DBS Bank Ltd v Yamazaki Mazak Singapore Pte Ltd and Another [2008] SGHC 181

Case Number : Suit 511/2007, RA 105/2008, 110/2008, 170/2008

Decision Date : 21 October 2008

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Terence Tan and Melissa Thng (Rodyk & Davidson LLP) for the plaintiff; Chua Sui Tong and Aw Wen Ni (Wong Partnership LLP) for the first defendant; Loo Dip Seng (Ang & Partners) for the second defendant

Parties : DBS Bank Ltd — Yamazaki Mazak Singapore Pte Ltd; Hwa Lai Heng Ricky

Civil Procedure

Evidence

21 October 2008

Tay Yong Kwang J:

Introduction

1 The three Registrar's Appeals before me were against the decisions of the Assistant Registrar Teo Guan Siew ("AR Teo") and Senior Assistant Registrar Kenneth Yap ("SAR Yap") given on 18 March 2008 and 25 April 2008 respectively. Registrar's Appeal No 105 of 2008 ("RA 105") concerned Mr Hwa Lai Heng's ("the 2nd defendant") appeal against AR Teo's decision granting summary judgment to DBS Pte Ltd ("the plaintiff") for its claim against him, while Registrar's Appeal No 110 of 2008 ("RA 110") concerned, conversely, the plaintiff's appeal against AR Teo's decision granting Yamazaki Mazak Singapore Pte Ltd ("the 1st defendant") unconditional leave to defend. The last Registrar's Appeal No 170 ("RA 170") concerned the 2nd defendant's appeal against SAR Yap's dismissal of his application to amend his Defence filed on 3 October 2007.

2 After hearing the parties, I dismissed all three appeals. However, for RA 105, I varied the judgment sum granted to the plaintiff to the extent and for the reasons stated at [33] below. The 2nd defendant has since appealed against my decision in both RA 105 and RA 170. I now set out the grounds for my decision.

Background

The facts

3 The 1st defendant was a company incorporated in Singapore and was in the business of, *inter alia*, the manufacture and repair of machinery and machine tools, while the 2nd defendant was an assistant sales manager of the 1st defendant. The dispute between the parties arose out of an agreement between the plaintiff and Sin Yuh Industries (Pte) Ltd ("Sin Yuh") ("the agreement") whereby the plaintiff granted Sin Yuh two Regionalisation Finance Scheme ("RFS") loans ("RFS I" and "RFS II") to partially finance the purchase of 31 units of Yamazaki Mazak machinery ("the machines") from the 1st defendant. The loan amount under RFS I ("the loan agreement") was $1.94m ("the loan") and the loan amount under RFS II was $1.54m. There appears to be some dispute as to who the actual buyer of the machines was; the defendants alleged that the machines were sold not to Sin

Yuh, but to a Malaysian company known as Zhang Hui Industries Sdn Bhd ("Zhang Hui"), in which Sin Yuh held 69% of the shareholding. However, nothing really turns on this in the present proceedings, given that it is undisputed that the loan agreement was between Sin Yuh and the plaintiff and it is this loan agreement that is relevant for the purposes of the present proceedings.

4 Under the loan agreement, the amount to be financed for the machines was 60% of the valuation/purchase price of the machines or $1.94m whichever was lower. The two pre-conditions for the disbursement of the loan were:

(a) Sin Yuh shall furnish evidence satisfactory to the plaintiff that the difference between the purchase price of the machines and the loan (*i.e.*, 40% of the purchase price of the machines) has been paid by Sin Yuh to the 1st defendant; and

(b) the legal documentation as required by the plaintiff must be completed.

5 By way of an email from Joyce Tia Hui Yee ("Joyce"), the finance manager of Sin Yuh, dated 13 December 2002 and sent to the 2nd defendant, Sin Yuh requested that the 1st defendant provide the plaintiff with confirmation that the difference between the purchase price of the machines and the loan had been received from Sin Yuh (as part payment of the machines) and details of the 1st defendant's bank account for the disbursement of the loan. By way of letter dated 16 December 2002 to the plaintiff ("the letter"), the 1st defendant confirmed that it had received the sum of $1.293m from Sin Yuh, being 40% down payment of the machines and provided its bank account details to Sin Yuh. This letter was prepared and signed by the 2nd defendant.

6 Eventually, the plaintiff disbursed the loan to the 1st defendant's bank account on or about 10 March 2003. Sin Yuh subsequently defaulted on the repayments of the loan to the plaintiff and became insolvent.

7 For his involvement in the transaction, the 2nd defendant was later charged under s 420 read with s 109 of the Penal Code (Cap 224, 1985 Rev Ed) for allegedly conspiring with one Roger Cheong Sing Whee ("Roger"), the managing director of Sin Yuh, and Joyce to cheat the plaintiff into disbursing the loan to the 1st defendant and was convicted and sentenced to 20 months' imprisonment by a District Judge. On appeal, Yong Pung How CJ ("Yong CJ") amended the charge of conspiracy to one of abetment by intentional aiding the commission of the offence of cheating under s 107(c) of the Penal Code and reduced the sentence to 18 month's imprisonment (see *Hwa Lai Heng Ricky v Public Prosecutor* [2005] SGHC 195 ("*Hwa Lai Heng Ricky*")).

The plaintiff's claim against the 2nd defendant

8 As submitted in its written skeletal submissions, the plaintiff's claim against the 2nd defendant rested on the tort of deceit. Essentially, the plaintiff's case was that the 2nd defendant had falsely represented in the letter that the 1st defendant had received 40% of the purchase price of the machines from Sin Yuh when he knew that this was untrue. His misrepresentation had induced the plaintiff into disbursing the loan to the 1st defendant, causing the plaintiff to suffer a loss when Sin Yuh subsequently defaulted on the repayments and became insolvent.

9 For the claim against the 2nd defendant and its summary judgment application, the plaintiff relied on the 2nd defendant's conviction in the earlier criminal proceedings, where the prosecution's case against the 2nd defendant was that he had induced and deceived the plaintiff into disbursing the loan by preparing and sending the letter, despite knowing that Sin Yuh had not paid the 40% of the purchase price for the machines stated in the letter (*Hwa Lai Heng Ricky* at [7]-[8]).

10 In the affidavit of Henry Tan Bee Heng dated 31 October 2007 filed in support of the plaintiff's application for summary judgment (as well as in its written skeletal submissions), the plaintiff sought to highlight a few salient findings made by Yong CJ in arriving at his decision that the 2nd defendant was guilty of the offence. In particular, the plaintiff referred to Yong CJ's finding that the plaintiff was "materially influenced by the false pretence effected through P64 [*i.e.*, the letter]" and without it would not have disbursed the loan (*Hwa Lai Heng Ricky* at [18]). The plaintiff also pointed out that Yong CJ had rejected the 2nd defendant's defence in the criminal proceedings that he had an honest belief that 40% of the purchase price had been paid by Sin Yuh, given that he had thought that the payments made by Sin Yuh via post-dated cheques for 15 other machines under hire purchase agreements with Tokyo Leasing (Singapore) Pte Ltd ("Tokyo Leasing") and Arab-Malaysian Finance Bhd ("Arab-Malaysian") were payment for 40% of the purchase price of the machines. Yong CJ had, in fact, found that the 2nd defendant was well aware that this was not the case and that he had a dishonest intention when he sent out the letter (*Hwa Lai Heng Ricky* at [20]-[21]):

> 20 As for the third ingredient of dishonesty under s 420, s 24 of the Penal Code provides that anyone who does anything with the intention of causing wrongful gain to one person or wrongful loss to another, is said to do that thing dishonestly. *The appellant's [i.e., the 2nd defendant] intention was dishonest within the meaning of s 24 read with s 23 Penal Code, as there was an intention on his part to cause wrongful gain to his company, Yamazaki, or alternatively to cause wrongful loss to DBS*. On the facts of the case, I found that the representation in P64 was obviously false. At the material time, Yamazaki had only received $902,460 from Sin Yuh towards the payment for all the machines. Out of this, the appellant confirmed that $147,000 was supposed to have been considered as down payment for six machines under hire purchase arrangements with Tokyo Leasing; $291,000 was supposed to have been considered as the down payment for nine machines under hire purchase arrangements with Arab-Malaysian. This means that Yamazaki would have received from Sin Yuh only about $464,460 (and not $1.293m as represented in P64) for the 31 machines.
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> 21 As the trial judge helpfully observed, the appellant had been hounding Cheong and Joyce for the payment of the machines for some time. He knew Sin Yuh must show that it had made a 40% deposit payment for the 31 DBS machines before the loan could be disbursed. The appellant must have known that DBS would not disburse the loan had it known that Sin Yuh only paid less than 40% of the purchase price. *Thus, the appellant prepared P64 [i.e., the letter] to induce DBS to disburse the loan*. At this juncture, I would also dismiss the appellant's contention that he did not send P64. *It did not matter whether Joyce or the appellant sent P64. What was important was that the letter was prepared by the appellant who harboured a dishonest intention, and the letter did in fact result in the deception and inducement of DBS into disbursing the moneys*. Consequently, I agreed with the judge's conclusion that the elements of s 420 Penal Code had been satisfied.
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> [emphasis added]

11 In his show cause affidavit, the 2nd defendant raised (again) the defence of an honest belief based on the post-dated cheques, as well as an alleged breach by the plaintiff of a condition imposed on it by the Economic Development Board of Singapore ("EDB"), which managed the RFS. Clause 3 of the terms and conditions set out in a letter from EDB to the plaintiff dated 25 February 2003 ("the EDB letter") provided that the machines should not be financed under the RFS if deposit on the machines had been made prior to the submission of the application form for RFS to the plaintiff. The 2nd defendant averred that Sin Yuh's application for RFS was dated 13 June 2002, yet partial payment of 40% of the purchase price had been made by Sin Yuh for the machines in January 2002.

12 On the strength of the findings made by the court in the criminal proceedings, AR Teo was satisfied that the plaintiff's current cause of action against the 2nd defendant was made out. He noted that the new defences raised by the 2nd defendant in his show cause affidavit were not pleaded in his defence and, in the absence of good reasons, should not be considered. In any event, he was also of the opinion that the 2nd defendant had failed to raise any triable issues in both his Defence or show cause affidavit:

> The findings of the criminal court and on appeal coincide with all the essential ingredients of the Plaintiff's current cause of action in fraudulent misrepresentation. It becomes incumbent on the second Defendant to show cause why this matter should nevertheless proceed to trial. This I find that the second Defendant has failed to do, whether in his defence or show cause affidavit. In particular, his references to the post-dated cheques and the EDB conditions are not pleaded in his defence, and in the absence of any good reason, these should not be considered for the purposes of this summary judgment application: *United States Trading v Ting Boon Aun*. In any event, I do not find that these points raise any triable issues.

Accordingly, he granted summary judgment against the 2nd defendant.

13 Subsequent to AR Teo's decision, the 2nd defendant sought to amend his Defence to essentially include the defences raised in his show cause affidavit. This application was dismissed by SAR Yap on the basis that the amendments were prayed for post summary judgment and that the defences, in any event, were not viable and would not change the outcome of the summary judgment.

14 Before me, counsel for the 2nd defendant, Mr Loo Dip Seng ("Mr Loo"), relied mainly on the same two defences raised in the 2nd defendant's show cause affidavit in support of the 2nd defendant's appeal. In his written skeletal submissions, Mr Loo further argued that the terms and conditions in the agreement (in which a few clauses provided that the loan was subject to the written approval of EDB) showed that the plaintiff was acting as agent for EDB and thus EDB was the right party to sue, not the plaintiff. Reference was also made to the Notes of Evidence dated 24 May 2005 in the criminal trial where Mr Choo Jon Haw, a relationship manager with the plaintiff at the material time, had given evidence that there was a loss sharing arrangement between EDB and the plaintiff in regard of the loan whereby they agreed to share the loss in percentages of 70% and 30% respectively. Mr Loo thus argued that the plaintiff, at most, suffered only a loss of 30% of the loan. Mr Loo also made it a point to stress that although, by virtue of s 45A of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), the conviction of the 2nd defendant, the charge, the statement of facts, the record of criminal proceedings were all admissible as evidence in the present civil proceedings, this was subject to the express qualification in s 45A(3) which entitled the convicted person to prove the contrary.

The plaintiff's claim against the 1st defendant

15 Although the plaintiff had pleaded various causes of action against the 1st defendant in its Statement of Claim, the plaintiff proceeded against the 1st defendant for summary judgment only on the sole basis of vicarious liability for the acts or omissions of the 2nd defendant. In its Defence filed on 19 September 2007, the 1st defendant pleaded at paragraph 13(c) that the letter was prepared by the 2nd defendant acting outside the scope of his authority (whether actual, usual or apparent) and therefore it was not bound by it. This was reiterated in the show cause affidavit of Mr Toshimitsu Kito dated 26 November 2007. AR Teo took the view that it was clearly a triable issue as to whether the 2nd defendant was acting within his scope of authority when he issued the letter to the plaintiff, and, accordingly, granted unconditional leave to defend to the 1st defendant.

16 Before me, counsel for the plaintiff, Mr Terence Tan ("Mr Tan"), argued that the 2nd defendant, as an assistant sales manager of the 1st defendant, must at least have the apparent authority to send out the letter. On that basis, Mr Tan argued that the plaintiff should be entitled to summary judgment against the 1st defendant as well. Counsel for the 1st defendant, Mr Chua Sui Tong ("Mr Chua"), however, argued that the question of whether the 2nd defendant had apparent authority to issue the letter on the 1st defendant's behalf was itself a triable issue that could not be decided summarily, but only at trial.

My decision

The applicable principles for summary judgment

17 The applicable principles governing summary judgment are well established. The purpose of O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) is simply to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried (*Singapore Civil Procedure 2007* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2007) at paragraph 14/4/1). It would suffice for me to refer to the Court of Appeal's decision in *Habibullah Mohamed Yusoff v Indian Bank* [1999] 3 SLR 650 where Karthigesu JA, delivering the judgment of the court, held at [21]:

> Under O 14 r 3(1) of the Rules of Court, summary judgment should not be given where the defendant 'satisfies the Court … that there is an issue or question in dispute which ought to be tried'. *The power to give summary judgment under O 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment*, and where it is inexpedient to allow a defendant to defend for mere purposes of delay; *Jones v Stone* [1894] AC 122. Where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend; *Ironclad (Australia) Gold Mining Co v Gardner* (1887) 4 TLR 18, *Ward v Plumbley* (1890) 6 TLR 198. [emphasis added]

RA 105

18 As mentioned, the plaintiff's case against the 2nd defendant rested on the latter's criminal conviction in *Hwa Lai Heng Ricky* ([7] *supra*). The second defendant did not deny that his conviction in the criminal proceedings was relevant and admissible in the present proceedings, but argued that he was not estopped by his conviction from denying and disputing liability in the present case, in the light of s 45A(3) of the EA.

19 Indeed, evidence of a criminal conviction is now admissible for any other subsequent proceedings under s 45A of the EA, which provides as follows:

> **Relevance of convictions and acquittals**
>
> **45A.** —(1) Without prejudice to sections 42, 43, 44 and 45, the fact that a person has been convicted or acquitted of an offence by or before any court in Singapore shall be admissible in evidence for the purpose of proving, where relevant to any issue in the proceedings, that he committed (or, as the case may be, did not commit) that offence, whether or not he is a party to the proceedings; and where he was convicted, whether he was so convicted upon a plea of guilty or otherwise.
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> (2) A conviction referred to in subsection (1) is relevant and admissible unless —

(a) it is subject to review or appeal that has not yet been determined;

(b) it has been quashed or set aside; or

(c) a pardon has been given in respect of it.

(3) A person proved to have been convicted of an offence under this section shall, unless the contrary is proved, be taken to have committed the acts and to have possessed the state of mind (if any) which at law constitute that offence.

(4) Any conviction or acquittal admissible under this section may be proved by a certificate of conviction or acquittal, signed by the Registrar of the Supreme Court or the Registrar of the Subordinate Courts, as the case may be, giving the substance and effect of the charge and of the conviction or acquittal.

(5) Where relevant, any document containing details of the information, complaint, charge, agreed statement of facts or record of proceedings on which the person in question is convicted shall be admissible in evidence.

(6) The method of proving a conviction or acquittal under this section shall be in addition to any other authorised manner of proving a conviction or acquittal.

(7) In any criminal proceedings, this section shall be subject to any written law or any other rule of law to the effect that a conviction shall not be admissible to prove a tendency or disposition on the part of the accused to commit the kind of offence with which he has been charged.

(8) In this section, "Registrar" has the meaning assigned to it in the Supreme Court of Judicature Act (Cap. 322) and the Subordinate Courts Act (Cap. 321), respectively.

20 Section 45A(1) makes it plain that such evidence is admissible whether the convicted person had pleaded guilty or was convicted after trial. Section 45A(5) further clarifies that the charge, the agreed statement of facts and the record of proceedings on which the person in question is convicted are also admissible as evidence.

21 It would be of some interest to note that s 45A was, in fact, introduced via the Evidence (Amendment) Act 1995 (No 8 of 1996) to abolish the old common law rule embodied in the English Court of Appeal decision of *Hollington v F Hewthorn and Company Limited* [1943] 1 KB 587 ("*Hollington*") that a prior conviction could not be adduced for the purpose of proving the guilt of the defendant in subsequent civil proceedings relating to the same matter (see Jeffrey Pinsler, Evidence, Advocacy and the Litigation Process (LexisNexis, 2nd Ed, 2003) at pp 172-174; see also *Ong Bee Nah v Won Siew Wan (Yong Tian Choy, third party)* [2005] 2 SLR 455 ("*Ong Bee Nah*") at [51]). Two years before its enactment, the Singapore High Court had actually departed from this common law rule in *Choo Michael v Loh Shak Mow* [1994] 1 SLR 584 ("*Choo Michael*"). The criticisms of the rule in *Hollington*, the subsequent decline and fall of the rule in the common law jurisdictions and the legislative intent and rationale behind the enactment of s 45A in Singapore are set out very ably by Andrew Phang Boon Leong JC (as he then was) in *Ong Bee Nah*.

22 The purpose behind s 45A is to save judicial time and legal costs by not having to re-litigate issues in civil proceedings where the same issues have been previously decided by a court in criminal proceedings (see *Ong Bee Nah* at [51] where the relevant parliamentary debate is set out; see also *PP v Heah Lian Khin* [2000] 3 SLR 609 at [89]). It also prevents, in the words of Goh Joon Seng J

("Goh J"), "a collateral attack by means of a civil action against a final decision of a court of competent criminal jurisdiction" (*Choo Michael* at 600). Bearing in mind that the standard of proof of beyond reasonable doubt in criminal proceedings is much *higher* than that of a balance of probabilities in civil proceedings, it only makes eminent sense to allow evidence of conviction to be admissible in subsequent civil proceedings, founded upon the same conduct of the convicted person. The difference in the standard of proof as well as the difference in the procedure in regard to the adducing of evidence in criminal and civil proceedings would mean that a finding of culpability against a person upon a contested criminal trial is of higher probative value than that in civil proceedings. As pertinently noted by the Law Reform Committee of Great Britain (Law Reform Committee, Fifteenth Report (The Rule in *Hollington v Hewthorn*) (Cmnd 3391, 1967)) at paragraphs 6 and 11 ("the report", which resulted in the legislative abolition of the rule in England):

> 6. … Basically the decision-making process is the same in both criminal and civil proceedings, but there are two significant differences which are relevant to the probative value of findings of culpability or lack of culpability by criminal courts and civil courts. A finding of culpability by a criminal court must not be made unless the court is satisfied beyond reasonable doubt that the accused is guilty of the offence with which he is charged. If not so satisfied, the court must make a finding of lack of culpability, even though it may be of opinion that it is more likely than not that the accused was guilty. In civil proceedings a finding of culpability must be made upon the balance of probabilities, i.e. if the court is of opinion that it is more likely than not that a party was culpable of civil wrong in respect of which he is sued. Secondly, although in both criminal and civil proceedings the court must form its opinion upon the evidence adduced before it, in civil proceedings in general the parties have complete liberty of choice as to how to conduct the respective cases and what material to place before the court, and, except in some matrimonial causes, the court has no duty to inquire whether all material relevant to its decision has been brought to its notice. In criminal cases, on the other hand, it is the practice and the duty of the prosecution, as well as adducing evidence which tends to show the culpability of the accused, either itself to adduce or to make available to the defence any material of which it has knowledge which tends to show his non-culpability. There is no corresponding duty on the defence as respects evidence of culpability. It is also the duty of the presiding judge in trials on indictment to exclude evidence against the accused if he considers that its prejudicial effect would outweigh its true probative value. *For these reasons, a finding of culpability against a person upon a contested trial in criminal proceedings is of higher probative value than a finding of culpability against him in civil proceedings*, and a finding of lack of culpability against a person in criminal proceedings is of lower probative value than such a finding in civil proceedings…
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> 11. … Any layman would, we think, regard the fact of such conviction as a firm foundation for the belief that the accused had conducted himself in such a manner as to constitute the criminal offence of which he was convicted and, if such criminal offence would also constitute a civil wrong, that the accused had committed a civil wrong also. We, too, share this commonsense view.
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> [emphasis added]

23 In fact, the contrary rule as embodied in *Hollington* offends one's sense of justice and has the undesirable implication that a conviction by a competent criminal court is as likely to be wrong as right (the report at paragraph 3):

> *Rationalise it how one will, the decision in [Hollington] offends one's sense of justice*. The defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil; the degree of carelessness

> required to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil cause of action in negligence. Yet, the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to prima facie evidence of his negligent driving at that time and place. *It is not easy to escape the implication in the rule in [Hollington] that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right*… [emphasis added]

24 It must be borne in mind that the admissibility of evidence of a criminal conviction is not conclusive in and of itself (*Choo Michael* at 600; *Ong Bee Nah* at [42]). Indeed, this is provided for in s 45A(3) of the EA. The *Butterworths' Annotated Statutes of Singapore* (Jeffrey Pinsler gen ed) (Butterworths Asia, 1997 Issue) in vol 5, Evidence, at p 141 explains the sub-section as follows:

> **Sub-s (3)** *Proof of the conviction is not conclusive, but is a presumption of law which may be rebutted by proof that there was no conviction*. If unrebutted, the person concerned is regarded, by law, as having had the mens rea (if required by the offence) for, and as having committed the actus reus of, the offence [emphasis added].

25 As for the weight to be given to evidence from criminal proceedings, a holistic approach should be adopted in assessing the precise weight which should be attached to such evidence (*Ong Bee Nah* at [62]; this approach was endorsed by the Court of Appeal in *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR 513 at [111]-[112]). However, there is no doubt that such evidence will, in the nature of things, "figure in the court's mind in at least a minimally substantive way" (*Ong Bee Nah* at [62]), though the court must always be prepared to "take into account evidence to the contrary that might prevail at the end of the day" (*id*).

26 Returning to the present case, it was indeed open to the 2nd defendant to show that notwithstanding the fact that the plaintiff's action in the present civil proceedings was founded ultimately upon the same criminal conduct in *Hwa Lai Heng Ricky*, he had not "committed the acts" and he did not possess the "state of mind (if any) which at law constitute[d]" the offence he had been convicted of in *Hwa Lai Heng Ricky*. However, it must also be borne in mind that we are concerned here with an O14 application and all that the 2nd defendant has to show is a triable issue or a fair case for defence at this stage (see [17] above). He need not discharge the burden of rebutting the presumption in s 45A(3). Nonetheless, he must, at least, be able to give good reasons why he would have a good chance of rebutting this presumption if the matter was to proceed to trial. Unfortunately, the 2nd defendant has failed to do this.

27 The 2nd defendant's Defence filed on 3 October 2007 was just a bare denial of the first plaintiff's claim against him. In its show cause affidavit, the 2nd defendant raised, for the first time, two new defences. The 'main' defence appeared to be the honest belief defence based on the post-dated cheques. However, this was the same defence raised by the 2nd defendant in the criminal proceedings, which was categorically rejected by the court. As noted above (see [10]), Yong CJ had found that it was impossible that the 2nd defendant could have mistaken these cheques as payment for the 40% down payment for the machines when he knew exactly that a good number of them were actually the down payment for 15 other machines. It was also found, contrary to the 2nd defendant's contention, that Joyce did not give any instructions to the 2nd defendant to reallocate the funds under the hire purchase agreements with Tokyo Leasing and Arab-Malaysian to the machines as 40% of the purchase price. In fact, there was credible evidence which contradicted the 2nd defendant's contention (*Hwa Lai Heng Ricky* at [25]):

> The appellant admitted that he was responsible for full payment for all the machines and that his superior had been keen to ensure Sin Yuh made prompt payments. The appellant knew of the DBS

loan application as early as May 2002 and had admitted that Sin Yuh had become a huge liability to Yamazaki. Thus, it would not be inconceivable that he did in fact chase Sin Yuh for payment. In addition, the *appellant did not confirm Joyce's verbal instructions to reallocate funds in writing, or reflect these instructions in some internal record, or communicate these instructions to the boss who took an active interest in ensuring Sin Yuh made its payments. In fact, these purported instructions were contradicted by Yamazaki's records. Six months after DBS had disbursed the loan, the appellant wrote to Joyce stating that, based on Yamazaki's own records, a substantial amount was still outstanding for a number of DBS machines, and requested full payment for these machines*. Consequently, I was in agreement with the trial judge's conclusion that Joyce did not instruct the appellant to reallocate the funds. [emphasis added]

No other reason was furnished by the 2nd defendant in his show cause affidavit as to why the same defence would work in the present civil proceedings.

28 It would perhaps be apposite to make some reference to the case of *Choo Michael* ([21] *supra*) here. In that case, the plaintiff's action against the defendant, a director and 50% shareholder of a broker company for the purchase and sale of commodities, was similarly based on the tort of deceit. Likewise, the defendant had earlier been convicted in criminal proceedings for several counts of abetment of cheating by conspiring with others to cheat the company's clients (including the plaintiff) of money by deceiving them into believing that their gold trading orders would be placed with authorized international gold exchanges and thereby, inducing them into paying money into the company. In the civil proceedings, the defendant relied on the same defence that he had relied on in the criminal proceedings, *viz*, that he was never in charge of trading operations at the company and was not aware that the clients' orders were not sent for execution. The defence was rejected by both the District Court and the High Court (on appeal), given that the prosecution had adduced evidence to show that the defendant himself had actual knowledge of such illicit operations, that he had, in fact, profited greatly from it and had destroyed accounting books and documents to prevent the discovery of such deceit (*Choo Michael* at 588). Relying on the defendant's conviction in the criminal proceedings, Goh J found that "the defendant had procured or directed the commission of the tort of deceit as a director of BVC as evidenced by the acts for which he was convicted in the criminal proceedings" (*Choo Michael* at 600). He therefore allowed the plaintiff's claim.

29 Similarly, in *Hwa Lai Heng Ricky*, there was also clear evidence which showed that the 2nd defendant was well aware that not all the post-dated cheques constituted the 40% purchase price for the machines and that he had received no instructions from Sin Yuh to treat such post-dated cheques as payment of the 40% purchase price of the machines (see [10] and [27] above). In the light of the 2nd defendant's conviction and the fact that no other good reason was proffered by the 2nd defendant as to why the same defence would succeed in the present action, I am not satisfied that the 2nd defendant has raised a fair defence or a triable issue on the honest belief defence based on the post-dated cheques.

30 As for the defence based on the plaintiff's alleged breach of the condition imposed by EDB, I am of the view that this was really a non-starter and was a red-herring. The alleged breach of the condition, even if true, clearly had no bearing on the plaintiff's claim against the 2nd defendant which was based on the tort of deceit, *i.e.*, that the 2nd defendant had falsely misrepresented to the plaintiff that the 40% purchase price for the machines had been fully paid by Sin Yuh. The alleged breach of the condition, if anything, was purely a matter between the plaintiff and EDB.

31 I also do not find any merit in the arguments based on agency and the alleged loss sharing arrangement (see [14] above). The loan was indeed subject to the written approval of EDB, but this, without more, could not suggest that the plaintiff was acting as EDB's agent in the transaction. In

fact, nothing in the agreement or the EDB letter suggested that EDB and the plaintiff were in a relationship of agency. As for the alleged loss sharing arrangement, this was not evidenced in the agreement or the EDB letter. It was undisputed that the loan was disbursed by the plaintiff to the 1st defendant and that the parties to the loan agreement were the plaintiff and Sin Yuh. The plaintiff was clearly entitled to sue for the loan. If indeed there was a loss sharing arrangement between the plaintiff and EDB and that EDB had previously reimbursed the plaintiff the loan, it would be up to EDB to recover 70% of the loan from the plaintiff. That is a matter strictly between EDB and the plaintiff and has no bearing on this case.

32 In conclusion, the 2nd defendant has failed, in my opinion, to raise any fair defence or triable issue. Mr Loo stressed repeatedly that s 45A(3) of the EA gave the 2nd defendant a statutory right to prove that he had not committed the criminal offence and to 'shut out' the 2nd defendant at this preliminary stage would be to deny the 2nd defendant of this opportunity to do so. As mentioned, s 45A(3) does indeed provide that evidence of conviction is not conclusive in itself and it is open to the defendant to rebut the presumption. However, this alone, cannot be sufficient for the grant of leave to defend in the present case where the 2nd defendant has not shown why the same defence raised in the criminal proceedings has a good chance of succeeding in this civil action. Indeed, it is bound to fail.

33 In the result, I affirmed AR Teo's decision granting summary judgment to the plaintiff in its claim against the 2nd defendant. However, Mr Loo informed me at the hearing that AR Teo was wrong to enter judgment for the full sum of $1.94m given the fact that the plaintiff have since recovered 26 of the 31 machines and have sold them. In view of this fact, I reduced the judgment sum from $1.94m by the net sales proceeds of the 26 machines (*i.e.*, the sale proceeds less only the necessary expenses incurred by the plaintiff to effect the sale). I also ordered interest at 5.33% per annum on the sum of $1.94m from the date of disbursement of the loan until the date of sale of the 26 machines and thereafter on the net amount after deduction of the net sales proceeds.

RA 170

34 The 2nd defendant's application to amend his Defence appeared to have been sparked by AR Teo's comments that the "references to the post-dated cheques and the EDB conditions [were] not pleaded in [the 2nd defendant's] defence", when AR Teo delivered his decision granting summary judgment for the plaintiff's claim against the 2nd defendant. I agree with SAR Yap that good grounds must be shown by the 2nd defendant before the court would allow the 2nd defendant's application, given that the amendments to the Defence were prayed for post summary judgment.

35 The proposed amended Defence essentially sought to introduce the two new defences raised for the first time in the show cause affidavit, as well as the arguments on agency and the alleged risk sharing arrangement between EDB and the plaintiff. As already demonstrated, these defences and/or arguments were wholly without merit. Given that I have found that the 2nd defendant has failed to raise any fair defence or triable issue despite raising these two defences in his arguments, it would follow that the 2nd defendant's appeal against SAR Yap's decision should also be dismissed. In any event, I am of the opinion that the amendments were clearly an afterthought in the light of AR Teo's decision of 18 March 2008 and there were no good reasons for allowing them.

RA 110

36 As mentioned, the plaintiff proceeded against the 1st defendant for summary judgment on the sole basis of vicarious liability for the acts or omissions of the 2nd defendant. Mr Tan pointed out that the 2nd defendant, as the assistant sales manager of the 1st defendant, was found by Yong CJ to be

responsible for collecting orders, co-ordinating production schedules, preparing delivery orders and invoices and collecting payment from customers (*Hwa Lai Heng Ricky* at [2]-[3]). It must then follow that he had at least apparent authority to send out the letter to the plaintiff. However, Mr Chua rightly pointed out that Yong CJ had actually found that the 2nd defendant did not check with his superiors before sending out the letter (*Hwa Lai Heng Ricky* at [28]). In fact, it was the 1st defendant's defence that the 2nd defendant had acted on his own and outside the scope of his authority (whether actual, usual or apparent) in sending out the letter and that it was simply not within the 2nd defendant's job scope, as an assistant sales manager, to issue confirmations directly to third parties (such as the plaintiff) regarding the status of the 1st defendant's customer accounts.

37 I agree with AR Teo that it was clearly a triable issue as to whether the 2nd defendant was acting within his scope of authority when he issued the letter to the plaintiff and/or whether the 2nd defendant had the apparent authority to issue the letter to the plaintiff on the 1st defendant's behalf. Accordingly, I dismissed the plaintiff's appeal against AR Teo's grant of unconditional leave to defend to the 1st defendant.

Conclusion

38 For the above reasons, I dismissed all three appeals, with a variation of the judgment sum awarded to the plaintiff against the 2nd defendant. As for costs, I ordered the 2nd defendant to pay the plaintiff costs of $5,000 and $2,500 for RA 105 and RA 170 respectively. The plaintiff, however, is to pay the 1st defendant costs of $2,500 for RA 110. The costs for the summary judgment application against the 1st defendant before AR Teo are to be costs in the cause.

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