# Teh Guek Ngor Engelin nee Tan and Others v Chia Ee Lin Evelyn and Another [2005] SGCA 19

**Case Number** : CA 80/2004

**Decision Date** : 06 April 2005

**Tribunal/Court** : Court of Appeal

**Coram** : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

**Counsel Name(s)** : Davinder Singh SC, Harpreet Singh Nehal and Nicolas Tang (Drew and Napier LLC) for the appellants; K Shanmugam SC, Christopher Anand Daniel and Sonita Jeyapathy (Allen and Gledhill) for the first respondent; Jimmy Yap (Jimmy Yap and Co) for the second respondent

**Parties** : Teh Guek Ngor Engelin nee Tan; Kau Yong Meng; Chen Lai Fong Tracy — Chia Ee Lin Evelyn; Koh Lee Kheng Florence

*Contract – Formation – Whether parties having intention to enter into binding oral contracts – Whether parties having intention to create compromise agreement – Whether perceptions of third party relevant in determining whether compromise agreement formed – Whether trial judge correct in finding no oral contracts or compromise agreement concluded between parties*

*Damages – Assessment – Respondent's consultancy agreement with appellant terminated without notice – Whether trial judge properly quantifying damages due to respondent – Whether benefits received by respondent independent of any act of mitigation may be considered to reduce amount of damages payable by appellant*

6 April 2005

**Choo Han Teck J (delivering the judgment of the court):**

1 The first appellant, Engelin Teh, was a partner in the law firm of M/s Colin Ng & Partners in 1994 when the first respondent, Evelyn Chia, joined the firm as a partner. The first respondent changed her position from that of a partner to that of a consultant in 1995. In September 1996, she joined Engelin Teh in a new firm, known as M/s Engelin Teh & Young, as a consultant. The terms of her consultancy were set out in a written letter dated 9 September 1996 ("the first consultancy agreement") under the letterhead of Engelin Teh & Young. Evelyn Chia's position under the first consultancy agreement made it clear that she worked on a profit-sharing basis. The profit sharing was based on the simple formula that she would be entitled to a 30% share of the bills rendered from files which concerned matters which were brought in, and dealt with, directly by her. In respect of those matters which were brought in directly by her but for which the work was done by other lawyers in the firm, her profit share would be 15% of the bills rendered for those matters. The profit shares would be calculated after deducting Evelyn Chia's "costs" to the firm. These costs were calculated at $130,000 a year, and included her annual fee of $84,000, the salary of her secretary, and an annual administrative charge of $12,000.

2 Evelyn Chia re-negotiated the terms of the first consultancy agreement with Engelin Teh in February 1998. This resulted in a fresh agreement in writing dated 25 February 1998 ("the second consultancy agreement"). The second consultancy agreement adopted all the terms of the first consultancy agreement except those specifically varied. The varied terms provided that the firm would not have a right to terminate Evelyn Chia's consultancy, a right that the firm could previously exercise after two years from 9 September 1996, by giving one month's notice. Under the second consultancy agreement, Evelyn Chia was given an option to extend her consultancy until 23 September 2000. It was also agreed that her annual costs would be set off against her billings in chronological order.

3 In mid-1999, Young Chee Foong, one of the partners in Engelin Teh & Young, left the partnership. Engelin Teh then formed a new partnership known as M/s Engelin Teh & Partners. It included the second appellant, Kau Yong Meng, the third appellant, Tracy Chen, and the second respondent, Florence Koh. These other partners were initially not involved in this action because Evelyn Chia named Engelin Teh as the sole defendant in her Writ of Summons. Engelin Teh subsequently joined her other partners as co-defendants. Florence Koh, who had given evidence at the trial, had since left the partnership, and did not appeal against the judgment below. It was only the appellants' appeal against the order of costs awarded by the trial judge against the appellants in Florence Koh's favour that maintained her continued interest in this appeal. Reverting to the new partnership, Evelyn Chia's consultancy was retained on 6 October 1999 on the same terms as the second consultancy agreement (which was a variation of the first consultancy agreement) ("the third consultancy agreement"). The third consultancy agreement was to end on 23 September 2001, after which it could be extended by mutual agreement.

4 In March or April 2000, Evelyn Chia was appointed the solicitor for a company described by the trial judge as a "subsidiary of a leading bank", and thereafter in the judgment as "the land developer". We will retain the latter description for convenience. Consequent upon her appointment, it was envisaged that she would be given the conveyancing work in respect of five major projects. It was about this time that Evelyn Chia once again re-negotiated with Engelin Teh the terms of her consultancy agreement. It is not important to dwell on the reasons why the third consultancy agreement needed to be re-negotiated, but to avoid any erroneous inferences being drawn, it would be sufficient for us to state the findings and views of the trial judge on this point. Firstly, the court below accepted that the retainer by the land developer had enhanced Evelyn Chia's position in the firm. Secondly, it also found that Evelyn Chia thought that her share of the profits under the agreement ought to be increased to 45%. Thirdly, she had contemplated leaving the firm to join M/s Rodyk & Davidson, a thought partly prompted, perhaps, by her strained working relationship with Kau Yong Meng over a client. Eventually, however, Florence Koh drafted an agreement on behalf of the partners, and the terms were agreed, after some amendments, and signed on 13 April 2000 ("the fourth consultancy agreement"). The terms of the fourth consultancy agreement were essentially the same as those of the third consultancy agreement. The main variations involved the increase of her share of profit from 30% to 45% in respect of the five anticipated projects from the land developer as well as all conveyancing files, and included the provision that, in respect of the bills between January and March 2000, she would receive a lump sum of $5,500. A sum of $20,000 would also be paid towards Evelyn Chia's membership fee in the Tower Club. This was a payment made in connection with Evelyn Chia's unhappiness with Kau Yong Meng, which in turn was connected to a condominium development in Sunset Way. Hence, in this regard, it was agreed that Evelyn Chia would repay the $20,000 to the firm if she were not retained as solicitor for the Sunset Way project. The fourth consultancy agreement also provided in cl 2 that Evelyn Chia's term of appointment "shall remain valid for as long as our duties as solicitors in the 5 Projects have not been completed", but nothing turned on this at the trial and on appeal.

5 In January 2001, the land developer merged with another company. The new management withdrew the appointment of Evelyn Chia as the solicitor for the five projects. However, as the trial judge found, Evelyn Chia was still working on a number of substantial projects in spite of the loss of the five mentioned ones. On 18 April 2001, Engelin Teh spoke to Evelyn Chia and asked if there was any possibility that she might be reappointed to the five projects. Evelyn Chia told her that that would be unlikely. The trial judge found that Engelin Teh, angered by this reply, demanded that Evelyn Chia repay the firm 15% of all the fees that she had collected under the fourth consultancy agreement. Evelyn Chia telephoned Engelin Teh the next morning to talk about this matter, but Engelin Teh was adamant that she repay the firm the money demanded, and at the same time told Evelyn Chia that the partners were terminating her consultancy with the firm immediately. On the

same day, 19 April 2001, Engelin Teh wrote a memorandum to Evelyn Chia ("the 19 April memorandum"). It is an important document and we set it out in full as follows:

> Dear Evelyn
>
> As you know, the agreement to pay you 45% of all invoices billed and collected by you and the $20,000 for the Tower Club membership was premised on your procuring the 5 projects. These projects have been withdrawn by [the land developer]. As the basis for such payment no longer exists, and you have indicated that you are not prepared to compromise the outstanding issues by giving the firm a refund of 15% of the 45% payments which have already been paid to you, you leave us with no choice but to take the necessary action against you to recover such sums and the $20,000. This is without prejudice to our rights to claim any sum greater than the aforesaid should we be found entitled thereto.
>
> As agreed in our telephone conversation this morning, your position as consultant with the firm is terminated by mutual consent with immediate effect.
>
> As spoken, you should not come into the office (save to collect your personal belongings) or communicate in any way with the clients of the firm including those files under your charge. With immediate effect, these files will be put under the charge of KYM.
>
> As Florence is an employee of the firm, no instruction to the contrary should be given to her and should she act against the instructions of the partners, the firm will have no choice but to terminate her services.
>
> Please note that all communications between yourself and the firm should be directed to myself or KYM.
>
> Please note that the matter herein is without prejudice to the firm's rights to claim against you in respect of the loss of the 5 projects.
>
> ET

6 Evelyn Chia replied by a letter dated 23 April 2001, in which she began by describing the impact that the 19 April memorandum had had on her. She stated:

> I have always had respect for you as a Senior member of the Bar and fond regard for you, but your memo and events of 19 April 2001 have left me so shocked and saddened that it has taken me a few days to regain my composure and clarity of mind to seek necessary help and advice.

Evelyn Chia then proceeded to refute the factual content of the 19 April memorandum, signing off by leaving the door open for a possible resolution of the quarrel on amicable terms, stating:

> It is not my intention to take this matter further than is necessary. But even if my efforts for the firm are not acknowledged, my contractual rights to payment must be observed.

7 On 11 October 2002, Evelyn Chia filed her claim against Engelin Teh as the sole defendant in the action below in the High Court, claiming damages for wrongful termination of the fourth consultancy agreement (see [2004] SGHC 193) . Engelin Teh subsequently joined Kau Yong Meng, Tracy Chen, and Florence Koh as the second, third, and fourth defendants. The foremost defence of the defendants (Florence Koh did not appeal and was named as the second respondent in the appeal

before us) was that of accord and satisfaction, or what the appellants called "a contract of compromise". This contract of compromise was said to have been "reached between [Engelin Teh & Partners] and [Evelyn Chia] on or about 23 April 2001 through the mediating efforts of Dorothy Chia pursuant to which each party agreed to waive any and all claims which it had or may have against the other".[1]

8 Dorothy Chia is the cousin of Evelyn Chia. She is also a friend of Engelin Teh from their days together in primary school. She was summoned to testify on behalf of the defendants by subpoena. Her evidence was, therefore, given entirely *viva voce*. Given the relationship that Dorothy Chia has with Evelyn Chia and Engelin Teh, it can reasonably be inferred that she had to be compelled to testify because she was unwilling to do so voluntarily for fear of jeopardising one or both of her relationships with the two main litigants. It was, however, because of her closeness to both Evelyn Chia and Engelin Teh that they consulted her, and that an attempt at mediating a settlement of the dispute through her was made. The issue before the trial judge was whether that attempt resulted in an accord and satisfaction. If it did, then the claims based on the wrongful termination of the fourth consultancy agreement must fail.

9 The trial judge seemed to have accepted the defendants' case that Engelin Teh initiated telephone conversations with Dorothy Chia, who later spoke to Evelyn Chia over the telephone. All these conversations took place on the same day, 23 April 2001. The peculiar nature of the compromise agreement in this case was that it was purportedly concluded through Dorothy Chia. It was not pleaded, or known, what Dorothy Chia's status and function in this compromise agreement was. Was she an agent of Evelyn Chia, or Engelin Teh, or both, or neither? How were the terms of the compromise communicated between the offeror and the offeree, assuming that they had been identified? In this case, it was not clear who was the offeror and who the offeree. There was no evidence that Engelin Teh had requested Dorothy Chia to convey to Evelyn Chia any specific terms of what Engelin Teh had said was a "drop hands" settlement. Under cross-examination from counsel, who asked if she had suggested that both sides should drop their claims against each other, Dorothy Chia said:

> No, I did not suggest that they drop their claims, I suggested that they should resolve the matters … because A had a claim against B and B had a claim against A, one of … the logical [things] to do … would be not to pursue [the] claim[s] against each other.

When asked whose proposal that was, Dorothy Chia said that she could not recall, but it could be Engelin Teh's. At another point during the cross-examination, Dorothy Chia testified that the telephone conversation, presumably with Engelin Teh (the witness did not make clear who it was), was a "social call". She said that she (Dorothy Chia) "was just trying to mediate, trying to resolve". Pressed by counsel, Dorothy Chia said that at the time it did not cross her mind whether the parties had agreed not to sue each other. It would not be necessary for us to analyse the evidence of these three key witnesses further, save to say that nothing more substantial could be elucidated from the evidence.

10 Mr Davinder Singh SC submitted on behalf of the appellants before us that a compromise agreement must have been reached because for 18 months after 23 April 2001, no action was taken by either party to pursue her claim against the other. That was a plausible inference. However, it was equally plausible that, had there been an agreement, the parties, who were experienced lawyers, would have confirmed it in writing, and therefore it could be inferred from the absence of a written confirmation that there was no agreement. It would be the duty of the trial judge to consider the two plausible inferences, and determine which was the more probable. The appellants contended that the trial judge's finding at [53] that the inaction over 18 months "was due to [Evelyn Chia] picking up the

pieces of her life and devoting herself to her work in another law firm", "was lifted directly from one sentence in [Evelyn Chia's Affidavit of Evidence-in-Chief]". It was submitted on Engelin Teh's behalf that there was no evidence to support that particular statement of the trial judge. We find no reason to disturb the trial judge's finding on this point as it was purely a finding of fact that depended not only on the affidavits of evidence-in-chief, but also the oral testimonies of the witnesses under cross-examination.

11 Mr Davinder Singh's main argument was that the trial judge was wrong to have paid too much regard to the subjective opinion of Dorothy Chia when he concluded that there was no contract of compromise. Counsel argued that the proper way was to ascertain whether the contract existed independently and objectively. That would be right as a general rule, but in this case Dorothy Chia was the conduit between the contracting parties. They could have written to each other, or telephoned each other, but they spoke to Dorothy Chia instead. Unlike paper, or the telephone set, Dorothy Chia was capable of giving an account of how, and why, she was used as the intermediary. She was capable of giving a clear account of the transaction. That account could also have included her personal impression. It was for this reason that Engelin Teh issued a subpoena for her to testify. That the trial judge's consideration of Dorothy Chia's personal impressions stood out for comment belies the fact that he could find nothing more substantial, or independent, to help him determine whether a compromise agreement had been reached. Dorothy Chia's evidence could have been useful to the plaintiff in this case, and to that extent, the court was entitled to consider her evidence as fully as possible, including the witness's own perception of what had taken place at the material times. In the end, it was not just this aspect of the evidence (*ie*, Dorothy Chia's subjective understanding) that determined the issue. The trial judge considered her evidence fully, including the substantive evidence as to whether the words and circumstances led to a concluded contract. The fact that had to be proved, in the circumstances, required more than whether the colloquial phrases in question, such as "yah lor, okay lor, drop hands, drop hands, lor" had been used. In this case, it was imperative that for the first defendant, Engelin Teh, to succeed, she had to persuade the trial judge that Dorothy Chia was engaged as an agent in the negotiation of a settlement agreement with the intention that the negotiation would lead to a binding contract. This intention and the proper role that Dorothy Chia played had not been clearly established. The evidence suggested that Dorothy Chia was not required to initiate and conduct a negotiation with a legally-binding contract as its object. Dorothy Chia had testified that the telephone call she had with Evelyn Chia was "a social call", and that she (Dorothy Chia) was "just trying to mediate". She further testified that it did not cross her mind whether the parties "were bound" by the telephone conversations she had with them.

12 In the contract of compromise that had been alleged in this case, not only was there insufficient evidence that the terms had been fully negotiated and properly communicated between, and to, the parties, the communication through Dorothy Chia also did not appear to have been made with the intention to create a binding contract, as Dorothy Chia herself regarded her conversation with Evelyn Chia as "a social call". Where three experienced lawyers, including a Senior Counsel, were unable to adduce clear evidence of a simple "drop hands" agreement, the trial judge would be entitled to dismiss the allegation of such a contract on the basis that the party relying on it had not discharged the burden of proof on a balance of probabilities. That appeared to be the case here. The trial judge could only go so far as to find at [48] that Dorothy Chia "was advising both parties not to pursue their claims against the other in court". This fits the evidence that the role played by Dorothy Chia was closer to that of an agony aunt than a contract agent. The appellants also contended that the trial judge failed to give sufficient weight to the testimonies of Kau Yong Meng and Tracy Chen, as well as that of another partner, Harish Kumar, all of whose evidence indicated that Evelyn Chia and Engelin Teh had reached a "drop hands" settlement. However, there were no direct communications on this point between Evelyn Chia and the three witnesses named. The strength of their testimonies depended on the strength of Engelin Teh's evidence. The trial judge was clear in his judgment whose

evidence he preferred to accept. In the circumstances, this court will not interfere with the trial judge's finding that there was no compromise agreement.

13 We now turn to the submission that the trial judge was wrong in finding that Evelyn Chia's consultancy was not terminated by mutual consent. This was strictly a finding of fact which depended on the judge's assessment of the evidence of Engelin Teh and Evelyn Chia, who were the only material witnesses on this issue. There was one piece of evidence that lent itself to an objective assessment, and that was the 19 April memorandum itself. Apart from the words "by mutual consent", the terminology of the rest of the memorandum was very much the terminology of the sacking of an employee.

14 The appellants also appealed against the trial judge's dismissal of their counterclaim on the basis that there were no oral agreements in respect of, first, a refund of 15% of the profits to the firm should the five projects be withdrawn, and, second, Evelyn Chia's entitlement to a 20% share of the profits in relation to conveyancing work for the Marco Polo Group, but not to non-conveyancing work. In respect of the first oral contract, the appellants contended that the trial judge was wrong to have ignored the note that Engelin Teh made after her meeting with the partners, and also the evidence of Kau Yong Meng, who testified that they had both discussed the matter with Evelyn Chia. There were other considerations that the trial judge appeared to have taken into account. These included the fact that firstly, it was out of character for experienced lawyers, such as the appellants, who had hitherto reduced all their contracts into writing, to omit the two oral agreements in question. Secondly, in respect of the second oral contract, Engelin Teh, in referring to the 19 April memorandum in support of the alleged agreement to refund 15% of the 45% payments made to Evelyn Chia, did not appear to appreciate that it was silent as to the second oral agreement, which related to the alleged agreement that Evelyn would not be entitled to the non-conveyancing fees from the Marco Polo Group. The factual evidence was therefore not sufficiently clear for inferences to be made objectively by a court that had not heard the oral testimonies of the principal parties. The veracity or reliability of a witness on issues of fact is not determined by the reputation of the witness, but by the careful appraisal of her testimony in court, for even the most reputable person might be wrong or unreliable with regards to specific matters. Whether that was so or not in any given situation is strictly a matter for the finder of fact – the trial judge. For the further reasons that this court had given, in respect of appeals on facts, in *MK (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1995] 1 SLR 36, and *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 3 SLR 1, we would not disturb the findings of fact of the trial judge.

15 We next turn to the appeal on the question of damages. In respect of this ground, the appellants contended, firstly, that the trial judge erred in not determining the period of reasonable notice for the purpose of quantifying the loss and damage in a wrongful termination case; secondly, it was contended that the court below had to determine the value of the damages, by determining the number of months of salary to be paid; and thirdly, it was further contended that there should have been a deduction of damages to take into account the amount that the first respondent would have earned, in the course of mitigating her loss. Mr K Shanmugam SC, in reply, submitted that the contention that the trial judge ought to have fixed a determinate period, of perhaps three or six months, as the reasonable period of notice was misconceived, because Evelyn Chia was not an employee but a consultant with a special contract. Counsel submitted that Evelyn Chia was not entitled to take away the files that she worked on with her in the event of termination. Furthermore, it was by special agreement that she was given a percentage of the billings on those files. Thus, he argued that the order of the trial judge at [63] in determining a period "sufficient to allow [Evelyn Chia] to complete … [her] files" was reasonable and correct.

16 In respect of the period for the quantification of damages, the trial judge held at [63] that

"reasonable notice [to terminate the consultancy agreement] ought to have been given" so that there would be sufficient time for Evelyn Chia "to complete and bill all the files on which she would be entitled to a profit share". The appellants contended that this assessment of the period of notice was wrong and a period of three months was the correct period for such a case. They further contended that the court below did not apply the correct principles of awarding damages, and failed to make the appropriate deductions of Evelyn Chia's earnings from her subsequent employment at Rodyk & Davidson, because that constituted her income from the mitigation of damage that she was obliged at law to make.

17 It was clear from Evelyn Chia's Re-re-amended Statement of Claim that her claim was based on the appellants' repudiation and/or breach of the fourth consultancy agreement and that the claim was for damages. In the alternative, she also sought an order for an account of all sums due from the appellants, as well as the second respondent, to her. This prayer, in our view, was in effect an application for an order for the equitable remedy of an account of profits. Generally, however, in cases of wrongful termination, the remedy has to be damages and not an account of profits. The more usual situations which might justify an order for accounts of profits are those where there has been a breach of trust or some fiduciary duty. In the context of a breach of contract, the basic common law rule is that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position as though the contract had been performed": *Robinson v Harman* (1848) 1 Exch 850 at 855; 154 ER 363 at 365. However, in the relatively recent decision of *Attorney General v Blake* [2001] 1 AC 268, the House of Lords held that there was no reason for the courts to rule out the remedy of an account of profits as a remedy for breach of contract (*per* Lord Nicholls of Birkenhead), although the law lord also issued a reminder at 285–286 that that remedy should not be too readily invoked:

> The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, *in practice*, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. ***An account of profits will be appropriate only in exceptional circumstances***. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. ***No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit*.**
>
> It would be difficult, and unwise, to attempt to be more specific. In the Court of Appeal [1998] Ch 439 Lord Woolf MR suggested there are at least two situations in which justice requires the award of restitutionary damages where compensatory damages would be inadequate: see p 458. Lord Woolf MR was not there addressing the question of when an account of profits, in the conventional sense, should be available. But I should add that, so far as an account of profits is concerned, the suggested categorisation would not assist. The first suggested category was the case of "skimped" performance, where the defendant fails to provide the full extent of services he has contracted to provide. He should be liable to pay back the amount of expenditure he saved by the breach. This is a much discussed problem. But a part refund of the price agreed for

services would not fall within the scope of an account of profits as ordinarily understood. Nor does an account of profits seem to be needed in this context. The resolution of the problem of cases of skimped performance, where the plaintiff does not get what was agreed, may best be found elsewhere. If a shopkeeper supplied inferior and cheaper goods than those ordered and paid for, he has to refund the difference in price. That would be the outcome of a claim for damages for breach of contract. That would be so, irrespective of whether the goods in fact served the intended purpose. There must be scope for a similar approach, without any straining of principle, in cases where the defendant provided inferior and cheaper services than those contracted for.

The second suggested category was where the defendant has obtained his profit by doing the very thing he contracted not to do. This category is defined too widely to assist. The category is apt to embrace all express negative obligations. But something more is required than mere breach of such an obligation before an account of profits will be the appropriate remedy.

***Lord Woolf MR [1998] Ch 439, 457, 458, also suggested three facts which should not be a sufficient ground for departing from the normal basis on which damages are awarded: the fact that the breach was cynical and deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the defendant put it out of his power to perform his contract with the plaintiff. I agree that none of these facts would be, by itself, a good reason for ordering an account of profits.***

[emphasis added in bold italics]

18 We would prefer, therefore, not to extend the remedy of the taking of accounts into a case of wrongful termination generally. The only indication allowing an exception to be made here, was the unusual relationship between Evelyn Chia and the appellants. Although the contract was referred to as a consultancy, Evelyn Chia had other duties and was entitled to a share of the profits. But this situation could, and therefore ought to, be analysed in the context of damages for breach. Counsel had also addressed us, in their written and oral submissions, on damages for breach of contract, rather than for an account of profits.

19 We will now consider the manner in which damages accruing to Evelyn Chia ought to be quantified. The following three issues needed to be determined:

(a) whether the damages ought to be limited to a reasonable notice period;

(b) the appropriate percentages and limits that should apply in an assessment of damages; and

(c) whether deductions ought to be made for the mitigation of losses.

20 In a case of wrongful termination, "[t]he normal measure of damages is the amount the employee would have earned under the contract for the period until the employer could *lawfully have terminated it*, less the amount he could reasonably be expected to earn in other employment" [emphasis added]: *Chitty on Contracts* vol 2 (Sweet & Maxwell, 29th Ed, 2004) at para 39-193. In the present case, there was no provision for termination in the fourth consultancy agreement. The only clause which purported to regulate the duration of the consultancy agreement was cl 2, which stipulated that the "term of employment … shall remain valid for as long as [Engelin Teh & Partners'] duties as solicitors in the 5 Projects have not been completed". Although the five projects were withdrawn in January 2001, Evelyn Chia continued to work for Engelin Teh & Partners for the months

of February and March 2001 before her dismissal in April 2001.The most reasonable conclusion must be that the parties had resumed their contractual relations on the basis of a new contract; since we agreed with the trial judge that there was no oral agreement between the parties that they would revert to the agreements made prior to the fourth consultancy agreement, the terms of the new contract would thus be essentially the same as those of the fourth consultancy agreement, with the exception that there would be no further reference to terms regarding the five projects or their withdrawal ("the new consultancy agreement"). The new consultancy agreement was, therefore, of an indefinite duration, with no express termination clause. In that situation, the presumption in law is that the new consultancy agreement would be terminable by either party giving reasonable notice: *Vibert v Eastern Telegraph Co* (1883) Cab & El 17, and, more recently, *Richardson v Koefod* [1969] 1 WLR 1812.

21 Since damages will necessarily have to be calculated based on the period from the time of wrongful termination until the point the employment could have lawfully terminated, the crucial factor would therefore be what the law would regard as a reasonable period of notice. The appellants contended that a reasonable period would be three months. In *Trevor Griffiths v Oceanroutes (SEA) Pte Ltd* [1997] SGHC 206, the court found a three-month period of notice (at [27]) to be reasonable, on the basis that the claimant had worked in a managerial position and as a director of the defendant for 17 years. In *Latham v Credit Suisse First Boston* [2000] 2 SLR 693, this court held at [72] that a period of one month's notice provided for in the claimant director's contract was acceptable as being reasonable. What is relevant for the purpose of determining the reasonable length of the period of notice of termination, therefore, depends on the individual facts of the case, and the courts would generally incline towards the period agreed by the parties, or, in the absence of agreement, a reasonable but determinate period. The trial judge found that the reasonable period would have to be one which Evelyn Chia would require in order to complete and bill all the files on which she would be entitled to a share of the profits. It ought to be remembered that first, the new consultancy agreement was an entirely different contract from that of a normal contract of employment. Evelyn Chia was not merely to carry out the work assigned to her. The fact that she would be able to bring into the firm a huge amount of work and profits was indisputably a major consideration for Engelin Teh & Partners to engage her. She was described as a "rainmaker", a fashionable term normally reserved for senior or important partners of a firm. Second, a significant amount of the remuneration due to Evelyn Chia was derived from the profits that accrued from the work that she brought to the firm, rather than from a fixed salary. Third, from the manner in which she was paid (that is, receiving her share of the profits at three-month intervals), she would have had to work for extensive durations or stages before she would be able to collect her share of the profits – after the files were billed, of course. This would naturally require her to be allowed to continue working for a reasonably lengthy period of time before her profit share materialised.

22 Furthermore, the amount of profits the firm derived from the work brought in by Evelyn Chia was substantial. In addition to the $3m that were the potential fees for the five projects, the other work brought in by her constituted more than $1m worth of profits for the firm. Finally, the new consultancy agreement expressly provided that Evelyn Chia was not to take her clients with her in the event that she left the firm, as evident in cl 2 of the fourth consultancy agreement on which the new consultancy agreement was based. It seemed to us that, if the appellants were right, they would have been able to determine the new consultancy agreement by merely paying one to three months' share of profits to Evelyn Chia, and keep the rest for themselves, even though she was the one who had brought in the clients for the firm. That would not be, in our view, the kind of intention reasonable lawyers would or ought to make. For the reasons above, on the unusual facts of this case, the notice period determined by the trial judge was reasonable.

23 Counsel for the appellants urged this court to reconsider the actual percentages that should

apply in the assessment of damages representing the profit share that Evelyn Chia ought to receive for the period of notice. We accepted the trial judge's rejection of the appellants' contention that there was an oral agreement to revert to any consultancy agreement made prior to the fourth consultancy agreement after the five projects were withdrawn. Therefore, it followed that the 45% and 15% rates continued to apply from the time that the five projects were withdrawn. What remained was the question of whether those files which Evelyn Chia claimed ought to be attributed to her were hers as stipulated in the terms of the new consultancy agreement. The appellants sought leave to conduct an inspection on all the relevant files to determine this issue. The trial judge had noted that the appellants had in fact been afforded plenty of opportunities to challenge this aspect of the claim. As a result, the appellants actually proved that some of the files were not "attentioned" to Evelyn Chia and these files were subsequently omitted from reckoning. The trial judge also noted the failure on the part of the appellants to follow up on this matter at the trial, in their closing submissions and at the clarification hearings. There is thus no basis for this issue to be re-examined.

24 Finally, in respect of the mitigation of damages, we agree with Mr Shanmugam that the profits earned by Evelyn Chia in the course of her employment with Rodyk & Davidson represented profits which she could have earned independently of the profits accruing from the existing files in Engelin Teh & Partners. It is not the law that damages will be reduced where the benefit received by the claimant is independent of any act of mitigation (see *Chitty on Contract* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 26-101). Such profits cannot be taken into account in respect of mitigation when assessing the amount of damages representing the profits due to Evelyn Chia for her wrongful dismissal. Accordingly, there was no merit in this aspect of the appellants' case.

25 As to the question of costs, Mr Davinder Singh submitted that the appellants ought not to bear the costs of Florence Koh because she had been properly joined as a defendant, and that the trial judge had found that she had to pay her contribution of the fees due by the firm to Evelyn Chia. We would express our agreement with the decision of Chan Sek Keong J (as he then was) in *The Karting Club of Singapore v David Mak* [1992] 2 SLR 483 ("the *Karting Club* case") when he held, at 485, [6] that the power to award costs conferred on the High Court by s 18 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) and O 59 r 2(2) of the Rules of the Supreme Court (Cap 322, R 5, 1990 Rev Ed) is "completely unfettered". This court had also held in *Soon Peng Yam v Maimon bte Ahmad* [1996] 2 SLR 609 at 619, [32] that the appellate court would not interfere with the exercise of a court's discretion on costs except "in clear cases". This might appear to contradict the words "completely unfettered" in the *Karting Club* case. However, in substance, what the two cases mean is that the award of costs or the refusal to award costs, or the amount awarded, are matters in the court's unfettered discretion. The appellate court would interfere in the rare cases in which costs were awarded to a party who was not entitled to costs, for example, awarding costs against a legally-aided person.

26 For the reasons above, we dismissed the appeal with costs to follow the event.

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[1]Para 30(a) of Appellants' Case