

Baumann Xiaoyan v Tong Lian Joo and another
[2011] SGHC 178

Case Number : Suit No 804 of 2009
Decision Date : 28 July 2011
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Jimmy Yim SC and Vikna Rajah s/o Thambirajah (Drew & Napier LLC) for the plaintiff; Pang Xiang Zhong and Wijaya Ravana Sivanathan (Peter Pang & Co) for the first defendant; Ng Lip Chih and Alfian Teo (NLC Law Asia LLP) for the second defendant.
Parties : Baumann Xiaoyan — Tong Lian Joo and another

Contract

28 July 2011

Judgment reserved

Judith Prakash J:

Introduction

1 The plaintiff's claim arises out of a transaction in which she purchased several works of art from the first defendant. The action is based on misrepresentation as well as on a breach of an undertaking.

2 The plaintiff has a doctorate in law and runs a number of specialist clinics. She is married to Mr Felix Huang ("Mr Huang"). The first defendant is a well known businessman in Singapore and has collected art works for many years. The second defendant was his personal assistant at all material times.

Factual background

The purchase of the paintings

3 Sometime in September 2008, Mr Huang was introduced to one Mr Marcus Chin ("Mr Chin") by a mutual friend. When Mr Chin found out that Mr Huang was interested in art, he suggested that Mr Huang meet the first defendant, as the latter was an avid art collector with a vast collection of art in his office.

4 On 17 September 2008, Mr Chin arranged a meeting between himself, Mr Huang and the first defendant at the first defendant's office at HUB Synergy Point. When Mr Huang arrived at the office, he was greeted by the second defendant, whom Mr Chin introduced as his mother. Shortly thereafter, the first defendant joined the meeting.

5 Mr Huang claimed in his affidavit of evidence-in-chief ("AEIC") that the first defendant had said that he was a successful businessman who had been collecting paintings for many years, and showed him photographs of himself with dignitaries. The first defendant also told Mr Huang that he had purchased most of his paintings directly from the artists. He told Mr Huang to choose a few paintings

and promised to give him a very good discount for them.

6 Mr Huang then picked out seven paintings and one wood carving. These were:

- (a) a painting signed with the name "Walter Spies";
- (b) a painting with the purported signature of Wang Yi Dong;
- (c) two paintings with the initials AF, purportedly the signature of the painter Affandi;
- (d) a painting with the purported signature of Hendra Gunawan;
- (e) a painting in which the painter's name could not be made out;
- (f) a painting signed with the name signed "R Bonnet; and
- (g) a wood carving engraved with the name "Hendra Gunawan".

7 The first defendant said that he was prepared to accept \$150,000 for these works. According to Mr Huang, the first defendant assured him that if he was not wholly satisfied with the purchase or if he discovered that any of the art pieces were not originals, the \$150,000 would be refunded to him.

8 On the same day, Mr Huang informed the plaintiff of this meeting and the selection he had made. The plaintiff was keen to view the first defendant's collection of artworks. So, later that evening, the plaintiff and Mr Huang met the first defendant at his office ("the 17 September 2008 evening meeting"). The plaintiff claimed that she enquired whether or not the art pieces were originals and the first defendant replied that they were originals. The first defendant added that he would never collect counterfeits, and reiterated that if the art works were counterfeits, he would give her a full refund. The plaintiff then paid \$150,000 for the pieces which her husband had selected ("the first agreement").

9 The plaintiff and Mr Huang were keen to increase their collection further. On 21 September 2008, Mr Huang met the second defendant at premises at Ang Siang Hill. The second defendant took Mr Huang to a storeroom where there were numerous paintings. She drew Mr Huang's attention to a set of ten paintings which were purportedly by the artist Affandi. Mr Huang chose two of these paintings. Thereafter, the second defendant told him that if he was interested in the rest of the shipment, he should proceed to the first defendant's office. Mr Huang did so and there, in the presence of the first defendant, he chose the following ten paintings and sketches:

- (a) two charcoal sketches by artists whose names could not be made out;
- (b) a painting bearing the name "Walter Spies";
- (c) a painting which Mr Huang claims that the second defendant orally represented as an original signed by Xu Bei Hong;
- (d) a painting which the first defendant allegedly orally represented as being painted by Wai Meng, whom he described as a famous painter;
- (e) a painting bearing the name "Antonio Blanco" with a certificate at the back of the painting describing it as an authentic Antonio Blanco painting;

- (f) a painting bearing the name "R Bonnet";
- (g) a painting bearing the name "Soejano";
- (h) a painting bearing the name "Arie Smith"; and
- (i) a painting purportedly signed by Chen Yi Fei, whom the second defendant allegedly described as a "famous painter whom [the plaintiff] would know".

10 Later that evening, the defendants visited the plaintiff and Mr Huang at their home to determine the price of the additional ten paintings and to collect payment. The first defendant reiterated that he would give the plaintiff a full refund if either she or Mr Huang was not satisfied with the purchase. According to the plaintiff, the first defendant said that "\$150,000 was very cheap for such famous painters." The plaintiff then paid the first defendant \$150,000 for these works ("the second agreement").

11 Sometime around the end of September 2008, Mr Huang sent four paintings to Sotheby's for an assessment of their authenticity. They were the purported Affandi paintings purchased under the first agreement, and the purported Walter Spies, Antonio Blanco and R Bonnet paintings purchased under the second agreement. According to Mr Huang, Sotheby's subsequently informed him that all the paintings were counterfeits.

The third set of paintings

12 Soon after, sometime in October 2008, the second defendant contacted Mr Huang regarding a third set of six paintings ("the third set"). It was alleged that she represented that "*for sure these are originals*". Mr Huang agreed to view the third set because if they were original paintings, he intended to acquire them in exchange for the counterfeit artworks purchased under the first and second agreements.

13 On 20 October 2008, the second defendant and one Mr Michael Ngor took the third set to the plaintiff's home ("the 20 October 2008 meeting"). At the start of the meeting, Mr Huang took out a hand-held video recorder and recorded all the paintings that the second defendant had brought. He then placed the video recorder on a shelf to record what was being said by the second defendant. At this meeting, the second defendant made a number of representations regarding the authenticity of the paintings. However, Mr Huang was unconvinced and he wanted to verify the authenticity of the paintings before purchasing them. As such, no agreement was reached on the sale and purchase of the third set.

14 The next day, the plaintiff and Mr Huang took one of the paintings from the third set, which was purportedly by the artist Wu Guanzhong, to Professor Arthur Lim, a well-known eye surgeon and art collector. After assessing the painting, Professor Arthur Lim concluded that it was not an original work by Wu Guanzhong.

15 Mr Huang then requested that the second defendant come to his home to take back all the artwork purchased from the first defendant.

16 On 21 or 22 October 2008, Mr Huang telephoned the second defendant and said that he did not believe that the paintings in the third set were originals. He declined to purchase them. He also told her that at least some of the paintings sold to the plaintiff under the first and second agreements were not original works. Mr Huang asked her to inform the first defendant that he and the plaintiff

wanted a full refund of the \$300,000 paid for the 19 paintings and one wood carving ("the Artworks") purchased under the first and second agreements.

The undertaking

17 Subsequently, the second defendant informed Mr Huang that the first defendant would keep his promise to refund the \$300,000 but had asked to be given one year to return the money as he was in a poor financial state. The plaintiff and Mr Huang sympathised with the first defendant and decided to accede to his request for more time to return the \$300,000. They, however, wanted evidence of his commitment. Therefore, Mr Huang drafted a letter of undertaking ("the Written Undertaking") which *inter alia* stated:

I, Mr Tong Djoe, hereby promise to return the above-mentioned S\$300,000.00 (Singapore Dollars Three Hundred Thousand Only) in CASH to Dr Xiaoyan Baumann latest by 1st August 2009. Upon returning the \$300,000.00 (Singapore Dollars Three Hundred Thousand Only) to Dr Baumann, Dr Baumann shall return back to Mr Tong Djoe the above mentioned 19 (nineteen) paintings plus 1 (one) wood carving. Photographs of all these 19 (nineteen) paintings plus 1 (one) wooden carving are attached.

The Written Undertaking was also translated into Mandarin as the plaintiff and Mr Huang wanted to ensure that the first defendant understood the obligations it contained.

18 On 4 November 2008, the defendants met the plaintiff and Mr Huang to resolve the matter. The plaintiff and Mr Huang confronted the defendants about the misrepresentations regarding the authenticity of the Artworks. The plaintiff then orally rescinded the first and second agreements and demanded her money back. According to her, the first defendant reiterated that he was encountering a "cash-flow problem" and could only return the money in August 2009. He added that the Plaintiff and Mr Huang could keep the Artworks as security for the \$300,000. Mr Huang then handed the first defendant the Written Undertaking. It was signed by the first defendant. The Written Undertaking is dated 4 November 2008 and bears the signatures of the plaintiff and the first defendant, and that of Mr Huang as witness.

19 At the end of the 4 November 2008 meeting, the first defendant took back the third set. The loading of these paintings into a van was witnessed by Stephen Wong Ji Kin, the security guard on duty that evening at the plaintiff's apartment block.

Events leading to this action

20 When the deadline for repayment expired on 1 August 2009, the first defendant had failed to pay the plaintiff the sum of \$300,000 or any part thereof. On 11 August 2009, the plaintiff sent the following text messages to both the defendants asking them to return the money:

Tong Joo,

I am Cheryl. You ought to have returned SGD 300,000 to us on 1st of August. When can we collect the money from your place? How about tomorrow? We have already waited for a year.

21 As the plaintiff did not receive a response, she engaged solicitors to recover her money. On 19 August 2009, the plaintiff's solicitors wrote a letter of demand demanding the return of \$300,000 and interest.

22 The first defendant's solicitors replied by way of letter dated 10 September 2009 and denied that the first defendant had made any representations regarding the authenticity of the Artworks. The first defendant asserted that there was a sum of \$500,000 due and owing from the plaintiff to him for the third set, which he alleged had not been returned to him. The first defendant further alleged that the plaintiff was in breach of the Written Undertaking for not returning the Artworks.

23 On 16 September 2009, the first defendant commenced Suit No 792 of 2009 ("Suit 792") against the plaintiff in which he claimed, *inter alia*, the sum of \$500,000 as being due and owing to him for the third set. On 18 September 2009, the plaintiff commenced the present action against the defendants, for *inter alia*, the return of the sum of \$300,000.

24 Subsequently, it was agreed between the first defendant and the plaintiff that the first defendant would discontinue Suit 792 and instead include a counterclaim for the sum of \$500,000 in the present proceedings.

The pleadings

25 In the statement of claim, the plaintiff alleged that the first and/or the second defendant had committed fraudulent misrepresentation and/or had been guilty of deceit in respect of the plaintiff. Paragraph 33.1 of the statement of claim sets out the representations allegedly made by the first and second defendants with regard to the first agreement and para 33.2 sets out the representations allegedly made with regard to the second agreement. The plaintiff averred that these representations were made fraudulently in that the defendants knew that the representations were false or they were reckless in making them not caring whether they were true or false. As a result of the fraudulent misrepresentations, the plaintiff was induced into entering the first and second agreements and purchasing the Artworks.

26 In the alternative, the plaintiff relied on the provisions of the Misrepresentation Act (Cap 390, 1994 Rev Ed). In the further alternative, the plaintiff pleaded that the first and/or second defendants made negligent misrepresentations which induced her to enter into the first and second agreements. She further alleged that it was a fundamental term of the agreements that all the Artworks were originals and that this term was breached by the first defendant. The plaintiff further pleaded, as against the first defendant, that he failed, neglected or refused to pay the sum due and owing under the Written Undertaking.

27 The reliefs claimed by the plaintiff include the following:

- (a) a declaration that she has validly rescinded the first and second agreements; alternatively rescission of the same;
- (b) return of the sum of \$300,000; and
- (c) damages to be assessed.

28 The first defendant has amended his pleadings several times. The key averments in the Defence and Counterclaim (Amendment No 2) dated 9 April 2010 filed jointly on behalf of the first and second defendants were as follows:

12 ...

- (a) At no time did the 1st Defendant agree that in the event that any of the paintings or art

pieces were not authentic, he would refund all the monies back to the Plaintiff.

...

(d) There was no discussion of the [third set] and as there was no mention of this in the written undertaking, the Plaintiff was thus obliged to pay the said sum of \$500,000 as the Plaintiff continued to retain these paintings.

(e) Consequently, as the written undertaking did not incorporate all the Terms in the Third Transaction, it did not constitute a binding agreement between the Plaintiff and the 1st Defendant.

29 On 2 November 2010, the second defendant, having instructed new solicitors, filed a separate Defence on her own behalf. She distanced herself from the first defendant and admitted that the third set had been returned to the first defendant. She averred that the transactions had been between the first defendant and the plaintiff and Mr Huang and had nothing to do with her as she had been the first defendant's personal assistant at all material times. She denied making the alleged representations set out in the statement of claim. She also denied that the plaintiff was induced by anything she had said to buy the Artworks.

30 The first defendant also changed solicitors. Subsequently, the plaintiff received a letter dated 10 December 2010 from the first defendant's new solicitors enclosing a Notice to Deliver, which stated as follows:

I, Tong Djoe @ Tong Lian Joo, holder of NRIC [XXX] of 70 Anson Road, #27-00, Singapore hereby give you notice that I want you to return all 19 paintings and 1 wood carving identified in the Letter of Undertaking dated 3 November 2008 specifically referred to in Suit 804 of 2009/J in the High Court of Singapore in the state and condition that they were delivered to you within 10 days from the date.

By prior appointment, I will hand over in exchange to you a Banker's guarantee, a copy of which is attached hereto, to assure you of full payment of \$300,000-00 under the terms of my Letter of Undertaking.

And upon the delivery of the said 19 paintings and 1 wood carving, in the state and condition when they were handed to you, the Bank guarantee will be released together with an acknowledgement of receipt from me.

Upon receiving your intention to deliver the 19 paintings and 1 wood carving [sic], I will arrange for the Banker's guarantee to be available in 3 working days for the exchange at my office #27-00, 70 Anson Road, Singapore.

Please be informed I would like to emphasize that should the above 19 paintings and 1 wood carving are not in the state and condition they were handed over to you by me or not delivered within the stipulated time, I will hold you in breach of the terms of the Settlement of 4 November 2008 and will seek the appropriate relief from the court or alternatively for damages suffered.

31 The first defendant then filed a further amended pleading. By his Defence and Counterclaim (Amendment No 3) dated 24 December 2010 ("Defence and Counterclaim (Amendment No 3)"), he:

(a) admitted that the [Artworks were] sold to the plaintiff on the understanding that she was

entitled to be reimbursed by him with her purchase price of \$300,000 if she was not satisfied;

(b) changed his initial position that the Written Undertaking was not a binding agreement and averred instead that the Written Undertaking was a full and final settlement agreement and that the plaintiff had compromised her original causes of action, including misrepresentation;

(c) dropped his counterclaim for \$500,000 or any damage arising out of the plaintiff's breach of contract for the sale and purchase of the third set; and

(d) added a counterclaim for damages arising from breach of the Written Undertaking based on the plaintiff's failure to deliver the Artwork under the Notice to Deliver.

Plaintiff's claim against the first defendant

32 As a result of the significant changes in the first defendant's defence and counterclaim referred to above, the issues before me have been reduced to the following:

(a) given that the first defendant accepted that he was obliged to reimburse the plaintiff with the purchase money paid by her if she was not satisfied, did he breach the terms of the Written Undertaking?

(b) was the plaintiff obliged to comply with the first defendant's Notice to Deliver dated 9 December 2010 *ie* was the plaintiff obliged to return the Artworks before she could claim the reimbursement of her payment?

(c) whether the Written Undertaking was a full and final settlement agreement which extinguished the plaintiff's other causes of action.

33 At the outset, it is worth noting that the first defendant did not take the stand for cross-examination and therefore his affidavit of evidence in chief could not be received in evidence without the leave of court pursuant to O 38 r 2(1) of the Rules of Court (Cap 322, 2006 Rev Ed). No such leave was sought on behalf of the first defendant. No other witnesses were called on his behalf either. Thus, he did not adduce any evidence in answer to the evidence adduced on behalf of the plaintiff. As the first defendant did not adduce evidence, the plaintiff only needs to adduce *prima facie* evidence supporting the elements of her claim (see *Central Bank of India v Hemant Govindprasad Bansal* [2002] 3 SLR 190 at [21]).

34 The first defendant was obliged under the Written Undertaking to return the \$300,000 by 1 August 2009. The first defendant's argument that the plaintiff's demand for the return of the \$300,000 was not in accordance with the Written Undertaking as the plaintiff did not express any intention to return the Artworks despite oral requests made for the return of the same is untenable. No evidence was led to show that the first defendant made oral requests for the return of the Artworks. More importantly, the Written Undertaking expressly states that it is only *upon* the first defendant returning the plaintiff \$300,000 in cash that the plaintiff would be obliged to hand over the Artworks to the first defendant. Additionally, the emphasis that the first defendant placed on being entitled to *inspect* the Artworks before paying the plaintiff is incredible considering that the Written Undertaking contains no such term. Undoubtedly, the first defendant has breached the terms of the Written Undertaking by failing to pay the plaintiff \$300,000 by 1 August 2009.

35 There is no doubt that the Written Undertaking constituted a binding contract because it was signed by the first defendant in consideration of the plaintiff's agreement not to enforce the return of

the \$300,000 immediately but to give him time to pay up till 1 August 2009. Accordingly, the plaintiff was not obliged to comply with the Notice to Deliver as it was inconsistent with the Written Undertaking. Under the Written Undertaking, the first defendant was obliged to pay the plaintiff cash. It was never contemplated that the refund would be in the form of a bank guarantee conditional on the first defendant acknowledging that the Artworks were in the state and condition that they were in when they were handed to the plaintiff. As the plaintiff argued, if the first defendant's position is correct, there is nothing to stop him from claiming that the Artworks were not in the condition they were in when they were handed to him, and using this excuse to refuse to refund the \$300,000. The first defendant's counterclaim for damages for being "deprived of the possession" of the Artworks arising from the plaintiff's alleged breach of the Written Undertaking is clearly unsustainable.

36 The first defendant also damaged his credibility as he had initially claimed that the Written Undertaking was not a binding agreement but subsequently changed his position and claimed that it was a full and final settlement of the plaintiff's claim against him. In any event, on the evidence adduced, it is clear that the Written Undertaking was not a full and final settlement/compromise agreement. The circumstances under which the Written Undertaking was drafted as set out in the testimony of the plaintiff and Mr Huang (which was not refuted by the first defendant) showed that the purpose of the document was to record the plaintiff's acceptance of first defendant's request for more time for payment. The plaintiff did not compromise the amount of the claim or the basis of the claim in any way. What she did was simply to agree not to enforce immediate recovery. The wording of the Written Undertaking reflects this. The document does not state that it is a full and final settlement. Rather, the Written Undertaking appears to be no more than a written acknowledgement, or an "IOU" of sorts, stating that the first defendant owes the plaintiff the full purchase price of \$300,000 and promising to make payment of the same by 1 August 2009.

37 There is no doubt that the plaintiff has established, at the very least, a *prima facie* case against the first defendant. As such, the plaintiff is entitled to a refund of the purchase price of \$300,000 and to interest at the rate of 5.33% per annum as from 2 August 2009. As regards the plaintiff's claim for a rescission of the first and second agreements, this is not required because it was the plaintiff's position that, as part of the agreements, the first defendant had agreed from the beginning to refund her the purchase price if she was not satisfied with the Artworks. That being the case, the plaintiff can have her remedy of repayment without the need for rescission. The plaintiff also made an alternative claim for damages. Such a relief is not appropriate since the plaintiff's claim herein was basically a claim for a liquidated sum and the damages recoverable in respect of such a claim are constituted by the award of interest.

The plaintiff's case against the second defendant

38 The plaintiff's cause of action against the second defendant is for negligent misrepresentation. The issues are:

- (a) whether the second defendant made the alleged misrepresentations;
- (b) whether a duty of care ought to be imposed on the second defendant; and
- (c) whether, if a duty of care is imposed on second defendant, she had met the reasonable standard of care expected of her in the circumstances.

Did the second defendant make the alleged misrepresentations?

39 The alleged representations that induced the plaintiff to enter into the first and second

agreements are as follows:

- (a) at the 17 September 2008 evening meeting, the second defendant orally represented to the plaintiff and Mr Huang that the first defendant would “never purchase fakes” (“No-fakes Representation”);
- (b) the second defendant orally represented to Mr Huang that two paintings she had shown Mr Huang in a storeroom at a club at Ang Siang Hill were original works by Affandi (“Affandi Representation”);
- (c) the second defendant orally represented to Mr Huang that a painting was an original by Xu Bei Hong (“XBH Representation”); and
- (d) with respect to a painting of a Chinese lady holding a fan bearing the signature of Chen Yi Fei, the second defendant orally represented that the said artist was “a famous painter whom [the plaintiff] would know” (“CYF Representation”).

40 In relation to the No-fakes Representation, the plaintiff testified that at the 17 September 2008 evening meeting, the second defendant represented that the first defendant “would never buy fakes”. As supporting evidence, she relied on the transcripts of the meeting on 20 October 2008 which showed that the second defendant had made the following remarks:

Mr Huang: No, but if you sell things that are fake, you get into trouble you know for selling fakes.

2nd Defendant: No fake lah.

Mr Huang: No fake, you know for sure.

2nd Defendant: I think is not fake, for what he wants to sell fake things like what you say correct or not

The plaintiff contended that the second defendant also represented that the Wu Guanzhong and the Walter Spies paintings that the first defendant had were original works. She argued that given the approach taken by the second defendant regarding the third set, this court can and should infer that she made similar representations to the plaintiff and Mr Huang regarding the Artworks at the first and second meetings.

41 The second defendant denied making any of the representations. She contended that apart from the plaintiff’s and Mr Huang’s bare assertions, the plaintiff had not adduced any other evidence to prove that the second defendant did in fact make these representations.

42 As regards the Affandi Representation, whilst the second defendant denied in her defence that she had made it, her evidence in court was somewhat different. Under cross-examination, the second defendant made certain admissions. She said:

2nd Defendant: Yah, I say this is the – the whole stack of Affandis? Mr Tong Djoe told me this is the shipment.

...

Mr Yim: Maybe you didn't use the word "original" but you said this is a whole shipment of Affandis?

...

2nd Defendant: Yes.

Whilst the second defendant emphatically denied that she had used the word "originals" to describe the paintings by Affandi, the obvious implication of what she admitted to have told Mr Huang was that the whole stack of paintings which she was showing him comprised original works by Affandi. I find that this representation has been proved.

43 As for the XBH Representation, the second defendant argued that there was no evidence that she had made this representation at all. In Mr Huang's affidavit of evidence in chief, he had said at para 24(v):

A portrait of a man (which I later learnt was a self-portrait of Rembrandt) which the 1st Defendant orally represented was a painting by **Xu Bei Hong** .

The first defendant submitted that Mr Huang's evidence had stated without qualification that the XBH Representation had come from the first defendant and he had made no reference to the second defendant as having made this representation.

44 The plaintiff's response was that the description "1st Defendant" in para 24(v) was an obvious typographical error and that it was clear all along that Mr Huang had been referring to a statement from the second defendant rather than from the first defendant. The plaintiff also noted that the fact that the second defendant had made a representation to Mr Huang regarding the authenticity of the Xu Bei Hong in question had been specifically put to her during cross-examination:

Mr Yim : My instructions are that you actually helped describe one of these paintings at HUB Synergy point as Xu Bei Hong to Mr. Huang.

2nd Defendant : All the paintings in the Mr. Tong Djoe's office, I can ...

Court: No, can you answer the question, yes or no?

2nd Defendant: No.

Counsel for the second defendant did not object to this line of examination. The plaintiff submitted that the argument made by the second defendant was an attempt to take advantage of a clerical error in Mr Huang's affidavit.

45 I find it difficult to accept the submission that the reference to the first defendant in para 24(v) of Mr Huang's affidavit was a typographical error and that the plain intention was to refer to the second defendant and such intention would have been obvious to anyone reading the affidavit. Paragraph 24 appears in a section of the affidavit headed "The 2nd Agreement" and deals with events occurring on 21 September 2008. Paragraph 24 recounts what happened after the second defendant and Mr Huang had visited the storeroom in Ang Siang Hill. It starts:

The 2nd Defendant then told me that if I was interested in the rest of the shipment, we should proceed to the 1st Defendant's office. The 2nd Defendant and I proceeded to the 1st Defendant's office. The 2nd Defendant then showed me various paintings and asked me to pick the paintings that I liked. Soon after, we were joined by the 1st Defendant who also asked me to select the artwork which caught my eye. In addition to the 2 Affandis I had selected earlier that day, I selected 10 other pieces of artwork (8 paintings and 2 sketches). ...

After this introduction, there are nine sub-paragraphs each dealing with different artworks shown to Mr Huang by the first and the second defendant in the first defendant's office. It must be emphasised that the paragraph deals with a time when both defendants were showing Mr Huang items and talking to him about them. In three of the sub-paragraphs, Mr Huang refers to statements made about the paintings to him by the first defendant. Apart from sub-para 24(v) quoted above, he also refers to the first defendant in sub-paras 24(vi) and (ix):

(vi) A painting of a women [*sic*] praying with a description attached to the back of the painting stating that the painting was titled '*The Temple*' which the 1st Defendant orally represented as being the work of **Wai Ming** whom the 1st Defendant described as '*a famous painter*' ...

(ix) A painting which the 1st Defendant represented as being painted by one '*Soejano*' ...

On the other hand, there is a specific reference to the second defendant in only one sub-paragraph viz para 24(xi):

(xi) A painting of a Chinese lady holding a fan with the purported signature of **Chen Yi Fei** at the bottom right-hand corner of the painting whom the 2nd Defendant described as '*being a famous painter whom your wife would know*' ...

46 From a study of Mr Huang's affidavit, it is not apparent that the reference to the first defendant in para 24(v) was a typographical error. As noted above, both defendants were present at the time the XBH Representation was made and there is no reason why the second defendant rather than the first defendant as identified in the affidavit should have made this representation. Mr Huang clearly testified in that paragraph of the affidavit to various statements made to him by the first defendant in his office that evening and only testified to one statement made by the second defendant when she was in the presence of the first defendant. In the circumstances, I accept the second defendant's submission that there was no evidence that she made the XBH Representation. The fact that her counsel did not object when the plaintiff's counsel asked the second defendant whether she had made the representation does not amount to evidence contradicting her denial.

47 As for the other two representations, since all the evidence is oral, I have the classic problem of weighing each party's evidence and deciding whom to believe.

48 The No-fakes Representation was allegedly made to both the plaintiff and Mr Huang whilst the CYF Representation was made to Mr Huang alone. Their evidence on these representations was not shaken in cross-examination. The second defendant did not challenge the credibility of either the plaintiff or Mr Huang. She was content to submit that the plaintiff's and Mr Huang's assertions were not supported by any other evidence adduced by the plaintiff.

49 On the other hand, the plaintiff did challenge the second defendant's credibility. The plaintiff submitted that the second defendant's testimony was riddled with contradictions and, in addition, she

had changed positions in her pleadings. The plaintiff relied on the transcripts of the 20 October 2008 meeting to show that the second defendant was a garrulous person who made numerous representations regarding the authenticity of the first defendant's paintings. Yet, in the second defendant's testimony, she had chosen to describe her conversation with Mr Huang on 20 October 2008 as nothing more than "small chit-chat from time to time". These were the same words that she used in her affidavit to describe what had transpired when she met Mr Huang at Ang Siang Hill.

50 The plaintiff submitted that during the 20 October 2008 meeting, the second defendant had made various representations about works included in the third set. She said, *inter alia*, that:

- (a) with respect to one of the purported Wu Guanzhong paintings in the third set, that Wu Guanzhong "gave it to Mr. Tong Joo[sic] when he came down to Singapore ... in the year 1993";
- (b) when discussing Walter Spies, the second defendant stated that "you see, so he said he can sell you this price because he bought it at a very cheap price in the past, but he did not know the price today until lately" and that "yes, he [the first defendant] said all walter sphere [sic] he bought from his son"; and
- (c) in addition, when asked about how the first defendant had so many Walter Spies paintings, she replied "He has so many, this is long ago, not popular. In the years 70s, 60s or 50s. He shows you what the thing, in the year 1948 he bought".

The plaintiff submitted that in those statements, the second defendant was clearly implying that the paintings she referred to then were original works.

51 Whilst I accept the logic of the second defendant's submission that one cannot prove what she said on earlier occasions by reference to what she said on 20 October 2008, that does not mean that the transcript showing what transpired on 20 October 2008 has no probative value at all. It does establish that the second defendant was talkative and was willing to make all sorts of assertions about the paintings belonging to the first defendant. In that transcript, she had also said that the first defendant had kept his paintings for a very long time and that he was able to sell at a low price because he had bought them at a low price as well. The way that the second defendant was willing to discuss the first defendant's collection and his motivation on 20 October 2008 makes it more likely that she had been equally willing to say similar things about the paintings that she had previously shown Mr Huang and the plaintiff. In coming to this conclusion, I am aware that when Mr Huang mentioned during that meeting that if fakes were sold, the first defendant would get into trouble, the second defendant replied by saying "no fake lah" and when Mr Huang asked her whether she knew for sure that there were no fakes, her reply was "I think is not fake, for what he wants to sell fake things like what you say correct or not". This qualification, however, does not reduce the inherent likelihood of her having earlier made the CYF Representation or the No-fakes Representation.

52 As the plaintiff pointed out, the difference in the second defendant's approach during the meeting on 20 October 2008 when she was trying to sell the third set and her approach in her affidavit was stark. In the affidavit, she claimed that she would never answer questions about the authenticity of the paintings. At paras 33 and 34 of her affidavit she had stated:

33. I did not at any time in the sale and purchase of the Purchased Artworks, made any representations, whether fraudulently or recklessly, of whatsoever nature, as regards the authenticity of any of the Purchased Artworks to [the plaintiff] or [Mr Huang] ...

34. As I was merely Tong Djoe's personal assistant, Tong Djoe did not authorise me to make

any representations as regards the authenticity of any of Purchased Artworks on behalf of himself. Due to this, I would not have said to [the plaintiff] or [Mr Huang] any matter which I did not have the authorization from Tong Djoe to say, and in any regard, I did not say anything to [the plaintiff] or [Mr Huang] that Tong Djoe would not himself had [sic] said to them.

During the meeting of 20 October 2008, however, she had talked about the Wu Guanzhong painting and the Walter Spies paintings quite freely. During cross-examination, she admitted that when asked whether a painting was an original, she would say that it was "not fake" and she tried to explain this away by saying that in her view, art could never be fake unlike gold and diamonds. This is shown by the following exchange:

Mr Yim: ...

This is Mr Huang narrating back to Tong Djoe. And you see your response:

[Reads] "No lah, the art cannot be fake ..."

You were asserting it cannot be fake –

2nd Defendant: Yes.

Mr Yim : -- as opposed to the position you've taken in affidavit that you won't answer any of this. You said "Mr Tong Djoe will deal with your questions."

2nd Defendant: This is a casual talk. In the office we have to be away from the – from the boss unlike [sic] you are wanted, like if he – if – if you ask me about the art, you know, fake or not fake, I will say not fake because it's the artist who draw it what, so how to fake? It's not gold –

Mr Yim: Ok.

2nd Defendant: -- or not diamond or what that is fake.

The second defendant must have realised the inconsistencies between her affidavit evidence and what she had said on 20 October 2008 and during cross-examination and therefore she sought to play down her statements by emphasising her lack of education and asserting that in the nature of art, paintings could not be faked since each painting had to be painted by an artist.

53 Further, the second defendant was inconsistent in other areas of her evidence. At first she had asserted that Mr Huang was the first person to whom she had shown the first defendant's paintings with a view to their sale. Subsequently, the second defendant was shown an affidavit which she had filed in a district court case where, referring to a different transaction which took place before the one in question in these proceedings, she had said:

This was the first time I had shown people to view the 1st Defendant's collection and assisted in such a purchase of the 1st Defendant's collection.

When confronted with this affidavit during cross-examination, the second defendant's first reaction was to blame her lawyers and say that she had affirmed the affidavit when she was sick and the first defendant was present at the time. Subsequently, she had called the lawyer in that case and asked the lawyer to change the affidavit. Under repeated questioning in this case, however, the second defendant finally admitted that Mr Huang was not the first person to whom she had shown the first

defendant's paintings.

54 The second defendant also told different stories in relation to the visit to Ang Siang Hill. At first, she said that the paintings in those premises were kept in a storeroom and that she did not go into the storeroom because she could not breathe in there. Later, she said that the paintings were kept along a place which she described as "a pathway of the ... house". She elaborated that there was no going into a room or standing outside the room because as soon as you entered the house there was a pathway where the paintings were kept. Subsequently, she changed again and said "Yah, it's a pathway, but there are also store room, you see". Finally, she decided that the better word to describe the area where the paintings were kept was "corridor". In her Defence and Counterclaim (Amendment No 3), however, the second defendant had pleaded that she had met Mr Huang at a storeroom in Ang Siang Hill and that her role "was simply to unlock the storeroom for the viewing of paintings by Mr Huang".

55 When the discrepancy between her evidence and her pleading was pointed out to the second defendant, she said that what was written in her defence was not in accordance with what she had told her lawyers. She then claimed that she had been sick when she had given instructions to her lawyers. Upon further cross-examination, however, she admitted that by the time she instructed the solicitors who had drafted her Defence and Counterclaim (Amendment No 3) she had recovered from her illness.

56 Having considered the evidence, I find the plaintiff and Mr Huang's evidence on the No-fakes Representation and the CYF Representation to be more credible than that of the second defendant. I accept that the second defendant made both these representations in addition to the Affandi Representation. The second defendant's credibility on several points was doubtful as I have noted above.

Did the second defendant owe the plaintiff a duty of care?

57 I have found that the second defendant made three representations in the course of the plaintiff's purchase of the Artworks. The plaintiff's case is that all three representations were false and she is seeking to hold the second defendant liable for negligent misrepresentation in tort. The second defendant did not seek to challenge the assertion that the representations were false. However, she maintains that nonetheless, legally, she is not liable in tort for misrepresentation to the plaintiff. The legal basis of the claim must therefore be considered.

58 In *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501, Belinda Ang J followed and endorsed the principles of liability for negligent mis-statement as set out in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Caparo Industries plc v Dickman* [1990] 2 AC 605 ("*Caparo*"). Basically, there must be a special relationship of proximity between the person making the statements and the recipient who acts in reliance on the statements. In *Caparo*, Lord Oliver stated that such a relationship may typically be held to exist where (1) the advice is required for a purpose made known to the advisor at the time the advice is given, (2) the advisor knows that the advice would be communicated to the advisee so that it would be used for that purpose, (3) it is known that the advice is likely to be acted upon without independent inquiry and (4) it is so acted upon by the advisee to his detriment. When the relationship of proximity exists between the parties, then the advisor will owe a duty of care to the advisee not to give negligent advice. The second element required for liability is reliance and this means that the advisee must show that he or she relied on the advice and was acting reasonably in doing so. In the House of Lords decision of *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 ("*Williams*") Lord Steyn stated that the "test is not simply reliance in fact" but whether the plaintiff could reasonably rely on the assumption of personal

responsibility by the individual who performed the services on behalf of the company (at 837).

59 The plaintiff relied on *White v Jones* [1995] 2 AC 207 ("*White v Jones*"), where it was held that a solicitor who failed to draw up the will of a client before his death owed a duty of care to the would-be beneficiaries under the new will, and was liable to them as they were unable to claim their inheritance. Lord Browne-Wilkinson said (at 273):

The assumption of responsibility referred to is the defendant's assumption of responsibility for the task, not the assumption of legal liability. *Even in the case of ad hoc relationships, it is the undertaking to answer the questions posed which creates the relationship.* If the responsibility for the task is assumed by the defendant, he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed.

[emphasis added]

The plaintiff asserted that by choosing to answer Mr Huang's questions regarding the Artworks, the second defendant had voluntarily assumed responsibility towards her. She argued that, even on her own case, the second defendant had stated during cross-examination that if asked whether an art piece was an original, she would say that it was not a fake.

60 The second defendant responded that she did not assume responsibility towards the plaintiff as she had told Mr Huang to direct his queries on authenticity to the first defendant. Furthermore, she made it plain that she did not have special knowledge and was not an expert in art. She relied on *Edgeworth Construction Ltd v N.D Lea & Associates Ltd* (1993) 107 DLR (4th) 169 ("*Edgeworth Construction*"), where the Supreme Court of Canada found that individual employees (in that case, engineers) did not owe a duty although their employer did. La Forest J reasoned (at pg 9) that:

While they [the individual engineers], in one sense, have expected that persons in the position of the appellant would rely on their work, they would expect that the appellant would place reliance on their firm's pocketbook and not theirs for indemnification... Looked at the other way, the appellant could not reasonably rely for indemnification on the individual engineers. It would have to show that it was relying on the particular expertise of an individual engineer without regard to the corporate character of the engineering firm. It would seem quite unrealistic... to hold that the mere presence of an individual engineer's seal was sufficient indication of personal reliance (or for that matter voluntary assumption of risk).

The second defendant also cited *Williams* and submitted that it was not reasonable for the plaintiff to rely on her statements.

61 In order to determine whether the necessary proximity existed and if so whether it was reasonable for the plaintiff to rely on what the second defendant said, it is necessary to revisit the facts. The circumstances surrounding the acquisition of the Artworks and the context in which the representations were made are the most important of these facts.

62 From the start, the plaintiff and Mr Huang knew that they were going to see a private collection. Mr Huang was given the opportunity to do this by Mr Chin who told him that his mother, the second defendant, was the personal assistant of a well known businessman and art collector. Therefore, Mr Huang initially, and thereafter the plaintiff, met the second defendant in her capacity as the personal assistant of a businessman. This businessman was not running an art gallery and the second defendant was not working in an art gallery or a museum. The first defendant was selling his

own private collection which he had built up over many years.

63 According to Mr Huang's evidence, on his first visit to the first defendant's office, Mr Huang met the first defendant who told him that he (*ie* the first defendant) was a successful businessman who had been collecting paintings for many years and that he had purchased most of the paintings from the artists directly. The first defendant showed Mr Huang the art collection and specifically showed him a painting which he claimed was an original work by Picasso. He asked if Mr Huang wanted to buy any of the paintings as he needed the money. The first defendant then took Mr Huang to a corner of the office and asked him to pick a few paintings that the latter liked. The first defendant said that prices could be discussed later. Mr Huang chose a few paintings and the first defendant made certain representations about them. He then asked Mr Huang to name a price. He was not willing, however, to accept the price named by Mr Huang and stated that the least he could accept was \$150,000 as the Artworks were all original and were worth a lot more.

64 It is clear from the account given by Mr Huang that it was the first defendant who was driving the sale. He made representations about his collection and about how long he had had the paintings. He also said he had purchased many of the Artworks directly from the artists. The second defendant acted more as an echo than an originator of the representations. Even when the plaintiff went to see the first defendant a few hours later, the first defendant repeated his assertions that all the Artworks were originals and that he would never collect counterfeits and that if any of the items was counterfeit he would return all the money to the plaintiff. According to Mr Huang, it was at that stage that the second defendant reiterated that the first defendant would "never purchase fakes" (*ie* that was when she made the No-fakes Representation).

65 The accounts given by Mr Huang and the plaintiff make it obvious that the second defendant's role was to assist the first defendant by showing the paintings to prospective purchasers. She performed this function during the first meeting and again during the visit to Ang Siang Hill which the first defendant did not attend. He remained in his office and sent the second defendant out to run around for him as necessary. He did this again on 20 October 2008 when it was the second defendant who had the task of carting the third set to Mr Huang's home and displaying them there.

66 The second defendant did not claim to possess any special skills in the field of art. In fact, at the 20 October 2008 meeting, the second defendant reiterated that she did not know about art:

Mr Huang: But according to Tony, you know a lot about art

2nd Defendant: Because I show him all the things. With you also thought I know a lot about art. Everyone thought I know a lot about art *but actually no. I personally don't really like art. I like beautiful things. You tell me, this one nice or not, if I think is nice, I said ok. I go for the colour that I like. I don't bother about the artist.*

Mr Huang: True, true, true

[emphasis added]

67 Both the plaintiff and Mr Huang admitted that the second defendant did not state that she was an expert in art. The authors of *Clerk and Lindsell on Torts*, Sweet & Maxwell, 2010, 20th Ed, observed at pg 501 para 8-118:

... [I]t remains the case that a claimant is *much more likely to be able to show that he is*

entitled to depend on a service or statement where the work is undertaken by a person who is exercising a special skill in a business context. This is particularly the case where the information being given relates to matters which are within the exclusive preserve of the defendant. Thus in *Smith v Eric S Bush* [1990] 1 AC 831 Lord Griffiths commented: "the valuer is discharging the duties of a professional man... The essence of the case against him is that he as a professional man realised that the purchaser was relying on him to exercise proper skill and judgment in his profession.

[emphasis added]

The second defendant was known to them only as the first defendant's assistant who performed the tasks he assigned to her and at no time were they told that she had any expertise in this area.

68 On a consideration of the evidence, I find that on balance, the second defendant did not voluntarily assume responsibility for advising the plaintiff. She was merely repeating things that the first defendant said and was acting as his assistant to help him in achieving the sales. Whilst she did earn some extra money from him when he made a successful sale, this incentive in itself does not mean that she was acting with professional knowledge or that she was someone whose statements could be accepted as independently verifying what the first defendant was telling the plaintiff and Mr Huang. It must have been clear to them after their experience with the first defendant that, enthusiastic as the second defendant was, she was parroting her boss and not conveying her own opinions gained from her own knowledge.

69 Furthermore, even if it is assumed that the second defendant voluntarily assumed responsibility, the plaintiff's claim nonetheless fails the proximity test because it would not have been reasonable in the circumstances for the plaintiff to rely on the representations made by the second defendant in making her decision to purchase the Artworks. As noted above, in *Williams*, where the House of Lords held that the claimants who were customers of a company could not reasonably have looked to the defendant director of the company for an indemnity, Lord Steyn endorsed the view of La Forest J in *Edgeworth Construction* and stressed the need for reasonable reliance.

70 In the present case, it is far more likely that the plaintiff and Mr Huang relied on and were influenced by the guarantee of the first defendant, who was supposedly a prominent businessman and an ardent art collector. After all, at the 17 September 2008 evening meeting, the plaintiff had specifically asked the first defendant whether the art pieces were originals and the first defendant had assured her that they were and that he would never collect counterfeits. Thereafter, the first defendant *reiterated that if the art pieces were not originals he would return the monies to them*. Obviously, it was his unequivocal guarantee that persuaded the plaintiff to purchase the Artworks. When the owner of an artwork which he is selling makes such a promise, it is hardly likely that a purchaser would rely on that seller's employee's endorsement in deciding to buy the work in question. If the second defendant's alleged representations had really induced the plaintiff to enter the first and second Agreements, surely she would have also have been made a party to the Written Undertaking? At the time the plaintiff asked for the Written Undertaking to be executed, she gave no hint that she held the second defendant legally responsible as well for what had occurred.

71 In the event, I hold that the second defendant did not owe the plaintiff a duty of care and therefore cannot be made liable for negligent misrepresentation.

Conclusion

72 There will be judgment for the plaintiff against the first defendant in the sum of \$300,000,

interest thereon at the court rate from 2 August 2009 to date of payment and costs. The plaintiff's claim against the second defendant is dismissed with costs.

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