Rohini d/o Balasubramaniam
v
HSR International Realtors Pte Ltd

[2018] SGCA 37

Court of Appeal — Civil Appeal No 66 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA and Quentin Loh J
19 March 2018

Agency — Principal — Tortious liabilities

Tort — Vicarious liability

Tort — Negligence — Breach of duty

5 July 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an unusual case. The appellant entrusted moneys to a real estate salesperson who was an undischarged bankrupt. She gave him blank cheques at his request for the purpose of making payments on her behalf in respect of certain property transactions. She trusted him, apparently because he had acted for her and her parents on previous occasions in respect of other property transactions. It turned out, however, that the salesperson was a rogue of the highest order. Instead of using the cheques for their intended purpose, he used them to make unauthorised payments to himself and others. He has since absconded. The appellant brought legal proceedings against both the rogue,

Kelvin Yeow Khim Whye ("Kelvin Yeow"), and the respondent, HSR International Realtors Pte Ltd ("HSR"), which was the real estate agent whom Kelvin Yeow represented at the material time. The appellant obtained judgment in default of appearance against Kelvin Yeow, but failed to recover any compensation from him. Her claims against HSR, which were based on vicarious liability, agency law and negligence, were all dismissed by the High Court judge ("the Judge"). The present appeal is against that decision, which is reported in *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin and another* [2017] SGHC 149 ("the GD").

2 Before we state the relevant facts, we must clarify a point of terminology. Under s 3(1) of the Estate Agents Act (Cap 95A, 2011 Rev Ed), the term "estate agent" refers to a "person", which can mean either an individual or a business, "who does estate agency work". An individual who does not personally hold an estate agent's licence, but does estate agency work in the course of his employment or engagement by a business which is a licensed estate agent, is a "salesperson" (see ss 3(1) and 32(2)(*b*)(i) of the Estate Agents Act). Whereas an "estate agent" is required to be licensed as such (see s 28), a "salesperson" is required to be registered as such (see s 29).

3 As we shall see, the Estate Agents Act was not in force when the events leading to the present case occurred. Nevertheless, for consistency, in this judgment, we adopt the terminology used in the Act. Thus, although, in common parlance, a business organisation such as HSR is often referred to as a "real estate agency", we refer to HSR as an "estate agent". And while an individual such as Kelvin Yeow is often colloquially referred to as a "real estate agent", we use the term "salesperson" or "representative" instead.

The factual background

4 The appellant first met Kelvin Yeow in 2007, when HSR acted for her parents in the sale of a unit at Neptune Court ("the Neptune Court Property"). Kelvin Yeow was HSR's representative for this transaction (see the GD at [4]). In connection with the sale, the appellant's father signed an agreement which conferred on HSR the exclusive right to act as the estate agent for the transaction. This agreement bore HSR's letterhead as well as Kelvin Yeow's photograph and contact details, which listed him as a "Group Director" of HSR. Kelvin Yeow held this designation at all material times.

5 That same year, HSR (again represented by Kelvin Yeow) also acted for the appellant's father in the purchase of a property at Bayshore Park ("the Bayshore Park Property") (see the GD at [4]).

6 The appellant inherited the Bayshore Park Property upon her father's passing in June 2008 (see the GD at [5]). In July 2009, she engaged HSR (likewise represented by Kelvin Yeow) to act for her in the sale of the Bayshore Park Property. On 30 September 2009, she granted certain purchasers an option to purchase the Bayshore Park Property at a price of $850,000. The purchasers exercised this option on 6 October 2009 (see the GD at [6]–[7]).

7 According to the appellant, sometime in October 2009, Kelvin Yeow "insistently persuaded" her to purchase a property at Bedok Court ("the Bedok Court Property"). This would have been around the time that the appellant sold the Bayshore Park Property. The appellant was granted an option to purchase the Bedok Court Property at $1,280,000, which option she exercised on 5 November 2009 (see the GD at [8]).

8 Kelvin Yeow told the appellant that the proceeds which she would receive from the sale of the Bayshore Park Property might be insufficient or might not be received in time for her to complete the purchase of the Bedok Court Property. He thus advised her to obtain a housing loan as well as apply to use her Central Provident Fund ("CPF") moneys to purchase the Bedok Court Property, which she did. United Overseas Bank Limited ("UOB") granted the appellant a loan of $650,000 ("the UOB Loan") sometime in November 2009. That same month (specifically, on 17 November 2009), the CPF Board approved the appellant's application to use her CPF moneys to finance the purchase of the Bedok Court Property (see the GD at [9]–[10]).

9 On 26 November 2009, the appellant entered into an agreement to rent a unit at Neptune Court for a two-year period ("the Tenancy"). Again, it was HSR, represented by Kelvin Yeow, which acted for the appellant in securing this tenancy (see the GD at [11]).

10 The sale of the Bayshore Park Property was completed on 1 December 2009. The appellant instructed her lawyers at the time, M/s Subra TT & Partners ("Subra TT & Partners"), to release the sale proceeds to her agent. On Kelvin Yeow's instructions, his colleague, Kenneth Lu, collected from Subra TT & Partners two cashier's orders and a cheque drawn for a total of $832,813.06 ("the Bayshore Park Sale Proceeds"). The Bayshore Park Sale Proceeds were then deposited into UOB Account No [xxx] ("the UOB Account"), which the appellant had opened on 1 December 2009 for the purpose of receiving the Bayshore Park Sale Proceeds (see the GD at [12]).

11 On or around 1 December 2009, Kelvin Yeow visited the appellant at her home. At his request, the appellant gave Kelvin Yeow four cheques drawn

on the UOB Account and signed by her in blank. The appellant claims that Kelvin Yeow requested the blank cheques on the pretext that he would use them to assist her in paying: (a) the UOB Loan; (b) agency fees; (c) legal fees; and (d) the deposit for the Tenancy (see the GD at [14]). Kelvin Yeow filled in the details for the cheques in the appellant's presence, but she did not see or check what he wrote because she trusted him (see the GD at [13]–[14]).

12 Subsequently, Kelvin Yeow told the appellant that one of the cheques had been dishonoured because he had made a miscalculation. The appellant then gave him another cheque signed in blank (see the GD at [15]).

13 Instead of using the blank cheques for their intended purpose, from 3 to 10 December 2009, Kelvin Yeow used the cheques to make the following payments: (a) $300,000 to himself; (b) $70,336 in cash; (c) $400,000 to himself; and (d) $60,000 to his colleague at HSR, Sammi Ching May (see the GD at [16]).

14 According to the appellant, she only noticed sometime in 2010 that the balance in the UOB Account did not reflect the Bayshore Park Sale Proceeds even though those proceeds had been deposited into the account in December 2009. It was not until around December 2010 or January 2011, a full year after the Bayshore Park Sale Proceeds were misappropriated by Kelvin Yeow, that the appellant discovered that those proceeds had been deposited into the UOB Account on 2 December 2009, and that shortly after, Kelvin Yeow had used the blank cheques to make withdrawals totalling $830,336 (see the GD at [17]–[18]).

15 On 21 February 2011, the appellant made a complaint against Kelvin Yeow to the Council for Estate Agencies ("the CEA"), alleging that the cashier's orders and cheque representing the Bayshore Park Sale Proceeds had not been presented (see the GD at [19]). The appellant also made a police report against Kelvin Yeow on 22 February 2011, alleging that she had not received the Bayshore Park Sale Proceeds. For reasons that are unknown to this court, the police informed the appellant's lawyers on 5 July 2012 that they had decided to take no further action against Kelvin Yeow (see the GD at [20]–[21]).

16 The appellant commenced legal proceedings against HSR and Kelvin Yeow in November 2015. She obtained judgment in default of appearance against Kelvin Yeow on 30 May 2016.

17 As against HSR, the appellant claimed that HSR was liable for Kelvin Yeow's fraudulent acts, either on the basis of vicarious liability, or under the law of agency as Kelvin Yeow's principal because Kelvin Yeow had been acting as HSR's employee or agent when he made the wrongful withdrawals from the UOB Account. Alternatively, the appellant claimed that HSR was liable in negligence as it had breached the duty of care which it owed to her by: (a) appointing Kelvin Yeow as its representative while he was an undischarged bankrupt; (b) failing to disclose his status as an undischarged bankrupt; (c) failing to supervise him; and/or (d) misrepresenting his status as a "Group Director". It should be noted that Kelvin Yeow was adjudged a bankrupt in August 2003 and was discharged from bankruptcy on 9 April 2010 (see the GD at [42]). He was therefore an undischarged bankrupt throughout the time when he was engaged by the appellant and her parents between 2007 and 2009.

The decision below

18 As mentioned at [1] above, the Judge dismissed all of the appellant's claims against HSR. He held that HSR was not liable in negligence, and neither was it liable for Kelvin Yeow's fraudulent acts, whether vicariously or as Kelvin Yeow's principal under the law of agency.

19 With regard to the claim in negligence, the Judge found that HSR had not breached any duty of care by appointing Kelvin Yeow as its salesperson while he was an undischarged bankrupt. The Judge noted that under s 32(2)(*c*) of the Estate Agents Act, an individual would not be eligible to be or remain registered as a salesperson unless the CEA considered him a "fit and proper" person, and the CEA would not consider a person fit and proper in this regard if he was an undischarged bankrupt. However, the Judge observed, this regulatory regime had not taken effect until 2010, and therefore did not apply to the present case (see the GD at [43]–[44]). Thus, HSR had not breached any duty of care by appointing Kelvin Yeow as its salesperson while he was an undischarged bankrupt. That being so, there was no reason why HSR had any duty to *inform* the appellant that Kelvin Yeow was an undischarged bankrupt (see the GD at [45]).

20 The Judge also dismissed the appellant's contention that HSR had breached the duty of care which it owed to her by failing to supervise Kelvin Yeow, as she was unable to say precisely what it was that HSR had failed to do (see the GD at [46]). As for the suggestion that HSR should not have allowed Kelvin Yeow to represent himself as a "Group Director", the Judge held that the appellant had trusted Kelvin Yeow not because he was a "Group Director", but because of her prior dealings with him. That being so, the appellant could not show any nexus between HSR's alleged breaches of duty and the loss that she

had suffered. Her loss had been caused "only because" she had given Kelvin Yeow blank cheques, and she had done so because she had chosen to trust him (see the GD at [50]).

21 With regard to the claim based on vicarious liability, the Judge held that, taking all the relevant circumstances into account, it would not be fair and just to impose vicarious liability on HSR. This was because a precondition for imposing vicarious liability was that the victim seeking compensation "should either be without fault himself, or be less at fault than the blameworthy party and/or the ultimate defendant" (see the GD at [30], citing the decision of this court in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska*") at [75]–[78]). In the present case, the Judge held, the appellant had been "grossly negligent" and her loss was "directly attributable to her own moral culpability" (see the GD at [34]). He further held that there was no reason to fault HSR for the appellant's loss. The appellant had given Kelvin Yeow blank cheques despite being aware, from a Service Fee Agreement signed in respect of the purchase of the Bayshore Park Property in 2007, that she should not be giving blank cheques to HSR's salespersons. Since it was the appellant's own conduct that had given Kelvin Yeow the opportunity to commit the fraud, it would be unjust to impose vicarious liability on HSR for the appellant's loss (see the GD at [35]–[36]).

22 As for the claim under the law of agency, the Judge held that the question of whether HSR was liable as a principal for Kelvin Yeow's fraudulent acts turned on whether Kelvin Yeow had been acting within his authority as HSR's agent when he obtained from the appellant the cheques signed in blank and used them for his own purposes. The Judge reasoned that Kelvin Yeow had been

authorised to receive only cheques that were crossed and made payable to *HSR*, and not cheques signed in blank. It thus could not be said that Kelvin Yeow's fraudulent acts had been committed within his authority as HSR's agent (see the GD at [37]–[39]).

23 It should be noted that one area of dispute between the parties in the court below related to the circumstances in which Kelvin Yeow received the blank cheques from the appellant. The appellant claimed that she had given Kelvin Yeow these cheques on the basis that he would use them to make payments on her behalf in respect of various property transactions, whereas HSR's position was that the appellant *knew* that Kelvin Yeow was going to use the cheques for his own purposes and *consented* to this. Indeed, on HSR's case, the appellant gave Kelvin Yeow the blank cheques because she intended to *loan* him money. In this regard, HSR argued that it was highly suspicious that, on the appellant's own evidence, Kelvin Yeow called her sometime in November or December 2010 *after* she had discovered his wrongdoing, and asked her for a loan. He also allegedly told her on that occasion that he would repay all her money, including the sums that he had withdrawn from the UOB Account using the blank cheques (see the GD at [51]).

24 The Judge agreed with HSR that it was suspicious that Kelvin Yeow had called the appellant to ask for a loan after having misappropriated her money. However, he found that HSR's assertion that the blank cheques represented loans to Kelvin Yeow was a "mere suspicion", and was unsupported by any evidence apart from the appellant's own testimony that Kelvin Yeow had asked her for a loan in late 2010 (see [23] above). He thus rejected HSR's defence that Kelvin Yeow had not misappropriated, but rather, had *borrowed* the appellant's money (see the GD at [51]).

The parties' cases on appeal

The appellant's case

25 The appellant contends that the Judge erred in dismissing her claim in negligence against HSR. She argues that even before the enactment of the Estate Agents Act in 2010, estate agents owed a duty of care to their clients, and the Act only "crystallised" the duty of care that had already existed at common law. The appellant submits that an estate agent's duty of care encompasses the following duties: (a) to act in the best interests of its clients; (b) to appoint as its salespersons only individuals who are fit and proper (which, the appellant argues, excludes undischarged bankrupts); (c) to supervise its salespersons; and (d) to have in place systems and processes for such supervision. The appellant asserts that HSR breached these duties by: (a) appointing Kelvin Yeow as its salesperson while he was an undischarged bankrupt; (b) failing to manage and supervise him; and (c) failing to inform its clients of his status as an undischarged bankrupt.

26 The appellant also argues that she was a "vulnerable victim" who was "physically and mentally incapacitated" at the material time because she was suffering from severe headaches as well as insomnia, and had undergone multiple operations on her knee during the second half of 2009. Accordingly, the appellant submits, HSR owed her an "additional duty of care". As to what this purported "additional duty of care" entails, the appellant argues that at the material time, the prevailing practice among estate agents, when dealing with "vulnerable clients", was to have a family member of the vulnerable client sit in to ensure that the vulnerable client understood whatever property transaction he was entering into. She contends that HSR breached its duty of care by not

ensuring that this "prevailing practice" was followed by Kelvin Yeow in his dealings with her.

27 In respect of her claim against HSR based on the doctrine of vicarious liability, the appellant emphasises that one of the policy considerations underlying this doctrine is the "deterrence of future harm by encouraging [an] employer to take steps to reduce the risk of similar harm in future" (see *Skandinaviska* at [76]). She submits that HSR must be deterred from causing future harm to befall unsuspecting clients. She further argues that the Judge erred in finding that she was wholly at fault for the loss that she suffered. She contends that "at a maximum", she was contributorily negligent, and the Judge ought not to have completely exonerated HSR from liability.

28 With regard to her claim against HSR under the law of agency, the appellant argues that HSR authorised Kelvin Yeow "to do all actions to facilitate property transactions, which include receiving cheques, on its behalf". Thus, Kelvin Yeow was acting within his authority as HSR's agent when he obtained the blank cheques from the appellant and used them for his own purposes, and HSR is accordingly liable for his fraudulent acts as his principal.

HSR's case

29 HSR argues that it is not liable to the appellant in negligence. It maintains that it did not breach any duty of care which it owed to the appellant. At the material time, there was no industry practice precluding the appointment of undischarged bankrupts as real estate salespersons, and while there is now such a rule in place, that is only because the Estate Agents Act effected a significant change in industry standards. HSR also contends that the appellant has not substantiated her claim that it failed to supervise Kelvin Yeow.

30 HSR further submits that even if it had breached any duty of care which it owed to the appellant, this had not caused the appellant's loss. Rather, such loss had been caused by the appellant's own actions in giving Kelvin Yeow the cheques signed in blank.

31 With regard to the appellant's claim based on vicarious liability, HSR contends that it cannot be made vicariously liable for Kelvin Yeow's fraudulent acts because the appellant was herself at fault for causing her own loss. It further argues that it did not encourage or acquiesce in Kelvin Yeow's wrongful conduct, nor did it materially increase the risk of the appellant suffering loss.

32 As for appellant's claim under the law of agency, HSR argues that it never gave its salespersons any actual or ostensible authority to accept cheques signed in blank. On the contrary, HSR argues, it did the very opposite by emphasising in several communications addressed to its clients that all cheques relating to property transactions should be made payable to HSR.

Our decision

Preliminary points

33 Before we turn to our decision proper, we pause to make two preliminary points. First, in the course of this appeal, HSR has, at least in its written submissions, continued to press the position that the appellant consented to Kelvin Yeow using her moneys for his own benefit (see [23] above). It submits that the Judge erred in rejecting this argument. This point was not, however, pursued in the oral submissions made on HSR's behalf at the hearing of this appeal.

34 It suffices for us to deal with this issue by saying that we agree with the Judge's finding that, on a balance of probabilities, the appellant did not consent to Kelvin Yeow using the blank cheques in the way that he did. We agree with HSR that there are several aspects of this case which are unsettling, even suspicious. For example, it is highly odd that the appellant only noticed that the Bayshore Park Sale Proceeds were missing from the UOB Account many months after Kelvin Yeow made the wrongful withdrawals. It is also inconsistent with her account that Kelvin Yeow asked her for a loan sometime in November or December 2010 after she had discovered his wrongdoing. In addition, it is strange that the appellant, after discovering sometime around November 2010 (at the latest) that the Bayshore Park Sale Proceeds were missing, let several months pass before she reported the matter to the CEA and the police in February 2011.

35 Be that as it may, the fact remains that by the beginning of December 2009, the appellant was in a position where she had purchased the Bedok Court Property and had taken out a $650,000 loan from UOB to finance that purchase. It is highly unlikely that the appellant, who is not, by any account, a wealthy person, would have agreed to give Kelvin Yeow *carte blanche* to borrow as much of her money as he pleased when she had such significant outstanding liabilities. In our view, it is more likely than not that the appellant did not consent to Kelvin Yeow using the blank cheques for his own benefit, and that she was indeed defrauded by him.

36 Our second preliminary observation relates to the state of the evidence: in many significant aspects, the evidence was inadequate. For example, it is not clear if HSR actually knew that Kelvin Yeow was an undischarged bankrupt at the time of his dealings with the appellant. It seems that the appellant made

attempts to obtain discovery of certain documents from HSR which might have shed light on this question, but HSR claimed that it had lost many important documents from the relevant period as a result of a termite infestation at its premises. There was also a lack of witnesses who could testify on HSR's state of knowledge, as well as the management decisions and policies adopted by HSR at the material time. The witnesses who gave evidence for HSR were not its key management personnel. Most were other salespersons who, like Kelvin Yeow, held designations such as "sales director" or "team director". While a Ms Pang Wai Chun, who held the designation of "Senior Manager, Operations", was among the witnesses, she described her duties as "administrative". Much more could have been done to give the court a fuller picture of what steps, if any, HSR took at the material time with regard to supervising and overseeing the salespersons operating under its auspices. Notwithstanding the gaps in the evidence, however, we find that the appellant has made out a case against HSR in negligence.

The claim in negligence

37 In relation to the appellant's claim in negligence, HSR admitted (correctly, in our view) that it owed the appellant a duty of care (see the GD at [41]). The nub of the matter is the content of that duty, for that would fix the standard of care which HSR was under a duty to observe at the material time.

38 As we mentioned earlier, this is an unusual case, not only because of what the appellant did (in simply handing blank cheques to Kelvin Yeow), but also because it is a situation that is highly unlikely to be replicated. As the Judge noted, in 2010, Parliament passed the Estate Agents Act, which sets out the requirement (in s 32(2)(*c*)) that in order for an individual to be or remain registered as a real estate salesperson, the CEA must consider him "fit and

proper" to be registered as such. In this regard, s 3(2)(*a*)(iv) of the Estate Agents Act provides that unless the CEA otherwise determines, an individual shall not be a "fit and proper person" if he is an undischarged bankrupt or has made a composition or arrangement with his creditors. Hence, under the present legal regime, Kelvin Yeow *would not even have been in a position to be a salesperson under HSR's banner or to be in the real estate profession at all to begin with* unless he had obtained specific approval from the CEA. Further, the Estate Agents Act now provides for additional protective measures. For example, s 38 requires every estate agent to appoint a key executive officer to be responsible for "the proper administration and overall management of the business of the estate agent, and the supervision of its salespersons".

39 Unfortunately, Kelvin Yeow's fraud took place just before the 2010 enactment. HSR stresses that there is no evidence that at the material time, it was against industry standards or normal practice for estate agents to appoint undischarged bankrupts as their representatives. We emphasise, however, that while industry standards and common practice are important factors in ascertaining the appropriate standard of care, they are not conclusive (see the decision of this court in *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 ("*Ng Huat Seng*") at [74]). Thus, even if there were *positive* evidence that it was within the industry *norm* at the material time for estate agents to appoint or engage undischarged bankrupts as salespersons, that would not preclude a finding of negligence on the part of an estate agent who did so, since negligent conduct does not cease to be so simply on account of repetition or normalisation (see *Ng Huat Seng* at [74]). Conversely, the fact that there is no evidence of an industry standard *against* a certain practice is no bar to a finding that such a practice is negligent. This is because the standard of care which has to be met in relation to a particular duty of care is to be

determined by reference to "the general objective standard of a reasonable person using ordinary care and skill" (see the decision of this court in *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] 2 SLR 360 at [43], citing *Blyth v The Company of Proprietors of the Birmingham Waterworks* (1856) 11 Exch 781).

40 What would that mean in the context of HSR's engagement of Kelvin Yeow as its salesperson while he was an undischarged bankrupt? In our view, although the Estate Agents Act was enacted only *after* Kelvin Yeow's fraudulent acts took place, it nonetheless furnishes us with an indication of what the content of the duty of care which HSR owed to the appellant was. Let us elaborate.

41 It is telling that in establishing the regulatory framework set out in the Estate Agents Act, the Singapore legislature took the view that an undischarged bankrupt was, as a *starting point*, not fit and proper to be a real estate salesperson unless the CEA considered otherwise. It is also not surprising. After all, real estate salespersons deal with large sums of money. This is all the more so in land-scarce Singapore, where property prices are generally at a substantial premium – whether in the public or the private housing sector. Whilst an estate agent such as HSR was free – prior to the 2010 enactment – to have on its books someone who was an undischarged bankrupt (such as Kelvin Yeow), this does not mean that prior to 2010, it could not have been a breach of duty for an estate agent to engage an undischarged bankrupt as its salesperson and give him free reign to deal with clients without any checks and balances. On the contrary, it must follow from the 2010 enactment that if an estate agent (here, HSR) did engage an undischarged bankrupt as its salesperson prior to 2010, then the standard of care which it owed to those of its customers who dealt with such a

salesperson ought to be a *high* one. In our view, what this means, applied to the present factual context, is that there ought to have been *a viable internal system or mechanism in place within HSR itself that would aid it in monitoring or supervising Kelvin Yeow's conduct and mitigating the risk of any fraud on his part*.

42 We would go further – such an internal system or mechanism would *also* have needed to have, as a *threshold* criterion, an information base or bank that tracked the status of each of HSR's salespersons (including the fact of whether they were (or had become) undischarged bankrupts). Put simply, even though the evidence on record in the present case does not *clearly* establish that HSR knew that Kelvin Yeow was an undischarged bankrupt at the time he dealt with the appellant (see above at [36]), it lies ill in HSR's mouth to deny liability in negligence on that basis simply because (as we have just noted) *HSR ought to have had in place a viable internal system or mechanism that would have let it know that Kelvin Yeow was in fact an undischarged bankrupt whilst operating under its banner*. In this regard, we note that it is not difficult or unduly onerous for a business organisation to perform the relevant searches to find out if an individual is or has been made a bankrupt. Regrettably, in the present case, there was no documentary (or, indeed, any other) evidence on record (apart, perhaps, from some unsubstantiated assertions) to demonstrate whether HSR had in place any system for tracking the bankruptcy status of its salespersons. This is perhaps not surprising as HSR was generally not forthcoming with the relevant evidence (see, again, above at [36]). In so far as HSR might seek to argue that there is no evidence to suggest that it *did not* have such a tracking system in place at the material time, our analysis below (at [44]) would apply with equal force in respect of this particular argument.

43 That is not an end of the matter. Apart from the fact that HSR should have had in place a system for tracking the bankruptcy status of its salespersons, HSR was (as we pointed out at [41] above) also under a duty to ensure that it had in place a viable internal system or mechanism that would aid it in monitoring or supervising the conduct of Kelvin Yeow and mitigating the risk of any fraud on his part. Counsel for the appellant, Mr Edmond Pereira, suggested that this might have taken the form of HSR *informing* its clients that a particular salesperson was an undischarged bankrupt. We have serious doubts about the practicability of requiring a business organisation such as HSR to *advertise or volunteer* to its clients that one of its salespersons was an undischarged bankrupt, but there were certainly other measures which HSR could have adopted. For instance, it was suggested that salespersons who were undischarged bankrupts should have been required to be accompanied or supervised by other personnel of HSR when meeting clients. It is clear from the evidence that the position was quite *the opposite* at HSR – Kelvin Yeow was apparently given full rein by HSR to do as he pleased. Indeed, he was even accorded the designation of "*Group Director*".

44 Counsel for HSR, Mr Eugene Thuraisingam ("Mr Thuraisingam"), argued on behalf of HSR that there was *no evidence* that HSR *did not* have an internal system of checks in place. That is, in our view, a red herring. Put simply, HSR had *the evidential burden* of adducing sufficient evidence that it *did* have such a system in place. Indeed, it might even be argued that HSR had *the legal burden* in this regard since, under s 108 of the Evidence Act (Cap 97, 1997 Rev Ed), "[w]hen any fact is especially within the knowledge of any person, the burden of proving that fact is upon him" (see also the decisions of this court in *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 at [67]−[69] and *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [79]−[80]). There is no

doubt that if HSR did have in place a system of internal checks, then this would have been within the unique knowledge of HSR itself.

45 What is clear in the present case is that there was ***no evidence whatsoever*** of HSR having had in place any internal system or mechanism that would aid it in monitoring or supervising the conduct of Kelvin Yeow and mitigating the risk of any fraud on his part.

46 Mr Thuraisingam submitted that this lack of internal controls had to be seen in light of other measures taken by HSR. In this regard, HSR stressed that in 2007, when it acted for the appellant's father in the purchase of the Bayshore Park Property, the appellant (who was involved as well in the transaction) had been sent a document titled "SERVICE FEE FOR PRIVATE PROPERTY (PURCHASER)", which stated that "All commission shall be paid by crossed cheque made in favour of HSR International Realtors Pte Ltd" [emphasis in original omitted]. The appellant had admitted under cross-examination that she had seen and understood this document. Further, on 4 December 2009, the appellant had received a "transaction advice" in connection with the Tenancy, which stated:

> 1) Kindly made [*sic*] your payment by cross cheque to HSR INTERNATIONAL REALTORS PTE LTD.
>
> 2) Please take note that HSR Salesperson[s] are not allowed to receive payment in cash or cheques in their name.
>
> 3) Should you make any payment to HSR Salesperson[s] in person, the company shall not be held responsible should the company not receive such payment.
>
> …

47 Apart from such communications to its clients, HSR also internally circulated newsletters in which it warned its salespersons that they should not

engage in any illegal or unethical conduct. Further, HSR apparently established a general procedure which required its salespersons to inform it of all property sales and purchases that they had transacted. For example, a newsletter circulated among HSR's salespersons set out the following timelines:

> i) Transactions must be submitted within 5 days of receipt by [salespersons].
>
> ii) Exclusives must be submitted within 5 days of receipt by [salespersons].
>
> iii) Commissions (Cash/Cheques) must be submitted within 5 days of receipt by [salespersons].

48 In our view, these measures were insufficient to deal with the more specific situation which is the focus of the present appeal. To begin with, the "transaction advice" dated 4 December 2009 which we referred to at [46] above would have been received by the appellant only *after* she had already given four blank cheques to Kelvin Yeow on or around 1 December 2009, so it is of limited assistance to HSR. Even putting that difficulty aside, in the absence of an internal system for monitoring or supervising its salespersons, HSR could not simply rely on statements in agreements and transaction advices urging its clients to make payments by crossed cheques made out to HSR to mitigate the risk of any wrongdoing by its salespersons. The very fact that one of HSR's newsletters to its salespersons stated that "Commissions (*Cash*/Cheques) must be submitted within 5 days of receipt" [emphasis added] suggests that HSR must have known that the rule requiring commissions to be paid only by crossed cheques made out to it was being disregarded by many of its clients, who were evidently paying its salespersons in cash instead. HSR cannot now claim to be ignorant of the fact that it had put its salespersons in a position where they could abuse the trust placed in them by its clients.

49 In a similar vein, the fact that HSR had internally circulated cautionary messages to its salespersons stating that they should not engage in illegal or unethical acts was insufficient to meet the standard of care. Indeed, that HSR issued these warnings to its salespersons suggests that the risk of wrongdoing by the latter was not only eminently *foreseeable*, but was *in fact foreseen* by HSR. The tone and wording of one of these warnings shows that HSR was well aware of the types of abuses which could be perpetrated by the salespersons operating under its banner:

> Any [salesperson] who broke [*sic*] the law or commit[s] an unprofessional, unethical, or immoral act will be terminated. For example, if you are a 'double agent', or *pockets money*, *or cheat the company*, you will be hand[ed] over to the POLICE.
>
> We will assist the Authorities to put you in PRISON. You will be blacklisted in your life. …
>
> [emphasis added]

50 In light of this, it was surely inadequate for HSR simply to warn or admonish its salespersons not to engage in dishonest or fraudulent conduct without putting in place any corresponding system of checks and monitoring to mitigate the risk of fraud. It is also no answer for HSR to say that it had instituted a procedure requiring its salespersons to report to it all transactions entered into by its clients if it had no accompanying means of enforcing compliance with this procedure.

51 Indeed, what we have, in substance, is a situation where HSR would receive all the fruits of its salespersons by way of the relevant commissions without assuming any responsibility whatsoever in taking reasonable steps to ensure that those salespersons most likely to pose a risk of loss to its clients were prevented from doing so. In the circumstances and for the reasons set out

above, we find that HSR breached the duty of care which it owed to the appellant.

52 Could it nevertheless be argued that, even if HSR had instituted some form of internal system or mechanism to monitor or supervise the conduct of salespersons such as Kelvin Yeow, the appellant would still have suffered loss? We acknowledge that this is a possibility, but any such suggestion must be assessed in light of the appellant's evidence on how she came to trust Kelvin Yeow in the course of her and her family's previous dealings with him. The appellant testified that Kelvin Yeow had acted as HSR's *sole* representative in the various transactions, and nothing untoward had taken place. Specifically, she mentioned that she thought Kelvin Yeow could be trusted because he had assisted her father in selling the Neptune Court Property in 2007 (see [4] above), and had "*handled cheques for [her] father even then*" [emphasis added]. In our view, it is clear that if HSR had put in place proper checks and measures for monitoring those of its salespersons who were undischarged bankrupts, Kelvin Yeow would never have had the opportunity to have interacted with the appellant as he did, or to have carried out the very acts which gave the appellant a false sense of assurance in his probity and trustworthiness. For example, given HSR's policy that all cheques should be made payable to HSR and not to its salespersons personally, Kelvin Yeow would not have been in a position to have independently handled payments on behalf of the appellant's father in 2007 if he had been subject to close monitoring. Indeed, even the most determined of fraudsters might have hesitated if he had encountered measures designed to avoid precisely what happened in the present case.

53 As against this evidence, if HSR took the view that Kelvin Yeow would nevertheless have evaded whatever internal system of checks and monitoring

was put in place, then it bore the evidential burden to adduce proof that this is what would have happened: that Kelvin Yeow would have gained the appellant's trust in any event, and, sooner or later, would have abused that trust. Without any evidence to this effect, it would be an exercise in idle speculation for this court to guess at the possible scenarios in which Kelvin Yeow might have defrauded the appellant notwithstanding any measures taken by HSR to meet the standard of care. Bearing in mind HSR's general approach towards the adduction of evidence (see above at [36], [42] and [44]) as well as the fact that Kelvin Yeow has already absconded and did not testify in the proceedings below, we are of the view that HSR has *not* discharged this evidential burden. The state of the evidence, therefore, is that Kelvin Yeow's ability to gain and abuse the appellant's trust was a direct result of HSR's lack of internal checks and monitoring measures; and against this, there is nothing to suggest that even if HSR had met the standard of care and discharged its duty of care, Kelvin Yeow would still have been able to defraud the appellant. We therefore allow this appeal.

54 *However*, we acknowledge that the appellant was *extremely careless* in giving Kelvin Yeow blank cheques, particularly since she *acknowledged* in the proceedings below that she knew that she should not be giving blank cheques to HSR's salespersons. In the circumstances, we are of the view that the appellant is clearly guilty of ***contributory negligence***. We have previously noted that the two key considerations guiding the court's discretion to apportion liability between a claimant and a defendant are "the relative causative potency of the parties' conduct" and the parties' "relative moral blameworthiness" (see the decision of this court in *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 at [118]). In this regard, we are broadly in agreement with the Judge that the opportunity given to Kelvin Yeow to commit the fraud arose *at least*

primarily from the appellant's own conduct (GD at [36]), and it was her misguided decision to trust him to such a great extent which was the more "potent cause" of her own loss. Having regard to the circumstances, we hold that the appellant is entitled to only ***30 per cent*** of the amount claimed.

The claims based on vicarious liability and agency law

55 In view of our decision on the appellant's claim in negligence, it is unnecessary for us to consider her claims under the doctrine of vicarious liability as well as under the law of agency.

Conclusion

56 For the reasons set out at [39]–[53] above, we find that the appellant has succeeded in establishing her claim in negligence against HSR, and we thus allow her appeal on this basis.

57 Unless the parties are able to come to an agreement on costs, they are to furnish to this court, within 14 days of the date of this judgment, written submissions limited to ten pages each, setting out their respective positions on the appropriate costs orders both here and below in the light of the present judgment.

Andrew Phang Boon Leong	Judith Prakash	Quentin Loh
Judge of Appeal	Judge of Appeal	Judge

Edmond Pereira and Goh Chui Ling (Edmond Pereira Law Corporation) for the appellant;
Eugene Thuraisingam and Suang Wijaya (Eugene Thuraisingam LLP) for the respondent.
