IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 42

Suit 1511/1995, RA 43/1996

Between

Oversea-Chinese Banking Corp Ltd

… *Appellant*

And

The Timekeeper Singapore Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Striking out; Credit and Security — Guarantees and indemnities — Co-guarantors; Credit and Security — Guarantees and indemnities

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Oversea-Chinese Banking Corp Ltd v The Timekeeper Singapore Pte Ltd and Others

[1997] SGHC 42

Suit 1511/1995, RA 43/1996
MPH Rubin J
28 February 1997

1 ***Introduction***

2 The appeal herein arises from a claim by the plaintiffs against the defendants for moneys due and owing to them on account of facilities granted to the first defendants, The Timekeeper Singapore Pte Ltd (`the company`) underpinned by a joint and several guarantee executed by the second, third and fourth defendants dated 21 December 1993. The company and the second defendant had allowed claims against them to go undefended. The third and fourth defendants disputed the plaintiffs` claim. Nevertheless, after a multitude of applications and in fact after the third and the fourth defendants had, at one stage, obtained conditional leave to defend the claim, upon a further application by the plaintiffs on 2 February 1996, the deputy registrar struck out the defences of the third and fourth defendants and granted liberty to the plaintiffs to enter final judgment against them. I heard the third and fourth defendants` appeals against the decision of the deputy registrar and at the end I dismissed both the appeals. My grounds now follow.

3 **Facts**

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4 The plaintiffs` original claim against all the defendants was for the following sums:

5 (1) for US$49,458.38 together with interest thereon at the rate of 9.3125% per annum commencing 25 August 1995 until payment - arising from overdue trust receipts from the company;

6 (2) for S$42,039.40 together with interest thereon at the rate of 4.75% per annum above the plaintiffs` prime lending rate calculated on a daily basis with monthly rests from 25 August 1995 until payment - arising from overdraft facilities granted to the company; and

7 (3) for legal fees, costs and disbursements.

Overdraft	$300,000	- $100,000	$200,000
Letter of credit (sight and $term 180 days), trust receipt (60 days) and shipping guarantee under the bank`s letter of credit	$100,000		
	$400,000 -	$100,000	$300,000
(signed)	(signed)	(signed)	
[second defendant]	[third defendant]	[fourth defendant]	

8 In formulating their claims, the plaintiffs initially relied on two documents, ie the facility letter addressed to the company dated 10 September 1993 and a joint and several guarantee in writing dated 21 December 1993

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signed by the second, third and fourth defendants. Insofar as material, the relevant parts of the said documents are reproduced hereunder:

> *[Facility Letter]*
>
> *10 September 1993*
>
> *The Timekeeper Singapore Pte Ltd*
>
> We are pleased to advise you that Oversea-Chinese Banking Corporation Limited (hereinafter called `the bank`) has agreed, subject to satisfactory completion of legal documentation, and upon the following terms and conditions to restructure and to grant to your company credit facilities (hereinafter called `the facilities`) as follows:
>
> *Interest:*
>
> *Overdraft: OCBC`s Prime (presently at 5% per annum) + 0.5% per annum*
>
> *Trust receipt: OCBC`s Prime + 1% per annum*
>
> *or at such other rate of interest as may from time to time be determined by the bank.*
>
> *SECURITY:*
>
> *The facilities shall be secured as follows:*
>
> (a) Set-off and cfharge over fixed deposit kept with the bank in any account and all account maintained in name of your company.
>
> (b) Joint and several guarantee for $300,000 by Mr Ngiam Choong Kam, [fourth defendant], Mr Sebastian Wong Cheen Pong [second defendant] and Mr Low Kian Beng [third defendant].
>
> *CONDITIONS*
>
> (2) Your company`s right to utilise the facilities and the obligation of the bank to continue with the same shall be subject to the condition precedent that there shall have been previously delivered to the bank the following documents in form and substance satisfactory to the bank:
>
> (a)

(e) Duly executed joint and several guarantee for $300,000 by Mr Ngiam Choong Kam, Mr Sebastian Wong Cheen Pong and Mr Low Kian Beng. [Emphasis added.]

(4) All expenses including stamp duty (whether as penalty or otherwise), legal, administrative, registration, execution fees and any other costs or charges (including abortive costs) whether of the bank or otherwise and incurred or expended by the bank in connection with the facilities whether the same is accepted or otherwise shall be borne by your company and all expenses including legal fees and costs as between solicitor and client and other costs and disbursements incurred by the bank in connection with any demand made or legal proceedings instituted for the recovery of any loan or facilities or any moneys due or unpaid or payable by your company or in relation to the realisation or enforcement of any security shall be borne by your company and also if the bank retains solicitors to enforce any of its rights whether by judicial proceedings or otherwise, then and in that event your company will pay to the bank all costs expenses including legal costs as between solicitor and client incurred by the bank.

This letter of offer shall supersede and cancel our previous letter of letter (sic).

Letter of guarantee (joint and several)

To: Oversea-Chinese Banking Corporation Limited

In consideration of your making or continuing to make loans or advances or otherwise giving or continuing credit or granting other credit or banking facilities or other accommodation from time to time to such extent and for so long as you may think fit to The Timekeeper Singapore Pte Ltd of 160 Orchard Road #03-17, Orchard Point, S(0923) (hereinafter called the `customer`) we Wong Cheen Pong, Low Kian Beng and Ngiam Choong Kam care of 160 Orchard Road #03-17, Orchard Point S(0923) the undersigned hereby jointly and severally unconditionally agree with you as follows that is to say:

1 We will pay to you on demand all sums of moneys or liabilities which are now or shall hereafter from time to time be due or owing or shall remain unpaid to you or be incurred from or by the customer anywhere whether as principal or as surety and whether solely or jointly with any other person or persons (in partnership or otherwise) on any account or accounts or otherwise including the ultimate balance which at the date of such demand shall be due or owing or remain unpaid to you by the customer TOGETHER WITH in all the cases aforesaid interest at such rate or rates as may from time to time be fixed

or determined by you with monthly rests commission discount and other banking charges and together with also all legal and other costs charges and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the moneys and liabilities hereby guaranteed.

2(a) This guarantee shall be a continuing guarantee for the purpose of securing the whole of the moneys and liabilities or ultimate balance in paragraph 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinafter mentioned provided always that the amount for which we shall be liable under this guarantee shall not exceed Dollars Three Hundred Thousand Only *** ($300,000).

2(b) In addition to the said limit hereinbefore mentioned we shall be liable to pay interest on the sum claimable from us on daily balance at such rate or rates as may from time to time be fixed or determined by you with monthly rests from the date of demand to the date of payment as well after as before any judgment is obtained in respect thereof.

7 ***This guarantee shall be in addition to and shall not in any way be prejudiced or affected by any other security whether negotiable or otherwise including any other guarantee or indemnity which you may now or at any time*** hereafter hold from us or any of us the customer or any other person for all or any part of the moneys hereby guaranteed nor shall such security or any other security to which you may be otherwise entitled or the liability of any person not a party hereto for all or any part of the money hereby guaranteed be in any way prejudiced or affected by this guarantee.

8 ***This guarantee shall not be prejudiced or diminished or affected in any way nor shall we nor any of us be released or exonerated by any of the matters following*** :

(a) ***any increase decrease extension renewal or re-structure of all or any of the loans or advances or credit or banking or credit facilities or other accommodation granted or given to the customer*** from time to time whether solely or jointly with any other person or persons (in partnership or otherwise) and whether beyond the said limit or otherwise or any variation of any terms and conditions thereof with or without notice to us;

(c) ***any variation exchange renewal release or modification of any guarantee indemnity or security*** or the refusal or neglect by you to complete enforce or assign any judgment specialty or other security or instrument negotiable

or otherwise and whether satisfied by payment or not all of which you are at liberty to do whether with or without our consent or notice to us;

(d) ***any time forbearance concession or other indulgence*** given or extended to the customer and/or to any party to any guarantee indemnity security or other instrument in respect of any moneys hereby guaranteed all of which you are at liberty to give whether with or without our consent or notice to us;

(e) ***any compromise composition or arrangement*** made with the customer and/or any other person or persons all of which you are at liberty to make whether with or without our consent or notice to us;

9 Though as between us and the customer we are sureties only for the customer yet as between you and us each of us shall be deemed to be a principal debtor for all the moneys the payment of which is hereby guaranteed and accordingly we shall not be discharged nor shall our liability be affected in any way by any fact circumstance act omission or means whatsoever whether known to you or not whereby our liability hereunder would have been discharged if we had not been principal debtors.

14 This guarantee shall be valid binding and enforceable upon any one of us who had signed notwithstanding that this guarantee has not been signed or given by any one or more of the guarantors named in this instrument or intending guarantors and notwithstanding the incapacity or bankruptcy of any one or more of the guarantors or intending guarantors.

15 This guarantee shall be a continuing security binding on us and our respective legal representatives. This guarantee shall not be determined or affected by the death or insanity of any one or more of us but shall in all respects and for all purposes be binding and operative subject to cl 16 hereof.

20 A certificate signed by your officer as to the moneys for the time being due or owing to you from the customer as aforesaid or as to the liabilities of the customer or any account settled or stated by or between you and the customer or admitted by the customer or on his/its behalf shall be accepted by us and each of us as conclusive evidence that the amount appearing thereon is due or owing to you from the customer.

22 For the consideration aforesaid and as a separate and independent stipulation in addition to and not in derogation of the guarantee herein given each of us hereby irrevocably and unconditionally undertake to indemnify you and keep you indemnified fully and completely against all claims and demands actions and proceedings losses damages costs and

> expenses including legal costs as between a solicitor and client and all other liabilities of whatsoever nature or description which may be made taken incurred or suffered by you in connection with or in any manner arising out of the loans or advances or credit or banking or credit facilities or other accommodation granted by you from time to time to the customer whether solely or jointly with any other person or persons (in partnership or otherwise).
>
> 24 This and all the agreements undertakings and other provisions hereof shall be deemed to be made by and be binding on us jointly and severally and on our successors respectively and shall enure to the bank`s benefit and be enforceable by the bank and its successors in title and assigns and this guarantee shall be construed in the manner and with the effect as if each of us had executed a separate guarantee. We hereby agree that you shall be at liberty:
>
> (b) to release or discharge any one or more of us from the obligations of this guarantee; or
>
> (c) without thereby releasing or discharging the other or others or otherwise against the other or others [Emphasis added.]
>
> *Dated this day of 21 December 1993*

9 As events unfolded, after the entry of appearance and after the fourth defendant had filed his defence on 25 September 1995, the plaintiffs applied for summary judgment against both of them for the sums originally pleaded.

10 The defence filed by the fourth defendant dated 25 September 1995 was brief and in the main his defence was (a) that he had already been discharged from the guarantee by the plaintiffs by virtue of a further guarantee obtained by the plaintiffs from the second defendant on or about 15 December 1995; (b) that the second defendant had assumed the obligations of the fourth defendant; and (c) and that as from 10 January 1995 the fourth defendant was not interested in the affairs of the company. A defence of estoppel was also raised in the pleadings against the plaintiffs

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11 The fourth defendant repeated the foregoing averments in his affidavit filed on 3 November 1995 in opposing the plaintiffs` application for summary judgment. Maintaining that he was only an inactive officer and a shareholder of the company, he further averred that the plaintiffs by advancing a sum of S$276,889.50 (para 5 of the affidavit) or S$279,889.50 (para 6 of the affidavit) to the company prior to the execution of the guarantee under reference cannot hold him liable for any sums now outstanding.

12 The third defendant`s contentions were substantially the same as that of the fourth defendant except that the third defendant claimed he was neither a shareholder nor a director of the company. His other averments as they appear in paras 5 to 13 and 17 of his affidavit dated 8 November 1995 are as follows:

> 5 The guarantee exhibited as `KSL-3` in the plaintiffs` affidavit was executed on or about 21 December 1993. Prior to the execution of the said guarantee, the plaintiffs had already advanced the sum of S$276,889.50 to the first defendants. The fact that the first defendants were overdrawn by such a sizeable amount prior to my execution of the said guarantee only came to my knowledge very recently when the plaintiffs` furnished further and better particulars filed on 26 October 1995 which was served on my solicitors on the same day pursuant to the letter of request made by my solicitors dated 24 October 1995. The plaintiffs had not made this known to me prior to the execution of the said guarantee, a fact of which is adverse to me.
>
> 6 In view of the fact that the sum of S$279,889.50 was advanced to the first defendants in respect of the facilities granted by the plaintiffs to the first defendants prior to the execution of the said guarantee, I verily believe that I should not be liable for the sum claimed by the plaintiffs in this suit or at all.
>
> 7 Further, on my behalf, my solicitors had sought details of the facilities in question from the plaintiffs by letter dated 24 October 1995 but the plaintiffs have refused to disclose the same to me as shown in their letter from their solicitors dated 26 October 1995 (copy is exhibited as indicated below).

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8 To the best of my knowledge, I believe that the plaintiffs have waived or discharged me from the guarantee in question (being the subject-matter of this suit). In this respect, the second defendant had executed an additional guarantee dated 15 February 1995 for the sum of S$375,000 in exchange for the discharge of the fourth defendant and I from the said guarantee. (copy of this guarantee is exhibited as indicated below).

9 From the documents rendered by the plaintiffs as enclosures to their solicitor`s letter dated 28 October 1995, the following facts are evident:

a The available overdraft limit granted to the first defendant was S$200,000 at all material times. Yet, the plaintiffs had allowed the first defendants to exceed the same without obtaining or seeking my consent or the fourth defendant`s consent as guarantors, individually.

b That, as at 18 July 1995, the first defendant`s deposit placed with the plaintiffs was S$212,921.33 allegedly with interest thereon. But the plaintiffs have failed to disclose and account for the amount of interest accrued and due to the first defendants;

c That as at or about 17 July 1995 or 18 July 1995, the amount due and owing to the plaintiffs by the first defendants was S$254,060.66 and US$48,802.43, an amount which far exceeded the first defendants` facility limit and the amount deposited with the plaintiffs by the first defendants, among others (without obtaining or seeking my consent to it as guarantor). I believe the fourth defendant takes the same stand as I do in this respect.

10 As for the sum of USD$48,802.43 allegedly being due and owing by the first defendants to the plaintiffs on trust receipts as shown on the collection notice from the plaintiffs, I believe that the amount allegedly due and goods ordered as therein stated were not for the first defendants. As far as I am aware, the first defendants should not be importing `leather watchstraps` in bulk as it is not engaged in that business. I believe that the said goods must have been ordered for another company controlled by the second defendant known as `Fashion Times`. I gathered this from my recent conversations with the second defendant. The plaintiffs gave credit for this amount without my knowledge or prior consent which caused the said limit of S$300,000.00 on the said guarantee and facility credit limit of the first defendants to be exceeded. The plaintiffs never sought and obtained my consent for this transaction and did not notify me of the same. Certainly, the plaintiffs did not consult me as to whether they could debit the

> first defendant`s credit line for this transaction when they had goods held as security but instead released it. I did not give the plaintiffs instructions to release the said goods and believe that the plaintiffs should have insisted on payment prior to its release. In the premises, I verily believe that I should not be liable to them for the same or at all.
>
> 11 I have been informed by the fourth defendant that he too had not been consulted by the plaintiffs on this transaction, ie the plaintiffs had not sought his consent to the same as guarantor (the trust receipts).
>
> 12 The fourth defendant and I regret that we cannot produce any documents in respect of the transaction for USD$49,458.38 given the short time granted to prepare and file our affidavits. We have been advised and verily believe that it is only possible to obtain the same on discovery against the appropriate parties and rightfully ought to be a matter to be dealt with at trial where there can be proper cross-examination of witnesses, in particular the officers of the plaintiffs, the second defendant and one Teo Shuit Teck and/or his associates or associated companies.
>
> 13 In the premises, the fourth defendant and I verily believe that we cannot be held liable for the sum of USD$49,458.38 or at all. The facts pertaining to this amount was only discovered recently and because of this, the fourth defendant was not able to raise this in his affidavit which was filed earlier.
>
> 17 I have also been informed that either the first defendants or the second defendants have paid a sum of about S$20,000 or thereabouts to the plaintiffs by way of instalment payments on or about 28 October 1995. The plaintiffs have not cared to disclose this. In any event, given the same, this amount ought to be taken into account either in reduction of liability (if any) or the fourth defendant and I ought (sic) be wholly exonerated from any liability.

13 The result was, on 10 November 1995, the assistant registrar, after hearing arguments, ordered that the third and fourth defendants be given leave to defend the action conditional upon them furnishing the plaintiffs with a bankers` guarantee for the sums of US$49,458.38 and S$21,352.26 within 28 days from the date of the order, failing which the plaintiffs may be at liberty to enter judgment against them. It is relevant to mention presently that at the

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hearing before the assistant registrar, the plaintiffs` counsel for some reason had omitted to tender to court the conclusive evidence certificate provided for under cl 20 of the guarantee under reference. The third and fourth defendants subsequently applied to court for an extension of time and obtained an order to produce the bankers` guarantee on or before 14 December 1995.

14 There then developed a dispute between the parties as to the terms of the guarantee. In the meantime, the plaintiffs proceeded to file an amended statement of claim on 11 December 1995 and subsequently applied to court on 15 December 1995 for liberty to enter judgment against the third and fourth defendants on grounds that they had failed to comply with the order to provide them with an acceptable bankers` guarantee within the prescribed time frame.

15 The plaintiffs` application for liberty to enter judgment on account of the third and fourth defendants` failure to provide an acceptable guarantee came up for hearing on 22 and 29 December 1995. The outcome was that the third and fourth defendants were given a further extension by the assistant registrar to furnish the plaintiffs with a guarantee providing for automatic renewals.

16 Amidst all this scrimmage, on 6 January 1996 the third and fourth defendants saw fit to apply to court to set aside the plaintiffs` amended statement of claim filed on 11 December 1995 on the ground that leave of court was not obtained in respect of that amended pleading. In the meantime on 6 January 1996, the third defendant filed his defence, material parts of which were no more than a faithful reproduction of what the fourth defendant had alleged in his defence filed on 25 September 1995 save for one paragraph to which I shall refer shortly. Some of the averments in the pleadings of the third defendant as

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they appear in paras 5, 6 and 7 are material to the issues at hand and they read as follows:

> *Paragraph 5:*
>
> *In consideration of the plaintiffs agreeing to discharge, inter alia, the third defendant from the guarantee dated 21 December 1993 or his obligations thereunder or the basis of the same, the second defendant executed a further sole guarantee in favour of the plaintiffs for a sum of up to S$375,000 on or about 15 February 1995.*
>
> *Paragraph 6:*
>
> *Further, the plaintiffs were made aware or otherwise knew that the third defendant was no longer bound by the said guarantee and/or and no longer wanted to be bound by the same and that he would no longer hold himself liable for any debts or liabilities of the first defendants.*
>
> *Paragraph 7:*
>
> *Further the third defendant and/or second defendant having acted in reliance of the aforesaid matters to their detriment the plaintiffs are estopped from denying or disputing the same.*

17 The additional averment as respects the fourth defendant appeared in para 5 of his defence. It reads:

> *In consideration of the fourth defendant allowing the second defendant and/or his nominated party buying over the interest of the fourth defendant in the first defendants, the second defendant agreed to secure the fourth defendant`s discharge from all liabilities and obligations of for and on behalf of the first defendants, including any guarantees.*

(signed)	(signed)
Koh Seok Luan	Teoh Keng Hoon
Assistant Manager	Senior Vice President
OCBC Centre Credit	

18 Interestingly, however, the defence filed by the third defendant as well as the defence of the fourth defendant which remained unaltered since it was filed on 25 September 1995, did not seem to include the several allegations and

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contentions put forward on behalf of the said defendants before the assistant registrar during the O 14 application hearing. Not surprisingly, the plaintiffs applied on 18 January 1996 to strike out the whole of the defences of the third and fourth defendants on the grounds that they disclosed no reasonable defences or that they were frivolous, vexatious or otherwise an abuse of the process of court. On this occasion the plaintiffs were armed for the first time with a certificate of conclusive evidence signed by Ms Koh Seok Luan, assistant manager of the plaintiffs and Mr Teoh Keng Hoon, their senior vice president, as provided for under cl 20 of the guarantee. The said certificate inasmuch as it is relevant is reproduced hereunder:

> *9 January 1996*
>
> *To: Low Kian Beng*
>
> *Ngiam Choong Kam*
>
> *Re: Account The Timekeeper Singapore Pte Ltd*
>
> *Guarantee dated 21 December 1993*
>
> *Pursuant to cl 20 of the above guarantee, this is to certify that as at 8 January 1996, you are both jointly and severally indebted to us in the following sums:*
>
> (1) US$51,092.30 together with interest thereon at the rate of 9.3125% per annum commencing from 9 January 1996 until payment;
>
> (2) S$2,837.10 together with interest on the outstanding principal sum at the rate of 4.75% per annum above the plaintiffs` prime lending rate calculated on daily basis with monthly rests from 9 January 1996 until payment.
>
> *Yours faithfully*

19 In the affidavit filed in support of the plaintiffs` application, Ms Koh explained that the amount claimed in the amended statement of claim and the foregoing conclusive evidence certificate differed because the plaintiffs had received a sum of S$19,000 from the second defendant on or about 27

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December 1995. The plaintiffs incidentally issued yet another certificate on 1 February 1996 confirming the figure stated in the certificate dated 9 January 1996, making it clear the certificate thus issued was intended to be conclusive proof against the third and fourth defendants in the suit herein.

20 The third and fourth defendants were not deterred by any of the above. They, for their part, jointly applied to amend their defences. Their defences are again identical and in essence contained reference to the following aspects:

Paragraphs 1 to 4:	General denial of liability; demand that the plaintiffs produce a stamped copy of the original guarantee.
Paragraphs 5 and 6:	Second defendant`s alleged agreement with the plaintiffs to discharge the third and fourth defendants from their liability arising from the further guarantee signed by the second defendant on 15 February 1995 for a sum of up to $375,000.
Paragraph 7:	The plaintiffs had knowledge that the third and fourth defendants were no longer bound by the guarantee relied on by the plaintiffs.
Paragraphs 8 and 9:	Plea of estoppel against the plaintiffs. Waiver of plaintiffs` rights on account of their accepting a further guarantee from the second defendant dated 15 February 1995 for $375,000.
Paragraph 10:	No consideration moving from the plaintiffs for the guarantee relied on; plea of past consideration, alternatively the consideration, if any, is illusory and not real.

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Paragraph 11:	The plaintiffs had disbursed funds in excess of the line of credit. The plaintiffs` advances should not exceed in the aggregate of either 85% of S$ equivalent to the ACU deposits furnished to the plaintiffs or 100% of S$ deposits furnished to them. At all times the deposit furnished was only about S$200,000.
Paragraph 12:	The plaintiffs, at any rate, could not make advances above S$300,000.
Paragraphs 13 to 17:	Breach by the plaintiffs of a condition precedent in that the plaintiffs had failed to disclose to the guarantors, information regarding particulars of accounts of the company and allowing the company excess credit with the knowledge that the said funds were being used by the company and the second defendant for a competitor business.
Paragraphs 18 and 19:	Failure to take reasonable or proper care and breach of duty towards the third and fourth defendants and denial of any liability under the said guarantee.

21 **Proceedings before the deputy registrar**

22 The plaintiffs` application (entered No 417 of 1996) to strike out the third and fourth defendants` defences and the third and fourth defendants` joint application (entered No 120 of 1996) to strike out the plaintiffs` amended statement of claim were heard by the deputy registrar on 2 February 1996.

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Extensive arguments appeared to have been advanced by both parties on the issues. In addition to the principal argument by the third and fourth defendants that they had been discharged from their obligations on account of a further guarantee obtained from the second defendant, counsel for the third and fourth defendants contended that the earlier order by the assistant registrar giving them conditional leave raised a question of issue estoppel against the plaintiffs.

23 Counsel for the plaintiffs in reply, invited the court to the provisions embodied in O 18 r 19 of the Rules of Court 1996 and in particular to a decision by Yong Pung How J (as he then was) in ***Bangkok Bank Ltd v Cheng Lip Kwong*** [1990] 2 MLJ 5; [1989] SLR 1154, to support the plaintiffs` contention that the court could well strike out defences even after unconditional leave had been granted to defend an action.

24 **Deputy registrar`s decision**

25 The upshot was that the deputy registrar struck out the defences of the third and fourth defendants and granted liberty to the plaintiffs to enter judgment for the sums set out in the certificate dated 9 January 1996 issued by the plaintiffs and costs on an indemnity basis. As regards the third and fourth defendants` application to set aside the amended statement of claim refiled on 11 December 1995, the deputy registrar after making a nominal order setting aside the said amended statement of claim, nevertheless, granted the plaintiffs leave to amend their statement of claim as filed by them on 11 December 1995, with the amendments therein to stand. Consequentially, the deputy registrar disallowed the third and fourth defendants` application for leave to amend their defences.

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26 **Appeal to judge-in-chambers**

27 The third and fourth defendants appealed against the foregoing orders and the appeals were heard by me.

28 ***an abuse of process and the matter is res-judicata/issue estopped (sic) in the wider sense*** The arguments on behalf of the third and fourth defendants as presented by their counsel were too long to be entered upon here and suffice it if I said that they were to the following effect:

29 (1) The plaintiffs` failure to lodge a notice of appeal against the said conditional order was fatal to the application for striking out and they should not be allowed to re-litigate the issues. At any rate, the attempt at re-litigation by the plaintiffs was `.` In the premises, the deputy registrar`s decision in striking out the defences of the third and four defendants was ill-founded and could not be supported in the face of the earlier order of the assistant registrar granting the third and fourth defendants conditional leave to defend;

30 (2) the guarantee relied on by the plaintiffs was unenforceable for the following reasons: (a) the plaintiffs by advancing more than the amount stated in the guarantee (ie $300,000) acted to the detriment of the guarantors; (b) a further guarantee signed by the second defendant superseded the previous guarantee, ie the guarantee under scrutiny; and (c) the plaintiffs by taking the said further guarantee dated 15 February 1995 from the second defendant were deemed to have waived their rights against the third and fourth defendants since the second defendant had been made to assume the liabilities of the third and fourth defendants;

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31 (3) the certificate issued by the plaintiffs was not pleaded in the statement of claim and therefore could not be relied upon;

32 (4) the plaintiffs by failing to disclose to the third and fourth defendants the release of one Yona Foo who was a party to an earlier guarantee dated 27 July 1993 signed by the second, third and fourth defendants together with the said Yona Foo, acted to the detriment of the third and fourth defendants and such conduct rendered the guarantee under reference unenforceable;

33 (5) the clauses in the guarantee relied on by the plaintiffs offended the Unfair Contract Terms Act; and

34 (7) the plaintiffs had conducted themselves in an entirely unreasonable and inequitable manner, warranting the court to intervene and exercise its equitable jurisdiction.

35 **Decision**

36 The first ground argued by counsel for the third and fourth defendants was that the failure by the plaintiffs to appeal against the earlier order of the assistant registrar granting the third and the fourth defendants conditional leave to defend was a bar to the plaintiffs` later application. However, in my opinion, the learning and authorities relied on by counsel appear to favour the proposition that even after leave had been granted to a party to defend an action - be it with a condition as was the case herein, or otherwise - the court is at liberty to exercise its inherent jurisdiction to strike out the pleadings, if it appears at a later stage that the pleas put forward earlier were frivolous, vexatious or otherwise an abuse of the process of court. In this context, the first principles are concisely set out by the authors of the ***1997 Supreme Court Practice*** in the following

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terms: That `[apart] from all rules and orders the court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process` (see para 18/19/18, ***1997 Supreme Court Practice***).

37 A scenario not dissimilar to the one at hand appeared to have arisen in the ***Bangkok Bank*** case (supra). In that case, the Bangkok Bank, the plaintiffs brought an action against one Cheng Lip Kwong (the defendant) on 2 October 1996 for a share of his liability under a joint and several guarantee given by him and two others to the bank in connection with a loan extended to a company. After effecting substituted service on the defendant, the plaintiffs made an application on 17 January 1987 for summary judgment to be entered against him for $1.25m with interest at 8% per annum and costs.

38 The defendant opposed the application on the ground that although in 1982 he had set up the said company together with the other two guarantors, he had been removed as a director in early 1986. He claimed that the other guarantors had taken over the control of the company and had mismanaged its affairs, resulting in the default.

39 On 3 July 1987, the deputy registrar ordered that judgment be entered against the defendant for the sum claimed. On 7 July 1987, the defendant applied for a stay of execution. He merely claimed in his supporting affidavit that there was a triable issue but did not set out the grounds of his application in detail. The application was dismissed on 7 August 1987 and on 18 August 1987, judgment was duly entered against the defendant.

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40 ***On 7 July 1987 however, the defendant had also appealed to the judge in chambers against the deputy registrar`s decision. The appeal was heard on 7 October 1987. The defendant was granted unconditional leave to defend the action and the deputy registrar`s earlier decision in entering judgment was set aside.*** [Emphasis added.]

41 On 26 October 1987, the defendant filed a defence in which he pleaded in essence that the liability of both the company and the defendant had not crystallised and there was therefore no liability on the part of the defendant.

42 On 11 March 1989, some 16 months later, the plaintiffs applied by way of a notice for further directions for the defence to be struck out under O 18 r 19 on the ground that it disclosed no reasonable defence; it was frivolous and vexatious and an abuse of the process of court. In a supporting affidavit dated 28 March 1989, the plaintiffs` solicitors averred that the defence filed on 26 October 1987 offered no defence at all to the plaintiffs` claim. The affidavit exhibited a certificate dated 27 March 1989 under cl 6(c) of the guarantee certifying that on 16 August 1986, a sum of $4,981,712.10 was due and owing by the company. It was contended by the plaintiffs that under cl 6(c) any certificate issued thereunder would be binding and conclusive on the defendant as a guarantor.

43 When this application was heard on 17 April 1989, the assistant registrar ordered that the defence be struck out under O 18 r 19 and under the inherent jurisdiction of the court and that the plaintiffs be at liberty to enter judgment against the defendant for the sum claimed by them earlier and for costs and interest. On the same date, the defendant gave notice of appeal to the judge of the High Court in chambers against the assistant registrar`s decision, seeking

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that it be reversed and that the plaintiffs` notice for further directions be dismissed.

44 On 17 October 1989, the defendant`s appeal was heard by Yong Pung How J (as he then was) at the conclusion of which he dismissed the defendant`s appeal with a slight variation to the order as to costs. At the defendant`s request, further arguments were heard at the end of which the court reiterated its earlier views that the defence was obviously unsustainable because there was no real defence and accordingly recourse could properly be had to the summary process under O 18 r 19 of the RSC.

45 Ms Sim attempted at length to downplay the effect of the ***Bangkok Bank*** case. It was in vain. In my view the reasoning contained in that case clearly support the proposition that the court could at any stage of the proceedings exercise its inherent jurisdiction to strike out the pleadings - on the grounds set out under O 18 r 19 of the Rules of Court. It was no surprise therefore, the plaintiffs` solicitors who had earlier let slip the certificate of conclusive evidence at the O 14 stage before the assistant registrar thought it vital to avail themselves of the recourse open to them under O 18 r 19, this time by producing the certificate of conclusive evidence and by serving an amended or the proposed amended statement of claim on the defendants. In the premises, the argument that the plaintiffs were barred from taking out an application to strike out the defence under the inherent jurisdiction of the court as provided under O 18 r 19 is ill-conceived.

46 The defendants` next argument that the assistant registrar`s earlier order giving conditional leave to the defendants rendered the situation res judicata is difficult to comprehend since it is elementary that invariably in all cases,

conditional leave is given only where there are grounds for the court to assume that the defence raised appears to dwell on shadowy grounds. When conditional leave is given on such a supposition, it would be naive to believe that the court has reached finality on the issues, especially when pleadings still remain open and discovery is yet to be completed. In the circumstances the contention by the defence that there is issue estoppel and the matter is res judicata is to say the least, most disingenuous.

47 Reverting now to the defences filed, it would appear that the main theme therein is housed in the following averment: That `in consideration of the plaintiffs agreeing to discharge the [third and the fourth defendants] the second defendant executed a further sole guarantee in favour of the plaintiffs for a sum of up to S$375,000 on or about 15 February 1995.` This had been the leitmotif played over and over again by both defendants throughout the several hearings before me and argued spiritedly by their counsel.

48 Though there was a great deal said about the second defendant assuming the liability of the third and fourth defendants, there was hardly any material placed before the court to suppose even provisionally that it might be the case. Moreover, the second defendant who had let the claim against him go undefended, did not come forward to lend support to the allegations of the third and fourth defendants. Insofar as the court was concerned, the claims of the third and fourth defendants that the second defendant executed the further sole guarantee in consideration of the plaintiffs agreeing to free the third and fourth defendants of their obligations under the guarantee dated 21 December 1993, remained nothing more than a shot in the dark without even a sliver of validation. On the other hand, the plaintiffs` averments in this regard were unequivocal and besides their denial that they agreed with anyone at any time

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to discharge or release the third and fourth defendants from their liabilities, the court`s attention was invited to the express phraseology of cll 7 and 24 of the guarantee which empower the plaintiffs to obtain further and additional guarantees from anyone without prejudice or without affecting the existing liabilities of the original guarantors.

49 The question whether a subsequent guarantee executed, say for example by parties A, B and D, would have substituted an earlier joint and several guarantee executed, say by parties A, B and C was considered by the High Court of Australia in ***Mahoney v McManus*** (1981) 55 ALJR 673. The facts and the ratio decidendi therein are set out by the authors of ***The Modern Contract of Guarantees*** (2nd Ed), Phillips and O`Donnovan at pp 371 and 372 and reads:

> *In* ***Mahoney v McManus****, a `joint and several` guarantee was given by A, B and C, who were shareholders and directors of the principal company, to secure a debt due to Chrysler Marine Australia Ltd from the principal company. At a later stage another `joint and several` guarantee was given in respect of the same debt by A, B and D. Although C was not a party to the second guarantee, he claimed to be released from liability on the basis that A and B had been impliedly discharged from their obligation under the first guarantee by the execution of the second guarantee, and in consequence, C, as co-guarantor of the first joint and several guarantee was also discharged. This argument was rejected by [the majority led by] Gibbs CJ [Murphy J] and Wilson J concurring because there was no evidence that the second guarantee was meant to be taken in substitution of the first guarantee so that it could be said that A and B were discharged from the first guarantee. As Gibbs CJ stated:*
>
> *`It is not inconsistent with the continued operation of a joint and several guarantee by A, B and C that a joint and several guarantee should be taken from A, B and D in respect of the same indebtedness. There is no reason why the two guarantees should not both be effective, so that the creditor can avail himself of either or both, and so that any surety can obtain contribution against all the others.`*

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50 In my view, the principle enunciated by Gibbs J in ***Mahoney*** are in accord with the tenets of fairness and the imperatives of commerce and industry. I was therefore driven to conclude that in the absence of any confirmatory statement from the second defendant suggesting an agreement to discharge the third and fourth defendants, the facts viewed as a whole are incapable of yielding in law an inference of any mutual intention to discharge the guarantee executed by the third and fourth defendants on 21 December 1993. The submission that they had been released from their obligation could not also be sustained especially when the third and fourth defendants had not placed any material before the court to suggest that there was any consideration provided by them for the alleged release and discharge.

51 The next argument by the third and fourth defendants was that the plaintiffs, by providing facilities in excess of the amount of $300,000 stated in the guarantee were in breach of the terms of the guarantee as well as the letter of offer and as such the third and fourth defendants were not liable under the guarantee. This contention again lacked substance. In the first place, cl 8 of the guarantee specifically provides that the guarantee shall not be prejudiced, diminished or affected nor shall any of the guarantors (ie the second, third or fourth defendants) be released or exonerated by any increase, decrease, extension, renewal or restructure of any of the loan amounts. Secondly, the claim by the plaintiffs against the third and fourth defendants is not for any sum in excess of $300,000; in fact the claim as of 9 January 1996 was only for US$51,092.30 and a sum of S$2,137.10 and interest.

52 The other defences raised by the third and fourth defendants included fraud, illegality, waiver, breach of duty, past consideration and at the eleventh hour the provisions of the Unfair Contract Terms Act 1977 (UCTA).

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53 It is trite law that fraud and illegality must be distinctly pleaded and proved (see ***Davy v Garrett*** (1878) 7 Ch D 473 at p 489, per Thesiger LJ). In the case at hand, except for the mention of the spectre of fraud and illegality, there were no particulars of any sort provided to the court. It was patent that these pleas were raised haphazardly in an effort to distract the court from the main issues and I was not impressed by them.

54 The issue of past consideration was another shy entrant and was at one stage abandoned by counsel. The other ancillary arguments on breach of duty, estoppel and waiver raised by the defence were equally too fanciful to merit a detailed summation presently. It appeared to me that these were also raised mainly with a view to muddying the issues without any legal or factual matrices to support them.

55 Then there was an attack on the amount claimed by the plaintiffs. In this regard it is instructive to refer to the principles of law expounded by the High Court of Australia in ***Dobbs v National Bank of Australasia Ltd*** (1935) 53 CLR 643 as regards conclusive evidence certificates. The court held at p 643, that a certificate issued by a bank under a conclusive evidence clause was conclusive upon the parties of the amount and existence of the principal debtor`s indebtedness. Later at p 651 the court said:

> *This clause does not purport to impose upon the bank the necessity of obtaining the certificate it describes. It is not a qualification of the undertaking to pay contained in the first clause. It does not make a certificate a condition precedent to recovery. The promise remains a promise to pay the amount owing; it does not become a promise to pay the amount owing if certified or a promise to pay only what is certified as owing. The bank could recover without the 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****. [Emphasis added.]*

56 The principles laid down in ***Dobbs*** were approved by Yong Pung How J in the ***Bangkok Bank*** case where he similarly held that in the absence of fraud or obvious error on the face of the certificate, a certificate so issued under a `conclusive evidence clause` is conclusive evidence of that fact between the parties. I adopt the same view.

57 I was urged by counsel for the third and fourth defendants that the court should not pay heed to the conclusive evidence certificate. I must observe instantly that there is nothing, not even anything remotely worthy of regard placed before me in this connection to infer even a faint trace of fraud or unconscionability in the transaction under reference; neither could I discern any obvious error on the face of the certificate and consequently I am impelled to conclude that the amount stated therein is definitive and incontestable not only in relation to the amount but also as to the liability of the guarantors under the guarantee dated 21 December 1993.

58 There was one further salvo by the defence attacking cll 7, 8, 9, 20 and 22 of the guarantee on the basis that they are unreasonable and therefore offend the provisions of ss 3 and 4 of the UCTA.

59 To my mind, in certain circumstances when clauses in a contract of guarantee endeavour to seek to ***exclude the creditors` liability for a breach of contract or of a common law duty*** , such clauses might well offend the provisions of the UCTA (see para 306 of 20 ***Halsbury`s Laws of England*** (4th Ed)) and Goode, ***Legal Problems of Credit and Security*** (2nd Ed) (pp 193 to 194). However, having regard to the averments of the defendants and the

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phraseology of the guarantee under reference, I am of the view that the clauses which are the subject matter of criticism do not offend the UCTA, as they appear to have been not only freely entered into by the parties concerned, but also do not purport to exclude liability for breach of contract or of a common law duty. In any case apart from the contentions raised by counsel, there was no assertion in any of the affidavits that the said clauses were foisted upon the guarantors willy nilly without their consent. Additionally, as I observed earlier, the amount demanded under the guarantee does not exceed the amount stated therein and therefore there is no substance in the complaint that the plaintiffs were gaining an advantage over the guarantors pursuant to these clauses.

60 The other contention that when the third and the fourth defendants signed the guarantee under reference, they were not told that a previous guarantor, one Yona Foo who together with the other defendants signed an earlier guarantee dated 27 July 1993 had been released from further obligations was again an argument without conviction. Firstly, the letter of offer made by the plaintiffs on 10 September 1993 expressly omits any reference to Yona Foo. Secondly, there was little doubt that at the time the second, third and fourth defendants signed the guarantee dated 21 December 1993, they had never intended Yona Foo to be a co-guarantor. Thirdly, the contention based on Yona Foo is significantly absent even in the proposed amended defence of the third and fourth defendants. Having regard to the documents placed before the court, it was apparent that the defendants` contentions in this regard again lacked substance.

61 In conclusion, having considered the arguments of the defendants as well as their pleaded and proposed defences, I had little doubt that their purported defences were not only frivolous and vexatious, but also a flagrant

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abuse of the process of court. As a result, I ordered that the appeals of the third and fourth defendants be dismissed with costs. Consequently the third and fourth defendants` applications to amend their respective defences became otiose and were abandoned by counsel. Against this decision, the third and fourth defendants now appeal.

62 ***Appeal dismissed.***

MPH Rubin J

Alina Sim (WT Woon & Co) for the third and fourth defendants/appellants
Tan Hin Tat (Sim Hill Tan & Wong) for the plaintiffs/respondents

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