IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 140

Suit No 1634 of 1990

Between

Nissho Iwai Corporation

… *Plaintiff*

And

Lim Chor Soon
Lee Chu Keng

… *Defendant*

GROUNDS OF DECISION

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

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Nissho Iwai Corporation v Lim Chor Soon and Another

[1993] SGHC 140

Suit No 1634 of 1990
Goh Joon Seng J
24 June 1993

1 **Judgment:**

2 Coram: The Honourable Justice GOH JOON SENG

3 JUDGMENT

4 The plaintiffs, Nissho Iwai Corporation, are a company incorporated in Japan with a place of business at 16, Raffles Quay #34-00 Hong Leong Building, Singapore, and are a trading house engaged in import and export trade.

5 The defendants were directors and shareholders of Noddy Fashion Knitter Pte Ltd holding between them 185,999 of the 186,000 issued shares of the company. The second defendant is the wife of the first defendant. Noddy Fashion Knitter Pte Ltd were garment manufacturers.

6 The plaintiffs had business dealings with Noddy Fashion Knitter Pte Ltd since 1982 or earlier. In the course of their business the plaintiffs would extend credit facilities to their customers. In the case of Noddy Fashion Knitter Pte Ltd credit facilities were accorded to a limit of US$80,000 or S$170,000 as from 3

July 1987. When Noddy Fashion Knitter Pte Ltd required supplies from their suppliers, they would either place their orders with the suppliers or convey their requirements to the plaintiffs who would purchase them from the said suppliers and in turn sold the same to Noddy Fashion Knitter Pte Ltd. The credit was for 90 days in the case of local transactions and 120 days in the case of import transactions. The credit limit was increased to US$100,000 with effect from 7 July 1989 subject to security for the `additional credit'. I agree that this was an inelegant way of saying that security was required for the increased limit of US$100,000 and not just for the additional credit of US$20,000.

7 On or about 17 July 1989 the defendants executed a guarantee in

8 favour of the plaintiffs. The guarantee read:

9 "This Personal Guarantee (hereinafter called `GUARANTEE') made the 17th day of July 1989 between personnels Madam Lee Chu Keng, NRIC NO 0179482/E and Mr Lim Chor Soon, NRIC No 0287632/I at 28 Mount Echo Park Singapore 1024 (hereinafter called `the GUARANTOR') of the one part and Messrs NISSHO IWAI CORPORATION, Singapore Branch and having its registered office at 16 Raffles Quay #34-00 Hong Leong Building, Singapore 0104 (hereinafter called `the SUPPLIER') of the other part and guarantee the Messrs NODDY FASHION KNITTING PTE LTD havings (sic) its registered office at Block 5000 Ang Mo Kio Industrial Park 2 Avenue 5 #04-08, Singapore 2056 (hereinafter called as `COMPANY').

10 Now THE GUARANTOR hereby agrees with `the SUPPLIER' as follows:

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11 In the event of `the COMPANY' failing to fulfil the commitments of the purchase, `the GUARANTORS' shall indemnity `the SUPPLIER' in full against the invoice amount plus interest of any outstanding payment.

12 ... ..." (Underlining added)

13 It is not in dispute that at the date when the guarantee was executed there were no debts due from Noddy Fashion Knitter Pte Ltd to the plaintiffs. Subsequent thereto came the three transactions in plaintiffs' invoices Nos AY 029 dated 29 September 1989, AY 030 dated 29 September 1989 and AY 031 dated 15 November 1989 respectively. They involved goods ordered by

14 Noddy Fashion Knitter Pte Ltd from the suppliers. The plaintiffs then purchased these goods from and paid the suppliers Kung Keng Textile Co Pte Ltd and P T Acryl Textiles Mills and in turn sold the same to Noddy Fashion Knitter Pte Ltd on credit. The goods were delivered to Noddy Fashion Knitter Pte Ltd who duly acknowledged receipt of the goods.

15 On 16 July 1990 a winding up petition was presented against Noddy Fashion Knitter Pte Ltd by a creditor Global Airfreight International Pte Ltd. The amount outstanding under the plaintiffs' invoices was $76,687.16 as at 7 August 1990.

16 By letters dated 24 August 1990 the plaintiffs demanded payment of the same from the defendants as guarantors of Noddy Fashion Knitter Pte Ltd under the guarantee. The defendants denied liability through their solicitors by letter stating that the guarantee "had only effect as to amounts outstanding at the date of the guarantee namely 17th July 1989. Our clients' instructions are that at the date of the said guarantee there were no outstanding amounts due by the

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company. Further and in any event, you will note that the said guarantee refers to commitments which `Noddy Fashion Knitting Pte Ltd' had failed to fulfil which company is a different entity from `Noddy Fashion Knitter Pte Ltd' of which our clients are directors." There was no company

17 by the name of `Noddy Fashion Knitting Pte Ltd' as opposed to `Noddy Fashion Knitter Pte Ltd' with which the defendants were connected. `Knitting' was patently a typographical error for `Knitter'.

18 On 12 September 1990 the plaintiffs commenced these proceedings under the guarantee against the defendants for the sum of $76,687.16 with interest at 7.5% per annum from 8 August 1990.

19 By order of court dated 11 January 1991 it was ordered that the guarantee `be rectified in that the defendants have agreed to indemnify the plaintiffs in the event that Noddy Fashion Knitter Pte Ltd failed to fulfil its commitments on its purchases from the plaintiffs instead of reference to Noddy Fashion Knitting Pte Ltd, which is to embody the agreement actually made or their true intentions at the time of exercising the same and to treat the said guarantee as having been so rectified'.

20 By their defence filed on 8 August 1991, para 3 the defendants contended that their liability if any under the guarantee "was limited to any outstanding payment in respect of `specific commitments' and `purchase' due by Noddy Fashion Knitter Pte Ltd ... ... to the plaintiffs existing as at the date of the guarantee" i.e. 17 July 1989. By para 7 the defendants said that

21 the sum of $76,687.16 allegedly due on the three invoices became due and owing if at all after the date of the guarantee and accordingly the defendants

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were not liable. By para 8 of the defence it was alleged that the goods comprised in the three invoices were not `commitments' or `purchase' or in respect of goods supplied and delivered by the plaintiffs to Noddy Fashion Knitter Pte Ltd. By para 9 it was further contended that the guarantee was to secure unlicensed banking and moneylending activities of the plaintiffs and therefore unenforceable. In addition to the aforesaid pleaded defences the defendants alleged for the first time at the hearing that the guarantee was intended for a specific debt arising allegedly in the following circumstances.

22 It was alleged that in July 1989, PW1 Ho Hoon Kwan who was then the manager of the General Commodities and Textile Department of the plaintiffs' branch in Singapore requested the first defendant to do him a favour telling the first defendant that an unidentified friend of his needed credit facilities from the plaintiffs to open a letter of credit and enquiring if this friend could make use of Noddy Fashion Knitter Pte Ltd's facilities with the plaintiffs. The first defendant agreed. He then placed an order for 100% cotton yarn 32's dyed for knitting with Jia Feng Trading Pte Ltd as requested by PW1. The first defendant then utilised Noddy Fashion Knitter Pte Ltd's facilities with the plaintiffs to have a letter of credit opened in favour of Jia

23 Feng Trading Pte Ltd. But no goods were in fact delivered by Jia Feng Trading Pte Ltd to Noddy Fashion Knitter Pte Ltd. The plaintiffs then issued their invoice No AY 026 dated 12 July 1989 to Noddy Fashion Knitter Pte Ltd. It was the understanding that the guarantee was for this transaction and it would be cancelled when the amount due on invoice AY 026 was paid. Subsequently PW1 handed the first defendant a cheque for an amount in excess of the amount due on invoice AY 026. This cheque was paid into Noddy Fashion Knitter Pte Ltd's account with the United Overseas Bank, Thomson Road Branch. Noddy

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Fashion Knitter Pte Ltd then drew a cheque for $53,359.46 in favour of the plaintiffs to pay the amount due on invoice AY 026.

24 I have no hesitation in rejecting this bare allegation by the defendants. It had not been pleaded. It had never been alleged in any of the affidavits in the Order 14 proceedings. On the other hand Delivery Order 1050 dated 15 June 1989 quite clearly showed that 217 cartons of 100% cotton yarn 32's were delivered by Jia Feng Trading Pte Ltd to Noddy Fashion Knitter Pte Ltd. The first defendant acknowledged receipt of the goods on behalf of Noddy Fashion Knitter Pte Ltd. I therefore reject the unpleaded defence that the guarantee was for the specific transaction relating to invoice AY 026.

25 I now turn to the issue raised in the defence as to whether the guarantee was intended as a continuing guarantee for the then existing and future debts of Noddy Fashion Knitter Pte Ltd.

26 By the guarantee the defendants agreed `in the event of the company failing to fulfil the commitments of the purchase < to indemnify the plaintiffs > in full against the invoice amount plus interest of any outstanding payment ... ...'. In construing the guarantee it is permissible to have regard to the factual matrix. See Reardon Smith Line Ltd v Yngvar Hansen-Tangen (1976) 1WLR 989. In that case to help finance the building of a Japanese motor tank vessel of some 88,000 tons, it was arranged for the vessel to be chartered on completion even before work on it was started. The charterparties referred to the vessel as one to be built at Osaka with the yard or hull number 354, but eventually because of its size the vessel was built at Oshima where it bore the yard or hull number Oshima 004 although in all external documents it was known as Osaka 354. For the purpose of the proceedings it was assumed that the physical attributes of the vessel corresponded with those required under the charterparties. When the

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vessel was ready for delivery in 1974 the market had collapsed owing to the oil crisis and the charterers sought to avoid their obligation under the charterparties by rejecting the vessel on the ground that it did not correspond with the contractual description in that it was `Oshima

27 004' and not `Osaka 354'. The House of Lords found against the charterers and dismissed their appeal. Lord Wilberforce at 995 said:

28 " The contract is in the English language and (clause 40) is to be construed in accordance with English Law. But it has been sought to introduce, as an aid to construction, a considerable amount of evidence as to Japanese usages and practice, some of which was in fact taken into account by the Court of Appeal. To decide how far this is legitimate one must make a distinction. When it comes to ascertaining whether particular words apply to a factual situation or, if one prefers, whether a factual situation comes within particular words, it is undoubtedly proper, and necessary, to take evidence as to the factual situation. Thus once one has decided what is meant by `Yard No. 354' or `to be built at a Yard' it is proper by evidence to establish the characteristics of particular yards, the numbering used at those yards, and the `building' which may have been done, in order to answer, yes or not, the question whether the contractual requirements have been met. There is no difficulty, in law, about this part of the case.

29 It is less easy to define what evidence may be used in order to enable a term to be construed. To argue that practices adopted in the shipbuilding industry in Japan, for example as to sub-contracting, are relevant in the interpretation of a charterparty contract between two foreign shipping companies, whether or not these practices are known to the parties, is in my opinion to exceed what is permissible. But it does not follow that, renouncing

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this evidence, one must be confined within the four corners of the document. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as `the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial

30 purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

31 On the factual matrix surrounding the signing of this guarantee, it is not in dispute that at the date thereof there was no invoice or outstanding debts due from Noddy Fashion Knitter Pte Ltd to the plaintiffs. Therefore the guarantee could not have been intended to relate to any particular invoice or to existing debts only. If it did, it would not fulfil its commercial purpose. It was signed on or about 17 July 1989. This was ten days after Noddy Fashion Knitter Pte Ltd's credit limit was raised from US$80,000 to US$100,000 on condition that security for the increased facilities be obtained. Accordingly I hold that the guarantee applied to Noddy Fashion Knitter Pte Ltd's then existing and future debts to the plaintiffs for goods purchased or to be purchased by Noddy Fashion Knitter Pte Ltd from the plaintiffs.

32 On the defendants' contention that the goods the subject matter of invoices AY 029, AY 030 and AY 031 were not `commitments' or `purchase' or in respect of goods supplied and delivered by the plaintiffs to Noddy Fashion Knitter Pte Ltd under the terms of the guarantee, the specifications might have been given to or orders placed and the price agreed by Noddy Fashion Knitter Pte Ltd with the suppliers but it was the plaintiffs who

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33 eventually purchased them from and paid the suppliers and had them delivered to Noddy Fashion Knitter Pte Ltd. Whatever earlier invoices rendered by the suppliers to Noddy Fashion Knitter Pte Ltd were then cancelled. Accordingly I am of the view that the amount due on the three invoices fell within the ambit of the guarantee.

34 On the alternative defence that by financing Noddy Fashion Knitter Pte Ltd in such manner in respect of the three invoices the plaintiffs were carrying on unlicensed banking or moneylending activities and hence the amounts due on the said invoices were not recoverable and the guarantee unenforceable, the point on alleged infringement of the Banking Act was not pursued at the hearing. Nonetheless a perusal of the definition of `banking business' under s.2 of the Banking Act would dispose of the point. It means `the business of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, the making of advances to customers ...'

35 On alleged infringement of the Moneylenders Act (Cap 188) section 2(c) of Cap 188 excludes from the definition of `moneylender'`any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.'

36 In Chow Yoong Hong v Choong Fah Rubber Manufactory < 1962 > A.C. 209, the appellant in the course of his business received from customers a number of out-station cheques which would take between seven and ten days to clear, indorsed them over to the respondents whose bank for a special charge, afforded them facilities for drawing on the credit of such cheques at once and the respondents gave the appellant their own cheques post-dated by about a week for the same amount in exchange for the out- station cheques. The

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respondents alleged that the appellant charged them interest. There were also transactions between them the other way round, when, according to the respondents they got the appellant to discount post-dated out-station cheques which they had received in the course of their business, the discount being at the rate of 8 cents per $100 per day of the period between the date of the transaction and the maturity of the cheques. In respect of these latter transactions the respondents also gave the appellant as collateral security their own post-dated cheques maturing the same day as the out-station cheques. On the appellant suing the respondents on their cheques which were dishonoured, the respondents contended that the contracts to which the cheques related were for repayment of money lent and therefore the claim was unforceable under the Moneylenders Ordinance. The Privy Council in allowing the appeal held that the respondents' cheques were given not for repayment of money lent but rather for the purchase or discounting of other cheques and the Moneylenders

37 Ordinance afforded them no defence to the appellant's claim. Lord Devlin at page 216 to 217 said:

38 " ... ... The fundamental error that underlies the defendants' case on both groups of cheques is that because they were, so they say, in need of ready cash, and because the plaintiff supplied them with it and made, if he did, a profit out of doing so, therefore there was a loan and a contract for its repayment. There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J., that transactions of this sort can easily be used as a cloak for moneylending. The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it

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is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly."

39 The court therefore has to look at the nature of the transactions behind the three invoices and see if the form was a sham for loan transactions.

40 In Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd (1980) 2 MLJ 9 the respondents were an United Kingdom confirming house. They entered into an agreement with the client, a Singapore company whereby the

41 respondents gave the client confirming facilities for the client's purchase of goods from a supplier in the United Kingdom. According to the agreement the respondents would confirm the purchases made by the client, pay for the goods and draw a fixed date bill of exchange covering the confirming facilities so granted, each bill to be drawn for acceptance by the client against shipping documents on the arrival of the vessel carrying the goods and payable 150 days thereafter. For the services rendered the respondents were to charge a 3% commission on the c.i.f. value of shipments with a minimum of 50 per shipment. Interest at the prevailing rate was also payable on the date of payment on the principal sum of the bill for the period of credit granted. All other charges such as bank's letter of credit, cables, postages, petty airmail postages, local taxes and the like were all for the client's account. The respondents would arrange for marine insurance but they were not responsible for the out-turn of the quality of the goods. The confirming facilities were granted on condition that the

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appellants stood as guarantors. By the terms of the guarantee the appellants agreed to pay on demand all sums which might become due from the client to the respondents and other sums which the respondents might be liable to pay to a third party as a result of the confirming transactions. In an action against the appellants under the guarantee the appellants disputed their liability on the ground that the transactions between the respondents and the client were in essence moneylending transactions. This argument was dismissed. Final judgment was entered in favour of the respondents pursuant to their Order 14 application. The appellants' appeal to the High Court was dismissed. The appellants then appealed to the Federal Court of Malaysia which also dismissed their appeal. Salleh Abas F.J. said at pages 11 and 12:

42 " To regard the agreement or the transactions between the respondents and their client as being one of moneylending, and therefore the respondents as a moneylender, in our view, reflects a lack of knowledge and appreciation of the important role played by confirming houses in the financing of international trade. An importer in one country would find it difficult to buy goods on credit from a foreign seller in another country without the assistance of an intermediary unless trade relationship between the two has grown to such an extent in terms of volume and length of time that there is a mutual confidence inducing the seller to grant credit to the buyer. A newcomer in import and export trade would find it virtually impossible to buy goods from a foreign seller unless he has ready cash to pay for them. Likewise, a seller in such trade will be reluctant and not able to sell his goods to a foreign buyer unless he is assured of getting payment for them. Nowadays, payment for the goods is effected through banks or confirming houses. As regards payment through banks, this can be either in the form of banker's documentary credits or banker's collection arrangements depending on whether the method of payment was arranged by

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the buyer or by the seller. If the buyer arranges the payment, he requests his bank (known as the issuing bank) to open banker's documentary credits with a bank in the seller's country (known as the correspondent banker). This bank is bound to pay once proper shipping documents are tendered, even though in the meantime it has received instruction that the buyer has repudiated the contract.

43 (Hamzeh Malas & Sons v British Imex Industries Ltd, see also Urquhart Lindsay & Co v Eastern Bank). If it is the seller who arranges the payment, he has to resort to what is known as banker's collection arrangements. By this method the seller has to instruct through his bank (known as remitting bank) a bank in the buyer's country (known as collecting bank) to collect payment for the goods. The buyer is bound to pay the collecting bank upon presentation to him of shipping documents either by handing in cash or by accepting bill of exchange drawn on him. Banker's documentary credits and collection arrangements have been developed by banks only in the last fifty years or so as a result of increased volumes of trade and commerce across the nations' frontiers. Until they have reached the present state of perfection, confirming houses played important roles of match- making between foreign buyers and sellers, both of whom are strangers to each other, and to this date despite the popularity of banker's documentary credits and collection arrangements, confirming houses still survive and continue to occupy important position in the financing of export trade (Anglo- African Shipping Company v J Mortner Limited.

44 A confirming house, formerly known as a merchant commission and now as an export house, adopts a set pattern of business procedure. It enters into two agreements. The first agreement is between itself and a foreign buyer (known as the client) whereby the client requests the confirming house to buy goods for him. The relationship so created is one of principal and agent, i.e. the

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client being the principal and the confirming house being the agent. The agreement between the client and the respondents dated April 18, 1975 is a typical one. In the agreement, it is clearly spelled out that the respondents would attend to the confirmation of the client's purchases and pay the prices and that bills of exchange would be drawn and accepted by the client and that such bills were in respect of payments made by the respondents on behalf of the client. Another agreement entered into by a confirming house is one between itself and the seller from whom the confirming house bought the goods. This agreement may fall into any of the three types. The first type is where the confirming house buys the goods as an agent on behalf of the foreign buyer, in which case there is a privity of contract between the buyer and the seller, irrespective of whether the foreign principal is disclosed or not. The second type is where the confirming house buys the goods in the capacity of a principal from whom the foreign buyer re-purchases the goods. In this case there is no privity of contract between the seller and the foreign buyer.

45 According to Lord Diplock who wrote a dissenting judgment in Anglo-African Shipping Company v J Mortner Ltd, this type of agreement whereby the confirming house becomes the seller is `in the ordinary way' of the business of a confirming house meaning a common one. The third type is where the confirm-ing house as agent of the overseas client places the client's order with the seller but indicates at the same time that it intends to hold itself personally responsible for the price. According to Professor Schmitthoff, The Export Trade (1969) 5th Ed. pages 145-150 this is the most typical of all the confirming arrangements. However, whatever the legal relationships created by these two agreements, the courts in England held that when a confirming house confirms the purchases of its client with the seller, it does not only assure and guarantee that payment will be made if proper documents are tendered, but also confirm

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the whole contract. Thus the seller is entitled to look to the confirming house personally to see that not only the payment will be made, but also the contract will be carried out by the buyer. (Sobell Industries Ltd v Cory Brothers & Co Ltd per McNair J at page 90).

46 Although a confirming house occupies an intervening position between the buyer and the seller, much the same as a bank does when it opens a confirmed irrevocable credit for its customer, the business of a confirming house is distinct from that of a bank and its obligations are not identical with those of a bank. The obligation of a bank is to pay against proper documents being tendered, whereas a confirming house whether it purchased goods as an agent of its client or in the capacity of a principal, as we have observed earlier, is not merely liable as regards price but also for damages arising out of a breach by the client: for example, refusal to accept delivery of goods. In so far as the seller is concerned, the confirmation by a confirming house gives him an added protection not only against non- payment of the price but also against contingencies which are not purely financial. (Rusholme & Bolton & Roberts Hadfield v S.G. Read Co < London > Ltd) and Sobell Industries Ltd v Cory Brothers & Co Ltd)." < Emphasis added > .

47 The transactions in the instant case are similar to the second type of transactions referred to by Salleh Abas F.J. I therefore hold that they were not moneylending transactions.

48 Accordingly there will be judgment for the plaintiffs in the sum of $76,687.16 with interest at 7.5% from 8 August 1990 to date of judgment and costs.

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Goh Joon Seng J

Joseph Yeo Swee Teck (Drew & Napier) for the plaintiffs
Siaw Kheng Boon (Tang & Co) for the defendants

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