

Directors and their Two Hats: An Analysis of *Sim Tee Meng v Haw Wan Sin David*

[2019] SGCA 71*

I. Introduction

- 1 The oft-cited doctrine of separate legal personality,¹ which draws a distinction between the acts of a company and those of the company’s directors, generally offers protection for the directors in cases where a company is sued for torts. This is because courts have generally refrained from “piercing the corporate veil”² to impose liability on the director for acts committed by the company.³ A director will not be held personally liable for negligence if they did not direct or procure the commission of the tort,⁴ and acted properly in the discharge of his duties to the company.⁵
- 2 However, the recent decision of *Sim Tee Meng v Haw Wan Sin David* (“*Sim Tee Meng*”) demonstrates how a director can be found to have *personally* committed a tort and therefore held liable for such a tort.⁶ On the facts, the Court of Appeal (“CA”) held that the director owed a *personal* duty of care to the customers for certain representations he had made.⁷ Thus, a key concern following this ruling is when acts of negligence will be personally *attributed* to a company’s director. This is in contrast to the more common scenario where the company is found liable for a tort, and the question is whether the corporate veil should be pierced to then impose personal liability on the director.

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¹ In *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, the UK House of Lords laid down the fundamental principle that a company has a distinct legal personality at law, and thus, a company can sue and be sued.
² Companies are separate legal entities from their directors. The corporate veil exists to shield a director from being liable for corporate acts. However, where the corporate veil is pierced, the director will be held personally responsible for the company’s liability. See: Stephen Bull, “Piercing the Corporate Veil – In England and Singapore” (2014) Sing JLS 24 at 27.

³ *Goh Chan Peng v Beyonics Technology Ltd* [2017] 2 SLR 592 at [71].

⁴ *Said v Butt* [1920] 3 KB 497; see also *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649; and *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543.

⁵ *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 (“*PT Sandipala*”).

⁶ *Sim Tee Meng v Haw Wan Sin David and another* [2019] SGCA 71 (“*Sim Tee Meng* (CA)”).

⁷ *Id.*, at [7].

3 The present article summarises the case and discusses the potential impact on directors’ liability in the course of their interaction with customers. Overall, the author believes the decision of *Sim Tee Meng* to be a helpful clarification on directors’ liability in this regard, by highlighting the “dos and don’ts” for a director when interacting with clients.

II. Facts

4 The people involved in this case are the appellant, Mr Sim Tee Meng (“**Mr Sim**”) and the respondents, Mr Haw Wan Sin David and Mdm Yee Ai Moi Cindy (“**Mr Haw**” and “**Mdm Yee**”).⁸ Mr Sim was the Key Executive Officer (“**KEO**”) of an estate agency, Faber Property Pte Ltd (“**Faber**”).⁹

5 Faber had agreed with a developer, the New Zealand company Albany Heights Villas Limited (“**the Developer**”), to market an investment in a residential housing project in New Zealand (“**the Project**”) on its behalf.¹⁰ Mr Sim worked alongside Ms Seah Beng Hoon (“**Ms Seah**”), the associate director of Faber, and met with Mr Haw and Mdm Yee regarding purchasing the Project.¹¹ Mr Haw and Mdm Yee eventually entered into agreements with the Developer to invest in the Project.¹² However, the Developer did not actually have the necessary title or legal authorisation needed to develop the land for the Project, and eventually went into insolvent liquidation.¹³

6 Mr Haw and Mdm Yee then sued Mr Sim, Ms Seah, and Faber on the basis of negligent misrepresentation.¹⁴ They alleged that when they had asked Mr Sim about the due diligence checks for the Project, Mr Sim replied in the affirmative, despite the fact that the checks had not yet been completed.¹⁵

⁸ *Id.*, at [1]–[3].

⁹ *Id.*, at [3].

¹⁰ *Id.*, at [3] and [9].

¹¹ *Id.*, at [3] and [10]–[13].

¹² *Id.*, at [14].

¹³ *Id.*, at [15].

¹⁴ *Id.*, at [3].

¹⁵ *Id.*, at [3], [14], and [33]–[34].

7 At first instance, the Judge held that Faber was liable for negligent misrepresentation, but dismissed the claim against Mr Sim and Ms Seah.¹⁶ On appeal, the High Court (“HC”) dismissed the appeal against Ms Seah,¹⁷ but allowed the appeal against Mr Sim, finding that he had assumed personal liability for the representations.¹⁸ Mr Sim then appealed to the CA. Mr Sim’s key contentions on appeal were that: (a) he did not make the alleged representations, and in any case, (b) he was not personally liable to Mr Haw and Mdm Yee for making the representations.¹⁹ The CA however dismissed his appeal.

III. Grounds of Decision

A. *Whether Mr Sim had made the alleged misrepresentations*

8 Mr Sim’s first argument was that he had not made the alleged representations. This was quickly dismissed, with the CA accepting the HC’s finding of fact that Mr Sim had in fact made such representations.²⁰ The CA reiterated that the trial judge was generally better placed to assess the veracity and credibility of witnesses, and the appellate court would only overturn such findings where the judge’s assessment was “plainly wrong or against the weight of such evidence”.²¹ In addition, the CA noted that there were internal inconsistencies between Mr Sim’s original case and his evidence regarding the meeting with Mr Haw and Mdm Yee on 16 January 2012.²² Here, the CA affirmed the HC’s ruling that such inconsistencies had decreased Mr Sim’s credibility as a witness.²³

¹⁶ *Haw Wan Sin David v Faber Property Pte Ltd* [2018] SGDC 143.

¹⁷ *Haw Wan Sin David v Sim Tee Meng* [2018] SGHC 272 (“*Sim Tee Meng* (HC)”), [104]-[117]. While the HC departed from the DC in finding that Ms Seah did owe a duty of care to Mr Haw and Mdm Yee, the HC ruled that Ms Seah did not breach this duty because she did not fall below the standard of care expected of her, since she acted reasonably in carrying out her duty as a property agent of Faber.

¹⁸ *Id.*, at [59]-[103].

¹⁹ *Sim Tee Meng* (CA), *supra* n 6, at [6].

²⁰ *Id.*, at [33]-[34].

²¹ *Id.*, at [33], affirming *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] 3 SLR 563 at [37]-[41].

²² *Ibid.*

²³ *Sim Tee Meng* (HC), *supra* n 17, at [27] and [49].

B. Whether Mr Sim owed a personal duty of care to Mr Haw and Mdm Yee

9 The second and more important issue was whether Mr Sim owed a duty of care to Mr Haw and Mdm Yee personally, since they had only committed themselves to the Project after obtaining the representations from Mr Sim.²⁴ In determining this, the CA applied the *Spandeck* framework, which required a consideration of whether it was (a) factually foreseeable that Mr Sim’s negligence would cause Mr Haw and Mdm Yee to suffer harm; (b) there was sufficient legal proximity between both parties; and (c) whether policy considerations militated against the imposition of a duty of care.²⁵

(1) *Application of the Spandeck Framework – Factual Foreseeability and Legal Proximity*

10 It was not disputed that the first element was satisfied.²⁶ Vis-à-vis the element of legal proximity, the CA agreed with the HC that since Mr Sim had “personal” and “direct” interaction with the plaintiffs, he had assumed responsibility to them for the accuracy of the representations made.²⁷ The plaintiffs also relied on those representations when entering the agreements made,²⁸ and thus sufficient legal proximity was established.

(2) *Application of the Spandeck Framework – Policy Considerations*

11 With respect to policy considerations, Mr Sim relied on the decision of *PT Sandipala* for the proposition that a director can be protected from personal liability where he acts properly in the discharge of his duties to the company.²⁹ Adopting that proposition, Mr Sim further argued that personal liability could only be imposed in cases where (a) the director was involved in a material way in the acts that led to the company incurring tortious liability, and (b) the director did not act properly in the discharge of his duties to the company.³⁰ This followed the formulation proposed³¹ by Prof Tan Cheng Han.³¹

²⁴ *Sim Tee Meng* (CA), *supra* n 6, at [41].

²⁵ *Id.*, at [35].

²⁶ *Ibid.*

²⁷ *Id.*, at [37].

²⁸ *Id.*, at [40].

²⁹ *Id.* at [44], citing *PT Sandipala*, *supra*, n 5, at [78].

³⁰ *Id.* at [44].

³¹ Tan Cheng Han, “Tortious Acts and Directors” (2011) 23 SAcLJ 816 at [26].

- 12 The CA however did not apply this test since Mr Sim was found to have committed the tort *personally*, whereas the test (as proposed by Prof Tan) was to determine whether personal liability should also be placed on a director in the specific situation where a tort was already committed by the company.³² In any event, even if the test applied, the CA held that Mr Sim had not made “reasonable checks” as to the truth of the statements made, and thus, Mr Sim did not act properly in discharging his duties to Faber.³³
- 13 Finally, the CA held that the mere fact that Mr Sim was acting as a director or employee of the company did not mean that he could not *also* be liable for his own torts committed in relation to the company’s affairs.³⁴ The imposition of a duty of care on Mr Sim was consistent with established principles on directors’ liability, even though Mr Sim was acting as Faber’s KEO at the material time.³⁵ The CA thus affirmed the HC’s finding that Mr Sim was personally liable to Mr Haw and Mdm Yee in negligence.³⁶

IV. Discussion

A. *The question of who committed the tort: Company or Director*

- 14 This decision draws a clear distinction between torts that are committed by a company and torts committed personally by its directors. Both the CA and HC found that the tort had been committed by Mr Sim personally, rather than the company Faber. This has important implications for how and when directors can be held liable for torts.
- 15 Local courts have healthy respect for the corporate veil, and have refrained from lifting it³⁷ to impose personal liability on the director for the company’s acts.³⁸ However, as stated in *Animal Concerns Research*,³⁹ lifting of the corporate veil would only occur

³² *Id.*, at [45].

³³ *Id.*, at [46].

³⁴ *Id.* at [47].

³⁵ *Ibid.*

³⁶ *Id.*, at [48].

³⁷ *Sim Tee Meng* (HC), *supra* n 17, at [67]–[70].

³⁸ Piercing of the corporate veil should be confined to true exceptions to legal personality, see Stephen Bull, “Piercing the Corporate Veil – In England and Singapore” (2014) *Sing JLS* 24 at p 36.

³⁹ *Animals Concern Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146.

where the director is sued for the company's tortious act, rather than his own tort.⁴⁰ In the present case, the HC stressed that Mr Sim's personal liability was not precluded even though he was a director.⁴¹ As he was found to have personally committed the tort, no lifting of the corporate veil was necessary to find him liable for it.

16 This raises a question. How then should the court decide between acts that are to be attributed to the company, and those attributed to the director, in order to accurately impose tortious liability? In this case, the key consideration was whether Mr Sim's representations amounted to a voluntary assumption of responsibility in a *personal capacity*. The approaches taken by the HC and the CA respectively in attributing the tort to Mr Sim will first be compared, followed by an analysis of Prof Tan's proposed test for imposing personal liability on directors for torts committed by the company.

B. Assumption of Responsibility

17 Both the HC and CA found that Mr Sim had voluntarily assumed responsibility for his representations in a personal capacity and hence the tort was attributed to Mr Sim rather than Faber. While both the CA and HC appeared to have reached the same conclusion, their reasoning differed, however. In short, the HC focused on Mr Sim's *conduct*, while the CA was concerned with Mr Sim's *knowledge*.

(1) High Court's Decision

18 In determining whether the director assumed personal responsibility, the HC looked at whether the director *conducted himself* in such a manner that would lead customers to believe that the director had assumed personal responsibility.⁴²

⁴⁰ *Animal Concerns Research*, *supra* n 39, at [84].

⁴¹ *Id.*, at [70].

⁴² *Sim Tee Meng* (HC), *supra* n 17, at [83].

- 19 The HC focused on the Mr Sim’s manner of speech and his failure to make a disclaimer. By focusing on Mr Sim’s *conduct* (his manner of speech and his failure to make a disclaimer), the HC examined whether Mr Sim had *assumed* responsibility for the representations in his personal capacity. The HC found this to be the case, since Mr Sim had spoken personally and directly to Mr Haw and Mdm Yee.⁴³
- 20 Indeed, the HC ruled that Mr Sim’s role was not dispositive of the matter; what was key was the manner in which he spoke to Mr Haw and Mdm Yee. He spoke directly and personally, making it obvious that the respondents could reasonably rely on his word as a personal assumption of responsibility.⁴⁴ As Lord Steyn explained in *Williams v Natural Life Health Foods Ltd* (“*Williams*”), if a director “wrote to a customer and rendered an invoice”, in contrast to writing on company notepaper, this would suggest personal assumption of responsibility by the director.⁴⁵
- 21 The HC also noted that Mr Sim failed to preface his statements with the disclaimer that he was speaking on behalf of Faber, the company, and not for himself.⁴⁶ The HC distinguished this from a situation where if, for instance, Mr Sim had written to the Mr Haw and Mdm Yee in the company’s name instead.⁴⁷ In reaching this conclusion, the HC raised the case of *Williams*, in which it was found that the director did not assume responsibility because there were no personal dealings, nor exchanges that “conveyed to the plaintiffs that [he] was willing to assume personal responsibility to them”.⁴⁸

⁴³ *Sim Tee Meng* (HC), *supra* n 17, at [83].

⁴⁴ *Sim Tee Meng* (HC), *supra* n 17, at [83].

⁴⁵ *Id.*, at [74] citing *Williams and another v Natural Life Health Foods Ltd* (“*Williams*”) [1998] 1 WLR 830 at 835–836.

⁴⁶ *Sim Tee Meng* (HC), *supra* n 17, at [83].

⁴⁷ *Ibid.*

⁴⁸ *Williams*, *supra* n 45, at 838.

(2) *Court of Appeal's Decision*

22 As previously stated, the CA focused on the *knowledge* Mr Sim actually possessed. Specifically, he knew that he would be speaking to Mr Haw and Mdm Yee as the KEO,⁴⁹ and that Mdm Yee, as a real estate salesperson, understood what he meant by “due diligence checks”.⁵⁰ Still, the CA went on to consider what “knowledge he could *reasonably* be assumed to have by virtue of his position”.⁵¹ This appears to be an additional requirement of constructive knowledge, beyond that of actual knowledge.

23 The CA therefore accounted for both Mr Sim’s *actual* and *constructive* knowledge in making the that there was a voluntary assumption of responsibility. This is consistent with both the high standard that a director is held to in respect of his actions,⁵² as well as the relevance of his internal state of mind for the imposition of personal liability.

(3) *Differences in the Courts' Reasoning*

24 Notably, while the HC focused on the *external* impression provided by Mr Sim via his conduct, the CA chose to examine his *internal* state of mind (i.e. his knowledge). The difference in the court’s focus highlights the multiple ways in which directors can be held personally liable for acts that were seemingly committed on the company’s behalf. Additionally, the CA’s decision may suggest a stricter standard whereby constructive knowledge is also relevant for imposing liability on directors.

25 The takeaway is that directors should guard themselves against personal liability, which can be imposed through various methods. Thus, directors should remain cautious when interacting with customers. For instance, they could always preface their discussions with the customer with a disclaimer that they are speaking on behalf of the company, and not in a personal capacity.

⁴⁹ *Sim Tee Meng (CA)*, *supra* n 6, at [37].

⁵⁰ *Ibid.*

⁵¹ *Id.*, at [38].

⁵² See Companies Act (Cap 50, 2006 Rev Ed) at s 157(1): A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

C. *Other Issues of Directors' Liability: Torts committed by the Company*

26 As mentioned above, the CA also briefly discussed Prof Tan's two-stage test.⁵³ While the test was not relevant to the facts of *Sim Tee Meng* as the tort was legally attributed to the director *himself*, rather than the company, the author thinks there is value to this test when applied to the specific issue of whether a director is liable for a tort committed by his or her company.⁵⁴

27 Applying this test to torts committed on behalf of a company grants greater protection for directors, especially for directors of small companies. Directors of small companies, as the court pointed out, face greater risk of personal liability because of the nature of their interactions with customers, which may be subject to practical constraints.⁵⁵ However, the second stage of this test, which requires consideration of whether the director acted properly in the discharge of his duties to the company, may help to shield the directors from personal liability. We await further analysis on this point by the courts in future cases.

V. Conclusion

28 The question now is – what are the “dos and don'ts” for directors when they interact with clients, so that they can protect themselves from personal liability? The decision in *Sim Tee Meng* makes clear that whether a director assumes personal responsibility for representations made on behalf of the company will depend on the specific facts of each case.⁵⁶ The CA identified the importance of the director's role in the company as a crucial consideration, as this can affect the weight of his words when he speaks on behalf of the company.⁵⁷ Furthermore, directors who have frequent direct interactions with customers (as directors of smaller companies may need to do so), may be more exposed to the risk of being found to have assumed personal responsibility.⁵⁸ Directors should take note of these important factors which can affect their personal liability.

⁵³ See this article, [11].

⁵⁴ *Id.*, at [45].

⁵⁵ *Id.*, at [40].

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

29 The CA’s decision also mentions that it is open for directors disclaim personal liability when conducting business for their companies by specifically stating that they are speaking on *behalf of the company* rather than themselves. The downside of such an approach, as the CA suggested, is of course that such disclaimers are “likely to drive business away”.⁵⁹ As such, diligently and carefully carrying out the business may be a more effective way of preventing legal action from customers against both the company and the director. Nonetheless, a disclaimer is something that directors should keep in mind when conducting business.

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⁵⁹ *Ibid.*