Tan Hock Keng v L and M Group Investments Ltd
[2002] SGCA 22

Case Number : CA 600120/2001

Decision Date : 12 April 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Davinder Singh SC, Ajay Advani and Chan Wei Meng (Drew & Napier) for the appellant; Chia Chor Leong (Chia Chor Leong & Co) for the respondent

Parties : Tan Hock Keng — L and M Group Investments Ltd

Contract – Contractual terms – Rules of construction – Contractual obligation to procure that company repays loans – Failure of company to repay – Whether clause imposes obligation of guarantee – Context of clause and entire document – Whether essential for word 'guarantee' to be in clause before guarantee obligation can arise – Whether breach of obligation

Evidence – Admissibility of evidence – Agreements for sale and purchase of shares – Limitation of liability clause – Whether extrinsic evidence admissible to aid construction – Whether clause clear and unambiguous – s 94 proviso (f) Evidence Act (Cap 97, 1997 Ed)

Words and Phrases – 'Procure'

and gave judgment for Tan in the amount of $285,000.

In the same action, L&M made a counterclaim against Tan. This claim arose from a prior L&M loan of some $5.5 million to KWF. Following default, L&M counterclaimed against Tan in respect of two instalments of the loan totalling $440,000. L&M argued that Tan had in clause 15.1 agreed to "procure that (KWF) repays the inter-company loans" and this meant that he had "guaranteed" the repayment of the $440,000. At trial, the judge found that under clause 15.1, Tan had assumed an obligation which in effect guaranteed that KWF would repay the inter-company loans. Tan was therefore liable to L&M for the same amount.

In the current proceedings, Tan appealed against the judge's construction of clause 16.1. On the counterclaim, Tan argues that just because he had agreed to procure that KWF pay the instalments on the loans, this did not mean that he assumed personal liability for its failure to meet its payment obligations. At best, it was only an obligation on him to use his best endeavours to persuade or induce KWF to repay the loans. In any case, even if he was in breach, there was no evidence that his breach had caused L&M's loss.

Held

, allowing the appeal in part:

> (1) Interpreted as a whole, clause 16.1 is obscure and ambiguous. Unlike other clauses in the contract where the draftsman had deemed it fit to refer to clause 16.1, clause 14 did not make express reference to it. While clause 16.1 effectively restricted the rights of Tan, L&M was not subjected to the same restrictions. This was inconsistent with a sale based on NTA. The aim of clause 14 is to ensure that no party should obtain a windfall and clause 16.1 is probably intended to apply only to those provisions in the S&P agreement where only L&M had assumed obligations to Tan (see 18-22).
>
> (2) Generally, extrinsic evidence is inadmissible to construe a document unless

the facts fall within any of the exceptions specified in s 94 of the Evidence Act (see 10-11). In view of the unclear nature of the scope and the precise restrictions contained in clause 16.1, the proviso in s 94(f) of the Evidence Act applies and extrinsic evidence is therefore admissible. Tan's claim in the action is to be remitted for continued hearing before the judge (see 23 and 35).

(3) The correct meaning of the word "procure" as it is used in clause 15.1 depends not only on its context but also on the context of the entire document. It is a canon of construction that the same word used in a document should be given the same meaning throughout it; Re Birks [1900] 1 Ch 417 (folld). Judging from the manner in which it is used in other clauses in the contract, "procure" cannot simply mean "to endeavour" or to "persuade or take steps". It is a definite obligation on the party for which the clause is directed (see 28-29).

(4) In clause 15.1, Tan undertook to ensure that KWF will repay the inter-company loans. When KWF defaulted, Tan breached his obligation of "ensuring" or "seeing to it" that KWF repays the loan. As such, it was unnecessary to determine if this was an guarantee obligation of the second category mentioned by Lord Reid in Moschi v Lep Air Services Ltd & Ors [1973] AC 331 or is only something akin to it. The fact that clause 15.1 had also contemplated that a guarantee be given by THK did not detract from the obligation of Tan and in the context, they are complementary. For Tan's breach, L&M is entitled to damages (see 30-32).

(5) If Tan had discharged his obligation of ensuring repayment of the loans, there would have been no loss and no claim by L&M. Because he has breached his obligation, the loss ensued. This, in turn, gave rise to a claim in damages quantified by the amount that KWF failed to repay (see 34).

Legislation referred to

:

Evidence Act (Cap 97) s 94

Case(s) referred to

:

Moschi v Lep Air Services Ltd & Ors [1973] AC 331 (folld)
Re Birks [1900] 1 Ch 417 (folld)

Judgment

GROUNDS OF DECISION

1. This is an appeal which concerns the construction of certain clauses in two Sale and Purchase (S&P) Agreements of shares in a company named Khai Wah-Ferco Pte Ltd ("KWF"), where the appellant, Tan Hock Keng ('Tan') was the buyer and L&M Group Investments Ltd ('L&M'), the seller.

The background

2. KWF was wholly owned by L&M. On 3 October 1997, Tan entered into a S&P Agreement to purchase from L&M 28,350 ordinary shares of KWF. By this purchase, Tan would become 81% owner of KWF. Some two months later, on 2 December 1997, a second S&P Agreement was entered into between them whereby Tan agreed to purchase the remaining shares (6,650) which L&M retained in KWF. The second S&P Agreement essentially incorporated the main terms in the first S&P Agreement. The completion date for both Agreements was 2 December 1997. The effect of the two Agreements was that Tan would become the sole owner of KWF.

3. The purchase price paid by Tan for the shares in KWF was based on net tangible assets (NTA), which was determined to be S$285,900. This valuation was in turn founded on KWF's unaudited accounts ended 30 September 1997. In part because the valuation was based on unaudited accounts, the first S&P Agreement in clause 14 provided that if a debt should, within a period of 12 months after it becomes due, be considered to be irrecoverable, or if credit notes were given by KWF after 30 September 1997 for work done prior to that date, the vendor (L&M) would pay the equivalent amounts to the buyer (Tan). We should add that there were corresponding provisions in clause 14 favouring L&M for similar events in the reverse situation. The problem that has arisen concerns the question whether clause 16.1, which is a limitation provision, applied to the amount or amounts which Tan is entitled to be paid under clause 14.

4. As the issue is one of construction, it is necessary that we should, at this juncture, set out the relevant provisions of clauses 14 and 16.1:-

Clause 14

(1) In the event that after Balance Sheet Date the Group Company recovers any debt that has been written off from the Accounts of the Group Company, the Purchaser shall within 14 days from the date of the Company's receipt of the debt pay an amount equivalent to 81% of the recovered debt to the Vendor.

(2) In the event that after Balance Sheet Date any debt of the Group Company as stated in the Accounts have not been recovered within the 12 months from the due date of the debt and in the unanimous opinion of the parties is irrecoverable (such decision being made in good faith), the Vendor shall within 14 days from the date of the unanimous decision of the parties pay an amount equivalent to 81% of the irrecoverable debt to the Purchaser. Notwithstanding the foregoing, the Purchaser shall, prior to the payment of the irrecoverable debt and at the election of the Vendor, procure the appointment of the Vendor as agent of the Group Company for the recovery of the debt on the Group Company's behalf.

(3) In the event that after Balance Sheet Date the Group Company issues a credit note to its customer or supplier for work done prior to Balance Sheet Date the Vendor shall within 14 days from the date of issuance of the credit note pay an amount equivalent to 81% of the amount stated on the credit note to the Purchaser.

(4) In the event that after Balance Sheet Date the Group Company receives a credit note from its customer or supplier for work done prior to Balance Sheet Date the Purchaser shall within 14 days from the date of issuance of the credit note pay an amount equivalent to 81% of the amount stated in the credit note to the Vendor.

(Note: (i) it would be appreciated that the amount payable to the other party under these provisions were specified to be 81% because that was the percentage of the shares involved under the first S&P Agreement. The second S&P Agreement related to the remaining 19% of the

shares. Therefore, under both Agreements, the amount payable to the other party under these sub-clauses would be 100%.)

(ii) "Balance Sheet Date" is 30 September 1997.

(iii) Sub-clauses (1) and (4) are in favour of the vendor L&M).

Clause 16.1

The parties hereby agree that the total liability of the Vendor for all claims of any kind whether in contract, warranty, indemnity, tort, strict liability or otherwise arising out of the performance or breach of the Agreement or any of the terms herein shall not exceed the Consideration Sum as determined in accordance with Clause 4.1, or shall not terminate prior to the expiry of three (3) years from Completion Date, whichever occurs first.

5. Tan's claim in the action is for the sums of S$109,737.55 and US$770,540.75, being the amounts due from L&M to him under clause 14 on account of trade debts which had become irrecoverable within 12 months of their due dates and credit notes issued after 30 September 1997 by KWF for work done prior to 30 September 1997, less various sums owing by Tan to L&M. In the course of the trial (during the cross-examination of Tan's second witness) counsel for L&M, Mr Chia Chor Leong, at the invitation of the court, indicated that in order to save time and if the court were to rule that clause 16.1 had the effect of limiting L&M's liability under clause 14 to only the "consideration sum" specified in clause 16.1, which is S$285,000, then L&M would be prepared to accept liability up to that sum. With this approach, there would be no necessity to go into a tedious examination of the various items of claim which made up the two sums claimed by Tan.

6. The trial judge ruled that, on a proper construction of clauses 14 and 16.1, the limit of $285,000 prescribed in clause 16.1 applied to the claim of Tan under clause 14. Following from that, the judge gave judgment to Tan for only the amount of $285,000.

Counterclaim

7. In the action, there was a counterclaim which L&M had made against Tan, totalling $751,504.13. Included in this amount claimed was a sum of $440,000, being two instalments of $220,000 each which were due from KWF to L&M in respect of inter-company loans of some $5.5 million made by L&M to KWF and in respect of which loans Tan agreed under the two S&P Agreements (clause 15.1) that he would "procure that (KWF) repays the inter-company loans". The remaining sum of $311,504.13 claimed by L&M was admitted by Tan.

8. The issue on the counterclaim of $440,000 centred on what exactly was the extent of Tan's obligation under clause 15.1. The clause reads:-

The Purchaser shall procure that the Company repays the intercompany Loans as free of interest over 12 instalments commencing on 15 April 1999 and on every anniversary thereafter (the 'repayment date') at a principal sum of thirty percent (30%) of the Company's consolidated net profit after tax or $220,000.00 per annum, whichever is the higher, and in any event on the twelfth and final repayment date the Purchaser shall procure that the Company shall repay all balance outstanding intercompany Loans to the Vendor in one lump sum. In consideration of the Vendor agreeing to a repayment of the intercompany Loans over 12 annual instalments, the Purchaser shall procure that THK REALTY PTE LTD shall deliver to the Vendor the duly executed

and stamped Guarantee.

9. The trial judge found that under this clause Tan had assumed an obligation in effect to guarantee that KWF would repay the inter-company loans owing by KWF to L&M. The fact that in clause 15.1 the word used was not "guarantee" but "procure" did not make a difference as the word "procure" in essence meant that Tan "undertook" or would "see to it" that KWF would repay the inter-company loans and as KWF did not repay the instalments due in respect of the loans, Tan was, therefore, in breach of that undertaking and should be liable in damages, which in the circumstances would be the two instalment sums not paid by KWF.

Construction of clauses 14 and 16

10. We shall first examine the question of the construction of clauses 14 and 16.1. These two clauses have been set out in 4 above. It is clear law that except where the situation falls within any of the exception specified in s 94 of the Evidence Act, no extrinsic evidence is admissible to construe a document. One of the exceptions provided in s 94 is:-

> (f) any fact may be proved which shows in what matter the language of a document is related to existing facts.

11. The trial judge held that this proviso has no application where the words or phrases used in a clause are clear, as is the case here. Relying on *Sarkar on Evidence (14th Edition)*, he felt that proviso (f) would only come into play when there is latent ambiguity in a document. He cited the following passage (at p.1283) from the learned author:-

> If the language employed is ambiguous and admits of a variety of meaning, the 6th proviso (i.e., our proviso [f]) can be invoked. The object of admissibility of such evidence is to assist the court to get the real intention of the parties and thereby overcome the difficulty caused by the ambiguity.

12. He held that clause 16.1 was very clear in its terms and thus no extrinsic evidence was admissible to show that it was meant to have effect only as a reference clause. The judge also dismissed two other arguments of Tan, namely, (i) that clause 16.1 could have no application to clause 14 because the latter clause did not expressly refer to clause 16 and; (ii) that clause 14 was repugnant to clause 16 and that the parties could not have intended clause 16.1 to override clause 14.

13. The primary question which we now must address is, is clause 16.1 clear and unambiguous? It will be recalled that the clause has two limbs. The first limb, which the judge found to be clear and unambiguous, reads:-

> The parties hereby agree that the total liability of the Vendor for all claims of any kind whether in contract, warranty, indemnity, tort, strict liability or otherwise arising out of the performance or breach of the Agreement or any of the terms herein shall not exceed the Consideration Sum as determined in accordance with Clause 4.1,

14. The judge, however, did not go into an examination of the second limb which reads:-

> or shall not terminate prior to the expiry of three (3) years from Completion Date, whichever occurs first.

15. Counsel for Tan submits that while the first limb may seem to be clear, it cannot be said that the clause as a whole is clear. Indeed, counsel submits that reading both limbs together, the clause is unclear and unintelligible. Putting it at the lowest, the clause is ambiguous. The two limbs are linked by the word "or". The first part seeks to limit Tan's claim to $285,000. The second limb purports to introduce, in a rather strange way, a different nature of limitation based on time. We will examine the problems which are inherent in the clause as a whole in a moment.

16. Counsel for Tan submits that the clause is capable of being interpreted in three different ways. First, it could mean that L&M's liability to Tan is limited to the consideration sum simpliciter. Secondly, it could mean that where Tan makes a claim against L&M within 3 years from the completion date, the respondent's liability for such claims is limited to the consideration sum but if the claim should arise after three years, L&M is no longer liable to make any payment. Thirdly, where Tan's claim against L&M arose within 3 years, L&M is liable for the full amount of the claim, but if it arose after the three years, L&M's liability is limited to the consideration sum.

17. On the other hand, counsel for L&M contends that while the clause is not a model of good drafting, it is nevertheless reasonably clear, introducing two limitation criteria, one based on quantum and the other on time and when so viewed the clause means:-

> (i) If the claim of Tan was made before the expiry of the three year period and is less than the consideration sum, no limitation shall apply; but if this claim should be more than the consideration sum then Tan would only be able to claim $285,000;
>
> (ii) If the claim of Tan was made after the expiry of the three year period, then the claim will not be entertained, whatever be the amount of the claim.

18. In our opinion, the clause is really quite obscure. It does not state "what" shall not terminate. Is it "total liability" or "all claims"? What does it mean to say that "total liability" "shall not terminate prior to the expiry of three years"? While it makes a little more sense to say that all claims "shall not terminate prior to the expiry of three years …" still it is extremely awkward if the intention was that the claims should be made within the period of three years. "Claims" do not terminate as such. The contract could provide that a claim may not be made after the expiry of a specified period; it does not terminate. A simple sentence like "No claims shall be met after the expiry of three years" without linking this criteria to the first limb would have achieved what was intended. Furthermore, in relation to the expression "whichever occurs first", the word "occurs" can hardly be appropriate to refer to a limitation based on quantum. We note that the judge below felt that clause 16.1 is clear. But from 1 of his judgment we see that he had only considered the first limb of that clause instead of the entire clause. The entire clause is certainly obscure.

19. It may well be, as asserted by L&M, that clause 16.1 was intended to introduce a two-pronged limitation: one was based on quantum, and the other on time. But the way the clause is structured does not sufficiently bear out the sense contended; the two limbs simply do not sit well with each other. It would probably have helped to substitute "or" with "and" and to delete "whichever occurs first". Even with these amendments, it is not a happily worded clause.

20. We now refer to two other grounds advanced by Tan to contend that further questions exist as to the scope of clause 16.1. The first is in relation to clauses 6.1, 7.1, 10.1 and 10.2. These clauses impose certain obligations on L&M, breaches of which would give rise to liabilities on the part of L&M. These clauses are somewhat lengthy and we will only set out clause 6.1 as this should be sufficient to appreciate the point which Tan seeks to make.

Clause 6.1

The (Respondent) hereby warrants and undertakes to and with the (Appellant) and its successors in title and permitted assigns (with the intent that the provisions of this Clause shall subject to Clause 16 continue to have full force and effect notwithstanding completion):

> (a) that it is or will on completion be beneficially entitled to or is otherwise able to procure the transfer of the Shares to the [Appellant] and/or its nominees; and
>
> (b) that the Shares will on completion be free from all and any charges, items and other encumbrances whatsoever.

The said warranties and undertakings shall be separate and independent and save as expressly provided in Clause 16 shall not be limited by anything in this Agreement.

21. As the wording of the first limb of clause 16.1 is so wide and would have undoubtedly encompassed the liabilities arising under clause 6.1 (and clauses 7.1, 10.1 and 10.2 as well), yet in these latter clauses the draftsman deemed it necessary to refer expressly to the limitation prescribed in clause 16.1. That being the approach, if it was intended that the limitation in clause 16.1 should also apply to the payments which are required to be made by the parties under clause 14, then the parties would have made express reference to clause 16.1. Yet, they did not do so.

22. This brings us to the second ground. If clause 16.1 were to be construed to be applicable to payments to be made under clause 14, it would have the effect of putting a limit as to what Tan could ask L&M to pay him. But clause 16.1 only works one way, restricting the rights of Tan. There is no corresponding restriction placed on what L&M could claim from Tan under clause 14. This does seem to be wholly inequitable, bearing in mind that the sale transaction was based on net tangible asset and the provisions for adjustments laid down in clause 14 was basically to achieve that objective: no party should obtain a windfall in the events enumerated in clause 14. It is difficult to imagine that the parties intended to bring about such a grossly unfair result. The one-sided nature of clause 16.1 would certainly support Tan's contention that that clause was probably intended to apply only to those provisions in the Agreement where only L&M had assumed obligations to Tan; thus the need to place some restrictions on Tan's rights.

23. In the light of all the foregoing, we are of the opinion that the scope and the precise restrictions contained in clause 16.1 are far from clear. This is, therefore, an instance where the proviso in s 94(f) applies and extrinsic evidence is admissible to assist in the determination of the true construction of clause 16.1.

Liability under guarantee

24. We now turn to consider L&M's counterclaim based on clause 15.1. The issue here is what is the nature of the obligations assumed by Tan under that clause. Did he effectively undertake to fulfil the repayment obligation of KWF in respect of the inter-company loans if KWF should fail to do so? Tan criticises the determination of the judge on two fronts. First, it does not follow that just because Tan agreed to procure that KWF pay the instalments on the loans he has thereby assumed personal liability for the failure of KWF to meet its payment obligations. What the clause imposed on Tan is at best only an obligation to use his best endeavours to persuade or induce KWF to pay the loans. Second, even if Tan is in breach of clause 15.1 there is no evidence that his breach caused L&M's

loss, a question of causation.

25. Tan submits that the judge was wrong to have relied on *Moschi v Lep Air Services Ltd & Ors* [1973] AC 331 to come to the conclusion that clause 15.1 imposed an obligation of guarantee on the part of Tan. He emphasised in particular the fact that the operative clause in *Moschi* was quite different and it reads:-

> "In further consideration of the above, Mr Moschi has personally guaranteed the performance by Rolloswin Investments Limited of its obligation to make the payments at the rate of 6,000 per week together with the final payment of 4,000 as hereinbefore set out so however that Mr Moschi's total obligation under this guarantee shall not exceed the total sum of 40,000 of which approximately 3,820 has already been paid as aforesaid."

26. The House of Lords found Mr Moschi liable for all the outstanding instalments owing to the creditors. Some of the Law Lords also went into a discussion of the nature of the obligation of a guarantee. Here, the most pertinent were the observations of Lord Reid where he distinguished between two types of guarantee obligations –

> With regard to making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than if the principal debtor fails to make any instalment he will pay it. That would be a conditional agreement. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have any obligation to pay the instalment on the due date then he could not fail to pay it on that date. The condition attached to that undertaking would never be purified and the subsidiary obligation would never arise.
>
> On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and if for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook he would do.

27. The trial judge in our case seemed to equate the obligation assumed by Tan in clause 15.1 to be of the second category enunciated by Lord Reid. But Tan argues that the crux of the matter is that unlike *Moschi*, where the wording of the obligation was clear, and where Moschi undertook the obligation of a guarantor, Tan has not assumed under clause 15.1 any guarantee obligation, even of the second category enunciated by Lord Reid. The court below failed to appreciate the difference in wording between clause 15.1 and the clause in *Moschi*. The meaning and effect of a clause is a matter of construction, depending on the words used. Tan contends that there must be clear words to support before a clause may be construed to be a guarantee. The word "procure" in clause 15.1 is not sufficient to imply such an obligation. What the entire clause amounted to is just an obligation "to persuade or take steps to induce KWF to meet its instalment payments."

28. We note that one of the meanings given to the word "procure" in the Shorter Oxford English Dictionary (3rd Edn) Vol II is "to induce, persuade". But the other meanings given are "to bring about", "to cause", "to obtain" and "to acquire". What is the correct meaning to give to the word "procure" in clause 15.1 must depend not only in its context but also the context of the entire document. We are unable to accept Tan's contention that in the context of clause 15.1 the word "procure" means only

to "persuade or take steps". If that was the intention, then the parties would have easily used the clearer word "endeavour", or the expression "use his best endeavour". If the parties had intended that there should be some flexibility in relation to the obligation, they would have adopted a modified form of words as they had done in clause 2.3 – "the parties shall use their respective *best endeavours to procure* the fulfilment …" In our judgment, the word "shall procure" in clause 15.1 means "shall cause a thing to be done", "shall ensure" or "shall bring about". It is a definite obligation which is being assumed. While we agree that "procure" in clause 15.1 does not mean that Tan undertakes to pay the loans himself but it does mean that Tan undertakes to ensure that KWF would repay and when KWF does not repay, Tan would have breached his obligation of "ensuring" or "seeing to it" that KWF repay.

29. There is another canon of construction which has to be borne in mind and it is this: that the same word in a document should, as a rule, be given the same meaning: see *Re Birks* [1900] 1 Ch 417 The word "procure" appears not only in clause 15.1 but in several other clauses. For example, clause 5.3 provides that on completion, L&M "shall procure the passing of board resolutions of the company" and under clause 5.4 L&M "shall procure the passing of board resolutions of each of the subsidiares." We do not think it can be argued that in clauses 5.3 and 5.4 the word "procure" means to endeavour. There can be no flexibility in relation to the obligations assumed by L&M under those two clauses. The obligations must be fulfilled. The obtaining of the necessary resolutions was fundamental to the entire transaction. If the resolutions were not obtained, L&M would have been in breach giving cause to Tan to rescind the contract. We do not see anything in the context of clause 15.1 which demands that a meaning different from that given in relation to clauses 5.3 and 5.4 should be given to the word "procure" here.

30. There is another aspect of clause 15.1 which is pertinent. There is a second part to that clause which requires Tan to "procure that THK Realty Pte Ltd shall deliver to (L&M) the duly executed and stamped guarantee". This obligation imposed on Tan is significant as it reinforces the point that Tan must ensure repayment of the loans so much so that he is required to obtain a formal guarantee for repayment from an associated company. This obligation is wholly inconsistent with the stand taken by Tan that what he was required to do was only to endeavour. If Tan failed to obtain the guarantee of THK, he would also be in breach of that term. The guarantee by THK was in fact furnished. As Tan has failed to fulfil his contractual obligation to ensure that KWF pay up the loans, he is in breach, giving rise to a claim in damages. Here, the measure of damages which L&M suffers would have to be the sums which KWF failed to repay.

31. We recognise that unlike the clause in *Moschi*, clause 15.1 does not state that Tan would "guarantee" the repayment. But what was stated by Lord Reid as to the two types of guarantee obligations was not dependent on the use of the word "guarantee" in the relevant clause before a guarantee obligation could arise. Lord Reid himself said (at p.345) that "there is no magic in the word guarantee". Lord Diplock said in the same case (at p. 349):-

> Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences to which I have referred depends upon the words in which the parties have expressed the promise. Even the use of the word "guarantee" is not in itself conclusive …

32. It is not essential that the word "guarantee" must be in the clause before there can be a guarantee obligation. There is no magic formula. It is the true nature of the obligation which is being assumed by the party or parties which is critical. In clause 15.1, Tan has undertaken to procure that KWF would repay the loans. He is obliged to see to it that KWF repay the loans. He has, in effect, undertaken that KWF would repay. Whether this is a guarantee obligation of the second category mentioned by Lord Reid or is only something akin to that, we do not think there is any need for us to

decide the point. Suffice it to say that Tan has breached his obligation to ensure that KWF repay the loans and for that breach he shall pay damages to L&M. The fact that clasue 15.1 had also contemplated that a guarantee be given by THK does not detract from the obligation of Tan. In the context, they are complementary.

33. In this regard, Tan argues that as the consideration for the transfer of all the shares of KWF to him was only for $285,000, it is wholly unjust and absurd that he should bear the burden of ensuring that KWF repay the $5.5 million inter-company loans. On first blush, this may seem a fair point. But it is not so. The shares in KWF were sold to Tan on an NTA basis. That means the loans owing by KWF to L&M would have been taken into account in determining the final NTA price. The loans would have been subtracted to arrive at the NTA price. So there would have been assets in KWF to repay the loans. As Tan has become the sole owner of KWF, and KWF has come under his sole control, it can hardly be said to be unjust to thrust upon him the burden of ensuring that the loans are repaid and to require him to also obtain a formal guarantee from another company of his, THK. Indeed it is wholly consistent with the way the transaction was arranged that he should assume that burden.

34. The final argument raised by Tan is that of causation, namely, that his breach was not the cause of L&M's loss and he should not be made liable for the loss. The short answer is this: if he had discharged his obligation of ensuring repayment of the loans, there would have been no loss and no claim by L&M. Because he has breached his obligation, the loss ensued. We do not see how it can be said that his breach did not cause the loss.

Judgment

35. In the premises, the appeal is allowed in part. Tan's claim in the action is remitted for continued hearing before Rajendran J.

36. The judgment awarded on the counterclaim of L&M shall stand. However, there shall be a stay of execution, pending the conclusion of the trial on Tan's claim.

37. On the question of the costs of this appeal, as the appellant has succeeded on one main point and failed on the other, we think a fair order in these circumstances would be that each party shall bear his own costs. The security for costs furnished for this appeal, together with any accrued interest, shall be refunded to the appellant. As for the costs below, L&M shall have the costs relating to the counterclaim. The costs of Tan's (plaintiff's) action shall be in the trial which we now direct should continue.

Sgd:

YONG PUNG HOW
CHIEF JUSTICE

Sgd:

CHAO HICK TIN
JUDGE OF APPEAL

Sgd:

TAN LEE MENG
JUDGE

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