IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 13

Suit 1537/1992

Between

Marine Accomm Pte Ltd

… *Plaintiff*

And

Western Tug & Barge
Company Pty Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Marine Accomm Pte Ltd v Western Tug & Barge Company Pty Ltd

[1995] SGHC 13

Suit 1537/1992
Lim Teong Qwee JC
19 January 1995

1 **Judgment:**

2 Coram: Lim Teong Qwee JC

3 GROUNDS OF JUDGMENT

4 Sin Koon Seng Shipbuilding & Engineering Pte Ltd ("SKS") agreed to build a 75m general purpose ore carrier for the defendant a Papua New Guinea company for $7.5m under a contract dated 4 February 1991. SKS then sub-contracted with the plaintiff for the carpentry works for the vessel known provisionally as Hull 698 for $460,000 under a contract dated 2 January 1992. The carpentry works have been completed. The defendant has taken delivery of the vessel. $115,000 part of the price for the carpentry works remains unpaid and SKS is unable to pay any part of it. In this action the plaintiff claims against the defendant the like sum of $115,000. Paragraph 2 and part of para 3 of the statement of claim state:

5 "2. On or around 26 December 1991 the Defendants requested the Plaintiffs to enter into an agreement with < SKS > to <execute the carpentry works>.

6 Particulars

7 The Defendants through their representatives, one Koh Chye Heng and one Vinod K Shah, entered into an oral agreement with the Plaintiffs (hereinafter referred to as the `Owner's Agreement'), that in consideration of the Plaintiffs entering into the abovestated agreement with < SKS > , the Defendants would pay or otherwise indemnify the Plaintiffs in respect of the contract sums relating to the said agreement with < SKS > .

8 3. In consequence and in furtherance of the Owner's Agreement with the Defendants, and in consideration of the Defendants' promise to pay such contract sums that would be due and/or owing by < SKS > , the Plaintiffs entered into an agreement with < SKS > on or about 2 January 1992 (hereinafter referred to as the `Shipyard Agreement') for a contract sum of $460,000.00. ...."

9 Mr Sreenivasan said that the claim was for an indemnity and not on a guarantee or for balance of price payable by the defendant as employer and the plaintiff as contractor. He said the loss suffered was occasioned by the failure of SKS to pay the balance of the price and para 5 was amended to allege the loss. The defence in so far as the claim on an indemnity is concerned consists of denials of the alleged oral agreement and of the authority of either Koh Chye Heng ("Koh") or Vinod K Shah ("Shah"). I heard oral evidence over 2 days and at the close of submissions on the third day I dismissed the plaintiff's claim with costs. The plaintiff has given notice of appeal.

Version No 1: 29 Oct 2026 (23:45 hrs)

10 The main issues on the pleadings and as qualified by Mr Sreenivasan's statement from the bar are:

11 (1) Whether Koh or Shah orally agreed with the plaintiff that in consideration of the plaintiff entering into the carpentry contract with SKS the defendant would pay or otherwise indemnify the plaintiff in respect of the contract sums relating to such contract but not as guarantor or as primary obligor under the contract as employer. (2) If Koh or Shah did so then whether either of them had any authority to bind the defendant.

12 The first is an issue of fact and the second an issue of law or mixed law and fact.

13 The oral agreement

14 Tan Teck Ming ("Tan") the managing director of the plaintiff said in his affidavit that some time in December 1991 Toh Tong Seng ("Toh") who was then employed as an estimator by SKS approached him to quote for the carpentry works. He said it was well known that SKS was facing severe financial problems and was a bad paymaster and he pointed this out to Toh and indicated that the plaintiff was not interested. He said Toh informed him that "the owners of the ship, the Defendants, had stepped directly into the picture, and would be responsible for payments to the sub-contractors, and that therefore, there was no cause for concern". He said that with this reassurance, the plaintiff quoted for the job. Under cross-examination Tan said Toh gave him this information in December 1991 or earlier.

15 Toh said in his affidavit that Tan who was the person in charge of quotations communicated with him. He said Tan was anxious about the

Version No 1: 29 Oct 2026 (23:45 hrs)

financial position of SKS and was not keen to quote. He said he "assured him that payment would not be a problem, as the owners had agreed to be directly responsible for payments to sub-contractors". It was either the SKS management or Koh or both who had informed him that the defendant would be responsible for and would make payments due after December 1991. He said that Koh was appointed by the defendant to act as project team leader and was involved in December 1991 when SKS ran into financial problems. When he was asked if all quotations had been received by then he said "When Koh Chye Heng joined we were discussing quotes. Revised quotes came in still."

16 It is not in dispute that following a meeting between the defendant and SKS on 15 December 1991 a supervision/project management team was set up and an executive action plan was proposed by the defendant. An outline of the plan was sent to SKS for confirmation on 16 December 1991 before implementation. Under the plan Kenton Marine Pte Ltd ("Kenton Marine") would "take over the Supervision/Project Management of completion" of the vessel and Koh an employee of Kenton Marine would be the team leader and he would be assisted by Shah an employee of the defendant and 2 others. Koh said he first met Toh on 16 December 1991 after he had been appointed team leader and was being introduced to SKS personnel. The agreed documents in this case include 3 quotations dated 12 December 1991, 16 December 1991 and 17 December 1991 and a number of revised quotations. Tan was referred to the quotation dated 12 December 1991 under cross-examination and he said that the first quotation was before 12 December 1991. Among the agreed documents is a letter dated 6 November 1991 from the defendant to SKS approving formica samples in accordance with the list proposed by the plaintiff for the vessel in its undated letter to SKS.

Version No 1: 29 Oct 2026 (23:45 hrs)

17 I find that Toh and Koh first spoke to each other on 16 December 1991 after his appointment as team leader and that by that time the plaintiff had submitted more than one quotation to SKS for carpentry works for the vessel. If Koh said anything to Toh about the defendant being responsible for payment to sub-contractors it would have been after and not before the plaintiff had submitted at least 2 quotations if not more. The plaintiff did not quote for the carpentry works "with the reassurance" of Toh's information about the defendant being responsible for payment to sub-contractors as Tan said in his affidavit. It was not because the plaintiff was not keen to quote for the carpentry works that Toh gave the assurance as he said or suggested in his affidavit.

18 Tan said in his affidavit that on or about 26 December 1991 he went to the shipyard of SKS to see Toh and together they saw Koh at the owner's representative's office at the shipyard. He went on to say that he voiced his concern as to the financial condition of SKS and that "the only reason that we had quoted for the job was the assurance that the Defendants would be responsible for payments". He said Koh told him that "the Defendants would pay for the works done or otherwise indemnify the Plaintiff company for works done, if it entered into the contract with SKS". He then said that "in consequence of and further to Koh's assurances and request to take on the job" the plaintiff entered into the carpentry contract with SKS on 2 January 1992. Under cross-examination he said the meeting he and Toh had with Koh took place after all the quotations had been submitted and before Christmas and that as regards what in his affidavit he said Koh had told him his exact words were "Timothy. You don't have to worry. We will pay you directly for all works being carried out on this project." "Timothy" is a reference to Tan. Toh said in his affidavit that he and Tan were in the owner's representative's office at the shipyard when Koh "assured him < Tan > that the Defendants would be responsible for and

Version No 1: 29 Oct 2026 (23:45 hrs)

make all payments in respect of the sub-contract, and that the Plaintiffs had no cause for concern". When he was asked what Koh actually said his answer was "Can't really recall."

19 Koh denied that he made any representation or gave any assurance that the defendant would pay or indemnify the plaintiff for sums due from SKS under the carpentry contract. Under cross-examination he said that on or about 26 December 1991 Toh introduced Tan to him at the administration office of SKS at the shipyard and when Tan saw him at the owner's representative's office Toh was not present. He said Tan wanted to know the outcome of the plaintiff's quotation. He reviewed the quotation. That took 10 minutes. He required the plaintiff to confirm delivery in mid-April 1992 and any track record of similar jobs. He wanted to know the plaintiff's past record. All that was over in about 15 minutes. He denied that Tan expressed concern that the plaintiff might not be paid or that he promised that the defendant would make payment.

20 In para 5 of the statement of claim it is pleaded that the plaintiff's first invoice for $92,000 was paid by a cashier's order issued by the Industrial & Commercial Bank and the next 4 invoices for sums totalling $253,000 were paid by the defendant through Austen Maritime Services Pte Ltd pursuant to the oral agreement referred to in para 2. The last 3 invoices for sums totalling $115,000 have not been paid. It is alleged that all the invoices were approved by the defendant's representatives. The defendant denies that the payments were made in pursuance of the oral agreement. The defence states that SKS was in financial difficulties and had requested advances. Kenton Marine was instructed to verify works done by the plaintiff and others against statements of account submitted by SKS. Upon verification of the works and subject to approval of SKS and the defendant the defendant would remit the funds for payment to be made by SKS.

Version No 1: 29 Oct 2026 (23:45 hrs)

21 The meeting between the defendant and SKS on 15 December 1991 and the executive action plan came about following the failure of SKS to deliver the vessel by the contractual delivery date which was 1 December 1991 and its request for advances to complete it. According to Roger Hawke who was one of the defendant's directors the defendant was prepared to advance the equivalent of 65% of the price which was $7.5m. Under the terms of the shipbuilding contract the price was payable as to 30% on signing of the contract which had been paid and 65% on delivery. In December 1991 the vessel was not ready for delivery and there was no further payment due to SKS. On 24 December 1991 the directors of SKS passed a board resolution to open a No 2 account with its bankers. The mandate to the bank required the signature of one of 3 nominees of the defendant jointly with that of one of 2 nominees of SKS. This account was however "frozen" by the bank and following a meeting on 25 January 1992 attended by representatives of the bank, the defendant and SKS the defendant committed itself to paying to the bank some $2m of the liabilities of SKS in respect of outstanding letters of credit in return for certain concessions from the bank including the release of the account. Advances were made by the defendant against written statements for release of funds submitted by SKS and as at 3 March 1992 SKS had been paid some $4.25m and US$250,000 as acknowledged in an agreement between the defendant and SKS dated 5 March 1992. Under cl 3 of the agreement the defendant agreed to make further payments to complete the construction of the vessel up to a total of 95% of the contract price. From 25 January 1992 when the defendant and SKS met with the bank these statements for release of funds for payment to sub-contractors were presented by SKS to the defendant. In respect of invoices from sub-contractors Koh said that his role "was to verify that the works were done by the sub-contractors, including the Plaintiffs, in accordance with industrial standards and contractual specifications. The invoices would then be referred to SKS for

Version No 1: 29 Oct 2026 (23:45 hrs)

payment". All the payments made to the plaintiff in respect of carpentry works were among the payments made in response to the statements of SKS for release of funds.

22 The plaintiff's case is that these payments to it were made by the defendant in accordance with the oral agreement sued on. From December 1991 the defendant was understandably concerned about the vessel and the ability of SKS to deliver it. It had paid 30% of the price and was being asked for advances in order to complete the vessel. If it refused the request the down payment might very well be lost along with the vessel in whatever state of completion it was. If it acceded to the request it would certainly wish to be assured that the money was being paid to complete the vessel or to obtain its release. That would be consistent with the executive action plan implemented on 16 December 1991, the mandate to the bank in respect of the No 2 account of SKS and the drawdown of funds from 25 January 1992 by SKS to pay the plaintiff and other sub-contractors. On my view of the evidence I am satisfied that the payment to the plaintiff of part of the price under the carpentry contract was made but not under the oral agreement as alleged and did not evidence the making of any such agreement. The payment was made by SKS with funds provided by the defendant under the arrangements made between SKS and the defendant.

23 There is no note or memorandum or anything in writing by anyone at all (other than the pleadings and documents prepared for the purpose of these proceedings) which contains any reference to the request or the oral agreement alleged in para 2 of the statement of claim or any of the terms of the alleged oral agreement. No document produced to the court made any such reference, not even any document prepared by or on behalf of the plaintiff. Quotations and revised quotations were said to have been submitted after the assurance of payment by the defendant as well as before but none of those among the

Version No 1: 29 Oct 2026 (23:45 hrs)

documents produced made any such reference. I observed during the hearing that the quotation dated 17 December 1991 (for furniture) unlike those dated 12 December 1991 (for doors) and 16 December 1991 (for panelling, ceiling, etc) did not provide for payment by letter of credit but there was no evidence to explain this apparent departure. However, it is to be noted also that the quotation for furniture is expressed to be valid for a package order with the order for "panelling, ceiling and doors". The carpentry contract was made between the plaintiff and SKS on 2 January 1992 which is within a week of the alleged request and oral agreement but makes no reference to such request or oral agreement. If the plaintiff had been so concerned about not being paid by SKS and had come to any arrangements with the defendant I would have expected at least a note to this effect. Much more so if the arrangements had only been made with Koh, a technical man and an employee not of the defendant but of Kenton Marine. But there was none. Tan's explanation for not having any letter to this effect was most unconvincing. The statement of claim alleges that Shah was also concerned but there is no evidence that anyone spoke to him or that he said anything or was present when anything relevant was said other than that he was working at his own desk which was in the same room where Koh saw Tan. There was no evidence of any request made to the plaintiff to enter into the carpentry contract with SKS as alleged in the statement of claim. On the evidence before me I am satisfied that the defendant, whether by Koh or by Shah or by anyone else, did not request the plaintiff to enter into the carpentry contract and did not agree orally or otherwise with the plaintiff to pay or otherwise indemnify the plaintiff in respect of any part of the price under the carpentry contract or any loss in connection with it and I find accordingly.

24 Authority of Koh Chye Heng

Version No 1: 29 Oct 2026 (23:45 hrs)

25 Mr Sreenivasan submitted that Koh had actual implied authority under the executive action plan. The plan is set out in a document in the agreed bundle and is in these terms:

26 " Executive Action Plan

27 Supervision/Project Management of Construction for SKS Hull Nos 698 and 700

28 1. WTB instructed that KML will take over the Supervision/ Project Management of completion of both SKS Hull Nos 698 and 700.

29 2. WTB confirmed that KEN NAGY will be the overall Manager of the supervision team ....

30 ....

31 KEN NAGY will closely liaise with SKS who have agreed that KEN NAGY will be given full access to all financial matters and commercial and operational decisions concerning with the building of SKS 698 and 700. This will also include full accessibility to quotations and estimates (prepared by SKS) of progress and purchasing documents.

32 KEN NAGY and his team leader will be allowed to participate with subcontractors and vendors negotiations with SKS (sic) and have the power to either appoint/sack the contractors or to put up alternative proposals.

33 3. ....

34 4. ....

35 5. ....

36 6. Mr Koh Chye Heng will be the team leader and will be stationed at WTB Representative office. Mr Koh Chye Heng will be assisted by two extra men (one hull and one other trades) and Mr Shah. It should be noted that in Mr Shah's case, he has other WTB duties to perform as well as the duties will be assigned to him by Mr Koh Chye Heng. It must be also understood that he is the WTB Representative has the right to ask questions if he feels that it is for the good of the project.

37 6(a).....

38 7. ... Whilst Koh Chye Heng must be given immediate and full access to all materials to enable him to estimate exactly the costs involved in finishing the ships.

39 8. ....

40 For and on behalf of WESTERN TUG & BARGE CO PTY LTD

41 Signed NIGEL DALTON General Manager

42 Date: 16th Dec 1991 "

43 "WTB" is the defendant and "KML" is Kenton Marine. The defendant had also contracted with SKS for the construction of another vessel provisionally known as Hull 700.

44 This passage from Halsbury's Laws of England (4th Ed) Vol 1(2) para 52 contains what I agree is an accurate statement of the law:

45 "The implied authority of an agent extends to all subordinate acts which are necessary or ordinarily incidental to the exercise of his express authority. It does not, however, extend to acts which are outside the ordinary course of his business, or which are neither necessary nor incidental to his express authority."

46 Koh was authorised to participate in negotiations between SKS and its sub-contractors. He had the "power to either appoint/sack the contractors or to put up alternative proposals". I will assume in favour of the plaintiff for the present purpose that contractors is a reference to sub-contractors. Koh was the team leader and as the defendant's representative had the right to ask questions. What I have to decide is whether entering into the oral agreement alleged is necessary or ordinarily incidental to his express authority as set out in the executive action plan. Mr Sreenivasan did not address me on this at all. Nevertheless I have given this due consideration and I am satisfied that it is neither necessary nor incidental to his express authority and if Koh did enter into the oral agreement alleged in para 2 of the statement of claim then he had no authority to do so on behalf of the defendant and the defendant is not liable.

Lim Teong Qwee JC

N Sreenivasan and Chua Swee Leen for plaintiff
Leong Kah Wah and Eric Tan for defendant

Version No 1: 29 Oct 2026 (23:45 hrs)