

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 273

Suit 164/1985

Between

Industrial & Commercial Bank
Ltd

... Plaintiff

And

Li Soon Development Pte Ltd

... Defendant

GROUND OF DECISION

Credit and Security — Guarantees and indemnities — Guarantor; Credit and
Security — Guarantees and indemnities — Guarantor; Credit and Security —
Guarantees and indemnities — Guarantor

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Industrial & Commercial Bank Ltd v Li Soon Development Pte Ltd and Others

[1993] SGHC 273

Suit 164/1985
Chao Hick Tin J
19 November 1993

1 Cur Adv Vult

2 The plaintiffs are bankers. By this action commenced in January 1985 they sought to recover from the defendants the sum of \$4,288.770 being the outstanding amount due to the plaintiffs from the first defendant (‘the company’) as on 18 December 1984, under an overdraft facility. The second to fifth defendants stood as guarantors for the said facility.

3 By the time this action came on for trial before me (i) the company was already under liquidation, as an order for its winding-up was made on 10 October 1985; (ii) the property held as security by the plaintiffs was already sold and the proceeds thereof applied towards the reduction of the overdraft; and (iii) summary judgment was obtained against the second and third defendants and there was an agreement between them under which, upon payment of a certain sum, the plaintiffs would not execute judgment against them. So the trial proceeded only as between the plaintiffs and the fourth and fifth defendants.

4 The company was first incorporated in 1973 with the objects of dealing in manufactured goods, machinery and material. It remained very much a dormant company until 1979 when it ventured into the business of construction and development. Then the board of directors consisted of the second to fifth defendants. Besides the said four defendants who were directors and shareholders of the company, one Chee Soon Wah (to whom more references will be made later) and a Mdm Goh Hock Eng were also shareholders.

5 The paid up capital of the company was \$2m with the shareholders holding the following different percentages of shares: second defendant (10%), third defendant (5%), fourth defendant (12%), fifth defendant (25%), Madam Goh Hock Eng (12%), and Chee Soon Wah (35%). Under an arrangement reached between the shareholders, the fourth defendant became the chairman of the company. The second and third defendants and Chee Soon Wah are brothers. It would be seen that the Chee brothers together held 50% of the shares with the other half of the shares held by the other three shareholders (hereinafter referred to as `the second group`).

6 It appears that the company was run very much like a joint-venture with the Chee brothers on the one side and the second group on the other. The bank account of the company required one signature from each group. The fourth defendant represented the second group and was an authorized signatory to operate the company`s account.

7 Business relationship between the plaintiffs (hereinafter referred to as `the bank`) and the company commenced in 1980 when, on 12 March, the company applied to the bank to open a current account. On 22 May 1980, the company applied to the bank for an overdraft facility of up to \$1,750,000 to be

secured by a first legal mortgage of the land known as lot 1248 of MK II (hereinafter referred to as `the land` or `the property` as may be appropriate in the context). This sum of \$1,750,000 was approximately 60% of the market value of the land estimated by M/s Richard Ellis to be at \$2.9m. At the time an in-principle approval for the development of the land was already obtained. The company also applied for a construction loan to the extent of 50% of the development costs estimated at \$2.5m. From the evidence, it would appear that the bank might not have known that the company had bought the land for only \$1,024,000. Apparently a figure of \$1.8m was mentioned. However, what the bank says is that, for the purpose of determining the proper amount of overdraft to be granted, it was the market value then that counts.

8 On 24 July 1980, the bank agreed to grant an overdraft facility of \$1.5m, secured by a legal mortgage of the land, at the interest rate of 21U2% above prime per annum. As regards the construction loan, the bank requested the company to submit approved construction plans together with estimates of construction costs for the bank`s consideration.

9 For the overdraft, the bank negotiated mainly with Chee Soon Wah and Mr Lim Sin, an advocate and solicitor, who is the husband of the shareholder Mdm Goh Hock Eng and who represented the second group. Mr Lim was the person who brought the parties together to embark on the development. Throughout he had kept a close watch over the affairs of the company. The fourth defendant invariably consulted him on matters relating to the project.

10 Chee Soon Wah, who is an architect, was engaged by the company to draw up plans for submission to the relevant authorities. Building plans

approval for the development of a four-storey commercial and residential complex on the land was obtained in November 1981.

11 Discussions proceeded between the bank and the company on the construction loan. The company, through its solicitors, M/s Lim Sin & Thiam Beng, asked for a loan of 65% of the construction costs as evidenced by the architect's certificates. The construction costs were estimated at \$4.6m. Subsequently, the company orally requested that the percentage of the construction loan be raised from 65% to 70%. Those discussions culminated in an offer dated 26 November 1982, by the bank, of an additional overdraft facility of \$3m to be utilized for the construction of the building, subject to these conditions:

- (i) a further charge on the property;
- (ii) personal guarantee of the four directors of the company on a joint and several basis for the total overdraft of \$4.5m;
- (iii) the additional overdraft of \$3m would be advanced progressively against 70% of the architect's certificates for value of work done;
- (iv) repayment would be from the sale proceeds of the units on the first and second storeys, or within one year after completion of the project, whichever is earlier.

12 The need for a personal guarantee from the directors of the company was, and is, a normal requirement of the bank.

13 It was further expressly stated that the said additional facility was subject to these terms:

- (c) The said facility is subject to determination, modification as our bank may impose.

(d) The duration in which the facility is granted is to be left at our bank's discretion.

14 The offer was accepted by the company. A resolution was passed by the company to that effect, which also expressly stated that the facility was to be secured by, inter alia, a personal guarantee of each of the four directors, jointly and severally.

15 As required by the terms of the offer, on 6 January 1983, the second to fifth defendants entered into a written guarantee agreement with the bank where it was stated that in consideration of the bank `opening or continuing an account with and making advances or otherwise giving credit or accommodation` to the company, they jointly and severally guaranteed, inter alia, to the bank as follows:

(1) We will pay you on demand all money which now is or may during the operation of this agreement be owing to you from the [company] ...

...

(4) This guarantee shall be a continuing guarantee to [the bank] to the extent of Singapore dollars four million and five hundred thousand only ...

(5) This guarantee shall be without prejudice to and shall not be affected nor shall I/we (or any of us) be released or exonerated by any of the matters following:

(i) Any securities negotiable or otherwise including other guarantees which you may now or at any time hereafter hold from the customer or any other person or persons in respect of any money hereby guaranteed.

(ii) The variation, exchange, renewal, release or modification of any such securities or the refusal or neglect to complete, enforce or assign any judgment specialty or other security or instrument, negotiable or otherwise, and whether satisfied by payment or not.

(iii) Any time given or extended to the customer and/or any other person or persons including any of us and the parties to any negotiable or other security instrument guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the customer and/or any other person or persons whether with or without consent or notice to me/us.

16 Pursuant to the facility, advances were made to the company with effect from March 1983 for the purpose of the construction of the building based on 70% of the value of work done as certified by the architect. All cheques issued by the company bore two signatures, one of which was that of the fourth defendant.

17 Starting sometime in December 1983, the relationship between the two groups in the company began to deteriorate. It was only in late September 1984 or early October that the bank came to realize the internal discord in the company. But earlier, on 17 September 1984, the bank wrote a letter to the company care of the address of Chee Soon Wah's architectural office at Golden Mile Tower, 6001 Beach Road, #10-01 Singapore 0719, in these terms:

We write to inform you that, as at 15 September 1984, your account shows an overdraft usage of \$4,114,578.64 against the effective limit of \$4,012,000.

18 Kindly arrange to cover the excesses within ten days from the date hereof.

19 This letter from the bank was redirected by Chee Soon Wah's office to the new registered office of the company at M/s Barbinder & Co, Penang Road, who, in turn, forwarded a copy of the letter to all the directors, including the fourth and fifth defendants. More will be said later why the letter was sent by the bank to the company at Chee Soon Wah's office. The fourth defendant

received it on 27 September 1984. On 30 September 1984, the fourth defendant wrote to the second defendant and Chee Soon Wah, querying them how the excess arose. He also suggested that all the shareholders should pay into the company's account with the bank a proportionate amount to cover the excess as well as the fees which were then due to the consultants. He further complained why the bank's letter of 17 September 1984 was not attended to by Chee Soon Wah or the second defendant. This was what he wrote:

ICB's letter was correctly sent to the company's postal address, ie Mr Chee Soon Wah's office at 6001, Beach Road, #10-01 Golden Mile Tower, Singapore 0719, but instead of attending to it promptly, the registered letter was sent on a merry-go-round and reached me on 27 September 1984. If Mr Chee Soon Wah is deliberately causing delays by directing letters to any other addresses, he will be held responsible for special damages.

20 Further correspondence ensued between the architect and the fourth defendant. There is a dispute as to whether Chee Soon Wah's firm had agreed to accept mail on behalf of the company. I do not think anything in this action turns on this point although, as will be shown later, it is quite clear that the company did inform the bank to direct all communications to the company at the address of Chee Soon Wah's office.

21 However, in so far as the bank were concerned, they did not receive any reply to their letter of 17 September 1984. Accordingly, on 1 October 1984, the bank wrote a reminder to the company, care of the same address at Golden Mile Tower, giving the company another ten days to cover the excess. Ten days passed and no remedial action was taken by the company. On 11 October 1984, the bank wrote to the company, copied to the four directors, recalling the entire overdraft facility and requesting the company to pay up all outstanding within 14 days, failing which the bank would exercise the power of sale as a mortgagee and institute legal proceedings against the company and the guarantors for the

same. By a separate letter of the same date, the bank wrote to the guarantors giving them notice that unless the company paid up, the bank would be looking to the guarantors for payment.

22 On 15 October 1984, the fourth defendant wrote to the bank explaining the confusion. He described the internal arrangement of the company - that it was Chee Soon Wah and the second defendant who were responsible for liaising with the bank and monitoring the account. He also mentioned the proposal he made to the Chee brothers to cover the excess in the overdraft account. He asked for time to regularize the position. But he made no specific proposal to the bank. Of course, by this time, the bank had become aware of the squabbling among the directors of the company. It did not think that this was a good development; something could go wrong.

23 At about the same time, correspondence was exchanged between the fourth and fifth defendants and the Chee brothers, with the former making the allegations that Chee Soon Wah, as architect, had failed to discharge his duties diligently and that he and the second defendant had not monitored the loan situation closely, resulting in the excess overdraft and the recall of the overdraft.

24 On 1 November 1984, having received no payment from the company, the bank wrote a reminder to the company and the four guarantors requesting payment, within 14 days, of the entire outstanding sum under the overdraft facility. The addressees were warned that the bank would institute legal proceedings to recover the same and exercise the power of sale as a mortgagee. Still, nothing was done by the company or the guarantors. By that time, the building construction was nearing completion. Then, on 21 November 1984, something very serious happened. The second defendant filed a petition to wind

up the company. It showed the two groups could not resolve their differences. They had reached a point of no return.

25 Accordingly, on 7 January 1985, the bank commenced the present action against the company and the four guarantors.

26 The bank supported the winding-up petition. Eventually, a winding-up order was made by the High Court on 10 October 1985. Liquidators were appointed. Ms Helen Ong ('PW1'), the officer-in-charge of the credit administration department at the bank, told this court that they supported the petition because the account was not serviced, the directors were squabbling and things did not appear to be moving. The bank wanted possession and yet no one could give it. The bank felt it might be better to deal with the liquidators.

27 In August 1985, at the request of the bank, Tan Kim Lee Property Consultants Pte Ltd assessed the force sale value of the property at S\$5,200,000. This valuation was obtained because the bank was thinking of selling the property. The valuation was made on the basis of the building plans without actual inspection of the internal structures of the building. On this valuation, there appeared to be enough money to pay off the overdraft then outstanding.

28 But, at that time, the bank could not obtain possession of the property. As early as April 1985 the bank was asking for possession of the premises. The company was also having problems with the building contractors, who were then under liquidation. The keys were held by the contractors. In June 1985, the bank took out an originating summons for possession, which application was opposed by the company and the fourth and fifth defendants. Mr Lim said that the second group opposed the application because they did not want to adopt a

stance which would prejudice them vis-à-vis this action; it might imply that they agree that the recall by the bank was correct. If this was the real reason then they cannot be heard to complain that the bank as mortgagee had failed to sell the property at that time; the bank could not have sold without possession.

29 Also, at around that time or soon thereafter, it became apparent that the building was in a poor state of maintenance. It was extensively damaged by vandals. Fittings and accessories were forcefully removed and some of the doors were missing. The underground car park was flooded with water. It was estimated that a sum of \$1m was required to reinstate the building to a saleable state.

30 At a meeting, on 16 April 1986, of contributories and creditors of the company, the contributories could not agree to provide the necessary funds to reinstate the building. The liquidators could not act as there was no consensus. There was, however, no objection to a proposal that the building be handed over to the bank. But it was only on 10 September 1986 that the liquidators handed all the keys of the building to the bank. The bank only went into possession of the building on 27 October 1986 after giving prior notice to the second to fifth defendants. On obtaining possession, the bank instructed surveyors to make a survey of the damage to the building.

31 On 1 December 1986, M/s Cheong Koon Seng Auctioneers and Valuers (Pte) Ltd, at the request of the fourth and fifth defendants, gave a report putting a value of \$5,925,000 on the property. This valuation was on the basis that the repairs would be carried out expeditiously to the building. The report was forwarded to the solicitors for the bank. The bank's solicitors replied that the bank would be quite happy to sell at that price if the fourth and fifth defendants

could find a buyer at that level. The bank's solicitors also gave notice that they would place the property up for tender on an 'as is' basis. Notices to invite tenders were in fact advertised in the media on 9, 14 and 16 January 1987. By a reply of 14 January 1987, the fourth and fifth defendants' solicitors objected to a sale by tender and/ or on an 'as is' basis. They also requested the bank to effect repairs before putting the property up for sale by public auction. The bank's solicitors responded on 24 January 1987 to the effect that they were entitled to put the property up for sale by tender. Tender closed on 15 February 1987. However, not a single tender was received.

32 Thereafter, the bank decided to do the necessary rectification works and to apply for the certificate of fitness before putting the property up for sale again. Work commenced in July 1987. The bank spent over \$600,000. Temporary occupation licence was obtained on 5 November 1987.

33 In early 1988, the bank placed the property in the hands of M/s Richard Ellis to be sold by tender. Again advertisements were placed in the media. Tender closed on 28 April 1988. The only tender received came from Hong Leong Holdings Ltd who offered \$6.2m. The bank resorted to tender instead of public auction because it was advised by M/s Richard Ellis that sale by tender was better. The tender of Hong Leong Holdings Ltd was accepted in May 1988 and the sale was eventually completed in November 1988.

34 In the meantime, in May 1985, judgment was obtained against the second and third defendants for a sum of \$4,288,770. Following negotiations between the second and third defendants and the bank, it was agreed on 26 February 1990 that 'in consideration of the bank forbearing to execute the judgments obtained ... against [them] ... [they] agree to and shall pay the bank

the sum of \$75,000 forthwith ... Provided always that the bank`s suit against (the fourth and fifth defendants) remains unaffected.`

35 As stated above, Mr Lim Sin, the husband of the shareholder Mdm Goh Hock Eng, was very much involved in the project from the very beginning. Testifying for the fourth and fifth defendants, he said that Chee Soon Wah told him that the latter had a very special relationship with the bank and that there would be no problem in obtaining financing from the bank to purchase the land and later, the financing to develop the land. Mr Lim said that although the land was only purchased for \$1,024,000, the bank gave a loan of \$1.5m to the company. It would be noted that the company, in fact, applied for a loan of \$1.75m. As regards the further overdraft of up to \$3m for construction, Mr Lim claimed there was an understanding that the bank would not recall the loan before one year from completion of the project.

36 Mr Lim said that during the initial stages of the development, matters of account were handled by Chee Soon Wah, who also held the cheque books. In December 1983, the second defendant took over the control of the cheque books. The fourth and fifth defendants had no objection to the change provided that the second defendant and Chee Soon Wah kept proper liaison with the bank to ensure that the account would be kept in order.

37 Mr Lim complained that the bank should not have supported the winding-up petition filed by the second defendant. He said the bank should have sold the property in 1985 when it was valued at \$5.2m. But I must make this observation. He conveniently overlooked the fact that the bank could not then obtain possession of the building. The fourth and fifth defendants even opposed the bank`s application to court for possession. Yet he says that since the

premises had been broken into by vandals, there was nothing to stop the bank from getting possession of the premises. I am surprised that Mr Lim could even suggest that!

38 The defendants called a valuer, one Ms Goh Seow Leng from Colliers Jardine Goh & Tan Pte Ltd to testify. She was of the view that the sale of the property at \$6.2m to Hong Leong was on the low side. She gave a valuation of \$7.5m (as at June 1988) though the plaintiffs' valuer put it at \$6.5m (as at April 1988). But it must be noted that Ms Goh gave her valuation on an ex post facto basis as it was done in March 1990. Ms Goh accepted that, in valuation, you would allow a margin of error of 5-10%.

39 The fourth and fifth defendants also attack the sale to Hong Leong on the ground that it was not by auction. But Ms Goh admitted that her firm does place properties for sale by both methods, tender and auction. It depends on the instructions of clients.

40 Allied Appraisal Consultants Pte Ltd were engaged by the bank to provide valuation of the property on three separate occasions - first, on 12 December 1986, where the property was valued at \$4m in its existing state (forced sale value was \$3,477,000) but the valuers recommended that the defects be made good; second, on 29 August 1987, where it was valued in its existing state at \$5,107,000 (forced sale value was \$4,341,000); third, on 6 April 1988 (after repairs were effected by the bank), it was valued at \$6.5m (forced sale value was \$5,850,000). Mr Teo Yik Weng, a chartered surveyor and licensed appraiser with Allied Appraisal Consultants, told the court that the sale to Hong Leong Holdings at \$6.2m was reasonable. He said properties may be sold by auction or by tender. Auction would not necessarily produce a higher

price. He said in practice most of the bigger properties were sold by tender. He noticed that only smaller residential properties were put up for sale by auction. He said property prices were depressed until 1986.

41 **Defences**

42 On the pleadings and the evidence, the defences raised by the fourth and fifth defendants are the following:

- (i) Breach by the bank of the agreement under which the overdraft facility was granted -
 - (a) recalling the loan although the time for payment had not yet become due;
 - (b) honouring cheques drawn by the company which would cause an excess to arise;
 - (c) honouring cheques drawn when the company or its shareholders had not paid up front 30% of the value of works certified by the architect;
 - (d) preventing the completion of the project by supporting the winding-up of the company.
- (ii) The notices of demand of 17 September 1984, 1 October 1984 and 11 October 1984 were of no effect as they were not sent to the registered office of the company but care of the office of Chee Soon Wah, the architect; accordingly, the subsequent letter of demand from the bank's solicitors dated 28 November 1984 was also invalid.
- (iii) The bank, as mortgagee, had failed to exercise reasonable care in expeditiously disposing of the property in 1985 or later when the value thereof far exceeded the outstanding sum due from the company to the bank; the bank was also in breach of that duty when it sold the property for only \$6.2m in 1988.
- (iv) In view of the settlement reached between the bank and the second and third defendants in respect of the judgment sum obtained against them, the fourth and fifth defendants are released from their liability since all the guarantors' liability under the guarantee is joint and several.

43 Before I move on to examine these defences, I think I should, at the outset, dispose of a vague allegation made by the fourth and fifth defendants. It is this: that there was collusion or conspiracy between the bank and Chee Soon Wah to bring the company to grief. There is this faint assertion by Mr Lim and the fourth defendant that Chee Soon Wah had a special relationship with the bank. It is true that Chee Soon Wah had dealt with the bank before. He was a customer of the bank. He was also the architect in relation to some renovation works undertaken by the bank. He knew some of the bank's officers. But there is nothing beyond that. I cannot see anything which shows that the relationship between Chee Soon Wah and the bank was anything but strictly business. Although the land was purchased by the company at only \$1,024,527.50, at the time the first line of overdraft of \$1.5m was obtained, the land was valued by M/s Richard Ellis at \$2,945,000 as an in-principle approval was obtained for its development. There is evidence that a development charge of \$270,000 was also paid by the company. The bank approved the overdraft based on the valuation of M/s Richard Ellis. In fact the company applied for a higher overdraft of \$1,750,000. There was no evidence of any impropriety. I am satisfied that insofar as the first line of \$1.5m overdraft is concerned, the bank had dealt with the application by the company in the normal manner and had applied the usual criteria. There is no evidence to suggest that the bank had approved the overdraft of \$1.5m unduly influenced by any request or demand of Chee Soon Wah other than purely in accordance with the commercial interest of the bank. I find that the allegation of collusion/conspiracy is based purely on conjecture.

44 **Issue (1): breach by the bank**

45 In common law, any variation in the terms undertaken by the primary obliger without the consent of the guarantor would discharge the guarantor:

Holme v Brunskill . Of course, the parties can contract out of the common law position. For a proper consideration of the several sub-issues under this head, it is necessary to set out the pertinent parts of the facility letter of 26 November 1982:

Additional O/D \$3m will be advanced against 70% of architect's certificate for value of work done, subject to satisfactory site inspection by our bank's officers, of which balance 10% will only be released upon issuance of TOL.

46 Repayment will be from the sales proceeds of the area on first and second storey or within one year after completion of the project whichever is earlier.

47 The said facility is subject to determination, modification as our bank may impose.

48 The duration in which the facility is granted is to be left at our bank's discretion.

49 It is important to bear in mind that what was granted by the bank to the company was not a term loan but an overdraft. A common feature of banking overdraft is that it may be withdrawn at any time by the bank. This is clearly provided for in the facility letter of 26 November 1982 which I have quoted above. The provision in the facility letter for repayment is not in derogation of the right of the bank to recall the overdraft at any time at its discretion; it is just a further term. It is inconceivable that Mr Lim, who had been dealing with the bank on behalf of the second group, was not aware of this essential characteristic of overdraft facility.

50 In any event, on the evidence, it has not been shown to my satisfaction that the bank officers did give any oral assurance that the bank would not recall the overdraft until one year after completion. I find that the bank officers could have indicated in a general sort of way that in the normal course, it was unlikely that the bank would recall the loan. That was about all. Neither Mr Lim nor the fourth and fifth defendants were misled. The recall of the overdraft facilities in the present case was caused by the default of the company in failing to service the loan and keeping it within the effective credit limit. Towards the end of the case, counsel for the defendants had to concede in his submission that this was not one of his strong points.

51 It is clear on the evidence that the excess in the present case was brought about largely by interest payments which were not serviced. The effective credit limit at any point in time was based on \$1.5m plus 70% of the value of work as certified by the architect. Of course the bank was entitled to reject any cheque drawn which would cause an excess over the effective credit limit to arise. But I do not think there was any duty on the part of the bank to check that the company had paid up front the 30% of the certified value before the bank could release the 70%. The facility letter did not say that. The evidence shows that it was a matter of discretion for the branch manager to decide whether he would honour a particular cheque which would cause an excess situation to arise. When a manager decided to permit the excess he was really being accommodating. In this regard, it should be noted that in the facility letter there was this express provision `the said facility is subject to determination, **modification** as (the) bank may impose.` That, in itself, is a complete answer to the point.

52 I will now, nevertheless, move on to examine the cheques which the fourth and fifth defendants say the bank should not have honoured. In July and August 1984, seven cheques were drawn by the company and presented by the payees for payment. They totalled \$50,857. Except for one cheque for a trivial amount of \$75 payable to the comptroller of income tax, all the other six cheques appear to be for payments related to the development. Each of these seven cheques was signed by both the second and the fourth defendants. It seems to me that by issuing a cheque which would cause an excess to arise, the authorized signatories were, in fact, asking the bank to honour it, and if the bank in exercise of its discretion had acceded to that request, I do not see how it could be argued that the bank was negligent or in breach of duty. This is absurd. I would also add that most of the cheques, before being signed by the fourth defendant, were screened by Mr Lim.

53 On this point I would go further and say that, by issuing the cheques which would cause an excess to arise, there was, in fact, an implied consent on the defendants' part, as was held to be the case in an analogous situation in **Woodcock v Oxford & Worcester Rly Co**, where the sureties were the solicitors who prepared the variation documents for execution. In **Wren v Emmett Contractors Pty Ltd**, Menzies J at the Australian High Court enunciated a similar principle at p 220, as follows:

It seems to me that if the defendant as controlling director of Celebrity Theatres Pty Ltd arranged an extension of time for the payment of what was due by the company under its contract with the plaintiff he cannot be heard to say, when sued upon the guarantee, that the extension was given without his consent. Mere knowledge of the variation of a contract or the giving of time does not of itself amount to consent; but for a guarantor on behalf of the principal debtor, to bespeak time to pay what is owing betokens his concurrence with the giving of time to pay. Were this not so, the law would be out of touch with reality.

54 The internal arrangements in the company and the squabbles among the directors were not matters which needed necessarily concern the bank. The bank could only act on the basis of instructions given by the authorized signatories. The bank was not, and could not be, the policeman of the company. It should not be expected to take sides in any internal disputes. There is no duty on a bank to monitor how the directors of a company carry on its business, or to investigate the internal squabbles among the directors. Any rule to the contrary would impose an undue burden and would bring banking business to a grinding halt. Of course, when internal squabbles arise in a company, a bank which has granted facilities will naturally be concerned. Anything can go wrong. The bank will, I am sure, in its own interest, keep a close watch over the situation and if need be, recall the facilities. But that is different from saying that the bank owes such a duty to the company or the guarantors.

55 Insofar as the liabilities of the present guarantors are concerned, each of them has undertaken a clear liability to pay up all moneys which may be owing by the company to the bank, subject to a maximum limit of \$4.5m. It is a continuing guarantee. I have earlier quoted the relevant provisions. They are self-evident.

56 Turning to sub-issue (i)(d), the fourth and fifth defendants contend that the bank should not have supported the winding-up petition; the bank had destroyed the company and the project. They aver that the bank had other options, eg to appoint a receiver or to sell the property. They question why the bank procured a valuation report to show that the company's assets were worth more than its liabilities, which enabled the winding-up order to be made.

57 From the grounds of judgment of the learned judge (exh D3) who made the winding-up order, it is clear that the petition was presented on the ground that `there had arisen an irreconcilable stalemate between two equal groups of shareholders by reason of which it was just and equitable to wind up the company under s 254(1)(i) of the Companies Act` and the judge made the order because he was satisfied that `the best and only course` was to order a winding-up. While the learned judge appears to have taken note of the valuation report procured by the bank, what was stated in the valuation report was precisely what the second group was telling the winding-up court, which was that the company was still solvent and should not be wound up. Any winding-up court would be interested to know what the assets and liabilities of the company were. I do not see why the fourth and fifth defendants should complain about that.

58 Considering the grounds of judgment of the learned judge, I am satisfied that the winding-up order would have been made in any event, whether the bank supported the petition or adopted a neutral stand. The bank has explained why it supported the petition. The stalemate between the two groups had caused the affairs of the company to come to a standstill. The bank could not obtain possession of the property. It will be recalled that the bank had considerable difficulties in obtaining possession; their application for possession was even resisted by the second group. The bank felt that it might be easier and better to deal with the liquidators. In the circumstances, I do not think that the bank had acted unreasonably; it really had no other viable alternative. In any case, the bank did not cause the company to be wound up. The petitioner was the second defendant. The bank was only indicating its position to the court as a creditor.

59 **Issue (2): notices not validly served**

60 The second issue raised by the fourth and fifth defendants is that all the relevant bank's notices to the company were not sent to its proper address, the registered address; thus, the notices were invalid. While in his closing speech counsel for the defendants abandoned this issue, I will nevertheless state that, in my view, there is no merit in the point.

61 When the company first opened the account with the bank, the address of the company was given to be at UIC Building at Shenton Way, its registered address. Sometime in or around April 1983, following a general renumbering exercise of high rise buildings in Singapore, the bank sent a notice to the company asking it to complete the new address on an enclosed card. The new address as furnished by the company on the card was 'c/o Golden Mile Tower, 6001 Beach Road #10-01, Singapore 0719'. The card was executed by the two authorized signatories of the company, including the fourth defendant. From June 1983, the bank had been communicating with the company at the address at Golden Mile Tower. In the meantime, in May 1984, the company changed its registered address from UIC Building, Shenton Way, to Supreme House, Penang Road. However, the company never informed the bank of any further change of address to which communications should be sent. The day-to-day running of the company was done at Chee Soon Wah's office ('NE70'). I do not think it is the duty of a banker to keep track of the address of a customer. The duty rests with the customer to notify the banker of any change.

62 It is of interest to see what the fourth defendant said on this. He said that when he signed the address card it was already filled up. He signed it at Chee Soon Wah's office. He was told it related to renumbering. But insofar as the bank was concerned, there was nothing on the card which would indicate to the bank that what was conveyed in that card was not correct and should not be

acted upon. The bank had to act on it as it bore the authorized signatures. If the bank had not acted on it, it would clearly be in breach of instructions. If the fourth defendant had signed the card without reading it, he cannot be heard to complain that his co-signatory had inserted an address which was not proper. If he had left everything to be filled up by his co-signatory he must also bear the consequences of his own conduct. What decisively shows that the fourth defendant knew what he signed was that, in his letter of 30 September 1984 to Chee Soon Wah and the second defendant, he stated that the bank's letter of 17 September 1984 was 'correctly' sent to the company's 'postal address' at Golden Mile Tower!

63 Issue (3): bank's failure to exercise reasonable care in selling property

64 This issue concerns the question whether the bank had exercised the power of sale promptly and with reasonable care, in particular, whether it had sold the property at a proper price.

65 The first allegation is that the bank should have sold the property in August/September 1985 when it was valued at \$5.2m and the debt outstanding to the bank was only at \$4.7-4.8m. There was, in fact, another valuation done by M/s CKS Auctioneers and Valuers on 24 June 1985 which placed a value of \$7.5m on the property. But the simple fact of the matter was that the bank required possession of the property before it could sell; that was the main obstacle encountered by the bank. It seems to me that a greater part of the blame for this must be laid at the door of the second group. As I have stated before, they even resisted the bank's application to court for possession made in June 1985. They cannot blow hot and cold. At that time, there were also some

difficulties with the contractors (who were under liquidation) who insisted on full payment before they would hand over the keys. Not only was no evidence placed before me to say that the property could have been sold in 1985, whatever evidence there is positively points to the fact that the second group was making it difficult for the bank to effect any sale. If the bank had attempted to sell the property in 1985, it would have ended up in a legal tangle if it could not deliver possession of the property to the buyer.

66 On the evidence before me, the plain truth of the matter is that between 1985 and 1986 property prices in Singapore were sliding. Recession hit Singapore in 1985. A sale in August/September 1985, even if possession was not a problem, would have been quite difficult. I find that, in all probability, the second group did not want to sell or allow the bank to sell the property as yet because of the depressed market. The valuation given by M/s CKS Auctioneers & Valuers at \$7.5m certainly seems very optimistic. It is very telling that even in early 1987, when the bank eventually put the property up for sale by tender on an `as is` basis, and which was also the time when the property market began to move upwards, no bid was received.

67 At no time did any of the four defendants/guarantors take any serious steps to have the property sold. They were more engrossed in their squabbles than the sale of the property. They were not prepared to put up the necessary funds to do the rectification works. I can well understand their predicament, as I said the property market in 1985 and 1986 was depressed. But they cannot now turn the table round and blame the mortgagee-bank. From the time the bank obtained possession in October 1986 until the time of the sale to Hong Leong, the bank had acted reasonably. We must bear in mind the market condition and the physical state of the building then. There was nothing to stop the company

and/or the directors/guarantors to look for a buyer themselves. The two defendants contend that the bank should have repaired the property before putting it up for sale. But they were not prepared to put their money where their mouth is. In those circumstances, I do not see how the bank can be faulted for not carrying out the repairs. I seriously doubt that there was or is such a duty. However, the bank did eventually carry out the repairs and had the property sold.

68 In any event, in a recent case from Hong Kong, ***China and South Seas Bank v Tan Soon Gin, George alias George Tan***, the Privy Council held that a creditor owed no duty to a surety to realize a security before it became worthless. It is instructive to note the reasons given by the Privy Council which are as follows (at pp 59-60):

The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time, or times, simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor, on being paid in full, was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security, he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt, is entitled to a transfer of the mortgaged securities to procure recovery of the whole, or part, of the sum he has paid to the creditor.

69 The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts

to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value, then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagor and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in **Watts v Shuttleworth** 5 H & N 235, 247, it appears to their Lordships that in the present case the creditor did no act injurious to the surety, did no act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all.

70 The second allegation is that the bank should not have put the property up for sale by tender; it should have been by auction. There is no evidence before me which suggests that a sale by tender is wrong or improper. In fact, whatever evidence there is points to the contrary. M/s Richard Ellis had advised the bank to proceed by tender. Even the expert of the defendants agreed that the sale could be by either tender or auction. Ms Goh did not say that a sale by auction would always fetch a better price. Accordingly, I hold that there is no basis for the allegation that a sale by tender was improper or that a sale by auction would have fetched a better price. Both are proper methods of sale. It is pure speculation to say that if the property had been sold by auction it would have fetched a better price. In passing, I would just observe that the State has more often than not sold property to the public by tender.

71 The third allegation is that the price in fact obtained by the bank, when they eventually sold the property, was below the market price. The evidence shows that from early 1987 the property market was rising, perhaps gradually. Even so, as I have stated before, the first attempt by the bank in January 1987 to put the property for sale by tender on an `as is` basis attracted not a single bid. Faced with that situation and even though no support was given by the guarantors, the bank carried out the repairs to make the property more saleable. The property was finally put up for sale by tender in early 1988. Enquiries were made by quite a number of potential buyers. However, by closing date on 28 April 1988 only one bid at \$6.2m, submitted by Hong Leong, was received. On 19 May 1988, the tender was accepted by the bank. This was slightly below the valuation of \$6.5m. It would appear that, in November 1988, Hong Leong sold the property to another at a price of \$7.246m. But there is evidence to suggest that Hong Leong did further work to the property before selling it, though the extent of the work done was not very clear.

72 However, taking into account these factors, viz (i) the bid by Hong Leong was made in April 1988, (ii) further work was done by Hong Leong before reselling it in November 1988, and (iii) in 1988, the property market was on the rise, I do not think it could be said that the sale then to Hong Leong at \$6.2m was at an improper price. It was to all appearances an arm`s-length transaction. At every stage the bank had acted on professional advice. The bank did try to persuade Hong Leong to increase the amount of the tender without success. I hold that the fourth and fifth defendants have not shown that the bank had sold the property below market price. The valuation given by Colliers Jardine Goh & Tan Pte Ltd on 13 March 1990 that at June 1988 the property would have been worth \$7.5m was clearly an ex post facto exercise. The defendants` valuer also admitted that, in valuation, there could be a margin of

error of 5-10%. In passing, I wish to say I am a little baffled that the defendants' valuer had placed a value of \$7.5m on the property (as at June 1988) when in 1988 the property market was rising and Hong Leong managed to sell it in November 1988 for only \$7.246m, and even that was apparently (I used the word 'apparently' advisedly because there is only hearsay evidence on it and the defendants' valuer did not dispute that some repairs could have been done by Hong Leong) after Hong Leong had spent some money to do some further repair work.

73 Insofar as the law is concerned, I do not think there is any doubt that a mortgagee, on exercising the power of sale, is required to exercise it with reasonable care. In *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd*, it was held that a mortgagee, although he may exercise his power of sale at any time of his own choice, owes the mortgagor a duty to take reasonable care to obtain a proper price for the mortgaged property at that time.

74 In *Standard Chartered Bank v Walker*, the Court of Appeal held that the receiver of a company appointed under the provisions of a debenture owed a duty to the borrower and guarantor of the company's liabilities to take reasonable care to realize the assets to the best advantage. But it does not follow that just because there is a breach of this duty, the guarantor will be discharged. When that happens, what the borrower and the guarantor should be given is credit for the difference between the actual sale price and the proper market price (per Denning MR at p 1416).

75 **Issue (4): Discharge through release of co-guarantors**

76 The final issue relates to the compromise reached between the bank and the second and third defendants. First, let me set out briefly the background leading to the compromise. Having on 24 May 1985 obtained judgment in this action against the two defendants for the sum of \$4,288,770.40, the bank pressed them for payment with the institution of bankruptcy proceedings. Negotiations followed. Those two defendants contended that after taking into account the sale proceeds of the property, the shortfall represented entirely interest element and as the company had lost substantially on the project, they felt that the bank should accept a token sum in settlement of the shortfall. Thus, they offered \$1,000. This sum was later increased to \$50,000 and \$65,000. All these offers were rejected by the bank. Eventually, on 7 December 1989, the bank counterproposed (1PB149), through their solicitors, that the two defendants pay to the bank a sum of \$75,000 and in return the bank agreed not to proceed to execute their judgment against the two defendants, but subject to this very important condition:

The proposal is made subject to details and contract and is without prejudice to (the bank's) right to pursue their claim against the other defendants and/or third parties. Further, this proposal does not constitute a discharge of liability upon any party whatsoever.

77 I should mention that at the final stages before the agreement was signed between the bank and the second and third defendants, it would appear that some attempts were made by Chee Soon Wah to bring the fourth and fifth defendants on board in order to reach a global compromise. However, it would seem that the attempts failed.

78 It is necessary that I should set out the substantive part of the agreement signed between the bank and the second and third defendants in order to see what they had in fact agreed:

Whereas -

(1) By a guarantee (‘the guarantee’) dated 6 January 1983 the judgment debtors together with Ong Lian Seng (‘Ong’) and Teo Beng Poh (‘Teo’) guaranteed payment to the bank for all moneys and liabilities owing to the bank by Li Soon Development Pte Ltd (‘the company’).

(2) The bank has commenced proceedings against the company, the judgment debtors, Ong and Teo in Suit No 164 of 1985 (‘the suit’) in the High Court of the Republic of Singapore.

(3) The bank has, inter alia, obtained judgment against the judgment debtors in the suit.

Now it is hereby agreed as follows:

In consideration of the bank forbearing to execute the judgments obtained in the suit against the judgment debtors, the judgment debtors agree to and shall pay the bank the sum of \$75,000 forthwith.

79 Provided always that the bank’s suit against Ong and Teo remains unaffected.

80 It is settled law that if the liability of guarantors is joint or joint and several, the release of one without the consent of the others will discharge all the guarantors unless there is a sufficient reservation of the creditor’s rights against the other guarantors: see ***Liverpool Corn Trade Association Ltd v Hurst & Ors*** .

81 In law, there is a distinction between a release and a covenant not to sue. A release coupled with a reservation of the right to sue the other guarantors has been construed as a covenant not to sue. The position of the law is clearly expounded in this passage in ***Chitty on Contract*** (26th Ed) at para 1307:

The discharge of one joint debtor by release under seal or by accord and satisfaction discharges all, in accordance with the general principle that joint liability creates only one obligation; and the same is true, illogical though it may seem, if one joint and several debtor is so discharged. On the other hand, a

covenant not to sue one joint or joint and several debtor does not discharge the others, though it may leave the covenantee liable to pay contribution to the other debtors, and thus deprive the covenant of some of its apparent effect. Moreover, the courts generally construe a release as a covenant not to sue if it contains an indication of intention that the other debtors are not to be discharged, thus in effect abrogating the rule as to releases in cases where the creditor has reserved his rights against the other debtors. Similarly, an accord and satisfaction with one joint or joint and several debtor will not discharge the others if the agreement provides that the creditor's rights against them shall be preserved. It is only when the document is construed as a release or an accord and satisfaction that there is this necessity for discovering a reservation of rights against the other debtors. If it is construed as a covenant not to sue, the other debtors are not released, even though there is no express reservation of rights against them.

82 The distinction between a release and a covenant not to sue rests on the intention of the parties. A release involves total destruction of the debt or claim; a covenant not to sue implies that the creditor undertakes not to take proceedings against the debtor in question (the covenantee) while not necessarily abandoning his rights against any other party liable.

83 In this regard it is enlightening to refer to the case ***Re EWA, a debtor***, where A and B became liable on a joint and several guarantee to a bank for a sum of £6,000 owing to the bank from a company. Subsequently, judgment was obtained by the bank against A and B jointly and severally, which remained unsatisfied. The bank presented a bankruptcy petition against B alone for the whole judgment debt. A compromise was eventually reached and, in consideration of a payment of £3,000 by B, the bank in a receipt stated that the payment was 'in full discharge of all claims by the bank against B in connection with the company and all guarantee given by him to the bank in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank.' Following this compromise, the bank

withdrew the bankruptcy petition against B but instead presented a bankruptcy petition against A. The English Court of Appeal held that the receipt amounted to an accord and satisfaction equivalent to a release of B from the entire joint and several judgment debt, there being no surrounding circumstances qualifying its effect as an absolute release in terms. Accordingly, by reason of the release of A's co-debtor, there was no debt to support bankruptcy proceedings against A.

84 However, it is pertinent to refer to these words of Collin LJ in that case (at pp 648-649):

It is clear that, although a document in terms purports to release one of two joint debtors, yet it may contain in terms a reservation of rights against the other joint debtor. Where you find those two provisions you construe the document, not as a release, but merely as an undertaking not to sue a particular individual, and the result is that the right to proceed against the co-debtor is reserved and can be put in force against him. Whenever you can find from the terms of the document an agreement for the reservation of rights against the co-debtor, then, I agree, the document cannot be construed as an accord and satisfaction of the joint debt, and, therefore, as a release of the co-debtor. But it appears to me that, on the face of this document, there is no intention shewn so to limit its effect, and that it is framed in the widest possible terms so as to cover, not only this particular debt, but all other claims by the bank.

85 It should be apparent that the present agreement between the bank and the second and third defendants is quite different from that in **Re EWA, a debtor**, because, here, the bank agreed only to forbear to execute the judgment against the second and third defendants and, furthermore, there is an express provision stating that the forbearance to execute was on the understanding that the bank's action against the fourth and fifth defendants would remain unaffected. Nothing can be clearer. There was no release of the liabilities of the second and third defendants. This was only a covenant not to execute the judgment. Therefore,

there is no question of the fourth and fifth defendants being released from their liabilities. This defence must fail.

86 **Conclusion**

87 In the light of the reasons above, the fourth and fifth defendants have failed to raise any defence to the action. Now, this action was begun by the bank before realizing the security. That is not improper. As Lord Diplock said in *Moschi v Lep Air Services Ltd & Ors* , at p 348, `the creditor`s cause of action against the guarantor arises at the moment of the debtors` default and the limitation period then starts to run.` He further explained that the obligation of the guarantor under a guarantee is not an obligation himself to pay a sum of money to the creditor but an obligation to see to it that the debtor does something and that the creditor`s remedy for the guarantor`s failure to perform lies in damages for breach of contract only. And at p 349 he said:

... whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee, the creditor can recover from the guarantor as damages for breach of his contract of guarantee whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure. The debtor`s liability to the creditor is also the measure of the guarantor`s.

88 Accordingly, there is no necessity for the bank to enforce the security before commencing action against the guarantors. Lord Diplock was undoubtedly expounding the position under common law. In any event, cl 5 of the guarantee agreement covers the point.

89 There is, finally, a point on interest, which counsel for the fourth and fifth defendants has raised. He submitted that with effect from the date of the winding-up of the company, the contractual rate of interest can no longer apply.

He said that the bank could only claim interest at 4% pa. He argued by analogy based on s 43(7) and (8) of the Bankruptcy Act (Cap 20). However, I do not think s 43 of the Bankruptcy Act, which relates to the question of priority of debts in the distribution of the assets of the estate of a bankrupt, can be of any assistance to the question here of the liability of a guarantor. Similarly, the case ***Re International Contract Co***, cited by counsel, which established that an order to wind up a company fixed the right of its creditors and nullified, as between them, all contracts for interest, is not really of much relevance.

90 As I see it, the point must be decided on a construction of the guarantee agreement itself. RM Goode on ***Legal Problems of Credit and Security*** (2nd Ed) states the following at p 203:

Some care needs to be taken in regard to the interest clause in the guarantee. If interest is expressed to be payable 'so long as any amount is due from the debtor', the right to charge interest to the surety apparently terminates with the debtor's bankruptcy, at which point the debt ceases to be legally recoverable from him. This result can be avoided by stipulating that interest is to run against the surety 'until payment' of the amount due from the principal debtor.

91 Reverting to the pertinent clauses in the guarantee agreement, cl 1 and 3 read:

(1) I/We will pay to you on demand all money which now is or may during the operation of this agreement be owing to you from the customer or remain unpaid on the general balance of the customer's account with you including advances overdrafts discount bills or notes held by you on or in respect of which the customer may be or have been liable to you commission and other ordinary banking expenses including interest at such rate as may be from time to time agreed between the customer and you or allowed by you with monthly rests ***although the relation of banker and customer may have ceased ...***

...

(3) ***Should the customer*** become bankrupt or insolvent or being an incorporated company ***shall be wound up***, you may prove in the bankruptcy insolvency or winding up of the customer for the whole amount outstanding against the customer on such general balance and no money or dividend so received by you shall be treated as received in respect of this guarantee or otherwise in relation to me/us, but the full amount hereby guaranteed shall be payable by me/us until you shall have received from all sources one hundred cents in the dollar on the ***ultimate balance outstanding*** against the customer. After you have received such ultimate balance in full any claim on my/our part to any excess or any securities remaining in your hands shall be matter of adjustment between you me/us and any other person or persons laying claim thereto. [Emphasis mine.]

92 It seems to me significant that cl 1 refers to `general balance` and cl 3 to `ultimate balance.` The word `ultimate` must refer to the state of account when everything owed under the account is paid. The effect of cl 3 is that the guarantors guarantee the full payment of the ultimate balance due from the company to the bank notwithstanding the winding-up of the company. The liability of the guarantors, to pay the bank on the basis of the rate of interest agreed between the company and the bank, shall continue until the overdraft, including interest due, has been completely repaid, subject to the maximum limit of \$4.5m. It appears to me that the whole commercial purpose of the guarantee was to make the guarantors liable to repay everything under the overdraft facility subject to that maximum limit.

93 As of 12 November 1993, the outstanding balance stood at \$1,926,877.61. Judgment is accordingly given in favour of the bank in that sum. The fourth and fifth defendants shall bear the cost of this action.

94 This is a case where a joint venture failed because the shareholders fell out. They were also unfortunate in the sense that when that happened, and the bank recalled the overdraft, the property market was on the downward slide.

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The second group resisted the bank's application for possession. They hoped that by stalling the bank, things would improve. While the property market had improved, interest on the outstanding overdraft had also accumulated. It did not ultimately turn out to their advantage.

95 Plaintiffs' claim allowed.

Chao Hick Tin J

P Selvadurai and Jessie Tong (Rodyk & Davidson) for the plaintiffs
Harry Wee and Kesavapan Nair (Braddell Brothers) for the
defendants
