IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1993] SGCA 37

CA 25/1991

Between

Indian Bank

… *Appellant*

And

Raja Suria

… *Respondent*

GROUNDS OF DECISION

Credit and Security — Guarantees and indemnities — Guarantor; Credit and Security — Guarantees and indemnities — Guarantor

Version No 1: 11 Sep 2026 (01:05 hrs)

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Indian Bank v Raja Suria and Others

[1993] SGCA 37

CA 25/1991
Lai Kew Chai J; Rajendran S J; Yong Pung How CJ
14 May 1993

1 This appeal arose out of an action by the appellant bank (`the bank`) against seven individuals alleged to have jointly and severally guaranteed the debt of a company known as Wesmapack (S) Pte Ltd (`Wesmapack`). Only the second and the fourth respondents were active respondents in this appeal. The circumstances in which the alleged guarantee came about were somewhat unusual and they raised the issue central to this appeal, viz which document or documents contain or evidence the contract of guarantee in favour of the bank? In the High Court, the claims of the bank against the second and fourth respondents were dismissed with costs. The bank also failed before us in its appeal which was dismissed with costs.

2 The facts may be briefly summarized as follows. Wesmapack opened an account with the bank on 21 March 1981 and several transactions were carried out. On 18 January 1982, Wesmapack wrote to the bank for a $130,000 overdraft facility for a 60-90 day period (`the overdraft facility`) to cover the purchase of container trucking equipment for the company`s business. The overdraft facility was to be followed by an application for a term loan of $400,000 and another overdraft facility of $200,000. The letter continued:

> *This term loan and overdraft will be secured by pledging the equipment and if required personal guarantee of all directors.*

3 The seven defendants in the court below were the seven directors of Wesmapack.

4 A guarantee dated 19 January 1982 (`the first guarantee`) in the bank`s standard form was then prepared naming the seven directors as joint and several guarantors of all money and liabilities owed or thereafter owing by Wesmapack to the bank. The guarantee was limited to the sum of $130,000 with interest from the date of demand or discontinuance of the guarantee to date of payment. The first guarantee was signed by the first six defendants only. The seventh defendant (the fifth respondent in this appeal) was away at the material time in England attending a chartered accountancy course. By a letter dated 22 January 1982, Wesmapack made an urgent request for the use of the overdraft facility.

5 Wesmapack drew on the overdraft facility on 1 February 1982. On 2 February, the bank sent Wesmapack a sanction ticket for the overdraft facility and this stated that a security for the facility was the `Personal guarantee of all directors for all facilities sanctioned.`

6 Subsequently, the seventh defendant received, in England, a copy of the bank`s standard form guarantee in identical terms as the first guarantee. This was dated 14 March 1982 and named only the seventh defendant as guarantor. He signed it and returned it by post. This guarantee will be referred to as `the second guarantee`.

7 Wesmapack last drew on the overdraft facility on 15 June 1982. The bank made several demands on Wesmapack for repayment of the moneys advanced but these were not met. The company was wound up on 11 November

Version No 1: 11 Sep 2026 (01:05 hrs)

1983. The bank then made demand upon the seven defendants by way of letters dated 29 September 1984. The debt then owing by Wesmapack was about $180,000 by way of principal and $60,000 by way of interest. The letters did not specify the documents relied upon as constituting the guarantee. The demands were not met.

8 The bank`s amended statement of claim sets out the basis of the defendants` liability as follows:

> (3) In consideration of the plaintiffs making advances or otherwise giving credit to the company, ***the defendants pursuant to the following written personal continuing guarantees*** duly signed by the defendants ***jointly and severally guaranteed*** the payment on demand of all moneys due to the plaintiffs from the company on, inter alia, overdraft and default guarantee facilities granted to the extent of $130k,000.00 and all interest thereon:
>
> *Date Amount Guarantors*
>
> *19 January 1982 $130,000 The abovenamed first, second, third, fourth, fifth and sixth defendants.*
>
> *14 March 1982 $130,000 The abovenamed seventh defendant.*

9 While not altogether a model of clarity, the italicized words just about indicated the bank`s position that the two guarantees were in fact one contract of guarantee between itself and the seven defendants. This remained the bank`s case here and below.

10 At the commencement of the trial, the first and second defendants consented to judgment being entered against them and the third and fifth defendants, being bankrupts, were not in court and took no part in the trial. The third and fifth defendants were the first and third respondents in this appeal.

Version No 1: 11 Sep 2026 (01:05 hrs)

11 The defence of the fourth defendant (the second respondent) was that the first guarantee was void as the seventh defendant had not signed it. The defence of the sixth defendant (the fourth respondent) was similar. The seventh defendant contended that he was not liable under the second guarantee as he was unaware of the existence of the first guarantee and under the impression that the other directors would also be executing the second guarantee.

12 **Evidence as to circumstances**

13 The bank`s sole witness was an officer with the bank, one Jeganathan. He stated that he received instructions from the manager of the bank, who had had a meeting with the second defendant, to prepare the first guarantee. The document was then handed to the second defendant. It was returned the next day by the third defendant with the six signatures on it. Jeganathan was told that the seventh defendant did not sign it as he was abroad. It was not clear when Jeganathan knew that the seventh defendant was studying abroad.

14 Jeganathan stated that his manager insisted that he wanted the guarantee of the seventh defendant. The manager told this to the second defendant who then agreed to get a separate guarantee from the seventh defendant. Jeganathan then prepared the second guarantee and sent it to Wesmapack. It was returned by Wesmapack to the bank.

15 Jeganathan stated that the bank`s view was that the second guarantee was merely an addendum to the first and the two guarantees constituted the basis of the defendants` liability to the bank.

16 The evidence of the fourth defendant was that the first guarantee was brought to his home and he signed it there. He said that he would not have signed

Version No 1: 11 Sep 2026 (01:05 hrs)

it if he had known that the seventh defendant was not going to sign it. He further stated that he was not given a copy of the guarantee.

17 He claimed, under cross-examination, that he had not played any active role in Wesmapack during his directorship between early January 1982 and his resignation on 18 March 1982. He said that he played no part in Wesmapack`s application for facilities from the bank and that he did not know the seventh defendant apart from the fact that the latter was the brother of the second defendant. He insisted that he did not see any of the documents relating to the overdraft facility and that he did not know about the second guarantee. His testimony was somewhat contradicted by the documentary evidence of late January 1982 showing him as a signatory to the company`s account with the bank and indicating that he was a deputy managing director of the company.

18 The evidence of the sixth defendant was that the first guarantee was brought to him at Wesmapack`s office and he signed it as he thought all the directors would sign. He would not have signed otherwise. He did not know that the seventh defendant had not signed the first guarantee until after the start of this action. Although he knew that the seventh defendant was away at the material time, he did not know that he was studying abroad. He had assumed that the second defendant would have obtained the seventh defendant`s signature. He was unaware that the seventh defendant had signed the second guarantee. He further testified that it was the first and second defendants who carried out the negotiations with the bank and that he was under the impression that by the time of the letter of 22 January 1982, all the directors had signed the first guarantee.

19 The seventh defendant testified that he was in the United Kingdom between September 1981 and 1985 apart from short visits for vacations. While

Version No 1: 11 Sep 2026 (01:05 hrs)

there, the second defendant told him of Wesmapack`s attempts to obtain financing. In March 1982, he received the second guarantee in the post. He signed and dated it on the same day as he had been told in advance by the second defendant that it was urgently needed. He had assumed that the other directors would also be signing it and he would not have signed it if they were not going to be joint signatories.

20 No other witnesses were called.

21 **The decision below**

22 The learned judicial commissioner stated the issue before him as follows [see [1991] 3 MLJ 241]:

> *The main issue before this court was whether the seven defendants are jointly liable to the plaintiffs for overdraft facilities extended to the company under the first guarantee which had been signed only by six of the seven persons named in that guarantee as co-sureties and the second guarantee which was executed only by the seventh defendant, who is the only named surety on the second guarantee. Both guarantees are in the plaintiffs` standard form. They are identical except that under the second guarantee the seventh defendant is the only nominated surety for the overdraft facilities granted by the plaintiffs to the company and all the seven defendants are nominated as co-sureties in the first guarantee.*

23 The learned judicial commissioner then made the following findings of fact:

> *Having considered both the oral and documentary evidence adduced at hearing, I found that when the company needed the use of the overdraft facilities urgently, the second defendant agreed with the plaintiffs` officer, Mr Reddy, to get the separate guarantee of the seventh defendant who had not signed the first guarantee. I also found that the fourth and sixth defendants had not given their consent to the plaintiffs that the seventh defendant need not sign the first guarantee and that the second guarantee signed by the seventh defendant is to be regarded as*

Version No 1: 11 Sep 2026 (01:05 hrs)

> *an addendum to the first guarantee. I also found that the fourth, sixth and seventh defendants were not given a copy of the first guarantee either by the company or the plaintiffs and that they were only aware that the seventh defendant signed the second guarantee and did not sign the first guarantee after the plaintiffs had commenced proceedings for the recovery of the sum guaranteed by the seven defendants. In arriving at the aforesaid conclusions, I took into account of the fact that the fourth defendant had at times not given his evidence in a frank and straightforward manner. I had also noted that there was no evidence from the plaintiffs` witness, PW1, that the fourth and sixth defendants had agreed with the plaintiffs or any of the plaintiffs` officers that the seventh defendant need not sign the first guarantee and that he should sign a separate guarantee instead. The evidence from PW1 was that the second defendant had agreed to get the separate guarantee of the seventh defendant and that it was the third defendant who informed PW1 that the first guarantee was not signed by the seventh defendant. The seventh defendant who was away at the material time could not have given his consent for the new arrangements for the execution of two guarantees instead of one guarantee where all seven defendants would have signed as guarantors.*

24 The learned judicial commissioner went on to hold that the two guarantees were unenforceable against the defendants because the first guarantee was not signed by the seventh defendant and the second guarantee was not, in law, an addendum to the first guarantee which was agreed to by all seven defendants on the one hand and the appellants on the other. He reasoned as follows:

> (1) It was a condition precedent of the first guarantee that all the named guarantors should sign it and the bank was under a duty to see that they did.
>
> (2) The first to sixth defendants had not waived the requirement that the seventh defendant should sign the first guarantee.
>
> (3) Even if all the surrounding circumstances were looked at, the conclusion would be that there were two separate and distinct contracts of guarantee.
>
> (4) There was no incorporation by reference of the second guarantee into the first guarantee.

Version No 1: 11 Sep 2026 (01:05 hrs)

25 The learned judicial commissioner accordingly dismissed the bank`s claim and the bank`s appeal was based on the following grounds:

> (1) It was not a condition precedent that all the directors had to sign the first guarantee.
>
> (2) If there was such a condition precedent then it has been waived or, alternatively, the defendants were estopped from denying that the guarantees were security for the facilities advanced.
>
> (3) The second defendant was the agent of the other defendants and his knowledge of the seventh defendant`s long term absence from Singapore should be imputed to the other defendants.
>
> (4) The learned judicial commissioner erred in law and in fact in failing to hold that since all the defendants had a right of contribution amongst themselves, as the two guarantees were for the same debt, the respondents were not discharged from their liability under the guarantees.
>
> (5) The two guarantees were in fact one guarantee by all seven defendants for the sum of $130,000 and interest as stated in the guarantee.

26 The appellant bank`s contentions which were relevant were those which dealt with the question whether the first and the second guarantees were in fact agreed as one guarantee or whether they could be so treated. The bank`s contention on this point was that if the circumstances surrounding the execution of the two guarantees were taken into account in construing the intention of the parties, it was clear that they agreed that the bank`s release of funds on 1 February 1982 should be guaranteed by all the directors of Wesmapack by two documents, viz the first and second guarantees.

27 In order for the bank to succeed, it had to show a connection between the two guarantees that allowed it to argue that the signature of the seventh defendant on the second guarantee is to be read as if it were part of the first

Version No 1: 11 Sep 2026 (01:05 hrs)

guarantee. The learned judicial commissioner correctly, in our view, rejected the incorporation by reference argument based on **Timmins v Moreland Street Property Co Ltd** [1958] Ch 110[1957] 3 All ER 265[1957] 3 WLR 678 as there was no reference, whether express or implied, in the second guarantee to the first guarantee.

28 Counsel for the bank did not argue that the learned judicial commissioner was wrong in rejecting that argument. He instead put forward a more sophisticated version of the general rule that all documents that form part of a single transaction are to be read together.

29 The argument went along the following lines. The agreement between the parties was contained in Wesmapack`s letter of 18 January 1982 and the bank`s acceptance of the terms offered in that letter. The subsequent guarantees were `merely evidence of this contract ` for the purposes of s 4 of the Statute of Frauds. It followed that both guarantees had to be looked at in order to give effect to the intention of the parties.

30 In our view, there were factual difficulties in the way of the argument. Firstly, the agreement between the bank and Wesmapack on the use of the overdraft was documented by the bank`s letter of 2 February 1982 and not the letter of 18 January 1982 since the former was intended to supersede the latter as an offer. On the other hand, the overdraft was used on 1 February 1982 and Jeganathan gave evidence that he was asked to prepare the first guarantee on 19 January. Secondly, Wesmapack`s letter was written on its behalf by the second defendant. The contract of guarantee was between the defendants in their personal capacities and the bank. The first and second guarantees were the only contracts of that nature between the parties in those capacities. It was never part

Version No 1: 11 Sep 2026 (01:05 hrs)

of the bank`s case that the second defendant was the agent of all the defendants in the sense that he had the authority to bind them at the time of the letter.

31 Could the two guarantees be read together as part of one transaction? The one transaction approach, however, is premised on the existence of some express or implied reference in one document to the other. **Fauzi Elias v George Sahely & Co (Barbados) Ltd** [1983] AC 646[1982] 3 All ER 801[1982] 3 WLR 956 at pp 654G-655G rejected a broader argument that all documents that form part of one transaction can be read together. The Privy Council approved **Timmins** [1958] Ch 110[1957] 3 All ER 265[1957] 3 WLR 678 and, accordingly, we took the view that just as the incorporation argument was rejected at first instance, the one transaction principle had no application here.

32 The bank relied on **Walter and Morris Ltd v Lymberis** [1965] SASR 204 but that case was concerned only with the question whether the form of a joint guarantee was appropriate when only an individual guarantor was the surety. The Queensland Court of Appeal in **Taubmans Pty Ltd v Loakes** [1991] 2 Qd R 109 held that it was not a rule of law that the failure of a named co-surety to sign a joint and several guarantee automatically discharged the other co-sureties. The case was one on summary judgment and the defendant co-surety had not filed any affidavits stating that it was intended that all the co-sureties should sign. Judgment was accordingly given to the creditor. The decision went no further. Similarly, the cases cited in support of reading the first and second guarantees together in this appeal had been brought together in **Fauzi Elias v George Sahely & Co** [1983] AC 646[1982] 3 All ER 801[1982] 3 WLR 956 which has been considered above.

Version No 1: 11 Sep 2026 (01:05 hrs)

33 We also took the view that to accept the bank`s arguments would be to open a way around the long standing principle that all the co-sureties of a joint and several guarantee have to sign the guarantee unless it is shown that there was no such intention or that the requirement had been waived. On the facts before us, this was not a case to consider opening a way around the principle in view of the learned judicial commissioner`s unchallenged findings that the fourth and the sixth defendants were unaware at all material times that the seventh defendant had not executed the first guarantee but only the second guarantee.

34 In the end, the appeal may be summarized as follows. The action by the bank was pleaded in para 3 of the amended statement of claim as based on the joint and several guarantee of the seven defendants as contained in the two documents. They therefore had to show that the two documents were in fact one guarantee. They were unable to do this because the guarantees did not refer to each other. The first guarantee recited that it was the joint and several guarantee of the seven defendants while the second stated that it was the guarantee of the seventh defendant. Neither was there any other evidence to show that the two were related. There was no evidence that the parties intended that the defendants` guarantee be given in two separate documents. Indeed, the evidence on behalf of the bank showed that their manager, who was not called, unilaterally wanted the guarantee of the seventh defendant separately. He acted as if the consent of the co-sureties was irrelevant.

35 Our decision was not merely based on the bank`s case as pleaded. Even if the action were pleaded as being based on the first guarantee and relief was only being sought against the second and the fourth respondents, the action would still have failed because the intention of the parties was that all seven

Version No 1: 11 Sep 2026 (01:05 hrs)

defendants would sign one document: **Evans v Bremridge** [1855] 69 ER 741 ***National Provincial Bank of England v Brackenbury***

36 ;6 ***James Graham & Co (Timber) Ltd v Southgate-Sands & Ors***

37 .7 We accepted that it is not a rule of law that where an instrument of guarantee is in the form or in terms that imply it is to be executed by more than one guarantor who are to be jointly and severally liable, all must sign the instrument before any is bound: **Taubmans Pty Ltd v Loakes** [1991] 2 Qd R 109 The crucial question in such cases was: what was the intention of the parties? Here, it was clear that insofar as the second and the fourth respondents were concerned, all seven defendants were to have signed the first guarantee. For these reasons, we dismissed the bank`s appeal with costs.

38 **Outcome:**

39 Appeal dismissed.

Lai Kew Chai J
Rajendran S J
Yong Pung How CJ

K Bala Chandran with Wong Khai Leng (Mallal & Namazie) for the appellants
P Suppiah (P Suppiah & Co) for the second respondent
R Joethy (Choo & Joethy) for the fourth respondent

Version No 1: 11 Sep 2026 (01:05 hrs)