SCT Technologies Pte Ltd *v* Western Copper Co Ltd
[2015] SGCA 71

Case Number	: Civil Appeal No 74 of 2015
Decision Date	: 05 January 2016
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Josephine Chong Siew Nyuk (Josephine Chong LLC) and Kelvin Lee Ming Hui (WNLEX LLC) for the appellant; Ng Hweelon and Ibsen Low (Veritas Law Corporation) for the respondent.
Parties	: SCT TECHNOLOGIES PTE LTD — WESTERN COPPER CO LTD

Evidence —Proof of evidence – Onus of proof

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2015] SGHC 135.]

5 January 2016 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 The Appellant commenced these proceedings to recover a fixed sum of money on three partially unpaid invoices. The Respondent's defence is that it had already paid the sum claimed in full. To this end, the Respondent furnished bank statements recording that it had made certain payments to the Appellant. However, the bank statements neither contemporaneously record the purpose for which the payments were made nor do they record payments that tallied exactly with the sums claimed on each of the three invoices. For its part, the Appellant does not deny that it received the payments as reflected in the bank statements. What it contends is that those payments were made by the Respondent in order to discharge debts *other than* those owing on the three invoices. However, like the Respondent, the Appellant did not adduce any documents which contemporaneously record the (other) purposes to which the payments were applied.

2 It is clear that the cases advanced by both parties are beset by evidential shortcomings, particularly where proving the purpose of the undisputed payments is concerned. This was also observed by the trial judge ("the Judge") in his written grounds of decision as follows (see *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2015] SGHC 135 ("the GD") at [18]):

> There was no dispute that the [Appellant] received money from the [Respondent], but unfortunately there was nothing in evidence that contemporaneously recorded the purpose of each payment. I would have thought that either at the point of payment, or in the receipt given at or after payment, there would have been some statement or remark capturing at least what either the [Appellant] or [Respondent] thought the payment was for, in terms of the purpose of the payment, or the invoice or order to which the payment related. Unfortunately, this was not so. …

3 In these circumstances, the allocation of the burden of proving the purpose of the payments is thrown into sharp relief. Is it for the Respondent to prove that the payments were meant to discharge

the debts on the three invoices? Or is it for the Appellant to prove that the payments were for discharging the other alleged debts? The Judge held that the burden was on the Appellant and, unsurprisingly, given the state of the evidence before him, he also found that this burden had not been discharged on a balance of probabilities. The Appellant's claim was thus dismissed and it now appeals against the Judge's decision.

Background

4 The Appellant is a Singapore incorporated company. It is in the business of manufacturing and distributing printed circuit board testing equipment. [note: 1] Its witnesses in the trial below included its sole director, [note: 2] Mr Terence Tea ("Mr Tea"), and its manager, Ms Aileen Sim ("Ms Sim"), who is, incidentally, also the wife of Mr Tea. The Respondent is a Taiwanese company. It is involved in the business of manufacturing and distributing copper balls. [note: 3] The only witness to appear for it at trial was its General Manager, Mr Chang Te-Lung ("Mr Chang").

5 The three invoices which formed the basis of the Appellant's claim in these proceedings were issued by the Appellant to the Respondent between November 2007 and January 2008. During this period, the parties were related through a company known as Advance SCT Ltd ("Advance SCT"). Essentially, Advance SCT held shares in both the Appellant and the Respondent. While the former was a subsidiary of Advance SCT, the latter, strictly speaking, was not so because Advance SCT never owned more than half of its shares. [note: 4] The parties' relationship through Advance SCT came to an end after October 2009 when the Appellant ceased to be a subsidiary of Advance SCT. [note: 5] As for the Respondent, it continues to be substantially owned by Advance SCT. [note: 6]

6 The fact that the parties were commercially related entities during the material period between 2007 and 2008 is particularly relevant for understanding how the three material invoices arose. During this time, the parties were jointly involved in trading in copper balls to be used in the manufacture of printed circuit boards. Essentially, they sat at different points in a transactional chain. Mr Tea, who was the Chief Executive Officer of Advance SCT between 2009 and 2011, [note: 7] gave evidence that a particular transaction for a consignment of copper balls would typically proceed along the following sequence: [note: 8]

(a) first, the Respondent (as a manufacturer and distributor of copper balls) would receive orders from the makers of printed circuit boards located mainly in Taiwan and China;

(b) next, the Respondent would forward the purchase orders to the Appellant;

(c) on the Respondent's instructions, the Appellant would then forward the purchase orders to copper ball manufacturers in China and make payment to those manufacturers;

(d) upon payment being made by the Appellant, the Chinese manufacturers would then deliver the copper balls directly to the end-consumers, namely, the Respondent's customers who had originally placed the orders with the Respondent;

(e) the Respondent's customers would then make payment to the Respondent upon receipt of the copper balls; and

(f) finally, the Respondent would pay the Appellant for the copper balls which the Appellant had purchased from the Chinese manufacturers (see step (c) above) – we pause to mention that

the Appellant would have sent invoices to the Respondent (such as the three material invoices) for these sums although it is not clear from Mr Tea's account as to the point in time when this happened in the course of an entire transaction.

7 In essence, the commercial arrangement between the parties was such that the Appellant would purchase copper balls from third party manufacturers to meet the orders of the Respondent's customers and then follow this up by issuing invoices to the Respondent seeking payment for the goods ordered. In these proceedings, the Appellant claims that three of the invoices which it had issued pursuant to the above commercial arrangement remain unpaid. The sums on these three invoices come up to a total of US$1,597,084.46. After accounting for certain undisputed partial payments which the Respondent had made in respect of each of these invoices, the outstanding sum still due from the Respondent to the Appellant is US$1,274,741.73. A breakdown of how this claim is arrived at is set out below at [9].

8 The Appellant commenced the present action in August 2013, more than five years after the last of the three invoices was issued in January 2008. According to the Respondent, the Appellant decided to commence these proceedings only then because the Appellant's director, Mr Tea, was the losing party in a previous action brought by the Respondent's witness, Mr Chang, to recover a personal debt owed by the former. On the other hand, the Appellant claimed that there was no vindictive motive behind the action; the delay was merely the result of it trying to resolve the matter amicably and the difficulty the Appellant had in obtaining information from the Respondent (given that the Appellant had ceased to be related to Advance SCT in 2009 whereas the Respondent remained related to Advance SCT). The Judge found that there was little to substantiate the Respondent's assertion of an improper motive on the part of the Appellant in pursuing this claim (see the GD at [43]). In any event, we do not consider the subjective motives of the Appellant to be relevant to the dispute at hand which falls to be resolved based on the objective evidence.

The pleadings

9 The Appellant filed its Statement of Claim on 21 August 2013. [note: 9] It asserted that the Respondent owed it the sum of US$1,274,741.73, being the price of the copper balls supplied by the Appellant to the Respondent's customers at the Respondent's request, less the partial payments which the Appellant admitted had been paid. The Appellant set out the particulars of its claim as follows:

Invoice number	Date of invoice	Invoice amount	Partial payment
I-27678	14 November 2007	US$336,200.83	US$80,221.69 (made on 27 December 2007)
I-27712	20 November 2007	US$646,212.06	US$22,191.20 (made on 4 April 2008)
I-28172	30 January 2008	US$614,671.57	US$219,929.84 (made on 10 May 2008)
Sub-total		US$1,597,084.46	US$322,342.73
Total claim amount		**US$1,274,741.73**	

10 The Respondent filed its Defence on 13 September 2013. [note: 10] The heart of its plea is to be found at para 3 therein where it denies the Appellant's claim and pleads that all three invoices had been paid in full. That paragraph reads as follows:

> The [Respondents] deny Paragraph 3 of the [Appellants'] claim and avers that all the transactions as stated were paid by the [Respondents] in full and that the [Respondents] do not owe the [Appellants] any of the said invoices as alleged …

In the same paragraph, the Respondent went on to particularise how the invoices had been paid in full through several tranches of payments between December 2007 and May 2008, as follows:

Invoice number	**Date of payment**	**Amount paid**	
I-27678	26 December 2007	US$80,221.69	US$336,200.83
	1 February 2008	US$180,000	
	12 February 2008	US$75,979.14	
I-27712	11 January 2008	US$222,191.20	US$646,212.06
	12 February 2008	US$424,020.86	
I-28172	7 March 2008	US$200,000	US$614,671.57
	3 April 2008	US$309,047.91	
	8 May 2008	US$105,623.66	

11 The Appellant's Reply was filed on 20 November 2013. [note: 11] The Appellant did not deny receiving the sums particularised in the Respondent's Defence but what it did dispute was the precise *purpose* for which those payments were made. In this connection, the Appellant averred that the undisputed payments had, in the main, been made by the Respondent to pay off debts which it owed to another company known as Seah Metal Industries Pte Ltd ("Seah Metal"). The Appellant went on to explain in the Reply that such a state of affairs existed because, when the Respondent intended to make payment to Seah Metal, it would do so through the Appellant who in turn collected the same on behalf of Seah Metal.

The decision below

12 The Judge began by observing that the "only real legal issue" (see the GD at [7]) arising from the parties' conflicting positions concerned the allocation of the burden of proof: on whom did the burden rest to prove the purpose of the payments which the Respondent had undisputedly paid to the Appellant? On this crucial issue, the Judge held that the burden was on the Appellant. He gave two reasons. First, on a proper construction of the parties' pleadings, it was clear that the Appellant had not denied receiving payments from the Respondent but, instead, positively averred that the actual purpose of those payments was for something other than discharging the outstanding sums on the invoices; accordingly, the burden was with the Appellant to make good its assertion (see the GD at [14] and [16]). Secondly, the Judge also considered this outcome to be justified by the fact that the Appellant was better placed to adduce the evidence required to prove its assertion; in particular, he said that it would be "overly onerous" on the Respondent if it had to prove how the payments were allocated after they had reached the hands of the Appellant (see the GD at [15] and [17]).

13 Having thus allocated the burden of proof, the Judge went on to examine the evidence. In doing so, he found that the Appellant had not satisfactorily discharged its burden of proof on a balance of probabilities. Not only did the Appellant not adduce any documentary evidence which contemporaneously recorded the purpose for which the Respondent's payments were made, the testimony of its two main witnesses was also found to be wanting. On the one hand, Mr Tea conceded that he had no personal knowledge of the details of the transactions between the parties (see the GD at [19]) while, on the other hand, Ms Sim primarily sought to rely on what were "at best simply entries in the [Appellant's] own books" to prove the Seah Metal transactions (see the GD at [21]). Accordingly, the Appellant's claim was dismissed.

The present appeal

14 The issues in the present appeal are the same as those which were dealt with by the Judge below, namely:

(a) who bears the burden of proving the purpose of the payments made by the Respondent; and

(b) has that party discharged the burden on a balance of probabilities?

15 We deal with each of these issues in turn.

Who bears the burden of proving the purpose of the payments?

16 The concept of burden of proof may be spoken of in two distinct senses which, to avoid any confusion in the analysis which follows, we would clarify from the outset.

17 First, the concept may be used in the context of referring to the *legal* burden of proof, which is "properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists" (see *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR 855 ("*Britestone*") at [58]). Central to determining where the burden lies in a civil suit is the state of the parties' pleadings. It is in the pleadings that one finds the material facts that each party asserts to establish its claim or defence (as the case may be) and, as is trite law, he who asserts must prove – this is a rule which is consistent with the general principle underlying ss 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) (see the decision of this court in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]). Once it is established who bears the legal burden of proof, it will remain fixed on the party who bears it throughout the course of the trial, never shifting regardless of the evidence that is led.

18 This leads us to the second sense in which the concept of burden of proof is commonly used, which is in the *evidential* sense. Essentially, the evidential burden of proof refers to "the need of the party to adduce evidence to discharge his legal burden (or the need of the opposing party to adduce evidence to prevent the proving party from discharging his legal burden)" (see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ("*Evidence and the Litigation Process*") at para 12.007). From this description alone, it is clear that, unlike the legal burden of proof, the evidential burden can shift from one party to the other depending on the evidence which is adduced at trial by either side. Therefore, it has been said that the evidential burden is not so much a burden of proof as it is "a tactical initiative which must be taken by a party if he is to succeed" (see *Evidence and the Litigation Process* at para 12.007, citing *Britestone* at [59]).

19 The practical operation of the above principles in the context of a trial were helpfully summarised by this court in *Britestone* at [60] as follows:

> To contextualise the above principles, at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of adducing some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the plaintiff that the legal burden is also discharged and making a finding on the fact against the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of that relevant fact would have been discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. …

20 At *this* stage of the present inquiry, the focus is purely on the *legal* burden of proof. It must first be determined, as a question of law, where this burden lies for proving the purpose of the Respondent's payments before it becomes appropriate to descend into the facts to see whether that party has successfully adduced sufficient evidence to shift the *evidential* burden on this issue onto the opposing party and so forth.

21 The first port of call for determining the incidence of the legal burden of proof is, as earlier explained, the pleadings. We have, for this reason, fleshed out the pleadings in some detail at [9]–[11] above. The Judge also adopted the approach of starting with the pleadings but, with respect, we disagree with his overall construction of them. In our view, the pleadings place the legal burden of proving the precise purpose of the payments made by the Respondent squarely on *the Respondent* itself. Let us elaborate.

22 We begin by looking at the Statement of Claim. What is clear from the Statement of Claim is that the claim which the Appellant has brought is in the nature of an action for a fixed debt (US$1,274,741.73) that arose out of the three specific invoices particularised therein. We then look at the Defence. The Defence does not make a bare denial of the debt claimed on the three invoices. The Respondent does not, for example, disclaim knowledge of these invoices or the underlying transactions which they purportedly relate to. Instead, the Respondent pleads at para 3 of the Defence that it had paid the invoices in full. Properly understood, the Defence *impliedly acknowledges* the existence of the debt on the three invoices, but meets the Appellant's claim with the *positive assertion* that this debt was fully paid in the various tranches as particularised.

23 We pause at this point in our discussion of the pleadings before taking into consideration the Appellant's Reply. Based on the Statement of Claim and the Defence, we find it clear that the legal burden of proving that the payments were made with the specific purpose of discharging the debt on the three invoices lies on the Respondent. As explained above, the Respondent's position in para 3 of the Defence is that it admits the existence of the amounts due to the Appellant on the three invoices but seeks to avoid liability through the positive allegation of payment. Seen in this light, "the [Respondent] is doing more than simply denying the [Appellant's] case; [it] is raising additional facts with a view to undermining the claim" (see Jeffrey Pinsler, *Singapore Court Practice 2014* vol 1 (LexisNexis, 2014) ("*Singapore Court Practice*") at para 18/8/14). This is often referred to as a "confession and avoidance" plea in the sense that the defendant expressly or impliedly "confesses" the truth of what is alleged against him (*ie*, the existence of the debt in this case) but proceeds immediately to "avoid" the effect of such an allegation (such as by positively asserting that payment was made as is the case here). Importantly, pleading the defence in this way has obvious implications

in so far as the burden of proof is concerned. In particular, it will be for *the defendant* to prove the facts on which he relies to avoid liability (see *Singapore Court Practice* at para 18/8/14). A clear statement to this effect can be found in the specialist text on the law on pleadings by Sir Jack Jacob and Iain S Goldrein as follows (see *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at p 134):

> **Material facts and burden of proof**
>
> The defendant must plead all the material facts relied on as constituting an "avoidance" of what he otherwise confesses or admits to. The burden of proof is upon him to prove those facts. …

24 This reasoning is consistent with the well-established principle in the case law that, in an action for a debt that is defended on the basis that payment has been made, the onus of proving such payment lies on the defendant. This may be illustrated by the decision of the High Court of Australia in *Young v Queensland Trustees Limited* [1956] 99 CLR 560 ("*Young*") which is often cited for this proposition (see, in this regard, J W Carter, *Contract Law in Australia* (LexisNexis Butterworths, 6th Ed, 2013) at para 37-01). In *Young*, the executor of the deceased's will sought to recover a fixed sum of money from the defendant. This sum comprised several loans which were made by the deceased to the defendant in the course of her lifetime. By his defence, the defendant admitted to each of the loans but claimed that he had repaid the deceased in respect of each and every one of them during her lifetime. The first instance judge found in favour of the executor on the evidence and, on appeal, one of the defendant's arguments was that the first instance judge should have found that the burden was on the executor to disprove the payments. The High Court of Australia considered this contention "erroneous" (at 562) before setting out its view of the law as follows (at 569–570):

> … The law was and is that, speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration. …

25 The above proposition in *Young* has been applied on numerous occasions in Australia (see, for example, the Federal Court of Australia decision of *McCarthy v McIntyre* [1999] FCA 784 at [90] and, more recently, the Supreme Court of New South Wales decision of *Palermo Seafoods Pty Ltd v Lunapas Pty Ltd (No 2)* [2014] NSWSC 1323 at [70]). Pertinently, it has also been cited with approval locally by the High Court in a series of fairly recent decisions (see *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212 ("*Wee Yue Chew*") at [4]; *Ma Ong Kee v Cham Poh Meng and another suit* [2013] SGHC 144 at [42]; and *Lim Andy v Tea Yeok Kian Terence* [2015] SGHC 92 at [14]). For present purposes, it suffices to discuss only the first of these local cases in some detail (since it was followed in the subsequent two cases). In *Wee Yue Chew*, the plaintiff brought an action to recover the contract price of shares which he had sold to the defendant. The defendant did not dispute that the shares were transferred to her and registered in her name but claimed that she had paid for the shares by remitting the contract price to the plaintiff's order. In so far as the burden of proof was concerned, the defendant argued that the legal burden was on the plaintiff to prove non-payment. The High Court, however, disagreed. Belinda Ang J held that the burden was on the defendant to prove payment discharging her obligation under the contract for the shares. After citing the same passage in *Young* which we have reproduced in the preceding paragraph, Ang J stated as follows at [5]–[6] of *Wee Yue Chew*:

> In Singapore, the statutory formulation of the burden of proof under ss 103–106 of the Evidence Act (Cap 97, 1997 Rev Ed) is basically the same as or similar to the propositions gathered from the Australian authorities outlined above. To illustrate, the commentaries on s 104 of the Indian

Evidence Act (Act No 1 of 1872) (our s 106 of the Evidence Act) in *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (Sripada Venkata Joga Rao ed) (LexisNexis Butterworths, 17th Ed, 2002) vol 3 at p 4041 state as follows:

> *When a defendant admits the cause of action and pleads payment, he must prove that the claim which is admitted has been discharged by payment*.

So, if the defendant does not deny the tenancy in an action for rent but pleads payment, the onus probandi *is on him* (see *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* vol 3 at p 4040). Likewise, in the present case, the legal burden is on the defendant as her defence is concerned specifically with discharge by payment.

[emphasis added]

26 A case which may be usefully contrasted with *Young* and *Wee Yue Chew* is the recent decision of the Hong Kong Court of Final Appeal in *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* [2015] HKEC 1232 ("*Big Island*"). In that case, the plaintiff claimed against the defendants for monies lent pursuant to an alleged oral agreement. The defendants admitted receipt of the payments but denied the existence of an oral loan agreement. Sir Anthony Mason NPJ (with whom Ribeiro and Fok PJJ and Chan NPJ agreed) made clear in his judgment that, in these circumstances, the burden of proof lay on the plaintiff-appellant to prove the existence of the loan agreement. Importantly, he went on to elaborate that this allocation of the burden would have been different *if* the defendants-respondents had raised the defence of payment instead. The following passages at [80], [81] and [84] of Mason NPJ's judgment are particularly instructive:

> One matter, if no other, emerges with dazzling clarity from the chaotic confusion of the pleadings. It is that the respondents denied the making of the Loans Agreement and breach of the Loans Agreement. Indeed, that denial was the very core of the respondents' case. The consequence was that the appellant carried the burden of proving the elements of its case on the pleadings i.e. the making of the Loans Agreement, the making of the alleged "Loans" payments and breach by the respondents, namely failure to repay. Nothing could be clearer.
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> ***Had the respondents pleaded payment*** *as an answer to the appellant's case of breach of the Loans Agreement, without denying the making of the Loans Agreement*, ***the plea of payment would have operated as a plea by way of confession and avoidance*** *, that is, it would have admitted the making of Loans Agreement and avoided liability on the pleaded cause of action by asserting payment resulting in discharge.* See the illuminating discussion by Sir Owen Dixon CJ in *Young v Queensland Trustees Ltd* [1956] 99 CLR 560 …
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> …
>
> ***There was … in this case, no plea of payment, the effect of which would be to confess the elements in the appellant's cause of action and thrust the burden of proof on the respondents. The respondents' burden would then have been to prove the payments.***
>
> [emphasis added in italics, bold italics and underline]

27 What *Big Island* demonstrates is that, if the Respondent in this case had simply run its defence on the basis that the debt disclosed by the three invoices did not exist, then the burden would have been squarely on the Appellant to prove that the debt did exist. We pause to note that Mason NPJ described the creditor in such a situation as also carrying the burden of proving the debtor's "failure

to repay". We wish to clarify in this regard that all we understand Mason NPJ to be saying here is simply that the creditor in these circumstances must prove that his claim is premised on a subsisting debt in order to make good his case; we do not read this part of the judgment in *Big Island* as suggesting that the creditor must conclusively show a lack of repayment on the part of the debtor for that would essentially place on him (*ie*, the creditor) the all too onerous burden of proving a negative. Nevertheless, what is clear is that, in this case, the Respondent positively pleads the defence that it had discharged the debt on the three invoices in full and, in so doing, the Respondent thrusts upon itself the burden of demonstrating precisely that this had been done by way of the payments which were made.

28 The analysis thus far makes it clear that, based on the parties' positions as contained in the Statement of Claim and the Defence alone, the burden lies on the Respondent to prove that the payments which it had made – and which the Appellant does not dispute receiving – did in fact go towards paying off the three invoices. At this juncture, our analysis will need to turn to the Reply filed by the Appellant – does it have any effect on this allocation of the burden of proof? Specifically, does it have the effect of *reversing* the legal burden onto the Appellant to prove instead that the payments were made for purposes other than discharging the three invoices?

29 This question was not specifically considered by the Judge because he did not seek to determine, in the first place, how the legal burden ought to be (provisionally) allocated based on the Statement of Claim and the Defence alone. Instead, the Judge's approach was to construe the pleadings in the round and, in this analysis, he placed great reliance on the Reply wherein the Appellant had made a "positive averment" that the monies paid to it were for "other purposes"; hence, in his view, it followed that the burden of proving these "other purposes" was on the Appellant. This is evident from [14] of the GD which contains the crux of the Judge's reasoning on the burden issue:

> In the present case, while the [Appellant] tried to bring itself within the position as stated in *Wee Yue Chew* … there is a significant difference. The [Respondent] claimed to have paid money directly to the [Appellant]. The [Appellant] did not deny receipt of this money, but maintained instead that the payment was for other purposes. This, to my mind, was a positive averment by the [Appellant], and thus the burden was with the [Appellant].

30 With respect, we are unable to agree with the Judge's reasoning. As the passage above suggests, the Judge seemed to think that the only positive assertion in so far as the precise purpose of the payments is concerned had emanated from the Appellant in its Reply; hence the Appellant should rightly bear the burden of proving the purpose which it alleged. In our view, however, this construction of the pleadings is misplaced. It is clear to us that, in the Defence that preceded the Reply, the Respondent had *already* fired the first salvo, so to speak, by positively advancing its case that the payments were made for the specific purpose of discharging the debts on the three invoices. The Judge appears not to have appreciated this and the reason, we think, is because of how he had characterised the Respondent's defence as may be gathered from the second sentence in the passage quoted above. While the Judge is not wrong in saying that the gist of the Respondent's defence is that it had "paid money directly to the [Appellant]", this does not adequately capture the *entirety* of its defence. The Respondent's defence is not merely that it had "paid money" to the Appellant, but that it had paid money *for the specific purpose* of discharging the outstanding amount (totalling US$1,274,741.73) which the Appellant claimed was owing to it on the three invoices as particularised in the Statement of Claim. So much is clear from para 3 of the Defence where the Respondent denies the Appellant's claim based on the invoices before positively averring that "all the transactions *as stated* were paid by the [Respondent]" [emphasis added]. Clearly, the Respondent is not saying in its Defence that the Appellant's claim is met by proof of payments *at large*. Not only is

that not what appears from para 3 of the Defence – which explicitly references the Appellant's claim based on the invoices and which goes on further to set out a table of particulars linking each alleged payment to each relevant invoice (see above at [10]) – but, more importantly, we do not see how that would be any good as a defence to a claim on a specific debt.

31 What emerges from the analysis above is that the Respondent, by pleading discharge by payment, has the legal burden of proving all the material facts it relies on to prove discharge. This requires not only proving that monies were paid to the Appellant, but also that these payments were meant to discharge the debt on the three invoices. This legal burden does not shift simply because the Appellant offers in its Reply an alternative explanation as to the purpose of the payments. Moreover, we would add that this assertion is one that the Appellant may have been *obliged* to specifically plead in its Reply because, otherwise, the Respondent might be taken by surprise at trial if it were raised for the first time only at that late stage (see O 18 r 8(1)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)). In our judgment, therefore, the Appellant does *not* take it upon itself – and at the same time relieve the Respondent of – the legal burden of proving what the payments were intended for by making a positive *counter*-assertion on this issue in the Reply. Rather, the true position is that, in accordance with our analysis of the Statement of Claim and the Defence, the Respondent, at the outset of the trial, bears the ***legal*** burden of proving that the payments were for the purpose that he alleges they were for, *ie*, discharge of the debt on the three invoices. This is an *intrinsic* and *essential* part of the positive defence which it raises. If the Respondent does not satisfy its legal burden, then its defence will fail; if, however, the Respondent manages to adduce sufficient evidence in the course of the trial which goes towards proving this, then the ***evidential*** burden shifts onto the Appellant to prove instead that the payments were made in respect of the other purposes which it alleges in the Reply, such as the Seah Metal transactions.

32 There remains one final point to be dealt with in so far as the allocation of the legal burden is concerned. This has to do with the Judge's *additional* basis for finding that this burden was with the Appellant, *viz*, that it would have been "overly onerous" if the Respondent had to prove the purpose for which the payments were made (see above at [12]).

33 With respect, we are again unable to agree with this reasoning. To begin with, the Judge's view appears to rest on an unsupported premise. The Judge seemed to think that since the allocation of payments was largely "a matter of the internal operations for the [Appellant]" (see the GD at [17]), the Appellant was in a better position to bring the required evidence to court. However, there is nothing in the pleadings nor in the evidence to suggest that, when the Appellant received payments from the Respondent, the Appellant had *carte blanche* to apply it in whichever way it saw fit according to its own internal decision-making processes. Surely, when the Respondent made payments to the Appellant, the Respondent would have intended the payment to go towards a particular purpose, especially given the large sums involved as particularised in the Defence. Indeed, as counsel for the Appellant argues, the law is also clear that where there are several distinct debts owing by a debtor to a creditor, it is *the debtor* who has, in the first place, the right to appropriate a payment to any debt so as to discharge it at the time of payment (see *Halsbury's Laws of Singapore* vol 12 (LexisNexis, 2014 Reissue) at para 140.756, citing the House of Lords' decision in *Cory Brothers and Company, Limited v The Owners of the Turkish Steamship "Mecca", The "Mecca"* [1897] AC 286; see also *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at para 21-060). Viewed in this light, the Respondent's Defence may be understood as being premised on the assertion that it had appropriated the payments which it made to the Appellant in a certain way (*ie*, to discharge the three invoices specifically). As a matter of principle, therefore, we do not see any unfairness at all in requiring the Respondent to prove exactly what it asserts. And, as a matter of logic, we are also unable to see how the task of proving the purpose of the payments is made any more difficult by placing it on the Respondent who should – one would have thought – be in

possession of the relevant records necessary to prove what its *own* payments were intended for. Indeed, in the recent local case of *Chua Kok Tee David v DBS Bank Ltd* [2015] 5 SLR 231, the High Court made the following observation at [32] in holding that the burden of proving that a debt had been repaid was on the defendant-debtor who asserted repayment:

> I do not consider that this allocation of the burden of proof causes any hardship to the defendant. It does not, in my view, cause hardship to a debtor to require a debtor who claims to have repaid a creditor to prove that he has done so. It would cause much greater hardship to a creditor to place the burden of proof on the issue of repayment on him. That would require the creditor to prove a negative, *ie*, to prove that the debtor did not repay the debt to him.

Has the burden been discharged on the evidence?

34 Once it is found that the legal burden of proving the purpose of the payments lies with the Respondent, then the resolution of this appeal becomes relatively straightforward because there is little in the way of evidence adduced by the Respondent to support its case as to what objects the payments were intended to satisfy. As the Judge himself observed at [7] of the GD, the Respondent "chose to put forward, as he was entitled, *a minimal case*, essentially requiring *the [Appellant]* to prove its claim, and giving little by way of evidence from its side" [emphasis added]. This strategy employed by the Respondent may have paid off in the trial below, but that was only because the Judge agreed with it that the legal burden rested with the Appellant. We, however, have reached a different conclusion in this last-mentioned respect. With the tables thus being turned, the Respondent's risky strategy of running only a "minimal case" in terms of the evidence is plainly unable to carry it very far. We pause to mention that, at the hearing before us, counsel for the Respondent strenuously argued that the Respondent never had any dealings with Seah Metal which thus made the Appellant's pleaded case in the Reply baffling. However, if this was truly the case, then, from the Respondent's point of view, the Appellant must have wrongly applied the monies which the Respondent had paid to it. That being so, it was always open to the Respondent to mount a counterclaim to recover the misapplied monies and to adduce the evidence in support thereof. However, the Respondent chose instead to run a bare case, the merits of which we now turn to investigate.

35 What, then, does the Respondent's "minimal case" consist of? Essentially, the Respondent seeks to rely on no more than certain bank statements recording several transfers of money to the Appellant as the only primary documents to prove that the debts on the three material invoices had been paid off. [note: 12] In our view, however, the Respondent's sole reliance on the said bank statements is insufficient to shift the evidential burden.

36 First, it is not explicitly stated on the face of these documents what the purpose of the payments was for (*ie*, it is unclear what debts these payments were intended to discharge). Had this been clearly marked out on the bank documents with, for example, references to the relevant invoice serial number, there is little doubt that this would have been sufficient to shift the evidential burden. In this connection, we note that there are some *handwritten notes* scribbled on the bank documents purporting to indicate the specific invoice that each payment was directed at. According to these handwritten notes, the payments recorded by each bank statement were allocated in the following manner:

Payment details in the bank statements	**Allocation according to the handwritten notes**

Payment date	Amount paid	
26 December 2007	US$508,600	US$80,221.69 (I-27678) US$428,378.31 (I-27600)
11 January 2008	US$480,000	US$222,191.20 (I-27712) US$257,808.80 (I-27814)
1 February 2008	US$180,000	US$180,000 (I-27678)
12 February 2008	US$500,000	US$75,979.14 (I-27678) US$424,020.86 (I-27712)
7 March 2008	US$200,000	US$200,000 (I-28172)
3 April 2008	US$309,047.91	US$309,047.91 (I-28172)
8 May 2008	US$250,841.18	US$105,623.66 (I-28172) US$145,217.52 (I-28000)

37 The Respondent's case would have been made out if the handwritten notes are accepted at face value. Take, for example, the invoice with serial number I-27678, which is one of the three invoices that the Appellant's claim is based on. The Appellant accepts that the Respondent has made partial payment of US$80,221.69 towards this invoice (which is for the total sum of US$336,200.83 (see above at [9])) and, indeed, that is what is reflected in the first row of the table above. This leaves a balance of US$255,979.14 which, on the Respondent's case, was discharged (entirely) by separate payments of US$180,000 and US$75,979.14 respectively as stated by the handwritten notes on the bank statements dated 1 and 12 February 2008. The same applies for the remaining two invoices which are the subject of the Appellant's claim, I-27712 and I-28172; these invoices would, according to the allocation of payments disclosed by the handwritten notes in the table above, likewise be fully discharged.

38 However, we are not able to attribute too much weight to the handwritten notes as evidence of how the payments were allocated. This is because the handwritten notes were not made *contemporaneously* with the payments themselves. Instead, as the Respondent has candidly admitted, the handwritten notes were made by it only *after* these proceedings had commenced as a sort of "internal memo" to aid it in the preparation of its Defence. [note: 13] It is also of significance, as the Appellant points out, that the person who had inserted the handwritten notes was not called to give evidence. [note: 14] Indeed, it is most curious how the maker of the handwritten notes was able to recall with such assured clarity the way in which each of the bulk payments were sliced up or allocated towards certain invoices. Notably, he or she was able to do so up to the very cent and almost eight years after the event. We find it hard to believe that such minute details could be recalled without the aid of any contemporaneous documentary records and, on this footing, the existence of the handwritten notes lead us to one of two possible inferences, both of which are problematic for the Respondent. First, one possibility is that the Respondent does have in its possession contemporaneous records demonstrating what the payments were intended for; but this only begs the question as to why these primary documents were not produced at the trial. Secondly, and more troublingly, there is the distinct possibility that the allocations disclosed by the handwritten notes were in fact *reverse-engineered* in a careful and calculated way to give the appearance that each of the three invoices were in fact paid in full, when in fact they were not. In our view, it is not

necessary to make any finding on which of these two situations is more probable. We raise this only in order to make the point that the handwritten notes, far from assisting the Respondent's case, in fact invite more searching questions to which satisfactory answers have not been forthcoming.

39 A further difficulty with the Respondent's reliance on the bank statements is that, as the table at [36] above demonstrates, none of these statements recorded payments of amounts which mirrored the total value of any of the three invoices dollar for dollar. In our view, there would be good grounds for inferring that, if the amount paid and the amount being claimed in respect of each invoice matched exactly, then the purpose of the payment was, subject to evidence to the contrary, to discharge precisely that invoice. However, in the present case, the bank statements did not record, for example, any payment for US$336,200.83 which could reasonably be inferred to be in full and final satisfaction of the debt in respect of I-27678. Instead, the bank statements record transfers of various sums which do *not* match any of the invoiced amounts. In fact, the total sum of the transfers the Respondent relies upon exceeds the total amount claimed on the three invoices. The explanation for this seems to be that the excess payments went towards *other* invoices (namely, I-27600, I-27814 and I-28000) which were then outstanding between the parties but, again, there is no contemporaneous evidence or credible explanation for how the Respondent knew of this.

Conclusion

40 In the premises, we find that the Respondent has not proven on a balance of probabilities that the payments which it made, and as evidenced in the bank statements which it adduced, went towards discharging the debts owing on the three invoices which it did not dispute existed. Accordingly, the appeal is allowed. The Appellant is awarded costs here and below to be taxed if not agreed. There will also be the usual consequential orders.

[note: 1] Appellant's Core Bundle vol 2 ("2ACB") at p 187.

[note: 2] 2ACB at p 5, para 7.

[note: 3] 2ACB at p 187.

[note: 4] ROA 3B at p 871 lines 17–19.

[note: 5] 2ACB at p 112, para 3.

[note: 6] 2ACB at p 5, para 8.

[note: 7] 2ACB at p 112, para 5.

[note: 8] ROA 3B at p 524 lines 7–28; see also ROA 3B at p 526 lines 5–27.

[note: 9] 2ACB at pp 187–190.

[note: 10] 2ACB at pp 191–193.

[note: 11] 2ACB at pp 194–197.

[note: 12] 2ACB at pp 35–36, pp 39–40, pp 41–42, pp 43–44, pp 47–48, pp 49–50, and pp 51–52.

[note: 13] Respondent's Case at para 21.

[note: 14] Appellant's Skeletal Submissions at para 18(b).

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