

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 184

Suit No 967 of 2015

Between

- (1) Lam Kwok Leong
- (2) Pow Kim Hoo

... Plaintiffs

And

- (1) Yap Koe Siong

... Defendant

GROUND OF DECISION

[Credit and security] — [Money and moneylenders] — [Loans of money]

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Lam Kwok Leong and another

v

Yap Koe Siong

[2016] SGHC 184

High Court — Suit No 967 of 2015
Chua Lee Ming JC
12, 13, 16, 17, 23 and 26 May 2016

5 September 2016

Chua Lee Ming JC:

Introduction

1 The plaintiffs, Mr Lam Kwok Leong and his wife Mdm Pow Kim Hoo, sued the defendant, Mr Yap Koe Siong, for:

(a) the sum of \$146,000 being the amount outstanding in respect of loans given by the plaintiffs to the defendant in connection with Gombak United Football Club (“the Club”) in which the defendant was the honorary chairman (“the Club loans”);

(b) the sum of \$365,823.50 being the amount outstanding in respect of a loan of \$400,000 allegedly given by the plaintiffs to the defendant in December 2007 for an investment in Debao Property Development Ltd (“Debao”). This loan shall be referred to as “the Debao loan”; and

- (c) damages for breach of fiduciary duties allegedly owed by the defendant as the first plaintiff's remisier.

2 I gave judgment for the plaintiffs on their claim in respect of the Club loans and dismissed their claims in respect of the Debao loan and the alleged breach of fiduciary duties. As the amount recovered by the plaintiffs did not exceed the jurisdiction of the District Court, I awarded them only the costs that they would have been entitled to if the action had been brought in a District Court.

3 The plaintiffs have appealed against my dismissal of their claim in respect of the Debao loan and consequently, the costs order that I made. The plaintiffs have not appealed against the dismissal of their claim for damages for breach of fiduciary duties. The defendant has not appealed against the judgment in respect of the Club loans.

The Club loans

4 The first plaintiff and the defendant first met in the early 1980s. The first plaintiff appointed the defendant as his remisier shortly after, and they developed a close friendship. The first plaintiff also introduced the defendant to his wife, the second plaintiff.

5 Sometime in 2002, the first plaintiff started giving loans to the defendant at the latter's request. These loans were for purposes of the Club which was facing cash-flow difficulties. The plaintiffs claimed the amount outstanding in respect of the Club loans.

6 It is not necessary for me to go into the issues or the evidence in respect of the Club loans in detail. In summary:

(a) The defendant did not dispute the Club loans; his dispute was with the amount outstanding.

(b) The defendant admitted that in November 2011, the first plaintiff showed him a computation for \$197,676 being the amount outstanding on the Club loans. The defendant then issued a cheque for \$197,000. The cheque was backdated and not intended to be presented for payment.

(c) I found that in issuing the cheque, the defendant had agreed to a compromise of the amount owing by him to the plaintiffs at \$197,000. I also found that the defendant agreed to pay \$1,300 per month as interest.

(d) Between December 2010 and February 2014, the defendant paid \$46,800 as interest and \$51,000 as repayment towards the principal amount. The plaintiffs' claim was for the outstanding principal amount of \$146,000.

(e) I found that the plaintiffs had proved their claim on a balance of probabilities.

(f) I rejected the defendant's defence of illegal moneylending under the Moneylenders Act (Cap 188, 2010 Rev Ed) on the ground that the plaintiffs were not in the business of moneylending.

(g) I therefore entered judgment for the plaintiffs in the sum of \$146,000.

The Debao loan

7 It was common ground that in 2007, the defendant introduced a pre-Initial Public Offering (“pre-IPO”) investment opportunity in Debao to the first plaintiff. The pre-IPO investment in Debao was by way of a convertible loan.¹

8 The plaintiffs’ case was that:

- (a) they decided to invest \$1m in Debao;
- (b) at the defendant’s request, they agreed to lend him \$500,000 to invest in Debao and to make the investment on his behalf;
- (c) subsequently, the defendant reduced his investment (and consequently the loan amount) to \$400,000. The balance amount of \$100,000 was taken up by his colleague, one Keith Siak Eng Teck (“Keith”), with the plaintiffs’ agreement;
- (d) the total investment of \$1.5m was made in the second plaintiff’s name in December 2007;
- (e) the second plaintiff opened a new securities account with the Central Depository (Pte) Ltd (“CDP”) sometime in August 2009;²
- (f) the defendant and Keith had to make their investments in the second plaintiff’s name because they could not do so in their own names.

9 The convertible loan was converted into Debao shares on 30 March 2010.³ The shares were issued in the second plaintiff’s name and she was

informed by CDP on 9 April 2010 that the Debao shares had been credited to her account.⁴ Debao was listed on the Singapore Exchange on 12 April 2010.⁵

10 There was no dispute regarding Keith’s investment of \$100,000 in Debao through the second plaintiff. Keith paid for his investment.⁶ The only dispute was whether the plaintiffs had given the defendant a loan of \$400,000 which the plaintiffs then used to invest in Debao on behalf of the defendant. The defendant denied taking the Debao loan or investing in Debao through the second plaintiff.

11 According to the plaintiffs:⁷

- (a) Debao paid interest and the defendant’s share of the interest was \$16,372.60;
- (b) after the IPO, some of the Debao shares were sold and the defendant’s share of the proceeds of sale was \$13,881.40;
- (c) Debao paid dividends between 2012 and 2015 and the defendant’s share of the dividends was \$12,482.50.

The plaintiffs claimed that they applied the above as part-payments of the Debao loan.

12 In their statement of claim, the plaintiffs also alleged that the defendant’s share of the “cost of placing” the Debao shares was \$22,377.60.⁸ In their affidavits of evidence-in-chief (“AEICs”), the plaintiffs confirmed that this referred to the commission (and GST) paid on the investment in Debao and that the amount payable by the defendant was \$8,560 and not \$22,377.60.⁹ Accordingly, the plaintiffs’ claim in respect of the Debao loan was for the

balance outstanding amount of \$365,823.50 (after taking into account the commission and the alleged part-payments) instead of \$379,641.10 as stated in the statement of claim. They also sought a declaration that these disputed shares were held on trust for the defendant.

The evidence relating to the Debao loan

13 Besides the plaintiffs' own testimony, the main pieces of evidence which they relied on were (a) an email from the defendant to the plaintiffs dated 6 December 2007 ("the 6 December email");¹⁰ (b) the testimony of Keith; and (c) the use of the second plaintiff's CDP account to hold the Debao shares.

14 In response, the defendant pointed to (a) the absence of any documentary evidence, especially when the plaintiffs had detailed written records of the Club loans; and (b) the fact that the plaintiffs did not mention the Debao loan in any of their correspondences with him until it was first raised in a letter of demand from the plaintiffs' solicitors to the defendant dated 20 March 2014.¹¹

The 6 December email

15 In the 6 December email, the defendant gave the following payment instructions to the plaintiffs:

- | | |
|-------------------|--|
| Pre IPO: | 1. SGD 1,000,000 (One Million) and
2. SGD 500,000 (Five Hundred Thousand) |
| Comm (2%): | 1. SGD 20,000 (Twenty Thousand) and
2. SGD 10,000 (Ten Thousand) |
| GST:
(on Comm) | 1. SGD 1,400 (One Thousand Four hundred)
2. SGD 700 (Seven Hundred) |

Total: 1. SGD 1,021,400 (One Million Twenty One
Thousand and Four Hundred) and
 2. SGD 510,700 (Five Hundred Ten Thousand
and Seven Hundred)

16 The plaintiffs submitted that the defendant had deliberately separated the \$1m investment from the \$500,000 investment in the payment instructions to distinguish between the plaintiffs' own investment of \$1m and the investment of \$500,000 which was allegedly made on behalf of the defendant. As of the date of the 6 December email, Keith was not yet in the picture. Keith decided to invest \$100,000 under the second plaintiff's name on 7 December 2007.

17 The defendant explained that (a) the first plaintiff had initially indicated that he wanted to invest \$1m in Debao but subsequently decided to invest another \$500,000 and (b) he had separated the \$1m investment from the \$500,000 investment in the 6 December email as a matter of convenience because the plaintiff's decision to invest the additional \$500,000 was made just shortly before the email was sent out.¹²

18 In my view, the defendant's explanation was a reasonable one which was supported by a subsequent email which he sent to the plaintiffs the next day on 7 December 2007 after Keith came into the picture. In this second email, the defendant gave the following payment instructions which separated only Keith's investment from the rest of the investment amount:¹³

SGD 1,532,100
SGD 102,140 (Less Keith Siak's 100k)
SGD 1,429,960 (One Million Four Hundred Twenty Nine
Thousand Nine Hundred Sixty)

If the plaintiffs' explanation for the 6 December email was correct, one would expect the payment instructions in the second email to have separated the three investments of \$1m, \$400,000 and \$100,000.

19 The plaintiffs also made much ado about the defendant's assertion in his defence and AEIC that the Debao bonds were sold in tranches of \$1m and \$500,000.¹⁴ The defendant confirmed during his oral testimony that the Debao bonds were sold in tranches of \$500,000. The plaintiffs argued that the defendant had lied in his defence and AEIC in order to explain away the 6 December email. I found this argument tenuous and rejected it.

20 In my judgment, the 6 December email was, at best, equivocal evidence of the Debao loan.

Keith's testimony

21 Keith testified that the defendant had told him in late 2007 that he had invested in Debao through the plaintiffs. However, Keith had no direct knowledge whether the defendant did in fact invest in Debao through the plaintiffs or whether the plaintiffs had lent the defendant any money for such an investment. The question therefore was whether it should be inferred from his evidence that the defendant had in fact invested in Debao through the plaintiffs. I shall deal with Keith's testimony as part of my overall assessment of the evidence.

Use of the second plaintiff's CDP account

22 It was true that the defendant arranged the opening of the second plaintiff's CDP account for the purposes of the investment in Debao. According to the second plaintiff, she had never traded in shares prior to that.¹⁵

The defendant accepted that, apart from the investment in Debao, he had never advised the second plaintiff on any other investment deals.¹⁶ In their closing submissions, the plaintiffs suggested that the defendant was using the second plaintiff as a “neutral person” (*ie*, someone other than the first plaintiff and himself) for the investment that he was making in Debao together with the first plaintiff. The plaintiffs pointed to the fact that the first plaintiff and the defendant had invested together in the shares of another company called Heatec Jietong Holding Ltd in 2009 in the name of the first plaintiff’s brother whom the defendant regarded as someone “neutral”.¹⁷

23 I found the plaintiffs’ submission tenuous and unpersuasive. Further, according to the plaintiffs themselves, the decision to invest in Debao was made by *both* the plaintiffs together.¹⁸ This was a joint investment which was paid for using monies from their joint account.¹⁹ The second plaintiff was clearly not a “neutral person” to this investment. I refused to draw any inference from the use of the second plaintiff’s CDP account.

Absence of documentary evidence and demands

24 Notably, there was no documentary evidence at all that the plaintiffs had invested \$400,000 in Debao on behalf of the defendant or that they had lent the defendant \$400,000. The second plaintiff, who had a background in accounting, had kept detailed contemporaneous records of all the loans to and repayments by the defendant in respect of the Club loans. Yet, the plaintiffs had no records at all in respect of the Debao loan.

25 The plaintiffs’ allegations that part of the commission was chargeable to the defendant and that there were sales proceeds, interest payments and dividends that were credited to the defendant made it all the more surprising

that there were no records kept by them. Further, the plaintiffs did not even inform the defendant of the interest and dividends received from Debao which they claim they applied towards payment of the Debao loan. I found this conduct inconsistent with the plaintiffs' claim.

26 Next, unlike in the case of the Club loans, there was no evidence of any claim or demand by the plaintiff for payment of the Debao loan before the letter of demand dated 20 March 2014 from the plaintiffs' solicitors to the defendant. This was more than six years after the investment was made in December 2007. An email dated 3 March 2014 from the first plaintiff to the defendant demanding payment of the compromised sum of \$197,000 in respect of the Club loans also made no mention of the Debao loan.²⁰

27 The plaintiffs chased the defendant for payment of the Club loans and gave him statements of the amount owing in November 2011 and August 2012²¹ yet the statements made no mention of the Debao loan.²² The SMSes and correspondences between the parties in 2013 concerned only the repayment of the Club loans and did not mention the Debao loan either.²³

28 The plaintiffs admitted that the value of the Debao shares started falling soon after listing and that the shares had lost 85% to 90% of their value.²⁴ One would have expected the plaintiffs to have demanded payment of the Debao loan once the value of the Debao shares started plummeting, yet they did not do so. The plaintiffs were facing difficulties getting the defendant to pay the Club loans. There was no reason why they did not also chase the defendant for payment of the Debao loan.

29 I rejected the plaintiffs' explanation that they did not keep records of the Debao loan or chase for payment because the Debao shares were held in

the second plaintiff's account with CDP. First, the fact that the shares were held in the second plaintiff's account with CDP did not explain why the plaintiffs did not keep any record of the Debao loan and the alleged repayments. There was no segregation in the second plaintiff's account between the plaintiffs' investment and the defendant's alleged investment. Second, as stated earlier, the value of the Debao shares started falling soon after its listing. The shares were no longer sufficient security for the loan. One would have expected the plaintiffs to have been concerned enough to seek payment of the Debao loan from the defendant. After all, the amount outstanding on the Debao loan far exceeded the amount outstanding on the Club loans.

30 In my judgment, the absence of records of the Debao loan and the alleged part-payments, the fact that the plaintiffs did not even inform the defendant of the interest and dividend payments and the fact that the plaintiffs did not chase the defendant for payment of the Debao loan, spoke volumes especially when viewed against the plaintiffs' conduct in respect of the Club loans. Against the weight of all these evidence, Keith's evidence was in my view not determinative on the issue concerning the Debao loan. I concluded that, looking at the totality of the evidence, the plaintiffs had failed to prove the Debao loan. I therefore dismissed the plaintiffs' claim in respect of the Debao loan.

31 As the claim in respect of the Debao loan was dismissed, it followed that the claim for the declaration that the second plaintiff held the Debao shares in trust for the defendant was also dismissed.

Breach of fiduciary duties

32 In brief, I agreed with the defendant that the plaintiffs were not entitled to pursue their claim for breach of fiduciary duties because the breaches alleged in their opening statement were not pleaded. The alleged breaches were factual assertions which ought to have been specifically pleaded in the statement of claim (O 18 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“ROC”)). In any event, there was no evidence that the plaintiffs suffered any loss as a result of these alleged breaches that were distinct from their claims in respect of the Club loans or the Debao loan.

Costs

33 The claim in respect of the Club loans involved more issues than the claim for the Debao loan. In my view, the plaintiffs were entitled to some costs. Both parties agreed that the plaintiffs should be entitled to 75% of their costs.

34 However, the sum recovered did not exceed the District Court limit of \$250,000 (s 2 of the State Courts Act (Cap 321, 2007 Rev Ed). Therefore, the plaintiffs were not entitled to any more costs than if the action had been brought in a District Court, unless there was sufficient reason for bringing the action in the High Court: s 39 of the State Courts Act; O59 r 27(5) of the ROC.

35 In this case, it was entirely within the plaintiffs’ knowledge whether the Debao loan existed. Having found against them on this point, I was not persuaded that there was a sufficient reason for them to have brought this action in the High Court. I therefore ordered the defendant to pay the plaintiffs

costs fixed at \$60,000 – being the fractional costs fixed on the District Court scale – plus 75% of the plaintiffs’ reasonable disbursements.

Conclusion

36 Judgment was entered for the plaintiffs in the sum of \$146,000 with interest at 5.33% per annum from the date of the writ of summons to the date of judgment.

37 The claims in respect of the Debao loan and the claim based on breach of fiduciary duties were dismissed.

38 Costs was awarded to the plaintiffs fixed at \$60,000 plus 75% of reasonable disbursements.

Chua Lee Ming
Judicial Commissioner

Faizal Shah Bin Mohamed Haniffa and Say Chin Phang, Sean
(Keystone Law Corporation) for the plaintiffs;
Ranvir Kumar Singh (Unilegal LLC) for the defendant.

¹ Defendant’s AEIC, para 93.
² Second plaintiff’s AEIC, para 25.
³ First plaintiff’s AEIC, para 77.
⁴ Second plaintiff’s AEIC, p 77.

5 Defendant's AEIC, para 93.
6 First plaintiff's AEIC, paras 74 and 75.
7 First plaintiff's AEIC, para 86; second plaintiff's AEIC, paras 32 and 33.
8 SOC at para 40.
9 First plaintiff's AEIC at para 85; second plaintiff's AEIC at paras 28–31.
10 AB 41.
11 AB 251.
12 Defendant's AEIC at para 100; NE4 (17 May 2016) at 54:21–55:18.
13 AB 42.
14 Defence para 56; Defendant's AEIC at para 100.
15 Second plaintiff's AEIC, para 26.
16 NE4 (17 May 2016) at 47:10–48:10.
17 NE4 (17 May 2016) at 105:16–107:12.
18 First plaintiff's affidavit, para 71.
19 First plaintiff's affidavit, para 75.
20 AB 248.
21 AB 298.
22 AB 297.
23 AB 238–247.
24 NE1 (12 May 2016) at 85:22–86:5.