# Citibank NA v Lim Soo Peng and Another
# [2004] SGHC 266

**Case Number** : Suit 1261/2003, RA 151/2004

**Decision Date** : 30 November 2004

**Tribunal/Court** : High Court

**Coram** : Lai Siu Chiu J

**Counsel Name(s)** : Hri Kumar and Shivani Retnam (Drew and Napier LLC) for plaintiff; Harry Elias SC and Josephine Choo (Harry Elias Partnership) for second defendant

**Parties** : Citibank NA — Lim Soo Peng; Ee Tai Ting

*Civil Procedure – Summary judgment – Whether triable issues raised – Whether other reason for trial – Whether order granting conditional leave to defend should be affirmed – Amount of security to be furnished by defendant*

*Contract – Duress – Economic – Whether economic duress established*

*Contract – Undue influence – Whether undue influence presumed – Whether actual undue influence established*

30 November 2004

**Lai Siu Chiu J:**

**Introduction**

1 Citibank NA, the plaintiff, applied by way of Summons in Chambers No 1808 of 2004 ("the O 14 application") for summary judgment against Ee Tai Ting, the second defendant, on its claim of $12,643,654.22 ("the plaintiff's claim").

2 The O 14 application came up for hearing on 25 May 2004 before an assistant registrar. She granted conditional leave to the second defendant to defend the claim provided the second defendant furnished a banker's guarantee for the plaintiff's claim within 21 days (*viz* by 15 June 2004). The second defendant appealed against the assistant registrar's order in Registrar's Appeal No 151 of 2004 ("the Appeal") and prayed for the following orders:

(a) that the second defendant be granted unconditional leave to defend the plaintiff's claim;

(b) alternatively, that the second defendant be granted conditional leave to defend the plaintiff's claim by the court setting aside the conditions imposed by the assistant registrar and imposing other appropriate conditions, including, but not limited to, reviewing the security to be provided by the second defendant and the time within which the security was to be furnished by the second defendant.

3 I dismissed the Appeal *vis-à-vis* the prayer for unconditional leave to defend the plaintiff's claim, affirmed the decision of the assistant registrar on conditional leave to defend, but varied her order on security. I granted, under prayer (b) of the Appeal, a reduction of the security to be furnished by the second defendant from $12,643,654.22 to 25% thereof amounting to $3,160,913.56 ($12,643,654.22 x 25%).

4 The second defendant is dissatisfied with my orders and has now appealed against my

decision (in Civil Appeal No 91 of 2004).

**The background**

5 According to the pleadings and affidavits filed for the hearing below, the plaintiff had, between 1990 and 1995, extended credit facilities ("the facilities") from time to time to two companies, *viz* Fook Huat Tong Kee Pte Ltd ("FHTK") and Fook Yong Pte Ltd ("FY"). Both FHTK and FY are wholly owned subsidiaries of a company which was listed on the Stock Exchange of Singapore in January 1977, called FHTK Holdings Ltd ("the holding company").

6 The facilities were secured by various guarantees ("the personal guarantees") furnished by the second defendant and Lim Soo Peng, the first defendant, on a joint and several basis in favour of the plaintiff. The holding company was the corporate guarantor for the facilities.

7 In or about 1991, FHTK and FY incurred substantial debts with the plaintiff and various other Singapore banks ("the creditor banks") and experienced severe financial difficulties. Apart from the plaintiff, the five other creditor banks were owed in excess of $150m.

8 As a result, on or about 24 June 1999, the holding company entered into a standstill agreement ("the Standstill Agreement") with the creditor banks to facilitate the development of a debt restructuring plan in respect of its debts and those of its two subsidiaries (hereinafter referred to as "the FHTK debts").

9 As at 20 October 2000, the moneys owed to the plaintiff alone stood at $47,716,216.59 ("the Debt"). Pursuant to the personal guarantees they had given to the plaintiff, the first and second defendants were liable to the plaintiff for the Debt; so too was the holding company. None of the other creditor banks, apart from United Overseas Bank ("UOB"), held personal guarantees from the defendants.

10 On 23 October 2000, the holding company entered into a restructuring agreement ("the Restructuring Agreement") with the creditor banks in respect of the FHTK debts. Under the Restructuring Agreement, the creditor banks (including the plaintiff) accepted a debt to equity conversion. The holding company would issue ten new shares to each creditor bank for every $3.20 of the FHTK debts. FHTK and FY would in turn issue new shares in their capital to the holding company. The issue of shares in the holding company ("the Shares") would constitute a full and final discharge to the creditor banks of the FHTK debts, subject to the terms and conditions set out in the Restructuring Agreement.

11 The Restructuring Agreement was subsequently amended and supplemented by two agreements both dated 31 July 2001, one of which was an extension and amendment agreement, and the other a supplemental agreement to the extension and amendment agreement ("the Amendment Agreements").

12 On 30 August 2001, a share escrow agency agreement ("the Escrow Agreement") was executed by the holding company, FHTK, FY, the creditor banks and Arthur Andersen (S) Pte Ltd ("the Escrow Agent"). Pursuant to the Escrow Agreement, the holding company appointed the Escrow Agent to discharge, perform and carry out all the functions, duties and obligations of the Escrow Agent under the Restructuring Agreement and the Amendment Agreements.

13 The Shares issued to the creditor banks were held on trust for the creditor banks by the Escrow Agent and were released to the creditor banks by the Escrow Agent in the following manner:

(a) 70% in yearly tranches spread over four years;

(b) 30% in equal monthly tranches spread over 36 months.

14 In consideration of the plaintiff agreeing to enter into the Restructuring Agreement, the defendants entered into a deed of irrevocable undertaking with the plaintiff dated 2 October 2000 ("the deed of undertaking"). The deed of undertaking was subsequently amended by a supplemental deed dated 31 July 2001 ("the supplemental deed").

15 The material terms of the deed of undertaking as amended by the supplemental deed are the following:

Clause 3.1

Subject to Clause 3.2, the [defendants] undertake to pay the [plaintiff], within 30 days after the end of each half-year of the first 5 years after the issue of [the Shares], the amount as represented by: –

(B-N)

where:-

B = (a) at the end of each half-year in the 1st year, the amount which is the number of Sold Shares (defined below) multiplied by S$0.33;

(b) at the end of each half-year in the 2nd year, the amount which is the number of Sold Shares (defined below) multiplied by S$0.35;

(c) at the end of each half-year in the 3rd year, the amount which is the number of Sold Shares (defined below) multiplied by S$0.37;

(d) at the end of each half-year in the 4th year, the amount which is the number of Sold Shares (defined below) multiplied by S$0.38;

(e) at the end of each half-year in the 5th year, the amount which is the number of Sold Shares (defined below) multiplied by S$0.40.

(each such amount deemed to include interest on the amount of the Debt converted into [the Shares] and held by the [plaintiff] during that period);

N = the net sale proceeds from the sale or placement of [the Shares] by the [plaintiff] (including without limitation any [shares] sold to the [defendants] or any of the other shareholders of [FHTK] pursuant to this Undertaking or the Scheme) during the preceding half-year in the relevant year (Sold Shares).

Clause 3.4

During the first 5 years after the issue of [the Shares], the [plaintiff] will also promptly notify the [defendants] of the price of the Sold Shares and, where practicable, the person to whom any of [the Shares] are sold or placed out.

16 The Shares were issued to the creditor banks on or about 28 September 2001 and deposited with the Escrow Agent to be periodically released in accordance with [13] above.

17 Between 28 May 2003 and 18 September 2003, the plaintiff sold 54,103,318 of the Shares, netting proceeds of $6,292,507.08. For each sale, the plaintiff gave written notice and particulars thereof to both defendants, pursuant to cl 3.4 of the deed of undertaking.

18 Based on the formula in cl 3.1 of the deed of undertaking, the defendants were obliged to pay the plaintiff's claim computed as follows:

where B = $54,103,318 x $0.35 = $18,936,161.30

and N = $6,292,507.08

B – N = $12,643,654.22

19 The defendants failed to pay the plaintiff's claim with the result that the plaintiff commenced this action on 30 December 2003. The second defendant filed his defence to the action on 30 January 2004. Separately, the plaintiff applied and obtained summary judgment from the deputy registrar against the first defendant on 2 April 2004. The first defendant filed a Registrar's Appeal against the decision of the deputy registrar, but on 5 May 2004, he withdrew his appeal.

**The proceedings below**

20 The second defendant resisted the O 14 application by his show cause affidavit filed on 24 April 2004 pursuant to O 14 r 2(4) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules"). He deposed, *inter alia*:

(a) He was not conversant in English and only had three years of primary school education in a Chinese school. His staff had to translate English letters and documents for him in order for him to understand their contents.

(b) He started FHTK as a sole proprietorship in 1965 (when he was 28 years old), before converting it into a limited company in or about 1977 with him holding 40% of the issued shares.

(c) After FHTK was incorporated, he became FHTK's managing director while the first defendant (who joined the business in 1977) was a director who became the chairman and then executive chairman in 1987.

(d) Since the commencement of their business relationship, there was a clear division of functions between him and the first defendant. The first defendant dealt with the financial aspects of the business whilst the second defendant took care of the operational aspects. This necessitated frequent travel to China, North America and South America to oversee the factories and farms where the fruits sold and/or distributed by FHTK and the holding company were produced.

(e) The first defendant dealt and corresponded with FHTK's bankers, including the creditor banks and the plaintiff, to the exclusion of the second defendant, due partly to the second defendant's inability to communicate in English with the bankers. The first defendant was in the habit of requesting banks and even lawyers to address all letters and documents to him. The first defendant appointed lawyers without consulting the second defendant. The first defendant

signed the Standstill Agreement on behalf of the three companies. Unless the first defendant chose to update him, the second defendant had no knowledge of banking matters relating to the three companies.

(f) The plaintiff dealt exclusively with the first defendant throughout the restructuring exercise leading to the Restructuring Agreement. The second defendant did not have a personal banking relationship with the plaintiff.

21 As for the deed of undertaking and supplemental deed (hereinafter collectively referred to as "the Deeds"), the second defendant asserted there were unusual circumstances in which the Deeds were signed and they had to be read in the context of the Standstill Agreement, the Restructuring Agreement, as well as the Amendment Agreements dated 31 July 2001 (hereinafter collectively referred to as "the 31 July Agreements"). In particular, the second defendant relied on cl 5 of the Standstill Agreement, the relevant extracts of which state:

**Restrictions during the Standstill Period**

During the Standstill Period … no Bank shall:

(a) ... make any demand for, or accept payment or discharge of, any indebtedness or liability to it of any Group company save in respect of any unpaid interest, commission or other similar charges;

...

(g) except for the benefit of all Banks pursuant to clause 6.1(h) seek or take any security, cash collateral, cash cover, guarantee or indemnity of whatever nature in respect of any Existing Facilities, notwithstanding the terms of any Existing Documentation;

...

22 The second defendant deposed that the Standstill Agreement was subsequently extended implicitly until 19 March 2000 after its expiry on 20 December 1999. Even after 19 March 2000, all parties continued to abide by the terms of the Standstill Agreement and continued negotiations on the restructuring exercise. None of the creditor banks commenced any action to recover the indebtedness.

23 The second defendant pointed out that under the Restructuring Agreement, the FHTK debts which would be cancelled out were referred to as "Aggregate Indebtedness". The definition of "Aggregate Indebtedness" included personal guarantors' indebtedness, *viz* the FHTK debts as guaranteed by each of the personal guarantors in favour of several of the creditor banks.

24 The second defendant contended that the plaintiff's claim did not arise from the personal guarantees but from the Deeds. However, the Deeds were in breach of the terms in the 31 July Agreements. This was because the Deeds put the plaintiff in the position of a preferred creditor. The plaintiff had also not disclosed to the creditor banks that the Deeds put it in a more advantageous position. He accused the plaintiff of entering into the deed of undertaking surreptitiously to the blissful ignorance of the other creditor banks.

25 The second defendant claimed that other creditor banks (*viz* OCBC, DBS, Standard Chartered) all recognised that when the holding company became public, any personal guarantees

would be and were released, save for the plaintiff who chose to sue him thereon. He was unaware that the personal guarantees he gave to the plaintiff were not discharged until June 2000, when the first defendant showed him the three letters dated 15 June 2000 from the plaintiff demanding payment of sums due under three of the personal guarantees. One demand, addressed to the two defendants and one Wong Fai Chi, was for repayment of $46,907,012.86. The second demand, addressed to the defendants and one Wong Lee Bin, was for $13.61m whilst the third demand, addressed only to both defendants, was for $46,907,012.86. All three letters of demand pertained to credit facilities granted to FHTK.

26 The second defendant accused the plaintiff of trying to get the best of two worlds by the deed of undertaking as well as the Restructuring Agreement. The plaintiff effectively held him to ransom by its demands – he was left to choose between agreeing to pay the plaintiff a sum in excess of $45m (which he did not have) or risk having the three companies (which he had built up painstakingly over the years since 1965) liquidated if he refused to pay.

27 The second defendant pointed out that the plaintiff's solicitors had drafted the 31 July Agreements. Neither the second defendant nor the three companies nor the creditor banks were separately represented.

28 The second defendant claimed the first defendant did not show him any drafts of any deed. It was only on the evening of 2 October 2000 that the first defendant telephoned the second defendant and told him he had to sign a document to "complete" the restructuring. Although he told the first defendant he was leaving at 6.00am on 3 October 2000 for China, the first defendant instructed the second defendant to go to the office of the plaintiff's solicitors at City House to sign the documents that night.

29 Accordingly, the second defendant went to City House on 2 October 2000 where he waited from 10.00pm (joined by the first defendant who arrived later) until 2.00am before he finally signed the documents. He recalled that a representative of the plaintiff, one AKM Ismail, was also present at City House that night. The second defendant cited various factors in relation to his signing of the Restructuring Agreement for his defence that the conduct of the first defendant and the plaintiff was unconscionable. Those factors included those stated at [20 (a)] and [20 (e)]. He alleged the plaintiff had taken unfair advantage of him and the creditor banks throughout the restructuring exercise.

30 The second defendant said he was away in China for most of October 2000, and upon his return to Singapore, he was kept busy with the restructuring exercise which included attending numerous meetings with the creditor banks. A signing ceremony followed on 23 October 2000 for the Restructuring Agreement.

31 As for the 31 July Agreements, the second defendant claimed that there was no discussion with the first defendant on the terms. He asserted that M/s Tan Rajah and Cheah ("TRC"), who acted for both defendants, was unaware of the supplemental deed. In any case, TRC only corresponded and/or liaised with the first defendant, as the firm's letters were addressed to the second defendant care of the first defendant's address at 17 Upper Circular Road #05-055 Juta Building.

32 In relation to the plaintiff's sale of the Shares, the second defendant alleged that the plaintiff failed to exercise reasonable care.

**The defences**

33 In summary, the four defences, which the second defendant contended raised triable issues,

are as follows:

(a) The Deeds were procured in bad faith by the plaintiff as it sought to steal a march over the other creditor banks;

(b) The Deeds were procured by undue influence exerted over the second defendant by the first defendant;

(c) The Deeds constituted an unconscionable bargain for the second defendant in that had the plaintiff proceeded with the restructuring exercise, the second defendant's liability under the personal guarantees would have been completely extinguished under the Restructuring Agreement and the 31 July Agreements;

(d) The Deeds were executed by the second defendant under economic duress.

**The decision**

34 I considered the above defences, the submissions put forth on the second defendant's behalf, the affidavits filed by the plaintiff as well as the submissions made on the plaintiff's behalf. Besides the requisite affidavit under O 14 r 2(1) of the Rules to support the O 14 application, the plaintiff had filed three other affidavits to counter the allegations and arguments raised in the second defendant's show cause affidavit. Two affidavits were filed by the plaintiff's legal counsel for Singapore, Balakrishnan Jayaprakash ("BJ"), one affidavit by Florence Choo ("Choo"), a Vice-President of the plaintiff, and one affidavit by Wico Yeo ("Yeo"), the lawyer from the plaintiff's firm of solicitors who drafted the Deeds and dealt with Sayana Baratham ("Baratham"), his counterpart from TRC who represented the two defendants in their execution of the Deeds.

35 I dismissed the Appeal *vis-à-vis* the granting of unconditional leave to defend as I was of the view that the second defendant's defence was at best shadowy. I therefore affirmed the order made below granting conditional leave to defend but moderated the security to be furnished by the second defendant to allow his defence to stand and for the plaintiff's claim to proceed to an early trial.

36 I shall now give the reasons for my decision, by addressing each of the defences put forward by the second defendant. At the same time, I will address, where necessary, the plaintiff's submissions on the defences and/or the second defendant's show cause affidavit on the O 14 application.

***The plaintiff's bad faith***

37 The second defendant had alleged that the plaintiff's claim in this action amounted to a breach of the Standstill Agreement. He had relied on cl 5 of the Standstill Agreement set out earlier at [21]. The plaintiff, however, relied on another clause in the Standstill Agreement to refute the second defendant's contention. Earlier at [9], I had alluded to the fact that only the plaintiff and UOB held personal guarantees from the first and second defendants, not the other creditor banks. This fact was specifically recognised in the Restructuring Agreement itself, as cl 3(E) provided:

> The issuance of the Conversion Ordinary Shares pursuant to Clause (A) above with respect to all the Aggregate Indebtedness shall constitute a full and complete discharge of all claims and demands of the Bank against FHTK, [FY], [the holding company] and/or the Personal Guarantors with respect to the FHTK Indebtedness and to the extent that the said indebtedness is guaranteed by [the holding company], the corresponding amount of the [holding company's]

Indebtedness and by the Personal Guarantors, the corresponding amount of the Personal Guarantors Indebtedness owed to such Bank under all Finance Documents, provided always that the discharge herein shall not discharge the Personal Guarantors from their obligations and liabilities under the Undertakings.

38 "Undertakings" in cl 3(E) was defined in the interpretation clause of the Standstill Agreement under cl 1(A) as:

> … the undertakings entered into between the Personal Guarantors and Citibank NA before the date hereof and the undertakings entered into between the Personal Guarantors and United Overseas Bank Limited before the date hereof, such personal undertakings relating to, inter alia, arrangements relating to the Conversion Ordinary Shares to be allocated to Citibank NA and United Overseas Bank Limited under this Agreement.

39 In the opening paragraph of the Standstill Agreement, the first and second defendants were referred to as the "Personal Guarantors" and each as "Personal Guarantor". Clause 3(E), read with the definition of "Personal Guarantors" in cl 1(A) of the Standstill Agreement, also effectively demolished the second defendant's argument that the plaintiff had entered into the deed of undertaking surreptitiously without the other creditor banks' knowledge. Neither could I find any clause in the 31 July Agreements nor any other evidence to support the second defendant's contention that he and the first defendant were to be released by the creditor banks from the personal guarantees upon the listing of the holding company.

40 Similarly, as was pointed out by the plaintiff in its submissions, there was no evidence to substantiate the second defendant's claim that the Standstill Agreement which expired on 20 December 1999 was extended *with the implicit consent of all the parties*. The plaintiff asserted that there was no such extension. Even if the Standstill Agreement applied to prohibit the plaintiff from taking action against the two defendants on the personal guarantees, it was pointed out to the court that the plaintiff did not breach the same, as it sent letters of demand six months *after* the expiry of the Standstill Agreement, *viz* on 15 June 2000.

***Undue influence by the first defendant over the second defendant***

41 I noted that the allegation of undue influence was only raised by the second defendant after he had been sued. Paragraph 57 of the second defendant's submissions reads:

> [I]t is not unreasonable to conclude that undue influence was exercised over the 2nd Defendant by the 1st Defendant and the [plaintiff] did have knowledge or ought reasonably to have knowledge that there was undue influence exercised over the 2nd Defendant.

42 The second defendant had relied on Lord Browne-Wilkinson's judgment in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 189–190 for the two classes of undue influence (his Lordship had adopted in turn the classification laid down by the Court of Appeal in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 953):

> *Class 1: Actual undue influence*
>
> In these cases, it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> *Class 2: Presumed undue influence*

In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In Class 2 cases therefore there is no need to produce evidence that actual undue influence was exercised in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, *viz*:

*Class 2(A)*

Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

*Class 2(B)*

Even if there is no relationship falling within Class 2(A), if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a Class 2(B) case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.

43 Counsel submitted that the first defendant's undue influence over the second defendant was presumed and came under class 2(B), whereas the plaintiff submitted that the second defendant must prove actual undue influence under class 1 and had failed to do so.

44 I rejected the second defendant's submission that this was a case of presumed influence. In order to succeed on this defence, he must prove actual undue influence. There is no presumption at law that a relationship of fellow directors of a company means one director exercises influence over another director or his fellow director(s). I noted from the second defendant's affidavit that it was a conscious decision on his part to concentrate on the fruit production and distribution operations of the holding company and/or its subsidiaries. He was content to leave it to the first defendant (who is nine years older than him) to take charge of financial matters. The second defendant was a "hands-on" managing director whilst the first defendant assumed the role of chief financial officer ("CFO"). The illogic in the second defendant's argument is best illustrated if the scenario was changed, *viz* the first defendant was not in charge of financial matters but it was a complete stranger who was the CFO discharging that function. Adopting the second defendant's argument, it would mean that he would similarly repose faith and complete trust in the CFO to deal with bankers because he (the second defendant) was not literate in English and had only a primary three education in the Chinese language. Would the second defendant still succeed in his defence of undue influence? I think not.

45 The second defendant chose to ignore or omitted to consider the fact that he was legally represented. He only mentioned in passing that TRC acted for him (but did not name the solicitor). He pointed out, as another instance of the first defendant's dominance over him, that he had no say in TRC's appointment, the decision being made solely by the first defendant.

46 I have two observations to make in this connection. First, Yeo, the plaintiff's solicitor who drafted the Deeds, had deposed in his affidavit that drafts of the deed of undertaking had been submitted to Baratham of TRC (who acted for the two defendants) before they met on 2 October 2000 to finalise the terms after which the documents were signed in the early hours of 3 October 2000. Both defendants attended the meeting. The delay in preparing the engrossed documents (incorporating the amendments discussed and agreed after negotiations) was due to a computer glitch on the part of Yeo's assistant.

47 Similarly, before the supplemental deed was signed, Yeo prepared and forwarded revised drafts on 13 June 2001 to both defendants and inquired who would act as their legal counsel. On 25 July 2001, TRC replied to say they acted for both defendants. Thereafter, Yeo liaised with TRC's Baratham on the document until the supplemental deed was signed on 31 July 2001. Consequently, the second defendant could not complain of a lack of independent legal advice.

48 I had earlier at [31] referred to the second defendant's assertion[1] that TRC did not know the supplemental deed was signed on 31 July 2001. He had, in support of the statement, exhibited[2] TRC's letter dated 1 August 2001 addressed to him and the first defendant but forwarded to the first defendant's office. I could not fathom how the second defendant arrived at his conclusion. The fax dated 1 August 2001 sent by Baratham from TRC and addressed to the two defendants was a one-page transmission with the heading Fook Huat Tong Kee Pte Ltd, signed by TRC without any text or contents. In any case, if this allegation was to have any credence, Baratham, and not the second defendant, should be the person complaining. As was noted by the plaintiff in its submissions, the second defendant made no mention whatsoever of Baratham in his affidavit.

49 It bears mentioning at this juncture that, once the second defendant had legal representation, it did not behove the plaintiff at law to ensure that the second defendant did receive independent legal advice (see *Bank of Baroda v Shah* [1988] 3 All ER 24). Neither was the plaintiff under a duty to ensure the second defendant was separately advised from the first defendant. I would have thought that it was for the second defendant himself to raise the issue with TRC, if he felt uncomfortable in having Baratham represent him as well as the first defendant.

50 As for the second defendant's professed lack of literacy in the English language, counsel for the plaintiff referred the court to a transcript of the judgment in *Barclays Bank plc v Schwartz* [1995] TLR 452 where the English Court of Appeal (Millett LJ) held:

> Illiteracy and unfamiliarity with the English language are quite different. An illiterate knows that he cannot read; a man who is unfamiliar with English is aware of this fact. If he signs a document which he does not understand he has only himself to blame. A man who signs a document in a language with which he is insufficiently familiar to understand can be in no better position than the man who signs a document which he does not read because he is too busy. Accordingly, mental incapacity and drunkenness provide defences to a claim in contract if the other party was aware of the defendant's condition. But illiteracy and unfamiliarity with the English language do not.

The fact that he was not literate in the English language did not mean (as he seemed to suggest) that the second defendant was a novice in business. Indeed, for someone with only three years of primary school education, the 66-year-old man has done remarkably well in the 38 years since he first started the sole proprietorship of Fook Huat Tong Kee in 1965. Moreover, according to the third affidavit filed by BJ,[3] the second defendant holds directorships in other Singapore companies outside the FHTK group.

***The Deeds constituted an unconscionable bargain***

51 This defence was obviously unsustainable in the light of cl 3(E) of the Standstill Agreement and [37] to [39] above. In her affidavit[4] filed on the plaintiff's behalf, Choo had deposed that the plaintiff, like UOB, was not prepared to give up its benefit of the personal guarantees which it had obtained from the two defendants. She said it was the defendants who then offered to undertake to pay the plaintiff the difference between the guaranteed and sale prices of the Shares (issued to the plaintiff) in a letter dated 22 July 2000 signed by both defendants, which letter enclosed a term sheet of the proposed undertaking.[5] In his affidavit, the second defendant[6] claimed that he did not recall the first defendant discussing the term sheet with him. He did not see the document nor did he know who had prepared it. The second defendant was asked by the first defendant to sign the letter dated 22 July 2000, and he signed it.

52 In the light of Millett LJ's comments in *Barclays Bank Plc v Schwartz* (see [50] *supra*), the second defendant only has himself to blame if he was foolish enough to co-sign the letter dated 22 July 2000 without knowing or finding out the contents. There was nothing unconscionable about the Deeds. The plaintiff had every right at law to call on the personal guarantees furnished by the two defendants (which signing the second defendant has not complained). If the defendants desired the plaintiff to give up those rights, the plaintiff was entitled to insist on obtaining equivalent or acceptable undertakings as substitutes; they came in the form of the Deeds.

***The Deeds were executed by the second defendant under economic duress***

53 I accepted the plaintiff's submission that the use of commercial pressure did not constitute economic duress unless it amounted to a coercion of the complainant's will which vitiated his consent. I can do no better than to refer to the cases cited by counsel for the second defendant where this proposition of law was enunciated by our Court of Appeal in *Third World Development Ltd v Atang Latief* [1990] SLR 20, adopting at 27, [19] what Lord Scarman said in the Privy Council in *Pao On v Lau Yiu Long* [1980] AC 614 at 635–636.

54 The second defendant's submissions then set out the Court of Appeal's criteria for determining economic duress:

(a) whether the defendant did or did not protest;

(b) whether, at the time of coercion, the defendant had an alternative course open to him such as an adequate legal remedy;

(c) whether the defendant was independently advised; and

(d) whether after entering into the contract, the defendant took steps to avoid it.

55 Applying the above criteria to the facts of this case, it seemed to me that the second defendant failed on every count. He did not protest until he was sued, he had independent legal advice and he took no steps to avoid executing the Deeds. On criterion (b), it was the reverse. If the second defendant had not been sued on the Deeds, he could and would have been sued on the personal guarantees by the plaintiff. Any pressure put on the second defendant was legitimate. The plaintiff submitted that the Deeds in fact benefited the second defendant as he (and the first defendant) was only required to pay the plaintiff after the Shares issued to the plaintiff were sold, thereby postponing the second defendant's liability.

***Was there some other reason for a trial?***

56 As an alternative argument, counsel submitted that the court should exercise its discretion in the second defendant's favour under O 14 r 3(1) of the Rules and grant unconditional leave to defend, based on the principle enunciated in *Miles v Bull* [1969] 1 QB 258 that *there ought for some other reason to be a trial.*

57 The defendant in that case was a deserted wife who asserted her right to remain in the matrimonial home she occupied, which her husband had contracted to sell to the plaintiff. The plaintiff brought an action against the defendant for possession of the property and for summary judgment. The Master gave the defendant unconditional leave to defend the action. On appeal by the plaintiff, the defendant sought to contend by way of defence to the action that the sale to the plaintiff had been a sham with the object of depriving her of her right, as against her husband, to occupy the property. The plaintiff's appeal was dismissed. Although on the evidence before the court, the defendant had failed to establish that she had an arguable defence to the plaintiff's claim, Megarry J nevertheless held that she had rightly been given leave to defend, based on O 14 r 3(1) of the UK Rules of the Supreme Court 1965. He said (at 265–266):

> Under rules 3 and 4 of the present Order 14, the defendant can obtain leave to defend if (and I read from rule 3(1)) the defendant satisfies the court "that there is an issue or question in dispute which ought to be tried or that ought for some reason to be a trial." These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked.

58 Using the guidelines of Megarry J, I did not see how O 14 r 3(1) could apply to this case. The plaintiff's claim was based on documentation which the second defendant had negotiated through his solicitors, had copies of or was aware of. There was nothing to suggest that the plaintiff's conduct was underhand and required further investigation. Order 14 r 3(1) could not assist the second defendant.

59 However, I was fully aware of the principles in *M V Yorke Motors v Edwards* [1982] 1 All ER 1024 where the House of Lords held (as set out in the headnote):

> It would be a wrongful exercise of discretion to order, as a condition of granting leave to defend an application for summary judgment under RSC Ord 14, the payment of a sum which the defendant would never be able to pay, since that would be tantamount to giving judgment for the plaintiff notwithstanding the court's opinion that there is an issue or dispute which ought to be tried, and that is so even though the court might consider the defence 'shadowy' or doubt the defendant's bona fides. The defendant cannot complain because a financial condition is difficult for him to fulfil; he can complain only when a financial condition is imposed which it is impossible for him to fulfil and that impossibility was known or should have been known to the court by reason of the evidence placed before it. Where the defendant seeks to avoid or limit a financial condition by reason of his own impecuniosity, the onus is on him to put sufficient and proper evidence before the court, and in so doing he should make full and frank disclosure.

60 It was obvious that the second defendant could not come up with the security the court below had ordered covering the full amount of the plaintiff's claim. It was tantamount to giving the

plaintiff judgment. Hearing was then adjourned as counsel for the second defendant wanted to file further affidavits (which he did) to attest to his client's means.

61 At the adjourned hearing, I reduced the security to be furnished by the second defendant to 25% of the plaintiff's claim. I declined the request of the second defendant's counsel that his client should be cross-examined pursuant to O 14 r 4(2)(b) of the Rules, as it was unnecessary. The reduction in the security by 75% took into consideration not only the second defendant's limited means, but also that the amount should not be a derisory figure either, as compared to the plaintiff's claim, as that would be unfair to the plaintiff. I should point out that the plaintiff questioned the second defendant's affidavits attesting to his means, alleging the second defendant had failed to give full and frank disclosure. I was of the view that if push came to shove, it was not impossible for the second defendant to come up with a bank guarantee or equivalent, for $3,160,913.56 and I so ordered.

**Conclusion**

62 I dismissed the second defendant's appeal against conditional leave to defend briefly for the following reasons:

(a) He did not complain of not understanding the seven guarantees (all in English) which he signed between November 1990 and September 1995 in favour of the plaintiff in respect of the liabilities of FHTK. This was strange as the guarantees were the genesis of the deeds and this action.

(b) He made selective references to the Standstill Agreement and other documents where it suited his purpose.

(c) His alleged defences were not substantiated and were in fact effectively discredited by the plaintiff's affidavits.

*Appeal dismissed.*

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[1]In para 69 of his affidavit

[2]In **ETT-6**

[3]Para 51

[4]Para 7

[5]See exhibit FC-1 in Choo's affidavit

[6]See para 58