

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 253

Suit 6568/1985, 6569/1985, 6659/1985

Between

Hong Leong Finance Ltd

... Plaintiff

And

Famco (S) Pte Ltd

... Defendant

GROUND OF DECISION

Agency — Rights of agent — Indemnity; Credit and Security — Guarantees and indemnities — Guarantor; Credit and Security — Guarantees and indemnities

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Hong Leong Finance Ltd v Famco (S) Pte Ltd and Others

[1992] SGHC 253

Suit 6568/1985, 6569/1985, 6659/1985
Judith Prakash JC
25 September 1992

1 Cur Adv Vult

2 These three actions arise out of a series of hire-purchase transactions entered into in 1983 between the plaintiffs, as owner, and the first defendants, Famco (S) Pte Ltd (`Famco`), as hirer. As security for the payment obligations of Famco, the plaintiffs required and received various guarantees. Famco having defaulted, the plaintiffs commenced these actions against it and the various guarantors to recover the balance due. By the time the trial started, in April 1992, the plaintiffs had obtained judgment in default against Famco and several of the guarantors. The remaining defendants who were contesting the actions were the second and third defendants in each suit, Chew Beng Gim (`Chew`) and Cheng Tye-Loke Leonard (`Cheng`), and the seventh defendant in Suit No 6568 of 1985, SPP Ltd (`SPPL`). In addition, in the two suits in which SPPL was not a defendant, Chew and Cheng had instituted third party proceedings against SPPL asking for an indemnity if they were found liable to the plaintiffs.

3 I will deal first with the issues and evidence in relation to the main actions and will thereafter consider the third party actions.

4 The main actions

5 The issues in the main actions

6 The first hire-purchase transaction took place in June 1983. It forms the subject matter of Suit No 6659 of 1985 in which the plaintiffs claim against, inter alia, Chew and Cheng the sum of \$46,608.14 and interest at 16%pa until date of payment. The second transaction, which took place in October 1983, is the subject matter of Suit No 6568 of 1985. The plaintiffs' claim thereunder against Chew, Cheng and SPPL, is for \$567,760.62 and interest thereon at 16%pa until date of payment. Finally, Suit No 6569 of 1985 reflects the plaintiffs' claim of \$21,046.77 and interest thereon, at the same rate, in respect of a hire-purchase transaction that took place in December 1985. Henceforth in this judgment, these three transactions will be distinguished by reference to the month in which they occurred.

7 Chew and Cheng took a common line of defence to all three claims. They averred that they were appointed as directors of Famco at the instance of SPPL which wanted representatives on the board of Famco as, at all material times, Famco was an associate company of SPPL. The management of Famco was the sole responsibility of its two executive directors, viz one Kee Ah Fok @ Kee Kum Piew ('Kee') and one Yap Teck Huat ('Yap'). Yap and Kee were the persons who arranged to buy the various machines specified in the suits and who negotiated with the plaintiffs for the finance by way of hire purchase of such goods. Chew and Cheng denied knowledge of each of the hire-purchase agreements and pleaded that whilst they did sign personal guarantees in respect of these transactions, the forms they signed were blank and the guarantees were furnished on the plaintiffs' representation that they were to be temporary and interim comfort pending the furnishing of a corporate guarantee by SPPL.

8 In the case of the October transaction, SPPL did in fact furnish a corporate guarantee in September 1986. Chew and Cheng therefore pleaded that the guarantee they had executed supporting this transaction was wrong in law or, alternatively, null and void or, in the further alternative, not legally binding on them and ceased to have any effect after 1 September 1986, ie the date on which the SPPL guarantee was issued.

9 In respect of the other two transactions where no corporate guarantee was issued by SPPL, Chew and Cheng denied liability on the grounds that the guarantees executed by them had been wrongfully obtained or they had been misled into executing such guarantees or that such guarantees were null and void and not legally binding on them.

10 SPPL's defence was that the plaintiffs, together with Chew, Cheng and Ong Tiong Soon ('Ong'), had induced them into giving the corporate guarantee of September 1986 to support the October transaction but had failed to disclose to them certain material facts relating to the October transaction and consequently they had been discharged from all liability under their corporate guarantee. At all material times Ong had been the chief executive officer cum managing director of SPPL and Chew and Cheng had sat on its board.

11 The evidence for the plaintiffs

12 In December 1982, Chew who knew the plaintiffs from previous dealings, contacted them and arranged for a loan on behalf of another company of which he was a director, Feng Yuan Holdings ('FYH'). This loan was secured by a charge of shares purportedly belonging to FYH.

13 Sometime before June 1983, Chew contacted the plaintiffs again and indicated that he wanted to obtain hire-purchase financing for some machines located in Johore. PW2, Mr James Sim (`Sim`) and PW1, Ms Tan Meng Leng (`Ms Tan`), who were employed by the plaintiffs in the positions of senior manager and marketing officer respectively, visited Chew at his office to discuss the financing request. During that meeting they were told that Famco would be the borrower. Ms Tan asserts that Chew informed her of the shareholders and directors of Famco. FYH was named as a shareholder holding 70,890 shares out of a total issued share capital of 120,000 shares. Ms Tan was not told that Famco was a subsidiary or associate of SPPL and, in fact, SPPL`s name was not mentioned in connection with the transaction at all. The machines to be financed were located in Johore at the premises of a company known as Chan Wah Lee Plywood Sdn Bhd (`Chan Wah Lee`) and were to be sold by Chan Wah Lee to the plaintiffs and then let to Famco on hire-purchase terms. After the transaction was completed, the machines were to remain in Johore. The actual user of the machinery was a company called Sejati Plywood Sdn Bhd (`Sejati`) which, unknown to the plaintiffs, was in fact Chan Wah Lee under a new name.

14 The plaintiffs agreed to give the financing and, as security, they required not only the machines but also, in accordance with their usual practice, personal guarantees of all the directors of Famco. At that time Famco had altogether five directors.

15 When the hire-purchase agreement which incorporated a guarantee was ready for signature, Sim and Ms Tan took it down to Famco`s office in SPP Building in Alexandra Road. Only Chew and Cheng were available to sign the documents. Chew, on behalf of Famco, signed the hire-purchase agreement and also the delivery receipt acknowledging receipt of the machinery hired. He then

signed the guarantee which was part of the hire-purchase agreement. Cheng also signed this guarantee. Chew's signatures were witnessed by Sim and Cheng's by Ms Tan. As the other directors were not available to sign the guarantee at that time, Chew and Cheng signed a letter of undertaking agreeing to procure that they sign the guarantee. The hire-purchase agreement and guarantee signed by Chew and Cheng were dated 6 June 1983. The other three guarantors subsequently signed a separate guarantee dated 22 June 1983.

16 The October transaction was, again, initiated by Chew. The plaintiffs were informed that Famco was interested in buying certain plywood machinery from a Malaysian company known as Johore Plywood Manufacturing Co Sdn Bhd ('Johore Plywood') and they were asked to finance the purchase. This was sometime in early October 1983. The plaintiffs were given a valuation report which showed that the value of the equipment was MR978,650 but they were informed by Famco that in fact the purchase price was only MR770,000 as Famco had received a discount from the vendor who needed to get rid of the equipment as it was closing down. Once again, the plaintiffs indicated that they required the personal guarantees of Famco's directors as security. Chew agreed and, in addition, offered the plaintiffs a second charge over the shares which had been charged to them in 1982 by FYH. This security was accepted by the plaintiffs.

17 Ms Tan took the completed documents which consisted of an agreement for hire purchase, the actual hire-purchase document and the guarantee, down to Famco's office at SPP Building for signature. She remembers clearly that all the directors of Famco were present at that time. Chew signed the agreement for hire purchase, the hire-purchase agreement and the delivery receipt on behalf of Famco and then all the directors signed the guarantee. At that time, the directors of Famco were Chew, Cheng, Kee, one Robert Lai and Ong. Ms Tan witnessed

their signatures. These documents were dated 26 October 1983. The deposit of shares agreement which created the second charge on the shares was signed on behalf of FYH by Ong, witnessed by Tan and dated 26 October 1983 as well. In fact the documents were signed prior to 26 October 1983 and that date was used as the date of the documents since it was the date on which the plaintiffs released the cashier's order in payment of the purchase price of the machinery to the vendor, Johore Plywood. Once again it was contemplated that the machinery would remain in Johore after the hiring commenced. The plaintiffs understood that it would be used by a Malaysian company. In the event, though it is not clear whether the plaintiffs were aware of this at the time, the user of the equipment was Sejati.

18 The December transaction was the final transaction initiated by Chew on behalf of Famco. It involved the financing of one unit caterpillar wheel loader. The plaintiffs agreed to buy this machine for about \$60,000. Chew requested the plaintiffs to take the personal guarantees from Cheng and himself only instead of from all Famco's directors as the amount involved in this transaction was very small. The plaintiffs agreed to his request. When the hire-purchase agreement and guarantee had been prepared by the plaintiffs' documentation unit, Ms Tan took them down to Famco's office and, as Chew and Cheng were not available, she left them with Sharon Neo, Chew's secretary. Chew subsequently signed the hire-purchase agreement and delivery receipt therein on behalf of Famco. The guarantee was at the bottom of the hire-purchase agreement and formed part of the document and both Chew and Cheng signed the guarantee. Their signatures were witnessed by Sharon Neo. These documents were dated 2 December 1983. Again the equipment was located in Johore and was to be used by Sejati.

19 According to both Sim and Ms Tan, at no time during the negotiations for any of the three transactions was mention made by Chew, with whom they dealt, of a corporate guarantee to be provided by SPPL. Sim and Tan averred that they were not aware that SPPL had an interest in Famco. They were under the impression that Famco was substantially owned by FYH, a company in which Chew, Cheng and Ong all had an interest. This was why they had accepted Feng Yuan's shares as additional collateral for the October transaction. They had not agreed that the directors' personal guarantees would be temporary pending the furnishing of an SPP guarantee. It should be noted here that a company search on Famco carried out between June and December 1983 would not have disclosed the interest that SPPL had in Famco at that time through Sejati which was supposed to own all the shares of Famco. In fact Sejati's name did not appear in the records of the Registry of Companies as a shareholder in Famco, let alone its sole shareholder, until April 1984.

20 Sometime in August 1984, Chew called Sim and informed him that Famco had been structured as a subsidiary of Sejati which was in turn majority owned by SPPL's wholly owned Malaysian subsidiary company, SPP (M) Sdn Bhd ('SPPM'). He asked for the deposit of shares which had collateralized the October transaction to be released on the basis that it would be replaced by a corporate guarantee given by SPPL. On the same day, a letter to this effect under the letterhead of FYH was sent by Chew to the plaintiffs. On 1 September 1984, SPPL executed a guarantee in favour of the plaintiffs guaranteeing all amounts owing to the plaintiffs under the October transaction. This guarantee was executed under the common seal of SPPL and Chew and the company secretary attested the affixing of the common seal. The guarantee recited, inter alia, that it was given in consideration of the plaintiffs releasing the deposit of shares agreement. The shares which had previously been charged to the plaintiffs by

FYH were released to FYH. SPPL did not execute any guarantee in respect of the other two hire-purchase transactions.

21 From November 1984, Famco failed to pay the hire-purchase instalments accruing due to the plaintiffs under the three hire-purchase agreements. In further breach of the agreements, Famco allowed the machinery to be seized under a writ of seizure and sale in Johore on or about 12 August 1985. The plaintiffs thereupon became entitled to, and did, terminate the hiring of the machinery under the agreements. The machines were repossessed and sold by the plaintiffs but a loss was incurred in respect of each transaction.

22 The evidence for the second and third defendants

23 Cheng gave evidence first. He stated that he had joined SPPL in mid-1976 and remained there until November 1984 when he resigned. During 1983, he was group general manager and a director of SPPL and most of its subsidiaries.

24 In 1982 the SPPL group decided to expand into the timber business. Consequently, in December 1982, SPPM acquired 45% of the shares in Chan Wah Lee, which carried on the plywood business. This company's name was subsequently changed to Sejati Plywood Sdn Bhd. Sejati was a company which peeled logs and sold green veneer to independent operators and its sales in Singapore were handled through Famco. At that time, Famco and Sejati were independent of each other although they did have some common shareholders. In late March 1983, SPPL came up with the idea of acquiring Famco through Sejati. In April 1983, according to Cheng, all the shareholders in Famco who were shareholders in Sejati sold their Famco shares to Sejati. As Sejati had no money, they were not paid but the books of Sejati reflected its indebtedness to

them. The remaining unconnected shareholders also sold all their shares to Sejati and were paid cash with money borrowed from FYH. This was in late April 1983. At about that time, Cheng was appointed a director of Famco at the instance of SPPL. Cheng perceived his task in Famco as being to safeguard the interests of SPPL therein.

25 Cheng was aware of the three hire-purchase transactions between the plaintiffs and Famco. He knew also that all the machinery being purchased were to be used by Sejati in Johore and that although ostensibly it was Famco that was being financed, Famco was in fact a vehicle for cheaper finance of Sejati's operations. He admitted signing all three guarantees and that he understood the nature and effect of the documents which he signed. He stated that he did not have any direct dealings with the plaintiffs as all negotiations with them were handled by Chew. He testified that prior to the first transaction in June 1983, he had understood from Chew that the guarantee he was signing was supposed to be interim and a comfort only and that it would be replaced by a corporate guarantee from SPPL at a later stage. Chew told Cheng that this was Chew's understanding with Sim since he had dealt with the latter for a long time.

26 Cheng was disturbed about having to give personal guarantees for the operations of Famco as he was only a salaried employee and had no shareholding in either Famco, Sejati or SPPL. He therefore discussed the matter of signing guarantees with Ong in the latter's capacity as the managing director of SPPL. Ong assured Cheng that he should not worry as the company (meaning SPPL) should indemnify him if anything happened as he was a representative of SPPL. Cheng then signed the guarantees as he thought that, as a director of the company, it was part of his duty to do so since, if he did not, Famco would not have funds to run and would come to a standstill. This explanation was somewhat specious as Chew knew that Famco had no need of the machines

being only a commission agent and that it was actually Sejati which required the financing. Later under cross-examination, he admitted that once SPPL became involved in the timber business, his actions were effected for the benefit of SPPL and to achieve SPPL's intent that its timber business would consist of, as an integrated unit, Sejati, Famco and another company, Kwong Hock Leong Sawmill Sdn Bhd ('Kwong Sawmill').

27 As regards the October transaction in particular, Cheng's testimony was that on the recommendation of Kee, Sejati wanted to acquire the complete line of plywood-making equipment available from Johore Plywood. When the decision to buy the machines through Famco was made, Chew contacted the plaintiffs to see if they were interested in financing it. Subsequently, a meeting was held involving Chew, Cheng, Yap, Kee and a representative from the plaintiffs so that Kee could explain the transaction. Kee told them that the vendor was selling the line for MR680,000. However, the purchaser would incur costs of approximately another MR100,000 to MR120,000 to dismantle the machine line, clean and reinstall it at the purchaser's site. By then Sejati had acquired 68% of Kwong Sawmill which had a ten acre site in Johore and the idea was to centralize the sawmilling and plywood manufacturing in one location. The equipment would be installed in Kwong Sawmill's site. The plaintiffs agreed to finance up to S\$700,000 (equivalent to MR770,000) to cover both the purchase price and the associated costs of moving the equipment and reinstalling it. When pressed under cross-examination as to who the plaintiffs' representatives were who attended that briefing, Cheng could not recall.

28 Under cross-examination, Cheng testified that he recalled signing the guarantee for the June transaction. This was a guarantee which formed part and parcel of the June hire-purchase agreement. He said that the document was brought to him by Chew and that it had no attachments. He could not remember

whether he had signed the guarantee before or after Chew had executed the hire-purchase agreement but he understood what he was signing. He did not recall signing the document in front of Ms Tan. Again with regard to the guarantee for the October transaction, Cheng asserted that when he signed it the document had no attachments. He confirmed in relation to all three guarantees, however, that he had understood what he had signed and that, unless there were irregularities in the documents, neither he nor Chew could prevent the plaintiffs from asking them to make payment under the guarantees.

29 He further admitted that when, in each of the defences filed to this action, he had asserted that he was assured that `the guarantee was only an interim and temporary measure until such time when SPP Ltd will furnish a corporate guarantee` the assurance that he had referred to was that given to him by Chew.

30 Cheng stated that he was not aware until after he had resigned as a director from SPPL in November 1984 that only one corporate guarantee had been given by SPPL. Chew had explained to him that that single corporate guarantee was supposed to cover all three personal guarantees as the amount of the corporate guarantee was sufficient to do this. Under cross-examination he explained that he had not asked for a release of his personal guarantee in September 1984 when the corporate guarantee was issued as he had been very busy at that time. Later, towards 5 or 6 September 1984, he had been on leave for three weeks and when he got back `the whole thing blew up in SPPL`. By this he meant that the majority shareholder in SPPL, Tuan Sing Holdings Ltd (`Tuan Sing`) had had disputes with Ong and his supporters as a result of which all of them had to leave SPPL.

31 Chew testified that he first became a director of SPPL when he sold Orchid Tissue Paper Co, a company which he had founded, to SPPL. Thereafter he was appointed a director of various subsidiaries or associated companies of SPPL. In each case, his appointment was initiated by Ong. Chew himself did not own any shares in any of these companies either directly or indirectly and his function as director was to represent the interests of SPPL.

32 Chew confirmed in evidence that he had signed each of the hire-purchase agreements on behalf of Famco; he had also signed the delivery receipts for the various equipment and the three guarantees sued on.

33 Chew recalled that in the first half of 1983, Famco was interested in refinancing a set of machinery at Sejati's factory. He contacted Sim at the plaintiffs' office and told him that they needed working capital for Sejati to operate. He asked Sim to meet with him to discuss the proposed transaction. At the meeting which ensued Chew averred that he explained to Sim that SPPL was expanding into the timber business. He did not tell Sim that Feng Yuan was a shareholder in Famco. Sim then indicated that to support the transaction he needed personal guarantees of the directors and Chew said that as he had no equity interest in Famco, he could not issue a personal guarantee. Then, to quote Chew:

There was some horse trading. I told him that the parent company should give him the corporate guarantee to substitute the personal guarantees. I told him that the personal guarantees were temporary guarantees and comfort till the corporate guarantee was in place. Mr Sim was agreeable.

34 Thereafter Chew spoke to Ong and Cheng about the issuance of the personal guarantee. Ong told him to go ahead and sign it on the basis that it would be replaced by a corporate guarantee once Famco was a subsidiary of SPPL. Chew asserted that when he in fact signed the guarantee it was not in the

form in which it was presented in court in that the document he signed was not witnessed by anyone. The documents were presented blank with crosses indicating the places where the guarantors and witnesses were to sign.

35 Chew`s attention was drawn to the discrepancy arising from his evidence that he had negotiated the June transaction with Sim and the averment in his defence that, apart from knowledge of some negotiations between Famco and SPPL, he knew nothing about the June hire-purchase agreement. Chew explained that this claim in the defence had been made on the basis that the guarantee he signed and the guarantee used as the basis of the action were not the same as the witnesses` signatures were not present when he executed the document. Chew then testified that he had also negotiated the October hire-purchase transaction with Sim. These negotiations took a little longer than usual as Famco wanted financing not only of the purchase price but also the cost of stripping and overhauling the machines and reassembling them in Sejati`s office. He stated that there was a meeting at Cheng`s office at which Kee, Yap and himself were present and had talked to Ms Tan of the plaintiffs on the costs of all this work. In the end the plaintiffs agreed to a total package for the machines and the necessary work. As the financing was substantial Sim, on behalf of the plaintiffs, wanted personal guarantees and also insisted that the corporate guarantee of SPPL should follow. As this guarantee would take a little while to come, Sim wanted, in the meantime, a charge on the shares pledged by Feng Yuan in December 1982. Cheng told Sim that the shares rightfully belonged to Ong and the latter`s permission would have to be sought. Sim assured Cheng that the personal guarantees were temporary and would be released upon the issue of the corporate guarantee. Ong agreed to the pledge of shares.

36 Chew explained that in his defence in respect of this transaction he had denied knowledge of the hire-purchase agreement because he felt that the hire-purchase agreement when he signed it was not witnessed in the manner of the document produced in court.

37 In relation to the December transaction, Chew confirmed that he had negotiated it with Sim and that it had been agreed that apart from the security of the machines, the plaintiffs would be given the directors' guarantees to be replaced by the corporate guarantee. Chew explained that the allegation in his defence that he had no knowledge of the hire-purchase transaction was because although he had agreed with Sim that all directors would sign as personal guarantors, the guarantee actually relied on by the plaintiffs only had the two nominee directors of SPPL as guarantors. He confirmed, however, that he had signed the document.

38 Chew's rationale for giving the three guarantees to support facilities to a company in which he had no equity interest was that if he had not done so the loans would not have materialized and the company could not have functioned. He said, 'We needed the funds.' In this context, 'we' probably referred to the SPPL group rather than to Famco itself. He too was fully cognizant of the fact that Famco was only being used as a vehicle for Sejati's needs.

39 In August 1984, there were problems between Ong and the majority shareholder of SPPL, Tuan Sing, and Ong wanted to dispose of his shares in Tuan Sing. These were the shares pledged to the plaintiffs and Ong wanted them back urgently. Chew therefore wrote to the plaintiffs on 13 August 1984 (exh PC1) to ask for the deposit of share agreement to be released and replaced by the corporate guarantee of SPPL. He explained that his letter did not contain any reference to the release of the personal guarantees as the letter was written by

him on FYH's letterhead as a director of FYH. If he had mentioned the personal guarantees it would have confused the issue. By an oversight, due to the continuing board struggles between the shareholders in SPPL, he omitted to subsequently ask separately for the release of his personal guarantee.

40 Evidence for Chew and Cheng was also given by Kee and Ong. The substance of Kee's testimony was to confirm that he had given a briefing on the price of the machinery purchased from Johore Plywood and the associated costs of removal, overhaul and reinstallation. He testified that a female Chinese representative of the plaintiffs had been present at this meeting. He was, however, unable to identify her.

41 Ong testified that he was aware of the negotiations for the three transactions as Chew briefed him on them. He himself did not come into direct contact with the plaintiffs. The arrangement that personal guarantees were to be given in each case and were to be released subsequently upon the furnishing of a corporate guarantee was made between Chew and Sim and notified to him by Chew. That arrangement was acceptable to him. He was prepared to procure SPPL's guarantee as soon as Famco became the subsidiary of SPPL. Until then SPPL would not be able to grant such a guarantee. In the meantime, he was prepared to give his personal guarantee and also reassured Chew and Cheng that it was in order for them to issue personal guarantees as well.

42 Ong was also willing to pledge his shares to support the October transaction. In August 1984 when the internal difficulties in SPPL arose, he wanted to dispose of his Tuan Sing shares and therefore asked the plaintiffs to release them. In order to do this, the corporate guarantee had to be issued. Ong's testimony was, however, that the corporate guarantee was not issued only for

the purpose of procuring the return of his shares but also pursuant to the earlier arrangement between Chew and Sim.

43 Evidence for SPPL

44 SPPL had only one witness, Low Siew Joon (`Low`), a former director of the company. His testimony related mainly to SPPL`s defence to the third party claim. In this section, I shall refer only to that part of his evidence that was relevant to the main action.

45 Low testified that he became a non-executive director of SPPL sometime in 1984 at the instance of Tuan Sing. As he had not been on the board in 1983, he was not informed of the execution of the hire-purchase agreements at the time they were signed. He became aware of the transactions later from the executive directors of SPPL. He confirmed that he was present at a board meeting of SPPL held on 10 September 1984. Referring to the minutes of that meeting

46 (exh 2DB129) he confirmed that the corporate guarantee which SPPL had given to the plaintiffs was tabled at the meeting. He agreed that he must have received the copy of the memorandum 7DB123 and that the reason given in that document for the issue of the corporate guarantee was as substitution for the shares deposited by FYH. He also confirmed that the entire board of SPPL did not object to the giving of the corporate guarantee on that basis.

47 My findings vis-a-vis the second and third defendants

48 The defence of Chew and Cheng revolves around the purported agreement between Chew and Sim that the personal guarantees were to be

temporary and interim and would be replaced by SPPL's corporate guarantee. This defence is not, in fact, much of a defence to the claims in Suit Nos 6569 and 6659 of 1985 since in neither of those cases was a corporate guarantee ever issued by SPPL. SPPL's guarantee of 3 September 1984 was restricted to the October transaction and affords a defence only to the action in Suit No 6568 of 1985. As the evidence of Chew and Sim is diametrically opposed on this point, I have now to decide which version is the correct one.

49 I find that there was no agreement between the plaintiffs and the second and third defendants that the personal guarantees furnished by the directors of Famco would, in any of the transactions, be interim, temporary and of comfort only until the issue of SPPL's corporate guarantee. I find that the sole occasion on which a corporate guarantee from SPPL was offered to the plaintiffs was in August 1984 and that offer was made in relation to the October transaction only and for the specific purpose of procuring the release of the shares which FYH had charged to the plaintiffs. It was not intended that the corporate guarantee would replace the personal guarantees of the directors.

50 The above findings are based on my assessment of the evidence as a whole and also of the credibility of Chew as opposed to that of Sim and Ms Tan. Having seen all three parties in the witness box, I have no hesitation in accepting as correct the evidence given by Sim and Ms Tan on any point where that evidence conflicts with the evidence of Chew.

51 Various aspects of Chew's evidence were unsatisfactory. He came across as a person who was willing to say or write anything that he thought would help him achieve his object at any particular time. Whether it was true was irrelevant. Set out below are some of the reasons why I am unable to accept him as a witness of truth.

(1) In his defence to the suit for the October transaction, Chew stated that the management of Famco was the sole responsibility of Yap and Kee, that they were the persons who negotiated the finance with the plaintiffs and that he only `had knowledge` of such negotiations. These allegations were completely contradicted by his evidence which showed that at all times he was the person in charge of the financing and had full control and full knowledge of all negotiations with the plaintiffs. Further the hire-purchase transactions had nothing whatsoever to do with the management of Famco as such since the machines were not for its use.

(2) In his defences to the other two suits, he again asserted that he only had `some knowledge` of the negotiations and denied knowledge of the hire-purchase agreements. Once again, his testimony contradicted this. His explanation that he denied knowledge of the agreements because the guarantees he signed were not witnessed unlike the guarantees relied on was feeble in the extreme. Further under cross-examination he was forced to concede, contrary to earlier assertions, that at the time he signed them the documents were complete with all attachments thereto.

(3) In each of his defences, Chew averred that he had been told by a representative of the plaintiffs that his guarantee was interim and temporary until such time when SPPL would furnish its guarantee and had also been assured by the plaintiffs that such guarantee would be furnished by SPPL within the next few days. None of these averments was backed up by the evidence. In fact Chew himself testified that it was he who had offered the plaintiffs a corporate guarantee from SPPL rather than them assuring him that such a guarantee would be forthcoming. Under cross-examination he stated that he had agreed with Sim in each case that the corporate guarantee would be forthcoming within the next few days. This contradicted the allegation in the defence. Further, it is impossible for me to accept that Chew could have actually given such an assurance. He was fully aware, as he himself testified, that Ong was the person in SPPL who could procure the issue of the corporate guarantee and that he could not do it himself as he had no access to other board members. He knew that Ong was careful to ensure that SPPL did not issue guarantees for another party's obligations until that party was a subsidiary of SPPL. There was no question in June 1983 that the corporate guarantee could be forthcoming `within the next few days` as the takeover of Sejati was far from complete. Neither could such a promise be made in October 1983 as Sejati's position was still

not certain. Even in December 1983 the exact date of the completion of the takeover was not known.

(4) When Chew signed the hire-purchase documents in respect of the October transaction, he also signed a delivery receipt acknowledging receipt of the machines which were being sold by Johore Plywood in good order. When he did this he was fully aware that neither Famco nor Sejati had actually received the machines; that they were still in Johore Plywood's possession and that it would take months rather than days to dismantle them and reinstall them in the premises of Kwong Sawmill (this process was not in fact completed till February or March 1984). He was, however, anxious to procure payment to Johore Plywood by the plaintiffs and thus went ahead to acknowledge, on Famco's behalf, receipt of the machines despite the patent untruth of this statement.

(5) Under cross-examination, Chew at first stated that he had informed the plaintiffs that the shares which FYH had pledged to them in fact belonged to Ong. This was shown to be a lie by the exh PC85 which was a letter dated 24 December 1982 written to the plaintiffs on the letterhead of FYH and signed by Chew. In this letter, Chew confirmed that the shares which had been pledged to the plaintiffs were beneficially owned by FYH itself. Chew tried to explain this away by saying that Ong had loaned the shares to FYH so that that company could get a credit line from the plaintiffs. Whilst that might have been the position, Chew was fully aware, in my view, that shares on loan to FYH could not be 'beneficially owned by' FYH. But if he had not given such an affirmation the plaintiffs would not have accepted a memorandum of deposit signed by FYH. Therefore he knowingly deceived them into believing that the shares belonged beneficially to FYH.

(6) In his examination-in-chief, Chew stated that he had told Sim in respect of the June transaction that working capital was needed for Sejati to operate. Under cross-examination he admitted that he knew the machines were being purchased from Chan Wah Lee and that he did not notify the plaintiffs that Chan Wah Lee and Sejati were one and the same company. He agreed with counsel's suggestion that the plaintiffs had no reason to believe that Chan Wah Lee, the vendor, was actually Sejati, the user of the equipment. Here again he was willing to deceive the plaintiffs to prevent any awkward questions arising.

(7) In a memorandum (exh 7DB123 and 124) dated 5 September 1984 which Chew sent to the other directors of SPPL as an explanation for an attached circular resolution approving the issue of the corporate guarantee in favour of the plaintiffs which he wanted them to sign, Chew gave the following reason for the necessity of issuing the corporate guarantee:

The loan was given on condition that Famco's directors were to give their personal guarantees and the Tuan Sing shares belonging to Feng Yuan Holding Pte Ltd were to be used as collaterals (sic). We now realize that this is in contravention of the Company's Acts [sic] and would need to resolve to substitute this collateral with a SPP corporate guarantee.

In evidence, he stated that the shares belonged to Ong and as Ong wanted them back he had to free the shares. His explanation for not telling the directors the actual reason for the issue of the corporate guarantee was 'in writing you use terms that are more appropriate'. When he was asked whether it was more appropriate to say that the company was in breach of the Companies Act (Cap 50), he replied 'till today, I'm not sure it was in contravention of the Companies Act'. He was also not sure why he had said this in the first place.

52 Other evidence in the case also casts doubts on Chew's testimony. The letter of 13 August 1984 from FYH to the plaintiffs (exh PC1) substantiates Sim's testimony that the first time the plaintiffs became aware of the relationship between Famco and SPPL was on that day itself. Its phraseology bears out the plaintiffs' contention that the corporate guarantee of SPPL was never made a condition of the three hire-purchase agreements. The letter did not refer at all to the personal guarantees. It mentioned only that the loan was secured by a deposit of shares agreement issued by Feng Yuan and goes on to say:

In place of the above collaterals (sic) [ie the charged shares] SPP Ltd could give you a corporate guarantee. The group has restructured Famco Pte Ltd as a fully owned subsidiary of Sejati Plywood Sdn Bhd which is a 51% owned subsidiary of SPP (M) Sdn Bhd which in turn is a fully owned subsidiary of SPP Ltd.

53 If in fact there had been an oral agreement that all personal guarantees were intended to be temporary and to be replaced by SPPL's corporate guarantee, Chew would also have asked for their release in this letter.

54 Further, the explanation by Chew and Cheng that by an oversight they did not press for the release of their personal guarantees at the time SPPL's

guarantee [was issued] is difficult to accept. Chew himself had attested the affixing of SPPL's corporate seal to its guarantee on 1 September 1984. At that time Ong was having great difficulties with the majority shareholder of SPPL (he had already stepped down as managing director of SPPL) and the events which were to lead to the forced resignation of Chew and Cheng from the boards of SPPL and its subsidiaries were well underway. It would have been important to them (to say the least) to have their personal guarantees replaced by SPPL's corporate guarantee if that had in truth been the intention and agreement with the plaintiffs from the outset. Both Chew and Cheng testified that they were men earning salaries which could not compare with the large amounts for which they had rendered themselves liable under the guarantees and that because of this they were extremely reluctant to issue personal guarantees in respect of a company in which they had no equity interest. Men in that position would have ensured that their personal guarantees were released once SPPL's corporate guarantee had been furnished. They would have bombarded the plaintiffs with letters insisting on a release and discharge. The fact that they did not and were able to put these concerns out of their mind `due to an oversight` goes a long way to support the plaintiffs' contention that no such arrangement existed.

55 Even after the plaintiffs made demands on their guarantees in early 1985, Chew and Cheng did not protest in writing that their liability had been discharged by the issue of the corporate guarantee. Chew, it is true, did pay a visit to the plaintiffs' general manager, one Mr Lim, but the actual purpose of that visit from Chew's own testimony appears to me to have been more in the nature of an appeal and fact finding mission than a robust denial of liability. He asked Mr Lim whether there was any way of making SPPL pay the instalments due under the hire-purchase agreements and whether SPPL had furnished its corporate guarantee. On his own account he did not at that meeting tell Mr Lim

that he was not liable as the arrangement had been that his personal guarantee would be released when SPPL's guarantee was issued. This omission on Chew's part is highly significant. Having the opportunity to repudiate liability on the ground later stated in his defence, he completely failed to do so.

56 Whilst there might well have been an agreement between Ong, Chew and Cheng that at such time as Famco became a subsidiary of SPPL, SPPL would issue a corporate guarantee in favour of the plaintiffs to procure the release of the personal guarantees, I do not believe that this was ever more than a personal internal arrangement. The plaintiffs were not party to it and cannot be bound by it.

57 SPPL's position

58 SPPL submitted at the end of the trial that it could not be held liable in respect of its guarantee of 1 September 1984 supporting the October transaction on the following grounds:

- (1) the plaintiffs had not established that there was a valid guarantee in that there was no consideration for its issue;
- (2) that there were other factors which rendered the guarantee unenforceable;
- (3) that in any event the plaintiffs would not be entitled to claim post-judgment interest at the rate of 16%.

59 It would be noted that their submissions departed considerably from their pleaded defence which relied on misrepresentation. Probably SPPL had realized in the course of the evidence that their original line of defence was no longer tenable as it was clear that at least three of SPPL's directors had at all times been fully aware of all events surrounding the transactions in question and also there was no evidence at all that the plaintiffs had in any way joined forces

with these directors to misrepresent or conceal facts from the rest of the SPPL board.

60 In support of their first ground, SPPL pointed to the guarantee itself (exh PB44). In its recital the consideration for the guarantee is stated as being (a) that the plaintiffs had entered into the October hire-purchase agreement with Famco at SPPL's request and (b) the plaintiffs had agreed at SPPL's request to release the security comprised in the deposit of shares agreement. SPPL contended in regard to (a) that the consideration was past at the time the guarantee was executed. With regard to (b) they submitted that the plaintiffs had not adduced any evidence that showed that at the time the guarantee was entered into the plaintiffs had in fact agreed to the release of the shares. They also said that satisfaction of both (a) and (b) were conditions precedent to the validity of the guarantee.

61 In reply to the foregoing, the plaintiffs first pointed out that the issue of consideration had not been pleaded in the defence of SPPL. Further, the recital to the guarantee explicitly set forth the actual consideration for the guarantee, ie the release of the shares charged to the plaintiffs. They said it is plain from the evidence that this consideration was valid and that the plaintiffs did, in fact, after the execution of the guarantee, release the shares to FYH. Secondly, the guarantee was executed under seal and therefore it derived its validity from its form alone and would have been valid even if there had been no consideration. The plaintiffs also referred to the various documents in evidence in the case which showed that the board of SPPL were at all times fully aware of the issue of the guarantee.

62 I accept the plaintiffs' submissions. The contention that there were conditions precedent to be satisfied is a non-starter. A recital in a guarantee is

meant to indicate the circumstances in which it is given and the transaction it is to support. Conditions precedent to liability do not appear in a recital. If they are present at all they are either in the body of the document itself or in a totally separate agreement.

63 In respect of the second ground, SPPL sought to rely on the fact that whilst the plaintiffs disbursed MR770,000 for the machines, the evidence of Cheng and Kee showed that only MR680,000 was paid to Johore Plywood for the machinery, the balance of MR90,000 being used for dismantling and other costs. SPPL submitted that this resulted in a contravention of s 23 of the Finance Companies Act (Cap 108) (‘the Act’) which prohibits a finance company from granting unsecured advances or loans or credit facilities in excess of \$5,000. The difference of MR90,000 was unsecured as it had nothing to do with the price of the machinery. They further submitted that the plaintiffs had failed to prove the valuation report by Ernest Cheong & Zaki Sdn Bhd (exhs PB24 to 43) and as this was not done the market value of the machinery had not been proven. The effect of the foregoing was that the guarantee was tainted with illegality and could not be enforced.

64 The plaintiffs in reply submitted that the above arguments were inadmissible as they had not been pleaded in SPPL’s defence. This is a valid point -allegations of illegality are serious and cannot be raised unless they have been specifically pleaded.

65 Quite apart from the pleading point which is sufficient in itself to dispose of this ground, I am satisfied on a review of the evidence that the plaintiffs were not aware of the back room transactions between Famco and Johore Plywood. Although Kee and Chew testified that a representative of the plaintiffs had been present at Kee’s briefing on the costs relating to the acquisition of the

machinery, this fact was never put to the plaintiffs' witnesses by the defence counsel. Kee was unable to identify the representative and, as I have already said, I find Chew to be an unreliable witness. Accordingly, the uncontroverted evidence is that as far the plaintiffs were concerned, they had purchased the machinery from Johore Plywood for MR770,000 as per the vendors' invoice dated 20 October 1983

66 (exh PC1A) and had paid such price by cashier's order for that sum, which cashier's order was handed over to the vendors by Kee.

67 The submission of SPPL that the plaintiffs had contravened s 23 of the Act because MR90,000 was unsecured as it paid for the dismantling and other costs is untenable because the valuation report by Ernest Cheong & Zaki dated 1 October 1983 (exh PB25) (which was not rebutted by any evidence adduced by SPPL) showed the fair market value of the machinery to be MR978,650. This was a valuation report commissioned by Famco and submitted by them to the plaintiffs in support of their application for financing. The plaintiffs relied, as they were entitled to, on the report when they granted their financing. The plaintiffs were under no obligation then or at the time of the trial to prove the contents of the report to be true. Finally, the transaction which the plaintiffs entered into was a hire-purchase transaction which meant that they purchased the machines and hired them to Famco. No advances loans or credit facilities were granted to Famco and thus s 23 of the Act is irrelevant.

68 The final argument on behalf of SPPL was that the plaintiffs were only entitled to claim contractual interest of 16% before judgment. They argued that once judgment had been obtained, the claim for interest would merge with the judgment. The plaintiffs' answer was that this rule did not apply as there was an independent covenant in the hire-purchase agreement which allowed the

contractual rate of interest to continue post judgment: see **Wardley Ltd v Tengku Aishah & Ors** [1991] 3 MLJ 370 and **Wardley Ltd v Tunku Adnan & Anor** [1991] 3 MLJ 366. The relevant clause here is cl 17 of the hire-purchase agreement. This clause provides that the hirer shall pay interest on overdue amounts at the overdue instalment rate (ie 16%) `from the due date until payment is made`. I agree with the plaintiffs. This clause is clear: interest at 16%pa would continue to run from the time it fell due until payment is actually made whether such payment is before or after judgment is obtained. Accordingly SPPL fails on this ground as well.

69 **Conclusion on main action**

70 In the result there will be judgment for the plaintiffs against the second and third defendants in all three actions for the following amounts claimed and costs:

(i) in Suit No 6568 of 1985, \$567,760.62

(ii) in Suit No 6569 of 1985, \$21,046.77

(iii) in Suit No 6659 of 1985, \$46,608.14

71 There will also be judgment for the plaintiffs against the seventh defendants in Suit No 6568 of 1985 for the amount of \$567,760.62 and costs. In respect of Suit No 6568 of 1985, interest at 16%pa on \$532,934.61 (as claimed in the statement of claim) is awarded from 27 June 1986 till payment. Interest on the amounts adjudged in Suit No 6569 of 1985 and Suit No 6659 of 1985 is awarded from 27 June 1986 and 26 February 1986 respectively at 16%pa up to date of payment.

72 **The third party claims**

73 The factual background

74 As I have found that Chew and Cheng (whom I shall hereafter collectively call 'the claimants') are liable to the plaintiffs in respect of the guarantees furnished by them in support of the June and December transactions, I have now to consider their claim to be indemnified by SPPL against these liabilities.

75 The claimants rely on the evidence which was given by Ong and themselves in relation to the operations of SPPL at the material time and their own functions as directors of SPPL and Famco. On these aspects, the testimony of the three witnesses was consistent and was also consistent with documents produced in evidence. Whilst I did not believe Chew's account of his agreement with the plaintiffs, I accept his explanation of the internal workings of the SPPL group and the circumstances in which he decided to furnish his personal guarantee since it was corroborated by other evidence.

76 Until August 1984, Ong was the moving spirit of SPPL. In effect, although there was a board of some seven members, Ong ran SPPL and its group. The group was managed in a relatively informal way. It had a three-tier structure: first, the day-to-day managers, then the executive members of the board (among whom were the claimants) each of whom were responsible for various companies in the group and finally the top tier comprising Ong and the non-executive directors. Ong functioned as a liaison between the executive and non-executive directors.

77 Ong, Chew and Cheng all worked in the same building, SPPL Building in Alexandra Road. They met frequently and discussed issues affecting the companies which they ran. It was rare for formal board meetings to be held until

the latter part of 1984. Instead, decisions were taken at the informal discussions. The claimants reported to Ong and would take instructions directly from him. Where the input or consent of non-executive board members was required, they left it to Ong to liaise with these persons, the most important of whom was TK Lim who was, in effect, through Tuan Sing, the majority shareholder of SPPL.

78 In 1982/1983, SPPL was an investment-holding company listed on the Stock Exchange of Singapore. It had associate and subsidiary companies both in Singapore and Malaysia. Ong was a director of many of these companies as were Chew and Cheng. Ong had appointed them to the boards of these companies to oversee their running and to represent SPPL's interests in such companies. It was Ong's principle that none of his directors should own shares in any of SPPL's subsidiaries.

79 In late 1982 SPPL decided to expand into the timber business. This led to its acquisition in December 1982 of a 45% interest in Sejati and to Sejati's takeover of Famco in about June 1983. Both the claimants joined Famco's board at the request of SPPL. Thereafter Famco was utilized as a convenient borrowing entity for Sejati's purposes since it allowed Sejati access to cheaper funds in the Singapore market. Each of the three transactions which Famco concluded with the plaintiffs was in respect of equipment which was either already being used by Sejati or which Sejati wanted in order to expand its business. Famco had no use for any of this equipment. The three transactions would have benefited Sejati and thus its shareholders, but not its subsidiary, Famco.

80 It was apparent from the evidence that the claimants were the directors in SPPL who were responsible for overseeing Sejati and Famco within SPPL's corporate organization. One example of this was a letter (exh 2DB141) dated

29 October 1984 in which SPPL referred to Chew and Cheng as `the company`s representatives on the Sejati group of companies`.

81 It was also clear that neither Chew nor Cheng had at any time any personal interest in the shares of Famco whatever impression Chew may have given to the plaintiffs to the contrary. Though the acquisition of Famco`s shares by Sejati did involve some financing by Feng Yuan and some confusing book entries, I find that Feng Yuan was not at any time a shareholder in Famco. From about June 1983, Famco was wholly owned by Sejati. It should be noted here that SPPL itself did not produce any evidence which would contradict the testimony of Chew, Ong and Cheng on this point.

82 When Chew was informed by the plaintiffs that they required personal guarantees from Famco`s directors in respect of the June transaction, both he and Cheng discussed the matter with Ong. Ong assured both men that it would be in order for them to sign the guarantees as they would be signing as agents of SPPL since they were wage earners and did not have shares in Famco. He also indicated that he was prepared to give a corporate guarantee from SPPL to replace the personal guarantees once Famco became a subsidiary of SPPL (this happened only in early 1984). The same assurances were given to the claimants in relation to the October transaction. By this time, Ong himself was a director of Famco and he also signed a personal guarantee. As regards the December transaction, Ong once again urged the two claimants to give the personal guarantees requested by the plaintiffs. In this case, as the amount involved was relatively small, he even told Cheng that if anything happened, he would pay it out of his own pocket. In all cases, Ong assured Cheng that SPPL would indemnify him if anything should happen. Ong also testified that he had discussed the giving of the personal guarantees by the claimants with the non-executive board members. No evidence was adduced by SPPL to contradict this.

83 SPPL's sole witness, Low, was unable to testify as to the circumstances under which the claimants had issued their personal guarantees for Famco's indebtedness. His testimony was limited to indicating that if the corporate guarantee issued in September 1984 had been intended to replace the personal guarantees, it would have stated so specifically as had other resolutions passed by SPPL for such a purpose. He also gave evidence that the practice of SPPL before he became a director was to expressly indemnify, by way of a resolution, any director who had been required by SPPL to give a personal guarantee. The implication was that if no such resolution had been passed, the giving of a guarantee by a director would not have been required by SPPL.

84 One further significant fact in this context is that whilst Chew and Cheng were directors of both Famco and SPPL, Famco met all its obligations under the three hire-purchase agreements. It only defaulted once the claimants were ousted. The clear inference to be drawn from this fact and such documents as were laid before the court is that in November 1984 the parties controlling SPPL (a new management team appointed at the instance of TK Lim) reassessed the value of its investment in the Sejati group and decided not to bear any further obligations of that group. Hence the default and hence Chew and Cheng were cast adrift.

85 **Basis of indemnity claim**

86 On the basis of the foregoing factual matrix, it was submitted on behalf of the claimants that:

- (1) they were nominees of SPPL on Famco's board;

(2) a nominee director is an agent of the shareholder who appoints him as well as being a fiduciary of the company to whose board such shareholder has appointed him;

(3) an agent who incurs personal liability in the discharge of the responsibilities entrusted to him by his principal is entitled, as a matter of law, to be indemnified by the principal against those liabilities;

(4) in the instant case, the claimants were expressly authorized by Ong, the chief executive officer of SPPL, to undertake the liabilities in question. Ong as chief executive officer had actual authority to do this and SPPL is bound by his acts;

(5) further SPPL was aware through Ong and its board members that the claimants were undertaking personal liabilities in discharge of their responsibilities as SPPL's nominees on Famco's board. As SPPL did nothing to alert Chew and Cheng to the possibility that they were acting beyond the scope of their responsibilities as nominee directors, SPPL is bound by such actions and must indemnify the two men.

87 The above submissions were cogently and persuasively presented.

88 In reply, SPPL contended that even if the claimants were nominee directors of SPPL that does not ipso facto mean that they are entitled to an indemnity from SPPL. The claimants must establish that the furnishing of the personal guarantees was a liability incurred by them in the execution and discharge of their duties as directors of SPPL (and not of Famco) within the meaning of art 158 of SPPL's articles of association. Article 158 reads:

Subject to the provisions of the Act, every director ... shall be entitled to be indemnified by the company against all costs, charges, losses, expenses and liabilities incurred by him in the execution or discharge of his duties or in relation thereto.

89 This, it was submitted, they had not been able to do and they had not been able to cite any authorities which supported their proposition.

90 The 'nominee director' is a creature who is well known in board rooms around the world. He is a director who is appointed to the board of a company

by a shareholder or creditor of that company in order to represent the appointor and safeguard his interest. The position of a nominee director has attracted a great deal of academic and judicial attention. Unfortunately such attention has been mainly directed to the conflicts of interest which a nominee director may face by reason of his appointment. The question usually addressed is well summed up in the following passage from ***Fiduciary Obligations*** by PD Finn (at p 54):

It is the clear expectation of those who appoint a nominee director that he will act as their spokesman on the board and will look after their interests in the board's deliberations. However like any other director, the nominee must, in participating in the board's decisions, act honestly in what he believes the company's interests to be. At first sight, this expectation and this obligation would seem to conflict. The appointors of a nominee, be they trustees for debenture holders, trade creditors, employees or a class of shareholders, cannot obviously be equated with the company. But each can have a real interest in the continuing prosperity of the company. To what extent - if at all - can their interest be served without it being said that the nominee has acted so as to advantage them at the expense of the company?

91 The passage continues with an examination of the nature of the nominee director's fiduciary obligation to the company. No attention is paid to the issue of the responsibility, if any, which the appointor has to the nominee. It would be noted that in the passage quoted above, however, that the nominee is said to be a 'representative' of the appointor. This terminology appears frequently in the cases and academic discussion dealing with nominee directors and its consistent use is of assistance in considering the relationship between the appointor and his nominee.

92 The position taken by the claimants is that a nominee director is an agent of his appointor and therefore, under principles of agency law, he is entitled to be indemnified against all costs and expenses reasonably incurred in the

execution of the task with which he has been entrusted. This submission is fortified by the fundamental nature of agency where the agent is the representative of the principal and acts on his behalf. This is set out in art 1(1) of ***Bowstead on Agency*** (15th Ed) which reads:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf and the other of whom consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent.

93 The relationship of appointor and nominee director fits very well into the above formulation. The appointor is the principal who has requested and thereby consented to the nominee acting on his behalf, that is to say representing the principal, and the nominee by accepting the appointment has consented to be such representative. It is in fact because of the fiduciary relationship between the appointor and the nominee that the nominee then has a conflict when confronted with his separate fiduciary duty to the company itself.

94 It is clear law that, except in certain specific instances which are not applicable here, an agent has a right against his principal to be reimbursed all expenses and to be indemnified against all losses and liabilities incurred by him in the execution of his authority. This right of indemnity extends to personal liabilities incurred by the agent in the execution of his duties. The case of ***Perishables Transport Co Ltd v N Spyropoulos (London)*** [1964] 2 Lloyd's Rep 379 cited by the claimants, supports this proposition. In that case a freight forwarder incurred personal liability for freight charges in respect of the transhipment of a consignment of rose bushes for a client. The freight forwarder had received the client's approval to take delivery of the roses and to tranship the goods by air to Cyprus. The court held that the defendants were, or should be deemed to have been, aware that air agents incurred a personal liability for

freight when arranging air passage for a named principal and that, therefore, the defendants were liable for these charges. The following passage from the judgment of Lord Justice Simon indicates he found the case to be clear cut:

But the question at the moment is: are the plaintiffs, who paid out these freight charges on behalf of the defendants entitled to recovery of the money. I have no doubt at all that they are entitled to recover the money. They had the defendants' clear instructions by telephone to ship these roses out to the defendants' sister company in Cyprus; they had the defendants' clear approval for having taken delivery of the roses at London airport, and it is quite plain that they became liable to the plaintiffs for the costs and expenses the plaintiffs incurred in carrying out the defendants' instructions ... The plaintiffs have acted perfectly ordinarily and openly in the ordinary course of business; they have incurred these expenses on the defendants' instructions and on their behalf and the defendants must pay.

95 The claimants further contended that the same principle applies when the agent has not yet made a payment but is under an obligation (like a guarantee) as a result of his reasonable performance of the task given to him by the principal. They argued that the giving of a personal guarantee is a reasonable incident of being a director in a private company as directors of such companies are often called upon to guarantee the debts of their companies when finance is needed for the business. In the absence of such guarantees the companies will not get financing. In this particular case, it was a fact that without the personal guarantees of the directors, the plaintiffs would not have provided the hire-purchase facilities. The plaintiffs' witnesses themselves made it quite plain that it was their inveterate practice when extending facilities to a private limited company to require the directors of the company to guarantee the discharge of the company's obligations. Further, both claimants were convinced that if they had not been willing to give personal guarantees to the plaintiffs they would not have been able to secure the financing that Sejati required. At the time the transactions were effected, Famco was not in a position to offer a corporate guarantee from SPPL as it was not an SPPL subsidiary. As the transactions were

for the benefit of Sejati and its shareholders rather than for the direct benefit of Famco itself, in giving the guarantees to secure the facilities, Chew and Cheng were, in the ultimate result, furthering the interests of Sejati's ultimate shareholders.

96 This particular fact situation therefore adds weight to the claimants' submission that where a nominee director gives a personal guarantee of his company's liabilities he is not doing it for himself but is doing it for the company and therefore for the interest of the appointor. These guarantees were obligations that Chew and Cheng incurred because they were directors of Famco which was being used to obtain facilities for other companies in the SPPL group and not for any reason directly relating to Famco itself. Additionally the evidence was clear that in this particular case the giving of the personal guarantees was directly authorized by the appointor, SPPL, in the person of its managing director, Ong, who had himself notified the other members of the board of the granting of the personal guarantees. This evidence has not been controverted. Objections to the giving of such guarantees, if any, could well have been made known to the claimants after the June transaction. The fact that the matter was not raised at all leads me to believe that the other board members were content for the claimants to assume such liabilities.

97 On the evidence overall, I find that Ong had the actual authority to bind SPPL in this regard. He seems to have run SPPL very much as a one man show and, to the executive directors like the claimants, his word was the word of SPPL itself. As SPPL did not adduce any testimony to the contrary, it is not now in a position to contend that Ong's authority was more limited than the claimants understood and believed.

98 Hence we have the position that the claimants who at all times acted in what they sincerely believed to be the best interests of the SPPL group have incurred a liability for facilities extended to a company within the group for the benefit of the group and are now being told that what they did was not authorized and that they cannot be indemnified for the personal liability which they incurred. If Chew and Cheng had not been directors of SPPL, they would not have become directors of Famco and they would not have incurred the liability. It does not lie in the mouth of the entity which urged the claimants to assume this responsibility to say that it will not indemnify them against the consequences of their action. Quite apart from authority therefore, I am of the view that on the facts of this case the claim by Chew and Cheng to be indemnified by SPPL is a valid claim and should be allowed.

99 I should, however, at this juncture, consider an Australian case in which in a similar situation the director concerned was held to be not entitled to an indemnity from his company. In **State Bank of Victoria v Parry & Ors** [1990] 8 ACLC 766 the plaintiff bank had provided a loan facility to Kynes Pty Ltd. This company had at one stage been a subsidiary of Parry Corporation Ltd (‘PCL’) but was no longer a subsidiary when the guarantee was given. Parry was the chairman and chief executive of PCL and a director of Kynes. He guaranteed repayment of the Kynes’ loan. The guarantee was not requested by PCL or authorized by its board. The bank enforced the guarantee against Parry and Parry claimed to be entitled to an indemnity from PCL on the ground, inter alia, of:

(1) a right under an article of PCL’s articles of association which indemnified directors against costs properly incurred in the discharge of their duties;

(2) a common law right to an indemnity for a contract entered into for PCL's benefit.

100 First, the learned judge, Nicholson J, considered the claim for an indemnity under art 155 of PCL's articles of association. This is similar to art 158 of SPPL's articles of association. To paraphrase art 155, it provided that every director of PCL would be indemnified by PCL against all costs, losses and expenses which he might properly incur or become liable to pay by reason of any contract entered into by such officer as such officer or in any way in the discharge of his duties. In the learned judge's opinion when Parry signed the guarantee he did not do so as an officer of PCL or `in his discharge of duty as such`. For an act to be done as an act of duty, it was requisite that it be done as a consequence of obligation, moral or legal. In that case the evidence did not establish any such obligation upon Parry as a director of PCL to give the guarantee for the benefit of Kynes. The guarantee was not given at the request of PCL or any of its officers and was not authorized or ratified by the board of PCL. The learned judge held that when Parry executed the guarantee he did it on his own behalf and his duties never extended to require him to assume personal liability for the actual or perceived benefit of PCL. Accordingly, he could not claim under the indemnity article.

101 The claimants herein have not in their submissions sought to rely on art 158 of SPPL's articles of association although it forms an alternative basis for their claim as pleaded. In my judgment, the claimants could not sustain an argument that the liability incurred under their guarantees was incurred in `the execution or discharge of [their] duties or in relation thereto` within the meaning of this phrase in art 158. The duties referred to must be the claimants' duties as directors of SPPL. As Nicholson J pointed out, an act done pursuant to a duty is an act which the doer had a legal or moral obligation to perform. I know of no

legal or moral obligation on a director of a company to give a personal guarantee for the benefit of its associate company.

102 This, however, is not the end of the matter. In the **Parry** case,⁴ Parry went on to claim a common law indemnity but this claim was presented on the basis that the guarantee had been given for PCL's benefit. The learned judge had no hesitation in rejecting that assertion. PCL was not the party in relation to which a liability would be discharged as a consequence of Parry being compellable by law to meet the guarantee. It was the liability of Kynes which would be so discharged. As PCL did not have any liability, it did not benefit from the guarantee and so was not responsible for Parry's obligations thereunder. In this case too, SPPL had no liability for the June and December transactions. Accordingly the guarantees given by the claimants would not discharge any liability which SPPL would otherwise have had to meet. The difference between the Parry situation and the present situation is that in the former case, the judge clearly found that PCL had not requested Parry to incur the liability. Thus he had to approach the question of an indemnity on the restitutionary basis that such indemnity would be available if PCL had been conferred a benefit by the actions of Parry. Here the question of benefit is not vital as the evidence is clear that the claimants were urged by SPPL in the person of Ong to issue the guarantees so as to obtain facilities for an associate company (in fact a company which they were intending to make a subsidiary). Whilst in this circumstance it is my view that SPPL in fact derived some benefit from the issue of the guarantees though not such a direct benefit as the discharge of a liability, even if it had not, it would still be responsible to indemnify the claimants as they were agents who incurred liabilities at SPPL's request and because they held an office in which SPPL had placed them and had been asked by the plaintiffs to issue the guarantees by virtue of such office. The position

here is therefore entirely different from that which obtained in the **Parry** case⁴ and that decision does not conflict with the decision I have made as to the liability of SPPL to indemnify the claimants.

103 It would be recalled that the claimants contended that even if SPPL had not asked them to provide the guarantees, they would be entitled to the indemnity as agents since it could be foreseen that as directors of a private company they would have to incur personal liability as guarantors. I do not need to rule on that submission in view of the evidence here. Whilst the proposition advanced by the claimants is certainly arguable, it appears to me to go rather too far and to impose an onerous liability on an appointor who might not have even been aware that a personal guarantee had been furnished, let alone authorized its issue. Of course, if it could be established that giving a personal guarantee is a reasonable and foreseeable part of the responsibilities of being a director of a private limited company the situation would be different. Many company directors would, however, argue that that is not the case.

104 **Conclusion**

105 Accordingly the second and third defendants are entitled to judgment against the third party in Suit Nos 6659 of 1985 and 6569 of 1985. I will hear counsel on the form the order should take.

106 **Outcome:**

Judith Prakash JC

Michael Khoo with Josephine Low (Michael Khoo & BB Ong) for
the plaintiffs

Sim Yong Chan (MPD Nair & Co) for the second and third
defendants

Sng Kheng Huat (Low Yeap & Co) for the seventh defendant
