tugboats was of obvious financial concern for NTT. Being a representative of one of the two joint venture companies, surely Timor has legitimate reason to be concerned.
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[172] In fact, there ought not to be any real concern for NTT even if Timor were to be involved in the issue of the two tugboats. After all, the opportunity to contract with Vale and to participate in its project came through NSSB. As for AMSB, it had no real reason to be concerned as it had control of both the Board and shareholding in NTT. On the other hand, it was reasonably foreseeable that the objections to Timor's participation would have further fuelled the lack of trust that had already come into existence.
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[173] As for Wan, whether he was brought into and participated in the alleged conspiracy clearly depended on whether there was a conspiracy in the first place. His support of Timor can be said to be no more mischievous than the support that the other directors gave to Suresh.
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[174] One single thread runs through the entire NTT's case – and that thread is the inference that has to be made of the overt acts such that they, or some of them, were acts pursuant to the conspiracy alleged of the defendants. If this thread is to hold up NTT's case, it must be strong enough to admit the inferences required. A

[175] There can be no doubt that in seeking to draw the inferences sought by NTT, the alleged overt acts ought not to be examined in isolation. Regard must be given to the prevailing circumstances at the material time and also to other facts and factors that may throw additional light on the events in question. Thus, the evidence led must be examined as a whole and not viewed in compartments. As was pointed out by Nallini Pathmanathan JCA (as Her Ladyship then was) in *Taz Logistics Sdn Bhd v. Taz Metals Sdn Bhd & Ors* [2019] 2 CLJ 48; [2019] 3 MLJ 510 at p. 90 (CLJ); p. 553 (MLJ), a case where this court held that the conspiracy to injure by unlawful means was established: B C

The learned judge ought to have considered the entirety of evidence on this subject together or cumulatively with all of the other factors in order to arrive at a decision. ... When Her Ladyship chose to consider each of these instances in vacuo as it were, she failed to give effect to the basis of the plaintiff's case particularly in relation to conspiracy; (emphasis added) D E

[176] As this case remains so dependent on inferences, an observation made by Mahadev Shankar JCA in *Heller Factoring (M) Sdn Bhd v. Metalco Industries (M) Sdn Bhd* [1995] 3 CLJ 9; [1995] 2 MLJ 153 at p. 29 (CLJ); p. 177 (MLJ), is pertinent: F

It is well established that when two inferences are equally open from the same set of facts, the sinister inference is not preferred.'

[177] In *Formis Resources Bhd & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals* [2016] 9 CLJ 169, at pp. 189 to 190, Mary Lim JCA (as Her Ladyship then was) made a similar observation citing *Heller*, where Her Ladyship stated as follows: G

These events and matters are capable of more than one inference. Where that is the case, the sinister inference cannot be preferred without more even where the burden is one on a balance of probabilities. The Court of Appeal had expressed to this effect in *Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd* [1995] 3 CLJ 9; [1995] 2 MLJ 153, 177: H

It is well established that when two inferences are equally open from the same set of facts, the sinister inference is not preferred.

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A [178] Both *Heller* and *Formis* were not cases concerned with inferences to be made pertaining to allegations of conspiracy. However, the proposition is a fair and just one. Indeed, obviously, if all things are equal, where either inference is possible or equally open, it then cannot be said that either is established, whether upon a balance of probabilities or otherwise.

B [179] What to my mind is significant in this case is the fact that the overt acts, from which inferences are to be made of a conspiracy to injure, occurred in circumstances where there had already existed an atmosphere of distrust. The overt acts, *per se* and without more, were not in themselves indicative of the probable existence of a conspiracy. In my view, they could all be attributed directly or indirectly to Timor's concerns which included concerns for the lack of financial transparency traceable to Shin Yang Shipyard Sdn Bhd's demand for payment, the difficulty that Timor encountered in seeking access to NTT's accounting and financial documents, the alleged conflict of interest on Suresh's part, ASM's refusal to pay the daily fees due to NSSB, the transfer of shares in NTT to Sudhir and the reasons and bases upon which Timor secured leave from the Court of Appeal to commence a derivative action in OS 392.

C [180] The measures undertaken by Timor and NSSB were not in any way by means of stealth. They turned to the courts in many instances. They were steps taken under the full sight of the law such that any impropriety could not be said to have passed without the opportunity for legal scrutiny.

D [181] Would the motives or reasons given for the conspiracy assist in supporting the inferences sought by NTT? In my view, not in the circumstances of this case, having regard to NTT's pleaded case. NTT's contention in regard to the conspiracy merits reiterating here. It was pleaded in para. 49 of the re-amended statement of claim as follows:

E 49. Arising from the 1st and 2nd Defendants' dissatisfaction over the refusal of the Plaintiff to continue paying the Tribute under a fresh advisory agreement and ASM's refusal to pay Daily Fee as claimed to be payable by the 1st Defendant, the 1st and 2nd Defendants conspired and combined between themselves to embark on a scheme ("the Scheme") with a view to:

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- G a) Displacing and excluding Azimuth and ASM from the Project and hijack the Project unto themselves without having to pay the full value for Azimuth's 80% shareholding; and/or
- H b) forcing Azimuth to buy over the 1st Defendant's 20% shareholding for an extortionate sum far in excess of the true value of the same.

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E. Implementation of the Scheme

50. The Scheme was put into effect by the 2nd Defendant (acting in conspiracy with or at the 1st Defendant's behest, direction or instruction), proceeding (under the guise of exercising his legitimate rights as a director of the Plaintiff and purportedly in doing so honestly and in the best interests of the Plaintiff) to launch a series of systematic attacks against Azimuth and its nominated directors on the BOD with the predominant purpose of causing injury to the Plaintiff by causing the Project to be in jeopardy by lawful and/or unlawful means.

[182] To begin with, NTT had entered into the agreement for advisory services with NSSB with a clear term that it would continue in force until the delivery of the seventh tugboat. This was an agreement that NSSB had entered into with no provision for any renewal. This agreement was worth only USD7,500 per month which is relatively small when compared to the value of the Vale contract which was said to be in the region of some USD200 million. Therefore, to suggest that the refusal to extend or execute a fresh agreement for advisory services with NSSB was part of the catalyst for the alleged conspiracy seems quite untenable to me. There was nothing wrong in wanting to seek an extension of this agreement. Besides, what was set out in Timor's email of 11 October 2015 indicated that the suggestion of an extension was in fact not immediately dismissed by Suresh.

[183] As for ASM's refusal to pay the daily fee which appears to be pleaded as part of the catalyst for the conspiracy, they were payments due for the months of May to October in 2016 which resulted in the filing of the Sessions Court action by NSSB against ASM. However, Timor's queries about NTT's financial data, which is part of the overt acts of the alleged conspiracy, had already begun in 2015. Needless to say, ASM's counterclaim for a declaration to avoid the Daily Fee Agreement, which was dismissed, would certainly have aggravated and exacerbated the distrust that had already existed.

[184] That the conspiracy arose out of dissatisfaction in the non-execution of a fresh agreement for advisory services and/or ASM's failure to pay the daily fee under the daily fee agreement do not seem to me to be either likely or probable in the circumstances.

[185] Conspiring to injure NTT with a view to displacing and excluding Azimuth and ASM from the project with Vale and to 'hijack' the project without having to pay the full value for Azimuth's 80% share in NTT also seems improbable. NSSB never had the expertise to provide the services that ASM was providing. Therefore, displacing ASM would not seem to be a tenable proposition. It was NSSB's own decision to reduce its shareholding in the joint venture because it did not want the financial exposure involved

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A in having to purchase the seven tugboats. To now suggest that NSSB wants to take over NTT and somehow provide the services that ASM was providing, which were services that NSSB did not have the expertise to provide, also seems improbable. It also seems very improbable that NSSB would incur the enormous legal expense it had in respect of the various legal proceedings to, at the same time, run the risk of jeopardising NTT's contract with Vale, to the detriment of its own interest as a shareholder in NTT.

B [186] The alleged alternative aim of forcing AMSB to buy over NSSB's 20% stake in NTT also seems to be quite improbable to me. Having 80% in NTT, and thus control as a substantial majority shareholder, there was no obvious reason why AMSB would or could be forced into buying out NSSB's 20% at an extortionate price. While it could be argued that NSSB had intended, as a minority, to be disruptive so that it would appeal to NTT to 'buy off' NSSB's 20%, this would be to ignore the concerns that existed about NTT's financial affairs under Suresh.

C [187] It could be contended that having only 20% of the equity in NTT, NSSB could have calculated the chances of securing a sale of its 20% stake in NTT to AMSB at an extortionate price versus the risk of the loss of value in NTT's shares altogether should Vale somehow succeed in terminating the Harbour Tugs services agreement, the only major contract of NTT.

D [188] Herein lies the danger and risks involved in drawing inferences from acts or omissions as being in pursuance of an alleged conspiracy. It is often relatively simple to attribute motive or purpose to *ex facie* innocuous acts or omissions by the employment of a theory or sequence of arguments which may appear plausible. By such an approach, the most innocent of actions may quite easily *ex hypothesi* be the subject of accusations of iniquitous intent. Faced with this, I think it is axiomatic that the court must be careful to determine if, after considering the entire circumstances and the material facts pertinent to the case, the contentions made meet the required standard of proof. Mere possibilities are legion and as legion as the human mind may imagine. But possibilities are not sufficient for a court of law to impose liability. As Loreburn LC observed in *Sweeney v. Coote* [1907] UKHL 1004 at pp. 1004 to 1005:

H It is an action for conspiracy, and no other ground of action is relied upon. In such a proceeding it is necessary for the plaintiff to prove a design common to the defendant and to others to damage the plaintiff without any just cause or excuse. That, at all events, it is necessary to prove. *Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them.*

I (emphasis added)

[189] It was contended by NTT, relying on a passage in the *OBG* case (*supra*), at p. 593, by Lord Nicholls that: A

A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as a means whereby to protect or promote his own economic interests. B

[190] But while this may be true, it nevertheless is the case that whether as an end in itself or as a means to an end, it must be established that there was an intention to injure NTT. Again, as Arden LJ pointed out in *Meretz Investments*, '... it is not enough that there is an intention to do an act which in fact causes loss. That act must be done with the intention that it will cause loss.' C

[191] Insofar as this case is concerned, I do not think the alleged conspiracy to injure NTT, whether by lawful or unlawful means was made out. Whether taken as a whole or even in isolation, the overt acts including the hosts of associated acts and some omissions relied upon by NTT in advancing its case, when set against the prevailing circumstances at the relevant times, do not in my view establish on a balance of probabilities that there existed the conspiracy alleged of NSSB, Timor and/or Wan of intending to injure NTT, whether such was a predominant intention or otherwise. Such a conclusion cannot fairly and justly be inferred from the overt acts relied upon by NTT when the case is viewed and examined in its entirety, having regard to the proven facts, the context and prevailing circumstances that existed at the time of the overt acts. In my view, NTT failed in proving that there was any intention to injure NTT, whether by means lawful or unlawful. As such, an important ingredient of the tort of conspiracy was not established. The claim in conspiracy must therefore fail. D E F

[192] I also view, with great dubiety, whether there was any actual damage caused to NTT by the alleged conspiracy. Among the damage allegedly caused to NTT was Timor placing NTT's relationship with Vale and EXIM in jeopardy. Even if it was so, placing a relationship in jeopardy is not the same as actual severance of that relationship or the jeopardy progressing to actual damage being caused. NTT's harbour tugs services agreement remains intact and, so too, its financial relationship with EXIM Bank. G H

[193] It was also maintained that NTT's administrative, management and operations suffered by reason of Timor's alleged systematic attacks. Under this rubric, learned counsel asserted that: I

- A (i) Timor's action that was aimed at alienating Suresh and ASM;
(ii) directors' loss of confidence and trust with Suresh and his management;
(iii) directors were subjected to committal proceedings and the need for NTT to indemnify them for their legal expenses;
- B (iv) exposing NTT to penalties by SSM;
(v) directors having to divert unnecessary resources and time to deal with Timor and his allegations;
(vi) NTT having to engage and deal with lawyers;
- C (vii) preventing the board from disposing NTT Lumut as scrap at an earlier opportunity and incurring storage charges;
(viii) NTT having to incur expenses to attend to various accounting and legal matters as a result of Timor's request for documents; and
- D (ix) enforcement of the order for inspection of accounting and financial documents which caused disruption to NTT's office and loss of staff morale.

'Injury' suffered by the directors or a risk of injury to NTT to my mind are not sufficient. They are not tantamount to damage suffered by NTT and damage is an essential ingredient. As Lord Diplock stated in *Lonrho Ltd and Another v. Shell Petroleum Co Ltd and Another (No. 2)* [1982] AC 173 at p. 188:

Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff.

- F [194] The damages that were put forth, if they were to be regarded as damage caused to NTT, were in my view, not caused by any of the defendants or by any conspiracy. The payment of indemnity by NTT to their directors for their legal expense, the storing of NTT Lumut and not selling it earlier as scrap could not have occurred without the intervening act and decision of the Board of NTT. Nothing was done by the defendants that actually prevented
- G NTT from selling the NTT Lumut as scrap. That they chose not to do so in light of the litigation was a decision no doubt made by the Board of NTT and which board, it must be said, is controlled by Suresh together with the directors installed by AMSB.

- H [195] There is an authority that damage constituted by the expense incurred by a plaintiff in unravelling and detecting the wrongful activities of a defendant can be awarded as damages directly caused by the conspiracy. In *British Motor Trade Association v. Salvadori* [1949] Ch 556 at p. 214, Roxburg J stated as follows:

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I am prepared to infer that the membership (of the claimant) would decline almost, if not quite, to the point of extinction. To resist such a counter attack, and also counter attacks from various other directions, the plaintiffs maintain a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. *I can see no reason for not treating the expenses so incurred which could not be recovered as part of the costs of the action as directly attributable to their tort or torts.* That these expenses cannot be precisely quantified is true, but it is also immaterial. The plaintiffs have proved the damage which is essential to the tort of conspiracy, and they are entitled to an inquiry. (emphasis added)

[196] Such, however, is not quite the case at hand. In addition, the alleged damages suffered were either the direct consequence of legal proceedings brought in court or the consequence of decisions made by the board. The expenses incurred and the administrative disruption that probably flowed from the enforcement of the order of court obtained by Timor in OS 179 cannot properly be regarded as damage or injury caused to NTT. Had the documents that Timor was entitled to been provided without the need for legal action, all could have been avoided. The expenses and administrative disruption that were consequent upon legitimate legal proceedings cannot, in my view, be regarded as damage caused to NTT. There may have been expenses incurred and management time wasted but it is really a case of *damnum sine injuria*.

[197] I have expressed that this was in essence a shareholders' dispute. This action brought in the name of NTT could only have been brought with the authority of the shareholder and directors in control, and that is AMSB. On record at least, the main shareholder in AMSB leads back to Suresh. The extent of Sudhir's beneficial interest in AMSB, if any, is unclear. The defendants in this action are the other shareholder (other than Sudhir) in the joint venture and its representatives on the Board of NTT.

[198] However, from the evidence relied upon, the main protagonists are Suresh and Timor. Having heard and seen them testify, I cannot help but conclude that part of the attrition and controversy that exists between the two is attributable to their individual personalities, each being strong-willed and tenacious. In hindsight, one might opine that these qualities do not lend to a successful joint venture unless the two individuals are completely *ad idem* on every issue. In my view, in this case, the conflict and disputes between them were ignited by an obvious lack of trust coupled with conduct that did not engender it.

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A The Alleged Breaches Of Directors' Duties

[199] Apart from its allegation of breaches of director's duties that were also part of and relied upon in respect of the alleged conspiracy to injure, there were also other alleged breaches relied upon by NTT. The breaches of duty were cast both as breaches of statutory duties imposed under CA 2016 as well as breaches of fiduciary duties.

[200] It should not be overlooked that CA 2016 only came into force on 31 January 2017 and would only capture allegations against the defendants thereafter. However, it has also to be pointed out that many of these statutory provisions relied upon have their roots in the common law. Therefore, even if specific statutory provisions relied upon were not in force at the time of any impugned conduct, the common law principles, including equivalent provisions incorporated in the Companies Act 1965, would still have been available to NTT.

[201] It was alleged that both Timor and Wan were acting in concert. Clearly, both, Timor and Wan, were not acting at variance with one another in as much as it could be said that the directors installed on the Board of NTT by AMSB had not acted at variance among themselves. That in itself is not necessarily a breach of any director's duty owed to a company, even though these directors were separately appointed as directors of NTT to also represent the interests of AMSB and NSSB, save perhaps for Sudhir.

[202] Among the director's duties relied upon by NTT was the duty to exercise powers for a proper purpose and in good faith, in the best interest of NTT as provided in s. 213(1) of the CA 2016. Section 213(1) provides as follows:

213. Duties and responsibilities of directors

- (1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.

[203] Insofar, as Wan and Timor were concerned, as nominee directors, it cannot be said that they had exercised any powers *qua* individual nominee directors of NTT. Unless specifically authorised to do so, directors on their own have no power to bind the company. Directors operate as a body and decisions are made by that body, the Board of Directors. The alleged breach of s. 213(1) of the CA 2016 in essence relates to the motive and purpose ascribed to NSSB and Timor for the overt acts and also to Wan for supporting it. Learned counsel for NTT contended in his written submissions that, 'Even if there were mixed motives, we respectfully submit that the true or dominant purpose of Timor and Wan's actions was improper – it was to advance their self-interest and the interest of NSSB.'

[204] This contention must fail in light of my finding that it was not proven that there was any intention to injure NTT and the inferences sought of the overt acts were not warranted and not made out. To my mind, the concern throughout was, among other things and, put candidly, with possible financial impropriety on the part of Suresh in his management of NTT. This, in so far as Timor was concerned, and Wan included, was in the interest of both NSSB as a shareholder of NTT and NTT itself. There was no conflict to my mind. After all, it was the possibility of NTT being sued by Shin Yang Shipyard Sdn Bhd that Timor was concerned with and subsequently, NTT's financial position and whether and how Shin Yang Shipyard Sdn Bhd was actually paid. The surrounding circumstances and the fact that there was no evidence that either Timor or Wan had any personal interest in NSSB (and clearly not in NTT) also do not lend support to the contention that they had acted to advance their self-interest as alleged (see for example the issue of self-interest in *Howard Smith Ltd v. Ampol Petroleum Ltd & Ors* [1974] AC 821 at 834G-835B).

[205] Sections 213(2) and 214(1) of CA 2016 were also invoked by NTT.

Section 213(2) provides as follows:

(2) A director of a company shall exercise reasonable care, skill and diligence with:

- (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
- (b) any additional knowledge, skill and experience which the director in fact has.

Section 214(1) provides as follows:

214. Business judgment rule.

(1) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection 213(2) and the equivalent duties under the common law and in equity if the director:

- (a) makes the business judgment for a proper purpose and in good faith;
- (b) does not have a material personal interest in the subject matter of the business judgment;
- (c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
- (d) reasonably believes that the business judgment is in the best interest of the company.

A [206] In respect of these provisions were included Wan's refusal to sign
cheques for NTT's operating expenses, Wan's refusal to attend an urgent
meeting with Vale, Timor and Wan's repeated calls for an investigation into
the sinking of NTT Lumut, Timor allegedly interfering with negotiations
with Vale and Timor filing the two applications seeking leave to commence
B derivative actions. These acts, it was contended, cannot be said to be *bona*
fide acts of Timor and Wan who, as directors, were expected to use
knowledge, skill and experience reasonably expected of them.

C [207] Again, the viability of the contention is interwoven with the alleged
motives to be inferred from the actions of Timor and Wan. Based on my
finding that the alleged motives could not fairly be inferred from the actions
of Timor and Wan, these allegations were untenable. In addition, in my view
and in relation to the signing of cheques, there were legitimate bases for
Wan's concerns as to the propriety of certain issues pertaining to NTT's
D financial commitment and affairs. These were all related to the overarching
concern with the financial management of NTT. Wan's concern may largely
have been derived from Timor's actions, but it was not as if Wan was
completely divorced from the issues in dispute. He did participate in the
attempts to secure the accounting and financial records of NTT and was
clearly aware of the concerns, *albeit* not with the degree of specificity as
E Timor.

F [208] In addition, it was not a case of either Wan or Timor having made any
business judgment on behalf of NTT, or indeed, was even in any position to
make any business judgment or decision on behalf of NTT as directors of
NTT. As nominee directors of NTT, they held no executive position. On the
Board of NTT, given that they were in the minority, they were in no position
to make any decision, *qua* directors, on behalf of NTT without the agreement
of Suresh and AMSB's nominee directors.

[209] Section 217(1) of the CA 2016 was also invoked by NTT. Section
217(1) states as follows:

G (1) A director who was appointed by virtue of his position as an employee
of a company, or who was appointed by or as a representative of a
member, employer or debenture holder, shall act in the best interest of the
company and in the event of any conflict between his duty to act in the
best interest of the company and his duty to his nominator, he shall not
H subordinate his duty to act in the best interest of the company to his
nominator.

I [210] It is clear that even as NSSB's nominee directors on NTT's Board,
both Timor and Wan may not subordinate the interest of NTT to that of
NSSB. That too is the position under the common law. As was stated by
Lord Denning in *Scottish Co-Operative Ltd Wholesale Society v. Meyer and*
another [1958] 3 All ER 66 at p. 87:

What, then, is the position of the nominee directors here? Under the articles of association of the company, the society was entitled to nominate three out of the five directors, and it did so. ... These three were, therefore, at one and the same time directors of the society – being three out of twelve of that company – and also directors of the company – three out of five there. *So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment.* But, so soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. ... It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies, and they did not do so. They put their duty to the society above their duty to the company in the sense, at least, that they did nothing to defend the interests of the company against the conduct of the society. They probably thought that, “as nominees” of the society, their first duty was to the society. In this they were wrong. *By subordinating the interests of the company to those of the society, they conducted the affairs of the company in a manner oppressive to the other shareholders.* (emphasis added)

[211] Similarly, Street J observed in *Bennetts v. Board Of Fire Commissioners Of New South Wales & Others* (1967) 87 WN (Pt 1) (NSW) 307 at pp. 282-283:

But the predominating element which each individual must constantly bear in mind is the promotion of the interests of the board itself. *In particular, a board member must not allow himself to be compromised by looking to the interests of the group which appointed him rather than to the interest for which the board exists.* ... Once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serve the interest of the group which appointed him. (emphasis added)

[212] I do not doubt that the duty referred to by Lord Denning in the United Kingdom and by Street J in Australia, applies equally in our law even if s. 217(1) of the CA 2016 had not come into force. But in the circumstances of the case at hand, was there any conflict such that either Timor or Wan or both, subordinated the interest of NTT to that of NSSB or anyone else as alleged by NTT? I do not find that there was.

[213] In the circumstances of this case, there was no inconsistency or incompatibility between the interest of NTT and NSSB as a shareholder. The issues involved were in both their interests. In my view, it is obvious that there can be no conflict of interest if both the interest of NTT and NSSB are congruent and not at variance. In *Kumagai Gumi Co Ltd v. Zenecon Pte Ltd* [1995] 2 SLR(R) 304 at p. 323, L P Thean JA, delivering the judgment of the Singapore Court of Appeal stated:

A 58 While it is uncontroversial that a nominee director may not prefer the
interests of his principal over his duties to the company, *nevertheless, when*
B *there is no conflict of such interests with his duty, he may take into account the*
interests of his principal. The principal clearly had an interest in how he
carries out his duties as a director of the subsidiary, as well as how he
serves the interests of the principal. It does not follow that when a
nominee is acting as a director of the company, he is only acting as a
director of that company and not also as nominee of his principal.
(emphasis added)

[214] It bears emphasising that the theme that underlies the actions of Timor
and Wan was, in my view, induced by the manner of Suresh's management
C of NTT and in particular, the lack of transparency in respect to NTT's
financial data. Indeed, there was also a financial dimension involved in the
sinking of NTT Lumut as it was one of NTT's assets with a substantial
intrinsic value and source of income. Ultimately, however, it was held by
D the court *inter alia* that there was no evidence to support Timor's allegations
and his attempt to seek leave for a derivative action was dismissed. At the
same time, from this fact, even in the light of the other allegations made by
NTT, it cannot be inferred or concluded that Timor's underlying intention,
E or indeed that of any of the defendants', was to injure NTT. Indeed, it is the
very nature of derivative actions that they are brought in the interest of, and
for, the company. Timor's concern and actions may not have been purely
altruistic but that is not the same as having an intention to injure NTT. The
only probable reason for his concern and actions would have been a concern
for the interests of both NSSB and NTT as the joint venture vehicle, but for
whose interests Timor would not have had any role in NTT.

F [215] While Timor's concerns were probably associated with the interest of
NSSB, it does not follow that this was necessarily in conflict with NTT's
interest. NSSB's interest was, in the circumstances of this case and as pointed
out, synonymous with NTT's interest. The factual scenario was such that
G NSSB's interest, as a shareholder in NTT, would be served by ensuring that
NTT, as the joint venture vehicle, was managed properly and its finances and
assets were not compromised in any way. Concomitantly, this too was
necessarily in the interest of NTT. Thus, in my view, upon the facts and
circumstances of this case, there was no subordination or compromising of
H NTT's interest in favour of NSSB by Timor or Wan in their role as directors
of NTT. I can see no breach of duty on the part of either Timor or Wan or
how, having regard to the circumstances of this case, concern for NTT's
finances, assets and management can be contrary or injurious to its interest.

I [216] In this regard, *mutatis mutandis*, the observation of the *Earl of Selborne*
in the Privy Council in Hirsche and others v. Sims and another [1894] AC 654
at pp. 660-661, is to similar effect:

If the true effect of the whole evidence is, that the defendants truly and reasonably believe at the time that what they did was for the interest of the company, *they are not chargeable with dolus malus or breach of trust merely because in promoting the interest of the company they were also promoting their own* ...
(emphasis added)

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[217] Other director's duties were also relied upon by NTT. They included the duty not to use property or information for personal benefit, duty to uphold and abide by the decision of the board, not to promote disaffection and strife, to make timely disclosure, not to conceal material and relevant information and not to cause harm and injury. All these were contentions of NTT that were, however, premised on the alleged conspiratorial motives of NSSB, Timor and Wan. Again, as I have found that the inferences and alleged motives sought to be attributed to the overt acts were not made out, neither can those overt and associated acts be said to be in pursuance of wrongs in breach of director's duties by reason of the alleged motives.

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[218] In my view, Timor's concerns about corporate governance and in particular his queries regarding the payment to Shin Yang Shipyard Sdn Bhd, were consistent with the interest of NTT while at the same time indirectly protective of NSSB's interest in NTT as well. Set against an objective yardstick, these concerns were warranted and at any rate sufficient for the Court of Appeal in OS 392 to grant leave for a derivative action to be brought. While I would reiterate that the decision of the Court of Appeal in granting leave is not conclusive as to Timor's allegations, it may be concluded that Timor's allegations in OS 392 were at the very least not frivolous, obviously unsustainable or not *bona fide*.

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[219] It should be borne in mind that under s. 348 of the CA 2016, the court has to be satisfied that the applicant seeking leave to bring a derivative action on behalf of a company was acting in good faith and that it appears *prima facie* in the best interest of the company that leave be granted. Conversely, there was no evidence led by NTT that was sufficient to conclude on a balance of probabilities that Timor, including Wan, had acted with ulterior motives to harm or to act to the detriment of NTT, or for the benefit of NSSB at the expense or detriment of NTT. What was presented to the court were inferences that the court should draw from the overt acts, of a conspiracy to injure NTT and motives and purposes that were at variance with the interests of NTT or not to its best interests. For the reasons already given, the inferences sought were, in my view, not made out or warranted.

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[220] As regards the allegation that Wan and/or Timor had breached their fiduciary duties owed to NTT, I too do not find that the allegation was made out. It must be borne in mind that the nature of a director's fiduciary duty is relatively well defined. It is not so all-encompassing as to embrace every act or omission of a director that may be said to be undesirable or

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A unjustifiable. It is well established that trustees as well as directors, owe fiduciary duties. In the case of trustees, the duty is owed to the beneficiaries of a trust. In the case of directors, the duty is owed to the company on whose board they sit. In *The Board Of Trustees Of The Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor* [2008] 3 CLJ 221; [2008] 5 MLJ 469, Zulkefli FCJ delivering the judgment to the Federal Court stated:

B [30] We would approach the issue raised in this appeal by first examining whether DSK is in a position of a fiduciary. It further follows if DSK is in the position of a fiduciary whether he had committed any breach of fiduciary duty. In law the position of the fiduciary and his obligation have been succinctly stated by Millet LJ in the English case of *Bristol and West Building Society v. Mothew* [1998] Ch 1 to be as follows:

C A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

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E The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity.

F Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

G [31] In the present case at all material times, DSK had been both the managing director and secretary in Sinsuran and Seranum, subsidiaries of SF. Under those circumstances and from the position he held in SF, Sinsuran and Seranum, we are of the view DSK must be in a position of a fiduciary. DSK was placed in a relationship of confidence and trust and he was obligated by law to be loyal to the principal.

H [221] As Millet LJ pointed out in *Bristol And West Building Society v. Mothew (t/a Stapley & Co)* [1998] Ch 1 at p. 18, the duty is in the nature of having to ‘... act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict;

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he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.' The distinguishing obligation is the obligation of single-minded loyalty and fidelity. A

[222] Similarly, in *Sinclair Investments (UK) Ltd v. Versailles Trade Finance Ltd (in admin)* [2011] 4 All ER 335, Lord Neuberger MR stated of the duties of trustees and others in fiduciary positions: B

[34] Although company directors are not strictly speaking trustees, they are in a closely analogous position because of the fiduciary duties which they owe to the company: *Bairstow v. Queens Moat Houses plc* [2001] EWCA Civ 712 at [49]-[52], [2001] 2 BCLC 531 at [49]-[52]. In particular they are treated as trustees as respects the assets of the company which come into their hands or under their control: per Nourse LJ in *Re Duckwari plc (No 2)*, *Duckwari plc v. Offerventure Ltd (No 2)* [1998] 2 BCLC 315 at 321, [1999] Ch 253 at 262. Similarly, a person entrusted with another person's money for a specific purpose has fiduciary duties to the other person in respect of the use to which those moneys are put. C

[35] *The distinguishing obligation of a fiduciary is the obligation of loyalty, which has several features: (i) a fiduciary must act in good faith; (ii) he must not make an unauthorised profit out of his trust; (iii) he must not place himself in a position where his duty and his interest may conflict; (iv) he may not act for his own benefit or the benefit of a third person without the informed consent of his principal: per Millett LJ in Bristol and West Building Society v. Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 712, [1998] Ch 1 at 18. D

[36] *In accordance with feature (i), it is a breach of fiduciary duty for directors of a company to exercise their powers of management and control otherwise than in good faith and in a way which they believe is in the best interests of the company: Item Software (UK) Ltd v. Fassihi* [2004] EWCA Civ 1244, [2004] IRLR 928, [2005] ICR 450. *In accordance with features (ii) and (iii), if a director of a company makes an unauthorised profit by the use of his position as a director, he is liable to account for that profit to the company, whether or not he acted in good faith: Regal (Hastings) Ltd v. Gulliver* [1942] 1 All ER 378 at 386, [1967] 2 AC 134n at 144. E

(emphasis added) F

[223] In *Foster Bryant Surveying Ltd v. Bryant and another* [2007] EWCA Civ 200 at Rix LJ synthesised the duty thus: G

[76] ... There is no doubt that the twin principles, that a director must act towards his company with honesty, good faith, and loyalty and must avoid any conflict of interest, are firmly in place, and are exacting requirements, exactly enforced. H

[224] The mere non-attendance at a board of directors meeting, with reason provided *albeit* doubted, such as was alleged of Wan was not, in my view, *per se*, necessarily a breach of any fiduciary duty. It would not be in the nature of a fiduciary duty contemplated by the law that is to be imposed on a I

A director. Indeed, if it were otherwise, it would be extremely onerous and impracticable for directors in this day and age. It, however, might be otherwise if a director intentionally fails to attend a board meeting intending that it would cause some damage or harm to the company; for example, if a director refuses to attend a board meeting intending that the meeting be inquorate so that accounts to be presented cannot be approved resulting in the company being penalised by the authorities with a fine. In the case of NTT, there was nothing of that nature. Besides, Suresh and AMSB's nominee directors were in control and in the majority and the board, as a board of directors, would not have been precluded from performing its duties by reason of the absence of Wan or Timor.

[225] It needs also be mentioned that NTT had contended that Timor and Wan had caused strife and disharmony to create instability. This contention was again linked to the allegations made and measures taken by Timor *ie*, the overt acts. This, it was said, was a breach of fiduciary duty as a director and the authority given for this proposition was *Super-Max Offshore Holdings v. Malhotra* [2017] EWHC 3246 (Comm), paras. [116] and [118].

[226] On the facts and having regard to all the circumstances of the case, the allegation of causing strife and disharmony to create instability, for the reasons alleged, were not established by NTT. In addition, upon careful consideration, the case of *Super-Max* does not stand for the proposition made by NTT. The central issue in *Super-Max*, as Poppelwell J stated, in para. 7 of his judgment was, '... whether Mr Malhotra's Service Contract was validly terminated'. In respect of the termination of that individual's service contract, the misconduct that was alleged of him was in undertaking a series of actions which included a campaign of abuse and intimidation, implementing a "parallel management", procuring and encouraging the Union to exclude one Mr Anindo Mukerji and senior management from the plant and offices at Thane and misleading the Advisory Board in an email. The main issue was whether Mr Malhotra was guilty of gross misconduct and whether his contract of service was validly terminated.

Conclusion

[227] It merits observing that the element of trust is no less important between joint venture partners than they are between persons in any business relationship. In fact, it can be said that the need for trust is even more crucial. There is often a need for interdependence and an expectation of candour and integrity. Indeed, there are cases that have concluded that the nature of a joint venture, depending on the facts, may be such as to even give rise to a fiduciary duty between the joint venture partners (see for example *Chirnside and Anor v. Fay* [2007] 2 LR 407 at pp. 436 to 437; *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833; [2000] 2 MLJ 353 at p. 378).

[228] In my view, based on the evidence, the circumstances presented arose initially from queries about financial propriety which then resulted in a sequence of events that ultimately brought about a breakdown of trust and the souring of relationship between the parties. It remains to be said how unfortunate it is that what appears to be a joint venture with a very viable and profitable business has been allowed to be marred by so much controversy and conflict.

[229] For the reasons given above, and in conclusion, I find that NTT's claims against the defendants, upon the causes of action pleaded, were not made out. I accordingly dismiss this action with costs.

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