CEF (Capital Markets) Ltd and Another v Goh Chin Soon and Others
[2001] SGHC 342

Case Number	: Suit 849/1998, Suit 24/1998, Suit 822/1999
Decision Date	: 19 November 2001
Tribunal/Court	: High Court
Coram	: S Rajendran J
Counsel Name(s)	: Andre Yeap with Ng Lip Chih and Prakash Pillai (Allen & Gledhill) for the plaintiffs; Jimmy Yim SC with Abraham Vergis (Drew & Napier) for the defendants; Alvin Tan with Raymond Wong (Wong Thomas & Leong) for the 3rd defendant in counterclaim
Parties	: CEF (Capital Markets) Ltd; CEF (Singapore) Ltd — Goh Chin Soon; Goh Teck Beng; Grandlink Group Pte Lrd; City Square Development Pte Ltd

Judgment

GROUNDS OF DECISION

1. In May 1997, Ricky Goh Chin Soon ("RG"), a successful Singapore businessman, entered into discussions with a prominent Malaysian businessman, Dato Sng Chee Hua ("Sng") for the purchase of 8 million shares (which would constitute 40% of the equity) in a public listed company in Malaysia called "Seng Hup Corporation Bhd" ("Seng Hup"). One Mdm Flora Ong ("Flora") a remisier with K&N Kenanga ("Kenanga"), a firm of Malaysian stockbrokers acted as the broker for both of them. RG confirmed to Flora, at a meeting at the Marina Mandarin in Singapore on 12 May 1998, that he was prepared to pay RM12 per share. By late May/early June 1997, the details of the sale at that price and the details of how the sale was to be effected were agreed with Sng.

2. Seng Hup (which also had outlets in Singapore known as "Crystal Palace") was in the wholesale and retail lighting business. RG had himself started his commercial career in the lighting business. It was clear that because of his familiarity with that line of business RG, from the beginning, was favourably disposed towards acquiring Seng Hup that were available for sale. Indeed, RG in his affidavit evidence-in-chief (paragraph 9) confirmed that when he said:

> "One of the reasons I was interested in this deal was because I started my career in the lighting and lightcraft wholesaling business myself. Therefore I was confident that if Seng Hup turned out to be a worthwhile company to takeover, I would be able to apply my considerable experience and success in this industry to run it profitably in the future."

RG had also, at about the time of the arrangements to purchase the Seng Hup shares, expressed confidence in his ability to successfully manage Seng Hup to a number of people. He had also expressed the view that Seng Hup was currently not as profitable as it could be because of internal mismanagement.

The financing of the Seng Hup acquisition

.

3. To purchase the 8 million Seng Hup shares, RG needed considerable financial assistance. From a very early stage CEF (Capital Markets) Ltd, a merchant bank based in Hong Kong through Leong Siew Loon ("Leong"), the executive director of its Singapore subsidiary, CEF (Singapore) Ltd (referred to

jointly as "CEF") had expressed interest in financing the purchase. It was RGs evidence that Leong had not only offered to finance the purchase but, in addition, had said that CEF would provide RG with professional advice in respect of the purchase.

4. CEF did not deny that it had, from the beginning, been interested in financing the acquisition but denied that it had offered to give professional advice to RG in respect of the acquisition. In this regard, it was pointed out that Seng Hup was a Malaysian listed company and CEF had no licence to operate as a merchant bank in Malaysia.

5. The total facilities that CEF undertook to procure for this transaction was US$40 million. As there were internal constraints on CEF providing such a large sum of money, it was agreed that CEF would provide US$25 million as a term loan and, in respect of the balance of US$15 million, would act as the facility agent to procure that loan.

6. It was agreed between RG and Sng that the purchase of the 8 million shares would be effected in two tranches. The first tranche of 4.3 million shares was to be crossed through the Stock Exchange at RM14.50 per share and the balance of 3.7 million shares would be crossed thereafter at about RM9 per share thereby maintaining the agreed price of RM12 per share. City Square Development Ltd ("City Square"), a British Virgin Islands ("BVI") company incorporated for that purpose, was the vehicle used to effect the purchase of the first tranche.

7. The crossing of the first tranche took place on 9 June 1997. To facilitate the crossing CEF, on that day, issued a letter to Lum Chang Securities Pte Ltd ("Lum Chang") the stockbrokers used to effect the crossing an undertaking that it would make full payment for the shares by 27 June 1997. At the date of the crossing the formal documentation relating to the loan and security to be provided had not been signed. The issue by Leong of the letter of undertaking, without first having the formal documentation executed, was somewhat unusual. Leongs explanation for this was that he had every confidence in RGs bona fides and accepted the risk involved in issuing that letter of undertaking. The senior management of CEF, when questioned, had reservations about the issue of that letter by Leong.

8. The formal documentation for the loan was signed by the parties on 26 July 1997. Amongst the documents signed by RG and his nephew Danny Goh Teck Beng ("DG") on that day were their respective letters of guarantee. Amongst the documents executed on behalf of City Square were an Agency Fee Letter Agreement and a Front-End Fee Letter Agreement.

Problems with the financiers

.

9. City Square failed to keep up with some of the payments that it was required to make to CEF under the Agreements signed on 26 June 1997. On 29 July 1997, CEF made a formal written demand for outstanding fees of US$328,938.20. City Square did not meet the demand. On 27 August 1997, CEF drew attention to cl 17 of the Facility Agreement which stipulated that upon the occurrence of an event of default CEF could withdraw from its obligations to finance the purchase and cautioned City Square that failure to pay outstanding fees was an event of default. As City Square did not effect payment, CEF, on 8 September 1997, informed City Square that it was cancelling all its commitments to City Square.

10. Faced with the difficulties he was having with CEF, RG had to secure some other method by which to finance the purchase of the second tranche of shares. Having purchased the first tranche at

an inflated price of RM14.50 per share, it was important to RG, in order to achieve the average price of RM12 per share, that the purchase of the second tranche was completed. Only then would the price paid for the Seng Hup shares average out to RM12 per share. To purchase the second tranche, RG turned to one Andrew Quek ("Andrew") a person very familiar with share market operations for assistance.

The "tango"

.

11. RGs arrangement with Andrew was for Andrew to purchase the remaining Seng Hup shares from Sng through Andrews trading account in a broking house and thereafter, within each settlement period, keep transferring the shares back and forth between different trading accounts. RG referred to this device as "tango". The idea was to keep on doing this until the shares were paid for or otherwise disposed of. One of the other accounts into which the shares were "tangoed" into was the account of one Wong Chin Yong ("Wong"), another person highly conversant with share market operations. Using this device, RG obtained control of the second tranche of Seng Hup shares (at RM12 per share) on 10 September 1997.

Trouble in Seng Hup: The AA Report

.

12. Having obtained control of Seng Hup, RG appointed his nominees amongst whom were a prominent Malay politician and representatives from a firm called Credit Risk Management ("CRM") to the Board of Seng Hup. The instrument appointing CRM was not produced but it would appear that CRMs brief included an investigation into the way Seng Hup had been managed. Towards that end, CRM, it would appear, began interviewing the employees of Seng Hup and soon after reported to RG that there had been mismanagement in Seng Hups finances. No one from CRM was, however, called to testify on all this. Nor did RG make disclosure (as he did in respect of AA) of any report that CRM may have made.

13. As a result of what CRM reported, Seng Hup appointed M/s Arthur Andersen ("AA"), a firm of public accountants in Kuala Lumpur (Malaysia), to conduct a position audit on Seng Hup. AA conducted such an audit and, in December 1997, produced a position report on the financial affairs of Seng Hup as at 30 September 1997 (AA Report). Meanwhile (in common with many other counters on the Malaysian Stock Exchange), the price of Seng Hup shares on the Stock Exchange was in decline. The evidence also was that on 9 September 1999, Seng Hup was placed under Dhanaharta.

14. It was RGs evidence that, from the later part of 1997, he began to realise that he had been misled by Flora, Sng, Leong and CEF into buying the Seng Hup shares. It also began to dawn on him, he said, that he had been the victim of a conspiracy amongst them to defraud him. RG, however, did not take any immediate action against any of them for misrepresentation or conspiracy.

The writs

.

15. The first person to take legal proceedings in connection with the purchase by RG of the Seng Hup shares was Flora. On 9 January 1998, Flora, in Suit No. 24/98, sued RG for her 2% commission.

16. On 18 June 1998, CEF, by way of Suit No. 849/98, sued RG, DG, Grandlink Group Pte Ltd and City Square (collectively referred to as "the RG Group") for, inter alia, the return of the US$25 million loan advanced to City Square.

17. On 3 June 1999, RG and City Square, in Suit No. 822/99, sued Sng for breaches of warranties, misrepresentations and conspiracy (together with Flora, Leong and CEF) to defraud RG in the acquisition of the Seng Hup shares. RG raised similar allegations of misrepresentation and similar allegations of conspiracy to defraud by way of counterclaim against Flora, Sng, Leong and CEF in Suits No. 24/99 and 849/98.

18. With the declining fortune of Seng Hup, RG himself was facing increasing financial difficulties. The commencement of Suit No. 849/98 by CEF for the sum of US$25 million loaned to City Square did not help matters. In the course of this hearing, there was frequent mention of RGs impending bankruptcy by reason of his failure to settle his debts. The judgments entered against RG and the others referred to in paragraphs 27 and 34 below were precipitated by the impending bankruptcy.

19. The hearing of the claims and counterclaims in these suits was protracted it was spread over 13 months and it took 61 trial days and the documents produced in court were voluminous. Five different sets of solicitors represented the various parties involved and the cross-examining of every witness was intensive and detailed.

20. As was to be expected in such protracted proceedings involving different interests, there was considerable differences in the accounts given by the various witnesses. To add to that, in respect of some witnesses (and this applies particularly to RG, Eddie and Andrew), there were considerable differences and contradictions even within their own evidence. Counsel for the parties have, in their closing submissions, highlighted many of these contradictions.

21. The evidence in support of the allegations of misrepresentation and conspiracy to defraud made against CEF, Leong, Flora and Sng (the alleged conspirators) came mainly from RG. As Mr Jimmy Yim, counsel for the RG Group, correctly stated in his closing submissions, whether the court accepted those allegations or not would depend almost entirely on whether the court believed RG or the alleged conspirators.

A. <u>The claims against RG and his Group</u>

.

(a) *<u>The claims by Flora (Suit No. 24/98)</u>*

.

22. In Suit No. 24/98, Flora claimed from RG the sum of RM1,920,000 being the 2% commission that RG had agreed to pay her for the purchase of the 8 million Seng Hup shares from Sng. RG did not dispute that he had agreed to pay Flora a commission of 2% but alleged, first, that the commission was for the purchase of 6.2 million and not 8 million Seng Hup shares and, second, that, in any event he (RG) had not purchased any Seng Hup shares from Sng and therefore no commission whatsoever was payable to Flora. In making this denial in Suit No. 24/98, RG was, no doubt, relying on the fact that as it was City Square, a BVI company, that had purchased the first tranche and as it was Andrew who had purchased the second tranche, Flora would have difficulty tracing these purchases to him.

23. In the Order 14 proceedings instituted in Suit No. 24/98, the Assistant Registrar ("AR") rejected RGs claim that he had not purchased any shares from Sng and gave part-judgment against RG in the sum of RM1,032,000 being the 2% commission in respect of the first tranche of 4.3 million shares purchased through City Square. The AR granted RG unconditional leave to defend Floras claim for commission in respect of the second tranche of 3.7 million shares. Dissatisfied with that decision, RG appealed but the appeal was dismissed.

The changing defences

.

24. On 1 September 1998, RG amended his Defence. In his Amended Defence he admitted that he had bought 4.3 million Seng Hup shares through City Square but continued to deny having bought the remaining 3.7 million shares. In this Amended Defence, RG counterclaimed against Flora for:

> (a) the sum of $384,383.74 being the brokerage fees of Lum Chang for the 4.3 million shares; and
>
> (b) the sum of RM10,750,000 being the additional amount incurred by him in having purchased the 4.3 million shares from Sng at RM14.50 and not at the agreed price of RM12.

It was significant that, even at this late stage a period of almost a year since RG (allegedly) began to realise that he had been defrauded by Sng, Flora, Leong and CEF RG, in the Amended Defence made no mention of any fraud.

25. Another 7 months later, on 23 April 1999, RG filed a Re-Amended Defence and Counterclaim. In this document, for the first time, RG alleged that he had purchased the 4.3 million Seng Hup shares (in the name of City Square) as a result of fraudulent and/or negligent representations about the affairs of Seng Hup made by Flora. RG further alleged that Flora had fraudulently, in conspiracy with Sng, Leong and other persons unknown, induced him to purchase the said shares. Again, it was of significance that RG continued to deny having purchased the second tranche of 3.7 million shares.

26. It was only on 25 February 2000 the 4th day after this consolidated hearing commenced that RG, through Mr Yim, came round to admitting that he had in fact purchased the second tranche and that he had done so in the name of Andrew. Mr Andre Yeap, counsel for CEF, submitted that this change of position came about because RG had, recently, been compelled to disclose a considerable amount of documents relating to the purchase of Seng Hup shares and, in the light of those disclosures, it was no longer feasible for RG to continue denying that he had purchased the second tranche.

27. On 26 May 2000, RG consented to judgment being entered against him for the sum of RM888,000 (being commission at 2% on the second tranche of 3.7 million shares). In view of the counterclaims that RG had against Flora that were still being pursued, it was, by consent, agreed that the judgment against him was not to be enforced without leave of court.

28. The counterclaims made against Flora were similar to the counterclaims/claims made against CEF, Leong and Sng in the other suits. I will therefore deal with these allegations and the counterclaims against CEF and Leong in Suit No. 849/98 together when considering the claim against Sng in Suit No. 822/99.

The brokerage fee to Lum Chang

.

29. In addition to the claims of misrepresentation and conspiracy, RG had, in his counterclaim, claimed reimbursement from Flora of the sum of RM384,383.74 being the brokerage charges paid to Lum Chang. The basis of this claim was that the 2% commission agreed with Flora included brokerage fees.

30. Flora agreed that she had to absorb brokerage charges but claimed that this would be so only if the transaction was put through Kenanga, the firm of brokers she worked for. It was her case that since RG, without her consent (and even knowledge), had effected the sale through Lum Chang, she was not liable to RG for Lum Changs brokerage charges.

31. This claim for brokerage refund is not connected with RGs other claims against Flora. I will therefore deal with this issue at this juncture. I found Floras evidence that she would absorb the brokerage charges only if the transaction was put through the broking house she worked for entirely credible and accepted that those were the terms of the agreement reached with RG. I also accepted her evidence that from early June 1997 both RG and Sng kept her entirely in the dark as to the progress of the sale. I therefore rejected RGs claim for reimbursement of the brokerage fees paid to Lum Chang.

(b) *The claims by CEF (Suit No. 849/98)*

.

32. In this suit brought by CEF against members of the RG Group, the claim against City Square was for:

> (1) the sum of US$25 million and interest thereon amounting to US$1,200,463.19 as at 31 March 1998;
>
> (2) the unpaid balance of the Front-End Fee amounting to US$384,938.20 under the Facility Agreement and/or the Front-End Fee Letter Agreement;
>
> (3) Agency Fee of US$20,000; and
>
> (4) Commitment Fee of US$11,562.10.

The claims against RG and DG were based on the personal guarantees that each had given. The claim against Grandlink was in respect of a cheque for US$256,713.19, dated 17 January 1998, issued by Grandlink in favour of CEF which when presented for payment was dishonoured. Grandlink was the company used by RG as a holding company for some of his property development businesses in Singapore.

Forgery

.

33. In their joint Defence, the RG Group alleged that the signature of one Yap Yew Hock ("Yap")

appearing on the Agency Fee and Front- End Fee Agreements, purportedly on behalf of City Square, was not the signature of Yap but was a forgery. That being so City Square was not liable for the Agency Fee and the Front-End Fee claimed. In respect of the US$25 million, it was pleaded that City Square had not drawn down on this sum under the Facility Agreement but that CEF had, without the authority of City Square, unilaterally paid the amount to Lum Chang pursuant to the written assurance given by CEF to Lum Chang on 9 June 1997. City Square was not therefore liable to repay the US$25 million.

34. I would, at this stage, point out that the RG Group made no effort to substantiate the serious allegations of forgery that they had made against CEF. Instead, on 22 May 2000 the 23rd day of the trial RG, City Square and Grandlink, through Mr Yim, admitted the claims made by CEF and judgment was entered against them. As in the case of Suit No. 24/98, in view of the on-going counterclaims, it was agreed that the judgment was not to be executed without leave.

35. The counterclaims in Suit No. 849/98 raised allegations of fraudulent misrepresentation, conspiracy and negligence against CEF and against Leong personally. As these issues overlapped similar issues raised as against Flora in Suit No. 24/98 and Sng in Suit No. 822/99, I will, as indicated earlier, deal with them together.

B. <u>The claims/counterclaims by the RG Group</u>

.

36. In Suit No. 822/99, RG and City Square alleged that Sng had made fraudulent/negligent misrepresentations regarding the commercial viability of Seng Hup; that he had conspired with CEF, Leong and Flora to defraud RG and that he was in breach of the written warranties contained in his letter dated 27 May 1997 ("the letter of warranty") addressed to RG.

37. In Suit No. 849/98, RG, by way of counterclaim, made similar allegations against Flora, Leong and CEF and sought damages. As against Leong and CEF, RG also made a counterclaim for breach of their duty of care to him in the professional advice they rendered vis--vis the acquisition.

<u>Breach of warranties</u>

.

38. I will deal first with the claims against Sng based on the letter of warranty. The letter stated:

> " I refer to my telephone conversation with Mr Eddie Lim on Tuesday 27th May 1997, in respect of the intended sale of shares in the capital of Seng Hup Corporation Berhad (Seng Hup).
>
> 2) In consideration of your agreeing to purchase from me or my nominees shares in the capital of Seng Hup and, in the absence of availability of Seng Hups audited financial statements for the financial year ended 31 March 1997 (the Relevant Year), I represent and warrant to you that:-
>
> > a) There has not been any changes in the capital of Seng Hup from the date of its last published accounts.

b) The sales turnover of Seng Hup and its subsidiaries and associates (the Seng Hup Group) for the Relevant Year shall be not less that (sic) MYR65.0 million and the profits before taxation of the Seng Hup Group shall not have more than a five (5) percent variance from MYR2.80 million.

c) The Seng Hup Group has not disposed of any of its fixed assets during the Relevant Year and have not contracted to dispose of any of its fixed assets.

d) The physical stocks and inventories held for sale in the Seng Hup Group shall not be more than a five (5) percent variance from MYR48.3 million as at the end of the Relevant Year and the valuation of the stocks shall be based on the accepted accounting practice.

e) Other than the MYR5.13 million owing to Seng Hup from a company in which a director of Seng Hup, Mr Richard TEO Song Kwang has an interest in, which I will undertake to guarantee that the said amount owing will be repaid to the Seng Hup Group before the financial year ending 31 March 1998, all trade and other debtors are debts and credits granted by the Seng Hup Group in the normal course of doing business which have been conducted on an arms-length basis.

f) All trade and other creditors are current liabilities of the Seng Hup Group which were incurred in the normal course of doing business which have been conducted on an arms-length basis.

g) The Seng Hup Group has not during the Relevant Year incurred any additional borrowings other than those incurred in the ordinary course of business. The Revolving Credit Facility and the Guaranteed Notes Issuance Facility have a final maturity not earlier than the financial year ending 31 March 1999.

h) All material contracts (the Rented Assets Contracts) relating to the rented property assets are entered into on an arms-length basis.

i) The Seng Hup Group has not entered into any service and/or employment contracts with any of its past and present shareholders or directors which cannot be terminated without the payment of any compensation.

j) The Seng Hup Group has not entered into any long term supply contracts with any of its past and present shareholders or directors, including any companies in which past and present shareholders and directors have an

interest in, which cannot be terminated without the payment of any compensation.

3) *The above representations and warranties* are given by me personally and *are in lieu of your request to undertake a due-diligence* on the accounts and business of the Seng Hup Group. I further am aware that you have relied on my above representations and warranties for your decision to purchase my shares in the capital of Seng Hup.

Looking forward to your acceptance hereof."

(Emphasis added.)

Paragraph 3 of the letter suggests that the warranties were given in lieu of an earlier obligation to afford RG an opportunity to conduct a due diligence exercise on Seng Hup. That was in fact so. The history of how this letter of warranty came to be given was as follows.

Warranties in lieu of due diligence

.

39. On 16 May 1997, as a follow-up to the meeting at the Marina Mandarin, RG had sent a letter to Sng confirming his (RGs) interest in buying 6.2 million Seng Hup shares at not more than RM12 per share "subject to our having undertaken a due-diligence to our satisfaction on the accounts and business of the company". Leong, at RGs request, had helped RG draft that letter. Seng Hup was a public listed company. As such, disclosing to an intending purchaser of Seng Hup shares, information relating to the affairs of Seng Hup that was not in the public domain, or giving an intending purchaser access to the books of Seng Hup for the purpose of conducting a due diligence exercise could meet with difficulties. Leong, who was aware of these difficulties, nevertheless inserted the proviso relating to due diligence. In effect, he told the court that he did this in order to give RG an escape route should the need arise.

40. Yeo Siah Meng ("Yeo") the then Managing Director of CEF (Hong Kong), when cross-examined by Mr Yim also confirmed that a purchaser of shares, even a large block of shares, in a public listed company would not be allowed access to the companys books of account. It was Yeos evidence that an intending purchaser of shares in a public listed company would have to rely primarily on the published information and published accounts of the company. The only protection that such a purchaser could expect would be such warranties that the vendor was prepared to give.

41. On 25 May 1997, Sng, in response to a request by Eddie, had sent a fax to RG and Eddie wherein Sng had confirmed that the profit before tax of Seng Hup as at 31 March 1997 was "within RM3 million". In that fax, Sng stated that he could not disclose the (exact) year-end results that had been asked for because the results had not been disclosed to the Stock Exchange. Sng, however, in the letter, assured RG that he (Sng) would be responsible for any shortfall. (This was also one of the warranties that Sng was alleged to have breached).

42. When Leong saw, from the letter of 25 May 1997, the willingness of Sng to give assurances in lieu of making disclosures prohibited by the Stock Exchange, Leong felt that it would be in RGs interest (and hence CEFs interests) to exact more warranties from Sng. In consultation with RG and Eddie, he drafted a list of warranties to be given by Sng in lieu of his giving RG an opportunity to conduct a due diligence exercise on Seng Hup. The letter of warranty sent by Sng contained the

draft warranties that Leong had helped to draft.

Were warranties breached

?

43. In order to succeed in his claim, RG would have to prove that Sng was in breach of the warranties contained in the letter. RG, by his pleadings (paragraph 24 of the Statement of Claim) sought to rely on the AA Report to provide this proof. To adduce the AA Report as evidence, the makers of that Report would have to be called as witnesses. At the time the hearing commenced, no arrangements had been put in place by RG for this to be done. Nor were any arrangements made for any other accountant or person familiar with the financial affairs of Seng Hup, to be called to testify on the accuracy or otherwise of the representations and warranties in question. What RG sought to do, instead, was to prove the breach of the representations and warranties by incorporating the AA Report as part of his evidence-in-chief.

44. CEF, Leong, Flora and Sng all objected to the admission of the AA Report. They objected on grounds of:

> (a) relevance
>
> The AA Report was a report on the state of affairs of Seng Hup as at 31 September 1997. It was not a report of the financial affairs of Seng Hup for the period relevant to the issues in this case, ie the period in respect of which the representations and warranties were given. The Report was therefore irrelevant; and
>
> (b) admissibility
>
> In the absence of direct testimony from the makers of the Report the contents of the Report were hearsay and inadmissible.

There was merit in both these objections. I indicated to Mr Yim that if he wanted to have the AA Report admitted in evidence he would have to apply for leave to call the person/s from AA who prepared the report to testify in these proceedings.

Application to call Teoh

.

45. On 7 March 2000 the 11th day of the trial by way of SIC No. 601130/2000, Mr Yim applied for leave to file the affidavit of evidence-in-chief of Teoh Soo Hock ("Teoh") of AA. Teoh was one of the authors of the AA Report. Affidavits in support of the applications were filed. Mr Yim told the court that because Seng Hup had been placed under Dhanaharta on 9 September 1999 and Dhanaharta had refused its consent for AA to testify about the affairs of Seng Hup, RG had not been able to call Teoh as a witness. Mr Yim went on to say that Dhanaharta had now given its consent and RG could now call Teoh as a witness. Mr Yim further submitted that as discovery of the AA Report had already been made to all the parties, there would be no prejudice to anyone by reason of this late application to call Teoh.

46. Counsel for Sng, Flora, CEF and Leong ("the alleged conspirators") all objected to the application. The gist of their objection was that:

> (a) they had, all along, been led to believed that RG was not calling AA or any other accountant to testify on the affairs of AA. In that belief, they had aborted all efforts to retain their own experts to study the AA Report. To allow RG to call Teoh at this late stage would therefore be prejudicial to them;
>
> (b) if the AA Report was admitted discovery would have to be made of all documents that form the basis of the AA Report so that the experts (to be appointed) could meaningfully look into the matter. This would cause considerable delay to this trial;
>
> (c) RG had claimed that he could not procure the attendance of Teoh earlier because Dhanaharta would not give its "consent", but, apart from the say-so of RG, nothing in the affidavits filed in support of the application not even the affidavit of Teoh reflected this. The "consent" that was produced dated 18 February 2000 was not signed by Dhanaharta but was signed by RG himself as "CEO and Director" of Seng Hup. Also, there was no evidence before the court as to why RG could not have procured this "consent" before Dhanaharta came into the picture; and
>
> (d) the AA Report reflected Seng Hups affairs as at 30 September 1997. That date had no relevance to these proceedings. If the Report was admitted, questions of causation and novus actus intervenus caused by the economic downturn in the second half of 1997 would also arise.

There was merit in the submission on behalf of the alleged conspirators that this "surprise" calling of Teoh as a witness would cause them prejudice and might further prolong this already long trial. But that prejudice had to be weighed against the difficulties that RG had faced in procuring the attendance of Teoh, the importance of the evidence of Teoh to RGs case and the prejudice to RG should the application be disallowed. The submission that the Report, being a report of the position of Seng Hup as at 30 September 1997, would be of no relevance to the issues in this case could also have merit, but, without hearing what Teoh had to say, it would be premature to accept that submission.

47. The affidavits filed in support of this application were, however, not sufficiently precise for me to be able to say that RG, up to then, had been unable to call Teoh because Dhanaharta had refused to consent. If that was indeed the reason, RG should be able, without much difficulty, to produce documentary evidence to support that assertion. At the very least Teoh, or someone from AA, could testify that it was because Dhanaharta refused to consent that AA could not agree to testify on behalf of RG. I granted RG leave to file a further affidavit/s to address this issue.

48. On 17 March 2000, Mr Yim addressed the court again on this matter. He had by then obtained another affidavit from Teoh. However, nowhere in that affidavit did Teoh state, in so many words, that it was because of the refusal by Dhanaharta to give its consent that Teoh/AA had so far been unable to testify. Because of the importance to RGs case that he adduce credible evidence to show that the written warranties given by Sng and the other representations allegedly made by Sng and the others were untrue, I allowed RG a further opportunity to satisfy me that the failure, up to then, to arrange for Teoh/AA to testify was not due to any fault of RG.

49. However, even by 2 August 2000, no further affidavits were filed by RG. The uncertainty about whether leave would or would not be granted to RG to call Teoh as a witness was causing difficulties in the cross-examination of witnesses. In the circumstances, as RG had not satisfied me that the failure to call Teoh earlier was not through any fault of his, I dismissed RGs application in Suit No. 601130/2001.

50. I do not know to what extent the AA Report and the evidence of Teoh would have helped in proving that the alleged representations/warranties were misleading or false but the position at the close of the hearing was that there was insufficient credible evidence before me for me to find that Sng had breached any of the terms in the letter of warranty. This was also so in respect of the other representations allegedly made by Flora, Sng, Leong and CEF.

51. The failure to adduce satisfactory evidence of the affairs of Seng Hup also meant that even if Flora, Sng, Leong and CEF had made the representations complained about, there was no evidence on which the court could conclude that these representations were untrue. In this case, however, I was not satisfied that, in the first place, such representations had been made by them and, even if made, that RG had relied on those representations in deciding to buy the Seng Hup shares.

RGs credibility

.

52. RG came through to me as a person who had scant regard for the truth. The contradictory positions he took in trying to defend himself from the claim for commission brought against him by Flora was sufficient by itself to show that he was a person who, when it came to protecting his self-interest, had no compunctions about taking any position that would achieve that end regardless of the truth of that position. A perusal of the record will show numerous instances of RGs evasiveness. Even his counsel, Mr Yim, conceded, in his closing submissions (paragraph 219) that there were various inconsistencies in RGs evidence and that RG was sometimes evasive.

53. The fact that RG was shown to be prevaricating in some aspects of the case does not, of course, mean that his entire evidence must be rejected outright. I accepted Mr Yims submission (based on the case of *Teo Geok Fong v Lim Eng Hock* [1996] 3 SLR 431) that the mere fact that the credit of a witness had been impeached did not necessarily mean that all his evidence would be disregarded. I accepted that it was the duty of the court to scrutinise the whole of the evidence to determine what was true and what was not. But the shifts in position by RG in this case were so drastic that his general credibility was put in doubt. The situation was not helped to cite just the two instances referred to above by his allegation that CEF had forged the signature of Yap on two documents but calling no evidence to support that allegation or by his assertion that he could not call Teoh to testify because Dhanaharta had refused consent but producing no evidence to support this assertion. But even so, in assessing the evidence of RG (and the other witnesses), I bore in mind that it did not follow that where a witness had told untruths or been evasive or contradicted himself on some material points, that witness was necessarily not to be believed in the rest of his evidence.

Flora

.

54. Flora, Sng, Leong and the other officers from CEF, when compared with RG, came through as truthful witnesses. Although RG tried to paint Flora as a conspirator, who, with the others, had

defrauded him, I accepted Floras evidence that her role was no more than that of a middleman who, for a fee, was putting a seller and a buyer together. I accepted her evidence that she made no representations to RG about the financial viability of Seng Hup and that she had not, at the Marina Mandarin meeting, produced any accounts of Seng Hup. I accepted her evidence that, in any event, she did not, at the Marina Mandarin meeting, have to "sell" Seng Hup to RG because RG (and Eddie) had, prior to that meeting, spoken to her on the phone and she knew from those conversations that RG was keen to buy the shares at RM12 per share. I was satisfied that nothing that Flora may have said, either at the Marina Mandarin meeting or elsewhere, had the effect of influencing RG to buy the Seng Hup shares.

55. I also accepted the evidence of Flora that from early June 1997, both RG and Sng kept her in the dark as to what was happening and that she did not get to know, until much later, that the shares had been sold to RG. The allegations of conspiracy and misrepresentation made against Flora by RG were, in my view, nothing but self-serving conjecture.

Sng

.

56. Although Sng was a major shareholder of Seng Hup, he was not on the Board of Seng Hup. Sngs interest in Seng Hup was only as a stock player. He had himself purchased the bulk of the shares he sold to RG only a short while before the agreement to sell them to RG. As Sng had no interest in getting involved in the management of Seng Hup, he had allowed the existing Board of Directors to continue to be in office even after acquiring such a large portfolio.

57. There was evidence that Sng, at a dinner hosted by RG in late May 1997, had said to those present (including RG) "Come, let us make some money"; and there was evidence that Sng had taken trading advantage of the fact that RG was about to buy 40% of the paid-up capital of a public listed company. He no doubt also took trading advantage of the fact that the first tranche was to be transacted at a price considerably higher than the RM12 that had been agreed and the second tranche at a lower price. Indeed, there was evidence that DG, RG himself, Eddie and Andrew, were also indulging in the trading of Seng Hup shares from around early June 1997.

58. There was evidence that Sng had given the profits he made in one lot of his earlier trades in Seng Hup shares to Flora. It was suggested that this showed that Sng and Flora were working together to defraud RG. I rejected that suggestion. I accepted the evidence of Flora and Sng that this reflected no more than a gift from Sng to Flora for having procured the sale of Sngs shares. It did not, in the circumstances, indicate the existence of any conspiracy between Sng and Flora to defraud RG.

59. I accepted Sngs evidence that RG, because of his previous history of trading in lighting equipment, was keen to acquire the 8 million Seng Hup shares and that, save for the written warranties and assurances he had given, Sng had not made any other representations to RG to induce RG to buy the shares. I was satisfied that RG bought the Seng Hup shares because of his desire to get back into a business he was experienced in and in his confidence in his own ability to successfully manage Seng Hup.

CEF and Leong

.

60. I take CEF and Leong together because the allegation of misrepresentation, conspiracy and negligence against CEF arose mainly from what Leong an employee of CEF did or did not do.

61. The allegation of conspiracy against CEF and Leong was, as in the case of similar allegations against Sng and Flora, completely without merit. It seemed to me that RG had thought up these allegations merely as a device to delay the proceedings taken against him.

62. The allegations of misrepresentation too were without foundation. There was no doubt that Leong was in close contact with Eddie and RG at the time RG decided to buy the Seng Hup shares but, to say that RG bought the shares as a result of any representation Leong made would, in my assessment, be a misrepresentation of the truth. It seemed to me, that if at all anyone had encouraged RG to buy the Seng Hup shares, that person was not Leong but Eddie.

63. It was clear to me that RG decided to buy the controlling interests in Seng Hup because

> (a) it suited RGs business needs to have a public listed company into which he could inject some of his assets;
>
> (b) the lighting business was one which RG was familiar with. He was also familiar with the way in which the existing management of Seng Hup had conducted its business and had full confidence in his own ability to make a success of Seng Hup;
>
> (c) there was some symbiosis between RGs main line of business as a property developer (in Singapore, Malaysia and China) and Seng Hups business in light fittings; and
>
> (d) the price of RM12 per share seemed to him to be a fair price to pay for a controlling interest in Seng Hup.

I accepted Leongs evidence that his main role was in the processing, structuring and securitisation of the massive loan that CEF was to make to RG. I accepted Leongs evidence that he had, at no stage, told RG or Eddie that CEF would provide professional advice in the acquisition. Indeed, the unchallenged evidence before the court was that CEF was not a licensed merchant bank in Malaysia and could not have provided such advice in respect of a Malaysian listed company. If CEF had wanted to assume the role of professional advisor to RG in the acquisition, CEF would have had to work with a merchant bank in Malaysia.

64. It would be relevant to note that just prior to the Seng Hup acquisition, CEF had acted for RG in RGs attempt to acquire a controlling interest of a public listed company in Hong Kong called "Poly Investments Holdings Ltd" ("Poly"). That attempt proved abortive because, in RGs words, "the price of the Poly shares on the Hong Kong market had risen too high by mid-May 1997". In respect of the Poly deal, the letter of offer from CEF to RG clearly spelt out that CEF would finance the acquisition and provide acquisition advice. Although some internal documents of CEF made reference to the giving of advice to RG, the letter of offer sent to RG (albeit sent only after the first tranche had been crossed) referred only to financing the acquisition and made no reference to the giving of acquisition advice.

65. Leong did not deny that he did assist RG in drafting some letters and in drafting the letter of warranty. He claimed that he did this because RG sought his assistance and, as these were matters within his competence, he could not reasonably refuse assistance. In any event, it was as important to CEF as financiers (since CEF was granting the loans, inter alia, on the security of the Seng Hup

shares being purchased) as it was to RG that the purchase should be on terms as favourable to RG as possible. Leong therefore considered the help he gave to RG in these matters as part of his duties to CEF as financiers of the intended purchase. Similarly, when Eddie at the last minute asked him to go in his place to meet Sng in Kuala Lumpur, Leong obliged since he had not, up till then, met Sng and he felt that such a meeting would be of benefit to CEF in assessing the bona fides of Sng as the vendor of such a large block of shares. Whilst in Kuala Lumpur, Leong made some enquiries from Sng on matters that RG and Eddie had asked him to.

66. I rejected RGs claim that it was Leong who decided on the pricing of the two tranches of shares. RG claimed that Leong had advised on this price strategy in order to generate market interest in Seng Hup shares. I accepted Leongs evidence and this was supported by the evidence of Eddie that he (Leong) had nothing to do with pricing strategy. I accepted that Leong was no market player and was not involved in any market rigging exercise. The other persons surrounding RG, namely Eddie, Andrew and Wong were, on the other hand, seasoned market players and, if at all anyone advised RG on pricing stratagem, it would have been one or more of them.

67. I accepted Leongs evidence that when he learnt that the second tranche was to be traded at a price considerably lower than the first tranche, he felt that in order to protect CEFs (and incidentally RGs) interest it would be critical to ensure that the sale of the second tranche did take place. To ensure this Leong arranged for Bayerische Landesbank, who were holding the 3.7 million shares comprised in the second tranche, to give an undertaking to RGs solicitors that that 3.7 million shares would be transacted at the lower price. There was nothing negligent or improper in this conduct of Leong. To the contrary, that undertaking benefited RG as much as it did CEF.

68. It was the evidence of RG that Leong went to Kuala Lumpur to conduct a due diligence exercise on Seng Hup and that when Leong returned he informed RG that the Seng Hups finances were in order. I accepted Leongs evidence on the circumstances that led to his Kuala Lumpur trip. I accepted his evidence that he had at no stage undertaken or been asked to undertaken a due diligence exercise on Seng Hup. I accepted his evidence that, in any event, it would have been impossible to perform such an exercise on just a one-day trip to Kuala Lumpur. I accepted Leongs evidence that he did not, at any stage whether before or after the Kuala Lumpur trip, assure RG that the finances of Seng Hup were in order or involve himself on the question of what the price for the purchase of the shares should be.

69. I also find that RG with his fairly extensive commercial experience knew that it would not be possible for a purchaser of shares in a public listed company to do an effective due diligence exercise on that company. I also find that RG knew, at the time he purchased the Seng Hup shares, that CEF had not carried out a due diligence exercise on his behalf on Seng Hup. This was obvious from the letter of warranty sent to RG by Sng well before the first crossing in which Sng stated that he was giving the warranties in lieu of the due diligence exercise.

Negligence

.

70. It was also RGs case that even if CEF had not represented to RG that they would be the professional advisors in the Seng Hup acquisition, Leong had voluntarily assumed this role and therefore Leong and CEF (as the employer of Leong) would be liable to RG for negligence in connection with that role.

71. In support of the above submission, Mr Yim referred to various authorities beginning with the

celebrated case of *Hedley Byrne & Co Ltd v Heller & Pnrs Ltd* [1964] AC 465 at 467. The principles laid down in those cases were, however, not in issue. What was in issue was whether Leong had fallen foul of those principles.

72. It may well be that Leong, in helping RG draft some of the documents, took on an advisory role or at least could have led RG to believe that he was acting in an advisory role. If it can be shown that, in respect of those matters on which RG had relied on the advice of Leong, RG suffered a loss because Leong had been negligent in his advice, then Leong (and CEF) may be liable in damages to RG. However, that did not happen in this case.

73. I am satisfied that Leong did not give any advice to RG relating to RGs commercial decision to buy the Seng Hup shares at RM12 per share. That was a matter in the province of RG and Eddie. Leong also played no part in the pricing strategy for the two tranches.

74. Leongs role in drafting the letter of 16 May 1997 and his role in drafting the letter of warranty were amongst the acts of Leong which were highlighted as providing evidence of the advisory role that Leong had undertaken. Leong and CEF have contended that in drafting these letters Leong was acting to protect CEFs interests as financiers but even if one accepts that Leong, nevertheless, had taken on the mantle of advisor on these matters to RG, there could be a cause of action against Leong only if it could be shown that Leong was negligent in what he did.

75. Leong admitted playing a role in ensuring that the offer by RG to purchase the shares was subject to due diligence. But, as noted earlier, it was not really feasible to do an effective due diligence exercise on a public listed company. Even Mr Yim recognised this difficulty when, in reference to Sngs claim that Sng had obtained the unaudited internal accounts of Seng Hup, Mr Yim said (at page 210 of his submissions):

> "Internal interim accounts of a public company is highly price sensitive information and no management team, mindful of their fiduciary duties, would ever disclose this to anyone, let alone a shareholder who was thinking of disposing of his shares!"

To the extent that a seller cannot have access to price-sensitive information, a buyer too cannot have access to such information.

76. The reality therefore was that by subjecting the intended purchase of Seng Hup shares to a right for RG to conduct a due diligence exercise on Seng Hup and then trading that (rather ineffective) right for warranties given by Sng, Leong was able to procure for RG a degree of protection that RG would not otherwise have had: such acts could hardly be described as negligent.

77. In his closing submissions, Mr Yim detailed a whole host of other acts done by Leong which, he submitted, went towards showing that Leong was rendering advisory services. Even if that was so, it does not assist RG in his claim against Leong (and CEF) because none of these acts, either alone or in combination, could be, in my view, characterised as negligent. Nor was it established that RG relied on the advise of RG in his decision to purchase the Seng Hup shares.

78. It was also suggested that in failing to warn RG about the risks of purchasing shares without carrying out a due diligence, Leong and CEF were in breach of their duty of care to RG. In response to this suggestion, Mr Alvin Tan, counsel for Leong, submitted that the risk that one runs in buying anything without carrying out proper checks was so obvious that the duty suggested that Leong should have warned RG of such risks did not accord with common sense. I accepted that submission.

Any person involved in commercial transactions, to the extent that RG was, would have known of the risks involved in buying shares of a company. I did not consider that to adopt the words of Lord Bridge in *Caparo Industries plc v Dickman & Ors* [1990] 2 AC 605) it was "fair, just and reasonable" that the law should in this case impose a duty on Leong to specifically warn RG of such obvious risks.

79. For the above reasons, I gave judgment against DG in Suit No. 849/98 and dismissed with costs the claims by RG and City Square against Sng in Suit No. 822/99; the counterclaim by RG against Flora in Suit No. 24/98; and the counterclaims by the RG Group against CEF and Leong in Suit No. 849/98.

Sgd:

S. RAJENDRAN
Judge