IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 71

Civil Appeal No 14 of 2019

Between

Sim Tee Meng

… *Appellant*

And

(1) Haw Wan Sin, David
(2) Yee Ai Moi, Cindy

… *Respondents*

GROUNDS OF DECISION

[Tort] — [Misrepresentation] — [Negligent misrepresentation]
[Tort] — [Negligence] — [Duty of care]

Sim Tee Meng
v
Haw Wan Sin David and another

[2019] SGCA 71

Court of Appeal — Civil Appeal No 14 of 2019
Judith Prakash JA, Belinda Ang Saw Ean J and Woo Bih Li J
13 August 2019

19 November 2019

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 This appeal raised the question as to the circumstances in which a Key Executive Officer ("KEO") and director of a limited company in business as an estate agency can be found to be personally liable for representations made to customers by him when such representations were made in the course of his employment with the company and in order to promote the business of the company.

2 Before us, the appellant was Sim Tee Meng ("Mr Sim" or "the appellant") and the respondents were Haw Wan Sin, David and Yee Ai Moi, Cindy ("Mr Haw" and "Mdm Yee" respectively, and "the respondents" collectively). The respondents are husband and wife. The appellant was at all

material times the KEO of Faber Property Pte Ltd ("Faber"), a limited liability company incorporated in Singapore.

3 In District Court Suit No 3237 of 2015 ("DC 3237"), the respondents sued the appellant, Faber and one Seah Beng Hoon ("Ms Seah") for negligent misrepresentation. Faber was and still is an estate agency licensed by the Council of Estate Agencies ("CEA"). Apart from being KEO of Faber, the appellant was its sole shareholder and only director. Ms Seah was an Associate Director of Faber and a licensed real estate salesperson. The respondents pleaded that in reliance on certain representations the defendants made to them, they had entered into various agreements with a New Zealand company Albany Heights Villas Limited ("the Developer") for a "First Right of Refusal" ("FRR") in respect of three units in a residential housing project in New Zealand ("the Project"). The Developer subsequently went into insolvent liquidation and the respondents suffered loss as a result.

4 In summary, the District Judge ("the DJ") found that only Faber was liable to the respondents for negligent misrepresentation. She dismissed their claims against the appellant and Ms Seah. The DJ's decision is *Haw Wan Sin David and another v Faber Property Pte Ltd and others* [2018] SGDC 143 ("*Judgment (DC)*").

5 The respondents then filed District Court Appeal No 16 of 2018 ("DCA 16"), seeking to overturn the DJ's decision in part. The High Court Judge ("the Judge") allowed the respondents' appeal in respect of the appellant (Mr Sim), but dismissed their appeal in respect of Ms Seah. The Judge's decision is *Haw Wan Sin David and another v Sim Tee Meng and another* [2018] SGHC 272 ("*Judgment (HC)*").

6 The appellant then sought and was granted leave to appeal to this Court against the High Court's decision. Before this Court, he argued that the Judge erred in: (1) overturning the DJ's factual finding that he did not make the alleged representations; and (2) finding that he was personally liable to the respondents for making those representations.

7 After hearing the parties, we dismissed the appeal. We upheld the Judge's findings of fact and her holding that the appellant owed a personal duty of care to the respondents arising out of his interactions with them. We accordingly lifted the stay of execution on the judgment below which had earlier been granted pending the outcome of this appeal.

8 These are the reasons for our decision.

Facts

9 On 7 January 2012, Faber entered into an agreement with the Developer and the Developer's Singapore entity to market the Project in Singapore. On 14 January 2012, a marketing event was held at an external venue to sell the FRR investment in the Project. At the event, Faber's representatives and salespersons approached potential investors with a view to marketing the investment. The respondents were amongst those who attended this event.

10 The respondents pleaded that Ms Seah made the following misrepresentations that day about the Project to a group of potential investors which included them:

(a) Representation 1: the owners of the Developer had a good track record of successful developments;

(b) Representation 2: Phase 1 of the Project was fully sold and construction was already in progress, while Phase 2 was 60% sold; and

(c) Representation 3: investment moneys paid by any investor would be held in a trust account by New Zealand lawyers, and the Developer would only have access to the moneys according to the progress of construction of the Project.

11 Two days later, on 16 January 2012, the respondents attended at Faber's office and met Ms Seah and Mr Sim. The respondents met Ms Seah first, and then they asked to speak with Mr Sim. Mr Haw had suggested to his wife that they meet with Mr Sim as he was Faber's KEO. They wanted to obtain confirmation of the representations Ms Seah had made, and to seek Mr Sim's assurance that all necessary due diligence checks for the Project had been performed. Mr Haw also wanted to speak with Mr Sim about the Project as he was concerned that Ms Seah, being a salesperson, might subsequently leave Faber whilst the Project was ongoing whereas it was less likely that the KEO would do so.

12 At the respondents' meeting with Mr Sim, Mdm Yee told him that she herself was a real estate salesperson and asked whether she could receive a co-broking commission if she found other persons to invest in the FRR scheme. The respondents had pleaded that Mr Sim made the following misrepresentations to them during the meeting:

(a) Representation 4: the representations Ms Seah had made at the marketing event on 14 January 2012 were true and correct;

(b) Representation 5: the defendants had complied with CEA's strict requirements to perform checks on the ownership and legality of the Project; and

(c) Representation 6: the defendants had done all relevant and necessary due diligence checks on the Developer and details such as title to the Project and building approval for marketing, and everything was in order.

13 In this regard, Mr Sim admitted that he had represented to the respondents that Faber had conducted due diligence checks in respect of the Project when he was asked about this by Mdm Yee. He, however, averred that the details of the due diligence checks conducted were not included in his representation.

14 The respondents' case was that in reliance on Representations 1 to 6, they entered into various agreements with the Developer that same day to obtain the FRR for three units in the Project. The respondents had to pay S$15,000 as reservation deposit and US$142,656.76 as the balance of the FRR price for the three units. In DC 3237, the respondents sought the return of those sums.

15 The fact of the matter was that, amongst other things, the Developer had neither the title nor the resource consent required to develop the relevant plot of land on which the Project was supposed to be constructed. Subsequently, the Developer went into liquidation and investigations by liquidators in New Zealand suggested that those who came up with the FRR scheme had siphoned off substantial sums paid by purchasers such as the respondents.

The DJ's decision in DC 3237

16 As mentioned, the DJ found that only Faber was liable to the respondents. The DJ found that Faber owed a duty of care to them as it had assumed responsibility to exercise care to avoid loss to investors like the respondents. Those investors relied on Faber to exercise care when presenting information about the Project, and Faber knew or ought to have known of such reliance (see *Judgment (DC)* at [27], [29]). Of the six alleged misrepresentations, the DJ found that Ms Seah, as Faber's representative, had only made Representations 1 to 3, or representations along those lines, to the respondents on Faber's behalf (see [34]–[36]). In spite of this, the DJ later held that Faber breached its duty of care by failing to ensure that it had a good basis for making Representations 1 to 3, *5 and 6* to the respondents (see [51], [58]).

17 As regards Mr Sim, the DJ accepted his account that when Mdm Yee asked whether due diligence checks had been conducted, he responded that Faber had conducted them but he did not particularise the exact checks conducted (see *Judgment (DC)* at [75]). The DJ held that it was unlikely that the respondents had asked Mr Sim to confirm that all the representations Ms Seah had made were true. The DJ was of the view that the respondents' evidence was inconsistent as to what transpired between them and Mr Sim, and that it was likely that their version was concocted as an afterthought to pin personal liability on Mr Sim (see [70], [74]). The DJ further held that Mr Sim's representation that due diligence checks had been conducted was made on Faber's behalf in his capacity as Faber's director and not in his personal capacity, and that the respondents relied on the representation as coming from Faber and not Mr Sim the individual (at [77]). The DJ found that Mr Sim did

not owe a personal duty of care to the respondents in making that general representation to them and dismissed their claim against him (at [81]).

18 As regards Ms Seah, the DJ found that she had made representations to the respondents along the lines of Representations 1 to 3 on behalf of the entities behind the marketing event (which included Faber) and that she was "merely a mouthpiece" when doing so (*Judgment (DC)* at [90]). The DJ found that Ms Seah did not owe a personal duty of care to the respondents as she did not voluntarily assume personal responsibility for those representations made on Faber's behalf. Further, the respondents had relied on them as representations made by Faber, not as representations made by Ms Seah (see [94]). The DJ thus dismissed the respondents' claim against Ms Seah.

The decision in DCA 16

19 As mentioned, in DCA 16, the Judge found the appellant jointly and severally liable with Faber to pay the respondents damages of S$15,000 and US$142,656.76.

20 The Judge found that the following evidence showed that the appellant had made Representations 4 to 6 to the respondents. First, when Mdm Yee asked the appellant generally whether due diligence checks had been conducted, he replied in general terms that they had been conducted. Then Mdm Yee began asking specific questions as to the particulars of the checks conducted, and the appellant replied to each of those queries by affirming that those checks had been conducted (*Judgment (HC)* at [36]). In making this finding, the Judge applied the principles for appellate intervention *vis-à-vis* findings of fact made by a trial judge. She was of the view that the DJ's finding that the appellant's account was to be preferred over the respondents' was against the weight of the

evidence (at [58]). She found the respondents' evidence consistent as to what transpired between them and the appellant, whereas the appellant's evidence was plagued with difficulty as it contained numerous internal inconsistencies and unsatisfactory explanations were provided for the inconsistencies (at [35], [48], [58]). These conclusions were arrived at upon a thorough review of the affidavit evidence and the evidence at trial (see [37]–[47], [49]–[57]).

21 Before the Judge, it was not disputed that the general framework to be applied to ascertain whether the appellant personally owed a duty of care to the respondents was that laid down in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") (see *Judgment (HC)* at [60]). Under this framework, the Judge found that the appellant owed the respondents a personal duty of care when he made Representations 4 to 6, because there was sufficient legal proximity between them and no public policy consideration which militated against imposing such duty of care in this case. There was physical proximity when the respondents met with the appellant and he made the material representations (at [66]). The Judge found that it was conveyed to the respondents that the appellant assumed personal responsibility to them, since he spoke directly and personally to them and it should have been obvious to him that they might reasonably rely on his word as a personal assumption of responsibility on his part (at [83]). There was nothing to suggest that the appellant prefaced his statements with a disclaimer that he was speaking solely as the company Faber and was not undertaking any personal responsibility and there was no intentional or deliberate structuring of the relationship between him and the respondents to preclude a tortious duty of care (at [83], [97]). The Judge found that the appellant breached his duty of care to the respondents by failing to make reasonable checks before making

Representations 4 to 6, and there was no real argument to the contrary (see [103]).

22 As regards Ms Seah, the Judge was of the view that she owed the respondents a personal duty of care when she made Representations 1 to 3 since she was a property agent (*Judgment (HC)* at [107]). This decision was based on *Su Ah Tee and others v Allister Lim and Thrumurgan (sued as a firm) and another (William Cheng and others, third parties)* [2014] SGHC 159, which the Judge found to be a decision on an analogous situation. It had been held there that property agents owe a duty of care to purchasers. While it was not disputed that Ms Seah had failed to make reasonable checks before making Representations 1 to 3, the Judge held that the standard of care expected of her did not require her to make such checks, and she therefore did not fall below the requisite standard of care (at [108]). In this case, Ms Seah was entitled to expect that the estate agency (*ie*, Faber) had conducted the due diligence checks to support the representations she was asked to make (at [116]).

Parties' cases on appeal

23 The appellant made a number of arguments. First, he argued that the Judge erred in finding that he had made Representations 4 to 6. He submitted that the DJ's factual findings were correct and should be affirmed by this court in that he only represented that Faber had conducted due diligence checks without particularising the exact checks conducted and that Ms Yee did not inquire about the checks that were conducted. He submitted that the DJ's findings of fact were correctly premised on the totality of the evidence canvassed at trial, and were derived from her first-hand evaluation of the witnesses and inferences of fact drawn. On the other hand, the Judge's findings

were not made with the benefit of directly assessing the veracity and credibility of these witnesses. The appellant also contended that the Judge's interpretation of the evidence given at trial was erroneous, asserting that the respondents failed to prove their pleaded case. This was because over the course of the proceedings they had taken three different positions as to what Representations 4 to 6 were, as could be seen from their pleaded case, their affidavit evidence and their answers during cross-examination.

24 Next, the appellant argued that even if he had made Representations 4 to 6 to the respondents, there was no legal proximity between them to give rise to a *prima facie* duty of care owed by him to the respondents. He submitted that his interactions with the respondents were routine, he met with them as the KEO of Faber and not in his personal capacity, and any representation made by him was made as the KEO of Faber. He thus argued that there was no personal relationship between himself and the respondents and he did not assume personal responsibility to them. The appellant contended that it was highly improbable that a director of any company would be willing to undertake personal responsibility to strangers he just met. He also submitted that the respondents were focused on obtaining assurances from the KEO of Faber *qua* organ of Faber, and not from him as an individual or as a salesperson, so that they could pursue claims against Faber if necessary. He contended that the respondents never expected to make a claim against him in his personal capacity.

25 Thirdly, the appellant argued that policy considerations militated against imposing a duty of care on him. These policy considerations dictated that he should be protected from personal liability as he had acted properly in the discharge of his duties to Faber, and the representations he had made were in

accordance with and in furtherance of the fiduciary or other personal legal duties he owed to Faber. The appellant referred this Court to the principles in *Said v Butt* [1920] 3 KB 497 and *PT Sandipala Arthaputra and others v STMicroelectronics Asia Pacific Pte Ltd and others* [2018] 1 SLR 818 ("*Sandipala*") (the latter case discussed the scope of the principle from the former case); these two cases had not been brought to the Judge's attention. The appellant thus submitted that any representations he made must be attributed to Faber. He argued that he had met with the respondents as Faber, made the representations to them in his capacity as the KEO and director of Faber and not in his personal capacity, and so the liability they wished to affix on him was predicated on Faber's corporate acts.

26 On the other hand, the respondents defended the Judge's decision. They first argued that the question as to whether the Judge erred in finding that the appellant made Representations 4 to 6 was a question of fact on which he had not sought leave to appeal to the Court of Appeal and for which such leave could not have been granted. The respondents submitted that in any case, the Judge's finding that the appellant made those representations was well-grounded in evidence adduced at trial. They also referred to the Judge's decision to intervene by making this factual finding as being an exercise of her discretion.

27 Secondly, the respondents submitted that the Judge did not err in finding that the appellant was personally liable to them for making Representations 4 to 6. In this regard, the respondents again contended that the question as to whether the Judge erred in finding that the appellant had assumed personal responsibility for making those representations was not one for which leave to appeal could have been granted. The respondents also referred to the making of this finding as an exercise of the Judge's discretion.

28 The third submission made was that the Judge's finding that the appellant assumed personal responsibility was not plainly wrong. The respondents emphasised that they were personally aware of a KEO's responsibilities, since Mdm Yee had been a property agent and Mr Haw was at the material time himself a KEO of a licensed estate agency although he was not actively running the same at that point. Thus it was only after the respondents met the appellant and received his personal assurances as the KEO of Faber that they decided to enter into the FRR investment.

29 The respondents also argued that there was no policy reason that justified relieving the appellant of personal liability. The appellant himself had made Representations 4 to 6 to them and therefore was a tortfeasor. Thus the appellant was liable to them on the basis of the ordinary principles of negligence as enunciated in *Spandeck* ([21] *supra*). The respondents contended that this appeal did not engage the question left open by this Court in *Sandipala*, and that in any case, the principles endorsed in that case would not assist the appellant since Faber's negligence was premised entirely on his failures as the KEO and director in not undertaking the basic checks on the various representations.

Issues

30 Accordingly, the main issues before this Court were:

(a) whether the Judge erred in finding that the appellant made Representations 4 to 6 to the respondents; and

(b) if he made Representations 4 to 6 to the respondents:

(i) whether there was legal proximity between them so as to give rise to a *prima facie* duty of care owed by the appellant to the respondents; and

(ii) whether there were policy considerations militating against imposing a duty of care on the appellant.

Decision

Preliminary points

31 We make two preliminary points. First, as pointed out to the respondents' counsel at the hearing, the Judge had granted leave to the Appellant to appeal to this Court against her decision without stating any restrictions on the matters on which he could appeal. In the light of this, the fact that the appellant had sought leave to appeal on the basis of particular questions of law, which was the only basis on which he could have sought leave anyway, did not mean that other matters could not be ventilated again in this appeal. These other matters included the questions whether the appellant had made Representations 4 to 6, and whether the appellant assumed personal responsibility for making those representations. As stated in s 37(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), "[a]ppeals to the Court of Appeal shall be by way of rehearing". So unless the questions to be dealt with in the appeal are specifically delineated in the order granting leave to appeal, the whole matter dealt with in the court below can be re-ventilated in this Court. Bearing this in mind, when leave to appeal is granted on a question of law the court granting the leave should consider whether the appeal should be restricted to that issue and not involve a general re-exploration of the issues considered below.

32 Second, in so far as the respondents' counsel described the appellate function of overturning findings of fact as an exercise of an appellate judge's discretion, it was incorrect for him to do so. An appellate judge scrutinises the findings of the court below and the evidence adduced before it and either affirms or reverses those findings on the basis of that scrutiny. Whatever the appellate judge does, that holding is the result of an analytical exercise and assessment and not an exercise of discretion at all.

Whether the appellant made Representations 4 to 6

33 As to the first issue, we upheld the Judge's finding of fact that the appellant had made Representations 4 to 6 to the respondents. In *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562, this Court at [37]–[41] set out the principles governing appellate intervention *vis-à-vis* findings of fact by a trial judge. In summary, as to findings of facts, the trial judge is generally better placed to assess the veracity and credibility of witnesses, and the appellate court should only overturn such findings where the trial judge's assessment is "plainly wrong or against the weight of the evidence". As to inferences of fact, however, the appellate court can engage in a *de novo* review since an appellate judge is as competent as any trial judge to draw any necessary inferences of fact. An appellate judge is in as good a position as the trial judge to assess a witness's credibility where such assessment is based on inferences drawn from the internal consistency of the witness's testimony and the external consistency between the witness's evidence and extrinsic evidence. These principles were applied by the Judge in making her decision to overturn the DJ's finding that the appellant did not make Representations 4 to 6 to the respondents.

34 In our view, the Judge was justified in finding that the appellant had made Representations 4 to 6 to the respondents when he replied affirmatively to each of Mdm Yee's specific questions as to the particulars of the due diligence checks conducted for the Project (see [20] above, and *Judgment (HC)* at [37]–[58]). In so far as the appellant contended that the respondents failed to prove their pleaded case that he specifically made Representations 4 to 6, we accepted that Mdm Yee had deposed in her affidavit of examination-in-chief ("AEIC") at para 36 that the appellant made those representations. We also emphasise that the internal inconsistency between the appellant's original case and his evidence as to the meeting with the respondents on 16 January 2012 was damning. In Faber and the appellant's pleaded defence it was averred that "[the appellant] *merely greeted* the [respondents] and did not deal with them thereafter" [emphasis added]. In the appellant's AEIC, he *failed to make any mention* of the respondents attending at Faber's premises on 16 January 2012, and his engagement with them (however brief). It was only in the appellant's second AEIC filed after the respondents had filed their respective AEICs that he deposed that he told Mdm Yee only that due diligence checks had been conducted without particularising the exact checks conducted. During cross-examination, the appellant even refused to accept that his accounts in the pleaded defence and in his second AEIC were inconsistent. We thus agreed with the Judge that the respondents' account was to be preferred over that of the appellant.

Whether there was legal proximity between the appellant and the respondents

35 For a duty of care to arise in tort, (a) it must be factually foreseeable that the defendant's negligence might cause the plaintiff to suffer harm (the threshold issue); (b) there must be sufficient legal proximity between the parties;

and (c) policy considerations should not militate against the imposition of a duty of care (see *Spandeck* at [73], [77], [83]). This appeal was concerned with whether there was sufficient legal proximity between the appellant and the respondents to give rise to a *prima facie* duty of care on the part of the appellant to the respondents, and whether policy considerations militated against imposing a duty of care on the appellant. It was not disputed that the preliminary requirement of factual foreseeability was satisfied in this case.

36 Legal proximity includes physical, circumstantial and causal proximity, and incorporates the twin criteria of voluntary assumption of responsibility by the defendant and reliance by the plaintiff (*Spandeck* at [81]). In this case, we agreed with the Judge that the requisite legal proximity for the imposition of a duty of care on the appellant *vis-à-vis* the respondents was present.

37 As regards the criterion of voluntary assumption of responsibility, we agreed with the Judge that through the personal and direct interaction the appellant had with the respondents, he assumed responsibility to them for the accuracy of Representations 4 to 6. Ms Seah had informed the appellant that the prospective investors, *ie*, the respondents, wished to speak to him as the KEO. The appellant thus knew that he would be speaking to the respondents as the KEO and that they placed some importance on his role as such. Otherwise, they would have been satisfied with the assurances of Ms Seah alone. When speaking with them, the appellant learnt that Mdm Yee was a real estate salesperson as well. Hence, when the respondents asked him whether due diligence checks had been conducted for the Project, the appellant knew exactly what they were referring to and he chose to answer accordingly by making Representations 4 to 6. He chose to meet the respondents and give them the assurance they sought to enter into the FRR investment.

38 The appellant might have been making the representations on Faber's behalf, but he was also the KEO of Faber whose words would carry weight because of the knowledge he could reasonably be assumed to have by virtue of his position. Under s 38(1) of the Estate Agents Act (Cap 95A, 2011 Rev Ed), the appellant, as the KEO, was responsible for the proper administration and overall management of Faber's business. He, as a salesperson, was also bound by the Code of Ethics and Professional Client Care set out in the First Schedule to the Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010), which required him to conduct his work with due diligence. The appellant would thus have voluntarily assumed the various responsibilities that his roles (as a KEO and as a salesperson) carried and held himself out as possessing the relevant qualifications, knowledge and skills necessary to discharge those roles. This holding out was all the more apparent in a situation in which, to the appellant's knowledge, the respondents were aware of the appellant's roles as the KEO of Faber and as a salesperson and, indeed, approached him on the basis of the same.

39 Therefore, when the respondents sought the appellant out, because as the KEO he could be expected to know whether the necessary due diligence checks had been conducted for the Project, and the appellant chose to make Representations 4 to 6 knowing that the respondents were interested in investing in the FRR scheme, the appellant assumed personal responsibility for those representations. No disclaimer of responsibility was made by the appellant.

40 In this regard, we add that whether a KEO of an estate agency company, or a director of a company for that matter, assumes personal responsibility for representations made on behalf of the company is a fact-specific inquiry. It may be that, unlike a director of a large company, a director of a small one may often

find himself in situations where he directly interacts with customers and is thus more open to the risk of being later held to have assumed personal responsibility for representations which he made in the course of the business of the company. In any case, the more important the role the director plays in the company, the more weight his words are likely to carry to the representee who is, to the director's knowledge, aware of the director's position. This will likely be a significant factor when a court is faced with deciding whether or not there was a personal assumption of responsibility. It is always open to a person in the appellant's position to disclaim personal liability although it may be risky to do so in that such a disclaimer is likely to drive business away.

41 As regards the criterion of reliance, the respondents had relied on the appellant's representations when entering into the various agreements with the Developer for the FRR for three units in the Project. Such reliance was evidenced by the fact that the respondents entered into these agreements the very day, 16 January 2012, on which they spoke with the appellant and shortly after speaking with him. It is significant that the respondents, though obviously interested after Ms Seah's presentation a few days earlier, did not commit themselves then but only did so after they had undertaken further investigation by speaking to the appellant.

42 The fact that the respondents admitted that they sought to obtain assurances from the KEO of Faber so that they could pursue claims against Faber if necessary did not mean that therefore they would be precluded from pursuing claims against the appellant personally.

Whether there was any policy consideration militating against imposing a duty of care on the appellant

43 Moving to the issue of whether there was any policy consideration which militated against imposing a duty of care on him, the appellant argued that he should be protected from personal liability as he had acted properly in the discharge of his duties to Faber. We could not accept that submission.

44 In making his submission, the appellant relied on the *obiter dicta* in *Sandipala* at [78] that the courts should possibly re-consider the position of a director's liability for torts other than his tortious liability for his company's breach of contract, and decide that in the case of these other torts, the director would be protected from personal liability if he had acted properly in the discharge of his duty to the company. The appellant submitted that the court should adopt the two-stage test proposed by Professor Tan Cheng Han in "Tortious Acts and Directors" (2011) 23 SAcLJ 816 ("*Tortious Acts*") at para 26 to determine if he should be personally liable for making Representations 4 to 6. Prof Tan's two-stage test is as follows: liability can be imposed on a director for a tort committed by a company when (a) the director was involved in a material way in the acts that led to the company's incurring tortious liability; and (b) he did not act properly in the discharge of his duties to the company.

45 At the outset, it is important to bear in mind that Prof Tan's article was concerned with the question as to when a director is responsible for a tort committed by the company. As he himself mentioned, this "is distinct from instances where a director commits the tort personally …". Thus, Prof Tan's article was not directly concerned with the situation before us where the tort was

committed by the director himself and it was the director's acts that procured the company's tortious conduct.

46 Even if we were to consider Prof Tan's proposed two-stage test, it could hardly be said that the appellant had acted properly in the discharge of his duties to Faber in making Representations 4 to 6 and so should be protected from personal liability. Prof Tan wrote that a director would not be protected from personal liability where he "has not acted in good faith, has been self-interested, has exercised his powers for improper purposes, or has not exercised the requisite care in the discharge of his duties" or where "he exceeded the authority granted to him by the company" (*Tortious Acts* at para 27). To be protected from personal liability, the director must "have acted honestly and with due care with a view to advancing the best interests of the company" and must "not [have] exercised [his] powers for improper purposes" (*Tortious Acts* at para 28). In this case, it was the appellant who made Representations 4 to 6 to the respondents without having made reasonable checks as to the truth of these statements. As the appellant did not exercise due care in the discharge of his duties as the KEO of Faber, and this failure resulted in Faber breaching its duty of care to the respondents too, it did not lie in the appellant's mouth to deny personal liability on the basis that any representations he made must be attributed to Faber.

47 The finding that the appellant was personally liable for the misrepresentations he made to the respondents notwithstanding that he was acting as KEO of Faber at the time was in accordance with well-established principle. In *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [84] this Court said: "A director is personally liable for his own torts committed in relation to the company's affairs, whilst acting as a director or employee of the company." We found that there was no policy

consideration militating against imposing a duty of care on the appellant in this case.

48 Accordingly, we affirmed the Judge's holding that the appellant owed a personal duty of care to the respondents arising out of his interactions with them. We also affirmed her holding that he breached this duty of care by failing to make reasonable checks before making Representations 4 to 6, and that he was thus personally liable to the respondents.

Conclusion

49 For the reasons aforesaid, we dismissed the appeal, and lifted the stay of execution on the judgment below. We also ordered the appellant to pay the costs of the appeal as fixed at the hearing.

Judith Prakash Judge of Appeal	Belinda Ang Saw Ean Judge	Woo Bih Li Judge

N Sreenivasan SC, Kyle Gabriel Peters and
Teh Jing Hui (instructed counsel) and
Sng Kheng Huat (Sng & Co) for the appellant;
Harish Kumar s/o Champaklal and Toh Jun Hian, Jonathan
(Rajah & Tann Singapore LLP) for the respondents.