SIOW YOON KEONG v. H ROSEN ENGINEERING BV
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, JCA; ABDUL KADIR SULAIMAN, JCA; RICHARD MALANJUM, JCA
CIVIL APPEAL NO: W-03-103-96
30 AUGUST 2003
[2003] 4 CLJ 68

***COMPANY LAW**: Directors - Offences by Directors - Director using funds of Company to speculate in Shares under his own name - Losses in trading passed to Company - Director recovering losses for himself in preference to Company's creditors - Whether there was intention to defraud creditors - Companies Act 1965, s. 304(1)*

***CIVIL PROCEDURE**: Declaration - Discretion to grant declaration - Whether judicial commissioner correctly exercised discretion - Companies Act 1965, s. 304(1)*

H. Rosen Engineering B.V. ('Rosen') had obtained summary judgment against Ventura Industries Sdn Bhd ('Ventura') for the payment of a sum of RM423,000, which was the balance owed by Ventura to Rosen pursuant to an agency agreement between the two companies. Rosen then commenced an action against the appellant, who was the managing director of Ventura, seeking: (1) a declaration that the business of Ventura had been carried out with intent to defraud the creditors of Ventura, especially Rosen, or for a fraudulent purpose; (2) a declaration that the appellant, being a knowing party to such practices, should be liable for the sum in question; and (3) an order that the appellant pays Rosen the balance sum of RM423,000. The learned judicial commissioner ('JC') (as he then was), in referring to the provisions of s. 304(1) of the Companies Act 1965('the Act'), declared the appellant liable and ordered him to pay Rosen the sum of RM392,479.81 resulting in this appeal. The principal issues were whether, on the facts: (1) the case fell within the ambit of s. 304(1) of the Act; and (2) this was a fit and proper case for the learned JC (as he then was) to make such a declaration.

Held:

Per Abdul Hamid Mohamad JCA

[1] In the present case, Ventura should have paid Rosen the RM423,000 upon receiving it but failed to do so; instead, the appellant, being the alter ego of Ventura, used the money or part of it to invest in the share market under his own name. Then, upon realising that he was going to incur losses in his investments, he caused a resolution to be passed by the Board of Directors to ratify the investments and the use of the company's funds, including that which was due to Rosen, for the investments. As a result, he had bailed himself out and the losses were passed on to the company; thus, Rosen could not be paid. By any standard, civil or criminal, there was clearly an intention to defraud Rosen or it was all done for a fraudulent purpose. Therefore, on the

facts, it was clear that a case had been made out under s. 304(1) of the Act.

[2] The learned JC (as he then was) clearly addressed his mind to the provisions of s. 304(1) of the Act, discussed at length the meaning of "fraud" and "fraudulent purpose", and indeed referred to the very same cases cited by learned counsel. It was also clear from the judgment that he did make findings of facts that constitute "intent to defraud creditors" and "for any fraudulent purpose". Furthermore, the learned JC (as he then was) was perfectly right to rely on the facts stated in the affidavits. Thus, he had confined his consideration of the case to undisputed facts and had correctly exercised his discretion in making the declaration that he did.

*[**Bahasa Malaysia** Translation Of Headnotes*

H. Rosen Engineering B.V. ('Rosen') telah memperoleh penghakiman terus terhadap Ventura Industries Sdn Bhd ('Ventura') untuk pembayaran satu jumlah sebanyak RM423,000, yang merupakan baki yang terhutang oleh Ventura kepada Rosen selaras dengan satu perjanjian ejensi antara kedua-dua syarikat tersebut. Rosen kemudiannya telah memulakan satu tindakan terhadap perayu, yang merupakan pengarah urusan Ventura, memohon: (1) satu perisytiharan bahawa perniagaan Ventura telah dijalankan dengan niat untuk memfraud pemiutang-pemiutang Ventura, khasnya Rosen, atau bagi tujuan fraud; (2) satu perisytiharan bahawa perayu, yang merupakan pihak yang mengetahui amalan-amalan yang sedemikian, haruslah bertanggungjawab bagi jumlah yang dipersoalkan; dan (3) satu perintah bahawa perayu hendaklah membayar Rosen baki jumlah sebanyak RM423,000. Pesuruhjaya kehakiman yang bijaksana ('JC') (seperti mana beliau ketika itu), dalam merujuk kepada peruntukan-peruntukan s. 304(1) Akta Syarikat 1965 ('Akta'), mengisytiharkan perayu bertanggungan dan telah memerintahkan beliau membayar kepada Rosen jumlah sebanyak RM392,479.81 yang mengakibatkan rayuan ini. Isu-isu utama adalah sama ada, berdasarkan fakta-fakta: (1) kes di sini terlingkung di dalam lingkungan s. 304(1) Akta tersebut; dan (2) ini adalah kes yang sesuai dan wajar untuk JC yang bijaksana (seperti mana beliau ketika itu) untuk membuat keputusan yang sedemikian.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR

[1] Dalam kes semasa, Ventura seharuslah telah membayar Rosen jumlah sebanyak RM423,000 setelah menerimanya tetapi telah gagal berbuat sedemikian; sebaliknya, perayu, yang merupakan "alter ego" Ventura, telah menggunakan wang tersebut atau sebahagian daripadanya untuk melabur dalam pasaran saham di bawah namanya sendiri. Kemudian, setelah menyedari bahawa beliau akan mengalami kerugian dalam pelaburan-pelaburan beliau, beliau telah menyebabkan satu resolusi diluluskan oleh Lembaga Pengarah untuk meratifikasikan pelaburan-pelaburan dan penggunaan dana-dana syarikat, termasuk yang kena dibayar kepada Rosen, untuk pelaburan-pelaburan tersebut. Akibatnya, beliau telah menyelamatkan dirinya dan kerugian-kerugian tersebut telah dialihkan kepada syarikat; dengan itu, Rosen tidak boleh dibayar. Di ukur dari apa jua standard, sivil atau jenayah, jelas terdapat niat untuk memfraud Rosen atau bahawa ia telah dilakukan bagi tujuan fraud. Oleh itu, berdasarkan fakta-fakta, adalah jelas bahawa satu kes di bawah s. 304(1) Akta telah dibuktikan.

[2] JC yang bijaksana (seperti mana beliau ketika itu) jelas mengambilkira peruntukan-

peruntukan s. 304(1) Akta membincangkan dengan panjang lebar maksud "fraud" dan "fraudulent purpose", dan sesungguhnya merujuk kepada kes-kes yang sama yang telah disebut oleh peguam yang bijaksana. Adalah juga jelas daripada penghakiman bahawa beliau telah membuat dapatan fakta yang membentuk "intent to defraud creditors" dan "for any fraudulent purpose". Lagi pun, JC yang bijaksana (seperti mana beliau ketika itu) adalah sesungguhnya betul bilamana bergantung ke atas fakta-fakta yang dinyatakan di dalam afidavit-afidavit. Jelas bahawa beliau telah menumpukan pertimbangan kepada fakta-fakta yang tidak dipertikaikan dan telah dengan betulnya melaksanakan budi bicaranya dalam memberikan perisytiharannya itu.

Rayuan ditolak.]

Reported by Suresh Nathan

Case(s) referred to:

*Hardie v. Hauson [1959-60] 105 CR 451 (**refd**)*

*Ozinsky No v. Lloyd & Ors [1992] 3 SA 396 (**refd**)*

*PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55; [1980] 2 MLJ 136 (**refd**)*

*R v. Graham [1984] 2 All ER 166 (**refd**)*

*R v. Grantham [1904] 3 All ER 166 (**refd**)*

*R v. Grauthan [1984] 3 All ER 166 (**foll**)*

*Re a Company (No 001418 of 1988) [1991] BCLC 197 (**foll**)*

*Re a Company (No 001418 of 1988) [1991] BCLC 198 (**refd**)*

*Re Augustus Barnett & Son Ltd [1986] BCLC 170 (**refd**)*

*Re FP & CH Matthews Ltd [1982] 1 All ER 338 (**refd**)*

*Re Gerald Cooper Chemicals Ltd [1978] 2 All ER 49 (**refd**)*

*Re Patrick and Lyon Ltd [1933] 1 Ch D 786 (**refd**)*

*Re Sarflax Ltd [1979] 2 WLR 202 (**refd**)*

*Re William C Leitch Bros Ltd [1932] 2 Ch 71 (**refd**)*

*Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming Philip [1996] 2 CLJ 380HC (**refd**)*

Simon & Ors v. Mitsui and Co Ltd & Ors [1997] (2) SA 475 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24PC ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 304(1), 305

Rules of the High Court 1980, O. 14

Companies Act 1942 [UK], s. 332(1)

Counsel:

For the appellant - Siow Yoon Keong; M/s Chai Yow San & Co

For the respondent - WM Chang; M/s Raja, Darryl & Loh

JUDGMENT

Abdul Hamid Mohamad JCA:

By a writ action No. D3-22-1033-91 H. Rosen Engineering B.V. ("Rosen") sued Ventura Industries Sdn. Bhd. ("Ventura") claiming for payment of a sum of RM423,000, interest and costs. That amount was for the balance that Ventura should pay Rosen under an Agency Agreement dated 1 August 1989 between them. On 28 May 1992 Rosen obtained a summary judgment against Ventura under O. 14 of the Rules of the High Court 1980("RHC 1980").

On 28 December 1995 Rosen took out an Originating Summons No. D2-24-432-95 against Siow Yoon Keong, the appellant in this appeal. Rosen sought, in brief:

> (a) A declaration that the business of Ventura had been carried out with intent to defraud the creditors of Ventura, especially Rosen or for a fraudulent purpose;
>
> (b) A declaration that the appellant was knowingly a party to the carrying on of the business of Ventura in that manner and shall be personally responsible, without any limitation of liability, for the debt or other liabilities of Ventura to Rosen.
>
> (c) An order that the appellant pays to Rosen the balance sum of RM423,000 together with interest for which a judgment had been obtained by Rosen against Ventura.

On 11 April 1996, on the application of the appellant, it was ordered that the originating summons be proceeded as if it was commenced by a writ action and that the affidavits therein filed be treated as pleadings.

However, on the date fixed for hearing the parties, by consent, agreed as follows:

> All the documents in Bundle "A" and "C" are agreed documents, but not the contents therein.
>
> As for bundle "B" - all the affidavits do stand as pleadings and the exhibits are agreed documents except "CB7" at page 101-104; the certified copy of which is in Bundle "C" at page 6-14.

After a short adjournment at the request of both counsel, further agreements were reached by them. The record shows as follows:

> Court:
>
> At the request of both counsels; the matter was adjourned for 20 minutes to agree on the facts and to decide if the calling of witnesses as (sic) necessary! It has been decided that Bundle "B" **all the facts stated in the affidavits are agreed facts.** However, all the allegations in the affidavit are denied. Further any state of mind stated in the affidavits are also denied. In addition the following facts are agreed upon:
>
> (i) It was the defendant who had negotiated the deal with Petronas Gas Sdn. Bhd.;
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> (ii) Some of the proceeds of the Petronas contract was used to buy the shares;
>
> (iii) After the shares sold, the proceeds of sale were used to pay the defendant RM523,248/ and the amount then due to the plaintiff was RM423,000. The sum of RM523,248/ was the amount under loan made by the defendant to his company by Mr. Siow Yoon Keong who is a Director in charge of the management. There were then two other directors - namely the defendant's wife Phoon Ching Heong - without any shareholding in the company - except as a Director. The other Director was Tuan Bidari bin Tan Sri Datuk Mohd, with 120,000 shares. The defendant had 80,000 shares.
>
> (iv) The defendant never informed the plaintiffs; and the plaintiff never knew at all material times about the transactions relating to the shares.
>
> In view of these agreed facts, both counsels have now agreed not to lead any further evidence but shall submit their case.

So, no oral evidence was led. Both counsel made their respective submissions.

On 16 November 1996 the learned Judicial Commissioner (as he then was) made the following order:

> (1) That the defendant do personally pay the plaintiffs the balance sum due and owing under the Judgment dated the 28th day of May 1992 obtained by the plaintiffs against the Company - (Ventura Industries Sdn. Bhd.) *vide* Kuala Lumpur High Court Suit No. D3-22-1033-91 in the sum of RM392,479.81 together with all interest thereon at the rate of eight per cent per annum calculated from the 23rd of March 1993; until the date of full realisation by the plaintiffs from the defendant

> herein; together with all costs payable by the defendant to the plaintiffs on a solicitor and client basis.

The appellant appealed to this court.

The learned Judicial Commissioner (as he then was) in his grounds of judgment, referred to the provisions of s. 304(1) of the Companies Act 1965under which the relief was sought. That sub-section provides:

> 304 (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with **intent to defraud creditors of the company** or creditors of any other person or for any fraudulent purpose, the court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs. (emphasis added)

Having done that, the learned Judicial Commissioner (as he then was) went on to say:

> 2. In order for the plaintiff to succeed, it must be proved that the business of Ventura Industries Sdn. Bhd. ("the Company") has been carried on by the defendant as its Managing Director with intent to defraud its creditors or for any fraudulent purpose.
>
> 3. The issue is therefore whether the facts show such an intent to defraud or a fraudulent purpose.

He then discussed the facts in great detail and concluded:

> 16. In conclusion, I would state that Ventura had sufficient liquid funds at the relevant time to discharge the debt owing to the plaintiff; but the Director used these funds to speculate on the stock exchange and then passed on the resulting loss to the Company whilst recovering for himself in full, his own funds used in that speculative activity. As a result, the Company had become insolvent.

The learned Judicial Commissioner (as he then was) then noted that:

> ... the claim is grounded on two grounds, namely:
>
> (i) that he had used the Company funds to purchase shares in his own name without first seeking prior approval from the Company; the fact that he has arranged with the Company subsequently to ratify his investments does not make his unauthorised use of the Company funds in the first place proper; and
>
> (ii) that he had repaid to himself; an unsecured creditor, his so-called advances to the company out of the proceeds of sale of the investments at the expense of the trade creditor of the Company whose debt was first in time to that of the Director's

> advance if any - as an act of misfeasance.

and continued:

> 18. The question that is now posed is "Do these facts lead to any or strong presumption that the business of the Company was carried out by the defendant with intent to defraud the creditors or for fraudulent purpose within the ambit of section 304(1) of the Companies Act 1965; and if so on a finding of fact whether the court would make a declaration to the effect that the defendant was knowingly a party to the carrying on of the business in the manner, to make the defendant personally liable (responsible), for all or any of the debts of the Company? The basic question is how extensive an interpretation is to be given to the word "fraud".

He then discussed the meaning of the word "fraud" and "fraudulent purpose". He referred to the case of *Re William C. Leitch Bros. Ltd.* [1932] 2 Ch. 71. Then, the coming back to the case before him he continued:

> 21. The test of the facts before this court show the conduct of the defendant as a Managing Director of the Company deriving for himself an unfair advantage over that of a creditor to whom he was a bare trustee and owned to himself the *last preference* in priority over the surplus of the Company's funds. *His conduct in preferring himself in payment over the priority of trade debts by signing a cheque to himself constituted an intention to defraud; or at least a fraudulent preference - morally not acceptable by the commercial world - as it is a dishonest conduct; and act of misfeasance for ones own purpose or benefit and this court will not lend its hand or support in the act of such dishonesty.*
>
> ...
>
> 24. The defendant herein used the plaintiffs money in share Investments in his personal name. He took a risk which was clearly an unauthorised transaction; and a risk of this nature should be to his own account and to be made accountable to the company for the losses caused to the Company's and the creditors money. He had no right to risk the funds in speculation to the prejudice of the plaintiff right; he is "guilty of commercially unacceptable conduct in the particular context involved". Acting in reckless disregard of others' right or possible rights can be a tell-tale sign of dishonesty.
>
> 25. In short; was the defendant fulfilling the Role of "The Reasonable Expectations of an Honest Businessman?" Keeping in mind "that honesty is the best policy" the defendant was expected to live to the standards to be observed by honest businessmen and not of an unconscionable conduct contrary to good conscience. The law of equity and good conscience is to be the order to be adopted in such commercial transactions to make good the resulting loss to an innocent person whose trust in the defendant has been betrayed by his misconduct. The defendant holding 199,999 shares out of 200,000 shares was the Company; and the Company was the defendant; and their state of mind is imputed to each other. This was not a case where the Company's money was simply lost in the ordinary course of the business being poorly administered; but upon a wrong with no right to employ the Company's money in the purchase of shares in his own name creating a loss;

> resulting in the Company being unable to pay the plaintiffs; thus becoming insolvent. *"It is the trite law that no one - having such duties to discharge, shall be allowed to enter into engagements in which he has; or can have, a personal interest conflicting; with the interest of those to whom he was bound to protect or answerable.* So strict is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into" *Aberdeen Ry. Co. v. Blaikie Bros* [1854] 1 Macq. 461, 471.

Dato' C.V. Das, learned counsel for the appellant, in opening his submission, noted that this was the first case in this country under s. 304 of the Companies Act 1965. He noted that the only issue was whether a director could be made to personally pay the amount due from his company to Rosen, the respondent. He then submitted on the scope of s. 304. He posed the question whether s. 304 could apply to an agency situation where money due to the principal (Rosen) was retained by the agent (Ventura). The learned counsel submitted that s. 304 does not apply where the complaint is that the agent is wrongfully retaining money due to the principal. It is not directed at agency trading but at directors of a company who knowingly incurs credit when the company is not able to pay the debt.

The learned counsel further submitted that "fraud" within s. 304 is "actual fraud" or "deliberate dishonesty". It is not fraudulent, he submitted, to prefer one creditor in preference to another, including the company's own director or shareholder, unless there is dishonesty. He cited a number of English cases like *Re Williams C. Leitch Brothers, Ltd* [1932] 2 Ch. D 71, *Hardie v. Hauson* [1959-60] 105 CR 451, *Re a Company (No. 001418 of 1988)* [1991] BCLC 197, *R v. Grauthan* [1984] 3 All ER 166.

The learned counsel also noted that the liability is both civil as well as criminal. Therefore, strict interpretation must be given.

The learned counsel then went on to submit on the meaning of "intend to defraud" and "fraudulent purposes". He cited *Re Patrick and Lyon, Limited* [1933] 1 Ch. D 786, *Hardie v. Hanson* [1959-60] 105 CLR 451. In *Re Sarflax Ltd* [1979] 2 WLR 202. He submitted that the learned Judicial Commissioner (as he then was) did not apply the proper test. Instead he went on "commercial morality". He drew the attention of the Court to the South African case of *Ozinsky No v. Lloyd and Others* [1992] 3 SA 396.

The learned counsel also submitted that the learned Judicial Commissioner (as he then was) had to make a finding of actual fraud, which he did not do. In any case he could not do merely by reading affidavits. He then cited the case of *Simon and Others v. Mitsui and Co. Ltd. and Others* [1997] (2) SA 475; *Tay Bok Choon v. Tahansan Sdn Bhd[1987] 1 CLJ 441; [1987] CLJ (Rep) 24*.

In conclusion the learned counsel submitted that the learned Judicial Commissioner (as he then was) had invoked s. 304 wrongly. Rosen had sued Ventura for payment of a debt and had obtained judgment against Ventura. He submitted that Rosen should have proceeded under s. 293 of the Companies Act 1965 or treat that the funds were held by the directors as bare trustee (citing *P.J.T.V Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55*; [1980] 2 MLJ 136 or proceeded under s. 305 of the Companies Act 1965and cited *Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming Philip[1996] 2 CLJ 380*.

We are of the view that the issue is the interpretation of s. 304(1) and whether the facts of this

case fall within the meaning of that subsection. It does not matter whether the relationship between Rosen and Ventura is one of principal and agent or otherwise. It does not matter whether the section carries both civil and criminal liabilities. It does not matter whether there are other remedies. The question is whether on the facts, the case falls within the ambit of s. 304(1) or not and whether this is a fit and proper case for the learned Judicial Commissioner (as he then was) to make the declaration that he did.

In the context of the facts of this case, the subsection provides that if "it appears that any business of the company has been carried on with intent to defraud creditors of the company.... or for any fraudulent purpose, the court on the application of... any creditor... of the Company if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts... of the company as the Court directs."

The section is very clear. It is a matter of making a finding of facts and decide whether the facts fit the provision of the subsection or not.

Let us now scrutinize the provisions of that subsection. It begins with "if in the course of the winding up of a company or in any proceedings against a company...". The English equivalent, s. 332(1) of the Companies Act 1942 does not contain the words "or in any proceedings against a company..." No argument was put forward on this part of the subsection. So, we decide to say nothing on it.

We now come to the phrase "any business of the company has been carried out..."

The relevant facts as found by the learned Judicial Commissioner (as he then was) with which we have no reason to differ are that Rosen had completed the works under a contract between Rosen and Petronas Gas Sdn. Bhd ("Petronas) dated 24 March 1990, Petronas had made payments to Ventura totaling RM1,067,100. Under an agreement, Ventura would retain 20 per cent thereof and remit the balance of 80% to Rosen. Ventura paid a sum of RM423,000 to Rosen but failed to pay the balance of RM423,000. What happened to the money? The appellant, as Managing Director of Ventura had used Ventura's funds to invest in shares on the stock exchange under his own name, instead of discharging the debt to Rosen. Having acquired the shares, partly using Ventura's funds and partly his own funds, the appellant realised that he was about to incur losses on his investments. He then arranged for a company resolution to ratify all his past investments making himself a trustee for Ventura. In that way, he legitimised the use of Ventura's funds for his own speculative investments and recovered his personal losses in full from Ventura.

Was the business of the company being carried out? We have no problem answering the question in affirmative, without even referring to any authorities. Resolution was passed to ratify the investments and the use of the company's funds for the purpose of investments, perhaps more correctly, "speculations". The company's funds were used to pay the losses of the appellant. Rosen, to whom RM423,000 was due, was not paid. These acts in our view constitute "carrying on of business of the company."

We see that in *R. v. Graham* [1984] 2 All ER 166, a criminal case, the obtaining of credit for the company was held to be carrying on the business of the company.

In *Re Augustus Barnett & Son Ltd.* [1986] BCLC 170 providing letters of comfort to a

subsidiary was also held to be "carrying on the business" of the company, even though on the facts of that case was held not to be fraudulent.

In *Re Sarflax Ltd.* [1979] 2 WLR 202, it was held

> (i) that the expression "carrying on any business was not necessarily synonymous with actively carrying on trade, and accordingly the collection of assets acquired in the course of business and the distribution of the proceeds thereof in payment of debts could constitute the carrying on of "any business" for the purpose of section 332 of the Companies Act 1948.

In *Re FP & CH Matthews Ltd.* [1982] 1 All ER 338 involves payments of two cheques into the company's current account with the bank thereby clearing the company's overdraft. It was held that it fell within the meaning of the phrase "carrying on the business of the company".

In the present case, by passing a resolution to ratify the investment and the use of the company's funds for the purpose of the investments and by paying the "loans" of the appellant the company, in our view, was clearly "carrying on business".

Next we come to the phrase "with intend to defraud creditors... or for any fraudulent purpose". First, we would like to note that the phrase should be read disjunctively even though on the facts of the case both limbs are relevant and applicable.

In *Re William C. Leitch Bros. Ltd.* [1932] 2 Ch. 71 Maugham J held at p. 77 that "if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intend to defraud."

In *Re Patrick & Lyon Ltd.* [1933] Ch. 786 the same judge said at p. 790 that fraud in the context of fraudulent trading connotes "actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame."

In *R v. Grantham* [1904] 3 All ER 166, a criminal case, it was held by the Court of Appeal (England) that:

> Where a person who takes part in the management of a company's affairs obtains credit or further credit for the company when he knows that there is no reason for thinking that funds will become available to pay the debt when it becomes due or shortly thereafter he may be found guilty of an offence under section 332 of the Companies Act 1948 of carrying on the company's affairs with intend to defraud creditors of the company.

In *Re Gerald Cooper Chemicals Ltd.* [1978] 2 All ER.49, Templeman J, held:

> (1) For the purpose of s. 332(1) it did not matter that only one creditor was defrauded and that he was defrauded by one transaction, provided that the transaction could properly be described as a fraud on a creditor perpetuated in the course of carrying on business. C Ltd. carried on its business with intend to defraud

> H Ltd. if it accepted the purchase price in advance knowing that it could not supply the indigo and would not repay the £125,698.32.

In *Re a Company (No. 001418 of 1988)* [1991] BCL C 198, it was *inter alia*, held:

> (1) A person was knowingly party to the business of a company having been carried on with intent to defraud creditors if (a) at the time when debts were incurred by the company he had no good reason for thinking that funds would be available to pay those debts when they became due or shortly thereafter and (b) there was dishonesty involving real moral blame according to current notions of fair trading.

Note that *R v. Grantham* [1984] BCLC 270 was followed.

Of course all those cases were decided and all those statements were made in the context of the facts of each case.

In the present case, the RM423,000.00, when received by Ventura from Petronas should be paid to Rosen. Ventura did not pay Rosen. Instead, the appellant, the alter-ego of Ventura used it or part of it to invest in share market in his own name. Then, realising that he was going to lose in the investment he caused a resolution to be passed by the Board of Directors to ratify the investment and the use of the company's funds including that which is due to Rosen, for the purpose. As a result he had himself bailed out and the losses were passed to the company. Rosen could not be paid.

By any standard, civil or criminal, clearly there was an intention to defraud Rosen or that it was done with fraudulent purpose. Note that the section only uses the term "if it appears" which indicates that a lower degree of proof is required. But, even on a higher degree of proof, the result would be the same

It must be stressed that the passing of the resolution was done when it was already clear that losses had been incurred and that there was no way of recovering them. It is at that stage that the company passed the resolution, the effect of which was that the losses were fully transferred to the company. Not only that. By paying the appellant, the appellant escaped from his personal losses and the company was left with no funds to pay the debt owed to Rosen. It is very clear that the intention was to defraud Rosen, the creditor. It is also equally clear that it was all done for fraudulent purpose.

On the facts, we are clearly of the view that a case has been made out under s. 304(1) and the learned Judicial Commissioner (as he then was) was right in making the declaration that he did.

Even though this point was not taken up by learned counsel for the appellant, we think we should clarify what appears to be contradictory statements regarding the shareholding of Ventura. The agreed facts states that the Appellant owned 80,000 shares of the company and one Tuan Bidari bin Tan Sri Datuk Mohd. owned 120,000 shares. On the other hand, in his grounds of judgment, the learned Judicial Commissioner (as he then was) stated that the appellant owned 199,999 of 200,000 shares of the company.

Actually, both statements are correct. We see, for example, from the audited account of the

company as at 1 July 1990 and as at 1 July 1992, the appellant owned 199,999 shares while his wife owned one share. However, the Company Search Report dated 10 July 1995 shows that as at 31 December 1994 the appellant owned 80,000 shares while Haji Bidari Tan Sri Datuk Mohd. owned 120,000 shares. In his affidavit, the appellant affirmed that Hj. Bidari Tan Sri Datuk Mohd. acquired the 120,000 shares on 29 May 1991. We do not know the circumstances leading to the acquisition of the shares by Hj. Bidari Tan Sri Mohd. But, it must be noted that the investment in the share market took place in late 1990 and early 1991. The shares of the company were sold to Hj. Bidari Tan Sri Datuk Mohd on 29 May 1991. On 30 June 1991 (one month later) the company passed the resolution ratifying the investments and as at the same date (30 June 1991) the appellant claimed that the company owed him RM523,248 in the form of loans given by him to the company.

It was argued by learned counsel for the appellant that the learned Judicial Commissioner (as he then was) did not make a definite finding of fraud and in any even he could not do it on affidavit evidence alone.

Reading the judgment, part of which we have reproduced, we are unable to agree with the submission. The learned Judicial Commissioner (as he then was) clearly addressed his mind to the provisions of s. 304(1), discussed at length the meaning of "fraud" and "fraudulent" purpose, and indeed referred to the very same cases cited by the learned counsel to us. It is also clear from the judgment that he did make findings of facts that constitute "intend to defraud creditors" and "for any fraudulent purpose".

Regarding the argument that the learned Judicial Commissioner (as he then was) could not have made such findings of facts based on affidavit evidence alone, again, with respect, we are unable to agree.

The case of *Tay Bok Choon, supra,* a Privy Council judgment cited by the learned counsel for the appellant was in respect of a petition for winding up. It was *inter alia,* held:

> (3) if allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts;
>
> (4) in this case the Board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company;

It is clear that the law is not that, so long as an allegation of fact made by one party in an affidavit is denied by the other party, the court must automatically shirk for making a finding of fact, even though the denial is merely a bare denial and contemporaneous documents are in evidence. The court may also decide on facts as agreed, as in *Tay Bok Choon, (supra).*

In this case, the proceedings that began by an originating summons (which it should not) was converted to a writ action and all affidavits filed were to be treated as pleadings.

(Even though this is allowed by the rules, we would not encourage such practice. A solicitor should know from the very beginning or, at the very least, after the defendant has filed his affidavit in reply, whether the action is one that should be begun by a writ action or by way of

an originating summons. Secondly, contents of affidavits and pleadings are different in nature. Pleadings contain statement of facts while affidavits contain statement of facts and also evidence, including documentary exhibits. Thirdly, it causes confusion in the statistics kept by the registry. Fourthly, it also causes confusion in the preparation of the record of appeal, subsequently. A party beginning an action by way of an originating summons when he should have begun by a writ should withdraw the originating summons and file a fresh writ action. He should realise that if he does not do so, he may be estopped from filing a fresh action if the court, after hearing the originating summons on affidavit evidence alone dismisses it).

On the date fixed for hearing, as soon as the first witness stepped into the witness box, both parties requested for a short adjournment to agree on the facts and the documents. What they agreed to was recorded by the learned Judicial Commissioner (as he then was) which has already been reproduced earlier.

Mr. Chan Yow San, learned counsel for Rosen, drew the court's attention that Rosen was only relying on the agreed facts and the appellants own documents, and not on the disputed facts in the affidavits.

Indeed that was what the learned Judicial Commissioner (as he then was) did. He relied on the audited accounts of Ventura for years ended 30 June 1991 and 30 June 1992. These documents were exhibits to the appellant's affidavits. Indeed, we notice that the appellant's own affidavits admit the material facts as found by the learned Judicial Commissioner (as he then was).

It must also be noted that the record shows that all the facts stated in Bundle "B" were agreed by the parties. "Allegations" and "statements regarding the state of mind" are not. Documents in Bundle 'A' and Bundle 'C' were agreed documents but not the contents therein. The exhibits, except "CB7" were also agreed documents.

The learned Judicial Commissioner (as he then was) was perfectly right to rely on the four agreed facts (reproduced earlier) and the facts stated in the affidavits. Even with regard to Bundle 'A' and Bundle 'C', the court was perfectly entitled to examine them and, in the absence of credible denial, drew whatever conclusion he could from them. Otherwise their inclusion had no purpose whatsoever.

In conclusion, like the Privy Council in *Tay Bok Choon, supra*, we are satisfied that the learned Judicial Commissioner (as he then was) had confined his consideration of the case to undisputed facts and rightly made his findings of facts and also rightly exercised his discretion to make the declaration which he did pursuant to the provisions of s. 304(1) of the Companies Act 1965.

We therefore dismiss the appeal with costs. We order that the deposit be paid to the respondent towards taxed costs.