IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(A) 24

Civil Appeal No 103 of 2021

Between

Marina Towage Pte Ltd

… *Appellant*

And

Chin Kwek Chong

… *Respondent*

In the matter of Suit No 158 of 2019

Between

Marina Towage Pte Ltd

… *Plaintiff*

And

(1) Chin Kwek Chong
(2) Chin Chee Chien

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Fraudulent trading]

Marina Towage Pte Ltd
v
Chin Kwek Chong

[2021] SGHC(A) 24

Appellate Division of the High Court — Civil Appeal No 103 of 2021
Belinda Ang Saw Ean JAD, Woo Bih Li JAD and Chua Lee Ming J
3 December 2021

14 December 2021

Chua Lee Ming J (delivering the grounds of decision of the court):

1 This was an appeal against the decision of the High Court judge (the "Judge") dismissing the appellant's claim for a declaration that the respondent was personally liable for a judgment debt owed by Island Logistic Pte Ltd ("IL") to the appellant. The appellant alleged that the respondent was personally liable under s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") because IL was trading fraudulently and the respondent was a knowing party to IL's fraudulent trading.

2 We dismissed the appeal and we now set out the grounds for our decision.

Background facts

3 The background facts are straightforward. In July 2015, the appellant bareboat chartered two vessels to IL – a barge at a rate of US$30,000 per 30

days and a tug at a rate of US$47,000 per 30 days (the "main charterparties"). IL subchartered on back-to-back bareboat terms the pair of vessels to Blue Metal Investments Pte Ltd ("BMI") at a total profit of US$8,000 per vessel per 30 days (the "subcharterparties"). The hire period for the two vessels under both the main charterparties and the subcharterparties commenced on 1 September 2015. The vessels were duly delivered to BMI, which then deployed the vessels in the Maldives.

4 It was common ground that, at the material times, IL had no sources of revenue other than the two subcharterparties. IL depended on BMI's payment of hire under the subcharterparties to pay the appellant under the main charterparties.

5 Sometime in March 2016, disputes arose between BMI and IL as to the condition of the vessels. BMI stopped paying the hire due to IL under the subcharterparties with effect from February 2016. IL, in turn, stopped paying the hire to the appellant under the main charterparties. By April 2016, the disputes had escalated to the point that BMI sued the appellant in the Maldives and secured a court order detaining the vessels.

6 In July 2016, the appellant commenced an arbitration against IL under each charterparty to recover damages for breach of contract. IL participated in the constitution of the tribunal but withdrew from the arbitrations after that. In November 2017, the appellant secured two awards against IL, under which IL was required to pay over $900,000 plus compound interest at 6% per annum and costs (subsequently quantified at over $120,000).

7 IL did not pay the appellant, which then obtained leave to enforce both awards against IL, in the same manner as judgments of the High Court to the

same effect, under s 46 of the Arbitration Act (Cap 10, 2002 Rev Ed). In the event, IL had nothing of value against which the appellant could levy execution.

8 The appellant then commenced the present action against the respondent and his nephew, both of whom were the only two directors and shareholders of IL. The appellant's claims were dismissed by the Judge. The Judge found that IL had no intent to defraud the appellant when it entered into the main charterparties with the appellant in July 2015: *Marina Towage Pte Ltd v Chin Kwek Chong and another* [2021] SGHC 81 (the "Judgment") at [146].

9 The present appeal is against the respondent only. The appellant's case is that the Judge: (a) applied the wrong test under s 340(1) of the CA; and (b) erred in finding that the appellant had failed to prove IL's intent to defraud it.

Whether the Judge applied the wrong test under s 340(1) of the CA

10 Section 340(1) of the CA states as follows:

> **Responsibility for fraudulent trading**
>
> **340.**—(1) 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.

11 The Appellant's Case referred to the Judge's statement that "the [appellant] must prove by adducing sufficiently cogent evidence that the

[respondent], as IL's controlling mind and will, dishonestly intended *never to pay* the [appellant] under the main charterparties" [emphasis added] (Judgment at [103]). The appellant submitted that the Judge had erroneously imposed an excessive burden because "a fraudulent intent or dishonesty or a reckless indifference may satisfy the mental element under s 340(1)". In so far as this suggested that "reckless indifference" was an alternative to an "intent to defraud" under s 340(1) of the CA, it could not be correct since what was required under s 340(1) of the CA was an "intent to defraud". It was not open to this court to rewrite s 340(1) of the CA to provide for "reckless indifference" as an alternative to an "intent to defraud".

12 However, counsel for the appellant, Mr Andrew Chan ("Mr Chan") clarified in oral arguments that the appellant was relying on reckless indifference only as evidence of fraudulent intent. He argued that the Judge was wrong to require the appellant to prove that IL "intended never to pay" under the main charterparties because a fraudulent intent could be proved by other evidence, including evidence of a reckless indifference as to whether the appellant would be paid.

13 During oral arguments, Mr Chan referred to the Judgment at [101], which reads as follows:

> The [appellant] pleads that IL had an intent to defraud the [appellant] on two slightly different grounds. First the [appellant] submits that IL entered into the main charterparties with no intent of paying the [appellant] the hire which would fall due under them: "the aim of entering into the [main charterparties] with the [appellant] had been to fraudulently charter the [v]essels … without any intention whatsoever of paying for [*sic*] the charter hire from the outset". Second, the [appellant] alleges that IL had a dishonest intent because it knew that there was no reasonable prospect of IL being able to pay the [appellant] the hire under the main charterparties. As I have mentioned, this second ground is in itself neither a

> necessary nor a sufficient condition for liability under s 340(1). It is only the first ground which is both a necessary and a sufficient [*sic*] to establish liability. I therefore treat the [appellant's] case on the second ground as circumstantial evidence from which it invites me to draw the inference necessary to sustain the first ground.

The appellant submitted that the Judge was wrong to treat the "first ground" (*ie*, that IL had no intent of paying) as the only ground that was necessary and sufficient to establish liability under s 340(1) of the CA.

14 The appellant relied on *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 ("*Tang Yoke Kheng*"). In that case, the Court of Appeal had referred (at [7]) to the following passage in *R v Grantham* [1984] QB 675 ("*Grantham*") at 681, which was a quote from the trial judge's summing up:

> … 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. …

15 The Court of Appeal concluded in *Tang Yoke Kheng* (at [7]) that the above passage from *Grantham* "is not a definition of fraud or fraudulent trading, but merely an account of an instance in which fraud might manifest itself" and that "[w]hether any given circumstances amount to fraud is a question of fact to be determined by the court". The appellant thus argued that the Judge was wrong to conclude that the only way it could establish liability under s 340(1)

of the CA was to prove that IL had no intent to pay under the main charterparties.

16 The respondent submitted that the formulation of the Judge's statement at [103] of the Judgment was from the appellant's case in its Opening Statement at the trial below, which was that:

> … [IL's] aim of entering into the [main charterparties] had been to fraudulently charter the [v]essels worth millions of dollars from the [appellant] without any intention whatsoever of paying for the charter hire from the outset.

However, we noted that the appellant's case at the trial below was wider than that. In its Opening Statement, the appellant had also stated that IL had carried on its business dishonestly because it knew that there was a substantial risk that the appellant would not be paid and that there was no reasonable prospect of it being able to pay the appellant. In addition, the Judge had noted that one of the appellant's allegations was that IL had a dishonest intent because it knew that there was no reasonable prospect of it being able to pay the appellant (Judgment at [101]) (see [13] above).

17 It is clear from the Court of Appeal's observation about *Grantham* in *Tang Yoke Kheng* (see [15] above) that an intention not to pay as well as knowledge that there was no reasonable prospect of one's ability to pay are both just instances in which fraud might manifest itself. Proof of the former is not the only way to prove an intent to defraud. In the present case, the relevant question under s 340(1) of the CA remained whether the evidence proved that IL had entered into the main charterparties with an intent to defraud the appellant, with dishonesty being the necessary element in an "intent to defraud".

18 That said, in our respectful view, the manner in which the Judge dealt with the appellant's two grounds in [101] of the Judgment was perhaps infelicitous. It was clear to us that in reaching his conclusion that there was no intent to defraud, the Judge did not restrict himself to only the question as to whether the appellant had proved that IL had no intent to pay the appellant. First, the Judge correctly directed himself on the relevant legal principles, which were clearly broader in scope. He was cognisant of the Court of Appeal's explanation in *Tang Yoke Kheng* at [7] of the passage from *Grantham* at 681 (Judgment at [96]; see also [14]–[15] above). He concluded that: (a) there could be no intent to defraud unless there was dishonesty resulting in the deception of an innocent party; (b) what had to be proved was a subjectively held dishonest intent; and (c) an intent to defraud could be proved by circumstantial evidence (Judgment at [98]). The Judge also reminded himself that the appellant's allegation of fraud had to be tested against all the available evidence (Judgment at [99]). Most importantly, the Judge took the view that an intent to defraud could be inferred from a finding that liability had been incurred without any reasonable prospect of meeting it in full (Judgment at [100]).

19 Second, the Judge considered the appellant's argument that the inference to be drawn from the evidence was that IL had no intent to pay the appellant *if BMI failed to pay IL* (Judgment at [106]). This argument had to do with whether there was a reasonable prospect of IL being able to pay the appellant rather than whether IL had never intended to pay the appellant.

20 Third, the Judge also considered the appellant's contention that BMI had no reasonable prospect of paying IL enough for IL to discharge its contractual obligations to the appellant (Judgment at [121]). Again, this contention had to

do with whether there was a reasonable prospect of IL being able to pay the appellant.

21 In any event, for the reasons set out later in these grounds, the Judge's conclusion that there was no intent to defraud was well supported by the evidence.

22 It was not necessary for us to decide whether, or under what circumstances, reckless indifference (be it reckless indifference to whether the creditor would be paid or reckless indifference to whether there were reasonable prospects that the creditor would be paid) might be sufficient to prove fraudulent intent under s 340(1) of the CA. In our view, again for the reasons set out later in these grounds, the appellant would not have established reckless indifference on IL's part in any event.

23 We reiterate that what must be shown under s 340(1) of the CA is a subjectively held intent to defraud. Such an intent requires proof of dishonesty. Whether an intent to defraud has been proved is to be assessed against all the relevant facts and evidence.

Whether the appellant had proved IL's intent to defraud

24 It was not disputed that the appellant bore the burden of proving that IL was trading fraudulently when IL entered into the main charterparties and that the respondent was knowingly a party to IL's fraudulent trading. It bears

emphasis that for purposes of s 340(1) of the CA, the intent to defraud must have existed at the time when IL entered into the main charterparties.

25 The appellant relied on several points as evidence of IL's intent to defraud. However, the main thrust of the appellant's case was that: (a) IL was insolvent and had no independent means to pay the appellant; and (b) the respondent knew that BMI was unable to pay its debts.

26 The Judge found that IL was insolvent on the balance sheet test but not on the cash flow test. The appellant challenged the Judge's conclusion that IL was not insolvent on the cash flow test. However, it was not necessary for us to decide whether IL was insolvent on the cash flow test. The respondent did not dispute the Judge's conclusion that his finding of insolvency on the balance sheet test was sufficient for an overall finding of insolvency. It was also clear that IL was, as the Judge described it, running hand-to-mouth (Judgment at [103]). IL was relying on BMI's payments under the subcharterparties to pay the appellant under the main charterparties.

27 It could not be disputed that the main charterparties and the subcharterparties were entered into as a back-to-back arrangement. We agreed with the Judge that the mere fact that IL had depended on BMI's payments under the subcharterparties to pay the appellant in itself did not support a finding that IL had intended to defraud the appellant. We disagreed with the appellant's submission that IL had dishonestly subjected the appellant to speculative risks. This was not a case where the hire under the subcharterparties was less than the hire under the main charterparties. As the Judge noted, IL would earn enough under the subcharterparties not only to pay the appellant but also to yield IL a gross profit of US$16,000 per 30 days (Judgment at [109]). On the evidence, it

was commercially unrealistic to describe the risks in this case as speculative, much less as evidence of an intent to defraud.

28 The appellant submitted that BMI's ability to satisfy its debts was doubtful because BMI had owed IL a debt of $35,568.75 since 2008. The appellant argued that IL's decision to enter into the main charterparties was therefore dishonest. The Judge found no evidence that the respondent had remembered this stale debt in July 2015 when he entered into the main charterparties with the appellant on IL's behalf (Judgment at [124]). We were satisfied that the Judge's finding in this regard was not plainly wrong. In any event, the existence of this stale debt, without more, would not have been sufficient to prove that BMI's ability to pay its debts was doubtful, such as to render IL's reliance on the back-to-back arrangement dishonest.

29 One important fact in this case was that IL had made payments to the appellant under the main charterparties, even as early as on 28 August 2015. On 20 August 2015 and 24 August 2015, the appellant issued invoices to IL for two months deposits for the two vessels (US$154,000) and advance hire for the period 1 September 2015 to 30 September 2015 (US$77,000) respectively. On 28 August 2015, IL paid the appellant US$77,000 in respect of the September 2015 hire ("the first hire"). The appellant applied this payment towards the deposits. Between 28 September 2015 and 27 November 2015, the appellant issued three invoices (totalling US$231,000) for the next three months of hire, namely, the second, third and fourth hire. On 10 December 2015, IL paid the appellant US$100,000; the appellant applied part of this towards the amount outstanding on the deposits and the balance towards the first hire. The appellant issued invoices for the fifth and sixth months of hire on 28 December 2015 and 22 January 2016 respectively. On 3 February 2016, IL paid the appellant

US$77,000, which the appellant applied towards payment of the amount outstanding on the first hire and part-payment of the second hire. Although IL was not prompt in making payment, the fact that it had made these payments, in particular the payment for the very first hire and the payments towards the deposits, was clearly inconsistent with an intent to defraud.

30 The Judge also found that when disputes arose over the condition of the vessels, the respondent had travelled to the Maldives to help resolve the issues with BMI. While the appellant questioned this finding, it did not adduce evidence from its own representative, Mr Lawrence Lim, who also went to the Maldives at about the same time, to show otherwise. We agreed with the Judge that the respondent's conduct in helping to resolve issues with BMI was inconsistent with an intent to defraud the appellant (Judgment at [138]).

31 The appellant pointed out that IL had used part of the moneys received from BMI not to pay the appellant, but to repay the respondent's loans to IL. Between September 2015 and February 2016, IL used part of the payments made by BMI to make seven payments totalling about $50,000 to the respondent, as repayment towards loans that the respondent had made to IL. The appellant accepted that such a preference in favour of the respondent would not, without more, amount to fraudulent intent. The appellant relied on the payments to the respondent as further evidence of IL's intent to defraud. On the facts of this case, we did not think that this piece of evidence took the appellant's case any further.

32 In its skeletal submissions, the appellant also argued that IL had defaulted on payment of the first hire when the main charterparties were signed and that such a default was evidence of IL's fraudulent intent. The basis for this

argument was the appellant's contention that, under the main charterparties, the first hire was payable in advance, on the date that the main charterparties were signed. We rejected the appellant's argument.

33 First, this argument was not raised in the Appellant's Case. Second, it was not raised before the Judge; in fact, it was not even part of the appellant's pleaded case. Third, we disagreed with the appellant's interpretation of the main charterparties. Although the main charterparties did provide for the payment of hire in advance, on the first day of each month, they also stated clearly that IL was to pay the hire for each vessel commencing from the date of the delivery of the vessel. The appellant also accepted that the *deposits* were payable only upon delivery of the vessels; it did not make sense that the *first hire* would have been payable earlier, upon the signing of the main charterparties. Further, each of the main charterparties provided that IL could cancel the main charterparty if the vessel was not delivered within seven days of the agreed delivery date. The appellant's interpretation was inconsistent with such a provision. Fourth, and in any event, the appellant did not issue its invoice for the first hire for both vessels until August 2015, some three weeks or so after the main charterparties were signed. Even assuming that the first hire was payable when the main charterparties were signed, the fact that IL did not make payment immediately was neither here nor there, especially since: (a) the appellant did not issue its invoice for the same until some three weeks later; and (b) IL did make payment of a sum equivalent to the first hire shortly after receiving the appellant's invoice (see [29] above).

34 The Appellant's Case and the Appellant's Skeletal Submissions referred to some other allegations which the appellant submitted were indicia of an intent to defraud. Some of these allegations related to events that happened after the

main charterparties had been entered into. We did not find it necessary to deal with these allegations in any detail. In our view, they did not assist the appellant in proving IL's intent to defraud.

35 In our judgment, the Judge's conclusion that the appellant had failed to prove that IL had intended to defraud it, was not against the weight of the evidence or plainly wrong. We agreed with the Judge that the respondent had subjectively believed in July 2015 that the back-to-back arrangement would enable IL to pay the appellant (Judgment at [113]). This was simply a case of a genuine commercial transaction gone wrong. BMI stopped paying IL under the subcharterparties as a result of the disputes over the condition of the vessels. This resulted in IL being unable to pay the appellant under the main charterparties.

Conclusion

36 For the above reasons, we dismissed the appeal. We also noted that the Judge made certain findings relating to procedural requirements under s 340(1) of the CA. Suffice it for us to say that those findings were not issues in this appeal.

37 We ordered the appellant to pay the respondent costs of the appeal fixed at $40,000 inclusive of disbursements, with the usual consequential orders.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

Andrew Chan Chee Yin (Allen & Gledhill LLP) (instructed), Clarence Lun Yaodong, Simone Bamapriya Chettiar and Chua Qin En (Fervent Chambers LLC) for the appellant;
Anil Murkoth Changaroth and Lim Muhammad Syafiq (ChangAroth Chambers LLC) for the respondent.
