IN THE COURT OF APPEAL OF MALAYSIA

Coram: Lim Yee Lan, JCA; Dr. Badariah Sahamid, JCA; Harmindar Singh Dhaliwal, JCA

Kum Hui Bing v Premium Plaza Sdn Bhd

Citation: [2018] MYCA 243 **Suit Number:** Rayuan Sivil No. W-02(NCC)(W)-439-03/2015

Date of Judgment: 09 March 2018

Contracts & commercial – Share sale agreement between the plaintiff and the second defendant – Loan obtained by the second defendant from the first defendant for the part payment of the purchase price of the shares to the plaintiff – Cheque issued by the first defendant payable to the plaintiff – Subsequent dishonouring of the cheque by the first defendant by stopping payment as instructed by the second defendant – Action by the plaintiff against the first defendant for the non-payment of the cheque – Whether the plaintiff has a cause of action against the first defendant premised on the latter's dishonouring of a cheque issued to the plaintiff although the cheque was issued in respect of a debt of a third party

Contracts & commercial – Whether there was a contractual relationship between the plaintiff and the first defendant – Whether there was consideration that passed from the plaintiff to the first defendant in return for the value of the cheque issued – Whether there was a relationship between the receipt of the bill and the debt of the third party (second defendant) to constitute valuable consideration – Whether the plaintiff could maintain a cause of action against the first defendant premised on the dishonoured cheque

Banking & Finance – Bill of Exchange – Cheque – Whether the common law requirement of contract that consideration must move from the promisee applies to a valid bill of exchange – Whether the antecedent debt or liability should necessarily be that of the drawer or whether that could be a debt or liability of a third party

JUDGMENT

Introduction

[1] This is an appeal against a part of the decision of the High Court delivered on the 26.02.2015 in which the learned Judge dismissed the Plaintiff's claim against the 1st Defendant for a sum of RM1

million on a cheque ("the cheque") that was dishonoured upon presentment.

[2] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

Background Facts

[3] The facts relating to the issuance and subsequent dishonour of the cheque are not disputed.

[4] By a share sale and purchase agreement dated 20.12.2010 ("the share sale agreement"), between the Plaintiff and the 2nd Defendant, the 2nd Defendant was required to pay the Plaintiff the consideration of RM6.5 million for the purchase of 375,000 ordinary shares in Times Academy Sdn Bhd. ("TASB"). This amount was subsequently reduced to RM 5,550,000.

[5] The 2nd Defendant had obtained a friendly loan from the 1st Defendant for the purpose of payment of the balance of the purchase price of the shares to the Plaintiff. The 2nd Defendant instructed the 1st Defendant to draw a cheque for the sum of RM1,000,000 payable to the Plaintiff.

[6] When the cheque dated 25.10.2011 was presented for payment, the cheque was dishonoured as the 1st Defendant had stopped payment on the cheque on the instructions of the 2nd Defendant.

[7] The Plaintiff brought an action against the 1st Defendant for the non-payment of the cheque issued by the 1st Defendant. No action was taken by the Plaintiff against the 2nd Defendant for a breach of the share sale agreement to pay the purchase price of the shares.

Issue

[8] Thus the issue raised against the 1st Defendant is in respect of the dishonour or non-payment of the cheque of RM1,000,000 that was issued by the 1st Defendant to the Plaintiff.

Findings and Decision of the High Court

[9] The learned Judge dismissed the Plaintiff's claim on the grounds summarised as follows:

> There is no agreement or contractual relationship between the Plaintiff and the 1st Defendant. There is thus no consideration passing from the 1st Defendant to the Plaintiff. The value of the cheque represents a friendly loan from the 1st Defendant to the 2nd Defendant for the purpose of payment of a part of the purchase price of the shares of TASB to the Plaintiff. Thus the Plaintiff has no cause of action against the 1st Defendant.

[10] The learned Judge had alluded to the above reasons in her grounds of judgment at p. 23 para. 19, reproduced below:

> *"Plaintiff (SP1) telah mengesahkan beliau tiada menerima apa-apa balasan daripada defendan pertama...Saya berpendapat tanggungan di sini jika ada, adalah defendan ke-2 berdasarkan*

perjanjian jual beli saham dengan Plaintiff...Di samping itu adalah satu fakta yang dipersetujui bahawa jumlah dalam cek tersebut adalah satu pinjaman persahabatan yang diberikan oleh defendan pertama kepada defendan ke-2 atas permintaan defendan ke-2 untuk membayar kepada plaintif sebahagian harga saham plaintif. Kewujudan pinjaman persahabatan ini juga disokong oleh resolusi lembaga pengarah defendan pertama yang meluluskan pinjaman persahabatan kepada defendan ke-2. Berdasarkan keterangan saksi defendan pertama, arahan untuk membatalkan bayaran terhadap cek tersebut adalah atas arahan defendan ke-2. Berdasarkan diatas saya berpendapat plaintif tidak mempunyai kausa tindakan terhadap defendan pertama. Oleh itu saya telah menolak tuntutan plaintif terhadap defendan pertama."

Grounds of Appeal

[11] The Plaintiff's grounds for appeal before us may be summarised as follows:

1. The learned Judge had erred in law and fact in her finding that there is no privity of contract between the Plaintiff and the 1st Defendant.

2. The learned Judge had erred in law and fact when she made a finding that there was no consideration from the Plaintiff to the 1st Defendant for the payment on the cheque.

3. The learned Judge had erred in law and fact in her failure to appreciate that the Plaintiff's cause of action against the 1st Defendant is premised on the 1st Defendant's dishonour of a cheque issued by the 1st Defendant to the Plaintiff.

[12] The appeal before us therefore focused on the narrow, legal issue of whether, in the circumstances of the case, the Plaintiff has a cause of action against the 1st Defendant premised on the 1st Defendant's dishonour of a cheque that was issued to the Plaintiff, although the cheque was issued in respect of a debt of a third party?.

The 1st Defendant/ Respondent's Submissions

[13] The 1st Defendant/ Respondent had canvassed the following submissions before us in support of the learned Judge's findings and decision that the Plaintiff has no cause of action against the 1st Defendant.

[14] It is undisputed that there is no contractual relationship or any dealings whatsoever between the Plaintiff and the 1st Defendant. Neither is the 1st Defendant a party to the share sale agreement entered into between the Plaintiff and the 1st Defendant. Since there is no privity of contract between the Plaintiff and the 1st Defendant, the Plaintiff has no *locus standi* to institute this suit against the 1st Defendant. The cases of **Metrod (M) Bhd v MGS Transport Sdn Bhd** [2011] 9 MLJ 873 and **Keongco Malaysia Sdn Bhd v Ng Seah Hai** (2012) 7 MLJ 288 were referred to as authorities.

[15] Furthermore, there was no consideration that passed from the Plaintiff to the 1st Defendant in return for the value of the cheque issued by the 1st Defendant to the Plaintiff.

[16] Section 27 of the **Bills of Exchange Act, 1949 ("the Act")** provides as follows:

"*The Consideration for a Bill*

Value and holder for value

27. (1) Valuable consideration for a bill may be constituted by-

(a) any consideration sufficient to support a simple contract;

(b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

According to section 2, "value" means valuable consideration.

[17] The above provisions underscore the essential requirement of consideration in a bill of exchange. In the absence of consideration between the Plaintiff and the 1st Defendant, the Plaintiff has no cause of action against the 1st Defendant.

[18] Reference was made to the case of **Oliver v Davis and Another** [1949] 2 K.B. 727 which referred to section 27(1) of the **Bills of Exchange Act, 1949** on the meaning of valuable consideration to a bill which may be constituted by "an antecedent debt or liability". However, it was held that such debt or liability, "must *be either that of the promisor or drawer of a bill or cheque or, if of a third party, then at least there must be some relationship between the receipt of the bill or cheque and the antecedent debt or liability such as forbearance or a promise to forbear, express or implied, on the part of the recipient in regard to the third party's debt or liability*".

[19] In the instant case, the antecedent debt or liability arising out of the Share Sale Agreement is that of a third party (the 2nd Defendant) to the Plaintiff.

[20] In addition, it was submitted that while Section 47(2) of the **Bills of Exchange Act, 1949** confers on the Plaintiff an immediate right of recourse against the 1st Defendant when a cheque is dishonoured for non-payment, nevertheless the right contains an important pre-condition, "*subject to this Act*". This clearly means that the Plaintiff's right is not absolute and must be read with other relevant provisions in the Act i.e.-sections 2, 27 and 48 of **the Act**.

OUR JUDGMENT

[21] After careful consideration of learned counsels' oral and written submissions as well as the appeal records, we were of the unanimous view that there are merits in the Appellant's submissions. We thus allowed the appeal with costs and set aside the decision of the learned Judge. We give our reasons below.

[22] The primary argument of the 1st Defendant which was accepted by the learned Judge was that there can be no cause of action between the Plaintiff and the 1st Defendant as the requirement that consideration must have passed from the Plaintiff to the 1st Defendant has not been fulfilled.

[23] At the outset it is noteworthy that the cheque is a specie of a bill of exchange which is a negotiable instrument. Historically the bill of exchange was developed to ease commercial transactions. While all negotiable instruments are contracts in writing and the law relating to contract applies to them, they are subject to certain requirements. Thus, a cheque has certain unique characteristics that is distinctive of a bill of exchange. In this respect there are certain exceptions to the common law requirements of contract that is statutorily provided by the Bills of Exchange Act, 1949. In particular, while common law requires that consideration must move from the promisee, there is no such requirement in a valid bill of exchange.

[24] This exception to the general rule finds expression in section 27(2) of **the Act**. Section 27(2) provides that, "where *value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time"*. This means that the consideration in a bill of exchange need not be furnished by the 1st Defendant in the instant case. A person can become a holder for value although he has not given "consideration" as understood in the general law of contract.

[25] It is clear therefore that the holder for value must in the first place be a holder. But he himself need not have given value, because the phrase "at any time" clearly suggests that someone before him may have given value.

[26] In the case of **Diamond v Graham** [1968] 2 AER 909, the English Court of Appeal had occasion to interpret section 27(2) of the **English Bills of Exchange Act, 1882** (which is in *pari materia* with our section 27(2) of **the Act**) in the following terms:

> *"There was nothing in s. 27(2) of the Bills of Exchange Act, 1882, which required the value for the bill should have been given directly to the holder (in this case by D), as long as value had been given for the cheque, consideration had been given by D to H for the bill, as a result of which D acquired possession of the bill and thus became "holder" of it within s.2 of the Act."*

[27] In addition, section 30(1) of **the Act** provides that, "every *party whose signature appears on a bill is prima facie deemed to have become a party thereto for value*". Thus the 1st Defendant whose signature appears on the cheque as a drawer is *prima facie* deemed to have become a party thereto for value.

[28] In the case of **Ong Guan Hua v Chong** [1963] 29 MLJ 6, the Court of Appeal had distinguished the position in a bill of exchange from a contract in the following terms:

> *"In an action based on a contract it is for the Plaintiff to prove consideration, in an action on a negotiable instrument consideration is presumed and it is for the maker of the endorser of the instrument if he wishes to defend the action to prove that there was no consideration.*

Where at any stage of its history there has been some consideration for a bill and there is no question of illegality of consideration then it can be sued on and if the original drawer is sued it is for him to prove that at no time has there been consideration."

[29] Thus it is clear that the common law principles that apply to a contract do not apply to a cheque as a bill of exchange. The Act had expressly provided for deeming provisions in respect of the requirement of consideration in a cheque.

[30] The 1st Defendant had submitted that the cheque issued by the 1st Defendant to the Plaintiff is for a third party's (the 2nd Defendant) debt or liability and not the debt or liability of the 1st Plaintiff, thus there was no valuable consideration pursuant to section 27(1)(b) of **the Act**.

[31] Section 27(1) of **the Act** provides as follows:

"Valuable consideration for a bill may be constituted by-

(a) any consideration sufficient to support a simple contract;

(b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time".

[32] There is no express requirement that the antecedent debt of liability must necessarily be that of the drawer. It could alternatively be a debt or liability of a third party provided, *"*there *is some* relationship *between the receipt of the bill and the antecedent debt or liability".* In the case of **Oliver v Davis and Woodcock** [1949] 2 KB 727, the plaintiff had lent 350 pounds to Davis, who gave him a post-dated cheque for 400 pounds. Davis was unable to meet the cheque, and he persuaded Miss Woodcock to send the plaintiff her cheque for 400 pounds. Before the cheque was presented for payment Miss Woodcock stopped the cheque. The plaintiff took action against Miss Woodcock on the dishonoured cheque. The primary issue that arose was whether there was consideration for the cheque.

[33] The English Court of Appeal had interpreted section 27(1) of **the Act**. Sir Evershed M.R. said at p. 735:

"I think for myself, that the proper construction of the words in para (b), "an antecedent debt or liability" is that they refer to an antecedent debt or liability of the promisor or drawer of the bill and are intended to get over what would otherwise have been prima facie the result at common law by which the giving of a cheque for an amount for which the drawer was already indebted imported no consideration since the obligation was past... It is at any rate plain that if the antecedent debt or liability of a third party is to be relied on as supplying "valuable consideration" for a bill, there must at least be some relationship between the receipt of the bill and the antecedent debt or liability."

[34] In the instant case, the cheque was issued to the Plaintiff with a payment voucher dated

18.10.2011 from the 1st Defendant which states as follows:

> *"We enclose cheque in settlement of the following: Partial Payment to purchase share for Times Academy Sdn Bhd."*

There is therefore a relationship between the receipt of the bill and the debt of the third party (the 2nd Defendant) to constitute valuable consideration according to the case of **Oliver v Davis and Woodcock**.

[35] In the cases of **Ng Choh Leng v Loh Che Kwet and NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd & Ors** [2011] 2 SLR 565, The consideration was received by third parties and the Singapore High Court held the consideration to be good consideration:

> *"the cheque that D2 issued to NEC was supported by consideration because that cheque was meant to discharge D1's obligation to make payment to NEC under the contract for the sale of the Mitsubishi projectors. Hence NEC was a holder for value in respect of the cheque under s. 27 of the Bills of Exchange Act, and D2 was liable to NEC for the sum of S$1,917.054 should the cheque be dishonoured."*

[36] Section 43(2) of **the Act** expressly confers a cause of action against the drawer of a cheque, in the instant case, the 1st Defendant, when a cheque is dishonoured. The cause of action premised on the dishonoured cheque accrues to the Plaintiff by virtue of his capacity as a holder.

Section 43(2) provides as follows:

> *"Subject to this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorses accrues to the holder, and no presentment for payment is necessary."*

[37] The liability of the 1st Defendant on a dishonoured cheque is further provided in section 55 of **the Act** which states as follows:

> *55 (1) The drawer of a bill by drawing it-*
>
> > *(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured, he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;*

[38] The cheque was drawn in favour of the Plaintiff. Thus, the Plaintiff is a "holder" of the cheque by virtue of his capacity as payee thereof. Section 2 of **the Act** defines "holder" as "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof". In this respect, the Plaintiff is a "holder" of the cheque within the meaning of sections 43(2) and 55(1) of **the Act**.

[39] Pursuant to section 38(1) of **the Act**, the holder "*may sue on the bill in his own name*".

[40] It is clear therefore, from the provisions abovementioned that the Plaintiff can maintain a cause of action against the 1st Defendant premised on the dishonoured cheque.

[41] For the reasons above stated, we therefore allowed this appeal with costs of RM15,000 subject to payment of allocator fees. The order of the High Court is set aside and judgment entered in favour of the Plaintiff.

Signed

DATUK DR BADARIAH SAHAMID
JUDGE,
COURT OF APPEAL, PUTRAJAYA

9 MARCH 2018

COUNSEL

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LEGISLATION REFERRED TO:

Bills of Exchange Act 1949, Sections 2, 27, 30(1), 38(1), 43(2), 47(2), 48, 55

English Bills of Exchange Act 1882, Section 27(2)

JUDGMENTS REFERRED TO:

Diamond v Graham [1968] 2 AER 909

Keongco Malaysia Sdn Bhd v Ng Seah Hai (2012) 7 MLJ 288

Metrod (M) Bhd v MGS Transport Sdn Bhd [2011] 9 MLJ 873

Ng Choh Leng v Loh Che Kwet and NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd & Ors [2011] 2 SLR 565

Oliver v Davis and Woodcock [1949] 2 KB 727

Ong Guan Hua v Chong [1963] 29 MLJ 6