Jurong Readymix Concrete Pte Ltd v Kaki Bukit Industrial Park Pte Ltd (Chng Heng Tiu, Third Party)
[2000] SGHC 174

Case Number : Suit 1032/1999

Decision Date : 26 August 2000

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Thanuja Thiagarajah and Chang Wai Yoong (Lai Mun Onn & Co) for the plaintiffs; Lim Khoon, Bernie Neo and Kalaiselvi d/o Singaram (Yeo Wu & Thian) for the defendants; Tan Kok Quan SC, Audrey Thng and Jeanette Lee (Tan Kok Quan Partnership) for the third party

Parties : Jurong Readymix Concrete Pte Ltd — Kaki Bukit Industrial Park Pte Ltd — Chng Heng Tiu

Companies – Directors – Duties – Whether director acted without authority in issuing guarantee – Whether director breached fiduciary duties in issuing guarantee

Contract – Consideration – Whether consideration moving from plaintiffs to support guarantee

Credit and Security – Guarantees and indemnities – Guarantee – Variation from usual practice – Whether variation justifying discharge of guarantee

: This is a claim by the plaintiffs Jurong Readymix Concrete Pte Ltd, suppliers of concrete, against the defendants Kaki Bukit Industrial Park Pte Ltd, the developers of the construction project to which the concrete was supplied. The claim is founded on a guarantee issued by the defendants to the plaintiffs in respect of concrete supplied by the plaintiffs to Boonann Construction Pte Ltd (`Boonann`), the contractors of the project. The defendants brought third party proceedings against Chng Heng Tiu, the defendants` director who signed the guarantee.

Background

A knowledge of the companies and persons involved would give an insight into the events leading to these proceedings.

The defendants were incorporated in 1994. Its main object was the development of the Kaki Bukit Industrial Park. A prominent figure in the company is Ho Kok Cheong, its project manager. He has been active in the construction industry for a long time, but his personal involvement in construction companies was restricted because he is an undischarged bankrupt. He said that his sons Ho Mun Sang and Ho Mun Fei decided to take on the project, but as they did not have funds for the whole project, and they invited the third party, Chng Heng Tiu to participate. Chng Heng Tiu in turn brought Chwee Meng Chong into the venture. Both Chng and Chwee are veterans in the construction industry, whereas the two younger Hos are novices compared to them.

Ho Kok Cheong described the defendants as being formed by the two groups, the Chng Heng Tiu group and the Ho group. The former was made up of Chng Heng Tiu, Chwee Meng Chong, Yeo Siew Hang (who is also the majority shareholder of Boonann) and HsiungKo Ying, while the latter group consisted of Ho Mun Sang, Ho Mun Fei and their corporate vehicles Straits International Resources Pte Ltd and Tenby Investments Pte Ltd. Chng Heng Tiu held the majority of the shares in the defendants through his company Chng Heng Tiu Pte Ltd. The directors of the defendants were Chng Heng Tiu, Chwee Meng Chong, Ho Mun Sang and Ho Mun Fei.

Discord set in between the shareholders which led to an agreement dated 1 December 1997 whereby Chng Heng Tiu, Chwee Meng Chong and Yeo Siew Hong contracted to sell their shares to Straits International Resources Pte Ltd. That agreement ran into difficulties and led to another set of litigation.

Thesupply contract

The supply contract between the plaintiffs and Boonann was evidenced in the plaintiffs` letter of 6 February 1996.

Some of the terms were typewritten and others were printed. The terms of interest to these proceedings are clause 1. 3 of the typewritten terms:

> *Our credit terms to you shall be forty-five (45) days from the date of delivery.*

and clause 14 of the printed terms:

> *A late payment interest of 2% per month will be charged on overdue bills*

The plaintiffs also asserted that the supplies to Boonann were subject to a credit limit of $60,000 established in the course of their previous dealings.

The letter of guarantee

Leow Kim San, the plaintiffs` general manager, explained the circumstances in which the guarantee was obtained. In or about April 1996, it was anticipated that Boonann`s orders for concrete would exceed the credit limit of $60,000. He told Yeo Siew Hong and Yeo Siew Hang, the directors of Boonann that if they wanted the credit limit to be extended to $1m, the plaintiffs required a guarantee as security, and the guarantee was furnished in response to the request.

The letter of guarantee was in the letter paper of the defendants, and it reads-

> *8 April 1996*
>
> *M/s Jurong Readymixed Concrete Pte Ltd*
>
> *15 Pioneer Crescent*
>
> *Singapore 628551*
>
> *Dear Sirs,*
>
> *Re: Supply of Readymixed Concrete for the Proposed Kaki Bukit Industrial Park*

This is to confirm that in the event Boonann Construction Pte Ltd failed to honour payment for the supply of readymixed concrete to the above project, we hereby undertake to make direct payment to you.

Yours faithfully,

Kaki Bukit Industrial Park Pte Ltd

(Signature)

Chng Heng Tiu

Director

The letter was prepared by Yeo Siew Hong. Its simplicity allowed the principles of law governing guarantees to apply without being modified by saving provisions usually found in more carefully crafted documents of this nature.

The plaintiffs` action

The plaintiffs carried out its obligations with Boonann and supplied the concrete they ordered. Unfortunately Boonann failed to pay for the concrete. This led to the plaintiffs suing Boonann in obtaining judgment for $610,270. 91, with $5,935. 51 interest accrued between the date of the writ and the date of judgment as well as the usual post-judgment interest. When they failed to recover payment under the judgment, they commenced this action against the defendants.

The defence

In the defence filed, three lines of defence were set out. First it was that there was no consideration moving from the plaintiffs to support the guarantee. The second and third lines of defence were grounded on the principle that a guarantee may be discharged by a variation of the principal contract to which it relates. The second defence was that the defendants had been discharged from liability when the plaintiffs extended Boonann`s credit limit from $60,000 to $1m without their knowledge or consent. Finally the defendants claimed that they were discharged from liability when the plaintiffs continued to supply concrete to Boonann when payments were overdue for more than 45 days without their knowledge or consent.

Consideration

The defendants contradicted themselves on this issue. In their statement of claim against the third party they pleaded that the guarantee was given `for the benefit of obtaining a higher credit limit from the plaintiffs`, acknowledging that the plaintiffs had provided consideration by increasing the credit limit.

The plaintiffs` sales manager Khoo Puay Yong, explained in cross-examination that Boonann was an existing customer of the plaintiffs prior to the supply contract, and had been granted a credit limit of $60,000 during the previous dealings, but by April 1996 Boonann`s orders were expected to exceed that credit limit, and Boonann requested for a higher credit limit of $1m. After the guarantee was received, the plaintiffs issued an authorised price letter which set out the prices for the concreteto be supplied to Boonann as well as the credit limit of $1m. This letter was an agreed document in this action in that the parties agreed on its authenticity.

When Yeo Siew Hong gave evidence on behalf of the third party, he did not refer to Leow Kim San`s account of the discussion between Leow and the two Yeos on the extension of the credit limit and the guarantee. When he was cross-examined, he said that there was no discussion on the credit limit when the supply contract was negotiated between the plaintiffs and Boonann, that he had not seen the authorised price letter before the trial, and that he did not know of the credit limit of $60,000 when the supply contract was signed. He went further to say that when he met Mr Leow there was no mention of an extended credit limit of $1m. However when he was told of Chng Heng Tiu`s evidence that Yeo Siew Hong himself had told him about the credit limit of $1m, he did not dispute that.

After reviewing the evidence, I prefer Leow Kim San`s evidence to Yeo Siew Hong`s. I accept Mr Leow`s evidence that the line of credit of $60,000was extended to $1m when the guarantee was furnished. His evidence on the discussion leading the guarantee was not contradicted, and his evidence on the $1m credit limit was corroborated by the authorised price letter and the evidence of Chng Heng Tiu, whereas Mr Yeo`s evidence that there was no credit limit was inconsistent with them. In addition to that, there was the defendants` acknowledgment of the plaintiffs` consideration in their statement of claim against the third party.

I find that the first line of defence that there was no consideration moving from the plaintiffs to support the guarantee cannot stand.

Extension of the credit limit

The defendants complained that they were ignorant of the increase of the credit limit. That may be true because the defendants were not a party to the discussion between Leow Kim San, Yeo Siew Hong and Yeo Siew Hang, but the lack of knowledge or consent is not sufficient to discharge them from liability.

A guarantor may be discharged if the principal contract is varied without his knowledge or consent after the guarantee is issued. In the present situationthe guarantee was sought and furnished to enable the credit limit to be increased; it was a condition precedent to the increase. The variation in these circumstancesdid not discharge the defendants from liability.

Supply beyond the 45-day period

The two relevant provisions in the supply contract have been set out in [para] 7.

These provisions do not regulate or terminate the supplies of concrete. Read together, they provide that the purchaser shall enjoy 45 days interest-free credit after delivery, and after that period, interest of 2% per month is payable. These clauses do not state that supplies will stop if payment is not made within 45 days.

The plaintiffs had not construed cl 1. 3 to mean that supplies will be terminated if payment is not received within 45 days. Both their witnesses Khoo Puay Yang and Leow Kim San confirmed that supplies would continue after that period.

Under the supply contract the plaintiffs are entitled to stop supplies. In cl 17 of the printed terms, the plaintiffs reserved the right to stop supplies without notice. This is a general right not restricted to events of late payment or non-payment, and the plaintiffs are not bound to exercise the right when payments are not made on time.

In the absence of any stipulation that supplies shall cease on late payment or non-payment, it was up to the plaintiffs to decide whether to continue supplies. They can stop supplies under cl 17, but if they continue, that would not be a variation of any term of the supply contract. Consequently, this line of defence failed.

In the course of the trial it emerged that there was a general practice for the plaintiffs to continue supplies to their customers for another 45 days after the initial 45-day period before stopping supplies. It also transpired that in the case of Boonann, they continued supplies beyond this 45-plus-45 day period because of the goodwill between the two companies.

By giving Boonann the indulgence, the plaintiffs exposed the defendants to a greater exposure than they would be if the general practice was followed. However this did not discharge the defendants from their liability because the plaintiffs had not changed the terms of the supply agreement inasmuch as the plaintiffs` general practice was not a part of the supply agreement.

The defendants` claim against the third party

The defendants claim against the third party an indemnity against the plaintiffs` claim and costs.

They founded their claim on two grounds, that the third party had acted without authority when he signed the guarantee, and that he was acting in breach of his fiduciary duties as a director of the defendants when he did that.

On the issue of authority, the defendants alleged that the defendants` board of directors had not authorised the guarantee, and that in any event the defendants did not have the capacity under their memorandum and articles of association to issue guarantees.

On the fiduciary duties issue, the defendants complained that the guarantee which was issued for the benefit of Boonann for obtaining a higher credit limit from the plaintiffs, was not issued in the normal course of the defendants` business, and was of no benefit to them. They alleged that when the third party signed the guarantee, he failed to act bona fide in the interest of the defendants.

The third party`s defence

In his defence the third party alleged that Yeo Siew Hong of Boonann suggested to him if the guarantee was issued the plaintiffs will erect a concrete batching plant at the site. The plant would ensure a steady supply of concrete, and enable the defendants` project to be completed on time. Thus it was inthe interest of the defendants to furnish the guarantee. (In fact supply contractprovided for the plaintiffs to erect a batching plant on site without the requirement of a

guarantee.)

Chng Heng Tiu`s authority to issue the guarantee

Mr Chng accepted that the directors had not agreed to issue the guarantee. He also admitted that of the defendants` directors, he had only talked with Chwee Meng Chong who handed the day-to-day running of the defendants about the guarantee and he had not notified or consulted Ho Mun Fei or Ho Mun Sang, the other two directors. His explanation for this was that he and Chwee regarded the guarantee as `a small matter pertaining to the day-to-day running of the construction aspects of the development which was well within our authority and ability to decide without having to consult them`.

When questioned on his explanation, Chng`s answers reviewed that the guarantee was not a routine matter as he made it out to be. He disclosed that not only had the defendants just issued that one single guarantee in this project, they had not issued similar guarantees in their other projects. As he knew it exposed the defendants to liability of up to $1m, it was clearly no small matter.

He attempted to rationalise the omission to consult the Ho brothers by saying that `Even if we brought the matter to the board, if I and Mr Chwee agree even if the Hos disagreed, I can exercise my casting vote`.

That did not justify it. His casting vote did not displace the need to consult those two directors. If there were consultation and discussion, the Ho brothers may have persuaded him and Chwee not to issue the guarantee, or to have further discussions with the representatives of Boonann or the plaintiffs before coming to a decision. Although they had no veto power, they had the right to be consulted on such a serious matter as this.

There was no basis for Chng Heng Tiu to regard the issuance of the guarantee as a part of the day-to-day operations of the company. I do not think that he really believed that himself. It was a matter that should be discussed and agreed to by the board. He obliquely conceded that when he was asked if he thought that he and Chwee and can run the company without consulting the Ho brothers, and he replied `When there are important decisions we consult, but we considered the guarantee as day-to-day business of the company`. The issuance of the guarantee was an important decision which required consultation.

The defendants` authority to issue the guarantee

The defendants argued that they had no power to issue the guarantee. They accepted that prima facie a company has that power by virtue of s 23(1)(c) of the Companies Act read with cl 12 of the Third Schedule of the Act. Section 23(1)(c) provides that

> *Subject to subsection (2), the powers of a company, whether incorporated before or after 29th December 1967, shall include -...*
>
> *(c) unless expressly excluded or modified by the memorandum or articles,the powers set forth in the Third Schedule ...*

The powers of a company are set out in the Third Schedule to the Act, cl 12 of which empowers a company

> *To lend and advance money or give credit to any person or company; to guarantee and give guarantees or indemnities for payment of money or the performance of contracts or obligations by any person or company; to secure or undertake in any way the repayment of money`s lent or advanced to or the liabilities incurred by any person or company; and otherwise to assist anyperson or company ...*

They nevertheless contended that

> *Looking now at the powers and objects contained in the defendants` memorandum of association, it can be seen that cl 12 of the Third Schedule has been excluded or to put it another way, the defendants` memorandum of association had been modified to exclude cl 12, ie the power to give guarantees. It is thus submitted that by virtue of s 23(1)(c) of the Companies Act, the defendants do not have the power to give guarantees.*

The memorandum of association of the defendants do not makereference to s 23(1)(c) or the Third Schedule. It sets out the powers and objects of the company, but nothing in it can be construed to have expressly excluded or modified the powers set out in the Third Schedule.

The defendants have failed to make good this complaint.

Breach of director`s duties

Section 157 of the Companies Act refer to the duties of a director thus -

> *(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.*
>
> *...*
>
> *(3) An officer or agent who commits a breach of any of the provisions of this section shall be -*
>
> *(a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions.*

The circumstances in which Chng Heng Tiu signed the guarantee raised serious questions whether he performed his duties properly. In addition to not consulting Ho Mun Sang and Ho Mun Fei, it was revealed that

(i) he had not seen or asked for the supply contract, and thus did not realise that a guarantee was not required for the erection of the batching plant on site

(ii) he had not obtained legal advice on the guarantee,

(iii) he assumed that if Boonann did not pay the plaintiffs, the defendants could deduct from progress payments due to Boonann and pay them to the plaintiffs without confirmingthat with Boonann, and

(iv) he regarded these matters as `minor details` because he and Chwee Meng Chong held the majority of the shares in the defendants.

He had not acted with reasonable diligence. He committed the defendants to liability in relating to a supply contract that he knew little of. Although the defendants had not issued such guarantees before, he did not refer the matters to his fellow directors or seek legal advice, and had assumed that the defendants can pay the plaintiffs from deductions for payments due to Boonann. He had acted as he did in reliance of his position as a majority shareholder and the holder of the casting vote, neither of which lessened his duties as a director.

I find that the defendants are entitled to be indemnified by him against any losses they incur reasonably under the guarantee. This would naturally include the judgment sum of $610,270. 91 for the unpaid concrete, but not the interest accruing thereon because the guarantee was for the price of concrete only, with no reference to consequential interest.

The defendants` party-and-party and solicitor-and-client costsin defending this action would also fall within the indemnity if they were reasonably incurred.

Were the defendants acting reasonably in defending the plaintiffs` claim?The defence of want of consideration is without basis as the defendants themselves pleaded that the guarantee was furnished to secure the increased credit limit from the plaintiffs. The defences founded on variation and discharge are also without merit because the extension of the credit limit and the continued supply of concrete to Boonann were not variations to the supply contract that could discharge the defendants from liability. I find that the defendants had not acted reasonably in defending the plaintiffs` claim, and are not entitled to be indemnified by the third party against these costs.

Conclusion

I order that judgment be entered in favour of the plaintiffs against the defendants for the sum of $610,270. 91 with the usual interest of 6% per annum from the date of this judgment to payment, and costs.

I also order that the third party indemnifies the defendants against their liabilities to the plaintiffs for the sum of $610,270. 91 and that he pays them the costs of the third party proceedings.

Outcome:

Plaintiffs` claim allowed; defendants` claim against third party allowed.

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