

6/84

O N A P P E A L

FROM THE COURT OF APPEAL IN SINGAPORE

B E T W E E N :

TAN LAI WAH

Appellant
(Fourth Defendant)

- and -

THE FIRST NATIONAL BANK
OF CHICAGO

Respondents
(Plaintiffs)

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CASE FOR THE RESPONDENTS

REFERENCE
PAGE IN
RECORD

1. This is an Appeal from the judgment of the Court of Appeal in Singapore (Wee C.J., Kulasekaram and A.P. Rajah, J.J.) dated 20th May 1981 allowing with costs the Respondents' appeal from a judgment of D'Cotta J. in the High Court of the Republic of Singapore dated 3rd July 1980 whereby it was adjudged that the Appellant was not liable upon a guarantee dated 18th April 1974 given in favour of the Respondents in respect of the First Defendant (hereinafter referred to as HLR), the Appellant's defence of non est factum having been established.

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THE ISSUES

2. The issues are as follows :

(i) When on 18th April 1974 the Appellant signed an unlimited guarantee (the guarantee) in favour of the Respondents in respect of the indebtedness to them of HLR was she under such a fundamental misapprehension as to its nature and effect, without carelessness on her part, as to entitle her to rely upon the plea of non est factum?

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- (ii) Was there good consideration for the guarantee?
- (iii) Under the terms of the guarantee did the Appellant become liable to the Respondents for monies lent to or paid for HLR before she signed the guarantee?
- (iv) Did the Respondents dispose of the property at No.10 Tomlinson Road, Singapore (the Property) at an under-value without taking reasonable steps to realise its true worth?

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THE FACTS

- 52 - 35
to
53 - 3
52 - 31
51 - 29/39
3. The Appellant is an experienced Chinese land broker. She does not read English. During the events in question the Appellant employed as her Secretary Esther Leong who read and explained to her all letters that were sent to her office; most of them being in English.
- 10 - 41/46
104 (AB 2)
- 33 - 30/35
53 - 37/39
- 34 - 6/10
- 34 - 20/22
116 (P 1)
140 (P 8)
- 53 - 27/31
- 53 - 43/55
- 34 - 32/48
40 - 9/29
- 41 - 13/17
16 - 11/27
19 - 1 to
20 - 7
35 - 5/17
4. On 18th April 1974 the Appellant signed an unlimited guarantee in favour of the Respondents in respect of the indebtedness to them of HLR which had purchased the Property for Singapore-\$2.7m, under an Agreement made in March 1973. HLR was acquired for this purpose from the Appellant by the Second Defendant (Edward Kong) who arranged a loan from the Respondents of Singapore \$2.5m, in respect of the purchase of the Property and on 24th April 1973 guaranteed the indebtedness of HLR to the Respondents. The Property was mortgaged to the Respondents by an instrument dated 2nd May 1973.
5. The Appellant recommended the purchase of the Property to Edward Kong. She acted as broker in the transaction, taking her commission. Subsequently the Appellant made payments in respect of interest on HLR's borrowings from the Respondents. Edward Kong offered the Appellant a share in the Property.
6. Some days before the loan facility was due for review the Respondents asked for further security by way of guarantee. Edward Kong asked the Appellant to be a guarantor. She agreed. On 18th April 1974 Edward Kong took the guarantee to the Appellant and she signed it. It was not read or explained to her. There was a conflict of evidence as to whether or not shortly afterwards the Appellant told her son-in-law, a solicitor called

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		PAGE REF. IN RECORD
	Lim Sin, that she was totally clear as to the contents of the guarantee and required no further explanation.	42 - 28 to 43 - 6 55 - 9/34 60 - 13/43
10	7. D'Cotta J. held that the Appellant signed the guarantee in the belief that she was signing a guarantee of the payment of interest on the Property. He accepted the Appellant's account of the conversation with Lim Sin. The Court of Appeal found it unnecessary to make a finding as to the conversation with Lim Sin. It held that the Appellant knew the nature and content of the document which she was signing and referred to three letters. The first dated 22nd April 1974 was from the Respondents to Edward Kong with a copy to the Appellant acknowledging receipt of "the unlimited guarantee form signed by Madam Tan Lai Wah". The second dated 8th August 1974 was from the Respondents to the Appellant's Solicitors and enclosed a photo copy of the guarantee. The third dated 10th August 1974 was to the Respondents from Lim Sin of the Appellant's Solicitors. It reads :	76 - 46/51 72 - 1/6 92 - 37/47 94 - 25/38 93 - 10 109 (AB 3) (not AB 4) 93 - 14/15 93 - 22 93 - 29/31 111 (AB 5) 93 - 32/33 112 (AB 6)
20	"We thank you for the Xerox copy of Madam Tan Lai Wah's guarantee which was requested by her and acknowledge receipt thereof".	93 - 39/41
	8. Both Courts were aware that the Appellant had signed several guarantees before that in question.	74 - 15/19 86 - 29/30 32 - 34/36 59 - 18/28
30	9. The loan fell into arrears. Demand was made upon the Appellant as guarantor by letter dated 21st July 1976. There were various fruitless negotiations for the sale of the Property. No sale was made. On 16th December 1976 the Property was offered at public auction. The Appellant's case is that a bid of approximately Singapore \$1.2m, was made. The Respondents contend that no bid was made. On 9th July 1977 the Property was sold to the Urban Renewal Authority for Singapore for \$1,024,954.32. It is alleged by the Appellant that it was resold in or about January 1978 to the Pontiac Land Pte. Limited for Singapore \$4 to 5m.	66 - 18/27 113 (AB 7) 97 - 18/19 47 - 24/35 31 - 18/19 163 (P 12) 87 - 27/29 48 - 30/34
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	<u>THE REASONS FOR THE DECISION OF D'COTTA J.</u>	
	10. D'Cotta J. found for the Appellant on the plea of non est factum. He considered that the	78 - 17/19 72 - 15 to 73 - 14

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77 - 3/12

71 - 1/6
77 - 13/17
76 - 46 to
77 - 2
76 - 3/10
76 - 33/40

78 - 13/17

case fell to be decided under the principles set out in Saunders v. Anglia Building Society (1971) AC 1004. It had to be established that there was a radical and fundamental difference between what the Appellant believed she was signing and the document upon which she was being sued. He held that there was such a difference, that Edward Kong had misrepresented the terms of the guarantee and that the Respondents had failed to explain them to the Appellant or to offer to do so. The Judge further held that it was necessary for the Appellant to show that she had not been careless in signing the documents. He found that she had acted reasonably and prudently in the circumstances. 10

THE REASONS FOR THE DECISION OF THE COURT OF APPEAL

85 - 17 to
87 - 2
90 - 5/24
92 - 37/47

94 - 25/38

92 - 50 to
93 - 8

93 - 42/47

94 - 5/9

94 - 25/30

94 - 40 to
95 - 27

11. The Court of Appeal agreed with D'Cotta J. as to much of the facts and the application of Saunders v. Anglia Building Society. The Court of Appeal found it unnecessary to make a finding as to the conversation with Lim Sin. It held that the real question was whether the Appellant knew that she was signing an unlimited guarantee in favour of the Respondents to secure overdraft facilities being extended by them to HLR for a further year. The Court held that she did. 20 30

12. The Court of Appeal listed the Appellant's undisputed business experience and resources. It was further of the view that the oral testimony should be weighed against the written evidence which, as to the letter of 22nd April 1974 made it "patently clear that on or about the 22nd April 1974, if not before, that (the Appellant) had signed an unlimited guarantee, on the 18th April 1974". The letters of 8th and 10th August 1974 made it clear that by then the Appellant was aware of the contents of the guarantee. The Court referred to the improbability of the Appellant signing and surrendering a document thought by her to give her an interest in the Property and to the delay in the raising of the plea. The Court was satisfied that if D'Cotta J. had had his attention specifically directed to the three letters he would not have held the plea of non est factum to be established. 40 50

13. The Court was further of the view that the Respondents by continuing the overdraft

facility had made or continued advances and afforded banking facilities, thus giving good consideration for the guarantee which had been requested by them before renewal of the facility.

10 14. As to the plea of no liability for past loans, the Court held that on the wording of the guarantee the Appellant was liable for such sums as were outstanding when the debt became due and payable. 95 - 29/48

20 15. In respect of the alleged negligence in the disposal of the Property (styled laches in the judgment), the Court was of the view that there was an implied term in the contract of guarantee whereby the Respondents had a duty to the guarantor whose Property was being sold under their power of sale, to take reasonable care to obtain a proper market price. However, the burden of proof was upon the guarantor to establish a breach of such a duty and, in the present case, the Appellant had failed to discharge that burden. 98 - 41/48
98 - 2/14

16. The Court dealt separately with the four instances of negligence raised in paragraph 12 of the Appellant's Further Amended Defence. The Court held that:

(Prevention in 1975 of a sale at Singapore \$4.5m)

30 (i) There was no satisfactory evidence of a firm offer to buy and that any offer was conditional upon the Competent Authority granting a conversion of use from residential to commercial. 96 - 45 to
97 - 3

(Prevention in 1976 of a sale at Singapore \$3m)

40 (ii) The offer was conditional upon the Property being converted to commercial use and approval of layout plans being obtained by the owners of the Property namely HLR. 97 - 4/9

(Bid at Auction of Singapore \$1.2m)

(iii) There was no evidence of any bid at the Auction. 97 - 10/20

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(Sale in July 1977 for Singapore
\$1,024,955.32)

97 - 21 to
98 - 13

(iv) While there was no evidence that the Respondents had obtained a valuation before the sale of the Property, the evidence produced at the trial was that prior to the sale the existing use value was less than Singapore \$1.5m and that at the date of the sale the market was falling.

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SUBMISSIONS

ISSUE (i) NON EST FACTUM

86 - 13/20
54 - 46/50
60 - 41/43
54 - 5/12
34 - 32/49
40 - 8/28
41 - 13/17
59 - 35/41

17. It is accepted that the situation was governed by the principles set out in Saunders v. Anglia Building Society. The Appellant was an experienced business-woman who gave the guarantee in the course of that business, having given several guarantees in the past. The Appellant's suggestion that she thought the guarantee to be a guarantee that she had a 50% interest in the land is intrinsically improbable, conflicts with her evidence as to the circumstances in which she was requested to give the guarantee and should be rejected for the reasons given by the Court of Appeal. Edward Kong was not the Respondents' agent neither did he misrepresent the nature of the guarantee.

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192 (P 24)
32 - 35/37
48 - 26/27
54 - 5/12

18. The Appellant knew that she was signing a guarantee and had no reason to believe that it was in any way limited. In the circumstances of the case, the Respondents had no duty to explain the legal effect of the guarantee and the sums involved. On 11th June 1973 the Appellant had signed an unlimited standard form of guarantee in favour of the Respondents in the same terms as that signed by her on 18th April 1974. The guarantee was in favour of Eastwood Enterprise Pte. Limited a company owned by Edward Kong who witnessed the document. On 10th October 1978 the Respondents obtained judgment on the guarantee. There was no good reason to draw any distinction between that guarantee and the one now in issue. The Appellant was asked to give her guarantee as surety in respect of the Property and she did so. If the Appellant

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was under any misapprehension as to the nature of the guarantee it resulted from her own carelessness in failing to inquire into the position and to make use of her own advisers. This history and the matters set out below indicate that Lim Sin's account of his conversation with the Appellant was correct.

- 10 19. The Appellant had readily available to her secretarial and legal advice as to the terms and effect of the document which she was signing. Shortly after signing that document she was sent a letter which described the guarantee as unlimited and a few months later, at her request, she received a copy of it. Nevertheless the plea of non est factum was not raised until 1st November 1979 in the Further Amended Defence. Prior to that, the Appellant did not dispute her liability but made proposals for the discharge of her indebtedness and contested an application for summary judgment on other grounds. In the circumstances the Court of Appeal was correct.
- 86 - 20/25
109 (AB 3)
111 (AB 5)
112 (AB 6)
20 - 10/28
11 - 12/15
22 - 31/44
198 (P 25)

ISSUE (ii) NO CONSIDERATION

ISSUE (iii) MONIES ADVANCED PRIOR TO THE SIGNING OF THE GUARANTEE

- 30 20. On the accepted facts of the case and the wording of the guarantee the only possible conclusion is that reached by the Court of Appeal.
- 34 - 32/43
104 (AB 2)

ISSUE (iv) NEGLIGENT DISPOSAL OF THE PROPERTY

- 40 21. It is accepted that there was an implied term in the guarantee under which the Respondents owed a duty to the Appellant to take reasonable care to obtain a proper market price, the burden being on the Appellant to establish breach of that duty. (Standard Chartered Bank Ltd. v. Walker (1982) 1 WLR 1410)
- 98 - 41/48

22. The submissions set out below deal separately with each allegation of lack of care pleaded in paragraph 12 of the Further Amended Defence of the Appellant.

(i) (Prevention in 1975 of a sale at Singapore \$4.5m)

- Contemporary documentary evidence
- 45 - 33 to
46 - 11

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176 (P 12)
179 (P 17)

180 (P 18)

shows the Premises to have been difficult to dispose of because co-operation from adjoining site owners was necessary to their development and there was a threat of compulsory government acquisition. Negotiations for the purchase of the Property never progressed far, there being no support for Edward Kong's subsequent evidence to the contrary. It is unlikely that a potential purchaser would have been put off because of knowledge of the original price, especially where the Respondents had expressed willingness to accept a sale at Singapore \$3m, rather than Singapore \$4.5m for which Edward Kong contended.

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(ii) (Prevention in 1976 of a sale at Singapore \$3m)

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184 (P 21)

It is clear that the Respondents wished to dispose of the Property. At the end of March 1976 HLR owed the Respondents Singapore \$3,028,653.35. The suggested price of Singapore \$3m for the Property set out in the letter of 16th March 1976 would have effectively covered the overdraft. The letter was addressed to HLR but no reply was produced from HLR. The absence of a sale must have been attributable either to HLR's wish to obtain Singapore \$4m or the condition of conversion to commercial use with approval of layout plans or the failure of Messrs. Surya and Tay to proceed. None of these reasons shows any breach of duty by the Respondents.

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157 (P 11)
158 - 41 to
159 - 31

(iii) (Bid at Auction of Singapore \$1.2m)

31 - 17/20
163 (P 12)

The Respondents' evidence is that there was no such bid. They employed reputable auctioneers and in any event it is not apparent that Singapore \$1.2m was an acceptable amount.

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(iv) (Sale in July 1977 for Singapore \$1,024,955.32)

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The Respondents rely upon the findings of the Court of Appeal that prior to the sale of the Property the effect of the evidence was that the Property had

no greater value than the sum for which it was sold by the Respondents. The Respondents had no interest in obtaining the lesser figure if a greater was available.

10 23. The Appellant produced no independent evidence of valuation and the evidence upon which she relied conflicted with the contemporaneous documents. The Respondents had a discretion and have not been shown to have exercised it incorrectly.

24. The Respondents submit that this Appeal should be disallowed with costs for the following among other

R E A S O N S

- 20 (1) BECAUSE, when the Appellant signed the guarantee dated 18th April 1974 she did not think it to be fundamentally different from the document which she signed.
- (2) BECAUSE, the Appellant was careless in connection with the signing of the guarantee of 18th April 1974.
- (3) BECAUSE, the Respondents gave good consideration for the guarantee.
- (4) BECAUSE, under the terms of the Guarantee the Appellant is liable for the sums claimed against her.
- (5) BECAUSE, the Respondents were not negligent in disposing of the Property.
- 30 (6) BECAUSE, the decision of the Court of Appeal was correct and ought to be upheld.

ROBERT ALEXANDER Q.C.

NICHOLAS CHAMBERS

No.38 of 1981

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL IN SINGAPORE

B E T W E E N :

TAN LAI WAH

Appellant
(Fourth Defendant)

- and -

THE FIRST NATIONAL
BANK OF CHICAGO

Respondents
(Plaintiffs)

CASE FOR THE RESPONDENTS

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