A

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)–72–10 OF 2013 (A)

RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, HASAN LAH, ABU SAMAH AND RAMLY ALI FCJJ

C 10 AUGUST 2015

Civil Procedure — Fraud — Standard of proof in civil action — Restatement of the law by Federal Court — Whether standard of proof of fraud in civil claims was on balance of probabilities — Whether that standard did not vary even if fraud D *alleged was criminal in nature or serious or bore serious consequences — Whether three previous decisions of Federal Court where different standards of proof were applied no longer good law — Whether instant judgment only applicable to present and future cases and could not be used to set aside or review past decisions involving fraud in civil claims*

E

The Federal Court was called upon in the instant appeal to once and for all declare the standard of proof applicable when fraud was alleged in a civil claim in view of conflicting decisions on the point in the past. Acknowledging the uncertainty in the present state of the law and acceding to the request of the F parties herein to revisit the subject, the Federal Court reviewed several leading cases on the point both in Malaysia and in other common law jurisdictions before restating the law on the subject and, in the process, declaring three of its previous decisions on the point as being no longer the law in this country. In the instant appeal, the respondent appointed the appellant to manage the G accounts for a project and make payments to its subcontractors which included a company named VN Sunrise ('Sunrise'). The respondent opened a bank account to receive payments from the employer of the project. The appellant pre-signed all cheques and authorised the respondent to make the necessary payments to the subcontractors from time to time from the said bank account. H The appellant was paid management fees for its services. Disputes arose between the parties and the appellant sued the respondent for alleged unpaid management fees and financial advances it had supposedly made. Denying the claim, the respondent counterclaimed for monies that were payable to Sunrise but which the appellant allegedly misappropriated to itself. In defence to the I counterclaim, the appellant said the monies it took were to set off or contra payments for goods and materials supplied to Sunrise to complete the project. The High Court dismissed both the claim and counterclaim holding that no monies were due to the appellant for management fees, that any financial advances it had made had to do with illegal money-lending and that the

counterclaim was not proven. The Court of Appeal dismissed the appellant's appeal and allowed the respondent's counterclaim. The Court of Appeal held the appellant failed to prove its claim for financial advances; that its claim for management fees was, in fact, a claim for interest; that the appellant was not authorised to pay itself but to only pay Sunrise and that the set offs and contra payments it claimed were unfounded. In the instant appeal against the Court of Appeal's decision, the parties were at odds, inter alia, over the correct standard of proof applicable for fraud in civil claims. The appellant contended that it should be on balance of probabilities; the respondent argued that while it should be on balance of probabilities, where the allegation of fraud was serious or criminal in nature, a higher quality of evidence was required. The respondent argued that although the courts below did not apply the proper standard of proof, and regardless of which standard was applied, the counterclaim should be allowed because the facts showed the appellant had fraudulently misappropriated monies payable to Sunrise. In perusing previous judgments of the courts in this country, the Federal Court found that Malaysian courts had at different times applied one of three standards of proof when fraud was alleged in civil claims: (a) the 'beyond reasonable doubt' standard as applied in criminal cases, or (b) the 'balance of probabilities' standard but with the requirement of a higher degree of probability of the fraud depending on how serious the allegation of fraud was, or (c) the standard applied varied with the nature of the fraud alleged ie if it was criminal fraud, such as conspiracy to defraud or misappropriation of money or criminal breach of trust, the standard of proof applied was 'beyond reasonable doubt' but where it was purely civil fraud (eg acts of fraud and misrepresentation under ss 17 and 18 of the Contracts Act 1950), and did not involve a criminal conduct or offence, the standard applied was the 'balance of probabilities'.

Held, dismissing the appeal:

(1) The position of the law on the standard of proof for fraud in civil claims in this country was far from satisfactory and the time had come to realign the position with the standard applied in other common law jurisdictions. The correct principle to be applied was as explained in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35 and it was this: that at law there were only two standards of proof, namely, beyond reasonable doubt for criminal cases while it was on the balance of probabilities for civil cases. As such, even if fraud was the subject in a civil claim, the standard of proof was on the balance of probabilities. There was no third standard; and '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts (per Baroness Hale of Richmond in *In re B (Children)* (see paras 47–49 & 51).

(2) It was up to the presiding judge, after hearing and considering the evidence adduced as done in any other civil claim, to find whether the standard of proof had been attained. 'The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies' (per Baroness Hale of Richmond in *In re B (Children)*. The criminal aspect of the allegation of fraud and the standard of proof required thereof should be irrelevant in the deliberation. The general rule at common law was that 'in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities' (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 at p 74 (see paras 50 & 52).

(3) Despite the reaffirmation of the law on the issue in *Yong Tim v Hoo Kok Cheong*, it was no longer the law in this country. Similarly, the principles as pronounced in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 and *Lee You Sin v Chong Ngo Khoon* [1982] 2 MLJ 15, despite applying the civil standard to a certain extent were also no longer the law. Hence, the disapproval of *Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21 in *Ang Hiok Seng* was no longer relevant (see para 53).

(4) This judgment only applied to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims (see para 54).

(5) Upon perusing the facts and evidence adduced in the present appeal and applying the principle just pronounced on the standard of proof for fraud in civil claims, which was less onerous than the standard applied by the courts below, the court agreed with the reasons, findings and conclusions of the Court of Appeal in allowing the respondent's counterclaim (see para 56).

[Bahasa Malaysia summary

Mahkamah Persekutuan dalam rayuan ini diminta untuk mengisytiharkan bahawa standard pembuktian yang terpakai apabila fraud didakwa dalam tuntutan sivil memandangkan keputusan yang bercanggah mengenai hal itu pada masa lalu. Setelah menyedari ketidakpastian dalam keadaan semasa undang-undang dan menyetujui permintaan agar pihak-pihak di sini mengkaji semula perkara itu, Mahkamah Persekutuan mengkaji beberapa kes utama mengenai hal ini di Malaysia dan di lain-lain wilayah sebelum menyatakan semula undang-undang berhubung perkara itu dan, dalam proses itu, mengisytiharkan bahawa ketiga-tiga keputusannya yang dirujuk terdahulu mengenai hal itu tidak lagi diterima sebagai undang-undang di negara ini. Dalam rayuan ini, responden telah melantik perayu untuk menguruskan akaun bagi satu projek dan membuat bayaran kepada subkontraktor termasuk

sebuah syarikat yang dinamakan VN Sunrise ('Sunrise'). Responden membuka akaun bank untuk menerima bayaran daripada majikan projek. Perayu sebelum menandatangani semua cek dan memberi kuasa kepada responden membuat bayaran yang perlu kepada subkontraktor dari masa ke semasa daripada akaun bank tersebut. Perayu telah dibayar yuran pengurusan bagi perkhidmatannya. Pertikaian timbul antara pihak-pihak dan perayu menyaman responden kerana dakwaan yuran pengurusan yang belum dibayar dan pendahuluan kewangan yang kononnya telah dibuat. Dalam menyangkal tuntutan itu, responden membuat tuntutan balas bagi wang yang kena dibayar kepada Sunrise tetapi perayu dikatakan telah menyalahgunakan untuk dirinya. Dalam pembelaan kepada tuntutan balas itu, perayu mengatakan wang yang diambilnya adalah untuk menolak atau bayaran kontra bagi barangan dan bahan-bahan yang dibekalkan kepada Sunrise untuk menyiapkan projek itu. Mahkamah Tinggi telah menolak kedua-dua tuntutan dan tuntutan balas dan memutuskan bahawa tidak ada wang yang kena dibayar oleh perayu untuk yuran pengurusan, bahawa apa-apa pendahuluan kewangan ia telah dibuat mempunyai kaitan dengan pinjaman wang secara haram dan tuntutan balas itu tidak dibuktikan. Mahkamah Rayuan ('MR') menolak rayuan perayu dan membenarkan tuntutan balas responden. MR memutuskan perayu gagal membuktikan tuntutannya untuk pendahuluan kewangan; bahawa tuntutan untuk yuran pengurusan adalah, sebenarnya, tuntutan untuk faedah; bahawa perayu tidak diberi kuasa untuk membayar sendiri tetapi untuk hanya membayar Sunrise dan bahawa penepian dan pembayaran kontra yang dituntut olehnya adalah tidak berasas. Dalam rayuan ini terhadap keputusan MR ini, pihak-pihak adalah bertentangan, antara lain, berhubung standard bukti yang betul yang terpakai kerana fraud dalam tuntutan sivil. Perayu berhujah bahawa ia hendaklah atas imbangan kebarangkalian; responden berhujah bahawa semasa ia hendaklah atas imbangan kebarangkalian, di mana dakwaan fraud adalah serius atau bersifat jenayah, kualiti keterangan yang lebih tinggi adalah diperlukan. Responden berhujah bahawa walaupun mahkamah bawahan tidak menggunakan standard bukti yang betul , dan tidak kira standard mana yang telah digunakan, tuntutan balas itu hendaklah dibenarkan kerana fakta-fakta menunjukkan perayu telah menyalahgunakan secara fraud wang yang perlu dibayar kepada Sunrise. Dalam meneliti penghakiman terdahulu mahkamah di negara ini, Mahkamah Persekutuan mendapati bahawa mahkamah Malaysia telah pada masa yang berlainan digunakan salah satu daripada tiga standard pembuktian apabila fraud didakwa dalam tuntutan sivil – (a) standard 'beyond reasonable doubt' sepertimana terpakai dalam kes jenayah, atau (b) standard 'balance of probabilities' tetapi dengan keperluan tahap yang lebih tinggi untuk kebarangkalian fraud bergantung kepada keseriusan dakwaan fraud itu, atau (c) standard itu terpakai secara berbeza berdasarkan sifat fraud yang didakwa itu iaitu jika ia adalah fraud jenayah, seperti konspirasi untuk menipu atau salahguna wang atau pecah amanah, standard bukti yang terpakai adalah 'beyond reasonable doubt' tetapi menipu atau penyalahgunaan wang atau pecah amanah jenayah,

standard pembuktian yang digunakan adalah 'melampaui keraguan munasabah' tetapi di mana ia adalah semata-mata fraud sivil (contohnya perbuatan fraud dan salah nyataan di bawah ss 17 dan 18 Akta Kontrak 1950), dan tidak melibatkan perlakuan atau kesalahan jenayah, standard yang digunakan adalah 'balance of probabilities'.

Diputuskan, menolak rayuan:

(1) Kedudukan undang-undang berhubung standard pembuktian untuk fraud dalam tuntutan sivil di negara ini jauh daripada memuaskan dan telah tiba masa untuk menyelaraskan kedudukan itu dengan standard yang terpakai dalam bidang kuasa common law lain. Prinsip yang betul untuk diguna pakai adalah seperti yang diperjelaskan dalam kes *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35 dan ia adalah ini: bahawa dari segi undang-undang hanya terdapat dua standard pembuktian, iaitu, melampaui keraguan munasabah untuk kes-kes jenayah manakala ia adalah melampaui imbangan kebarangkalian untuk kes-kes sivil. Oleh itu, meskipun fraud merupakan subjek dalam tuntutan sivil, standard pembuktian adalah atas imbangan kebarangkalian. Tiada standard ketiga; dan '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts (per Baroness Hale of Richmond in *In re B (Children)*' (lihat perenggan 47-49 & 51).

(2) Adalah terpulang kepada hakim yang bersidang, selepas mendengar dan mempertimbangkan keterangan yang dikemukakan sepertimana dalam tuntutan sivil lain, untuk memutuskan sama ada standard pembuktian telah diperoleh. 'The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies' (per Baroness Hale of Richmond in *In re B (Children)*. Aspek dakwaan fraud dan standard pembuktian yang dikehendaki sepatutnya tidak relevan semasa membuat keputusan. Rukun am common law adalah bahawa 'in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities' (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 at p 74 (lihat perenggan 50 & 52).

(3) Walaupun pengesahan semula undang-undang berhubung isu ini dalam *Yong Tim v Hoo Kok Cheong*, ia bukan lagi undang-undang dalam negara ini. Begitu juga, prinsip-prinsip sepertimana dinyatakan dalam kes *Ang Hiok Seng @Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 dan *Lee You Sin v Chong Ngo Khoon* [1982] 2 MLJ 15, meskipun mengguna pakai standard sivil kepada tahap tertentu yang juga bukan lagi undang-undang. Justeru, pandangan tidak bersetuju dalam kes *Lau Kee*

Ko & Anor v Paw Ngi Siu [1974] 1 MLJ 21 dalam kes *Ang Hiok Seng* tidak lagi relevan (lihat perenggan 53).

(4) Penghakiman ini hanya terpakai kepada rayuan ini dan kepada kes-kes masa hadapan dan tidak patut digunakan untuk mengetepikan atau menyemak semula keputusan yang melibatkan fraud dalam tuntutan sivil (lihat perenggan 54).

(5) Setelah meneliti fakta dan keterangan yang dikemukakan dalam rayuan ini dan mengguna pakai prinsip yang dibentangkan atas standard pembuktian untuk fraud dalam tuntutan sivil, yang kurang berat daripada standard yang terpakai oleh mahkamah bawahan, mahkamah bersetuju dengan sebab, penemuan dan kesimpulan Mahkamah Rayuan dalam membenarkan tuntutan balas responden (lihat perenggan 56).]]]]]

Notes

For cases on standard of proof in civil action, see 2(2) *Mallal's Digest* (5th Ed) paras 3596–3599.

Cases referred to

A L N Narayanan Chettyar v Official Assignee, High Court Rangoon AIR 1941 PC 93, PC (refd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal Representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45, FC (overd)

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening), In re (2008) UKHL 35, HL (refd)

Bater v Bater (1951) P 35, CA (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)

Chong Song @ Chong Sum & Anor v Uma Devi a/p V Kandiah [2011] 2 MLJ 585, CA (refd)

Chu Choon Moi v Ngan Siew Tin [1986] 1 MLJ 34, SC (refd)

Chua Kwee Chen v Koh Choon Chin [2006] 3 SLR 469, HC (refd)

Datuk Jaginder Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105, PC (refd)

Doe d Devine v Wilson (1855) 10 Moo PCC 502, PC (refd)

Eastern Enterprises Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)

Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd [2000] 4 MLJ 399; [2000] 4 AMR 3784, HC (refd)

F H v McDougall [2008] SCC 53, SC (refd)

H and Others (Minors) (Sexual Abuse: Standard of Proof), In re [1996] AC 563, HL (refd)

Hanes v Wawanesa Mutual Insurance Co (1936) 36 DLR (2d), SC (refd)

Helton v Allen (1940) 63 CLR 691, HC (refd)

Hornal v Neuberger Products Ltd [1957] 1 QB 247, CA (refd)

Lau Kee Ko & Anor v Paw Ngi Siu [1974] 1 MLJ 21, FC (refd)

Lee You Sin v Chong Ngo Khoon [1982] 2 MLJ 15, FC (overd)
Miller v Minister of Pensions (1947) 2 All ER 372, KBD (refd)
New York v Heirs of Phillips Decd [1939] 3 All ER 952, PC (refd)
PP v Yuvaraj [1970] 2 WLR 226, PC (refd)
Ratna Ammal v Tan Chow Soo [1967] 1 MLJ 296, FC (refd)
Regina (McCann and others) v Crown Court at Manchester and another Clingham v Kensington and Chelsea Royal London Borough Council [2003] 1 AC 787, HL (refd)
Rejfek & Anor v McElroy & Anor (1965) 39 ALJR 177, HC (refd)
S-B (Children) (non-accidental injury), In re [2009] UKSC 17, SC (refd)
Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)
Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153, HL (refd)
Shell (M) Trading Sdn Bhd v Tan Bee Leh @ Tan Yue Khoen & Ors [2013] 8 MLJ 533, HC (refd)
Tang Yoke Kheng v Lek Benedict [2005] 3 SLR (R) 263, CA (refd)
Yogambikai Nagarajah v Indian Overseas Bank [1997] 1 SLR 258; [1996] 2 SLR (R) 774, CA (refd)
Yong Tim v Hoo Kok Cheong [2005] 3 CLJ 229, FC (overd)

Legislation referred to

Contracts Act 1950 ss 17, 18
Evidence Act 1950 ss 3, 102, 103

Appeal from: Civil appeal No A-02-(NVCV)(W)-1114–05 of 2012 (Court of Appeal, Putrajaya)

Malik Imtiaz (Ananthan Ragawan, Chan Wei June and Gurbachan Singh with him) (Ananth & Assoc) for the appellant.
Gopal Sri Ram (Yunus Ali and Norazali Nordin with him) (Yunus Ali & Kam) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] This court granted the appellant leave to appeal on 10 October 2013.

[2] There is only one leave question to consider which reads:

> Whether the Federal Court should rely on the ratio set in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 in determining the burden of proof in civil fraud?

[3] At the outset we note that the leave question uses the term 'burden of proof in civil fraud'.

[4] There is of course a difference between the terms 'burden of proof' and 'standard of proof'.

[5] Briefly the former relates to the burden or obligation of proving a fact on the party who exerts the existence of any fact in issue and wishes the court to believe in its existence: ss 102–103 of the Evidence Act 1950 ('the Act'). The burden of proof of a party never shifts.

[6] The latter refers to 'the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen' (*In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35 – per Lord Hoffmann para 4).

[7] With respect, after hearing the submissions of learned counsel for the parties we are of the view that the real issue for determination is on the standard of proof required in civil claim when fraud is alleged. Accordingly we will take that the use of the term 'burden of proof' in the leave question is meant to be the 'standard of proof'.

[8] Now, before we dwell into the leave question we need to first consider the facts involved in this appeal. This is necessary so that irrespective of our answer to the leave question we would at the same time be able to determine the final outcome of this appeal.

[9] Further, in this judgment the appellant will be referred to as the plaintiff and the respondent as the defendant unless the context otherwise requires.

BACKGROUND FACTS

[10] In early 2005, the defendant, Damai Setia Sdn Bhd was awarded a contract by Public Works Department ('PWD') to upgrade Federal Road A13 into a four-lanes road from Jalan Sultan Azlan Shah Junction to Tanjung Rambutan in the State of Perak ('the project'). On 1 February 2005 the defendant appointed a company VN Sunrise ('Sunrise') as their subcontractor for the Project. Work on the project commenced on 1 February 2005. It was duly completed on 15 October 2005. There was a two months delay in the completion. Concurrently the defendant appointed the plaintiff, Sinnaiyah & Sons Sdn Bhd as the project manager for the project. As the project manager the plaintiff was to manage the accounts for the project and to make payments to subcontractors for the project including Sunrise for goods and materials supplied.

[11] In order to receive payments from PWD for the project and to facilitate the arrangement with the plaintiff, the defendant opened a current bank account with Bank Bumiputera Commerce in Johore Bahru. The plaintiff pre-signed all cheques and authorised the defendant to make the necessary payments from time to time from the said bank account. It was also agreed between the defendant and the plaintiff that the latter would be paid management fees for the services rendered for the duration of the project period (ie 1 February 2005 until 15 October 2005).

[12] Unfortunately, the arrangement between the defendant and the plaintiff did not go smoothly. Dispute arose. The plaintiff sued the defendant for the sum of RM301,767.40 which it claimed to be the unpaid management fees and financial advances given.

[13] In turn the defendant not only disputed the claim but also counterclaimed for the sum of RM535,836.04, being an amount the defendant alleged the plaintiff to have fraudulently paid itself instead of paying Sunrise.

[14] In defence to the counterclaim the plaintiff asserted that the sums it paid itself was for set-offs or contra payments for goods and materials supplied to Sunrise for the completion of the project.

BEFORE THE HIGH COURT

[15] After hearing the evidence the learned trial judge dismissed both the claim of the plaintiff and the counterclaim of the defendant. It was the finding of the learned trial judge that the plaintiff had been duly paid for the management fees, that any financial advances made would be on illegal money lending and that the defendant failed to prove its counterclaim.

BEFORE THE COURT OF APPEAL

[16] Dissatisfied with the decision of the High Court both parties appealed to the Court of Appeal. In coming to its decision the Court of Appeal dismissed the appeal by the plaintiff. The Court of Appeal held that the plaintiff had failed to prove its claim for financial advances to the defendant. The defendant did not sign the payment vouchers for the alleged financial advances and with the project almost completed there was also no necessity for the alleged financial advances. As to the claim for management fees the Court of Appeal held that it was in fact a claim for interests. The project was already completed. Management was no longer required.

[17] In respect of the counterclaim of the defendant the Court of Appeal held that the finding of the High Court was against the weight of the evidence adduced. The plaintiff was not authorised to pay itself but to Sunrise. The set-offs and contra payments as alleged by the plaintiff were unfounded as the defendant was still indebted to Sunrise. The appeal of the defendant was therefore allowed.

BEFORE THIS COURT

Submissions of parties

[18] Briefly, learned counsel for the plaintiff submitted:

(a) that the correct standard of proof for fraud in civil claims should be on the balance of probabilities;

(b) that the learned trial judge was not satisfied even on the balance of probabilities that the defendant had proved its counterclaim based on fraud; and

(c) that the Court of Appeal therefore erred in finding that the diversion of the fund by the plaintiff was unauthorised. The defendant was aware of the diversion and explanation given but was not considered by the Court of Appeal.

[19] In response learned counsel for the defendant argued:

(a) that the present standard of proof for fraud in civil claims in Malaysia is not in tandem with the standard applied in other common law jurisdictions;

(b) that the present standard adopted for fraud in civil claims in Malaysia is not premised on policy ground. It is a product of misinterpretation of the judgment of Lord Atkin in *A L N Narayanan Chettyar v Official Assignee, High Court Rangoon* AIR 1941 PC 93);

(c) that the principle propounded by this court in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal Representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 is impossible to apply;

(d) that the standard of proof for fraud in civil claims should be on the balance of probabilities. However, where the allegation of fraud is serious in nature as for instance criminal in nature, a higher quality of evidence should be demanded while maintaining the standard of proof to be on the balance of probabilities;

(e) that in this case neither the learned trial judge nor the Court of Appeal applied the proper standard. Nevertheless they must be assumed to have applied the correct test;

(f) that in this case irrespective of which standard of proof to apply the plaintiff should be liable for the counter claim of the defendant. There was a misappropriation of trust by the plaintiff when it diverted the use of the pre-signed cheques to pay itself. Further, if indeed the diversion of the fund was pursuant to an arrangement made between the plaintiff and Sunrise, there should be no longer any demand made by Sunrise to the defendant. Yet there were six demand letters served on the defendant; and

(g) that the learned trial judge failed to properly consider the documentary evidence while preferring the oral evidence adduced. As such the Court of Appeal was right to review and reassess the evidence adduced and coming to its own factual finding.

Decision of this court

[20] We begin with our observation that there is no specific provision in the Act or for that matter any legislation in Malaysia that stipulates the relevant standard of proof required in both criminal and civil proceedings. Section 3 of the Act in interpreting the words 'proved' and 'disproved' only makes reference to a 'prudent man'. As such the principles of law in relation to burden of proof and standard of proof are therefore common law principles (see: *Public Prosecutor v Yuvaraj* [1970] 2 WLR 226; *Bater v Bater* (1951) P 35; *Miller v Minister of Pensions* [1947] 2 All ER 372).

[21] On casual perusal of the reported judgments by the courts in this country it can be elicited that there are at least three principles propounded in addressing the issue of what is the standard of proof required in civil claims when fraud is the subject matter.

[22] The first principle is premised on the standard of beyond reasonable doubt as applied in criminal cases. Such principle began in the case of *Saminathan v Pappa* [1981] 1 MLJ 121 in which the Privy Council upheld the decision of the then Federal Court that adopted the principle enunciated in *Narayanan*. Lord Atkin in that case said this at p 95:

> There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. Fraud of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. The High court were justified in holding that the trial judge's finding was largely based on suspicion and conjecture.

[23] After *Saminathan* most of the subsequent decisions by the courts in Malaysia followed this first principle (see: *Chu Choon Moi v Ngan Siew Tin* [1986] 1 MLJ 34 and *Datuk Jaginder Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105).

[24] But it would be quite erroneous to say that prior to *Saminathan* the courts in this country had also applied the first principle as enunciated. On the contrary before *Saminathan* the courts in this country applied albeit 'a very high degree of' the balance of probability standard in civil claims when fraud was alleged. In the case of *Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21), Raja Azlan Shah J (as His Majesty then was) delivering judgment for the then Federal Court said this at p 23:

> It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.

(see also the earlier case of *Ratna Ammal v Tan Chow Soo* [1967] 1 MLJ 296).

[25] Meanwhile we take note that this court in *Ang Hiok Seng* declared that 'to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law'. Whether this pronouncement is tenable today depends on our answer to the leave question.

[26] Anyway, even after *Saminathan* the then Federal Court appeared to have reverted to the earlier position. In the case of *Lee You Sin v Chong Ngo Khoon* [1982] 2 MLJ 15, the civil standard of proof for civil claims, that is, on the balance of probabilities was adopted despite the allegation of fraud. However, the court imposed the requirement of a higher degree of probability for a serious allegation of fraud. We take it as the second principle.

[27] In delivering the judgment of the court Lee Hun Hoe CJ (Borneo) after making reference to *Bater v Bater* said this at p 17:

> We would therefore with respect suggest the test to be applied is one set out in *Bater v Bater* [1950] 2 All ER 458, ie the learned judge was correct in relying on *Bater v Bater* though his mistake was in not saying that the statement of claim in substance alleges fraud.

[28] The foregoing view expressed in *Lee You Sin* was in tandem with what Winslow J said in the Singapore case of *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 MLJ 236. He said this at p 242:

> I would therefore conclude for purposes of this action that the plaintiffs must establish their allegation against the defendant on a balance of probability as laid down by *Doe d Devine v Wilson* subject to the qualification that in tilting the balance against the defendant, they must attain a higher degree of probability than is required in an ordinary case of civil negligence though not the very high standard of the criminal law. Although the difference in the standards of proof in civil and criminal cases 'may well turn out to be more a matter of words than anything else'

(per Denning LJ in *Bater*'s case), the Australian High Court in the *Rejfek* case held that it was no mere matter of words but a matter of critical substance.

[29] In other words, both the cases of *Eastern Enterprises* and *Lee You Sin* applied the balance of probabilities standard when fraud was alleged subject to the requirement of a higher degree of probability depending on the seriousness of the allegation. The more serious it is such as tilting towards criminal liability the higher degree of probability is required before it can be said that the standard of proof on the balance of probabilities has been satisfied (see: *Hornal v Neuberger Products Ltd* [1957] 1 QB 247).

[30] But while the two earlier conflicting principles (Re: *Saminathan* and *Lee You Sin*) adopted by the highest court of this country were yet to be reconciled, this court in the case of *Ang Hiok Seng v Yim Yut Kiu* crafted the third principle. It was held that the standard of proving fraud should be dependent on the nature of the fraud alleged. In delivering the judgment for the court Mohd Azmi FCJ said this at pp 59–60:

> ... where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. ... But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud – and not based on a criminal conduct or offence – the civil burden is applicable.

[31] We would say that the *Ang* case seemed to have made a distinction between civil fraud and criminal fraud even in civil proceedings. Examples of fraud with criminal nature in civil claims were given such as conspiracy to defraud or misappropriation of money or criminal breach of trust while for fraud of civil nature were those provided under ss 17 and 18 of the Contracts Act 1950 . Those sections define certain acts as 'fraud' and 'misrepresentation' if they have induced the entering or deceived someone into entering a contract. Unfortunately even with such illustrations the demarcation between civil and criminal fraud remained ambiguous.(Note on the view expressed on the difficulties in distinguishing between civil and criminal fraud in *Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd* [2000] 4 MLJ 399; [2000] 4 AMR 3784).

[32] The confusion was further compounded when this court quite recently in the case of *Yong Tim v Hoo Kok Cheong* [2005] 3 CLJ 229) was emphatic and adopted the first principle, namely, that 'the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has been consistently applied by the courts in Malaysia. We see no reason to disturb that trend (see also: *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1)).

[33] It is therefore not surprising that subsequent to *Yong Tim* the lower courts, being bound by the principle of stare decisis, adopted the criminal standard of proof for fraud in civil claims (see: *Chong Song @ Chong Sum & Anor v Uma Devi a/p V Kandiah* [2011] 2 MLJ 585); *Shell (M) Trading Sdn Bhd v Tan Bee Leh @ Tan Yue Khoen & Ors* [2013] 8 MLJ 533).

[34] In view of such uncertainty in the law both learned counsel for the parties in this appeal strenuously urged us to revisit the earlier decisions of the courts in this country. It was submitted that the position of the law should be rectified so as to be in tandem with the generally accepted standard as applied in other common law jurisdictions, in particular among the Commonwealth countries such as England, Canada, Australia and Singapore.

[35] Now, before we respond to that urging it is only appropriate that we begin by examining the English position. Based on the various decisions of the English courts it is clear that under English law the standard of proof for fraud in civil claim has been on the balance of probabilities. But 'the elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities' (see: *Bater v Bater*; *Hornal v Neuberger Products Ltd*: ... for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities.).

[36] While the English position appeared to be clear, some confusion came about when the Privy Council through Lord Atkin held otherwise (see: *New York v Heirs of Phillips Decd* [1939] 3 All ER 952; *Narayanan*) and failed to consider an earlier decision of the same tribunal (see: *Doe d Devine v Wilson* (1855) 10 Moo PCC 502: In a civil case ... The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities.) This resulted in some common law jurisdictions including this country adopting the criminal standard of proof on a beyond reasonable doubt in civil claims when fraud is alleged. But there were also some other jurisdictions, after considering the rationale of the proposition by Lord Atkin, declined to follow it. (Canada and Australia courts declined to follow Lord Atkin's preposition.)

[37] Be that as it may, the English position is now settled once and for all in the case of *In re B (Children)* (see also *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153 where Lord Hoffmann first stated the law). In that case the House of Lords held that there is 'only one civil standard of proof and that is proof that the fact in issue more probably occurred

than not'. The 'range of circumstances which have to be weighed when deciding as to the balance of probabilities' (*Hornal v Neuberger Products Ltd*) or 'heightened civil standard' (see: *Regina (McCann and others) v Crown Court at Manchester and another Clingham v Kensington and Chelsea Royal London Borough Council* [2003] 1 AC 787 per Lord Steyn) is no longer a factor to consider 'when deciding as to the balance of probabilities'. This is what Lord Hoffmann said at p 7:

> My Lords, I would invite your Lordships fully to approve these observations. I think that the time has come to say, once and for all, that here is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann*'s case, at p 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

[38] And Baroness Hale of Richmond was even more forceful in emphasising on the law when she said this at pp 11 and 22 respectively:

> In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.
>
> ...
>
> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies'.

[39] It is worthy to note that the English Supreme Court in the case of *In re S-B (Children) (non-accidental injury)* [2009] UKSC 17 followed the law as pronounced in *In re B (Children)*. The Supreme Court firmly approved that 'there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not'. The court also rejected the 'nostrum, 'the more serious the allegation, the more cogent the evidence needed to prove it'. This rejection goes to show that even for hybrid cases (civil cases but containing material allegations implying criminal conduct. There are some judicial views that for a hybrid case a higher degree of probability or a higher standard of

proof is required. In the words of Lady Hale in *In re S-B Children* such views 'had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said' in *In re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563) the same civil standard of proof applies.

[40] The Canadian courts took the same position as the English courts. In *F H v McDougall* [2008] SCC 53) the Canadian Supreme Court held that 'in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinise the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred'.

[41] And in rejecting the suggestion that there are different levels of scrutiny of evidence depending on the seriousness of the allegation, Rothstein J delivering the judgment of the Canadian Supreme Court said this at para 45:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinised with greater care implies that in less serious cases the evidence need not be scrutinised with such care. I think it is inappropriate to say that there are legally recognised different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinised with care by the trial judge.

[42] In fact long before *McDougall* the position of the law in Canada (see: *Hanes v Wawanesa Mutual Insurance Co* (1936) 36 DLR (2d)) was in line with the jurisprudence as stated in *Bater v Bater*.

[43] In Australia the approach then by the courts there could be surmised in the case of *Rejfek & Anor v McElroy & Anor* (1965) 39 ALJR 177) in which the High Court of Australia stated this at para 11:

> But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

[44] It is to be noted that *Rejfek & Anor v McElroy & Anor* followed an earlier decision of the High Court in *Helton v Allen* (1940) 63 CLR 691) that preferred the decision in *Doe d Devine v Wilson* to that of Lord Atkin's pronouncements in *New York v Heirs* of *Phillips Dec'd* and *Narayanan*. Indeed the pronouncements of Lord Atkin were considered as a mere dicta.

[45] Nearer home, in Singapore, the principle of law on the standard of proof for fraud in civil claims is also on the balance of probabilities. And although the notion of a third standard of proof where fraud is the subject in a civil claim has been rejected, the courts there nevertheless added a caution that 'the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case' (see: *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR (R) 263; *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258; [1996] 2 SLR (R) 774)

[46] It is therefore quite obvious that the current law in Singapore on the standard of proof for fraud in civil claims is the pre *In re B (Children)* position under the English law.

[47] In view of the positions of the law in the respective common law jurisdictions as summarised above, we agree with both learned counsel for the parties in this appeal that the position of the law on the standard of proof for fraud in civil claims in this country is far from satisfactory. With respect, there is merit in the submission of learned counsel for the defendant that the adoption of the criminal standard of proof for fraud in civil claims is due to the misinterpretation or even a blind adoption of the judgment of Lord Atkin in *Narayanan Chettyar v Official Assignee of the High Court, Rangoon*.

[48] As such, in our judgment the time has come to realign the position of the law in this country on the standard of proof for fraud in civil claims. While learned counsel for the defendant seemed to favour the adoption of the Singapore position, learned counsel for the plaintiff urged us to adopt the principle in *In re B (Children)*.

[49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In re B (Children)*. It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts'.

[50] Hence, it is therefore up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim to find whether the standard of proof has been attained. 'The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies'. The criminal aspect of the allegation of fraud and the standard of proof required thereof should be irrelevant in the deliberation.

[51] Accordingly as stated earlier we agree with the reasons given by learned counsel for both parties that the present standard of proof for fraud in a civil claim in this country is not in line with the principle as applied in other common law jurisdictions and should therefore be reviewed (see: *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR 469 which discusses the thorny issues related to the application of the criminal standard in a civil claim involving the allegation of fraud). Indeed it is quite obvious in *Narayanan* that Lord Akin did not provide any cogent reason for applying the criminal standard of proof in a civil claim when fraud is alleged. Similarly in *Saminathan* the principle in *Narayanan* was applied without any discussion on its rationale.

[52] We therefore reiterate that we agree and accept the rationale in *In re B (Children)* that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply. And perhaps it is not out of place here to restate the general rule at common law that, 'in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities' (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, at p 74).

[53] Accordingly, despite the reaffirmation of the law on the issue in *Yong Tim v Hoo Kok Cheong* we hold that it is no longer the law in this country. Similarly, the principles as pronounced in *Ang Hiok Seng* and *Lee You Sin v Chong Ngo Khoon* despite applying the civil standard to a certain extent are also no longer the law. Hence, the disapproval of *Lau Kee Ko* in *Ang Hiok Seng* is no longer relevant.

[54] However, we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims.

[55] Our answer to the leave question is therefore in the negative.

[56] Reverting to the present appeal, we have duly perused the facts and evidence adduced. And applying the principle we have just pronounced on the standard of proof for fraud in civil claims which is less onerous than the standard applied by the courts below, we agree with the reasons, findings and conclusions of the Court of Appeal in allowing the counterclaim of the defendant.

[57] In the upshot this appeal is therefore dismissed with costs.

Appeal dismissed.

Reported by Ashok Kumar