Hwa Lai Heng Ricky *v* DBS Bank Ltd and another appeal and another application [2010] SGCA 5

Case Number	: Civil Appeals Nos 108 and 109 of 2008 and Summons No 416 of 2009
Decision Date	: 22 February 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Goh Kok Leong and Sunita Carmel Netto (Ang & Partners) for the appellant; Lek Siang Pheng, Tan Ky Won Terence and Melissa Thng Hui Lin (Rodyk & Davidson LLP) for the respondent.
Parties	: Hwa Lai Heng Ricky — DBS Bank Ltd

Civil Procedure

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2008] SGHC 181.]

22 February 2010

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 Hwa Lai Heng Ricky ("the Appellant") took out two related appeals against the decision of the High Court in *DBS Bank Ltd v Yamazaki Mazak Singapore Pte Ltd and Another* [2008] SGHC 181 ("*DBS Bank Ltd*"). Civil Appeal No 109 of 2008 ("CA 109") pertained to the refusal of the High Court judge ("the Judge") to allow the Appellant to amend his defence. Civil Appeal No 108 of 2008 ("CA 108") pertained to the Judge's decision to uphold summary judgment which was given in favour of DBS Bank Ltd ("the Respondent") on the basis that the Appellant's case had not disclosed any viable defences. Both appeals were heard together with Summons No 416 of 2009 ("SUM 416"), which was taken out by the Respondent for: (i) an extension of time to file its case; and (ii) leave to admit further evidence in the form of a Scheme Funding Line Agreement ("the SFL Agreement") between the Economic Development Board ("the EDB") and itself, and evidence to the effect that it had not received funds to finance a loan extended by it to an entity known as Sin Yuh Industries (Pte) Ltd ("SY Industries"). All three matters arise out of the same factual matrix.

The factual background

2 SY Industries wished to purchase certain machine units from a company known as Yamazaki Mazak Singapore Pte Ltd ("Yamazaki"). The Respondent was willing to finance part of that purchase through a loan amounting to $1.94 million ("the Loan"), provided that, *inter alia*, SY Industries furnished satisfactory evidence that 40 per cent of the purchase price for those machine units had, in fact, been paid to the seller, Yamazaki.

3 On 16 December 2002, at the request of SY Industries, the Appellant, who was then an assistant sales manager of Yamazaki, wrote a letter to the Respondent. In that letter, he falsely represented that Yamazaki had received certain payments from SY Industries which amounted to 40 per cent or more of the purchase price. In reality, all that Yamazaki had received were post-dated cheques that had not yet been cleared. However, on 10 March 2003, the Respondent, who had been

deceived by the Appellant's letter, disbursed the full Loan quantum of $1.94 million to SY Industries. SY Industries proved to be financially unsound. Most of the post-dated cheques SY Industries issued to Yamazaki could not be cleared. Further, SY Industries never paid any of the instalments that were due to the Respondent, and, by 26 March 2004, a winding up order had been made against the former in the High Court.

4 The Appellant was prosecuted for cheating. On 23 June 2005, he was convicted by the District Court. That decision was upheld on appeal (see *Hwa Lai Heng Ricky v PP* [2005] SGHC 195). Subsequently, the Respondent also brought a civil claim for damages against both Yamazaki and the Appellant based on the tort of fraudulent misrepresentation or deceit.

The decision below

5 The Respondent succeeded in obtaining summary judgment against the Appellant on 18 March 2008. The learned Assistant Registrar ("the AR") granted the application because: (i) the findings of the criminal court coincided with all the essential ingredients in the Respondent's cause of action; and (ii) the Appellant had not managed to raise any viable defences. In coming to his decision, the AR refused to take into account certain defences the Appellant had raised, namely that:

(a) the Respondent could not recover in excess of 30 per cent of the Loan amount, which was allegedly the proper measure of its loss, as there was an arrangement between the Respondent and EDB, pursuant to which loss arising from the Loan would be shared between them in a ratio of 30:70 respectively ("the 30:70 Loss Sharing Arrangement"); and

(b) the relationship between the Respondent and EDB *vis-à-vis* the giving of the Loan was that of agent and principal, respectively, such that EDB (and not the Respondent) was the proper party to bring the action against the Appellant ("the Agency Argument").

The AR refused to take these points into account on the basis that they had not been pleaded in the Appellant's Defence, and in any event, they did not raise any triable issues.

6 Following the AR's decision, the Appellant applied to amend his Defence to include the points above which the AR had not taken into account. The application was heard by the learned Senior Assistant Registrar ("the SAR"), who dismissed the application. The basis of the SAR's decision was that: (i) the amendments had been prayed for only post-summary judgment; and (ii) the proposed defences, in any event, were not viable and would not have changed the outcome of the decision to award the Respondent summary judgment.

7 Dissatisfied with the outcome, the Appellant appealed against the decisions of the AR and SAR in the High Court. Both appeals were dismissed, also essentially on the basis that none of the points raised by the Appellant had any merit. However, as 26 of the 31 machine units had been recovered by the Respondents and sold, the Judge rightly reduced the judgment sum of $1.94 million entered by the AR by the net sales proceeds of the 26 machines (*ie*, the sale proceeds less only the necessary expenses incurred by the plaintiff to effect the sale) (see *DBS Bank Ltd* at [33]).

8 Consequently, the Appellant brought before us CA 108 (against the decision of the High Court with respect to the summary judgment) and CA 109 (with respect to the decision of the High Court in respect of the application to amend his Defence). The Respondent subsequently took out SUM 416 (for an extension of time to file its case and to adduce further evidence). These have already been briefly mentioned above (at [1]). At the hearing before this court on 9 September 2009 (in respect of SUM 416), we granted the Respondent an extension of time to file its case. We also directed that the

remaining prayers in SUM 416 and the two appeals be consolidated into a single hearing. When the parties next appeared before us, we dealt, first, with the appeal in CA 109 (together with the related application in SUM 416 in so far as the Respondent's application for leave to adduce further evidence was concerned) before proceeding to consider the appeal in CA 108.

CA 109 and SUM 416

9 As already mentioned, we heard both CA 109 and SUM 416 together, not least because they were, of course, closely related.

10 In so far as the appeal in CA 109 is concerned, the general approach which ought to be taken towards amendments of pleadings in the *post-judgment* context is clear, and is embodied within the following observations by Yong Pung How J in the High Court decision of *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc and another* [1990] 2 SLR(R) 66 ("*Invar Realty*") at [21]:

> While a court may have a wide power of amendment even after a final judgment, the appropriate cases in which such a power should be exercised must necessarily be very limited. Whether or not a court should do so will be in the discretion of the court, and will depend on the facts of each case, including in particular the nature and implications of the amendment sought. In all cases, a court will have to bear in mind the fundamental principle of all courts that there must be a finality to litigation.

11 Whilst finality is important, there is, as V K Rajah JC very pertinently pointed out in the High Court decision of *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [85] (affirmed in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502), "a constant tension in our legal system to accommodate the Janus-like considerations of fairness and finality". This tension is elaborated upon by the learned judge, who observed thus (*id* at [84]–[85]):

> 84 It is axiomatic that a court will generally be cautious if not reluctant to effect any amendments once the hearing has commenced; even more so once the evidential phase of the proceedings has been completed. Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220 stated:
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> > [T]o allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
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> 85 Having stated the general rule, it is imperative that the rationale underlying this approach be understood. Rules of court which are meant to facilitate the conduct of proceedings invariably encapsulate concepts of procedural fairplay. They are not mechanical rules to be applied in a vacuum, devoid of a contextual setting. Nor should parties regard pleadings as assuming an amoeba-like nature, susceptible to constant reshaping. Rules and case law pertaining to amendments are premised upon achieving even-handedness in the context of an adversarial system … In short, where does the justice reside?

12 And, in the recent decision of this court in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52, Chan Sek Keong CJ, delivering the judgment of the court, set out a comprehensive overview of this area of the law, as follows (at [110]–[114]):

> 110 …O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) gives the court a wide discretion to allow pleadings to be amended at any stage of the proceedings on such terms as

may be just. Order 20 r 5(1) reads:

> Subject to Order 15, Rules 6, 6A, 7 and 8, and this Rule, the Court may *at any stage of the proceedings* allow the plaintiff to amend his writ, or any party to amend his pleading, *on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct*. [emphasis added]

111 In *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 ("*Chwee Kin Keong*"), this court said at [101]:

> Under O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), the court may grant leave to amend a pleading at *any* stage of the proceedings. *This can be before or during the trial, or after judgment or on appeal*. [emphasis added]

112 Indeed, local case law shows that our courts have allowed amendments to be made to pleadings even:

> (a) at the final stages of a trial after the parties have made their closing submissions (see *Chwee Kin Keong* at [101]–[103] and *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd* [1992] 3 SLR(R) 855 at [91]–[96]);
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> (b) after summary or interlocutory judgment has been obtained (see *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc* [1990] 2 SLR(R) 66 at [21]–[22]); and
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> (c) pending an appeal or in the course of an appeal itself (see *Soon Peng Yam v Maimon bte Ahmad* [1995] 1 SLR(R) 279 at [25]–[30], *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR(R) 173 ("*Asia Business Forum*") at [17] and *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*") at [56]; see also O 57 r 13(1) of the Rules of Court, which states that "the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court"). …

113 The guiding principle is that amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined… However, an important caveat to granting leave for the amendment of pleadings is that it must be just to grant such leave, having regard to all the circumstances of the case. Thus, this court held in *Asia Business Forum* that the court, in determining whether to grant a party leave to amend his pleadings, must have regard to "the justice of the case" (at [12]) and must bear in mind (at least) two key factors, namely, whether the amendments would cause any prejudice to the other party which cannot be compensated in costs and whether the party applying for leave to amend is "effectively asking for a second bite at the cherry" (at [18]). These two key factors were endorsed recently again by this court in *Susilawati* at [58].

114 It cannot be over-emphasised that all the relevant circumstances of the case at hand should be considered by the court in deciding whether or not to allow an amendment to pleadings, and that delay in bringing the application for leave to amend *per se* does not constitute prejudice to the other party. As this court stated in *Wright Norman* at [23]:

> In our opinion, at the end of the day, the most important question which the court must ask itself is, are the ends of justice served by allowing the proposed amendment. Pleadings should not be used as a means to punish a party for his errors or the errors of his solicitors. All relevant issues should be investigated, provided the other party will not be prejudiced in a

> way which cannot be compensated by costs. All relevant circumstances should be considered by the court before it exercises its discretion [as to] whether it would allow an amendment. *While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay per se does not equal prejudice or injustice*. We do not think any rigid rule should or can be laid down on this. [emphasis added]

13 Applying the above principles to the present proceedings (and bearing in mind the fact that the power to permit amendment of pleadings should, in the post-judgment context, be exercised sparingly), we were of the view that it was appropriate to allow the amendment sought by the Appellant as it related to an important issue (turning on the construction of the SFL Agreement) which had not hitherto been canvassed. To recapitulate, such an issue, which focuses, *inter alia*, on the 30:70 Loss Sharing Arrangement between the Respondent and the EDB, could furnish the Appellant with a possible argument to the effect that he was only liable to the Respondent to the extent of only 30 per cent of the total claim mounted against him. It is also important to emphasise that the judgment given in favour of the Respondent was a *summary* judgment. The question then arose as to whether the Appellant should be barred – at the *threshold* point relating to the pleadings – from pursuing a legal course of action which, if successful at trial, would enable it to reduce (by a substantial amount) its liability to the Respondent. At this juncture, it is important to note that the facts of *Invar Realty* are quite different because, in that particular case, summary judgment was, in fact, ordered by the court in favour of the plaintiff based on *a clear and unambiguous admission* on the part of the defendant. This was clearly *not* the case here. The question, however, remains as to whether or not, by granting the application by the Appellant to amend its pleadings, *prejudice* would be caused to the Respondent (which is an important facet of the overall justice of the case, and which is what the court is ultimately concerned with). We are of the view that this would *not* be the case. Indeed, we note that SUM 416 was filed by the Respondent *precisely because* of this application by the Appellant to amend its defence. If, therefore, the appeal in CA 109 was allowed (with the consequence that the Appellant could amend its defence in order to plead, *inter alia*, the 30:70 Loss Sharing Arrangement), it followed that the application in SUM 416 ought also to be allowed in order to avoid any prejudice resulting to the Respondent by allowing it (the Respondent) to adduce further evidence to help counter the amended defence raised by the Appellant. Indeed, the further evidence sought to be adduced by the Respondent by way of SUM 416 consisted of a copy of the SFL Agreement as well as evidence to the effect that the Respondent had not received any funds pursuant to the SFL Agreement to finance the loan extended by it (the Respondent) to SY Industries. In addition, the Respondent would also be entitled to lead further evidence at the trial itself to counter any evidence raised by the Appellant with regard to this particular issue (*cf* also the High Court decision of *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [65]). This confirms, further, in our view, the fact that permitting the Appellant to amend his defence would not only raise squarely for decision an important issue between the parties but would also not prejudice the Respondent. This is unlike, for example, the situation in the decision of this court in *Asia Business Forum Pte Ltd v Long Ai Sin and another* [2004] 2 SLR(R) 173, inasmuch as allowing the amendment sought by the Appellant would not (as was in the case just cited) change the basic premises or case theory that had already been canvassed before the courts below. On the contrary, the Appellant in the present proceedings sought to raise an issue that had not even seen the light of day in the courts below. It is also not surprising, in the circumstances, that counsel for the Appellant, Mr Goh Kok Leong, stated that he had no objections whatsoever with the application in SUM 416 being allowed if this court allowed his client's appeal in CA 108. We were also of the view that the delay (which, as pointed out above, whilst a relevant factor, is not, in and of itself, decisive in precluding an amendment of the pleadings) by the Appellant in filing its application to amend its defence was not, having regard to all the circumstances of the case, an irremediable flaw.

14 Hence, for the reasons set out briefly in the preceding paragraph, we allowed the appeal in

CA 109 as well as granted the application in SUM 416 to adduce further evidence.

CA 108

15 Turning to what was, in effect, the substantive appeal (in CA 108), counsel for the Appellant, Mr Goh, *conceded* that the Appellant was, in fact, liable to the Respondent on the basis of fraudulent misrepresentation or deceit. However, he argued (citing Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 41-004) that the present action by the Respondent against the Appellant was in *tort* for fraudulent misrepresentation or deceit and that the purpose in awarding damages in *tort* was to put the plaintiff in the position that it would have been if the wrong (here, the deceit) had not been committed in the first place, whereas the purposes in awarding damages in *contract* was to put the plaintiff in the position that it would have been had the contract been performed. That this is indeed the case is, in fact, confirmed by the decision of this court in *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 ("*Wishing Star*"), as follows (at [28]):

> The point … relates to the different objectives of awarding damages in contract and in tort, respectively. Indeed, it is yet another specific distinction underlying the more general difference between contract on the one hand and tort on the other. And it is effectively put in a leading textbook, as follows (see Edwin Peel, *Treitel on The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 20-018):
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> > The object of damages for ***breach of contract*** is to put the victim "so far as money can do it … in the same situation … as if the contract had been performed" [citing the leading decision of *Robinson v Harman* (1848) 1 Ex 850 at 855; 154 ER 363 at 365]. ***In other words, the victim is entitled to be compensated for the loss of his bargain, so that his expectations arising out of or created by the contract are protected. This protection of the victim's expectations must be contrasted with the principle on which damages are awarded in tort: the purpose of such damages is simply to put the victim into the position in which he would have been, if the tort had not been committed*** . Of course, in many tort actions the victim can recover damages for loss of expectations: e.g. for loss of expected earnings suffered as a result of personal injury, or for loss of expected profits suffered as a result of damage to a profit-earning thing. But these expectations exist ***quite independently of*** the tortious conduct which impairs them: it is the nature of most torts to destroy or impair expectations of this kind, rather than to create new ones. ***Tortious misrepresentation does, indeed, create new expectations, but the purpose of damages even for that tort is to put the victim into the position in which he would have been, if the misrepresentation had not been made, and not to protect his expectations by putting him into the position in which he would have been, if the representation had been true*** . Such damages may be awarded in respect of losses which the victim could have avoided if he had been told the truth, and here again there is a sense in which the victim will recover damages for "loss of a chance", but it is the chance of avoiding loss rather than that of making a profit for which he will be compensated. He may even be compensated for loss of profit if the tort impairs expectations which exist independently of it…. In a contractual action, on the other hand, damages are recoverable as a matter of course for loss of the expectations created by the very contract for breach of which the action is brought. That is why damages of this kind are the distinctive feature of a contractual action.
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> [emphasis added in bold italics]

16 However, that having been said, we did *not* see how that proposition *alone* aided the Appellant.

Indeed, the damages awardable for the tort of fraudulent misrepresentation or deceit are, potentially, *very wide*. In *Wishing Star*, it was observed thus (at [21], [23] and [25]–[26]):

> 21 [Another] consequence [in relation to the tort of fraudulent misrepresentation or deceit] concerns *the scope or extent of damages that can be awarded in the context of fraudulent misrepresentation, assuming that both the misrepresentation(s) of this nature and the damage alleged can be proved*. **Embedded in this question are two closely related matters. The first is embodied in the last part of the question. It relates to a requirement that is by no means peculiar only to claims based on fraudulent misrepresentation. Indeed, it is a *general* requirement that must be satisfied each time damages are sought by a plaintiff. And it is that *the plaintiff must prove its loss*** . As mentioned in a recent decision of this court, this requirement is so obvious that it is rarely mentioned expressly (see *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [27]). The second matter is embodied in the first part of the question – for which the leading authority is the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"). This particular decision reaffirmed the general principle that damages for fraudulent misrepresentation would include all loss that flowed directly as a result of the entry by the plaintiff (in reliance upon the fraudulent misrepresentation) into the transaction in question, *regardless of whether or not such loss was foreseeable, and would include all consequential loss as well*.
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> ...
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> 23 The decision in *Smith New Court* was concerned, in fact, with the *nature* of fraudulent misrepresentation (in terms of the element of deceit which such misrepresentation necessarily involves). It will be immediately seen that the potential amount of damages awardable for a fraudulent misrepresentation exceeds even that awardable for a negligent misrepresentation (pursuant to the seminal House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465). In particular, damages awarded with respect to a negligent misrepresentation are constrained by the doctrine of remoteness of damage (as manifested in the concept of reasonable foreseeability, as to which, see the leading Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388). However, … damages awarded with respect to a fraudulent misrepresentation are not subject to such a constraint, and are recoverable even if they are not reasonably foreseeable. The reasons for this were elaborated upon in some detail in *Smith New Court* itself.
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> …
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> 25 *Doyle* ([21] *supra*) has, in fact, been adopted in several local decisions …
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> 26 More importantly, perhaps, *Smith New Court* ([21] supra) has also been cited with approval in a number of Singapore decisions with regard to the issue of recovery of all direct (including consequential) loss flowing from the transaction that was entered into as a result of a fraudulent misrepresentation, even if such loss was not reasonably foreseeable …
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> [emphasis added in bold and bold italics; remaining emphasis in original]

17 However, notwithstanding (as just noted) the potentially large amount of damages that might be awarded to a plaintiff in the context of a fraudulent misrepresentation or deceit by the defendant, the Appellant's central argument in the present proceedings was based, in our view, on the *first* element that the plaintiff must establish its loss (*viz*, the language in bold and bold italics in the

quotation from *Wishing Star*, as set out in the preceding paragraph).

18 The Respondent and the EDB had, in fact, entered into the SFL Agreement on 13 November 1995. Pursuant to cl 2.1 of that agreement, the EDB would furnish the Respondent with a Scheme Funding Line that the Respondent could draw down on for the purposes of financing loans to business enterprises under a number of schemes, including the Regionalisation Finance Scheme ("the RFS"). In this regard, it was common ground between the parties that the Loan extended by the Respondent to SY Industries was pursuant to the RFS and with the approval of the EDB. It was also common ground between the parties that the 30:70 Loss Sharing Arrangement existed. However, what *was disputed* between the parties was whether the Respondent had in fact been reimbursed by the EDB for the Loan amount as well as what legal effect the SFL Agreement had on the 30:70 Loss Sharing Arrangement. The former argument is, of course, a purely factual one, and was not in fact the one focused upon by the Appellant – at least during its oral submissions before this court.

19 Turning to the latter argument, which was referred to in the preceding paragraph and which *was* the focus of the Appellant during its oral submissions, Mr Goh argued, on behalf of the Appellant, that pursuant to the 30:70 Loss Sharing Arrangement, the Appellant was only liable to the Respondent for 30 per cent of the Loan amount. In this regard, Mr Goh cited the definition of "loss" in the SFL Agreement, which reads as follows:

> 1. Definitions
>
> In this Agreement unless the context otherwise requires:-
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> …
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> "Loss" In respect of any Facilities under the LEF scheme or the LEF(O) scheme, means such amount as EDB and PFI may agree to be the sum of: (a) *the principal outstanding in respect of such Facilities after taking into account all sums recovered from the Borrower after the Date of First Default* (including sums realised from the enforcement of any security or guarantees relating to such Facilities); (b) *solicitors and court fees paid by PFI in respect of legal actions taken between the Loss Determination Date and the Write off Date to recover such Facilities or to enforce such security or guarantees less any part thereof as are recovered from the Borrower and not otherwise treated as a recovery under (a) above*; (c) interest paid by PFI to EDB on such Facilities between the Loss Determination Date and the Write-off Date; and (d) such other sums or costs as may be agreed to by EDB. In the absence of agreement between EDB and PFI on the sum of "Loss" to be calculated on the above basis, the term "Loss" shall mean such sum as EDB may in its absolute discretion determine and notify in writing to PFI with respect to any particular Facilities
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> [emphasis added]

Mr Goh proceeded to argue that, in the light of the clause reproduced above, the loss that the Respondent and the EDB agreed to share ought to be computed by way of the following formula:

> Loss = Moneys that the borrower does not pay + interest that the Respondent has to pay to EDB for funding the loan + the Respondent's legal costs for pursuing the claim against the borrower.

20 Mr Goh highlighted that the above formula only factored in moneys recovered from the borrower and not from third parties. In the circumstances, the EDB's liability to the Respondent was for up to *70 per cent of the moneys unpaid by SY Industries*, and not *70 per cent of the net sum of the moneys unpaid by SY Industries less judgment sums recovered from third parties such as the Appellant*. He argued that, consequently, the Appellant's liability towards the Respondent was only 30 per cent of the Loan amount and that it was up to the EDB to recover in its own name the balance 70 per cent of that amount if it so desired. The EDB was not a party to these proceedings and there was no pending application to include them.

21 In contrast, the Respondent's case was simply that, as between EDB and the Respondent, the 30:70 Loss Sharing Arrangement was such that the Respondent would have to take steps to recover the loss from the borrower and third parties *first*. Any apportionment of loss would take place *after* legal proceedings against the borrower and third parties have ended and after deducting the judgment sums that have been recovered from the calculation of loss. Counsel for the Respondent, Mr Terence Tan, emphasised that the measure of damages for the tort of deceit was a liberal one and included loss amounting to the full Loan amount disbursed to SY Industries.

22 In our view, if, indeed, the Appellant was correct in its argument, then the Respondent ought to be restricted to the quantum of recovery argued for by the Appellant lest there be double-recovery by the Respondent. Further, and more importantly, as a matter of general principle, the Appellant is only liable to the Respondent for damages in fraudulent misrepresentation or deceit only to the extent that that loss *flowed directly* from the misrepresentation concerned. If, indeed, the Appellant can successfully establish that the 30:70 Loss Sharing Arrangement operated between the Respondent and the EDB *in the manner argued for by it*, then only 30 per cent of the loss suffered by the Respondent as a result of the Appellant's misrepresentation would flow from that particular misrepresentation and, hence, the Respondent can only recover that quantum — and no more. However, whether or not this argument is correct is not one that could be determined by way of an application for summary judgment. More evidence would, presumably, need to be adduced by the parties. Further, the court would also have to hear arguments from both parties as to the proper construction of the SFL Agreement in the context of its legal effect on the 30:70 Loss Sharing Arrangement. For example, whilst the SFL Agreement appears to be an umbrella agreement under which the Respondent received financing from the EDB in the form of a Scheme Funding Line it could draw down on if certain conditions were met, neither party was able to furnish details as to how the Scheme Funding Line worked in practice. In particular, the Respondent could not state, with certainty, that it had no recourse to the EDB without first bringing legal proceedings against relevant third parties such as the Appellant. In the circumstances, we were of the view that the issue as to whether or not the Respondent was entitled to damages in excess of 30 per cent of the Loan amount was an issue that ought to be tried.

23 However, to the extent that the Appellant conceded, first, that there had been a fraudulent misrepresentation by himself and, secondly, that he was liable for 30 per cent of the loss suffered by the Respondent as a result of the said misrepresentation, we ordered that CA 108 be allowed to the extent that judgment be given for the Respondent to the extent of 30 per cent of its claim and that the Appellant be granted leave to defend the remaining 70 per cent of the same.

Conclusion

24 For the reasons given above, we allowed the appeal in CA 109 and also granted the application in SUM 416. We also allowed the appeal in CA 108 in part to the extent that judgment be given for the Respondent to the extent of 30 per cent of its claim against the Appellant, and that the Appellant be granted leave to defend the remaining 70 per cent of the same. In the circumstances, we were of

the view that a fair order in so far as costs were concerned was that the costs of the proceedings both here and below ought to be in the cause and we so ordered accordingly.