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IN THE PRIVY COUNCIL No. 38 of 1981

ON APPEAL

FROM THE COURT OF APPEAL IN SINGAPORE

BETWEEN:

TAN LAI WAH (Fourth Defendant)
Appellant

- and -

THE FIRST NATIONAL BANK OF CHICAGO (Plaintiff)
Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from a Judgment dated the 13th day of June 1981 of the Court of Appeal in Singapore (Wee Chong Jin CJ, Kulasekaram and Rajah JJ).

2. The issues in this Appeal arise out of a plea of non est factum in respect of guarantee signed by the Appellant and an alternative defence of lack of consideration for the said guarantee.

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Record

3. The Respondent is a bank which in April 1973 granted credit facilities to How Lee Realty Pte. Limited, the First Defendant in the suit, for the purchase of the property known as number 10 Tomlinson Road, Singapore, by way of overdraft facility on the account of the First Defendant with the Respondent. The loan was secured by a mortgage of the property to the Respondent.

P.140-P.152.

4. The First Defendant was unable to meet the monthly payment of interest regularly and Mr. Edward Kong, the Managing Director of the First Defendant and himself Second Defendant in the suit, sought the assistance of the Appellant. The Appellant sent to the First Defendant money to enable it to pay the interest and in return was promised a 50% holding in the said property by the Second Defendant. The promise was oral.

P.34 11.43-46
P.37 11 18-19
P.37 11 20-22
P.38 11.8-9
P.53 1 56
P.38 11 12-13

5. The Appellant can neither read nor write in English and understands only simple spoken English — P.36 11.33-38; P.52 11.30-34

6. In early April 1974 the Second Defendant approached the Appellant to obtain her signature to an unlimited guarantee in favour of the Respondent to secure the overdraft facilities being provided by the Respondent to the First Defendant. — P.34 11.39-46; P.34 11.51-52; P.40 11.22-24; P.34 11.34-36

The Respondent required the Appellant's signature to be attested by one of the partners of the firm of solicitors who were at the material time the Respondent's solicitors. The Second Defendant presented a guarantee to the Appellant and told her in Hokkien that it was the guarantee for the Tomlinson Road property. The Appellant signed the guarantee and returned it to the Second Defendant, who thereupon presented it to a partner in the firm of the Respondent's solicitors, Mr. Lim Sin, for him to attest the signature of the Appellant. — P.22 11.1-5; P.54 11.30-40; P.34 11.53-54; P.42 11.12-19; P.17 11.8-13; P.131; P.41 11.13-17; P.41 11.5-7; P.34 1.52; P.41 1.35; P.42 11.12-13; P.42 1.22; P.16 11.33-35; P.41 11 28-29; P.42 11.16-19; P.16 1.29

The Appellant is the mother-in-law of Mr. Lim Sin and Mr. Lim Sin's firm acted at all material times also as legal advisers to the Appellant.

P.17 11.14-15
P.29 11.9-11
P.16 11.33-5

7. From about the end of 1974 the Respondent became anxious regarding the repayment of the loan by the First Defendant and attempts were made by the First Defendant in conjunction with the Respondent to sell the property and discharge the sums due to the Respondent by the First Defendant. Following the failure of these attempts in December 1976 the Respondent sought unsuccessfully to auction the said property. In July 1977 the Respondent sold the property to the Urban Redevelopment Authority without informing the Appellant

P.22 11.13-15
P.176 11.40-43
P.179 11.13-14
P.180 11.29-31
P.177 11.14-21
P.179 11.30-40
P.31 11.4-5
P.31 11.19-20
P.180 11.29-32
P.182 11.130-35
P.169 1.32
P.185 11.23-30
P.57 11.21-25
P.168 11.43-47

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8. Subsequently the Respondent started the present action claiming, (inter alia) against the Appellant, pursuant to the signed guarantee the balance due on the account of the First Defendant after crediting the account with the proceeds of sale. The Appellant denied the Respondent's claim on the grounds (so far as is material to this Appeal) that the guarantee dated 18th April 1974 and signed by her was represented to her and, honestly believed by her to be, a guarantee or confirmation of her interest in the property pursuant to the promise mentioned in paragraph 4 above, or alternatively that the said guarantee was not enforceable because it was not supported by consideration in law. The amended Statement of Claim and the Amended Defence dated respectively 23rd January 1978 and 1st November 1979 set out the material facts as stated in paragraphs 3 to 8 of this Case.

PP.4-7

P.7 11.25-35

P.11 11.6-11

P.11 11.12-14

P.11 11.16-19

9. This action came on for trial before D'COTTA J. on 24th October 1979.

10. The Learned Judge gave Judgment on the 1st July 1980. He first described

PP.65-78 the nature of the claim and set out

P.66 11.1-27 certain of the facts. Turning to the

P.72 1.9 allegation of non est factum the Learned Judge considered the decision in Saunders -v- Anglia Building Society [1970] 3 A.E.R. 919 and concluded that the question to be asked and answered was whether in the circumstances the guarantee was fundamentally different

P.73 11.4-9 from what the Appellant believed it to be. He referred in some detail to the

P.73 1.14 evidence before him and said he had no

P.74 1.32 reason to disbelieve the Appellant's

P.74 1.35-P.77 1.42 contention that she understood the

P.74 11.30-32 guarantee to be a confirmation of her

P.74 11.30-35 50% interest in the land

P.77 11.14-17 Accordingly the Learned Judge concluded that there was a radical or fundamental difference between the guarantee signed by the Appellant and the document she believed she was signing.

11. The Learned Judge then turned to the question whether the Appellant acted

reasonably and prudently in signing P.77 ll.17-22
the document and concluded that in P.77 ll.31-34
all the circumstances prevailing when P.77 ll.35-36
she signed the document she had in P.77 ll.39-46
fact acted reasonably and prudently. P.78 ll.14-17
Accordingly the Learned Judge found
that the Appellant had successfully P.77 ll.41-46
established the plea of non est factum P.78 ll.17-19
and dismissed the Respondent's claim
with costs. P.78 ll.22 P.79

12. By a Notice of the Appeal dated P.80
1st August 1980 the Respondent
appealed to the Court of Appeal in
Singapore. The Appeal came on for
hearing before Wee C. J. and
Kulasekaram and Rajah JJ. who gave
judgment on 20th May 1981.

14. The Judgment of the Court of
Appeal was delivered by the Chief
Justice Wee Chong Jin. The Court PP.84-98
rejected the findings of D.'Cotta J.
that the one material fact in dispute
was what was said by Lim Sin to the
Appellant when he telephoned P.92 ll.27-36

P.92 11.28-35 her before attesting her signature. The Court of Appeal considered the issue to be whether the Appellant knew
P.98 11.40-42 the nature and content of the document she was signing and that where oral self-testimony was conflicting on a particular matter and there was contemporaneous or near contemporaneous documentary
P.92 11.50-54 evidence before the Court, such evidence should also be given due
P.93 11.1-6 consideration by the Court. In this context the Court of Appeal referred to the three letters set out at pages 109, 111 and 112 of the Record. They concluded that it was clear from the first such letter that at least by the 22nd April 1974 the Appellant knew she
P.93 11.42-47 had signed an unlimited guarantee. The Court stated that it was satisfied that, if the attention of D'Cotta J. had been specifically directed to these three documents, he would not have held that the Appellant had
P.94 11.25-30 established the plea of non est factum. The Court further decided

that in view of her business experience, her assertions as to her belief regarding the nature of the document were unbelievable. P.94 11.31-34 P.94 11.35-39

14. The Court of Appeal then turned to the present Appellant's argument that in any event the guarantee was unenforceable against her because of lack of consideration. The Court held that the guarantee was supported by consideration in that the Respondent was only willing to renew overdraft facilities granted to the First Defendant for another year if the Appellant gave the guarantee. P.94 11.40 - P.95 11.1-27 P.95 11.22-26 P.94 11.53 - P.95 11.1-5 P.95 11.5-10

15. The Appellant humbly submits that there was no admissible evidence of such consideration. The only basis for the Court of Appeal's conclusion is to be found in evidence given at the trial by Yew-Kwan Mei Sin, an Assistant Manager with the Respondent, who had no personal knowledge of the First Defendant's account with the P.21 11.22 - P.33 11.19 P.24 11.24-40

P.21 11.25-26 Respondent prior to the end of 1977,
P.21 11.27-32 and who admitted under cross-examination that there was no record of what transpired in April 1974 with regard to the terms of renewal of the First Defendant's
P.28 11.14-16 overdraft facilities. However a letter dated tne 8th April 1974 from the Respondent to the Second Defendant
P.204 (Exhibit "D 1") is quite inconsistent with the Court of Appeal's decision on this point, because that letter makes clear that the Respondent had decided as early as the 8th April 1974 to
P.204 11.20-22 renew the overdraft facility. The Court of Appeal ought to have decided that there was no evidence of consideration to support the guarantee. Alternatively the Court of Appeal should have directed a new trial of that issue which was not dealt with by the Learned Judge in his judgment. However, this point arises for decision in this Appeal only if the Appellant fails in her primary submissions hereinafter contained to

the effect that the Court of Appeal was wrong in reversing the Learned Judge's decision on the plea of non est factum. P.94 11.25-38

16. The Court of Appeal then disposed of certain arguments as to other Defences which had not fallen to be determined at first instance and do not fall to be considered on this Appeal, and allowed the Appeal with costs there and below. P.95 11.27 - P.98 11.50 P.98 11.51-52

17. The Appellant respectfully submits that the Court of Appeal erred in rejecting D'Cotta J.'s impression of the witnesses and his acceptance (having had the advantage of seeing the witnesses and hearing their oral evidence) of the Appellant's contention that she did not understand the document. The present case is covered by the principle that an appellate Court should not interfere with a Judge's conclusions of fact if

his estimate of the witnesses forms a substantial part of his reasons. (cf. Akerhielm v. De Mare and others [1959] AC 789 at pp 794-5).

18. In particular the Appellant respectfully submits that the Court of Appeal ought not to have preferred the three letters referred to above as evidence of the Appellant's understanding of the nature of the document. There was no evidence before the Court that any of the said letters actually came to the notice of the Appellant herself. The Court of Appeal accepted the letter of the 22nd April 1974 addressed to the Second Defendant as evidence that by that date the Appellant knew the nature of the document, presumably because the letter indicates that a copy of it was sent to the Appellant c/o Mr. Lim Sin's firm. Having regard to the unsatisfactory conduct of Mr. Lim Sin

P.109 ll. 13-35

P.76 ll.22-26

P.74 ll.4-12

P.74 ll.33-35

in relation to the matter (as found by the Learned Judge) and the fact that his firm acted as solicitors for both the Appellant and the Respondent, the Court of Appeal ought not to have assumed that the letter of the 2nd April 1974 was ever brought by Mr. Lim Sin to the Appellant's notice - particularly as this point was never explored in evidence at the trial. P.72 11.5-6 P.67 11.19-21 P.17 11.8-13 P.68 11.9-14

19. On the 7th July 1981 the Court of Appeal in Singapore made an Order granting the Appellant leave to appeal to Her Majesty in Council. P.101-102

20. The Appellant respectfully submits that the Judgment of the Court of Appeal in Singapore was wrong and ought to be reversed and this Appeal ought to be allowed with costs here and below and the decision of D'Cotta J. restored or alternatively (if this appeal fails in respect of the plea of non est factum) that a new trial should be ordered of the issue of lack of consideration for the following (amongst other)

R E A S O N S

1. Because D'Cotta J.'s estimate of the witnesses formed a substantial part of his reasons for his Judgment and his conclusions of fact (in particular as to the Appellant's understanding of the documents she signed) should not have been disturbed.

2. Because there was no or alternatively no sufficient evidence that the Appellant was ever made aware of the contents of the letters set out at pages 109, 111 and 112 of the Record relied upon by the Court of Appeal.

3. Because the Court of Appeal supported no criticism of D'Cotta J's finding that if the Appellant did sign the document without understanding its nature she acted reasonably and prudently in the matter.

4. Because the decision of D'Cotta J was right and ought to be reinstated.

5. Because there was no or no sufficient evidence before the Court of Appeal to justify a finding that the guarantee given by the Appellant (if contrary to her submission she gave such a guarantee) was supported by consideration.

DONALD RATTEE

L. KAYE

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