

Tng Kay Lim v Wong Fook Yew and Another
[2009] SGHC 195

Case Number : Suit 533/2008
Decision Date : 28 August 2009
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Choo Ching Yeow Collin (Straits Law Practice LLC) for the plaintiff; The first and second defendants in person
Parties : Tng Kay Lim — Wong Fook Yew; Lek Sock Peng
Credit and Security – Guarantees and indemnities – Co-guarantors

28 August 2009

Lee Seiu Kin J:

Introduction

1 This action harks to the alchemist's timeless quest to transform lead into gold. The first defendant ("Wong"), second defendant ("Lek"), Joseph Low Boon Aun ("Low") and Raymond Foo Siang Sai ("Foo")(collectively "the Founders") got together to exploit Foo's invention that promised to turn construction or horticultural wood waste into charcoal chips. This business model was very promising as there would be two sources of revenue, the first from payments from people who required to get rid of wood waste (apparently there is a big demand for such disposal services) and the second from sale of the charcoal chips manufactured from the wood waste (the plan was to eventually produce activated charcoal, a high value material). In other words, the business would generate revenue when it took in the raw material necessary for the production of charcoal chips, which would bring in further revenue. In the context of the high cost of disposal of waste in Singapore, this appeared to be an extremely profitable project. It was made all the more profitable by the Founders' ability to secure government incentives for this "eco-project". The Economic Development Board ("EDB") offered the project pioneer status and the National Environment Agency ("NEA") offered a 1.5 ha piece of land in Lim Chu Kang at a subsidised rate. The Founders projected a net positive cash flow after only six months of operation and profits of \$16m in the first year rising to \$141m in the third year. The success of the project hinged on the ability of the invention, a contraption called the carboniser, to work as promised. Unfortunately, unlike the legendary philosopher's stone, it did not work and the venture eventually ended as an unmitigated financial disaster for the Founders and for the investors they brought on board.

2 This suit is one fall out from the disaster. The claim of the plaintiff ("Tng") against the defendants is for contribution as co-guarantors in relation to payment made by Tng under a guarantee ("the PHH Guarantee"). The third defendant ("Khee") and fourth defendant ("Koh") had settled the suit with Tng and the trial proceeded against Wong and Lek only. The PHH Guarantee was given jointly and severally by seven individuals, namely Tng, Wong, Lek, Khee, Koh, Low and Foo. It was given to the building contractor, Poh Huat Heng Construction Pte Ltd ("PHH"), that built the factory for the company incorporated to undertake the venture, Gold Green Corporation Pte Ltd ("the Company"). When the Company was unable to pay PHH, the latter sued the guarantors on the PHH Guarantee and obtained judgment against them. PHH then demanded and obtained full payment under the PHH Guarantee from Tng, who in turn sought contributions from his co-guarantors. However two of the co-guarantors, namely Low and Foo had been adjudicated bankrupt and Tng proceeded only against the remaining four.

3 There is no dispute as to the liability of the co-guarantors to PHH under the PHH Guarantee. The defendants claimed that they were not liable to make contribution to Tng on two grounds:

- (a) by agreement ("the Share Transfer Agreement") dated 7 April 2003; and
- (b) certain acts carried out by Tng.

Background facts

4 With EDB and NEA support for the project, the Founders secured an offer of financing from United Overseas Bank Ltd ("UOB") which was conditional upon there being sufficient equity investment. However the Founders were only able to put up \$200,000 in capital and needed another \$1m or so. They engaged Khee as their financial consultant and he managed to get Tng to make a \$1.3m investment. For this investment, Tng was to receive 13% of the shares. Tng said that he was impressed by the fact that the Company had obtained incentives from EDB and NEA and was of the view that the project was an attractive one. For his role as financial consultant, Khee was given 5% of the shares on terms that would enable him to pay for them out of future dividends from the Company.

5 With Tng's investment, the UOB facility for the sum of \$1.63m to purchase the carboniser and other equipment was obtained in March 2002. This was secured by a joint-and-several guarantee given by the four Founders ("the UOB Guarantee"). In the course of the year, the Company obtained two increases in the facilities, on 20 August 2002 for \$50,000 and on 9 September 2002 for \$138,800. These additional facilities were guaranteed by the Founders together with Tng, Khee and Koh.

6 Low was the first managing director ("MD") of the Company with the other three Founders holding management positions in the Company. Although Tng was a director, he did not participate in the management of the Company initially. In March 2002 the Company engaged PHH to construct the factory building for the sum of \$1.736m. PHH granted very favourable instalment payment terms for the building contract. This was secured by the PHH Guarantee which was executed by the seven guarantors on 25 April 2002. With the construction of the factory building, the Company's operations began in earnest. However things did not go well in the latter part of 2002. There was dissension between the four Founders over an allegation that Low was involved in a competing business. Low stepped down as MD around August 2002 and the Founders persuaded Tng to be the MD to try to resolve matters. Tng remained as MD only until November 2002 and, after a fire broke out in the accumulated wood waste, Wong took over as MD. However in February 2003, Wong resigned as MD. Wong said in his affidavit evidence-in-chief that the reason for this was because he disagreed with the direction that the majority directors wanted to take the Company. However Tng's version was that when they could not get the carboniser to work by early 2003, Foo proposed to install a second carboniser that he was very confident would work. It was necessary to procure further funds for this new carboniser but Wong and Lek disagreed with that proposal. They, along with Koh, refused to give further guarantees to obtain financing for the second carboniser. Tng said that this was the reason Wong resigned as MD. Wong and Lek pulled out from further participation in the Company's management. Under cross-examination, Wong agreed that his resignation as MD was because he had disagreed with the procurement of the second carboniser and he had felt that they should try to get the original carboniser to work. Wong said that as he had refused to provide the guarantee for the

further financing for the second carboniser, he had to resign as director.

7 After Wong and Lek resigned as directors, they entered into separate Share Transfer Agreements ("STA") with Tng on 7 April 2003. Wong and Lek claimed that under these agreements, Tng had agreed to meet their liabilities under the PHH Guarantee. I shall deal with this issue later in this judgment.

8 Tng, Foo and Khee procured further financing from UOB for \$650,000 for the second carboniser and proceeded with its procurement and installation. In the event, the new machine also failed to work. With this, it became clear that the original business model of the Company, which depended on two revenue sources, could not be achieved. What was left was not only the loss of a crucial source of revenue, but the Company had now acquired an additional cost centre, that for the disposal of the wood waste brought in.

9 Tng gave evidence that he tried to keep the Company afloat as long as he could. The Company had run out of money and was awash with debt while at the same time it had to find funds to pay for operational and financing costs. There was also the huge pile of wood waste that had been accumulated in anticipation of the carboniser coming into operation. The Company now had to pay contractors to remove the wood waste, at a cost of about \$25 per tonne. As the Company took in wood waste at the rate of \$45 to \$60 per tonne, this enabled an operating profit to be made that could cover the overheads. Tng made the decision to continue taking in wood waste to try to reduce the Company's debt. However he had to put in his own funds to provide working capital for this operation and by the time the Company was wound up he had put up some \$2m of his own money, which is reflected as a debt of the Company. Tng claimed that over this period, he had tried his best to keep the Company afloat so as to discharge as much of the Company's liabilities as possible, including those liabilities that were guaranteed by Wong and Lek. However Wong and Lek claimed that Tng had focussed on those liabilities that he had a greater interest in. Tng said that due to shortage of funds he had concentrated on making those payments that were most urgent.

10 Sometime in mid-2005, Wong and Lek approached Tng with a proposal to take over the entire business of the Company, including its assets and shares. Wong and Lek had started a company, Inno Synergy Pte Ltd ("IS") which was in the recycling business. Tng did not find the proposal attractive as, among other things, it left him with the obligation to dispose of part of the remaining wood waste, a liability he was not prepared to incur. In the event, the negotiations broke down. The last straw on the camel's back for the Company was when PHH applied and obtained an order in 2006 to wind up the Company on the basis of a \$40,000 debt.

Findings of Fact

11 I now set out the material findings of facts that I have made.

12 Wong and Lek alleged that there was something amiss in the UOB Guarantee which was given in respect of the first UOB facility for \$1.63m. They claimed that at the time it was signed, Tng, Khee and Koh were not only present but that they had also signed as joint and several guarantors along with the four Founders. However the guarantee that is found in the documents only contained the signature of the four Founders. Wong and Lek claimed that something must have happened after the seven persons signed the guarantee. However apart from their oral testimony, they were not able to produce any evidence that there were actually seven signatories to this guarantee and not four. Indeed Wong and Lek produced a letter of offer from UOB dated 19 February 2002 which showed that UOB required the four Founders to sign the UOB Guarantee. They did not call the witness to their signatures, one Chia Lay Beng, who was the Company secretary at the time, to give supporting

evidence that there were three more signatories. On the face of it, the UOB Guarantee was in order and did not reveal any discrepancy. UOB only sued the four Founders on the UOB Guarantee and Wong and Lek did not challenge its validity. Wong and Lek produced a subsequent letter of offer from UOB dated 1 March 2003 pertaining to further facilities for \$650,000. In it, there was a reference to "Existing Joint and Several Guarantee for \$1,800,000-00" and the same reference asserted that these were signed by the four Founders and Tng, Khee and Koh. Wong and Lek relied on this to submit that the UOB Guarantee must have been signed by seven persons and not just the four Founders. However Khee pointed out that the UOB Guarantee was for the sum of \$1.63m, and that there were two subsequent guarantees signed by the seven persons for the sums of \$50,000 and \$138,800 which would bring the total facilities to about \$1.8m. Khee surmised that the UOB letter of 1 March 2003 had probably compendiously referred to those three guarantees. Tng and Khee both testified that they were not signatories to the UOB Guarantee. Khee said that at the time the UOB Guarantee was executed, they were not yet directors of the Company and that UOB would have been satisfied with granting the \$1.63m facility in view of the fact that the Company had \$1.5m in paid up capital and had the personal guarantees of the four Founders. Taking all the evidence into account, I find as a fact that the UOB Guarantee was signed only by the four Founders.

13 Wong and Lek claimed that Tng had managed the Company to his personal advantage, including in relation to the discharge of liabilities in which he had the greatest interest. However I find no basis for this allegation from the evidence. I accept Tng's evidence that he had put in a huge sum of money to keep the Company afloat at a difficult time and that he had tried his best to meet the cash requirements of the Company to keep the creditors at bay, including putting up a huge sum of money personally. He also had discharged liabilities that Wong and Lek were interested in, such as the hire purchase facilities for the crusher and excavators. In relation to the facilities that were not fully cleared, Tng had secured the discharge of about half a million dollars, which amounted to a third of the facility the subject of the UOB Guarantee (in which he had nothing at stake), and about a third of another UOB facility for about \$680,000 (in which he was co-guarantor with Khee and Foo). I find that there was no basis for the allegations of Wong and Lek in this regard.

14 Wong and Lek also made allegations of other improprieties against Tng. I do not intend to set them out here as I do not find any support for them whatsoever from the evidence.

15 I now set out my observations pertaining to the demeanour of the witnesses. Wong and Lek are facing huge claims in this suit and even larger claims from UOB under the UOB Guarantee. They were in desperate financial straits during the trial and the pressure showed in their conduct of the defence. However while it is understandable that, under such circumstances, they would be emotionally affected, what is not acceptable is the manufacturing of evidence on the flimsiest pretext which they did in a few areas. One such area pertained to the UOB Guarantee. I had found as a fact that the UOB Guarantee was signed only by the four Founders and that Tng, Khee and Koh had not signed it at the time. It would follow that they were not telling the truth when they alleged that Tng, Khee and Koh had signed it. The second area pertained to the issue of depreciation in the accounts. Wong and Lek had accused Tng of fixing a high depreciation rate in the accounts of the Company in order to run down the value of the Company. However the minutes of the board meeting of 8 October 2002 showed that the meeting had decided on a depreciation period of three years as this was the lease period for the land. In my view, Wong and Lek were prepared to make assertions not aligned with reality in their attempt to absolve themselves of their liability for contribution. Tng, on the other hand, gave evidence that was measured in tone and had the ring of truth in it.

The law

16 A guarantor has the right to call upon a co-guarantor to contribute towards his liability if he has

made a payment in excess of his own share of liability: *Davies v Evan Humphreys* (1840) 6 M&W 153. This right to contribution is founded not in contract but in equity: *Sir Edward Deering v The Earl of Winchelsea* (1787) 2 Bos & Pul 270, at 272-273:

If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded on contract ... In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burthen. They are bound as effectively quoad contribution, as if bound in one instrument, with this difference only that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally."

17 In *Teo Song Kwang v Vijayasundram Jeyabalan* [2005] SGHC 60, Tan Lee Meng J held at [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.

18 The extent of the liability of each guarantor to the person who seeks contribution is an equal share among all the co-guarantors of the amount paid up. However if one of the guarantors is insolvent, then the remaining co-guarantors are liable for an equal share based on the reduced number. In *Ellesmere Brewery Company v Cooper* [1896] 1 QB 75, Lord Russell of Killowen CJ said at 80:

Thus, if there are four sureties and one of them pays all, he can recover one-fourth, and one-fourth only, of his payment from each of the other three co-sureties. But this is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths, of the sum paid.

19 However it has long been held that this right to contribution may be modified or excluded by agreement: *Swain v Wall* (1641) 1 Rep Ch 149, *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] 1 QB 887 (CA) at 893.

Decision

20 I first deal with the STA. Wong and Lek executed separate agreements with Tng but the terms of both STAs are exactly the same. The relevant clauses thereof provide as follows:

4(I) In consideration of the aforementioned transfer, Tng shall keep the business of the company as a going concern so as to generate income to meet the undermentioned liabilities of Wong [or Lek] as and when they fall due to the creditors ("the Creditors") listed below:-

(a) Banking facilities obtained from United Overseas Bank Ltd by the Company by way of a facility Letter dated 19th February 2002 and 9th September 2002;

(b) Hire Purchase Agreement between the Company and Sing Investments & Finance Ltd Dated 9th May 2002; and

(c) Construction Project involving the Company and M/S Poh Huat Heng Construction Pte Ltd as stated in the quotation forwarded from M/S Poh Huat Heng construction Pte Ltd To the Company dated 15th March 2002.

(II) In the event that Tng does not meet Wong's [or Lek's] liabilities as aforementioned, Tng shall transfer back the Shares to Wong [or Lek]. Thereafter, Tng shall have no further obligations to meet Wong's [or Lek's] liabilities as aforementioned and Wong [or Lek] shall have no claim whatsoever against Tng in respect of the Shares.

21 These provisions, in the context of the entire agreement, showed that the objective of the STA was to get Tng to inject funds to turn around the Company so that its liabilities could eventually be met. As a consequence, the liabilities of Wong and Lek as well as all the other guarantors under the various guarantees they had executed may be discharged. There was nothing in the STA that imposed any obligation on Tng to take over the liabilities of Wong and Lek under the guarantees. The STA only imposed an obligation on Tng to transfer the shares back to them if he should fail to discharge his obligation under cl (4), which was to keep the business of the Company as a going concern to generate income to meet the liabilities under the three facilities listed. In such event the recourse that Wong and Lek have against Tng is to require him to transfer the shares back to them. It is therefore clear that there is no obligation for Tng to take over the liability of Wong or Lek under the various guarantees. Tng claimed he had orally offered to transfer the shares back when he was unable to turn the situation around. Wong and Lek denied this. In view of my finding on the interpretation of the STA, this issue is not material. But if it were, on the basis of my finding on the demeanour of the witnesses, I would prefer Tng's evidence that he had made the offer to the evidence of Wong and Lek that he had not.

22 I turn to the issue whether Tng had conducted himself in such a manner that equity would relieve Wong and Lek from making contribution. Wong and Lek were two of the original four founders of the Company. They had managed to get Tng, a stranger, to invest in the Company and put up \$1.3m of the \$1.5m capital. This comprised 86.7% of the capital, in return for which Tng received 13% of the shares. This huge disparity was, of course, to take into account the fact that the Founders had come up with the initial idea and taken the project to that stage. Although Tng had participated in the project only with the intention to make what he thought was a lucrative investment, he became drawn into the management of the Company due to a falling out among the four Founders. Although he managed to hand the Company to Wong for a while in late 2002, it fell back to him again in February 2003 when there was another schism and Wong and Lek resigned as directors. Despite the efforts made by Foo, the inventor of the carboniser, the equipment could not be made to work and the object of the Company vanished. Along with that went its viability as an ongoing business. Tng then tried to keep the Company afloat in order to pay off as much of its liabilities as possible, to the extent of sinking some \$2m of his own money which is no longer recoverable. Meanwhile UOB, PHH and other creditors sought to recover the debts of the Company,

including going after the guarantors under the various guarantees. Tng himself paid up a total of \$1.23m to PHH under the PHH Guarantee, as well as \$406,013.60 to UOB under another guarantee given to UOB. As for Wong and Lek, UOB obtained judgment against them for some \$1.17m under the UOB Guarantee. Wong and Lek have landed themselves in financial hot soup as a result of this unfortunate venture. However they had taken the risk of pledging their personal credit under the UOB Guarantee to secure the \$1.63m facility, and under the PHH Guarantee to construct the factory, in the hope of making a huge return. Their gamble did not pay off and they are perched on the verge of bankruptcy. Tng for his part, had also lost a fortune on the venture even though he had thrown in a lot of good money after bad to try to salvage the situation for the sake of the Company and common benefit of all the co-guarantors of the various guarantees. One major complaint of Wong and Lek is that Tng had refused to accept their offer in 2005 to take over the Company and as a consequence, had unfairly denied them the opportunity to turn the Company around. This could have enabled them to discharge their liabilities under the PHH Guarantee, and even the UOB Guarantee. Tng said that the proposal by Wong and Lek left him with huge liabilities that he could not accept. He also said that by that time his trust in them had been lost and he felt that he could not rely on them to live up to their promise.

23 In the event, I can find nothing in the circumstances, or anything in the evidence before me, that would move me to find in favour of Wong and Lek. Indeed the circumstances are such that equity would impel me to order Wong and Lek to contribute towards Tng's payment on the PHH Guarantee in excess of his share.

24 Since two of the seven co-guarantors for the PHH Guarantee are bankrupt, the remaining five guarantors are liable for one-fifth of the judgment sums totalling \$1.65m awarded to PHH in Suit No 1150 of 2003 and Suit No 327 of 2005. This works out to \$330,000 each. Wong, Lek, Khee and Koh had paid various amounts to PHH but those sums were short of their liability for a fifth of the total. Tng had made up the shortfall to PHH, paying up a total of \$1.23m. In respect of Wong, he had paid \$150,000 and therefore is liable to Tng for the balance of \$180,000. In respect of Lek, she had paid \$50,000 and therefore liable to Tng for the balance of \$280,000.

25 Accordingly I grant judgment against Wong in the sum of \$180,000 and against Lek in the sum of \$280,000, plus the usual interest from the date of the writ. Unless there is any reason to order otherwise, I order Wong and Lek to pay costs to Tng on the standard scale, which is to be taxed if the parties cannot come to an agreement on the quantum.

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