Yeow Chern Lean v Neo Kok Eng and Another
[2009] SGCA 27

Case Number : CA 42/2008, 43/2008, 44/2008, 45/2008, 157/2008

Decision Date : 26 June 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Edmund Kronenburg, Leong Kit Wan and Joan Sim (Tan Peng Chin LLC) for the appellant; Philip Ling and Hwa Hoong Luan (Wong Tan & Molly Lim LLC) for the respondents

Parties : Yeow Chern Lean — Neo Kok Eng; Chip Hup Hup Kee Construction Pte Ltd

Bills of Exchange and Other Negotiable Instruments – Delivery – Conditional – Whether stipulation of condition as to use of cheque entailed conditional delivery of cheque

Restitution – Money had and received – Whether claim for restitution of a tort could be sustained even though claimant had failed to establish the tort

Tort – Conversion – Whether claimant had locus standi to bring claim to recover proceeds of cheques he had issued as loan to another party

26 June 2009 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal by Yeow Chern Lean (the defendant in Suit No 136 of 2007/L and Suit No 137 of 2007/Q below) against the decision of the trial judge ("the Judge") in *Neo Kok Eng v Yeow Chern Lean and another suit* [2008] SGHC 151 ("GD"). The two respondents in this case are Neo Kok Eng (the plaintiff in Suit No 136 of 2007/L) and Chip Hup Hup Kee Construction Pte Ltd (the plaintiff in Suit No 137 of 2007/Q). We shall refer to them as "Neo" and "the Company" respectively.

Background

2 The four protagonists in this case are the Company; Neo who is managing-director and majority shareholder of Chip Hup Holdings Pte Ltd which wholly owns the Company; one Lim Leong Huat ("Lim") who was the Company's general manager, project director and executive director before his employment was terminated on 29 November 2006; and the appellant who was the Company's general manager before his employment was terminated on 1 February 2007.

3 Although the appellant shared one of Lim's titles, that of general manager, it was not disputed that he was Lim's subordinate and took instructions from Lim. As for Neo and Lim, they enjoyed a close relationship before they fell out. Apart from being an employee of the Company, Lim was also the majority shareholder and, effectively, the owner of another company, AZ Associates Pte Ltd ("AZ Associates"). Neo and Lim's close relationship was reflected in the way the Company and AZ Associates (collectively "the two companies") were then being run. The two companies were both engaged in the building and construction business and shared the same telephone numbers, office premises and employees such as the accounting and administrative staff.

Suit No 136 of 2007/L

4 Suit No 136 of 2007/L was precipitated by an action, Suit No 779 of 2006 ("Suit 779"), brought by Lim on 21 November 2006 against the Company. In that suit, Lim claimed for the return of $7,205,000 which he alleged was the total amount of interest-free loans he had extended, at Neo's request, to the Company between July 2003 and September 2006. As a result, the Company investigated this claim and discovered that Lim had misappropriated various sums of money from the Company. In all, $6,083,741.06 worth of cheques which Neo had handed to Lim for the Company's use were allegedly diverted in the following ways: (a) in cash by Lim; (b) credited into the bank accounts of Lim, his wife or AZ Associates; or (c) credited into the Company's bank account but recorded as loans made by Lim or AZ Associates, to the Company.

5 Pursuant to these discoveries, the Company denied Lim's claims in Suit 779 and counterclaimed against Lim, his wife and AZ Associates for the misappropriated monies. The Company obtained summary judgment against Lim for the sums of $347,030 and $426,740. Lim appealed against this summary judgment by way of Civil Appeal No 142 of 2007. In the meantime, pending the determination of the appeal, Lim paid up the two sums pursuant to the judgment. At the hearing of the appeal on 11 July 2008, the judgment against Lim was set aside by consent but on the condition that the Company could retain the two sums and be at liberty to deal with them. It was also agreed that in the event that Lim and/or his wife succeeded in defending the counterclaim in Suit 779, the two sums would be refunded on such terms as the trial judge might deem fit to impose.

6 Following from the Company's investigations, Neo decided to procure, from United Overseas Bank Ltd, cheque images of the various personal cheques which he had handed over to Lim for the purposes of the Company. He discovered that two cheques, cheque number 378730 for $80,000 ("the $80,000 cheque) and cheque number 634684 for $100,000 ("the $100,000 cheque"), were cashed by the appellant on 22 November 2000 and 4 April 2002 respectively. On the $80,000 cheque, against the "payee" column, the defendant's name was inserted and on the $100,000 cheque against the same column the word "cash" was written. Neo recognised that those insertions, along with the date and the amount written on each cheque, were in Lim's handwriting.

7 On 29 November 2006, while clearing out the office which Lim occupied, an invoice issued by AZ Associates dated 1 April 2003 was discovered. This invoice was issued by AZ Associates to the appellant in respect of the third progress payment for the construction of a house at No 189 Eng Kong Garden, Singapore 599287 ("the Eng Kong property"). The words "PAID ChqNo" were stamped on the invoice and the words "10/3/03 UOB 788740" were handwritten alongside it. It transpired that UOB 788740 was a cheque for $260,000 which Neo had issued and handed over to Lim which Lim had subsequently handed over to AZ Associates. The construction of the house on the Eng Kong property was subsequently completed. This property, together with the house erected thereon, has since been sold.

8 Having made these discoveries, Neo instituted Suit No 136 of 2007/L ("Suit 136") to recover $440,000, being the total proceeds of the three cheques. All the three cheques were effectively bearer cheques as the word "bearer" appearing on the cheques was not crossed out. The action in Suit 136 was based on conversion and, in the alternative, for moneys had and received. In addition, Neo sought a declaration that the sale proceeds of the Eng Kong property was held by the appellant on trust for Neo and the appellant in the proportion of their contributions towards the purchase price (including the cost of constructing the house thereon) of the Eng Kong property, or, in such proportions as the court may determine.

Suit No 137 of 2007/Q

9 In Suit No 137 of 2007/Q, the Company brought claims against the appellant (a) for $306,580, being overpayment made to him in respect of his salary for seven years between October 1998 and October 2006; (b) for breach of fiduciary duties; and (c) for $5,320, being overpayment made to him in respect of his salary for November 2006. The first two claims were subsequently discontinued. With regard to the third claim, which was based on mistake, the Company relied on its accounts staff, Khoo Choon Yean ("Khoo"), who had averred that she had overpaid the appellant the sum of $5,320 because she thought his salary for November 2006 was $11,920 when it should have been $6,600 per month. In respect of the sum of $6,600, we should clarify that the documentary evidence showed that the appellant's salary was, in fact, $6,800 per month and not $6,600.

10 Furthermore, in Suit 137, the appellant had also counterclaimed for his salary and allowance for the period of 1 December 2006 to 7 March 2007. He alleged that he had tendered his resignation from the Company on 7 December 2006 by giving the requisite three months notice and his last day of employment would have been on 7 March 2007. He claimed that the Company had, in breach of the terms of his employment agreement, dismissed him earlier on 1 February 2007.

11 Accordingly, the appellant sought to claim for his salary, transport and meal allowances up to 7 March 2007. Taking into account his receipt of the $11,920 and another $2,000 from the Company on 1 February 2007 as well as CPF contributions, he claims a remainder of $10,990.64 from the Company.

12 On the Company's part, the reason why it had sought to terminate the appellant's employment on 1 February 2007 was because on that day Neo had confronted the appellant regarding the cheques. Neo wanted to know why the proceeds of the $80,000 and $100,000 cheques went to the appellant and the proceeds of the $260,000 cheque, to the appellant's third progress payment for the construction of the house at the Eng Kong property. When the appellant gave no satisfactory answers to his queries, Neo terminated his employment forthwith. This conversation between Neo and the appellant was secretly recorded by the appellant and transcribed for the purposes of the trial.

The Decision below

13 In the course of the proceeding in the High Court, four interlocutory applications were made by the parties. The decisions of the court below on these applications are the subject of Civil Appeals No 42, 43, 44 and 45 of 2008.

The Interlocutory Applications

14 The first interlocutory applications pertained to the appellant's attempt to introduce evidence to prove that Neo's cheques were not issued as loans to the Company but were actually repayments to Lim for monies that Neo owed Lim. In his affidavit of evidence-in-chief ("AEIC"), Lim testified that Neo owed him money and had issued the three cheques to him as repayment. By way of Summons No 980 of 2008/C filed on 3 March 2008, Neo applied to strike out these paragraphs in Lim's AEIC ("the Striking-Out application"). Neo argued that the offending paragraphs were irrelevant because they went towards proving facts which were not part of the appellant's pleaded case.

15 The very next day, on 4 March 2008, the appellant, by way of Summons No 1003 of 2008/W, sought leave to file a Rejoinder ("the Rejoinder application") to achieve two things: first, to plead the facts alleged in the offending paragraphs in Lim's AEIC so as to prevent them from being struck out; and second, to introduce a defence against Neo's claim in conversion that the claim must fail because Neo had no right of possession of the cheques after he had handed them over to Lim. In the same summons, the appellant also applied to call the Company's auditor Lim Kok Khuang as an additional witness to give evidence on whether Neo consistently took the position that the cheques handed to

Lim were loans to the Company.

16 The Judge refused the appellant leave to file the Rejoinder for two reasons: first, Neo's Reply did not raise new allegations which had to be addressed by way of the proposed Rejoinder; and second, the appellant provided no satisfactory explanation as to why he was so late in pleading the aforementioned facts and defence. Without the Rejoinder, the offending paragraphs in Lim's AEIC had to be struck out since they did not relate to any part of the appellant's pleaded case. The Judge also refused the appellant's application to introduce the new witness because she was of the view that nothing that the Company auditor could say would be material to the case.

17 The third application, made by way of Summons No 1107 of 2008, was to apply for leave to amend the appellant's Defence filed on 10 March 2008 ("the amendment of Defence application"). The pleadings sought to be introduced were essentially the same as those in the proposed Rejoinder. The Judge likewise rejected this application.

18 The fourth application was an appeal by Neo against the Assistant Registrar's order to discover all the personal cheques which he had issued or had handed over to Lim for the purposes of the Company. Neo's counsel informed the Judge that if the discovery order was confined to discovery of the three cheques, he would have no objections to the discovery requested. The appellant's counsel confirmed that those were the cheques he wanted and the Judge thus limited the Assistant Registrar's order accordingly and made no order as to costs save that the appellant would reimburse Neo for disbursements incurred for the appeal.

19 We turn now to the Judge's decision on the merits of the two suits.

Suit No 136 of 2007/L

20 The Judge held that the appellant converted the $80,000 and $100,000 cheque without Neo's consent. In her view, the lack of intention to convert the cheques or of knowledge that the cheques belonged to Neo, was irrelevant. In any event, the Judge found that the appellant knew that the cheques came from Neo and he could and should have inquired further or verified with Neo what Lim had told him with regard to the two cheques.

21 The Judge went on to consider the precondition to a right of action in conversion, *i.e.*, that there must have been a demand for the converted goods. While she acknowledged that it was the Company and not Neo that made the demand, she held that there was no need for Neo to make the demand in February 2007 because it would have been futile since the appellant had long parted with the money. Accordingly, she found the appellant liable for converting the $80,000 and $100,000 cheques.

22 The Judge also rejected the appellant's argument that the claim pertaining to the $80,000 cheque was time barred by s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed). She, however, accepted the argument of Neo that since the alternative claim was for moneys had and received, which was not a claim in tort or contract, s 6(1)(*a*) of the said Act had no application.

23 As for the $260,000 cheque, she held that the appellant could not have converted it since it was Lim who used it to pay AZ Associates for the third progress payment for the construction of the house on the Eng Kong property. However, the Judge held that Neo could succeed in his alternative action for moneys had and received. She found that the appellant could not deny that the cheque was applied towards the third progress payment for the construction of the house and that he had also failed to establish the defence of change of position.

24 The declaratory relief sought by Neo was also granted. The Judge held that Neo could trace the proceeds of the three cheques amounting to $440,000 to the Eng Kong property. Therefore, the appellant held the sale proceeds of the property as constructive trustee on trust for Neo and the appellant in the proportions in which they contributed to the property. The Judge directed the Registrar to conduct an inquiry to ascertain their contributions. In coming to the conclusion that Neo could trace and follow the cheque proceeds into the Eng Kong property, the Judge also held that Lim was the true purchaser of the Eng Kong property and that the appellant was merely a nominee.

Suit No 137 of 2007/Q

25 As for the Company's claim against the appellant for monies paid to him by mistake, the Judge found that Khoo made an honest mistake by overpaying the appellant his salary in February 2007. She awarded the Company the sum of $5,320 and dismissed the appellant's counterclaim.

Issues raised on appeal

Issues pertaining to Civil Appeals 42 to 45 of 2008

26 The issues raised by the appeals against the Judge's decisions on the interlocutory applications are three-fold:

(a) Whether the Judge was right to limit the Assistant Registrar's order for discovery to the three cheques;

(b) Whether the Judge was right in refusing to allow the appellant to call Lim Kok Khuang, the Company's auditor, as an additional witness; and

(c) Whether the Judge was right to dismiss the appellant's applications for a Rejoinder and for an amendment to the Defence filed and, instead, allow the Striking-Out application of Neo.

Issue pertaining to Suit No 136 of 2007/L

27 While the appellant has raised many issues pertaining to the merits of the Judge's decision on this suit, it will soon be apparent in the subsequent analysis that there is one issue the resolution of which would determine the result of this appeal, which is, whether Neo is entitled to bring an action for conversion in respect of the three cheques.

Issues pertaining to Suit No 137 of 2007/Q

28 The issues raised on appeal with regard to this suit are essentially two-fold:

(a) Whether the Judge was right to have found that the Company was entitled to recover the $5,320 as monies paid out by mistake to the appellant; and

(b) Whether the Judge rightly dismissed the appellant's counterclaim for his monthly salary, transport and meal allowances in respect of the period 1 December 2006 to 7 March 2007.

The Judge did not err with regard to her decisions on the interlocutory applications

29 The applicable test in relation to an appeal against a judge's decisions on interlocutory applications involving the exercise of judicial discretion is such that the appellate court will only

interfere if: (a) the judge misdirected himself with regard to the principles under which his discretion was exercised; (b) the judge took into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (c) where his decision was plainly wrong: see *The Vishva Apurva* [1992] 2 SLR 175 at [16].

(i) The discovery order

30 The Judge limited the scope of discovery to only the three cheques because the appellant's counsel agreed that that was what he wanted. This was revealed in the Notes of Evidence which read as follows:

> 10 March 2008
>
> Time: 10.55 am
>
> [Mr.] Ling [counsel for Neo]: I am only appealing against one aspect of the order made by AR below. If counsel confines his case to the 3 cheques I have no problems.
>
> [Mr.] Kronenburg [counsel for the appellant]: I confirm those are the documents I want.
>
> Court: In that case, the Order of Court for discovery made by AR Tan Wen Hsien on 29/2/08 is limited in scope to the 3 cheques of $80,000, $100,000 and $260,000 in issue in this case...

31 We note that the appellant's counsel did not deny this account of what he had said at the proceedings. As such, we do not think that it is now open to counsel to argue that the Judge erred when her order was clearly premised on his agreement with Neo's counsel's proposal to limit the scope of discovery to the three cheques which were the subject-matter of the action. In any event, even if the Judge had erred, the appeal would not be allowed unless the procedural irregularity or error would have affected the merits of the case (see s 40 of the Supreme Court of Judicature Act (Cap. 322, 2007 Rev Ed)). In the present case, we are unable to see how providing the appellant with access to the other cheques which Neo had issued would have affected the merits of the case.

(ii) The calling of the Company's auditor, Lim Kok Khuang, as an additional witness

32 The appellant sought to call Lim Kok Khuang, who was the Company's auditor, to testify so as to challenge Neo's claim that the cheques handed to Lim were meant to be loans for the Company. The appellant pointed out that every year, Neo signed off the Company's Annual Returns as being accurate even though the Annual Returns did not reflect the loans which Neo purportedly made to the Company through issuing the three cheques. The appellant wanted to call Lim Kok Khuang to give evidence on whether Neo consistently took this position every year.

33 There would have been merits in the appellant's application if Lim Kok Khuang had advised Neo on the Annual Returns and had witnessed Neo inspecting and signing off on them as being accurate. We appreciate that at the time when the application was made, Lim Kok Khuang's testimony might appear to be relevant. However, it emerged at trial that the Company's auditors including Lim Kok Khuang dealt only with Lim and not with Neo. Therefore, Lim Kok Khuang's testimony would have been of limited utility. He was not a material witness and his testimony would not have affected the merits of the case. There is therefore no basis to allow the appeal against the Judge's decision on this ground.

(iii) The Rejoinder, amendment of Defence and Striking-Out application

34 The Judge was right to refuse to grant leave to the appellant to file the Rejoinder. The purpose of requiring leave to be granted before a Rejoinder can be filed is to ensure finality in the pleading process. There must be an end at some stage (see *Singapore Civil Procedure* (Singapore: Sweet & Maxwell Asia, 2007) at [18/4/1]). The plea in the proposed Rejoinder consists of two parts: first, that Neo issued the $80,000 and $100,000 cheques to Lim as partial repayment of the monies which Lim had placed with Neo previously for the purposes of investing in shares; second, that the statutory presumption in s 21(5) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed) would have applied with the result that Neo would have been presumed to have delivered the cheques to Lim unconditionally thereby giving up his right of possession to the cheques.

35 These matters raised in the proposed Rejoinder were not a necessary response to the Reply. The appellant was in fact seeking to introduce new issues by way of the Rejoinder and this was certainly not in order. The proper avenue to raise these matters would have been by way of an amendment to the Defence.

36 However, by the time the appellant realised this, it was too late. The amendment of Defence application was filed *after* Neo had given his testimony and was cross-examined on it. We agree with the Judge that allowing the amendment of Defence application at that stage would have been unfair and prejudicial to Neo. As was noted in *Sin Leng Industries Pte Ltd v Ong Chai Teck* [2006] 2 SLR 235 at [23]:

> [T]he later an amendment to pleadings is sought, and especially so when it is sought in the middle of a trial, the more difficult it would be to say that justice lies in the direction of allowing the amendment.

In the absence of countervailing reasons, the Judge did not err in exercising her discretion to disallow the application to amend the Defence.

37 Accordingly, the Judge also did not err in allowing the Striking-Out application since the facts sought to be proven by the expunged paragraphs in Lim's affidavit of evidence-in-chief remain unpleaded.

38 In the circumstances, we dismiss the appeals against the Judge's decisions on the interlocutory applications. We now turn to consider the merits of Suit No 136 of 2007/L.

Is Neo the proper party to bring the claim for the cheque proceeds?

39 Neo's claim in conversion, and alternatively, for moneys had and received, in respect of the cheque proceeds cannot succeed unless he can show that he is the proper party to bring the claim. It is settled law that a person has the right to sue for conversion only if he had, at the time of the conversion, either actual possession of, or the immediate right to possess, the goods converted (see *The Cherry* [2003] 1 SLR 471 at [58] – [59] ("*The Cherry*"). Neo must satisfy this threshold requirement before he can sue for conversion. If we accept Neo's averment that he issued the cheques as loans to the Company, which we must as that was the position he had taken, he would have given up his immediate right to possession of the cheques after he had passed them over to Lim. This is so as Lim received the cheques as the Company's agent. Neo himself admitted in cross-examination that he had handed the cheques over to Lim with Lim acting in his capacity as executive director of the Company. As agent of the Company, Lim entered into a loan agreement with Neo on behalf of the Company. As a result, when Neo passed the cheques to Lim, he had relinquished his title to them and received in return, a contractual right to recover the loan amount from the Company. Accordingly, title to the cheques had passed from Neo to the Company. If Lim subsequently

misappropriated the cheques, then it would be for the Company to bring the claim and not Neo. Neo is not left without a remedy. He would still have a right to sue the Company for repayment of the loan.

40 To get around this problem, Neo's counsel tried to rely on s 21(3)(*b*) of the Bills of Exchange Act to argue that Neo retained a right of possession to the cheques because the delivery of the cheques was conditional. Section 21(3)(*b*) provides that:

> As between immediate parties, and as regards a remote party other than a holder in due course, the delivery –
>
> ...
>
> (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

Neo's counsel sought to argue that the delivery of the cheque was conditional on Lim using the cheque proceeds for the Company's benefit. He submitted that, because Lim failed to do so, Neo still retained title and thus the right of possession to the cheques.

41 If the delivery was indeed conditional, title to the cheques would not have passed. As Waller J in *Citibank NA v Brown Shipley* [1991] 2 All ER 690 rightly observed at 699: "the instrument only becomes a valid instrument on delivery." If Neo's counsel is right, then Neo would retain title and thus the right to sue. However, counsel appears to have failed to draw the important distinction between a condition for the use of the cheque proceeds and a condition pertaining to the delivery of the cheques. Section 21(3)(*b*) is concerned only with the latter. The learned editors of *Byles' Bills of Exchanges and Cheques* (London: Sweet & Maxwell, 2007, 28th Ed) ("*Byles*") make the following observations with regard to the English equivalent of s 21(3)(*b*):

> As set out in s.21(2)(b) of the 1882 Act, delivery of an instrument can be shown to be conditional; however once the condition is fulfilled delivery is complete and the instrument is treated as having been issued or negotiated, as the case may be. In order for s.21(2)(b) to be operative it seems clear that any condition or special purpose must be communicated by the transferor to the transferee, since the commercial efficacy of the transaction depends upon the transferee knowing that he may not, *pro tem*, present or negotiate the instrument.

42 If the delivery of a cheque is conditional, the transferee may not present or negotiate the instrument. Such an act of delivering the cheque is inchoate to convey title in the cheque to the transferee and the transferor retains title to it. What constitutes a conditional delivery has been considered and expounded upon by the learned editors of *Chalmers and Guest on Bills of Exchanges and Cheques* (London: Sweet & Maxwell 2005, 16th Ed) ("*Chalmers and Guest*") as follows at 121:

> …it may be shown that the delivery was conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. Thus it may be shown that the delivery was in escrow, i.e. that the instrument was to be delivered so as not to take effect as a bill until a certain condition should have been fulfilled. Or it may be shown, for example, that the bill was indorsed and delivered so that it might be discounted or realised, the property not to pass until that time, or so that the indorsee might collect payment of the bill, but not with the intention of transferring to him the property in the bill. The condition or special purpose must, however, be communicated by the transferor to the transferee. A bill may also be delivered conditionally as collateral security, it being agreed that it will become operative only in the event of default.

43 Therefore the delivery of a cheque is conditional only if the transferor intends its delivery to remain inchoate until a certain condition is satisfied or if the delivery was made for some purpose other than that of transferring the title to the cheque to the transferee and makes this intention clear to the transferee. Section 21(3)(*b*) is therefore only concerned with conditions pertaining to the *delivery* of the cheque and not the *use of its proceeds*. Conditions specifying the manner in which the proceeds are to be used are different for they do not relate to the delivery of the cheque. In fact, they presuppose good delivery for only if delivery was good and the cheque effective, could the proceeds be withdrawn in the first place to be used in the manner specified by the condition. Consequently, even if we accept that Neo had imposed a condition on the use of the cheque proceeds, there was still good delivery of the cheques. Moreover, we would add that it is not open to Neo to contend that the condition for the delivery of the cheques to Lim was that they were to be deposited into the Company's account as loans to the Company. This is because the cheques were not made out to the order of the Company; neither did Neo cross out the "bearer" status of the cheques. Obviously Neo had contemplated that the cheques could be negotiated. Hence, on the facts before the court, we are of the view that Neo had intended at all times to pass property of the cheques to Lim as agent for the Company. He had relinquished title to the cheques and, in turn, his right of possession with the result that his claim in conversion must fail.

44 Before we leave this issue, we will now turn to examine the cases relied upon by Counsel for Neo. When the circumstances of those cases are closely scrutinized it is clear that they are quite different and that explains why delivery in each case did not pass title to the bill. The first case is *Bell v Lord Ingestre* (1848) 12 QB 317 ("*Bell*") where the facts were quite distinct and the bills were regarded to be held in escrow. This appeared clearly from the following comments of Patteson J at 320:

> …for here it was not intended that the transferee should take any interest until the old bills were returned; and, until that time, it is the same thing, in principle, as if it had been intended that no interest should pass at any time. The bills were received on terms which were not satisfied.

45 The second case was *Goggerley v Cuthbert* (1806) 2 Bos & Pul (NR) 170 ("*Goggerley*") where the bill was drawn by one Parnell in favour of the plaintiff, who indorsed it and put it into the hands of another called Daponte for the purposes of getting it negotiated and raising money upon it for the benefit of the plaintiff. However, Daponte gave the bill to his brother and it came into the hands of the defendant without consideration. In answer to the contention of the defendant that the plaintiff could not recover in trover, Mansfield CJ asked:

> If Daponte, after receiving the bill, had betrayed an intention of obtaining the money and running away with it, could not the plaintiff have demanded the bill again of him? And if he could, why can he not demand it of any person into whose hands it comes dishonestly?

The nature of this transaction was put succinctly by Heath J when he said "the delivery of the bill was not absolute, but conditional, and was in the nature of the delivery of an escrow."

46 There is a clear difference between the position in *Goggerley* and that in the present case. Here the cheques were given by Neo as loans to the Company. The cheques were handed to Lim as the agent for the Company. By handing the cheques over to Lim, delivery was complete. No condition was imposed in respect of the delivery. Moreover, there is one other factor which undeniably showed that Neo did not care how the Company would deal with the cheques. By not crossing out "bearer" on the cheques, Neo intended that the Company could endorse them over to whomsoever it deemed fit. By leaving the cheques as bearer cheques, Neo could not have intended that the cheques should only be credited into an account of the Company.

47 The third case is *North & South Wales Bank Ltd v Macbeth* [1908] AC 137 ("*Macbeth*") where the plaintiff was induced by the fraud of W to draw a cheque for 11,250/ in favour of one Kerr. W obtained the cheque, forged Kerr's endorsement, and banked it into W's account with the defendant. The defendant was held liable to refund the proceeds of the cheque to the plaintiff. It would be seen that the delivery of the cheque to W was conditional, as he was to pass it on to Kerr. *Macbeth* also raised the question of whether Kerr was a "fictitious person" within the meaning of s 7(3) of the English Bills of Exchange Act 1882, an issue which does not concern us here.

48 Next is the case of *Arnold v The Cheque Bank* (1876) 1 C P D 578 where a draft payable to the plaintiff or his order was indorsed by the plaintiff to W. The draft was later stolen by an employee of the plaintiff, who forged an indorsement of W. The defendant banker obtained the proceeds of the draft on behalf of someone who was not entitled to the draft. The court held the defendant to be liable to the plaintiff. Lord Coleridge CJ at 584 emphasised that for property to the draft to be passed, besides the physical delivery, there must be an intention to transfer the property in the draft. As the draft was the subject of theft, title to it never left the plaintiff.

49 The final case is *Clifford Chance v Silver* [1992] 2 Bank LR 11 where a cheque was indorsed by the purchaser's solicitors to the vendor solicitors towards payment of deposit but on condition that it was "returnable on demand until we are able to authorise you to effect an exchange". The English Court of Appeal held that the initial delivery of the cheque was conditional but that it became unconditional when the contracts for the sale of the property were exchanged and the conditions stipulated were fulfilled.

50 In the circumstances of the present case, and for the reasons alluded to above, it was the Company which had title to the cheques and the latter was thus the proper claimant of the cheque proceeds and not Neo. Neo's assertion that he intended the cheques to be credited only into an account of the Company cannot reasonably be sustained and is inconsistent with the objective facts. This probably explains why the Company had demanded the proceeds of the $80,000 and $100,000 cheque from Lim and why it had brought a claim against Lim in Suit No 779 of 2006 for the proceeds of the $260,000 cheque.

51 At this juncture, we should allude to a related argument of Neo which is that for a party to be in a position to sue for conversion all he needs establish is an immediate right to possession of the thing and not ownership thereof. As Neo was the Managing Director of the Company, and was the superior of both Lim and the appellant, he was in a position to require Lim and the appellant to return the three cheques to Neo. On this basis, it was argued that Neo retained the immediate right to possession of the three cheques at the point of conversion. It seems to us that in making this argument, Neo overlooked the fact that Neo could so compel Lim and/or the appellant to return the cheques to him only because of his position as the Managing Director of the Company. This argument in fact works against him and reinforces the point that the cheques belonged to the Company and it is only by virtue of his position as Managing Director that he could ask Lim/the appellant to return the cheques back to him.

52 Neo's alternative claim for moneys had and received is contingent on him proving his claim in conversion. It fails along with his inability to prove the existence of the tort. This is so because Neo's alternative claim in restitution is premised on a "waiver of the tort." The House of Lords has made it clear in *United Australia v Barclays Bank Ltd* [1941] 1 AC 1 that the "waiver" was really an election to take a gain-based rather than loss-based award for the tort. In the absence of the tort, this claim in restitution fails. As Viscount Simon LC explained (*ibid* at 18):

> When the claimant 'waived the tort' and brought assumpsit, he did not thereby elect to be

> treated from that time forward on the basis that no tort had been committed; indeed, *if it were to be understood that no tort had been committed, how could an action in assumpsit lie? It lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution*. [emphasis added]

Since Neo's claim for conversion is unsustainable, it follows that his claim for restitution of the tort also fails. Simply put, he cannot 'waive the tort' when there is no tort to waive in the first place. In any event, as the cheques were issued as loans to the Company, if any loss was suffered, it was on the part of the Company.

53 For the foregoing reasons, the appeal on the merits of Suit No 136 of 2007/L is allowed. Since the appellant has succeeded only on one issue, that of the proper claimant, he is only entitled to costs pertaining to this issue.

The sum of $5,320 was not paid out by mistake

54 We turn now to consider the merits of the claim in Suit No 137 of 2007/Q. For the Company to succeed in its claim against the respondent for the $5,320, it will need to show that the transfer of $11,920 to the appellant was caused by a mistake of fact. The parties do not dispute that the Company has been paying the appellant more than the $6,800 to which he is entitled to as his salary from the Company. However, nowhere in the transcript of the exchange between Neo and the appellant on 1 February 2007 does it show that Neo complained about this overpayment, despite Neo not being unaware of it. In fact, Khoo, who joined in the conversation, said the following:

> December you were paid this amount 11,920, but we are going to take out this amount, it is for CHHK. Then for this month, we will net off this one. So the balance is this. This is the net amount, so *for the CHHK portion*, which is only 6600, this part is deducted out. [emphasis added]

55 Khoo's remarks with regard to the $11,920 are very telling. These remarks are contrary to her assertion that she had typed the figure into the payroll system by mistake; that it was a typographical error. Khoo did not say the payment was a mistake. Instead, her remarks suggest that part of the payment was on behalf of the Company; that it was "for the CHHK portion." She did not clarify on whose behalf the other portion was paid.

56 This, however, would not matter. It is clear from Khoo's remarks that the full sum of $11,920 was not paid because of a mistake of fact and that the excess was for some other unspecified purpose. It follows that the Company's claim for the $5,320 cannot be sustained.

Was there any basis for the appellant's summary dismissal

57 We now turn to consider the counterclaim of the appellant in Suit No 137 of 2007/Q. As mentioned earlier at [10], the appellant had given the required three-month notice to resign which would have taken effect on 7 March 2007. Notwithstanding the resignation notice, the Company would still be entitled to dismiss the appellant for cause, although the burden would be on the Company to show the reason justifying the earlier termination of the appellant's employment on 1 February 2007. In the absence of a ground for summary dismissal, the employment contract should be allowed to take its course.

58 What then were the grounds on which the Company relied upon to justify the summary dismissal of the appellant? The basic contention of the Company in this regard is that the appellant had been dishonest having misappropriated the cheque proceeds. It is a well-established principle that an

employee owes the employer a duty of good faith and fidelity, an aspect of which includes the employee not making use of the employer's property for his own purposes (see *DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR 424; see also generally Ravi Chandran, *Employment Law in Singapore* (Singapore: LexisNexis, 2008, 2nd Ed) at paras [5.12] - [5.14]). If it can be shown that the appellant was dishonest by misappropriating the Company's property, then there would be a justifiable basis for his summary dismissal.

59 As we have found that the Company had title to the cheques (see [51] above), it was entitled to seek an explanation from the appellant as to why he had cashed the $80,000 and $100,000 cheques and why the $260,000 was applied to the third progress payment for the construction of the house at the Eng Kong property. The Judge found that the appellant could and should have inquired further or verified with Neo what Lim had told him with regard to the $80,000 and $100,000 cheques. We agree with the Judge. Apart from the $260,000 cheque which never came into the hands of the appellant but was handed directly to AZ Associates by Lim, the fact that the other two cheques which were handed to the appellant were drawn from Neo's account and bore Neo's signature would have put the appellant on inquiry. The appellant had ample opportunity to inquire further or verify with Neo what Lim had told him with regard to these cheques but did not do so. In fact, when confronted on 1 February 2007 by Neo, the appellant still did not provide an explanation to Neo of what had transpired between Lim and him. In these circumstances, we find that the Company was entitled to summarily dismiss the appellant.

60 We therefore allow the appeal pertaining to Suit 137 of 2007/Q only in part but dismiss the Company's claim for the overpayment of $5,320.

Conclusion

61 To recapitulate, with regard to CA 42, 43, 44 and 45, we hold that the Judge did not err in her decisions on the interlocutory applications and therefore dismissed the appeals with costs. As for the appeal in CA 157 relating to Suit 136 of 2007/L, we would allow it on the ground that Neo was not entitled to sue for conversion of the three cheques. The appellant shall be entitled to costs on this issue. With regard to the appeal in CA 157 pertaining to Suit 137 of 2007/Q, we would allow it in part as we have held that the Company was entitled to summarily dismiss the appellant. However, as the Company has failed to recover the sum of $5,320 from the appellant, we think a fair order as to costs on these two issues (*ie* recovery of $5,320 and summary dismissal) would be to make no order on them. The security for costs lodged in CA 157 shall be returned to the appellant.

62 The costs of the hearing below in relation to Suit 136 of 2007/L shall be awarded to the appellant subject to the qualification that costs shall be confined to work touching on the question of the *locus standi* of Neo to sue. There will be no order as to costs in Suit 137 of 2007/Q.