IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 15

Civil Appeal No 44 of 2023

Between

Nicholas Eng Teng Cheng

… *Appellant*

And

Government of the City of Buenos Aires

… *Respondent*

GROUNDS OF DECISION

[Companies — Incorporation of companies — Lifting corporate veil]
[Conflict of Laws — Choice of law — Corporations]
[Evidence — Proof of evidence — Onus of proof]
[Tort — Misrepresentation]

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v
Government of the City of Buenos Aires

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27 February 2024

15 May 2024

Tay Yong Kwang JCA (delivering the grounds of decision of the court):

Introduction

1 This appeal raised the question of what is the proper law that governs the issue of lifting the corporate veil of a Singapore-incorporated company which entered into a contract governed by foreign law.

2 In HC/S 160/2021 ("Suit 160"), the Government of the City of Buenos Aires ("the respondent") brought a claim against HN Singapore Pte Ltd ("HN Singapore") and its controller, Mr Nicholas Eng Teng Cheng ("the appellant") for breach of contract and for misrepresentation. The Judge allowed the claim for breach of contract and found HN Singapore and the appellant liable for damages of US$237,619.35 on a joint and several basis (see *Government of the City of Buenos Aires v HN Singapore Pte Ltd* [2023] SGHC 139). The appellant was made personally liable on the ground that Argentine

law, the governing law of the contract (or *lex contractus*), also applied to the issue of the lifting of HN Singapore's corporate veil and, under that law, HN Singapore's corporate veil should be lifted. The appellant appealed against the Judge's decision to hold him personally liable.

3 The central issue in this appeal was therefore which law should apply to determine whether HN Singapore's corporate veil should be lifted. After hearing the parties, we allowed the appeal on the basis that the law of incorporation (or *lex incorporationis*), which is Singapore law, should apply to the issue and that under Singapore law, there was no legal basis to lift the corporate veil of HN Singapore.

Background facts

4 The appellant, a Singapore citizen, was the sole director and shareholder of HN Singapore. HN Singapore was incorporated in 2016 with a paid-up capital of S$1 to carry out the business of import and export of goods and to provide consultancy services. In March 2020, owing to the global COVID-19 pandemic, the respondent sought to purchase COVID-19 test kits. On 2 April 2020, the respondent entered into an agreement with HN Singapore for the company to supply 300,000 COVID-19 test kits for US$1,770,000 to the respondent. The test kits were expressed to be of "China" origin and manufactured by Guangzhou Wondfo Biotech Co., Ltd ("Wondfo"), a company in China.

5 On 6 April 2020, the respondent paid the purchase price in full. Subsequently, on 12 April 2020, the number of test kits was reduced to 182,475 due to changes in the packaging and the unit price. The purchase price remained the same ("the Varied SPA").

6 On 20 April 2020, HN Singapore entered into a sale and purchase agreement with Wondfo for the purchase of 182,475 test kits at a total price of US$821,137.50.

7 HN Singapore failed to deliver any test kit by the agreed delivery date of 26 April 2020 to the respondent. Despite this, the parties continued to correspond to try to resolve the issue. Eventually, the respondent terminated the Varied SPA on 27 May 2020 on the basis that the non-delivery on 26 April 2020 constituted a repudiatory breach by HN Singapore of the Varied SPA.

8 In June 2020, HN Singapore transferred US$1,532,380.65 back to the respondent. HN Singapore did not refund the balance sum of US$237,619.35 ("the Balance Purchase Price") on the basis that the amount was spent on "non-refundable charges, expenses and fees".

9 Accordingly, the respondent filed Suit 160 against HN Singapore and the appellant for breach of contract and misrepresentation. In turn, HN Singapore brought a counterclaim for wrongful termination.

The decision of the High Court

10 The Judge allowed the respondent's claim for breach of contract but dismissed its claim of misrepresentation. HN Singapore's counterclaim in unlawful termination was also dismissed. HN Singapore was found liable for damages of US$237,619.35 (*ie*, the Balance Purchase Price) for its breach of contract. The Judge further ordered HN Singapore's corporate veil to be lifted and the appellant was made personally liable to the respondent for the sum of US$237,619.35.

11 The Judge reasoned as follows. First, the governing law of the Varied SPA was Argentine law. There was no express choice of law clause in the Varied SPA but Argentine law had the closest and most real connection with the contract.

12 Second, the Judge accepted the evidence of the respondent's expert witness, Dr Ezequiel Cassagne ("Dr Cassagne"), that the respondent was entitled to terminate the Varied SPA under Argentine law because of HN Singapore's failure to deliver the test kits within the stipulated time. HN Singapore and the appellant did not call any expert witness on Argentine law.

13 Third, the respondent's claim in misrepresentation was dismissed because although the COVID-19 test kits were not delivered eventually, there was no evidence that at the time of the formation of contract, HN Singapore could not deliver the test kits. The representation that it would deliver them was therefore not shown to be false.

14 Apart from the above alleged misrepresentation, the respondent also alleged that the appellant made two other false representations. First, the appellant represented that he and/or HN Singapore were in the business of importing and exporting commodities and supplies, including medical supplies. Second, the appellant made misleading statements that he was a member of the Singapore delegation to the 2018 G20 Leaders' Summit in Buenos Aires or that he was part of the summit in some capacity. However, the Judge found that the respondent failed to plead these two representations properly. In any event, even if they were pleaded properly, neither amounted to an actionable misrepresentation.

15 Fourth, in determining whether HN Singapore's corporate veil should be lifted, the Judge applied Argentine law. The Judge accepted Dr Cassagne's evidence that under Argentine law, a company's corporate veil could be lifted if it was undercapitalised relative to the transaction that it entered into. On this basis, HN Singapore was clearly undercapitalised as its paid-up capital was only S$1.

16 However, the Judge went on to opine that had Singapore law applied to the question of corporate veil lifting, HN Singapore's corporate veil would not be lifted as none of the grounds for such lifting was established. The *alter ego* ground, in particular, was not made out mainly because HN Singapore was not incorporated solely to trade with the respondent and there was no evidence that the appellant operated HN Singapore's bank account as if it was his own or treated its dues as his own.

17 Lastly, HN Singapore's counterclaim for unlawful termination was dismissed because there was no waiver of the non-delivery by the respondent.

Procedural history following the Judge's decision

18 On 8 August 2023, HN Singapore and the appellant filed AD/CA 82/2023 ("AD 82") to appeal against the Judge's decision. On 16 October 2023, the appellant filed AD/SUM 43/2023 to amend its Notice of Appeal. This was allowed on 15 November 2023 with costs of the application ordered to be costs in the appeal. On 28 November 2023, the appellant filed an amended Notice of Appeal that removed HN Singapore as a party to the appeal.

19 On 1 December 2023, the appellant filed CA/OA 33/2023 ("OA 33") for the whole of the proceedings in AD 82 to be transferred to the Court of Appeal.

We granted OA 33 on 20 December 2023 with costs of the application reserved to the Court of Appeal hearing the substantive appeal.

The parties' cases on appeal

The appellant's case

20 The appellant's main argument was that the Judge erred in finding that Argentine law was applicable to the question of veil lifting. Instead, Singapore law should have been the applicable law for the following reasons:

(a) HN Singapore was incorporated in Singapore. Singapore law, as the law of incorporation, was therefore inextricably tied to HN Singapore's corporate personality. As a matter of law, the law of incorporation already governed various matters that were related to corporate veil lifting. Applying the law of incorporation to the question of veil lifting would also ensure a consistent result regardless of the potential applicability of different laws under different contracts entered into by a company. Further, other jurisdictions also applied the law of incorporation to the question of corporate veil lifting.

(b) The law of the contract should not be applied because the question of corporate veil lifting was related to the compact between the company and its members and not the company's agreements with third parties. It would also be contrary to policy to apply the proper law of the company's obligations with third parties as this would expose its members to a potentially wide ambit of scenarios where the company's veil might be lifted. For instance, in the present case, HN Singapore's corporate veil was lifted pursuant to Argentine law merely because it was undercapitalised.

21 If Singapore law (and not Argentine law) was the applicable law, it followed that HN Singapore's corporate veil should not be lifted in the light of the Judge's conclusion that none of the grounds for corporate veil lifting was made out under Singapore law. Accordingly, the appellant should not be held personally liable for HN Singapore's obligations under the Varied SPA, including the Balance Purchase Price.

22 The appellant acknowledged that the issue relating to choice of law for corporate veil lifting was not raised by either party before the Judge and that it was a new point on appeal. However, he submitted that this Court could nonetheless consider this new point on appeal since it concerned a question of law and no new evidence was required for the point to be determined.

The respondent's case

23 The respondent submitted that since the appellant's liability to the respondent was a consequence of the Varied SPA, it was a matter to be governed by the law of the Varied SPA (which was Argentine law). The proper law of the contract would also be the law that governed the consequences and reliefs that flowed from a breach of that contract.

24 Further, in the proceedings before the Judge, the appellant did not challenge the respondent's point that the governing law of the Varied SPA would determine the various issues. These included the question of whether the respondent would be entitled to lift HN Singapore's corporate veil in order to hold the appellant personally liable.

25 In any case, the appellant's submissions that the law of incorporation should govern the question of corporate veil lifting should be rejected for the following reasons:

(a) First, corporate veil lifting was not concerned with the internal management of the company but involved the rights of external parties who were strangers to the compact between a company and its members.

(b) Second, the use of the law of the contract, rather than the law of incorporation, would promote certainty, since the parties could easily choose a law that they were familiar and comfortable with to govern the contract. In advocating for the law of incorporation to apply, the appellant relied on extreme examples.

(c) Third, applying the law of incorporation would open the door to abuse by a party who incorporated a company in a jurisdiction where separate legal personality was absolute.

26 The respondent also challenged the Judge's finding that the appellant was not liable for fraudulent misrepresentation. The respondent relied on s 108 of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act") to shift the burden of proof to the appellant for the following matters that were especially within his knowledge, namely, whether: (i) HN Singapore had the ability to deliver the test kits by 26 April 2020; and (ii) the appellant honestly believed (and was not recklessly indifferent) that HN Singapore could do so. The appellant could not have discharged his burden of proof because:

(a) HN Singapore received no confirmation from Wondfo that they could commit to delivering the test kits within 20 days upon payment;

(b) there was no evidence of Wondfo allegedly communicating to the appellant, through the middleman, one Mr Li Chong, that it could deliver within 20 days; and

(c) HN Singapore did not have reasonable grounds for its belief that it could deliver by 26 April 2020.

27 For completeness, on the assumption that Singapore law should apply as the governing law for the question of corporate veil lifting, the respondent submitted that the Judge erred in finding that the *alter ego* ground was not made out. The respondent highlighted the fact that there was no evidence that HN Singapore was carrying on any other business at the time that it entered into the Varied SPA and the appellant had sole control over its bank account.

Our decision

The issues to be determined

28 Based on the parties' submissions, the following issues arose for our determination:

(a) As a preliminary point, was the appellant precluded from arguing that the law of incorporation should govern the issue of corporate veil lifting as it was not a point raised before the Judge?

(b) What law should govern the issue of lifting a Singapore-incorporated company's corporate veil to hold its controller personally liable for the company's contractual debts and obligations?

(c) Under the proper law identified in (b), should HN Singapore's corporate veil be lifted?

(d) Did the Judge err in finding that misrepresentation was not made out?

Issue 1: Whether the appellant was precluded from raising the issue on the proper law governing the lifting of the corporate veil on appeal

29 At the hearing before us, the respondent stated that it would not object to the appellant raising on appeal the issue of the proper law governing the lifting of the corporate veil. We appreciate this move by the respondent which saved some time at the oral hearing of this appeal.

30 While an appellate Court will not allow a new case to be mounted on appeal, it will generally be willing to consider new legal arguments on questions of law that can be answered without the need for further evidence: *Liew Kit Fah and others v Koh Keng Chew and others* [2020] 1 SLR 275 at [14]. In this case, the question of what is the proper law governing the lifting of the corporate veil is of sufficient importance to commerce, especially where cross-border trade is concerned. No further evidence was required and the parties were amply prepared to argue this point as seen in their respective written submissions. We therefore allowed the appellant to argue this question of law on appeal subject to an appropriate order on costs.

Issue 2: What should be the governing law to lift the corporate veil?

Separate entity rule and its rationale

31 We first consider the separate entity rule and its rationale in the context of corporate law. The cornerstone of modern company law lies in the concept of the company's separate legal personality: *Aron Salomon v A Salomon and Co, Ltd* [1897] 1 AC 22 at 42. If a company incurs legal liabilities, it is the company and not its members that should be sued. The members cannot be sued in respect of the company's liabilities since they are not in law responsible for the company's acts: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [32]. Section 19(5) of the Companies

Act 1967 (2020 Rev Ed) ("Companies Act") spells out the key consequences that flow from a company's status as a separate legal person.

32 This principle of separate legal entity has been described as the "bedrock of company law not just in Singapore but also throughout the common law world": *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [75]. Consequently, members of a company are generally shielded from personal liability for the company's contractual obligations or misconduct, save for the exceptions to the principle of separate legal personality: *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and anothe*r [2022] 1 SLR 884 at [114].

33 Under the common law, there are generally two justifications for lifting the corporate veil. Firstly, where the evidence shows that the company is in fact not a separate entity. Secondly, where the corporate form is abused to further an improper purpose: *Tjong Very Sumito and others v Chan Sing En and others* [2012] SGHC 125 at [67].

The law of the contract

34 In our view, the law of the contract is unsuitable to be the governing law for the lifting of the corporate veil in the present case and probably in other cross-border commercial cases as well. This becomes apparent when we examine the consequences on a controller of a Singapore company that enters into contracts with different parties which are governed by different laws. As observed by Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 2767 (Comm) at [1144]:

> … It is inherently possible that a company entirely dominated by another may, in respect of the same course of conduct,

> commit breaches of contracts governed by the laws of countries A and B and torts whose applicable law is that of countries C and D. It would be anomalous if the liability of the dominator (if any) for these wrongs was determined by four different laws.
> …

35 In submitting that the law of the contract should be the governing law, the respondent relied on the well-established rule that the proper law of the contract is also the law that governs the consequences and reliefs that flow from a breach of that contract: see *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at [138]. In our view, the "consequences and reliefs" refer to issues such as the right to terminate the contract and the appropriate remedies (*eg*, damages or specific performance). They should not include the matter of corporate veil lifting as this is intimately connected with the status of the company as a separate legal entity and its relationship with its members.

36 At the outset, the nature of the company and its capitalisation should be clear to all the contracting parties before they enter a contract. The status of the company, as opposed to the governing law of the contract (which can be varied), is the constant in all its contracts. If a party chooses to contract with a Singapore-incorporated company which is under-capitalised, save for situations where the corporate veil can be lifted (under the law of incorporation), the contracting party must accept the consequences of contracting with such a company. In our view, applying the law of the contract to the lifting of the corporate veil may lead to "governing law shopping" and that would be undesirable.

The law of incorporation

37 In submitting that the law of incorporation is unsuitable to govern the issue of corporate veil lifting, the respondent relied heavily on the English High

Court decision of *Akhmedova v Akhmedov* [2019] EWHC 1705 (Fam) ("*Akhmedova*"). That case involved the enforcement of a judgment for the division of matrimonial assets, in which the wife was awarded ancillary financial relief against the husband in the sum of £453,576,152. The wife alleged that the husband was deliberately evading or frustrating enforcement of the judgment against him by putting his assets in a Liechtenstein-incorporated company, Straight Establishment ("Straight"). The issue before the English court was therefore whether Straight's corporate veil should be pierced. Haddon-Cave J held at [61] that the law of incorporation (which did not permit such piercing) was inappropriate. Instead, he held that the law of the forum (*ie*, English law) should apply to the wife's claim based on the evasion principle:

> … In my view, the 'evasion' principle is clearly *remedial* in nature. It aims to prevent dishonest attempts to evade enforcement. The 'evasion' principle was developed to respond to dishonest attempts to evade enforcement of a subsisting obligation or liability by the stratagem of the interposition of a company or legal entity to thwart enforcement. Second, the well established general rule is that questions as to mode and method of enforcement and available remedies are for the lex fori : " *As a matter of English common law, the nature of the remedy is a matter of procedure to be determined by the lex fori* " (*Dicey, Morris & Collins on Conflict of Laws* , 15th Edn, 7-011). Third, there are sound reasons of common-sense and policy as to why the general *lex fori* rule should apply to cases concerning the 'evasion' principle. The Court should be astute not to aid evasion. To apply the *lex incorporationis* in relation to the 'evasion' principle would be to do the international fraudster's job for him: it would permit enforcement to be subverted simply by the use of corporate structures in jurisdictions with no such exceptions to the 'veil' of incorporation.
>
> [emphasis original]

38 In our view, the English court in *Akhmedova* was concerned primarily with the enforcement of its order on the distribution of matrimonial assets. The lifting of Straight's corporate veil was an incidental question. The husband was subject to the family jurisdiction of the English court but he was deliberately

evading the enforcement of its order by putting his assets out of the reach of the wife. The factual situation in *Akhmedova* did not involve a contractual dispute and there was therefore no question of the law of the contract being the governing law for the lifting of the corporate veil.

39 To reiterate, the law of incorporation is linked inextricably to the company's corporate personality and its relationship with its members. The law of incorporation governs various matters that are related to the lifting of the corporate veil, including: (a) the creation and conferral of a separate personality (see Rule 186 in *Dicey, Morris and Collins on The Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 16th Ed, 2022)); (b) statutory exceptions to the corporate personality (see *eg*, ss 169 and 201(5) of the Companies Act); and (c) issues of corporate governance and internal management (see *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party)* [2020] 1 SLR 226 at [88]). The following observation was made in *Grupo Torras SA v Al-Sabah (No.1)* [1996] 1 Lloyd's Rep 7 at 15:

> It is generally accepted as a matter of private international law that the law of the place of incorporation determines the capacity of the company, the composition and powers of the various organs of the company, the formalities and procedures laid down for them, the extent of an individual member's liability for the debts and liabilities of the company, and other matters of that kind.

40 In our judgment, since the law of incorporation confers upon the company its separate legal personality and its attendant rights and liabilities, it must be that law which creates the exceptions to the separate entity rule. The jurisdiction in which a company is incorporated has a paramount interest in

maintaining the corporate structure and in regulating the situations where the piercing of the corporate veil is permitted.

41 In general, the law of incorporation should be the governing law when the court considers the issue of lifting the corporate veil. However, while the law of incorporation is linked inextricably to a company's corporate personality, we do not think that it must invariably be the governing law for the lifting of the company's corporate veil. In a case where the interests of justice render it necessary, the court may decide to apply the law of the forum or some other more appropriate law when it considers the question of whether the corporate veil ought to be lifted in that particular case.

42 In summary, when a company's corporate veil is lifted, it is an exception to the general rule that the liability of the company is distinct from that of its shareholders. We hold that the exception applies in the following situations:

(a) The law of its incorporation is the appropriate governing law and that law allows the exception to be made; or

(b) Where the court decides to invoke the exception but it is not available under the law of incorporation but the court nonetheless wishes to do so as a matter of its policy:

(i) If the law of incorporation is the same as the law of the forum, then the court cannot create exceptions to separate corporate personality that are not recognised by the law of incorporation as the law of incorporation must be taken to have encompassed all the relevant policy concerns in disregarding a company's separate legal personality.

(ii) However, where the law of incorporation is some other law and the court considers that a liability has been shielded by using a company that is subject to that law which does not permit the lifting of the corporate veil, the court may nonetheless lift the corporate veil in such situations by applying the law of the forum. This was the situation in *Akhmedova*.

43 In the present case, it was clear that Singapore law as the law of incorporation was the applicable law in determining the appellant's liability. The contract was entered into by HN Singapore, a Singapore-incorporated company and HN Singapore was liable for the Balance Purchase Price. This appeal concerned the separate question of whether the appellant, the sole shareholder of HN Singapore, was also liable. This clearly depended on the company law of Singapore and not what the proper law of the contract was. Any rights that the respondent may have against the shareholder(s) of HN Singapore was a question that must be answered by reference to the law of HN Singapore's incorporation.

Issue 3: Whether HN Singapore's corporate veil should be lifted under Singapore law?

44 Following our decision that Singapore law was the governing law where the lifting of the corporate veil was concerned, we next considered whether HN Singapore's corporate veil should be lifted under Singapore law. At the trial, the Judge found that none of the grounds (*ie*, fraud, sham or façade and *alter ego*) pleaded by the respondent was made out. At the appeal, the respondent relied only on the *alter ego* ground.

45 The UK Supreme Court in *Prest v Petrodel* [2013] 2 AC 415 limited the scope of corporate veil piercing to the evasion principle. Accordingly, as a

matter of English law, the *alter ego* ground is not sufficient in itself to warrant lifting the corporate veil. However, the parties agreed that as a matter of Singapore law, the *alter ego* ground was applicable and proceeded on that basis here and at the trial. We therefore proceeded on the same basis as it was unnecessary for us to take a firm view on *Prest v Petrodel* in the present matter.

46 Under the *alter ego* ground, the key question is whether the company was carrying on the business of its controller. This is inevitably a question of fact: *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [96].

47 We disagreed with the respondent that HN Singapore was the appellant's *alter ego*. First, HN Singapore was established on 9 September 2016, approximately three and a half years before its transaction with the respondent. Second, HN Singapore had other business activities, including import and export and consultancy and the respondent did not challenge the appellant's evidence on this point. Third, HN Singapore was not formed for the purpose of the contract with the respondent. In any case, as observed by Vinodh Coomaraswamy J in *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd* [2016] 1 SLR 1129 at [195], "the doctrine [of separate legal personality will not] be displaced simply because the owners of the company incorporated it for the very purpose of insulating themselves or other group companies from liability. That is the very purpose of the limited liability."

48 We saw no basis to disagree with the Judge's finding that there was no indication that the appellant treated HN Singapore's bank account as his own or its financial obligations as personal. The appellant did not deposit any part of the purchase price paid by the respondent into his personal bank account. Instead, on 7 April 2020, one day after the respondent's payment, HN Singapore

transferred US$1,525,286 to Mr Li Chong, for him to manage payments to Wondfo, Nuodong (a China company that acted as a middleman) and the designated shipping company. Additionally, HN Singapore disbursed a total of US$219,608.32 to Nuodong and GuangZhou QG International Shipping Co Ltd for other charges related to the transaction.

49 On appeal, the respondent submitted that the only payments out of HN Singapore's bank account were for the performance of the Varied SPA and the appellant had sole control over HN Singapore's bank account and had referred to it as "my account" in an email. We were not persuaded by the respondent's arguments. Since the only major transaction that HN Singapore was carrying out at the material time was the supply of COVID-19 test kits, it followed that the only payments out of its bank account were related to the performance of the Varied SPA. The appellant had sole control over HN Singapore's bank account but that was not surprising since he was its sole controller. Evidence of sole shareholding and control of the company without more will not move the court to intervene: *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [36]. The referral of the bank account as "my account" was nothing more than a choice of expression and did not detract from the fact that HN Singapore's bank account was not used as though it was the appellant's personal bank account with no regard to the proper separation of funds.

50 The fact that HN Singapore was undercapitalised should have been readily discoverable if it was not known to the respondent and there was nothing to suggest that that fact alone warranted the lifting of HN Singapore's corporate veil. The respondent could have asked for a personal guarantee or some other form of security to ensure the performance of the contract but it did not.

Issue 4: Whether the appellant made an actionable misrepresentation

51 The respondent appealed against the Judge's decision that misrepresentation was not made out. At the trial, the respondent alleged that the appellant made the following misrepresentations: (i) that HN Singapore could deliver the test kits on time within 20 days of receipt of payment; (ii) that the appellant and/or HN Singapore were in the business of importing and exporting commodities and supplies, including medical supplies; (iii) that the appellant was a member of the Singapore delegation to the 2018 G20 Leaders' Summit in Buenos Aires or that he was part of the summit in some capacity.

52 The Judge found that representations (ii) and (iii) were not properly pleaded and in any event did not amount to actionable misrepresentations. The appeal was solely in relation to the first alleged misrepresentation.

53 We affirmed the Judge's finding that the appellant did not make an implied representation that HN Singapore had the ability to effect the delivery of the test kits within 20 days of receipt of payment. There was no evidence that at the time when the contract was entered into, *ie,* 2 April 2020, HN Singapore could not deliver the test kits. The non-delivery was the result of Chinese export bans but nothing showed that the appellant was aware of such bans at the time of contract formation. The respondent knew all along that the test kits were manufactured and supplied by a third party from China, *ie*, Wondfo, and not by HN Singapore. Insofar as the respondent relied on the appellant's WhatsApp message to a representative of the respondent stating, "Yes my friend, we can do it", we disagreed with the respondent's contention that the appellant was not only agreeing to act but that he was warranting in effect that he could guarantee Wondfo to supply the goods. By the statement, the appellant was merely agreeing to procure the test kits from Wondfo and nothing more. He did not

make a positive representation on the date of delivery that he believed and knew to be false.

54 The objective evidence after 2 April 2020 also undermined the respondent's case that the appellant had no reason to believe that HN Singapore was able to deliver the test kits within 20 days of receipt of payment. On 20 April 2020, the appellant caused HN Singapore to enter into an agreement with Wondfo for the purchase of 182,475 test kits (see [6] above) and even transferred sums of money to relevant parties in China as part of the transaction with Wondfo (see [48] above). There was no reason why the appellant would have done so if he had already known that the test kits would not be delivered to the respondent on time.

55 We also saw no merit in the respondent's invocation of s 108 of the Evidence Act to shift the burden of proof to the appellant regarding his knowledge of whether HN Singapore had the ability to deliver the test kits by 26 April 2020 and whether the appellant honestly believed that HN Singapore could do so. Section 108 of the Evidence Act reads:

> **Burden of proving fact especially within knowledge**
>
> **108**. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.

56 In *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [80], this Court set out three principles in s 108 of the Evidence Act:

> (a) First, it does not apply where the facts in question are known by others apart from the defendant. This is in keeping with the purpose of the rule, which is to maintain fairness between the parties …
>
> (b) Second, it operates in a "commonsense way" and the "balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts"

> must be taken into account in deciding whether the incidence of the burden of proof has shifted …
>
> (c) Third, in order for s 108 of the EA to apply, a mere allegation that there are facts which are solely within the knowledge of the defendant is insufficient; instead, the plaintiff has to establish at least *a* prima facie case against the defendant. It is only after this has been done that s 108 of the EA operates to place the burden on the defendant to avoid liability by proving the facts which are especially within his knowledge …

57 What the respondent was trying to do in invoking s 108 of the Evidence Act was to shift the burden of proof to the appellant to disprove the respondent's claim of a fraudulent misrepresentation when it had not even established a *prima facie* case that the appellant had made a statement of fact that was false. This was clearly unacceptable.

58 In the result, we upheld the Judge's decision in holding that misrepresentation was not made out.

Conclusion

59 For the foregoing reasons, we allowed the appeal. We made no order as to costs for the amendment of the notice of appeal. We allowed the Judge's costs order to stand.

60 We awarded costs of $120,000, including disbursements, to the appellant for the appeal and for the transfer application. We also released the undertaking given by the appellants' solicitors as a condition for obtaining a stay of execution of the judgment pending this appeal.

61 In ordering the appellant the amount of $120,000, we took into account the fact that the legal arguments that the law of incorporation should govern the issue of corporate veiling lifting were not made before the Judge. Further, the

appellant made an offer to settle to the respondent on 2 October 2023. The offer was to settle the High Court action and the appeal for $150,000. It lapsed after three weeks and although the respondent submitted that it had insufficient time to consider the offer, the fact was that the respondent did not respond to the offer at all and neither did its solicitors ask for an extension of time to take instructions.

62 We record our appreciation to counsel for both parties for their comprehensive written submissions. We also commend counsel for the appellant, Mr Tan Jun Hong, for his clear and measured oral submissions which assisted the court in its deliberation.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Tan Jun Hong (D'Bi An LLC) (instructed counsel) and Wong Thai Yong (Wong Thai Yong LLC) for the appellant;
Daniel Soo, Cumara Kamalacumar and Luis Inaki Duhart (Selvam LLC) for the respondent.