

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 85

CA 120/1991

Between

Associated Asian Securities
Pte Ltd (in liquidation)

... Appellant

And

Lee Kam Wah

... Respondent

GROUND S OF DECISION

Contract — Contractual terms — Express terms

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Associated Asian Securities Pte Ltd (in liquidation) v Lee Kam Wah

[1992] SGCA 85

CA 120/1991

Goh Joon Seng J; L P Thean J; Yong Pung How CJ

10 December 1992

1 This was an appeal from a decision of Karthigesu J dismissing the appellants' counterclaim against the respondent for the sum of \$143,707.74 with interest thereon (see [1991] 3 MLJ 286). We allowed the appeal and now give reasons for our decision.

2 The appellants were at all material times a member of the Stock Exchange of Singapore Ltd, although they have since been put into liquidation. The respondent was a remisier with them but ceased acting in this capacity on 31 August 1984, after which he claimed from them a sum of money due to him on his account with them. The appellants did not dispute this claim but counterclaimed, with interest thereon, the sum of \$143,707.74 as losses suffered in the following manner.

3 In September 1983, the respondent carried out instructions from a client to sell Promet, Genting and Magnum shares. In purported furtherance of these transactions, the client delivered share certificates to the appellants' Scrip Delivery Department, whose personnel signed the appropriate share transfer forms, believing the share certificates to be genuine when the Genting and

Magnum share certificates were in fact forgeries. The client was subsequently prosecuted for dealing in forged share certificates. Since the appellants were bound to guarantee the authenticity of shares sold through them, they bought replacement shares for the purchasers in these transactions, thereby suffering the said loss of \$143,707.74.

4 The appellants claimed an indemnity from the respondent, relying on the terms and conditions of an agreement dated 14 September 1981 made between them (‘the contract’). These terms and conditions included the following:

You [the respondent] shall be responsible for all liabilities arising from contracts written by you.

5 You [the respondent] shall indemnify [the appellants] of any losses and damages that may arise on all contracts written by you.

6 And at the foot of the contract, just above the respondent’s signature:

I [the respondent] agree to the above terms and conditions and hereby indemnify [the appellants] for any losses or damages arising from any contracts written or any transactions entered into by me.

7 In the alternative, the appellants contended that the respondent impliedly warranted the genuineness of the documents submitted.

8 The respondent’s defence was that on a proper construction of the terms and conditions, he was not liable to the appellants for any loss or damage suffered by them and in the alternative that the appellants had themselves been negligent in accepting the forged share certificates from the client without first ensuring the authenticity of the share certificates, and were thus debarred from relying on the indemnity clauses.

9 The trial judge decided in favour of the respondent. He said he was unable to construe the indemnity clauses in the appellants' favour, and in the circumstances of the case he also could not construe the terms and conditions to include an implied warranty given by the respondent to the appellants as to the genuineness of the share certificates sold by the client. He thought that the language of the indemnity clauses was too open-ended and sought to place some limitation on it. He held that the clauses applied to all losses and damage incurred in the course of bona fide and genuine transactions. As to transactions that were not bona fide and genuine, the indemnity clauses applied if the remisier had been negligent or had himself been party to the fraudulent intention.

10 His decision thus far was not disputed. Beyond this, however, the learned judge would not go. The appellants contended that he ought to have gone further and construed the indemnity clauses to extend even to losses and damage incurred as the result of fraud by third parties in which the remisier had no part.

11 Normally, when contractual terms are clear and unambiguous they are taken at face value unless there is some compelling reason why they should not be. The fact that a term may put what appears to be a disproportionate or unfair burden upon one party is not regarded as a sufficient reason to interfere with its interpretation if it is in itself clear, because parties who contracted on equal terms must be left free to apportion risks as they see fit. For this reason the plain wording of the indemnity clauses in this case favoured the appellants.

12 In construing the terms of this contract, it is necessary to have regard to the commercial purpose thereof and the relevant factual background in which the parties made the contract. In ***Reardon Smith Line Ltd v Yngvar Hansen-***

Tangen (trading as HE Hansen-Tangen) 1at pp 995-996 Lord Wilberforce said:

No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

13 He then referred to various authorities and dicta on what matters the court ought to have regard to in construing a contract, and summarized the position thus, at p 997:

I think that all of their Lordships are saying, in different words, the same thing - what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognize that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.

14 In this case, the factual background as found by the learned judge was this. At this material time, the appellants were a member of the Stock Exchange and the respondent a remisier. A remisier is licensed by the Stock Exchange to trade in securities but he has to trade through a member firm of the Stock Exchange. Under the Stock Exchange Rules, a member firm trades through two classes of persons, namely, dealers and remisiers. Dealers are employees of the member firm whereas remisiers are not. A remisier is therefore self-employed and ties himself to a member firm by agreement and is remunerated from a percentage of the brokerage received by the member firm in respect of all

contracts transacted by the remisier in the name of the member firm. The relationship of a remisier with the member firm is therefore merely that of agent and principal. A remisier has to solicit or look for his own business but he channels it through the member firm. All the clients of a remisier are his, but the contracts which he puts through for them are contracts made between them and the member firm. Vis-a-vis his clients, it is he who instructs the member firm to put through the contracts for them. As they are his clients, it must necessarily follow that it is he who has to check and ascertain the bona fides of his clients. The member firm is in no position to inquire into the remisier's clients.

15 It is in the context of this factual background that the terms of the contract between the respondent and appellants ought to be construed. The contract was obviously intended to regulate the dealing of securities by the respondent in the appellants' company and to safeguard the interests of the appellants in relation to such dealings, as the appellants would be vicariously responsible for the performance of all contracts the respondent had put through for his clients. For instance, if it was a sale of shares, the appellants would have to ensure that the certificates and transfer were delivered, and if it was a purchase of shares, they would have to ensure that the price was paid, all in due time. Obviously for this purpose, the contract was drawn up by the appellants and was expressed in very stringent and comprehensive terms from the point of view of the respondent, and the relevant terms providing an indemnity to the appellants were expressed in very wide terms: the respondent agreed to 'indemnify [the appellants] for any losses or damages arising from any contracts written or transactions entered into by' the respondent. These words are sufficiently wide to cover losses arising from any default of the respondent's clients in honouring a bona fide and genuine transaction as well as losses arising

from fraud or forgery by the respondent's clients. Such losses, including loss arising from delivery of forged certificates, must have been in the contemplation of the parties when the contract was made.

16 This brings us to another reason for the learned judge's decision on the indemnity clauses. There was evidence given by the appellants' witnesses that, at the time the contract was made, fraudulent transactions involving forged share certificates were rare or unheard of, and therefore such matters would not have been within the contemplation of the parties at the time that the contract was made. Notwithstanding that no evidence was led to counter the appellants' witnesses on this point, we were unable to accept that the forgery of share certificates would not have been within the contemplation of the parties at the time of contract. The forging of share certificates is an activity that has a history as long as that of shares themselves and has a case history of some note. A remisier who does not have within his contemplation the possibility that he may be faced with forged share certificates at some time must be in a state of complacency which is fraught with peril. For these reasons we were disposed towards the appellants' contention that it was reasonable for the indemnity given by the respondent to extend to the genuineness of the share certificates submitted by his client.

17 Accordingly, we were of the opinion that the indemnity given by the respondent to the appellants was wide enough to encompass the genuineness of the share certificates submitted by his client. This being so, it was unnecessary for us to consider the arguments on implied warranty, and on the case of ***Stanley Yeung Kai Yung and Anor v Hong Kong and Shanghai Banking Corp*** 2 which was referred to by Karthigesu J in the court below and by counsel for both the appellants and the respondent before us.

18 The respondent further argued that even if he were held to have agreed to indemnify the appellants against this loss, the appellants had been negligent in accepting the forged share scrip from the client without first ensuring the authenticity of that share scrip, and were thus debarred from relying on the indemnity clauses. We rejected this argument. In the first place, the learned trial judge found that the respondent had not proved negligence on the part of the appellants. That finding was plainly correct, and the respondent has not succeeded in persuading us otherwise. In the second place, any negligence on the part of the appellants in this regard (and we were not in any event persuaded that they or their employees had in fact been so negligent) could not possibly have caused the loss, because the relevant transactions would already have been executed by the time the share scrip was delivered. In short, there should still have been purchasers to compensate and the loss would nonetheless not have been averted if the forgery had been detected at that point.

19 Accordingly we allowed the appeal, and ordered that the appellants be awarded the sum of \$143,707.94 with interest thereon at the rate of 6%pa from 22 July 1985, the date the counterclaim was filed, with costs here and below to the appellants and with the usual consequential orders.

20 **Outcome:**

Goh Joon Seng J
L P Thean J
Yong Pung How CJ

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Bernard Doray (Bernard Rada & Lee) for the appellants
Ng Kai Ming (PK Wong & Advani) for the respondent
