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THE 12TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2017

BETWEEN

ASAMURA INTERNATIONAL DEVELOPMENT CO. LTD.

(CLAIMANT)

AND

SHWE PWINT THONE CO. LTD.

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

INDIAN CASES

MALAYSIAN CASES

UK CASES

SCHOLARLY WORK AND ARTICLES

STATEMENT OF JURISDICTION

The parties, the Asamura International Development Co., Ltd. (AID) and the Shwe Pwint Thone Company have agreed to submit the present dispute to arbitration in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules ("KLRCA i-Arbitration Rules").

QUESTIONS PRESENTED

1. Whether the termination of the Agreement by the Respondent is valid?
    a. Whether the termination of the Agreement by the Respondent was done according to the law?
    b. Whether the Claimant has breached the Partnership Agreement?
2. Whether the jade-mining machinery and equipment are partnership properties?
    a. Whether the jade-mining machinery and equipment were intended to be partnership properties?
    b. Whether the Claimant holds the jade-mining machinery and equipment as trustee?
3. Whether the Respondent owns and subsists the rights in the JADEYE Software?
    a. Whether the Claimant is the lawful owner of the JADEYE Software under the Copyright Act 1914?
    b. Whether the software are partnership property?
    c. Whether the Respondent can reverse engineer the software?

STATEMENT OF FACTS

1. The Claimant, Asamura International Development Co., Ltd. ("AID") is a private international development company, founded in Tokyo, Japan. Specializing in crisis relief and development, assisting bilateral donors and the private sector to manage projects in developing countries. Its core competencies are the design, management and implementation of projects fostering economic growth and local trade, supply chain solutions, biodiversity conservation, and environmental and natural resource management.

2. The Respondent, Shwe Pwint Thone Co., Ltd. ("SPT"), is a local company in Myanmar, SPT was established with the aim of providing secular and vocational training to students from underprivileged families. SPT runs teashops, jade carving and polishing studios, and training centres in Mandalay and Yangon.

3. On 9 September 2008, AID and SPT (each a "Party" and collectively, "the Parties") Asamura decided to enter into a partnership for the purpose of venturing into the jade mining industry in the Hpakant mines in Myanmar in one of SPT's teashops in Yangon. A Partnership Agreement ("the Agreement") was signed by the Parties after three rounds of negotiations. From the Agreement, it is agreed that AID will source for second hand jade mining machinery and equipment from Japan, purchase, and recondition them; the importation of these items were to be handled by SPT and further operated by both of the parties. SPT handled all the visa and accommodation requirements of AID's employees. SPT also obtained the necessary jade mining and

equipment permit from the government to ensure the smooth flow of works at the jade field.

4. The Agreement was entered into in the context of AID's desire to expand into the Myanmar market. On the other hand, SPT entered into the Agreement seeking to utilise AID's experience in natural resource management.

5. The Agreement did not specify any date of expiry of the partnership, Clause 8 of the Agreement merely described the partnership as a brotherhood for the long term. Furthermore, the Agreement outlines the obligations of the Parties with regard to the operation of the business, per Clause 6, the jadeite venture involves four main business activities:

    (i) Exploration and extraction;

    (ii) Breaking and cutting;

    (iii) Processing and production;

    (iv) Distribution and sales.

    For extracting and cutting AID will take charge and give the direction and instructions. For processing and selling, SPT will play the main role. For financial and money decisions, both AID and SPT will decide together.

6. On 11 April 2012, one of AID's finance executives, Joe Yamashita, informed Dr. Yugi Asamura (The director of AID) that he developed a process optimisation and operations management software known as JADEYE, following a test run which yielded positive

results, JADEYE was installed in all the computers at the Hpakant mining sites. On 4 January 2013, Joe Yamashita resigned from AID and the source code of JADEYE was handed to the Head of Finance of AID in Tokyo on his last day.

7. On 1 November 2016, AID was approached by Hashimoto Co., Ltd ("HCL") to provide assistance in sourcing for jades from Hpakant, as HCL had won a contract to produce official jadeite souvenirs and merchandise for the Tokyo Olympics in 2020, AID and HCL then entered into a USD 1.2 million contract on 1 November 2016, wherein AID will supply jades from the Hpakant mines to HCL for the next one year, following a discussion with SPT concerning the contract, the profit from the contract between AID and HCL was shared between AID and SPT.

8. On 21 November 2016, SPT was approached by Patrick Green of New Ventures Corporation, who expressed his interest in forming a new partnership with SPT in regard to the jade business. The proposed profit split by New Ventures Corporation was 85% for SPT, this is higher than the current profit split enjoyed by SPT in their partnership with AID.

9. On 10 January 2017, U Thein Khaw (Director of SPT) communicated his intention to end the partnership between AID and SPT to Dr. Yugi Asamura, this was not received well by AID, following this communication of intention to end the partnership, disputes arose concerning the validity of the termination, ownership of the jade mining

machineries and equipment, and subsistence and ownership of rights in the JADEYE software.

10. Unable to resolve the matter, the Parties have submitted the dispute to binding arbitration. The place of arbitration is Tokyo, Japan, and the arbitration is to be conducted in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules.

SUMMARY OF PLEADINGS

A. The termination of the agreement by the Respondent is valid

The partnership formed by the parties is a partnership at will, as there has been no stipulated date of expiry of the partnership provided in that partnership agreement, this is pursuant to S.7 of the Myanmar Partnership Act 1932. Thus, the partnership may be dissolved unilaterally by virtue of S. 43(1) of the Myanmar Partnership Act 1932, the requirement of notice in writing is not strictly a requisite to render such unilateral dissolution as valid as the existence of legal precedents have already indicated that it may be waived when the indication of intention is clear enough, as the statement given by the Respondent was equivocally communicated, the termination should be valid.

B. The jade-mining machineries and equipment are partnership properties.

Notwithstanding the fact that the properties were initially purchased by the Claimant, the purpose of the purchase and the use of the properties were for the partnership, this intention to treat the properties as partnership properties is derived from the surrounding circumstances filling in the absence of provisions in the partnership agreement designating the properties as partnership properties, under the law, the consideration of intention is a vital consideration to determine whether or not it is a partnership property, and from the facts of the dispute, it is clear that the Claimant intended for the jade mining machineries and equipment to be partnership property, giving an ownership right to the Respondent as a partner.

C. The Respondent has beneficial ownership over the jade mining machinery and equipment

The Claimant is holding the properties as a trustee for the purpose of the jadeite venture, the purchase of the properties by the Claimant was done to pursue the obligation in the partnership agreement, and reliance of the parties could be seen from Respondent's act of obtaining the necessary permit to allow the properties be used for the jade mining business by the partnership, there exist a constructive trust for the purchase of the properties and it was done as a trustee by the Claimant, in proving the constructive trust, the existence of an agreement between the parties which was relied upon by the parties in the acquisition of the property as well as the detriment caused the trustee towards the other party by denying the other party's right over the property was considered.

D. The JADEYE software is a partnership property

The JADEYE software was introduced by the Claimant into the partnership specifically for the purpose of the business efficacy of the partnership itself, the circumstances that led to the creation of the software was most certainly the subject matter of the partnership, there are no clear designation of ownership over the software, however the facts stands to show that it was intended to be a partnership property, by law, the consideration of intention is a vital consideration to determine whether or not it is a partnership property.

PLEADINGS

(I) THE TERMINATION OF THE PARTNERSHIP AGREEMENT BY SHWE PWINT THONE CO., LTD. (SPT) WAS VALID

A. The termination of partnership at-will by Respondent was sufficiently done with a notice of dissolution as required by law.

In law, dissolution of a firm can be inferred from various circumstances and that there is no necessity for a notice in writing to bring about a dissolution. In Pollock & Mulla's "The Indian Partnership Act."[1], the following passage is found:

"An intention to dissolve a firm may be inferred from circumstances showing that a partner has in fact abandoned his interest in the business. No positive rule can be formulated to define what evidence will be sufficient. It is a matter of inference from the facts in each case whether a partner's interest has or has not been abandoned either by overt acts or passively."

The dissolution of the partnership at will by Respondent by virtue of the meeting with Dr. Yugi Asamura[2] on 10 January 2017 is sufficient evidence of the absence of willingness to continue with the partnership. According to Section 7 of the Myanmar Partnership Act 1932, a partnership at will is:

[1] Sir Frederick Pollock, *The Indian Partnership Act*, LexisNexis Butterworth India, 2002
[2] Moot Problem, ¶ 40

"7. Where no provision is made by contract between the partners for the Partnership duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will"

Applying the provision to the contents of the Partnership Agreement between Claimant and Respondent[3] in which the clause of the agreement that indicates duration can be seen in clause 8 of the agreement:

> *"8. Our partnership and brotherhood will be for the long term. The party causing the partnership to end must pay compensation"*

It is clear that there is no clear provision for the duration of the partnership between Claimant and Respondent, and by law[4], this renders the status of the partnership as "partnership at will".

Following the identification of the partnership as a partnership at will, the method of dissolution for such partnerships are provided in the legislation[5], in Chapter IV, the specific provision governing dissolution of partnership at will is Section 43:

[3] Moot Problem, Annexure 1
[4] Myanmar Partnership Act 1932, Section 7
[5] Myanmar Partnership Act 1932, Section 43

"43. (1)Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention partnership to dissolve the firm,

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."[6]

The rationale behind section 43 was expounded in the case *of V.V.P. Thangaraju v. K.V. Perumal Chettiar and others*[7], the judge had stated that:

"When once there is dent or dissonance in that consensus, the basis requisite for its continuance goes. This is why the statute, in section 43, provides for dissolution as a certain consequence of even a mere unilateral notice by a single partner."

The definitive question that needs to be answered with regard to the validity of dissolution by Respondent is the requirement of proving the communication of dissolution is sufficient by law; despite the wordings of S.43 of the Myanmar Partnership Act included the word "writing", there are several authorities that takes the position that any indication of intention would be sufficient, and is not strictly exclusive to writing as in the form of a written notice of dissolution.

[6] Myanmar Partnership Act 1932, Section 42
[7] *V.V.P. Thangaraju Versus K.V. Perumal Chettiar and others* (1979) 2 MLJ 469

In *Sudarsanam Maistri v. Narasimhulu Maistri*[8], Justice Bhashyam Ayyangar, one of the members of a Division Bench which decided that case after quoting from Lord Lindley in his Treatise on 'Partnership'[9], observed as follows:

> *"The same learned author, on the authority of Pearce v. Lindsay Pearce v. Lindsay Pearce v. Lindsay 3 De.G.J., & Sm.,page 139 says that a dissolution of a partnership at will may be inferred from circumstances, e.g., a quarrel, although no notice to dissolve may have been given.* ***(Lindley on 'Partnership', 5th Edition, page 572)."***

Similarly on another authority, in Commissioner of Income-tax, *West Bengal-Ill v. M/s.Pigot Champan & Company Commissioner of Income-tax*[10], the Supreme Court of India held that the question whether there has been a dissolution of the firm and upon such dissolution a new firm has succeeded to the business of the old firm is a question which depends upon the intention of the parties to be gathered from the document, if any, executed by and between the partners and other facts and surrounding circumstances of the case.

[8] *Sudarsanam Maistri v. Narasimhulu Maistri* I.L.R. 25 Mad. 149
[9] Lindley, N., Baron, Gull, W., Sir Lindley, W., & Audenreid, C., *A Treatise on the law of Partnership: From the 5th English ed*(Text-book series, v. 2, no. 20-21), Philadelphia: Blackstone Pub, 1888
[10] *West Bengal-Ill v. M/s.Pigot Champan & Company Commissioner of Income-tax* A.I.R. 1982 S.C. 1085

The flexibility showcased in cases that discussed the application of S.43 of the Partnership Act proves that the requirement that the notice of dissolution be in writing is a non-issue in determining the validity of the dissolution thereof.

Applying the law to the dispute at hand, U Thein Khaw on 10 January 2017 had communicated his intention the partnership between Claimant and Respondent, and given that no specific future date of dissolution was stipulated, the date of dissolution shall be the same as the notice.[11]

B. <u>Claimant breached the partnership agreement</u>

Alternatively, Respondent may also rely on the breach of the partnership agreement by Claimant as a justification to validate the termination of the agreement by virtue of Section 44 of the MPA 1932[12]:

> *"44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely:—*
>
> *...*
>
> *(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the*

[11] Myanmar Partnership Act 1932, Section 43(2)
[12] Myanmar Partnership Act 1932, Section 44

business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;

With specific reference to Dr, Fiona Lum Ka Ching's (Non-Executive Director of AID[13]) answer in an interview concerning the alleged ethnic cleansing that is ongoing in Myanmar[14], the allegation is a statement that is against the solidarity and national interest of the Myanmar, this is a clear breach of the Partnership Agreement between Claimant and Respondent[15], which bars Claimant from committing acts or saying anything that is harmful to the national interest and solidarity of Myanmar. This warrants Respondent the right to dissolve the partnership at will with reliance on Section 44(d) of the MPA 1932.

[13] Additional Clarifications to the Moot Problem, ¶ 3
[14] Moot Problem, ¶ 28
[15] Moot Problem, Annexure 1, Clause 11

(II) THE RESPONDENT HAS AN OWNERSHIP RIGHT OVER THE JADE MINING MACHINERY AND EQUIPMENT.

A. <u>The jade mining machinery and equipment are partnership properties.</u>

The definition of 'partnership property' can be found in Section 14 of the Partnership Act 1932 in Myanmar. Section 14 states:

> *"14. Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.*
>
> *Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm."*[16]

With reference to the above provision, the most important factor in determining the ownership of properties used in a partnership is the presence of an agreement between partners on this matter. However, in this instant case, AID and SPT did not make such agreement and the facts are silent on the ownership of the properties. Due to this, it is vital to take into account the circumstances and intention of the partners in making the properties part of the partnership. This can be derived from the duties and responsibilities that the partners have undertaken in acquiring and managing the properties.

[16] Myanmar Partnership Act, Section 14

Lord Lindley, a House of Lord judge, had provided three statutory rules to assist in determining the ownership of the properties when the intentions of the partners are not apparent.[17] They are: (i) the circumstances of the acquisition of the property, (ii) the purpose of acquiring the property; and (iii) the manner in which the property has been subsequently dealt with.

i. The circumstances of the acquisition of the property

While it is true that the Claimant was the purchaser of the machinery and equipment,[18] it is important to note that this does not deny the Respondent's ownership right over these properties because of the fact that these properties have been intended to be partnership properties. The properties were only purchased after the Claimant and Respondent had entered into the Partnership Agreement and had agreed on the allocation of duties with regards to acquiring the properties.[19] The properties were then acquired by the Claimant for the purpose of the partnership and are treated as partnership properties. The Respondent was responsible of obtaining the necessary permits needed to use the properties in Myanmar[20] and had also contributed to the shipping costs incurred in importing the machinery and equipment from Japan and into Myanmar.[21] Therefore, the allocation of duties among the partners ensured a smooth acquisition of the properties for the purpose of the partnership business. The two partners have

[17] Roderick I'Anson Banks, *Lindley and Banks on Partnership*, 18th Edition, Sweet & Maxwell, 2007
[18] Moot Problem, ¶ 16
[19] Moot Problem, ¶ 16 & 18; Annexure 1, Clause 3 & 4
[20] Moot Problem, ¶ 18; Annexure 1, Clause 3
[21] Additional Clarifications to the Moot Problem, ¶ 30

contributed to the acquisition of the properties and from this it can be inferred that they had the intention to bring in the properties as partnership properties. This intention to purchase the properties as partnership properties by the two partners is sufficient to confer ownership of the properties to the partnership.[22]

ii. The purpose of acquiring the property

The purpose of acquiring the machinery and equipment is to ensure that jades can be extracted from the Hpakant site[23]. While it is true that these properties are only used in the Hpakant site to extract and cut jades,[24] and that the site is under the management of the Claimant,[25] this does not deny the fact that these properties are used for the partnership business and are vital to the operation of this business. These properties are used in two out of four of the main business activities that the partnership is involved in.[26] These properties are therefore crucial to the partnership because without them, the partnership business will not be able to be carried out by both partners.

iii. The manner in which the property has subsequently been dealt with

The machinery and equipment are used at the Hpakant site for the jadeite venture.[27] They are managed by the workers of both the Claimant and the

[22] *Barton v Morris* [1985] 2 All ER 1032; *Nadeem v Rafiq and another* [2007] EWHC 2959 (Ch)
[23] *Supra* n.18
[24] Moot Problem, ¶ 20; Additional Clarifications to the Moot Problem, ¶ 11
[25] Moot Problem, Annexure 1, Clause 6
[26] Moot Problem, ¶ 19
[27] Moot Problem, ¶ 16; Additional Clarifications to the Moot Problem, ¶ 11

Respondent.[28] Furthermore, the operational costs incurred for the jade mining machinery and equipment are borne by both partners.[29] Therefore, the manner in which the property has subsequently been dealt with by both partners shows that the partners have treated the properties as partnership properties.

Therefore, the parties have intended for the jade mining machinery and equipment to be partnership properties as these properties were brought into the 'stock of the firm' for the 'purposes and in the course of business of the firm'. This is in line with the definition given under Section 14 of the Act.

B. <u>It is important to infer an intention as it affects the business efficacy of the partnership.</u>

In the leading case of *Miles v Clark*[30], a case from the High Court of England decided in 1953, the court held that the properties in question are not regarded as partnership properties because of the absence of a formal listing of properties and stated that there is no need for the court to infer any intention of the partners with regard to the determination of whether or not the properties are partnership properties because it does not affect the business efficacy of the partnership business. This case has been cited in *Ponnukon v Jebaratnam*,[31] decided by the Federal Court of Malaysia, which held that the fact that the Respondent in that case owned the property does not affect the efficacy of the

[28] *Supra* n.18
[29] Moot Problem, ¶ 17; Additional Clarifications to the Moot Problem, ¶ 12 & 13
[30] *Miles v Clarke* [1953] 1 A11 ER 779
[31] *Ponnukon vs. Jebaratnam* [1980] 1 MLJ 282

partnership business because the business is not dependent on the question of ownership. Therefore, it did not matter who owned the property as the business could still be conducted regardless of who the owner of the property was.

With reference to the above judgements, it is important to highlight the fact that in the present case, the determination of who the owner of the machinery and equipment is crucial as it does affect the efficacy of the partnership business. Business efficacy is a common law test used to determine whether there is a need to infer an implied term in an agreement. It is established in the case of *Moorcock,*[32] decided in 1889 at the Court of Appeal of England. The principle behind this test is that the court can only infer an implied term if it is "obvious and necessary" and not merely because it is "desirable and reasonable" to do so.

In the present case, the two parties relied on each other in order to acquire and ensure that the machinery and equipment needed to be used for the partnership business can be used in Myanmar.[33] The Respondent held the title to all of the machinery and equipment as they obtained the permit[34] because of Section 2(h) of Myanmar Gemstone Law 1995[35] which only allows locally registered companies to apply for permits. The Claimant's duty to purchase and acquire the properties is essential to the partnership because the jade mining machinery and equipment are not available in Myanmar as there were no locally manufactured machinery and equipment.[36] Due to this, the properties had to be imported from Japan to be brought into Myanmar by the Claimant. Furthermore, the

[32] *The Moorcock* (1889) 14 PD 64
[33] *Supra* n.19
[34] Moot Problem, ¶ 43
[35] Myanmar Gemstone Law 1995, Section 2(h)
[36] Additional Clarifications to the Moot Problem, ¶ 6

two parties contributed to the operational cost required to maintain such machinery and equipment by injecting capital contribution into a partnership fund held by the Respondent.[37] Therefore, it is obvious and necessary to infer that there is an intention to treat the properties as partnership properties because the failure to do so will affect the business efficacy of the jadeite venture such that the properties could not be obtained or used in Myanmar for the partnership business.

C. Alternatively, the Respondent has a beneficial interest over the jade mining machinery and equipment as a result of constructive trust.

Constructive trust arises by operation of law and it is imposed whenever there is an unconscionable conduct on the part of a party so as to deny the beneficial interest of another party over a specific property.

A general definition of the doctrine of constructive trust is stated by Millet LJ in *Paragon Finance plc v DB Thakerar & Co*:

> *"A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another."*[38]

[37] Moot Problem, ¶ 17
[38] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400

In the present case, a constructive trust arises under the equity in *Pallant v Morgan.*[39] The requirements to invoke constructive trusts under the equity in *Pallant v Morgan* are the existence of an agreement between the parties which was relied upon by the parties in the acquisition of the property as well as the detriment caused the trustee towards the other party by denying the other party's right over the property.[40]

Based on the current facts, the Claimant had acquired the jade mining machinery and equipment in pursuant to the agreement that the two parties have entered into whereby the Claimant would purchase the machinery and equipment for the benefit of both parties.[41] The Claimant is therefore holding these properties as a trustee for the purpose of the jadeite venture. The Respondent, in reliance of the Claimant's agreement to acquire the properties for the venture, had obtained the necessary permits needed in order to use these properties in Myanmar[42] and contributed to the costs incurred to ship these properties from Japan.[43] Therefore, the assertion by the Claimant to retain full ownership right over the properties is an unconscionable conduct as it denies the beneficial interest of the Respondent over the properties. The Respondent's beneficial interest over the jade mining machinery and equipment cannot be denied by the Claimant even though these properties were bought by the Claimant as it would be inequitable to do so.

[39] *Pallant v Morgan* [1953] Ch. 43
[40] *Banner Homes Group plc v Luff Development Ltd (No. 1)* [2000] Ch 372, Court of Appeal
[41] Moot Problem, Annexure 1, Clause 4
[42] Moot Problem, Annexure 1, Clause 3
[43] Additional Clarifications to the Moot Problem, ¶ 30

(III) RESPONDENT HAS AN OWNERSHIP RIGHT OVER THE JADEYE SOFTWARE.

A. The JADEYE software is a partnership property

The JADEYE software is owned by the Claimant and this is in pursuant to Section 5 (1) (b) of the Myanmar Copyright Act 1914.[44] However, this does not deny the Respondent's ownership right over the JADEYE software because it is a partnership property.[45]

With reference to Section 14 of the Partnership Act 1932, a property can be regarded as a partnership property once it is brought into the partnership and used for the purposes of the partnership unless a contrary intention is shown. The property is thus considered a partnership property is it is used and treated as a partnership property.[46]

In the present case, the JADEYE software was created during the subsistence of the partnership by Joe Yamashita.[47] The creation of the software was intended by Joe Yamashita to be for the purpose of the partnership.[48] It was installed into the computers used in the Hpakant site by the Claimant himself so as to be used for the partnership business.[49] Moreover, the software has been used for almost five years since 2012 for the partnership business and despite this long period, the Claimant still did not bring up the issue of ownership right in the software. This is despite the fact that the Respondent had considered the software as a partnership property when the Respondent presented cash to

[44] Myanmar Copyright Act 1914, Section 5(1)(b)
[45] *Bourne v Davis* [2006] EWHC 1567 (Ch)
[46] Roderick I'Anson Banks, *Lindley & Banks on Partnership*, 19th Edition, Sweet & Maxwell, 2010
[47] Moot Problem, ¶ 22; Additional Clarifications to the Moot Problem, ¶ 26
[48] Additional Clarifications to the Moot Problem, ¶ 26
[49] Moot Problem, ¶ 23

Joe Yamashita and the Claimant was aware of this.[50] This shows that it can be inferred that the Claimant also has the same intention as Joe Yamashita which is to treat the software as partnership property. Therefore it is apparent that both parties in the present case have the intention to treat the software as a partnership property.

B. It is necessary to infer that the JADEYE software is a partnership property for business efficacy of the partnership

The surrounding circumstances are to be taken into account to determine whether there is a necessity to infer that the JADEYE software is a partnership property so as to give business efficacy to the partnership. The principle of necessity has been illustrated in *Ibcos Computers Ltd v Barclays Finance Ltd*[51]. In that case, the property was held to be a partnership property because it was fundamental to the partnership and that it was "absolutely necessary" that the company should own the property, which was a computer program. Therefore, the property has to be integral to the partnership and due to that is central to the business and could not be separated from it.[52] Treating it as a separate property in this situation would thus not make "any commercial sense".[53]

In the present case, despite the fact that the JADEYE software was only introduced during the partnership,[54] it was used for the purpose of the partnership[55] so as

[50] Moot Problem, ¶ 24; Additional Clarifications to the Moot Problem, ¶ 34
[51] *Ibcos Computers Ltd v Barclays Finance Ltd* [1994] FSR 275
[52] *Supra* n.30; *Waterer v Waterer* [1873] LR 15 Eq 402, 21 WR 508
[53] *Coward v Phaestos Ltd and others* [2013] EWHC 1292 (Ch)
[54] Moot Problem, ¶ 21
[55] *Supra* n.48

to be used exclusively for the partnership itself.[56] This is in line with Section 15 of the Act which states:

> *"Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business."*[57]

The JADEYE software also played an integral role to the partnership as it improved financial efficacy by allowing the user to test the quality and viability of the jade at 99% accuracy.[58] The success of the software had been proven through the trial tests conducted[59]. Since then, the software was used in all computers and equipment on the jade-mining sites[60] and the business was stated to be largely successful.[61] The high value of the software is further evident when the Claimant denied the Respondent from gaining access to it[62] even though it should be considered as a partnership property. Therefore, based on the above facts, the JADEYE software is an integral part of the partnership such that without it, the partnership will not be as successful as it is in the present case.[63] It is central to the business to the extent that it cannot be regarded as a separate property so as to give business efficacy to relationship between the partners of the present partnership.

Despite the fact that there is no transfer of legal title with respect to the ownership of the software, this does not prevent it from being a part of partnership property. This is in line with the judgement in *Don King Productions Inc v Warren*[64] which held that if

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[56] Moot Problem, ¶ 22
[57] Myanmar Partnership Act, Section 15
[58] *Supra* n.56
[59] *Supra* n.49
[60] *Ibid.*
[61] Moot Problem, ¶ 26
[62] Moot Problem, ¶ 25 & 44
[63] Moot Problem, ¶ 26 & 27
[64] *Don King Productions Inc v Warren* [2000] Ch 291, [1999] 2 All ER 218, [2000] 1 BCLC 607

necessary, the legal owner of the property will hold legal title upon trust for the partnership as the property belongs to the partnership from the outset. Therefore, the JADEYE software belongs to the partnership and consequently, the Respondent has an ownership right over it.

C. In any event, the Respondent can reverse engineer the JADEYE software or create a product similar to the JADEYE software

Reverse engineering is allowed as it is an exception to the breach of duty of confidence and it would not infringe the copyright of the Claimant.

a. Reverse engineering would not be a breach of confidence

In the event that the Claimant bring forward the proposition that there is a fiduciary duty between the Claimant and the Respondent is due to the very fact that they are partners, the confidential information in the form of source code will thus be claimed by the Claimant to be only owned by them.[65] On this, it is crucial to note that firstly, the Respondent also owns the confidential information because of the fact that it is a partnership property and secondly, even if the software is not regarded as a partnership property, the Respondent also has a right to reverse engineer. Reverse engineering is an exception to a breach of the duty of confidence. This is due to the fact that there is no sense of obligation when the

[65] Moot Problem, ¶ 44

information was lawfully acquired through a process of dismantling a product to learn how it was made.[66] The process does not involve disclosure of the confidential information and due to this, the act does not breach this duty of confidence. Therefore, reverse engineering can still be carried out by the Respondent as it does not breach any duty of confidence owed by the Respondent to the Claimant and it is the Respondent's right to do so since the Respondent is already in possession of the software.[67]

b. Reverse engineering would not infringe the Claimant's copyright protection over the software

According to Lord Atkinson, the purpose of the copyright is to protect the skills and labour of the author.[68] This is to ensure that other parties will not undertake the same skills and labour so as to surpass the skills and labour needed for the original author to create the product. On this, it is crucial to note that the set of skills and labour involved is totally different from that involved in the creation of the product by the original author.

Furthermore, the test of infringement is such that it occurs when a substantial part of the original work is taken by any party, that occurrence would be an infringement.[69] In the present case, the act of reverse engineering does not take any substantial part from the JADEYE software. The creation of a similar software with the same function as the JADEYE software is not an infringement

[66] *Mars UK Ltd v Teknowledge Ltd* [2008] EWHC 226
[67] *Supra* n.49
[68] *MacMillan & Co Ltd v Cooper* (1924) 40 TLR 186
[69] *Sawkins v Hyperion Records Ltd* [2004] 4 All ER 418

as copyright protection does not involve the functionality of the software.[70] Therefore, the act of reverse engineering or creating a product similar to the software via reverse engineering will not infringe upon the Claimant's copyright protection afforded on the software.

[70] *SAS Institute vs World Programming Ltd.* [2010] EWHC 1829 (Ch)

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests the Tribunal to declare that:

1. The termination of the agreement by the Respondent is valid;
2. The ownership of the jade-mining machinery and equipment belongs to the partnership;
3. The subsistence and ownership of rights in the JADEYE software belongs to the partnership.