Susilawati v American Express Bank Ltd
[2007] SGHC 179

Case Number : Suit 305/2006

Decision Date : 18 October 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Siraj Omar, Tandip Singh and Dian Chen (Tan Kok Quan Partnership) for the plaintiff; Francis Xavier, Boey Swee Siang, Dawn Wee and Ho Hua Chyi (Rajah & Tann) for the defendant

Parties : Susilawati — American Express Bank Ltd

Banking – Secrecy – Customer of bank executing charge over account to secure son-in-law's liabilities – Situations where bank could disclose information to guarantor about debtor's liabilities

Civil Procedure – Costs – Whether standard or indemnity costs should be awarded for winning party whose conduct not blameless

Contract – Undue influence – Customer of bank executing charge over account to secure son-in-law's liabilities – Whether presumption of undue influence arising

Equity – Fiduciary relationships – When arising – Customer of bank executing charge over account to secure son-in-law's liabilities – Whether fiduciary relationship arising between bank and customer

18 October 2007 Judgment reserved.

Lai Siu Chiu J:

1 The present suit involves allegations of undue influence and breach of fiduciary duties brought by a customer against a bank for losses allegedly incurred from the execution of a third party charge.

The facts

2 The plaintiff Susilawati is a wealthy Indonesian citizen, married to a prominent Indonesian businessman, one Mr. Gustimego, until his death in April 2002. Her late husband owned an Indonesian conglomerate known as the Gajah Tunggal group which businesses *inter alia* comprised rubber remilling and supply of rubber tyres for vehicles and bicycles, commodities trading, hotels and even the largest private commercial bank in Indonesia known as Bank Dagang Negara Indonesia.

3 The defendant American Express Bank Limited is a limited liability corporation incorporated in the United States of America providing, among other things, private banking services to high net worth individuals in Singapore.

4 The plaintiff had been a customer of the defendant's private banking division since 27 August 1997 when she opened an account ("the Account") with them. On or about 11 February 1998, the plaintiff executed a document entitled "Third Party Liabilities" ("the Charge"), under which the plaintiff granted a charge in favour of the defendant over all monies in the Account to secure the due and punctual discharge of all monies, obligations and liabilities due from her son-in-law, Lim Thian Long ("Tommy"), to the Defendant.

5 Between 1998 and 2006, Tommy incurred substantial debts to the defendant which consisted of losses from foreign exchange transactions which he effected through his account with the defendant, as well as loans made to him by the defendant. By March 2006, Tommy's liabilities to the defendant, including interest, amounted to a staggering sum of about US$17.4 million.

6 As a result of Tommy's inability to discharge his liabilities, the defendant effected the deduction of a sum of US$17,560,390.98 from the Account pursuant to the terms of the Charge, soon after which the plaintiff commenced this action to recover a sum of US$17,500,605 from the defendant.

The pleadings

7 The plaintiff asserted two causes of action against the defendant, namely, (i) that Tommy had a relationship with the plaintiff of such a nature as to give rise to a presumption of undue influence, and that the plaintiff's signature on the Charge had been procured by this undue influence, of which defendant had actual or constructive knowledge, thus rendering the Charge void and unenforceable; and (ii) that the defendant owed fiduciary duties to the plaintiff, which the defendant had breached, resulting in losses suffered by the plaintiff, for which she is entitled to damages.

8 The defendant on the other hand maintained that the plaintiff had executed the Charge in the exercise of her free and independent mind, in the full knowledge that she was pledging the sums in the plaintiff's Account as security to cover Tommy's liabilities. Alternatively, the defendant averred that the plaintiff had affirmed the Charge by continuing to operate and make investments through the Account, thus making it inequitable to set aside the Charge, since the defendant had, in reliance on the plaintiff's acquiescence, acted to its detriment by continuing to make available banking facilities to Tommy. Finally, the defendant denied that it owed the plaintiff any fiduciary duties or (if it did) that those alleged duties were breached.

The plaintiff's case

9 The plaintiff's action can be categorized into two broad heads of claim, namely, undue influence and breach of fiduciary duty, each of which will be dealt with separately.

Undue influence

10 The plaintiff's claim of undue influence was essentially premised on two main allegations. First, at the time of the purported execution of the Charge, the plaintiff had reposed trust and confidence in Tommy, and the transaction was one that "called for an explanation" and was not readily explicable because of her relationship with Tommy. Second, the defendant had actual or constructive notice of those facts and yet failed to advise her adequately prior to the execution of the Charge.

11 Pursuant to the foregoing allegations, the plaintiff painted an unmitigated picture of naivety and dependence as follows. Around mid-1997, the plaintiff had allegedly opened an account with Citibank upon the advice and recommendation of Tommy and had left the subsequent management of the account in his hands because she did not have much experience in dealing with banks. In early 1998, Tommy allegedly told the plaintiff that he was opening an account with the defendant and suggested that she did the same. The plaintiff subsequently did so and authorized Tommy and his wife (her daughter Zina) to transact all transactions under the Account with the exception of withdrawals.

12 Against this backdrop, the plaintiff submitted that the Charge was manifestly disadvantageous to her as she gained absolutely no benefit whatsoever. Instead, she stood to potentially lose all the funds in the Account if Tommy's liabilities were substantial (as turned out to be the case) and he

could not repay them. In addition, the plaintiff denied any recollection of signing the Charge and alleged that the document was never explained to her. In her view, the only plausible explanation for her signature on the document was that the document was one of many that Tommy had asked her to sign following the opening of the Account. She signed the documents in reliance upon Tommy's assurances that they were routine documents necessary for the management of the Account.

13 The plaintiff alleged that the defendant was put on inquiry of this relationship of undue influence and yet failed to take any reasonable steps to ensure that she knew the nature and effect of the document that she was executing.

Breach of fiduciary duty

14 The plaintiff's second cause of action lay in her allegation that the defendant had breached its fiduciary duties to the plaintiff, which she characterized as follows. As the plaintiff's private banker, the defendant agreed and undertook to provide her with a highly personalized level of service, including investment advice tailored to suit her individual needs and requirements, and therefore knew or ought to have known that she relied on the latter to counsel, advise and inform her. The defendant had a duty not to place itself in situations where its own interests were contrary to and otherwise in conflict with those of the plaintiff, but nevertheless failed to do so.

15 The defendant's alleged breach of fiduciary duties therefore stemmed from the two-fold failure to ensure that the plaintiff was fully aware of and had understood the significance of the Charge when she purportedly executed the document and to inform the plaintiff that the defendant had placed itself in a position where her interest in minimising any potential liability to herself was in conflict with the defendant's own interests.

16 By continuing to derive income from Tommy's continued use of the extended trading facilities and continuing to keep the Charge in force so that the plaintiff's funds in the Account could be used as security for any liabilities incurred by Tommy under those facilities, the defendant had breached its fiduciary duties to the plaintiff resulting in losses for which she was entitled to claim damages.

The defendant's case

Undue influence

17 In response to the flurry of allegations set out above, the defendant argued that the plaintiff was a high net worth individual who independently made her own financial decisions and was the dominant person in her relationship with Tommy.

18 In addition, the defendant asserted that the plaintiff was fully aware of the purport and consequences of the Charge which she executed, as the terms and consequences of the Charge had been explained to her by Lim Chee Kong ("LCK") (DW1), her former relationship manager. In the same vein, the defendant suggested that the plaintiff had executed the Charge because she intended to assist Tommy financially, as he had been pleading with her for financial help for some time.

19 The defendant also denied that it had actual or constructive notice of any such alleged undue influence, and in any event had, by explaining the terms and effect of the Charge *i.e.* that the monies in the Account would be pledged to cover Tommy's liabilities to the defendant, taken reasonable steps to satisfy itself that the proper consent of the surety had been obtained.

20 Finally, the defendant submitted that despite being reminded as early as September 2001 that

substantial amounts of her funds had been pledged to the defendant as security for Tommy's debts, the plaintiff did not take any steps to revoke the Charge or to withdraw her funds. Given that she continued to transact through the Account and make investments through the same, she had elected to affirm the Charge. The defendant had relied on such conduct and continued to extend credit facilities to Tommy to its detriment, thus rendering it inequitable for the plaintiff to set aside the transactions he had made and the losses consequent thereon.

Breach of fiduciary duty

21 As for the allegation of breach of fiduciary duty, the defendant denied that the circumstances of the case gave rise to a fiduciary relationship as there was no form of "unfair" conduct on the part of the defendant, nor did the defendant provide any "advice" to the plaintiff in respect of the Charge.

22 Alternatively, the defendant submitted, even if a fiduciary relationship had arisen between the parties, the defendant did not breach any of its fiduciary obligations to the plaintiff as (i) it had not withheld any information from the plaintiff as regards any possible risks when she executed the Charge, nor did it take advantage of the plaintiff in any way; (ii) the defendant had not placed itself in a position where its duty to the plaintiff conflicted with its interest – the plaintiff herself had informed LCK that she wanted to assist Tommy, as he had been pleading for her financial help; and (iii) at the time when the plaintiff executed the Charge, she was well aware that Tommy was going to benefit from the same, as the nature, terms and consequences of the Charge had been explained to her.

The findings

23 I preface my findings by observing that the witnesses' accounts and recollections of the events which had taken place were riddled with inconsistencies and often directly contradicted one another. My findings of fact are therefore intertwined with my assessment of the credibility of the witnesses and will be elaborated upon below.

Undue influence

Applicable Law

24 The law has long established guidelines to protect individuals who provide guarantees or otherwise act as sureties for banks or other lending institutions in respect of liabilities owed to such institutions by a third party. Such protection is not afforded to all such sureties, but only to those that the law deems require such protection. The effect of these guidelines is that suretyship contracts that do not satisfy these guidelines are deemed to be void and unenforceable against the sureties.

25 Pursuant to these guidelines, the trite categorization of impugned transactions into cases of "actual" and "presumed" undue influence (*Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923) has been widely endorsed and applied in the local context. We are, for the purposes of the present case, concerned with the latter categorization, regarding which Andrew Ang JC (as he then was) in *The Bank of East Asia Ltd v Mody Sonal M and Others* [2004] 4 SLR 113 at [4] clarified as follows:

> In such cases, there is no requirement to prove actual undue influence. It is enough if the complainant demonstrates that (i) there was a relationship of trust and confidence between him and the wrongdoer; and (ii) the relationship was such that it could fairly be presumed that the

wrongdoer abused the trust and confidence in procuring the complainant to enter into the impugned transaction.

26 These categories must be further applied in the context of the general principles established in *Royal Bank of Scotland v Etridge (No. 2)* [2001] 3 WLR 1021 ("*Etridge*"), pursuant to which Lord Hobhouse held as follows (at 1054):

> [A] structured scheme for the decision of cases raising the issue of enforceability as between a lender and a wife… can be expressed by answering three questions: (1) Has the wife proved what is necessary for the court to be satisfied that the transaction was affected by the undue influence of the husband? (2) Was the lender put on inquiry? (3) If so, did the lender take reasonable steps to satisfy itself that there was no undue influence?

27 Applied in the context of the present case, the plaintiff must first establish that the Charge was executed as a result of Tommy's undue influence; second, that the defendant was put on inquiry as to the manner in which the Charge had been procured; and finally, that the defendant had failed to take reasonable steps to ensure that the Charge had not been procured by undue influence. Each of these inquiries will be dealt with below.

Nature of relationship between Tommy and the plaintiff

28 Given that the relationship between Tommy and the plaintiff (son-in-law/mother-in-law) does not fall within the categories of relationships the law recognizes as automatically giving rise to a presumption of undue influence (above at [25]), the plaintiff must, in order to raise the presumption, establish the following two *Etridge* prerequisites:

> First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.

29 On the facts, I am not convinced that these prerequisites to the presumption have been satisfied. The law recognizes that the presumption of undue influence does not arise simply whenever any relationship of trust and confidence exists (*In re Craig* [1971] Ch 95). It is not enough for the plaintiff to simply show that she had trusted Tommy. To succeed in raising the presumption, the plaintiff must show that Tommy acquired a measure of influence or ascendancy of which he then took unfair advantage (*Etridge* at 1029).

30 Additional guidance on the relevant threshold to be met is proffered by the learned authors Peter Birks and Chin Nyuk Yin, of "*On the Nature of Undue Influence*" in *Good Faith and Fault in Contract Law* (Beatson and Friedmann ed.) (Clarendon Press Oxford 1997) in which they observed that:

> In cases in which the presumption is relied upon, it is clear time and again that facts upon which it arises suggest excessive dependence… What has to be shown is not a relationship raising the probability of illegitimate threats, but one in which the integrity of the plaintiff's judgment is likely to have been impaired by excessive dependence… The relationship must be such as to impair the autonomy of the weaker party to a serious and exceptional degree.

31 On the evidence, I find that the plaintiff has failed to show that she had reposed such a degree of trust and confidence in Tommy so as to allow Tommy to be in a position of ascendancy over her, such as to justify the drawing of a presumption that the Charge was executed whilst under his undue

influence. The plaintiff did not blindly follow Tommy's advice and clearly made independent financial decisions contingent on the type of investments she was open to and the level of risk she was willing to tolerate, as borne out by the following facts.

32 When the plaintiff opened her account with the defendant, she gave specific instructions to the latter that Tommy was not authorized to effect withdrawals, which indicated a significant reservation on the part of the plaintiff despite her alleged naïve dependence on Tommy. Her independence of mind is further reinforced by the fact that she had, at the outset, issued a clear mandate to Tommy and the banks regarding what her monies could be invested in *i.e.* she had given specific instructions that her funds could not be utilized for shares, mutual funds or speculative trades, and allowed small investments in bonds although she preferred the bulk of her monies in deposit products – a mandate that was scrupulously adhered to.

33 Indeed, the plaintiff acknowledged that the key decisions relating to the Account would be made by her. I also noted that LCK had direct access to the plaintiff and was specifically instructed to update her on the status of her Account. He clearly was not required to communicate with her through Tommy and was at liberty to make direct recommendations to the plaintiff in respect of various investments, which the plaintiff could either accept or reject.

34 Despite the plaintiff's self-proclaimed allegations of ignorance and dependence, the dynamics of the relationship between Tommy and the plaintiff suggested that the plaintiff was the dominant person in the relationship. In this regard, LCK (who had been the plaintiff's relationship manager for about 10 years and who was well-acquainted with various members of the family before he moved to another bank) testified that in all his years of dealing with Tommy and the plaintiff, Tommy would invariably obey the plaintiff and was sensitive to her moods because he depended to a large extent on the plaintiff for his financial backing. LCK observed that the plaintiff was the "dominant personality" as she had the "financial clout and strength of will to control Tommy". Indeed, while the plaintiff may have trusted Tommy and delegated particular financial day-to-day affairs to him, this degree of trust and confidence did not reach the threshold necessary to justify a presumption of undue influence.

35 Turning now to the second prerequisite, I am of the view that the court should take a more holistic view of the circumstances as opposed to a blinkered and artificial preoccupation with financial considerations. In order to determine whether a transaction is explicable in terms other than undue influence, it becomes necessary to examine its context and to ascertain its true nature and objective.

36 Having regard to all the circumstances, I am not satisfied that execution of the Charge was one that could not "be reasonably accounted for on the grounds of relationship, charity or other motives on which ordinary men act" (*Allcard v Skinner* (1887) 36 Ch D 145 at 185). While execution of the Charge was, from an economic perspective, arguably not the most prudent course of action, it certainly was understandable and explicable in the context of the particular family elements and relationships involved.

37 In this regard, I observed that the plaintiff was family-oriented and close to her daughter Zina (Tommy's wife), which provided the impetus for her to extend financial help to Tommy. On this note, I am inclined to believe LCK's recollection of events regarding his discussion of the Charge with the plaintiff, during which she had told him (in Mandarin) that she wanted to give this "young man" one last chance pursuant to his repeated pleas for financial assistance (see [49] below). As an aside, it also did not escape my notice that the plaintiff only complained about the Charge in 2005, the year Tommy and Zina's marriage ran into difficulty. These matters will be further discussed below.

Whether the plaintiff was an experienced and knowledgeable investor

38 While the plaintiff may not have been the financially savvy investor that the defendant sought to make her out to be, she was undoubtedly no babe in the woods as she sought to portray herself.

39 The plaintiff held her monies in multi-currency deposits with several banks and invested in dual currency convertible deposits and enhanced yield deposits. These transactions necessitated a certain degree of financial sophistication and it is difficult to believe that she was totally clueless in this respect, notwithstanding her allegations that she left all investment decisions to Tommy.

40 While Tommy may have been the person with whom LCK dealt with regarding most of the plaintiff's day-to-day investment decisions, the plaintiff clearly retained some form of independent supervisory authority over her investments, a fact that is corroborated by contemporaneous call reports recording the plaintiff's instructions regarding her Account. For example, the call report for 27 August 1997 prepared by LCK recorded that:

> [The plaintiff] is monitoring the USD/Rp price movement and keen to execute convertibles with us as she is indifferent to holding DEM or Rupiah, as long as she has the high interest. From what Tommy can recall, she bot the DEM above DEM2/= and she likes the high interest rates on convertibles. So, we have to structure a DEM/Rp convertible for her.

41 To further illustrate, a meeting between the plaintiff and LCK on 28 February 2000 culminated in a call report which recorded that:

> [The plaintiff] has lost some money in equity/bonds & mutual funds with Merrill Lynch and is still sore over her losses there. She rejected any investment proposals and will only begin to put her USD in premium deposits. She is impressed with the LIBOR rate and I have asked her to remit more funds as we pay higher by 0.25%. Left her the premium deposit documents to complete at her disposition.

42 Turning to other aspects of her fairly diversified portfolio, a call report dated 28 August 2001 recorded that LCK had:

> Reviewed [the plaintiff's] portfolio with her and she is pleased that the EUR/YEN strategies are working for her… Will continue to execute these CPP and equivalent capital protected structured deposits. Spoke of Fiduciary and she does NOT intend to do TRUST yet without further explanation.

43 These call reports are clearly at odds with the plaintiff's assertions in her affidavit, that she "never discussed any investments in relation to [her] Account" nor was she aware of any such investments. Several other events also serve to undermine the plaintiff's blanket denial of all financial and investment expertise.

44 In September 2001, the plaintiff took a loan from the defendant of ¥239,000,000 ("the loan") equivalent to US$2m for an investment which she intended to undertake jointly with her other son-in-law Handojo Santosa, for the purchase of some land in Jakarta. It was significant that the loan was taken in Japanese Yen so that the plaintiff could benefit from the marked interest rate differentials despite the fact that her deposits with the defendant were far in excess of US$2m. She was charged a low interest rate of 0.700% per annum on the loan but was earning much higher interest rates from the defendant on her time deposits[note: 1] in American dollars (3.125% per annum), Euros (3.6875% - 4.055% per annum) and Australian dollars (3.6875% - 4.2008% per annum).

45 In early 2000, the plaintiff purchased and refurbished several Dutch colonial warehouses in

Jakarta and converted them into an entertainment and tourist location called VOC Galangan Café and Gallery ("the project") at a cost of at least US$10m. Her counsel sought to downplay the significance of her investment by directing the court's attention to the losses sustained by the project. This did not, in my view, detract from the fact that the plaintiff showed responsibility, oversight and initiative as illustrated by her desired collaboration with Christie's to host some of their events at the project. More importantly, the plaintiff was given an award in 2001 by the prestigious Pacific Asia Travel Association (PATA) Indonesian Chapter for the project and she was described as the "*driving force in the movement to revitalize Jakarta's old port area*" into a tourist destination. It was not modesty that made the plaintiff disclaim her significant role in the project – she did not wish to come across as the shrewd investor she really was/is.

46 Granted there was no basis to impute to the plaintiff Tommy's financial knowledge and expertise (he was a finance director in a securities firm in Jakarta). However, her business initiative in [45] clearly proved the plaintiff to be a resourceful, business-minded person, in stark contradiction to the picture she sought to paint of herself – a housewife with little formal education and no knowledge of financial affairs whatsoever. I would add that the plaintiff's stock answers during cross-examination of "I don't know", "Maybe", "I don't recall", "I am not aware", even when asked her age in 1998 [note: 2], became increasingly unconvincing.

Whether the plaintiff was aware of the effect and consequences of the charge before she signed it

47 I further find that the plaintiff was fully aware of the effect and consequences of the Charge and had executed it pursuant to the free exercise of her independent will.

48 To begin with, I am convinced that the effect and significance of the Charge had been explained to the plaintiff by LCK who had travelled to Jakarta to do so. In particular, he had explained to her that the effect of the Charge was that the monies in her Account would be pledged to cover Tommy's liabilities to the defendant. More importantly, LCK testified that the plaintiff had informed him that she would get someone to review the Charge document before signing it and that she would return it to the defendant thereafter.

49 Regarding the conflicting testimonies of the plaintiff and LCK, I am more inclined to accept LCK's version and recollection of events, in particular, his specific conversation with the plaintiff during which she recounted her motivation for execution of the Charge. His testimony[note: 3] bears reproduction in full:

LCK: When I met her, she did say that – she did tell me that she understands that Tommy had financial difficulties; that his family members are not going to help him. And she was willing to give this, in her words is "nian qing ren", which means a young man, give this young man "yi ge ji hui", which means one chance.

Court: One chance to what?

LCK: One chance for him to prove himself.

Court: I see. Yes.

LCK: Two Chinese words were very, very clear to me, you know, erm, "nian qing ren" –

Court: Young man.

LCK: -- giving this young man a chance, you know, and giving him one last chance. These two words were very, very clear to me.

Court: Right.

LCK: It must have been because of that, you know, that the third party charge was raised.

Court: And then what – what did you tell her?

LCK: I remember very clearly I told her that if Tommy doesn't pay for his dues --- for his liabilities, she has to pay for whatever he owes to the bank.

Court: So ---

LCK: Er, your Honour, can I add on? I'm very clear this was spoken because Mdm Susilawati is, er, someone who's ---you know, she's the wife of a conglomerate owner. It is not easy for a banker to tell someone of that status that, "I will offset your deposit." And I remember I took the courage to tell her that.

50 Having had the opportunity to observe LCK's demeanour in the witness stand, I believe the foregoing testimony was the truth. Whilst there was some inconsistency in LCK's evidence as to whether the Charge had been explained to the plaintiff before or after it was signed, I was satisfied that this was the genuine result of an erroneous recollection, which he was subsequently able to clarify. I noted also, that LCK was an independent witness in the sense that he was, at the time of trial, no longer in the defendant's employ having left in April 2005.

51 LCK had at the material time, about 7 years of experience as a relationship manager and testified that it had always been his practice to explain to his clients the documents which he handed to them for signature and that he had not made any exception in the plaintiff's case. His account of events was further corroborated by entries in his old passport, which recorded several visits to Jakarta in September and October 1997, despite the absence of any call reports recording such a meeting.

52 I believe there was no reason for LCK, as an independent witness, to go to such lengths to contrive his recollection of events in such minute detail. On the other hand, it was somewhat telling that the plaintiff only began to challenge the Charge after Tommy had defaulted and ran into problems in servicing his loans in the later half of 2005, which incidentally, coincided with the period during which Zina's relationship with Tommy ran into difficulties.

53 Counsel for the plaintiff sought to portray her denial of the Charge to Chay Hong Leng (who replaced LCK as the plaintiff's relationship manager for the Account) on 21 November 2005 as logical and consistent given that there was "no immediate or impending threat to the plaintiff's funds at that time". I found this unconvincing as the plaintiff had at that time just been informed that the funds available for her use were insufficient to meet her request, as withdrawal of the funds had been blocked to secure Tommy's debts to the defendant. This clearly provided the impetus for her to then deny signing the Charge in an intuitive attempt to avert such an "unexpected" outcome.

54 I found the plaintiff's questioning of the differing formats of the Charge signed by her and that signed by Zina as well as the "vague" receipt of the Charge once it was signed largely irrelevant. The crux of the case centred on whether the plaintiff had in fact understood the nature and terms of the Charge and signed it on her own free will, not on ancillary issues such as why the format of the

Charge was different or whether Tommy had subsequently handed the signed Charge to LCK.

55 Moreover, I found it puzzling that the plaintiff only raised the undue influence assertion for the very first time when she filed her statement of claim on 11 May 2006. Her initial position, as reflected in her previous solicitor's letters to the defendant dated 22 and 24 November 2005, was simply that she *had not signed* the Charge – a position that was clearly at odds with her admission under cross-examination that she "did not ask any question" but had signed the Charge "willingly" as she had "trusted Tommy".

56 In her Further and Better Particulars filed on 10 October 2006, the plaintiff pleaded that she had no recollection of signing the Charge, an allegation that was repeated in her affidavit, in which she also insisted that the Charge was *never explained* to her. Again, this was contradicted during cross-examination in the course of which the plaintiff herself testified that Tommy had explained the Charge to her in "*one or two words*" but "*never at length*".[note: 4] When pressed, however, she denied any recollection of the explanation. These vacillating stances did not reflect well on her credibility.

57 On a related note, I am somewhat perturbed by the plaintiff's failure to call Tommy as a witness. Tommy was the crucial figure at the heart of the controversy and the sole cause of the plaintiff's suit. His absence from court as her witness left many questions unanswered. I could understand Tommy's reluctance, if not downright refusal, to testify for the defendant if he had been approached. However no explanation was proffered by the plaintiff or her counsel as to why Tommy was not called to testify on her behalf. Was it because the son-in-law and mother-in-law relationship had broken down irretrievably or because the relationship no longer existed? As the court was not told, I am entitled to and do draw an adverse inference against the plaintiff that had Tommy been called to testify, he would not have corroborated her testimony.

58 Finally, I was disinclined to believe the plaintiff's allegations that she was unaware of the existence of the Charge until 2005, as her awareness was amply corroborated by a contemporaneous e-mail dated 15 November 2000 sent from LCK to another bank officer, Bharat V Vijayan, in which LCK confirmed that both the plaintiff and Zina were aware that part of their collateral was used to support Tommy's CFX (foreign currency) trading. Indeed, the plaintiff's inaction and undue delay over a period of at least five years only serves to reinforce my earlier finding that she was fully aware of the effect and consequences of the Charge and had executed it pursuant to the exercise of her independent will.

59 The plaintiff's claim on undue influence therefore fails *in limine* and there is accordingly no necessity to address the issues of affirmation, or whether the defendant was "put on inquiry" or had constructive notice of Tommy's alleged undue influence.

Breach of fiduciary duty

Whether the defendant owed a fiduciary duty to the plaintiff in respect of the Charge in the circumstances of the case

60 The relationship between a bank and its customer is a contractual one. The bank does not, generally, owe fiduciary duties to its customers. However, a fiduciary relationship can arise between the bank and its customer under certain circumstances. Indeed, in *Cook v Evatt (No. 2)* [1991] 1 NZLR 676, it was held (at 685) that:

> The essence of a fiduciary relationship is an inequality of bargaining power brought about by the

trust or confidence reposed in, and accepted by the fiduciary to perform some function for another's benefit in circumstances where the beneficiary lacks the power adequately to control or supervise the exercise of that function.

61 The protective gauntlet of a fiduciary relationship has previously been imposed in cases where a banker has acted as the financial adviser of the customer and actually provided investment advice, or where there is some form of over-reaching by the bank concerned *e.g.* deliberate non-disclosure of material information or putting itself in a position of conflict of interest (*Lloyds Bank v Bundy* [1974] 3 All ER 757; *Dungey v ANZ Banking Group (NZ) Ltd* [1997] NZFLR 404).

62 On the present facts, there was neither advocacy directed at persuading the plaintiff to execute the Charge, nor was there any form of "overreaching" characterized by non-disclosure of material facts. I remain unconvinced that the private banking services afforded by the defendant to the plaintiff and the communications between them were characterized by an inequality of bargaining power sufficient to give rise to the imposition of a fiduciary relationship between the parties, who were in essence, transacting at arm's length.

63 Indeed, courts should, in the absence of exceptional circumstances, be slow to impose a fiduciary relationship in cases where a suretyship transaction is undertaken by a customer in favour of the bank. The rationale underlying a fiduciary relationship is basically an expectation of one party that the other will act in his or her interest, whereas a bank's interest in a suretyship transaction would not ordinarily be concordant with that of the customer (*Shivas v Bank of New Zealand* [1990] 2 NZLR 327).

64 These tensive interests were expressed by Branson J in *Truebit Pty Ltd v Westpac Banking Corporation* – 27 November 1997 (unreported) (at [52]) as follows:

> There is thus an inconsistency between the notion of Westpac assuming a fiduciary duty to the applicants in respect of its treatment of their application for finance and the maintenance of Westpac's "own commercial self interest as lender". Moreover, there is a commercial, and possible conceptual, unreality surrounding the contention that Westpac was entitled to consider the applicants' application for finance both in the applicant's interest and in Westpac's own interest as proposed lender to the applicant's, but not in Westpac's interest as the mortgagee/lender exercising through a receiver the power of sale in respect of [the property].

65 Similarly, in *Province of Alberta Treasury Branches v Hammond* 67 ACWS (3d) 122, the court held that:

> It would surely be an exceptional case where parties who have different commercial interests and who have entered into a contract to bring about diverse results for each of them, ought to be considered, from the circumstances, to have assumed a fiduciary relationship in which one of them owes a duty of loyalty and selflessness to the other.

66 Indeed, the absence of such a fiduciary duty is further buttressed by the standard terms and conditions contained in the Private Banking Services Agreement ("PBSA") between the plaintiff and the defendant, to which all transactions were subjected to. Under the heading "*Disclosure of Risks and Disclaimer*", the PBSA provided that:

> 3. In accepting any services made available pursuant to this Agreement, the Customer understands and agrees that: -

(a) the Customer makes its own judgment in relation to investment or trading transactions;

(b) the Bank assumes no duty to make or give advice or make recommendations;

(c) if the Bank makes any such suggestions, the Bank assumes no responsibility for the Customer's portfolio or for any investment or transaction made;…

67 These contractual terms clearly militate against the plaintiff's allegations regarding the existence of a fiduciary duty. Indeed, the extent of deference accorded by the court to such contractual terms was clarified in the recent case of *ASIC v Citigroup Global Markets Australia Pty Limited* (No.4) [2007] FCA 963, which held (at [280]) as follows:

> It may well be that a fiduciary cannot exclude liability for fraud or deliberate dereliction of duty but beyond that there appears to be no restriction in the law to prevent a fiduciary from contracting out of, or modifying, his or her fiduciary duties, particularly where no prior fiduciary relationship existed and the contract defines the rights and duties of the parties…

68 In view of the foregoing, I find the plaintiff's attempts to establish a fiduciary obligation owed by the defendant with respect to the Charge misconceived and without merit. On the facts, the defendant could not reasonably be considered to have undertaken to act in the best interests of the plaintiff in respect of procuring the Charge.

69 From a commercial perspective, this argument taken to its logical conclusion would undermine the very purpose of third party guarantees, directed at enabling banks and other creditors to extend credit at an acceptable level of risk and would severely impact the suretyship transactions routinely undertaken by such banks.

70 By way of observation, it appears to me that what the plaintiff did not fully realize or appreciate was the potential extent of the son-in-law's indebtedness. This unfortunate incongruence is borne out by the fact that in February 1998, Tommy's borrowings from the defendant totalled US$880,000. The very next month following execution of the Charge, Tommy's borrowings amounted to a staggering US$11.2m, a substantial increase attributable to the collateral made available by the Charge.

71 Unfortunately, the "unexpected" extent of the repercussions of Tommy's default is insufficient for the plaintiff to avoid the Charge altogether, given that she understood the terms and effect of the Charge and had executed it pursuant to the free exercise of her independent will. Nonetheless, it would be apposite to append several concluding observations on the defendant's conduct in relation to the potential conflict of interests involved as well as its reliance on the confidentiality provisions under the Banking Act.

Conflict of interests

72 To begin with, it struck me that the defendant was aware of the potential conflict of interest between Tommy (who was a remunerated referral agent for the defendant) and the plaintiff, from the commencement of its relationship with the plaintiff.

73 When the plaintiff agreed to open the Account with the defendant, she authorised Tommy and Zina to operate it. This arrangement was a cause for concern when LCK submitted the relevant documents to obtain approval to open the Account. This can be seen from an e-mail dated 5 January 1998[note: 5] from LCK's superior John Hughes that said:

> I note that the referring agent to the Bank will also be operating the account. To avoid any future misunderstandings or potential problems with the actual client, I would require a written acknowledgement from the client to the effect that she is aware of Tommy Lim's position as both a compensated referral agent and operator of the account.

74 Despite LCK's subsequent agreement to obtain such a written acknowledgement to "prevent any 'anticipated' disputes", it appeared that no such acknowledgement was obtained. On hindsight, these concerns foreshadowed the potential conflict of interest and underscored the need for the defendant to be especially vigilant in respect of any dealings between the plaintiff and Tommy.

75 From an economic perspective, it was clearly in the bank's interests to continue to provide foreign exchange trading facilities to Tommy and to earn interest, fees and commissions thereon. In this particular context, it would have been prudent for the defendant to have taken additional steps to update the plaintiff on the nature and extent of her exposure under the Charge, particularly in view of the exponential increase in Tommy's borrowings immediately after execution of the Charge.

76 Notwithstanding the plaintiff's numerous allegations, I am not persuaded that the defendant resolved this conflict in its own self-interest, in that it intentionally abetted execution of the Charge so as to increase its income in the form of interest, fees and commissions. Still, it cannot be seriously disputed that it was the defendant's lack of vigilance that contributed in no small measure to the present dispute, which could easily have been avoided by closer scrutiny and more comprehensive disclosure on the part of the defendant.

77 At this juncture, the defendant sought to justify its failure to "update the plaintiff" by asserting its obligation at law to protect the confidentiality of Tommy's account information pursuant to the laws of banking secrecy.

78 The plaintiff, in response, sought to draw a distinction between the actual liabilities that Tommy was incurring and the extent of her potential liability by way of the following submission:

> The plaintiff is not asserting that the defendant ought to have kept her abreast of the liabilities that Tommy was incurring. Her assertion is that the Defendant was under a duty to keep her updated as to the extent of her liabilities under the Charge. This could have been done by simply informing her of the extent of her potential liability, either monthly or at such other regular intervals as would be feasible, and would in no way have compromised the secrecy of Tommy's account information.

79 With respect, I found this distinction rather strained. The extent of the plaintiff's *potential* liability would have been clear at the time the Charge was executed *i.e.* the total sum of money in the Account was secured by the Charge. It made no sense for the plaintiff to request updates of her "potential liability" at "regular intervals". What the plaintiff, or any other guarantor for that matter, would primarily be interested in, was an update of the synchronous debts or liabilities that Tommy was incurring and which he was unable to repay – information that unfortunately, fell squarely within the ambit of banking secrecy laws, further discussed below.

80 On the facts, there was no evidence that the plaintiff had at any time requested for such information and/or it had been denied. Nevertheless, it cannot be disputed that if the plaintiff knew that her liability under the Charge was spiralling upwards, she would in all probability have taken steps to staunch the haemorrhaging of funds from her Account, either by cancelling the Charge and/or castigating Tommy accordingly.

Banking secrecy

81 Conflicts of disclosure and confidentiality manifest most starkly in suretyship transactions, not least in the context of guarantees taken by banks in respect of the liabilities of their customers, as the guarantor is likely to want to know the precise nature, scope and extent of the guarantee. Whilst it is essential for such information to be honest, accurate and given with reasonable care, such disclosure ostensibly comes into direct conflict with a banker's duty of confidentiality.

82 In the local context, a bank has both a contractual as well as a statutory duty to keep the affairs of a customer confidential. The contractual duty is to be implied from the banker and customer relationship while the statutory duty is imposed by section 47 of the Banking Act (Cap 19, 2003 Rev Ed) ("the Act") (see Poh Chu Chai, "*Law of Banker and Customer*" (Lexis Nexis 5th ed., 2004) at 568)

Duty of confidentiality

83 Section 47 of the Act provides for a general prohibition against disclosure of customer information followed by a limited number of exceptions embodied in the Third Schedule under which disclosure is permitted. The relevant sub-sections provide that:

> (1) Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act.
>
> (2) A bank in Singapore or any of its officers may, for such purpose as may be specified in the first column of the Third Schedule, disclose customer information to such persons or class of persons as may be specified in the second column of that Schedule, and in compliance with such conditions as may be specified in the third column of that Schedule.

84 Unsurprisingly, a brief perusal of these statutory exceptions reveals a close parallel between the statutory duty imposed by the Act and a banker's common law duty of confidentiality.

85 In the seminal case of *Tournier v National Provincial Bank & Union Bank of England* [1924] 1 KB 461, the English Court of Appeal held that a banker came under an implied duty to keep the affairs of a customer confidential, subject to four general exceptions (at 473) under which disclosure could be made by the bank. These have been classified into four categories: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express *or implied* consent of the customer.

86 We are, for our purposes, primarily interested in the fourth exception, which interestingly, finds no exact parallel under our (stricter) statutory regime. Under s 47(4)(a), nothing less than a *written* consent by the customer or his personal representatives would suffice to lift the prohibition against disclosure (see The Act, Third Schedule, Part I, Clause 1).

Implied consent to disclose

87 Quite apart from our statutory regime, it is not clear in what instances a bank can disclose information to a guarantor or intending guarantor. Commentators clearly disagree as to whether a bank has the implied authority of its customer to disclose customer information to a guarantor. Case law is similarly ambivalent. Notwithstanding the strict statutory prohibition against disclosure, this amorphous common law position only serves to exacerbate the uncertainty encountered by bankers faced with an inquiring guarantor. What exactly is the ambit of this confidential relationship?

88 As a starting point, the most authoritative statement of the scope of the common law duty of confidentiality remains that of Lord Campbell in *Hamilton v Watson* (1845) 12 Cl & Fin 109 (at 119) which reads as follows:

> But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, *whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction*, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and if so the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between those parties, then, if the surety would guard against particular perils, he must put the question and he must gain the information he requires. [emphasis added]

89 The foregoing extract clearly alludes to a limited duty of disclosure with reference to any transactions between the creditor and debtor which might potentially "subvert the presumed basis of the guarantee" (see also *Ross v Bank of New South Wales* (1928) SR (NSW) 539; *Goodwin v The National Bank of Australasia Ltd* (1968) 42 ALJR 110 at 111).

90 In theory, this qualified duty of disclosure might be easy to grasp, but the multi-faceted interests underlying suretyship transactions are likely to result in a practical conundrum aptly expressed by Lord Chorley in *Law of Banking* (Sweet & Maxwell, 6th ed. 1974) at 335-336 as follows:

> [I]n the vast majority of cases there is no duty upon the bank to disclose to a prospective guarantor any details relating to the customer's account. If in doubt, a banker is well advised to consult his solicitors. *On one hand, a failure to disclose might conceivably enable a guarantor to escape liability, on the other hand, disclosure of affairs relating to a customer might be held to be a breach of the banker's duty of secrecy*. [emphasis added]

91 There is clearly a need for both the legislature and the courts to strike a delicate balance between protecting would-be guarantors by ensuring access to the "necessary" information, while at the same time safeguarding the customer's rights to privacy. At common law, this balance has been struck by the accretion of various principles governing interactions between a bank and an intending guarantor (see generally *Paget's Law of Banking* (Lexis Nexis Butterworths, 13th ed., 2007) ("Paget") at 839-841).

92 According to Paget, a bank is entitled to assume that a principal debtor who tenders a surety has explained the general nature of his position and has explained it properly (citing *Lloyd's Bank Ltd v Harrison* (1925) 4 LDAB 12 at 16) and that an intending guarantor has made himself fully acquainted with the financial position of the customer whose debt he is about to guarantee (referring to *Royal Bank of Scotland v Greenshields* 1914 SC 259 at 266-267). Accordingly, in the absence of specific inquiry, a bank is not legally obliged to disclose the "existence or state of liabilities additional to the customer's account which will come within the scope of the guarantee such as another overdrawn account of the customer" (*Union Bank of Australia Ltd v Puddy* [1949] VLR 242 at 247). Arguably, if a bank is ordinarily under no duty of disclosure *after* the guarantee has been given, there would obviously be no subsequent duty to "update" the guarantor as the plaintiff sought to argue. Of course these three cases cited by Paget are very old authorities and cannot be applied wholesale without taking into consideration the very different circumstances prevailing in today's banking industry, not to mention the innumerable banking instruments and facilities (with their related volatility

and risks) made available to high-net- worth customers by banks nowadays, which were probably unimaginable before and after the First and Second World Wars.

93 From the guarantor's perspective, it is equally entitled to be protected against misleading, deceptive or "unconscionable" conduct that would induce the execution of a guarantee (so held by the Federal Court of Australia in *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227). The Federal Court addressed the issue of unconscionable conduct not only at common law/in equity but also dealt with contravention by the appellant bank of s 52 of the country's Trade Practices Act 1974 (which prohibits misleading and deceptive conduct by banks). Singapore does not have an equivalent legislation. Factors to be considered in determining unconscionability at common law/in equity would, *inter alia*, include an assessment of the (a) accuracy of the representations; (b) potentiality for injustice at the time of execution; and (c) circumstances of the execution (see Warren Pengilley's article, "*Misleading or Deceptive Conduct and Financial Institutions*" (1989) 1 Bond L R 157 at 170).

94 At the end of the day, the principles culled from case law must be interpreted in the context of our statutory regime, which effectively negates the doctrine of implied consent to disclosure. Where a guarantor requests for information, a bank is best advised to ensure that it has the customer's explicit written authority to override its statutory duties of confidentiality, which if refused, should prompt the intending guarantor to draw the appropriate conclusions and realise the risks attendant to giving the guarantee requested.

95 If in doubt, it would seem that the most prudent course of action would be that suggested by Milnes Holden, in *The Law and Practice of Banking* (F T Prentice Hall, 5th ed. 1990) at 101 and endorsed by J M Walter and N Elrich: "*Confidences – Bankers and Customers: Powers of Banks to Maintain Secrecy and Confidentiality*" 63 ALJ 404 (at 418) as follows:

> Without doubt, the safest course – and indeed, the usual course – is to arrange a joint meeting between the guarantor, the customer and the banker, at which the guarantor may, in the customer's presence, ask for information on any matters concerning the customer's affairs.

Alternatively, a person who is asked to execute a guarantee should be in a position to insist, as a pre-condition, that the customer gives his express consent to the bank to disclose his liabilities to the guarantor both at the time when the guarantee is executed and at periodic subsequent intervals, for so long as the guarantee is in force.

96 I have in [82], [90] [91] and [95] referred to standard textbooks commonly referred to by banking law practitioners but not relied on by the parties in their submissions. In [88], [89], [92] and [93] I have referred to cases cited by Paget as well as to useful articles in [93] and [95] to highlight the continuing difficulties faced by banking institutions in an area fraught with uncertainty, akin to the banks treading through minefields. It is hoped that in time to come, there will be amendments to the Act or new legislation altogether, to strike an appropriate and fair balance between the interests of confidentiality for banks and the protection of guarantors of banks' customers. At the very least, it would provide a modicum of guidance to banks who find themselves in a similar position to the defendant, to avoid being the recipient of writs from disgruntled guarantors.

Conclusion

97 Although the defendant's conduct was not beyond criticism, I find that the plaintiff has failed to discharge the burden of proof for her case.

98 In its closing submissions, the defendant had asked (in para 167) for indemnity costs attendant

on the dismissal of the plaintiff's claim, relying on the following provision in the PBSA [66] under the heading **Liabilities and Indemnities**:

> 2 The Customer shall indemnify the Bank in full against all actions, suits, proceedings, claims, demands, costs and expenses (including legal fees on a solicitor and client basis and any interest and commission payments) which may be taken or made against the Bank pursuant to or in connection with any of the Customer's accounts, the securities, any Deposit, any Investment, any facility extended by the Bank to the Customer, this Agreement or the performance of its duties and obligations hereunder (as investment manager or otherwise) or which may be incurred by the Bank in connection with any claim by it for monies payable to the Bank…

99 The defendant argued that its entitlement to indemnity costs would not only apply to third party claims but would include suits instituted by and against its own customers, citing *Deepak Fertilisers & Petrochemical Corporation v Davy McKee (London) Ltd* [1999] 1 All ER 69 and *Standard Chartered Bank v Elang Mas Enterprise Pte Ltd* [2003] SGHC 181 respectively in support.

100 I note however that despite amending its pleadings, that the defendant did not include a prayer for indemnity costs in its defence. As for the wording in the second limb of cl 2 set out in [98] above, I agree that the indemnity provision would cover claims made by the defendant against the plaintiff as its customer, which was the situation in *Standard Chartered Bank v Elang Mas Enterprise Pte Ltd*. However, the other authority cited by the defendant *Deepak Fertilisers & Petrochemical Corporation v Davy McKee (London) Ltd* can be distinguished; that was a case based on negligence with attendant third party proceedings by the second defendant (ICI) against the first defendant/appellant (Deepak). There, the UK appellate court held that the indemnity given by the plaintiff/respondent to Deepak (under article 10.10.3 of the contract between the parties) contained an implied promise by the plaintiff that it would not sue ICI – it would be absurd to allow the plaintiff to sue ICI with the consequence that ICI sued Deepak and Deepak then had to sue the plaintiff for acting in breach of article 10.10.3. I should add that the wording of article 10.10.3 excluded all liabilities; it was far wider in scope than cl 2 above.

101 Consequently, even if I accept (which I do not) that the indemnity provision under cl 2 above applied to proceedings instituted by the plaintiff against the defendant, I decline to exercise my discretion to award indemnity costs to the defendant. As I said earlier [97], the defendant's conduct was not beyond approach. Accordingly, I dismiss the plaintiff's claim with costs to the defendant on a standard, not an indemnity basis.

[note: 1] See AB1378

[note: 2] (see N/E 62)

[note: 3] (at N/E 118-119)

[note: 4] (see N/E 15)

[note: 5] At AB 22

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