

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 149

Suit No 1167 of 2015

Between

Rohini d/o Balasubramaniam

And

... Plaintiff

- (1) Kelvin Yeow Khim Whye
- (2) HSR International Realtors Pte
Ltd

... Defendants

FOUNDATIONS OF DECISION

[Agency] — [Principal] — [Tortious liability]
[Tort] — [Vicarious liability]
[Tort] — [Negligence] — [Breach of duty]

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Rohini d/o Balasubramaniam
v
Yeow Khim Whye Kelvin and another

[2017] SGHC 149

High Court — Suit No 1167 of 2015
Chua Lee Ming J
7–8, 15 March 2017

28 June 2017

Chua Lee Ming J:

1 In 2009, the plaintiff, Ms Rohini d/o Balasubramaniam, gave four cheques, signed in blank, to the first defendant, Kelvin Yeow Khim Whye (“Kelvin”). Kelvin was a real estate agent who represented the second defendant, HSR International Realtors Pte Ltd (“HSR”). Kelvin misappropriated the cheques for his own use. The plaintiff sued both Kelvin and HSR. She obtained judgment in default of appearance against Kelvin but has been unable to recover her loss from him. The trial proceeded against HSR.

2 On 15 March 2017, I dismissed the plaintiff’s claim against HSR. The plaintiff has appealed against my decision.

Undisputed facts

3 The facts in this case are straightforward and largely not in dispute.

4 In 2007, HSR acted for the plaintiff’s parents in the sale of their property at 6 Marine Vista #05-19, Neptune Court, Singapore (“the Neptune Court Property”)¹ and for the plaintiff’s father in the purchase of a property at 66 Bayshore Road #21-01, Bayshore Park, Singapore (“the Bayshore Park Property”).² HSR was represented by Kelvin in both transactions.

5 The plaintiff’s father passed away on 6 June 2008 and the plaintiff inherited the Bayshore Park Property.

6 In mid-2009, the plaintiff decided to sell the Bayshore Park Property. The plaintiff signed an agreement dated 25 July 2009 giving HSR the exclusive right to sell the property.³ Once again, Kelvin was the real estate agent who represented HSR in this transaction.

7 By an Option to Purchase dated 30 September 2009, the plaintiff granted the purchasers an option (“the Bayshore Option”) to purchase the Bayshore Park Property for \$850,000.⁴ The Bayshore Option was exercised by the purchasers on 6 October 2009.⁵ HSR denied any knowledge of the *exercise* of the Bayshore Option or the subsequent sale of the Bayshore Park Property.

8 On 16 October 2009, the plaintiff was granted an option (“the Bedok Court Option”) to purchase an apartment at Blk 297 Bedok South Avenue 3 #04-03, Bedok Court, Singapore (“the Bedok Court Property”) for \$1,280,000.⁶ Kelvin acted for the plaintiff in this transaction. However, HSR denied all knowledge of the Bedok Court Property transaction and claimed that Kelvin did not inform it of the transaction. The plaintiff exercised the Bedok Court Option on 5 November 2009.⁷

9 In October/November 2009, the plaintiff applied (a) for a housing loan from United Overseas Bank Limited (“UOB”) and (b) to use monies in her Central Provident Fund (“CPF”) account in connection with the purchase of the Bedok Court Property. The plaintiff claimed that Kelvin advised her to do so on the ground that the sale proceeds from the Bayshore Park Property may not be sufficient to pay for the Bedok Court Property and that the loan from UOB would be for a short term until the completion of the sale of the Bayshore Park Property.

10 Sometime in November 2009, UOB gave the plaintiff a loan of \$650,000.⁸ On 17 November 2009, the CPF Board gave its approval for the plaintiff to use her CPF monies to pay her legal and other fees, part of the purchase price, and the servicing of the housing loan.⁹

11 On 26 November 2009, the plaintiff entered into a tenancy agreement to rent an apartment at 6 Marine Vista #09-25, Neptune Court, Singapore for two years from 1 December 2009 to 31 November 2011 (“the Tenancy”).¹⁰ Kelvin helped the plaintiff secure the Tenancy and HSR invoiced her for the commission for services rendered.¹¹

12 The sale of the Bayshore Park Property was completed on 1 December 2009.¹² The plaintiff informed her lawyers, M S Subra TT & Partners (“Subra TT & Partners”), to release the sale proceeds to her agent.¹³ Kelvin asked a colleague, one Kenneth Lu Zhongyi (“Kenneth”), to collect the cashier’s orders and cheque from Subra TT & Partners.¹⁴ Kenneth collected two cashier’s orders and a cheque¹⁵ drawn for a total amount of \$832,813.06 (“the Bayshore Park Sale Proceeds”) and passed them to Kelvin. The Bayshore Park Sale Proceeds were deposited into the plaintiff’s account with UOB no. 301-305-527-9 (“the

UOB Account”) on 2 December 2009.¹⁶ The UOB Account had been opened on 1 December 2009 for purposes of receiving the Bayshore Park Sale Proceeds.

13 In late November/December 2009, the plaintiff gave Kelvin four cheques drawn on the UOB Account and signed by her in blank. The plaintiff claimed that Kelvin had visited her at home when she was recovering from her knee surgery and advised her to give him the signed cheques which he would use to assist her in making payment for the purchase of the Bedok Court Property.

14 According to the plaintiff, the four cheques were meant to be used to pay (a) the loan taken from UOB, (b) agency fees, (c) legal fees and (d) the deposit for the Tenancy. The plaintiff claimed that Kelvin completed the cheques in her presence but she did not see or check what he wrote on the cheques. The plaintiff said that she gave Kelvin the cheques signed in blank and left everything else to him because she trusted him.

15 Subsequently, Kelvin told the plaintiff that one of the cheques had been dishonoured because he had miscalculated and completed the four cheques for a total amount that exceeded the Bayshore Park Sale Proceeds. The plaintiff then gave Kelvin another cheque, again signed in blank. Again, the plaintiff claimed that she left it to Kelvin to complete the cheque.¹⁷

16 As it turned out, Kelvin did not use the cheques for any of the purposes set out at [14] above. Instead, Kelvin used the four cheques to make the following payments (“the Withdrawals”):

- (a) \$300,000 to himself (cheque no. 576852);¹⁸

- (b) \$70,336 in cash (cheque no. 576853);¹⁹
- (c) \$400,000 to himself (cheque no. 576854);²⁰ and
- (d) \$60,000 to one Sammi Ching May (“Sammi”) (cheque no. 576856).²¹

The first three cheques were dated 1 December 2009 and paid on 3 December 2009 whilst the fourth cheque was dated and paid on 10 December 2009.²² Sammi was Kelvin’s colleague in HSR. No evidence was adduced during the trial to explain why Kelvin paid Sammi \$60,000.

17 The plaintiff alleged that sometime in 2010, she noticed that her UOB Account balance did not reflect the Bayshore Park Sale Proceeds.²³ Her new lawyers, Asia Law Corporation checked with her former lawyers, Subra TT & Partners, in November 2010.²⁴ By way of letters dated 17 December 2010, 14 January 2011 and 20 January 2011, Subra TT Law LLC (formerly Subra TT & Partners) explained that Kenneth had collected the cashier’s orders and cheque after the plaintiff instructed the firm to release the same to her agent.²⁵

18 The plaintiff further alleged that upon further investigations, she discovered that the Bayshore Park Sale Proceeds were deposited into the UOB Account on 2 December 2009, and that shortly after, the four cheques were used to make withdrawals totalling \$830,336.²⁶

19 On 21 February 2011, the plaintiff made a complaint to the Council for Estate Agencies against Kelvin alleging that the cashier’s orders and cheque (representing the Bayshore Park Sale Proceeds) had not been presented.²⁷ It was not clear why the plaintiff made this allegation when she would have known by

then that the Bayshore Park Sale Proceeds were in fact deposited into the UOB Account on 2 December 2009.

20 On 22 February 2011, she made a police report against Kelvin alleging that she did not receive the Bayshore Park Sale Proceeds.²⁸ On 5 July 2012, the police informed the plaintiff's present lawyers that they had decided "not to take further action against the accused".²⁹

21 On 16 November 2015, the plaintiff commenced the present action against Kelvin and HSR. On 30 May 2016, the plaintiff entered judgment in default of appearance against Kelvin.

The plaintiff's case

22 The plaintiff's case against HSR was as follows:

(a) The Withdrawals were not authorised by her and HSR was liable for Kelvin's fraudulent acts in making the Withdrawals because Kelvin was acting either as HSR's employee or as its agent.

(b) Alternatively, HSR had breached its duty of care to the plaintiff.

Whether HSR was liable for Kelvin's fraudulent acts

23 The plaintiff's case against HSR was based on vicarious liability, alternatively agency.

24 A defendant can be vicariously liable for the act of another even though the act cannot be said to have been authorised by the defendant: Tan Cheng Han SC, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*Law of Agency*") at para 02.003. Vicarious liability is imposed on the defendant for

policy reasons: *Ng Huat Seng and another v Munib Mohammad Madni and another* [2016] 4 SLR 373 (“*Ng Huat Seng*”) at [16] citing *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 (“*Skandinaviska*”) at [76]–[80]. As will be seen later, the question in vicarious liability is whether the conduct of the tortfeasor has a sufficient connection with the relationship between the tortfeasor and the defendant such that it may be said that vicarious liability may arise.

25 In contrast, in the case of agency, a principal’s liability for the act of his agent depends on whether the act was within the agent’s authority: *Law of Agency* at para 02.011.

Whether HSR was vicariously liable for Kelvin’s acts

26 Although the doctrine of vicarious liability developed in the context of an employer-employee relationship, it is no longer so limited: *Ng Huat Seng* at [26], citing *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 (“the *Christian Brothers* case”) at [35]. Under the so-called two-stage approach, vicarious liability will be imposed where the following two conditions are satisfied:

- (a) The relationship between the tortfeasor and the defendant must be of a type which is capable of giving rise to a finding of vicarious liability.
- (b) The conduct of the tortfeasor must possess a sufficient connection with the relationship between the tortfeasor and the defendant such that it may be said that vicarious liability may arise.

See *Ng Huat Seng* at [25] and [40].

27 During the trial in the present case, there was some dispute over whether Kelvin was (as the plaintiff alleged) HSR’s employee or (as HSR alleged) an independent contractor. Vicarious liability cannot be imposed on a defendant where the tortfeasor is an independent contractor: *Ng Huat Seng* at [33] and [38]. However, the question whether Kelvin was an employee or an independent contractor became irrelevant as HSR accepted, in its closing submissions, that the first condition was satisfied, *ie*, the relationship between HSR and Kelvin was capable of giving rise to vicarious liability.

28 HSR submitted that the second condition was not satisfied, *ie*, that Kelvin’s fraudulent acts did not bear a sufficient connection with the relationship between HSR and Kelvin.

29 It is accepted that a defendant can be vicariously liable even for intentional torts, including fraud, committed by the tortfeasor: Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) (“*Law of Torts*”) at para 19.034.

30 The question is whether, taking into account all the relevant circumstances – including policy considerations – it would be fair and just to impose vicarious liability on the defendant. Two policy considerations underlie the doctrine of vicarious liability, namely: (a) effective compensation for the victim; and (b) deterrence of future harm by encouraging the employer to take steps to reduce the risk of similar harm in future. However, a precondition for the imposition of vicarious liability is that the victim seeking compensation should either be without fault himself, or be less at fault than the blameworthy party and/or the ultimate defendant; otherwise, the policy of victim

compensation as a justification for imposing vicarious liability loses much of its moral force. See *Skandinaviska* at [75]–[78].

31 Relevant factors to consider in determining whether a sufficient connection exists, include the following (using neutral terms that are not employment related):

- (a) The opportunity that the defendant afforded the tortfeasor to abuse his or her power.
- (b) The extent to which the wrongful act may have furthered the defendant’s aims (and hence be more likely to have been committed by the tortfeasor).
- (c) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the defendant organisation.
- (d) The extent of power conferred on the tortfeasor in relation to the victim.
- (e) The vulnerability of potential victims to wrongful exercise of the tortfeasor’s power.

See *Skandinaviska* at [87], citing *The Children’s Foundation, the Superintendent of Family and Child Services in the Province of British Columbia and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Ministry of Social Services and Housing v Patrick Allan Bazley* [1999] 2 SCR 534 (more commonly known as *Bazley v Curry*) at [41].

32 The relevant facts in the present case were as follows:

(a) The plaintiff gave Kelvin the four cheques signed by her in blank. She left it to Kelvin to fill in the date, name of the payee and the amount on each cheque.³⁰

(b) The cheques were meant to be used to pay (a) the loan taken from UOB for the Bedok Court Property, (b) agency fees, (c) legal fees and (d) the rental deposit for the Tenancy.³¹

(c) The plaintiff did not know what amount was to be paid for each of the four items and she did not see, check or ask what Kelvin wrote on each cheque.³² Even when Kelvin told her that one of the cheques had been dishonoured because he had miscalculated the amount, the plaintiff simply gave him another cheque signed in blank without asking any further questions.³³

(d) The plaintiff realised from her UOB loan statements that she received from January to March 2010 that the UOB loan had not been repaid but she did nothing.³⁴

33 In my judgment, there was nothing on the facts of this case that warranted HSR being held vicariously liable for the fraud perpetrated by Kelvin. It was abundantly clear from the plaintiff's testimony that she gave Kelvin the four cheques signed in blank and left everything to him simply because she chose to trust Kelvin. The plaintiff said that she was recovering from her knee surgery at the material time. However, that did not explain why she could not have (a) obtained the details from Kelvin and filled in the details on the cheques herself, or (b) asked Kelvin to complete the cheques before she signed them.

34 In my view, the plaintiff's conduct was grossly negligent. No reasonable person would have or could be expected to have done what the plaintiff did. Her loss was directly attributable to her own moral culpability.

35 There was no reason to fault HSR. Indeed, the plaintiff was aware from HSR's Service Fee Agreement for the purchase of the Bayshore Park Property back in 2007 that she should not be giving blank cheques to HSR's agents.³⁵ The Service Fee Agreement clearly stated that all commission was to be paid by crossed cheque made in favour of HSR.³⁶

36 None of the factors listed in [31] above gave rise to any reason to impose vicarious liability on HSR in this case. The opportunity given to Kelvin to commit the fraud arose from the plaintiff's own conduct. As pointed out in *Skandinaviska* at [81], in the final analysis, the ultimate goals of fairness and justice must be paramount. In the present case, it was unfortunate that the plaintiff was defrauded by Kelvin. However, on the facts, it would be unfair and unjust to impose vicarious liability on HSR.

Whether HSR was liable under agency law

37 A principal who authorises his agent, whether an employee or independent contractor, to commit a tortious act is liable for the consequences of such act. In the context of agency, the distinction over whether a person is an employee or an independent contractor and how such persons differ from an agent is of little significance. See *The Law of Agency* at paras 02-013 and 02-014).

38 In my view, Kelvin was clearly acting as HSR's agent in his dealings with the plaintiff. However, that did not mean that HSR was therefore liable for

everything that Kelvin did. The question was whether Kelvin acted within his authority as HSR's agent when he obtained the cheques, signed in blank, from the plaintiff and used them for his own purposes.

39 An agent's authority may be express, implied or apparent. It was not the plaintiff's case that she thought Kelvin had authority to receive cheques signed in blank.³⁷ Instead, her case was based simply on the fact that Kelvin was authorised to receive cheques on behalf of HSR.³⁸ However, it could not be disputed that Kelvin was authorised only to receive cheques crossed and made payable to HSR. Clearly, this was vastly different from receiving a cheque signed in blank. In my judgment, there was no basis upon which Kelvin's fraudulent acts could be said to have been within his authority as an agent.

40 In the circumstances, I found HSR not liable for Kelvin's wrongdoing based on agency.

Whether HSR was in breach of its duty to supervise Kelvin

41 It was common ground that HSR owed the plaintiff a duty to exercise care and skill. The plaintiff alleged that HSR breached its duty of care by

- (a) appointing Kelvin as an agent representing HSR when Kelvin was an undischarged bankrupt between 2 August 2003 and 9 April 2010;
- (b) failing to disclose Kelvin's status as a bankrupt;
- (c) failing to supervise Kelvin; and
- (d) misleading the plaintiff and/or misrepresenting Kelvin's status as a "Group Director".³⁹

42 Kelvin was adjudged a bankrupt on 1 August 2003; he was discharged from bankruptcy on 9 April 2010.⁴⁰ Kelvin was therefore an undischarged bankrupt when he was engaged by the plaintiff in 2009.

43 The Estate Agents Act (Cap 95A, 2011 Rev Ed) (“the Act”) was enacted in 2010. Section 28 of the Act imposes a requirement for estate agents to be licensed and s 29 imposes a requirement for salespersons (acting for licensed estate agents) to be registered. Section 32(2)(c) provides that an individual shall not be eligible to be or to remain registered as a salesperson unless the Council for Estates Agents (“CEA”) considers him a fit and proper person to be registered as a salesperson. The CEA considers a person not to be fit and proper to be registered as a salesperson if he is an undischarged bankrupt.⁴¹

44 It was not disputed that the regulatory regime under the Act did not apply in the present case since it came into effect only in 2010. Appointing an undischarged bankrupt as a salesperson prior to 2010 did not breach any regulations. During closing submissions, the plaintiff accepted that HSR did not breach its duty of care in appointing Kelvin as a salesperson in 2009, when Kelvin was an undischarged bankrupt.⁴²

45 Instead the plaintiff submitted that HSR should have informed the plaintiff that Kelvin was an undischarged bankrupt and asked the plaintiff whether she was prepared to still let Kelvin handle her transactions.⁴³ I disagreed with the plaintiff. If HSR did not breach any duty of care in appointing an undischarged bankrupt as a salesperson, there was no reason why HSR should have had to inform the plaintiff that Kelvin was an undischarged bankrupt.

46 As for the submission that HSR failed to supervise Kelvin, the statement of claim was silent as to how HSR had breached this duty to supervise. During closing submissions, the plaintiff was also unable to say what it was that HSR had failed to do in supervising Kelvin.

47 I turn next to the alleged misrepresentation by HSR. Salespersons in HSR were given different designations according to the total amount of commissions that they earned to date.⁴⁴ Kelvin's designation was "Group Director" as he had earned sufficient commissions to qualify for that designation. The use of the word "director" did not mean that Kelvin was a statutory director under the Companies Act (Cap 50, 2006 Rev Ed). Kelvin's designation as "Group Director" appeared on his business card.

48 The plaintiff argued that the designation "Group Director" showed that Kelvin was a senior person within HSR and it was therefore reasonable for the plaintiff to trust him in giving him cheques signed in blank. According to the plaintiff, since Kelvin was an undischarged bankrupt, HSR should not have allowed him to present himself as a Group Director.⁴⁵

49 I disagreed with the plaintiff. It was clear that the plaintiff trusted Kelvin because of her prior dealings with him when he acted for her father in selling the Neptune Court Property.⁴⁶

50 In any event, the plaintiff was unable to show the nexus between any of the alleged breaches by HSR and the loss that she suffered. I had no doubt that Kelvin was able to misappropriate the plaintiff's monies only because the plaintiff gave him cheques signed in blank. The plaintiff did so because she chose to trust him. In my judgment, the plaintiff had failed to prove that her loss resulted from any breach of duty by HSR.

Whether the four cheques were loans to Kelvin

51 One of the defences was that the four cheques represented loans to Kelvin and/or his nominees. The plaintiff testified that in November/December 2010, Kelvin called her and asked her for a loan, saying that he would repay all her money (including the amount withdrawn using the Cheques) later.⁴⁷ I agreed with HSR that the fact that Kelvin would call the plaintiff to ask for a loan, after having misappropriated the plaintiff's money, did arouse suspicion. However, this was mere suspicion and as there was no other evidence, the defence that the four cheques represented loans to Kelvin did not succeed.

Conclusion

52 It was unfortunate that the plaintiff suffered loss at Kelvin's hands. However, there was no basis whatsoever in law to hold HSR liable for Kelvin's wrongful acts in misappropriating the plaintiff's monies. Kelvin was able to do so because the plaintiff chose to give him cheques signed in blank, trusting him to use the cheques for specified purposes.

53 I therefore dismissed the plaintiff's claim. As the plaintiff had been granted legal aid under the Legal Aid and Orders Act (Cap 160, 2014 Rev Ed), I made no order as to costs.

Chua Lee Ming
Judge

Pereira Edmond Avethas and Justin James Zehnder (Edmond Pereira Law Corporation) for the plaintiff;
Eugene Thuraisingam and Suang Wijaya (Eugene Thuraisingam LLP) for the second defendant.

1 AB 44.
2 AB 52.
3 AB 79.
4 AB 80–83.
5 AB 83.
6 AB 131–132.
7 AB 134.
8 Plaintiff’s affidavit of evidence-in-chief (“AEIC”) para 57; AB 143.
9 AB 139–141.
10 AB 61–66.
11 AB 72–73.
12 AB 98.
13 AB 130.
14 Kenneth’s AEIC at para 17.
15 AB 97.
16 AB 177.
17 NE 7 March 2017 at 54:14–55:12.
18 AB 173.
19 AB 174.
20 AB 175.
21 AB 176.
22 AB 177.
23 Statement of Claim (Amendment No 2) (“SOC”), para 38.
24 AB 123.
25 AB 126, 128 and 130.
26 SOC, paras 40–41.
27 AB 178–179.
28 AB 180–181.
29 AB 193.
30 NE 7 March 2017, at 13:30–15:9.
31 NE 7 March 2017, at 15:30–16:5.
32 NE 7 March 2017, at 18:13–24; 19:10–22:20.
33 NE 7 March 2017, at 54:17–55:26.
34 NE 7 March 2017, at 25:11–26:3.
35 NE 7 March 2017, at 37:19–38:16.
36 AB 54.
37 NE 15 March 2017, at 3:6–19.
38 NE 15 March 2017, at 3:20–24.
39 Plaintiff’s Skeletal Arguments at Close of Trial, para 75.

- 40 AB 39.
- 41 Plaintiff's Bundle of Authorities, Tab U.
- 42 NE 15 March 2017, at 7:23–27.
- 43 NE 15 March 2017, at 11:24–12:4.
- 44 NE 8 March 2017, at 20:3–15; AB 292.
- 45 NE 15 March 2017, at 12:11–13:4.
- 46 NE 7 March 2017, at 20:17–25; SOC, para 48.
- 47 NE 7 March 2017, at 31:29–31; 32:24–30; 33:3–6.