IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 23

Civil Appeal No 30 of 2021

Between

Kashmire Merkaney

… *Appellant*

And

NCL Housing Pte Ltd

… *Respondent*

Summons No 8 of 2022

Between

Kashmire Merkaney

… *Applicant*

And

NCL Housing Pte Ltd

… *Respondent*

In the matter of Suit No 297 of 2019

Between

NCL Housing Pte Ltd

… *Plaintiff*

And

(1) Sea-Shore Transportation Pte Ltd
(2) Kashmire Merkaney

(3) Sushela w/o Vijayarahavan

… *Defendants*

EX TEMPORE JUDGMENT

[Credit And Security — Guarantees]
[Civil Procedure — Leave to adduce further evidence]

Kashmire Merkaney
v
NCL Housing Pte Ltd and another matter

[2022] SGHC(A) 23

General Division of the High Court (Appellate Division) — Civil Appeal No 30 of 2021 and Summons 8 of 2022
Belinda Ang Saw Ean JAD, Woo Bih Li JAD and Quentin Loh JAD
26 May 2022

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Belinda Ang JAD (delivering the judgment of the court *ex tempore*):

1 AD/CA 30/2021 ("the Appeal") is the appeal of Kashmire Merkaney ("the Appellant") against the entirety of the decision of the Judge below in *NCL Housing Pte Ltd v Sea-Shore Transportation Pte Ltd and others* [2021] SGHC 29 ("the Judgment"), where the Judge granted judgment in favour of NCL Housing Pte Ltd ("the Respondent"). SUM 8/2022 is the Appellant's application for leave to adduce further evidence on appeal ("the Application").

2 The Appellant gave 20 personal guarantees for 20 corresponding interest-free loans ("the Loans") that were made by the Respondent to her father-in-law's company, Sea-Shore Transportation Pte Ltd ("SST"). Each loan was for a year. The 20 guarantees were given over a period, from 29 November 2016 to 4 October 2017. The Respondent sued the Appellant after SST defaulted on the loans totalling $4,090,830.26 ("the Loan Amount"). The crux of the

Appellant's defence before the Judge was that there was an oral agreement not to enforce the personal guarantees, and the personal guarantees were a mere formality. She also claimed that the Respondent had acted unconscionably because of the exploitative circumstances under which she issued the personal guarantees, and the Respondent's conduct which caused SST to collapse and default in repayment of the Loan Amount. In addition, the Appellant counterclaimed for rescission of the personal guarantees and damages for breach of the oral agreement. In so far as the Appellant's pleadings mentioned misrepresentation, this was premised on the terms of the oral agreement and did not take her case any further. In her appeal, she focussed on the oral agreement (and not misrepresentation), and we do so likewise while also addressing her allegations about the Respondent's conduct.

3 The Judge did not accept her defences, and found that the alleged oral agreement did not exist. On appeal, the Appellant repeated these arguments, and additionally raised the defence of economic duress, that she was coerced into signing the personal guarantees. But this was not the pleaded case before the Judge, and on that basis we decline to consider it.

4 On the existence of the oral agreement, the Judge's findings could not be said to be against the weight of the evidence:

(a) The allegation about the oral agreement was raised only after the Respondent had filed an action to claim repayment of the Loans.

(b) The Judge rightly considered that all of the Loan Agreements contained an "entire agreement" clause, which put paid to the oral agreement argument raised by the Appellant.

(c) There is no documentary evidence supporting the Appellant's assertion that the Respondent promised not to enforce the personal guarantees.

(d) As we agree with the Judge that the oral agreement did not exist, this would also dispose of the Appellant's contention that she was wrongfully removed as a director, as the said oral agreement allegedly included a term that she would not be removed as a director.

(e) Further, given the Judge's findings on the Appellant setting up Seashore Holdings Pte Ltd ("SSH"), it is unsurprising that the Respondent had to act as it did.

5 We note that the crux of the Appellant's case on appeal is that the Judge came to the wrong conclusion because he did not have the benefit of considering other evidence, which she claimed was due to her counsel's incompetence to put before the Judge. On that basis, we turn to address the Application.

6 We do not find the Application meritorious. The Appellant would need to show that she has fulfilled the three requirements in *Ladd v Marshall*, namely that (i) the evidence could not have been obtained with reasonable diligence; (ii) the evidence would be material to the outcome of the appeal; and (iii) the evidence is credible. These are cumulative requirements: *BNX v BOE* [2018] 2 SLR 215 at [74]. The *Ladd v Marshall* requirements should be applied with full rigour when proceedings below were a full trial: *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 ("*Anan*"). But they may be relaxed where: (a) the new evidence reveals a fraud that has been perpetrated on the trial court; (b) the applicant was prevented from adducing further evidence during the hearing below in circumstances which amount to a

denial of natural justice; or (c) the subject matter of the dispute engenders interests of particular importance to the litigant or to the society at large (*Anan* at [58]). The Appellant could, at best, make the argument for the court to relax the *Ladd v Marshall* requirements under situation (b).

7 In our view, the *Ladd v Marshall* requirements should be applied with full rigour, as the proceedings below were a full trial. Moreover, the requirements should not be relaxed in this case. Although she alleged that it was her counsel's incompetence or refusal to put before the Judge evidence of three witnesses, we do not find that a valid reason to relax the *Ladd v Marshall* requirements. First, that her counsel was incompetent or refused to put forward such evidence is a bare allegation on her part. The evidence of three witnesses could have been obtained with reasonable diligence. Her explanation that her counsel did not call Mr Chua Choon Meng ("Mr Chua"), Mr Mohamed Husainsa Meraikayar Syed Mushathik ("Mr Husainsa") and Mr Liow Fook Kee ("Mr Liow") to testify because their evidence was irrelevant is a matter between the Appellant and her counsel who had conduct of the counterclaim and defence. She similarly claims that the counsel advised that the other evidence, namely the account books of another company, SSH, was not relevant to her claim of personal guarantees. Counsel's alleged error, if any, is not a valid reason to adduce further evidence which was otherwise available.

8 Secondly, as we address below in considering the *Ladd v Marshall* requirements, the evidence of the three witnesses is not material. Crucially, the affidavit evidence of Mr Chua, Mr Husainsa and Mr Liow is untested. As this court has considered in *Yee Heng Khay (alias Roger) v Angliss Singapore Pte Ltd and another matter* [2022] SGHC(A) 20 at [32], it is at odds with the exercise of appellate jurisdiction to reverse the judgment below on the basis of untested evidence. That would require us to act as the court of first instance, and

that is not the basis for appellate jurisdiction. Admitting such evidence would also be prejudicial to the Respondent who has not tested such evidence and put its case to the witnesses.

9 Moreover, from the affidavits, none of the three witnesses have personal knowledge of the alleged oral agreement. They have no personal knowledge of the meeting that allegedly took place, which renders their evidence on the oral agreement essentially hearsay. We further observe the following:

(a) On Mr Husainsa's claim that the representative of NCL, one Mr Choo Kim Hiong ("Mr Choo"), had refused to co-sign cheques, his assertion does not address the allegation of unconscionability that Mr Choo had unreasonably refused to sign cheques, which has been raised before and addressed by the Judge.

(b) The account books of SSH and the correspondence with William Loh are similarly immaterial to the current appeal. They do not show how such an oral agreement existed.

(c) As the Respondent has rightly pointed out in the Respondent's Case, the Appellant has not established that the documentary evidence is authentic or credible. This is an unaudited account signed by Mr Balan Vijayarahavan Pillai ("Mr Balan"), the Appellant's husband, who was also called as a witness below but failed to introduce such evidence. Also, the account has no bearing on the issues at trial. The same can be said about the correspondence with Mr William Loh. They were never produced during the trial even though they were within the Appellant's possession. The Appellant has also failed to explain in her affidavit why this is material. The correspondence with Mr Loh is similarly immaterial. In any event, the WhatsApp messages in July 2020 relate to

the judicial management process of SST, which has no bearing on the Appellant's case on appeal pertaining to the formation of an oral agreement as early as 2016.

10 On the issue of unconscionability, which is another issue the Appellant has re-stated on appeal, we do not find the Appellant's allegations meritorious. The Judge has dealt with her allegations comprehensively, and rightly found that her allegations did not meet the legal requirements set out in *BOM v BOK and another appeal* [2019] 1 SLR 349, because the burden is on the Appellant to show that there was an infirmity of such gravity that was exploited by the Respondent in procuring the transaction. The Judge had gone through these factors and concluded that the allegations simply did not meet the threshold, and in any event these allegations were not factually sound:

(a) **Impecuniosity**: the Appellant's allegation of her impecuniosity and the Respondent's knowledge of it runs contrary to the contemporaneous evidence. In his WhatsApp messages to the Respondent's representatives, Mr Balan offered his two family homes worth $2.5m as security. Further, SST was a family business with a long history, the Judge rightly found that there was basis for the Respondent to assume that the family could have accumulated wealth from it over the years. But this is not in any event material given that we have dismissed the oral agreement argument.

(b) **The Appellant's mental state**: even if we take the Appellant's evidence at face value that she suffered from depression, this was never conveyed to the Respondent at the time of the relevant agreements. Neither was it suggested at trial that the Respondent was aware of her

depression. Therefore, it is not material to the validity of the personal guarantees.

(c) **The lack of independent legal advice**: the evidence shows that the Appellant was assisted by solicitors during the negotiation of various agreements. This was accepted by the Appellant at trial. There was even an email dated 1 February 2017 from her solicitors referring to the fact that the debts were personally guaranteed (see Judgment at [33]).

(d) **Oppressive terms**: the terms of the Loans could not be said to be oppressive. They were interest-free for a year, and after which an interest rate of 10% per annum would apply. The Appellant has failed to show how these were unfair terms. Neither could she show that the terms of the personal guarantees were one-sided, as she had legal representation at the material time.

(e) **Proposals**: The Judge has also applied his mind to the proposals, which the Appellant claimed were proposed settlements the Respondent had unreasonably rejected.

(i) For the Kerry-ITS offer, Mr Balan liaised with Mr William Loh, and yet no meeting happened. It was not the Respondent who rejected the offer.

(ii) The other offers were either not relevant to settling the Loan Amounts in question, or took place after the commencement of this suit. The Judge was right in finding that the Respondent did not act unreasonably in relation to these proposals.

11 In addition, the Appellant argued that the Respondent had managed SST poorly, and "destroyed" SST, such that SST could not pay back the Loans. The Judge has dealt with and rejected her allegation. The Judge found that NCL did supply the necessary funding to SST and did not breach any commitment to SST. We are of the view that the Judge's findings are supported by evidence, and the further evidence the Appellant seeks to adduce, for the reasons stated above, does not suffice to show that the Judge's findings were plainly wrong.

12 The Appellant also raised various allegations in this appeal, such as the Respondent's failure to fulfil its "obligation" to lend her $5m and the alleged wrongful appointment of Mr Azad Deen. Regarding the $5m, the Judge has rightly considered the point at para 40 of the Judgment that this was not the Appellant's pleaded case, nor was it in the AEIC, and was a baseless claim. We agree.

13 Insofar as the appointment of Mr Deen is concerned, these events took place before the trial below commenced. The judicial management process commenced in 2019, and the Appellant swore the affidavit of evidence-in-chief for the trial below in October 2020. Although she did mention Mr Deen's father misappropriating company assets in 2017 and the fact of Mr Deen's appointment, she made no mention how Mr Deen's appointment or his dealings with the judicial manager had any bearing on her case, which was about the enforceability of the personal guarantees or the defence of unconscionability. We reiterate our earlier point that it is not within the appellate jurisdiction to address such new points of fact that should have been raised before the Judge.

14 We therefore dismiss both the Application and the Appeal. The parties' cases are largely factual. The Judge has dealt with the salient issues comprehensively, and the Appellant has not shown that his findings were

against the weight of the evidence or plainly wrong. As such, appellate intervention is unwarranted.

15 On the issue of costs, there are four items to be considered: (a) the Application to adduce further evidence; (b) the appeal; (c) the previous Extension of Time Application by the Appellant under Summons 33; and (d) the Striking Out Application by the Respondent. The Respondent now seeks a total of $55,000 plus disbursements of $3,888 for all four items of costs.

(a) On the Striking out Application, we decline to award costs. The Respondent could have waited for the appeal to be deemed withdrawn instead of filing the Striking Out Application.

(b) Therefore, we fix lump sum costs for (a), (b) and (c) at $45,000 all-in.

16 The usual consequential orders apply.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

The Appellant in person and unrepresented;
Mulani Prakash P and Safiuddin Naseem (M&A Law Corporation)
for the Respondent.