

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 310

Suit No 7079 of 1985

Between

Hong Leong Finance Limited

... Plaintiff

And

Tan Kia Poh
Tan Teow Kee
Tan Teow Siang
Tan Hng Yong
Soh Chye Hock

... Defendant

GROUNDS OF DECISION

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Hong Leong Finance Limited v Tan Kia Poh and Others

[1992] SGHC 310

Suit No 7079 of 1985
Goh Joon Seng J
10 December 1992

1 Judgment:

2 GROUNDS OF JUDGMENT

3 The plaintiffs' claim is for \$192,962.08 plus interest at 1/24% per day against the defendants as guarantors under a guarantee and indemnity dated 6 January 1982 ('the Guarantee'). By the Guarantee the defendants 'jointly and severally guarantee on demand by you the punctual payment by the Company of all sums due under the said Financing Agreement and the due performance of the Company's obligations thereunder and we further jointly and severally undertake to indemnify you against all losses, expenses (including legal costs on a full indemnity basis) charges and damages incurred or suffered by you in consequence of any failure by the Company to perform any of the Company's obligations under the said Financing Agreement'. The financing was on accounts receivable.

4 The Company was Futraco Pte Ltd ('Futraco'). Of the 400,000 issued shares of Futraco, the first defendant held 200,000; his son Tan Teow Siang, the third defendant, held 100,000 and the remaining 100,000 were held by the fifth

defendant. The second defendant, Tan Teow Kee, another son of the first defendant, was the managing director. The first and third defendants were also directors.

5 These proceedings were commenced on 20 July 1985.

6 On 10 January 1986 summary judgment for \$192,962.08 plus interest under Order 14 of the Rules of the Supreme Court was entered against the fourth defendant.

7 On 20 January 1986 summary judgment for a similar amount under Order 14 of the Rules of the Supreme Court was entered against the fifth defendant.

8 Receiving and Adjudication orders have been made against both the fourth and fifth defendants. Futraco has also been wound up.

9 The second defendant has not been served. Hence the proceedings continued against only the first and third defendants.

10 At the hearing, the first and third defendants ('both defendants') disputed the claim on both liability and quantum. By consent hearing proceeded only on the issue of liability leaving quantum to be disposed of at a later date. On liability it is not disputed by both defendants that they executed the Guarantee. But they deny liability on the following grounds: (1) that by a letter dated 28 December 1982 ('D-2') they gave notice to terminate their Guarantee to take effect six months from 22 December 1982;

11 (2) alternatively that there was an oral collateral agreement or warranty that the facilities to be given to Futraco should not exceed \$300,000. However

in March 1983 this amount was raised to \$350,000 without their consent. This constituted a substantial material variation which thereby discharged them from liability under the Guarantee; (3) in the further alternative, both defendants contended that the plaintiffs continued financing Futraco even after the plaintiffs knew that Futraco was selling goods on 'consignment basis' thereby breaching cl 4(m) of the Financing Agreement stipulating that the amount of receivables should at all time be at least 143% of the amount due to the plaintiffs from Futraco.

12 I now deal with the three grounds raised by the defence. On ground (1), it is the plaintiffs' case that they never received any notice from the first, second and third defendants terminating the Guarantee. According to both defendants, D-2, after being signed by the first, second and third defendants on 28 December 1982, was sent by ordinary post by the third

13 defendant to the plaintiffs. D-2 read: "Messrs Tan Kia Poh Tan Teow Kee Tan Teow Siang c/o 17-19 Jalan Kilang Barat Singapore 0315

14 28th December 1982

15 Hong Leong Finance Limited 16 Raffles Quay Hong Leong Bldg
Singapore 0106

16 Dear Sirs,

17 Re: FUTRACO PTE LTD

18 We are writing to inform you that we have resigned as director of the above company with effect from 22nd December 1982.

19 Please note that we have in principle agreed to guarantee the existing accounts receivables finance facilities for a duration of six months commencing from 22nd December 1982 until the outstanding amount are paid. After we will like to withdraw as guarantors for any credit facilities that you are granting to the company.

20 We thank you for your attention.

21 Yours faithfully,

22 Sgd: Tan Kia Poh Sgd: Tan Teow Kee Sgd: Tan Teow Siang

23 cc Soh Chye Hock Tan Hng Yong"

24 There was no acknowledgement from the plaintiffs of the receipt of D-2. Neither was there any confirmation from the plaintiffs that the first to the third defendants would be discharged from their liability under the Guarantee in accordance with D-2. Yet they took no steps to obtain such confirmation. They also took no steps to ensure that Futraco would be discharging its liability to the plaintiffs incurred before the purported termination of their Guarantee. On 10 April 1985 the plaintiffs demanded of Futraco by letter as follows: "Our Ref: AR/HSY/HFL/cl

25 10 April 1985

26 M/s Futraco pte Ltd 110 Middle Road #03-01 Chiat Bong Building
Singapore 0718

27 Dear Sirs (Attn: Mr C H Soh/Mr Tom Tan)

28 Re: Settlement of loan by instalments - Accounts Receivable Finance

29 We refer to the last meeting held between yourselves and our Mr David Chan, Freddie Lee and Miss Hoong on 5th March 1985 where you agreed to settle the outstanding Accounts Receivable loan by 3 monthly instalments of at least \$78,000 per month, commencing March 1985.

30 At the end of March, our Freddie called to propose that we should notify your debtors in order to assist with your collections when no payments were received from your major debtors.

31 However we have withheld notification upon your request as you mentioned that you were expecting some payments from Hong Sheng and Emporium Holdings in early April. To date, there were no payments from these debtors and the first of the instalments as proposed was not kept up with.

32 Under these circumstances, we will notify your debtors without further reference to you unless you immediately update the previously agreed upon instalments (of \$117,000/- for month of March and part of April) which must reach us by 15th April latest.

33 The foregoing does not preclude us from taking further legal action as deemed appropriate by us to cover the outstanding sums due together with interests and costs.

34 Yours faithfully HONG LEONG FINANCE LIMITED

35 Sgd: (Legal Officer)

36 cc Guarantors:- Tan Kia Poh Tan Teow Kee Tan Teow Siang Tan Hng Yong and Soh Chye Hock"

37 Although this letter of demand was copied to the first to third defendants as 'guarantors' their only reaction was a request by letter dated 23 April 1985 through their solicitors for a copy of the Guarantee. There was no allegation by them that they had terminated their Guarantee even when a direct demand

38 was made on them under the Guarantee by letter of 5 July 1985 for the sum of \$192,962.08 and interest thereon. Even in his affidavit of 19 November 1985 the third defendant only contended that they had been discharged as guarantors not by D-2 but by events taking place after their resignation as directors, that is, the increase in the facility by \$50,000 to \$350,000 and financing on invoices for goods sold on 'returnable' basis. This contention presupposed that their Guarantee had not been terminated or revoked earlier.

39 In the Order 14 proceedings before the registrar no reference or claim was made on both defendants' behalf of their having terminated or revoked the Guarantee.

40 In their defence filed on 15 April 1986 again nowhere was it alleged that they had revoked or terminated their Guarantee and D-2 was never referred to. It was only in paras 5 and 6 of their proposed amended defence annexed to the Notice of Further Direction of 4th June 1991 that revocation and termination of their Guarantee was raised and

41 reference made to D-2 for the first time. I find the evidence of DW3 (third defendant) on how D-2 was located hard to accept. (Page 59 of notes of evidence). Both defendants were allegedly advised in mid-1985 by their

solicitors to look for, inter alia, D-2. They allegedly found these letters (being D-2 and two other letters D-1 and D-3 relating to their resignation from the Board of and the sale of their shares in Futraco) after more than one year later in June 1986 and immediately handed them to their solicitors. At first DW3 said these documents were found in a 'Fuji Silk' company file. Later he said it was found in a 'Fu Yuan, Nan Seng and Miscellaneous' file. It was not in a 'Futraco' file, and it was found after DW3 had opened all 50-60 carton boxes except for 3 or 4 of the boxes (pages 64-66 of notes of evidence). Each box is said to contain 50 files, if the files were thick then about 10 files. If D-2 was in fact handed over to their solicitors in June 1986, there is no reason why reference was only made to it for the first time in their draft amended defence on 4 June 1991. I therefore reject both defendants' allegation that they had sent D-2 to the plaintiffs in December 1982.

42 On ground (2) being the defence that there was an oral collateral agreement or warranty that the facilities to Futraco should not exceed \$300,000, both defendants, through their family shareholding and their membership of the Board were in control of Futraco. It is therefore unlikely that they would have gone to plaintiffs for financing facilities and at the same time stipulated that such facilities should not exceed \$300,000.

43 There was also no limit specified in the Financing Agreement. Clause 2 of the Financing Agreement provided that plaintiffs would grant to Futraco financial facilities to 'such extent and for so long as the Company in its absolute discretion thinks fit.'

44 According to PW1, one Hoong Fong Ling, the senior accounts manager of the plaintiffs, the initial financing was to a limit of \$300,000 and 60% of the goods sold. See page 6 of the notes of evidence:

45 "... ... At this meeting with the four defendants no one said advances should be no more than \$300,000. No one said we should

46 not advance more than a certain percentage of the invoices. There was no discussion on a limit on the Guarantee. If they did we would have asked for a limited guarantee. We explained to Tan Kia Poh that the initial financing would be up to \$300,000. We said this could be subject to change. We informed all the four defendants on the formula of 60% on the advances.

47 Q: It is alleged by 1st and 3rd defendants that either you or Freddie Lee had orally agreed and warranted to them with the intention that this representation be relied on that plaintiffs would in no event lend Futraco sums in excess of \$300,000. Do you agree?

48 A: No.

49 Q: It is also alleged that you represented that plaintiffs would advance only 60% of the value of goods sold and no more. Is it true?

50 A: No. We are at liberty to vary it at any time."

51 PW1 is corroborated by PW2, one Freddie Lee Cheng Seng who was the former assistant manager of the plaintiffs' Trade Finance Division. At the date of the hearing, he was no longer with the plaintiffs. See his evidence at page 36 of the notes of evidence:

52 "Q: Did 1st defendant say he wished that the facility should be no more than \$300,000?

53 A: No. That meeting at which these documents were handed over to defendants was my first meeting with them.

54 Q: At that meeting did 1st defendant make any request that you should not advance in excess of 60% or 70% of the book debts?

55 A: No. Normally the client wants as high a percentage as possible. But we want to limit our exposure. In this instance we fixed our limit at \$300,000.

56 Q: You told 1st defendant that was the limit?

57 A: It could have been interpreted as the credit limit.

58 Q: So you informed Futraco of the limit of the facility, did you also tell 1st defendant this could be varied depending on future performance?

59 A: Yes."

60 I accept the evidence of PW1 and PW2.

61 A Form 34 dated 6 January 1982 was filed stating the amount of the charge in favour of the plaintiffs on Futraco's accounts receivable at \$300,000. This is not inconsistent with the evidence of PW1 and PW2. Later when the limit was raised by \$50,000 to \$350,000 another Form 34 dated 17 March 1983 was filed stating:

62 "The additional amount secured by the charge is:- Dollars Fifty Thousand only (\$50,000) thereby

63 making the total facilities the sum of Dollars Three Hundred and Fifty Thousand only (\$350,000)."

64 The percentage of 60% fluctuated upwards to 70% in 1983 and back to 60% around November 1984. But the increase of \$50,000 in the limit of the facility was certainly within the scope of cl 2 of the Financing Agreement.

65 By the terms of the Guarantee the defendants guaranteed the payment by Futraco of all sums due under the Financing Agreement and also undertook to indemnify the plaintiffs against all losses arising as a result of Futraco's failure to pay.

66 On the evidence adduced I reject both defendants' allegation that there was a collateral agreement or warranty to the defendants that the limit would be \$300,000 and no more. If that was so, a limited guarantee would have been entered into.

67 On ground (3) being the further alternative defence that the plaintiffs gave finance in excess of the limit of 70% of the accounts receivable when they

68 knowingly gave advance on invoices on sales on consignment basis and not bona fide sales is inherently incredible. To do so on the part of the plaintiffs would be to perpetrate a fraud on themselves. The evidence also shows that the plaintiffs stopped further financing by early January 1985 after it was discovered that goods had been sold on 'returnable' basis. See the evidence of PW1 at page 22 of the notes of evidence:

69 "A: ... We were aware that in the garment trade returns are quite normal. If the returns were not high we would not mind. I became aware of the

high rate of return in mid-1984. I checked with the 5th defendant. Also around mid- 1984. He explained that he allowed the goods returned to be exchanged for goods of fresh design. When I received audit report of November 1984 (D-6) this was the first time that the possibility of consignment sales was raised by the auditors. I spoke to 5th defendant. He mentioned the same stand that there were exchanges for new design goods and not consignment sales. At that time the financing margin was 70%. I had to reduce it to 60% because of the high returns. It was 60% at the beginning, went up to 70% in 1983 and I brought it back to 60% around November 1984. Around December 1984 or early January 1985 we asked our auditors to go down to the Futraco's premises to do a detailed audit to confirm this suspicion. Their report of 18.1.85 confirmed our suspicion. We had stopped further advances from January 1985. ..."

70 Accordingly I held both defendants liable to the plaintiffs under the Guarantee with costs reserved pending the further hearing on quantum.

71 Dated this day of December 1992.

Goh Joon Seng J

Antony Lee for the plaintiffs
Vincent Yeoh for the First and Third defendants
