

Developing Common Law in Hong Kong
(A lecture in the Common Law Lecture Series 2015
delivered at the University of Hong Kong
on 27 October 2015
by the Hon Mr Justice Tang PJ)

1. I am going to talk about three recent decisions of the Court of Final Appeal and use them to illustrate Hong Kong's place in the development of the common law.

2. The first is *Big Island*¹ where the CFA refused to follow *Seldon v Davidson*, a decision of the English Court of Appeal which has been followed in England since it was decided in 1968.² How *Big Island* will be received in England is uncertain but it is unlikely that we have heard the last of *Seldon v Davidson*. Most of the talk will be devoted to this case.

3. The second decision is *Richly Bright*,³ which concerns the rule in *Hadley v Baxendale*, the meaning and effect of which, has been the subject of constant refinement since it was decided in 1854. Loosely stated, the rule was that the contract breaker is liable for any loss which is reasonably foreseeable as the ordinary consequence of the relevant breach in the circumstances known to

¹ *Big Island Construction (HK) Ltd v Wu Yi Development Company Ltd and Another*, FACV No 1 of 2015, 26 June 2015. Ribeiro, Tang and Fok PJJ, Chan and Sir Anthony Mason NPJJ.

² [1968] 1WLR 1083.

³ *Richly Bright International Ltd v DE Monsta Investment Ltd and Another*, FACV No 12 of 2014, 18 May 2015. Ma CJ, Ribeiro, Tang and Fok PJJ, Lord Walker of Gestingthorpe NPJ.

the parties to the contract. An important development is the recent decision of the United Kingdom Supreme Court in *The Achilles*,⁴ where there was a difference of opinion on what is the correct juridical basis for the rule. The Supreme Court was divided 3:3. Both Lord Hoffmann and Lord Hope were of the view that liability depends on whether the defendant could be taken to have undertaken responsibility for the particular kind of loss rather than the foreseeability of loss depending on the knowledge of the defendant. As Toulson LJ explained in *Supershield Ltd v Siemens Building Technologies FE Ltd*, that meant that the contract breaker would not be held to be liable for loss which resulted from its breach although some loss of the kind was not unlikely. Lord Rodger of Earlsferry and Lady Hale preferred the traditional view. Lord Walker agreed with both views.⁵ The difference did not matter in the actual decision in *The Achilles* but may matter in some cases.⁶ In *Richly Bright* the CFA came down decisively in favour of the basis that liability depends on whether the defendant could be taken to have undertaken responsibility for the particular type of loss. *Richly Bright* provides a good example of the ready adoption of the development of common law in Hong Kong.

⁴ [2009] 1 AC 61.

⁵ Indeed, in my judgment I also said I agree with both views because on either view the conclusion was the same.

⁶ It might even have made a difference in *Richly Bright*, see para 76 of Ribeiro PJ. Although not so in my view (Para 125).

4. The third is *Moulin*⁷ which concerns the attribution of fraud or misconduct of directors or agents to a company. It was an unusual case which did not fall within the usual situations in which this question usually arises. The types of cases in which this question usually arises are: “liability cases, where a third party seeks to make the company liable for a liability which involved fraud or misconduct on the part of its directors or agents; redress cases, where the company seeks redress from its fraudulent or misconducting directors or agents; indemnity cases, where the company sues a third party who was not involved in any such misconduct for an indemnity against its consequences”,⁸ for example, insurers or auditors. In liability cases, the matter is often a straight-forward question of agency. In redress and indemnity cases, the question of attribution often arises in the context of the defence of *ex turpi causa non oritur actio*. *Moulin* was concerned with a claim for a refund of profits tax overpaid due to the fraudulent inflation of profits by the company’s management, on the basis of which the return was made. The claim was made under s 70A of the IRO, under which the Commissioner was empowered to correct an assessment within six years of the assessment if the tax charged was excessive by reason of an error in the tax return submitted. On the basis that a deliberate lie is not an error, the question was whether the fraudulent knowledge of the management should be attributed to the company. So *Moulin* was not concerned with a claim against

⁷ *Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, Ma CJ, Ribeiro and Tang PJJ, Bokhary and Lord Walker of Gestingthorpe NPJJ.

⁸ See *per* Lord Sumption in *Bilta (UK) Ltd v Nazir (No.2)*[2015] 2 WLR 1168 at #87.

anybody as such. The CFA held by a majority that the fraud exception did not apply and the fraudulent knowledge of the management was attributed to the company. The leading judgment was given by Lord Walker NPJ. Lord Walker's judgment was discussed by the UK Supreme Court in *Bilta*,⁹ where the question of attribution arose in the context of the illegality defence.

5. In *Moulin*, we assumed that subject to the fraud exception the knowledge of the fraudulent management would be attributed to *Moulin*. That seemed to have been the approach adopted by Lord Sumption in *Bilta*. However, the other members of the court in *Bilta* appeared to have regarded the fraud exception as not so much an exception to a general rule but as part of a general rule. The difference may not matter very much. In either case, I believe the critical issue is what considerations should govern the determination of the proper ambit of the exception or the formulation of the general rule. I will briefly consider the impact of *Bilta* on *Moulin*.

6. I return now to our first case. *Big Island*. There, the plaintiff claimed repayment of 19 loans totaling over \$102 million. The defendants admitted the receipts of the money but denied that they were loans and claimed that they were paid by the plaintiffs to them pursuant to various fund exchange

⁹ *Bilta (UK) Ltd v Nazir* (No 2)[2015] 2 WLR 1168.

agreements, under which RMBs were pay to the plaintiff's order in the Mainland in return for the payments in Hong Kong. The trial had taken 43 days. In the end, the trial judge rejected the plaintiff's case on loans but was unimpressed with the defence evidence which he rejected as improbable.¹⁰

7. It was in that context that the question of burden of proof came before us.¹¹ The plaintiffs relied on *Seldon v Davidson* and argued that since the trial judge had rejected both the plaintiffs' case and the defence, and given that receipt of the payments was admitted, the burden of proof was on the defence to show on a balance of probabilities why the money did not have to be repaid, for example, that the payments were gifts, (or) they were made in settlement of an existing debt, in return for cash or something of the sort. And since the defence could not discharge the burden of proof, judgment should have been entered in favour of the plaintiffs. Counsel for the appellant, *Big Island*, relied on the following statement in *Chitty on Contracts*, 31st edition, volume 2, specific contracts at 38-259 where the effect of *Seldon v Davidson* was summarized in these words :

“If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly if B claims that the money was intended as a gift, the onus is on him to prove this fact.”

¹⁰ Para 162.

¹¹ The appeal was as of right.

8. In *Big Island*, we were unanimously of the view that on the facts, the trial judge ought to have found the defence proved and on that basis we dismissed the appeal. However, because *Seldon* was often invoked in Hong Kong, and its correctness directly challenged before us, we decided to consider whether it should continue to be followed in Hong Kong. Sir Anthony Mason NPJ, whose judgment was agreed to by three other members of the court¹² was of the view that *Seldon* was wrongly decided and inconsistent with earlier English decisions and with Australian authorities. I believe *Seldon* was correctly decided on its own facts namely, a claim for the repayment of money when the only defence raised was that the money was a gift.¹³

9. *Seldon v Davison* was an extempore judgment of the English Court of Appeal (Willmer and Edmund-Davies LJJ) on an interlocutory appeal from the County Court. There, the plaintiff claimed the return of £1,550 for debt or as money had and received from her chauffeur and handyman. The money was paid by two cheques to *Davison*'s solicitors and used in the purchase of a house. The receipt of the money was admitted but the defence was that it was a gift, alternatively if it was a loan it was not yet repayable and would only be repayable as and when the defendant was able to do so. On such pleadings, the County Court judge ordered the defendant to begin, being of the view that the

¹² Ribeiro and Fok PJJ and Chan NPJ.

¹³ Para 99.

legal burden was on the defendant to prove “either that there was a gift or, if it was a loan, that it was not repayable at the date of the issue of the writ”.¹⁴ We are not concerned with the alternative defence, which in any event was rejected by the Court of Appeal.¹⁵ The trial was adjourned however to enable the defendant to appeal. The Court of Appeal affirmed the decision of the County Court judge that the burden of proof that the money was a gift was on the defendant. In the Court of Appeal, counsel for the defendant relied on *Cary v Gerrish* (1801) 4 Esp 9, and submitted that the burden was on the plaintiff to prove a loan of money. In *Cary* the claim was for money lent to the defendant during the lifetime of the testator. Payment was proved. On a plea of non assumpsit, Lord Kenyon said, payment by a draft made out in the name of the defendant and paid:

“... is no evidence to establish a debt. No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator; or the defendant might have given cash for it at the time ...”

10. I will ask you to note that in 1801 , when *Cary* was reported, a plea of non assumpsit put everything in issue and it was for the plaintiff to prove that there was a loan as well as non repayment.¹⁶

¹⁴ 1087D.

¹⁵ Wilmer LJ took 1088F the view that the loans were repayable on demand and Edmund-Davies LJ 1090G that the loans were immediately repayable because *Davison* had repudiated any such alleged agreement by claiming that they were gifts.

¹⁶ See the helpful discussion in *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 563.

11. Willmer LJ distinguished *Cary* and said that there was no suggestion in *Seldon* that the money:

“... was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort.¹⁷ In the absence of any such circumstances, money paid by the plaintiff (Note the expression, money paid, not money lent) in circumstances such as these is prima facie repayable on demand. If the defendant seeks to evade repayment of the money which was paid to him, it seems to me that the judge was right in placing the onus upon him to prove the facts which he alleges show that the money was not repayable.” (1088F)

12. Edmund-Davies LJ agreed and said:

“... when the simple payment of money is proved or admitted between strangers ... on that bald state of affairs, proof of payment imports a prima facie obligation to repay the advancement in the absence of circumstances from which presumption of advancement can or may arise.” (1090F)

13. Both Willmer LJ and Edmund-Davies LJ said that on the facts of *Seldon v Davison*, no presumption of advancement could arise. Wilmer LJ¹⁸ said that since counsel for the defendant accepted that the house which was bought with the money supplied by the plaintiff would be held on a resulting trust for her, it would be strange “if the same consideration did not apply to the money paid by the plaintiff to the defendant to assist him in the purchase of the house”. Edmund-Davies LJ also referred to counsel’s concession and said¹⁹ “[a]lthough it is conceded, it is nevertheless said that it is for the plaintiff to

¹⁷ I will return to this below.

¹⁸ At 1088C.

¹⁹ At 1090A.

prove that the money was advanced by way of a loan and not as a gift”. I will return to these remarks later.

14. In dismissing the appeal, Willmer LJ said:²⁰

“If the defendant seeks to evade repayment of the money which was paid to him, it seems to me that the judge was right in placing the onus upon him to prove the facts which he alleges show that the money was not repayable.”

15. Edmund-Davies LJ said:²¹

“... this trial should proceed upon the basis that it is for the defendant to establish that which he asserts, namely, that he received the two sums of money from the plaintiff by way of gift.”

16. *Seldon v Davidson*'s correctness has not been questioned in England. Nor indeed, in Hong Kong until *Big Island*. I will first discuss some of the authorities in England where *Seldon* were considered.

17. In *Chapman v Jaume* [2012] EWCA Civ 476 (Thorpe, Etherton and Lewison LJJ), the parties were unmarried co-habitees. The plaintiff claimed the return of £162,589.42 which he alleged were loans subject to express terms about the time at which they were repayable. The defendant's case was that the money had been paid in lieu of contribution to the running of the household. The judge rejected the respondent's case but dismissed the claim

²⁰ At 1088G.

²¹ At 1091A.

since the plaintiff had failed to prove the precise conditions about the time at which the money would be repaid. The appeal was allowed. Lewison LJ referred to *Seldon* and in particular, the passages from Willmer LJ's judgment and Edmund Davies LJ quoted above and said it was unfortunate that the judges' attention was not drawn to this authority. He then rejected the respondent's argument on presumption of advancement saying that there was no presumption between cohabitants and then said:

“25. ... on the facts found by the judge, he ought to have drawn the inference that the money was repayable within a reasonable time after demand.”

So the decision actually turned on its own facts and not on *Seldon*, but *Chapman* is nevertheless a clear affirmation of *Seldon*.

18. In *Clark v Mandoj* (unreported, 19 March 1998) the plaintiff who cohabited with the defendant sued her for debt. Her defence was that they were gifts. The judge “... rejected the plaintiff's evidence and case that there was an agreement for a loan on the terms put forward by the plaintiff. He also rejected the case of the defendant that the plaintiff had intended that the whole of that which he had contributed should be a gift” and decided that only a limited amount need to be repaid. The plaintiff appealed. In the Court of Appeal, Hobhouse LJ said *Seldon* “concerns the burden of proof and the presumption which exists in the absence of adducing of evidence” however, Hobhouse LJ

was of the view that the judge had decided as a matter of fact by way of inference that they were certain limited funds which should be repaid and that the remainder should not be repaid and dismissed the appeal. Swinton Thomas LJ who agreed with Hobhouse LJ, added at p.10, that if the trial judge had not made any findings he had no doubt following *Seldon* and the other cases mentioned in the Hobhouse LJ's judgment, there would be a clear presumption in favour of a loan together with an obligation to repay.

19. One case relied upon by Hobhouse LJ in *Clark* was *Freeman v Tems*,²² where the defence to a claim for money lent was that they were gifts. Russell LJ pointed out that the judge had not had cited to him *Seldon*, "an important case" and said (with the concurrence of Simon Brown LJ), after quoting the passages from the judgments of Willmer and Edmund Davies LJJ, that the County Court judge having failed to direct himself upon the principles set out in *Seldon*, there was a risk that he approached the problem of whether this was a loan or a gift from the wrong standpoint. The Court of Appeal ordered a retrial.

20. These decisions show quite clearly that the correctness of *Seldon* was generally accepted in England.

²² Unreported, 27 January 1993.

21. *Seldon* was often relied on in our courts but as Sir Anthony Mason NPJ pointed out never critically scrutinized.²³ In *Mak Ka Hing v Pang Ming Chung*²⁴ [2011] 1 HKLRD 347, counsel conceded and the Court of Appeal thought it proper for him to do so that *Seldon* was authority that when receipt was admitted:

“... the legal burden was on the defendant to prove either that there was a gift or, if it was a loan, that it was not repayable at the date of the issue of the writ.”

22. *Lui Fai Yeung v Chui Kin Man*²⁵ (2012) 15 HKCFAR 803 is a decision of the Court of Final Appeal. There, the plaintiff sued the defendant for money lent. There were 178 payments. Receipt of the money was admitted and the relevant defence was that they were gifts. The trial judge was not satisfied with the evidence of either the plaintiff or the defendant and took the view that the money might have been gifts, joint investment or loans and dismissed the claim because the plaintiff failed to prove how much of the payments fell into which category. The plaintiff relied on *Seldon* in the Court of Appeal. The Court of Final Appeal did not find it necessary to decide who had the burden of proof or whether *Seldon* was concerned with the persuasive or

²³ Para 107.

²⁴ MA CJHC, Rogers VP and Le Pichon JA.

²⁵ Chan, Ribeiro and Tang PJJ, Bokhary and Lord Walker of Gestingthorpe NPJJ.

evidential burden. The court held that on the facts of that case, the proper inference to draw was that the payments were gifts.

23. I come now to *Big Island* where by a majority, we decided that the reasoning in *Seldon v Davidson* was flawed and that it should no longer be followed in Hong Kong. Sir Anthony was of the view that *Seldon* was inconsistent with earlier English authorities and Australian authorities. In my dissent, I said that *Seldon* was correctly decided on its facts and that in a case, where payment was admitted or proved and the defence was that the payment was a gift, and where the presumption of advancement was inapplicable, the burden of proof was on the defendant to prove a gift, but because *Big Island* was not concerned with a defence of gift, *Seldon* was not applicable. Of course, our comments on *Seldon* was obiter because we concluded that the trial judge ought to have found that the defence was proved and the appeal was dismissed on that basis.

24. I turn now to Sir Anthony's judgment and the authorities he relied on. First, *Cary v Gerrish*, a decision of Lord Kenyon. You will recall *Cary* was discussed in *Seldon* and I have dealt with it already.

25. *Welch and Another v Evans* (1816), where the payment of money was proved, but:

“Lord Ellenborough was of the opinion that there was not sufficient evidence to leave it to the jury, whether this money had been advanced to Evan Evans, by way of loan, since the presumption of law was, that money when paid is paid in liquidation of an antecedent debt.”

26. *Aubert v Walsh* (1812) 4 Taunt 294, which was very briefly reported, the headnotes of which read:

“Proof of the delivery and payment of a check to the Plaintiff is not sufficient evidence of a debt in order to support a set-off, unless it be shown upon what consideration, and under what circumstances, the check was given.”

27. These English cases are very old, if they had stood alone, I doubt if Sir Anthony would have been prepared, on their authority, to overturn a line of modern English Court of Appeal decisions. However, Sir Anthony had the support of high authority in Australia, namely, *Heydon v Perpetual Executors and Trustees and Agency Company (WA) Ltd* (1930) 45 CLR 111, a decision of the High Court of Australia. There, on a claim for debt and for money had and received, the defence was that the money was a gift. At first instance as well as in the Full Court of Western Australia, it was held that the burden of proving that the money was a gift was on the defence. On appeal, counsel for the appellant/defendant relied, inter alia, on *Cary v Gerrish*. He was stopped by the court which did not require further submissions. In the course of the

submissions on behalf of the respondent, and in response to a submission that “a voluntary payment to a stranger raises a presumption of a resulting trust”, Dixon J said:

“Godefroi, 3rd ed²⁶, at p 195, 4th ed, at p 145 says chattels which pass by delivery are not within the rule, and the presumption arising from a voluntary delivery of them is that a gift was intended, in the absence of circumstances; and in *George v Howard* (1819) 7 *Price* 646, Richards C B says: ‘If I deliver over money ... to another, even although he should be a stranger, it would be *prima facie* a gift.’”

29. There was little discussion in the two judgments which were given in *Heydon*. In the first, Gavan Duffy J, said that:

“... the burden of proving the facts in support of either one or other cause of action ... lies on the plaintiff.”

30. In his concurring judgment Dixon J said:

“In addition to the cases cited during the argument, I desire to mention *Aubert v Walsh* (2) as a further authority in support of the view that the burden was upon the plaintiff.”

31. It seems clear that in *Heydon* the High Court of Australia took the view that a voluntary payment to a stranger would not raise a presumption of resulting trust. On the other hand, it is equally clear that both Willmer and Edmund-Davies LJJ took the opposite view. That is the fundamental difference between *Seldon* and *Heydon*.

²⁶ Henry Godefroi, a digest of the principles of the law of trusts and trustees 1891.

32. Both *Seldon* and *Heydon* were cited to Jenkinson J in the Victorian Supreme Court in *Joaquin v Hall* in 1976, who recognized the fundamental difference.

33. In support of the view that no resulting trust would arise on payment of money, Jenkinson J referred to the 16th edition of Lewin on Trusts which was published in 1964, and said at 789 that Lewin:

“suggests that there are conflicting dicta on the point whether there is a presumption of a resulting trust for the transferor where shares, money or other pure personalty are transferred to a stranger, but none of the cases cited in support of that suggestion throws any doubt, in my opinion, on the proposition that no such a presumption is raised by payment of money to a stranger.”

34. The relevant passage in Lewin at 118 read:

“Where shares, money or other pure personalty are transferred without consideration to a stranger *alone* it is not clear whether there is a presumption of a resulting trust for the transferor.”

35. However, in the 19th edition of Lewin on Trusts which was published in 2015, it stated at 9-013:

“where shares or other items of pure personalty are transferred without consideration to a stranger alone, the better view is that there is a rebuttable presumption of a resulting trust for the transferor, though the matter does not seem to be subject to any authority directly in point.”

36. I have considered the cases cited by Lewin in footnote 58 in support of the better view. They included, a dictum of Lord Browne-Wilkinson in *Tinsley v Milligan*²⁷ where his Lordship said:

“A presumption of resulting trust also arises in equity when A transfers personalty or money to B: see Snell’s Equity, 29th ed. (1190), pp 183-184; *Standing v Bowring* (1885) 31 Ch D 282, 287, per Cotton LJ and *Dewar v Dewar* [1975] 1 WLR 1532, 1537.”

37. I ask you to note that in *Dewar v Dewar*, Goff J, as he then was, actually decided that a resulting trust arose following a payment of money.

38. At 9-014, Lewin went on to say:

“A simple payment of money to a stranger, however, raises no presumption of resulting trust (I will leave out the next sentence, which I will not spend time to discuss) ... The better view now is that, in the absence of a presumption of advancement, the payment of money *prima facie* imports an obligation to repay on the basis that the payment was a loan. This can be avoided where the recipient adduces evidence to demonstrate that the payment was a gift.”

39. The authority cited for this better view is *Seldon v Davidson*. With respect, I am unable to agree with this view of *Seldon v Davidson*. *Seldon* was not really about the money being repayable on the basis that the money was a loan. Nor was *Seldon* the only authority in favour of a resulting trust upon a voluntary payment. I have already referred to the citations at footnote 58. To

²⁷ [1994] 1 AC 340 at 371.

which I must add *WLB v Islington London Borough Council*,²⁸ where Lord Browne-Wilkinson, said:

“Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions ...”

40. As Sir Anthony pointed out in his judgment, in *Islington* Lord Slynn²⁹ agreed with Lord Browne-Wilkinson.

41. I have no doubt that the modern English view is that a resulting trust can arise from a payment of money. That is not the Australian view. From a hurried and incomplete research, it appears to me that *Heydon* remains the law in Australia. For example, *Heydon* was applied though without discussion in the Northern Territory in 2008 by Southwood J.³⁰

42. I return to Sir Anthony’s judgment in *Big Island* where his Lordship said:

“ 91. The Court of Appeal’s reasoning, based on the *prima facie* proposition that (*Davison*) held the house property on a resulting trust for the benefit of S, leading

²⁸ [1996] AC 669 at 708.

²⁹ At 718.

³⁰ *Sherwin & Sherwin v Commens & Commens* [2008] NTSC 45.

to the conclusion that the money is paid by (*Seldon* to *Davison*) should be repaid, is difficult to explain. The imposition of a resulting trust was designed evidently to justify an order for the repayment of the money paid on the footing that it was a loan. The relationship of resulting trust and loan in the circumstances of the case was inconsistent, as appears from the discussion below.”

43. With respect, as I said in my separate judgment, I agreed that if money was provided as a loan, no resulting trust could arise, as indeed, Lord Browne-Wilkinson’s judgment in *Islington* made clear. Nor was resulting trust used to justify an order for the repayment of a loan. First, it should be recalled that the claim was put on two bases, for money lent and for money had and received. This shows that even if the loan was not made out, the plaintiff would still be entitled to the return of the money, as money had and received, if it was money which the defendant “ought not in justice (to keep)”.³¹ Which is the classic basis for money had and received. To the claims in *Seldon*, two defences were pleaded. First and primarily, that the money was a gift. Alternatively, if the money was a loan, they were not yet repayable. We are not concerned with this latter defence, which as I have said above, the Court of Appeal rejected. On the defence of gift to the claim for money had and received, the burden would be on the defence. That must be so if a voluntary payment of money gives rise to a resulting trust absent a presumption of advancement. The

³¹ Chitty on Contracts, General Principles 29-012.

fact that the plaintiff relied on two causes of action makes it easier to see the point. But the point does not depend on it.

44. Earlier, I asked you to note that when *Cary* was decided in 1801, a defendant could plead the general issue. As the Annual Practice 1932 at p 359 stated:

“Before the Judicature Act, 1873, the defendant was allowed to plead what was called ‘the general issue’, i.e. ‘that he is not guilty’ or ‘that he never was indebted as alleged’ – both of which were conclusions of mixed law and fact.”

45. However, since at least 1875³² that was no longer permissible. In *Byrd v Nunn* (1877) 7 Ch D 284, Baggallay LJ said the object of the 1875 rules was to ensure a proper statement of the issues intended to be raised in the defence, in order that the other party might know to what to direct his evidence. The current rule in Hong Kong requires a party who denies an allegation to state his reasons for doing so, and if he intends to put forward a different version of events from that given by the asserting party, that he states his own. O18 r 13(5) HK Civil Procedure 2016, 18/8/2. This is the product of the Civil Justice Reform. However, earlier rules though less specific are to similar effect such that denials must be specific.³³ So that, in a claim on a debt said to be payable on demand, if the receipt of the money is admitted or proved, absent a reason

³² It is unnecessary for present purpose to consider any change prior to 1875. See *Young v Queensland Trustees Ltd* for a discussion.

³³ See for example, Odgers, the Principles of Pleading in civil actions, 1st edition 1892.

for non- repayment, the claim should succeed. Thus, the defence would have to plead why the money was not repayable, for example, that the loan had been repaid, or that the money was not a loan but was a gift. In respect of these defences, the burden would be on the defendant. In the case of a defence of payment because it is a confession and avoidance.³⁴ In the case of a gift, because the burden is on the defence to overcome the presumption of a resulting trust. Suppose also that the only claim is for money had and received and the only defence is that it was a gift. In that case, the position is straight-forward, the burden is on the defence.

46. I return to the passages in the judgments of Lord Justices Willmer and Edmund-Davies quoted above.³⁵ You may remember my earlier remark that their Lordships used the expression money paid and not money lent. I ask you also to note Lord Justice Edmund-Davies used the expression “on that bald state of affairs” and LJ Willmer’s statement “in the absence of any such circumstances”. I believe it is clear they were referring to the fact that the only relevant defence relied on by the defendant to say he was entitled to keep the money was that the money was a gift.

³⁴ *Young*.

³⁵ Paras 10 & 11.

47. Both of their Lordships mentioned counsel's concession that the property bought with the plaintiff's money would have been held on a resulting trust for her. I believe the concession was properly made because it was made on the defendant's case that the money was not a loan (if it was a loan, the Court of Appeal having rejected the defence that it was not yet repayable, the defendant would have been out of court). That being the case, namely, that the money was not a loan then absent presumption of advancement or proof that the money was a gift, property bought with money provided by the plaintiff, would have been held on a resulting trust for her. I believe that's why Willmer LJ said it would be strange if the money was not held on a resulting trust for the plaintiff (1088C and 1089H).

48. Suppose, the defendant had become bankrupt when the money was still with his solicitors, it would be strange if the plaintiff did not have a claim for the money on a resulting trust.³⁶ Indeed, the plaintiff might have a claim for the repayment of the money as money had and received, if the defendant used the plaintiff's money without the plaintiff's knowledge or consent in the

³⁶ I am not talking about a Quistclose trust which does not apply. *Barclays Bank v Quistclose Investment Ltd* [1970] AC 567. The resulting trust which arises upon the purchase of a property with another person's money does not depend on the actual intention of the parties. It arises by operation of law, so that in the case of a transfer of a property by A to B there is a presumption (absent circumstances giving rise to a presumption of advancement) Snell's Equity 33rd ed 21-020.

purchase of the property. But if the purchase was made with knowledge or consent, the plaintiff's claim would normally be confined to the property.

49. I have no doubt our decision in *Richly Bright* will be closely examined, in England as well as Australia. Probably, in New Zealand and Canada as well.

50. I believe *Seldon* was correctly decided according to English law, given the modern English view that a resulting can arise upon payment of money. That happens also to be preference. But, most probably, it makes little practical difference whether the English or Australian view is adopted.³⁷ Just as it does not matter whether one drives on the right or left, so long as one knows on which side one is supposed to drive.

51. That's why I said in my judgment I welcome the majority decision because *Seldon* has so often distracted our courts from the task of deciding on a balance of probabilities which of two unsatisfactory versions is more likely. In particular, I agreed with Sir Anthony that:

³⁷ One possible advantage of the English approach is that any money paid and before it is used in the purchase of the property would be treated in the same way as the property bought with it, both held on a resulting trust. On the other hand, the English approach may give rise to injustice. Suppose both the payer and payee are dead and there is no evidence to explain the payment, it may be unfair if the burden is on the payee's estate. A lender is more likely to retain an IOU than a payee of a receipt. But these are likely to be theoretical rather than real difficulties.

“Presumptions lend themselves to tactical ploys in litigation; it is better that parties be encouraged to present the totality of their case, particular in cases arising out of commercial transactions.”

Richly Bright

52. *Richly Bright* is a relatively simple case. It was about a chain confirmor sale which had gone wrong. *De Monsa* was the last purchaser on the chain. It had paid a deposit of 10%, in the sum of \$ 13,586,400 to *Richly Bright*. Three other sales up the chain also provided for completion at different but later time on the same day. As a result of *De Monsa*'s default, there were defaults up the chain. Now the usual measure of damages on default is the difference between the contract and market price. The complication in this case is that apparently the deposits paid in each sale exceeded the difference between its market and contract price. That being the case, one would expect *De Monsa*'s deposit to be forfeited and no more.

53. However, in *Richly Bright*'s claim against *De Monsa*, *De Monsa* was adjudged liable to pay damages totaling \$40,783,238 which was about 3 times its deposit. The damages covered losses which were the consequence of the chain defaults. *De Monsa* was adjudged liable to pay such damages because the courts below were of the view, that given *De Monsa*'s knowledge that it was involved in a confirmor sale, it was within its reasonable contemplation that its

default was likely to lead to chain defaults and consequential losses. As Kwan JA put it,³⁸ “it must be easily foreseeable that if the ultimate purchaser should default, corresponding defaults in the chain of sub-sales would be entirely possible”.

54. It was in this context that the Court of Final Appeal adopted the test which was favoured by Lords Hoffmann, Walker and Hope in *The Achilleas*. In the joint judgment of Ribeiro and Fok PJJ, which had the agreement of the Chief Justice and Lord Walker NPJ, they referred to *The Achilleas* and said at para 41 that:

“... the analysis in *The Achilleas* regarding the concept of assumption of responsibility is compelling. It represents a logical extension of the rule in *Hadley v Baxendale* ... the assumption of responsibility concept provides a principled basis for distinguishing between losses which are or are not too remote”.

55. In my separate judgment, I agreed but I also held that in addition, the chain default would not have been in the reasonable contemplation of the parties so that even on the test adopted by the Court of Appeal, I would have allowed the appeal.

³⁸ Para 43.

Moulin

56. *Moulin* is about the rule of attribution. I have stated the facts above. *Moulin* did not fall within any of the usual category of cases where the problem of attribution has to be resolved. In *Moulin*, the liquidators sought to demonstrate that there were errors in the tax returns because they were based on fraudulently inflated profits. But, on the basis that a deliberate lie is not an error, the court had to consider whether the error was deliberate. So far as the fraudulent management was concerned the error was deliberate. Thus, the court had to decide whether the state of mind of the management should be attributed to the company which depended on the application of the fraud exception. The majority decided that the exception did not apply. I took a different view.

57. *Moulin* straddled *Stone & Rolls*,³⁹ a decision of the House of Lords and *Bilta*, a decision of the Supreme Court. Lord Walker of Gestingthorpe NPJ who wrote the majority judgment in *Moulin*, was part of the majority in *Stone & Rolls*. *Stone & Rolls* was a one man company owned by S who used it as a vehicle for defrauding banks. The defendant was the auditors. After the company was put into liquidation, the company sued the auditors for negligence in failing to detect S's fraud, the auditors relied on the illegal defence. The majority (Lords Phillips, Walker and Brown) held against the dissent of Lords

³⁹ *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391.

Scott and Mance, that since the company was to be attributed with responsibility for the fraudulent activities against the bank's and had relied on that illegality in its claim against the auditors, any failure by the auditors to detect frauds, notwithstanding that was "the very thing" they were engaged to undertake, could not debarred them from relying on that illegality in its claim against the auditors. Although, with respect, I cannot agree with the majority decision, it appeared that in *Stone and Rolls* their Lordships answered the question of attribution according to their perception of where justice and common sense laid.⁴⁰

58. *Bilta* was also concerned with a one shareholder company. There, the liquidators claimed against the two directors, one of whom was the sole shareholder as well as other defendants who were said to have dishonestly assisted them. The company was involved in what is known as VAT carousel scheme. The victim of the fraud was the Revenue. This is not the occasion to discuss *Bilta*, an important decision, but its present importance is that it contained useful discussions on *Moulin*, in particular in the judgment of Lord Sumption. Also, *Bilta* and *Stone & Rolls* demonstrated the importance of the proper understanding of the nature and limits of the rule of attribution.

⁴⁰ For example, Lord Phillips of Worth Matravers said: "5 My initial reaction to S&R's claim was that, as a matter of common sense, it could not succeed." See also his Lordship's discussion of the views of the other members of the court under "The significance of the fact that S&R was a 'one man company'".

59. In *Moulin*, we proceeded on the basis that subject to the fraud exception, the knowledge of the fraudulent management should be attributed to *Moulin*. In *Moulin*, I said,

“13. ... justice and common sense is the reason for the fraud exception”

60. It appears that in *Bilta* Lord Sumption also proceeded on the basis of a general rule and a misconduct exception and as Lord Neuberger said in Lord Sumption’s view the exception is based on public policy --- or common sense, rationality and justice.⁴¹

61. However, Lord Neuberger also pointed out he and other members of the court in *Bilta* took the view that the fraud exception might not be so much of an exception as part of a general rule. And as summarised by Lord Neuberger, the question is an open one:

“whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent’s principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question.”

⁴¹ See para 9 of Lord Neuberger and paras, 72,73,74,78 and 85 of Lord Sumption JSC’s judgment.

62. I believe whether it is appropriate to do so should also depend on considerations of public policy, common sense, rationality and justice in the context of the particular claim.

63. I will not discuss whether the two approaches are different or whether any difference matters. According to Lord Mance it made no difference in *Bilta*.⁴² For our present purpose I will discuss Lord Sumption's comments on Lord Walker's judgment in *Moulin*. Lord Sumption said Lord Walker was of the view that the fraud exception only applies to redress cases, namely, where a director or senior employee of a company seeks to rely on his own knowledge of his own fraud against the company as a defence to a claim by the company against him (or accomplices of his). Lord Sumption said at para 85 that Lord Walker:

“... concluded that the breach of duty exception was in fact of limited application. Its rationale was to prevent the illegality defence from barring a claim by a company against its own agents. He summarised the proper scope of the exception as follows, in para 80:

‘The situation to which it most squarely applies (and some would say, the only situation to which it should properly be applied) is where a director or senior employee of a company seeks to rely on his own knowledge of his own fraud against the company as a defence to a claim by the company against him (or accomplices of his) for compensation for the loss inflicted by his fraud. The injustice and absurdity of such a defence is obvious, and for more than a century judges have had no hesitation in rejecting it.’”

⁴² At para 37.

64. Lord Sumption went on to say that it is clear that Lord Walker numbered himself among the “some” who would say that this was the only situation in which the fraud exception should properly be applied. If so, the exception is narrow. However, Lord Walker also said at para 134 that:

“It would frustrate (the statutory purpose that the IRO should be able to make assessments on the basis of the taxpayers returns) if the fraud exception were to intrude into this scheme. The fraud exception must be limited to its proper, limited role, that is of barring an unmeritorious defence in claims by corporate employers against dishonest directors or employees, or accomplices who have conspired with them.”

So, it seems that in *Moulin* Lord Walker also considered the statutory purpose.

65. However, it appears from *Moulin* that Lord Walker remained of the view that on the facts of *Stone & Rolls*, his decision in that case was correctly decided.⁴³ It is not clear whether that view can stand with *Bilta*. Also, *Bilta* shows that when questions of attribution arise in the context of the illegality defence, subject to a re-consideration of *Tinsley v Milligan*⁴⁴ on the nature and ambit of the illegality defence, insofar as the answer may depend on considerations of public policy, perhaps the focus should be on the scope of the illegality defence rather than the limits and scope of the rule of attribution. I

⁴³ Para 91.

⁴⁴ [1994] 1 AC 340.

await such development and hope that a suitable case will come along soon. However, in the very unusual circumstances of *Moulin*, where the question of attribution did not arise in the context of an illegality defence, it may remain important whether the fraud exception is confined to redress cases only.

Conclusion

66. I have chosen these 3 cases for discussion because I think they demonstrate the buoyancy of the common law and how readily Hong Kong fits into its main stream. In *Big Island*, we preferred the Australian approach. Our deliberate departure from *Seldon v Davidson* may well result in a more intense scrutiny of *Seldon* and *Heydon* and associated issues. Our decision in *Moulin* too should provoke discussions on the nature and limits of the fraud or misconduct exceptions.

67. I hope my talk today will also stimulate academic discussions in Hong Kong. Thank you for your attention.