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

[2023] SGHC 37

Suit 1150 of 2020

Between

Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani

… *Plaintiff*

And

(1) Nantakumar s/o V Ramachandra
(2) Benshaw Commodities Pte Ltd

… *Defendants*

JUDGMENT

[Contract — Breach]

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Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani
v
Nantakumar s/o v Ramachandra and another

[2023] SGHC 37

General Division of the High Court — Suit 1150 of 2020
Lee Seiu Kin J
15, 16 March, 13 May, 7 September 2022

17 February 2023 Judgment reserved

Lee Seiu Kin J:

Introduction

1 Every investment carries with it certain risks. In return for taking on that risk, the investor is rewarded financially. There are times, however, when the investor not only loses out on potential gains, but his or her entire capital sum as well. This was the crux of the dispute in the case before me – the plaintiff had brought the present suit to recover the capital sum which she had invested, as well as the investment gains which she was promised.

2 The trial was conducted on 15 and 16 March 2022. The second defendant was not represented and did not participate in it. At the end of the hearing, parties were directed to file their written submissions by 13 May and replies by 25 May 2022. Counsel for the plaintiff filed their submission on the due date, but nothing was filed by counsel for the first defendant. On

13 June 2022, the Registrar sent an email to counsel for the first defendant stating that if his submissions were not filed by that week, the court would proceed to consider the matter without the benefit of those submissions. On 17 June 2022, the first defendant's counsel replied to seek an extension of time of one week, which was granted. However, to date no submission has been filed by the first defendant. I therefore proceeded to consider the case without the first defendant's written submissions. These are the reasons for my decision.

Background

3 The plaintiff ("Mrs Kavita") is a housewife.[1] The first defendant ("Mr Nantakumar") was a director of the second defendant from 25 March 2011 to 13 February 2014.[2] The second defendant was a company incorporated in Singapore on 25 March 2011 and later struck off the ACRA Register as of 8 May 2017. The second defendant was later restored to the ACRA Register on 11 November 2020 by an Order of Court in originating summons no 1004 of 2020.[3]

4 Mrs Kavita was introduced to Mr Nantakumar by a mutual friend in early 2013.[4] Mr Nantakumar was seeking loans for his alleged business and promised secure and good returns on loans. In or around April 2013, Mr Nantakumar asked Mrs Kavita to lend him $500,000. Mrs Kavita declined as she did not have that amount of money. She, however, agreed to lend Mr Nantakumar some $70,000. Mr Nantakumar agreed to return the $70,000

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1 Statement of Claim at para 1.

2 Statement of Claim at para 2; Defence of the first defendant ("Defence") at para 3.

3 Statement of Claim at para 3; Defence at para 4.

4 Statement of Claim at para 4; Defence at para 5.

within five months and to pay returns on the loaned amount at a rate of $2000 per month.

5 Once details of this agreement had been hammered out, on 5 July 2013, Mr Nantakumar instructed Mrs Kavita's son, Mr Amaresh, via email to deposit the $70,000 into a UOB Bank Account which was in the second defendant's name.[5] Mrs Kavita complied, and instructed her bank to issue a cheque for the sum of $70,000 to be made out in favour of the second defendant's UOB account on 17 July 2013.[6] Mr Nantakumar acknowledged the transfer in an email addressed to Mr Amaresh on 22 July 2013.[7]

6 Later, on 27 September 2013, Mr Nantakumar met Mrs Kavita and Mr Amaresh over tea at the Marina Bay Sands hotel.[8] Mr Nantakumar told Mrs Kavita that he required a loan of $350,000.00 for his dredging project in Myanmar, and asked her if she would be willing to loan him that sum. Mrs Kavita declined, stating that she did not have that much money.[9]

7 Mr Nantakumar met Mrs Kavita once more on 31 October 2013 at the Paramount Hotel. In between these two meetings, there were several email and telephone exchanges between Mrs Kavita and Mr Nantakumar in which Mrs Kavita alleged that Mr Nantakumar only spoke for himself, and had never held himself out as speaking on behalf of the second defendant.[10]

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5 Statement of Claim at para 8; Defence at para 9.

6 Statement of Claim at para 9(a).

7 Statement of Claim at para 9(b); Defence at para 11.

8 Statement of Claim at para 10.

9 Statement of Claim at para 10.

10 Statement of Claim at para 11.

8 During this meeting on 31 October 2013, the parties discussed a "roll over" loan, whereby the existing loan of $70,000, along with the outstanding returns (calculated at $2000 per month), would be included in a loan of $350,000.00. Effectively, Mrs Kavita would only have to top up the difference. According to Mrs Kavita, Mr Nantakumar further stated that because he had a very lucrative sand business and was confident of making huge profits, he would pay $51,000.00 as a fixed return for the loan of $350,000.00. In total, this meant that Mr Nantakumar would return to Mrs Kavita the sum of $401,000.00.[11] However, Mr Nantakumar's position was that it was the second defendant which had promised Mrs Kavita returns of investment (at 1.7% per month) together with a payment of $401,000, and that Mr Nantakumar had not personally undertaken to pay any of these sums to her.[12]

9 The date of repayment of this sum was 1 December 2014 but was later extended to end December 2015.[13] The parties formalised this arrangement in a written agreement that was prepared by Mr Nantakumar and signed by Mrs Kavita (the "Agreement").[14] The terms of the Agreement are reproduced below:

> This written agreement was made and entered into this day dated 01st day of November 2013 between:-
>
> 1. Mdm Kavita Gope Mirwani …
>
> Hereinafter referred as "Investor"
>
> AND
>
> 2. BENSHAW COMMODITIES PTE LTD …

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11 Statement of Claim at paras 12–13.

12 Defence at para 15.

13 Statement of Claim at paras 12–13 and 17.

14 Agreed Bundle of Documents at pp 189–191.

Hereinafter referred as "Director"

WHEREAS

1. The Investor is investing with the sum of **THREE HUNDRED FIFTY THOUSAND SINGAPORE DOLLARS (SGD$ 350,000.00**) into **BENSHAW COMMODITIES PTE LTD**.

A) The first tranche of investment will be a sum of **Two Hundred Twenty Nine Thousand and Seven Hundred Thirty Eight Dollars Only** which will be commence on the 01st November 2013

B) The second tranche of investment will be a sum of **One Hundred Twenty Thousand and Two Hundred Sixty Two Dollars Only** which will commence on the month of December 2013

2. The Director has appointed Mdm Kavita Gope Mirwani, Nric No … to act as a trustee in terms of monetary matters between the Director and Investor.

3. The Director is the shareholder of BENSHAW COMMODITIES PTE LTD.

4. The Director has agreed to make total payment, amount SGD FOUR HUNDRED ONE THOUSAND ONLY (S$ 401,000.00) to the Investor within 13mths period with ROI (Returns of Investment).

NOW IT IS HEREBY AGREED by the Parties as follows:-

1. The Director will remunerate the Investor, an amount equivalent to 1.7% INTEREST ON A MONTHLY BASIS payable to Investor from **BENSHAW COMMODITIES PTE LTD**. Payments to Investor will be paid out [3 months] prior after receiving the investment sums as agreed.

2. The Director will hand over the payment to whoever the Investor has appointed as power of attorney.

3. The term of this Agreement can only be terminated when both parties mutually agreed and consent of such action.

4. If any one of the following events (hereinafter referred to as the "Event of Default") shall occur:-

the Director is made a bankrupt or makes any composition of whatever form (including entering into any deed of arrangement) with his creditors or where a receiver and manager is appointed in respect of the whole or any part of the assets of the Director; or any event occurs or circumstances arise which in the Investor's opinion gives

> reasonable grounds for believing that the Director may not or may be unable to make such payment; or any event occurs or circumstances arise which in the Investor's opinion has a material adverse effect on the Director's assets or financial position;
>
> This Agreement shall be forthwith terminated on the date when the Event of Default shall have occurred whether or not notice in writing has been given by the Investor to the Director and the entire of Principle amount, the sum of (**SGD$ 350,000.00**) shall become immediately due and payable by the Director to the Investor. Any termination of this Agreement under the provisions of this Clause shall not release the Director from any liabilities, obligations and responsibilities which at the time of termination have already accrued or which may thereafter accrue and shall not extinguish any remedies which the Investor has in respect of a breach of any of the terms and conditions in this Agreement against the Director.
>
> …

10 Pursuant to the parties' agreement and Mr Nantakumar's instructions, the balance sum was transferred in the following tranches to the second defendant's bank account:[15]

(a) 1st Tranche: Mrs Kavita prepared a cheque for $229,738.00. Mr Nantakumar collected this cheque in person.[16] This amount was deposited in the second defendant's UOB account on 1 November 2013.[17]

(b) 2nd Tranche: On 30 December 2013, Mrs Kavita transferred another $20,000.00 to the second defendant's UOB Bank Account.[18]

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15 Statement of Claim at para 20.

16 Statement of Claim at paras 15 and 19.

17 Plaintiff's Affidavit of Evidence in Chief ("PAEIC") at p 600.

18 Statement of Claim at para 20; PAEIC at p 605.

(c) 3rd Tranche: On 31 January 2014, Mrs Kavita transferred another $20,000.00 to the second defendant's UOB Bank Account.

(d) 4th Tranche: On 1 February 2014, Mrs Kavita transferred $8,262.00 to the second defendant's UOB Bank Account.[19]

11 Mrs Kavita avers that despite numerous promises made by Mr Nantakumar to make payment of the $401,000.00 owed,[20] no payment was forthcoming. Mrs Kavita therefore sued both the defendants, seeking to recover the sum of the $401,000.00 which she says is owed to her. That being said, the essence of Mrs Kavita's claim lies against Mr Nantakumar as the second defendant had previously been wound up. Therefore, even if judgment is obtained against the second defendant, there are no assets of the company left to satisfy the judgment debt.

Issues

12 The following issues arose for my determination:

(a) Whether it was Mr Nantakumar or the second defendant who was liable to pay the $401,000.00.

(b) If Mr Nantakumar was liable to pay the $401,000.00, was that sum due and owed from Mr Nantakumar on an account stated?

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19 Statement of Claim at para 20; PAEIC at p 610.

20 Statement of Claim at paras 21 and 22.

(c) If the second defendant was liable to pay the $401,000.00, should the corporate veil be pierced, and Mr Nantakumar be made personally liable for that sum?

13 I deal with these issues, *seriatim*.

Whether it was Mr Nantakumar or the second defendant who was liable to pay the sum owed

14 Mrs Kavita argues, for the following reasons, that it was Mr Nantakumar who is liable to pay the $401,000.00 as he was the party to the Agreement. First, a textual interpretation of the Agreement showed that Mr Nantakumar was a party to it, and not the second defendant. Second, Mrs Kavita alleges that there is similar fact evidence to show that Mr Nantakumar was party to the Agreement. In support of her argument, Mrs Kavita points to another agreement which Mr Nantakumar had entered into with one Samy, which was similar to the present Agreement. Finally, Mrs Kavita argues that the subsequent conduct of the parties indeed showed that it was Mr Nantakumar who was party to the Agreement, and not the second defendant.

15 I deal with Mrs Kavita's arguments in turn, starting with the interpretation of the Agreement and parties' subsequent conduct, before considering the point on similar fact evidence.

Whether Mr Nantakumar was the proper party to the contract based on the Agreement

16 Where contractual interpretation is concerned, it is trite law that a contextual approach will be used: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") at [114]. There must, however, be a balance struck between the text of a contract

and the context – the court cannot use the context to rewrite the terms of the contract: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1187 ("*Y.E.S. F&B*") at [32].

17 If the objective evidence demonstrates that the parties had contemplated an absurd result or consequence, the court cannot disregard this to reach a more commercially sensible interpretation of the contract. The court must, based on the relevant objective evidence, ascertain the intention of parties at the time they entered into the contract (see also *Diane Lumley v Foster & Co Group Ltd and ors* [2022] EWHC 54 (TCC) at [6] which stated that the approach to identifying the proper parties to a contract is an objective one). While the court can start from the position that parties did not intend that the terms concerned should produce an absurd result, it could be the case that the objective evidence demonstrates that parties were aware of the absurd result that might ensue from the said terms, but nevertheless proceeded to enter into the contract. It bears emphasising that while the relevant context is important, the text of the contract should always be the first port of call for the court: *Y.E.S. F&B* at [32] citing *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 at [59], *Zurich* at [57] and *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2011] 1 All ER 175 at [11].

18 Here, Mrs Kavita points to several parts of the Agreement" (see [8] above) which she says shows that the second defendant could not have been a party to the Agreement. First, the second defendant is defined as the "Director" in the Agreement. That definition made no sense given that it was Mr Nantakumar who was the Director of the second defendant at the material

time.[21] Mrs Kavita also points to cl 3 of the Agreement which states: "The Director is the Shareholder of [the second defendant]". This clause would not make sense if the term "Director" was a reference to the second defendant.[22] Finally, Mrs Kavita points to a clause which provides that: "The Director will remunerate the Investor, an amount equivalent to 1.7% INTEREST ON A MONTHLY BASIS payable to Investor from [the second defendant]" [emphasis in original].[23] Mrs Kavita says that if the term "Director" refers to the second defendant, then there is no need to express the clause in this manner.[24] The only way in which these clauses can be read sensibly is if the term "Director" as defined in the Agreement is taken to be a reference to Mr Nantakumar instead of the second defendant.

19 In essence, Mrs Kavita's argument is that if one applied the well-established principles of contractual interpretation, it was clear that it was Mr Nantakumar, and not the second defendant who was the proper party to the contract. While Mrs Kavita has advanced what seems like a rather compelling argument, to my mind, the more crucial fact is that Mr Nantakumar had signed the Agreement on behalf of the second defendant:[25]

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21 Plaintiff's Skeletal Submissions ("PSS") at para 16(a).

22 PSS at para 16(b).

23 PSS at para 16(c).

24 PSS at para 16(c).

25 PAEIC at p 199.

IN AGREEMENT HEREOF the parties hereunto have set their hands the day and year first above written.

Signed by **Mdm Kavita Gope Mirwani**)
In the presence of:)

Signed by **N.K SHAWN** onBehalf of Benshaw Commodities Pte Ltd)
In the presence of:)

20 This strongly indicated that it was the second defendant, and not Mr Nantakumar who was the proper party to the contract. In *Gregor Fisken Limited v Bernard Carl* [2021] EWCA Civ 792 ("*Gregor Fisken*"), the UK Court of Appeal noted (at [54]) that where a person signs a contract "with no qualification as to the capacity in which he signs, he will be a party to the contract unless the document makes it clear that he contracted as an agent. … [T]he mere description of that person as an agent in the heading of a contract will not be sufficient to outweigh the effect of an unqualified signature".

21 In that case, the appellant had bought a Ferrari 250 GTO car from the respondent who undertook to use his best efforts to recover and deliver to the appellant, the original gearbox which was missing from the car. While the gearbox was eventually found, and parties initially agreed on a recovery fee and that the gearbox should be reunited with the car, a dispute arose as to how this should be achieved. The appellant sued the respondent, seeking specific performance of the sale contract. One argument, which the respondent raised in response, was that the appellant was not a proper party to the contract. This was

because, in the contract itself, the claimant was described as "an agent for an undisclosed principal" when no such principal existed – in contrast, the defendant was defined as the "seller". The appellant in turn submitted that no other principal existed, it must have concluded the contract on its own behalf and hence has standing to sue on the contract (*Gregor Fisken* at [52]–[53]). When the case went before the UK Court of Appeal, Lord Justice Males agreed with the High Court's finding that the appellant was indeed the proper party to the agreement. This was because the appellant's signature as a party to the contract was unqualified, notwithstanding the description of the appellant as "agent for an undisclosed principal" – here the signature would prevail to resolve the inconsistency. Further, the draft bill of sale attached to the contract expressly confirmed the sale to the claimant and transferred title in the car to the appellant. This evidence only lent support to the fact that the appellant's signature was as a contracting party (*Gregor Fisken* at [63]).

22 Apart from *Gregor Fisken*, there is a long line of authorities as to the effect of an unqualified signature: see *Cooke v Wilson* (1856) 1 CB (NS) 153, *Parker v Winlow* (1857) 7 E & B 942, 119 ER 1497, *The Frost Express* [1996] 2 Lloyd's Rep 375, *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492, *Tanner v Christian* (1855) 4 E & B 591, *Paice v Walker* (1870) LR 5 Ex 173 and *H.O. Brandt & Co v H.N Morris & Co Ltd* [1917] 2 KB 784, *Badgerhill Properties Ltd v Cottrell* [1991] BCLC 805. These authorities were reviewed and affirmed in the cases of *Internaut Shipping GmbH and another v Fercometal SARL* [2003] EWCA Civ 812 ("*The Elikon*") (at [39]–[47]) and *Hamid (t/a Hamid Properties) v Francis Bradshaw Partnership* [2013] EWCA Civ 470 ("*Hamid*") (at [52]).

23 In *The Elikon*, the first claimant, Internaut Shipping GmbH, had signed a charterparty under the heading 'Owners' without qualification. However, in

the charterparty form, the Owner was specified as "Sphinx Navigation Ltd, Liberia c/o Internaut Shipping GmbH". During the voyage, a delay at the discharging ports led to a claim against the defendant for demurrage and/or damages for detention. Arbitration was commenced by the 'Owners' under the charterparty but there was uncertainty as to whether it was Internaut Shipping GmbH ("Internaut") or Sphinx Navigation Ltd ("Sphinx"), or both, who were parties to the charterparty. Proceedings were therefore commenced to determine the parties to the charterparty and the arbitration.

24 In finding that Internaut was the proper party to the contract, and not Sphinx, Rix LJ reasoned (at [51]) that this was because Internaut had signed the contract under the designation of 'Owners', and the signature did not in any way qualify that they were signing *qua* Sphinx's agent. Rix LJ further took the view (at [53]) that the reason why particular attention is paid to the form of the signature, which was effectively a maxim of construction and not a rule of law, was:

> [I]t reflects the commercial facts of life, the promptings of commercial common sense. The signature is, as it were, the party's seal upon the contract; and that remains the case even where, as here, the contract has already been made (in the fixture telexes). Prima facie a person does not sign a document without intending to be bound under it, or, to put that thought in the objective rather than subjective form, without properly being regarded as intending to be bound under it. **If therefore he wishes to be regarded as not binding himself under it, then he should qualify his signature or otherwise make it plain that the contract does not bind him personally**.
>
> [emphasis in bold]

25 While *The Elikon* concerned the case of determining the proper party to a charterparty, the rule has been applied outside of the shipping context. In *Hamid*, one Dr Muneer Hamid ("Dr Hamid") was the sole director and shareholder of a company named Chad Furniture Store Ltd ("Chad"), which

was in the business of selling furniture under the trading name "Moon Furniture". Dr Hamid would, from time to time, conduct business personally, as well as through his company. In 2003, Dr Hamid purchased a property with the intention of shifting the business of his company, Chad, to that location. He assembled a team, which included the defendant – a firm of engineers, to carry out the design and construction of the new proposed showroom for Chad. The defendant's engagement was formalised by way of letter which constituted the written contract between the parties (*Hamid* at [8]–[16]). Work was done on the premises, but problems with the retaining walls which were installed cropped up. Dr Hamid sued the defendant, claiming damages for substantial losses he had suffered as a result of the defects in the retaining walls (at [21]). In response, the defendant pleaded that it had no contract with Dr Hamid – rather the party which had engaged them was Chad. The tactical reason for doing so was that if Chad was substituted or joined as the claimant, then it was arguable that Chad had suffered no loss as it did not own the property (at [23]).

26 Justice Raynor, who heard the case at first instance, found that the party who engaged the defendant was Dr Hamid, and not Chad (*Hamid* at [29]). Dissatisfied, the defendant appealed. On appeal, Jackson LJ distilled the following principles after reviewing the relevant authorities (at [57]):

> i) Where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue.
>
> ii) **In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information, would conclude.** The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.
>
> iii) **If the extrinsic evidence establishes that a party has been misdescribed in the document, the court**

> **may correct that error as a matter of construction without any need for formal rectification**.
>
> iv) Where the issue is whether a party signed a document as principal or as agent for someone else, there is no automatic relaxation of the parol evidence rule. The person who signed is the contracting party unless (a) the document makes clear that he signed as agent for a sufficiently identified principal or as the officer of a sufficiently identified company, or (b) extrinsic evidence establishes that both parties knew he was signing as agent or company officer.

27 In finding that Dr Hamid was the proper party to the contract, Jackson LJ took the view that Dr Hamid's signature at the foot of the letter was his seal upon the contract. Dr Hamid did not qualify his signature or otherwise make it plain that the contract did not bind him personally. The mere reference to "Moon Furniture" below Dr Hamid's signature, without any indication that this was the trading name of Chad was not an effective qualification (*Hamid* at [64]–[65]).

28 It would therefore be apparent, from the aforementioned cases, that a party who has signed a contract, without any qualification as to the capacity in which the signature was made, will be the proper party to that contract. In cases such as *The Elikon*, where there was an inconsistency between the way the contract was signed and the definition of who the parties are in the contract, such inconsistencies can be resolved by looking at the capacity in which the parties have signed the contract.

29 In my view, this principle is equally applicable to the present case. While Mr Nantakumar has signed the contract, if one looks at the signature box (see [19] above), it is stated that Mr Nantakumar signed the Agreement on behalf of the second defendant. Mr Nantakumar's signature carries with it a clear qualification that he was not signing it in his personal capacity, but rather, on

the second defendant's behalf. It must therefore follow that it is the second defendant who is the proper party to the contract, and not Mr Nantakumar.

30 While this suffices to dispose of the point, I turn now to consider Mrs Kavita's alternate arguments on subsequent conduct and similar fact evidence.

Whether Mr Nantakumar was the proper party to the contract based on the subsequent conduct of the parties

31 In support of their argument that extrinsic evidence involving subsequent conduct of parties should be admitted to aid in contractual interpretation, counsel for Mrs Kavita cites the Court of Appeal's decision in *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 ("*MCH International*") at [18] (citing *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 ("*Hewlett-Packard*") at [56]) for the proposition that the following criteria has to be met:

> (a) the subsequent conduct must be relevant, reasonably available to all the contract parties, and relate to a clear and obvious context;
>
> (b) the principle of objectively ascertaining contractual intention(s) remains paramount; and accordingly,
>
> (c) the subsequent conduct must always go toward proof of what the parties, from an objective viewpoint, ultimately agreed upon.

32 This extract from *MCH International*, however, must be read in its proper context. While the Court of Appeal found that the subsequent conduct in that case was relevant, reasonably available, and related to a clear and obvious context, the court qualified its view as provisional and did not express a definitive view as to the admissibility of subsequent conduct for contractual

interpretation as it was not an appropriate case for the issue to receive detailed and definitive treatment: *MCH International* at [19]–[21]. The court observed that evidence of subsequent conduct tended to fall into two categories which militates against their use. The first category is where such evidence is likely to be inadmissible by its "sheer inability to fulfil the criteria" as set out in *Hewlett Packard* (at [56]), or is otherwise "unprofitable" as it can be shaped to suit each party's position after the fact. The second category is where evidence of subsequent conduct does no more than echo the "*objectively ascertained intentions* of the parties illuminated by the *contextual evidence at the time of the contract*" [emphasis in original]. In such cases, evidence of subsequent conduct would be rendered superfluous. In *MCH International*, the Court of Appeal took the view that the evidence of subsequent conduct fell into the second category – it was unnecessary for the trial judge to have had recourse to the subsequent conduct of parties (*MCH International* at [21]).

33 It is therefore clear to me that the Court of Appeal in *MCH International* did not lay down any definitive proposition of law in relation to the use of subsequent conduct as an aid to contract interpretation. This point was also emphasised in *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 ("*Simpson Marine*"), where the Court of Appeal reiterated (at [78]):

> We note that the evidence just discussed pertains, strictly speaking, to the parties' subsequent conduct, that is, their conduct after the formation of the alleged agreement that supplied the basis for the appellant's retention of the Deposit. **The admissibility and relevance of subsequent conduct in the formation and interpretation of contracts has yet to receive detailed scrutiny by this Court.** We have in the past opined that, while there is no absolute prohibition against evidence of subsequent conduct in interpreting a contract, such evidence is likely to be inadmissible in construing a written contract because it does not elucidate the parties' objective intentions or relate to a clear and obvious context: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design &*

> *Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich* Insurance") at [132(d)] (referring to [125] and [128]–[129]). **Such evidence has been considered unprofitable for the purpose of discerning the parties' intentions at the time of entering into the contract and because such evidence can, with the benefit of hindsight, be shaped to suit each party's position**: see, *eg*, *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1187 at [74]; see also Goh Yihan, *Interpretation of Contracts in Singapore* (Sweet & Maxwell, 2018) ("*Interpretation of Contracts*") at paras 7.005–7.008. However, where the court is ascertaining whether a contract has been *formed*, evidence of subsequent conduct has traditionally been regarded as admissible and relevant, although there is some instability in this rule: see Goh Yihan, "Towards a Consistent Use of Subsequent Conduct in Singapore Contract Law" [2017] JBL 387 ("Goh") at 395–398. It may be argued that a distinction between the evidential rules applicable to the formation and interpretation of contracts is untenable: see Goh at pp 402–412; *Interpretation of Contracts* at para 7.025; and D W McLauchlan, "Contract Formation, Contract Interpretation, and Subsequent Conduct" (2006) 25 UQLJ 77. On this basis, a case could be made that the restrictive approach adopted in respect of contractual interpretation ought to be extended to contractual formation, though the case for consistency could equally lead to the opposite conclusion because the decision whether to adopt a consistently restrictive or consistently liberal approach depends on arguments of policy and principle: see *Interpretation of Contracts* at paras 7.039–7.048.
>
> [emphasis in original in italics, emphasis added in bold]

34 Apart from *MCH International*, counsel for Mrs Kavita also cites the Court of Appeal's decision in *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] 2 SLR 627 ("*Ngee Ann*") as an example where the court had relied on subsequent conduct to aid in contractual interpretation.[26] *Ngee Ann* concerned a dispute between Ngee Ann Development Pte Ltd ("Ngee Ann Development") and Takashimaya Singapore Ltd ("Takashimaya") over a lease agreement. Under the terms of the lease, Takashimaya would lease commercial space (the "Demised Premises") in Ngee Ann Development for an initial term

[26] PSS at para 29.

of 20 years with six consecutive options to renew, each for a period of ten years, save for the last option period which would last for about eight and a half years. After the first five years, a rent review would be conducted to determine the rent payable for each of the successive 5-year periods up to the end of the initial 20-year term. If parties could not agree on the rent, then the prevailing market rental value would be determined by a licensed valuer: at [10]–[15].

35 A dispute arose when Takashimaya sought to exercise its option to renew the lease for another 10-year term. Takashimaya took the view that the rental valuation should be based on the existing configuration of the Demised Premises. Ngee Ann Development, however, contended that the valuer could posit a different and hypothetical configuration, specifically, one which would reflect the "highest and best use" of the Demised Premises. Both parties later agreed to appoint joint valuers and to take the average of the two valuations obtained. While the valuers produced their reports, parties later agreed to obtain a fresh set when it emerged that Ngee Ann Development had omitted to provide Takashimaya with a contemporaneous copy of certain written representations it had sent to the valuers. Thereafter, parties reached an impasse on how to proceed. Ngee Ann Development subsequently sued Takashimaya for breach of terms of the lease. Takashimaya filed a counter-claim for a declaration that the prevailing market rental value of the Demised Premises was to be determined in accordance with the existing use of the Demised Premises (at [24]–[33]).

36 The Court of Appeal, in interpreting the terms of the parties' lease agreement, reaffirmed remarks made in *Y.E.S. F&B* – that the text of parties' agreement ought always to be the first port of call when interpreting a contract. In taking the view that the valuation should take place with reference to the existing configuration of the Demised Premises, the court noted that parties' intentions regarding the manner in which the valuation of the Demised Premises

should take place should be congruent with the nature and terms of the parties' agreement (*Ngee Ann* at [67]). After examining the context painted by the parties' evidence, the court found that it was entirely consistent with the terms of the lease. Here, the court examined parties' conduct in relation to previous rent reviews as it provided an insight as to the parties' understanding of how the prevailing market rental value of the Demised Premises had been, and should be determined. Ultimately, the court took the view (at [103]) that Ngee Ann Development's failure to object to the valuer's prior and consistent usage of the existing configuration as a basis for valuation was cogent evidence that applying such a configuration for the purposes of valuation was entirely in line with parties' agreement.

37 Apart from the aforementioned authorities, there is also the Court of Appeal's decision in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 ("*Centre for Laser and Aesthetic Medicine*"). That case concerned a dispute between two doctors. The plaintiff operated a clinic specialising in aesthetic medicine (the "Orchard clinic"). Both doctors worked at the Orchard clinic on different days such that one of them would be on duty at any given day of the week. A dispute between both the doctors was settled by agreement, cl 10 of which provided that parties "shall be entirely at liberty to set up any other business or clinics in any location in Singapore. For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers …". A subsequent dispute between the parties arose when one of the doctors, Dr Goh, set up a competing clinic just two units away from the Orchard clinic. On appeal, the main issue concerned the interpretation of cl 10 of the settlement agreement and whether it permitted Dr Goh to actively divert patients from the Orchard clinic to his competing

clinic. Here, the court found (at [54]) that the subsequent conduct relied on by both parties did not shed any light on their settlement agreement as to the nature of the diversion permitted under cl 10 at the time when the settlement agreement was signed. A holistic analysis of the subsequent conduct made it apparent that it did not form cogent evidence of the parties' intention as regards the nature of the permitted diversion under cl 10 at the time when the settlement agreement was concluded.

38 From a perusal of the aforementioned cases decided by the Court of Appeal, it seems to me that there were two distinct lines of cases insofar as the use of subsequent conduct as an aid to contract interpretation was concerned. The first line of cases takes the view that the admissibility and relevance of subsequent conduct in interpreting contracts has not received detailed scrutiny – and so the position on that point is still very much open: *Simpson Marine* at [78], *MCH International* at [20] – [21]. The second line of cases, which were decided before *Simpson Marine* and *MCH International*, had gone ahead to consider whether the subsequent conduct of parties shed light on the intention of parties at the time the contract was concluded: *Centre for Laser and Aesthetic Medicine* at [54], *Ngee Ann* at [103].

39 From a perusal of the aforementioned cases decided by the Court of Appeal, it seems to me that while there is no bar against the use of evidence of subsequent conduct in contractual interpretation, that any use of such evidence must be undertaken in a circumspect manner such that the text of the contract remains paramount. Where the Court of Appeal had gone ahead to consider evidence of the subsequent conduct of parties, this was only in cases where the court was satisfied that the evidence would shed light on the intention of parties at the time the contract was concluded (*Centre for Laser and Aesthetic Medicine* at [54]; *Ngee Ann* at [103]). *Simpson Marine* and *MCH International* further

reinforce this need for circumspection by taking the view that the admissibility and relevance of subsequent conduct in interpreting contracts has not yet received detailed scrutiny. In those cases, the Court of Appeal expressed its reservations on the admissibility of evidence of subsequent conduct where this evidence does not "elucidate the parties' objective intentions or relate to a clear and obvious context" (*Simpson Marine* at [78], *MCH International* at [20] – [21]).

40 Apart from this apparent divergence in appellate authority, it has also been observed that the tenor of authorities at the High Court level has also indicated a certain ambivalence towards the admissibility of subsequent conduct to contract interpretation: Goh Yihan, "Towards a Consistent Use of Subsequent Conduct in Singapore Contract Law" (2017) Journal of Business Law 387 ("Consistent Use of Subsequent Conduct") at pp 390 to 392 citing *Lian Hwee Choo Phebe and another v Maxz Universal Development Group Pte Ltd and others* [2008] 4 SLR(R) 265 at [16]–[17], *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [57], *Fico Sports Inc Pte Ltd v Thong Hup Gardens Pte Ltd* [2010] SGHC 237 at [60]. In the same article, the learned author also notes that difficult questions of principle and policy arise when subsequent conduct is used to establish a fact prior in time (*ie*, parties' intention at the point of contract formation). The learned author then goes on to argue that, as a matter of principle and policy, there is no reason why evidence of subsequent conduct should not be admitted to establish a fact prior in time.

41 In the present case, according to Mrs Kavita, the subsequent conduct of the parties showed that the Agreement was concluded between herself and Mr Nantakumar. Leaving aside questions pertaining to the admissibility of the subsequent conduct of parties, I am of the view that the subsequent conduct of parties should not be relied on in interpreting the Agreement to ascertain who

the proper parties are in the present case. For one, as a matter of logic, it is more difficult to infer the occurrence of a fact prior in time from subsequent conduct: Consistent Use of Subsequent Conduct at p 401. Second, there is also the fact that Mr Nantakumar had signed the Agreement on behalf of the second defendant (see [19] above). As Rix LJ explained in *The Elikon* (see [24] above), attention is paid to the form of a party's signature because, *prima facie*, a party does not sign a document without intending to be bound under it, and if that party does not wish to be bound then they would have either qualified their signature or made it clear that the contract does not bind them personally. Therefore, if a party signs a contract without qualification, that party would be the proper party to that contract even if evidence of subsequent conduct appears to suggest otherwise. The danger of using subsequent conduct here is that such evidence can be shaped to suit each party's position *ex post facto* (see *MCH International* at [21]) in a manner that flies in the face of what the contractual documents actually provide for.

42 In any case, the subsequent conduct which Mrs Kavita argues shows that it was Mr Nantakumar who was party to the Agreement is not particularly relevant in ascertaining the objective intentions of parties at the time of contract formation. Here Mrs Kavita relied on the following five instances of subsequent conduct.[27] I deal with them in turn. First, Mrs Kavita points to the fact that no documents were produced by Mr Nantakumar to prove that it was the second defendant who had entered into the Agreement. The second defendant would have the ledger, balance sheet and other accounting documents to show that the money received from Mrs Kavita was classified as a liability on the second defendant's balance sheet.[28] Mr Nantakumar could easily have obtained the

[27] PSS at para 32.

[28] PSS at para 34.

aforesaid documents from IRAS, ACRA or the company secretary, but did not do so. In essence, Mrs Kavita's argument was that if the contract was indeed formed with the second defendant, then there should be records to show that the money received pursuant to the contract was classified as a liability on the second defendant's balance sheets, and that there would be documentation to that effect – and because Mr Nantakumar had adduced no such documents, it should be inferred that the contract was not formed with the second defendant.

43 However, it emerged during the course of Mr Nantakumar's testimony that the second defendant might not always have kept detailed records, and that the reason as to why such records are no longer available was because the second defendant had ceased operations and been wound up:[29]

Court:	You know the company records to the company, right?
1st Def:	Yah, the accountings record was---
Court:	Yes.
1st Def:	When the payment was made to the company, it was in the accounting system during that point of time, exactly, yah, Your Honour.
Court:	Yes.
Counsel:	Thank you, Your Honour, thank you.
Counsel:	Alright, okay, can you please give some explanation as to where or under what book it was recorded or how it was recorded?
1st Df:	Okay, Mr Vijay, I might have not hired a proper accountant to foresee these---these accounting systems, but whatever the payment or entry or payment come into Benshaw---
Court:	Mr Nantakumar.
1st Df:	Yah.

[29] Transcript, 15 March 2022, at p 94 lines 1–22.

> Court: Can you show us those accounts where the payments are reflected?
>
> 1st Df: I don't have it here, Sir, Your Honour, because it was more than 8 years ago, and only supporting here is now is the bank statement which has got because the office is no longer there, the company has already wind up, and there's no any operations ongoing under Benshaw, Your Honour.

44 This was where Mrs Kavita's argument, which is premised on the assumption that Mr Nantakumar could have produced these documents but did not do so, falls apart. There was an alternative explanation as to why Mr Nantakumar could not produce these documents: that given the passage of time and the subsequent cessation of its business operations, such records would have been destroyed or disposed of. I would further add that even assuming if the company's records had been adduced, and the loans did not appear on the balance sheet or company accounts, this would not take Mrs Kavita's argument very far. For one, it could well be the case that the loans were simply not recorded, due to a clerical error, on the balance sheets. It would be quite a stretch to draw the conclusion that the absence of the loans being recorded on the balance sheets, without more, somehow meant that Mr Nantakumar, and not the second defendant, was the proper party to the contract.

45 Second, Mrs Kavita relies on the fact that Mr Nantakumar had ceased to be the director of the second defendant after 13 February 2014[30] and thus had no authority to represent the second defendant after 13 February 2014. This meant that all Mr Nantakumar's admissions and requests for extension of time to repay the $401,000.00 to Mrs Kavita must have been made in his personal capacity. I, however, did not see how this was relevant in ascertaining the

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30 PSS at paras 42–48.

intentions of parties at the time of contract formation. At best, this evidence only goes towards showing that Mr Nantakumar had made these admissions and requests for extension of time without authorisation from the second defendant.

46 Third, Mrs Kavita says that there is no evidence from any of the subsequent directors of the second defendant after 13 February 2014 to confirm that the second defendant was the party to the Agreement and consequently was liable to pay the $401,000.00 to Mrs Kavita. This was despite the fact that all the ex-directors of the second defendant were made aware of Mrs Kavita's claim as they were made party to Suit No 1150 of 2020 which was an application to reinstate the second defendant with ACRA. Strangely, while Mrs Kavita asserts that there was no evidence from the second defendant's subsequent directors, she did not call any of them to give evidence at the trial. In any case, the mere absence of evidence showing that the second defendant's subsequent directors did not know of the loans, without more, could not lead to the conclusion that it was Mr Nantakumar who was the proper party to the contract.

47 Fourth, Mrs Kavita asserts that if the second defendant was party to the Agreement, then from 14 February 2014 onwards, the second defendant would have dealt with Mrs Kavita through their directors or company secretary.[31] There were, however, no such communications from the second defendant's secretary, directors or other authorised persons to Mrs Kavita. And while Mr Nantakumar explained that he was acting for the second defendant *qua* Regional Manager, Mrs Kavita contends that his explanation is not credible and remains unproven.[32] Taking Mrs Kavita's argument at its highest, the mere absence of any communications from authorised representatives of the second defendant to

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31 PSS at paras 55–57.

32 PSS at para 57.

Mrs Kavita could not lead to the conclusion that it was Mr Nantakumar who was the proper party to the contract.

48 Finally, Mrs Kavita contends that all bank withdrawals from the UOB Bank Account showed that it was withdrawn by Mr Nantakumar for his personal expenses and had nothing to do with the second defendant.[33] I reject this argument. At best, this might show that Mr Nantakumar had misappropriated funds from the second defendant – but it did not go so far as to show that Mr Nantakumar was the proper party to the contract at the time of contract formation.

Similar Fact Evidence

49 Finally, Mrs Kavita relies on similar fact evidence to show that it was Mr Nantakumar who was the proper party to the Agreement. Here, she points to proceedings commenced against Mr Nantakumar in suit no 728 of 2019 ("Suit 728"). There, Mr Nantakumar had discussed his sand shipping business with one Samy. Between 2014 to 2017, Samy lent money to Mr Nantakumar. Parties agreed to treat these loans as an investment sum in one SOL Global Holdings.[34] Mr Nantakumar had drafted the loan agreement with Samy. This agreement was similar to the Agreement in the present case.

50 Samy commenced proceedings against Mr Nantakumar. In his defence, Mr Nantakumar alleged in his affidavit that Samy was "intending to interpret

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33 PSS at para 59.

34 PSS at paras 17, 19–22.

the [agreement] to make it seem that I, personally, was liable to repay the [p]laintiff the investment sum".[35]

51 Relying on what had transpired in Suit 728, namely that Mr Nantakumar had drafted and entered into an agreement containing similar terms with another person, and alleged in his affidavit that he was not personally liable, Mrs Kavita argues that this is similar fact evidence showing that Mr Nantakumar is the proper party to the Agreement in the present case. This is because "[Mr Nantakumar] doing the same in the present case" by entering into the Agreement in his personal capacity, refusing to return the money, and when sued, turning around to claim that the agreement has been made with the company and not with him.[36]

52 The starting point is whether the similar fact evidence is admissible. In Singapore, the rules governing the admissibility of evidence are found in the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). It is widely accepted that the concept of similar fact evidence is reflected in ss 14 and 15 of the EA, which for ease of analysis, are reproduced below (Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 3rd Ed, 2022) at para 5.017 citing *Hin Hup Bus Service (a firm) v Tay Chwee Hiang and Another* [2006] 4 SLR(R) 723 at [34]–[38], *Rockline Ltd and Others v Anil Thadani and Others* [2009] SGHC 209 at [2]):

> **Facts showing existence of state of mind or of body or bodily feeling**
>
> **14**. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the

35 PSS at para 23.

36 PSS at para 23.

> existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.
>
> *Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally but in reference to the particular matter in question.
>
> *Explanation* 2.—But where upon the trial of a person accused of an offence the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.
>
> **Facts bearing on question whether act was accidental or intentional**
>
> **15**. When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

53 In determining who the proper party to the Agreement was, what is important is the intention of the parties at the time of contract formation. Therefore, in the present case, s 15 of the EA, which deals with "facts bearing on [the] question [of] whether [the] act was accidental or intentional" does not appear to be relevant. However, s 14, which deals with facts "showing [the] existence of state of mind or of body or bodily feeling" does appear, at first blush, to be relevant. This is borne out by the following illustration to s 14 of the EA:

> (*g*) *A* is sued by *B* for the price of work done by *B* upon a house of which *A* is owner by the order of *C*, a contractor.
>
> *A's* defence is that *B's* contract was with C.
>
> The fact that *A* paid *C* for the work in question is relevant as providing that *A* did in good faith make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C's* own account and not as agent for *A*.

54 Illustration (g) to s 14 of the EA traces its genesis to the case of *Gerish v Chartier* [1845] 135 ER 439 ("*Gerish*"): Harry Lushington Stephen and Lewis Frederick Sturge, *A Digest of the Law of Evidence by the late Sir James Fitzjames Stephen* (Macmillan and Co, 12th ed, 1936) at p 23. In *Gerish*, the plaintiff sued the defendant to recover the value of certain iron railing and coping for twelve houses. The defendant asserted that there was no contract between himself and the plaintiff and sought to adduce evidence to prove this in the form of a statement of accounts between himself and a builder named Amos, whom the defendant alleged was the one who had given the order for the goods in question. The plaintiff objected to the admissibility of such evidence. Maule J ruled (at p 440) that the evidence was admissible and properly admitted as it tended to show that the "defendant was not seeking to evade payment for goods ordered for his benefit, but that he had actually paid the person with whom alone he had contracted". The evidence also showed that the defendant conducted himself "like a party who was dealing with Amos as a principal, and not as an agent".

55 From the facts of *Gerish*, it is clear that the evidence sought to be admitted must go directly towards showing the state of mind that exists in reference to the particular matter in question: see Explanation 1 to s 14 EA. In the context of the present case, this means that the circumstances of the contract formed between Samy and Mr Nantakumar have to go towards showing Mr Nantakumar's state of mind in reference to the particular matter in question, which is the intentions of parties, objectively ascertained, at the time of contracting. Here, I would note that what was alleged by Mr Nantakumar in his affidavit in Suit 728 was never tested at trial. Judgment under O 13 of the Rules of Court (Cap 322, 2014 Rev Ed) was obtained against Mr Nantakumar who did not enter an appearance in Suit 728, and so the contents of Mr Nantakumar's

affidavit were never subjected to cross-examination. Notwithstanding this, even if I accept that the allegations levelled against Mr Nantakumar in Suit 728 were true, this does not take Mrs Kavita's case very far. It is difficult to see how the evidence in question sheds light on the objective intentions of the parties at the time of contract formation in the present case.

56 This point is perhaps usefully illustrated by the case of *Nai Yau Juu v Pasdec Corp Sdn Bhd & Anor* [2005] 3 MLJ 431 ("*Nai Yau Juu*"). In that case, one issue was whether the alleged offer was accepted by the issuance of a receipt. There, counsel attempted to argue that the offer had been accepted by the issuance of a receipt. To do so, evidence of one PW3 was adduced, apparently on the basis of s 14 of the Malaysian Evidence Act 1950, which for all intents and purposes is *in pari materia* with our EA. PW3's evidence was an attempt to substantiate that there was, in that case, a similar intention to make an offer for sale, and that offer was also accepted by the payment of the same sum and then completed by the issuance of a receipt. The court rejected this argument as there was "nothing additional to prove that the conduct of the first defendant in issuing the receipt to another party had constituted an intention to manifest something binding" (*Nai Yau Juu* at [24]).

57 It is therefore clear that the manner in which Mr Nantakumar contracted with Samy is not, without more, necessarily indicative of the objective intentions of Mr Nantakumar and Mrs Kavita in the present case. For this reason, I did not think this evidence was admissible under s 14 of the EA for the purposes of proving that the objective intentions of parties was that the contract was formed as between Mrs Kavita and Mr Nantakumar. Even if such evidence was admissible, I would decline to accord it much weight, especially in light of the documentary evidence (*ie*, the signed contractual documents – see above at [19]–[20]).

Action on an Account Stated

58 While I have found that it was the second defendant who was the proper party to the Agreement, that is not the end of the matter as Mrs Kavita has also pleaded that Mr Nantakumar owes the sum of $401,000.00 on an account stated.[37] Here, Mrs Kavita points to an email sent by Mr Nantakumar, which she says is a clear admission of monies owed from Mr Nantakumar.[38]

59 The law on an account stated has been usefully summarised by Chua Lee Ming JC (as he then was) in *Viet Hai Petroleum Corp v Ng Jun Quan and another and another matter* [2016] 3 SLR 887 ("*Viet Hai*") at [21]–[22]:

> 21 The expression "account stated" can mean any one of the following:
>
> (a) **A mere account stated is an absolute acknowledgement by a defendant of a debt owed to the plaintiff.** There is no need for the plaintiff to communicate its acceptance of the acknowledgement to the defendant. **The plaintiff may sue on the account as an independent cause of action**. The defendant's promise to pay is not binding as it is not supported by consideration but the plaintiff can rely on the defendant's admission as evidence of the debt. The defendant is entitled to challenge the debt.
>
> (b) **A real account stated is an agreement between two parties on the debts owing to each other, how the debts on each side are to be set off against each other and the balance payable.** The consideration for the promise by the defendant to pay the balance is the discharge of the debts which have been set off. A real account stated is therefore a binding agreement between the parties in which there is an enforceable promise to pay. The plaintiff has to prove the agreement but need not prove the underlying debts. The defendant is entitled to show that the agreement is not binding on him on any of the grounds upon which an agreement can be set aside at law.

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37 Statement of Claim at para 24.

38 PSS at paras 62–65.

> (c) **An account stated for valuable consideration is also a binding agreement between the parties in which there is an enforceable promise to pay.** It is different from a real account stated in that (a) the debts are on one side only, and (b) the consideration is extrinsic, eg, consent to wait for payment or a reduction in the amount of the claim (unlike a real account stated where the consideration is in the discharge of the debts on both sides). **As with a real account stated, the plaintiff has to prove the agreement but does not have to prove the underlying debts.** The defendant is entitled to show that the agreement is not binding on him on any of the grounds upon which an agreement can be set aside at law.
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> See: *Gobind Lalwani v Basco Enterprise Pte Ltd* [1998] 3 SLR(R) 1019 ("Basco") at [7]–[10]; *Siqueira v Noronha* [1934] AC 332 at 337–338; *Harris and another v Charalambous* [2013] EWHC 1317 at [15]; Atkin's Encyclopaedia of Court Forms in Civil Proceedings vol 12(2) (LexisNexis, 2nd Ed, 2013 Issue) ("Atkin's Court Forms") at paras 70–71.
>
> 22 In so far as the burden of proof is concerned, the general principle remains that the person who asserts the existence of certain facts has the burden of proving that those facts exist. Therefore,
>
> (a) where a plaintiff sues on a mere account stated, he has the burden of proving the account stated. This means he has to prove the defendant's absolute acknowledgement of the debt. A defendant who challenges the debt has the burden of proving that he is not liable for the debt; and
>
> (b) where a plaintiff sues on a real account stated or an account stated for valuable consideration, the plaintiff has to prove the parties' agreement to the account stated. A defendant who challenges the agreement bears the burden of proving that he is entitled to set aside the agreement.
>
> The plaintiff does not bear the burden of proving that the underlying debts exist where he sues on an account stated.
>
> [emphasis in bold]

60 It is clear from Chua JC's exposition of the law set out above that an action on an account stated is an independent cause of action. The more pertinent question in the present case is, given my finding above that it was the second defendant who was the proper party to the Agreement, whether there was any basis on which Mrs Kavita could bring an action on an account stated

(be it a mere account stated, or an account stated for valuable consideration) against Mr Nantakumar. To do so, it is perhaps useful to examine the historical development of an action on an account stated, as well as the relevant cases.

61 An action on an account stated has its roots in old English law. As Samuel Stoljar notes in his article "What is Account Stated?" (1964) Sydney Law Review 373 at p 373:

> As the name shows, account stated has an obvious connection with the old action of account. In the thirteenth century the purpose of the latter was to compel manorial bailiffs to render accounts, usually before auditors who, though appointed by the manorial lord, had a power of arrest and with this power could therefore enforce compliance with the payment of an account. A century later, the old action widens in scope when it begins to be used in cases of agency and partnership. At the same time, however, it also becomes settled that in this non-manorial sphere the auditors have no power of arrest; and this was to have profound significance. In non-manorial or commercial situations, not only would the account take place between the parties themselves or before auditors voluntarily accepted by them, but the amount thus accounted would have to be recovered by a separate action of debt, simply because these auditors could not enforce payment of the balance struck. It is at this point that **what became known as account stated separates from the action of account**. For **the latter becomes increasingly concerned not with the recovery of money but with establishing whether a defendant is accountable at all**, while to speak of an account stated is as yet not to name an action, but rather to describe an activity, namely that the parties voluntarily accounted between themselves, and an accounting, moreover, that had certain legal effects. As the accounting involved a mutual set-off, it would constitute payment (technically described "payment by a retainer"), so as to extinguish or reduce a debtor's existing liability to the creditor. Again, the actual recovery in debt of the balance struck would bar further demands in respect of claims forming part of the same stated account.
>
> [emphasis in bold]

62 Stoljar further notes in his book, *A History of Contract at Common Law* (Australian National University Press, 1975) at p 114:

> [A]ccount stated did important and even desirable work, functioning as a sort of unofficial gloss on over-wide statutory requirements that obstructed otherwise meritorious claims. How meritorious can be seen from the fact that account stated lay only on executed, not executory, claims, and not on claims where the consideration had failed, nor on illegal claims; in short, all claims where the defendant had already been supplied with satisfactory goods or services, and refused to pay on purely technical grounds. Not surprisingly, account stated became a popular pleading device: it was an elementary precaution to add account stated, to the other money counts, to pick up claims that might otherwise founder on an unworthy obstacle.

63 It is therefore clear, from Stoljar's useful summary of the development of an action on an account stated, that it was used to get round obstacles which stood in the way of otherwise meritorious claims. One might sue for a breach of contract, and to that cause of action, also add an action on an account stated in the event that one's claim in contract failed on some technicality. The important point to note is that there must first be a contract between the parties. This, as we shall see, is amply illustrated from the cases below.

64 In *Knowles v Michel* (1811) 13 East 249, the plaintiffs brought an action in assumpsit upon the common count for goods sold and delivered. Their alternative cause of action was upon an account stated. The plaintiffs had sold to the defendants some standing trees, which the defendants had afterwards procured to be felled and taken away. While the defendants later admitted that they had jointly bought the trees for nine guineas, they argued that the action could not be maintained as the contract was for standing trees which were part of the realty. The plaintiffs, however, argued that the acknowledgement of the price to be paid for the trees, made after they were felled and applied to the use of the defendants, was sufficient to sustain the action on an account stated, though there was no other item of account between the parties. In response, the defendants argued that an admission of money due on a single contract between parties was not evidence of an account stated, which implied different dealings

between them. The court however disagreed, taking the view that if there were an acknowledgement by the defendant of a debt due upon any account, it was sufficient to enable the plaintiff to recover upon the count for an account stated.

65 In *Viet Hai*, the plaintiff alleged that in an account stated in writing between the plaintiff and WE Bunker, titled "Agreement of Account Balance Finalization" (the "Account Balance Agreement"), dated 30 April 2012, WE Bunker acknowledged that it owed the plaintiff US$1,690,874 and promised to pay that amount by 7 May 2012 (at [4]). WE Bunker failed to make payment and so the plaintiff sued the defendants, who were partners of WE Bunker at the material time, to recover the sums owed on the basis of an account stated. Chua JC took the view that the Account Balance Agreement was a mere account stated – it set out the amounts paid by the plaintiff to WE Bunker, and the balance amount outstanding after deductions. Further, WE Bunker had also, in the Account Balance Agreement, unequivocally admitted that it owed the plaintiff the balance amount of US$1,690,874. To establish its claim, the plaintiff merely had to show a *prima facie* case that the Account Balance Agreement was signed by someone with the authority to bind WE Bunker (and consequently the defendants who were partners in WE Bunker). This would be *prima facie* proof of the defendants' acknowledgement of the debt and the plaintiff did not have to show a *prima facie* case that the underlying debts existed. It was the defendants who bore the burden of proving that the underlying debts did not exist or were not enforceable against them. Chua JC found that because the defendants did not adduce any evidence to rebut the plaintiff's evidence that the payments had been made to WE Bunker, and that WE Bunker owed the plaintiff the amount stated in the Account Balance Agreement, they had failed to discharge the burden of proving that they were not liable for the debts: *Viet Hai* at [26]–[28].

66 Having found (above at [29]–[30]) that there was no contract as between Mrs Kavita and Mr Nantakumar, it is clear to me that Mrs Kavita's claim against Mr Nantakumar on an account stated must fail.

Whether the second defendant's corporate veil should be pierced to hold Mr Nantakumar liable

67 Having found that the Agreement had been concluded between Mrs Kavita and the second defendant, and having found against Mrs Kavita's claim on an account stated (be it a mere account stated or an account stated for valuable consideration), I turn to consider the final string to Mrs Kavita's legal bow. Here counsel for Mrs Kavita argues that the second defendant's corporate veil should be pierced, and Mr Nantakumar held personally liable on grounds that the second defendant was a sham or a facade. In support of their argument, they advance the following three reasons:[39]

(a) Mr Nantakumar was merely using the second defendant as a conduit to receive the sum of $350,000.00 paid by Mrs Kavita.

(b) The second defendant was being used by Mr Nantakumar as an instrument to bear all liabilities while Mr Nantakumar siphoned off the sums paid by Mrs Kavita for his own personal use.

(c) Mr Nantakumar was in absolute control of the second defendant.

68 The bedrock upon which company law is built is that of the company's separate legal personality (see *Salomon v Salomon* [1897] AC 22). The grounds for piercing the corporate veil are an exception to the general rule that the company is a separate legal entity, and the difficulty lies in carefully

[39] PSS at para 72.

circumscribing the grounds on which the corporate veil may be pierced such that it does not undermine or entirely consume the general rule: *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd and others* [2016] 1 SLR 1129 at [196]. As a matter of Singapore law, it is generally accepted that there are three grounds on which the corporate veil may be pierced: a) that the company was the alter ego of the defendant, b) that the company was a mere sham or façade, and c) that the company was used by the defendants to further their improper purpose including defrauding creditors: *Mohamed Shiyam v Tuff Offshore Engineering Services Pte Ltd* [2021] 5 SLR 188 ("*Shiyam*") at [55]–[57] citing *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at paras 2.58–2.59. It also bears noting that the ground of alter ego is distinct from the ground of a sham or façade: *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [96].

69 In the present case, Mrs Kavita has only relied on the ground of "sham or façade" as a basis to pierce the corporate veil. As noted by Justice Judith Prakash (as she then was) ("Prakash J") in *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd and another* [1999] 2 SLR(R) 24 ("*Win Line*") at [38], citing with approval the judgment of Toulson J in *The Rialto; Yukong Line Ltd of Korea v Rendsburg Investments Corporation (No 2)* [1998] 1 Lloyd's Rep 322 ("*The Rialto*"):

> Before considering that issue further, it is necessary to refer to the doctrine also relied upon by Yukong that the courts will pierce the corporate veil where **the corporate structure is merely a device, façade or sham**. That was part of the reasoning of the Court of Appeal in *Salomon's* case, which led to Lord Halsbury's riposte at [1897] AC 22 at p 33:
>
> > My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its

> > constitution as a company, it appears to me to follow as a consequence, that it is impossible to deny the validity of the transactions into which it has entered.
>
> However, it has been recognised in subsequent cases, including the decision of the House of Lords in *Woolfson v Strathclyde Regional Council* 1978 SLT 159 at p 161 that **it is appropriate to pierce the corporate veil where special circumstances exist indicating that it is a mere façade concealing the true facts.**
>
> Certain authorities in this area were considered by the Court of Appeal in *Adams v Cape Industries plc* where the court concluded at [1990] Ch 433 at p 543, that the authorities left rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involved a façade.
>
> Lord Justice Diplock considered the legal concept involved in describing a transaction as a 'sham' in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at p 802:
>
> > As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* (1882) 21 Ch D 309 and *Stoneleigh Finance Limited v Phillips* [1965] 2 QB 537), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.
>
> [emphasis added in bold]

70 In essence, to pierce the corporate veil on grounds of a "sham or façade", it must be shown that there were "acts done or executed by parties to the sham that were intended by them to give to third parties the appearance of creating

between the participating parties legal rights and obligations which were different from the actual rights and obligations which the participating parties intended to create": *Sitt Tatt Bhd v Goh Tai Hock* [2009] 2 SLR(R) 44 ("*Sitt*") at [80].

71 At this juncture, it is perhaps useful to examine the facts of the cases where the "sham or façade" ground has been argued as a basis to pierce the corporate veil. I begin with the decision of Prakash J (as she then was) in *Win Line*. In that case, the plaintiffs were the owners of a cargo vessel, the *Winco Mariner*. The vessel was chartered by the first defendant to ship a cargo of parboiled rice from Kandla, India to Colombo, Sri Lanka. The vessel arrived in Kandla but no cargo was loaded. The plaintiffs were informed that the first defendant was no longer interested in the vessel. The plaintiffs decided to sue, alleging that they suffered loss from the breach of the charterparty and the detention of the vessel at Kandla. The plaintiffs not only sued the first defendant, but also brought the action against the second defendant whom they alleged should be responsible for the first defendant's default. In particular, the plaintiffs argued that although the charterparty was entered into by the first defendant, the first defendant was only the nominal charterer and was "a sham and/or a mere façade and/or the alter ego" of the 2nd defendant (at [3]).

72 Prakash J took the view (at [40]) that the ground of "sham or façade" was not made out. The first defendant had "more than a nominal paid-up capital and also had independent shareholders and officers who though employees of [the second defendant] were also capable of being traders and conducting business in their own right". Further, the bulk of the first defendant's business consisted of parallel supply transactions derived from the second defendant, but "this did not constitute evidence that the company was not run by its own directors or that they were not the persons making decisions on its behalf".

Finally, the mere fact that the first defendant owed money to the second defendant, which the second defendant had not yet taken steps to recover, did not necessarily mean that the first defendant was a sham or a façade.

73 Then there is the case of *Singapore Tourism Board v Children's Media Ltd and others* [2008] 3 SLR(R) 981 ("*Singapore Tourism Board (HC)*") which counsel for Mrs Kavita cites as being similar to the present case.[40] In that case, the plaintiff, Singapore Tourism Board ("STB") had entered into a series of agreements with the first defendant to stage a mega event in Singapore known as "Listen Live". The second defendant was a shareholder of the first defendant. The third defendant was at all material times, the director and chief executive officer of the first and second defendants as well as the sole shareholder of the second defendant. Amongst other things, STB alleged that the first defendant was a sham or mere front for the second and third defendants.

74 Lai Siu Chiu J found (at [155]) that the corporate veil should be pierced such that all three defendants were jointly and severally liable to STB on its claim. In her view, there was "no doubt that the first defendant was a façade and/or a sham and like the second defendant, the company was used by the third defendant to evade his legal obligations". It was also, in her view, telling that the third defendant was the sole shareholder of the second defendant which in turn, owns the first defendant. The facts showed that the first defendant was merely the conduit to receive the sponsorship sums from STB – thereafter, the third defendant proceeded to milk the first defendant dry by withdrawing those sponsorship sums to generously repay himself and other third parties before transferring all remaining funds to the second defendant's account. In particular, where liabilities were to be incurred, the contracts were entered into by the first

[40] PSS at para 78.

defendant, but where income was to be received, the contract was entered into by the second defendant. It was therefore clear that the first defendant acted as a façade for the third defendant to allow him to evade his legal obligations (at [110] and [155]). Lai J's findings were affirmed on appeal where the Court of Appeal held that the first and second defendants were no more than corporate puppets who were compliantly dancing to the tune of the third defendant: *Children's Media Ltd and others v Singapore Tourism Board* [2009] 1 SLR(R) 524 ("*Singapore Tourism Board (CA)*") at [9].

75 Apart from *Win Line* and *Singapore Tourism Board (HC)*, there is also the case of *Sitt*. In that case, Prime (an Australian company), had entered into a memorandum of understanding ("MOU") with KTR (an Indonesian company) to record their intention to negotiate with each other to secure a project for oil and gas exploration in Kutai Timur, East Kalimantan. The defendant, who was the sole shareholder and director of Prime, approached the plaintiff (a company incorporated in Malaysia) to fund the project. In July 2005, Prime, KTR and the plaintiff signed a tripartite joint venture agreement ("TJVA") indicating that they were desirous of entering into a further joint venture agreement to define their complete roles and responsibilities in the project, and that all parties were to endeavour to achieve the terms of the TJVA in a timely and efficacious manner (at [2]–[8]). The final JVA was signed in August 2005, and problems arose soon after. The plaintiff demanded the immediate refund of the US$1m it had paid to the defendant and brought a suit to recover that sum (at [16]–[18]). Apart from a contractual claim, the plaintiff also argued that Prime's corporate veil ought to be pierced so as to hold the defendant liable for breach of trust. Prakash J refused to pierce the corporate veil on the grounds of a sham or façade. She found (at [81]) that there was no evidence that Prime had been created as a sham or a façade to shield the defendant from responsibility for nefarious

transactions. After all, there had been no assertion of any impropriety in the defendant or Prime's dealings and Prime had not been used by the defendant to further any improper purpose. In addition, Prime's venture with the plaintiff and KTR was a *bona fide* commercial transaction. The defendant could not be held personally liable for Prime's breach of contract on the sole basis that, as the only director of Prime, he was instrumental in Prime's breach of contract.

76 Finally, there is the decision of International Judge Roger Giles ("Giles IJ") in *Shiyam*. In that case, the plaintiff, an infrastructure project consultant, had contracted with the defendant, a Singaporean company involved in the design and construction of infrastructure projects. The two contracts into which parties had entered entitled the plaintiff to commissions upon the defendant being awarded the contract for an airport construction project by the Government of the Republic of Maldives. A dispute subsequently arose between the parties as to which airport project the contracts referred to. The plaintiff brought a suit in the High Court but the case was transferred to the Singapore International Commercial Court, upon which the plaintiff applied to amend his statement of claim to join persons who were shareholders and directors of the defendant. The reason for joining these persons, according to the plaintiff, was that the defendant's corporate veil should be lifted, and the proposed defendants made liable, on grounds that – among other things – the defendant was a sham or façade.

77 Giles IJ noted (at [59]) that while the plaintiff referred to "sham or façade" as a ground of corporate veil piercing, they did not descend into detail of how the matters alleged in their amendments made out this ground. Following the reasoning set out in *Win Line*, the key question was whether "in contracting between the plaintiff and defendant, the defendant and proposed defendants had the common intention that the contractual rights and obligations" in the

concluded contracts were not to be between the plaintiff and the defendant, but between the plaintiff and the proposed defendants. In answering this question, the overall contracting landscape had to be borne in mind. Giles IJ was of the view that the defendant was a company with a track record of infrastructure projects – it could not be reasonably thought that the proposed defendants had intended that the defendant was not to have true existence or that it would not incur contractual obligations. Nothing in the proposed amendments to the statement of claim established a case that the proposed defendants intended to be the real contractors, and the allegation that funds or business opportunities were diverted from the defendant later on was insufficient (at [61]–[62]).

78 Returning to the present case, Mrs Kavita points to the following facts as evidence that the second defendant was a mere sham or a façade.[41] First, Mr Nantakumar was merely using the second defendant as a conduit to receive the S$350,000.00 that had been paid by Mrs Kavita. Second, the second defendant was being used as an instrument by Mr Nantakumar to bear all liabilities while the S$350,000.00 was siphoned off by Mr Nantakumar to use for his personal expenses. Finally, Mr Nantakumar has been using the second defendant's corporate form as a shield against lawsuits brought by investors who had ploughed money into his sand business – in particular, counsel points to Suit 728 where Mr Nantakumar had been sued by Samy.

79 Having considered Mrs Kavita's arguments as well as the evidence, I do not think that Mrs Kavita has discharged its burden of showing that the corporate veil should be pierced so as to hold Mr Nantakumar liable. Mrs Kavita has built her entire case on veil piercing around the second defendant's UOB bank account statement – in particular, she claims that after the $350,000.00 had

[41] PSS at para 72.

been transferred, Mr Nantakumar withdrew all the money for himself, his friends and his family members.[42] Apart from this, Mrs Kavita also points to the fact that a number of transactions were made for Mr Nantakumar's own personal expenses. There is, however, one fatal flaw with this argument – the bank statements, by themselves, only showed how the money had been spent (*ie*, on food and entertainment) and that cash withdrawals were made. It did not show that the cash had indeed been transferred to Mr Nantakumar's friends and family members.

80 Aside from this, Mr Nantakumar also explained that the cash withdrawals were used for the sand business.[43] The cash would be withdrawn so that it could be converted to USD at favourable rates. This money would then be used to pay the company's business counterparts in advance in order for them to make arrangements for sand dredging. Mr Nantakumar also added that he would also bring some of the converted USD with him when he travelled for business. While Mr Nantakumar had no vouchers and documents to directly prove that the cash withdrawals were indeed for the purposes of conducting the sand business,[44] this was hardly surprising given that the second defendant had been wound up.

81 In any case I am satisfied that on the evidence available, it seems more likely than not that the cash withdrawals had indeed been made for the purposes of the sand business. For one, there was a particular series of transactions which

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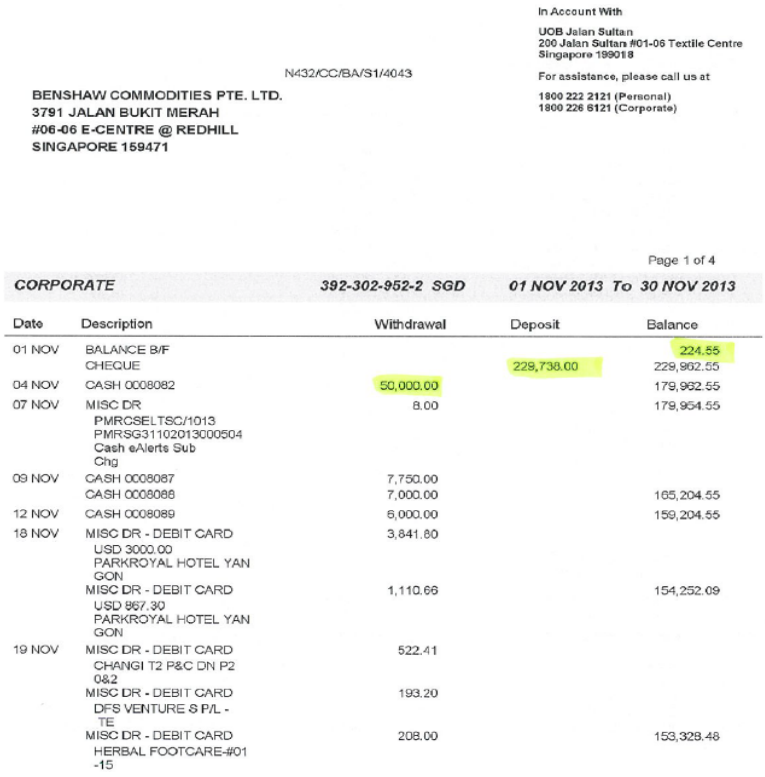
42 PSS at para 79.

43 Transcript, 16 March 2022 at p 75, lines 18 – 24; 1st Defendant's AEIC at para 10.

44 Transcript, 16 March 2022 at p 76, lines 3–6.

had been made shortly after Mrs Kavita had transferred the first tranche of $229,738.00:[45]



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CORPORATE **392-302-952-2 SGD** **01 NOV 2013 To 30 NOV 2013**

Date	Description	Withdrawal	Deposit	Balance
01 NOV	BALANCE B/F			224.55
	CHEQUE		229,738.00	229,962.55
04 NOV	CASH 0008082	50,000.00		179,962.55
07 NOV	MISC DR PMRCSELTSC/1013 PMRSG31102013000504 Cash eAlerts Sub Chg	8.00		179,954.55
09 NOV	CASH 0008087	7,750.00		
	CASH 0008086	7,000.00		165,204.55
12 NOV	CASH 0008089	6,000.00		159,204.55
18 NOV	MISC DR - DEBIT CARD USD 3000.00 PARKROYAL HOTEL YAN GON	3,841.60		
	MISC DR - DEBIT CARD USD 967.30 PARKROYAL HOTEL YAN GON	1,110.66		154,252.09
19 NOV	MISC DR - DEBIT CARD CHANGI T2 P&C DN P2 0&2	522.41		
	MISC DR - DEBIT CARD DFS VENTURE S P/L - TE	193.20		
	MISC DR - DEBIT CARD HERBAL FOOTCARE-#01 -15	208.00		153,328.48

82 The second defendant's bank account statement above showed that on 4 November 2013, $50,000 was withdrawn from the account. Subsequently, on 18 November 2013, there were two payments of $3,841.60 and $1,110.66 to ParkRoyal Hotel Yangon. While counsel for Mrs Kavita alleged in the course of cross-examining Mr Nantakumar that the payment to ParkRoyal Hotel Yangon had no connection with any sand business being conducted,[46]

45 Agreed Bundle of Documents at p 592.

46 Transcript, 16 March 2022 at p 75, lines 2–3.

Mr Nantakumar did in fact produce evidence to that effect. This was contained in the form of the following documents:

(a) An agreement with Amoe Logistics Pte Ltd to provide sand concession in Myanmar dated 25 November 2013 and an export license from the Department of Commerce and Consumer Affairs of Myanmar.[47]

(b) A contract with Amoe Logistics Pte Ltd dated 25 November 2013 to dredge for sand in Myanmar.[48]

83 Apart from the aforementioned agreements with Amoe Logistics Pte Ltd, one other important document was a purchase order placed by Thalanar Agro, an Indian company, for some 20,000 metric tons of sand on 11 November 2013.[49] The inference which I drew from these documents was that it was more likely than not that Mr Nantakumar had indeed travelled to Myanmar for the purposes of securing a supply of sand for sale. It was apparent from the contractual documents that at the time, orders had been placed with the second defendant for sand, and that the second defendant had, to that end, entered into agreements to secure a supply of sand with which to fulfil its contractual obligations.

84 Apart from this, it also bears noting that Mrs Kavita has not adduced any evidence to prove that the cash withdrawn from the second defendant's UOB account had been transferred to Mr Nantakumar's friends and relatives. There were no bank statements produced to show that Mr Nantakumar's friends and

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47 1st Defendant's AEIC at para 21 and pp 83 – 90.

48 1st Defendant's AEIC at para 22 and pp 91 – 101.

49 1st Defendant's AEIC at p 127.

relatives had received such money and none of them were called to testify. Further, in cross-examination, counsel for Mrs Kavita was quite content to hurl accusations at Mr Nantakumar as opposed to seriously interrogating his story that the numerous cash withdrawals from the second defendant's UOB account had indeed been used for the sand business. It bears noting that the threshold for corporate veil piercing is a high one, and that the burden lies on Mrs Kavita to prove that there are grounds on which the corporate veil should be pierced. In the present case, I do not find that Mrs Kavita has discharged her burden of doing so. On the available evidence before me, in particular, the contractual documents which I have highlighted above (at [83]–[84]) suggested to me that the second defendant was indeed carrying on a legitimate business in trading sand. Indeed, counsel for Mrs Kavita made no attempt to dispute these contractual documents which had been exhibited in Mr Nantakumar's affidavit of evidence in chief, but was quite content to merely assert that the entire sand business was a sham. Finally, insofar as Mrs Kavita has argued that Mr Nantakumar was utilising the second defendant to run a Ponzi scheme, and that the promised monthly returns of $2000.00 were paid out of the same funds which Mrs Kavita had deposited in the second defendant's UOB account,[50] this was never pleaded in the statement of claim. In fact, this argument is contrary to Mrs Kavita's pleaded case which was that the outstanding payment interest of $2000.00 had been "rolled over" (see above at [8]).

85 For completeness, I briefly deal with one final point which Mrs Kavita has pleaded[51] but abandoned in her closing submissions: that Mr Nantakumar should be personally liable for the sum of $401,000.00 as he was using the

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50 PSS at para 87.

51 Statement of Claim at para 30.

second defendant for fraudulent trading under s 238(1) of the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA").[52] That provision states:

> **Responsibility for fraudulent trading**
>
> 238.—(1) If, in the course of the judicial management or winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the judicial manager, liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.
>
> (2) Where the Court makes any declaration under subsection (1), it may give such further directions as it thinks proper for the purpose of giving effect to that declaration and in particular —
>
> (*a*) may make provision for making the liability of any person under the declaration a charge —
>
> (i) on any debt or obligation due from the company to the person liable; or
>
> (ii) on any charge or any interest in any charge on any assets of the company held by or vested in —
>
> (A) the person liable;
>
> (B) any corporation or other person on behalf of the person liable; or
>
> (C) any person claiming as assignee from or through the person liable or any corporation or person acting on behalf of the person liable; and
>
> (*b*) may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

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52 Statement of Claim at para 30(1).

86 It is clear from the text of s 238 IRDA that upon the application of a creditor, the court can declare that a person who was a knowingly party to the company's fraudulent trading would be personally liable for all or any of the company's debts. A key element which must be shown under s 238 IRDA is a "subjectively held intent to defraud", and such an intent requires proof of dishonesty: *Marina Towage Pte Ltd v Chin Kwek Chong* [2021] SGHC(A) 24 at [23] where the Appellate Division of the High Court reiterated this requirement in respect of s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed) which is identical in all respects to s 238(1) IRDA: see the High Court decision in *Marina Towage Pte Ltd v Chin Kwek Chong and another* [2021] SGHC 81 at [16]. Mrs Kavita, however, has not adduced any evidence to show that there was such a subjectively held intent to defraud.

Conclusion

87 For the reasons above, I dismiss Mrs Kavita's claims as against Mr Nantakumar. As I have found that the Agreement was concluded between Mrs Kavita and the second defendant, Mrs Kavita shall have judgment as against the second defendant for the sum of $401,000.00. However, as I have noted above (at [11]), this is but a pyrrhic victory as the second defendant has no assets with which to satisfy the judgment debt. I will hear parties on costs. In preparing their submissions on costs, parties should take into account the fact that despite multiple extensions of time being given to Mr Nantakumar's counsel to file the closing submissions, they have not, to date, done so.

Lee Seiu Kin
Judge of the High Court

Narayanan Vijya Kumar (Vijay & Co) for the plaintiff;
Muhammed Riyach Bin Hussain Omar (H C Law Practice) for the first defendant;
The second defendant absent and unrepresented.