IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 102

Suit 2278/1996

Between

The Tai Ping Insurance Co Ltd

… Plaintiff

And

Fan Chun Wah
Another

… Defendant

GROUNDS OF DECISION

Credit and Security — Guarantees and indemnities — Co-guarantors

Version No 1: 20 Nov 2026 (00:35 hrs)

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The Tai Ping Insurance Co Ltd v Fan Chun Wah and Another

[1998] SGHC 102

Suit 2278/1996
S Rajendran J
09 April 1998

Judgment:

S RAJENDRAN

Sung Foo Kee Construction (Singapore) Pte Ltd (SFK Construction) were awarded a contract by the Housing & Development Board (HDB) for some construction work at Bukit Panjang. By the terms of that contract SFK Construction were required to take out a Contractor`s All Risks Insurance Policy (CAR policy) and provide a security bond jointly with a third party acceptable to the HDB whereby SFK Construction and the third party would be jointly and severally liable to pay to HDB immediately upon demand a sum of up to $1,649,900.

2.The plaintiffs were approached by Miss Minnie Hwang (Hwang) of M/s Marsh & McLennan (S) Pte Ltd (Marsh & McLennan), a firm of insurance brokers, to quote their rates on an urgent basis for issuing the CAR policy and providing the security bond. Miss Wong Fei Lin (Wong) received the relevant documentation from Hwang on 26 October 1994 and responded the same day with the plaintiffs` quote. In quoting the rate Wong told Hwang that the

plaintiffs would require SFK Construction as well as its directors (in their personal capacity) to sign the plaintiffs` standard form of indemnity as guarantors. When Hwang confirmed that the rates were acceptable, Wong forwarded a blank copy of the plaintiffs` standard indemnity form to Hwang for execution by SFK Construction and the directors in their personal capacities. Wong told the court that she did not, at that time, know any details about the directors of SFK Construction.

3.Subsequently Hwang told Wong that two directors had signed on the indemnity form and that another person whose name was on the form had not signed because he was no longer a director of SFK Construction. Wong replied that that would be fine as the plaintiffs only wanted the signatures of existing directors. When Wong received the signed indemnity (dated 1 November 1994) she noted that it had been signed by three guarantors, namely, SFK Construction, Fan Chun Wah (first defendant) and Tang Kam Tong (second defendant). There was a third name Cheng Hung Fat (Cheng) described as `director` whose name and address were typed on the form. There was no signature against this name but someone had written against it the word `resigned`. This accorded with what Hwang had earlier told her. The plaintiffs were satisfied with the indemnity signed by SFK Construction and the two directors and issued the security bond.

4.Sometime later Marsh & McLennan informed the plaintiffs that SFK Construction had changed its name to Winhouse Construction Pte Ltd (Winhouse) and asked the plaintiffs to issue an endorsement to HDB to that effect. On 5 October 1995 the plaintiffs issued such an endorsement.

5.In February 1996, the plaintiffs learnt that Winhouse had been placed under judicial management. Sometime thereafter, on 16 July 1996, the plaintiffs

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received a demand, under the security bond, from the HDB for a sum of $1,649,900. The plaintiffs remitted this sum to the HDB as demanded.

6.By letter dated 16 August 1994 the plaintiffs` solicitors made a demand under the indemnity for payment of the said sum of $1,649,900 from the first and second defendants. There was no response and the plaintiffs commenced these proceedings. The second defendant did not enter appearance and judgment in default of appearance was entered against him.

7.Cheng was called by the plaintiffs to testify on their behalf. Cheng, who was from Hong Kong, was posted to SFK Construction in 1991 and in 1992 was designated as general manager and appointed to sit on the Board of SFK Construction. Cheng told the court that whilst employed by SFK Construction he worked under the first defendant who was the managing director. On 15 April 1994 Cheng resigned from SFK Construction and from its Board to set up his own construction business in Singapore.

8.Cheng testified that the first time that he knew of the indemnity dated 1 November 1994 was on 12 May 1997 when it was shown to him in connection with these proceedings. Cheng was surprised to see his name typed thereon. He testified that no one had approached him about signing such an indemnity and if they had he certainly would not have agreed as he had left SFK Construction and had nothing more to do with that company. Cheng also stated that he did not know who Ang Siew Lian - the witness to the signatures on the indemnity - was. At the time he left SFK Construction there was no such person in the company`s employ.

9.The plaintiffs also called the second defendant as their witness. The second defendant, at the relevant time, was the financial director of SFK Construction.

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The second defendant told the court that there was a Board resolution authorising the company and the directors to sign the indemnity. He told the court that he had signed because at that time SFK Construction`s finances were sound - it was the subsidiary of a large public-listed Hong Kong company - and the second defendant did not foresee any risk in signing.

10.The second defendant told the court that the document was given to him for signature by Diana Ang Siew Lian (Diana) who had recently joined the company as its assistant administrative manager. At the time she gave the document to him to sign it had already been signed by the first defendant on behalf of the company and on his own behalf. He could not recall if, at the time he signed, Cheng`s name was typed on the document. The second defendant told the court that there was no reason for Cheng`s name to be on the document as Cheng at that time was not a director and was no longer with the company.

11.The second defendant told the court that the CAR policy and the security bond in respect of the Bukit Panjang project were arranged by Diana through Marsh & McLennan who were the brokers of SFK Construction. It was also Diana who made arrangements for the indemnity. He said that he himself did not have any discussions on these matter with the plaintiffs or with Marsh & McLennan.

12.The first defendant told the court that although he was managing director of SFK Construction he was, in October/November 1994, not fully resident in Singapore. At that stage he was still stationed at the head office in Hong Kong and would attend at the Singapore office only on weekends. The first defendant testified that he was aware that the HDB had required SFK Construction to obtain a CAR policy and a security bond in respect of the Bukit Panjang project. He did not handle these requirements himself. It was Diana who did so. Diana,

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he said, did not report to him directly and he had not had any discussion with her on the matter. He confirmed, however, that he knew that she was obtaining the CAR policy and the security bond from the plaintiffs through Marsh & McLennan. The first defendant also confirmed that there was a Board resolution pertaining to the issue of the indemnity. He did not, however, produce this document.

13.The first defendant told the court that on one of his visits to his office in Singapore he saw the indemnity document in his `in` tray. At that time the document had been filled in and was in the form of the exhibit in court except that there were no signatures on it. When he read it he knew what the document was about. The company`s rubber stamp had already been imprinted on the document and he signed on behalf of the company. He then signed again against his own name and then put the document in his `out` tray. The first defendant told the court that when he signed against his own name it was on the basis that all the four parties named on the document as guarantors would sign. He said that if he knew that Cheng was not going to sign he would also not have signed. He testified that the plaintiffs did not at any stage ask for his consent to dispense with the execution of the indemnity by Cheng.

14.The first defendant agreed that Cheng had resigned from SFK Construction well before 1 November 1994 to set up his own construction business and that thereafter Cheng had no contact with him or with SFK Construction. When asked why in those circumstances Cheng should be asked to sign an indemnity subjecting himself to personal liability in respect of SFK Construction, the first defendant replied that he believed that the plaintiffs had requested that Cheng should sign and that Cheng was willing to sign because he was `a founder of the company` and `had a sense of belonging`.

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15.The first defendant had pleaded that there was an understanding and agreement between the plaintiffs and him that the indemnity would be signed by all the four parties named in the indemnity (ie SFK Construction, first defendant, second defendant and Cheng). In his further and better particulars, the first defendant had clarified that this understanding was arrived at at a meeting between a representative of the plaintiffs and Diana as representative of the first and second defendants.

16.The plaintiffs denied any such understanding with the first defendant or even any meeting with Diana: all discussions on this matter, according to the plaintiffs, were with Marsh & McLennan. The only person who could have testified to such an understanding was Diana but, although the first defendant had previously given notice that he would be calling Diana, Diana was not called as a witness. In any event, it was the first defendant`s testimony that Diana did not report to him and had not at any time discussed matters relating to the CAR policy and security bond with him. It was not easy to reconcile that evidence with the first defendant`s pleaded position that the understanding was reached at a meeting where Diana was acting on behalf of the first defendant. If Diana had not spoken to the first defendant on this matter it must follow that Diana could not have been his representative and the first defendant could not have known about any such understanding (assuming there was one).

17.It seemed to me that the evidence of Wong reflected the true state of affairs. I accepted Wong`s evidence that all negotiations in respect of the CAR policy and the security bond were through Marsh & McLennan. I also accepted the evidence of Wong that she did not know the particulars of the directors of SFK Construction and she did not - save for requiring personal guarantees from the directors - specify the names of the persons who were to be the guarantors. She had left that to Marsh & McLennan and/or SFK Construction. I also accepted

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Wong`s evidence that Hwang had called to tell her that the name of a person who had ceased to be a director had been wrongly inserted on the form and that Wong had confirmed to Hwang that that would be all right.

18.I could not accept the first defendant`s explanation that it had been agreed with the plaintiffs that Cheng should be one of the guarantors. It made no sense for the plaintiffs to want a former employee who now had no connections whatsoever with SFK Construction to sign the indemnity. I was satisfied that the insertion of Cheng`s name on the indemnity was an error made either by Marsh & McLennan or by Diana. As neither Hwang nor Diana were called to testify, it was not possible to know how the error came to be made.

19.I rejected the first defendant`s testimony that he signed the indemnity on the basis that Cheng would also sign. The first defendant knew that Cheng had resigned from the company some six months previously and that Cheng no longer had any connection with the company. I found that the first defendant, when he signed the document, did so knowing that Cheng`s name had been included in error and that there was no question of Cheng signing the indemnity.

20.Lai Kew Chai J, in delivering the judgment of the Court of Appeal in **Indian Bank v Raja Suria & Ors** [1993] 2 SLR 497 at 504, highlighted the fact that in cases like this the intention of the parties was what mattered In his words:

> *We accepted that it is not a rule of law that where an instrument of guarantee is in the form of or in terms that imply it is to be executed by more than one guarantor who are to be jointly and severally liable, all must sign the instrument before any is bound:* ***Taubmans Pty Ltd v Loakes*** *[1991] 2 Qd R 109. The crucial question in such cases was: what was the intention of the parties?*

The case of **Taubmans v Loakes** [1991] 2 Qd R 109 referred to by Lai Kew Chai J offered some useful guidance. In that case the defendant, a director of a

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the debtor company, agreed to guarantee the indebtedness of the company. The defendant argued that it was contemplated that the other director was supposed to sign on the guarantee as well, and his failure to do so discharged his liability as co-guarantor. However, the defendant was unable to adduce any evidence to show that there was in fact such a mutual intention, and thus the defence failed. The headnote of that case read:

> *There is no rule of law that where an instrument of guarantee is in a form or in terms that imply it is to be executed by more than one guarantor who are to be jointly and severally liable, all must sign the instrument before any is bound. Each case is to be decided in accordance with the common intention of the parties as appearing from the evidence.*

and in his judgment MacPherson J at p 112 of the report, after emphasizing that it was the intention of the parties that was critical, went on to say:

> *The instrument of guarantee itself is, however, not the only place to which resort may be had in order to discover the relevant common intention. It affords evidence but is not necessarily conclusive either for or against the existence of that intention. Evidence from other sources is also admissible.*

21.The fact that the name of a person is included in a guarantee or indemnity could be evidence that it was the common intention of the parties that that person was to be a guarantor. But in our present case, even though Cheng`s name appears on the indemnity, it was not inserted in the document by the plaintiffs but was inserted in error by either Marsh & McLennan or by Diana. I am satisfied that the first defendant, when he saw Cheng`s name on the document knew that the name was there by mistake and that Cheng would not be signing the indemnity. When the indemnity signed by the first and second defendants and SFK Construction was tendered to the plaintiffs, the plaintiffs accepted the indemnity and released the security bond. On these facts it seemed to me that it was the common intention of the parties that only the first and second defendants and SFK Construction would be liable under the indemnity. The fact

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that Cheng`s name happened to be on the indemnity form at the time the first defendant signed the indemnity was not, in this case, of any significance.

22.In my view, the indemnity signed by the first defendant constituted a binding agreement between the first defendant and the plaintiffs and accordingly I gave judgment to the plaintiffs as prayed.

S Rajendran J

Brij Raj Rai and Jenny Ang (Rajah & Tann) for the plaintiffs
Sean Tan (Engelin Teh & Young) for the first defendant

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