Wee Yue Chew v Su Sh-Hsyu
[2008] SGHC 50

Case Number : Suit 665/2004

Decision Date : 07 April 2008

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Rasanathan s/o Sothynathan (Colin Ng & Partners) for the plaintiff; Hee Theng Fong, Low Wei Ling Wendy and Teo Swee Ling Joana (Hee Theng Fong & Co) for the defendant

Parties : Wee Yue Chew — Su Sh-Hsyu

Contract – Breach – Sale and purchase of shares – Shares transferred to purchaser but seller not paid balance contract price – Dispute as to contract price – Defence of discharge by payment – Purchaser's case that seller had given instructions for contract price to be remitted to third party – Whether seller giving remittance instructions to pay third party – Whether seller was paid balance contract price

Evidence – Proof of evidence – Onus of proof – Sale and purchase of shares – Shares transferred to purchaser but seller not paid balance contract price – Dispute as to contract price – Defence of discharge by payment – Whether legal burden on purchaser to prove payment by way of discharge of her obligation as defence or for seller to prove non-payment – Whether legal burden on purchaser or seller to prove contract price – Whether purchaser proving discharge by payment and contract price – Sections 103, 104, 105, 106 Evidence Act (Cap 97, 1997 Rev Ed)

7 April 2008 Judgment reserved.

Belinda Ang Saw Ean J:

1 These proceedings arise out of the sale of 1000 shares in the share capital of a Singapore registered company called Interstellar Intereducational Pte Ltd ("Interstellar") whose business is that of providing tertiary education in Shanghai through a college known as Shanghai Normal University Science, Technology & Management College.

The burden of proof

2 It is common ground that 1000 Interstellar shares belonging to the plaintiff, Dr Wee Yue Chew ("the Shares"), were sold and transferred to the defendant, Dr Su Sh-Hsyu, on 25 June 2004. The Shares were then registered in her name. It is not the defendant's case that the events to payment of the Shares had not occurred. Factually, the defendant concedes that the Shares were transferred and registered in her name. However, the defendant maintains that she has paid for the Shares having remitted the contract price to the plaintiff's order. In this connection, the issue is whether the payment to one Tung Cheng Yu ("Tung") was for the Shares.

3 Counsel for the defendant, Mr Hee Teng Fong, submits that the legal burden of proof is on the plaintiff to prove non-payment. In my view, it is erroneous to characterise the issue as one of non-payment. It is to be noted that the defendant has in her defence alleged payment of the contract price to the plaintiff's order. Plainly, the defendant has to prove payment by way of discharge of her obligation as a defence to this action. The legal burden of proof in this present case is best addressed by turning to the following passage of the judgment of Walsh JA in *Currie v Dempsey* [1967] 2 NSWR 532 at 539 for an answer:

> In my opinion, the burden of proof … lies on a plaintiff, if the act alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action. *The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has*.
>
> [emphasis added]

4 Specifically and by way of illustration, I turn to the decision of *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 on the application of the rule on the legal burden of proof. That case was not about the characterisation of the arrangement between the parties because it was conceded that the original payment to the defendant was by way of loan. The issue was who bore the onus of proving, as the defendant alleged, that the money had been repaid. The Australian High Court at 569-570 said:

> The law was and is that, speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration.

5 In Singapore, the statutory formulation of the burden of proof under ss 103 to 106 of the Evidence Act (Cap 97, 1997 Rev Ed) is basically the same as or similar to the propositions gathered from the Australian authorities outlined above. To illustrate, the commentaries on s 104 of the Indian Evidence Act (our s 106 of the Evidence Act) in *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (LexisNexis Butterworths, 17th Ed, 2002) in Vol III at 4041 state as follows:

> … When a defendant admits the cause of action and pleads payment, he must prove that the claim which is admitted has been discharged by payment.

6 So, if the defendant does not deny the tenancy in an action for rent but pleads payment, the *onus probandi* is on him (see *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* in Vol III at 4040). Likewise, in the present case, the legal burden is on the defendant as her defence is concerned specifically with discharge by payment.

7 A related issue here is the contract price itself. The plaintiff's case is that the agreed contract price was RMB 2.5m whereas the defendant pleaded the contract sum as US$508,069 (being the equivalent of RMB 4.2m as at 29 July 2004). In my judgment, the plaintiff has, for the reasons explained below (see [41] to [45]), made out a *prima facie* case that the contract price was RMB 2.5m. The defendant, having asserted a positive case of a different contract price, bears the legal burden on both issues - the price of RMB 4.2m and the discharge of the payment obligation. These two factual disputes raised by the defendant are inexorably intertwined. The legal burden which is constituted by the pleaded case lies upon the defendant as the party affirming a fact in support of her defence, and it remains with her and is assessed at the end of the trial after hearing evidence and counter-evidence from the parties. As with most civil suits, the evidential burden shifts or alternates from one party to the next in the progress of a trial according to the nature and strength of the evidence offered in support or in opposition of the main fact to be established (see *Ong & Co Pte Ltd v Quah Kay Tee* [1996] 2 SLR 553 at 560).

8 Lastly, if the state of the evidence is such that at the end of the trial the court is left in an uncertain position, the court may rule that the assertions have not been made out. This proposition is clear from *The Popi M* [1985] 1 WLR 948. In that case, the claimant's vessel sank in deep water such

that no inspection of the wreck was possible. The claimants sought to claim under a marine policy issued by hull underwriters. They had to prove the loss was from "perils of the sea". Prior to the trial, various explanations were put forward to support the claim. But eventually, only one was contended for, namely, that the "*Popi M*" had come into collision with an unidentified submerged submarine travelling in the same direction. The underwriters contended that the cause of the aperture was prolonged wear and tear of the vessel. Bingham J regarded the former explanation as inherently improbable and the "wear and tear theory" as virtually impossible. In those circumstances, he concluded that the submarine theory on the balance of probabilities must be accepted as the explanation of the loss. The House of Lords reversed the decision. Lord Brandon of Oakbrook, with whose speech the other members of the House agreed, said at 955:

> My Lords, the late Sir Arthur Conan Doyle in his book *The Sign of Four*, describes his hero, Mr. Sherlock Holmes, as saying to the latter's friend, Dr. Watson: "How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" It is, no doubt, on the basis of this well-known but unjudicial dictum that Bingham J. decided to accept the shipowners' submarine theory, even though he regarded it, for seven cogent reasons, as extremely improbable.
>
> In my view there are three reasons why it is inappropriate to apply the dictum of Mr Sherlock Holmes, to which I have just referred, to the process of fact-finding which a judge of first instance has to perform at the conclusion of a case of the kind here concerned.
>
> The first reason is one which I have already sought to emphasise as being of great importance, namely, that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.
>
> The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated. That state of affairs does not exist in the present case: to take but one example, the ship sank in such deep water that a diver's examination of the nature of the aperture, which might well have thrown light on its cause, could not be carried out.
>
> The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.
>
> In my opinion Bingham J. adopted an erroneous approach to this case by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. He should have borne in mind, and considered carefully in his judgment, the third alternative which was open to him, namely, that the evidence left him in doubt as to the

cause of the aperture in the ship's hull, and that, in these circumstances, the shipowners had failed to discharge the burden of proof which was on them.

9 These remarks are of relevance in the present case. On the authorities which are applicable here, and where the court determines that the version advanced by a plaintiff is not a probable one, the court does not have to choose the most likely of competing theories. The court may decline to accept either case. Gleeson CJ in *Anthony Peter Suvaal v Cessnock City Council* [2003] HCA 41 at [36] said:

> A trier of fact, confronted with divergent cases being advanced by the parties, may decline to accept either case and may proceed to make findings not exactly representing what either party said. But that does not justify the creation of an entirely new case with which the losing party had no testimonial or other evidentiary opportunity to deal.

10 With these principles in mind, I now turn to the matters in dispute.

The competing views

11 The alleged payment of the contract price was the subject of conflicting evidence between the plaintiff and the defendant's principal witness, Shi Bi Xian ("Shi"). As mentioned above at [7], an interrelated issue is the contract price itself: Was the price of the Shares agreed at RMB 2.5m or RMB 4.2m? Counsel for the plaintiff, Mr S Rasanathan, submits that the contract price was evidenced by the share transfer form. Hence, Shi's evidence to the effect that the contract price was US$508,069 is inadmissible as it offended s 94(d) of the Evidence Act. Mr Rasanathan's fallback submission is that that DBD-3 was post contract, and if anything, the figure of approximately US$500,000 stated in DBD-3 would have to be the contract price as varied. He points out that variation of the contract price was not pleaded. In issue is also the question whether it was a term of the sale that payment was to be in two stages, namely, a deposit of RMB 500,000 before the transfer of the Shares, and the balance sum to be paid upon transfer of the Shares. In contrast to the plaintiff's case of two stages, the defendant's contention is that there was no deposit and a lump sum payment was made to the plaintiff's order. I start with the plaintiff's version of the matters in dispute.

The plaintiff's evidence

12 At the material time, the major shareholders of Interstellar, Madam Xia Xiaojun ("Madam Xia") and her family had agreed to collectively sell their entire 90% stake in Interstellar for RMB 22.5m to Tsai Yen-Yu ("Tsai"), Lee Ming-Ta ("Lee") and Huang Yin-Mei ("Huang"). The intermediary handling the transaction on behalf of the purchasers of the 90% shareholding was one Hsieh Hsi Mou ("Hsieh") who is also the husband of Huang. Out of the 9000 shares, the purchasers each acquired 3000 shares.

13 As for the remaining 10% shares in the company belonging to the plaintiff, he agreed to sell his stake at RMB 2.5m to the defendant who is Tsai's daughter. Lee is the defendant's step-father. The whole business of the company was valued at RMB 25m. Based on that valuation, the plaintiff's 10% shareholding was priced at RMB 2.5m. The purchase of the Shares was handled by Hsieh who was introduced to the plaintiff as Huang's husband and the trusted agent and representative of the Tsai family. The plaintiff explained in his written testimony that one of the shareholders of the company, Zhang Wei (Madam Xia's husband), had introduced him to Shi and Hsieh at about the same time he had agreed to sell his shares. Shi was introduced to him as a relative of Tsai. This part of his testimony on Shi's relationship with Tsai was not challenged. It was also not denied that Hsieh

represented the Tsai family and, in turn, the defendant in the purchase of the Shares. Shi testified that Hsieh is her father's friend. In May 2004, the plaintiff was told by Hsieh that the defendant, Tsai's daughter, would be purchasing his Shares at the price of RMB 2.5m (which is equivalent to S$517,750). The terms orally agreed through Hsieh, *inter alia*, were that the plaintiff would be paid an initial deposit of RMB 500,000. The balance sum of RMB 2m would be paid upon the transfer of the Shares to the defendant. A deposit of RMB 500,000 was remitted by Huang to the plaintiff on 28 May 2004. According to the plaintiff, the contract was concluded in May 2004, and not in June 2004 as alleged by the defendant.

14 The plaintiff claims that apart from the deposit of RMB 500,000 (which is equivalent to S$103,550), no more money was paid towards the balance sum of RMB 2m (S$414,200) despite the transfer of the Shares to the defendant on 25 June 2004. It is not disputed that stamp duty on the Shares had been paid. The stamp duty certificate was issued on 29 June 2004 for stamp duty paid on the transfer of the Shares at a consideration of S$517,750. The same figure was inserted in Form E4A (Requisition form for transfer of shares) as the consideration for the share transfer. Notably, Form E4A was signed by Lee as director of Interstellar. On 25 June 2004, the plaintiff wrote to Hsieh advising that he had signed the papers in connection with the sale of the Shares, and that it would take two days to formally transfer the Shares to the defendant. In that same communication, he asked Hsieh to expedite payment within the next two days to his HSBC bank account in Perth, Australia.[note: 1] He provided banking details such as his account number and the branch of his HSBC bank account. On 2 July 2004, the plaintiff informed Hsieh that the transfer of the Shares to the defendant had been finalised. Again, he asked that payment due to him be remitted to his HSBC bank account in Perth.[note: 2] On 8 July 2004, he wrote again to Hsieh. On 8 July 2004, the company secretary of Interstellar, Koh Jiun Hau of The World Secretarial Pte Ltd, advised a Mr Xie (who, according to the plaintiff, was Hsieh[note: 3]) that the formalities for the transfer of the Shares in the company had been accomplished.[note: 4] The directors' resolution approving the transfer of the Shares from the plaintiff to the defendant was dated 25 June 2004. A search on 4 August 2004 of the company's records lodged with the Accounting & Corporate Regulatory Authority confirmed the defendant's status as a registered shareholder of the Shares. As the plaintiff did not hear from Hsieh or receive payment of the balance purchase price, he sued the defendant claiming RMB 2m (or S$414,200) as the balance money due to him for the Shares. Later, upon learning the whereabouts of the defendant, the plaintiff wrote directly to her on 1 September 2004, and again on the following day. In both letters, he again asked for payment and directed that payment was to be sent to his bank account in Australia. Prior to writing to the defendant, he had on or about 31 August 2004 spoken on the telephone to the defendant about payment. In that telephone conversation, the defendant had informed him that payment had been made. As mentioned, the issues with which I am concerned with arose out of the defendant's defence.

The defendant's evidence

15 The defendant accepted that she had contracted with the plaintiff. In acknowledging the contract evidenced by the share transfer form which she signed, she also accepts that the matters stated therein are true, and that, in my judgment, certainly included the price of S$517,750. Apart from her limited testimony, the defendant has no personal knowledge of the transaction. The crucial document which the defendant relies upon in support of her defence is DBD-3, a composite document depicting at the upper half of the page the business card of a Standard Chartered officer by the name of Daphne Tay; at its mid-section, the Standard Chartered Cash/Cheque Deposit Advice ("the Deposit Advice") with an account number 01-X-XXXXXXX (machine printed and handwritten) and the name "Tung Cheng Yu" in machine print. A little below that printed name are handwritten instructions in Chinese to pay the "transaction price" of "approximately US$500,000" to the designated bank account number appearing in that Deposit Advice. It was said that DBD-3 carried the signature of the

plaintiff to signify his remittance instructions. Two other signatures also appear on the page as witnesses to the plaintiff's signature and instructions. Other than what was allegedly handwritten on DBD-3, no other document linked the Shares with the remittance of US$508,069 to Tung and as payment for the Shares. The English translation of the handwritten Chinese characters provided by the defendant (which the plaintiff disputes) read as follows:[note: 5]

> Please transfer the transaction price (approximately USD$500,000) for 10% of the shares of Interstellar Intereducational Private Ltd, Singapore to the account bearing the above account number.
>
> Seller: (Signed)
>
> Witness: Hsieh Hsi Mou (Signed) Shi Bi Xian (Signed)

Shi's version of the mid-June 2004 meeting at Merry Hotel

16 As stated, the defendant has no personal knowledge of actual payment and is, therefore, unable to testify to this as a fact. Shi is a crucial witness for the defence. Shi was introduced to the plaintiff by Zhang Wei in or about February or March 2004. She introduced Hsieh to the plaintiff as the plaintiff wanted to sell his shares in Interstellar.[note: 6] She confirmed that she was present at the meeting in mid-June 2004 at the Merry Hotel, Shanghai, where the plaintiff met Hsieh. She testified that Hsieh penned the Chinese characters found on DBD-3 and the plaintiff signed the document which was witnessed by herself and Hsieh. She read through what Hsieh had written down before she signed DBD-3 as a witness. DBD-3 contained, as she confirmed, the plaintiff's instructions to remit about US$500,000, being the purchase price of 10% Interstellar shares, to the designated bank account. The bank account was in the name of Tung. She claimed to have overheard Hsieh's remark to the plaintiff that with a photocopy of the account number available, there would not be any mistakes in the remittance. She also overheard the plaintiff remind Hsieh that the currency of remittance was US dollars.

The plaintiff's version of the June 2004 meeting at Merry Hotel

17 At the trial, the plaintiff admits to his signature on DBD-3. However, he claims that DBD-3 must have been concocted as the document he signed did not contain any instructions directing payment of the sale proceeds of approximately US$500,000 to Tung who was a total stranger to the plaintiff. The document that he was asked to sign, and did sign, made reference to 10% shares in Interstellar and nothing more. There were also no witnesses to his signature. Rejecting the defendant's translation in English of DBD-3 as misleading, he tendered another translation obtained for the proceedings, and it reads as follows:[note: 7]

> Singapore Interstellar Company (Interstellar) 10%
>
> Shares transfer prices approximately USD500,000.00 (Please transfer to the above account number)
>
> Reseller [signature]
>
> Witness [signature] Shi Bideng

18 The plaintiff claims that the sentence "Shares transfer prices approximately USD500,000.00 (Please transfer to the above account number)" was not on the document he signed at the Merry

Hotel meeting, and that sentence must have been added later on without his knowledge or consent.

19 He also recalled Hsieh asking him on one occasion to sign on a blank sheet of A4 sized paper which was intended for a project in which a company called WYC Archiplan Pty Ltd and one other company owned by Hsieh were planning to collaborate to refurbish a row of shop houses in Shanghai. It was pointed out that the project fell through at a preliminary stage. The plaintiff reasons that the blank piece of paper with his signature on it could have been subsequently used to create DBD-3 in its current form.

20 The plaintiff maintains that he did not sign DBD-3 in its current form. To him, DBD-3 was on any view a concocted document. He therefore asks the court to reject DBD-3 as proof of his instructions to pay to the plaintiff's order.

Discussion and Analysis of the conflicting evidence

The state of the evidence

21 The plaintiff's performance of the contract between the plaintiff and the defendant was not disputed. The share transfer form was executed and duly stamped. The Shares were transferred to the defendant and duly registered in her name. In the context of the ownership of the Shares having passed to the defendant, a debt being the price of the Shares has to be met. The defendant is here arguing that the indebtedness to the plaintiff has ceased to exist as she has paid the plaintiff. Accordingly, the defendant who bears the onus of proof has to establish that her liability to the plaintiff arising under the sale contract had been discharged by payment of US$508,069 to Tung. She relies heavily on DBD-3 and Shi's evidence to prove the discharge by payment.

22 Notably, this question of discharge by payment has to be considered by reference to the evidence as a whole, including Shi's eyewitness account, the expert evidence on DBD-3 and that of the plaintiff, all of which (like any evidence) must be considered against the probabilities. Inevitably, the court has to have regard to several important matters such as "What was the contract price?"; "Was it the price pleaded in the Statement of Claim or the sum stated on DBD-3 and the amended Defence which was for a much larger sum?"; and "Were there two contracts as alluded by Shi or was there an agreement to under declare the contract price for the plaintiff's purpose?". Furthermore, the court will have to evaluate whatever inherent inconsistencies in DBD-3, inconsistencies between the plaintiff's and the defendant's evidence as well as inconsistencies between DBD-3 and contemporaneous documentary evidence like the plaintiff's written communications to Hsieh.

23 Before moving on to the next topic, I must say that the difficulty with this seemingly straightforward case is that Hsieh who played a central role in the transaction did not testify. He was the person who arranged the sale and purchase and remittance instructions. Hsieh clearly stood at the heart of the transaction. He clearly had full knowledge of the arrangements agreed with the plaintiff. Hsieh provided an affidavit of evidence-in-chief way back in April 2006. On 1 February 2008, Mr Hee informed the court that Hsieh would not be able to attend this tranche of the trial which was expected to end upon completion of re-examination of Shi on 6 February 2008. On 6 February 2008, Mr Hee informed the court that the defendant was not calling Hsieh as a witness. I note that Hsieh did not attend court when the action first came up for trial on 6 July 2006 (see *Wee Yue Chew v Su Sh-Hsyu* [2007] 1 SLR 1092). No explanation was offered for his absence this time round. His affidavit of evidence-in-chief affirmed on 29 April 2006 was not admitted in evidence. Without a doubt, the evidence before the court is limited and invariably incomplete. Consequently, I have to approach the evidence to the extent that I find it credible.

The witnesses

(i) The defendant

24 The defendant undoubtedly laboured under the disadvantage that she never dealt directly with the plaintiff and Hsieh. She said she had never met or spoken to the plaintiff save for the occasion he called to ask for payment. She was largely dependent upon what she was told by her parents in their explanation of her case in defence of the action. She conceded in cross-examination that she neither met Hsieh nor spoke to him about the transaction contrary to what she had clearly stated on oath in her affidavit of evidence-in-chief. That was not all. The defendant further admitted that she had no personal knowledge of the payment. Yet, she claimed in her written testimony that she had arranged for the purchase price to be remitted to the plaintiff's order. That statement was clearly untrue as Mr Rasanathan pointed out that the defendant did not know about DBD-3 until she signed her affidavit of evidence-in-chief on 28 April 2006. In the witness box, the defendant admitted that the arrangements were not made by her. At the request of her parents, her brother in Taiwan had arranged for Profound World Investment ("Profound") to remit US$508,069 to the account of Tung.

25 Therefore, most if not all of what the defendant said in her written testimony about the dealings with Hsieh were untrue. This revelation was disturbing for she had confirmed in para 2 of her affidavit of evidence-in-chief that the facts deposed were true to her knowledge, information and belief. Again, in evidence-in-chief, the defendant reconfirmed the truth and accuracy of the statements in her affidavit of evidence-in-chief[note: 8]and had incriminated herself in lying in a sworn document. Whilst her subsequent confession has mitigating and redeeming qualities, it does not excuse the defendant from putting before the court false evidence for the purpose of defending the claim - the sworn statements were still false. The court could not pass by the false sworn statements with indifference for by their falsehood the court, prior to the confession, was misled into believing that the defendant was privy to the transaction in terms of the contract price and the discharge of her obligation by payment. In *Koh Pee Huat v Public Prosecutor* [1996] 3 SLR 235, Yong Pung How CJ pointed out at 247 that, in a proper case, an offence under s 193 of the Penal Code (Cap 224, 1985 Rev Ed) could be committed the moment a false affidavit was affirmed. That said, in fairness to the defendant, after she came clean, so to speak, she rightly under cross-examination did not purport to explain the transaction and dispute payment to any significant extent. I also appreciate that the defendant was unwittingly caught up in this episode as a result of her parents' nomination of her as the purchaser of the Shares. But that was not an excuse for her cavalier attitude towards the legal suit. Putting aside any misgivings that have arisen from the mendacious statements, the defendant's evidential difficulties remain and were compounded by the omission of Hsieh's evidence.

(ii) Shi

26 The principal witness for the defence was Shi who introduced herself as a part-time teacher at the college in Shanghai operated by Interstellar. Shi admitted that her role in relation to the sale of the Shares was to introduce the plaintiff to Hsieh, and thereafter both Hsieh and the plaintiff continued to discuss the sale with each other. I find that Shi was not directly involved in the transaction and was unable to testify as to when the contract was concluded. The plaintiff testified that the contract was concluded in May 2004, and not in June 2004 as was alleged by the defence.

27 Mr Rasanathan, attacked Shi's evidence by stating that her version of the events was implausible for essentially three reasons. The first relates to Shi's account of how the price was agreed at RMB 4.2m. This, Mr Rasanathan said, did not make sense, quite apart from Shi's version differing from the plaintiff's story. The other reason for saying that Shi's evidence should be disbelieved was the very nature of DBD-3 which was so incredible that it just could not be. Third, her

narrative of witnessing the plaintiff's signing of DBD-3 given in the course of cross-examination was different from her written version. I shall deal with his three broad comments in turn.

28 Shi in her written testimony said that during the meeting at the Merry Hotel in mid-June 2004, Hsieh confirmed that he had found a purchaser for the plaintiff's shares. However, Shi in the witness box was asked by counsel for the plaintiff whether Hsieh told the plaintiff that he had found a buyer for his shares and her answer was no. She was very categorical in her reply having been asked during the morning's cross-examination the same or similar question at least eight times and on each occasion she said no. [note: 9] Notably, immediately after lunch, the same or similar question was asked of Shi, namely, whether Hsieh at the meeting in Merry Hotel said anything to the plaintiff about finding a purchaser for his shares in Interstellar. By this time, she changed her answer to yes. She was asked, at least five times, the same or similar questions and her answer was yes. Why did her answer change so dramatically after lunch? No adequate explanation of the matter or inconsistencies was offered in the evidence or in argument.

29 Shi claimed to have been present on the occasion when the plaintiff met Hsieh and she witnessed his signature on DBD-3. She testified that before she signed as witness, she read Hsieh's handwritten note in Chinese which did not only state "Singapore Interstellar Company (Interstellar) 10%" as claimed by the plaintiff. In her written testimony, she claimed that in May 2004, she, Hsieh and the plaintiff met at the Shanghai Four Seasons Hotel. At that meeting, Shi said that the plaintiff had requested Hsieh to find a purchaser to buy his 10% shares. In mid-June 2004, the three of them met at the Merry Hotel in Shanghai. [note: 10] The pleaded case is that the defendant agreed to purchase the shares in June 2004 for US$508,069. In contrast, the plaintiff's pleaded case is that the agreement was concluded in May 2004. The deposit for the Shares was remitted to the plaintiff as early as 28 May 2004. Shi claimed that the deposit was for another matter. I note that much of her testimony in the witness box was not in her affidavit of evidence-in-chief.

30 Again, Shi's written testimony contradicts her oral testimony. In para 11, she deposed:

> Mr Hsieh then asked me to sign on the same photocopied document as a witness. I did so. Mr Hsieh countersigned.

31 In her oral testimony, she said she signed *after* Hsieh.[note: 11] She confirmed this testimony in re-examination.[note: 12] After she signed as a witness, Hsieh got up and left.[note: 13] Given the inconsistencies in her written and oral testimony, her recollection of the events is demonstrably unreliable. The inconsistencies highlighted above reflect unfavourably on Shi's general reliability as a witness.

32 Shi considers herself to be under a moral obligation to assist the defendant in these proceedings. She was openly anxious to tell her story rather than answer Mr Rasanathan's questions. As a result, her evidence appeared to be partisan and evasive rather than an attempt to set out the facts objectively. This diminishes the extent to which her testimony could be safely relied upon without corroborative support. That, however, does not mean that the court is bound to accept the plaintiff's testimony as accurate.

(iii) The plaintiff

33 As for the plaintiff, I thought he exaggerated the extent to which he was ignorant of what was going on. I got the impression that he knew exactly what had gone on and was content with it. The court has still to critically evaluate the evidence having regard to the inconsistencies with contemporaneous documents, inherent implausibility and other compelling evidence. In addition,

bearing in mind that the parties have chosen to conduct their business without regard to any sensible paperwork, I have formed the view that none of the evidence is sufficiently safe to be relied on without some documentary support.

34 Mr Hee identified some matters which he said showed that the plaintiff was a thoroughly dishonest man and his testimony should be rejected:

(a) He wanted to under declare the consideration on the share transfer form for his own purpose;

(b) He lied that the signature on DBD-3 was not his and only admitted that the signature was his at the trial. This was after his own expert reached the same conclusion as the defendant's expert that the signature on DBD-3 was the plaintiff's;

(c) He had several opportunities over the last 24 months to explain how his signature was on DBD-3 but he did not do so until the trial. The plaintiff's conduct showed that he made up the story of how his signature was on DBD-3; and

(d) He used a business card falsely describing himself as a former secretary to the Prime Minister.

35 Mr Hee submits that these matters would have considerable weight when assessing the veracity of the plaintiff. I have commented on the first point in [42] below. The fourth is not relevant to the issue before me.

36 A more likely explanation of the second and third points is that the plaintiff realised that he had to explain how his signature came to be on the document, and he came up with at least four different possibilities rather than different versions of the truth. I agree that a rational person in the position of the plaintiff with his academic achievements and work experience concerned to look after his own interest could not have put up with what was said by Shi to have been agreed by him at the Merry Hotel meeting unless it was true. The plaintiff was a scholar and had worked for the National Productivity Board (now known as Spring) for many years. He was conferred an honorary doctorate degree in management from the Moscow University of Science and Technology. There was more than a bit of mystery about DBD-3 which, in the absence of Hsieh, remains to be so. Be that as it may, for the reasons stated below (see [47]-[48]), the second and third points are not determinative of the principal issue to be decided.

DBD-3 as proof of payment instructions

37 The defendant's case is that the plaintiff had given instructions for the purchase price to be remitted to a third party, Tung. Paragraph 3 of her Amended Defence reads as follows.

> The Defendant further avers that the Plaintiff gave the Defendant instructions to make full payment for the Shares in one lump sum by telegraphic transfer to the Account of Tung Cheng Yu, bearing account number 01-X-XXXXXX-X, with Standard Chartered Bank, Battery Road Branch, Singapore. Therefore, paragraph 3 of the Statement of Claim is denied.

38 The defendant filed further and better particulars to para 3 on 25 November 2005. She stated that the alleged instructions to her were given in or around June 2004. In answer to a further question whether the alleged instructions were oral or in writing, she stated as follows:

> The instructions were given orally by the Plaintiff in the presence of Hsieh Hsi Mou and Shi Bi Xian. The Plaintiff then gave the said Hsieh Hsi Mou a copy of a Standard Chartered Bank Cash/Cheque Deposit Advice with the said bank account number for payment to be made. The said Hsieh Hsi Mou requested the Plaintiff to sign on the said document to confirm his instructions and the said Hsieh Hsi Mou and Shi Bi Xian counter-signed as witnesses.

39 Significantly, the instructions were said to be oral and nothing was said about Hsieh writing down the plaintiff's instructions which the plaintiff then signed as his written instructions. Shi's affidavit of evidence-in-chief talked about this in the following terms.

> 10. Mr Hsieh wrote down Mr Wee's instructions on the photocopied document in Chinese and asked Mr Wee to sign on that photocopied document to confirm the instructions to transfer the money into that particular account. Mr Wee signed on the photocopied document.
>
> 11. Mr Hsieh then asked me to sign on the same photocopied document as a witness. I did so. Mr Hsieh countersigned.

40 At the trial, the focus was on DBD-3 as it was the document that connected or linked the remittance by Profound to the Shares. Without it, the remittance by Profound could have been for something else and nothing to do with the purchase of the Shares. DBD-3 was said to contain the plaintiff's instructions in writing which is somewhat different from the pleaded case and the further and better particulars filed in November 2005.

(i) Remittance instructions was for a higher contract sum

41 Taking DBD-3 at face value, the transaction price was stated to be approximately US$500,000. This figure of US$500,000 found in DBD-3 is different from the figures found in the other documents disclosed for the trial. Other than the Morgan Stanley letter dated 29 December 2005 confirming the remittance of US$508,069 to Tung and the bank documents relating to this remittance, nowhere else does the figure of US$508,069 appear. The figure of S$517,750 on the share transfer form represents the consideration for 1000 shares in Interstellar. The stamp duty certificate attests to this.

42 The defendant herself was not in a position to challenge the plaintiff's evidence on the contract price and the deposit of RMB 500,000. In an attempt to explain the higher contract sum, Shi claims without establishing any basis that (a) Zhang Wei, his wife and son signed two contracts for the sale of the 9000 shares in Interstellar; and (b) the transfer forms executed by Zhang Wei, his wife and son were in respect of one part of the price.[note: 14] This account is hearsay evidence and is inadmissible. In the case of the plaintiff, Shi explained that the figure of S$517,750 on the share transfer form was an under declaration. This under declaration was at the plaintiff's request as his objective was to avoid stamp duty or tax. Her explanation does not make sense. First, stamp duty was not payable by the plaintiff. Second, there is no capital gains tax on the sale proceeds of the Shares in Singapore.

43 On the deposit of RMB 500,000, Shi said that it was for a different matter. There is nothing to substantiate her testimony. The best person to explain this payment would have been Hsieh since the remittance was from his wife, Huang who together with the defendant's parents had earlier acquired shares in Interstellar. In the absence of countervailing evidence, the RMB 500,000 remitted to the plaintiff in May 2004 was, and I so find, the deposit for the purchase of the Shares.

44 In my judgment, I find that S$517,750 as stated on the share transfer form was the contract price. This figure of S$517,750 was for the 1000 shares based on S$517.75 per share which was the same price disclosed in the share transfer forms relating to the sale by the majority shareholders of

Interstellar. It follows from my finding on the contract price that the defendant has to explain why a larger amount was remitted to the plaintiff's order. The defendant has not managed to give a satisfactory explanation. In fact, in cross-examination, Shi agreed with Mr Rasanathan that it would not make sense for the defendant to pay for shares in the same company at a price which is 70% more than the purchase price paid by the defendant's family members.[note: 15] In the circumstances, any instruction to remit the transaction price of "approximately US$500,000" is inexplicable since the balance due to the plaintiff was only RMB 2m or the equivalent of S$414,200.

45 Moving on to another point, accepting for the sake of argument that the plaintiff had signed DBD-3 in the form it was presented to the court, the instructions there are far from conclusive and are not exhaustive. DBD-3 purports to be written instructions to the defendant to pay the purchase price to the order of the plaintiff. It purports to bind the plaintiff. As mentioned in [36] above, there is more than a bit of mystery about DBD-3. First, DBD-3 was not addressed to the defendant or Hsieh. Hsieh, the person to whom the instructions were allegedly conveyed, did not testify at the trial. Second, the amount to be remitted was lacking in exactitude which is unusual. Why did Hsieh who was taking remittance instructions not specify the exact amount to be remitted? Any foreign exchange uncertainties could easily have been taken care of by stipulating payment in US dollars of the contract price in RMB. It was odd that Hsieh wrote down "approximately US$500,000". It was equally odd for the plaintiff to agree to such an approximate amount given the deposit of RMB 500,000 he had received earlier, and the amount owing was RMB 2m or S$414,200, and not US$500,000 or thereabouts. A reasonable person in the position of the plaintiff giving instructions to remit money to his order would want to ensure that the instructions were clear and precise especially the amount to be remitted, rather than as was the case here leaving the amount as an approximation that was substantially different to the outstanding balance. This would be a very odd thing to be doing even for an unsophisticated man. For the plaintiff, he had simply denied that DBD-3 in its entirety contained his instructions. Third, I have already said that the defendant and her family would have known that the price per share was S$517.75. This arose from her parents having earlier signed in May 2004 the share transfer forms based on a share price of S$517.75 per share. Nonetheless, a larger amount was remitted. The upshot of all the discrepancies highlighted is that when the evidence is evaluated in totality, DBD-3 is, and I so find, inconclusive and not exhaustive for what it purports to accomplish. The fact the defendant acted on DBD-3 does not affect my finding.

46 Finally, it seems to me that demonstrating that money was withdrawn as confirmed by the Morgan Stanley letter of 29 December 2005 is no proof that the liability to make payment for the Shares had been discharged. As stated, no acknowledgement of receipt of US$508,069 was discovered. It seems to me that in circumstances where money is ordinarily remitted, people as a matter of commercial practice often ask for an acknowledgment or a receipt to be issued for money paid or received.

(ii) Remittance instructions in DBD-3 countermanded

47 Taking the defendant's case at the highest - that DBD-3 in the form it was presented to the court was signed by the plaintiff and it constituted instructions to the defendant to pay the purchase price of US$508,069 to Tung - the defendant's defence that her liability has been discharged by payment still fails. First, the defendant has to prove that DBD-3 was the plaintiff's payment instructions. Second, the defendant acted on those instructions. I am here concerned with the first point. The instruction in DBD-3 must not be considered in isolation. DBD-3 has to be examined or reviewed in the full context of contemporaneous documents such as the two letters faxed to Hsieh on 25 June 2004 and 2 July 2004 respectively (see [14] above]. In contrast to DBD-3, the plaintiff was, *inter alia*, asking Hsieh in these two faxes to Hsieh (also known as Sumo) for payment to be made to the plaintiff's HSBC bank account in Perth, Australia. Crucially, the faxes came *after* DBD-3 and *before*

the remittance to Tung. I noticed from the documents disclosed by the Standard Chartered Bank that US$508,069 was credited to Tung's account on 29 July 2004. It is the defendant's case that the money was remitted on 28 July 2004 and credited into Tung's account on 29 July 2004. Notably, the plaintiff had referred to the faxes of 25 June 2004 and 2 July 2004 in his affidavit of evidence-in-chief affirmed on 14 June 2006. This was 18 months ago and the defendant, if she had wanted, had ample time to deal with the two faxes. Although it is not the defendant's case that Hsieh did not receive the two faxes, Mr Hee tried to neutralise the effect of the faxes by attempting to discredit the plaintiff's testimony that the faxes were sent to Hsieh. The plaintiff was cross-examined on the absence of any documentary proof of fax transmission. The absence of fax transmission data on the faxes to Hsieh is not determinative of the matter. There was no fax transmission data printed on the two letters faxed in September 2004 to the defendant which she received. No evidence was led to rebut the plaintiff's written testimony that he sent to Hsieh the faxes of 25 June 2004 and 1 July 2004 respectively. I find that the faxes of 25 June 2004 and 1 July 2004 respectively were sent to Hsieh on those dates. In context and to add credence to the faxes, they were sent in the same period as the formalities to register the Shares were undertaken and completed. For instance, the directors' resolution approving the transfer of the Shares from the plaintiff to the defendant was dated 25 June 2004 and on 8 July 2004, the company secretary of Interstellar advised a Mr Xie (who, according to the plaintiff, was Hsieh[note: 16]) of the completion of the formalities for the transfer of the Shares in the company.[note: 17]

48 In my judgment, the defendant has to establish, and I find that she has not proved, that DBD-3 stood as the plaintiff's payment instructions despite the faxes of 25 June 2004 and 2 July 2004 respectively, which were clearly at odds with DBD-3. As mentioned in [47] above, on a plain reading of the faxes, the plaintiff was asking Hsieh to make payment to the plaintiff's HSBC bank account in Perth. The instructions there plainly countermanded any other earlier instructions to the contrary. I must point out that even if DBD-3 was concocted and false, the fax of 25 June 2004 was the plaintiff's first genuine instructions on remittance to his Perth bank account, and the same instructions were repeated on 2 July 2004. On any view taken of DBD-3, for the same reason, the defence of payment fails.

(iii) Was DBD-3 concocted?

49 As explained in [48], in the final analysis, the present case turned on the faxes of 25 June 2005 and 2 July 2004 rather than on a determination of whether DBD-3 was concocted or not. However, as much time and effort was spent by the parties on the question, I shall now comment on the evidence.

50 The forensic point here is that if DBD-3 was a deliberate concoction, a good job was done. For the defendant, it was argued that DBD-3 was not concocted. First, the experts were not able to confirm that DBD-3 was doctored in the manner suggested by the plaintiff. The plaintiff's expert, Christopher Anderson ("Anderson"), who is a forensic document examiner, was not able to conclusively determine the order in which the handwritten entries, the business card and the Deposit Advice were placed on DBD-3. He concludes in his amended report dated 16 January 2008:[note: 18]

> While the questioned document is a composite document, it is inconclusive whether or not the reproduced forms on the questioned document referred to in item 1, being the enlarged business card of Daphne Tay and the Cash/Cheque Deposit Advice, were on the document when the signature "WY Chew" was signed.

51 Furthermore, Anderson explains that to prove that the plaintiff signed first and some additional text was subsequently added as the correct sequence of events, it was necessary to show that the toner was sitting on top of the ink for the plaintiff's signature. There was no such finding upon

examining the plaintiff's signature. The defendant's own expert, Adrian Lacroix, also reached the same conclusions. He opined that there was no evidence of any intersection of entries on DBD-3 at the plaintiff's signature and the Deposit Advice to determine their respective sequence.

52 Although the plaintiff admitted to the signature on DBD-3 as his, he disputes having signed DBD-3 in its current form as it purports to convey. I note that one side of DBD-3 is the composite document with the handwritten instruction to pay to Tung's account. On the reverse side of DBD-3 is a share transfer form with the plaintiff's name typed in as transferor. It also has on it the plaintiff's signature which was not witnessed. The number of shares was indicated as "ONE THOUSAND ORDINARY SHARES OF $1/- EACH FULLY PAID in the undertaking called INTERSTELLAR INTEREDUCATIONAL PTE LTD". The transfer form was not dated although the year, "TWO THOUSAND AND FOUR", was typed in. The name of the transferee was not stated. The consideration was also left blank.

53 Seeing that the transfer form was on the reverse side of DBD-3, I do not, from this perspective, consider as far-fetched the plaintiff's testimony that he gave this transfer form to Hsieh during the meeting at the Merry Hotel and that Hsieh made the notation in Chinese "Singapore Interstellar Company (Interstellar) 10%". Hsieh spoke Mandarin and for him to use the reverse side of the transfer form to make a note in Chinese that is consistent with the English text of the share transfer form was not so implausible. According to the plaintiff, the handwritten notation and his signature was made after he had received the deposit of RMB 500,000 from Hsieh's wife. However, Hsieh curiously did not ask for an acknowledgment of the receipt of the deposit. So as not to be misunderstood, all I am saying in discussion of the evidence under this subject matter is that in the absence of any countervailing evidence from the defendant, the plaintiff's version is not so fatuous or such a bum point as to be disregarded outright.

54 Anderson explained that it is simple to place or reproduce parts of a document on another document.[note: 19] This can be done as he further explained using the photocopier or the computer. He has seen regularly in his practice, information being added after signatures was placed on documents.[note: 20] He therefore accepts that it is possible that the Chinese characters were already written down when the plaintiff signed before photocopying was done for the enlarged business card of Daphne Tay and the Deposit Advice and then the other signatures were placed on it. More importantly, from the plaintiff's point of view, Anderson did not carry out an examination to determine whether the sentences in Chinese were written at the same time, or one part was written first and then another part written on another occasion. This was because he did not have any writing specimen to compare with DBD-3 to make any determination.

55 As stated, the expert evidence is only part of the evidence in the case. The other part that is important is the conflicting evidence of the plaintiff and Shi and the contemporaneous documentary evidence. In my judgment, the crucial issue turns on whether there is any satisfactory proof of payment instructions. Seeing that the defendant has not discharged the legal and evidential burden that DBD-3 contained the plaintiff's instructions on the payment of the purchase price for the reasons explained above (see [47] to [48]), it is not necessary for the determination of this case that I make a finding on whether that DBD-3 was concocted or not.

(iv) Discovery against Standard Chartered Bank

56 The plaintiff drew the court's attention to his investigations following information gathered from disclosure of documents relating to the details of Tung's bank account. A discovery order was obtained by the defendant in June 2007 against the Standard Chartered Bank for disclosure of documents relating to the details of Tung's account, and pursuant to the order the bank had filed a

list of documents. According to the plaintiff, the defendant's application against Standard Chartered Bank was not served on him and he only found out in September 2007 that the bank had disclosed documents. The bank's documents showed that after US$508,069 was credited into Tung's account, a sum of US$500,000 was remitted from his account to one Tung Shu Fen ("Shu Fen") in Shanghai on 10 August 2007. The plaintiff learned through a property search that Shu Fen's address is the same as Hsieh's. The plaintiff contends that the evidence shows that after the money was paid into Tung's account, the bulk of it was remitted back to persons connected with the deal. His investigation also revealed that the majority shareholders of Interstellar, Madam Xia Xiajun and her husband, Zhang Wei, and their son have also not been paid in full for their shares and they have since sued the purchasers in Shanghai.

57 The plaintiff would have the court draw a number of inferences from the fact that the money remitted to Tung exceeded the contract price by 70%; that Tung, a total stranger to the plaintiff, redirected the bulk of the money to his wife, Shu Fen. Although the plaintiff has no evidence that the money was eventually taken by the defendant's representative, Hsieh, it seems more than a coincidence that the money trail revealed that the money was redirected from Tung's account to Shu Fen and that Shu Fen, Hsieh and Huang share the same residential address. Huang is one of the three newly registered shareholders of Interstellar and her husband, Hsieh who stood at the heart of the transaction did not testify. There is much to be explained, but given the conclusion reached in this judgment, the plaintiff's investigations, although intriguing, have no bearing on the basis of my decision in [48] above.

Conclusion

58 At the end of the day, the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case. In this regard, in the final analysis, I conclude on the evidence that DBD-3 is inconclusive in effect for the reasons explained above (see [41] to [46]). More importantly, the defendant had considered DBD-3 in isolation and ignored the effect of the plaintiff's faxes of 25 June 2004 and 2 July 2004 and their impact on the instructions contained in DBD-3. Timing wise, these two faxes were sent to the defendant's representative, Hsieh, *after* DBD-3 and well *before* Profound remitted US$508,069 to Tung on 28 July 2008. Evidentially, what this means is that there were no instructions to remit money to Tung as the instructions in DBD-3 were countermanded by the two subsequent faxes to Hsieh. There was nothing in evidence to overcome the consequences of these faxes. Even if DBD-3 was concocted, it was a nullity and the fax of 24 June 2004 was the plaintiff's first genuine remittance instructions which were repeated on 2 July 2004. The outcome is still the same either way. In the circumstances, it follows that any omission on the part of Hsieh to notify his principal of the changes or latest instructions is a separate matter between Hsieh and the defendant and outside these proceedings.

59 Accordingly, the defendant has failed in her defence. Therefore, I order judgment for the plaintiff in the sum of S$414,200 together with interest thereon at the rate of 5.33% from the date of the writ to judgment. The defendant is to pay the plaintiff the costs of the action.

[note: 1]AB 18

[note: 2]AB 19

[note: 3]Plaintiff's affidavit of evidence-in-chief at para 8

[note: 4]AB 22

[note: 5]DBD-3 at p 2

[note: 6]Transcript of Evidence, 1 February 2008, at pp 22-23

[note: 7]Plaintiff's Bundle of translated Documents at p 27

[note: 8]Transcript of Evidence, 31 January 2008, at p 96

[note: 9]Transcript of Evidence, 1 February 2008, at pp 53-68

[note: 10]Transcript of Evidence , 1 February 2008, at p 50

[note: 11]Transcript of Evidence, 1 February 2008, at p 74

[note: 12]Transcript of evidence, 6 February 2008, at p 27

[note: 13]Transcript of Evidence, 1 February 2008, at p 78

[note: 14]Transcript of evidence, 1 February 2008, at pp 112-114

[note: 15]Transcript of Evidence, 1 February 2008, at p 110-111

[note: 16]Plaintiff's affidavit of evidence-in-chief para 8

[note: 17]AB 22

[note: 18]AB 54

[note: 19]Transcript of Evidence 31 January 2008 at 92,

[note: 20]Transcript of Evidence 31 January 2008 at 92 lines 5 to 18