China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) *v* Teoh Cheng Leong
[2012] SGHC 2

Case Number	: Suit No. 877 of 2009/K
Decision Date	: 03 January 2012
Tribunal/Court	: High Court
Coram	: Chan Seng Onn J
Counsel Name(s)	: Ravi Chelliah and Sally Kiang (M/s Chelliah & Kiang) for the plaintiff; Arivanantham s/o Krishnan (Ari, Goh & Partners) for the defendant.
Parties	: China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) — Teoh Cheng Leong

CREDIT AND SECURITY

3 January 2012

Chan Seng Onn J:

Introduction

1 The plaintiff, China Taiping Insurance (Singapore) Pte. Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) ("the Plaintiff") has eight heads of claims against the defendant, Mr Teoh Cheng Leong ("the Defendant") based on two main sets of documents, *viz*, (a) 47 guarantees (referred to collectively as "the Guarantees") provided by the Plaintiff to the Controller of Immigration ("the Controller") at the request of the respective Companies (as defined in [4]) and, *inter alia*, the Defendant; and (b) 47 documents entitled "Indemnities" (referred to collectively as "the Indemnities") which were executed concurrently with the Guarantees by the Defendant.

2 The Plaintiff's claim totalled up to $449,896.98 and comprised of eight heads of claims as follows: (i) token wages ($350,423.33), (ii) bond ($500), (iii) air tickets ($41,330), (iv)meals ($292.50), (v) lodging ($29,641.65), (vi) mattress ($399), (vii) transport ($10.50) and (viii) administrative fees ($27,300). Counsel for the Defendant confirmed twice during the trial that the Defendant does not dispute the claims for (ii) the bond, (iii) air tickets, (iv) meals, (v) lodging and (vi) mattress [note: 1]. The core of the dispute therefore centred on whether the Plaintiff was justified in claiming for (i) token wages, (vii) transport and (viii) administrative fees based on the Guarantees and the Indemnities. The determination of the exact legal nature of the Guarantees and the Indemnities will therefore be determinative of this issue.

3 On close examination of both the Guarantees and the Indemnities, I found that all eight heads of the Plaintiff's claim as stated in [2] were proved. As the issues of liability and damages were bifurcated by an order of court dated 20 May 2011, I gave interlocutory judgment for the Plaintiff with damages to be assessed by the Registrar with costs reserved to the Registrar hearing the assessment. I now give the grounds of my decision.

Factual Background

4 The factual background is undisputed. The Defendant was the director of six companies in the

SME group of companies ("SME Group"), *viz*, (a) SME Group Pte Ltd, (b) RE & RI Logistics Pte Ltd , (c) SME Dorm Pte Ltd, (d) SME Logistics Pte Ltd, (e) RE & RI Cleaning Services Pte Ltd and (f) SME Consultancy Pte Ltd (collectively referred to as "the Companies") [note: 2]. The key person of the SME Group was the Defendant's father-in-law, Mr Lim Chye Cheng, but he was not involved in the hearing.

5 The Companies employed, *inter alia*, 182 foreign workers as work permit holders. Pursuant to Regulation 21 of the Immigration Regulations (Cap 133, Regulation 1, 1998 Rev Ed), the Companies were required to provide security bonds for these foreign workers in the form titled "Security Bond Form for Foreign Workers" marked "WPCM 013" ("the Security Bonds") [note: 3]. The Security Bonds required the Companies, as the employers of the 182 foreign workers, to place a security deposit of $5,000 per foreign worker (a) to secure the foreign workers' compliance with the conditions of the Security Bond; and (b) to ensure observance of further conditions imposed on the employers in the Security Bond. The total security deposit for all 182 foreign workers would amount to $910,000.

6 Instead of placing a cash security deposit of $910,000 with the Controller, the Defendant had, as stated in the Indemnities, requested the Plaintiff to provide Guarantees to the Controller whereby under Clause 1 of the Guarantees, the Plaintiff was to "guarantee and undertake as principal debtors to pay to [the Controller] at any time forthwith, on demand" [note: 4] the security deposit originally required under the Security Bond. Thus, the Companies' requirement to furnish a security deposit of $910,000 with the Controller under the Security Bond was dispensed with because of the Plaintiff's Guarantees to the Controller. The Guarantees dated between 28 November 2007 and 19 December 2008 were for various sums ranging from $5,000 to $85,000.

7 In consideration of the Plaintiff's Guarantees, the Defendant executed concurrently (*ie*, on the same day) the Indemnities [note: 5] to:

> unconditionally and irrevocably, jointly and severally, agree and undertake to indemnify [the Plaintiff] and keep [the Plaintiff] fully and completely indemnified against all claims, payments, demands, actions, suits, proceedings, losses, liabilities, costs and expenses whatsoever and however which may be taken or made against [the Plaintiff] or incurred or become payable by [the Plaintiff] in any way arising from or in connection with [the Plaintiff's] issue of the Bonds.

The Indemnities were similarly dated between 28 November 2007 and 19 December 2008. It is noted that these Indemnities (and the corresponding Guarantees) have identical terms setting out their obligations and differ only as to the quantum of the security deposits and the companies involved.

8 During the period between February 2009 and June 2009, the Companies requested the Plaintiff's assistance to repatriate the 182 workers to prevent the forfeiture of the entire security deposit under the Security Bonds by the Controller. The Companies had breached the conditions of the Security Bonds by failing in the upkeep and maintenance of the 182 foreign workers (*ie*, by failing to provide lodging and meals to these foreign workers), and by failing to repatriate them. Although it was the Controller who was named in the Guarantees, parties agreed that it was the Ministry of Manpower ("MOM") who was entitled to have the entire $910,000 security deposit for the 182 foreign workers forfeited. However, instead of an automatic forfeiture of the whole sum, the Plaintiff was called upon by MOM to assist in resolving the problems of housing, meals, transport and unpaid wages for the 182 workers and in their repatriation. In order to mitigate the loss, the Plaintiff agreed to cooperate with MOM to avoid the forfeiture of the entire $910,000 in security deposits. The Defendant admitted that he knew that the Plaintiff was carrying out direct negotiations with MOM [note: 6]. He had attended one meeting with the Plaintiff and MOM where he was informed "of the

steps that the Plaintiff would be taking, pursuant to [its] discussions with MOM" [note: 7]. The Defendant admitted that he did help ascertain the "token wages" even if he disputed whether the "token wages" reflected the true amount of unpaid wages of the workers [note: 8]. He stated that he helped the Plaintiff because in doing so, he would also be helping himself by reducing the amount of the claims [note: 9]. The Defendant also signed on some of the payment records of the foreign workers [note: 10].

9 There was an agreement between MOM and the Plaintiff set out as follows in an email from Jeanette Har of MOM to the Plaintiff dated 28 February 2009 [note: 11]:

> This mail is to follow up with our discussions and your companies' agreement to pay up to a maximum of $3,000 (inclusive of air-ticket) per worker for the *insurance guarantees* issued by your companies in respect of foreign workers hired by 14 companies. We have given the detailed listing to China Insurance, and we will be doing so shortly for India Insurance.
>
> 2 During the MOM's discussion with you, we have told you that the eventual amount paid to the workers will comprise the following components:
>
> (i) salary arrears and overtime, and other statutory claims
>
> (ii) return of $500 of security deposit
>
> (iii) an ex-gratia component (those to be repatriated)
>
> (iv) air-ticket (those to be repatriated)
>
> You have also agreed that should there be incidental cost in respect of the maintenance of workers from now to their repatriation or their successful change of employment, your companies would be prepared to chip in to help.
>
> [emphasis added]

Therefore, pursuant to the agreement with MOM, the Plaintiff incurred a total cost of $449,896.98 through the eight heads of claims as set out in [2] which it now claims should be repaid by the Defendant under the Indemnities.

The Witnesses

10 Three witnesses gave evidence at trial, *viz*, (i) Mr Foo Jong Meng, the Deputy Director of Labour Relations of the MOM ("Foo"); (ii) Ms Lee Ah Teng Josephine, the Claims Manager for the Plaintiff ("Lee"), giving evidence for the Plaintiff; and (iii) the Defendant giving evidence for himself.

The Plaintiff's Submissions

11 The main premise of the Plaintiff's submission was that the Guarantees were "on-demand guarantees, *ie*. payable upon demand without requirement of proof of any default on the part of the Companies or linkage to the Security Bond" [note: 12]. MOM was therefore entitled to call upon the Security Bonds and have the Plaintiff disburse the $910,000 security deposit even without a default of the Security Bonds. The obligations under the Security Bonds were irrelevant to the liabilities of the Plaintiff and the Defendant under the Guarantees and Indemnities.

12 In the present case of a clear default of the Security Bonds, MOM had informed the Plaintiff that it would call upon the Security Bonds if the Plaintiff did not assist and pay for unpaid salaries, housing, meals, transportation, air tickets and mattresses. Therefore, the Plaintiff made the payments and incurred expenses as stated above in [2] in good faith pursuant to an agreement with MOM in order to mitigate the full extent of loss under the Guarantee. The Plaintiff had full discretion to compromise any claim or demand which could be taken against the Plaintiff under Clause 2 of the Indemnities ("compromise clause"), which states as follows:

> 2. [the Plaintiff] may at [the Plaintiff's] *absolute discretion compromise* all claims, payments, demands, actions, suits, proceedings, losses, liabilities, costs and expenses whatsoever and howsoever which may be taken or made against [the Plaintiff] or incurred or become payable to [the Plaintiff]*, including but not limited to, making payments to third parties which [the Plaintiff], in good faith*, consider[s] to be *necessary or expedient or desirable* in order to *reduce [the Plaintiff's] liabilities under the Bond and/or [its/the Plaintiff's] liabilities to the [Controller] or for any reason whatsoever [the Plaintiff] deem[s] fit*.
>
> [emphasis added]

13 Furthermore, combined with Clause 1 of the Indemnities which states that "any demands or claims as aforesaid shall as between [the Plaintiff] and [the Defendant] be conclusive evidence that the sum demanded or claimed is (are) properly due and payable", what the Plaintiff had paid under the Guarantees as stated in [2] represents the full extent of the Defendant's liabilities to the Plaintiff under the Indemnities.

The Defendant's Submissions

14 In essence, the Defendant argued that the Plaintiff can only claim those heads of claim that are specifically spelled out under the Security Bonds, *ie*, bond, air tickets, meals, lodging and mattress. However, token wages, transport and administrative fees are not covered under the conditions of the Security Bonds and therefore cannot be claimed under the Indemnities. This is because the liabilities under the Guarantees and Indemnities are inextricably linked and necessarily circumscribed by the conditions of the Security Bonds.

Legal Issues

15 There is only one main critical issue in this case – what are the Plaintiff's and Defendant's obligations *vis a vis* each other under the Guarantees and Indemnities? The Defendant submits that the liabilities under the Guarantees and Indemnities are circumscribed by the conditions of the Security Bonds, while the Plaintiff submits that the conditions of the Security Bonds are irrelevant. The exact legal nature of the Guarantees and the Indemnities is therefore determinative of this issue. The legal analysis will be as follows:

> Main Issue 1: What are the Plaintiff's and Defendant's obligations *vis a vis* each other under the Guarantees and Indemnities?
>
> (i) Issue 1 (a): What are the Plaintiff's obligations under the Guarantees?
>
> (ii) Issue 1 (b): What are the Defendant's obligations under the Indemnities?

(iii) Issue 1 (c): Are the Plaintiff's and Defendant's obligations circumscribed by the Security Bonds? Even if so, will the Plaintiff's claim still succeed under the Guarantees and Indemnities?

Analysis

Main Issue 1: What are the Plaintiff's and Defendant's obligations *vis a vis* each other under the Guarantees and Indemnities?

16 The parties tended to argue legalistically that because a certain document is an on-demand guarantee, a guarantee or an indemnity, certain obligations will naturally follow such a labelling of the document. This presumes that the titling of the document as a "guarantee" becomes determinative of the nature of obligations within the document itself. However, that is putting the cart before the horse because whether the document is an on-demand guarantee, a guarantee or an indemnity depends on the *very nature of the obligations* undertaken in the documents themselves. The importance of the contractual construction of the documents to determine their true nature was emphasised by Lord Diplock in *Moschi v Lep Air Services Ltd* [1973] AC 331 at 346 and 349:

> Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences to which I have referred *depends upon the words in which the parties have expressed the promise. Even the use of the word "guarantee" is not in itself conclusive.* It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to mis-describe what is in law a contract of indemnity and not of guarantee. Where the contractual promise can be correctly classified as a guarantee it is open to the parties expressly to exclude or vary any of their mutual rights or obligations which would otherwise result from its being classified as a guarantee. *Every case must depend upon the true construction of the actual words in which the promise is expressed.*
>
> [emphasis added]

Issue 1 (a): What are the Plaintiff's obligations under the Guarantees?

17 The Plaintiff's case is that the Guarantees are on-demand guarantees, also known as demand guarantees, first demand guarantees, performance guarantees or performance bonds (see Low Kee Yang in *The Law of Guarantees in Singapore and Malaysia* (LexisNexis 2nd Ed, 2003) ("*The Law of Guarantees in Singapore and Malaysia*") at p 361). The nomenclature of "on-demand guarantees" or "performance guarantees" may be misleading because these undertakings are not in actual substance guarantees as the essential collateral nature of a guarantee is not present. The undertaking in an on-demand guarantee is unconditional and independent. This was emphasised by the Court of Appeal in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 ("*American Home Assurance"*) at [41]:

> Indeed, performance bonds *are not guarantees in the true sense*, but have been described as a *particularly stringent form of contract of indemnity by which a primary liability, wholly independent of any liability which may arise as between the principal and the creditor*, falls upon the surety. *The fact that the obligation to indemnify is primary and independent has the effect that the principle of co-extensiveness does not apply to contracts of indemnity.* Thus an indemnity not only effectively shifts the burden of the principal's insolvency onto the surety, but also potentially safeguards the creditor against the possibility that his underlying transaction with

the principal is void or otherwise unenforceable.

[emphasis added]

18 In *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 166 ("*Edward Owen*"), an archetype of a performance bond or performance guarantee was stated as follows "[w]e confirm our guarantee… *payable on demand without proof or conditions*" [emphasis added]. Lord Denning (*ibid* at 171) compared a performance guarantee to a letter of credit and stressed that the performance guarantee must be paid out *according to its terms* :

> It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

19 It is important also to note the English Court of Appeal judgment in *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2005] 1 WLR 2497 ("*Marubeni*"), where it was held that in construing a guarantee given outside the context of a banking instrument, the absence of language appropriate to a performance bond or something having similar legal effect created a strong presumption against the parties' intention to create a performance bond. In *Marubeni*, the material document was found to be a guarantee instead of a performance bond because the wording of the obligation under the material document was consistent with a secondary obligation and *conditional* upon default by the buyer. The wording (at *Marubeni* at [31]-[32]) stated that the obligation only arose if the "amounts payable under the agreement [are] not paid *when the same becomes due*" [emphasis added] and this is reinforced by the following pledge of "the full and timely performance and observance by the buyer of all the terms and conditions of the agreement".

20 It was stressed by the Court of Appeal in *American Home Assurance* at [49] that the terms of the document need to be construed in light of the parties' intentions, especially the commercial objectives of the documents executed. As the Court of Appeal stated (*ibid* at [49]), the clear commercial objective of the performance bond in *American Home Assurance* was to provide the respondent with "recourse to a ready source of funds" in the event of unsatisfactory or non-performance of the shipyard's obligations. Therefore what was required was "for a third party to issue performance bonds which would enable the respondent to obtain payment *irrespective* of the position between them and the shipyard" [emphasis added]. As stated pithily in *The Law of Guarantees in Singapore and Malaysia* at p 361 in the context of performance bonds, "[t]he commercial intention is simple enough – to secure a third party payment obligation that is as good as cash".

21 The terms of the Guarantees provided by the Plaintiff and addressed to the Controller are set out below:

> Whereas [insert name of one of the Companies]… (hereinafter called "the Employer") by a Bond (hereinafter called "the Security Bond") dated … made under Regulation 21 of the Immigration Regulations, undertake[s] to ensure that the Visit Pass Holder whose particulars appear in the schedule to the Security bond [*sic*] shall comply with all the conditions on which Visit Pass was granted and which are set forth in the Security Bond and to observe further conditions imposed on himself in the Security Bond.
>
> And whereas the Employer is required to deposit a sum of dollars… to [the Controller] as security under the Security Bond.

> And whereas, at [the Plaintiff's] request, [the Controller has] agreed to accept this guarantee in lieu of the said sum of … in cash, upon the terms and conditions hereinafter set forth.
>
> 1. Now, we **CHINA INSURANCE CO. (SINGAPORE) PTE LTD.** [*ie*. the Plaintiff] Having our registered office at … in consideration of [the Controller] having agreed, at [the Plaintiff's] request, not to insist on a cash deposit from the Employer as security under the Security Bond, hereby *guarantee and undertake as principal debtors to pay [the Controller] at any time forthwith, on demand* any sum or sums not exceeding in total the said sum of …
>
> 2. On receiving from [the Plaintiff] any sums under Clause 1, [the Controller] will be entitled to hold and use them as if they were the security deposit paid to [the Controller] under the Security Bond.
>
> **3. [The Plaintiff] shall not be discharged or released from this guarantee by an alteration in the Employer['s] obligations and liabilities under the Security Bond without [the Plaintiff's] consent or by any forbearance shown towards him [*ie*. the Employer] thereunder.**
>
> 4. All requests for payment under Clause 1 shall be in writing and shall be made to us on or before …
>
> [bold in original, emphasis added]

22 Undoubtedly as stated in [6] above, the commercial purpose of the Guarantees was to provide the Controller or MOM with a third party payment obligation from the Plaintiff that was as good as the cash that would have been held otherwise by the Controller or MOM as the cash security deposit. Each of the Guarantees is in reality an on-demand performance bond that is similar in nature to a promissory note. Clause 1 under the Guarantee makes it clear that the Plaintiff will pay the Controller the cash security deposit contracted for "on demand" without any conditions, and thus the obligation to pay was not contingent on the Companies (or for that matter the Visit Pass Holders) having breached any of the conditions under the Security Bonds. Although the term "guarantee" was used in the Guarantees, it was clear that the Plaintiff was not undertaking to perform only upon the default of the Companies but as a "principal debtor" with a primary liability. There was no need for an actual default by the Companies under the Security Bonds. The only condition was that under Clause 4 where the demand has to be made in "writing" but such a condition is not truly a condition and should be treated only as a procedural matter (see Court of Appeal in *Bocotra Construction Pte Ltd and others v Attorney-general* [1995] 2 SLR(R) 262 at [24] ("*Bocotra*")). Thus, the obligations under the Guarantees were unconditional on-demand bonds that were in substance similar to the performance bonds in *Edward Owen* and *American Home Assurance.*

23 It should be further noted that with Clause 3 as stated in [21], the obligations under the so called Guarantees to MOM are no longer characteristic of what is normally expected of guarantees, where guarantors are usually discharged from their obligations under the guarantee if the obligations of the principal guaranteed by the guarantor are varied or altered.

24 In the Defendant's submissions, he did not address the legal nature of the Guarantees, *ie*, whether it was only a guarantee or an on-demand guarantee. The Plaintiff noted that the Defendant did not question the meaning and intent of the Guarantees to the Plaintiff. Counsel for the Defendant confirmed during the re-examination of Lee that he did not cross-examine Lee on Clause 1 of the Guarantees at all [note: 13] . The Defendant's point simply is that the Guarantees refer to the Security Bonds and therefore are circumscribed by the conditions under the Security Bonds. In *Bocotra* at [7],

the bank was obligated to pay the respondent "forthwith on demand any sums not exceeding in… upon receipt of any written notice". The Appellants in *Bocotra*, similar to the Defendant in this case, tried to argue that a separate contract qualified the right of the respondent to pay a demand on the performance bond because the recital in the performance bond made *reference* to a separate contract as follows:

> [W]hereas by cl 9 of the conditions of contract, the contractor must provide a bank guarantee for a sum equal to 10 per cent (10%) of the contract sum, for the due performance of the contract.

25 The Court of Appeal in *Bocotra* held at [22] that there was no "incorporation" clause in the performance bond and that the:

> logic of the appellants' submissions is somewhat baffling, as it amounts to asserting that simply because the [performance bond] referred to cl 9, the terms of the entire contract were thereby incorporated "by reference" into the guarantee. We are quite unable to see how the passing reference to cl 9 in the recital could support the appellants' arguments that the contract itself had qualified the right of the respondent to make a demand on the guarantee.

26 The Court of Appeal's reasoning in *Bocotra* is equally apposite here. As seen in [21] above, while the recital of the Guarantees made references to the conditions under the Security Bonds, these conditions were clearly not incorporated into the operative clauses in the Guarantees to qualify the Controller's right to make a demand on the Plaintiff. I therefore found that on a construction of the Guarantees, they were on-demand performance bonds and the Plaintiff's liabilities under the Guarantees were independent and not circumscribed by the conditions in the Security Bonds. The full implications of this will be examined further under Issue 1 (c).

Issue 1 (b): What are the Defendant's obligations under the Indemnities?

27 The Plaintiff stated that the Indemnities were in substance indemnities and not guarantees as claimed by the Defendant. I noted that when the Defendant was cross-examined about the importance of being a guarantor instead of an indemnifier under the Indemnities, he admitted that he was "not able to tell" [note: 14] . When used in its widest sense, a contract of indemnity can include a contract of guarantee – however, the distinction between the two is crucial in three main aspects, *viz*, (i) the guarantor's liability is co-extensive with the principal but an indemnifier is not affected even if the principal contract is void or unenforceable, (ii) the guarantee must be evidenced in writing (see s 4 of the Statute of Frauds 1677 (c 3) (UK) and s 6 of the Civil Law Act (Cap 43, 1999 Rev Ed) but an indemnity need not be, and (iii) a guarantor will be discharged from liability in certain circumstances that an indemnifier will not.

28 The main difference between a guarantee and indemnity is that the obligation of a guarantor under a guarantee is always subsidiary to the obligation of the principal debtor, who remains primarily liable to the creditor. However, the contract of indemnity is "a contract by one party to keep the other harmless against loss", which is an obligation of primary liability and is independent of the liability of the principal debtor (see *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828 at 830-831). The High Court in *S Y Technology Inc v Pacific Recreation Pte Ltd* [2007] 2 SLR(R) 756 at [23] cited the English Court of Appeal decision in *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 for one significant aspect with regards to an indemnity, which is as follows:

> … there are, therefore, three parties to a guarantee, the creditor, the debtor and the guarantor, who promises to answer for "the debt, default or miscarriage of another", *whereas there are only*

two parties to an indemnity and if it is a promise to indemnify a debtor it is owed to the debtor only, and not because he has failed to perform his obligation, but because he has performed it.

[emphasis added]

This is significant in construing the Indemnities because the Indemnities were clearly only between two parties – the Plaintiff and the Defendant. Although at the portion of the signature in the Indemnities, the Defendant is stated as "Guarantor", it is clear that the main language of the obligations shows that the Defendant's liabilities were that of an indemnifier and not a guarantor. The Defendant could not reasonably be construed as a guarantor because there was no principal liability which his liabilities could be ancillary to. The Defendant was not guaranteeing performance of a third party; the Defendant was promising to indemnify the Plaintiff against any payments incurred by the Plaintiff "arising from or in connection with [the Plaintiff's] issue of the Bonds".

29 Such a primary liability to indemnify is encapsulated in the main obligation of the Defendant towards the Plaintiff, which is stated as follows in the Indemnities, where the Defendant together with some other persons:

unconditionally and irrevocably, jointly and severally, agree and undertake to *indemnify [the Plaintiff] and keep [the Plaintiff] fully and completely indemnified against all claims, payments, demands, actions, suits, proceedings, losses, liabilities, costs and expenses whatsoever* and *however* which may be taken or made against [the Plaintiff] or *incurred or become payable by [the Plaintiff] in any way arising from or in connection with [the Plaintiff's] issue of the Bonds*.

[emphasis added]

30 The Indemnities were given "in consideration of [the Plaintiff] agreeing at my/our request [*ie.* the Defendant's request] and the request of [insert name of one of the Companies] to issue a Security Bond No. … (hereinafter called "the Bond"), in favour of the Controller of Immigration (hereinafter called "the Beneficiary") for the sums of Singapore…". Therefore, considering the commercial circumstances, what is stated as "with [the Plaintiff's] issue of the Bonds" under the Indemnities must be reasonably construed to be the Guarantees that the Plaintiff gave to the Controller in lieu of the cash security deposits required under the Security Bonds. These Guarantees were executed concurrently with the Indemnities and it was common ground between the parties that the Indemnities were executed by the Defendant in consideration of the Plaintiff executing the Guarantees [note: 15]. This is as described in Geraldine Andrews & Richard Miller, *Law of Guarantees* (Sweet & Maxwell, 5th Ed, 2008) at p 590 in which as a "condition of giving a performance bond, the bank or surety company will invariably require a *counter-indemnity* from the person whose performance it secures."

31 If that is so, and given the absolute discretion conferred on the Plaintiff to compromise in good faith all claims and demands as encapsulated in the compromise clause (see Clause 2 of the Indemnities at [12] above), the Plaintiff is clearly entitled to be indemnified by the Defendant under the Indemnities against "whatsoever" and "howsoever" amounts that the Plaintiff had paid out to the Controller pursuant to the demands made by the Controller under the Guarantees. The Defendant himself admitted that the Plaintiff had the right to compromise before or after a call on the bond is made [note: 16]. He also admitted that the Plaintiff had not done anything which was wrong, unnecessary or inexpedient in their efforts to reduce the total amount that could be called by the Controller. [note: 17]. I have found no evidence of any bad faith on the part of the Plaintiff when it exercised its discretion to compromise with the Controller and pay out the agreed sums to avoid

having the Controller call on the full amounts under the various Guarantees.

Issue 1 (c): Are the Plaintiff's and Defendant's obligations circumscribed by the Security Bonds? Even if so, will the Plaintiff's claim still succeed under the Guarantees and Indemnities?

32 Following the analysis of Issues 1(a) and 1(b), the Plaintiff's and Defendant's obligations under the Guarantees and Indemnities are not circumscribed by the Security Bonds. Whether or not there has been a breach the conditions of the Security Bonds is irrelevant to the Plaintiff's and Defendant's obligations. As long as there is a demand under the Guarantees, the Plaintiff is obliged to pay whatever amount the Controller or MOM wants the Plaintiff to furnish up to a maximum of $910,000; and under the Indemnities, the Defendant is liable to indemnify the Plaintiff for whatsoever payment has been incurred by the Plaintiff under the Guarantees. The Defendant himself rightly admitted during cross-examination that he is liable to indemnify the Plaintiff even if the Plaintiff exercised its right to compromise what is required to be paid under the Guarantee:

> Q: So instead of paying $910,000 if [the Plaintiff] can attempt to lower the sum, that would be acceptable, you have agreed that they can do so?
>
> A: Yes.
>
> Q: Right? And if they do so, you will pay? You will still indemnify them?
>
> A: Yes [note: 18].

33 Even if the Guarantees and Indemnities were indeed circumscribed by the conditions under the Security Bonds, I would still have found for the Plaintiff for all eight heads of its claim. Under the Security Bond, any sum "to the extent of the sum deposited" under the Security Bond can be forfeited in the event that any of the conditions of the Security Bond is breached. The Controller or MOM can thus call for and forfeit any amount it wants up to a maximum of $910,000. This is accepted by the Counsel for the Defendant [note: 19]:

> Court: Part of it. They need not call $5,000 [per bond per worker], they can call $3,000.
>
> [Counsel for the Defendant]: That's the question I posed to him –
>
> Court: He did say he can call any amount he wants.
>
> [Counsel for the Defendant]: He had that liberty.
>
> Court: And then [the Plaintiff] would have no choice but to pay it.
>
> [Counsel for the Defendant]: Yes.
>
> Court*: If he had not used the term "token wages" and instead it's characterised as a part-call, the whole amount of $449,000 is a part-call on the whole bond, nobody has anything to say. We don't need the trial here.*
>
> [Counsel for the Defendant]: *Yes. There's one practical difficulty.*
>
> Court: What practical difficulty?

[Counsel for the Defendant]: I asked [Foo] earlier, where does the $5,000 go to or whatever amount is forfeited.

Court: He can forfeit the whole $5,000 and after that the balance can go to the [consolidated] fund.

[Counsel for the Defendant]: Yes.

Court: But as far as the insurance company is concerned, it will just have to pay out $449,000.

[Counsel for the Defendant]: Yes, except according to his evidence, the full sum must go to the consolidated fund, and the only provision that has been made in law, somehow, is for certain sums to be paid out of consolidated fund only for one item, which is airfare. Otherwise you can't touch that money, it becomes government reserves to be invested by GIC.

Court: So the effect here is that the workers get paid, the [consolidated] fund didn't get any money.

[Counsel for the Defendant]: Yes.

Court: *Does it make any difference to the liabilities being discharged by the insurance company?*

[Counsel for the Defendant]: *That itself, I don't think so, sir.*

Court: No difference, right?

[Counsel for the Defendant]: Yeah.

Court: If MOM calls for the bond for – because MOM can call up to $900,000, MOM call $449,000 – let's not break the number into how many bonds there were – if you don't pay, I call $449,000, full stop. Just pay. Nobody is going to say anything. *They are entitled to call $449,000 because you did breach the bond.*

[Counsel for the Defendant]: Yes.

Court: You may dispute about the token wage, but effectively you have breached the bond on those items that the bond is very clear about. Who can say anything?

[Counsel for the Defendant]: Yes.

[emphasis added]

34 The Defendant therefore conceded that if the Controller had called for the forfeiture of the entire security deposit of $910,000 for all 182 workers (based on the security deposit required of $5,000 per worker) and the Plaintiff *had not compromised* but had paid out $910,000 on the Guarantees, the Defendant would nevertheless still be liable to indemnify the Plaintiff for the amount paid out of $910,000. However according to the Defendant, the Plaintiff in exercising its right to compromise, exceeded its powers by paying for token wages, transport and administrative fees that were not spelt out as conditions in the Security Bonds. This reasoning of the Defendant is strange since firstly, the Plaintiff's right to compromise is at the Plaintiff's "absolute discretion" in Clause 2 of the Indemnities as long as it is exercised in "good faith" and is "necessary or expedient or desirable".

Secondly, the conditions of the Security Bond itself do not limit the extent of forfeiture in respect of each breach – as long as there is *one* breach of the conditions of the Security Bond, the Controller is entitled to claim a forfeiture up to the *full* amount of the security deposit. There is no such restrictive clause in the Guarantees, Indemnities or Security Bonds that the Controller is entitled to demand and Plaintiff is entitled to pay an amount only to the extent of each breach of the conditions. As the Defendant rightfully conceded above, if the Controller had just asked for a part call of $449,000 without breaking down its claim, the Defendant cannot even begin an action to ask the Plaintiff to justify what it has paid out under the Guarantees. Quite significantly, the Defendant admitted that part of the Plaintiff's right to compromise under the Indemnities included "paying for wages if it resulted in [the Defendant] paying less than $910,000" [note: 20], and with that, the Defendant had practically admitted the rightfulness of the Plaintiff's claim.

35 It was highlighted at trial that the present format (which was not relevant to this case) of the Security Bond required by MOM, which was updated on 1 January 2010, states explicitly that it is a condition of the employer to pay outstanding salaries to the workers before repatriation [note: 21]. As stated by Foo, MOM's position for the previous version (relevant to this case) of the Security Bond before the update was that if an employer's *only* failing was in not paying the salaries of the workers, this would not be a breach of the Security Bond and would not be sufficient in itself for MOM to call for a forfeiture of the security deposit [note: 22]. Even if it is accepted that an employer's obligation to pay the salaries of the foreign workers is not a condition of the Security Bond, this however is not such a hypothetical case. It is common ground that the Defendant did breach the obligations for the "upkeep and maintenance" and "repatriation" [note: 23] of the 182 foreign workers, which were conditions of the Security Bonds as set out below:

> i) That during their stay in Singapore, we shall be responsible for their *upkeep and maintenance* and for *the cost of their eventual repatriation*, and if any of them should die while in Singapore, for the cost of burial or cremation or the return of the body to the country of nationality;
>
> [emphasis added]

36 Therefore, if "token wages" need to come within one of the conditions of the Security Bonds, I would find that the payment of the "token wages" would fall under the "cost of their eventual repatriation". Foo stated that "[n]o worker would agree to be repatriated if he or she is still owed wages" [note: 24]. Thus payment of the "token wages" is necessary to facilitate the eventual repatriation. Foo testified very clearly that MOM would have forfeited the Security Bonds for the full amount of $5,000 for each foreign worker if the Plaintiff had not agreed to assist in paying the outstanding wages and repatriating the workers [note: 25]. The Plaintiff's payments under the heads of "token wages" and "transport" were clearly part of the package deal worked out between the Plaintiff and MOM for the successful repatriation of the foreign workers in order to avoid forfeiting the entire $910,000 under the Security Bonds.

37 Even if the primary liability of the Defendant to indemnify under the Indemnities is related to the Security Bonds, as espoused in the words "incurred or become payable by [the Plaintiff] in any way arising from or in connection with [the Plaintiff's] issue of *the Bonds*" (emphasis added) (see [7] and [29] above), with the Bonds referring to the conditions of the Security Bonds instead of the Plaintiff's obligations under the Guarantees, this obligation to indemnify, having regard to the ambit of the phrase "in any way arising from or in connection with", has been drafted very widely. I would consider all eight heads of the Plaintiff's claims as payments "arising from or in connection with" the breach of the "upkeep and maintenance" and "repatriation" conditions of the Security Bonds. The head of

"administrative fees" clearly arose from the breach of the Security Bonds, being part of the actual expenses the Plaintiff incurred to negotiate with and ensure the successful repatriation of the 182 foreign workers. However, only the items of "administrative fees" that constituted *actual* administrative expenses incurred should be allowed, *eg*, actual overtime payments additionally paid to the Plaintiff's salaried employees to process the repatriation and the various claims on unpaid wages by the 182 work permit holders on an urgent basis, but not "notional administrative expenses" based on the imputed time costs or hourly rates in normally processing the claims for which fixed salaries have to be paid by the Plaintiff to these salaried employees anyway. Even on the Defendant's case that the Defendant's obligation to indemnify under the Indemnities is circumscribed by the conditions of the Security Bonds, I would still have allowed the Plaintiff's claim.

38 On the Defendant's evidential point that the Plaintiff failed to prove its case because it failed to prove the relevant Security Bonds, I found that this was irrelevant since the main analysis from Issues 1(a) and 1(b) showed that the Security Bonds were immaterial to the Plaintiff's case. Also, it must be recognised that the sample of the Security Bond provided in the Plaintiff's Core Bundle of Documents is a statutorily provided template; there is no suggestion that the relevant Security Bonds differed from the statutory norm. Furthermore, counsel for the Defendant confirmed at the start of the trial that the Defendant was not disputing the authenticity of the documents in the Plaintiff's Core Bundle, which included a sample of the Security Bond, but reserved the right to cross-examine on the contents of the same [note: 26]. Counsel for the Defendant did not object to the use or the relevance of this sample of the Security Bond during the trial, and he even used it as the basis of his cross-examination. The Defendant himself referred to the same sample of the Security Bond in his affidavit and treated the conditions stated therein as being identical to those in the Security Bonds granted by the Companies to the Controller. In fact, MOM's entitlement to call for any sum up to the maximum of $910,000 of the security deposit under the Security Bonds was accepted by both parties. It was also not disputed between the parties that the Defendant had clearly breached the "upkeeping and maintenance" and "repatriation" conditions of the Security Bonds, which were based on the sample provided. Therefore, even if the conditions of the Security Bonds were material, I would have found that the Plaintiff proved its case.

Conclusion

39 The commercial circumstances of an insurer like the Plaintiff giving a performance bond to the Controller in exchange for the dispensation of the Companies' obligation to provide cash security deposits under the Security Bonds appears to be a relatively common situation in Singapore. The insurer protects itself from any loss that may arise from the issuing of such a performance bond to the Controller by ensuring that the directors of the companies concerned concurrently execute an indemnity to indemnify the insurer against the payments that the insurer will have to pay out in the event the Controller calls on the performance bond.

40 The Defendant admitted that he understood that as a director of the Companies, he was required to execute the Indemnities to the Plaintiff for the Guarantees for the Security Bonds and that he was "guaranteeing the due performance of these [C]ompanies of their obligations under the Security Bonds" [note: 27]. He "did not have any issues with this, as the business of the SME Group appeared to [him], to be thriving" and he "therefore signed these [Indemnities], without raising any issues or reservations" [note: 28]. The Defendant may have signed the Indemnities under the belief that the management of the SME Group was secure under his father-in-law and therefore there was little risk of him ever having to indemnify the Plaintiff. However, the Defendant cannot escape from the legal consequences of the Indemnities which he had signed and it was clear from the cross-examination that he understood that the obligation he personally undertook was a heavy and wide-

ranging one. This is a clear instance of directors of companies needing to be careful of and to comprehend the full extent of their liabilities when they undertake obligations as an indemnifier. This is especially so when the Defendant had taken legal responsibility for the due performance of these Companies when he was not involved with the management of the Companies.

41 The Defendant's proposed interpretation of the relationship between the Guarantees, Indemnities and Security Bonds is not only impractical but one that is inconsistent with the very language and commercial purpose of the documents. The Defendant accepted that if the Plaintiff had not made efforts to reduce the sum forfeited and instantly paid out the $910,000 on the Guarantees, he would be liable to reimburse the $910,000. However, in the event the Plaintiff tries to negotiate and compromise the claim, the Plaintiff can only compromise the claim within the constraints of the conditions specified in the Security Bonds itself. Under such a restrictive interpretation, which is not supported by the documents, an insurer should perhaps avoid attempting to compromise the claim and instead automatically allow forfeiture of the full amount – because the risk of compromising the claim outside its authority falls entirely on the Plaintiff – although it may have acted in good faith to compromise the claim in a way that mutually benefits both the Plaintiff and Defendant. As I found at [34] and [37], the Plaintiff's right to compromise is an absolute one and even if the right to compromise is qualified by the conditions of the Security Bonds, the Indemnities are drafted widely enough to subsume all eight heads of the Plaintiff's claim as stated in [2]. Even if I had accepted that the Guarantees and the Indemnities were circumscribed by the conditions of the Security Bonds, I found that the eight heads of claim were "arising from or in connection with" the breach of the "upkeep and maintenance" and "repatriation" conditions of the Security Bonds and the Plaintiff was entitled to be indemnified.

42 I therefore gave interlocutory judgment for the Plaintiff with damages to be assessed by the Registrar with all costs reserved to the Registrar hearing the assessment.

[note: 1] See Notes of Evidence for 1st day of trial, 25 July 2011, p 14 and 3rd day of trial, 28 July 2011, p 41-42.

[note: 2] Defendant's AEIC dated 15 June 2011, [7].

[note: 3] Plaintiff's Core Bundle of Documents, p 154.

[note: 4] An example of the Plaintiff's Guarantees – see Plaintiff's Core Bundle of Documents, p 1.

[note: 5] An example of the Plaintiff's Indemnities – see Plaintiff's Core Bundle of Documents, p 3.

[note: 6] Defendant's AEIC dated 15 June 2011, [27].

[note: 7] Defendant's AEIC dated 15 June 2011, [32].

[note: 8] See Notes of Evidence on 3rd day of trial, 28 July 2011, p. 60.

[note: 9] See Notes of Evidence on 3rd day of trial, 28 July 2011, p. 61.

[note: 10] See Plaintiff's Core Bundle of Documents, pp 37 to 42.

[note: 11] Plaintiff's Core Bundle of Documents, p 118.

[note: 12] Plaintiff's Written Submissions filed 22 August 2011, [4.1].

[note: 13] See Notes of Evidence on Day 3 of the Trial, 27 July 2011, p 47.

[note: 14] See Notes of Evidence for day 3, 28 July 2011, p 41.

[note: 15] Defendant's Affidavit filed 15 June 2011, [13].

[note: 16] See Notes of Evidence, 3rd Day of Trial, 28 July 2011, p 36.

[note: 17] See Notes of Evidence, 3rd Day of Trial, 28 July 2011, p 38.

[note: 18] See Notes of Evidence, Day 3 of the trial, 28 July 2011, p 38.

[note: 19] See Notes of Evidence, Day 2 of the trial, 27 July 2011, pp 58-60.

[note: 20] See Notes of Evidence on 3rd day of trial, 28 July 2011, p 46.

[note: 21] See Plaintiff's Core Bundle of Documents, p 155.

[note: 22] See Notes of Evidence on 2nd day of trial, 27 July 2011, p 15.

[note: 23] Transcript page 47 line to page 48 line 18 (26 July 2011)

[note: 24] See Notes of Evidence on 2nd day of trial, 27 July 2011, p 39.

[note: 25] See Notes of Evidence on 1st day of trial, 25 July 2011, pp 50-51.

[note: 26] See Notes of Evidence for day 1 of trial, 25 July 2011, p 1.

[note: 27] Defendant's Affidavit filed 15 June 2011, [13].

[note: 28] *Ibid*.