Mok Kwong Yue v Ding Leng Kong
[2008] SGHC 65

Case Number : Suit 119/2004

Decision Date : 06 May 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Ee Chong Nam Andrew (Andrew Ee & Co) for the plaintiff; Tan T'eng Ta' Benedict (Bernard & Rada Law Corporation) for the defendant

Parties : Mok Kwong Yue — Ding Leng Kong

Civil Procedure

6 May 2008 Judgment reserved.

Judith Prakash J:

1 The plaintiff, Mok Kwong Yue ("Mr Mok"), brought this action to recover three sums of money which he alleged he had paid the defendant, Ding Leng Kong ("Mr Ding"), by reason of a mistake of law on his part. Judgment in favour of Mr Mok was granted in respect of the first sum, an amount of $240,000, in July 2004 pursuant to an Order 14 application. When the matter came on for trial before me therefore, the dispute was confined to the other two sums.

Background

2 The facts of this case are rather involved. Perhaps the best place to start is with High Court Suit 1515 of 2001 ("Suit 1515"), which was an action commenced by Mr Ding against Mr Mok and three others to recover sums of money owing to Mr Ding under a document that all parties referred to as the "November Agreement".

3 The November Agreement was dated 1 November 1999. The parties to it were Mr Ding, Mr Mok, an individual named Subbarao Pinamaneni ("Mr Subbarao") and three companies which Mr Subbarao and Mr Mok ran *viz* Teamasia Pte Ltd ("Teamasia"), a Singapore company, Teamasia Semiconductor (India) Pte Ltd ("TSI"), an Indian company, and Teamasia Semiconductor (USA), ("TA USA"), collectively the "TA Companies". The recitals of the November Agreement noted that at the request of Mr Mok and Mr Subbarao, Mr Ding had already provided, and would in the future be providing, funds for the use of Teamasia and TSI. It stated that it was contemplated that the TA Companies would be reorganised under a holding company ("TA Holdings") and that the purpose of the November Agreement was to consolidate all previous agreements in respect of funds provided by Mr Ding for the TA Companies.

4 In the body of the November Agreement, it was provided as follows:

> 1. DEFINITIONS & INTERPRETATIONS
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> 1.1 "Borrowers" means Mok, Subbarao, and the TA Companies; and
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> "TA Companies" means [Teamasia], TA India and TA USA.
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> 2. ACKNOWLEDGEMENT OF AMOUNT OUTSTANDING

2.1 Each of the Borrowers acknowledges that for valuable consideration Ding has provided funds on various occasions previously ("Previous Loans") for the [use of the TA Companies] and that in consideration for providing these funds Ding is entitled to inter alia,

2.1.1 shares in TA Holdings representing four per cent. of its share capital after the injection of approximately $16 million into TA Holdings by a third party investor (the "Enlarged Capital"); and

2.1.2 be appointed a director of TA Holdings.

2.2 Each of the Borrowers acknowledges that the outstanding amount of the Previous Loans amounts to a sum of at least US$696,000 and is subject to further confirmation by Ding.

3. FURTHER LOAN

3.1 Upon the execution of this Agreement, Ding shall provide a further loan of US$500,000 … to the Borrowers.

4. RE-PAYMENT OF THE LOANS

4.1 Each of the Borrowers undertake to repay the Previous Loans and the Further Loan as follows:

4.1.1 Repay US$630,000 by 8 November 1999; and

4.1.2 Repay US$566,000 and such further amount as may be determined by Ding by 31 January 2000.

5 Just before the November Agreement was signed, in October 1999, Mr Ding had sent TSI US$250,000 and that sum was part of the US$696,000 referred to in cl 2.2 of the November Agreement. Thereafter, pursuant to the November Agreement, on 2 November 1999, Mr Ding advanced US$500,000 to enable TSI to acquire shares in a company listed on NASDAQ. On 14 December 1999, he advanced a further sum of US$299,928.69 for the same purpose. It should be noted that Teamasia was in the semiconductor industry and was trying to expand its productions in India through TSI and the listed company.

6 Unfortunately, in the year 2000 many companies connected with the IT industry collapsed. As a result, Mr Mok and Mr Subbarao and the TA Companies (as defined in the November Agreement) sustained huge losses and were not able to repay Mr Ding his loans in the manner contemplated in the November Agreement. On 30 November 2001, Mr Ding commenced Suit 1515 against Mr Mok, Mr Subbarao, Teamasia and TSI. In it, he made both monetary and non-monetary claims against the four defendants. As far as his monetary claims against Mr Mok were concerned, these were for:

(a) payment of the sum of $30,000 being a personal loan that Mr Ding had made to Mr Mok; and

(b) payment of the sum of US$1,203,750.91.

The second claim was made against all four defendants and was put on two alternative bases. The first basis was that Mr Mok had forwarded a total sum of US$1,203,750.91 as investment in the

NASDAQ company and that the said sum had to be returned. The second basis, contained in para 28 of the statement of claim was that the various sums remitted by him had been advanced by way of loans rendered and guaranteed by the respective parties. The particulars of this allegation were as follows:

Particulars

	Date of Loan	Amount	Loan Recipient	Guarantors
(i)	3rd June 1998	S$276,880 (US$153,822.22)	[Teamasia]	[Mr Mok and Mr Subbarao]
(ii)	11th October 1999	US$250,000	[TSI]	[Mr Mok, Mr Subbarao and Teamasia]
(iii)	2nd November 1999	US$500,000	[TSI]	[Mr Mok Mr Subbarao and Teamasia]
(iv)	14th December 1999	US$299,928.69	[TSI]	[Mr Mok, Mr Subbarao and Teamasia]
	Total	US$1,203,750.91		

7 Mr Ding was not able to effect service of the writ of summons in Suit 1515 on Mr Subbarao and therefore when the trial of that action came on for hearing before Woo Bih Li J in March 2003, the claim was proceeded with against Mr Mok and the two company defendants only. These defendants did not dispute that all the sums claimed had been advanced. The main defence put up was that the sums were loans that were not recoverable as they had been made by an unlicensed moneylender. On the first day of the trial, Mr Mok applied to amend his defence and was granted leave to do so. In the course of the trial, counsel for Mr Mok put questions relating to an allegation that Mr Mok had repaid US$300,000 and MR200,000 to Mr Ding. Woo J did not allow questions thereon because no defence of partial repayment had been pleaded. On the last day of trial, after Mr Ding's case was closed, Mr Mok applied to amend his defence further by including the partial prepayment defence. Woo J did not allow this application. In his judgment ([2003] SGHC 114) he explained (at [23]):

> I noted that Ding's Counsel had already said during his opening statement that Ding's claims *excluded* other sums he had advanced. If the monies Ding admittedly received were not applied to pay those other sums, then the Defendants should have raised this point right from the time when the Re-Amended Statement of Claim was served and, having failed to do so, they should have applied for leave to amend their Defences before Ding's case was closed. As it was, I had already granted leave for Mok to amend his Defence on the first day of the trial in respect of a different point.
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> (emphasis original)

8 Woo J granted judgment, in part, to Mr Ding. He found that the moneys advanced by Mr Ding were in the nature of loans and not by way of investment. The shares promised to him were really in lieu of interest and the fact that Mr Ding was also entitled to be appointed as a director of TA Holdings and Teamasia, did not change the nature of the advances as loans. In respect of the money lending defence, Woo J held that Mr Ding was not a moneylender although he had lent out money for repayment with interest because his loans had been made to the same group of entities and were for the same purpose which was to acquire shares in a business in an industry which was he was familiar.

9 Woo J then went on to deal with the liability of Mr Mok and the other defendants for the repayment of sums due under the November Agreement. He noted that there was some disconnection between the way in which the statement of claim in the action was worded and the way in which the November Agreement had been drafted:

> 61 It seems to me that Ding's solicitors had used the words "Loan Recipient" in para 28 of the Re-Amended Statement of Claim to mean "Borrowers" although the latter expression is preferable so as not to confuse borrowers with recipients of the loan monies. After all, recipients of loan monies are not necessarily the borrowers. Indeed, the November 1999 agreement makes the situation confusing by failing to distinguish clearly between (a) borrowers, (b) parties who have the benefit or use of the loans and (c) guarantors, if any.
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> 62 Thus, recital (A) of the November 1999 agreement states that at the request of Mok and Subba, Ding has and will be providing funds for the use of the TA Companies (as defined therein). Recital (C) states that the November 1999 agreement consolidates all previous agreements "in respect of funds provided by Ding (either directly or indirectly through Mok and/or Subbarao or otherwise) to or on behalf of the TA Companies". Then, suddenly, in the definition section, clause 1.1 states '"Borrowers" means Mok, Subbarao and the TA Companies.'
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> …
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> 65 The matter is made more confusing because para 28 of the Re-Amended Statement of Claim asserts liability against Mok for the four sums stated therein as guarantor. It also asserts liability against Teamasia Singapore as guarantor for three of the four sums therein. However, there is no mention of a guarantee in the November 1999 agreement. On the contrary, Mok, Subba and the TA Companies (as defined therein) are, as I have said, defined as "Borrowers". Furthermore, from clauses 4 and 5 of the November 1999 agreement regarding re-payment of the loans and interest, it appears that each of the "Borrowers" has principal liability and not liability as guarantor.
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> 66 In the circumstances, I am not inclined to make a finding of liability against Mok or Teamasia Singapore as guarantor in respect of all the four sums except for one qualification. In para 9 of Mok's Amended Defence, read together with para 3.1 of the same, Mok has admitted that he stood as surety in respect of the sum of $276,880 which was for the use of Teamasia Singapore, meaning Teamasia Singapore was the borrower.

10 Having come to the conclusion that Mr Mok was not liable under the November Agreement as a guarantor, Woo J by [69] of his judgment granted judgment to Mr Ding as follows:

> (a) Mok is to pay Ding $30,000 forthwith with contractual interest thereon at 2% per month from 1 January 1998 until judgment (since contractual interest is claimed until judgment only).
>
> (b) Teamasia Singapore, as borrower, and Mok, as guarantor, are to pay Ding $276,880

forthwith. I am not granting judgment in respect of the shares and directorship stated in clauses 2.1.1 and 2.1.2 of the November 1999 agreement as it is uncertain whether and how much of the 4% of the shares in TA Holdings and whether the appointment of Ding as a director of TA Holdings are attributable to the sum of $276,880 only.

(c) TSI, as borrower, is to pay Ding USD250,000, USD500,000 and USD299,978.60 forthwith. I am not granting judgment against Mok or Teamasia Singapore in respect of these three sums since the claims against them for these sums were on the basis that they were guarantors and they are not guarantors.

(d) TSI, as borrower, is to pay Ding damages in lieu of specific performance for the shares and directorship mentioned in para 67 above. The damages are to be assessed by the Registrar of the Supreme Court. … Again, I am not granting judgment against Mok or Teamasia Singapore in respect of the damages because the shares are in lieu of interest and Mok and the third defendant are not liable as guarantors.

For completeness I note that Woo J also allowed Mr Mok's counterclaim and granted him judgment for $30,000 against Mr Ding and ordered that this amount was to be set-off against Mr Ding's personal loan of $30,000 to Mr Mok.

11 When Mr Mok read Woo J's judgment, he considered that Woo J had absolved him from all liability in respect of the sums of US$250,000, US$500,000 and US$299,978.60 which Mr Ding had claimed in para 28 of the statement of claim in Suit 1515. Woo J had only ordered him to pay, as guarantor, the sum of $276,880. Mr Mok recalled that prior to the institution of Suit 1515, he had paid Mr Ding three sums of money *viz* $240,000, $519,000 (the actual amount paid was US$300,000 but using the rate of conversion applicable at the time of payment, in Singapore dollars this was $519,000) and RM200,000. These amounts when totalled up exceeded the total amount of the judgment against him in Suit 1515. Mr Mok came to the conclusion that Woo J's holding meant that he had overpaid Mr Ding by reason of a mistake of law and that he was entitled to recover from Mr Ding the amounts paid by mistake.

The present proceedings

12 This action was commenced on 13 February 2004. It took some time to come to trial because in the intervening period, Mr Mok was declared a bankrupt and the official assignee's consent had to be obtained and certain other formalities had to be complied with in order to enable him to proceed with the action.

13 In his amended statement of claim, Mr Mok set out the circumstances that led to the conclusion of the November Agreement and the institution of Suit 1515. He pleaded that Woo J had granted judgment to Mr Ding against him in respect of the sum of $276,880 only and that in respect of the other sums claimed judgment had been ordered against TSI only. Next, he averred that Mr Ding's appeal against this decision to the Court of Appeal had been dismissed in November 2003. By para 6, Mr Mok pleaded that prior to the institution of Suit 1515 and in response to Mr Ding's demands for repayment, he had made the following payments:

(a) on 8 October 1999, he had paid the sum of $240,000 to CCD Enterprise, a business controlled by Mr Ding;

(b) on 31 January 2001, he had paid $519,000 (US$300,000) to Mr Ding (it should be noted that in various places in the documents and the submissions the amount paid was stated as being

$519,150 but since $519,000 is the pleaded amount, I will use that figure only); and

(c) he had arranged for the sum of RM200,000 to be paid into the account of A&K Industries Sendirian Berhad ("A&K"), a Malaysian company under Mr Ding's control.

He then pleaded:

7. As the High Court in Suit 1515/2001/Y had determined that "Teamasia Pte Ltd as Borrower and Mok, as guarantor, are to pay Ding $276,880 forthwith", it would appear that the Plaintiff has overpaid Ding prior to the institution of Suit 1515/2001/Y.

14 Mr Mok claimed back all three sums as being overpayments to Mr Ding. In the alternative, he asserted that he had mistakenly made repayment to Mr Ding in excess of his liability as guarantor for the loans made by Mr Ding to the Teamasia group. He asserted that he was entitled in law to demand repayment of the sums which had been made by mistake. Specifically, in para 7 he stated that the amount in Singapore dollars that he had paid was $759,000 and when the judgment amount ($276,880) in Suit 1515 was deducted from this amount, the amount that he had overpaid was $482,120 and he therefore claimed that amount as an overpayment. In addition, of course, he claimed the sum of RM200,000 which was also an overpayment.

15 In his defence and counterclaim Mr Ding asserted that the sum of $240,000 was paid on 8 October 1999 by Mr Mok to him towards funds advanced to Mr Mok which did not form any part of the claim under the November Agreement made in Suit 1515. Mr Ding then alleged that the sums of $519,000 and RM200,000 had been paid by Mr Mok to him towards the satisfaction of various trade debts ("the trade debts") and gave the following particulars of the same:

	Description	Amount
a.	Goods ordered by CCD Enterprise from Strong Electronics on the instructions of Mr Mok under purchase order no. TP9805/CCD3002 dated 5th May 1998	US$155,175
b.	Good ordered by CCD Enterprise from Hsin Semiconductors and Teck International on the instructions of Mr Mok under purchase order no. TP9806/CCD3015 dated 25th June 1988	US$121,189.80
c.	Goods ordered by CCD Enterprise from Teck International on the instructions of Mr Mok under purchase order no. TP9807/CCD3016 dated 9th July 1998	US$105,085.22
	T o t a l	
	US$381,450.02	

Mr Ding further averred that the said goods ordered by his firm, CCD Enterprise were supplied to Teamasia at Mr Mok's request.

16 It was further pleaded that the sums of $240,000, $519,000 and RM200,000 were paid by Mr Mok to Mr Ding towards the trade debts that were advanced to Mr Mok and/or on behalf of

Mr Subbarao, Teamasia, TSI and TA USA. Further, at the time of the payment of the sums of $519,000 and RM200,000, Mr Mok had orally informed Mr Ding that the moneys were being paid in payment of all debts, including but not limited to the trade debts, due and owing by Teamasia, Mr Subbarao and Mr Mok to CCD Enterprise and Mr Ding. Since at the time he made payment, Mr Mok did not exercise his option to appropriate the payments towards any particular debt, Mr Ding had appropriated the said payments towards settlement of the trade debts.

17 In the alternative, it was pleaded that if Mr Mok had paid the sums claimed under a mistake, Mr Mok was estopped from recovering the said moneys because Mr Ding had altered his position as a result of the representation of Mr Mok namely that:

(a) Mr Mok had failed and/or refused and/or neglected to raise this issue in his defence in Suit 1515;

(b) the payment was made for good consideration to discharge the trade debts which Mr Mok was authorised to discharge;

(c) the purported mistake was a mistake of law; and

(d) the moneys had been used by Mr Ding in the operation of his companies and businesses in Singapore and Malaysia.

18 A further defence of estoppel was raised on the basis that Mr Mok had failed or neglected to raise the issue of the repayments in Suit 1515 and, even if the issues were raised, the repayments had been dealt with by Woo J in that suit. By filing a fresh claim for the return of the repayments, Mr Mok was seeking to circumvent the decision made by Woo J in Suit 1515.

19 Next, Mr Ding raised the defence of set-off and said that if he was liable to Mr Mok on the claim, he was entitled to set-off so much of the sums claimed by way of counterclaim as sufficient to diminish or extinguish Mr Mok's claim. In his counterclaim, he counterclaimed the sum of $240,000 and the sum of US$381,450.02 being the trade debts.

20 In his reply, Mr Ding specifically denied that he had orally informed Mr Mok that his payments were being made towards all debts including the trade debts. He also asserted that Mr Ding had no right to appropriate the sums of $519,000 and RM200,000 to the payment of the trade debts. Mr Ding's asserted change of position was not accepted.

The issues

21 The issues arising from the pleadings are both factual and legal. As far as Mr Mok's case is concerned, the main issues are as follows:

(a) whether Mr Mok made the two payments in question (hereinafter referred to as "the repayments") in partial settlement of his liability under the November Agreement or whether he made them to account of the liabilities of the TA Companies and Mr Subbarao and himself to Mr Ding generally;

(b) if Mr Mok's repayments were specifically for the November Agreement, were they made because he thought he was legally liable for the same or were they made for other reasons; and

(c) if Mr Mok made the repayments believing he was legally liable for the same, was that belief

a mistake of law?

22 In relation to the defence and counterclaim, the main issues are:

(a) whether Mr Ding had established that the amounts of the trade debts were US$155,175, US$121,189.80 and US$105,085.22 as alleged;

(b) whether the repayments were paid towards all debts, including but not limited to the trade debts, due and owing by Teamasia, Mr Subbarao and Mr Mok to CCD Enterprise and Mr Ding;

(c) whether Mr Ding was entitled to appropriate the payments made by Mr Mok entirely towards satisfaction of the trade debts;

(d) whether Mr Mok is estopped from recovering the moneys paid to Mr Ding by reason of any alteration of Mr Ding's position;

(e) whether Mr Mok is estopped from recovering the moneys paid to Mr Ding in view of the fact that he did not raise the issue of the repayments in Suit 1515 (the *res judicata* issue); and

(f) whether Mr Ding's counterclaim and set-off can be maintained.

It is clear that the issues on each side overlap to a considerable extent.

The law

23 Since the Court of Appeal decision in *Management Corp Strata Title No. 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 ("the *De Beers* case"), the law in Singapore has been that a plaintiff who has paid money to a defendant in the mistaken belief that the law imposed an obligation on him to make such payment, can recover the moneys so paid. The Court of Appeal in coming to that decision applied the English House of Lords case of *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. The English authorities prior to the *Kleinwort Benson* case established that a mistake of law occurred when a paying party believed, at the time of making payment, that he was bound in law to make such payment. The payer's state of mind thus is of paramount importance and the concept of mistake includes cases of sheer ignorance as well as of positive but incorrect belief. See *Kleinwort Benson* at p 409-410. As *The Law of Restitution* by Goff and Jones (Sixth Ed, London Sweet & Maxwell 2002) states at para 5-005, however, a person who pays when he is in doubt about what the law is will be denied recovery and his claim will also fail if he made the payment in the knowledge that there was a ground to contest liability. This is because in both situations it can be said that he assumed the risk that he was mistaken. In relation to causation, the same textbook at para 5-006 cites Lord Hope's judgment in *Kleinwort Benson* to the effect that the plaintiff must prove that he would not have made the payment had he known of the mistake at the time it was made. As regards defences, apart from the two already mentioned, a plaintiff's claim can fail because he compromised the recipient's claim or, possibly, because he settled an honest claim (see para 5-010 of *The Law of Restitution*). In the *De Beers* case, the court accepted these two defences. It did not recognise either honest receipt or estoppel by convention as affording a defence to a claim founded on mistake of law and also held that if it was established that the payment had been made under a settled view of the law and that view of the law was subsequently changed by judicial decision, the recipient of the money would not be liable to reimburse it.

Analysis of the case for the plaintiff

24 In paragraph 6 of his evidence-in-chief, Mr Mok stated that in response to Mr Ding's demands for repayment of loans made under the November Agreement, he had made the following payments to Mr Ding:

(a) he paid the sum of $240,000 to Mr Ding in October 2000;

(b) he paid the sum of about US$300,000 (equal to $519,150) to Mr Ding on 19 December 2000; and

(c) he paid the sum of RM200,000 on 31 January 2001 into the account of A&K.

Mr Mok repeated that when he had made the repayments, he was labouring under the mistaken belief that he was liable to Mr Ding for a far greater amount (*ie* US$1,203,750.91) under the terms of the November Agreement. In Suit 1515, however, Woo J had held that he was only liable to Mr Ding in the sum of $276,880 in his capacity as guarantor of Teamasia. In the light of the said judgment, Mr Mok had overpaid Mr Ding a total of $849,000 by mistake. He only realised his mistake after the delivery of the judgment. He submitted that Mr Ding had no right to retain the three sums and as he had been unjustly enriched at Mr Mok's expense, he had to be ordered to return the money.

25 It should be noted that in relation to the sum of $240,000, there were some mistakes and discrepancies. First, in the statement of claim, Mr Mok had pleaded that this amount had been paid to Mr Ding on 8 October *1999*. That date was a date prior to the execution of the November Agreement and if the money had been paid on that date, then it could have had nothing to do with the November Agreement. In his affidavit of evidence-in-chief, therefore, Mr Mok corrected the date of the payment to October *2000*. In support of his assertion, he produced what he described as a "true copy of a bank statement from DBS Bank to me and Kathleen Wong May Chin (my wife) in October 2000 and a Bank Advice SLIP which shows that a cheque for S$240,000 was issued from the account of myself and Kathleen Wong May Chin (my wife) in favour of CCD Enterprise, a sole proprietor-firm of the Defendant". When I looked at the supporting documents he produced, however, I noticed that the DBS Debit Advice Slip indicating to Mr Mok and his wife, Mdm Wong, that funds of $240,000 had been transferred to the account of CCD Enterprise, was dated 28 October *1999*. Further, the bank statement showing the debit of $240,000 was a statement for the period 1 October *1999* to 31 October *1999*. It appears to me therefore that the original pleading in the statement of claim as to the year in which payment was made was correct and Mr Mok's assertions in his affidavit of evidence-in-chief that the payment was made in October 2000 after the conclusion of the November Agreement was wrong. As judgment has already been given for the sum of $240,000 however, the significance of these discrepancies relates only to the credibility of Mr Mok generally.

26 Turning back to the circumstances under which the payments of $519,000 and RM200,000 were made, there was no dispute by Mr Ding that these repayments were paid after the conclusion of the November Agreement and on the dates asserted by Mr Mok *ie* 19 December 2000 and 31 January 2001 respectively. Mr Ding admitted receipt of the repayments. Mr Mok was, however, extensively cross-examined on why he had made them.

27 The following evidence was elicited from Mr Mok under cross-examination:

(a) He agreed that the claims made by Mr Ding in Suit 1515 were in respect of the November Agreement and that his assertion was that he had overpaid Mr Ding with respect to the sums under Suit 1515. He also agreed that there were other sums owed to Mr Ding apart from those sums.

(b) He agreed that he was saying that the repayments were a mistake because they were in excess of his liability as a guarantor for the loans made by Mr Ding and claimed under Suit 1515.

(c) He mentioned that Mr Ding was pressing him for repayment but he did not recall whether Mr Ding specifically identified the amounts that were overdue or whether it was his own thought that he had to try to honour the repayment schedule in clause 4 of the November Agreement and settle those sums first.

(d) He agreed that when he paid the first amount of $519,000, the reason why he made the payment was that Mr Ding was demanding money from him. Also, he was trying to discharge his obligations under the November Agreement. He said he had to satisfy the repayment schedule first. He agreed that he did not specifically mention the November Agreement when he made the payment. Mr Mok said he must have spoken to Mr Ding about the payment and he believed that he told Mr Ding that the payment was from himself. He really could not recollect whether or not he told Mr Ding what debt the payment was intended to satisfy. He agreed that there was a possibility that he did not specify the purpose of the payment. On the other hand, Mr Mok disagreed with the suggestion that there was a likelihood he had told Mr Ding that the payments were meant for all moneys due and owing to Mr Ding. I should note here that later in the cross-examination Mr Mok asserted that he must have told Mr Ding that the payment was being made towards the November Agreement.

(e) In respect of the RM200,000 payment, Mr Mok confirmed at one stage that he could not remember whether he had told Mr Ding what that repayment was for.

(f) Mr Mok was questioned extensively as to why in Suit 1515, he had not raised the repayments at the time his defence was first filed. His explanation was that the TA Companies were grossly underfunded and he was then desperately trying to keep them alive. Thus, he did not have much time to spend on Suit 1515 and had overlooked giving his attorney the necessary instructions. Whilst he recognised the importance of the suit which contained a claim of over US$1m, he was dealing with investments of between US$20m and US$30m and that was why he spent more time trying to keep the companies afloat. He forgot therefore to instruct his lawyer on his partial repayments. He only remembered the repayments when he saw the documents attached to Mr Ding's affidavit of evidence-in-chief shortly before the trial of Suit 1515.

(g) It was put to him that his explanation was not credible because on the first day of the trial, he had applied for leave to amend his defence by including a counterclaim for $30,000 and at that stage he could have applied to include the repayments as well. His answer was difficult to understand. Mr Mok said:

> This 30,000 was in respect of a personal loan and it was not --- it was different from the other amounts that, er, were actually not under my personal, er, er --- I mean the money was not given to me. So I think --- at that time I was under the impression that signing the loan agreement, er, I was liable to --- to pay for the full amount of $1.2 million, so I think the repayments that I made didn't come to that amount …

Under further questioning, he maintained that he had not raised the repayments in his defence because of the work pressure at the time. I asked him why he was concerned about $30,000 and not concerned about the US$500,000 that he had allegedly prepaid and he said that it was very difficult to explain but he could have had a mental block and somehow forgotten to put this fact in his defence.

(h) Mr Mok testified that when in December 2000 and January 2001 he had made the repayments, he had done so without legal advice. These repayments had come from him and were made to settle his own liability and were not made on behalf of anybody else. He did not agree that he had told Mr Ding that the payments were made towards all debts that were owed by Mr Subbarao, the Teamasia companies and he himself. He could not agree to that suggestion because he was more concerned with his position as the signatory to the November Agreement and there was no reason to pay any other so-called debts for which he was not a guarantor. He agreed, however, that when he spoke to Mr Ding, he was asking for more time in which to settle the remaining debt. He agreed also that it was obviously the case that he wanted more time when he made the two payments. He accepted that he knew, after the repayments were made, that there were still moneys owing to Mr Ding.

(i) Later in his cross-examination, Mr Mok maintained that he must have told Mr Ding that the money he was paying was from himself only and that he must have also told Mr Ding that the repayments were made towards the November Agreement. At that time (December 2000/ January 2001), there were also other creditors asking for settlement of debts due from the TA Companies. Mr Mok said he had invested a lot of time in the project and did not want the TA Companies to go down. He agreed that when he spoke to Mr Ding hoping that the payments would buy him more time, what he meant was that they would buy him time for the TA Companies to pay up the balance due. He also agreed that at that time he had assumed that he was liable for the payments. He did not make any enquiries as to whether he was personally liable for the amounts due under the November Agreement because of this assumption.

(j) In relation to the trade debts, Mr Mok's position was that when he approached Mr Ding to pay the suppliers of materials to Teamasia, he was acting on behalf of Teamasia. His arrangement with Mr Ding was that once the goods had been paid for and delivered to Teamasia's customer, Teamasia would repay Mr Ding out of the proceeds of sale received from the customer. He agreed that in all three cases where Mr Ding had paid Teamasia's suppliers, Teamasia had itself received moneys for those goods but had not channelled those payments towards repaying Mr Ding's advances. This was because the proceeds were used to keep Teamasia alive. According to Mr Mok's calculation, these proceeds would have been received in late 1998.

(k) Mr Mok also gave evidence on why he disputed two of the three trade debts.

28 On behalf of Mr Ding, it was submitted that Mr Mok could not succeed because he was unable to prove that his alleged mistake was operative at the time when he made the repayments. This was because:

(a) when the repayments were made, Mr Mok had clearly informed Mr Ding that they were for all amounts due and owing by him and his companies including Teamasia. The mistake could not have been operative because Mr Mok had approached Mr Ding on behalf of the other debtors as well;

(b) it was Mr Mok's intention when making the repayments to buy time to allow not only himself but also the other debtors including the TA Companies to pay the balance of what was due and owing; and

(c) the debts of the plaintiff and the debts of the TA Companies were interlinked and when Mr Mok approached Mr Ding, he made no distinction between the indebtedness of the TA Companies and his own indebtedness which he was trying to discharge. The discharge of the TA Companies' debts would also be a discharge of his own debts.

29 In considering whether or not a mistake of law was operative in inducing the payments, I have first to decide whether, as alleged by the defence, Mr Mok told Mr Ding at the time the payments were made that they were meant to discharge his own indebtedness and that of Mr Subbarao and the TA Companies. During the rather long cross-examination to which he was subjected, Mr Mok did not at any time agree that he had said all that. His recollection of what he had said, however, was not precise and varied from time to time. At one stage, he said that he could not remember what he had told Mr Ding. At another stage, he said that he told Mr Ding that he was making the payment (that is meaning that he was making on account of his own liability). Later on, he said that he must have told Mr Ding that the payments were being made in connection with the November Agreement. As a result of all these changes in his testimony, I do not think that I can rely on his recollection of events in relation to these statements and must determine the issue differently.

30 To me, it is unlikely that Mr Mok would have made the long statement on payment in the manner alleged by the defence. It is also unlikely that Mr Mok would have said that payment was being made specifically in respect of the November Agreement. This is because both Mr Mok and Mr Ding were, on both of the dates on which payment was made, well aware of what was owing to Mr Ding and who was responsible for the debts. Indeed, Mr Ding had been pressing Mr Mok for payment ever since the designated payment dates set out in cl 4.1 of the November Agreement had not been honoured. In that situation, what Mr Mok was most likely to have told Mr Ding was simply that he was sending him a partial repayment of the particular amount that was on the way. He would not have said it was for the November Agreement; he would not have specified that he was paying his own indebtedness rather than that of the companies or Mr Subbarao; and, *a fortiori*, he would not have said that the payment was being made towards discharge of all indebtedness of the TA Companies, himself and Mr Subbarao. I believe that Mr Mok did not recall precisely what had been said and changed his version as he went along to try and strengthen his position. Probably his most accurate assertion in court was the one he resiled from later *ie* that he had told Mr Ding that he was making a repayment but did not specifically mention the November Agreement or on whose behalf he was making the payment. I also believe, however, that it would have been the November Agreement that was uppermost in Mr Mok's mind at the time the payments were made, not only because it contained a repayment schedule but because it had been drafted with the intention of documenting the liability of Mr Mok and Mr Subbarao as well as that of the TA Companies for the repayment of the various amounts advanced by Mr Ding. I accept that Mr Mok would have been concerned about the legal consequences of the November Agreement and would have been endeavouring to mitigate the same. In relation to the November Agreement, I think the defence is right and that Mr Mok made no distinction between his own liability and that of the other parties to that contract. He did not need to do so, however, as any payment towards that indebtedness would reduce all parties' liability for the same.

31 Analysing the evidence, it also appears to me that at the time he made both payments, Mr Mok's main concern was to prevent any action being taken by Mr Ding that would jeopardise the business project then being undertaken in India by the TA Companies. It was clear from everything that he said in court that during the period between 1999 and the time when Suit 1515 came on for hearing, Mr Mok's focus was on keeping the TA Companies afloat. Considering that he ascribed his failure to take the obvious step of pleading the repayments in his defence in Suit 1515, to his need to keep the companies going and ascribed his inability to concentrate on other matters to the effort that that required, one can readily accept that the repayments were made with one predominant motive: to buy time for the TA Companies so that there would be more opportunity for the business to succeed and for income to be generated to repay the indebtedness. Mr Mok admitted in court that this was one of the reasons that he made the repayments (though he also said that he had done so under a misapprehension as to his legal liability). It cannot be gainsaid that this purpose was achieved: the repayments were made in December 2000 and January 2001 and, as a result, at least

ten months' time was bought for the TA Companies: Suit 1515 was not started until November 2001. If it had not been for the repayments, that action would probably have been commenced very much earlier (especially considering that under the November Agreement more than US$1m had to be repaid by the end of January 2000).

32 I have therefore come to the conclusion that when he made the repayments, Mr Mok's main purpose was to forestall any action that Mr Ding might take to enforce the November Agreement. He intended the repayments to reduce the indebtedness under that contract and show Mr Ding that if he was patient and gave the companies and Mr Mok time, Mr Ding could expect further repayment. If nothing else, the two repayments would have indicated to Mr Ding that Mr Mok was not trying to escape from any of his liabilities at that time. Since Mr Mok acted with that purpose and that purpose was achieved in that Mr Ding did give the companies and the individuals further time to return his loans, I do not consider that Mr Mok has been able to establish that whatever mistake he was labouring under in regard to his personal liability was operative in causing the payments to be made. To put it another way, it appears to me that even if Mr Mok had known he was not personally liable for the indebtedness, he would have funded the repayments anyway, so pressing was his need and desire to keep the TA Companies afloat.

33 There is another point in this connection, one that was not emphasised by the parties but bears mention. The ground on which Woo J held that Mr Mok was not liable in Suit 1515 was that he had been sued as a guarantor and it was quite clear from the terms of the document that Mr Mok did not assume liability as a guarantor under it. Woo J did not comment, since it was not necessary for him to do so, whether Mr Mok was liable in any other capacity. He did, however, note that under cl 4 of the document, the four parties concerned had been named "Borrowers" and that each of the Borrowers was made liable as a principal debtor. With respect, I agree with Woo J's analysis of the November Agreement and consider that the mistake of law was one that was made equally by Mr Mok and Mr Ding. They must have thought that Mr Mok was liable as a guarantor when his true liability was that of a principal debtor, a liability that he had specifically assumed when he entered into the November Agreement in the full knowledge that the monies that had already been advanced by Mr Ding had been advanced for the use of the TA Companies and the intention that the further monies coming in were also to be used by the TA Companies, in particular, TSI. At that stage Mr Mok was willing to borrow monies for the use of the TA Companies, because his aim was to help them succeed in their Indian venture. It appears to me, therefore, that if Mr Mok took the view that he was personally liable to repay the monies when he remitted funds to Mr Ding in December 2000 and January 2001 he was not making a mistake of law even though he was not a guarantor.

34 The above findings mean that Mr Mok's claim herein for repayment of $519,000 and RM200,000 on the basis of a mistake of law cannot succeed. I am proceeding, however, to deal briefly with the defences raised in order to determine whether, had my finding on the operative mistake been different, Mr Mok could have succeeded in his claim.

Analysis of the defence

35 I have dealt above with the defence submissions on operative mistake. The defence also made submissions under the following headings:

(a) appropriation of payment;

(b) assumption of risk;

(c) change of position;

(d) good consideration; and

(e) *res judicata*.

Appropriation of payment

36 On the appropriation of payment point, it was submitted that when Mr Mok made the repayments, he did not specify what they were for except to say that they were meant for all debts due and owing by Mr Mok and his companies to Mr Ding. Counsel for the defence reminded me of the general principle that where severable debts are due from a debtor to a creditor, if the debtor does not appropriate a payment to a particular debt, the creditor may do so. In this case, as Mr Mok had not told Mr Ding which particular debt his repayments were supposed to satisfy, it was open to Mr Ding to appropriate the repayments to discharge the trade debts owed by Teamasia. Having made this appropriation, Mr Ding then started Suit 1515 to recover the amounts due under the November Agreement.

37 Counsel for Mr Mok had no quarrel with the general principle of law cited by the defence. What he disputed, however, was the relationship between Mr Mok and Mr Ding in relation to the trade debts. He submitted that the trade debts were owed to Mr Ding by Teamasia only and therefore there was no relationship of debtor and creditor between Mr Mok and Mr Ding in relation to the trade debts. Accordingly, Mr Ding had no right to appropriate Mr Mok's payments to satisfy obligations for which Mr Mok was not responsible.

38 I have found as a matter of fact that Mr Mok did not tell Mr Ding that he was making the payments towards all debts that he and the Teamasia companies owed the latter. In my judgment, all that Mr Mok said was that he was making a partial repayment. I accept that Mr Mok did not say that the partial repayments were towards the November Agreement but, as I have already said, in the circumstances that existed at the time, Mr Ding would have been aware that it was the indebtedness under this contract that was being partially paid. Therefore, Mr Ding would not have been entitled to appropriate the payments towards settlement of the trade debts. Even if Mr Ding had no inkling that the payments were for the November Agreement, he would only be entitled to use funds provided by Mr Mok to settle the trade debts if Mr Mok was his creditor in respect of those debts. This is the issue to which I now turn.

39 In the defence, Mr Ding had pleaded that the trade debts were due from Mr Mok to Mr Ding for materials supplied by Mr Ding's firm CCD Enterprise to Teamasia. In his affidavit of evidence-in-chief, he stated that it was Mr Mok who had asked him to help finance certain component purchases. At the time (April/ May 1998) Mr Mok said that he needed Mr Ding's assistance to pay for certain components purchased by him and he would pay Mr Ding after the components were delivered to the end-purchasers. Teamasia was not mentioned then. It was only after Mr Ding had agreed that he was informed that Mr Mok was making the purchases and deliveries to Teamasia. The first trade debt was incurred on 5 May 1998. Subsequently in June and July 1998, Mr Mok again approached Mr Ding and asked for help to fund purchases that he was making. Mr Ding agreed to help and stated that his understanding with Mr Mok was that Mr Mok would be personally responsible for paying any moneys due and owing to him as a result of the second and third transactions. Mr Ding emphasised, both in his affidavit and later when he was being cross-examined, that at the time he was being asked to advance the trade debts, he hardly knew Teamasia and only made the advances because he relied on Mr Mok.

40 During cross-examination, it appeared that Mr Ding had not been completely open in his evidence. He was reminded that whilst the first trade debt was advanced in May 1998, he had been

dealing with Mr Mok and Mr Subbarao in relation to Teamasia since late 1997 when he was invited by them to become an investor in relation to Teamasia's proposed acquisition of a publicly listed company in India. According to Mr Ding's statement of claim in Suit 1515, he had made an oral agreement with Mr Mok and Mr Subbarao acting on behalf of Teamasia in connection with this proposed acquisition. In performance of this oral agreement, Mr Ding had advanced money to Teamasia and, as a result of this advance, some time after February 1998, Teamasia had purchased a company in India. It was clear from this evidence that Mr Ding had had dealings with Teamasia prior to the advance of the first trade debt. Secondly, Mr Ding was shown the documents that related to the trade debts. In each case, Teamasia had sent Mr Ding/CCD Enterprise a purchase order whereunder it agreed to purchase the goods specified therein from Mr Ding/CCD Enterprise at the prices set out in the purchase order. Each of the purchase orders was signed on behalf of Teamasia either by Mr Mok or by Mr Mok and Mr Subbarao. It was pursuant to those purchase orders that Mr Ding took delivery of the goods from Teamasia's suppliers and paid for them and then "on-sold" them to Teamasia so that Teamasia could deliver the goods to its own customers. The documentation therefore showed only a relationship between Teamasia and Mr Ding (either in his own name or in the name of his firm CCD Enterprise) in relation to these purchases. There was no documentation showing any relationship between Mr Mok and Mr Ding in respect of the trade advances. It would appear therefore that the principal debtor in each of these cases was Teamasia. Since there was nothing in writing from Mr Mok to support those purchases, Mr Ding could not involve him as a guarantor.

41 The cross-examination also showed that Mr Ding had taken inconsistent positions in relation to the trade debts. On the one hand, in his affidavit of evidence-in-chief made on 7 March 2003 for the purposes of his action in Suit 1515, Mr Ding had stated that in early 1998, CCD Enterprise and another one of his companies Peridin Pte Ltd had supplied TSI with semi-components through Teamasia and these components had not been paid for up to the date of that affidavit. The total amount owing he said was more than US$381,000. Before me, Mr Ding was asked whether those trade debts of more than US$381,000 that he had referred to in his affidavit in the earlier suit were the same trade debts as the ones mentioned in his defence and counterclaim in this action. His answer was that they were the same trade debts. It was then pointed out to him that his position in Suit 1515 and his position in this suit were inconsistent in that on 7 March 2003, he had stated that the trade debts were still due and owing in full whilst in the present suit, his position was that the payments made in December 2000 and January 2001 had been channelled or appropriated towards the partial settlement of the trade debts. Mr Ding said he could not see any inconsistency in his stand because the position was something "just like jointly and severally guaranteed or something like that". When I asked him, however, whether he was saying that he could get payment from two people for the same debt twice, he replied in the negative. Subsequently, he agreed that if there was a double claim, it must have been his oversight.

42 These inconsistencies in Mr Ding's stand cast doubt on his assertions that he had appropriated the repayments made by Mr Mok towards satisfaction of the trade debts at the time when the repayments were made. It would seem that his decision to appropriate them towards the trade debts was only taken after Suit 1515 was decided and Mr Mok filed this action asking for recovery on the basis of mistake. Mr Ding's failure to immediately appropriate the repayments towards settlement of the trade debts indicates to me that at the time he received the moneys, he was aware that Mr Mok was concerned with liability under the November Agreement and seeking to reduce that rather than to settle the trade debts.

43 I have come to the conclusion that Mr Ding's advances in respect of the trade debts were made to Teamasia and not to Mr Mok. There was no relationship of creditor and debtor between the two men vis-à-vis the trade debts. Accordingly, Mr Ding was not entitled on receipt of the repayments to use them to pay off the trade debts. I should also mention here that the amount of

the trade debts claimed by Mr Ding appeared to be overstated although I accept that he made advances in respect of all three consignments. Whilst Mr Ding was not able to produce the letter of credit which had been utilised to pay for the first purchase, I accept the evidence given by Mr Manaivalan, a former employee of Teamasia, that he took delivery of these goods and the other two consignments from the respective suppliers. I agree with counsel for Mr Ding that these deliveries would not have been made had the goods not been paid for. The quantum of the second trade debt appears, however, to have been inflated. This is because while the purchase order that Teamasia issued to Mr Ding was for US$121,189.80, the tax invoice issued by the supplier of the goods was only for US$70,297.50 and Mr Ding settled this amount by paying the supplier the equivalent amount in Singapore dollars *ie* $116,693.85. In his defence, Mr Ding pleaded that the second trade debt was in the sum of US$121,189.80 but his own documentation does not support that figure. Mr Ding has not been able to show that he took delivery of goods worth US$121,189.80 or that he paid that sum to the supplier. Accordingly, as far as the second trade debt is concerned, the amount due would be US$70,297.50 or $116,693.85 being the amount actually advanced by Mr Ding.

Assumption of risk

44 This argument was based on the principle as set out at para 4-030 of *The Law of Restitution* by Goff and Jones (Sixth Ed, London, Sweet & Maxwell 2002) that if the payer had assumed the risk of his mistake, then recovery will be denied. Paragraph 4-032 of the same text explains:

> Much depends on the circumstances in which the payment was made; for example, whether the payer has waived any or any further investigation of the facts. Whether a person has assumed the risk is a question of fact. If he had doubts and swallowed them, he should be denied recovery. Similarly, a restitutionary claim should fail if he paid, having taken the chance that his view of the facts may be mistaken, or if he could not be bothered to investigate further whether he was mistaken. The payer is particularly vulnerable if the payment was made in response to the payee's honest claim, which is accompanied by the threat of legal proceedings if the payer did not satisfy it. Money paid under compulsion of legal process cannot be recovered on the grounds of mistake. The plaintiff cannot choose his own time for litigation. If he is sued, he must fight or submit; if he chooses to submit, his submission cannot be revoked on the ground that he was then mistaken.

45 The defence submitted that Mr Mok had assumed the risk of his mistake when he made the payments because:

(a) he did not query the outstanding amount due and owing by him or the companies;

(b) he did not investigate as to what was owing by him and what was not (he explained that he did not specifically make any enquiries as to whether he was liable for the payments as he presumed he was liable);

(c) on Mr Mok's own evidence, he paid without specifying whether the payment was made in respect of his liabilities or the liabilities of the TA Companies;

(d) Mr Mok did not seek legal advice on whether he was liable to make the payments although he knew of their importance;

(e) at the time he made the payments, Mr Mok knew of the existence of the trade debts but he did not specify that the repayments were not meant for the trade debts; and

(g) Mr Mok continued to make payments despite being concerned (as he claimed) regarding what he was liable for and what the TA Companies were liable for.

46 From the factual matters relied on by the defence to establish that Mr Mok took the risk of his mistake, it can be seen that this principle is akin to the requirement that the mistake must be operative in order to found recovery. Having found that, factually, payment was made because Mr Mok wanted to buy time for the TA Companies (if not himself), it is not difficult to find further that if at the time Mr Mok was labouring under the mistaken impression that he was personally liable for the amounts, he nevertheless was content to take the risk of his assumption being wrong because he needed to placate Mr Ding. As counsel pointed out, Mr Mok had admitted that at the time of payment he had taken no steps to ascertain the amounts that were still actually due or to get advice on his legal liability for the indebtedness to Mr Ding whether the same arose under the November Agreement or in respect of the trade debts. If Mr Mok was really concerned with what he was liable for as opposed to what the TA Companies were liable for, he would, at the least, have made some enquiries before making any payment. He would also have told Mr Ding who the repayments were coming from and what debts they were supposed to settle. He would have pressed for an acknowledgement from Mr Ding. Since Mr Mok did not bother to do this even orally, let alone in writing, I do not accept that at the time the repayments were made, his first concern was his liability. He made the repayments for a different purpose and, in so doing, took the risk that he was mistaken as to his liability. Whilst Mr Ding had not yet started legal proceedings for recovery, Mr Mok was well aware at that time that there was a possibility of such action being taken if no payment was made. If legal proceedings had started and Mr Mok had made payment, he would not have been able to recover the same. Just because in this case that step was staved off for a while as a result of the repayments, I do not think the recovery position should be different. I hold therefore that this ground of the defence has been made out.

Change of position

47 The principle that a defendant to a restitutionary claim cannot be called upon to make repayment if he has changed his position after receipt of the payment, is one that is well established. The defence argued that that principle applied in this case.

48 The basis of the argument was Mr Mok's failure to include in his pleaded defence in Suit 1515 the two payments made in December 2000 and January 2001. It was asserted that if the repayments had been made by Mr Mok to satisfy outstanding amounts under the November Agreement, then his pleading to this effect in his defence in Suit 1515 would have been an admission on his part that he was liable for the other moneys claimed in that suit. As Mr Mok did not make that pleading (or at least did not try to until it was too late), the claim for the recovery of the indebtedness under the November Agreement was disposed of without Mr Ding having a chance to make use of the admissions by Mr Mok as to liability. As the claims under the November Agreement had been dealt with by the time that this action was started, the defendant was not able to raise the repayments as admissions made in Suit 1515. Therefore the defendant had changed his position to his detriment.

49 With respect, like the plaintiff, I do not understand the above argument. When Mr Mok applied to amend his defence in Suit 1515 to include the repayments, Mr Ding objected to that amendment and it was not allowed. Mr Ding cannot therefore say that it was action on the part of Mr Mok that caused him to change his position. In any case, I do not see in what manner Mr Ding changed his position because of the pleadings in Suit 1515. The fact that Mr Ding was unable to rely on admissions in Suit 1515 did not cause him to change his position in that suit. His stand there was that Mr Mok was indebted to him under the November Agreement and had to pay up. He did not give Mr Mok or any of the other debtors any credit for the two repayments and therefore he was able to

obtain a judgment against TSI for three amounts claimed without any reduction to reflect the repayments. Instead of suffering a detriment therefore, he benefited from Mr Mok's omission. This defence is not available to Mr Ding.

Good consideration

50 In the well known case of *Barclays Bank v. WJ Simms Ltd* [1980] 1 Q.B 677, Goff J, after reviewing the law relating to the recovery of payments made under a mistake of fact, laid down various propositions. One of these was that the claim for recovery may fail if it is shown that the payment concerned was made for good consideration, in particular if the money was paid to discharge, and did discharge, a debt owed to the payee by the payer or by a third party by whom he is authorised to discharge the debt.

51 The argument was that Mr Ding had satisfied this requirement in two ways. First, it was contended that there was good consideration for the repayments because Mr Mok had admitted that he had made the repayments in the hope that Mr Ding would give him more time to settle the outstanding balance due from the TA Companies and himself. Mr Mok had agreed in court that the TA Companies were suffering from severe cash flow problems and he was trying to keep them afloat. After the second repayment in January 2001, Mr Ding did not make any further demand for repayment until November 2001 and thus he granted the debtors time from January to November to repay the debt. The second point was that the repayments were made to discharge the trade debts which Mr Mok was authorised to discharge. This followed from the facts that he was then the managing director of Teamasia, that he had approached Mr Ding on behalf of the TA Companies when he asked the latter to advance the trade debts and that he wanted to buy time for the companies when he made the repayments. In making the payments, he was thus authorised on behalf of Teamasia to discharge its indebtedness in relation to the trade debts and since he did not inform Mr Ding that the payments were not meant for the trade debts, the latter was entitled to use the money to discharge the trade debts.

52 I have dealt with the first argument in relation to the operative mistake point and need not dwell on it. As for the second point, the fact that Mr Mok was trying to buy time for the TA Companies and himself under the November Agreement must have been obvious to Mr Ding. He himself relied on it in relation to the good consideration argument. He must have known which indebtedness the monies were intended to pay and that was not the trade debts which were the liability of Teamasia alone. No, it was the liability of the borrowers under the November Agreement, in particular that of TSI which was the company that was going to be the money-spinner, that Mr Mok was concerned about. Mr Ding's own assertion that Mr Mok had said the repayments were for all the debts including the debts of Mr Subbarao, the TA Companies and himself, reflected his awareness of this fact since the only document which imposed liability for various advances on all those disparate parties was the November Agreement. In that situation it is difficult to infer that Mr Mok was acting as the agent of Teamasia to pay debts that were Teamasia's alone. In so far as he was acting as an agent, he was acting to buy time for all the TA Companies and therefore his authority to discharge debts for the other borrowers would have been in respect of the amounts due under the November Agreement only. Thus, this defence does not avail Mr Ding.

Res Judicata

53 The last defence need not detain me long. It was submitted that Mr Mok ought to have raised the issue of the repayments in Suit 1515. There was no reason why these repayments could not have been pleaded as a defence in that action. Therefore the doctrine of *res judicata* in the wider sense applied and it was an abuse of the process of the court to raise in a subsequent proceeding matters

which could and should have been litigated in the earlier proceedings.

54 I agree that the repayments should have been raised in Suit 1515. It was a terrible oversight on Mr Mok's part not to have tried to do so until after the plaintiff's case in that action was closed. If, however, those repayments had been included in the pleadings of that suit, the issue of mistake would not have arisen since what Mr Mok sought to do at that time was to reduce his liability under the November Agreement rather than to recover the repayments. Having found out from the judgment of Woo J that Mr Ding had sued him on the wrong basis in Suit 1515, Mr Mok thought he had grounds to bring this action. Whilst some of the issues raised here may have been raised in Suit 1515 had the repayment issue surfaced there, the whole basis of this case is entirely different from the earlier action and therefore, whilst this action fails on its merits, I do not consider that it was an abuse of process.

Conclusion

55 For the reasons given above, this action fails and must be dismissed with costs. It has not proven necessary for me to consider the counterclaim in detail. The counterclaim must also fail, however, because I have found that Mr Mok is not Mr Ding's debtor in respect of the trade debts. Accordingly, the counterclaim is also dismissed with costs.