Teo Song Kwang (alias Teo Richard) and Another v Vijayasundram Jeyabalan [2005] SGHC 60

Case Number : Suit 406/2004

Decision Date : 30 March 2005

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Oon Thian Seng and Sophia Saw (T S Oon and Bazul) for the plaintiffs; Leong Wai Nam and Jamilah Ibrahim (Wong M Seow and JYP Chia) for the defendant

Parties : Teo Song Kwang (alias Teo Richard); Seng Hup Realty Pte Ltd — Vijayasundram Jeyabalan

Credit and Security – Guarantees and indemnities – Co-guarantors – Separate guarantee documents executed – Whether separate guarantee documents part of same transaction – Whether co-guarantor consulted on settlement agreement – Whether co-guarantor liable under settlement agreement

Tort – Misrepresentation – Fraud and deceit – Whether plaintiffs induced to inject more funds into business by defendant's misrepresentation that he had signed guarantee

30 March 2005 *Judgment reserved.*

Tan Lee Meng J:

1 The first plaintiff, Mr Teo Song Kwang alias Richard ("RT"), and the second plaintiff, Seng Hup Realty Pte Ltd ("Seng Hup"), sued the defendant, Mr Vijayasundram Jeyabalan ("VJ"), to recover a large part of the losses incurred by them in a business venture in the Indonesian timber market, on the ground that VJ had a share in the said business venture and had agreed to be liable for the amount claimed by them. In addition, RT, who settled a claim made against him by an Indonesian bank, PT Internationale Nederlanden Indonesia Bank ("ING Bank"), under a guarantee signed by him, VJ, and another party, claimed that VJ was liable for one-third of the settlement sum. VJ denied that he owed any money to RT or Seng Hup.

The background

2 RT was, at the material time, the managing director and majority shareholder of Seng Hup, his family's investment company, whose subsidiaries include a number of companies in the lighting business in Singapore, Malaysia, Brunei, Indonesia and the United States.

3 In 1979, RT offered VJ a job in his lighting business. He was rather pleased with VJ's work. In due course, RT regarded VJ as his right-hand man in his lighting business. In his own words, when it came to dispensing rewards, he was more generous to VJ than to his own brothers. RT gave VJ shares in a number of his companies without requiring the latter to pay a single cent for them. He allotted VJ 10% of the shares in Crystal Palace Brunei, Krystalina Worldwide Sdn Bhd and Kristalina Mannuggal. He also gave VJ 5% of the shares in his Malaysian company, Seng Hup Sdn Bhd.

4 From 1990 onwards, RT asked VJ to take charge of Seng Hup's lighting business in Malaysia. As a result, VJ moved to Kuala Lumpur. By then, RT, who wanted to diversify his business, had taken an interest in the Indonesian timber market. His plan was to buy Indonesian timber logs and process them into parquet wood for the Italian market. For this purpose, he wanted to acquire an Indonesian company, PT Profilindo Sejahtera, which owned a wood-processing plant.

5 RT roped in his right-hand man, VJ, for his new business venture in Indonesia ("the Indonesian timber business"). The exact nature of VJ's involvement in the Indonesian timber business was disputed. VJ said that he was only nominally involved as a trusted and faithful employee of RT. He added that apart from a couple of junket trips to Indonesia, he had very little to do with the Indonesian timber business. On the other hand, RT claimed that VJ was an equal partner in the new business. RT also decided to work with another person, one Mr Hendrick Tay Cheng Leong ("HT"), on his new business venture. According to RT, the duties and responsibilities were as follows. RT himself was to take charge of financing and marketing, VJ was to take charge of administration and co-ordination and HT was to take charge of the acquisition of the shares of PT Profilindo Sejahtera, the obtaining of the requisite approval from the Indonesian authorities for the transfer of the said shares to RT, VJ and himself, and finally, to handle matters relating to production and customer service.

6 The foray into the Indonesian market was carried out through Asiapac Pte Ltd ("Asiapac") which was incorporated in July 1989. RT and VJ were directors and shareholders of Asiapac from its inception. All the shares issued by Asiapac to VJ and HT were paid for by RT. In his Affidavit of Evidence-in-Chief, RT said that VJ and HT "did not have the resources to contribute towards the teak business".[1]

7 On 2 July 1990, RT, VJ and HT signed a memorandum of understanding ("MOU") with respect to the purchase of shares in PT Profilindo Sejahtera. Thereafter, RT and Seng Hup poured millions of dollars over the next few years into the Indonesian timber business. RT, VJ and HT furnished guarantees to a number of financial institutions, including the Oversea-Chinese Banking Corporation Limited ("OCBC") and ING Bank, for the purpose of the said business.

8 The warm relationship between RT and VJ did not last. VJ eventually left RT's lighting business in 1995 and set up his own lighting business in Kuala Lumpur.

9 After VJ left Seng Hup in 1995, RT continued to inject his own funds as well as Seng Hup's funds into the Indonesian timber business. However, the Indonesian timber business proved to be a loss-making enterprise. There was a proposal by HT to take over the Indonesian timber business but nothing came out of this. By March 1997, it was decided that the parties' assets in the Indonesian timber business would be sold. However, no buyer for the business was found and no further action was taken. On 27 October 1999, HT resigned as a director of Asiapac.

10 In December 1997, OCBC demanded from RT the repayment of US$563,803.01, which was due under an overdraft facility granted to Asiapac. This overdraft facility had been guaranteed by RT, VJ and HT. On 9 May 1998, RT paid OCBC US$264,596.86 in full and final settlement of the sum claimed. In District Court Suit No 50759 of 1998 ("DC Suit 50759/1998"), RT successfully sued VJ for one-third of the said settlement amount.

11 In March 2002, ING Bank sued RT in Singapore on a guarantee for US$700,000 that was executed by him, VJ and HT ("the ING Bank guarantee"). This High Court suit was settled by RT for merely US$200,000.

12 In April 2003, RT's Malaysian solicitors wrote to VJ to demand that the latter pay two-thirds of the debt incurred by RT and Seng Hup with respect to the Indonesian timber business under the terms of a guarantee that was supposed to have been handed over to VJ for his signature in November 1992 ("the November guarantee"). Under the terms of this document, VJ and HT were required to jointly and severally guarantee to RT the payment of up to two-thirds of debts due to him and Seng Hup as a result of the Indonesian timber business. RT said that VJ told him that the November guarantee had been signed and he allowed the latter to keep the signed guarantee. He also

said that the knowledge that VJ had signed the November guarantee induced him to put more money into the Indonesian timber business. On the other hand, VJ denied having seen the November guarantee in 1992 or at any time while he was still working in RT's lighting business and he alleged that this document was created recently for the purpose of advancing the plaintiffs' case.

13 In 2004, RT and Seng Hup commenced the present action against VJ. They both sought a contribution from VJ towards the millions of dollars that they claimed to have lost in the Indonesian timber business. RJ also sought to recover from VJ one-third of the US$200,000 that he paid to ING Bank to settle its bank's claim for US$700,000 under the terms of the ING Bank guarantee.

VJ's liability for the plaintiffs' losses

14 VJ's liability to contribute towards the loss suffered by RT and Seng Hup in the Indonesian timber business will first be considered. Although the plaintiffs claimed to have invested and lost more than $7.5m in the Indonesian timber business and had sought to recover either one-third or two-thirds of the said sum, their counsel stated in his closing submissions that, leaving aside the claim for a contribution by VJ towards the settlement with ING Bank, his clients had decided to claim only $2m from VJ.

15 The plaintiffs' case against VJ for a share of the amount injected by them into the Indonesian timber business was hopelessly doomed from the start for the simple reason that there was insufficient proof as to the amount of money actually lost by them in the said business. The accounts of Asiapac were clearly qualified by the company's auditors, M/s Thong & Lim, who were not called to give any evidence. Furthermore, no audited accounts from Asiapac's Indonesian subsidiary, PT Profilindo Sejahtera Manunggal, which would have shed much light on the position, were made available, either to Asiapac's auditors or to the court. Admittedly, Asiapac decided to write down its massive investment in its Indonesian subsidiary to $1, but its own auditors commented on this move in the following damning terms in their report to the members of Asiapac on 26 May 1998:

> We have not sighted the share certificate nor [are] able to obtain independent confirmation of the Company's investment in the subsidiary, P.T. Profilindo Sejahtera Manunggal. *As such, we are unable to satisfy ourselves as to the validity of the Company's investment in this subsidiary notwithstanding that the investment has been written down to S$1.00*. [emphasis added]

16 In the light of Asiapac's own auditors' views on the validity of the company's investment in the Indonesian subsidiary, the amount of money put into the Indonesian timber business by the plaintiffs and the amount lost cannot be properly ascertained. As the plaintiffs did not prove their entitlement to the amount claimed by them, their action must be dismissed.

17 Notwithstanding the aforesaid, the plaintiffs' grounds for claiming an indemnity from VJ will, for the sake of completeness, be considered. RT contended that VJ was liable to indemnify him for a number of reasons. Firstly, he alleged that VJ's liability arose from the MOU signed by the both of them and HT on 2 July 1990, or under the November guarantee allegedly signed by VJ. Secondly, RT asserted that VJ induced him to inject more funds into Asiapac by representing to him that the November guarantee had been signed. Thirdly, he claimed that the parties had an understanding that VJ would be liable for one-third of all the funds injected by RT into Asiapac. As for Seng Hup, it claimed that its right against VJ arose out of the November guarantee. All the grounds relied on by the plaintiffs did not rest on a firm foundation.

The MOU

18 The MOU is the foundation of RT's claim against VJ. In his Affidavit of Evidence-in-Chief, he said that the MOU sets out "the basic principles of the joint venture" and "the rights and responsibilities of the parties to the agreement".[2] He testified that cl 5 of the MOU required VJ to pay him one-third of the amount lost by him personally or by Seng Hup in the Indonesian timber business.

19 Clause 5 of the MOU must be read together with cl 1. Both these clauses outlined the purpose of the MOU in the following unmistakable terms:

> 1 [RT] shall provide adequate financing needs by way of loan *for the purchase by Indonesian nationals of all the issued equity of P.T. Profilindo Sejahtera* … the legal and beneficial owner of all assets and goodwill in a wood processing plant …
>
> 5. [VJ and HT] shall … be seised of the obligation to repay 1/3 each of the loan extended by [RT], including all applicable interest and cost of funds. …
>
> [emphasis added]

20 Clauses 1 and 5 of the MOU are only concerned with the amount paid by RT for the purchase of the shares of PT Profilindo Sejahtera, which owned the Indonesian wood-processing plant eyed by RT. No other clauses in the MOU gave RT any right to seek a contribution from VJ for the money ploughed by him into the Indonesian timber business. RT finally accepted that this was the correct position when he said as follows during cross-examination:

> Q: Do you agree that the right to claim one-third of all sums disbursed by you [for the Indonesian timber business] is not found in the MOU?
>
> A: … *I agree* but I have to check *other* voluminous documents.
>
> [emphasis added]

21 As the "other" voluminous documents referred to by RT had nothing to do with the MOU, it follows that, as far as the MOU is concerned, RT is, without more, only entitled to claim from VJ a contribution of one-third of the purchase price of the shares of PT Profilindo Sejahtera. However, his claim for the said contribution is time-barred. According to the MOU, VJ's obligation to repay RT crystallised upon the transfer of all the issued and paid-up capital of PT Profilindo Sejahtera to himself, RT and HT. The transfer in question took place more than 12 years ago. As RT's suit was commenced in 2004, his claim for a contribution towards the cost of the shares in question is, without more, time-barred. RT argued that his claim for such a contribution is not time-barred because VJ acknowledged this debt when he relied on Asiapac's accounts for 1996 to fend off RT's claim for a contribution with respect to the sum paid by RT to OCBC under the guarantee given to OCBC. There is a world of difference between an acknowledgment by VJ that Asiapac owes RT and Seng Hup money and an acknowledgment by VJ that he is still liable to RT for a contribution towards the purchase price of the shares of PT Profilindo Sejahtera. More importantly, whether or not the claim is time-barred, RT could not say for certain what the amount he had paid for the said shares was. Apparently, the records had been lost. No court can determine how much RT is entitled to under the terms of the MOU if the amount paid by him for the shares is not known. It is clear that his claim for a contribution from VJ under the MOU need not be further considered.

The unsigned November guarantee

22 The plaintiffs' assertion that VJ is liable to them under the terms of the November guarantee will next be considered. The plaintiffs' attempt to rely on the November guarantee is fraught with insurmountable problems.

23 To begin with, neither a signed copy of the November guarantee nor an original copy of the unsigned guarantee was furnished as evidence. RT contended that VJ had admitted in DC Suit 50759/1998, that he had signed this guarantee because it was included in his affidavit in that suit among the guarantees he claimed to have signed when asked to do so by RT. However, the copy of the November guarantee that was included in the said affidavit was also an unsigned copy, and when cross-examined in the present case, VJ said that he received a copy of the unsigned guarantee long after he had left Seng Hup. It appears that the unsigned copy of the November guarantee had been included among the copies of signed guarantees in VJ's affidavit in DC Suit 50759/1998 by mistake.

24 At the outset, it must be noted that there was insufficient proof that the November guarantee was handed over to VJ for his signature in November 1992 or at any time thereafter. VJ, who had executed various guarantees when asked to do so by RT, stated categorically that if RT had asked him to sign the November guarantee in 1992, he would have done so unhesitatingly and immediately. After all, their working relationship was such that he signed, without questioning, other guarantees put in front of him by RT. It is rather telling that RT testified that he did not ask VJ to return the signed guarantee to him in November 1992 or at any time between 1992 and 1998. RT must have known that if the signed guarantee was not in his hands, it was unlikely to surface should it become necessary for him to rely on it in the future. In any case, one would have expected RT to ask VJ to hand over to him the November guarantee after his relationship with VJ deteriorated to such an extent that the latter left Seng Hup in 1995 to set up a rival business in Kuala Lumpur. It is significant that it was only in April 2003 that RT finally made a claim under the November guarantee. On balance, I believe VJ's evidence that he was not given the November guarantee to sign in November 1992.

25 Notwithstanding my finding that VJ was not given the November guarantee to sign in 1992, RT's allegation that he was induced to inject more funds into Asiapac by VJ's fraudulent representation that the November guarantee had been signed will also be considered. As RT alleged that a fraudulent representation had been made, he has, in Lord Herschell's words in *Derry v Peek* (1889) 14 App Cas 337 at 374, to prove that VJ made the false representation "(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false".

26 In his Affidavit of Evidence-in-Chief, RT alleged that the false representation that the November guarantee had been signed was communicated to him by VJ. He stated as follows:[3]

> Subsequently, during one of our regular meetings … [VJ] *told me* that he had signed the Guarantee and the duly executed copy is in his possession. I had no reason to doubt him. He was then my right-hand-man and business associate. We were good friends.
>
> [emphasis added]

27 Surprisingly, instead of reiterating during cross-examination that VJ had told him that the November guarantee had been signed, RT repeatedly referred to the "impression" that had been given to him by VJ that the November guarantee had been signed. When questioned, his answers were as follows:

> Q: How did the defendant make a fraudulent representation?

A: He gave the impression that it was signed and I continued to put in money.

Q: *How did he give you the impression?*

A: *By allowing me to continue to support the Indonesian business when I thought I had the comfort of a Deed of Guarantee.*

[emphasis added]

28 When cross-examined as to whether he had asked VJ if the November guarantee had already been signed, RT did not say that this was unnecessary because VJ had told him that it had been signed. Instead he claimed that he did not have to ask VJ this question because their "relationship was so good". The series of questions and answers that merit attention are as follows:

Q: You did not ask him to sign the guarantee on the spot?

A: No, he kept the guarantee.

Q: Did you ask if he had signed it?

A: *Our relationship was so good.*

Q: Did you ask him if he had signed it in 1993?

A: No.

Q: Did you ask if he had signed it in 1994 or 1995?

A: No.

[emphasis added]

29 Even when VJ's counsel, Mr Leong Wai Nam, asserted that his client did not say that the November guarantee had been signed, RT did not contradict him. Instead, he said as follows:

Q: You are saying that the very fact that *VJ remained silent as to whether he signed the guarantee* is a representation.

A: He allowed me to carry out activities. That gave me the impression that he signed it and it is fraudulent.

[emphasis added]

30 I have no doubt that VJ did not tell RT that he had signed the November guarantee. Neither did he give any impression that the said guarantee had been signed. That being the case, RT's case on fraudulent misrepresentation and deceit collapsed.

31 In any case, RT could not prove that he had been induced by any representation by VJ that the November guarantee had been signed to put more money into the Indonesian timber business. When asked how he could have been induced by VJ to pour more funds into that business when he was in fact the leader, he pointed to a letter from Seng Hup to the board of directors of Asiapac as evidence of inducement. This letter, dated 15 July 1995, which was signed by both RT and VJ as

directors of Seng Hup, was worded as follows:

> We hereby confirm that we will provide to Asiapac Pte Ltd and its subsidiary company, P.T. Profilindo Sejahtera Manunggal continuing financial support as may be required for them to meet their liabilities and their normal operating expenses incurred until this undertaking is revoked by us in writing. We further confirm that we will not demand immediate payment for debts owing to us so that Asiapac Pte Ltd and P.T. Profilindo Sejahtera Manunggal will be able to continue to operate as going concerns.

32 RT clutched at straws when he asserted that the above-mentioned letter was an inducement to him to continue to pour money into the Indonesian timber business as he finally admitted that the letter had been suggested by his auditors because the financial position of Asiapac was then quite critical. Such evidence could only further undermine his case against VJ. I thus hold that the allegation, that RT was induced by VJ's representation that he had signed the November guarantee to inject more funds into the Indonesian timber business, had no substance whatsoever.

Whether there was an understanding to share the cost of funds

33 The plaintiffs' assertion that the parties had an understanding to share the cost of the foray into the Indonesian timber business will next be considered. The alleged understanding is supposed to have been an oral one. However, there was insufficient proof of this.

34 Admittedly, RT, VJ and HT were to contribute one-third of the cost of the shares in PT Profilindo Sejahtera, but apart from this, RT appeared to treat the Indonesian timber business as an extension of his family group of companies and especially so after VJ and he went their separate ways and became competitors in the lighting business in Kuala Lumpur. In his Affidavit of Evidence-in-Chief, VJ stated as follows:[4]

> It is contrary to the nature of Richard Teo to give away any part of his business to anyone, let alone 34% in real terms of the timber business in Indonesia to me. I find the idea of me being the equal partner of Richard Teo absurd and preposterous. I wish to add that what I mean is that Richard Teo is always absolutely in control of the timber business in Indonesia and other businesses and he treated the Indonesian timber business as his own.

35 What VJ said is not without sense. Indeed, if RT had wanted to have VJ assume a share of the liabilities, it would have been very easy for him to do so when he gave the latter a 5% stake in his Malaysian company, Seng Hup Sdn Bhd. According to RT, he made VJ a rich man as the shares given to the latter were worth millions of ringgit after that company became a public company. That being the case, RT could easily have arranged for the money that was given on a silver platter to VJ to be diverted to the Indonesian timber business as the latter's share of the money required by the said business, but he did not do so. As for the money loaned to Asiapac by Seng Hup, which was recorded as a debt owed to the company by RT, that debt could have been recorded in Seng Hup's books as a debt that was owed equally by RT and VJ if both of them had an equal share in the Indonesian timber business, since they were both directors of Seng Hup at the material time.

36 Reference was made to a proposal by HT to take over Asiapac. In the proposal, HT assumed that he had a one-third share of the assets of Asiapac and calculated the price for his takeover on this basis. This, the plaintiffs alleged, showed that the parties must have agreed to share equally the cost of the foray into the Indonesian timber business. HT was not called to give any evidence on his rather skimpy proposal. He was named by the plaintiffs as a witness for the trial as late as September 2004 but RT said that he subsequently lost contact with HT. Without the benefit of cross-

examination, HT's proposal cannot advance the plaintiffs' case. Furthermore, VJ said that he had not agreed to accept HT's proposal and whatever may have been HT's dealings with RT, he did not have a one-third share of the assets or liabilities of Asiapac.

37 I hold that the plaintiffs have failed to establish that an understanding was reached between the parties concerned that VJ would assume one-third of the liabilities incurred in the Indonesian timber business.

The decision

38 The plaintiffs' claim against VJ for a contribution with respect to their losses in the Indonesian timber business is dismissed with costs.

The ING Bank guarantee

39 RT's claim on the ING Bank guarantee, which stands on a different footing from his other claims, will next be considered. As has been mentioned at [11] above, RT was sued by ING Bank for US$700,000 under the terms of the ING Bank guarantee signed by him, VJ and HT. He compromised this claim for US$200,000 without consulting VJ.

40 It is trite law that a creditor is entitled to sue any of the guarantors of the sum loaned. It is also a well-established rule founded upon natural justice and equitable principles that if one guarantor is asked to pay a sum, his co-guarantors are liable to contribute their share of the amount paid if they benefit from such a payment to the creditor. In *Craythorne v Swinburne* (1807) 14 Ves 160; 33 ER 482, Lord Eldon LC explained that the equitable principle of contribution enabled a guarantor to assume the burden of suretyship on the faith of an implied promise of contribution from his co-sureties.

41 When cross-examined, VJ tried to avoid liability under the ING Bank guarantee on three grounds. Firstly, he said that he had signed a separate guarantee from that on which RT was sued. Secondly, he complained that the signature on the letter accepting the offer for credit facilities of $700,000 was not his and that he had signed a letter of offer for credit facilities of $500,000 instead. Thirdly, he said that he should not be liable because he was not given notice of the suit by ING Bank against RT and was not consulted in any way by the latter on the negotiations to compromise the suit.

42 Admittedly, VJ and RT signed separate documents in relation to the ING Bank guarantee, but it is not the case that co-guarantors need not contribute towards a claim merely because separate guarantee documents had been signed (see, for instance, *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd* [1998] 2 SLR 649). Much depends on the facts of each case and on whether the papers signed by the parties were part of the same transaction. In the present case, VJ knew that the documents were all part of the same transaction as he and RT signed separate guarantee documents pursuant to ING Bank's letter of offer, which made it clear that the loan of US$700,000 was to be granted on the basis of guarantees executed by VJ, RT and HT. As for VJ's claim that the signature on the acceptance copy of the said letter of offer was not his, this was a bare denial without any proof whatsoever. Furthermore, it was not pleaded that his signature had been forged. As such, VJ cannot avoid liability on the guarantee on the basis that he signed a different document from that signed by RT.

43 As for the negotiations undertaken by RT, there can be no doubt that VJ ought to have been consulted. A person who settles a claim by a creditor under a guarantee without informing and

consulting his co-guarantor runs the risk that the latter may defend a claim for contribution on the basis that the creditor's claim could have been resisted or that a settlement could have been reached on better terms.

44 In the present case, there was no concrete evidence that this was not a good settlement of ING Bank's claim under the ING Bank guarantee. Although VJ asserted that the proper forum for the determination of ING Bank's claim against RT is Indonesia, there was no doubt that RT, who had received legal advice, had done quite well by compromising ING Bank's massive claim of US$700,000 for only US$200,000. This resulted in a savings of US$500,000 for all the co-guarantors. VJ benefited from this settlement because part of the deal between ING Bank and RT was that the former could no longer sue VJ and HT after the payment of the settlement sum. In view of this, VJ is liable for one-third of the US$200,000 paid by RT to ING Bank.

45 As far as his claim for a contribution under the ING Bank guarantee is concerned, RT is entitled to costs.

---

[1]Para 21 of RT's Affidavit of Evidence-in-Chief.

[2]Para 15 of RT's Affidavit of Evidence-in-Chief.

[3]Para 25 of RT's Affidavit of Evidence-in-Chief.

[4]Para 8 of VJ's Affidavit of Evidence-in-Chief.