SIS Technologies Pte Ltd v Chan Beng Wai (Tan Kuan Yew and Others, Third Parties) [2004] SGHC 15

Case Number : Suit 1086/2002

Decision Date : 31 January 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Nicholas Lazarus (Justicius Law Corporation) for plaintiff; Tan Liam Beng and Yow Su Joan (Drew and Napier LLC) for defendant; Collin Choo and Jonathan Yuen (Straits Law Practice LLC) for first and second third parties; Alvin Tan (Wong Thomas and Leong) for third third party

Parties : SIS Technologies Pte Ltd — Chan Beng Wai — Tan Kuan Yew; Chee Wei Li; Ang King Wee

Companies – Shares – Transfer – Whether draft agreement for transfer of shares had legal effect – Whether there was requirement that sale and purchase of shares must be evidenced in writing.

Contract – Formation – Certainty of terms – Whether indemnity clause in contract for supply meant to be enforceable – Whether defendant can rely on indemnity clause in action against the third parties.

31 January 2004

Lai Siu Chui J:

Introduction

1 At the conclusion of the trial, I dismissed the claim of SIS Technologies Pte Ltd (the plaintiffs) against Chan Beng Wai (the defendant) with costs and in turn I dismissed with costs the defendant's third party claims against Tan Kuan Yew ("Tan"), Chee Wei Li ("Chee") and Ang King Wee Samuel ("Ang"). As the defendant has now appealed against my dismissal of his third party claims (in Civil Appeal No 107 of 2003), I shall set out my reasons for the dismissal.

The facts

2 In 1991, the defendant incorporated the following companies in Singapore:

(a) Iverson Computer Associates Pte Ltd;

(b) Iverson Consultants Pte Ltd.

In June 1994, the defendant established Iverson Associates Sdn Bhd in Malaysia followed by two other foreign companies in 1996, namely, PT Iverson Konsultant in Indonesia and Iverson Computer Associates (Thailand) Limited. (Hereinafter, all these companies will be referred to collectively as "Iverson"). The shareholders of Iverson were the defendant and his wife Landa Tang Kit Yee ("Landa"). As the name implies, Iverson is in the computer business. The office of Iverson Computer Associates Pte Ltd ("ICAPL") was located at 315, Alexandra Road #05-01, Performance Centre, Singapore 159944.

3 According to the plaintiffs, they commenced supplying computer equipment and parts to Iverson, in particular to ICAPL, from 17 September 1994 onwards, after they had received from the defendant an indemnity[1] dated 28 August 1994 ("the Indemnity") addressed to the plaintiffs. As the

Indemnity forms the basis of the plaintiffs' claim against the defendant, I shall set out its contents in full. It states:

1 In consideration of your having established ~~and/or establishing~~ at our request the credit facilities in favour of *Iverson Computer Associate Pte Ltd* we the undersigned hereby undertake jointly and severally that we will at all times hereafter well and sufficiently indemnify you and keep you indemnified against:

(i) all losses, damages, costs, expenses or otherwise which may be incurred by you by reason of any default on the part of Iverson Computer Associate Pte Ltd;

(ii) ~~all liabilities in respect thereof;~~

(iii) all actions, suits, proceedings, claims, demands, costs and expenses ~~whatsoever which may be taken or made against you or incurred or become payable by you in respect thereof~~ *by you against Iverson Computer Associate Pte Ltd for non-payment only*.

2 And we further agree that our liability aforesaid is irrevocable and shall remain in full force and effect until this indemnity is returned to us by you, duly cancelled. *Iverson Computer Associate will also have the rights to recall this indemnity anytime if no outstanding monies is owed to you or notice has been served to you that Iverson Computer Associate wishes to terminate business relationship and paying you all monies owing to you*.

3 This indemnity shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by you nor shall such collateral or other security or any lien to which you may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of this indemnity be in any way prejudiced or affected by this Indemnity.

4 We further agree that you may amend the terms of credit at your discretion.

5 ~~We shall not be discharged or released from this Indemnity by any arrangements made between _____ and you made with or without our assent or by any alteration in the obligation undertaken by -_____ or by any forbearance whether as to payment, time, performance or otherwise.~~

Dated this *24/8/94* day of _____.

Signed by: Signed by: Signed by:

Name: *Chan Beng Wai* Name: Name:

IC No: IC No: IC No:

Signed by: Signed by: Signed by:

Name: Name: Name:

4 The words in italics in the Indemnity were handwritten insertions or amendments made by the defendant who was also responsible for the various deletions. The defendant initialled above his name in the space meant for his signature. According to the defendant, he amended the document before he sought the approval of other directors to the Indemnity; he considered the document as only a draft. Hence, he did not sign but merely initialled the same to indicate to his fellow directors that he had vetted the document. However, the defendant was unable to say whether he did discuss the Indemnity subsequently with his fellow directors nor what he did with the Indemnity subsequently. According to his then secretary/accounts clerk however, the document was retained in the files of Iverson; it was not given or returned to the plaintiffs.

5 The defendant and his wife sold their shares in Iverson to Tan, Chee and Ang (collectively referred to as "the three third parties") on or about 17 August 1997, for a total consideration of $500,000. I should point out that while two draft sale and purchase agreements (including one dated 17 August 1997) were the subject of negotiations between the defendant and the three third parties, no final sale and purchase agreement was prepared by any legal firm for the parties' signature. Instead, both sides signed the draft agreement dated 17 August 1997. This was followed by payment of the consideration from each of the three third parties to the defendant, proportionate to the shares they would take up in Iverson.

6 According to the three third parties, there was discussion (at the time the sale of shares from the defendant and his wife was being negotiated) about releasing the defendant from the guarantees he had provided to Iverson's bankers. However, the Indemnity was never raised at all by the defendant. Indeed, the three third parties were emphatic that they did not even know of the existence of the Indemnity until the defendant instituted proceedings against them. Further, they claimed to have seen the document for the first time when it was produced in court by the plaintiffs' witness. It was however the plaintiffs' case that it was only after their receipt of the Indemnity, that they commenced supplying computer equipment and parts to Iverson in September 1994.

7 The defendant resigned his directorship of ICAPL some time in October 1996. The three third parties ran the company for a few years after the change in ownership from the defendant and his wife. During that time, the plaintiffs continued supplying goods to the company. Unfortunately, due partly to the downturn in the computer industry and partly to the poor state of the economy generally, the operations of Iverson were adversely affected after 1997, notwithstanding an injection of $4m into the company from venture-capitalists and despite a tremendous increase in the company's turnover of up to $30m in 2001. Consequently, Iverson suffered losses. After making an unsuccessful attempt to save the company by an application under s 210 of the Companies Act (Cap 50, 1994 Rev Ed), the three third parties eventually put ICAPL into voluntary liquidation on 13 August 2002, under the charge of the accounting firm of Kong, Lim & Partners.

8 On 10 July 2002, the plaintiffs' then solicitors made a written demand on the defendant based on the Indemnity, for the sums of $91,076.92 and US$279,953.25 due and owing by ICAPL as at 24 June 2002. The defendant's response through his solicitors on 17 July 2002 was to say that he could not recall executing the Indemnity, not to mention that he had left ICAPL some six years earlier. The plaintiffs' solicitors forwarded a copy of the Indemnity to the defendant's solicitors on 23 July 2002. The defendant's solicitors responded in September 2002 to deny categorically that he had furnished any such Indemnity, pointing out that the document (which was on an old piece of paper) contained draft cancellations and amendments. Not surprisingly, the plaintiffs' response was to file this suit.

The pleadings

9 In the Statement of Claim, the plaintiffs averred that due to the creditors' voluntary liquidation of ICAPL in August 2002, they had suffered loss and damage in the sums of S$91,076.92 and US$279,953.25. The plaintiffs pleaded they were entitled to be indemnified by the defendant for their loss, based on the Indemnity.

10 In the Defence, the defendant denied executing any written indemnity in favour of the plaintiffs. He contended that the Indemnity was only a draft which was not meant to be binding and/or to have any legal effect. He pleaded he had no knowledge who had forwarded the draft indemnity to him, which document was left in his in-tray with a note stating it was for his approval.

11 The defendant averred that it was the practice of ICAPL to seek the approval of all directors for formal documents. Consequently, after he had made amendments to the draft indemnity and initialled it to denote he had amended the document, he left the draft in his out-tray for it to be transmitted to the other directors for their comments. He did not know how the draft came to be in the possession of the plaintiffs, to whom he did not forward the document. Even if the plaintiffs suffered the losses they claimed, the defendant denied it was caused by any default on the part of ICAPL.

The third party proceedings

12 Some five months after he had filed his Defence, the defendant filed a third party notice on 23 March 2003 against the three third parties pursuant to O 16 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed).

13 In the third party notice, the defendant referred to a written agreement for sale and purchase of shares dated 17 August 1997, wherein he and his wife Landa sold their shares in Iverson to the three third parties. He relied on cl 4(A)(3) therein which states:

> [T]he Purchasers [the three third parties] shall procure that the vendors shall be discharged from all liabilities, contingent or otherwise, incurred by the Vendors [the defendant and his wife] pursuant to any guarantee or indemnity given or made by the Vendors to secure the liability of any of the Companies [Iverson].

to say the three third parties, having agreed to discharge him from all liabilities contingent or otherwise, had breached the clause, should he be found liable to the plaintiffs under the Indemnity. Consequently, they were liable to him for all loss and damage including interest and costs.

The evidence

14 The plaintiffs had only one witness for their case. He was Yue Mui Fai ("Yue"), their country sales manager, who joined the plaintiffs in May 1993 as a sales executive and rose through the ranks to assume his present post in 1999. Yue had no dealings with ICAPL in 1994. He reports to his executive director H H Lim who had dealings with a director (K C Low) of ICAPL but that was only in 1999.

15 Yue's evidence was based on records maintained by his company of which he had no personal knowledge. The accounts manager of the plaintiffs (whom he could not even recall) who dealt with ICAPL had since left their employment. Over the years, other staff of the plaintiffs who dealt with ICAPL had also left. The problem was compounded by the fact that the plaintiffs' records (on

personnel) prior to 1995/1996 were destroyed. Consequently, Yue could not enlighten the court on how (and when) the Indemnity came to be in the plaintiffs' possession, although he maintained that the plaintiffs had the document *all along* and not only from 1999 or 2002, as suggested by counsel for the defendant. He testified the plaintiffs did not look at the Indemnity (because there was no need), until ICAPL closed down in 2002. The Indemnity would have been kept by his finance department, whose current head, Caroline Tay, handed the document to him for purposes of the trial.

16 It was the plaintiffs' case that the company would not have supplied goods and extended credit to any customer (save for banks and government bodies) until after the plaintiffs had received an indemnity from the customer. Yue relied on the plaintiffs' invoices to ICAPL which bore dates on and after 17 September 1994 to support his contention that Iverson was only given credit after the Indemnity was received. The plaintiffs would accept an indemnity from any of, and not necessarily from all, the directors of ICAPL. It was the creditworthiness of the actual signatory/signatories which mattered rather than the number who signed. Although it was also the plaintiffs' practice to request credit application forms from its customers before approving and extending credit, Yue testified that he had not seen such a form from Iverson. However, he changed his testimony when he was recalled to the witness stand. From searches he had conducted in his office with Caroline Tay, Yue found (in a very old file *chucked in a corner*) a credit application form (undated) of ICAPL completed by the defendant's wife Landa. He also produced an indemnity form[2] dated 9 September 1993 signed by Landa. Yue had no knowledge of the document prior to its discovery and he did not know how it came about. Neither could any of the plaintiffs' staff from 1993 recall this case.

17 Yue said the plaintiffs were unaware of the change in ownership of ICAPL from the defendant to the third parties in August 1997. It was not the practice of his company to keep track of the change in ownership of their customers.

18 When he testified, the defendant was emphatic that the Indemnity was only a draft meant for his five fellow directors' approval or comments. However, he forgot to have his then secretary Sei Geok Suan ("Sei") transmit the same to the other directors after he had made amendments to and initialled the document. He called Sei (who now works for one of his companies) to corroborate his evidence. Sei recalled that the defendant had left the Indemnity in his tray. Since she did not receive any instructions to the contrary from the defendant, she had filed the document away as was her usual practice. The defendant believed someone had taken the Indemnity from ICAPL's files and handed it to the plaintiffs after he and Sei left the company in 1996. He confirmed the evidence of the three third parties that he did not show the document to any of them until last year. He also agreed with one of their counsel that at the time the shares in Iverson were transferred to the three third parties, none of his other directors knew of the Indemnity. They were only aware of guarantees he had furnished to United Overseas Bank Limited ("UOB") and to Overseas Union Bank Limited ("OUB") for overdraft facilities he had secured when he established Iverson. Notwithstanding that the three third parties were unaware of the Indemnity, the defendant expected them to discharge him from any liability owed to the plaintiffs, based on the terms of the Agreement. Indeed, according to the defendant, Tan, Chee and Ang should have done their utmost to remove him from this and other liabilities owed to suppliers, by writing to suppliers or advertising in the newspapers. He opined it was their duty to discharge him from all liabilities, contingent or otherwise.

19 The defendant and Sei (who was in charge of accounts at the material time including making payments) testified that ICAPL had ordered goods from the plaintiffs well before September 1994. In fact, they were one of the company's first suppliers shortly after ICAPL commenced business in 1991. However, neither of them could produce any documentary evidence to substantiate such earlier transactions between Iverson and the plaintiffs. Accounting documents and other records from 1994, which were with the auditors of ICAPL, had been destroyed. In any case, the defendant no longer

had access to the company's documents.

20 The defendant testified that in 1994 (until his departure in 1996), his role in Iverson was limited to approving payments (signing cheques) and liasing with the company's banks. He would only be in the company's office for about an hour each day, depending on the workload.

21 The defendant denied he had any contact with either UOB or OUB (after selling off his shares in Iverson) relating to his discharge from the guarantees he had furnished to them. This was contrary to the testimony of Tan and Ang that they had visited UOB's branch at The Adelphi and OUB's branch at Outram Park shortly after 17 September 1997, which appointments were arranged by the defendant. The defendant claimed he merely took the word of the three third parties that he had been released from his guarantees.

22 Tan's role in ICAPL was to provide information technology ("IT") services and train students whilst Chee took charge of the system integration department, implementing computer networks and IT solutions and training; Ang dealt with customers.

23 As stated earlier, the testimony of the three third parties was unequivocal on the issue of the Indemnity: they did not know of its existence at the material time and only saw it for the first time in court, it was only a draft not meant to have any legal effect (because the defendant did not sign but only initialled the document) and, if indeed an indemnity was to be given to the plaintiffs, all of them as directors would have signed the document, after first passing a directors' resolution to evidence their approval. Chee went further to testify that had he, Tan and Ang known of the existence of the Indemnity, it may have affected the purchase price paid to the defendant and his wife for Iverson. It was also the trio's common evidence that it was not and never their practice to furnish indemnities to suppliers and, if the latter insisted on the same as a pre-condition to supplying goods to Iverson, the three third parties would look for, and give their business to, alternative suppliers. Tan understood from K C Low (the majority shareholder during the defendant's time with whom the defendant had differences) that the latter had turned down the plaintiffs' request as well as those of other suppliers, for indemnities; these included Microsoft, who was a much bigger supplier than the plaintiffs.

24 Although it was the defendant's stand that the Indemnity was only a draft, he adopted the opposite stand as regards the draft agreements for the sale of his and Landa's shares in Iverson to the three third parties. He maintained that the (second) draft agreement dated 17 August 1997 and signed one night in August 1997 was a valid and enforceable agreement. This was disputed by the three third parties who contended that the numerous cancellations and hand-written amendments on the document, and the fact that the defendant's and their signatures were not witnessed, meant that it could not be treated as a legally binding agreement. In addition, certain blank portions of the draft agreement were not filled in. However, I noted there was performance of the draft agreement in that the three third parties paid to the defendant part ($150,000) of the agreed consideration of $500,000, in exchange for executed transfer forms from the defendant and Landa of their shares in ICAPL.

25 Chee testified he had recommended the services of the law firm of Chor Pee & Partners to Tan and Ang, which law firm prepared the two drafts. However, the three third parties did not revert to the law firm to prepare the finalised agreement after both sides had appended their signatures (save for Landa) to the second draft. Chee had asked but the common consensus was not to revert to the law firm. One factor could be that costs of preparing the agreement were to be borne by the three third parties jointly and severally, under cl 10 of the second draft. The defendant's reason was that the matter should end there as otherwise it would carry on indefinitely. Even though all parties had agreed not to revert to the law firm, Chee maintained that the second agreement was still a draft

because it had not been finalised. Indeed, in relation to cl 4, the law firm had informed Chee that they had to get a list of his liabilities from the defendant to attach to the agreement. Even then, Chee was of the view that the Indemnity would not have been included in such a list. He assumed the parties proceeded on the understanding they had reached in their discussions, albeit incomplete. Ang[3] explained that the signatures to the second draft agreement were to signify the parties' intention to proceed with the deal.

26 The defendant had relied on cl 4(A(3) of the document for his third party proceedings against Tan, Chee and Ang. I shall now set out cl 4 in its entirety before explaining why I was of the view that it did not cover the Indemnity. The clause states:

> OBLIGATIONS ON EXECUTION
>
> (A) On or as soon as reasonably possible after the First date of Completion:
>
> (1) Chan [the defendant] shall deliver to the Purchasers [the three third parties]
>
> (a) his letter of resignation as a director of ICP [Iverson Consultants Pte Ltd], confirming under seal that he has no claims against ICP;
>
> (b) his letter of resignation as a director of ISB [Iverson Associates Sdn Bhd], confirming as a director under seal that he has no claims against ISB;
>
> (c) his letter of resignation as a director of PTI [PT Iverson Konsultan Indonesia], confirming under seal that he has no claims against PTI;
>
> (d) his letter of resignation as a director of ICT [Iverson Computer Associates (Thailand) Limited], confirming under seal that he had no claims against ICT.
>
> (2) Chan shall deliver to ICA [Iverson Computer Associates Pte Ltd], ICP, ISB, PTI and ICT all documents, records and all other property of the respective companies which are in his possession or control; and
>
> (3) the Purchasers shall procure that the Vendors shall be discharged from all liabilities, contingent or otherwise, incurred by the Vendors [the defendant and his wife] pursuant to any guarantee or indemnity given or made by the vendors to secure the liability of any of the companies *within three months of this document.*

The italicised words in sub-cl 3 above were hand-written additions made by Ang. However, completion did not take place three months after August 1977 as stipulated, but much later.

27 The three third parties denied the defendant's claim that they were instrumental in discharging him from his guarantees to UOB and OUB. They disputed the suggestion from the defendant's counsel that the onus was on them to procure the defendant's discharge from such liabilities, contingent or otherwise. They contended the duty to procure such discharge was on the defendant as he, not they, had contacts in the two banks. They asserted that pursuant to their discussions and negotiations with the defendant, it was understood that their liability to the defendant under cl 4(A)(3) would be to banks only, not suppliers. In addition, their obligation to indemnify the defendant (for known liabilities) was only to financial institutions for facilities extended to ICAPL, disputing the defendant's assertion that the trio was expected to find out for themselves whether the defendant was under any liability, contingent or otherwise, to any suppliers.

28 Although it was not the practice to give indemnities to suppliers, Chee explained that the defendant nonetheless amended the Indemnity so that the three third parties could consider whether they should take their business away from the plaintiffs and give it to some other supplier. Earlier, Tan had testified that after the three third parties had bought over the shares of the defendant and Landa, they met their suppliers regularly and would inform the latter of shareholding changes in ICAPL.

29 I should point out that Tan and Ang joined ICAPL in 1993. If the trio's testimony was accepted (that there was a common understanding amongst all the directors that guarantees would be given by them collectively), this meant that the defendant and the three third parties were well aware of this practice long before the defendant and his wife sold their shares in 1997.

The decision

The plaintiffs' claim

30 In the light of the inability of the plaintiffs' only witness (Yue) to explain when and how the Indemnity came to be in the plaintiffs' possession and with evidence to the contrary from the defendant and his former secretary, that the document was *never delivered* or returned to the plaintiffs, I was of the view that the Indemnity was indeed a draft which was not meant to be an enforceable document. Consequently, I dismissed the plaintiffs' claim, against which dismissal there is no appeal.

The third party proceedings

31 Consequent on my dismissal of the plaintiffs' claim, I dismissed the defendant's third party proceedings against Messrs Tan, Chee and Ang. It bears recapitulating that the defendant's action against the three third parties was (in part) premised on the following paragraphs in his third party notice filed on 28 March 2003:

> The defendant claims against you for an indemnity or contribution for any amount which the defendant may be ordered to pay to the plaintiffs as a result of the plaintiffs' claim, interest, costs and such further or other relief as may be deemed fit to be granted by this Court to the extent that this Honourable Court shall determine …
>
> The defendant therefore avers that if he is found liable under the Indemnity, the third parties are in breach of clause 4(A)(3) of the Agreement for sale and purchase of shares and are then liable to him for all loss and damage including interest and cost.

As the defendant was not liable to the plaintiffs based on the Indemnity, I was of the view that similarly he could not succeed in his own action against the three third parties, based on cl 4(A)(3) of the agreement.

32 There was a divergence of testimony between the parties, on whether cl 4(A)(3) entitled the defendant to be indemnified by the three third parties against contingent liabilities such as the plaintiffs' claim. The defendant contended the clause would apply whereas the three third parties asserted otherwise.

33 I had rejected the contention made by Tan, Chee and Ang that the agreement was not meant to have legal effect as it was only a draft. After all, there was performance of the contract pursuant to the second draft agreement in that money changed hands from the three third parties to the defendant, followed by the transfer of shares in Iverson from the latter and his wife. There is no

legal requirement that the sale and purchase of shares in companies must be evidenced formally in writing. Even so, I was of the view that the three third parties spoke the truth when they testified that cl 4(A)(3) was intended to cover and only covered liabilities or guarantees known to them and/or disclosed by the defendant.

34 It was totally unreasonable of the defendant to maintain that the onus was on the three third parties to ascertain for themselves from suppliers whether ICAPL and/or Iverson owed any debts to the suppliers. I disbelieved the defendant's evidence that he played no part in procuring his discharge from guarantees he had furnished to banks and he merely took the word of Tan, Chee and Ang that he had indeed been released from such liabilities. That is highly unlikely as the defendant, not the three third parties, would know the personnel in UOB and OUB with whom to liaise in relation to such matters. Counsel for the defendant did not challenge the testimony of Tan and Ang that they had accompanied his client when the defendant visited UOB's branch at The Adelphi and OUB's branch at Outram Park shortly after 17 September 1997. What else could have been discussed in those visits if not the defendant's liabilities in relation to the bank accounts of ICAPL? There was no obligation on the defendant under the terms of the second draft agreement to ensure that UOB and/or OUB continued to extend credit facilities to ICAPL after he had sold his and his wife's shares.

35 At the conclusion of the trial, when I dismissed the plaintiffs' claim against the defendant and in turn the defendant's third party proceedings, counsel for the defendant did not address me on the issue of costs. Consequently, applying the usual rule that costs must follow the event, I awarded costs to the defendant against the plaintiffs on the claim and in turn, to Tan, Chee and Ang against the defendant in the third party proceedings.

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[1] Exhibit P1.

[2] See exhibit P2.

[3] In his written testimony para 9