IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 298

Suit 1646/1993

Between

SAL Industrial Leasing Ltd

… *Plaintiff*

And

Hydtrolmech Automation Services Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Companies — Capacity; Companies — Directors — Powers; Companies — Directors — Managing directors; Contract — Contractual terms — Rules of construction; Contract — Mistake — Non est factum; Credit and Security — Guarantees and indemnities; Credit and Security — Guarantees and indemnities

Version No 1: 20 Nov 2026 (00:35 hrs)

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SAL Industrial Leasing Ltd v Hydtrolmech Automation Services Pte Ltd and Others

[1997] SGHC 298

Suit 1646/1993
Judith Prakash J
14 November 1997

Judgment:

JUDITH PRAKASH J

Cur Adv Vult

The first defendant, Hydtrolmech Automation Services Pte Ltd (the company), carried on the business of ship repairers. In October 1990, it entered into a factoring agreement with the plaintiffs. At the same time, the second and third defendants signed a joint and several guarantee in favour of the plaintiffs. The second defendant, Mr Yeo, and the third defendant, Mr Lin, were then the sole directors and shareholders of the company.

2.On 17 May 1993, the plaintiffs terminated the factoring agreement and demanded that the company pay them the sum of $427,216.18 by 25 May 1993. On 4 June 1993, letters of demand were sent to the second and third defendants for the sum of $430,384.34 outstanding as at 2 June 1993 together with interest at the specified rate. No payment being received, this action was commenced

Version No 1: 20 Nov 2026 (00:35 hrs)

against all three defendants on 30 July 1993. The amount claimed was that outstanding as at 2 June 1993.

3.Mr Lin had resigned from his directorship in January 1993. He entered an appearance to the action and proceeded to contest it vigorously. Neither the company nor Mr Yeo, however, took any part in the proceedings. At some stage, Mr Yeo absconded from Singapore. In November 1993, the plaintiffs obtained judgment in default of appearance against the company and Mr Yeo for the sum of $387,385.63, interest thereon at the rate specified in the factoring agreement and costs on a solicitor and client basis. Mr Lin continued to resist the claim and whether he is liable to the plaintiffs under the guarantee is the issue which I have now to decide.

4. **Background**

Mr Lin first became acquainted with Mr Yeo in 1987. The latter was then employed by a ship repairing company and used to buy rubber articles from a family business in which Mr Lin worked. In 1990, Mr Yeo set up a partnership with a third party to carry on business as a ship repairer. Shortly thereafter, his partner left and Mr Yeo then invited Mr Lin to join him as a new partner in the business called `Hydtrolmech Automation Services` (the partnership).

5.The two men discussed the proposed business and agreed that the partnership should be converted into a private limited company as soon as possible and that Mr Yeo would be the active partner and director seeing to the day-to-day running and administration of the business whereas Mr Lin would be a dormant partner whose main contribution would be an infusion of capital. On 25 June 1990, Mr Lin was admitted as a partner. Shortly thereafter, Mr Yeo informed

Version No 1: 20 Nov 2026 (00:35 hrs)

Mr Lin that the partnership was having cashflow problems because one of its big customers, Sembawang Shipyard Ltd (Sembawang), was slow in payment. Mr Yeo suggested that this cashflow problem be resolved by factoring the partnership`s invoices to the plaintiffs.

6.The plaintiffs first came into contact with the partnership and its partners in July 1990. They were referred to the partnership by a supplier. The main person who dealt with the partnership on behalf of the plaintiffs was Ms Teo Lay Sim who was then an account officer. In early July, she paid a visit to the partnership`s office together with a colleague and explained to Mr Yeo how a factoring facility worked. After that, Ms Teo put in a credit application to the management of the plaintiffs and the plaintiffs then decided to offer the partnership a $300,000 factoring line.

7.On 6 July 1990, the plaintiffs issued a letter of offer to the partnership whereby they offered to extend the latter a factoring line of up to $300,000. The main terms of the facility were that the partnership would have to pay a factoring discount charge and a service charge and, prior to the plaintiffs collecting payment from the customer on the factored invoices, would receive, at the plaintiffs` discretion amounts not exceeding 70% of the face value of the invoices factored. Further, all invoices that were not settled by the customers within 180 days after the due date would be reassigned to the partnership. The plaintiffs required both partners to sign a joint and several personal guarantee in their favour in respect of the facility. By an appendix to the letter it was made clear that the only invoices which the plaintiffs would accept for factoring were those issued to Sembawang and that the maximum aggregate amount which the plaintiffs would advance on such invoices (ie the advance limit) would be $300,000.

Version No 1: 20 Nov 2026 (00:35 hrs)

8.Ms Teo took the letter of offer to the partnership`s office together with copies of the plaintiffs` standard form factoring agreement and guarantee. There she met both partners. The copies of documents produced in court show that the plaintiffs` letter of offer was accepted on 6 July 1990 itself by both partners signing on behalf of the partnership. The same day, both also signed the factoring agreement on behalf of the partnership and signed the joint and several guarantee as the joint and several guarantors. Their signatures on all documents were attested to by Ms Teo.

9.According to Ms Teo, before the documents were signed, she explained to both men the facilities contained in the letter of offer. She told them that in order to obtain the facilities they would have to sign the factoring agreement and the guarantee. She explained that the guarantee was made in their personal capacity and that if there was any default in payment or advances or loans outstanding, they would be personally liable for the same. She also explained briefly the mechanics of the factoring facility.

10.On 12 October 1990, the company was incorporated to take over the business of the partnership and to carry on business as ship repairers. Mr Yeo and Mr Lin were the promoters and initial directors and shareholders of the company. At some stage, Mr Yeo informed Ms Teo that they were converting the partnership into a company and he was told that because there was a change in the business entity, the plaintiffs would require a fresh set of documents to be signed for a similar facility to be given to the company. Mr Yeo agreed to this.

11.On 18 October 1990, the plaintiffs prepared a fresh letter of offer in respect of the facility to the company. Most of the conditions in the new letter were the same as those in the letter of 6 July 1990 to the partnership. On 23 October

Version No 1: 20 Nov 2026 (00:35 hrs)

1990, Ms Teo went to the company`s office. She took with her the new letter of offer, a new factoring agreement and a new guarantee. According to her evidence, both directors were present when the documents were handed over. The letter of offer and the factoring agreement were signed by Mr Yeo on behalf of the company and the guarantee was signed by both directors. Again, Ms Teo acted as witness. After the signing was over, she took all the documents back with her to the plaintiffs` office for signature by the plaintiffs` authorised officers.

12.On 9 July 1991, the plaintiffs wrote to the company referring to a recent request made by Mr Yeo and stating that they were agreeable to reallocating the company`s factoring line of $300,000 to include invoices issued to Keppel Corporation Ltd. The company accepted the terms and conditions of this offer on 9 July. The acceptance was signed by Mr Yeo on behalf of the company and both Mr Yeo and Mr Lin signed an indorsement stating `we hereby agree to guarantee due performance of the terms and conditions of the above factoring facility`. On 21 October 1991, a further letter of offer was issued by the plaintiffs. By this letter, the plaintiffs increased the company`s credit line from $300,000 to $500,000 and approved three customers viz Jurong Shipyard Ltd for $200,000, Keppel Corporation Ltd for $150,000 and Sembawang for $150,000. The company accepted the offer on 3 November 1991 and once again the two guarantors signed an indorsement guaranteeing the facility.

13.On 19 June 1992, the plaintiffs revised the facility further. They offered to reallocate the factoring line of $500,000 based on the following revised credit limits: $50,000 for Keppel Corporation Ltd, $300,000 for Sembawang, $50,000 for Jurong Shipyard Ltd and $100,000 for Esso Singapore Pte Ltd (Esso). This letter of offer was accepted by Mr Yeo on behalf of the company on 24 June

Version No 1: 20 Nov 2026 (00:35 hrs)

1992. There was no indorsement signed by the guarantors and the stand taken by Mr Lin throughout this action has been that he knew nothing about this revised offer of June 1992.

14.Mr Lin said that if he had known about it, he would not have agreed since it meant that the plaintiffs were allowing the company to increase the quantum of Sembawang invoices factored by $150,000 and also to factor up to $100,000 worth of invoices to Esso. This was because he was having problems with Mr Yeo. He had not received any salary from the company since August 1990; no accounts of either the partnership or the company had been furnished to him despite requests; and, in January 1992, he had been informed by Mr Yeo that the latter was having problems collecting payment from Sembawang. Therefore, he was not in favour of any increase in facilities in respect of Sembawang.

15.On 9 January 1993, Mr Lin sold his 50,000 shares in the company to Mr Yeo`s wife. At the same time, he resigned as a director of the company and Mdm Tan Hwee Eng (Mrs Yeo) was appointed a director in his place. Mr Lin was under the impression that the guarantee he had given was only for the duration of his term of office as a director. Thus, on the same day, he telephoned Ms Teo to give the plaintiffs oral notice of his resignation. During the conversation, he was informed that the plaintiffs had advanced certain sums to the company which were still outstanding.

16.By April 1993, the plaintiffs had realised that something had gone seriously wrong in the company. Many of the invoices it had issued to Esso and Sembawang, and which the plaintiffs had purchased, remained unpaid despite more than 180 days having passed since their issue. Further, Esso had indicated

Version No 1: 20 Nov 2026 (00:35 hrs)

that an invoice for $101,103.30 which the plaintiffs had sent to them for collection was not acceptable as the correct amount due was only $25,000 and Esso wanted an amended invoice from the company. Secondly, Sembawang had denied receiving invoices totalling some $522,802.70 which the company had factored to the plaintiffs. The plaintiffs noted that these discrepancies were in breach of the terms stated in the factoring agreement and told the company that if the problems were not resolved by 22 April 1993, they would institute action to recover the amounts owed. Mr Yeo did nothing and on 17 May 1993, the plaintiffs terminated the factoring agreement and called on the company to repurchase the outstanding debt.

17. **The pleadings**

Both parties amended their pleadings several times and even during the course of the trial itself which led to the trial process being prolonged. I will set out the averments in the re-re-amended statement of claim in its final form in some detail and then go on to consider the various defences raised.

18.The statement of claim relied heavily on the written factoring agreement dated 23 October 1990 (the agreement). Paragraph 1 stated that by this agreement, the plaintiffs agreed to purchase from the company and the company agreed to sell to the plaintiffs certain book debts owed to it by its customers. Paragraph 2 set out the following provisions of the agreement:

> *Clause 15*
>
> (1) Whenever [the plaintiffs`] right of recourse against [the company] arises in respect of any debt or part thereof, the plaintiffs shall be entitled forthwith to debit [the company`s] account with [the plaintiffs] with the amount of that debt or that part thereof.

Version No 1: 20 Nov 2026 (00:35 hrs)

> (2) Without prejudice and in addition to the preceding cl 15(1), if and where a customer raises any dispute over an invoice or as to his liability to pay a debt or any part thereof on its due date, [the plaintiffs] shall be entitled forthwith to debit [the company`s] account with [the plaintiffs] with the amount of that debt or that part thereof.
>
> (3) Without prejudice and in addition to the generality of cl 15(1) hereof, if a customer refuses for any reason or neglects to pay a debt or any part thereof on its due date, [the plaintiffs] shall be entitled forthwith to debit [the company`s] account with [the plaintiffs] with the amount of that debtor or that part thereof.

19.The plaintiffs then went on to refer to the guarantee signed, inter alia, by Mr Lin, whereunder in consideration of the plaintiffs agreeing to grant and continuing to grant credit facilities to the company, Mr Lin agreed to guarantee payment to the plaintiffs, upon written demand, of all sums due and/or payable by the company to the plaintiffs. The guarantee also contains a clause providing for the guarantors to bear the plaintiffs` costs of granting the facilities to the company, including costs of enforcement, on a solicitor and client basis.

20.In para 5 the plaintiffs pleaded that they purchased debts owing by the company`s customers to it and made initial payments to the company pursuant to cl 8(2) of the agreement. During the period from December 1991 to 22 July 1992, the company offered to sell and the plaintiffs purchased debts having a face value of $664,063.65. The plaintiffs pleaded that the customers failed to pay the debts to the plaintiffs by their respective due dates and up to the date of the action, the debts remained substantially unpaid. As a result, the company was in breach of its warranty and undertaking relating to due payment of the debts and the plaintiffs` right of recourse against the company had arisen pursuant to the agreement.

21.As an alternative plea, the plaintiffs said that the customers had disputed the debts and refused to pay them and the plaintiffs thereby became entitled under

Version No 1: 20 Nov 2026 (00:35 hrs)

cl 15(2) and (3) of the agreement to debit the company`s account with the amount of the debts. Despite the plaintiffs` demand that they do so, the company failed to resolve the dispute raised by the customers on the debts.

22.By reason of the non-payment/disputes relating to the debts, the company was in breach of the agreement and the plaintiffs were entitled pursuant to cl 21(4)(a) to terminate it forthwith and upon such termination to require the company to re-purchase the debts. By their letter of 17 May 1993, the plaintiffs required the company to effect the re-purchase by settling what they termed as the `funds in use` and discount charges which then amounted to $427,216.18. As at 2 June 1993, a sum of $430,384.34 was due and payable by the company to the plaintiffs. The company did not pay any part of this sum.

23.In paras 7 and 8 the plaintiffs pleaded facts which they said entitled them to rely on cl 3 of the guarantee which provides for certain matters to be conclusive evidence as against the third defendant of the company`s liability to the plaintiffs.

24.The relief claimed in the statement of claim was the sum of $388,255.52 and interest or alternatively the sum of $387,385.63 and interest.

25. **Mechanics of the factoring facility**

It may be helpful to explain, briefly, how the factoring facility which the plaintiffs extended to the company worked. Basically, the mechanism was set out in the agreement but, as the agreement`s main purpose was to record legal obligations and liabilities, the operational aspects of the factoring line do not clearly appear there. These were gleaned from the evidence.

Version No 1: 20 Nov 2026 (00:35 hrs)

26.The factoring process started when the company, pursuant to cl 2 of the agreement, offered to sell to the plaintiffs debts owing from its customers. Each offer was made by the company completing a standard form Schedule of Offer which contained particulars as to, inter alia, the customer`s reference, the invoices under which the debts to be sold were owing and the amounts due under such invoices. Each Schedule of Offer was supposed to be accompanied by copies of the invoices and documents such as work orders evidencing that the work for which the invoices had been rendered had actually been contracted for and carried out.

27.In making an offer to sell debts to the plaintiffs, the company was deemed by cl 3 of the agreement to give warranties that the particulars contained in the offer and the information and documents furnished by the company were complete and correct and that each debt included in the offer related to actual and bona fide services actually performed and was and would be legally enforceable against the customer in full without any counterclaim or other defence.

28.Once the offer was made, it could be accepted by the plaintiffs and the debt purchased in one of two ways. First, they could signify their acceptance by making payment to the company of any sum on account of the purchase price of the debt. Alternatively, if they did not make payment but simply kept quiet and did not notify the company within seven days of receiving the offer that they did not want to purchase the debt, then the plaintiffs would have been deemed to have purchased it at the end of that seven-day period.

29.Under the agreement the plaintiffs had no obligation to pay the company immediately upon purchase of a debt. Their payment obligation only arose after

Version No 1: 20 Nov 2026 (00:35 hrs)

they had collected the proceeds of the debt from the customer concerned. The plaintiffs could, however, at the request of the company, make an advance payment of part of the purchase price of the debt at any time prior to their receipt of payment from the customer. This advance payment was termed an `initial payment`. In the case of the company, each initial payment was limited to 70% of the face value of the invoices tendered. This did not mean, however, that the company would receive the full 70% of any invoice purchased.

30.Assuming that an invoice for $100 was submitted and at the time there was $100 available, the initial payment would probably be $65. This is because the plaintiffs would take the maximum figure of $70 payable and deduct from it their service charge of 1% of the face value of the invoice. In this case, that would be $1 making the maximum amount payable $69. Generally the plaintiffs would not advance that maximum amount but would round it downwards and pay the company $65. The plaintiffs would then round the figure down to $65 and pay that to the company. The amount advanced plus the service charge ie $66 would be debited to the company`s account in the plaintiffs` books. At the end of the month, the plaintiffs would debit, additionally, their factoring discount charge (provided for under cl 13) on the amount of $65. If this was $3 then the total amount debited at the end of the month would be $69. This total figure ie the initial payment of $65 plus the service charge of $1 plus the factoring discount of $3 would at the end of the month be what the plaintiffs referred to as the `funds in use` or FIU. So all initial payments made to the company, all service charges and all factoring discounts were debited to the funds in use. When the plaintiffs received payments from the company`s customers, they would credit 70% of such payments to the funds in use and pay the other 30% back to the company. Thus, using the example I gave earlier, if the invoice of $100 purchased by the plaintiffs was settled in full at the

Version No 1: 20 Nov 2026 (00:35 hrs)

beginning of the month following that in which it had been purchased, the plaintiffs would keep $69 being the outstanding funds in use and would pay $31 to the company.

31.It should be noted that the plaintiffs were only willing to factor invoices which, when submitted, had not been outstanding for more than 180 days ie not more than 180 days had passed since the due date of the invoice. If an invoice which had originally qualified for purchase subsequently became disqualified because after 180 days it had still not been paid, it was classed as an ineligible invoice and the plaintiffs could require the company to re-purchase it and/or debit the company`s account with the amount of that debt.

32.To ascertain whether the amount available to be paid to the company was $65 or less, the plaintiffs would go through a rather complicated calculation. First, they would ascertain the total face value of all invoices factored so far including the face value of the new invoice for $100. They would then deduct from that figure the face value of all invoices which had become ineligible and a sum equivalent to 30% of the eligible invoices (the 30% represented the difference between the face value of the invoice and the maximum initial payment). They would then deduct the sum of the funds in use. The resulting figure could be either a negative or a positive one. If it was a positive one equal to or more than $70, then the plaintiffs would advance $65. If it was, say, $40 then the plaintiffs might advance $30. But if it was a negative figure then no initial payment at all would be made and in fact the company might be asked for some repayment.

33.Under the agreement, the plaintiffs had the sole and exclusive right of collecting and enforcing payment of every debt purchased, but if the plaintiffs

Version No 1: 20 Nov 2026 (00:35 hrs)

so requested, the company had to co-operate to procure and enforce collection of the debt. The company was also required to endorse on the original and every copy of each invoice relating to the purchased debt, a notice of assignment of the debt in the form prescribed.

34.Under cl 6 of the agreement, whenever: (a) any debt purchased or any part of it remained unpaid after becoming due or (b) if there was any breach of the warranties and undertakings given by the company, the plaintiffs would have a right of recourse to the company to the fullest extent of the debt. Under cl 15(1) whenever such right of recourse arose in respect of any debt, the plaintiffs were entitled to debit the company`s account with them with the amount of that debt. The plaintiffs also had power under cl 21 of the agreement to terminate it by notice in writing if the company was in breach. Upon such termination, the plaintiffs were entitled to: (a). require the company to re-purchase all or any unpaid debts which the plaintiffs had bought at their then outstanding face values;

(b). forthwith debit the company`s account with the full face values of such debts; and

(c). call upon the company to pay any debit balance in its account.

The issues:

(1) Was there a valid contract between the plaintiffs and the company?

35.The third defendant`s first plea in his defence was a denial that the plaintiffs and the company had entered into a written factoring agreement and he put the plaintiffs to strict proof of this allegation. In closing, his argument was that

Version No 1: 20 Nov 2026 (00:35 hrs)

neither the letter of offer from the plaintiffs nor the agreement was binding on the company.

36.It would be recalled that the letter of offer dated 18 October 1990 was purportedly accepted by Mr Yeo on behalf of the company. Ms Teo`s evidence was that Mr Yeo had signed both the acceptance and the agreement in his office on 23 October 1990 in her presence and that of Mr Lin. Mr Lin, however, testified that he had not seen either document on that occasion and neither had he seen Mr Yeo sign them. His arguments as to why Mr Yeo`s signature did not bind the company were as follows: (1). the letter had been addressed to Mr Yeo himself and not to the company;

(2). the resolution which the company had passed at the request of the plaintiffs had referred to an acceptance of `working capital facilities` and not a factoring agreement;

(3). no common seal was affixed to either document; and

(4). the letter was more liberal and less onerous than the agreement.

The last point, is, in my view, a non-starter. The fact of the terms of the letter being more advantageous to the company than the agreement (if indeed they were) does not render either of the documents a nullity if they have been duly entered into by the company. It would only be a question of construction to determine which terms prevailed.

37.There is no real substance in the first argument either. Whilst it is correct that the letter of offer was addressed to `Mr John Yeo, Director, Hydtrolmech Automation Services Pte Ltd` followed by the address of the company, the form

Version No 1: 20 Nov 2026 (00:35 hrs)

of address by itself did not mean that in fact the plaintiffs were making an offer to Mr Yeo personally rather than to the company. In order to ascertain to whom the offer was made, the letter has to be construed as a whole. Such a construction establishes without a doubt that the offeree was the company. First, it is clear from an overall reading that the letter was sent out in respect of factoring facilities for invoices rendered to Sembawang relating to works done for Sembawang. As all parties were aware at the time, the entity that was rendering ship repairing services to Sembawang was the company and not Mr Yeo personally. Secondly, there were several references to the company in the letter. For example, under para C(1), it was specified that the company`s paid up capital had to be at least $100,000 before the facilities could be activated. Also, para C(2) made reference to the existing factoring account of the partnership ceasing upon activation of the new account. Then, in para D, the plaintiffs stated that `your company` was required to submit half yearly unaudited financial statements and annual audited statements. In para G(a), it was stated that the facilities would be rescinded or cancelled should there be a significant change in the shareholding structure and/or shareholders of the company, a material adverse change in the company`s financial position or any legal proceedings instituted against the company or any one of the directors/shareholders. All these references made it clear that the facility was being offered to a legal entity which took the form of an incorporated body and not to Mr Yeo personally.

38.The next objection relates to the resolution which the company passed on 18 October 1990. The third defendant, Mr Lin contends that he had no knowledge of this resolution and that he had not been a party to it. The document which the plaintiffs produced in court as being the resolution furnished to them was an extract of the resolution confirmed as a true copy by Mr Yeo (signing as chairman) and Mr Henry HS Ng, the company`s secretary. One of the

Version No 1: 20 Nov 2026 (00:35 hrs)

documents in the third defendant`s bundle was a letter from Mr Ng to the third defendant. In this letter which was a reply to a query made on the latter`s behalf, Ng said that to the best of his knowledge and belief, prior to signing the certified true copy of the resolution in question, he followed his usual procedure of sighting the original to see that the certified extract was similar to it and that the resolution had been signed by all or the majority of the directors. Only then did he certify the extract as a true copy. The third defendant did not call Mr Ng as a witness and I can only infer that this was because Mr Ng`s testimony would not have supported his contention that he did not sign the original resolution. I therefore accept that the original resolution was duly passed by both directors at the material time. In any case, even if the third defendant did not sign the resolution, the plaintiffs had no knowledge of this irregularity and are protected by the well known rule in **Royal British Bank v Turquand** [1856] 6 E & B 327 whereby persons dealing with a company need not enquire into the regularity of its internal proceedings and may assume that everything has been done regularly. In this case, the plaintiffs were faced with an extract of a directors` resolution which appeared to be a true extract and issued in the normal fashion of such extracts. They were perfectly justified in taking it at face value and the third defendant cannot question the regularity of the resolution at this stage.

39.The resolution reads as follows:

> *Resolved:*
>
> *Working Capital Facilities*
>
> *That the company accepts the offer of working capital facilities from SAL Industrial Leasing Private Ltd, Singapore, under the terms and conditions enumerated in the letter of offer dated 18 October 1990 (Ref: SAL/TLS/160/90).*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *That Mr John Yeo Jui Meng or Mr Lin Hwee Guan be authorised on behalf of the company from time to time to conclude with SAL Industrial Leasing Pte Ltd such variations to the working capital facilities as such directors may deem desirable.*
>
> *That the common seal of the company be affixed in accordance with its articles of association, to all legal documents relating to the said working capital facilities.*

40.Mr Lin says the above resolution was an acceptance of a working capital facility. No mention at all was made of a factoring line or agreement and therefore the company was not agreeing to enter the agreement. This argument is fallacious. In relation to the acceptance of working capital facility, specific reference is made to the terms and conditions in the letter of offer dated 18 October 1990 reference SAL/TLS/160/90. The letter with that reference is the letter referred to above which all parties accept was a letter relating to a factoring facility and a factoring agreement. They could not do otherwise. The letter mentioned a factoring discount charge, it refers specifically to cl 6 of the factoring agreement and it talked about `activation of the new factoring account`. I am satisfied that the term `working capital facilities` as used in the resolution was intended to refer to the factoring facility specified by the letter of offer and that it was this facility that was accepted.

41.The resolution authorised the affixing of the common seal of the company to all legal documents relating to the working capital facilities. There were only two of these: the letter of offer itself and the agreement. Neither was signed under seal. They were both signed by Mr Yeo and Mr Lin now says that the former did not have the authority to do so and the documents are not binding on the company.

Version No 1: 20 Nov 2026 (00:35 hrs)

42.The established principle of company law is that directors act collectively unless specifically authorised to act individually. As stated in ***Company Law*** (5th Ed) by RR Pennington:

> *In the absence of different provisions in a company`s memorandum or articles of association, in general its directors can only exercise their powers collectively or collegiately, by resolving at properly convened meetings of the board of directors that act shall be done in the company`s name. They are not like partners, who have authority to represent their firm individually and to enter into transactions on its behalf for the purpose of carrying on its business in the usual way without the concurrence of their fellow partners (p 134).*

and

> *By the general law directors can act on behalf of the company only at board meetings at which their collective decisions are expressed by resolutions. They have no power to act individually as agents for the company. This applies equally to the chairman of the board of directors, who is distinguished from other directors only by the fact that he presides at board meetings (p 141).*

43.The same textbook also discusses the rationale for the fact that the rule in ***Turquand*** `s case does not apply to the situation where a third party is dealing with only one director of a company. If it did, then such person might be entitled to assume that the board had delegated to this one director the powers which he pretended to assume. As explained by Mr Pennington:

> *The reason for the exclusion of the* ***Turquand*** *rule, however, is the purely practical one that if it did apply, each director would be invested with apparent authority to enter into transactions on the company`s behalf without consulting his fellow directors, and this would be destructive of the system of collective management by the board on which our company law is based. Collective management is the normal system, and everyone dealing with the company must be taken to know that it is. Individual acts of management by directors are, in theory, exceptional, and persons relying on them must therefore be able to show not only that they might be regular, but also that they were either regular, or, at least, that the organ of the company responsible for*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *collective management, the board of directors, held them out to be regular (p 147).*

44.The above passage is particularly apropos to our present situation. The plaintiffs here must be taken to know that the directors had to act collectively unless specifically authorised to act individually. In fact, the evidence is that they did know this since it was the plaintiffs who drafted the resolution in question and the resolution clearly confers on each director authority to individually conclude with the plaintiffs such variations to the facility as such director might deem desirable. The plaintiffs must have known that no such authority was given to either Mr Yeo or Mr Lin in respect of the original letter of offer and the agreement since the resolution went on to provide that other `legal documents` be executed under seal.

45.The plaintiffs argue that the articles of the company empowered it to appoint a managing director and to delegate to such managing director all the powers vested in the board. They say Mr Yeo was the managing director and therefore he had the authority to sign the documents even without a specific resolution. There is, however, no evidence that he was ever so appointed. In all the company`s documents which he signed on behalf of the company, the company`s stamp which appears below his signature shows his designation as director only. The plaintiffs themselves in all their letters to him addressed him as `director` and not as `managing director`. They say that he should be considered the managing director because he acted as such. At the time the documents were signed, however, the company had been incorporated for less than two weeks and there had not been such a course of conduct by Mr Yeo as a director of the company which entitled them to assume that he was also its managing director.

Version No 1: 20 Nov 2026 (00:35 hrs)

46.In my judgment therefore, Mr Yeo was not authorised by the company to sign either the agreement or the letter of offer solely and the company may have been able to resile from its obligations thereunder. As far as the company is concerned, however, it is very strongly arguable that both these documents were impliedly ratified by the board thereafter since the company acted on them for a period of almost two years during which it submitted invoices to the plaintiffs to be factored and accepted from the plaintiffs not only the initial payments in respect of such invoices but also its portion of all collections made by the plaintiffs on the invoices. The plaintiffs did not, however, plead such ratification and thus cannot rely on it vis-a-vis the third defendant in these proceedings.

47.What the plaintiffs have pleaded in their reply is that Mr Lin is estopped from saying that he did not know of or consent to the letter of offer and the agreement. This pleading was in response to para 9H of the re-re-amended defence whereby Mr Lin averred the guarantee was discharged by injurious, prejudicial or unequitable conduct on the part of the plaintiffs among which was failing to disclose the letter of offer and the agreement to the third defendant and failing to get his consent to them. The estoppel, if any, does not relate to the lack of authority on the part of Mr Yeo and therefore it is irrelevant to this issue. The conclusion is that the plaintiffs have not been able to establish vis-a-vis the third defendant that the agreement was entered into. What is the consequence of this? The answer depends on the width and true construction of the guarantee.

(2) The effect of the guarantee

48.The plaintiffs had pleaded that in consideration of their agreeing to grant and continuing to grant credit facilities to the company or alternatively entering into the agreement with the company, the second and third defendants jointly and

Version No 1: 20 Nov 2026 (00:35 hrs)

severally agreed to guarantee payment to the plaintiffs, upon written demand, of all sums due and payable by the company to the plaintiffs. The third defendant does not deny signing the guarantee on 23 October 1990. He does, however, raise several issues as to its validity and effectiveness.

49.The first issue relates to the consideration for the guarantee. Clause 1 of the guarantee expressed the consideration as follows: `in consideration of your agreeing at my/our request to grant and continue (sic) to grant credit facilities to [the company]`. The third defendant says that the plaintiffs have not pleaded nor led any evidence showing any agreement to grant (let alone, continue to grant) credit. The guarantee should be construed contra preferentem and its application should be limited only to any credit facilities ie loans extended to the company and not to any payments of price made to it. If the initial payments were of price as pleaded then the guarantee clearly did not apply to the funds in use which were an account of initial payments, service charge and factoring discount charge and not loans. If the payments were loans, then this was not pleaded by the plaintiffs.

50.The third defendant`s argument turns on the meaning to be attributed to the words `grant credit`. As submitted by the plaintiffs, it is a rule of construction that commercial contracts must be construed in the way the reasonable businessman would understand them ie in a commercial sense. In such construction, one must also have regard to the surrounding circumstances. In **Reardon Smith Line Ltd v Hansen-Tangen** [1976] 3 All ER 570, Lord Wilberforce said:

> *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 purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the contracts, the market in which the parties are operating.*
>
> *It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or of object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in situation of parties it is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like `knew or must be taken to have known` (at pp 574-575).*

51.It is recognised by legal practitioners and businessmen alike that the factoring of book debts and similar financial transactions where the substance is one of sale and not loan (eg block-discounting schemes) are methods for the provision of finance and though legally structured as purchases, commercially they are the same as lending money. Lord Wilberforce himself in the case of **Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd** [1992] BCLC 609 stated that block-discounting was essentially a method of providing finance and commercially and in its economic result it did not differ from lending money at interest. In other cases too, judges have recognised that financing can be done either by way of a purchase or by means of a transaction of sale. See for example **Re George Inglefield Ltd** [1933] Ch 1. Academics also accept this position and in the book ***Factoring Law and Practice*** (2nd Ed) by F Salinger, factoring is defined as `the purchase of debts for the purpose of providing finance or relieving the seller from administrative tasks or from bad debts or for any two or all of such purposes` (at p 2).

Version No 1: 20 Nov 2026 (00:35 hrs)

52.The evidence showed that Mr Lin knew that the company had cashflow problems caused by slow payment by Sembawang and that it did not have much money. He knew that the company would not be paid immediately it issued its invoices. Probably he knew that credit terms had been agreed to. He definitely knew that the purpose of taking the factoring facility was to solve the cashflow problem and that on selling its invoices to the plaintiffs, the company would receive up to 70% of the invoiced amount prior to payment by Sembawang or other approved customers. He agreed that this was similar to borrowing money from a bank. He also knew the plaintiffs would collect payment from the customers but that the terms of the facility were such that if the customers did not pay, the company would have to pay the plaintiffs the amount of the invoice.

53.The object and commercial purpose for the factoring facility offered by the plaintiffs which the company in its resolution accepted was to raise immediate finance for use by the company in its operational expenses. In these circumstances, I think that the description of the consideration in the guarantee ie grant credit, was wide enough to cover the factoring facility offered and actually made use of by the company even though in form, that facility was a facility for the purchase of debts and was not a loan facility. There can be no doubt that by reason of the facility, the company obtained finance for its activities and, since the factoring was done on recourse terms, in the commercial sense that finance had to be regarded as essentially in the nature of credit. It is also noteworthy, though perhaps not strictly germane, that the third defendant himself made a point of saying that he had been told that the guarantee was to be given for the purpose of the company obtaining factoring facilities. He was not under any misapprehension therefore as to the nature of the underlying transaction that he was guaranteeing. I therefore hold that the guarantee does

Version No 1: 20 Nov 2026 (00:35 hrs)

cover indebtedness of the company to the plaintiffs arising out of the factoring facility utilised.

(3) The conclusive evidence clause

54.I have held, however, that the plaintiffs have not established that the agreement was validly entered into and binding on the company. Thus they cannot rely on the terms of the agreement to establish the company`s indebtedness to them. Does that mean that the third defendant has no liability under the guarantee? The plaintiffs` argument is that by cl 1 of the guarantee, the third defendant agreed to pay all sums due and/or payable by the company to the plaintiffs and that this indebtedness has been established and cannot be disputed by the guarantor because of the effect of cl 3 of the guarantee. This clause reads as follows:

> *Any acknowledgement in writing by the company or by any person authorised by the company of the amount of his/its indebtedness (whether such acknowledgement be express or implied) shall be conclusive evidence of such indebtedness against me/us and any judgment obtained by you against the company or proof in bankruptcy or winding up or any statement of account furnished by you certified by any of your authorised officers shall be binding and conclusive on and against me/us, my/our executors and administrators or successors.*

55.It is immediately apparent that the clause is divided into two segments. The first relates to an admission by the principal debtor itself whilst the second relates to matters external to the debtor which the clause deems conclusive evidence of the existence and quantum of the indebtedness. This is the section of the clause which the plaintiffs seek to invoke. First, in para 7 of the statement of claim, the plaintiffs state that by their solicitors` letter dated 14 December 1993 they demanded payment of $388,255.52 from the third defendant and enclosed with this letter was `the plaintiffs` statement of account dated 9

Version No 1: 20 Nov 2026 (00:35 hrs)

December 1993 accompanied by the plaintiffs` senior manager operations, Ms Monica Heng`s certificate dated 9 December 1993 confirming that the amount of $388,255.52 was due and owing by [the company] to the plaintiffs as stated in the plaintiffs` said statement of account`. They pleaded that these documents satisfied one limb of the second section of cl 3. Then in para 8 of the statement of claim, the plaintiffs pleaded the judgment that they had obtained against the company in this action on 30 November 1993 for the sum of $387,385.63 and interest and averred that this judgment also fell within cl 3.

56.In his defence, the third defendant admitted that the documents referred in para 7 of the statement of claim had been issued but denied that they constituted conclusive and binding evidence of the company`s indebtedness. As regards the judgment, he admitted it had been obtained but averred that since it was a judgment obtained in default of appearance rather than a judgment on the merits, it could not constitute conclusive evidence of the company`s indebtedness.

57.The points put on behalf of the third defendant in closing are first, that cl 3 of the guarantee since it appears in a document drafted by the plaintiffs, has to be construed contra preferentem. Secondly, that the clause cannot be binding and conclusive of the third defendant`s liability as he has defences which are not available to the principal debtor. The third argument is that conclusive evidence clauses are not binding and conclusive of quantum if there is fraud or manifest error on the face of the certificate to which they refer. I will take the points in turn.

58.First, dealing with the construction of the clause, I accept that since it was drafted by the plaintiffs and the third defendant had no say in it, it must be strictly construed and, in order to avail themselves of the rights thereby given,

Version No 1: 20 Nov 2026 (00:35 hrs)

the plaintiffs have to show that the clause applies to the documents which they say constitute conclusive evidence of the company`s indebtedness and are binding on the third defendant.

59.The first limb of cl 3 which the plaintiffs seek to invoke requires them to furnish a `statement of account certified by any authorised officer`. In my judgment, this means that the document which the plaintiffs furnish must clearly indicate on its face that it is a statement of account relating to the company and it must be certified as a true statement of such account by a person describing himself as an authorised officer. An examination of the documents which the plaintiffs produced as meeting the requirements of that portion of cl 3 reveals that they do not satisfy those requirements.

60.The first document adduced was headed `Hydtrolmech Automation Services Pte Ltd, Factoring Agreement No: FA/0085/90 Statement of Account as at 9 December 1993`. The first entry in the main body of the document read `Debt outstanding as at 30 April 1993 $424,815.68` and this was followed by various debit and credit entries. The last entry read `Amount payable as of 09 December 1993 $388,255.52`. Then there appeared the statement `Discount charge at the rate of 3.5% above DBS prime lending rate will continue to accrue until payment`. Below that statement were stamped the words `Certified True Copy` and they were followed by an illegible signature which appeared to be that of Ms Monica Heng although there was no indication on the document whose signature it was and whether such person was an authorised officer of the plaintiffs. The document itself was not signed. The other document was a letter written on the letterhead of the plaintiffs and dated 9 December 1993. It was addressed to `To Whom It May Concern`. The body of the letter read as follows:

> *Dear Sirs,*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *Re: Factoring Agreement No FA/00085/90 Dated 23 OCTOBER 1990*
>
> *Outstanding Debt*
>
> *We confirm that as of 9 December 1993 there was a sum of $388,255.52 due and owing from Hydtrolmech Automation Services Pte Ltd to us. Enclosed herewith is a copy of our statement of account as at 9 December 1993.*
>
> *Yours faithfully,*

Thereafter, the name `Ms Monica Heng` appeared followed by the designation `senior manager, operations`.

61.The first document was a certified true copy of a statement of account. The second was a letter of confirmation written on behalf of the plaintiffs as to a certain amount due. In my judgment, they did not either individually or together constitute a certificate by a person described as an authorised officer that the statement of account of the customer was correct as required by the clause. In **Dobbs v National Bank of Australia Ltd** [1935] 53 CLR 643, the High Court of Australia in its judgment on the validity of a conclusive evidence clause stated:

> *The bank could recover without production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer`s indebtedness may be ascertained conclusively by a certificate (at p 651).*

and, later in disposing of the argument that a conclusive evidence clause is void because it ousts the jurisdiction of the court,

> *Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent on the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction*
>
> *It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the court prevents parties giving a contractual conclusiveness to a third person`s certificate of some matter upon which their rights and obligations may depend. In* ***Ex parte Young; In re Kitchin*** *(2) James LJ says: `If a surety chooses to make himself liable to pay what any person may say is the loss which the credit has sustained, of course he can do so, and if he has entered into such a contract he must abide by it` (pp 652-654).*

The above extracts make it extremely clear that when a conclusive evidence clause calls for a certificate to be issued by an ascertained or ascertainable person what must be provided is such a certificate and not just a confirmation of indebtedness. The importance of the certificate and the reason for its conclusiveness is that the person giving it is carrying out the contractually prescribed duty of acting as an arbiter whose arbitration the parties have agreed to accept. In this case, Ms Heng did not purport to act as such arbiter.

62.The other part of cl 3 on which the plaintiffs seek to rely is that referring to `any judgment` obtained by the plaintiffs against the company. The third defendant`s submission is that this phrase must be construed to refer to a judgment which has been obtained after a trial on the merits and not to a judgment obtained in default of appearance. The words `any judgment` are wide. The context, however, is not. It would be recalled that a `judgment` is one of the three matters external to the principal debtor which constitute conclusive proof of its indebtedness. The others are `a proof in winding up or bankruptcy` and the certificate endorsed on the creditor`s statement of accounts. Both these other matters envisage a determination by an authorised person. The `proof` must mean an adjudicated or accepted proof not simply a proof filed by the creditor as that may be rejected, and the certificate, as I have said, can only be

Version No 1: 20 Nov 2026 (00:35 hrs)

issued once the appointed person has made an arbitrament. The only interpretation of `any judgment` which would be consistent with the foregoing is an interpretation which reads the `judgment` as being one which is obtained after proof of the indebtedness had been adduced to the court (whether on a summary judgment application or at trial) and it had made a determination rather than a judgment obtained simply because the debtor failed to appear to contest the claim.

63.Also, if the phrase `any judgment` were to be interpreted to include a judgment in default, it would mean that a careless creditor could obtain a default judgment against a debtor who had absconded (or simply did not fight) for more than was actually due (as actually happened in this case as I point out below) and, on the basis of such judgment, get a further judgment against the surety who would not be able to adduce any evidence to dispute the amount of the principal debtor`s indebtedness. For, as **Kerr v John Mottram Ltd** [1940] Ch 657 makes very clear, the words `conclusive evidence` mean evidence which cannot be displaced and which is conclusive as between the parties bound by such an agreement and, accordingly, any evidence tended to disprove what would otherwise be conclusive, would be inadmissible in the absence of fraud. If a creditor wants a default judgment to have such an effect, he can draft his conclusive evidence clause to so provide. If he does not make such a provision, however, the court reading the phrase `any judgment` in the context in which it appears and contra preferentem will not apply it to a judgment in default.

64.As regards the third defendant`s second argument, I think it is irrelevant to the applicability of a conclusive evidence clause that a guarantor may have defences which are not open to the principal debtor. These defences, for example, discharge because of variation, will be available despite the fact that

Version No 1: 20 Nov 2026 (00:35 hrs)

the guarantor is unable to contest the existence or quantum of the principal debtor`s indebtedness due to the presence of the clause. The third argument is a statement of the law which I need not deal with since in this case, I have found that there is no certificate which meets the requirements of cl 3. I therefore do not have to consider whether there was an error on the face of the certificate. In any case, such error was not pleaded.

65.The consequence of the findings that I have made above is that in order to recover against the third defendant, the plaintiffs would have to adduce proof of the actual indebtedness of the company. This it has not done. First, the evidence of Ms Heng showed that on 10 April 1992, the plaintiffs debited the company`s account with a sum of $29,821.40 which represented unpaid invoices which they had purchased from the partnership. Instead of asking Mr Yeo and Mr Lin to repurchase these debts, the plaintiffs charged them to the company. They thus purported to make the company liable for an amount which it did not owe. The judgment which they obtained against the company was, therefore, for a greater amount than was actually due to them and was thereby irregular. Secondly, as I have held that the agreement was not binding on the company, the plaintiffs have not established their right to require the company to re-purchase all the debts for the total sum representing the funds in use which as stated earlier include not only initial payments made to the company but also service and factoring discount charges. Neither have the plaintiffs established the company`s liability to pay interest at the per annum rate which is the sum of 3.5% and the prevailing prime rate of DBS Bank.

66.In the circumstances, this action must fail and must be dismissed. However, for completeness I will go on to consider the other defences raised by the third defendant.

Version No 1: 20 Nov 2026 (00:35 hrs)

(4) Was the guarantee vitiated by non-est factum, mistake or misrepresentation?

67.In para 2A of his defence, the third defendant averred that he had signed the guarantee under the mistaken belief that it was for: (a). invoices to be factored by the company to the plaintiffs;

(b). 70% of the value of the invoices to be factored; and

(c). sums due from the company`s customers to the plaintiffs on the invoices factored.

68.As far as the first point is concerned, the guarantee covered the indebtedness of the company to the plaintiffs arising from the facility which the plaintiffs granted to it and since this facility was a factoring facility, the guarantee was basically in relation to the invoices factored, although it covered other indebtedness as well. I do not see any operative mistake which the third defendant can rely on in that regard. In respect of the other two allegations, the evidence does not support the third defendant`s stand.

69.In his affidavit of evidence-in-chief the third defendant said: `[Ms Teo] said that the invoices could be factored for only up to 70% of the value of the invoices` and `I did not seek any advice, whether legal or otherwise, on the matter`. Nowhere in his evidence did he say that Ms Teo stated that the guarantee was limited to invoices which would be factored for amounts not exceeding 70% of the invoice value. In fact the third defendant admitted in cross-examination that Ms Teo had not said that under the guarantee he would be liable for up to 70% of the value of the invoices and that his liability would be for only half that amount (on the basis that Mr Yeo would be liable for the other half). He admitted that he had glanced through the guarantee and had

Version No 1: 20 Nov 2026 (00:35 hrs)

noticed that it did not mention `70%` at all. He thus could not have relied on any representation from the plaintiffs that the guarantee was for 70% of the value of the invoices factored as he did check the guarantee himself. Further, his evidence in cross-examination shows that in October 1990 he was aware of the broad outlines of the mechanism of factoring. He knew the plaintiffs would advance money to the company on the factored invoices and that if these sums were not paid by the customers or the company, then he would be personally liable for the same under the guarantee. Overall, the evidence did not establish that he laboured under any mistake as to what the guarantee covered or that, even if he himself was mistaken, that the plaintiffs were aware of such mistakes.

70.In para 2B of the defence, the third defendant averred that he had signed the guarantee upon the false representation made by Ms Teo on 23 October 1990 that the document was a guarantee for invoices which would be factored by the company to the plaintiffs for 70% of the value of the invoices. He pleaded that, in the belief that it was such a guarantee and not otherwise and without any negligence on his part, he had signed it without knowing that it purported to be:
(1). in consideration of the plaintiffs agreeing and continuing to grant credit facilities to the company;

(2). a joint and several guarantee; and

(3). a guarantee of all sums due or payable by the company to the plaintiffs.

This plea was partly a plea of misrepresentation and partly one of non-est factum.

71.On the evidence of the third defendant himself, the misrepresentation allegation was not substantiated. Nowhere in his evidence did he say that Ms

Version No 1: 20 Nov 2026 (00:35 hrs)

Teo had told him that `the guarantee was limited to invoices which would be factored by the company to the plaintiffs for amounts not exceeding 70% of the invoice value` as he had pleaded. He admitted in cross-examination that she did not say that under the guarantee he would be liable for up to 70% of the value of the invoices. As his affidavit makes clear, what she told him was that the invoices could be factored for up to 70% of their value only, which was an accurate statement of the situation. Any other construction which he placed on her words was his own doing.

72.As regards the non-est factum allegation, it is settled law that in order to succeed on such a plea, the third defendant must establish: (a). that he is a person who for some permanent or temporary reason is not able to read and sufficiently understand the purport of a particular document;

(b). that he made a fundamental mistake as to the nature or contents of the document he was signing, having regard to the intended practical effect of the document concerned; and that

(c). he was not negligent and took reasonable precautions in the circumstances to ascertain the nature of the document.

See **Saunders v Anglia Building Society** [1971] AC 1004 and **Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd** [1993] 2 SLR 297 .

73.The third defendant has not been able to meet the above requirements. First, he is of full age and normal understanding. He is not completely illiterate in English. He testified that he is not fluent in reading, writing, speaking or understanding English but he did complete his GCE `O` levels in the English medium which shows a certain basic level of understanding and the ability to

Version No 1: 20 Nov 2026 (00:35 hrs)

read and write. He admitted glancing through the guarantee and gathering information from it. Further, although he spoke through an interpreter, his reactions while in the witness box showed that he could understand many questions asked in English without the help of the interpreter.

74.Secondly, the evidence was that he knew what he was signing in October 1990 was a guarantee and he knew that he was signing it in relation to the factoring facility. Even assuming that something that Ms Teo said misled him into believing that the guarantee was limited to advances made by the plaintiffs up to 70% of the face value of the factored invoices, such misapprehension would not amount to a fundamental mistake as to the contents and nature of the guarantee because: (a). he knew it was a guarantee;

(b). he understood that it covered the advance payments that the plaintiffs would make and the guarantee does in fact cover advances;

(c). he understood that the purpose and objective of the guarantee was to secure the due performance of the factoring facility by the company and that he would be liable to pay the plaintiffs amounts due to them in connection with the facility if they were not paid by the company or the customers.

75.Finally, the third defendant did not prove that he took reasonable care to ascertain the nature or the ambit of the document he was signing. It should be remembered that he had previously signed a guarantee in favour of the plaintiffs. If he had been in doubt as to his obligations thereunder, he could have asked for advice on that first guarantee. In any case, there was nothing to stop him from asking for advice from a lawyer or even a lay person who was fluent in English on the ambit of the second guarantee which he was being asked to sign before

Version No 1: 20 Nov 2026 (00:35 hrs)

signing it. He was not a neophyte in the commercial world having been involved in his family business for a number of years before joining Mr Yeo as a partner and must have been exposed to normal business practices. He would have been aware of the availability of advice had he wanted it. The third defendant admitted in cross-examination that he did not even ask Ms Teo whether his belief as to the limitation of his liability under the guarantee was correct. Such an omission is significant since he had noticed that the figure `70%` did not appear in the guarantee and, therefore, on its face it was inconsistent with his belief. I do not believe that at the time the third defendant was under the misapprehension he pleaded.

76.The next plea made by the third defendant was that the guarantee ought to be discharged as the plaintiffs through their agent, Ms Teo, had misrepresented to him that the guarantee would be limited to the period during which he was a director of the company and to invoices which would be factored to the plaintiffs for amounts not exceeding 70% of their value. I have already dealt with the latter assertion and I will now deal only with the plea relating to the representation on the period for which the third defendant would be liable.

77.In support of the above allegation, the third defendant stated in his particulars that Ms Teo said: `You are required to give this guarantee as a director of Hydtrolmech Automation Services Pte Ltd`. In para 3 of his affidavit of evidence-in-chief he said that Ms Teo told him: `that [he] was required to give the guarantee as a director of the first defendants` and later in his affidavit he said: `as Teo Lay Sim had told [me] that [I] was required to give the guarantee as a director of the first defendants, [I] had thought that the guarantee was only for the duration of [my] term of office as a director`.

Version No 1: 20 Nov 2026 (00:35 hrs)

78.The plaintiffs have submitted, and I accept, that the words which the third defendant says were uttered by Ms Teo do not amount to the misrepresentation that he has alleged. These words cannot be interpreted to mean that the guarantee would be limited to the duration of his directorship or that he would cease to be liable when he ceased to be a director of the company. What Ms Teo said was no more than a repetition of the condition in the letter of offer that the plaintiffs required the directors of the company to stand as guarantors. If the third defendant had been concerned to ensure that his liability would be co-extensive with his service as a director, he could have asked for such a term to be included in the guarantee but he did not do so. Neither did he question Ms Teo to ascertain whether his understanding of the limitation of his liability was reflected by the clauses in the guarantee.

(5) Whether the guarantee has been discharged by reason of any subsequent event

79.Paragraph 9 of the defence starts with a general averment that the guarantee was discharged by acts and conduct on the plaintiffs` part which were injurious, prejudicial and/or inequitable to the third defendant. Then particulars of this averment setting out the third defendant`s specific complaints are given. These are: (1). the plaintiffs had advanced $365,961.89 to the company on 13 invoices dated between 30 June 1991 and 29 September 1991 without ascertaining that these invoices had actually been rendered by the company to its customer, Sembawang, or ensuring that the company had forwarded the original invoices and supporting documents to Sembawang for their approval or ascertaining the true commercial value of the invoices;

Version No 1: 20 Nov 2026 (00:35 hrs)

(2). as at 31 January 1993, the plaintiffs had advanced some $479,560.97 to the company although for more than two months no payments had been forthcoming from the customers and some $475,757.95 worth of invoices had not been settled by the customers despite more than 180 days having lapsed from their respective due dates;

(3). the plaintiffs had not re-assigned to the company outstanding invoices immediately upon the lapsing of 180 days from the respective due dates of the invoices, or within a reasonable time therein or thereafter or at all;

(4). the plaintiffs had rendered statements of account to Esso, Jurong Shipyard and Sembawang late;

(5). the plaintiffs had failed to disclose to or obtain the consent of the third defendant to the letter dated 18 October 1990 and the agreement and, alternatively, had entered these agreements with the company without the knowledge or consent of the third defendant;

(6). that by their letter dated 19 June 1992 to the company, the plaintiffs entered into a third agreement with Mr Yeo which purported to be an agreement with the company and did so without the knowledge or consent of the third defendant;

(7). finally, the plaintiffs had advanced sums to the company in excess of the limit stated in their letters of 21 October 1990 and 19 June 1992 without notice to the third defendant and without his consent or knowledge.

80.I do not see any merit in the first point. There was no duty imposed on the plaintiffs vis-a-vis the third defendant that before purchasing any invoices from

Version No 1: 20 Nov 2026 (00:35 hrs)

the company the plaintiffs had to ensure that the invoices were authentic and represented works actually done. The whole scheme of the arrangement between the plaintiffs and the company as set out in the agreement, and these were the only terms upon which the plaintiffs were willing to contract, was that upon offering to sell any invoice to the plaintiffs, it was the company who warranted that such invoice related to bona fide services actually performed and that the invoice would be legally enforceable against the customer in full. The third defendant as a director of the company was better placed to ensure that the proper procedures had been followed but he chose not to concern himself with the management of the company. He cannot now say that his liability is released because the plaintiffs did not do what he should have done. The circumstances are such that I cannot imply into the relationship between the plaintiffs and the third defendant the duty on the plaintiffs which he seeks to impose.

81.As regards the second point, the allegation that as at 31 January 1993, the plaintiffs had advanced $479,560.97 to the company although no payments had been forthcoming since November 1992 from the company`s customers and some $475,757.95 worth of invoices had become ineligible and had not been settled, has no basis in fact. The evidence is that the last advance payment made by the plaintiffs to the company was made on 22 July 1992. At that time most of the invoices were not yet ineligible.

82.In respect of the third and fourth points, the third defendant`s argument is that if the plaintiffs had promptly called on the company to re-purchase all the invoices that had remained unpaid for more than 180 days after their due date, they would have alerted him to the situation while he was still a director and he could have had the opportunity to prevent the funds in the company`s account from being dissipated. Similarly, if statements of account had been sent to the

Version No 1: 20 Nov 2026 (00:35 hrs)

various customers earlier, they would have raised queries about the false invoices and these matters could have been dealt with earlier. The plaintiffs` inaction prejudiced the third defendant to the extent of sums which would then have been recoverable from the company and also to the extent of the additional interest which they charged once the invoices became ineligible.

83.There are short answers to these contentions. First under the agreement, the plaintiffs did not have any duty to send statements of account to the customers. What they had to do was attempt to collect the debts and they did this by sending out the invoices and asking for payment. The third defendant did not allege that no such attempts at collection were made. Secondly, by cl 4(a) of the guarantee the third defendant had agreed that his liability would `not in any way be discharged, diminished or affected by the granting of any time or indulgence to [him] or to the company`. The third defendant therefore cannot complain that the plaintiffs did not insist on strict compliance with the terms of the factoring facility.

84.Additionally, the third defendant did not prove that he was actually prejudiced by the indulgence which the plaintiffs showed the company. He did not prove that if the plaintiffs had asked the company to re-purchase the debt it would have had the funds to do so whether partially or substantially. On the contrary, his evidence was that from the very beginning there were cashflow problems and that he himself received only two months of salary in July and August 1990. By October 1991, he was owed almost 14 months of salary amounting to $24,500. This must have alerted him that all was not well with the company`s finances and yet he signed the plaintiffs` letter of offer dated 21 October 1991 increasing the advance limit from $300,000 to $500,000 and thereby increasing his own exposure under the guarantee. By July 1992, the

Version No 1: 20 Nov 2026 (00:35 hrs)

third defendant was owed 23 months of salary amounting to some $40,000. Even then he did nothing to prevent the company`s assets from being dissipated although he testified that by around 1992 he had began considering pulling out of the company.

85.The fifth point relates to the third defendant`s lack of knowledge of the agreement and the letter of offer dated 18 October 1990. His argument is that because these documents were not disclosed to him he was deprived of the opportunity of seeking legal advice on how they applied to the guarantee. Since I have found that these documents were signed by Mr Yeo without the proper authority, I need not dwell on this point. What is important to note is the convincing evidence of the third defendant`s knowledge that he was signing a guarantee and that that guarantee related to factoring facilities which the plaintiffs were extending to the company. He was not deprived of any opportunity to ask advice on the way in which the guarantee covered this facility.

86.The last two points relate to the ability of the plaintiffs to vary the facility granted to the company without thereby discharging the guarantor. There are two variations complained of. The first is contained in the plaintiffs` letter of 19 June 1992 whereunder whilst the overall advance limit of $500,000 remained as specified in the letter of 21 October 1991 (which the third defendant had agreed to), the sub-limit in respect of Sembawang was increased from $150,000 to $300,000 and $100,000 was provided as a sub-limit for Esso. He says he knew nothing about this letter. The second variation was based on the evidence which showed that on 22 July 1992, the plaintiffs by advancing a sum of $75,000 to the company exceeded the overall advance limit of $500,000 by $50,000.

Version No 1: 20 Nov 2026 (00:35 hrs)

87.The third defendant says that each of these variations prejudiced him and therefore operated to discharge him from the guarantee. It has long been the law that any material variation of the terms of the principal contract agreed between the creditor and the principal but which the surety has not consented to, will discharge the surety. The plaintiffs argue that this principle is not applicable in the present case because of cll 4(c) and 9(i) of the guarantee. These read:

> 4 My/our liability hereunder shall not in anyway be discharged, diminished or affected by:
>
> (c) the variation of any agreement which you may have with the company and to such extent as may be necessary to give effect to this sub-clause, this guarantee shall be treated as an indemnity;
>
> 9(i) Though as between the company and myself/ourselves, I/we are sureties only for the company, yet as between us, I/we shall be deemed to be principal debtors for all sums of monies the payment of which is hereby guaranteed. Accordingly, I/we shall not be discharged nor shall my/our liability be discharged by anything whatever whereby my/our liability would not have been discharged if I/we have been principal debtors.

88.In my judgment, the variation to the facility effected by the plaintiffs` letter of 19 June 1992 which was accepted by the company on 24 June, is a variation which falls within the scope of both cl 4(c) and 9(i) above and accordingly, the third defendant`s liability under the guarantee is not affected by it. Even at common law, this variation may not have discharged the third defendant since where the parties are providing for a future course of dealing, it is open to the creditor, without discharging the surety, to vary the terms applicable to the future course of dealing so long as it remains within the scope of the guarantee. See ***Law of Guarantees*** (2nd Ed) by Andrews and Millett (p 256).

Version No 1: 20 Nov 2026 (00:35 hrs)

89.I have more difficulty with the other matter viz the plaintiffs` advance of $50,000 more than the $500,000 limit agreed to by the third defendant on 21 October 1991. The reason for my difficulty is that the additional advance was not just a change in the facility but an increase which the third defendant did not agree to. I do not think that this increase is covered by the term `variation` as used in cl 4(c). The plaintiffs say it is, relying on **International Bank of Singapore Ltd v Bader** [1989] 1 MLJ 214 [1988] SLR 823 where Chao Hick Tin JC (as he then was) held that the defendant guarantor was not discharged from his guarantee of an overdraft facility extended to the principal debtor by the plaintiff bank allowing the debtor to overdraw the agreed limit of the facility. In that case, however, cl 3 of the guarantee gave the bank the liberty to `vary or ***enlarge*** ` the credit (emphasis mine). That wording was an express permission to the creditor to lend more than had originally been agreed.

90.The plaintiffs` fall back position is cl 9(i). This is a very wide provision. Not only has the third defendant agreed that he should be treated as a principal debtor but the clause goes on to state (and this is something that is not always found in principal debtor clauses) that his liability would not be discharged by any circumstance that would not discharge the principal debtor`s liability. In this case, the company`s liability to the plaintiffs was, obviously, not adversely affected by its obtaining, at its request, more than the plaintiffs had originally agreed to advance it. I have, rather reluctantly, come to the conclusion that cl 9(i) is wide enough to cover an increase in the facility limit and therefore that the third defendant remained liable under the guarantee despite the additional money paid to the company without his knowledge or consent. It is always open to a guarantor to protect himself from this sort of result by insisting that the guarantee contain a limit on his liability.

Version No 1: 20 Nov 2026 (00:35 hrs)

91. **Conclusion**

The plaintiffs` action is dismissed for the reasons given in para 65. The third defendant, however, has raised many issues which have not been successful and the investigation of which prolonged the trial. I do not think it right that he recover full costs. I will therefore hear the parties on costs.

92.For what it is worth, I would like to state that the procedure which the plaintiffs followed in relation to the extension of the factoring facility was, in my view, gravely lacking. Both the factoring agreement and the guarantee are complex legal documents. Yet neither was given to the client or the guarantors in advance. There may have been some excuse for this in October 1990 since this was the second occasion on which such documents were being signed, but there was no good reason why in July 1990 the letter of offer, the agreement and the guarantee all had to be signed on the same day as the letter of offer was issued. The plaintiffs relied on Ms Teo to explain the agreement and the factoring mechanism to their clients. It was obvious from her testimony that the explanations she gave were very brief. Also the plaintiffs` practice as explained to me in court was not wholly reflected in the agreement. Neither did the plaintiffs take due care when it came to the technicalities of authorisation and signing of documents. A great deal of time and effort could have been saved and misunderstanding avoided if at the very beginning the documents had been given to the parties early and the plaintiffs had taken care to ensure that their daily practice in relation to the factoring facility had been clearly reflected in the documents.

Version No 1: 20 Nov 2026 (00:35 hrs)

SAL Industrial Leasing Ltd v Hydtrolmech Automation Services Pte Ltd and Others
[1997] SGHC 298

Judith Prakash J

Leonard Hazra (David Lim & Partners) for the plaintiffs
VK Rai (VK Rai & Partners) for the third defendant

Version No 1: 20 Nov 2026 (00:35 hrs)