IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 23

Suit No1501 of 1993

Between

Makin Nominees (Pte) Ltd (In Liquidation)
Dato Mak Kok

… *Plaintiff*

And

Ong & Company Private Limited

… *Defendant*

GROUNDS OF DECISION

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Makin Nominees (Pte) Ltd (In Liquidation) and Another v Ong & Company Private Limited

[1997] SGHC 23

Suit No1501 of 1993
Lai Siu Chiu J
27 January 1997

Judgment:

GROUNDS OF JUDGMENT

The background 1. At the conclusion of the trial, I dismissed the plaintiffs' claim against the defendants. The plaintiffs have appealed against my decision (Civil Appeal No 160 of 1996); I shall now set out my reasons.

2. The first plaintiff (Makin) was a company incorporated in Singapore by the second plaintiff (a Malaysian businessman who resides in Kuala Lumpur), for purposes of trading in securities listed on the Stock Exchange of Singapore (SES).

The second plaintiff was a director and the controlling shareholder of, Makin. Makin was compulsorily wound up by an order of court made by Lim Teong Qwee JC on 17 March 1994 in Companies Winding Up No 294 of 1993 (the winding up) on a petition presented by the defendants, who are stockbrokers. Makin contested the winding up (see Re Makin Nominees Pte Ltd < 1994 > 3

SLR 429) and appealed against Lim JC's order. However its appeal was deemed to be withdrawn for lack of further action after filing the notice of appeal on 14 April 1994. Makin was granted permission by the Official Receiver to pursue this suit provided it furnished security for costs which condition the second plaintiff complied with.

3. Between 1981 and August 1984, Makin was a customer of and operated a trading account with, the defendants. Arising out of such trading (which was done through a remisier Lim Sin Kok < Lim >), Makin incurred substantial losses and or was unable to pay for its purchase of shares during the time of the Pan Electric Industries Ltd (Pan Electric) crisis. The second plaintiff was a guarantor for Makin's account. The defendants then instituted proceedings and obtained judgment thereto against both plaintiffs in Suit No 3806 of 1986 (the suit) for $6,731,855.20 on 21 November 1986 (the judgment). The plaintiffs appealed against the judgment but their appeal to a judge in chambers was adjourned by mutual agreement when it first came up for hearing on 19 March 1987.

4. The parties negotiated and subsequently entered into an agreement dated 29 July 1987 (the settlement agreement) whereby the defendants agreed to withhold further proceedings in the suit provided the plaintiffs paid a sum of $6,494,351.83 (inclusive of overdue interest) in full and final settlement of the defendants' claim.

5. The settlement agreement further provided: a. the plaintiffs would pay to the defendants $500,000 by 31 December 1987 which deadline would only be extended to 30 June 1988 if the second plaintiff furnished satisfactory collateral (which would include shares listed on the SES) of the value of $500,000 to the

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defendants, and b. the balance of $5,994,351.83 would be paid to the defendants by 29 February 1989.

The plaintiffs were also obliged to pay further interest on the actual balance of the principal sum outstanding by quarterly instalments commencing 1 August 1987 < see cl 1(c) > .

6. On the same date as the settlement agreement, Lim executed a letter of undertaking to the defendants agreeing to be fully responsible for the outstanding indebtedness of the second plaintiff as well as of the second plaintiff's wife Virginia Mak (who also maintained a trading account with the defendants). On 1 August 1987 Lim entered into a separate agreement with the second plaintiff (the second agreement) agreeing to credit Makin's account with the sum of $767,481.99 in consideration of Makin and the second plaintiff entering into the settlement agreement; that sum represented the losses incurred by Makin in consequence of the defendants' disposing of the securities pledged by Makin to the defendants. Lim was only obliged to credit the said $767,481.99 from commission he earned through share transactions entered into for Makin's, the second plaintiff's and or Virginia Mak's account. Lim passed away on 13 November 1989.

7. The second plaintiff paid one (1) instalment of the overdue interest on 2 September 1987, amounting to S$164,885.68, after repeated reminders from the defendants' solicitors; thereafter no further payments were made nor was collateral furnished in lieu thereof.

8. In July 1990 the defendants' solicitors gave notice to the plaintiffs' solicitors that the defendants would take further steps on the judgment in view of the

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plaintiffs' default, under cll 10A and 10B of the settlement agreement, which provisions I shall set out presently. On 4 September 1991 the defendants obtained an order from the Kuala Lumpur court registering the judgment in Malaysia. The second plaintiff applied to set aside the registration. In the several affidavits he filed to oppose the registration, he complained that the defendants obtained summary judgment in November 1986 (the application) without the court assessing the merits of the case because the registrar refused to allow the plaintiffs an adjournment to enable them to file their affidavits to contest the application. He deposed that the defendants made the appplication when negotiations for a settlement between the parties were still in progress and he was misled into believing that the defendants would not be proceeding with the application. He had also agreed to adjourn the plaintiffs' appeal indefinitely if the defendants would not enforce the judgment. In any event under cll 9 and 12 of the settlement agreement, the defendants had the option to start fresh proceedings against him in the event that the plaintiffs breached the terms thereof. The second plaintiff's objections were however dismissed by the registrar of the Malaysian court on 15 July 1992; against that decision he filed an appeal to the Federal Court on 22 April 1994 which appeal was still pending at the time this suit was heard.

9. Meanwhile, on 4 May 1992 the plaintiffs' application in Singapore for a stay of execution on the judgment was dismissed. The plaintiffs' appeal against the judgment (as well as the unsuccessful stay application) was finally heard and dismissed, by Warren Khoo J on 7 July 1992 (see Ong & Co Ltd v Makin Nominees Pte Ltd < 1993 > 1 SLR 289). The plaintiffs then appealed to the Court to Appeal (Civil Appeal No 111 of 1992) against Khoo J's decision which appeal was also dismissed on 23 February 1993. On 13 July 1993 the plaintiffs filed this action.

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10. Prior thereto, on 13 October 1992, the defendants issued a bankruptcy notice against the second plaintiff in the Kuala Lumpur courts. He resisted the proceedings and on 11 November 1994 the second plaintiff's application to set aside the bankruptcy notice was allowed.

The pleadings 11. The statement of claim in its amended form alleged the following:

a. Makin entered into a margin account agreement (the margin account) with the defendants on 21 August 1984 which was guaranteed by the second plaintiff by a separate agreement of the same date. As the margin account was only to be valid for an initial period of three months up to a maximum of 12 months (namely 21 August 1985), it followed that the second plaintiff's liability was similarly limited. The margin account was not renewed after 21 August 1985;

b. the defendants commenced the suit against the plaintiffs relating to transactions which took place after 21 August 1985. Therefore Makin's alleged liability to the defendants was disputed and similarly the second plaintiff's liability to the defendants. The suit was eventually resolved by the settlement agreement after negotiations took place from November 1986 to July 1987 which negotiations were carried out on behalf of the defendants by their chief executive Ong Tjin An (Ong) and Lim, and on behalf of the plaintiffs by the second plaintiff;

c. on or before 29 July 1987 it was orally agreed that the defendants would not enforce the judgment against the plaintiffs and the plaintiffs would deposit shares/collateral in excess of $2m in value with the defendants; thus the parties' liabilities against one another would be satisfied;

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d. at the insistence of Ong that the settlement agreement was necessary for accounting and other purposes and, relying on his oral representation as aforesaid, the plaintiffs entered into the same;

e. under cl 3 of the settlement agreement, the defendants held certain shares of Makin either as collateral or awaiting collection, including shares in Promet Bhd (Promet shares). Clause 4(c) of the settlement agreement stipulated that the Promet shares would not be released/sold by the defendants for less than 0.50 per share;

f. the settlement agreement was intended to be set off against the total judgment sum. Apart from the collateral listed in cl 3 thereof, the defendants also unlawfully disposed of the second plaintiff's other collaterals (worth in excess of $7m) for only $3m (the collateral agreement);

g. the defendants by their director Lim then entered into the second agreement on 1 August 1987 admitting their liability;

h. the defendants breached the oral agreement and the settlement agreement by

(i) disposing of Makin's shares below the agreed price;

(ii) proceeding to register the judgment in Kuala Lumpur on 14 September 1991, and

(iii) failing to credit Makin's account with $767,481.99.

The plaintiffs prayed inter alia, for full accounts of the sale of shares held by the defendants as collateral, as well as for damages.

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12. In the defence, the defendants pleaded a. the price of 0.50 per share for Promet shares was inserted into cl 4(c) of the settlement agreement for the defendants' protection;

b. under cl 4(a) of the settlement agreement Makin had irrevocably appointed and authorised Lim in his sole discretion to sell the shares held by the defendants. Any disposal of Promet shares was done with the agreement of the second plaintiff who was Makin's director. Even if Makin's shares were not sold by Lim, the defendants could still dispose of them in the event there were monies owing by the plaintiffs to the defendants;

c. Lim was not a director of the defendants who had no knowledge of the second agreement allegedly entered into on 1 August 1987; if indeed there was such an agreement, it was surreptitiously entered into without the defendants' knowledge or consent and in any event does not bind the defendants;

d. the defendants' right to enforce the settlement agreement was upheld by the Court of Appeal and the matter is therefore res judicata between the parties;

e. pursuant to cl 6 of the settlement agreement, the defendants sent monthly statements of transactions done on Makin's account and quarterly statements of interest due to the defendants, to the plaintiffs' addresses as stated in the settlement agreement; neither plaintiff objected to such statements and they were therefore conclusively bound by each and every statement and are thereby estopped.

13. In the re-amended reply, the plaintiffs averred that Lim represented himself as a director of the defendants and, there was no proper res judicata because

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there had been no full hearing with arguments and subsequent judicial determination, of the issues between the parties.

The proceedings 14. When hearing commenced, counsel for the plaintiffs applied to adduce oral evidence from Ong Ka Tuan, a director of the defendants, as to the financial position of the defendants at the material time. He submitted that such evidence was highly relevant as, in 1986-87 the defendants were in severe financial difficulties and the plaintiffs entered into the agreements in question against that background with a view to assisting the defendants to obtain outside shareholders. It was unnecessary for me to make a ruling on the application as counsel for the defendants readily conceded that his clients were in financial difficulties at the material time. Accordingly I released Ong Ka Tuan as a witness.

15. Counsel for the plaintiffs had a second application -- he wanted leave to adduce oral evidence from the second plaintiff (not stated in his affidavit evidence in chief) relating to the alleged oral/collateral agreement on the mutual stand-off situation -- that the plaintiffs had agreed not to enforce their rights against the defendants for improper and unauthorised share trading on Makin's account and the defendants had agreed not to enforce the judgment. Against the strenuous objections of counsel for the defendants (who argued that allowing the application went against s 94 of the Evidence Act (Cap 97) in the face of the settlement agreement not to mention res judicata), I allowed the application but only to the extent that the plaintiffs could adduce evidence of the collateral agreement; they could not resurrect their previous arguments on the settlement agreement which I accepted were issue estopped (see Ong & Co Ltd v Makin Nominees Pte Ltd and Re Makin Nominees Pte Ltd < supra >).

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The plaintiffs' case 16. The second plaintiff was the only witness for the plaintiffs. He testified that apart from the trading account, Makin had been granted a temporary facility of $2m by the defendants in August 1984 (the facility), which was guaranteed by him. Makin executed the margin account agreement and a memorandum of deposit of shares while he executed a guarantee, on 21 August 1984. The second plaintiff contended that the facility and also his liability under the guarantee, did not extend beyond 21 August 1985 as the former was only valid for a maximum period of twelve (12) months. For that reason the plaintiffs disputed liability for the suit as it pertained to transactions after 21 August 1985.

17. During the Pan Electric crisis, the defendants sold part of Makin's shares at a loss and took away part of the second plaintiff's collateral. When he inquired of Lim the reason for the defendants' actions, he was told the defendants had to sell because they were in (financial) trouble. The second plaintiff wanted to recover his losses but if he took action, the defendants would fold up. Because of his friendship with Ong and his good relationship with the defendants, he agreed with Ong not to take action against the defendants. After all, as was pointed out to him by Ong, the defendants had previously extended to the second plaintiff a $100m facility to mount a takeover of a public company, so what were the plaintiffs' losses compared with the volume of business done between the parties?

18. On behalf of Makin, the second plaintiff therefore entered into negotiations with Ong and Lim (representing the defendants), which culminated in the signing of the settlement agreement, the purpose of which was to compromise all the disputes which had arisen between the parties. Notwithstanding the terms of the settlement agreement, the second plaintiff reiterated the plaintiffs' pleaded

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case -- that he understood and was assured by Ong before the execution of the document that

a. the defendants would not enforce the judgment against the plaintiffs, and b. the plaintiffs would make certain payments and deposit collateral/shares with the defendants

so that the parties' alleged liabilities against each other were satisfied. Ong had represented to the second plaintiff that the settlement agreement was required by the defendants merely for accounting purposes, to record the deposit of collateral by Makin and the agreed value ($2,151,800) thereof. He was also told that he need not worry about the instalment payments set out in the settlement agreement save that the second plaintiff had to pay the losses on his wife's account which he did. For that reason and until the defendants reneged on the oral agreement in July 1991 by taking steps to register the judgment in Kuala Lumpur, the defendants made no attempt to enforce the judgment against the plaintiffs in the years 1987 to 1990.

19. The defendants' wrongful acts are reflected in the second agreement wherein Lim admitted liability for disposing of the plaintiffs' collateral and agreed to credit Makin's account with the sum of $767,481.99 from the commission he would earn. Lim had traded personally on the plaintiffs' account without the second plaintiff's knowledge and it was Lim who worked out that $700,000 - $1,000,000 would be the commission he would earn and credit to Makin's account. Since the parties had agreed to a mutual stand-off, the payments to be credited by Lim to Makin's account did not concern the second plaintiff.

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20. The defendants also breached the oral agreement by failing to give credit to Makin for the value of the shares the company had deposited with the defendants under the settlement agreement or the amount of $767,481.99 stated in the second agreement. In the alternative the defendants breached the settlement agreement by disposing of the plaintiffs' shares/collateral at an undervalue which loss the second plaintiff was unable to particularise as the defendants had not given full discovery.

21. As for the memorandum (signed by Melvyn Mak) of a meeting between himself and the defendants purportedly held on 18 December 1987 (see 1AB455), the second plaintiff could not recall attending such a meeting. Indeed his passport entries (see exh P1) showed he was not in Singapore that day as he returned to Malaysia from London on 15 December 1987 and he did not leave Malaysia again until 15 January 1988 when he went to Hong Kong. He doubted that the meeting took place in Kuala Lumpur.

22. The second plaintiff was not aware of the letter of undertaking executed by Lim in favour of the defendants until these proceedings but in any event, it did not concern him/Makin.

23. After the defendants breached the oral agreement by initiating steps to enforce the judgment, the second plaintiff tried to make an appointment with Ong through his solicitors but Ong refused to see him.

24. Under cross-examination, the second plaintiff clarified that it was Lim who informed him verbally before the execution of the document, that the defendants would not enforce their rights under the settlement agreement, they would not take any action against the plaintiffs.

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25. Counsel for the defendants drew to the second plaintiff's attention the exchange of correspondence between the parties' solicitors after the execution of the settlement agreement. It showed that the defendants pressed for payment and ultimately by the plaintiffs' solicitors' letter dated 2 September 1987 (see 1AB898) the second plaintiff forwarded his cheque for M$195,000 to pay the defendants' statement of account for S$164,885.68. That statement of account was rendered under cl 6 of the settlement agreement relating to further quarterly interest charged to and payable on, Makin's account.

26. When shown his aforesaid payment, the second plaintiff said he could not recall making it and it could be that his wife had paid. Counsel then drew the second plaintiff's attention to a fax from the defendants' solicitors to the plaintiffs' solicitors dated 4 September 1987 (see 1AB902) which stated

We are instructed that since your clients' cheque is a Malaysian cheque in excess of M$10,000, a foreign exchange form signed by the drawer of the cheque Dato Mak Kok must be signed and handed to our clients.

The second plaintiff claimed he had not seen the fax previously. He was also not sure whether he had seen his solicitors' fax dated 4 September 1987 (see 1AB903) to the defendants' solicitors advising that

our (sic) clients....have already signed a foreign exchange form which has been handed to his bank as he left the matter to his secretary to handle. Furthermore, at that time he and his wife were on the verge of separating (they have since divorced) and she was anxious to get out of any involvement. As she was a director of Makin it could be that she had given instructions to his lawyers.

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27. Similarly the second plaintiff was unsure about the letter of undertaking which one Dato Seri Abdullah Mohamed (Dato Mohamed) gave to the defendants regarding the furnishing of collateral of 2 million shares in Global Equities Berhad on behalf of Makin and the second plaintiff. Dato Mohamed was a friend and client of Lim and it could be that Lim had approached Dato Mohamed for the letter of undertaking.

28. The second plaintiff was also not sure whether his solicitors raised any objections when the defendants' solicitors (in November 1987) gave notice

that our clients will exercise their rights in such manner and at such time as they think fit without any further reference to any person (see 1AB915).

The second plaintiff agreed however that in the affidavit he filed for a stay of execution on the judgment, he made no mention of the oral collateral agreement.

29. I need only deal briefly with two other aspects of the second plaintiff's testimony before I go on to review the defendants' evidence. The first concerned the monthly and quarterly statements of account sent to 27 Balmoral Rd #18-29 by the defendants. The second plaintiff confirmed that the address was the residence of his wife between 1987-90. He visited her 1- 2 times a month but sometimes he stayed in hotels when he came to Singapore as by then the couple had their differences. Counsel drew to the second plaintiff's attention the defendants' solicitors' letter dated 26 August 1987 (1AB896) where they alerted the plaintiffs' solicitors to the fact that a statement of account sent to Makin's address was returned by the postal authorities and, asked for Makin's correct address failing which the defendants would continue to send statements to the former address; there was no reply. The second plaintiff could not recall who

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changed Makin's registered address or when it was done. In any case he was not bothered about the defendants' statements of account (which he acknowledged were received) as his main concern was the Promet shares.

30. The second plaintiff confirmed that Lim was given permission to dispose of the shares and the proceeds would be credited to Makin's account. He agreed that if the shares deposited were meant to be in full and final settlement of the defendants' claim, then the fate of the shares lay with the defendants including whether and at what price, they should be sold. Although this included the Promet shares he said he had indicated to the defendants he wanted to purchase the 2.7m Promet shares they held (to add to the $100m shares he had agreed to buy from Brian Chang the controlling shareholder). He asserted it was part of the oral agreement that he would be given first priority to buy these shares, at 0.50 each before the defendants disposed of them. He agreed there was no mention of this right of first refusal in his affidavit evidence in chief, due to his oversight. Neither did he inform the defendants after the settlement agreement was signed, that he wanted to purchase the Promet shares. Lim had told the second plaintiff that he (Lim) did not sell the Promet shares.

31. As for the plaintiffs' allegation that Lim was a director of the defendants, the second plaintiff clarified he was told that by Lim; he now accepted it was not true. However, when he entered into the second agreement, he believed what Lim told him and did not verify the information with the defendants.

The defendants' case 32. I start with the testimony of Melvyn Mak Siak Hong (Mak), who was the defendants' credit manager at the material time. He confirmed that he attended and prepared a memorandum thereafter, of the meeting between Lim, the second plaintiff and Tan Khee Huat on 18 December

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1987. Although he could not recall whether the meeting took place in Singapore or in Kuala Lumpur, Mak said he had visited the second plaintiff at his residence/office in Kuala Lumpur in those days.

33. When cross-examined, Mak said he was unaware the second plaintiff was a personal friend of Ong as negotiations with the second plaintiff were done mainly by him, debt collection being his responsibility. He explained there was a 4 year delay in enforcing the judgment because of such negotiations.

34. When re-examined, Mak confirmed that there was a follow-up to the 18 December 1987 meeting by another meeting with the second plaintiff on 4 January 1988 as reflected in his memorandum dated 5 January 1988 (see 1AB461).

35. The defendants' second and last witness was Tan Khee Huat (Tan) who was their general manager; he left their services in February 1990. Tan said he alone represented the defendants in negotiations with the second plaintiff up to the signing of the settlement agreement and he never agreed with the second plaintiff not to enforce the settlement agreement. The collateral oral agreement alleged by the second plaintiff would also be contrary to cl 10 of the settlement agreement which states:

If any of the moneys due and payable to the company under cl 1(a) or 1(b) or 1(c) herein is not paid within 14 days after the due date as provided herein or the collateral referred to in cl 2(a) herein is not provided in accordance with cl 2(a) or if Makin's and DMK's {the second plaintiff's > share of stamp duty is not paid as provided herein, then

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A. if the judgment has not been set aside at the time of default, then, (a) the company < the defendants > shall be at liberty to enforce the judgment for a sum equivalent to the total of the following:-

(i) so much of the principal sum as is unpaid; and (ii) any unpaid share of stamp duty, and (iii) costs and interest as has been granted under the judgment and further interest under the Rules of the Supreme Court 1970, and

(b) Makin and DMK shall not appeal against the judgment or apply for an injunction against execution thereof, and the judgment shall not merge into this agreement, and

B if the judgment has been set aside at the time of default, Makin and DMK shall immediately be due and liable to pay without demand:

(a) so much of the principal sum as is unpaid at the time of default, and (b) any unpaid share of stamp duty, and (c) interest on para B(a) and (b) above at 9% per annum from the date of default to date of payment, and

(d) solicitor and client costs of the company in pursuing its claim hereunder under the said suit and/or under any other suit or action or proceedings and no objection shall be taken by Makin and DMK to the existence of more than one suit or action or proceeding against them or either of them; provided always and without prejudice to the company's claim to party and party costs, the company shall be entitled to solicitor and client costs for one suit only.

C. In addition to cl 10A and 10B, and irrespective of whether the judgment has been set aside or not at the time of default, the company may from time to time immediately after default, sell or dispose of so much of the said shares or of the

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shares provided under cl 1(a) or 2(a) herein as are still in the company's possession or control as the company thinks fit and to apply any monies received by the company towards payment of the monies owing to the company.

36. With regard to the Promet shares, Tan explained that he was instrumental for the insertion of the price of 0.50 per share in cl 4(c); he wanted to protect the defendants as he was concerned that the plaintiffs may want the defendants to release the shares for less than 0.50 a unit, to the defendants' detriment. There was then still a risk that the plaintiffs would not perform their obligations under the settlement agreement. The plaintiffs could in any event have obtained the release of those shares by:

a. paying monies to the defendants b. asking Lim to sell the same on the 'grey' market (Promet was suspended from trading between late 1986 and 1987) but they did not.

37. The memorandum of 18 December 1987 clearly stated under the heading Makin Nominees: DMK < the second plaintiff > has instructed LSK < Lim > to liquidate all share scrips including Promet, as soon as possible. To the best of his recollection, the paragraph correctly reflected what the second plaintiff did. At that time the second plaintiff was already in default of his obligations under cl 2(a) of the settlement agreement (in failing to provide by 14 September 1987 satisfactory collateral to the value of $4,342,871.83). So Tan decided he would not object when the second plaintiff instructed that all shares including Promet should be sold. Accordingly the shares were sold by Lim who gave written confirmation to the second plaintiff from time to time of the sales and the prices transacted. In any case under cl 4(a) of the settlement agreement, Lim was irrevocably appointed by Makin to sell the shares at Lim's sole discretion.

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38. Cross-examined, Tan said he was not aware that Makin bought the Promet shares with a view to a take-over nor did he know about the second plaintiff's alleged agreement with Brian Chang.

39. As for the second agreement, Tan reiterated Mak's evidence that Lim was not in 1987 and was never, a director or employee of the defendants. As a remisier, Lim could not represent the defendants and could not bind them to the second agreement. However Lim attended most if not all of the meetings between the second plaintiff and Tan in the presence of the parties' legal counsel because it was in Lim's interests that the second plaintiff paid up; otherwise Lim would have to do so pursuant to his letter of undertaking to the defendants.

40. Questioned by counsel for the plaintiffs, Tan said he did not know of the existence of and did not see, the second agreement, until recently. Neither was he aware of the second plaintiff's oral agreement with Ong that there would be no enforcement proceedings. Contrary to the second plaintiff's claim, Tan said the relationship between the former and Ong was bad and they were not personal friends.

41. Tan dismissed the plaintiffs' suggestion (in counsel's opening remarks) that the defendants were in such dire financial straits at the material time as to require a 'lifeboat fund' of $100m from bankers. Tan explained that the local banks (4) made available to the SES and to its members, a line of credit for $180m but the defendants never utilised the facility. The defendants owed substantial sums to their bankers because debtors owed the defendants $200m. In 1986 the defendants were under time constraints to comply with the (new) Securities Industry Act in consequence of which they underwent three (3) restructuring exercises between April 1986 and October 1989 which resulted in the total

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discharge of their debts to their bankers. Tan said the defendants' debts had no relevance to the settlement agreement and the litigation between the parties did not jeopardise the defendants' restructuring exercise or the admission of 2 new (bank) shareholders. It was his decision to settle with the plaintiffs rather than engage in prolonged litigation as he thought the second plaintiff could pay the defendants in the long run if given time. As things turned out, the second plaintiff did not.

42. Tan explained that the defendants liquidated Makin's positions pursuant to their rights, as spelt out in the bye-laws of the SES (and did not need Makin's permission to do so), when Makin failed to pay for its purchases within the time limit stipulated and failed to voluntarily liquidate its outstanding positions.

The decision 43. I shall not refer to the closing submissions of counsel but I shall make reference to their arguments where appropriate, in setting out my reasons for finding in the defendants' favour.

44. I begin with why I did not believe the second plaintiff's testimony that there was an agreement to have a mutual stand off vis a vis the judgment and or the settlement agreement; quite simply it went against the undisputed evidence before the court.

Counsel for the defendants had taken the second plaintiff through the series of letters/faxes exchanged between the parties' solicitors subsequent to 29 July 1987 which showed there was initial compliance by the second plaintiff with the settlement agreement in that he paid the first instalment of interest on the principal debt, pursuant to cl 1(c) thereof. It clearly contradicted the plaintiffs' assertion that no compliance was expected of them. It was also difficult to

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believe the second plaintiff's lame excuse that his wife could well have made the payment without his knowledge as, the fax of his solicitors dated 4 September 1987 confirmed that he issued the cheque and signed the necessary foreign exchange form as well. The second plaintiff's poor recollection of various other correspondence is also not convincing. Far more significant, as counsel for the defendants drew to my attention, in the various affidavits the second plaintiff filed on his own and on Makin's behalf for a stay of execution on the judgment and to resist the Kuala Lumpur proceedings to register the judgment and make him a bankrupt, the second plaintiff made no mention of the alleged oral agreement, even disregarding the parol evidence rule and s 94 of the Evidence Act.

45. Although the second plaintiff attempted to show by his passport entries (P1) that he could not have attended a meeting with the defendants' representatives in Singapore on 18 December 1987, that did not mean that the meeting could not have taken place in Kuala Lumpur or, for that matter in Singapore, there being no conclusive evidence that the second plaintiff did not travel on a restricted passport. In any event I prefer the testimony of the defendants' witnesses in this regard. The contents of the memorandum dated 18 December 1987 coupled with the subsequent memorandum (dated 5 January 1987) of a follow-up meeting on 4 January 1988 suggests that the second plaintiff did meet with the defendants' management on both dates to explain why he had failed to comply with the terms of the settlement agreement. I note from 1AB454 that after the second plaintiff instructed Lim to liquidate all shares including Promet on 18 December 1988, that on that very day Lim commenced selling Promet shares, at M$0.412 a share. Moreover, at the second meeting in January 1988, the second plaintiff indicated he would hand over more shares to Lim to sell and the sale proceeds would be utilised to pay some of the outstanding interest on

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Makin's account. The second plaintiff's conduct was consistent with attempts to comply with the settlement agreement, not vice versa.

46. Another significant feature of the 18 December 1987 meeting was the second plaintiff's reference to shares in Global Equity which company the second plaintiff was apparently trying to take over control. Shares in Global Equity were the same collateral offered by Dato Mohamed to the defendants on the plaintiffs' behalf; I find it all too much of a coincidence.

47. Other aspects of the evidence which contradicted the plaintiffs' stated case were as follows:

a. cl 4(a) of the settlement agreement irrevocably appointed Lim to sell the plaintiffs' shares. Moreover, Lim whenever he sold the shares, wrote to inform the second plaintiff in his personal capacity, not as a representative of the defendants. There was no disagreement or protest from the second plaintiff whatsoever. How then could the plaintiffs complain that the defendants sold without their permission especially the Promet shares? That complaint is also unfounded since the defendants had every right to dispose of the shares as they deemed fit, under the bye- laws of the SES, once Makin defaulted in payment or failed to voluntarily liquidate the shares;

b. logically, the price of 0.50 per share inserted into cl 4(c) of the settlement agreement was to protect the defendants not the plaintiffs. In this regard I prefer the version of Tan to the second plaintiff's, as to why the price was set;

c. Lim was never an employee/director of the defendants as the second plaintiff admitted. How then could his signature to the second agreement bind the defendants, especially when the document (not even prepared by the defendants'

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solicitors) was executed without their knowledge? It is trite law that any representation made to the second plaintiff so as to bind the defendants must have been made by the defendants' servant or agent; Lim was neither, if indeed he did inform the second plaintiff he would be made a director of the defendants. If Lim did make the representation, it is surprising that the second plaintiff, a seasoned businessman and corporate player, did not verify such information with the defendants. Further, why did the second plaintiff wait until 1993 to institute this suit, instead of commencing it soon after July 1991 when, according to him, the defendants reneged on the oral agreement by taking steps to enforce the judgment? I note from the correspondence (see 1AB939) that the defendants' solicitors had, as far back as 5 July 1990, informed the plaintiffs' solicitors that

until our client is fully paid in accordance with the agreement, our client reserves ...THe right to take such steps as it thinks fit without warning to you or to your clients notwithstanding negotiations or discussions, if any, between our respective clients or any proposal as to how your clients intend to rectify the default or defaults...

There was no reaction whatsoever from the plaintiffs or from their solicitors, let alone any protests which one would have expected, if indeed a stand off situation was the mutual understanding;

d. counsel for the plaintiffs had urged me to draw an adverse inference against the defendants under s 116(g) of the Evidence Act for their failure to call Ong to testify. He contended that the defendants' omission meant that the second plaintiff's testimony of his close relationship/friendship with Ong was not rebutted; with respect, I disagree. Throughout the proceedings, counsel for the

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defendants made it clear that the defendants had no case to answer on this allegation because it was never pleaded in the statement of claim nor stated in the second plaintiff's affidavit evidence in chief; the principle in Browne v Dunn (1894) 6 R 57 therefore does not apply. In any case the allegation was rebutted by Tan who, I believe spoke the truth, being no longer in the defendants' employment. Although Tan's sister is married to Ong's younger brother, I do not think the marriage ties between them coloured Tan's evidence in any way. I further note that Ong was absent from the December 1987 and January 1988 meetings. This would not be the case if indeed he was the defendants' representative for negotiations with and was a good friend of, the second plaintiff as alleged.

48. I had at the beginning of my judgment, made passing reference to the second plaintiff's unsuccessful attempt to oppose the winding up of Makin by the defendants in Re Makin Nominees Pte Ltd (supra). I shall now refer to some parts of the decision which are particularly relevant to this suit. Leading counsel for the plaintiffs had there applied to Lim JC (p 432F) for an order that oral evidence be taken as to the issue whether or not there was a collateral oral contract between the defendants and Makin whereby the defendants agreed not to proceed against Makin after signing the settlement agreement. The court held that the terms of the contract between Makin, the second plaintiff and the defendants having been reduced into writing under s 93 of the Evidence Act, s 94 thereof precluded any oral agreement being introduced to contradict/vary the terms of the settlement agreement.

49. Counsel for Makin then gave a third version of the oral agreement sought to be proved (at p 437A). He said under the oral collateral agreement there was accord and satisfaction -- the shares already held by the defendants were to be

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appropriated by them to the oral collateral agreement after which the judgment debt was extinguished. The second plaintiff repeated this version in my court. I need only quote from Lim JC's judgment (at p 437D) as to why I too dismissed this version of the oral collateral agreement:

.... There was nothing further to be done by the company < Makin > or Mak Kok if there was this collateral oral agreement. There are serious obstacles in the way of proving this collateral oral agreement. Clause 2(a) of the settlement agreement provides:

< Mak Kok > shall provide by 14 September 1987 to the < petitioner > collateral of such kind and nature that is satisfactory and acceptable to the < petitioner > (quoted and traded shares on the Stock Exchange of Singapore and/or Kuala Lumpur Stock Exchange shall be deemed to be satisfactory and acceptable collateral) so that the total value of the shares provided as collateral is not less than $4,342,871.83 being the difference between the total indebtedness ($6,494,351.83) and the value of the shares ($2,151,480) as stated in cl 3(b) herein.

The collateral oral agreement as now described by Mr Roy will if proved contradict cll 1 and 2(a) of the settlement agreement and by virtue of s 94 of the Evidence Act no evidence of the collateral oral agreement may be admitted. The collateral oral agreement would have been a complete answer to the petitioner's case on the company's appeal against the refusal of a stay of execution on the judgment. It would have been open to the company to rely on it at the time of the hearing of the appeal. Indeed before the court in that case it was common ground that the company and Mak Kok were in default under the settlement agreement and it was contended that cl 10A(b) of the settlement agreement was

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void as against public policy as it purports to oust the jurisdiction of the court. If the settlement agreement was not to be enforced then neither the company nor Mak Kok could ever have been in default and cl 10A(b) could not be enforced. In the result cl 10A(b) was enforced against the company and Mak Kok.

In the course of counsel's submissions I asked if the matter was not res judicata.....

I have not had the advantage of counsel's submissions on this and it is in the view I have taken unnecessary for me to come to any decision on it although I would have thought that there can be no doubt about it.

The collateral oral agreement in the second version (by which the petitioner agreed not to petition for the company to be wound up) is substantially different from that relied on in the affidavit of Mak Kok filed on 8 February 1994. Even at as late a stage of the proceedings as the hearing of this petition Mr Roy from the firm instructing leading counsel for the company contradicted him on the version of the collateral oral agreement in respect of which he was making an application for directions.....

50. Although Lim JC made reference to this suit in his judgment (at pp 439-441) and expressed reservations on the bona fides of Makin's claim or that it is based on any reasonable let alone substantial grounds, I would stress that I was not at all influenced by his comments. My purpose in setting out the above extracts from Lim JC's judgment (in which he made reference to Khoo J's decision in Ong & Co Ltd v Makin Nonimees Pte Ltd) is to show the unrelenting albeit fruitless attempts made by the second plaintiff to prevent the defendants

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from bringing the suit to its finality against him, by his new allegation of the oral collateral agreement.

51. As I found neither merit nor truth in the second plaintiff's contention that there was such an oral collateral agreement, which terms also contradicted those of the settlement agreement and were therefore inadmissible under s 94 of the Evidence Act, I had no hesitation in dismissing the plaintiffs' claim.

Lai Siu Chiu Judge 27 January 1997.

Lai Siu Chiu J

Richard Edward Buxton (Hilborne & Co) for the plaintiffs
Woo Bih Li & Lye Kah Cheong (Bih Li & Lee) for the defendants

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