

Wee Yong Chin & Others

AND

Baiduri Bank Berhad

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 11 of 2005)**

Cons, P.; Power and Mortimer, JJ.A;

Date of Handing Down Judgment: 6th December, 2006.

Joint and several bank guarantee by 5 persons to obtain a company overdraft. Subsequent guarantee entered into by 3 of the 5 to guarantee the same account in an increased sum.

Prior to the subsequent guarantee the 2, who do not enter into it, have a conversation with a bank officer informing him that they would like to be released from the first guarantee. He tells them that he will deal with the matter. No written notice of determination is given as required by the terms of the guarantee and there is no further communication as to release between the Bank and the 2 guarantors. Held that the evidence of the conversation fell far short of the clarity, precision and weight required to determine the guarantee.

Mr Rudi Lee (M/S Fathan Rudi Lee & Associates) for the Appellants.

Mr Navasiwayam K.Palaniandy (M/S Ahmad Isa & Partners) for the Respondent.

Cases cited in the Judgment:

Mahoney v McManus [1981] ALRJ 673

Overseas Chinese Banking Corporation Ltd v The Timekeeper Singapore

Pt Ltd and as (1997) SLR 526

Power, J.A.:

At the commencement of the hearing before this court Mr. Rudi Lee for the Appellants announced that the 1st Appellant Mr. Wee Yong Chin died about one year ago. After a short adjournment Mr. Lee said that he was now instructed by the executors of the estate of Mr. Wee and that they wished to become an Appellant in this appeal. He undertook to file the necessary papers. This has now been done.

The agreed facts as recited by Madam Justice Hayati in her judgment were as follows:

The 1st Defendant in the original action, BINA RIA SDN BHD, was a company (“the Company”) which applied to the Respondent, the Baiduri Bank (“the Bank) which was the Plaintiff in the original action, for overdraft facilities. The 2nd, 3rd, 4th, 5th and 6th Defendants in the original action were all directors of the Company. On 24 April 1995, they executed a joint and several guarantee (“the first JSG”) of the overdraft of the Company with the Bank with a principal sum liability limit of \$4,099,000.00. A second joint and several guarantee was entered into by the 4th, 5th and 6th Defendants on 9 June 1998, some three years later, again guaranteeing the Company’s account which, it is of significance to note, was for an increased principal sum liability of \$6,400,000.00 (“the second JSG”). The Company was wound up on 4 April 2001.

In March and April of 2000 Letters of Demand requiring payment under the first JSG were sent to the Company. On 20 April, a letter of demand was sent to the 4th, 5th and 6th Defendants and on 1 September 2000 a similar letter was sent to the Appellants who were the 2nd and 3rd Defendants in the action. On 4 September 2000 the present writ was issued seeking payment of \$2,411,272.90 and interest at rate of 6% from the Appellants and 4th, 5th and 6th Defendants under the first JSG and from the 4th, 5th and 6th Defendants under the second JSG.

We are here concerned with the first JSG. It was addressed to the Manager of the Bank and provided in clause 1

“that joint and several liability enforceable against us shall not exceed the principal sum of BND4,099,000.-.....[Brunei Dollars FOUR MILLION AND NINETY-NINE THOUSAND ONLY] (hereinafter referred to as “the Principal Sum”) (or its equivalent at the date of payment) together with a further sum for all interest at the aforesaid rate or such higher rate of interest as you in your absolute discretion may determine such interest shall be compounded in the event of if not being punctually paid and commission thereon and all costs, charges and expenses as stated above as shall have accrued or shall accrue or due to you at anytime before or at any time after the date of such demand as stated hereinbefore”

and in clause 3 that:

“This guarantee shall not be affected either by the death, bankruptcy liquidation or insolvency of the Principal and shall be binding as continuing security on us, our executors, administrators and legal representatives and shall secure the ultimate balance from time to time owing to you by the Principal in any manner whatsoever and shall be valid until the expiration of 3 (three) calendar months after we or in case of our death or becoming under any disability our executors, administrators or legal representatives shall have given to you notice in writing to discontinue or determine this guarantee (the cessation date) whereupon this guarantee shall cease with respect to transactions after the cessation date PROVIDED that we shall remain liable to you under this guarantee.

- (i) In respect of all obligations of the Principal to you outstanding at the cessation date, with interest on such obligations until actual payment at the rate charged by you against the Principal;
- (ii) In respect of all moneys, interests, costs, commissions and other banking charges and expenses which will or may become due to you from the Principal under or in respect of any dealing, transaction or engagement affected or entered into either prior to the cessation date or on or after the cessation date pursuant to any commitment, express or implied, assumed or undertaken by you to the Principal prior to the cessation date; and
- (iii) For all legal and other costs, charges and expenses which you may incur as hereinbefore stated.”

and in clause 7 that:

“This guarantee shall be in addition to and shall not merge with or otherwise prejudice or affect any other right remedy guarantee indemnity or security and may be enforced notwithstanding the same or any other bill note mortgage charge pledge or lien now or hereafter held by or available to you.”

Plainly the JSG was binding as a continuing security until the expiration of 3 months after notice in writing to discontinue or determine it whereupon the guarantee ceased but the guarantors remained liable for obligations outstanding at the cessation date with interest.

In the event of a determination it must have been quite clear to the parties that written notice was of considerable importance as it fixed the cessation date which would be used to determine the liability of the guarantors.

The Appellants contend that they have been discharged from their liability under the first JSG by virtue of an oral release confirmed by surrounding circumstances. The Bank contends to the contrary that there was no such release and that they remain liable under that JSG.

The Judge set out the evidence of the Appellants as follows:

“The second and third defendant’s defence is pretty straight forward. Whilst conceding that they had signed the first JSG and acknowledging fairly their liabilities under it as joint and several guarantors, their defence is that they had been discharged from that JSG. No written notice from them to the plaintiff was produced nor any written correspondence from the bank to confirm that they were discharged from the first guarantee but they rely on a meeting which took place sometime before the 1st Oct 1997, supposedly held between the 2nd, 3rd defendants with the plaintiff’s senior officer where they informed the plaintiff’s senior manager corporate, one Paul Thien, who had since left the bank, that owing to a

misunderstanding between the 3rd and 6th defendant, they have decided to leave the company (first defendant). According to the 2nd defendant, the officer advised him to submit the papers about the proposed changes and that he would deal with it. Both the defendants gave evidence that they had informed the officer that in view of the changes, they would like to be discharged as guarantors.

It is not in issue that the documents showing the changes were filed with the bank on the 1-10-1997 and soon after, the second JSG was signed by the other defendants except the 2nd and 3rd defendant, which, to them, was further proof of the bank's intention to discharge them from the first JSG. It was the common understanding of all the defendants, it seems, that the 2nd and 3rd defendant were discharged from the first JSG and the second JSG was a 'fresh guarantee' binding only those defendants who had signed them. It is pertinent to note at this stage that at the time the 2nd and 3rd defendants purported to leave the company, the first defendant's account with the Bank had already shown a balance of more than 7 million dollars in debit." (Emphasis supplied).

The passage emphasized appears to come from the cross examination of Miss Catherine Chin, who gave evidence for the Bank, to whom the case for the Appellants was put. The Judge did not, however, at any time in her judgment detail the affidavit evidence of the Appellants themselves. The 2nd Appellant in his affidavit of evidence-in-chief had said:

- “(8) We are both concern about our personal guarantee to the Plaintiff for the amount of B\$4,099,000.00 dated 24/4/95 the 3rd Defendant and I discussed this with the 5th Defendant, Tan Chai Wah.
- (9) The 5th Defendant then brought us to the Plaintiff to see Mr. Paul Thien the Plaintiff's general manager corporate sometime around the 1st October 1997 but before this date.
- (10) I told him my concern and that because of my circumstances with the 6th Defendant, the 3rd Defendant and I wanted to leave the company and transfer my shares to the 5th Defendant.
- (11) I also informed Paul Thien that in that circumstance the 3rd Defendant and I do not wish to be liable as guarantors for the company the 1st Defendant.
- (12) Mr. Paul Thien asked us to follow up with the submission of the company documents showing the change and verbally assured us not to worry and it is not a big issue, he will deal with it.
- (13) Both the 3rd Defendant and I felt relief and we told the 5th Defendant to follow up with the company documents.
- (14) On the 1st of October 1997 both the 3rd Defendant and I transferred our shares to the 5th Defendant.” (Emphasis supplied).

This evidence was not subjected to any challenge in cross-examination.

The affidavit of evidence-in-chief of the 3rd Appellant was as follows:

- “(11) The 2nd Defendant and I spoke to the 5th Defendant and also discuss the matter of the personal guarantee, both the 2nd Defendant and I do not want to be involved with the company anymore.
- (12) The 5th Defendant brought the 2nd Defendant and myself to see Mr. Paul Thien, the general manager of the Plaintiff and the 2nd Defendant explained to him that both the 2nd Defendant and I wanted to leave the company and did not want to be guarantor anymore for the company.
- (13) Mr. Paul Thien asked us to follow up with the company documents of the change of shareholders and verbally assured us not to worry as it is not a big matter and he will deal with it.
- (14) On the 1st of October 1997 both the 2nd Defendant and I cancelled and transferred our shares to the 5th Defendant.” (Emphasis supplied).

This evidence was also not subjected to challenge in cross-examination.

5th Defendant in his affidavit of evidence-in-chief:

- “(11) I decided to take up the shares of the 2nd and 3rd Defendants as it was offered to me.
- (12) I also had a discussion with the 2nd and 3rd Defendants who did not want any part with the company and did not want to be guarantors.
- (13) The 2nd Defendant wanted to approach the Plaintiff to have the Guarantee cancelled, I suggested that they should approach the Plaintiff themselves, I took them to the Plaintiff to meet the General manager, Paul Thien. The 2nd Defendant spoke to Mr. Paul Thien. He did all the talking, he explained to Mr. Paul Thien the circumstances of him (2nd Defendant) and the 3rd Defendant wanting to leave the company.
- (14) I remembered Mr. Paul Thien said the Plaintiff can only release both 2nd and 3rd Defendant upon obtaining the change of shareholders and resignation letters of Directors. I remember delivering these documents to Mr. Paul Thien subsequently.” (Emphasis supplied).

He also was not cross-examined about this evidence.

The Appellants rely upon what their counsel Mr. Rudi Lee submits are three crucial matters to establish that they were no longer liable under the first JSG. They are:

- (i) The conversation with Mr. Paul Thien prior to the 1 October 1997 which is set out above.
- (ii) A letter from Anthony Bong, the Bank's Assistant Manager Corporate Banking, dated 30 April 1999, to "The Manager" of the company stating "we have a revised joint and several guarantee form to be signed by" D3, D4 and D5.
- (iii) The signing of the second JSG by D3, D4 and D5 dated 30 April 1998.

The Appellants suggest that the date "30 April 1999" was mistakenly typed on the letter which, they say, common sense must, on the balance of probabilities, dictate was written on 30 April 1998 and, relying thereon, they contend that the second JSG was, an altered guarantee which was intended to and did, when signed, replace the first JSG.

In short the thrust of the Appellants' argument was that either prior to 1 October 1997 or within a matter of months thereafter Mr. Thien released the Appellants from the first JSG and that that release was confirmed by the Bank in writing some months later when it wrote to company stating that it had a "revised" JSG ready for signature by three of the original five guarantors and that the release was further confirmed by the signing of the second JSG.

The Appellants contend, in the alternative, that the Bank is estopped by reason of the above from pursuing an action against the Appellants to enforce the first JSG. In the further alternative the Appellants submit that the Bank has waived any right they had to make such a claim.

Crucial to a determination of each of these contentions is the conversation with Mr. Thien prior to the 1 October 1997 and, the meaning and effect of the word "revised" in the letter dated 30 April 1999.

The Judge relying upon *Mahoney v McManus* [1981] ALRJ 673 held that she "was not persuaded that the defendants' 'subjective' impression that the events that they had argued, albeit, spiritedly, amounted to the release of the 2nd and 3rd defendants from the first JSG."

It was not clear from this ruling whether the Judge was indicating acceptance of their evidence but was nonetheless refusing to be persuaded that it amounted to a release.

The uncertainty as to whether she is accepting or rejecting their evidence is compounded as the Judge later went on to state:

"Even if I accept that the meeting took place and the officer had said as alleged by the 2nd and 3rd defendant to the effect that there's no problems, just file the papers for the change and I will deal with it, that cannot be regarded as sufficient to import the intention by the bank to release them from the first JSG nor can I

accept the defendants suggestion to consider the exclusion of the 2nd and 3rd defendant, from the second JSG, without more, as to indicate the intention of the bank to release them from their obligation under the first JSG.” (Emphasis supplied).

It is, however, clear that the Judge was satisfied that the conversation “even if” accepted was not “sufficient to import the intention of the Bank to release” the Appellants from the first JSG.

Being satisfied that the conversation was not evidence of discharge the Judge went on to consider whether, as a matter of law, “a subsequent guarantee would have substituted an earlier JSG.....”

She referred to *Overseas Chinese Banking Corporation Ltd v The Timekeeper Singapore Pt Ltd* and as (1997) SLR526 which in turn had relied upon the Australian High Court case of *Mahoney v Mc Manus* (1981) ALRS 673 and in particular upon the passage from Gibbs C.J. in the latter case where he said: “It’s not inconsistent with the continued operation of a joint and several guarantee by A, B and C that a joint and several guarantee should be taken from A, B and D in respect of the same indebtedness. There is no reason why the two guarantees should not both be effective, so that the creditor can avail himself of either or both, and so that any surety can obtain contribution against all the others.” (Emphasis supplied). Relying upon the above authorities she rejected the Appellants’ argument that the second JSG had discharged the first JSG.

Mr. Rudy Lee first attacks the reliance by the Judge on Mahoney’s case contending that Gibbs C.J. did no more than state that when two JSGs existed there were no reasons why, in a given situation, both should not be effective leaving open the possibility that in some situations a later guarantee may be taken to have discharged a former one. Reference was made to a *Commercial Law Note* in 56 AJJ 143 where referring to the judgment in *Mahoney’s* case the author states:

“It would appear from the judgments of the members of the Court that the solution of each of these questions is not governed by any generally accepted technical rules of law, but that in each instance the Court is required to make the closest possible examination of all the relevant circumstances, particularly any relevant documentation, the facts surrounding the supply of funds by the guarantor and the intentions of the parties.” (Emphasis supplied).

The author goes on at 144 to refer to the need to obtain “a written assurance” of discharge as follows:

“In regard to question (2), Gibbs C.J. seems to be on firmer ground. As he pointed out (*ibid.*, at 677), it is not inconsistent with the continued operation of a joint and several guarantee by A, B and C that a joint and several guarantee should be taken from A, B and D in respect of the same indebtedness. The same two guarantees could both be effective in favour of the creditor, and there had

been no expressed or implied intention on the part of the creditor to discharge the guarantor, excluded from the second guarantee. There was also nothing to show that the creditor had decided to rely solely and exclusively on the second guarantee. At the same time, the judgment of Gibbs C.J. provides a valuable pointer – by way of a salutary lesson – for a co-guarantor excluded from a second guarantee; he should obtain a written assurance from the creditor that the initial guarantee has lapsed and/or that he is discharged from further liability thereunder.” (Emphasis supplied).

The Appellants’ counsel referred also to a passage in James O’Donovan’s “Modern Contract of Guarantee” which suggests the need “to be aware of the possibility of an implied release of a guarantor.....” but the passage goes on, perhaps pertinently, to state that “such a release will rarely be inferred. In particular, if a guarantee is given by two or more co-guarantors and a subsequent guarantee is given by only some of those guarantors, the guarantors who do not incur liability under the second security usually will not be impliedly released”.

Mr. Rudy Lee’s principal contention is that the Judge’s ruling is flawed as she failed to make “the closest possible examination of all the relevant circumstances” within “the matrix of facts” constituted by the three “crucial matters” set out above i.e. the conversation, the letter dated 30 April 1999 and the third JSG.

While not accepting that the letter was misdated Mr. Palaniandy, for the Bank, relies upon the evidence of Miss Catherine Chin, the bank officer, who said that the word “revised” in that letter relates to the amount of the guarantee and means “increased” or “decreased” and does not have the meaning “altered” contended for by the Appellants. He submits that, given this evidence from a bank officer, the court should have very considerable doubt as to the meaning urged by the Appellants.

As to the second JSG Mr. Palaniandy submits further that it does nothing to support the suggested release of Appellants from the first JSG. He points out that the indebtedness of the Company was steadily increasing and that the second JSG would, as a matter of course, have been required by the Bank to protect it against that increased liability.

We are satisfied that neither the letter nor the second JSG give support of any real substance to the suggested release by virtue of the conversation.

It now falls for us to determine whether the Judge was right in holding that even if the evidence of the Appellants as to the conversation was accepted it was insufficient to establish a release.

Suggestions were made by both the Appellants and by the Bank that the other party should have called Mr. Paul Thien. The absence of Mr. Thien is, however, not of any real moment as we are acting upon the basis that the Appellants’ evidence is true.

Their evidence must, as Mr. Lee submitted, be examined against the matrix of facts which we set out below. The Appellants had entered into a written guarantee from which a release could, in its terms, only be obtained by the giving of three month's notice in writing.

At the time of meeting with Mr. Thien the Company being guaranteed was overdrawn well in excess of the amount of the first JSG. Common sense would dictate to any business man that release from the guarantee's obligations, however given, would inevitably be subject to the financial terms set out in clause 3 (i), (ii) and (iii) of the JSG.

The evidence of the Appellants and their witness is that they told Mr. Thien that they would like to be released from the guarantee. Mr. Thien, according to the evidence, did no more than to say he would "deal" with the matter and to tell the Appellants to send in documents relating to their leaving the Company. There was no request for a written notice as required by the JSG, there was no mention of continuing liability and there was, thereafter, no correspondence from the Bank confirming the conversation and setting out any details of release, and, significantly no enquiry from the Appellants as to how they then stood.

This evidence falls far short of the clarity, precision and weight that would be required to prove on the balance of probabilities that the guarantee established by the manifestly clear words of the JSG had been brought to an end. The Judge was, we are satisfied, right to hold as she did.

As to estoppel and waiver we say no more than that in the light of our ruling above the conversation was not sufficient to have created either.

The appeal must be dismissed. Order nisi that the Respondent Bank is to have its costs. Order to become absolute at 10.30 a.m. today unless application is made.

Appeal dismissed