Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and Others
[2005] SGCA 27

Case Number : CA 100/2004

Decision Date : 13 May 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Tan Lee Meng J

Counsel Name(s) : P Suppiah and Elengovan Krishnan (P Suppiah and Co) for the appellant; Daniel John and Lim Fung Peen (Lim Ang John and Tan LLC) for the first and second respondents; Daryll Ng and Nicole Tan (Haridass Ho and Partners) for the third respondent

Parties : Tang Yoke Kheng (trading as Niklex Supply Co) — Lek Benedict; Lim Wee Chuan; Tan Te Teck Gregory

Companies – Winding up – Fraudulent trading – Respondents using new company to carry on business of old company against which winding up proceedings pending – Appellant creditor alleging respondents using new company to put old company's assets out of reach from creditors – Whether respondents causing old company to conduct business with intent to defraud creditors – Essential elements of fraud – Whether subjective or objective standard of honesty applicable when determining whether fraudulent intent existing – Section 340(1) Companies Act (Cap 50, 1994 Rev Ed)

Evidence – Proof of evidence – Standard of proof – Whether civil standard of proof of balance of probabilities applicable in civil cases involving fraud

13 May 2005

Choo Han Teck J (delivering the judgment of the court):

1 This was an appeal by the appellant who had brought an action under s 340(1) of the Companies Act (Cap 50, 1994 Rev Ed) against the defendants in this suit. The company in question was Amrae Benchuan Trading Pte Ltd ("the Company") and the first and second respondents were its directors and shareholders. The third respondent was an employee of the Company. The appellant traded in Bohemian crystalware under the name of "Niklex Supply Company" ("Niklex") and was the erstwhile principal supplier to the Company.

2 In the course of time, the Company owed substantial trade debts to the appellant. The appellant sued for the recovery of the debts and a consent judgment was entered in Suit No 21 of 2002 against the Company in the sum of $1,070,000. The appellant managed to recover $59,710.46 by way of a Sheriff's sale, leaving $1,010,289.54 of the judgment debt unsatisfied. The appellant then obtained a winding-up order against the Company on 19 September 2003. On 25 September 2003, the appellant commenced Suit No 864 of 2003 (the subject of this appeal). Various allegations of fraud were made, including the claim that the respondents caused the Company to continue trading with the appellant after they knew, in 1999, that the Company was insolvent; and secondly, that the respondents dissipated or caused the Company to dissipate its assets. This was allegedly done in several ways. One of the allegations was that the Company wrongfully gave loans to the respondents in 2000 and 2001. Another was that the first and second respondents caused the Company to pay salaries and bonuses to them in 2000 and 2001 (when the Company was already insolvent). Ultimately, the appellant reduced her claim to the allegation that the three respondents set up a company called Axum Marketing Pte Ltd ("Axum"), which they bought off the shelf in June 2001, and began trading through it the following month, and caused the Company to transfer goods (purchased by the Company from the appellant) to Axum. The total value of goods transferred by the Company to

Axum amounted to $1,268,983.02. The appellant's claim against the third respondent was for conspiracy, and the aiding and abetting of the s 340(1) offence by the first and second respondents.

3 In the course of the trial, the appellant adduced evidence to support her core allegation of the incidents and circumstances that she alleged constituted a breach of s 340(1) of the Companies Act. The evidence was considered and evaluated by the trial judge who formed the view that the evidence failed to prove fraud and thus dismissed the appellant's action. The appellant appealed against that judgment. The appellant's principal contention was that the trial judge had failed to enquire into the most relevant issue, namely, whether Axum was created to be used as an instrument of fraud, that it was used to profit the respondents by selling goods taken from the Company without payment; thus leaving the appellant as the creditor of the Company without payment and with no real recourse against the Company. The appellant averred that the trial judge misdirected himself in law in holding that the acquisition of Axum was done in good faith, and therefore there was no breach of s 340(1) of the Companies Act.

4 There are some facts that were found and considered by the trial judge, which we need to set out to complete the narrative of the commercial episode involving the parties. The business between the appellant and the Company was conducted by the first and second respondents on behalf of the Company, and one Chan Chon Tuck ("Chan") on behalf of the appellant. The business relationship began in 1990 and spanned a period of ten years through 2000 during which time, the Company paid the appellant a total of about $5.2m in trade debts. In 1994, Chan asked for a 50% stake in the Company from the first and second respondents, on the ground that the Company owed him a huge debt on account of his generosity towards it in its business dealings with the appellant. The first and second respondents acceded to Chan's request, and eventually, Chan was also given access to the Company's books and financial records, which he inspected regularly. By 1998, the relationship between the first and second respondents and Chan was no longer the warm and trusting one they had shared before. It was about this time that the first and second respondents discovered that Chan had been charging exorbitant prices to the Company for the goods supplied by the appellant. Chan was also unreliable in the delivery of goods ordered from the appellant. Consequently, as the Company was not able to compete in the market, it ended with a $1.5m debt to the appellant. Strangely, in 1999 Chan asked for his stake in the Company to be increased to 70% and also to be paid a salary. Even stranger, was the first and second respondents' agreeing to the increase although they did not agree to pay the salary Chan had demanded.

5 The Company made its last purchase of goods from the appellant in December 1999. These goods were delivered between February and April 2000. The first and second respondents also met Chan in February 2000 during which they discussed various issues relating to their business, in particular, the Company's debts to the appellant. From about that time on, the first and second respondents also began to obtain supplies from other sources, and in June 2001, Axum was bought off the shelf to be used as a company through which the first and second respondents carried on their business. The appellant's principal claim was that between July 2001 and June 2002, the Company sold $1,268,983.02 worth of goods to Axum at 10% more than what it paid for them. The evidence as to the reasons why the first and second respondents needed to have a new company (Axum) appeared to be, first, a fear that the appellant might wind up the Company because of the debts it owed to the appellant. There were also problems concerning the business relationship between the Company and the appellant, mainly, it seemed, because the friendship between Chan and the first and second respondents was falling apart. That, in turn, led to disagreements as to how the Company was to be run. It would be noted from the trial judge's grounds of decision, that the first and second respondents' allegation that Chan had a 70% stake in the Company, was not refuted. The evidence also showed that the Company had given credit notes amounting to $114,246.73 for goods rejected

by Axum. Axum had, by the material time, paid up $713,831.38 of the debt it owed the Company. The trial judge accepted that the money received by the Company was used to pay directors' fees accrued over the years rather than to pay the appellant. On these facts, the trial judge could either infer that the Company indulged in fraudulent trading, or that it had merely exercised undue preference to one creditor over another. The trial judge inferred that it was the latter.

6 The crux of the appellant's case is contained in para 13(3) of the Re-Amended Statement of Claim that averred as follows:

> The [first and second respondents] together with the [third respondent] incorporated on or about 4.6.2001 a company called Axum Marketing Pte Ltd (Axum) and caused the subject company to transfer goods bought from the [appellant] to the said Axum for the purported value of $1,268,983.02. No payments have been made by this company [Axum] to the said subject company.

The appellant maintained that her claim was not based on a conspiracy to defraud, but on the statutory cause of action under s 340(1) of the Companies Act. Section 340(1) provides as follows:

> If, in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

Mr Suppiah, counsel for the appellant, argued that the trial judge was wrong to conclude that the evidence did not establish fraudulent trading, and instead, he came to the conclusion that it was only an instance of undue preference.

Elements of fraud

7 The approval by Lord Lane CJ in *R v Grantham* [1984] QB 675 at 682 ("*Grantham*") of the trial judge's summing up in that case, is often cited as a starting point in the definition of fraud in s 340(1) situations. It has been relied upon in *Rahj Kamal bin Abdullah v PP* [1998] 1 SLR 447 ("*Rahj Kamal*") at [35]. In *Rahj Kamal,* the appellant was convicted for fraudulent trading. He was a director of a company that had been soliciting and collecting funds from the public in return for a promise of a large return of profits. There was no issue that the scheme itself was not *bona fide*, and the critical issue was whether the appellant knew about the company's activities. He denied complicity and knowledge, but the court found otherwise. His appeal to the High Court was dismissed. *Rahj Kamal* was a criminal case, and there is, therefore, a separate issue regarding the onus of proof. We shall revert to that point shortly. But first, Francis Allen J, the trial judge in *Grantham*, whom Lord Lane CJ quoted at 681 of his judgment, stated that:

> … A man intends to defraud a creditor either if he intends that the creditor shall never be paid or alternatively if he intends to obtain credit or carry on obtaining credit when the rights and interests of the creditor are being prejudiced in a way which the defendant himself knows is generally regarded as dishonest … [A] trader can intend to defraud if he obtains credit when there is a substantial risk of the creditor not getting his money or not getting the whole of his money and the defendant knows that that is the position and

> knows he is stepping beyond the bounds of what ordinary decent people engaged in business would regard as honest.

After citing the above passage, Lord Lane CJ referred to passages from Maugham J in two separate cases, namely, *In re William C Leitch Brothers, Limited* [1932] 2 Ch 71 at 77, and *In re Patrick and Lyon, Limited* [1933] Ch 786 at 790, and expressed his concurrence with Maugham J's express disavowal of any intention on his part to define fraud. The passage from Maugham J's decision in *In re Patrick and Lyon, Limited* reads as follows:

> … I will express the opinion that the words "defraud" and "fraudulent purpose," where they appear in the section in question, are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame. No judge, I think, has ever been made willing to define "fraud," and I am attempting no definition. I am merely stating what, in my opinion, must be one of the elements of the word as used in this section.

The Court of Appeal in *Grantham* was of the opinion (at 682) that:

> The [trial] judge [Allen J] eventually decided in favour of the trader on the basis that, although he might have been guilty of insufficient care and supervision of his business, he could not be said, in the words of Maugham J., to have been guilty of moral blame so as to justify the judge in saying that he ought to be liable for the debts of the company without limit. In other words, he acquitted the trader of dishonesty – an essential ingredient to liability.

It is, therefore, clear that the *Grantham* passage cited in *Rahj Kamal* is not a definition of fraud or fraudulent trading, but merely an account of an instance in which fraud might manifest itself. Maugham J saw clearly the futility of attempting to cast a legal definition for something as amorphous as "fraud". To defraud someone is to cheat him, but what is cheating? The best that one can say is that it is an act or omission in which the fraudster deceives the innocent party so as to enrich the fraudster, or cause the innocent party to suffer a loss or detriment. But the fraudster or cheat may achieve his objective in any number of ways. The only invariable element is the element of dishonesty on the part of the fraudster or cheat. Whether any given circumstances amount to fraud is a question of fact to be determined by the court – as was the case in *Grantham* and *Rahj Kamal*.

8 *Rahj Kamal* was an approval of a finding of fact by the lower court judge in circumstances that the appellate court found were consistent with dishonesty having been proved. A dishonest intention can always be inferred from the surrounding circumstances. Hence, in that case, the court was entitled to infer dishonest intention by the fact of concealment, evidence of which was independently provided by prosecution witnesses. There was also other corroborative evidence such as the collection of money by the appellant in that case, and the subsequent substitution of receipts. All that was found by the court to have been done for the purpose of confusing the authorities. Hence, there was ample evidence of a dishonest intention on the part of the appellant in that case.

9 The Hong Kong case of *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324 ("*Aktieselskabet*") requires some comment. Lord Hoffmann, delivering the judgment of the Hong Kong Court of Final Appeal, stated at 334 that:

> While I quite accept that a defendant cannot be allowed to shelter behind some private standard of honesty not shared by the community, I think that there is a danger in expressing that proposition by invoking the concept of the hypothetical decent honest

> man. The danger is that because decent honest people also tend to behave reasonably, considerately and so forth, there may be a temptation to treat shortcomings in these respects as a failure to comply with the necessary objective standard. It seems to me much safer, at least in the context of an allegation of fraud, to concentrate upon the actual defendants and simply ask whether they have been dishonest. Judges or juries seldom have any conceptual difficulty in knowing what is meant by dishonesty.

We agree entirely with the above passage, but would say further, that the objective standard of what an honest person would have done in the circumstances can still be a useful device to test the honest intention of the person concerned against all the other evidence available, including, and especially, the explanation by the defendant of his deviation from what an honest person would have done in his circumstances. The High Court in *Rahj Kamal*, at [33], noted that the appellant there "was unable to explain adequately how he was going to honour his financial obligations". To rely on the objective standard as a sole test would be exceptional because it would require the court to be convinced that the negative answer given in the factual circumstances was sufficiently indicative of fraud to warrant a finding of fraud.

Standard of proof required in civil fraud cases

10 *Grantham* and *Rahj Kamal* were criminal cases and the burden of proving fraud lay with the prosecutor which he had to discharge by proving his case beyond reasonable doubt. The summing up by Allen J in *Grantham* was thus guiding the jury as to what could constitute the offence of fraud in law so that the members of the jury could relate the evidence to the law. Like Maugham J, the learned judge was not laying down a comprehensive definition of fraud or fraudulent intent. What is clear is that dishonesty is an element of fraud. A trial judge must find dishonesty if he is to adjudge that there has been fraud. The burden of proving fraud in a civil case lies with the party alleging it, but the infusion of a shared criminal element (fraud) in civil proceedings tends to create some uncertainty as to the standard of proof required. The degree of proof is not as stringently required as it would be in a criminal case because it is accepted that the standard of proof in a civil case is that based on a balance of probabilities. But what is the standard of proof when fraud is alleged in civil proceedings? It is important to refer to the Evidence Act, (Cap 97, 1997 Rev Ed) before we consider the judicial statements regarding the standard of proof. Section 3(3) of the Evidence Act provides, in regard to the meaning of "proved", that:

> A fact is said to be "proved" when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

In respect of "disproved", s 3(4) provides that:

> A fact is said to be "disproved" when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

And in s 3(5), "not proved" is defined as:

> A fact is said to be "not proved" when it is neither proved nor disproved."

It is also important to be mindful that s 3 of the Evidence Act itself makes no distinction between the standard of proof in a criminal case and that in a civil one.

11 The disparate standard of "proof beyond reasonable doubt" in criminal cases, and "proof on a balance of probabilities" in civil ones, is a distinction established by judicial licence in the courts to emphasise the point that the graver the consequences, the more severe the requirement for proof ought to be. After the House of Lords' approval in *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481, the "beyond reasonable doubt" standard in criminal cases was firmly established, and was so recognised by Hodson LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247. Hodson LJ also referred to Denning LJ's decision in *Bater v Bater* [1951] P 35 at 36, to express the idea that the distinction between the two standards is really a difference in the degrees of probabilities, which is to say, that "proof beyond reasonable doubt" is also a measure based on a balance of probabilities since "beyond reasonable doubt" falls short of absolute certainty, and is not proof "beyond a shadow of doubt": see *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373. In *Bater v Bater*, Denning LJ said at 36–37:

> The difference of opinion, which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best, C.J., and many other great judges have said, "in proportion as the crime is enormous, so ought the proof to be clear". So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.

12 The anxiety of applying the correct standard of proof of fraud in a civil case is more evident in judicial formulations such as "a degree of probability which is commensurate with the occasion", and "proof going beyond the usual civil standard of proof", than in the actual application by judges who usually, and instinctively, know that they need not apply the stringent standard as that required in a criminal case, and yet not find fraud in the same way they would find, say, negligence: see *Soh Lup Chee v Seow Boon Cheng* [2004] SGHC 8 at [16], and *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162 at [30]. Lord Nicholls of Birkenhead in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586 aptly sums up the situation, which was described by Lord Hoffmann (in *Aktieselskabet* at 329) as "an exercise in terminological hygiene", but so "timely and faultless". Lord Nicholls, after referring to the approach in *Hornal v Neuberger Products Ltd*, stated at 586–587:

> This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.
>
> No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability. Similar suggestions have been made recently regarding proof of allegations of sexual abuse of children: see *In re G. (A Minor) (Child Abuse: Standard of Proof)* [1987] 1 W.L.R 1461, 1466, and *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419, 429. So I must pursue this a little further. The law looks for probability, not certainty. Certainty

> is seldom attainable. But probability is an unsatisfactorily vague criterion because there are degrees of probability. In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings. Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the in-built flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.

13 Lord Hoffmann expressed a similar view in *Aktieselskabet*, where he used a scale of 0 (impossibility) to 1 (certainty) for illustration. He reasoned at 329 that:

> [I]f proof is required on a preponderance of probabilities … it is inconsistent to require a 'degree of probability commensurate with the occasion'. This suggests some other degree of probability, higher than >0.5, somewhere between the civil standard and the criminal standard, which the courts have wisely never attempted to define as a point on the probability scale. The correct analysis is that the court is not looking for a higher degree of probability. It is only that the more inherently improbable the act in question, the more compelling will be the evidence needed to satisfy the court on a preponderance of probability.

This reasoning is logically correct, but the rejection of a third test and the reference to the application of the civil standard (on a balance of probabilities) to cases of fraud, without more, is not entirely satisfactory. First, in using a scale (say, from 0 to 1) to determine the balance of probabilities, one would be assuming that there is an objective standard by which evidence (quantitatively and qualitatively) may be assessed inerrably. But that is rarely possible, if at all. Although the premise itself is perfectly logical in that a balance of probabilities merely requires the court to decide which of the two cases is more probable (that is, on proof greater than 50%, or in Lord Hoffmann's terminology, >0.5 on a scale of 0 to1), it is not realistic to apportion grades to evidence – on any scale, be it a scale of 0 to 1, 10, or 100 because of the subjectivity of such an exercise. Secondly, the application of a scale of points to evidence (and the assumption that all evidence is quantitatively and qualitatively homogeneous) naturally assumes also that all evidence may be presented at a single level only. The problem with this assumption is easily demonstrable. Let us take two hypothetical cases. In each case, the plaintiff adduces evidence, the sum of which is *x*, and where *x*, say, consists of one witness and one document. The defendant adduces his evidence, the sum of which is *y*, and where *y*, say, consists of only one witness. The court may find that in each case, *x* is >0.5 (on a scale of 0 to 1) – more than *y*. However, let us assume that in one of the cases, the evidence of *x* is quantitatively and qualitatively superior to the evidence of *x* in the other case. Yet, if the court in both cases were to apply the balance of probabilities test, it would have reached a decision in favour of *x*, that is to say, finding *x* to be >0.5 on a scale of 0 to 1. There would be no problems of consistency and evaluation if they both concerned a simple breach of contract. But if they were both civil cases involving fraud, then the court in the other case may not find in favour of the plaintiff on the ground that it was not satisfied that *x* was >0.5, *ie*, more than *y*.

It will be seen, therefore, that the two cases could have been presented at different levels. Hence, the test of a balance of probabilities, by itself a simple test of ascertaining >0.5 on a scale of 0 to 1, may vary according to the levels at which the evidence is presented as well as the nature of the issues in dispute. In other words, in the case of a case involving fraud, the court's expectation of proof of >0.5 on a scale of 0 to 1 would be higher, bearing in mind that in each case the court is balancing the case of the plaintiff against the case of the defendant. Thus, it has no concern with what evidence some other plaintiff or defendant may adduce.

14 The real problem thus, is more a semantic one than one of logic. There are, indisputably, only two standards of proof. For criminal cases, the standard is proof beyond reasonable doubt; for civil matters, the standard is that of a balance of probabilities, where, minimally, the party charged with the burden of proving will succeed if he can show just that little more evidence to tilt the balance. The prosecutor in a criminal case will have to furnish more evidence than just that little more to tilt the balance. So when fraud is the subject of a criminal trial, there is no difficulty appreciating what burden falls on the prosecutor. But since fraud can also be the subject of a civil claim, the civil standard of proving on a balance of probabilities must apply because there is no known "third standard" although such cases are usually known as "fraud in a civil case" as if alluding to a third standard of proof. However, because of the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the "balance". They normally require more. That *more* is commonly described as "a burden that is higher than on a balance of probabilities, but lower than proof beyond reasonable doubt", see, for example, *Vita Health Laboratories Pte Ltd v Pang Seng Meng* at [30], or, as stated in the English cases mentioned above, "proof is required on a preponderance of probabilities", or in reliance of the "different degrees of probabilities" notion that was discredited by Lord Nicholls and Lord Hoffmann. All these descriptions of the test would, in essence, produce the same effect. While it is not a test, the following short passage from the judgment of Morris LJ in *Hornal v Neuberger Products Ltd* at 266, quoted with approval by Lord Hoffmann, explains with great clarity what judges do in weighing evidence of fraud:

> Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.

Therefore, we would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case.

15 We now revert to the facts of the present case. We find that there were at least two facts that might have warranted closer scrutiny and consideration. The first was that in a separate writ action, the appellant had sued the Company in January 2001 for the unpaid price of goods; and the fact that the appellant's claim in the present action concerned the Company's conduct from July 2001 to June 2002 meant that the Company and the first and second respondents must have known for six months that there was a substantial claim against the Company. *Prima facie*, an explanation would be required if assets were moved out of the Company during this period. The Company might have thought that the claim in the other action was frivolous and unsustainable, but if that were the case, it ought to explain why it consented to judgment. This point did not appear to have been raised at trial and did not feature in the court's judgment below. Furthermore, since the first and second respondents' case was that they started Axum because they had discovered that the appellant had overcharged the Company, thereby making it no longer competitive, they ought to explain why it was that Axum bought goods from the Company at a10% higher price than what the Company paid the

appellant. However, we are of the opinion that the rejection of fraud by the trial judge was not wrong because, as we have alluded to above, dishonesty and deception are key elements of fraud. From the record alone we do not think that the appellant's manager and key witness, Chan, could have been deceived when he had a 50% interest in the Company (later increased to 70%), and had been diligently checking the profit and loss accounts and balance sheet of the Company – even though he claimed not to have seen the invoices and vouchers. If that finding of fact was wrong, it behoved the appellant to persuade us on the evidence why the finding of those facts ought to be reversed. Save for a brief denial by counsel from the bar, no evidence was pointed to us to show why that finding was wrong. The trial judge found no evidence of fraud against the third respondent. Nothing new was presented before us and we, therefore, find that there was no ground to disturb the trial judge's finding.

16 For the reasons above, we were satisfied that the appellant had not discharged her burden of proof, and the trial judge was not wrong to have rejected the allegations of fraud. The appeal was therefore dismissed.