IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1997] SGCA 10

CA 89/1996, 90/1996

Between

Malayan Banking Berhad

… *Appellant*

And

Hwang Rose

… *Respondent*

GROUNDS OF DECISION

Banking — Lending and security; Banking — Lending and security; Contract — Misrepresentation; Contract — Undue influence

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Malayan Banking Berhad v Hwang Rose and Others

[1997] SGCA 10

CA 89/1996, 90/1996
Karthigesu JA; L P Thean JA; Yong Pung How CJ
26 February 1997

1 There are two appeals before us. First, there is CA 89/96 which is an appeal by Malayan Banking Bhd (the bank) against the decision of the High Court dismissing their claim against the three respondents for the sum of $1,636,252.25 together with interests arising from the facility granted by them to the first respondent (Rose Hwang). They claimed this sum against Rose Hwang as the principal debtor and against the second respondent (Patrick Tan) and third respondent (Tan Sr) as the guarantors. This is the main appeal. Next, there is CA90/96 which is an appeal by Rose Hwang (although it was filed expressly as an appeal by Rose Hwang and Patrick Tan) against the decision of the High Court dismissing her counterclaim against the bank for the loss arising from the sale or disposal of certain bearer bonds belonging to her but held by the bank as security for the facility. The determination of this appeal depends entirely on the outcome of the first appeal.

2 **The facts**

3 The party who played a pivotal role in the dispute which gave rise to the present litigation is Patrick Tan. He is the husband of Rose Hwang and the son

of Tan Sr. He is in the business of construction and development with interests in Singapore, Malaysia and Hong Kong. Among other things, he owns and controls a Malaysian company, Prinsip Dinamik Sdn Bhd (Prinsip) which in 1990 purchased a plot of land in Ukay Heights near Kuala Lumpur for development.

4 In early 1991 or thereabouts Patrick Tan was interested in purchasing zero coupon bonds issued by NatWest Australian Bank Ltd and intended to use the bonds to raise finance for his development in Ukay Heights. He approached a Malaysian bank called Bank Buruh (Malaysia) Bhd (Bank Buruh), which on 11 December 1991 agreed to grant to Prinsip a loan of RM$13m for a term of ten years. Strangely enough, the purpose of the loan as stated in the letter was not for the purchase of any bonds but for the working capital of Prinsip. The loan was repayable by a `bullet` payment at the end of ten years, but interest thereon was to be paid monthly. The security stipulated was a standby letter of credit for 90 days issued by a prime bank and on expiry to be replaced by a cash deposit of not less than RM$16m and a deposit of the title deeds of the Ukay Heights property and also a joint and several guarantee executed by Patrick Tan and one Shee Koon Ruay.

5 Having obtained the offer of a term loan, Patrick Tan proceeded to look for a bank which would provide the standby letter of credit. He was introduced by a business associate to one Wong Kwok Hoy (Wong) who was then the branch manager of the bank in Singapore. Wong was agreeable to provide the standby letter of credit and required the amount of RM$13m to be deposited with the bank as security. After several discussions it was eventually agreed that the deposit would be placed in an account to be opened by Rose Hwang with the bank and the standby letter of credit would be issued on her account. Accordingly, arrangement was made for Rose Hwang to open an account with

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the bank and apply for the issue of a standby letter of credit in favour of Bank Buruh as security for the term loan of RM$13m. The standby letter of credit was issued on 24 December 1991 and was expressed to expire on 24 March 1992. The loan was disbursed by Bank Buruh to Prinsip on 28 December 1991, and the entire amount was converted into S$7,745,400 and transferred to Rose Hwang`s account with the bank and was held by the bank as security.

6 Of this amount, a sum of S$7.5m was on 14 January 1992, on instructions from Rose Hwang, remitted to NatWest Australian Bank Ltd which was then converted to A$6,162,695.15 and on 15 January 1992 was used to purchase A$14,860,000 NatWest Australian Bank Ltd zero coupon bonds due on 15 January 2002 (the bonds). These are bearer bonds earning interest at 9.2% per annum which is capitalised and forms part of the face value of A$14,860,000 on maturity. The bonds were intended to be held by the bank as security. Hence, after the purchase, they were held in safe custody by Natwest Capital Markets Ltd in the name and on behalf of the bank.

7 For reasons which were not explained, the temporary standby letter of credit issued by the bank was not replaced by the securities as stipulated in Bank Buruh`s letter. By 24 March 1992 the letter of credit was due to expire. But Bank Buruh were willing to give an extension of time to Prinsip to repay the loan and the bank in turn were agreeable to extend the standby letter of credit at the request of Rose Hwang. It was first extended to 31 March 1992, later to 7 April 1992 and finally to 21 April 1992.

8 On the first extension of the standby letter of credit, Patrick Tan executed a guarantee in favour of the bank whereby he guaranteed the liability of Rose Hwang. A fresh guarantee on similar terms was executed by him on each of the other two occasions when the standby letter of credit was extended.

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As for Tan Sr, he executed a similar guarantee in favour of the bank when the standby letter of credit was extended the second time. On the third and final occasion when the standby letter of credit was extended to 21 April 1992, Tan Sr did not execute a fresh guarantee, but a solicitor, Josephine Low of Michael Khoo & BB Ong, wrote to the bank`s solicitors confirming on his behalf that the guarantee executed by him on 31 March 1992 would continue to subsist.

9 On 15 April 1992, Bank Buruh called on the standby letter of credit and the bank in turn called on the three respondents to put them in funds to meet the payment.

10 On 21 April 1992 the bank`s solicitors, PK Wong & Advani (PK Wong) wrote to the first and second respondents` solicitors, Michael Khoo & BB Ong (Michael Khoo) informing them that Bank Buruh had made a demand for payment under the standby letter of credit and that the bank were obliged to make payment thereunder on 22 April 1992, and giving notice that the bank would sell the bonds if the respondents failed to put the bank in funds on the following day. On 22 April 1992 in compliance with the demand the bank paid to Bank Buruh the sum of RM$13m under the letter of credit; but no payment was made to the bank by the respondents.

11 Following the payment, lengthy correspondences took place between the two firms of solicitors on behalf of their respective clients. For our purpose it is necessary to refer briefly to the essential ones passing between them. On 23 April 1992 PK Wong wrote to Michael Khoo demanding immediate payment of the full amount the bank had paid under the standby letter of credit together with interests thereon and giving notice that if the respondents failed to make payment by 4pm the following day, the bank would proceed to sell the bonds and thereafter claim from the respondents any shortfall in the amount realised

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from the proceeds of sale. Michael Khoo responded on the following day requesting the bank to hold the matter in abeyance until 6 May 1992, as the first and second respondents anticipated that by that time funds would be available and a draft facility agreement providing finance to Patrick Tan or his company would be finalised. This was not acceptable to the bank and further exchanges of correspondence took place between the two firms. Eventually the bank agreed to hold the matter in abeyance until 6 May 1992, if the respondents would deposit with them a sum of S$1m to cover any shortfall in the amount realised from the sale of the bonds. On 30 April 1992 Michael Khoo informed PK Wong that Rose Hwang agreed to place with the bank the deposit of S$1m. Unfortunately no payment was made by 6 May 1992.

12 On that day the bank received instead a letter from Global Trade Insurance Management Pte Ltd (Global) stating that they had been approached by Rose Hwang and Patrick Tan to furnish a guarantee to the bank for the sum of S$1m `against [Patrick Tan`s] failure to pay this amount` and that they were then working out `the security arrangements` with Rose Hwang and Patrick Tan and their `overseas bankers`. In response PK Wong immediately wrote to Michael Khoo stating that any guarantee from Global must take the form of a standby letter of credit issued by a local bank. In other words, on behalf of the bank they rejected the proposed guarantee from Global. Following that letter a meeting took place on 9 May 1992 at which were present representatives of the bank, Patrick Tan, and one Gerard Lim of Global. However, nothing was achieved at that meeting.

13 On 20 May 1992 Patrick Tan informed the bank that his bankers were prepared to finance 85% of the current value of the bonds and he requested the bank to hold the bonds until further notice and, that if the bank insisted on selling the bonds, he would like to know the price prior to the disposal. In response PK

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Wong wrote to Patrick Tan stating that the bank would not be prepared to release the bonds unless and until they received full payment of the outstanding sum owing on account of Rose Hwang and that if the bonds were sold on that day, the price thereof would be in the region of `S$5.530m`. This amount was in error, as the correct amount was A$5.5m. In a subsequent letter PK Wong corrected this amount. On 26 May 1992, Patrick Tan wrote to the Bank stating that the true value of the bonds was approximately S$7.94m. PK Wong immediately replied on the same day stating that the indicative price for the bonds was approximately A$5.5m and requested Patrick Tan to provide or identify the buyer for the bonds for S$7.94m and to inform the bank accordingly. There was no response from Patrick Tan on such buyer, and on the following day at about 1.30pm the bank sold the bonds for A$5.5m.

14 The amount realized by the bank was S$6,740,800 which was applied to account of payment of the amount owed by Rose Hwang. After this payment there was still a balance due amounting to S$1,636,252.25 as at 4 June 1992. On 10 June 1992 the bank instituted proceedings against the three respondents claiming against Rose Hwang as the principal debtor and against Patrick Tan and Tan Sr as the guarantors the sum of $1,636,252.25 and interest thereon.

15 To this claim separate defences were filed by each of the respondents. First, the first and second respondents in their defences averred that Rose Hwang was only a nominee of Prinsip and the facility was granted to Prinsip which was arranged by Patrick Tan, and that the account with the bank, although in the name of Rose Hwang, was opened by her for and on behalf of Prinsip. In the premises, if there was any liability to the bank in respect of the facility, the liability was that of Prinsip and not Rose Hwang`s. Secondly, the first and second respondents denied that the bank were entitled to sell the bonds. Thirdly, they asserted that the bank in selling the bonds failed to take reasonable care to

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obtain the best price for the bonds at the time of the sale and that at the date of the sale the value of the bonds was S$7.94m. They further averred that the bank before selling the bonds failed to give them a reasonable opportunity to find a purchaser for the bonds at the best price available. Rose Hwang herself counterclaimed against the bank the loss arising from the sale of the bonds.

16 Tan Sr raised two defences. First, he averred that the guarantee dated 31 March 1992 was given in consideration of the bank extending the expiry date of the standby letter of credit to 7 April 1992 and he was accordingly only liable to the bank for any payment made by them on or before 7 April 1992. The extension of the standby letter of credit to 21 April 1992 was made without his consent, and accordingly he was not liable to the bank for the payment made by the bank. Secondly, he averred that his execution of the guarantee was procured by undue influence exercised by Patrick Tan and/or by misrepresentation made by Patrick Tan, and that the bank had actual or constructive notice of the undue influence and/or misrepresentation.

17 **The decision below**

18 The learned trial judge rejected the defence that Rose Hwang was merely a nominee for Prinsip. He held that although the funds in her account might belong to Prinsip, the account was in her name and the bank at all times treated her as the customer. She also signed all the important documents as well as gave written instructions to the bank.

19 The learned judge held that the bank had acted unreasonably. He said that Patrick Tan had been actively making efforts to secure alternative financing arrangements and that the bank failed to give a realistic length of time for the purpose. He referred to the abortive arrangement made by Patrick Tan with

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Morgan Grenfell (Asia) Ltd for the syndicated facility and the proposal of Bank Buruh to take over the bonds and to cancel the standby letter of credit, and found that the conduct of the bank`s officer in dealing with such matters unreasonable. He found that it was the bank which `deliberately brought about a situation where Bank Buruh was compelled to make the demand on the standby letter of credit`. He concluded that the loss from the sale of the bonds by the bank was a direct result of the extremely unhelpful attitude of the bank and their own acts and omissions, and that the bank utterly failed to do anything to avoid or minimise the loss.

20 Turning to the guarantee signed by Tan Sr the learned judge held that the guarantee did not apply to any call on the standby letter of credit after 7 April 1992, even though the guarantee had a provision to the effect that the obligations thereunder would continue. The fact that the bank asked for a new guarantee every time an extension on the letter of credit was sought estopped the bank from claiming on the guarantee. He said that the course of dealing was sufficient to show that the agreed assumption between the parties was such that each guarantee was restricted to each extension.

21 The learned judge held that Josephine Low of Michael Khoo had no authority to confirm that the guarantee signed by Tan Sr continued to subsist. Josephine Low said that on 31 March 1992 Tan Sr told her that in the event that alternative financing arrangements were not in place by 7 April 1992, she should `extend the guarantee accordingly`. The learned judge believed her evidence but said that since she was dealing with the second and third respondents, albeit they were closely related, she should have obtained the clear authority of each to give the confirmation required. He held that in the case of Tan Sr, what Josephine Low got from the discussion with him on 31 March 1992 was substantially short of clear authority.

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22 The learned judge rejected Tan Sr`s defence of undue influence. He held that no presumption of undue influence would arise merely by virtue of the father and son relationship. He said that such a presumption was well recognised where a person standing in loco parentis received a benefit from the person under his protection, but there was no such presumption where the former conferred a benefit on the latter.

23 As for misrepresentation, the learned judge held that if there was any misrepresentation it was made by Patrick Tan. The learned judge said that to hold the bank responsible for any misrepresentation made by Patrick Tan, it was necessary to show that Patrick Tan was acting as agent for the bank or that the bank had notice, constructive or actual, of such wrongdoing or the risk of such wrongdoing. The learned judge held that the bank were not imputed with any knowledge that any wrongdoing would be committed by Patrick Tan in procuring his father to provide a guarantee or that there were circumstances which would put the bank on inquiry about such a possibility. The learned judge therefore rejected the defence of undue influence and misrepresentation.

24 **The appeal**

25 The issues canvassed before us are: (i) whether the bank in their dealing with Rose Hwang and Patrick Tan had acted unreasonably or oppressively and failed to give them a reasonable opportunity to secure alternative financing arrangements; (ii) whether the bank had the power to sell the bonds; (iii) whether the bank in selling the bonds had failed to obtain the best price or proper price for the bonds at the time of the sale; (iv) whether the guarantee executed by Tan Sr covered the amount paid by the bank to Bank Buruh on 22 April 1992; and (v) whether the execution of the guarantee was procured or induced by any undue influence on Tan Sr or by any misrepresentation made by Patrick Tan to

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Tan Sr, and if so whether the bank were fixed with notice of such undue influence or misrepresentation.

26 On the first issue, neither Rose Hwang nor Patrick Tan raised in their pleadings matters pertaining to the unreasonable or oppressive conduct of the bank. However, Patrick Tan in his evidence gave various instances in which he alleged that the bank`s officers or solicitors had acted in such a way that they frustrated the efforts he made in securing the alternative financing arrangements. The learned judge accepted substantially his evidence and made findings in his favour. These findings were challenged before us. It is necessary to examine the evidence relating to the financing arrangements which Patrick Tan said he had been actively making efforts to secure and which the learned judge held were frustrated or stymied by the bank.

27 **McKinley**

28 First, there was the financing arrangement said to be offered by McKinley Mortgage Limited of Melbourne (McKinley). Patrick Tan said he had negotiations with McKinley for financing his project in Ukay Heights. He produced a letter dated 3 February 1992 from McKinley which offered to Rose Hwang a `first mortgage loan` of A$14m. Unfortunately, the second page of this letter was missing and this missing page was never produced at any stage of the trial. It appears to us that this page contained some material terms of the loan and in particular the securities required. The first page of the letter indicated that the security for the loan was, among others, a mortgage of some immovable property. On that page against the side heading of `Property Address` there was written the following: `Still awaiting confirmation and further details`, and Rose Hwang was referred to both as a borrower and a mortgagor. Further, on p 3 it

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was stipulated that the legal firm`s disbursements incurred in the preparation of `the mortgage` and advancing of the loan were to be borne by the borrower.

29 It seems to us most unlikely that the proposed A$14m `mortgage loan` would be secured or was intended to be secured only by the bonds as claimed by Patrick Tan. This is plain if one looks at the issue or original price of the bonds which was A$6,162,695.15. Although the face value of the bonds was A$14,860,000, that amount would only be payable on maturity, ie 15 January 2002. It seems to us that no financial institution with any commercial sense would advance a loan of A$14m solely on the security of the bonds alone which were then worth about A$6.1m or less.

30 Apart from this incomplete letter, Patrick Tan did not produce any other document. In particular, he did not produce any document or correspondence which showed that there was a follow-up on the offer of McKinley. Patrick Tan relied wholly on his viva voce evidence which was this. In February 1992 after his return from Australia he had his first meeting with Lawrence Yeo, the officer of the bank who was then in charge and who seemed to require him `to take the bonds and get out`. Patrick Tan was asked to see Mr PK Wong, the solicitor of the bank, and he saw Mr Wong. He said that Mr Wong was friendly to him and handed him a letter to the effect that the bank wished to have the bonds replaced with cash or a letter of credit, and failing that the bank would have a right to sell the bonds. He was then being pressed by the bank to provide alternative financing. These were `the problems` he had with the bank, and McKinley then `got wind of these problems`. According to him, a business associate, Dennis Ng told McKinley of `these problems`. He then said:

> *That is why I say Ng must have told McKinleys about my problems.*

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> *McKinleys decided to hold on while I sorted out my problem with Malayan Banking. That put paid to the idea of raising 2 further financing on the bonds.*

31 The entire evidence on this abortive financing arrangement with McKinley came only from Patrick Tan himself, and there was no direct evidence either from Dennis Ng or any other person. There was no evidence to show that McKinley knew about the alleged problems between Patrick Tan and the bank - whatever the problems were - and no letter from McKinley was produced to show that they decided to put on hold the proposed financing arrangement until Patrick Tan had resolved the `problems` with the bank. It was only an assumption made by Patrick Tan himself that Dennis Ng had told McKinley about the `problems`. No one from McKinley was called to testify as a witness. There was a total lack of evidence to show, first, the precise terms on which McKinley had agreed to grant the loan and, secondly, the reason why the proposed financing arrangement of McKinley became abortive.

32 It is certainly not clear to us why McKinley should be concerned with the `problems` which Patrick Tan had with the bank. Assuming that only the bonds were to be used as security for the mortgage loan of A$14m, which we say was highly unlikely, all that McKinley needed to do was to get in touch with the bank, make satisfactory arrangements to provide funds to the bank to enable them to discharge their liability under the standby letter of credit and take possession of the bonds. It seems to us extremely odd that McKinley should put the matter on hold merely because of the alleged problems which Patrick Tan had with the bank. The evidence of Patrick Tan on the decision of McKinley was heresay and has no probative value whatsoever.

33 We find Patrick Tan`s evidence inherently incredible. His failure to negotiate and conclude the financing arrangement with McKinley was clearly

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not caused or contributed to by the unhelpful conduct, if any, on the part of the bank, its officers or solicitors. More likely than not Patrick Tan had difficulty in procuring the securities or otherwise in fulfilling the terms required by McKinley.

34 **Morgan Grenfell**

35 Next, there was the financing arrangement offered by Morgan Grenfell (Asia) Ltd (Morgan Grenfell). Here again the evidence on this proposed financing arrangement came only from Patrick Tan himself. His testimony was this. Immediately on his return from Australia - presumably that was after his discussion with McKinley - he approached a dozen banks including Morgan Grenfell which is a merchant bank. He saw them on 19 February 1992 - that was about two weeks after McKinley`s letter of offer for the `mortgage loan`. After some meetings he had with them, they gave him a letter confirming that they would finance him. He produced a letter dated 10 March 1992 from Morgan Grenfell written to his other company, Kim Yuen Investments Ltd (Kim Yuen), in which, among other things, Morgan Grenfell agreed to arrange a syndicated tender advance facility of RM$50m with a standby revolving credit facility of RM$30m on the security of (i) a legal mortgage of certain land (not specifically described but presumably the land in Ukay Heights), (ii) a pledge of the bonds, and (iii) assignment of all the revenues from the development in Ukay Heights. This was followed by a subsequent letter dated 23 March 1992 which was called the `Mandate Letter` which set out further terms and which was to be signed by Kim Yuen, if the proposal was acceptable.

36 Under the terms of the Mandate Letter, Kim Yuen was required to pay a fee of S$250,000 to Morgan Grenfell of which S$150,000 was payable upon the signing of the letter by Kim Yuen. Patrick Tan said he accepted the terms

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and board resolutions of Prinsip and Kim Yuen were passed. However, he did not say whether the sum of S$150,000 required to be paid was indeed paid to Morgan Grenfell. He said that the loan documentation was completed but the company did not execute the document because the bonds had by then been sold. Again, no loan agreement or other document was produced to show the stage at which the proposed transaction had reached and why it became abortive.

37 Patrick Tan in his evidence relied on a telephone conversation between Nicholas Chia, an associate director of Morgan Grenfell, and Lawrence Yeo, which he said he overheard while he was waiting for Nicholas Chia in the adjoining room. He said that as a result of that conversation Nicholas Chia became very cautious of him. He alleged that Lawrence Yeo sabotaged his negotiations with Morgan Grenfell by telling Nicholas Chia that he (Patrick Tan) was not worth anything. Patrick Tan`s oral evidence in relation to the alleged conversation between Nicholas Chia and Lawrence Yeo was purely hearsay. Nicholas Chia was not called to testify as to why the financing arrangement offered by Morgan Grenfell did not come to fruition. It seems to us inconceivable that a reputable merchant bank like Morgan Grenfell would back out of such a transaction merely because of what Lawrence Yeo had allegedly said.

38 **Global**

39 On 6 May 1992 the bank received from Global a letter which stated as follows:

> *Dear Sirs:*
>
> *Re: Madam Rose Hwang Yue EyeAUD 14,800,000 Natwest Australian Bank LtdZero Coupon Bonds Due on 15 January 2002*

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> *We have been approached by Mr Patrick Tan/MM Rose Hwang Yue Eye to furnish a guarantee in your favour for a sum of S$1m against his failure to pay this amount to you.*
>
> *We are currently working out the security arrangements with them and their overseas bankers. In the meantime, we shall be pleased if you could let us know in what form you would like to have the guarantee.*
>
> *Yours faithfully*
>
> *Sgd: CS Sigamany*

40 On receipt of this letter PK Wong wrote to Michael Khoo stating, among other things, that the only guarantee the bank would be prepared to accept was one from a bank. Patrick Tan said that Global would have used a bank to provide the guarantee and had intended to use The Hongkong And Shanghai Bank Corporation Ltd. But, given the pressure exerted by the bank, the arrangement with Global could not go through.

41 We think that this letter should be considered in the proper perspective. Prior to this date Michael Khoo had informed the bank through PK Wong that Rose Hwang would deposit with the bank by 6 May 1992 the sum of S$1m to cover the shortfall that may arise from the sale of the bonds. No such deposit was made but instead the bank received this letter from Global. The letter was totally unexpected and was not in accordance with what seemed to have been agreed. Clearly at that stage it was highly uncertain whether Rose Hwang and Patrick Tan could satisfy the security arrangements of Global. In the circumstances, it was not unreasonable for the Bank to reject the proposed guarantee from Global.

42 There was no evidence to show that Global`s security requirements referred to in the letter had been met or would be likely to be met. No one from Global was called to testify. Again, the only evidence, apart from that letter, was that of Patrick Tan. His evidence on this financing arrangement was highly

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unsatisfactory. At any rate, this financing arrangement was to provide security for the shortfall of S$1m; it was not one which would enable Rose Hwang and/or Patrick Tan to take over the bonds and pay to the bank the entire indebtedness of Rose Hwang. Hence, even if the arrangement had been successfully concluded, the respondents would still have the remaining problem of seeking other financing arrangements to pay to the bank the entire amount owing. There was no evidence that Patrick Tan had made or was making any such arrangement.

43 **Coutts**

44 Patrick Tan also mentioned the proposed financing arrangement with a bank, Coutts & Co (Coutts). His evidence was that he was approached by Coutts; they were prepared to provide a loan up to 85% of the value of the bonds, which according to him was A$5.5m, and they had head office approval for this loan. When he told the bank of this arrangement, the bank`s solicitor, Mr PK Wong, insisted on going with him to Coutts to verify this. At Coutts` office Mr PK Wong `banged the table` and said that he wanted to be paid `now`. After that, Coutts refused to take any calls from Patrick Tan. The learned judge had this to say on the Coutts` deal:

> *Patrick Tan also gave evidence that he approached Coutts, the private banking arm of National Westminster Bank. They agreed to provide up to A$5.5m on the security of the bonds. According to Patrick Tan, whose evidence was not rebutted, Mr PK Wong insisted on going with him to the offices of Coutts to verify this. Mr Wong spoilt any prospect of a deal by telling them, as was the fact, that Malayan Banking had to be paid immediately.*

45 It appears that the learned judge accepted the evidence of Patrick Tan that Coutts had offered financing up to A$5.5 million on the security of the bonds, and Coutts` decision not to proceed with the deal was caused by or

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attributable to the alleged arrogant and brash conduct of Mr PK Wong. Irrespective of the conduct of Mr PK Wong, Coutt`s proposed arrangement could not possibly be concluded. It was not one which could reasonably be accepted by the bank. The bank had paid to Bank Buruh under the standby letter of credit the sum of RM$13m which far exceeded the Malaysian equivalent of A$5.5m, and since then interest had accrued and was accruing on that amount. It would not make any commercial sense for the bank to allow Coutts to take over the bonds and in return receive only a sum of A$5.5m without, in addition, some satisfactory arrangement being made by Patrick Tan to cover the shortfall, eg by payment in cash or bank guarantee or other security. There was no evidence of any offer of such additional securities from Patrick Tan.

46 Patrick Tan did not adduce any documentary evidence to substantiate his claim that Coutts had agreed to provide the financing of A$5.5m. No letter of offer or other document from Coutts was produced. Neither was any representative from Coutts called to corroborate his evidence. The only document produced was a letter dated 20 May 1992 written by Patrick Tan to the bank stating, among other things, that his `bank` was prepared to finance `85% of the current value` of the bonds and `possibly a little more`, if he could meet their conditions. As we have said, the bank could not possibly accept such a proposal. Accordingly, on the following day PK Wong wrote to Patrick Tan stating that the bank would not be agreeable to release the bonds unless full payment was received of the outstanding sum on Rose Hwang`s account. We certainly do not consider such a stand unhelpful or unreasonable.

47 If Coutts had really intended to provide the financing of A$5.5m, Coutts, being a reputable banker, would not have refused to continue discussions with a potential customer merely because a lawyer, who did not even represent that potential customer, had so badly behaved himself in the manner alleged. No

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officer from Coutts was called to testify why they withdrew from further discussions with Patrick Tan. It seems to us that the proposed financing arrangement offered by Coutts was simply not feasible.

48 **Richard Ellis**

49 Patrick Tan also said that he was approached by Richard Ellis - presumably that is Richard Ellis (Pte) Ltd - with a view to arranging a transaction which would enable him to raise funds to discharge Rose Hwang`s liability to the bank. Richard Ellis had a client called the Darmala group which was selling 22 units of apartments of Ardmore Point in Singapore. The arrangement was for him to buy these units, using the bonds as part payment, and then to mortgage the apartments to raise funds to pay the bank. He said that nothing came out of this as the bonds were sold.

50 We have the following observations on this proposed transaction. Patrick Tan`s evidence was totally lacking in particulars. First, there was no evidence from him as to how much the 22 units of apartments would cost. Secondly, there was no evidence as to what part of the purchase price of the units would be paid by the use of the bonds and how he would raise and pay the remaining part of the purchase price. There was plainly no evidence of his source of funds for such an ambitious transaction. There was also no documentary evidence or evidence of any officer from Richard Ellis to show that this arrangement was even contemplated. The first time this transaction was mentioned was at the hearing which was more than three years after the bank had disposed of the bonds.

51 **Bank Buruh**

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52 We now come to the financing arrangements offered by Bank Buruh. There were in fact two proposals emanating from Bank Buruh which we should consider. First, in their letter dated 11 December 1991 Bank Buruh offered Prinsip a ten year term loan of RM$13m on the security of a standby letter of credit for 90 days issued by a prime bank. It stated, among other things, that the standby letter of credit was to be replaced by (i) a cash deposit of not less than RM$16m, (ii) a deposit of title deeds, and (iii) a joint and several guarantee of Patrick Tan and Shee Koon Ruay. This proposal was accepted by Prinsip, and the term loan of RM$13m was advanced to Prinsip on or about 28 December 1991 on the security of the standby letter of credit issued by the bank. It was clearly contemplated by all the parties that the standby letter of credit was a bridging or temporary security. There was no evidence as to what steps Patrick Tan had taken to replace the standby letter of credit in terms of the letter dated 11 December 1991 of Bank Buruh. Nor was any reason given as to why the temporary standby letter of credit was not replaced by the securities as contemplated. Whatever might be the position, it seems to us that Patrick Tan had no intention of complying with those terms. Although it was an express term of the loan that Prinsip was to use the term loan of RM$13m as part of its working capital, Patrick Tan caused the amount to be converted into Singapore dollars and transferred to Rose Hwang`s account with the bank and thereafter used substantially the whole of it for the purchase of the bonds.

53 The next proposal of Bank Buruh came about three months after the term loan of RM$13m had been advanced and after the standby letter was first extended. The proposal was that Bank Buruh would take over the bonds from the bank and cancel the standby letter of credit. On 4 April 1992 Bank Buruh wrote to the bank stating that `in principle` they were prepared to cancel and nullify the standby letter of credit in exchange for the bonds as security subject

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to the approval of their board of directors and that they would require sometime to formalize their arrangements. Accordingly, they said that they would agree to extend the letter of credit for another two weeks.

54 There was no evidence as to what happened thereafter. In particular, there was no evidence whether Bank Buruh had moved forward and made any arrangement to take over the bonds. Patrick Tan in his affidavit evidence-in-chief said:

> *However, Bank Buruh was not able to get the permission of Bank Negara to take over the NatWest bonds as security for the loan to Prinsip. Bank Buruh, however, was agreeable to extending postponing repayment of the loan until I could make arrangements for another bank or financial institution to take over the NatWest bonds and I was in the process of negotiations*

55 However, the learned judge did not accept that this was the reason. He said:

> *There was a suggestion in evidence that it was because Bank Buruh could not get the national bank Bank Negara`s permission to take over the bonds that the takeover proposal failed. This arose from a sentence in Patrick Tan`s affidavit, where, after referring to the Bank Buruh`s letter of 4 April (agreeing in principle to the takeover), he said: `However, Bank Buruh was not able to get the permission of Bank Negara to take over the Natwest bonds ...`.*
>
> *There is nothing in the evidence to suggest that the proposal had gone as far as Bank Negara when it was foreclosed by Malayan Banking paying on the letter of credit. Mr Tan was not able to explain why he made this statement, but the point has not been further pursued and I do not feel I need to dwell on it.*

56 We agree that the statement that Bank Buruh was not able to get the requisite permission from Bank Negara was purely heresay. But that was the evidence emanating from Patrick Tan himself explaining why Bank Buruh did not take over the bonds. Quite apart from the probative value of that statement by Patrick Tan, the fact remains that there was nothing from Bank Buruh to

show that they had moved forward to take over the bonds. With respect, it is not correct to say that the proposal to take over the bonds `was foreclosed` by the bank paying on the letter of credit. Bank Buruh made a call on the standby letter of credit on 15 April 1992, which was nearly a week prior to the expiry of the letter of credit, and the bank had no choice but to make the payment which they did on 22 April.

57 The learned judge further said:

> *It seems beyond any reasonable doubt that the takeover proposal was prevented from being pursued to conclusion primarily by Malayan Banking`s reluctance to do anything about the payment of the $150,000 or the undertaking required. The proposal was to the mutual advantage of the bank and the customer as the bonds would be taken over instead of being sold at a loss. However, for reasons not apparent, Malayan Banking, through Lawrence Yeo, were set on pursuing a course which made the call on the letter of credit and a sale of the bonds inevitable, a course to the mutual disadvantage of the bank and the customer, particularly the customer.*

58 With respect we are unable to agree. We can find no credible evidence to support such a conclusion.

59 Although Bank Buruh had stated that in principle they were prepared to take over the bonds and cancel the standby letter of credit, they must have had a change of mind on further consideration of the arrangement, particularly with respect to adequacy of the bonds as security. Looking at the arrangement purely from a commercial point of view, it seems to us that the proposal of Bank Buruh to take over the bonds as security for the loan of the RM$13m in exchange for the cancellation of the standby letter of credit was not feasible. The amount advanced to Prinsip was RM$13m, which was converted into S$7,745,400 and deposited in the account of Rose Hwang with the bank. Of this amount a sum of S$7.5m was used to purchase the bonds with the balance of $245,400 being

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held by the bank. The purchase was made on 16 January 1992. The price paid for the bonds was the Australian dollar equivalent of S$7.5m, ie A$6,162,695.15. Assuming that the value of the bonds on 4 April 1992 was the same as the issue or original price, that value was much below the sum of RM$13m which was still owing to Bank Buruh. Even if the amount S$245,400 then held by the bank was to be remitted to Bank Buruh, there would still be a shortfall in the amount owing to Bank Buruh. This is evident from the demand made by Bank Buruh on the bank under the standby letter of credit. In the demand Bank Buruh gave the following breakdown of Prinsip`s indebtedness:

Principal	RM$	13,000,000.00
Overdue interest	RM$	354,953.42
Penalty interest	RM$	492.02
Interest computed on 15.4.92	RM$	78,000.00
	RM$	13,433,445.44

60 Finally, there was a suggestion by Patrick Tan that the bank failed to give an undertaking to Bank Buruh to pay the sum of S$150,000 on completion of the transfer of the bonds to Bank Buruh, and this was the reason, or partly the reason, why Bank Buruh called on the standby letter of credit. This sum according to Patrick Tan represented the fees and outstanding interest payable to Bank Buruh. It seems to us that there was a lot of confusion over this matter; but from the documentary evidence the position was clearly this. By her letter dated 12 April 1992 and received by the bank on 13 April, Rose Hwang instructed the bank to give an undertaking to Bank Buruh to remit to the latter the amount of S$150,000 by telegraphic transfer to Prinsip`s account immediately upon the completion of the transfer of the bonds to Bank Buruh. However, before the bank could act on the instruction, there was presented to the bank for payment on 14 or 15 April 1992 a cheque for S$150,000 drawn by Rose Hwang on her account in favour of Bank Buruh. Clearly there was some

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inconsistency between what she had asked the bank to do and what she had done. The bank could not do both: give the undertaking and honour the cheque. Not surprisingly PK Wong wrote to Michael Khoo on 15 April 1992 saying that due to the conflicting instructions, the bank would not be paying on the cheque.

61 On 15 April 1992, Bank Buruh made a demand on the bank for payment of RM$13m under the standby letter of credit. Following that PK Wong on 16 April 1992 wrote to Michael Khoo informing the latter that a call on the standby letter of credit had been made and seeking clarification of the matter. The letter then referred to a conversation between one Lim Chai Seong of Bank Buruh and Lawrence Yeo in which Lim suggested to Yeo that if the bank would remit the sum of S$150,000 to Bank Buruh, that sum would be treated as part of the amount to be paid under the standby letter of credit. The letter also stated that Patrick Tan said he would remit the money himself. On the same day, Michael Khoo replied to PK Wong withdrawing Rose Hwang`s earlier instructions contained in her letter of 12 April and giving fresh instructions to the bank to remit to Bank Buruh the sum of S$150,000 immediately by telegraphic transfer. That sum however was not remitted. On 20 April 1992, PK Wong replied stating, among other things, that the bank would remit the sum of S$150,000 to Bank Buruh only on condition that Bank Buruh would agree that that sum would form part of the RM$13m payable by the bank to Bank Buruh.

62 It seems to us that the main reason why the bank did not give the undertaking in the first place was the conflicting instructions from Rose Hwang. As to why the money was not paid to Bank Buruh conditionally, the evidence was unclear. But the fact was that there was no letter from Bank Buruh requesting the bank to remit the sum on the condition that that sum would be treated as part of the amount to be paid under the standby letter of credit. The

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instruction contained in the letter of 16 April 1992 of Michael Khoo was to remit the sum unconditionally. That obviously the bank could not do.

63 It must not be forgotten that the sum of S$150,000 was not `ready money in Rose Hwang`s account which could be used`; nor was it `lying idle` in her account. If the payment of S$150,000 was to be made, it would have to come from the S$245,400 in Rose Hwang`s account which was held by the bank as part of the security. This S$245,400 was part of Singapore dollar equivalent of RM$13m originally deposited with the bank as security for the standby letter of credit. As the bank was already then of the opinion that the bonds were not adequate security they obviously would not part with any part of this sum except on clear terms that their liability to Bank Buruh would pro tanto be reduced. On the evidence before the court, no clear terms had been agreed between them and Bank Buruh on the payment of S$150,000.

64 At any rate, it seems to us that the S$150,000 was really a red herring. Neither the giving of an undertaking by the bank for payment of this amount upon the taking over of the bonds by Bank Buruh nor the payment by the bank of this amount on condition that it would form part of the sum of RM$13m to be paid to Bank Buruh under the standby letter of credit would have staved off Bank Buruh calling on the letter of credit, which they did on 15 April 1992. The plain and simple reason is that the amount owed by Prinsip to Bank Buruh had by then exceeded the amount secured by the standby letter of credit by about RM$433,000 and Patrick Tan had made no arrangement to settle this excess. There was certainly no evidence that he did.

65 **Conclusion on financing arrangements**

66 Having considered the evidence in depth, we can find no ground for saying that Patrick Tan`s failure to procure to satisfactory conclusion the financing arrangements discussed above was caused or contributed to by any unhelpful or obstructive attitude or unreasonable conduct on the part of the bank, its officers or solicitors. Nor do we accept the contention that the bank did not give Patrick Tan a reasonable opportunity to relieve them of their obligations under the standby letter of credit. The standby letter of credit was a temporary security; it was issued for 90 days. Patrick Tan knew very well that it was a short term arrangement to be replaced by securities as stated in Bank Buruh`s letter. It is true that, having issued the standby letter of credit, the bank agreed to Patrick Tan using the sum of S$7.5m to purchase the bonds and accepted the bonds as part of the security for the letter of credit. But this did not detract from the fact that he had to relieve the Bank of their obligation on or prior to the expiry of the letter of credit. That was the period he had bargained for.

67 It is clear to us that subsequently the bank had second thoughts about the bonds as security and were not comfortable with the adequacy of the bonds. Clearly the bank were concerned about the security which consisted of the bonds and the credit balance of S$245,000 in Rose Hwang`s account. For this reason, they were not prepared to agree to a lengthy extension of the standby letter of credit and agreed only to `the drib-drab extensions`. They were entitled to take that stand and insist that their customer, namely Rose Hwang, should make arrangement to have the bonds taken over by other financial institutions and have the standby letter of credit cancelled by Bank Buruh. In our opinion, they were acting fully within their rights.

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68 We think that the bank were entitled to hold the view that the bonds were not adequate security for their liability under the standby letter of credit. With regard to the value of the bonds as security, the learned judge had this to say:

> *The bonds were issued by a prominent bank bearing that name, and their credit was guaranteed by the parent bank in London. Interest accrued daily on the bonds at the rate of 9.2% per annum and was compoundable every year. Although the accumulated interest was not payable in full until maturity, it can be assumed that the longer the bonds were held, the more valuable they would become. Malayan Banking`s liability under the standby letter of credit was thus quite well secured. Secondly as the evidence shows, although the bonds are readily saleable, there is always a discount if they are sold before maturity. So it is always better to try to avoid selling them if possible.*

69 With respect we are unable to agree. The bonds were valuable security only to the extent of their value at the relevant time. Whilst, in a strict sense, it may be true that the longer the bonds are held, the more valuable they would become, in reality it does not work out that way, at least at the initial stage. The bonds were issued in mid-January 1992 and the amount of interest at 9.2% per annum accumulated at the material time, namely April 1992, was not really very considerable. The determining factor on the value of the bonds is the prevailing bank interest rate. If the prevailing rate goes up beyond 9.2% the value of the bonds would decline.

70 We agree that during the critical period, namely from early April to 27 May 1992, there were `barrages of demands` by the bank`s solicitors, pressing for guarantees and further security to be given. The bank was definitely putting pressure on Rose Hwang and Patrick Tan. But such conduct on the part of the bank must be considered in the context of the relevant circumstances then prevailing.

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71 In early April there were two extensions of the standby letter of credit. Patrick Tan was supposed to procure a replacement of the security as required by Bank Buruh. He was unable to do so. Nor was he able to raise the sum of RM$13m to pay Bank Buruh. He was therefore in default. The demand for payment by Bank Buruh was therefore imminent and the Bank were naturally concerned about the inability of Rose Hwang and Patrick Tan to put them in funds to meet the obligation. On 15 April Bank Buruh called on the bank to pay under the letter of credit and that was six days prior to its expiry, and in turn the bank called on the respondents to put them in funds to meet the payment. They failed to do so. The bank having paid to Bank Buruh the RM$13m demanded payments from all the respondents and gave the necessary notices to them that if they failed to pay, the bank would sell the bonds. None of the respondents made any payment, and naturally the bank resorted to harassing Patrick Tan `with their constant demands and ultimatums`. In our opinion, the bank were fully justified in making those demands.

72 The learned judge criticised the bank for not trying to work with Patrick Tan `in a constructive way to achieve positive results`. With respect, we do not see how the bank could work with Patrick Tan to achieve a positive result to their mutual advantage. Patrick Tan was in default since 31 March 1992 when he failed to replace the standby letter of credit, and he was further in default on 22 April 1992 in failing to put the bank in funds to discharge their obligation to Bank Buruh. It was his obligation to raise the necessary funds to pay the bank the amount owing. He failed to do so. Nor did he show any source of funds that would assist him in the payment. There was absolutely no concrete sign of any funds coming from Patrick Tan or his company. The bank were under no obligation to hold discussion with Patrick Tan to explore ways and means with a view to assisting him to settle the amount outstanding.

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73 With respect, we are unable to agree with the learned judge that the resulting loss from the sale of the bonds was a direct result of the extremely unhelpful attitude of the bank and their own acts and omissions. In our judgment, there is absolutely no merit in the defence of Rose Hwang and Patrick Tan that the bank failed to give them a reasonable opportunity to relieve the bank of their obligations under the standby letter of credit.

74 **Sale of the bonds**

75 The first and second respondents disputed that the bank were entitled to sell the bonds. They contended that the bank held the bonds on trust for them and relied on the absence of any document conferring on the bank the power to sell the bonds. We are unable to accept this contention.

76 Although the bonds were purchased with the funds of Rose Hwang in her account, those funds were held by the bank as security for the standby letter of credit. Upon the purchase of the bonds, Rose Hwang gave instructions for the bonds to be held in the name of the bank. Accordingly, thenceforth, the bank held the bonds as security for the same liability. The only question is whether the bank held the bonds as a mortgagee or pledgee. The bonds are bearer instruments and are transferable by delivery, and a mortgage or pledge may be created thereon, depending on the intention of the parties. However, in this case it is immaterial whether the bank held the bonds as a mortgagee or pledgee. In either case, the bank had an implied power to sell the bonds in the event of default by Rose Hwang to pay the amount secured.

77 In ***Re Morritt LR; ex p Official Receiver*** (1887) 18 QBD 222 at p 233 Cotton LJ said:

> *... I am of opinion that a mortgagee of personal chattels which are in his possession is not in a worse position than a pledgee, and that, where there is no express power of sale given by the mortgage, he has, after default in payment, and after he has given the mortgagor a reasonable time to pay the money due, a power to sell and give a good title to the purchaser, though, of course, the mortgagor has, at any time before sale, a right on payment of the money due, including expenses, to prevent the sale and redeem the chattels.*

78 A similar statement of law on the implied power of a pledgee or mortgagee to sell the subject-matter pledged or mortgaged is found in the following passage of the judgment of Vaughan Williams LJ in ***Deverges v Sandeman, Clark & Co*** [1902] 1 Ch 579, at pp 588-589:

> *In the present case there is no express power of sale, and we have, therefore, to ascertain whether or not there is, in the circumstances of this case, an implied power of sale. I wish at once to say that I do not think that the circumstances which will give rise to an implication of a power of sale in favour of a mortgagee of a chattel, or even of stock or shares, can differ in favour of the mortgagee from those which are necessary to give a right of sale to a pledgee. In both cases the creditor holding security is allowed, as against the debtor in default, to enlarge his interest or estate. In the case of a pledge, whether of chattels or of stock or shares, a power of sale is implied at law if a day is fixed by the contract for the payment of the debt; for in such a case it is inferred that the contract between the parties is that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the thing pledged. In the case of a mortgage in which there is a fixed day for payment and default in payment, a similar power of sale would seem to arise, if not in the case of a mortgage of a chattel, at all events in the case of a mortgage of stock or shares.*

79 In the present case, immediately upon demand being made by Bank Buruh under the standby letter of credit, the bank gave notice to the respondents of such demand and requested them to put the bank in funds to meet the payment and in default the bank would sell the bonds. The respondents defaulted in so doing. Thereafter, repeated notices were given to them to the effect that the bank would sell the bonds, unless the amount owed to the bank was paid in full. They

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again defaulted in making payment and continued to be in default. The bank then sold the bonds on 27 May 1992, and that was more than a month after the respondents were first called upon to meet their obligations. In the circumstances, ample notice had been given to the respondents, and the bank were fully entitled to sell the bonds.

80 **Sale price of the bonds**

81 In selling the bonds the bank had a duty to act in good faith and to take reasonable steps to sell them at the true market value or the proper price prevailing at the time of sale. The leading authority is ***Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd*** [1971] Ch 949. In that case, the mortgagee exercised the power of sale and sold the property by auction. In the advertisement of the property for sale, the auctioneer failed to describe that there was in existence in relation to the property a planning permission for 100 flats. This was drawn to the attention of the mortgagee before the sale, but they nonetheless proceeded with the sale and their auctioneers merely mentioned this fact at the auction. The property was sold for o44,000 and the mortgagor alleged that the true market value was o75,000. The trial judge held that the mortgagee had failed in their duty and assessed the true market value to be o65,000. On appeal, the Court of Appeal dismissed the appeal as regards the breach of duty of the mortgagee but ordered an inquiry on the question of damages.

82 In the course of his judgment, Salmond LJ said, at p 965:

> *It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an*

> *auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes.*

83 His Lordship then discussed the question whether a mortgagee in exercising the power of sale was also under a duty at the time of sale to take reasonable care to obtain the true market value of the property to be sold, and he said, at p 966:

> *Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.*

84 and finally concluded thus, at pp 968-969:

> *I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.*

85 Cross LJ, the other member of the court, said at p 969:

> *On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at.*

86 Later his Lordship held (at p 972) that a mortgagee is liable in damages to the mortgagor for negligence either of the mortgagee or his agent in connection with the sale. Cairns LJ, the third member of the court, held (at p 978) that the mortgagee has a duty to take reasonable steps to obtain the proper price in the interest of the mortgagor.

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87 The decision in ***Cuckmere*** has been followed in Singapore, and in particular it was followed by this court in ***How Seen Ghee v Development Bank of Singapore Ltd*** [1994] 1 SLR 526 at pp 530-531.

88 The first and second respondents complained that the bank had not sold the bonds at the best price then available. There was hardly any evidence bearing on this issue. The question then is on whom the burden of proof rests. It must be borne in mind that it is the respondents who were in default and in consequence of their default, the bank were entitled to sell the bonds, and they sold the bonds in exercise of their right. The respondents now aver that the bank had failed to exercise their duty of care and sold the bonds at an undervalue. In such an event, the burden is clearly on the respondents to show that the price at which the bonds were sold was not the true market price or the proper price at the time of the sale.

89 In ***Haddington Island Quarry Co Ltd & Ors v Alden Wesley Huson & Ors*** [1911] AC 722, the sale of the property mortgaged was impugned by the plaintiffs, the mortgagors, on the ground that the interest in or title to the mortgage did not vest in the defendants, the assignees of the mortgage. The trial judge rejected this argument and held that the sale was valid and regular and dismissed the claim. The Court of Appeal of British Columbia held that the sale was at an undervalue and that there was no due exercise of the power of sale by the mortgagee. On further appeal, the Privy Council reversed the decision of the Court of Appeal and restored that of the trial judge, holding that the pleadings contained no charge of fraud, collusion or bad faith. Lord De Villiers delivering the judgment of the Board said, at p 727:

> *Ostensibly, therefore, the mortgagees acted within their powers in selling the property, and the purchasers are entitled to the full benefit of their purchase unless it be alleged and proved that they*

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> *acted in collusion with the vendors, or that the price was so low as in itself to be evidence of fraud or collusion.*

90 In ***Cuckmere*** , Salmond LJ had this to say on the question of burden of proof in that case, at p 965:

> *It has been argued that the judge approached this case the wrong way, namely on the basis that it was for the defendants [the mortgagees] to justify their acts and omissions. I cannot accept this argument. There is one passage in the judgment which if taken in isolation is capable of bearing this interpretation, but I am quite satisfied that the judge neither said nor meant anything of the kind. The plaintiffs` [the mortgagors`] whole case at the trial was that a fair price had not been obtained because of the defendants` default and negligence. The plaintiffs naturally accepted that the onus was upon them to establish the default and negligence of which they complained. The judge could not have been under any misapprehension on this point. He concluded that the plaintiffs had proved their case.*

91 In the present case, the respondents adduced no evidence to show that the price of bonds at the relevant time was above that at which the bank sold them. They did not do anything to show that the bank did not obtain the true market value of the bonds.

92 The learned judge below talked about the sale price of the bonds as follows:

> *The sale price of A$5.5m does not, on the face of it, make sense, bearing in mind the original purchase price of A$6.612m and the fact that interest was accruing at the rate of 9.2% per annum. Although the interest so accruing at this rate was not payable until maturity, and the full amount of the interest at this rate would not be reflected in the value of the bonds on a premature sale, nevertheless the fact that the bonds were sold below their original price merits some explanation.*

93 It must be remembered that the bonds were issued only in January 1992 with a maturity of 10 years. It is true that the issued or original price of the bonds was A$6,162,695.15 and interest on the bonds accrues at 9.2% per annum.

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However, at this initial stage the price of the bonds on re-sale may well be below the issued or original price. As we have said, the determining factor which controls the price of the bonds is the bank interest rate at the time. If bank interest rate is higher than 9.2% per annum at the time of sale, the sale price would be low. What needs to be looked at is the change in interest rate at the date of the purchase and the date of the sale. No evidence on this point was adduced by the respondents. A mere fall in value of the bonds is insufficient to shift the burden on the bank to show that they had obtained the true market value of the bonds.

94 The bank`s right or power of sale had arisen and there was no evidence that the bank could have sold the bonds at a price higher than A$5.5m. In the circumstances, there was nothing to indicate that the bank had not sold the bonds at the best price then available. This defence of the first and second respondents on this issue failed.

95 **Guarantee of Tan Tiang Quee**

96 We now turn to the guarantee given by Tan Sr. His counsel argued that by the natural construction of the guarantee, Tan Sr had only agreed to `pay on demand all monies ... incurred to the bank by the applicant arising out of or in connection with the standby letter of credit` which would expire on 7 April 1992. Therefore Tan Sr was not responsible for calls made by Bank Buruh after 7 April 1992. He relied on recital (F) of the guarantee which stated the following:

> *At the request of the applicant [Rose Hwang], the bank has agreed to extend the expiry date of the standby letter of credit to 7 April 1992.*

97 It seems to us that counsel was reading too much into recital (F). That recital did not contain a definition of what the standby letter of credit was. In fact, recital (A) referred to the standby letter of credit as an irrevocable standby letter of credit No MO/SC/91/071 dated 24 December 1991 in favour of Bank Buruh for the amount of RM$13m. When the standby letter of credit was extended to 21 April 1992, it was still the same letter of credit. Clause 1 of the guarantee reads:

> *... the guarantor hereby unconditionally guarantee to and agree with the bank to pay on demand all moneys and discharge all obligations and liabilities whether actual or contingent now or at any time hereafter due owing or incurred to the bank by the applicant arising out of or in connection with the standby letter of credit ...*

98 And cl 2 reads:

> *This guarantee shall continue in effect until all sums whatsoever payable by the applicant have been finally paid in full under the standby letter of credit.*

99 On a natural construction of the guarantee it is a continuing guarantee. It remains in full force and effect after 7 April 1992 and covers the call made on the bank under the standby letter of credit after 7 April 1992.

100 The learned judge held that the bank was estopped by convention from claiming on the guarantee because it was the common understanding of the parties that the guarantee was only supposed to last for a week. The judge relied on the following passage of the judgment of Lord Denning MR in ***Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*** [1982] QB 84, at p 121:

> *There are many cases to show that a course of dealing may give rise to legal obligations ... If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts*

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> *and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract.*

101 The learned judge also cited a passage from ***Spencer Bower & Turner on Estoppel by Representation*** (3rd Ed, 1977) at p 157 which was adopted by the other two members of the Court of Appeal in that case:

> *When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the state of facts so assumed.*

102 In that case, a company guaranteed a loan to be given by a bank to one of the company`s subsidiaries. The loan was in fact made by a subsidiary of the bank to circumvent some banking restrictions. However the guarantee was phrased in such a way so that the guarantee only applied to a loan made by the bank rather than its subsidiary. The court held that the company was estopped from denying their liability under the guarantee because throughout the negotiations the company and the bank proceeded along the basis that the guarantee was to be effective as between the bank and the company. It was the understanding between the parties that the company would have to pay on the guarantee should its subsidiary fail to pay back the loan.

103 Reverting to the present case, the learned judge said:

> *I think in the instant case there was certainly a sufficient course of dealing on the basis and assumption that each guarantee was restricted to each extension. Each extension was in effect treated as a new and separate letter of credit for which a separate guarantee was, or separate guarantees were, required. It is my view, therefore, that Malayan Banking is estopped from relying on the continuing guarantee provision of cl 2, alone or read with cl 1.*

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104 With respect, we are unable to agree with this finding. It is true that it was unnecessary for the bank to ask for a new guarantee every time Patrick Tan and Rose Hwang asked for a further extension of the standby letter of credit, but it is quite another thing to say that such a request amounted to a course of dealing which shows that the common assumption of the parties was that each guarantee was restricted to each extension. There was no evidence to show that there was such a course of dealing. There was really no course of dealing - certainly none between Tan Sr and the bank - which showed that the parties` common intention was that each guarantee was restricted to each extension of the standby letter of credit. In fact, there was no communication between the Bank and Tan Sr at all.

105 In our judgment, the guarantee executed on 31 March 1992 by Tan Sr was a continuing guarantee and the bank was not estopped from calling on the guarantee even though Bank Buruh called on the standby letter of credit after 7 April 1992. It is unnecessary for us to decide whether Michael Khoo had authority to confirm on 8 April 1992 that the guarantee executed by Tan Sr continued to subsist.

106 **Undue influence**

107 It is part of the case submitted on behalf of Tan Sr that Patrick Tan exercised undue influence on Tan Sr as a result of which the latter signed the guarantee, and the bank had actual or constructive notice of such undue influence.

108 The learned judge held that there was no presumption of undue influence in the present case. He said that he did not accept that any presumption could arise merely by virtue of the father and son relationship in this case. Counsel for Tan Sr relied on the case of ***Avon Finance Co Ltd v Bridger & Anor*** [1985] 2

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All ER 281. There, an elderly couple purchased a house for their retirement and left everything to their son to make arrangements for the purchase. The purchase price was paid partly by their own savings, partly by a loan from a building society secured by a mortgage and partly by funds provided by the son. However, in providing the funds the son, unknown to the parents, arranged for a bridging loan, and the purchase was completed. Subsequently he obtained a loan from the plaintiffs to pay off the bridging loan and this loan was secured by a charge on the property. The son undertook to the plaintiffs to procure the execution of the charge by his parents. The charge was accordingly executed by them. About one year later, the payments of this loan fell into arrears and the plaintiffs took proceedings against the couple seeking to recover the loan. The Court of Appeal held there was undue influence exerted by the son on his parents and the plaintiffs had constructive notice of such undue influence and affirmed the lower court`s decision dismissing the plaintiffs` claim. Brandon LJ said, at p 287:

> *They [the plaintiffs] chose to appoint the son, a young accountant in the prime of life, to procure this contract from his parents, both of whom were old-age pensioners, much less well educated than he was. The person whom they chose to appoint, being a son, could be expected to have some influence over his elderly parents, and that is something of which the plaintiffs could or should have been aware. In fact, the son was fraudulent. He deceived his parents, and by his deception induced them to enter into this transaction. We have those two matters, the procurement of the security by the son and the relationship between the son and his elderly parents of different educational attainment. Finally we have the third factor of the absence of any independent advice.*

109 In our opinion, each particular father and son relationship must be looked at to see whether a presumption of undue influence would arise. In the present case, Tan Sr was an experienced businessman and knew the nature of the guarantee and the legal consequences of signing it. As the learned judge found, Tan Sr is a man `well seasoned in the ways of the business world` and

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had `a mind of his own about his own financial affairs`. He signed the guarantee to help his son. On the first occasion when he was asked by his son to give a guarantee, he refused. Only on the second occasion did he succumb to his son`s persuasion. We find that no presumption of undue influence would arise in this particular father and son relationship and there was no evidence of actual undue influence. The circumstances in which Tan Sr executed the guarantee showed that he was not under any influence of his son and that he exercised his judgment independently.

110 **Misrepresentation**

111 The learned judge did not make a specific finding as to whether there was actually a misrepresentation made by Patrick Tan to his father. He said that in order to make the bank responsible for Patrick Tan`s alleged misrepresentation, it was necessary for Tan Sr to show either that Patrick Tan was the bank`s agent or that the bank had actual or constructive notice of Patrick Tan`s misrepresentation. He held that Patrick Tan was not the bank`s agent and the bank had no actual or constructive notice of any misrepresentation. Hence, the learned judge rejected the defence of misrepresentation. We agree entirely with the learned judge`s conclusion on this point.

112 Clearly, there was no evidence to show that the bank had any actual notice of any misrepresentation. As for constructive notice, the bank were not put on enquiry as to any possible wrongdoing by Patrick Tan. Counsel for Tan Sr argued that, since the bank knew of the father and son relationship and of the underlying risk of the son exploiting the emotional involvement and trust of his father, the bank should have advised Tan Sr of the risk involved and also should have told him to seek independent legal advice. We are unable to accept this submission. As we have said, Tan Sr was a businessman and knew the nature of

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the guarantee and the consequences of signing it. Given his business experience, he would have obtained independent legal advice had he wished to do so. He was not dependent on Patrick Tan. This is certainly not a case where the bank should be put on enquiry as to any possible wrongdoing by Patrick Tan.

113 This case is clearly distinguishable from ***Barclays Bank plc v O`Brien & Anor*** [1994] A C 180 which was relied upon by counsel. There, the wife jointly with the husband executed a second charge of the matrimonial property in favour of the bank to secure the liability of a company, in which the husband had an interest. The wife executed the document at the branch of the bank, where no explanation was given to her as to the effect of the document and no one suggested to her to take independent legal advice. The trial judge found that the husband had falsely represented to her that her liability under the charge was limited to o60,000. But he held that there was no evidence that in deceiving the wife the husband was acting on behalf of the bank and accordingly the bank was not responsible for his misrepresentation. The Court of Appeal allowed the appeal holding that the charge was not enforceable against her save to the extent of o60,000. On further appeal, the House of Lords dismissed the appeal. Lord Browne-Wilkinson who delivered the main speech of the House said, at p 195:

> *A wife who has been induced to stand as a security for her husband`s debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (eg against a creditor) if either the husband was acting as the third party`s agent or the third party had actual or constructive notice of the facts giving rise to her equity. ... The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife`s equity to set aside the transaction.*

114 Reverting to the facts, his Lordship held that the bank should have been put on enquiry as to the circumstances in which the wife had agreed to execute

the charge, and the branch manager before whom she executed the charge should have explained to her her potential liability under the security document and should also have recommended her to take independent legal advice. As the bank had failed to take these steps, it was fixed with constructive notice of the misrepresentation made by the husband to the wife.

115 The relationship between Tan Sr and Patrick Tan in this case is not analogous or comparable to that between the husband and wife in O`Brien. First, it is clear on the evidence that Patrick Tan was not in a position to influence his father. As the evidence shows, Patrick Tan could not persuade his father to sign a guarantee on the first occasion when the standby letter of credit was extended. Secondly, Tan Sr himself was a businessman who must be aware of the consequences of such a transaction. It is therefore unnecessary to decide whether Patrick Tan made any misrepresentation, because even if he did, the bank were not responsible for it.

116 **Conclusion**

117 For the reasons given, we allow the bank`s appeal in CA 89/96. We set aside the order below and enter judgment for the bank against the respondents in the sum of $1,636,252.25 together with interest as claimed to the date hereof. We award costs to the bank here and below, and the deposit in court as security for costs is to be refunded to the bank.

118 It follows that Rose Hwang`s appeal in CA 90/96 must fail and is dismissed. There was hardly any argument on this appeal and we make no order as to costs. However, the deposit in court as security for costs in this appeal is to be paid to the bank or their solicitors to account of their costs in CA 89/96.

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119 ***Appeal allowed; first respondent`s appeal dismissed*** .

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Ng Kai Ming and Janice Wu (PK Wong & Advani) for the appellants
JB Jeyaretnam (JB Jeyaretnam & Co) for the first and second respondents
Alvin Yeo and Sim Bock Eng (Wong Partnership) for the third respondent

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