Ho Soo Fong *v* Ng Chuan Hwa and others
[2010] SGHC 176

Case Number : District Court Appeal No 40 of 2009/Z

Decision Date : 14 June 2010

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Mimi Oh (Mimi Oh & Associates) for the appellant; S H Almenoar (R Ramason & Almenoar) for the second and third respondents.

Parties : Ho Soo Fong — Ng Chuan Hwa and others

Debt and Recovery

14 June 2010 Judgment reserved.

Steven Chong J:

Introduction

1 This is an appeal against the decision of the District Judge (the "DJ") who disallowed part of the appellant's claim in the trial below.

2 The action was instituted by one Ho Soo Fong ("the appellant") against the three respondents, Ng Chuan Hwa ("the first respondent"), Ng Soon Wah ("the second respondent") and a construction company, Ser Chuan Construction Pte Ltd ("the Company"). The claim was in respect of an outstanding debt allegedly owing from various loans that were extended by the appellant to the Company. The first and second respondents are siblings. At the material time, both the first and second respondents were directors of the Company; the first respondent has since stepped down from the directorship. The claim against the first and second respondents was based on various acknowledgements under which they purportedly guaranteed the debt of the Company. The first respondent did not contest the appellant's claim in the court below. In fact, he testified on behalf of the appellant. The DJ in the court below awarded the appellant the sum of $12,000 which has since been paid. The appeal relates only to the sum of $75,507.10 that was disallowed by the DJ.

Background

The loans

3 Sometime in or around August 2007, the Company was facing cash flow problems and needed to borrow some money. In particular, the Company had successfully tendered for two Singapore Telecommunications Limited ("Singtel") projects and needed to procure a performance bond in the sum of $131,000. The projects were valued in excess of $6,000,000. The husband of the Company's company secretary, one Mr Chew, introduced the appellant to the second respondent. The initial purpose of the meeting was to discuss the possibility of the appellant investing in or even buying into the Company. However, these discussions did not bear fruit, as the second respondent was not agreeable to the appellant's proposals.

4 The discussions then turned to the possibility of the appellant lending money to the Company.

The appellant subsequently agreed to lend the Company a sum of $131,000 on condition that the first and second respondents stand as guarantors. The first and second respondents agreed. The appellant claims, *inter alia*, that he agreed to provide the $131,000 loan to the Company in the hope that the Company would return the favour by letting his company use the Company's licence to tender for future government projects. According to the appellant, the Company is licensed to tender for government projects in value above $4,000,000.The appellant claims that he was also assured by the fact that the Company would be receiving substantial progress payments from Singtel for the projects, sufficient to pay off the loan. On 11 October 2007, the appellant utilised his bank deposits as collateral to procure a banker's guarantee in the amount of $131,000 from Development Bank of Singapore Ltd ("DBS") in favour of Singtel. However, as it later transpired, the DBS banker's guarantee was not acceptable to Singtel. The appellant then procured a substitute performance bond from Overseas Assurance Company ("OAC") on 31 October 2007. The first and second respondents signed an acknowledgment dated 31 October 2007 for the $131,000 loan, and agreed to stand as guarantors for it. There was no earlier acknowledgement for the $131,000 loan by the first and second respondent for the DBS banker's guarantee.

5 However, the Company required additional funding. On 25 October 2007, the appellant extended an additional $30,000 loan to the Company. On the same day, the first and second respondent signed an acknowledgement that they agree to stand as guarantors for the $30,000 loan. Both the $131,000 and the $30,000 loans are not disputed by the respondents ("the undisputed loans").

6 The appellant claims that he extended five other loans to the Company totalling a further sum of $82,100. The five loans are disputed by the second respondent and the Company ("the disputed loans") and comprise:

(a) $16,000 on 10 October 2007 via cash payment;

(b) $12,000 on 15 October 2007 via cash payment;

(c) $8,000 on 25 October 2007 via a cash cheque;

(d) $23,100 on 7 November 2007 ($20,000 via a cash cheque and $3,100 via cash payment); and

(e) $23,000 on 17 November 2007 via cash payment.

7 In support of his claim, the appellant produced five acknowledgments of the above loans signed solely by the first respondent, purportedly on behalf of the Company and the second respondent. Other than the different loan amounts and the different dates of the acknowledgments, the five acknowledgments were similarly drafted in the following terms:

> We confirmed and understand that the amount of [amount of loan] given by you Mr. HO SOO FONG is to help us for doing Construction project for Authorities only and we hereby also confirmed and understand that you Mr. HO SOO FONG are not a Money lender.
>
> The money given …are to return to you (Mr. HOO SOO FONG) within 3 weeks.
>
> We both **Miss: NG SOON WAH and MR. NG CHUAN HWA** directors of the Company herby assured you that the Company will pay you within the about agreed times and if the Company did not pay you the amount owed to you (Mr. HO SOO FONG). We both personal Miss NG SOON WAH

and Mr. NG CHUAN HWA agreed to guarantee to pay you upon demand to us with including acceptable interest to be pay by us to you.

Yours Sincerely

[signature of the first respondent]

Signed by Mr. NG CHUAN HWA and behalf of director

Dated; [date]

[emphasis in original]

8 The appellant claims he agreed to extend additional loans to the Company because without them, the Company would not have been able to continue to perform the Singtel projects, and as a consequence he would risk a default of the undisputed loans that he had already provided to the Company.

The Repayments

9 The appellant claims that the respondents made the following repayments towards the undisputed as well as the disputed loans:

(a) For the disputed $16,000 loan of 10 October 2007, $16,000 was repaid on 22 October 2007 via the Company's cheque;

(b) For the disputed $8,000 loan of 25 October 2007, $8,000 was repaid on 2 November 2007 via the second respondent's cheque;

(c) For the undisputed $30,000 loan of 25 October 2007, $30,000 was repaid on 2 November 2007 via the second respondent's cheque;

(d) For the disputed $12,000 loan of 15 October 2007, $12,000 was repaid on 5 November 2007 via cash payment; and lastly,

(e) For the disputed $23,100 loan of 7 November 2007, $23,100 was repaid on 22 November 2007 via the Company's cheque.

The amount repaid came to a total of $89,100. There is some dispute between the parties as to how the $8,000 was repaid. According to the appellant, the cheque dated 26 October 2007 for repayment of the disputed $8,000 loan was paid on 2 November 2007, although it was initially dishonoured upon presentation. On the other hand, according to the second respondent, while the $8,000 cheque on 2 November 2007 was indeed dishonoured, the sum was subsequently repaid by cash. In any case, there is no dispute that the sum had been repaid.

The Bank Service Charge

10 Although the DBS banker's guarantee was subsequently rejected by Singtel, a service charge of $5,407.10 was imposed ("the DBS service charge"). The appellant claims that he paid for the DBS service charge in cash, on behalf of the Company, in the first respondent's presence. The second respondent, on the other hand, claims that she gave the money to the first respondent to pay the DBS service charge.

The Proceedings Below

11 The action was commenced on 2 May 2008 when the appellant filed a writ and statement of claim against the respondents. On 9 June 2008, the appellant entered judgment in default of appearance against the first respondent for the sum of $159,407.10 being the balance outstanding from the two undisputed loans, the five disputed loans and the DBS service charge. This was the original sum claimed by the appellant as indorsed in the statement of claim.

12 On 18 June 2008, the appellant applied for summary judgment against the second respondent and the Company for the original claim amount of $159,407.10. The second respondent and the Company contested the claim on three grounds; first that the DBS service charge was not paid for by the appellant, secondly, that the five disputed loans were never made, and thirdly, that the appellant is a moneylender pursuant to the Moneylenders Act (Cap 188) (the "Moneylenders Act") and therefore the appellant's claim is illegal and unenforceable.

13 On 18 September 2008, Deputy Registrar Ms Lynette Yap ("DR Yap") entered summary judgment against the second respondent and the Company for the sum of $71,900 being the outstanding sum of the two undisputed loans after deducting the undisputed repayments made ($161,000 - $89,100 = $71,900). In so doing, she did not accept the defence that the loans were in contravention of the Moneylenders Act. Unconditional leave to defend was granted to the second respondent and the Company to defend the balance sum of $87,507.10 representing the five disputed loans and the DBS service charge. The appeal by the second respondent and the Company against the decision of DR Yap (RA179/2008/X) was dismissed by District Judge Mr Leslie Chew ("DJ Chew") on 20 October 2008. Thereafter the Company paid the judgment sum of $71,900 on 28 February 2009.

The Trial Below

14 At the trial below, the following issues were before the DJ in respect of the balance claim of $87,507.10:

(a) Whether the appellant had extended the five disputed loans to the Company;

(b) If so, whether the first respondent, who had admitted to taking the loans and had signed the acknowledgments, had the authority to bind the second respondent and the Company to the five disputed loans;

(c) Whether the amounts paid by the second respondent and the Company to the appellant were partial payments towards the two undisputed loans and/or the five disputed loans; and

(d) Whether the Company had paid for the DBS service charge.

At the hearing before the DJ, counsel for both parties agreed that the defence under the Moneylenders Act was *res judicata* as there had been no appeal against the decision of DJ Chew on this issue; *Ho Soo Fong v Ng Chuan Hwa and others* [2010] SGDC 8 ("the GD") at [5].

15 The second respondent and the Company defended the appellant's claim on the following grounds:

(a) The second respondent claimed that she had no knowledge of the five disputed loans or

the fact that the first respondent had signed the acknowledgments. In addition, the moneys allegedly disbursed under the five disputed loans were also never received by the second respondent or the Company;

(b) None of the payments made by the second respondent or the Company were repayments towards the five disputed loans. Instead, the payment of $16,000 was partial repayment of the undisputed $131,000 loan, the $30,000 was repayment for the undisputed $30,000 loan, the $8,000 and $23,100 were interest payments for the two undisputed loans, ie the $30,000 loan and the $131,000 loan respectively;

(c) The appellant charged the second respondent and the Company exorbitant interest for the undisputed loans and the acknowledgments signed by the first respondent were fabricated by the appellant to disguise the interest payments for the two undisputed loans as fresh loans; and

(d) Although it is not disputed that the Company is obliged to pay for the DBS service charge, the second respondent claimed that the Company and not the appellant had paid for it. The second respondent claimed that she gave the money to the first respondent on 11 October 2007, to pay for the DBS service charge on behalf of the Company and believed that the first respondent had duly done so.

16 The appellant claimed that it was the second respondent who contacted him to request for the five disputed loans, stating that the Company needed money urgently to pay for the Company's outgoings such as wages to the workers. This was why the five disputed loans were disbursed either in cash or by cash cheques. The first respondent would then meet the appellant near the appellant's office at Yio Chu Kang road to collect the moneys, and then signed the corresponding acknowledgments for each of the five disputed loans. Sometimes, he came alone, and sometimes, he came with the second respondent, who would be waiting for him in the car by the roadside.

17 The first respondent's version of events corroborated the appellant's case. He testified that the five disputed loans were indeed made to the Company, and that he had signed the acknowledgments for the five disputed loans with the knowledge of the second respondent. In addition, he testified that the second respondent did not give him the money to pay for the DBS service charge and that it was the appellant who had paid for it.

The Findings by the DJ

18 The DJ made the following findings. First, she found that the appellant did not make the five disputed loans. The reasons for this finding can be found at [53] of the GD and can be summarized as follows:

(a) She found the affidavit and oral evidence of the first respondent to be unreliable and contradictory and suggested that the first respondent could be lying to help the appellant in return for the appellant not proceeding against him as guarantor for the two undisputed loans (GD at [57]);

(b) She did not accept that between 7 to 10 October 2007, the appellant had gotten to know the second respondent sufficiently well to disburse loans to the Company without getting the second respondent to sign the corresponding acknowledgments;

(c) The procedure of only getting the first respondent to sign the acknowledgments for the five disputed loans was at odds with that adopted for the undisputed loans; and

(d) She was of the view that some, if not all of the five disputed loans, in particular, the disputed loans of $23,100 and $23,000, seem to be fabricated by the appellant to enforce payment of interest for the two undisputed loans.

19 Second, the DJ found that even if the five disputed loans were made, the first respondent had no authority to enter the loan transactions to bind either the second respondent and/or the Company. She reasoned as follows (GD at [55]):

(a) It is the appellant's own affidavit and oral evidence that he would advance the monies only at the request of the second respondent;

(b) The appellant negotiated the possible investment in the Company and the $131,000 undisputed loan only with the second respondent;

(c) The first respondent's role was confined to going with the appellant to pay the service charge for the DBS banker's guarantee and collecting the cashier's order for the undisputed $30,000 loan; and

(d) Even if the five disputed loans are proven, there was no evidence proffered by the appellant, an experienced businessman, as to why he would assume that the first respondent could sign on behalf of the second respondent to bind her as a guarantor for the Company.

20 Third, the DJ found that the DBS service charge was paid by the Company. This was because the receipt for payment was issued to the first respondent, and unlike the appellant's alleged practice, the appellant had not required any of the respondents to sign an acknowledgment that this sum was owing to him (GD at [52]).

21 The DJ, however, entered judgment for the appellant in the sum of $12,000 the basis of which or lack thereof is explained below at [34]. The Company has since paid this sum to the appellant. As a consequence of her decision, the DJ disallowed the balance claim of $75,507.10 ($87,507.10 - $12,000).

The Present Appeal

The issues in this appeal

22 All the issues raised in this appeal are essentially factual issues. It is trite law that the appellate court should only interfere with the trial judge's decision if the court is satisfied that despite the privilege of the trial judge who has heard and tried the case, the trial judge is plainly wrong and any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusions; *Lam Soon Oil & Soap Manufacturing Ltd v Impex Syndicate Ltd* [1964] MLJ 176. The appellant's basis for this appeal is that the DJ had erred in her findings as stated in [18]–[21] above.

23 The appellant's claim in this appeal is for the balance claim amount of $75,507.10; being the sum of the outstanding undisputed $131,000 loan of 31 October 2007, the disputed $23,000 loan of 17 November 2007 and the $5,407.10 DBS service charge, less the judgment sums of $71,900 and $12,000 paid by the Company ($131,000 + $23,000 + $5,407.10 – $71,900 - $12,000 = $$75,507.10). The issues in this appeal are no different from those raised in the trial below and I will now consider them in turn.

Were the five disputed loans extended to the Company

24 In spite of the various factual disputes, the one constant between the parties is the undeniable fact that payments were made by the second respondent and the Company to the appellant. It seems to me that the key to this appeal is to determine from the evidence whether any or some of the payments were made towards repayment of the five disputed loans. If indeed such repayments were so made, it must follow, in the absence of a reasonable explanation to the contrary, that the five disputed loans were in fact extended to the Company.

25 The appellant produced the following documentary evidence in support of his claim that the five disputed loans were extended to the Company:

(a) The acknowledgments of the five disputed loans signed by the first respondent (see [6]–[7] above) as evidence that the first respondent received the loans;

(b) A copy of a cash cheque for $8,000, dated 25 October 2007, issued from the appellant's bank account and encashed on the same day by the first respondent, as evidence that the first respondent received a loan of the same amount on the same day;

(c) A copy of a cash cheque for $20,000, dated 7 November 2007, issued from the appellant's bank account and encashed by the first respondent on the same day, which corroborates the appellant's claim that he gave the first respondent a $23,100 loan on the same day, of which $20,000 was provided by way of a cash cheque;

(d) A copy of a cash cheque for $16,000, dated 20 October 2007, issued from the Company's bank account, as evidence that the Company had knowledge of the disputed $16,000 loan made on 10 October 2007 of the same amount and was making repayment for it;

(e) A copy of a cheque made payable to the appellant for $8,000, dated 26 October 2007, issued from the second respondent's bank account, as evidence that the second respondent had knowledge of the disputed $8,000 loan of 25 October 2007 of the same amount and was making repayment for it;

(f) A copy of a cheque made payable to the appellant for $23,100, dated 5 November 2007, issued from the Company's bank account, as evidence that the Company had knowledge of the disputed $23,100 loan of the same amount and was making repayment for it. There is, however, a discrepancy in the dates since the $23,100 loan was supposed to have been extended only on 7 November 2007 (2 days after the date of the cheque). The appellant's explanation is that the cheque could have been wrongly dated. In any case, this cheque was dishonoured and the Company issued a replacement cheque of the same amount (see below at (g)); and

(g) A copy of a cheque made payable to the appellant for $23,100, dated 22 November 2007, issued from the Company's bank account, as evidence that the Company had knowledge of the disputed $23,100 loan of the same amount and was making repayment for it.

Whether any payments were made towards the disputed loans

26 In response to the appellant's claim, the second respondent argues that the payments were not for the disputed loans but were made towards the undisputed loans, including interest payments for the undisputed loans instead.

27 In my view, it is clear from the objective evidence that the payments made by the second respondent and the Company were repayments of the disputed loans. The payment of $16,000 could

not possibly have been towards repayment of the $131,000 loan as the second respondent claims. The repayment was made on 20 October 2007. However, the $131,000 loan was only extended on 31 October 2007 when the OAC performance bond was issued. Why would the Company pay for a debt, which was not yet in existence? The second respondent's explanation is that she believed the $131,000 loan was effectively disbursed on 11 October 2007 when the DBS banker's guarantee was issued. However, the acknowledgement for the $131,000 loan signed by the second respondent was dated 31 October 2007, *ie* 11 days *after* the repayment on 20 October 2007.

28 Even assuming that the second respondent truly believed that the $131,000 loan was disbursed on 11 October 2007, the second respondent's claim that the $16,000 repayment was partial repayment of the $131,000 loan is still riddled with insurmountable difficulties, as follows:

(a) It is not disputed that the $131,000 loan only became due sometime around 9 November 2007 when the Company was to receive its first progress payment from Singtel. It is therefore incongruous that the Company would choose to pay a debt that was not yet due, especially given its impecunious state. This is supported by the Company's bank account statement for the month of October 2007, which revealed that on 19 October 2007, the Company only had a balance of $6,807.42 and on 24 October 2007, after the $16,000 cheque was cleared, it had a negative balance of -$2,162.57.

(b) The second respondent tried to explain that the Company wanted to pay off the $131,000 loan as and when it had funds so as to incur less interest. However, it is evident from the Company's bank account statement that the Company had no means to do so. It is also not disputed that just five days after the alleged repayment of $16,000 towards the $131,000 loan, the Company had to borrow another $30,000 from the appellant.

(c) In addition, the acknowledgment signed by both the first and second respondent dated 31 October 3007 was for the full sum of $131,000. If the second respondent is to be believed, by then the Company would have already prepaid the sum of $16,000 and yet the acknowledgement made no mention of the alleged prepayment of $16,000 at all. Any reasonable person or businessman would have ensured that the acknowledgment of debt would reflect the latest status of the debt.

29 It is therefore plain and obvious that the $16,000 which was repaid on 20 October 2007 was for the disputed $16,000 loan. It was no coincidence that the repayment tallied exactly with the disputed $16,000 loan. The Company could have only made the repayment if it was aware of the loan, and logically, it could have only been aware of the loan if it had requested for and had approved it.

Whether any of the payments were for interest

30 The second respondent and the Company must also provide an acceptable explanation to account for alleged interest payments. The second respondent claims that $8,000 and $23,100 were interest payments for the two undisputed loans, *ie* the $30,000 loan and the $131,000 loan respectively (see [15(b)] above). For such an argument to merit consideration, there must be some evidence on the applicable rate of interest. In support of her claim that the payments $23,100 and $8,000 were for interest payments, the second respondent referred to an email sent by the appellant to her daughter on 7 October 2007, where there was a reference that the appellant had wanted to charge 35% interest, on a $132,000 loan. She claims that the payment of $23,100 was indeed for the payment of the interest of the $131,000 loan as it was approximately half of the 35% interest on $131,000, *ie* $46,200. In that email, the appellant had stated that the repayment amount was to be divided into two and made via two cheques. However, the second respondent's purported explanation

cannot account for the $8,000 payment as interest.

31 In any case, even if these two payments were indeed for interest, the Company is not permitted to claim that the appellant was not entitled to the interest which the Company had agreed to pay and had paid. To hold otherwise, would effectively permit the second respondent and the Company to rely on the defence under the Moneylenders Act that was agreed by both parties to be *res judicata* at the outset of the trial. As such, even if the disputed loans were "*disguised*" as fresh loans as alleged and the repayments were interest payments, it was nonetheless wrong for the DJ to treat them as repayments towards the principal amount owing under the undisputed loans when that was not the intention of the Company or the second respondent in the first place.

Whether the second respondent and/or the Company had knowledge of the disputed loans

32 As a consequence of my findings, it must follow that the second respondent and the Company were not only aware of the disputed loans but had approved of the same. The second respondent claims that she had no knowledge of the five disputed loans and the five acknowledgements signed by the first respondent until the documents were shown to her by her solicitors. However, in the same breath, the second respondent claims that the alleged loans were "fallacious documents engineered by the [appellant] to disguise the fact that he had charged exorbitant interest for the loans he had lent to the 3rd [respondent]." (Affidavit of second respondent dated 23 June 2008 at paras 22 and 24). If the acknowledgements were indeed part of the appellant's plan to cover up the interest for the undisputed loans, and the second respondent and/or the Company was paying interest as stipulated in the acknowledgments, then it must also logically follow that she and/or the Company must have known about these acknowledgments and consequently the disputed loans.

33 Accordingly, the two further repayments of $8,000 and $23,100 were not interest payments for the undisputed loans. They were instead payments for two of the disputed loans. Once again it was no coincidence that these two repayments matched two of the disputed loans. I therefore cannot accept the second respondent's claim that she had no knowledge of the five acknowledgments and/or the five disputed loans.

Errors by the DJ

34 The DJ allowed the appellant's claim in the sum of $12,000. It is not clear from her GD why this sum was awarded. According to the appellant, he received repayment of the $12,000 disputed loan on 5 November 2007. Although the DJ noted at [42] of her GD that there was no dispute between the parties that the $12,000 repayment was received by the appellant, she went on to find that it could not be regarded as payment by the Company since the repayment was not pleaded by the second respondent or the Company. The second respondent alleged that she paid $5,000 in cash to the appellant which the DJ found was not proved by the evidence. The DJ at [58] of her GD then "entered judgment for the [appellant] for the amount of $12,000 as [she] found that the [respondents] had not pleaded and had failed to prove that they had paid this amount or the $5,000 that they had alleged." The claim before the DJ was for the disputed loans for which unconditional leave to defend was granted. It is difficult to reconcile the DJ's decision as regards the judgment sum of $12,000 given her finding that the disputed loans including the $12,000 were not made by the appellant. She did not explain whether it was awarded as payment for the disputed $12,000 loan or for some other claim. However, the Company did not appeal against this finding and has in fact since paid the judgment sum to the appellant. Accordingly there is no longer any issue before me that the $12,000 disputed loan has been paid to the appellant.

35 In arriving at her findings, the DJ appeared to have been unduly influenced by the fact that the

appellant did not follow the same procedure to obtain acknowledgements from the second respondent for the five disputed loans as he did for the two undisputed loans. It will be fair to say that there were inconsistencies in the evidence of all the witnesses. However, the inconsistencies of the second respondent's evidence goes to the heart of both her defence and that of the Company. In particular, the DJ did not attempt to reconcile the repayments made by the second respondent and the Company to the appellant against the clear objective evidence. On a proper analysis of the repayments by reason, *inter alia*, of the timing and the amounts as fully explained in [27] – [29] above, it is clear that they were made towards repayment of the five disputed loans. Accordingly, her principal finding that the appellant did not extend the five disputed loans is plainly against the weight of the evidence.

36 Further, the DJ failed to appreciate that her finding inevitably meant that two of the repayments, *ie* the $8,000 and $23,100 repayments, were effectively treated as interest payments for the undisputed loans. However, that finding cannot sit with the fact that both parties had agreed that the defence under the Moneylenders Act was *res judicata* for the purposes of the trial. As such even if they were interest payments, they were still enforceable. In any case, it is the second respondent's and the Company's case that these two payments, even if they were for interest, had already been paid. The DJ erred in appropriating these two repayments towards the undisputed loans.

37 The DJ found that the first respondent was inconsistent and unreliable in his evidence. With respect, I disagree. The first respondent's stand that it was the second respondent who had requested for the disputed loans and that he was only collecting the loans on the Company's behalf has always been clear and unwavering. The first respondent had also stated under cross-examination that the Company would not have had the money to fund its projects without the five disputed loans. This was entirely consistent with documentary evidence produced by the appellant, such as the copies of cheques and the Company's bank account statements. From the Company's own bank statements, it is clear that without the disputed loans, the Company simply did not have the funds to finance the Singtel projects. The DJ did not give any reasons why she found the first respondent's evidence to be unreliable or inconsistent other than the view that the first respondent was untruthful because he could possibly be helping the appellant in return for the appellant not proceeding against him as a guarantor for the two undisputed loans of $131,000 and $30,000 (GD at [57]). This view, to me, is without basis because the appellant *did* proceed against all the respondents, including the first respondent and had entered judgment against the first respondent for the sum of $159,407.10 on 9 June 2008.

38 The appellant's case is corroborated by reliable and clear evidence; both documentary and oral. On the other hand, the second respondent's allegations are bare and inconsistent with the objective evidence. Her own evidence is inconsistent with the sequence of events and defies logic.

39 For the above reasons, I find that four of the payments made by the second respondent and/or the Company were repayments of the following four disputed loans:

(a) For the disputed $16,000 loan of 10 October 2007, $16,000 was repaid on 22 October 2007 via the Company's cheque;

(b) For the disputed $8,000 loan of 25 October 2007, irrespective of whether the appellant's or the second respondent's version of event was to be believed, it is not disputed that the sum was repaid (see [9] above);

(c) For the disputed $12,000 loan of 15 October 2007, $12,000 was repaid on 5 November 2007 via cash payment as alleged by the appellant, notwithstanding the DJ's finding; and lastly,

(d) For the disputed $23,100 loan of 7 November 2007, $23,100 was repaid on 22 November 2007 via the Company's cheque.

The logical conclusion flowing from above repayments is that the appellant did make the five disputed loans to the Company. As a result of the DJ's finding, she wrongly attributed the repayments towards the undisputed loans. In the light of my findings, in particular my finding that the repayments were made for the disputed loans, it follows that the balance amount remains due and owing under the undisputed loans.

Did the first respondent have the authority to enter into the "disputed" loans to bind the second respondent and/or the Company

40 One of the issues at trial was whether the first respondent had the authority to enter into the disputed loan transactions to bind the second respondent and/or the Company. In view of my findings that four out of the five disputed loans had already been repaid, this issue is now only relevant to the remaining disputed $23,000 loan.

41 The appellant adduced evidence that the first respondent was the managing director of the Company at the material time, *ie* he produced a copy of the tender document for the Singtel project dated 23 September 2007 where the first respondent was denoted as the "M.Director", presumably meaning "managing director". The second respondent does not dispute that the first respondent was appointed as the Company's managing director. The question therefore is whether the first respondent, as the managing director of the Company, had the authority to enter into loan transactions on behalf of the Company. In *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, Lord Denning MR highlighted (at 584) that whether an agent had implied authority to undertake a certain act must be determined from the conduct of the parties and the circumstances of the case, and not just by the nature of his office. On the facts of the present case, I find that there is no necessity to embark into any in-depth analysis of the first respondent's office. For reasons I have already discussed above, I accept the appellant's and the first respondent's evidence that it was the second respondent who had requested for the five disputed loans on behalf of the Company. She and the first respondent were, at the material time, the only two directors and the controlling minds of the Company. I am therefore satisfied that the first respondent was acting with implied actual authority from the Company to obtain the disputed loans. I find that the Company had utilised the moneys from the five disputed loans for its operations and had made repayments towards the disputed loans. Therefore, even if the first respondent had no *actual* authority from the Company to obtain the disputed loans, the Company had ratified the first respondent's actions when it accepted and utilised the funds for its operation. After receiving the benefits of the five disputed loans with full knowledge that the loans came from the appellant, it does not lie in the Company's mouth to now argue that it did not authorise the loans.

Section 6(b) of the Civil Law Act (Cap 43, 1999 Rev Ed)

42 The same, however, cannot be said for the second respondent regarding her liability for the disputed loans. Section 6(b) of the Civil Law Act (Cap 43, 1999 Rev Ed) provides as follows:

> **6**. No action shall be brought against –
>
> (b) any defendant upon any special promise to answer for the debt, default or miscarriage of another person;
>
> unless the promise or agreement upon which such action is brought, or some memorandum or

note thereof, is in writing and *signed by the party to be charged therewith or some person lawfully authorised by him*.

[emphasis added]

43 As the acknowledgments were not signed by the second respondent, the appellant cannot rely on them to claim the disputed loans against her unless he can establish that she had authorised the first respondent to sign on her behalf. This issue was raised by the court during the appeal hearing and both counsel were invited to address it.

44 The appellant cannot overcome the fact that the acknowledgements were not signed by the second respondent.

(a) First, there is no evidence whatsoever to suggest that the first respondent was authorised by the second respondent to sign the acknowledgments on her behalf. Even though it is not disputed that the second respondent had acted as the guarantor of the Company for the undisputed loans, it does not follow that the same arrangement must necessarily be so for the disputed loans and that the first respondent had the authority to bind the second respondent for the debts of the Company. The mere fact that the Company had authorised or ratified the disputed loans does not translate into authority for the first respondent to sign the acknowledgements on behalf of the second respondent. It is a separate factual inquiry for which no evidence was led at the trial below.

(b) Second, from the text of the disputed loan acknowledgements, stated at [7], it is not even clear that the first respondent was signing on behalf of the second respondent. They were signed by the first respondent "and on behalf of director" without specifying the name of the "director" though the body of the acknowledgements did refer to the second respondent.

(c) Third, the appellant did not plead that the first respondent was authorised by the second respondent to sign the acknowledgements on her behalf.

45 The difficulties in proving that the first respondent had acted with the second respondent's authority prompted the appellant to abandon its claim against the second respondent for the disputed $23,000 loan, midway through the appeal.

Whether the appellant paid for the DBS service charge

46 The receipt for the payment of the DBS service charge was issued in the name of the first respondent. This was one of the reasons why the DJ found that the first respondent had paid for the DBS service charge (see GD at [52]). That, however, is not necessarily decisive that it was the first respondent who paid for the DBS service charge. It may well be that DBS issued the receipt in the first respondent's name because he was the director of the Company for which the banker's guarantee was issued. Although it was issued in the first respondent's name, the receipt was retained by the appellant. This indicates to me that the appellant was the party who had paid for the DBS service charge. Otherwise why would the first respondent allow the appellant to retain the receipt?

47 Furthermore it was the appellant who arranged for DBS to issue the banker's guarantee. Significantly, the first respondent himself denied paying for the DBS service charge and admitted that it was paid by the appellant instead. Finally, a letter of demand dated 16 April 2008 sent by the appellant's solicitors to the respondents' previous solicitors included the claim for the DBS service charge. There was no response from the respondents that they had paid for the DBS service charge

instead.

48 For these reasons, I find, on the objective evidence before me, that the appellant was the party who paid for the DBS service charge and is therefore entitled to this claim only as against the Company. The second respondent did not guarantee payment for the DBS service charge on behalf of the Company.

Conclusion

49 From my examination of the evidence adduced before the DJ, the defence of the second respondent and the Company simply did not "*add up*". As a consequence of my findings, I would allow the appeal, save that the second respondent is not personally liable for the $23,000 disputed loan and for the DBS service charge. I accordingly make the following orders:

(a) The Company is to pay the appellant a sum of $75,507.10 together with interest at 5.33% per annum from the date of the writ to the date of this judgment.

(b) The second respondent is liable for the debt of the Company up to a sum of $47,100 ($75,507.10 - $23,000 - $5,407.10) together with interest at 5.33% per annum from the date of the writ to the date of this judgment.

(c) Costs of the trial below to be taxed if not agreed instead of the costs fixed at $6,000 by the DJ to be paid by the second respondent and the Company to the appellant

(d) Costs of the appeal fixed at $15,000 and disbursements to be paid by the second respondent and the Company to the appellant.