

Lim Zhipeng v Seow Suat Thin
[2020] SGHC 5

Case Number : Suit No 336 of 2018
Decision Date : 07 January 2020
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Adrian Tan Wen Cheng and Delson Tan Choon Yuan (August Law Corporation) for the plaintiff; Kanthosamy Rajendran and Madeline Ee (RLC Law Corporation) for the defendant.
Parties : Lim Zhipeng — Seow Suat Thin

Contract – Consideration – Forbearance

[LawNet Editorial Note: The appeal in Civil Appeal No 11 of 2020 was allowed by the Court of Appeal on 8 September 2020. See [\[2020\] SGCA 89.](#)]

7 January 2020

Judgment reserved.

Choo Han Teck J:

1 The plaintiff is a 36-year-old businessman who was a long-time friend of Derek Cheong Wee Ker (“Derek Cheong”). Although they were schoolmates, Derek Cheong was closer to the plaintiff’s younger brother, Lim Zhiyong (“LZY”). Derek Cheong approached the plaintiff through LZY for money for his business. They both had business in Shenzhen, China when they concluded the agreement for this transaction. The defendant is the mother of Derek Cheong. Her counsel, Mr K Rajendran, submitted that this transaction was a loan and not an investment as the plaintiff claimed. That is one of the many red herrings in this case. A loan can, of course, be a form of investment, but as will be seen, the taxonomy of business deals is not important in this case.

2 The agreement between the plaintiff and Derek Cheong was simple and not disputed. The plaintiff was to transfer \$565,000 to Derek Cheong. Some of the money was transferred in China and some in Singapore. Derek Cheong agreed to repay the plaintiff the money in two tranches: the first in the sum of \$265,000 and the second in the sum of \$330,000. The total amount is therefore \$595,000. The extra \$30,000 represents the interest or profit to the plaintiff, depending on whether one regards the transaction as a loan or an investment. By the time of the trial, and prior to the filing of this action, Derek Cheong had repaid \$105,000. At trial, the defendant testified that she had since paid a further \$40,000 to the plaintiff in November 2017.

3 Derek Cheong was unable to make full payment and after the plaintiff began pressing for payment, Derek Cheong told him that his mother (the defendant) would be selling her properties and would pay the plaintiff from the proceeds of the sale. He assured the plaintiff that the defendant would sign a guarantee to that effect. The defendant signed a document titled “Deed of Guarantee” dated 28 September 2017 (“the Guarantee”). A lawyer, Victor Lee Chay Pin, witnessed the signing. It was also signed by the plaintiff, without a witness, but no issue was raised on this point.

4 In the Guarantee, the plaintiff is described as “Creditor” and the defendant as “Guarantor” but immediately below that line, the plaintiff was referred to as “Lender”. Nothing turns on this careless

draftsmanship. The main parts of the "Guarantee" provide as follows:

WHEREAS

1. CHEONG WEE KER DEREK (NRIC No SXXXX011F) of 19 Jalan Kechubong, Singapore 799379 (the "Debtor") has borrowed an aggregate sum of \$595,000.00 from the Creditor, of which \$490,000.00 remains outstanding (the "Debt").
2. The Debtor and Guarantor have proposed to pay the Debt to the Creditor by way of:
 - a. \$150,000 from the sale proceeds of 5 Kampong Eunus #04-07 Eunus Park Singapore 417771 on or before 11 November 2017;
 - b. \$150,000 from the sale proceeds of 188 Race Course Road #04-05 Singapore 218612 on or before ~~[date]~~; and *1st April 2018 or upon settlement, whichever is earlier.* [signature]
 - c. \$5,000 on or before the 15th day of each month starting from 15 February 2018 until the Debt is fully paid off (the "Repayment Scheme").
3. The Guarantor has agreed to guarantee the payment of the Debt by the Debtor on the terms set out below.

WHEREBY IT IS AGREED

1. GUARANTEE

The Guarantor hereby guarantees the following:

- a. that the Debtor shall make payment on the terms of the Repayment Scheme as set out in paragraph 2 above; and
- b. full and immediate payment of any and all outstanding sums due from the Debtor under the Repayment Scheme, upon a notice in writing from the Creditor that the Debtor has defaulted on payment on the terms of the Repayment Scheme.

5 Derek Cheong is described in the Guarantee as "the Debtor" but he is not referred to in "the Parties". This is a little troublesome because the recital states, "The Debtor and the Guarantor have proposed to pay the debt to the Creditor". Why this omission is relevant will become obvious.

6 It transpired that Derek Cheong was unable to pay the debt, and the plaintiff called upon the defendant to pay under the Guarantee. The defendant demurred and the plaintiff sued in this action on the Guarantee. The summary judgment obtained by the plaintiff was set aside on the ground that there are triable issues arising from the Guarantee.

7 The evidence at trial is largely not in dispute except for a few areas, none of which are relevant. The first and most devastating problem for the plaintiff is that he had sued on the Guarantee as a deed that was signed, sealed and delivered. Unfortunately for him, as the Guarantee shows, and which the plaintiff does not deny (save to say that the Guarantee was drafted by his own lawyer, Mr Adrian Tan), it was signed and delivered but not sealed.

8 It is elementary that a deed is an enforceable agreement without proof of consideration, and

for that reason, the formalities must be complied with strictly. Without the seal, the document may still be a contract, but as in all contracts not under seal, the plaintiff must then show that consideration was given to the defendant in exchange for it: see *Kuek Siew Chew v Kuek Siang Wei* [2015] 1 SLR 396 at [30]–[33]. In this case, we must examine the plaintiff’s statement of claim.

9 The statement of claim merely states that the plaintiff is relying on the Guarantee for its full terms and effect. No consideration was pleaded. At the end of the trial no application was made to have the statement of claim amended even though by this time, the plaintiff must be fully aware that the Deed might be defective. Indeed, his solicitors ought to have known by the time the summary judgment was set aside in *Lim Zhipeng v Seow Suat Thin* [2019] SGHC 104, which highlighted the deficiencies in the so-called deed (at [6]). No effort was made by the plaintiff to amend the statement of claim after the decision was given.

10 The second problem arises from the fact that the plaintiff advanced the money to Derek Cheong between January and March 2017, and Derek Cheong was adjudicated a bankrupt on 13 July 2017, before the debt could be paid. The defendant executed the Guarantee in September 2017, after Derek Cheong was made a bankrupt, and Derek Cheong is not one of the parties to the Guarantee. What consideration did the plaintiff give in exchange for the defendant signing this Guarantee? We do not know from the pleadings because it was silent on this point, presumably because the plaintiff was relying on the guarantee as a contract under seal.

11 In his reply to the defendant’s counterclaim, the plaintiff said that the consideration was a “forbearance to enforce and/or prove a debt against Derek [Cheong]”. This matches his evidence in his application for summary judgment, where he stated on affidavit:

20. Even though the [Guarantee] was executed after I provided the loan, this does not make the [Guarantee] unenforceable as I did not lodge a proof of debt against [Derek Cheong] in exchange for the [Guarantee] being executed. However, when it appeared that the Defendant was not going to comply with the terms of the repayment scheme as set out in the [Guarantee], I lodged a proof of debt against [Derek Cheong] on 28 March 2018...

12 And yet this version of events contradicts the evidence he gave at trial. The plaintiff stated clearly in his affidavit of evidence-in-chief that at the time of signing the Guarantee, he did not know whether Derek Cheong was a bankrupt; it then follows that he could not have intended to forbear to prove the debt in exchange for the Guarantee, because one proves a debt against a bankrupt. When questioned at trial, he was thoroughly unhelpful and did not clear up the contradictions:

Q When you say that “proof of debt”---that you will not file a proof of debt, it refers to bad--- Derek being a bankrupt, Do you---

A What?

Q ---agree or not?

A Why is it so? Why does it mean that when I file a proof of debt against someone, it means he’s bankrupt?

Q You explain to me. What does your statement---

A No, I---I explained to you. So when I did not file a proof of debt against someone that owes me money doesn’t mean that he’s bankrupt. Right. Someone can owe me money and---and I

can just file a---a---a proof of debt, right? Isn't it wrong---isn't it right?

13 Finally, in his closing submissions, the plaintiff submitted that the consideration was in the form of "forbearance in taking further action against Derek [Cheong]". That is too vague to be helpful. It is unclear, then, what consideration there was, which is an obvious consequence of the lack of proper pleading. On the vague evidence in this case, it appears that if the plaintiff and the defendant did not know that the debtor was a bankrupt, as they claim, then the likely consideration would have been a forbearance to sue. If the parties knew that the debtor was a bankrupt when the purported deed was executed, then they may have known that no proceedings can be brought against a bankrupt without leave of court pursuant to s 76(1)(c) of the Bankruptcy Act (Cap 20, 2009 Rev Ed), and the consideration would have to be a forbearance to file a proof of debt. Without the specific pleading, and in light of the unsatisfactory evidence, I am of the view that the failure to plead the consideration given is fatal to the plaintiff's claim.

14 For the reasons above, the plaintiff's claim is dismissed. As for the defendant's counterclaim for the return of the sum of \$40,000 that she paid to the plaintiff, she submits that the plaintiff was unjustly enriched as he provided no consideration. As a consequence of my finding above, I allow her counterclaim.

15 The plaintiff shall pay costs to the defendant to be taxed if not agreed.

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