Tan Hock Keng v L & M Group Investments Ltd
[2001] SGHC 253

Case Number : Suit 524/2000

Decision Date : 03 September 2001

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Tan Bar Tien (BT Tan & Co) for the plaintiff; Chia Chor Leong and Jasmine Daniel (Chia Chor Leong & Co) for the defendants

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

Contract – Contractual terms – Breach – Obligation of plaintiff to procure another's performance of contract – Failure of that other to perform – Whether plaintiff in breach and personally liable – Nature of obligation to procure another's performance of contract

Contract – Contractual terms – Interpretation – Term limiting defendants' contractual liability – Whether term(a 'reference clause' or it) applies to all provisions – Whether reference may be made to extrinsic evidence

Damages – Assessment – Breach of obligation to procure company's repayment of loans – Whether damages should be amount due from company – Whether failure to mitigate loss swing company to recover outstandings affects assessment of damages

Evidence – Admissibility of evidence – Extrinsic evidence – Whether extrinsich evidence admissible to aid interpretation of contract – ss 94(f) & 96 Evidence Act (Cap 97,1997 Ed)

Words and Phrases – 'Procure'

Judgment

1. Khai Wah-Ferco Pte Ltd ("the Company") was a wholly-owned subsidiary of the defendants – L&M Group Investments Ltd ("L&M"). By two Sale and Purchase Agreements dated 3 October 1997 and 2 December 1997 (referred to together as "the contract"), L&M sold its entire holding in the Company to the plaintiff – Tan Hock Keng ("Tan"). The sale was on a net tangible asset ("NTA") basis and the contract provided for adjustments to be made between the parties in respect of trade debts not recovered within 12 months from due date (cl 14.2), and credit notes given or received by the Company for work done, or for supplies prior to 30 September 1997 (cll 14.3 and 14.4). Clause 16.1, set out below, limited L&M's total liability to Tan for all claims of any kind to the Consideration Sum:

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

The Consideration Sum referred to in cl 16.1 was S$285,900.

2. At the time of the share transfer the Company owed a considerable sum of money - an amount in excess of S$5 million - to L&M, its parent company. The contract, in cl 15.1, required Tan to procure that the Company repaid these intercompany loans. It will be necessary to consider this clause in detail and I therefore set it out in full:

> "The Purchaser shall procure that the Company repays the Intercompany Loans as free of

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

3. L&M disputed any liability to Tan under the provisions of cl 14. In the event L&M was held liable, L&M sought to limit that liability by invoking cl 16.1. Tan, however, disputed the applicability of cl 16.1 to cl 14. It was submitted on behalf of Tan that it was the intention of the parties, in view of the Consideration Sum having been arrived at on an NTA basis, that cl 16.1 was only - to use the words of Mr Tan Bar Tien ("Mr BT Tan) who appeared for Tan - "a reference clause" that was intended by the parties to be operational only if specifically invoked in the other clauses in the contract.

4. The claims against L&M under cl 14 related to transactions with various customers and the documentation relating thereto was voluminous. In the course of the hearing, counsel for L&M, Mr Chia Chor Leong, at the invitation of the court, indicated that if the court ruled that cl 16.1 had the effect of limiting his clients' liability to the Consideration Sum, his clients would accept liability up to that sum. I therefore suggested that even though we were only about mid-way through the trial, the parties make their submission on the applicability of cl 16.1 to cl 14 and that further evidence relating to the details of the claims against L&M under cl 14 would be gone into only if the court rules that cl 16.1 does not affect cl 14. Both parties agreed to this suggestion.

5. Mr BT Tan – in support of his submission that cl 16.1 was only a reference clause and therefore inapplicable to cl 14 because there was nothing in cl 14 that invoked cl 16 – wished to refer to previous drafts of the contract that had been prepared by M/s Haridass Ho & Partners, the firm of solicitors who had acted for both parties in this sale and purchase. Mr Chia, relying on ss 94, 95 and 96 of the Evidence Act, objected to any reference to any extrinsic material in the construction of the contract. Mr BT Tan submitted that such extrinsic evidence was admissible under s 94(f) of the Evidence Act.

6. Section 94(f) of the Evidence Act reads as follows:

> "94. When the terms of such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, *no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions*:
>
> …
>
> (f) any fact may be proved which shows in what matter the language of a document is related to existing facts."
>
> (Emphasis added.)

The effect of adopting the submission of Mr BT Tan would be that cl 16.1 would not have the general

application which, on its face, it clearly had. Instead, a proviso would have to be read into cl 16.1 to the effect that cl 16.1 would apply only if specifically invoked by other clauses in the contract. Evidence that that was what the parties had agreed to was clearly prohibited under s 94 unless the matter fell into one of the provisos to s 94, in this case (on the submission of Mr BT Tan) proviso (f). Mr BT Tan did not refer me to any decided case that supported his contention. He was content merely to read out the entire commentary on s 94(f) given in *Butterworths' Annotated Statutes of Singapore* (Vol 5; 1997 issue).

7. Mr Chia, in his submissions, pointed out that that commentary in *Butterworths*, far from supporting Mr BT Tan's submission, in fact negated it. Mr Chia pointed out that the very first paragraph of the said commentary on s 94(f) in *Butterworths* stated:

> "This proviso is, strictly speaking, providing for the *interpretation* of a contract, grant or other disposition. Although it might have been grouped with the rules of interpretation which are laid down in the ensuing sections, it has been treated as a proviso to the principle of conclusiveness set out in s 94. *It seems, therefore, that this proviso enacts that interpretation of the terms which have been reduced to writing is not varying, contradicting, adding to or subtracting from the written terms* and opens the way to the more elaborate rules of interpretation laid down in the ensuing section."
>
> (Emphasis added.)

This first paragraph itself, Mr Chia submitted, made it clear that s 94(f) of the Evidence Act comes into play only when a word or phrase is unclear and the court has to interpret or ascertain what that word or phrase means. The commentary in *Butterworths*, he pointed out, was not mandating the wholesale reference to extrinsic evidence in construing a contract.

8. Mr Chia pointed out that in the present case, Mr BT Tan had not alleged that there was doubt about any word or phrase used in cl 16.1. Mr Chia submitted that the meaning of every word used in cl 16.1 was clear and unambiguous and that, in that scenario, s 94(f) cannot be invoked to let in extrinsic evidence. In support of his submission, Mr Chia quoted a number of English authorities. I need only refer to the following.

9. In *Great Western Railway and Midland Railway v Bristol Corporation* [1918] 87 Ch.D 414, the court was concerned with the meaning to be attributed to the word "traffic" in an agreement made between the Bristol Corporation and railway companies wherein rates were payable on excess traffic. The issue was whether extrinsic evidence was admissible to explain what the parties intended by the word "traffic". What Lord Shaw said at page 424 is apposite:

> "The question is: What does the word 'traffic' or what does the expression 'traffic taken by or delivered to the companies respectively' mean?
>
> In the first place, I desire to express my opinion that the word and expression quoted do not appear to me to be ambiguous. *There being no ambiguity I am accordingly further of opinion*, speaking for myself, *that it was not competent to introduce a reference to facts, history, and circumstances for the purpose of specialising, modifying, or restricting the unambiguous terms of the agreement of parties*. I assent to the view that, if from other parts of the contract, it could be shown that a special or restricted meaning was given to the word 'traffic', or if in those other parts the word 'traffic' was so employed as to render it doubtful in what sense the term was used in clause 6, then the contract read as a whole might make evidence *dehors* the contract admissible for light upon interpretation. There is, however – the term being in clause 6

unambiguous – no obscurity cast upon it by other parts of the agreement, and, in my view, nothing accordingly for outside history or facts to clear up."

(Emphasis added.)

and at the same page, in a later paragraph, Lord Shaw said:

"*The simple and familiar rule*, as Lord Campbell pointed out in *MacDonald v Longbottom … is that evidence is not admissible to contradict a document but solely to interpret it*. It may have a special, commercial or mercantile or technical meaning, and to deny such a meaning to it in the circumstances in which – or with reference to which – it was used, would be to make it express something else than the words were set down for. But the rule is used with a dangerous elasticity in practice whenever by outside evidence it is sought to introduce some intention of the writer which has been disclosed by any other than the authorised channel – namely, the words which he himself selected."

(Emphasis added.)

In that same page, Lord Shaw very lucidly states the function of a court in interpreting a contractual provision. In his words:

"… Courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employ shows that they did: in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean? That when ascertained is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion."

10. In *Prenn v Simmonds* [1971] 1 WLR 1381, Lord Wilberforce who dealt with an attempt to introduce into evidence for the purpose of construing a contract the previous drafts of that contract, had this to say at page 1384:

> "… the present case illustrates very well the disadvantages and danger of departing from established doctrine and the virtue of the latter. There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in clause 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents used different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to."

11. The Evidence Act is an enactment that codifies the Law of Evidence as it applies to Singapore. The position under the English common law may not therefore reflect the law of evidence as it applies to Singapore. The provisions of the Indian Evidence Act, on which Act our Evidence Act is based, are – in relation to the exclusion of oral evidence by documentary evidence - in pari materia with the relevant provisions in our Act. It will therefore be useful to look at how the equivalent provision in the Indian Act has been dealt with.

12. The commentary in Sarkar on *Evidence* (14th Ed) in relation to proviso (6) of s 92 of the Indian Evidence Act (the equivalent of our s 94(f) reads (at page 1282) as follows:

> "This is the last of the proviso to this section and is expressed in very general terms. This is really a rule regarding the interpretation or construction of documents, and it embodies one of its principal canons. Wherever a court has to deal with a document which has been proved, its object is to endeavour to ascertain its real meaning, and for this purpose extrinsic evidence is sometimes necessary. So the proviso says that 'any fact may be proved which shows in what manner the language of a document is related to existing facts'. *The object of the admissibility of the evidence of surrounding circumstances is to ascertain the real intentions of the parties, but those intentions must be gathered from the language of the document as explained by the extrinsic evidence. No evidence of any intention inconsistent with the plain meaning of the words used will be admitted, for the object is not to vary the language used, but merely to explain the sense in which the words are used by the parties*. This rule of interpretation is not so easy as it may appear, and it is not possible to define its precise limits in view of the ever changing facts involved in every case. Generally speaking, in case of ambiguity or doubt as to its meaning extrinsic evidence of intimately connected existing facts or surrounding circumstances may be given in order to find out the real nature of the transaction in the document."
>
> (Emphasis added.)

And at page 1283, Sarkar summarises the position as follows:

> "Prov (6) comes into play when there is latent ambiguity in a document, ie when its language is not *prima facie* consistent with the existing facts, or in other words, when there is a conflict between the plain meaning of the language used and the facts existing or when put together they lead to an ambiguity … *If the language employed is ambiguous and admits of a variety of meaning, the 6th proviso can be invoked. The object of admissibility of such evidence is to assist the Court to get the real intention of the parties and thereby overcome the difficulty caused by the ambiguity*."
>
> (Emphasis added.)

Sarkar at page 1283 adverts to the link between proviso 7 to s 92 (of the Indian Act) and the subsequent sections of the Act. He states:

> "Its application (ie the application of proviso 6 to s 92) will appear from the provisions of ss 93-98. When the language is on the face ambiguous or defective, extrinsic evidence is not admissible (s 93), for admission of such

> evidence would not be interpreting a contract, but making a new one. Such a course would be upholding a document which is void for uncertainty. *When the language is plain in itself or unambiguous and when it applies accurately to existing facts, extrinsic evidence is also inadmissible (s 94). To do so would be to allow the parties to show that they meant something different from what they have plainly expressed, and to alter the document*. Parol evidence is in no case admissible to alter or vary the terms of a written instrument.
>
> (Emphasis added.)

13. The s 94 referred to in Sarkar is identical to s 96 of our Act. Section 96 of our Act reads:

> "When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."

Clause 16.1 is very clear in its terms. It does not, on the face of it, purport to be merely a "reference clause". Section 96 would therefore preclude the admission of any evidence designed to show that cl 16.1 was meant to have effect only as a reference clause.

14. On the strength of the above authorities, I was satisfied that the extrinsic evidence (including the previous drafts of the contract) that Mr BT Tan was seeking to rely on to establish the underlying intention of cl 16.1 of the contract was inadmissible in evidence and I so ruled.

15. The next question that had to be resolved was whether there was any substance in Mr BT Tan's submission that cl 16.1 had no application to cl 14 because cl 14 did not, in terms, invoke cl 16. In support of that submission, Mr BT Tan pointed out other clauses in the contract, such as cll 6, 7 and 10, which specifically make themselves subject to cl 16. He submitted that it was because the parties had intended that cl 14 should not be subject to cl 15 that those words were not incorporated into cl 14.

16. I saw no merit in that submission. Clause 16 clearly and unambiguously states that the total liability of the vendor (ie L&M) arising out of the performance or breach of any term of contract shall not exceed the Consideration Sum. That restriction is worded in such wide language that it clearly will restrict any liability attaching to L&M under cl 14. The fact that other clauses may have specifically invoked cl 16 does not detract from this fact and cannot form a basis for me to conclude that cl 16.1 was to be only a "reference clause".

17. Mr BT Tan further submitted that cl 14 was repugnant to cl 16 and the parties could not have intended cl 16.1 to override cl 14. It would be relevant, in considering that submission, to refer to what Lord Bingham stated in *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 All ER 565 at 574b:

> "It is commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. That does not make the later provisions inconsistent or repugnant."

I saw no repugnancy between cll 14 and 16.1. I therefore ruled that the limitation of liability provided under cl 16.1 would apply to any liability that L&M may have under cl 14.

18. In the light of the above ruling and in the light of the fact that L&M had agreed to accept

liability under cl 14 up to the Consideration Sum (ie S$285,900), there was no need to hear further evidence relating to such liability.

19. L&M had counterclaimed against Tan for the sum of $751,504.13. Included within this sum was the sum of $440,000 being two instalments of $220,000 each that were due from the Company to L&M in payment of the outstanding intercompany loan of some S$5 million.

20. As noted in paragraph 2 above, Tan had, in cl 15.1 of the contract, undertaken that he would procure the repayment of that loan. In effect, Tan had, by cl 15.1, agreed to do the following:

> (a) Procure that the Company repay the intercompany loan in 12 instalments commencing 15 April 1999 of $220,000 per annum.
>
> (b) On the last instalment date, procure that the Company repay the entire balance of the intercompany loans.
>
> (c) Procure that THK Realty Pte Ltd (which was the family holding company of Tan) shall deliver to L&M a guarantee that the intercompany loans will be repaid.

Mr BT Tan conceded that, except in respect of the two instalments of the intercompany loans claimed (totalling $440,000), his client accepted liability on the balance of the $751,504.13 sought in the counterclaim. Mr BT Tan disputed liability for the instalments on the grounds that his client's obligation under cl 15.1 was only to procure that the Company pay the instalments: his client had not, by the terms of cl 15.1, undertaken personal liability to pay the instalments should the Company fail to pay.

21. The key words in cl 15 were as follows:

> "The Purchaser shall procure that the Company repays the Intercompany Loans … "

Both Mr Chia and Mr BT Tan referred to *Black's Law Dictionary* for the meaning of the word "procure". The definition in *Black's* was adopted in a case referred to me by Mr Chia (*The People of the State of New York v Davan Executive Services Inc*, 411 NYS 2d 532 at 534 where the judge held:

> " The term 'procure', interpreted according to its clear and logical tenor, means 'to cause a thing to do done; to instigate; to contrive, bring about, effect or cause'. "

In *Chambers (21st Century Dictionary)* the meaning is given as:

> "to manage to obtain something or bring it about"

Mr Chia submitted that by agreeing to cl 15, Tan was under an obligation to ensure that the Company paid the instalments to L&M. The fact that the Company did not repay the two instalments meant that Tan had breached his obligations to L&M to procure these payments and was liable to damages for that breach. The quantum of damages, Mr Chia submitted, would be the same as the instalments not paid.

22. Mr BT Tan submitted that the word "procure" does not connote an undertaking to pay the money himself. All that Tan had agreed to do in cl 15, he submitted, was to cause the Company to

pay. He submitted that if it was intended by the parties that there should be a personal liability on Tan to pay, clearer words would be called for. In support of this submission, Mr BT Tan relied on the following passage from Phillips and O'Donovan *"The Modern Contract of Guarantee*", 2nd Ed, at page 18:

> "To support a guarantee they (ie the words used) must amount to a firm undertaking to pay if the principal debtor defaults."

Mr BT Tan did not dispute that Tan was in breach of cl 15 in failing to procure that the Company paid the instalments but submitted that as Tan had not undertaken a personal liability to pay if the Company failed to pay, Tan would be liable to L&M only in damages for such losses arising from that breach that L&M could prove. In assessing such damages, he submitted, the court would have to take into account such amounts as may have been retrieved by L&M had L&M taken steps to mitigate its loss.

23. Mr Chia, relying on the House of Lords decision in the case of *Moschi v Lep Air Services Ltd & Ors* [1973] AC 331, submitted that a personal undertaking to pay was but one of two possible ways in which the payment of a debt can be guaranteed. In that case, Lep Air were forwarding agents for goods imported by a company known as Rolloswin Investments Ltd which was controlled by one Gabriel Moschi. In a tripartite agreement entered into between Lep Air, Rolloswin and Mr Moschi for payments by Rolloswin of sums due to Lep Air, Mr Moschi had (to quote the words used in cl XIII of the agreement):

> "… personally guaranteed the performance by Rolloswin Investments Limited of its obligation to make the payments at the rate of 6,000 per week together with the final payment of 4,000 as hereinbefore set out so however that Mr Moschi's total obligation under this guarantee shall not exceed the total sum of 40,000 …".

Rolloswin failed to pay the instalments agreed upon and on 22 December 1967 Lep Air brought the agreement to pay by instalments to an end on the grounds of fundamental breach. Rolloswin subsequently went into liquidation and Lep Air sued Mr Moschi under the guarantee contained in the tripartite agreement.

24. One of the arguments raised by Mr Moschi was that in cl XIII he merely guaranteed that each instalment of 6,000 shall be paid. It was Mr Moschi's case that, since by reason of Lep Air accepting the repudiation of the contract by Rolloswin, the contract had been brought to an end, the later instalments were no longer payable and the only claim that Lep Air had against Rolloswin was for damages. It was argued for Mr Moschi that he was not liable for the claim against Rolloswin for damages as that was not a claim guaranteed by Mr Moschi. It was argued for Mr Moschi that if the creditor chooses or acts in such a way that future instalments were not payable by the debtor, the creditor cannot recover these instalments from Mr Moschi.

25. To meet this argument, it was first necessary for the House of Lords to determine what exactly Mr Moschi had undertaken to do. It is interesting to note that Lord Reid prefaced that task by saying:

> "I would not proceed by saying this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means."

Lord Reid then went on to say that in making good to the creditor payments of instalments by the

principal debtor there were at least two possible forms of agreement. He summarised these two forms (at pages 344 and 345) as follows:

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

Lord Reid considered the *Moschi* contract to be one that fell within (b) above.

26. Having set out the above classification, Lord Reid went on to say:

> "In my view, the appellant's contract is of the latter type. He 'personally guaranteed the performance' by the company 'of its obligation to make the payments at the rate of 6,000 per week.' The rest of the clause does not alter that obligation. So he was in breach of his contract as soon as the company fell into arrears with its payment of the instalments. The guarantor, the appellant, then became liable to the creditor, the respondents, in damages. Those damages were the loss suffered by the creditor by reason of the company's breach. It is not and could not be suggested that by accepting the company's repudiation the creditor in any way increased his loss. The creditor lost more than the maximum which the appellant guaranteed and it appears to me that the whole loss was caused by the debtor having failed to carry out his contract. That being so, the appellant became liable to pay as damages for his breach of contract of guarantee the whole loss up to the maximum of 40,000."

Having made the above analysis, Lord Reid went on to say that he would not refer in detail to the authorities on the matter as it never seemed to have been necessary to make a full analysis of the position of a contract of this kind – but noted that the cases show that there was no magic in the word "guarantee" and that most contracts of guarantee fall within (b). He concluded his judgment by stating:

> "The appellant as guarantor had undertaken that the company would carry out its contract so the damages which the company have not paid were part of the loss flowing from the appellant's breach of contract for which the appellant is liable."

27. Lord Diplock, in his speech, took a similar view. He stated at page 348A:

> "By the beginning of the 19th century it appears to have been taken for granted, without need for any citation of authority, that the contractual promise of a guarantor to guarantee the performance by a debtor of his obligations to a creditor arising out of contract gave rise to an obligation on the part of the guarantor to *see to it* that the debtor performed his own obligations to the creditor.
>
> …
>
> It is because the obligation of the guarantor is to *see to it* that the debtor performed his own obligations to the creditor that the guarantor is not entitled to notice from the creditor of the debtor's failure to perform an obligation which is the subject of the guarantee, and that the creditor's cause of action against the guarantor arises at the moment of the debtor's default and the limitation period then starts to run."
>
> …
>
> It follows from the legal nature of the obligation of the guarantor to which a contract of guarantee gives rise that it is not an obligation himself to pay a sum of money to the creditor, but an obligation *to see to* it that another person, the debtor, does something; and that the creditor's remedy for the guarantor's failure to perform it lies in damages for breach of contract only."
>
> (Emphasis added.)

And at page 349A he goes on to say:

> "The legal consequence of this is that whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as damages for breach of his contract whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure. The debtor's liability to the creditor is also the measure of the guarantor's."

28. When Tan agreed to "procure" that the Company repays the intercompany loans, he was in effect saying, that he – to use the language used by Lord Reid – "undertook" that the Company would carry out its contract or – to use the words of Lord Diplock – Tan had by cl 15 agreed to "see to it" that the Company would carry out its contract. Mr BT Tan submitted that *Moschi's* case can be distinguished. He submitted that in that case it was not in dispute that Mr Moschi had, in the tripatrite agreement, in so many words guaranteed that Rolloswin would perform its obligation. In the present case, however, there was no reference to any guarantee in cl 15. Mr BT Tan submitted that in *Moschi's* case the fact that the document was in terms a guarantee was accepted and what the court was concerned with was how to interpret that guarantee in the light of the facts of that case.

29. The lack of the word "guarantee" in cl 15 does not, in my view, detract from the obligation imposed by that clause on Tan. It is relevant, in this context, to note the statement by Lord Reid (referred to in paragraph 26 above) that there was no magic in the word "guarantee" and that parties are free to make any agreements that they like and it is for the court to determine just what the

agreement means. The undertaking of Tan that he would "procure" that the Company paid its intercompany loans imposed an obligation on Tan to ensure or see to it that the Company paid off the loans. Tan did not deliver on this obligation. He was therefore in breach of cl 15. The question therefore arises as to what the measure of damages for that breach of obligation should be.

30. Mr Chia, relying on the passages in the *Moschi* case quoted above submitted that the damages payable would be the total instalment payments due to L&M from the Company in respect of the intercompany loans the payment of which Tan had failed to procure. Mr BT Tan did not dispute that failure by the Company to pay the instalments agreed to in respect of the intercompany loans constituted a breach by Tan of his obligation in cl 15 to "procure" that the Company repaid its intercompany loans but submitted that the measure of damages would not be the instalments that the Company had defaulted in paying but would be of an amount that the court would have to assess bearing in mind the duty of the party claiming compensation to mitigate its loss. Mr BT Tan pointed out that there was no evidence of L&M having taken any proceedings against the Company to recover the outstandings.

31. If that submission by Mr BT Tan is upheld, the effect would be that the obligation that Tan had taken upon himself in cl 15 to procure that the intercompany loans are paid to L&M would be shifted from Tan to L&M. Such a result would be a negation of cl 15 and for that reason I reject it. It is also established law that a plaintiff need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him (see *McGregor on Damages*, 16th Ed, paragraph 329). Following the reasoning of Lord Reid in the *Moschi* case set out in paragraph 26 above and the approach taken by Lord Diplock at page 349A of the report (quoted in paragraph 27 above), I am of the view that the proper basis for the assessment of damages payable by Tan for the breach of his obligation under cl 15 would be the amount that was due from the Company to L&M. In this case, at the time of the writ, two instalments were outstanding and the amount was $440,000.

32. L&M have, in this case, admitted liability to the plaintiff's claims under cl 14 to the sum of $285,900. Tan's only dispute on L&M's counterclaim of $751.504.13 was as to his liability in respect of the instalments (totalling $440,000) payable by the Company. On this I have ruled that Tan is liable for the said sum under cl 15 of the Agreement. L&M therefore succeed in their counterclaim. Giving credit for the $285,900 admitted by L&M the net result is that there is a sum of $465,604.13 due from Tan to L&M and I grant judgment in favour of L&M for the said amount with costs (of both claim and counterclaim).

Sgd:

S. RAJENDRAN
Judge