# Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd
# [2000] SGHC 52

**Case Number** : Suit 1478/1999

**Decision Date** : 31 March 2000

**Tribunal/Court** : High Court

**Coram** : Choo Han Teck JC

**Counsel Name(s)** : Yang Ing Loong and Christopher Tan Teow Hin [Allen & Gledhill] for the plaintiffs; Alfonso Ang and Nicholas Chan Wai-Kuin [A Ang Seah & Hoe] for the defendants

**Parties** : Capital Realty Pte Ltd — Chip Thye Enterprises (Pte) Ltd

## JUDGMENT:

### GROUNDS OF DECISION

1. The plaintiff is a company incorporated in 1972. It was the developer of a condominium and bungalow housing project at Tanglin Hill – Ridley Park. The project was known as the "Tanglin Hill Project". One of the plaintiff's directors, Ang Poon Soon, was in charge of the project. He was the person who made all the important decisions. One of the decisions he made on the plaintiff's behalf was to lend large sums of money (between November 1996 and May 1998) amounting to $1,400,000. The loans were made by cash cheques drawn on the plaintiff's account and received by one Lee Chin Kian. The cheques were all paid into the account of a company called Articon Construction Pte Ltd ("Articon") of which Lee was a director and shareholder. Payments were made from time to time, and the balance unpaid is $500,000. This was the sum that the plaintiff claimed in this suit against the defendant.

2. The big question, and the sole issue in this suit was, who was the borrower? It was not disputed that the agreement for the loans was made orally between Ang Poon Soon and Lee Chin Kian. Neither was it disputed that Ang and Lee were close friends. Lee was once the tutor in Chinese to Ang. The plaintiff's case was that Lee Chin Kian borrowed the money on the defendant's behalf. The defendant is a construction company. It entered into a construction contract with the plaintiff as the main contractor for the Tanglin Hill development. However, it assigned the entire contract to Articon. Lee was neither a shareholder or director of the defendant company. The defendant company held a 35% shareholding in Articon. The defendant claimed that the sub-contract it signed with Articon was made with the knowledge and consent of Ang Poon Soon. The sub-contract was indeed proved in evidence and was not disputed at trial; but the plaintiff's witnesses say that they had no knowledge of that contract at the material time.

3. It was also not disputed that the defendant's witnesses Phay Gi Mo and his nephew Pey Ciew Chang, were authorised signatories to Articon's cheques. The other signatory was Lee Chin Kian. Pey Ciew Chang had about 16.6% of Articon's shareholding, while Lee Chin Kian owned 26.6%, Kwek Teng Pheow owned 21.3%, and the defendant 35.3%. Lee Chin Kian is the brother-in-law of Phay Gi Mo, who is a director of the defendant.

4. It is obvious that direct evidence of the contract of loan could only be adduced by Ang Poon Soon or Lee Chin Kian. Ang is dead (he died in 1998), and Lee was not called by either party as a witness. He was also not a party to the suit whether as a defendant or a third party. Articon had been wound up. It was not disputed that the loans were made by way of cash cheques issued by Ang Poon Soon on behalf of the plaintiff. The cheques were handed over to Lee Chin Kian who deposited the cheques into Articon's account. Some of the receipts for the cheques from the plaintiff were issued by the defendant and marked as "Advance in payment to the Tanglin Hill project" (sic). There was also no dispute that the general ledger of Articon recorded the payments as loans made to it by the plaintiff. Partial payments were made from time to time by Articon. However, the plaintiff relied on an audit confirmation dated 23 January 1998, signed by Phay Gi Mo, acknowledging that the defendant owes the plaintiff a sum of $300,000. A subsequent confirmation note for $500,000 was not signed. Phay Gi Mo explained that he initially declined to sign the audit confirmation because the defendant had already sub-contracted the construction work to Articon, but Kwek Teng Pheow, a director of Articon, assured him that it was of no major significance as the letter was only a

formality. He was further assured by Kwek that the plaintiff had a retention sum of more than $500,000 which was sufficient to set-off the $300,000 stated in the audit confirmation if necessary. Mr. Phay did not make it clear, but my impression from his evidence was that he was thus assured that the defendant was not at risk by his signature.

5. Pey Ciew Chang averred that with the assistance of Ang Poon Soon, Articon obtained credit facilities of up to $4.9m from the Overseas Union Bank for the purposes of the project. The facilities were secured only by the personal guarantees of Articon's shareholders. The defendant on its part, executed an assignment, in the bank's favour, of all money due to it from the plaintiff.

6. The legal burden of proving the cause of action lies with the plaintiff. In the course of a trial, evidence adduced by one party may require a rebuttal from the opposing party. One such instance in this case was the evidence of the audit confirmation signed by Phay Gi Mo. Mr. Yang Ing Loong for the plaintiff made a strong submission on this point, relying on *Gobind Lalwani v Basco Enterprises Pte Ltd [1999] 3 SLR 354*. In that case, the company signed an audit letter acknowledging a debt to the plaintiff who was one of its shareholders. The court found for the plaintiff. Chao Hick Tin J (as he then was) held, at p359 as follows:

> "I cannot see how, when the audit confirmation letter clearly stated that the sum is due to the plaintiff, it can reasonably be argued that no debt is due and owing to the plaintiff. And if a sum is due and owing, it is payable, unless there is evidence of a special contractual arrangement for deferring payment or an agreement for other methods of payment."

7. By itself, the written confirmation is strong *prima facie* evidence of debt. It required an explanation. This was provided by Mr. Phay, whose evidence and explanation I accept. Basco's case concerned a claim for an account stated on the basis of the audit confirmation letter alone. That case was not complicated by other factors so far as the effect of the audit confirmation letter was concerned. The facts in this case were distinctly different. There was an outright dispute as to who the contracting parties were. The possibility of a third and even fourth party being the borrower in this case significantly altered the context of the claim. A straightforward approach towards the audit confirmation letter cannot be taken in this case without due consideration to other evidence which suggests that it might perhaps be Articon or Lee himself who was the borrower.

8. The evidence which indicated that the loan could have been made to either Lee Chin Kian or Articon was ample. Significantly, the benefit of the money loaned went to Articon. Articon assumed the responsibility of payment and did make periodic payments. The main contract was sub-contracted by the defendant to Articon. This was also material even though the plaintiff witnesses claimed that the plaintiff was not aware of the sub-contract. I am of the view (given the closeness of the relationship between several of the personalities in the plaintiff, the defendant, and Articon) that this was improbable. Nonetheless, the plaintiff's knowledge on this point was not crucial. What was crucial was the fact that by reason of the sub-contract the defendant's benefits, liabilities, and its responsibilities under the contract with the plaintiff were vastly diminished. It seems more probable that the loan was requested by Lee Chin Kian on behalf of Articon. The loan effectively benefited Articon, and indirectly Lee himself. There was hardly any evidence that the defendant benefited from them. In my view, there is no significant inference to be drawn from the fact that Lee had signed contracts on behalf of the defendants and had attended site meetings as the defendant's representative. This evidence must be considered against all the others pieces of evidence, some of which were favourable and others contradictory to the plaintiff's case. The personalities involved were close friends and that was borne out by the evidence that Lee was the brother-in-law of Phay Gi Mo; Kwek Teng Peow, a director of Articon was previously an employee of the defendant; the defendant and Pei Ciew Chang together owned a total of 52% of the shares in Articon; Phay Gi Mo himself was a cheque signatory of Articon; and Lee and Ang were at all material times the principal decision makers. The fact that Lee had a say in both Articon and the defendant only intensified the burden on the plaintiff (to show that he acted on behalf of the defendant). The plaintiff's basic burden was still to prove that the borrower was probably the defendant; but in the absence of direct evidence, the indirect evidence proved contradictory and inadequate.

9. I should add that the plaintiff was not without a remedy in the circumstances. It could have sued Lee Chin Kian and/or Articon. The practical difficulties in the way of an action against Lee or Articon do not detract from the reality of the situation, namely, that the defendant was not a contracting party. It should not be pursued merely because Articon had become

impecunious and Lee Chin Kian cannot be found.

10. Thus, on the evidence before me, I am unable to say that the plaintiff has proved on a balance of probabilities that the loans were made to the defendant. The claim was, therefore, dismissed with costs.

Choo Han Teck

Judicial Commissioner

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