Standard Chartered Bank v Neocorp International Ltd
[2005] SGHC 43

Case Number : Suit 92/2004

Decision Date : 28 February 2005

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Andre Maniam and Ong Pei Chin (Wong Partnership) for the plaintiff; Oommen Mathew and Genevieve Chia (Haq and Selvam) for the defendant

Parties : Standard Chartered Bank — Neocorp International Ltd

Banking – Lending and security – Plaintiff bank issuing conclusive evidence certificate – Whether certificate arrogating to plaintiff bank sole right to judge propriety of its claim against defendant borrower – Whether court precluded from reviewing legal basis of plaintiff's claim

Contract – Collateral contracts – Whether collateral contract existing to limit terms of guarantee

Contract – Contractual terms – Construction of guarantee – Whether guarantee should be interpreted in context of existing facts – Whether subsequent conduct of parties and evidence of subjective views may be considered when interpreting guarantee

28 February 2005

V K Rajah J:

Parties

1 The plaintiff is a bank. The defendant is a public company listed on the Singapore Stock Exchange. Pursuant to a guarantee dated 8 October 1999 ("the guarantee") the defendant stood as a guarantor for certain banking facilities granted by the plaintiff to its customer, Ceramic Technologies Pte Ltd (formerly known as S H Soil Works Pte Ltd) ("the borrower"). The borrower is a subsidiary of the defendant, in which it owns 56.3% of the issued shares.

Factual matrix

2 By way of a facility letter dated 7 September 1999 ("the facility letter"), subsequently amended by a supplementary facility letter dated 21 February 2000 ("the supplementary facility letter"), the plaintiff agreed to grant to the borrower banking facilities. Both the facility and supplementary facility letters were duly accepted by the borrower without qualification.

3 The banking facilities the plaintiff made available to the borrower included:

(a) $4,500,000 by way of a term loan to assist with the financing of 58% of the cost of a factory at Lot A167037 Tuas Crescent Mukim No. 7 Tuas ("the Tuas Factory"), with interest at prime plus 1.5% p.a. payable monthly in arrears, calculated on a monthly reducing basis, to the *debit of the borrower's current account*; and

(b) $750,000 overdraft in current account, repayable upon demand, *to assist with working capital requirement*.

[emphasis added]

(In the facility letter, the $4,500,000 term loan was referred to as Limit 1 and the overdraft as Limit 2.)

4 In the facility letter, the security required by the plaintiff was described as follows:

> SECURITY
>
> Securities for the above *Facilities and for Facilities which may be extended* by the Bank to the Customer [*ie*, the Borrower] from time to time:-
>
> For limit 1 [Term Loan] only
>
> 1) Fresh all monies mortgage over an industrial property over Lot A 16037 Tuas Crescent Mukim No. 7 [the Tuas Factory] in the name of the Customer.
>
> Fire insurance policy covering the above property for the full reinstatement value with the Bank's interest indicated thereon including mortgagee, non-cancellation and reinstatement value clauses and premium paid receipt are to be lodged with the Bank.
>
> A formal valuation by the licensed appraisers on the above property will be obtained upon acceptance of this letter.
>
> 2) Fresh letter of assignment of all rights, titles and benefits of the construction contract, insurance, policies, including contractor's All Risk Policy in favour of the Bank. ["Mortgagee"]
>
> For Limits 2) to 4) and Treasury Facilities
>
> 3) Fresh guarantee for SGD1,500,000 on the Bank's form, to be executed by Presscrete Holdings Ltd [the Defendant], to be supported by an appropriate board resolution and subject to the Laws of Singapore.
>
> [emphasis added]

5 The facility letter, in addition, expressly stated that the banking facilities were subject to the plaintiff's Standard Terms and Conditions. The Standard Terms and Conditions, *inter alia*, stated that the facilities approved could be "revised, amended and supplemented from time to time".

6 On 8 October 1999, the defendant provided the plaintiff with the executed guarantee and a board resolution also dated 8 October 1999 ("the board resolution"). In the board resolution, the defendant expressly "[r]esolved that the Company [defendant] *shall provide a Guarantee in the forms and contents* [*sic*] *as provided by the Bank* in favour of the Bank". The preamble to the board resolution briefly referred to the facility letter as follows:

> Noted that
>
> 1) In consideration of Standard Chartered Bank ("the Bank") agreeing to grant banking and treasury facilities to S H Soil Works Pte Ltd ("SHSW") *in accordance with the terms and conditions of the Bank's letter dated 7 September 1999*, the company is required to guarantee the due and punctual payment to the Bank.
>
> 2) The total liability of the Company as a Guarantor shall not exceed the principal sum of

S$1,500,000 together with interest.

[emphasis added]

7 I now turn to the guarantee itself, which includes certain clauses of particular relevance for the purposes of the present proceedings. Clause 1 of the guarantee, *inter alia*, states:

I/We, the undersigned (hereinafter referred to as the "Guarantor") HEREBY IRREVOCABLY AND UNCONDITIONALLY GUARANTEE the due and punctual payment to the Bank, on demand, *as principal debtor* and not merely as surety *all monies, obligations and liabilities*, *whether present or future*, actual or contingent, primary or collateral which are now or may *at any time hereafter be or become from time to time due, payable or owing to the Bank by the Customer* …

or in respect of which the Customer may be or become liable to the Bank on any account anywhere, whether in or outside Singapore …

or in respect of any other banking facilities whatsoever …

[emphasis added]

8 Clauses 3.1 and 6 of the guarantee stipulated:

Clause 3.1:

This Guarantee shall be a continuing security for the whole of the Guaranteed Obligations and shall in respect of each separate account of the Customer cover and secure the ultimate balance of the Guaranteed Obligations from time to time owing to the Bank by the Customer on each separate account or owing in any other manner whatsoever and the obligations of the Guarantor under this Guarantee shall not be considered as satisfied in whole or in part or reduced by any payment of any particular sum or sums or any settlement of any particular account in respect of any of the Guaranteed Obligations.

…

Clause 6:

The Guarantor hereby agrees and acknowledges that *the obligations and liabilities of the Guarantor* hereunder shall be absolute and unconditional and, in addition to the other provisions hereof, *shall not be abrogated, prejudiced, affected or discharged … by any increase, amendment or variation to any of the credit, banking or other accommodation extended to the Customer* …

[emphasis added]

9 After the guarantee was provided by the defendant, the borrower was allowed to operate the overdraft account from 15 October 1999. Subsequently, pursuant to the supplementary facility letter, the borrower began servicing the term loan in May 2000. In accordance with the terms of the facility letter, interest payments payable monthly on the term loan were debited from the borrower's current account through which the overdraft facilities were also being drawn on. The monthly repayment instalments of $75,000 on the principal sum of the term loan were subsequently also debited from the borrower's current account as and when they became repayable. While the modalities for repayment were not expressly spelt out in the documentation, it is incontrovertible that

the borrower acquiesced in this arrangement. In addition, the borrower periodically made payments into the current account to service the term loan instalments and outstanding interest. It bears mention that at no time did the borrower make any separate payments or adopt any other mechanism to repay the overdraft facilities, term loan instalments and or interest; the sole operational account it had with the plaintiff was the current account through which all moneys were paid in and out after the term loan had been disbursed.

10 In June 2000, the borrower requested an increase in the overdraft limit from $750,000 to $1m for a period of six weeks. The request was made during discussions between Mr Khoo Boo Tat ("Khoo") and Mr Tan Gee Shan ("Tan"). Khoo held directorships in both the borrower and the defendant when the guarantee was provided by the defendant to the plaintiff, while Tan was the plaintiff's senior relationship manager who negotiated the grant of banking facilities to the borrower in 1999. The plaintiff acceded to this request. In August 2000, the borrower requested that the increase in overdraft limit be extended for a further two months, that is, until 8 October 2000. Once again, the plaintiff approved the borrower's request.

11 Towards the end of January 2001, the borrower reduced the overdraft balance on the current account to just under $750,000. However, not long after, the current account swelled again as a result of the borrower's liquidity requirements. By June 2001, the outstanding overdraft balance stood at $1.1m.

12 In January 2002, the borrower was placed under interim judicial management, thereby entailing default under the plaintiff's Standard Terms and Conditions. Thereafter, the borrower's indebtedness to the plaintiff on the overdraft facility continued to augment, eventually exceeding $1.5m on 7 December 2002. On 14 November 2003, the plaintiff's solicitors demanded payment from the defendant under the guarantee of the principal sum of $1.5m and interest thereon. The defendant disputed its liability.

The issues

13 The plaintiff's claim in these proceedings is for the principal sum of $1.5m and interest thereon, as stipulated under the guarantee. The borrower's total indebtedness to the plaintiff on the other hand substantially exceeds the amount claimed under the guarantee, given that it is indebted to the plaintiff on the term loan as well as the current account. I should add here that I use the terms "current account" and "overdraft facilities" interchangeably.

14 Clause 17.1 of the guarantee, which authorises the plaintiff to issue "conclusive evidence" certificates, states:

> A certificate signed by any officer or solicitor of the Bank as to any amount due at any time from the Customer [*ie*, the borrower] and/or the Guarantor [*ie*, the defendant] to the bank in respect of the Guarantee (including the calculation of any amount of any interest payable) shall, in any legal proceedings against the Guarantor, *be conclusive evidence of the indebtedness at such date* of the Customer and/or the Guarantor to the Bank and shall be binding on the Guarantor. [emphasis added]

15 A certificate dated 2 April 2004 was duly issued by the plaintiff pursuant to cl 17.1 of the guarantee. This certificate asserts that as at 1 April 2004, there was a sum of $1,712,938.36 due from the defendant to the plaintiff in respect of the guarantee. This sum of $1,712,938.36 comprised the sum of $1.5m together with accrued interest from 7 December 2002 to 1 April 2004.

16 The main issues for resolution are:

(a) whether the court is precluded by the terms of the conclusive evidence certificate from reviewing the legal basis of the plaintiff's claim ("the conclusive evidence point");

(b) whether the plaintiff was precluded by the existence of a collateral contract from claiming any amounts outstanding on the overdraft facility that were not utilised strictly for the borrower's working capital ("the collateral contract point");

(c) whether, in any event, the broad terms of the guarantee should be interpreted narrowly in the context of the existing factual matrix ("the interpretation point").

The conclusive evidence point

17 Conclusive evidence clauses were originally devised and inserted in commercial documents to obviate cumbersome and painstaking inquiries to prove outstandings on running accounts. Having received the judicial imprimatur both in England (*Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437) and in Australia (*Dobbs v The National Bank of Australasia Limited* (1935) 53 CLR 643), the clauses are now used pervasively in all manner of documentation by all manner of businesses in common law jurisdictions. It would appear, however, that the rationale articulated by Lord Denning MR in the *Bache* case for the acceptance of such clauses has been tossed aside. He had tentatively observed at 440:

> I would only add this: this commercial practice (of inserting conclusive evidence clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted.

18 Accepting this as the sole rationale for the legal acceptability of conclusive evidence clauses would, however, make it difficult to justify the upholding of similar clauses in other commercial matrices. I am not persuaded that this is the sole basis on which such clauses ought to be accepted. Indeed in a much earlier decision in the late 19th century, *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 at 672, James LJ observed:

> If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it.

This was an observation of general applicability, not confined merely to banking transactions. In *Lishman v Christie & Co* (1887) 19 QBD 333 at 338, a non-banking case, Lord Esher MR opined in relation to a largely similar clause in intent:

> The provision is a good business provision for the purpose of avoiding disputes as to the quantity shipped where there is no dishonesty on either side.

19 The real foundation for the legal efficacy of such a clause is contract. It can be cogently argued that if parties expressly agree on the modalities for determining a matter, such an agreement should be upheld in the absence of any relevant public policy considerations. Indeed, this is the very basis on which the court recognises and gives effect to arbitration agreements, conclusive certificates of engineers and architects found in construction contracts and experts' decisions, among others. The High Court of Australia correctly observed in *Dobbs*' case at 652 that:

> It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them. … Parties may contract with the intention of affecting their legal relations but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person.

20 This leads to two corollary issues: can the parties preclude a legal review of the basis for the claim simply by inserting a term making the claimant the sole arbiter of the existence of the payee's legal liability? Is the court only entitled to review the propriety of a "conclusive evidence" claim when there is evidence of fraud or an error on the face of the demand?

21 In *The Glacier Bay* [1996] 1 Lloyd's Rep 370, the contract included a stipulation that the claimant was the "sole judge of the validity of any claim made thereunder". The Court of Appeal observed that while it was somewhat unusual to have such a stipulation, the agreement was in a form commonly used in the international oil trade. The clause was upheld notwithstanding that it was not a bank that invoked the clause. It must, however, be emphasised that the claimant conceded that there was a duty to act fairly in making such a determination. In other words, it was accepted that the basis of the claim was inherently justiciable. The learned editors of *Law of Guarantees* (Sweet & Maxwell, 4th Ed, 2005) observe at p 274:

> It would appear, therefore, that even in cases where a clause of this nature is inserted in the guarantee, for example one purporting to give the creditor the power to determine whether or not there had been a breach of the principal contract, *the Court would retain the power to review any determination made by the creditor if it could be shown that he acted in bad faith or the decision was perverse*. [emphasis added]

I am inclined to agree with this observation and to reiterate that a court would be loath to construe such a clause as encapsulating an intention to preclude any manner of review of the justiciability associated with and giving rise to the claim. Indeed this also appears to be the position that the common law courts took towards the applicability and efficacy of arbitral determinations until statutory intervention circumscribed their role (*per* Neill LJ in *The Glacier Bay* at 377):

> On questions of law, however, the Court will in general retain control and will decline to allow the extra-curial tribunal to be the final arbiter on such questions.

22 In *Bangkok Bank Ltd v Cheng Lip Kwong* [1989] SLR 1154 at 1159, [19], it was observed, *inter alia*, "in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause *is conclusive of both the liability and the amount of the debt*" [emphasis added]. The plaintiff contends that this *dicta* constitutes "conclusive" authority that a conclusive evidence clause invariably precludes any challenge as to the propriety of a demand. For the reasons I have already outlined, I do not agree. Furthermore, the relevant clause in that case provided, at 1157, [11], that:

> … any certificate by an officer of the bank as to the *moneys and liabilities* for the time being due and remaining or incurred to the bank from or by the customer or a copy of the account of the customer contained in the bank's book of account signed by any officer of the bank shall be binding and conclusive evidence on the guarantor in all courts of law and elsewhere. [emphasis added]

23 In my estimation, the word "liabilities" in the clause appears to be another abbreviated reference to "outstandings". It appears to me that the court, to the extent that it subsequently

adverted to "liability" ([22] *supra*), did not specifically contemplate the issue of whether this particular clause precluded a challenge to the actual legal propriety of the demand. In any event, even if I am mistaken in my reading of this decision, it is evident that the court was doing no more than construing the clause at hand. There was no intention to state a general principle applicable to all such clauses. Axiomatically, the effect of any such clause must turn on its particular wording – it is a matter for interpretation. I am not therefore suggesting that a court would never give effect to a well-drafted conclusive evidence clause in the event that such a clause purports unequivocally to arrogate to a contractual party the sole right to determine issues impacting on the other party. The point is that there will generally be a rebuttable presumption in commercial documents that a party has *not* agreed to confer on the opposing party an exclusive right to determine conclusively *all* matters pertaining to an adversarial claim. This situation is separate and distinct from one where the parties agree that a neutral party, such as an arbitrator or an expert, should resolve a dispute. A party should not, generally speaking, be allowed to use the fig leaf of a conclusive evidence clause to make an unlawful claim.

24 In this context it is also helpful to refer to the Court of Appeal decision in *Chip Hua Poly-Construction Pte Ltd v Housing and Development Board* [1998] 2 SLR 35. The "conclusive evidence" clause in that case provided that any demand under the bond should be conclusive that the sum or sums demanded was or were due and payable. The court had little hesitation in summarily dismissing a suggestion that the clause precluded a challenge to the propriety of the demand itself. It opined at [15] of the decision:

> We agree that … by reason of cl 8, a demand made under cll 1 and 3 is conclusive that the sum demanded is due and payable. Clause 8 is conclusive as to the amount demanded. *It is not conclusive as to the right of HDB to make the demand and the validity of such demand. The issue is not whether the amount demanded was correct but whether HDB were entitled to demand payment of that sum in the first place. Thus, the question still remains whether the demand was made in accordance with the terms of the bond*. It follows that where a demand is challenged, as here, HDB would have to satisfy the court that under the terms of the bond, and in particular cl 3, they can validly make the demand for payment of the sum, as they did. In our judgment, under cl 3, HDB are entitled to call on the bond to satisfy their claim against Chip Hua under any contract made between Chip Hua acting alone and HDB and not, as contended by HDB, a contract made between (i) Chip Hua and another party and (ii) HDB, such as any of the joint contracts. [emphasis added]

25 In the result, I do not accept the plaintiff's contention that the relevant conclusive evidence clause in the instant case precludes any inquiry into the legitimacy of the claim. The clause as drafted refers to the "indebtedness" of the defendant. This ought to be construed as a reference only to the quantum of the outstandings being claimed. *The Oxford English Dictionary* (Clarendon Press, 2nd Ed, 1989) defines the word to mean, *inter alia*, "the extent to which one is indebted; the sum owed; the actual debt". The clause *ex facie* does not preclude an inquiry into the propriety of the demand. Having so decided, I then proceeded to examine the other contentions.

The collateral contract point

26 A party may rely on extrinsic evidence to prove the existence of a collateral agreement: see ss 94(b) and 94(c) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). However, this will only be allowed in limited circumstances:

> Extrinsic evidence is admissible to prove a separate oral agreement, as to any matter on which the document is silent and is not inconsistent with its terms. … A collateral agreement made

> contemporaneously with the written contract may also be proved. … The court has regard to the degree of formality of the document when determining whether the parties have concluded a partially integrated contract …

See *Halsbury's Laws of Singapore* vol 10 (Butterworths Asia, 2000) at para 120.331.

27 One must bear in mind that in pursuing this particular contention the defendant is unable to rely on any exchange of correspondence, representations or even negotiations with the plaintiff. Indeed, prior to the signing of the guarantee, there does not appear to have been any meaningful communication between the parties relating to the actual terms of the facility letters or the guarantee. The plaintiff's communications were with the borrower exclusively. Nor is there any evidence of the common directors having taken up any issues *qua* directors of the defendant.

28 All that the defendant can rely on and has relied upon in pursuit of this point is the facility letter and the board resolution. In its opening statement the defendant framed the issue in the following manner: "whether the plaintiff should be entitled to ignore the clear and unequivocal terms of the bargain which was struck between the parties as contained in the Facility Letter". This contention conveniently sidesteps the inconvenient fact that the facility letter was not addressed to the defendant. Furthermore, the board resolution does not create a contractual relationship between the parties. In any event, the board resolution itself militates against any finding of a collateral agreement; it merely states, *inter alia*, that "the [defendant] shall provide a Guarantee in the forms and contents [*sic*] as provided by the [plaintiff] in favour of the [plaintiff]". To that extent it is amply evident that the defendant signed the guarantee without any manifest reservation about the terms of the plaintiff's standard guarantee.

29 In the circumstances, there is no substance at all to the defendant's contention that a collateral agreement prevailed between the parties limiting the terms of the guarantee. Given that the guarantee was signed after the facility letter was issued, it is axiomatic that the defendant was not only fully cognisant of the unqualified terms of the guarantee but had expressly agreed to these terms when it executed the guarantee. The defendant was staffed with experienced directors and managers who, had they wished to qualify or modify the terms of the guarantee in any way, would have certainly done so. In my view, the collateral point is clearly an afterthought, creatively developed and deployed by it in an attempt to stave off its legal liability. I should also add for good measure that the defendant's counterclaim for the rectification of the guarantee in these proceedings is entirely contingent upon the existence of a collateral contract. Given that there was no collateral contract, the defendant cannot even begin to meet the standard of "convincing proof" imposed on a party seeking rectification: *Kok Lee Kuen v Choon Fook Realty* [1997] 1 SLR 182 at [45] and [49].

The interpretation point

30 This contention forms the second string of the defendant's bow. In its opening statement, the defendant postulated that "*all the issues* really turn on the proper construction of the facility letter, the guarantee and the board resolution". The plaintiff however vigorously disputed this. It argued that in effect the defendant was not merely seeking to construe the guarantee but to contradict it; the defendant, it said, sought to restrict and contradict the meaning of the phrase "all monies, obligations and liabilities" which articulated its liability under the terms of the guarantee. The plaintiff took the position that as the terms of the guarantee were unambiguous, the court should not even deign to peruse the facility letter and the board resolution in determining the extent of the defendant's obligations.

Factual matrix

31 The broad contractual principles of interpretation and scrutiny summarised in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 have been considered and applied by the Court of Appeal in *Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443. In that case, the learned trial judge had permitted oral and affidavit evidence of "the mutual understanding that led to the insertion of cl 11(E) as part of the factual matrix": at [12] of the judgment.

32 On appeal, the Court of Appeal held that the learned trial judge had erroneously admitted evidence of negotiation and the intent of one party to the negotiation. The court stressed that the "factual matrix" which was admissible in *Investors Compensation* was clearly subject to the principle that the law invariably excludes the admission of previous negotiations of the parties and their declarations of subjective intent.

33 In *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [39], Lord Hoffmann himself clarified the scope of principles he had so succinctly summarised in the *Investors Compensation* case:

> I should in passing say that when, in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913, I said that the admissible background included "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man", I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law … or proved common assumptions which were in fact quite mistaken. *But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: "we do not easily accept that people have made linguistic mistakes, particularly in formal documents"*. I was certainly not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage. [emphasis added]

34 In Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2004), the learned author summarises the legal position (after a review of all the relevant authorities, including *Prenn v Simmonds* [1971] 1 WLR 1381, *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 and the *Investors Compensation* case) on the admissibility of the factual background known to the parties at or before the date of the contract as an aid to construction at pp 85–86, para 3.11:

> *It may, therefore, be concluded that the admissible evidence of background is limited to objective facts, and that save in exceptional circumstances those facts exclude evidence of the negotiations between the parties, and direct evidence of their actual intentions*. Further, the object or aim of a transaction is something which the court must ascertain on the evidence. It is not something which the court is able to determine from its own knowledge.
>
> It is, of course, the case that facts which were not known to either party at the date of the contract are not relevant to the construction of their contract, for if the facts were unknown they cannot have played any part in forming the presumed intention which is embodied in the contract. However, where a fact is known to one party and not to the other, in theory it may well have played a part in forming the intention of the party who knew that fact. *However, unless a fact was known to both parties, it will not be admitted in evidence, because what the court is seeking is not the actual intention of one party to the contract, but the presumed mutual intention of both of them*.

> However, *the court must be careful to ensure that the evidence of background is used to elucidate the contract, and not to contradict it.*
>
> [emphasis added]

35 The plaintiff's contention was that the sum total of the defendant's liability was to be determined merely by reference to the terms of the guarantee. That is not entirely correct. It is settled law that "where words of a written agreement have a clear and fixed meaning, not susceptible of explanation, extrinsic evidence is inadmissible to show that the parties meant something different from what they have written": *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 at [67]. Broadly speaking, if the purport of a guarantee is plain from the terms of the document, extrinsic evidence will not be admissible to alter, vary or contradict its terms (see also s 96 of the EA). However the immediate events surrounding the giving of a guarantee may be relevant and "admissible in evidence to determine the existence and the application of the terms of the guarantee having regard to the provisions of [ss 93 and 94 of the EA)": *Citibank NA v Ooi Boon Leong* [1981] 1 MLJ 283 at 282. Such evidence could be relevant in determining the context in which the guarantee was given and to be interpreted; it must not be applied for the purposes of contradicting unambiguous language, but rather to see if there are circumstances addressing the alleged inchoate attachment of a purported contractual obligation.

36 The matrix approach to contractual interpretation so succinctly summarised by Lord Hoffmann in the *Investors Compensation* case is in accordance with s 94(f) of the EA. It advocates a commercially-sensible approach in divining the objective intentions of the parties to a document. This approach has the requisite suppleness to permit a departure from the literal terms of a document, where necessary, to allow the court to objectively find a rational meaning contingent upon the proper commercial context. It cannot be gainsaid that when parties draft contracts they do not usually expect the court to indulge in excessive formalism. In the ultimate analysis, the task of the court is to arrive at the reasonable meaning of the documents without artificial rules that fetter its sole objective of ascertaining the true intention of the parties. Substance takes precedence over form. This approach also recognises the chameleon-like character of words, phrases and sentences. They take their true meaning from their contextual usage and not invariably from the dictionary. This commonsense approach is not, however, to be interpreted as an unbridled license to import subjective expressions of intent or to cast away established rules of interpretation which eschew reliance on prior negotiations and subjective expressions of intent.

37 The terms of the guarantee itself, a formal document under seal, are plain. The issue, however, is whether the plaintiff had, through the facility letters which preceded the guarantee, not only conveyed but created an understanding with the defendant that they would rely on the guarantee only to recover overdraft facilities employed by the borrower strictly for purposes of its working capital.

38 At this juncture, three pertinent points need to be emphasised. First, the facility letter was not addressed to the defendant. Secondly, the portion of the facility letter dealing with "SECURITY" is immediately followed by the words:

> Securities for the above facilities and *for facilities which may be extended* by the [plaintiff] to the [borrower] *from time to time*. [emphasis added]

Thirdly, it was expressly stated that the guarantee was to be given "on the [plaintiff's] form". It should also be noted a subsidiary caption intituled "For limits 2) and 4) and Treasury facilities" (see [4]) immediately precedes the term in the facility letter providing for the guarantee. This subsidiary

caption appears to form the linchpin of the defence; the defendant has sought to establish that this caption conclusively restricts the scope of the guarantee to cover only facilities utilised for the borrower's working capital. I rejected this contention.

39 It was clear to me that the intention of the facility letter was to confer on the bank the discretion to rely on the securities for not only the proposed facilities but "for facilities which may be extended … from time to time" as well. There was nothing unusual or awkward about this arrangement. It is common banking practice for banks to vary or amend facilities periodically. The borrower was content to accept the facility arrangement on these terms. So was the defendant. Indeed its board resolution, far from advancing the defendant's cause, actually undermined it. The resolution, after noting the terms of the facility letter (see [6]) and reaffirming that the defendant's liability as guarantor "should not exceed the principal sum of $1,500,000 together with interest", unequivocally states:

> Resolved that the [defendant] shall provide a guarantee in the forms and contents [*sic*] as provided by the [plaintiff] in favour of the [plaintiff].

40 It is hornbook law that material variations of the contract existing between the creditor and a borrower (principal debtor) made without the guarantor's concurrence will release the guarantor: *Holme v Brunskill* (1878) 3 QBD 495. It is because of this principle that most bank guarantees invariably include "variation" clauses. These clauses permit the bank to vary, amend or modify banking facilities with the borrower without discharging the guarantor. Clause 6 of the guarantee (see [8]) is one such clause. It is as plain as a pikestaff that the defendant was by all accounts more than content to have accepted liability on the terms of the plaintiff's standard guarantee form. Given the very clear terms of the guarantee (see [7] and [8]), it is difficult to comprehend the defendant's complaint, let alone sustain it. The defendant was quite content to sign the bank's standard guarantee; it did not qualify its obligations under the guarantee in any manner; the guarantee continued to steadfastly apply even in the event of any "amendment or variation" to the banking facilities. Notwithstanding, the defendant's real complaint was that the term loan instalments and interest should not have been debited to the borrower's current account. This is an entirely vacuous contention considering that the borrower had agreed to this arrangement. The borrower itself had raised no objection(s) on receiving its regular bank statements from the plaintiff. The borrower had, to all intents and purposes, agreed to utilise the overdraft account not only for the purpose of drawing money for its working capital but to service its term loan obligations apropos the property. Surely this arrangement could not discharge the defendant from its liability to the plaintiff. The defendant had expressly agreed in the guarantee that the plaintiff and borrower could vary their arrangements without any reference to it. The plaintiff's right to vary the facilities was further contained in the Standard Terms and Conditions (see [5]). To that extent, I find the defendant's contentions totally without merit.

41 The final illusive crutch that the defendant attempted to rely on in seeking to limit the plain terms of the guarantee came in the form of the plaintiff's internal documents which appeared, at first blush, to indicate that the plaintiff may have *initially* intended to rely on the guarantee in somewhat limited circumstances. Pertinently, the defendant's witnesses conceded that they had no knowledge of any such documents or their contents and, more importantly, they never had any direct communications with the plaintiff on these issues at all material times. As the defendant's counsel laboured at length over this issue, I should briefly state why I summarily rejected these documents as evidentially relevant.

Earlier facility letter of 16 August 1999

42 Pursuant to this earlier document the only security for the facilities was the mortgage for the property. This letter was subsequently superseded by the facility letter. This was not disputed. In *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161 at [83], Rix LJ astutely observed in a similar context:

> In principle, it would seem to me that it is always admissible to look at prior *contracts* as part of the matrix of surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. *The difficulty of course is that, where the later contract is intended to* supersede *the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one.* … Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law. [emphasis added]

I respectfully agree with this observation. The only legitimate conclusion one can draw with reference to the earlier letter is that the plaintiff's original intention as expressed therein was subsequently modified. Even assuming it was relevant, it could not assist in the actual interpretation of the facility letter.

Internal documents

43 These documents were a combination of documents that both preceded and followed the execution of the guarantee. It bears reiterating that the contents of these documents, unknown to the defendant, clearly do not form part of the matrix: see [33], [34] and [36]. At the very most, these documents, and in particular the documents that preceded the guarantee, would reflect the plaintiff's subjective intentions. It is settled law that such documents are inadmissible: see [34]. The danger in relying on such documents, quite simply, is that there can be many a slip between the cup and the lip. The documents are inherently unreliable tools to employ in ascertaining the objective intention of the parties.

44 In so far as the internal documents that followed the execution of the guarantee are concerned, they are clearly inadmissible. In instances where the contract is fully embodied in documents, the court ought not to look at the subsequent conduct of either of the parties to determine the meaning of the written agreement or to divine the parties' original intentions. Such documents evidencing subjective intentions are not only almost invariably wholly unreliable but often also contain an element of posturing. Even if they merely record the purely subjective intention of one of the parties untarnished by imputations of posturing, they would be of little assistance. In short, uncommunicated intentions or personal interpretations are inadmissible. Indeed, even when such intentions or interpretations are published or communicated, they remain inadmissible. A party's subjective construction of a document or its terms, except where issues of estoppel are involved, cannot preclude it from taking a contrary position later. It is for the court, in the event of a dispute, to determine the true meaning of contractual documents objectively. In *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603, Lord Reid observed with his customary acuity:

> I must say that I had thought that it now well settled that *it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later*. [emphasis added]

Liability under the guarantee

45 The defendant's liability has to be defined by the guarantee itself. There is no basis for suggesting that its liability was *co-extensive* with the terms of the facility letter even assuming *arguendo* that the original intention in the facility letter was to procure the guarantee solely for the purposes of securing only overdraft facilities for the borrower's working capital. The terms of the facility letter themselves contemplated other or additional facilities being secured by the guarantee. The terms of the guarantee itself were explicit. While it is correct to say that common law courts often strive for co-extensiveness between primary and secondary liability, this would in the final analysis be dependent on the terms of the guarantee. The learned authors of *The Modern Contract of Guarantee* (Sweet & Maxwell, English Ed, 2003) at p 292, para 5-91, incisively discern:

> It is thought, however, that … the general principle of co-extensiveness would lead the courts to strive for an interpretation which would make the liabilities of principal and guarantor the same, *except where the instrument clearly indicated that the "guarantor" has assumed a wider independent liability*. This view is supported by the fact that, as has been seen, the courts may construe a contract as a guarantee, even though it contains an indemnity clause. [emphasis added]

46 I see no reason why a guarantor cannot assume a more extensive liability than that contemplated in a facility letter if the terms of the guarantee explicitly provide so. However, such instances would be unusual. This will essentially be a question of fact. Most guarantors normally focus only on the upper limit of their liability when they sign a guarantee. They do not query or carefully consider the consequences and the permutations that may be visited upon them by the other terms of the guarantee. Only when they are called upon to fulfil their obligations do they raise, often upon securing legal advice, the plaintive pleas of collateral contracts, conditions precedent and the factual matrix. A court of law is not a court of sympathy and cannot yield to contentions based on amorphous and usually unsupportable notions of equitable justice.

47 In this case the liability of the defendant was not greater than that of the borrower. Admittedly, the plaintiff and the borrower varied some aspects of the original facilities arrangement. Notwithstanding, the defendant *qua* guarantor continued to be liable under the guarantee, as it had expressly agreed to such an occurrence. The defendant in this case admitted, through the evidence of Chan Weng Kong, a director of the borrower and its finance manager during the material period, that it had studied the guarantee "carefully" because it had "a very prudent policy in extending corporate guarantees" given its standing as a listed company. In the light of this concession acknowledging full knowledge of the liability undertaken, I had to ineluctably conclude that there was no substance in any of the grounds the defendant had raised in these proceedings.

Conclusion

48 In the ultimate analysis there are just two questions to resolve. First were the terms of the guarantee broad enough to embrace the plaintiff's claim in these proceedings? The answer is an unequivocal yes. Secondly, did the terms of the facility letter and/or the board resolution whittle down the ambit of guarantee? The answer is an emphatic no. In the circumstances, I allowed the plaintiff's claim for the principal sum of $1.5m and outstanding interest, as reflected in its conclusive evidence certificate dated 2 April 2004, in full. As the guarantee provided for indemnity costs I also directed that the plaintiff's costs be taxed on an indemnity basis if it could not be agreed upon.

Judgment for the plaintiff with costs.