IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 49

CA 252/1998

Between

Habibullah Mohamed Yousuff

… *Appellant*

And

Indian Bank

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Summary judgment; Contract — Collateral contracts

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Habibullah Mohamed Yousuff v Indian Bank

[1999] SGCA 49

CA 252/1998
Karthigesu JA; L P Thean JA
10 July 1999

1 **Judgment:**

2 **KARTHIGESU JA**

3 (delivering the grounds of judgment of the court): This was an appeal against the dismissal of the appellant`s appeal against the assistant registrar`s decision granting summary judgment to the respondents. The summary judgment arose out of the respondents` action by way of Suit No 2355 of 1996 (`the Suit`) against Sadeco Sarl Pte Ltd (`Sadeco`) and their guarantors for the recovery of about US$10.97m. The appellant was the second defendant in the Suit.

4 2. ***The facts***

5

6 The appellant is Habibullah Mohamed Yousuff. According to his affidavit filed on 14 March 1998, he graduated from International Islamic University, Malaysia, sometime in the middle of 1991. He was at that time an

Indian national. Sometime in late 1991 or early 1992, Pakirisami Vijayagavan (`Pakirisami`) approached the appellant to join Sadeco as a director. Sadeco had been incorporated on 18 February 1991 with a paid up capital of S$1m. Sadeco`s principal activity was general wholesale trade. At the time that the appellant was approached, Pakirisami was an employee of Mountamount (S`pore) Pte Ltd (`Mountamount`), who were the de facto parent company of Sadeco. Pakirisami is also the nephew of the seventh defendant in the Suit, Muthukrishna Varatha Raja (`MVR`). The appellant became a director of Sadeco on 19 March 1992.

7 3.After becoming a director of Sadeco, sometime in 1993, the appellant was given 500,000 shares in Sadeco to hold as nominee for Varatha Rajaloo Usha (`Usha`), the sixth defendant in the Suit, and MVR. According to the appellant, he was not involved with the day to day management of Sadeco, which was done by MVR even though he was not a director of the company. The appellant claims that he did not visit Sadeco`s office as he was working at his father`s shop at Albert Complex. Whenever his signature was required, the relevant documents would be despatched to him.

8 4.By a letter dated 8 June 1993, the appellant applied on Sadeco`s behalf to the respondents, Indian Bank, for changes to the existing credit facilities that Sadeco had with the respondents. The facilities were for the sum of S$16.5m.

9 5.Over a year later, the respondents informed Sadeco by way of a letter dated 18 July 1994 (`letter of offer`) that they had renewed Sadeco`s credit facility. The nature of the facility was a single line of credit subject to a maximum of US$10m (`credit facility`). The credit facility, inter alia, allowed for discounting of foreign bills of exchange with interest at 2.5% pa above the respondents` prime lending rate at monthly rests. According to the letter of

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offer, the limits of the credit facility were scheduled for review on 4 June 1995. As security for the facility, the respondents required joint and several guarantees for US$10m from four individuals, including the appellant, and a pledge of deposits for S$223,160.68 plus interest accrued thereon.

10 6.On 14 October 1994, the appellant and Kumarappan s/o Maruthamuthu (`Kumarappan`), one of the directors of Sadeco and the third defendant in the Suit, went to the respondents` office and signed a joint and several guarantee (`the guarantee`) as security for the credit facility extended by the letter of offer. The signing of the guarantee was handled by M Nachiappan (`Nachiappan`), an assistant manager (credit) of the respondents. Nachiappan did not ask for any documents relating to the appellant`s credit worthiness.

11 7.According to the appellant, Nachiappan said that the guarantee was merely `cosmetic`, as the top management of the respondents in India had agreed to certain arrangements with Usha, MVR and Mountamount. According to the appellant, Nachiappan also assured the appellant that the guarantee would never be enforced against him under any circumstances as they knew that he was not worth anything. This allegation of the appellant is disputed by Nachiappan. In his joint affidavit with M Umayal filed on 28 May 1998, Nachiappan said that if he had said what the appellant claimed he did, he would be `stark starring mad`. According to Nachiappan, he did not do anything of that sort, and that as part of his practice, he would have explained to the appellant the nature of the guarantee.

12 8.Two months after the guarantee was signed, by way of a letter dated 12 December 1994, the respondents wrote to Sadeco enclosing copies of the assets and liabilities forms to be completed by the appellant and Kumarappan. According to the respondents, their failure to ask the appellant to furnish a

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declaration of assets and liabilities when he signed the guarantee was due to an oversight, which they attempted to rectify by way of the letter dated 12 December 1994. Further reminders for the same were sent by the respondents by way of letters dated 21 December 1994, 28 January 1995, and 9 June 1995. To date, the assets and liabilities forms have not been completed.

13 9.The appellant resigned from Sadeco on 26 September 1995. On 6 May 1996, he went to the respondents` office and asked for a print out of the company`s outstanding and a copy of the guarantee. By way of a letter dated 3 June 1996, the appellant`s solicitors Ms Drew & Napier informed the respondents that the appellant was no longer a director and shareholder and requested his release from the guarantee. The respondents replied by way of a letter dated 5 June 1996, noting that Sadeco had liabilities of US$2,236,130.48 for foreign bills purchased and US$7,759,378.52 for overdue foreign bills purchased, and that those liabilities were secured, amongst others, by the guarantee of the appellant and that they would not be able to release him from his guarantee until the liabilities were adjusted.

14 10.About five months later, the appellant instructed another set of solicitors. By way of a letter dated 5 November 1996, Ms Karuppan Chettiar and Husain wrote to the respondents informing them that:

> *We are instructed that the principal debtors have caused the creation of a collateral security in India through your Muthialpet branch, Madras which security would be sufficient to cover all existing liabilities of the above company.*
>
> *...*
>
> *As our client is anxious to get into new business venture, he wants to be released from his guarantee herein as early as possible ...*

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15 11.The respondents replied through their solicitors Ms Mallal & Namazie by way of a letter dated 18 November 1996 stating that the respondents would be unable to release any of the guarantors who stood guarantee for the facilities granted until the outstanding amount was fully repaid or fully secured by security acceptable to the respondents.

16 12.Throughout 1995 to 1996, 112 foreign bills drawn by Sadeco to the value of US$9,995,509 were purchased by the respondents pursuant to the credit facility. All of these bills were dishonoured upon presentation. By 31 October 1996, the sum and interest due from Sadeco was US$10,974,929.96 (`the sum`).

17 13.On 6 December 1996, the respondents commenced action by way of the Suit against Sadeco and its guarantors for the recovery of the sum. Judgment in default of appearance was obtained against Sadeco on 14 December 1996. Sadeco was subsequently wound up on 9 May 1997 after two unsuccessful attempts by Sadeco to petition for judicial management.

18 14.On 6 March 1998, the respondents applied for summary judgment against the appellant. On 17 April 1998, the appellant applied for discovery against the respondents by way of SIC 2911/98 (`discovery application`). The discovery application was dismissed by the assistant registrar on 12 June 1998. The appellant appealed to the High Court against the dismissal of the discovery application. On 18 July 1998, the respondents obtained summary judgment against the appellant for the sum. On 28 July 1998, the appeal in relation to the discovery application came before Kan Ting Chiu J, who adjourned the appeal pending the outcome of the appellant`s appeal against summary judgment.

19 15.On 21 September 1998, the respondents filed an affidavit which exhibited copies of the 112 foreign bills and set out details of the paid and

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unpaid bills of Sadeco. On 25 September 1998, the appellant`s appeal to the High Court against the granting of summary judgment was heard.

20 16. ***Decision of the learned judge***

21

22 The learned judge dismissed the appellant`s appeal. The learned judge was of the view that the facts did not disclose triable issues. Neither had the appellant made out a case under the principle in Miles v Bull [1969] 1 QB 258 that there should be `some other reason` for trial.

23 17.The appellant had relied on numerous newspaper reports and internet articles to contend that loans were extended by the respondents to companies belonging to MVR because of the personal relationship between MVR and the chairman of the respondents` head office, Gopalakrishnan, and not for commercial reasons. The appellant also relied on a first information report filed in India and noted that investigations were being carried out in India against MVR and Gopalakrishnan. In respect of this, the learned judge held that:

> 33 …My view is, until the charges (if any) preferred against the seventh defendant and Gopalakrishnan are proved in a court of law, it is not for the second defendant to judge and convict them based on newspapers and other reports. Even if the close personal relationship between the two persons is true, it does not detract from the fact that the company and the plaintiffs had a history of legitimate business transactions in discounting bills.
>
> …
>
> 35 Consequently, the second defendant`s allegations regarding pending criminal charges or investigations against Gopalakrishnan, even if true, were irrelevant and did not afford a defence to him on his obligations as the company`s guarantor … To suggest that the bad loans incurred by the plaintiffs on

> the company`s account were more sinister than the exercise of poor commercial judgment (on hindsight) on the part of the plaintiffs, requires a greater degree of proof than mere allegations; the second defendant failed to discharge the burden.

24 18.The learned judge rejected the appellant`s evidence that Nachiappan had assured him that the guarantee was `cosmetic` and would not be enforced because: a. the appellant had instructed his first set of solicitors M/s Drew & Napier to write to the respondents to seek release from the guarantee after he had resigned as director of Sadeco. In the learned judge`s view, such a letter hardly suggests that the second defendant was not aware of his obligations under the guarantee, let alone that his signing of the same was merely `cosmetic`;

25 b. when the respondents rejected the appellant`s request to be released from the guarantee, the appellant changed solicitors who merely wrote to the respondents to say that Sadeco had given collateral security in India to cover all existing liabilities of the company;

26 c. when the respondents rejected the second request for release there was no protest from the appellant that he would not be liable due to assurances given to him by Nachiappan.

27 19.In relation to the appellant`s contention that the respondents` grant of the credit facility to Sadeco was not made in the ordinary course of business because the respondents continued to discount the bills notwithstanding that the drawees defaulted in payments due under the earlier bills, the learned judge was of the view that:

> 40 The commercial nature of the 112 bills discounted, the prior substantial and uneventful dealings between the [respondents], [Sadeco], and Mountamount as well as with Nagova Exim and,

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> the favourable recommendations made to the plaintiffs by the drawees` bankers rendered the second argument untenable.

28 20. ***The appeal***

29

30 There were two main submissions on which the appellant based his appeal. First, the appellant submitted that there is a fair and reasonable probability that the appellant has a real or bona fide defence to the respondents` claim. In the event that the court was of the view that there was no real or bona fide defence, the appellant`s second submission was that the circumstances of the case gave rise to `some other reason` for trial under the Miles v Bull principle.

31 21. ***Fair and reasonable probability of real or bona fide defence***

32

33 Under O 14 r 3(1) of the Rules of Court, summary judgment should not be given where the defendant `satisfies the Court ... that there is an issue or question in dispute which ought to be tried`. The power to give summary judgment under O 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay; **Jones v Stone** [1894] AC 122. Where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend; **Ironclad (Australia) Gold Mining Co v Gardner** [1887] 4 TLR 18, **Ward v Plumbley** [1890] 6 TLR 198.

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34 22.The defence raised by the appellant was that there were `unusual features` in the respondents` relationship with the companies under the control of MVR which substantially enhanced the appellant`s risk as a guarantor. Mr Harpreet Singh Nehal, counsel for the appellant, contended that these `unusual features` were known to the respondents and that as a result of the respondents` failure to disclose these matters, the appellant should be discharged from the guarantee.

35 23.The appellant relied on a decision of the High Court of Australia in **Commercial Bank of Australia v Amadio** [1983] 151 CLR 447. In that case, two elderly migrants who were unfamiliar with written English were asked by their son to execute a mortgage in favour of a bank land which they owned to secure the overdraft of a company which the son controlled. The son had told his parents that the mortgage was to be limited to $50,000 and to be for six months. The bank and the company had been selectively dishonouring the company`s cheques to preserve the company`s appearance of solvency. The bank and the company agreed that the overdraft the mortgage was to secure should be reduced and cleared within a short time, but these matters were not disclosed to the prospective mortgagors.

36 24.In his judgment, Gibbs CJ started by noting that a contract of guarantee was not uberrimae fidei such as to require full disclosure from the bank. His Honour then went on to cite with approval the dicta of Barwick CJ in **Goodwin v National Bank of Australasia Ltd** [1968] 117 CLR 173 regarding the necessity for disclosure of `unusual features`, saying at p 455 that:

> *... a bank which takes a guarantee `is only bound to disclose to the intending surety anything which has taken place between the bank and the principal debtor "which was not naturally to be expected", or as it was put by Pollock MR in* ***Lloyds Bank Ltd v Harrison*** *"the necessity for disclosure only goes to the extent*

> *of requiring it where there are some unusual features in the particular case relating to the particular account which is to be guaranteed"`:* ***Goodwin v National Bank of Australasia Ltd****.*

37 Gibbs CJ explained the rationale for such a rule in the following manner:

> *The reason why a creditor is bound to reveal to an intending surety anything in the transaction between himself and the debtor which the surety would expect not to exist is that a failure to make disclosure in those circumstances would amount to an implied representation that the thing does not exist: see* ***Lee v Jones****;* ***London General Omnibus Co Ltd v Holloway****;* ***Union Bank of Australia Ltd v Puddy****.*

38 His Honour went on to say at p 457:

> *It would be commercially unreal to suggest that a bank has a duty to reveal to a surety all the facts within its knowledge which relate to the transactions and financial position of a customer in any case where those transactions are out of the ordinary. The obligation is to reveal anything between the banker and the customer which has the effect that the position of the customer is different from that which the surety would naturally expect, particularly if it affects the nature or degree of the surety`s responsibility.*

39 Gibbs CJ therefore held that the mortgage should be set aside because of the bank`s failure to disclose to the mortgagors matters which it ought to have disclosed.

40 25.While Mason, Wilson and Deanne JJ agreed that the mortgage instrument should be set aside for failure of disclosure, they proceeded on a different basis, that of unconscionable conduct. Mason J said at p 463:

> *It has been said that this duty to disclose does not require a bank to give information as to matters affecting the credit of the debtor or of any circumstances connected with the transaction in which he is about to engage which will render his position more hazardous (* ***Wyhtes v Labouchere****, per Lord Chelmsford LC). No surety is entitled to assume that the debtor has not been overdrawing, the proper assumption being in most instances that he has been doing so and wishes to do so again (* ***London General Omnibus Co Ltd v Holloway****).*

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> *But the fact that a bank`s duty to make disclosure to its intending surety, arising from the mere relationship between principal creditor and surety, is so limited has no bearing on the availability of equitable relief on the ground of unconscionable conduct. A bank, though not guilty of any breach of its limited duty to make disclosure to the intending surety, may none the less be considered to have engaged in unconscionable conduct in procuring the surety`s entry into the contract of guarantee.*

41 At pp 467-468 Mason J said:

> *The knowledge of Mr Virgo was the knowledge of the bank. Whether we treat Mr Virgo as having knowledge of the possibility already discussed or as having knowledge of facts which would raise that possibility in the mind of any reasonable person the inevitable conclusion is that the bank was guilty of unconscionable conduct by entering into the transaction without disclosing such facts as may have enabled the respondents to form a judgment for themselves and without ensuring that they obtained independent advice.*

42 26.The principle requiring disclosure of `unusual features` laid down in ***Goodwin v National Bank of Australasia Ltd*** and followed by Gibbs CJ in ***Commercial Bank of Australia v Amadio*** was referred to and accepted in **Levett & Ors v Barclays Bank plc** [1995] 2 All ER 615. In his judgment, Michael Burton QC abbreviated the principle at p 628 in the following manner:

> *... the creditor is under a duty to the surety to disclose to the surety contractual arrangements made between the principal debtor and the creditor, which make the terms of the principal contract something materially different in a potentially disadvantageous respect from those which the surety might naturally expect.*

43 In ***Levett*** the bank failed to disclose the terms of the borrower`s facility letter which were materially different from the terms of the guarantor`s memorandum of deposit of Treasury stock, in that the facility letter contained no requirement of a demand upon default and gave the bank an automatic right to apply the proceeds of sale of the Treasury stock on the date of its maturity in paying out its loan. These material differences between the terms of the

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principal contract and the terms of the guarantee were unknown to the guarantors and caused them a substantial loss. It was held by Michael Burton QC that the guarantors were entitled to recover the proceeds of sale of the deposited stock from the bank on the ground of a material non-disclosure by the bank.

44 27.There is therefore amongst the Commonwealth jurisdictions, general acceptance of a principle requiring a bank to disclose `unusual features` relating to its transactions with a surety. At the end of their survey of the relevant Commonwealth authorities, the authors of ***The Modern Contract of Guarantee*** (3rd Ed, 1996), Dr James O`Donovan and Dr John Philips note at p 127:

> *Whatever the precise ambit of the obligation to disclose unusual facts, one thing is clear; whether a feature is unusual will be dependent upon the particular transaction between creditor and principal and the surrounding circumstances.*

45 28.Mr Harpreet Singh Nehal raised certain circumstances to show that there were `unusual features` in the granting of credit facility by the respondents to Sadeco. He highlighted a first information report dated 19 November 1998 filed in India (`FIR`), naming as accused, inter alia, MVR, Gopalakrishnan, MBN Rao (`Rao`) the deputy general manager of the respondents` Singapore branch, Mountamount, Nagova Exim and Sadeco. The FIR states, inter alia that:
a. Nagova Exim and Sadeco were floated at Singapore to act as front companies of M/s MVR Exports Pvt Ltd (`MVR Exports`), in the matter of their import and export business by over invoicing the raw cashew nuts.

46 b. Gopalakrishnan and Rao indulged in indiscriminate lending to the private firms MVR Exports and Mountamount by clearly breaching the norms and regulations of the banking system.

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47 c. Credit was extended by the main branch of the respondents to MVR Exports with regard to adequate security. Furthermore, `huge advances were given ... without proper accounting`.

48 d. Mountamount acted as a front company for MVR Exports. Mountamount required bank finance against invoices for the purpose of purchasing raw cashew nuts from foreign sellers. Based on the request of Mountamount and the favourable recommendation of Rao, limits aggregating S$9m were sanctioned by Gopalakrishnan in March 1990. When granting this facility, Gopalakrishnan and Rao knew very well that MVR had floated Mountamount as a front company of MVR Exports and that double financing would be involved in the grant of limits to the three companies for the same purpose and knowing full well that some of the sanction conditions could not be fulfilled by Moutamount on account of the requirement for Reserve Bank of India`s permission. Rao without conveying and imposing the conditions to Mountamount, released the facilities and dishonestly informed his Head office that all conditions had been fulfilled.

49 e. In the meantime, two more associates of MVR Exports, Nagova Exim and Sadeco were started in Singapore and export bills were drawn on them. However, 88 bills drawn on them and Mountamount remained unpaid.

50 Criminal proceedings pursuant to the FIR are presently pending in India.

51 29.The matters set out in the FIR were considered and rejected by the learned judge:

> 33 … My view is, until the charges (if any) preferred against the seventh defendant and Gopalakrishnan are proved in a court of

> law, it is not for the second defendant to judge and convict them based on newspapers and other reports.
>
> …
>
> 35 Consequently, the second defendant`s allegations regarding pending criminal charges or investigations against Gopalakrishnan, even if true, were irrelevant and did not afford a defence to him on his obligations as the company`s guarantor…To suggest that the bad loans incurred by the plaintiffs on the company`s account were more sinister than the exercise of poor commercial judgment (on hindsight) on the part of the plaintiffs, requires a greater degree of proof than mere allegations; the second defendant failed to discharge the burden

52 The thrust of the learned judge`s judgment was that the pending criminal charges against Gopalakhrisnan and MVR were insufficient proof of `unusual features` surrounding the grant of the credit facility. While it is true that in criminal proceedings criminal charges are not proof that an accused person has committed the alleged crimes, what was on hand was not a criminal proceeding but an O 14 application. It is not necessary to the appellant`s case to prove that Gopalakhrisnan and MVR are guilty of the crimes as charged. All that is necessary at the O 14 stage is for the appellant to adduce evidence to show that he has reasonable grounds for setting up a defence based on the presence of `unusual features` surrounding the grant of the credit facility, and the fact that there is a formal report of investigation against the chairman of the respondents` head office, Gopalakrishnan, the deputy general manager of the respondents` branch in Singapore, Rao, and the controller of Sadeco, MVR, for loans made without regard to security, performance or banking regulations should suffice for that purpose.

53 30.A second matter which strengthened the appellant`s contention that there were `unusual features` in the granting of the credit facility was the fact that the respondents continued to purchase from Sadeco large amounts of bills drawn on the same drawees even after earlier bills had been dishonoured upon

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presentation. In an affidavit of the respondents filed on 21 September 1998, the respondents exhibited particulars of the unpaid collection of bills of Sadeco. The first 58 bills listed in that exhibit were purchased during the period 21 April to 24 May 1995 and were due on various dates within the period 19 August to 21 September 1995. Therefore by 21 September 1995, the respondents would have been aware that bills amounting to at least US$4.2m had been dishonoured. From 22 November 1995 to 22 January 1996 however, the respondents carried on purchasing bills (No 68 to 112) to the further amount of at least US$5.13m.

54 31.The respondents` explanation for the continuing purchase of bills is set out in their affidavit filed on 21 September 1998. They said:

> 9 The fact that the first defendant has overdue bills at the time the plaintiff purchased additional bills from the first defendant does not mean that the plaintiff did not grant banking facilities to the first defendant in the ordinary course of banking business. It does not follow that when a customer`s bills become overdue all facilities grind to a halt. A company`s credit is its lifeline and if the bank cuts off the facilities it may result in a credit squeeze for the company with its concomitant consequences. In this case, the first defendant was within its line of credit.

55 The respondents` assertion that cutting off the credit facility would result in a credit squeeze for Sadeco does not answer the disconcerting features of the respondents` operation of the credit facility. While a bank has to ensure that it does not squeeze its debtor to the point where it cannot repay its debts, in pursuance of its own interest, it would want to ensure that the credit facility does not become a ballooning non-performing loan. As of 21 September 1995, there were already critical signs warning the respondents that Sadeco was heading towards a massive default. There is no indication of any action taken by them to stem this, and instead there was a continuation of loans exposing them to an even larger liability of at least US$5.13m.

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56 32.This matter was taken into consideration by the learned judge, who said:

> 40 The commercial nature of the 112 bills discounted, the prior substantial and uneventful dealings between the [respondents] [Sadeco], and Mountamount as well as with Nagova Exim and, the favourable recommendations made to the plaintiffs by the drawees` bankers rendered the second argument untenable.

57 With the greatest respect to the learned judge, none of the above factors explain away the respondents` behaviour. The fact that the 112 bills discounted were of a `commercial nature` does not change the fact that they were dishonoured and were essentially worth nothing. While there were `prior substantial and uneventful dealings` between the respondents and Sadeco, there cannot be much security from knowing that there were prior uneventful dealings in the past, when market conditions are relentlessly changing and in the face of at least US$4.2m of dishonoured bills. Neither are the recommendations made by the drawees` bankers any comfort. The learned judge refers to a letter from one of the drawees` bankers, MeesPierson NV dated 26 February 1996 stating that:

> *With reference to your request 96/AN/ADV mountamount, dated 19 January 1996, we herewith send you some information on M/s Nutworld, M/s Globenut Europe ARL, M/s Hamilton Ventures Pte Ltd.*
>
> *The above mentioned companies have been clients of our banks for several years. To our knowledge the client is active in the trade of cashew nuts. The company, till the present has met its commitments towards our bank.*

58 The respondents claim that they were entitled to rely on this letter of recommendation to continue extending credit. The letter of recommendation however is dated 26 February 1996 on a request from the respondents dated 19 January 1996. By this time the respondents had already disbursed to Sadeco

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further amounts of close to US$5m despite knowledge that their earlier bills were dishonoured. Moreover, the ability of the drawees to meet their commitments to MeesPierson NV is not a relevant consideration for the respondents. The point was not whether the drawees were financially sound and able to meet their commitments to MeesPierson NV. The point was that regardless of their financial soundness, the drawees refused to accept liability for any bills of exchange drawn on them by Sadeco. In such a situation, it was Sadeco that the respondents should have looked to as the drawers of the bills, and not to the bankers of the drawees.

59 33.The respondents` behaviour is even more unusual in the light of their failure to secure adequate security for the loans. The respondents accepted as security a guarantee to the sum of US$10m from two individuals, the appellant and Kumarappan, without regard to their credit worth. No assets and liabilities statement was extracted from the guarantors despite the value of the guarantee. According to the respondents, this was due to an "oversight". The respondents tried to substantiate their stand by saying in their affidavit filed on 11 July 1998 that:

> *The second defendant has also alleged that he is a man of straw. However, at the material time, the second defendant was the substantial shareholder of the first defendant, owning half of the entire shareholding of the first defendant of $1,000,000. We had no reason to doubt the second defendant`s standing.*

60 However, as was pointed out by Mr Harpreet Singh Nehal, a guarantor whose asset comprises wholly or principally shares in the principal debtor is not worth anything. A guarantor will only be called on where the principal debtor is unable to pay off his liabilities. In such a situation however, the shares in the principal debtor would be worth nothing and the guarantor`s security would consequently be worthless.

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61 34.In their affidavit filed on 21 September 1998, the respondents had highlighted that they held a charge of a mortgage on land in India as a first charge. The documents of title were deposited with the Muthialpet branch of the respondents on 16 August 1996 by the mortgagor, Wellstore (Madras) Pte Ltd, another company owned by MVR. According to the respondents, the mortgagor gave the value of property as about S$7.64m. This attempt to get security was however made in August 1996, by which time the respondents had already disbursed at least US$9m, having disbursed a further US$5.13m after 21 September 1995 despite knowledge that earlier bills worth at least US$4.2m had been dishonoured. From the period of 21 September 1995 onwards, the respondents would have been aware of ballooning non-performing loans. In spite of that, no effort was made to obtain further security before disbursing more amounts.

62 35.The respondents` continual purchase of bills which had earlier been dishonoured and their comfort with the lack of adequate security is even more puzzling since they should have been aware of the paucity of Sadeco`s assets. In an affidavit filed on 3 February 1997 opposing Sadeco`s petition for judicial management, the respondents said in relation to Sadeco and Nagova Exim:

> *They have little assets, apart from their meagre stock. In fact, from the accounts, it appears that Sadeco and Nagova have no stock whatsoever. In the financial statements of the company for the financial year ended 31 March 1995 (which are also the latest audited accounts available) the principal asset of the company were units [num]22-06/07/08 and [num]07-10 at the High Street Centre ... These units were mortgaged to Overseas-Chinese Banking Corporation [sic] to secure facilities granted by the bank to the company.*

63 36.In support of the contention that there were unusual circumstances in the granting of the credit facility, Mr Harpreet Singh Nehal also referred to the respondents` refusal to give discovery of documents in Suit No 2354 of 1996.

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This was an action by the respondents against Nagova Exim Pte Ltd (`Nagova Exim`), another company under the control of MVR, to recover the value of foreign bills drawn on Nagova Exim.

64 37.The fifth defendant in that action, Ashok Kumar Sharma (`Sharma`), was one of the guarantors for Nagova Exim. He applied for discovery of documents before filing his defence. Sharma alleged that the documents sought would show that there were unusual circumstances in the respondents` grant of banking facilities to Nagova Exim. On 12 March 1997, Lai Kew Chai J directed the respondents to `disclose every badge/documentary evidence proving that the facilities were granted in the ordinary course of business`. According to Sharma, Lai Kew Chai J informed the respondents` solicitors that should there be failure or refusal to give access to the relevant documents, the inference would be that the respondents had something to hide. When the respondents failed to give access to documents, Sharma applied for and received on 9 May 1997, a peremptory order to compel discovery of the documents. The respondents failed to comply with the peremptory order and Lai Kew Chai J dismissed the respondents` claim against the Sharma on 8 August 1997.

65 37.Mr Harpreet Singh Nehal contends that the respondents` conduct in relation to Sharma, the fifth defendant in Suit No 2354 of 1996, is only explicable on the basis that the respondents had something to hide. In itself, the respondents` behaviour in relation to Sharma in Suit No 2354 of 1996 does not bear much weight for the appellant. Suit No 2354 of 1996 was against a different company, Nagova Exim and not Sadeco, though admittedly both were under the control of MVR. Furthermore, while it is might be true that the respondents chose not to comply with the peremptory order so as to hide something, it does not necessarily follow from that conduct that there were `unusual features` surrounding the respondents` grant of credit facility to Sadeco or the other

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companies under the control of MVR. The material evidence necessary to support the appellant`s contention is not evidence of unusualness surrounding the respondents` behaviour in an action against another company, but unusualness in the transaction where the respondents granted Sadeco credit facility. However, taken in the context of the other circumstances such as the matters set out in the FIR, the purchase of foreign bills of exchange despite default by the drawees on ealier bills, and the granting of credit without regard for adequate security, the respondents` conduct in relation to the fifth defendant in Suit No 2354 of 1996 does provide some additional support for the appellant`s contention.

66 39.The same reasoning applies to the appellant`s contention that Nachiappan assured him that the guarantee was `cosmetic`. Taken in isolation, this lone assertion is not, ipso facto, a sufficient basis for granting leave to defend. Taken in the context of the other circumstances however, the appellant`s contention of Nachiappan`s assurance lends some slight weight to his contention that there were `unusual features` surrounding the credit facility.

67 40.Taking all the above evidence into consideration, we were of the view that the appellant had adduced evidence of `unusual circumstances` surrounding the grant of the credit facility.

68 41.The question which led on from this was whether the appellant, as a director of Sadeco, knew or ought to have known of these `unusual features`, in which case the respondents would not be under any duty to disclose. In other words, from the time that the appellant was appointed as a director of Sadeco on 19 March 1992 to 14 October 1994 when the appellant signed the guarantee, did he in his capacity as director of Sadeco, come to know of the internal credit

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arrangements between the heads of the respondents and the controller of his company.

69 42.The appellant`s contention was that he was merely a nominee director and that the operations were run by MVR. The respondents have relied on the fact that the appellant signed the letter dated 8 June 1993 requesting for changes to existing credit facilities to assert the appellant`s involvement and knowledge of the company. This fact is however inconclusive since the signing of the letter is consistent with the appellant`s stance that he served as a rubber stamp for required documents.

70 43.Based on what was adduced before us, we were of the view there was insufficient evidence to make a conclusive finding on this issue. This issue was a further reason for the matter to be tried.

71 44.For the above reasons, we were of the opinion that the appellant had adduced sufficient evidence to raise a triable issue as to whether there were any `unusual features` surrounding the respondents` grant of credit facility to Sadeco which the respondents ought to have disclosed. It was therefore unnecessary for us to consider the appellant`s alternative argument that there was `some other reason` for trial under the principle of Miles v Bull.

72 45. ***Separate and independent covenant to indemnify***

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74 The final issue raised before us was that of a separate and independent covenant to indemnify. Mr Tan Teng Muan, counsel for the respondents, submitted that the decision of the learned judge should be upheld on the ground

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that the appellant had given a separate and independent covenant to indemnify the respondent. This argument was not addressed by the learned judge in the grounds of judgment. This `covenant` is not set out in a separate document but found in the guarantee itself under cll 17 and 18. The clauses provide that:

> 17 Though as between us and the customer we are sureties only for the customer, yet as between us and you we and each of us shall be deemed to be principal debtors for all the moneys the payment of which is hereby guaranteed and accordingly shall not be discharged nor shall our liability be affected by any fact or circumstance or any act thing omission or means whatsoever, whereby our liability would not have been discharged if we had been the principal debtors.
>
> 18 For the consideration aforesaid and as a separate and independent situation:
>
> (i) we hereby agree that all sums of money which may not be recoverable from us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the customer or any other fact or circumstance, whether known to you or not shall nevertheless be recoverable from us or each of us on demand as though we and each of us were the sole and principal debtors;
>
> (ii) we hereby irrevocably and unconditionally undertake to indemnify you in full and keep you fully indemnified against all loss damage liabilities costs and expenses whatsoever which you may sustain or incur as a result of or arising form your loan advances credit or other banking facilities granted to the customer.

75 46.Mr Tan Teng Muan relied on the Australian case of **Fletcher Organisation Pty Ltd v Crocus** [1988] 2 Qd R 517 to argue that where a surety had been converted into a principal debtor, defences available to the defendant qua guarantor would not avail him. In that case cl 6 of the guarantee stated that:

> *In order to give full effect to the provisions of this instrument, the guarantor agrees and declares that the mortgagee shall be at liberty to act as though the guarantor were the principal debtor and the guarantor hereby waives all rights in connection with such provisions that it might otherwise be entitled to claim or enforce.*

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76 Clause 12 provided that:

> *... the guarantor hereby waives all the guarantor`s rights as surety (legal equitable statutory or otherwise) which may at any time be inconsistent with any of the provisions of this instrument or to the detriment or disadvantage of the mortgagee.*

77 The court was of the opinion that by virtue of cll 6 and 12, the respondent had given the appellant liberty to act as though he were a principal debtor and had waived all his rights as surety which might be to the detriment or disadvantage of the appellant, and had thereby contracted out of his right to be discharged from the guarantee by the release of the mortgage, when the mortgagor by way of compromise with a co-guarantor, accepted a payment from the co-guarantor and released his mortgage.

78 47.In coming to its decision, the court relied on **Bank of New Zealand v Baker** [1926] NZLR 462, where the New Zealand Court of Appeal held that, because of a clause which stated that the relationship between the bank and the defendant guarantor was not that of creditor and surety, the defendant was not entitled to rely on the creditor`s release of the principal debtor`s security to discharge him from liability.

79 48.The decision in ***Fletcher Organisation Pty Ltd v Crocus*** has been criticised in James O`Donovan and John Philips` ***The Modern Contract of Guarantee*** (3rd Ed, 1996) at p 416 in the following manner:

> *In an agreement which (principal debtor clause apart) is drafted as a guarantee, this is perhaps a harsh construction, given that the creditor`s action in impairing the securities may well deprive the guarantor on payment of the debt of an effective right of reimbursement from the party primarily liable. Indeed, in* ***Fletcher Organisation Pty Ltd v Crocus****, the court considered that the principal debtor clause should preserve the guarantor`s liability by relying on another general rule, namely, that if the guarantee is specifically varied so that a primary liability is assumed the defence of loss of securities is no longer available.*

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> *The analogy, however, is doubtful because in the latter case it will be perfectly clear from the variation that a primary obligation as principal debtor has been assumed. But in the case of a "principal debtor" clause embodied within a guarantee there is authority which suggests that its inclusion does not impose a primary liability and convert what would otherwise be a contract of guarantee into a contract of indemnity.*

80 49.In James O`Donovan and John Philips` ***The Modern Contract of Guarantee*** (3rd Ed, 1996) there is also the following discussion at p 29 of a `principal debtor` clause in a guarantee:

> *A guarantee which contains clauses preserving the liability of the guarantor in certain circumstances when the principal is no longer liable will invariably also contain a `principal debtor` clause, whereby the creditor is `given liberty to act as though the guarantor was a principal debtor` (an example from* ***Fletcher Organisation Pty Ltd v Crocus****). It is clear that the effect of such a clause, even standing alone, may be to preserve the guarantor`s liability in circumstances in which he or she would otherwise be discharged, for example, where the creditor improperly releases a security; or grants the principal an extension of time to repay the debt. Depending on its precise construction, the clause may also obviate the necessity for a demand to be made upon the guarantor before issuing proceedings.* ***The dominant view however, is that the incorporation of a "principal debtor" clause does not convert what would other wise be interpreted as a contract of guarantee into a contract of indemnity.*** *[Emphasis added]*

81 50.The authors of ***The Modern Contract of Guarantee*** cite a number of cases which hold the dominant view: **Citicorp Australia Ltd v Hendry** [1985] 4 NSWLR 1 at 20 per Clarke J (at first instance); **Heald v O`Connor** [1971] 2 All ER 1105[1971] 1 WLR 497, **Clipper Maritime Ltd v Shirlstar Container Transport Ltd** [1987] 1 Lloyd`s Rep 546 at 555 and **Brown Bros Motor Lease Canada Ltd v Ganapathi** [1983] 139 DLR (3d) 227. ***Heald v O`Connor*** was a decision of Fisher J, who said at [1971] 2 All ER 1105, 1110; [1971] 1 WLR 497, 503:

> *In the present case, the instrument was given pursuant to cl 7 of the agreement which calls for a personal guarantee. The word*

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> *`guarantee` is used in it time and again. The obligation is to pay the principal moneys to become due under the debenture if and whenever the company makes default. The statement of claim refers to it as a guarantee and pleads the company`s default and the consequent liability of the guarantor. The only straw for the plaintiff to clutch is the phrase `as a primary obligor and not merely as a surety` but that in my judgment, is merely part of the common form of provision to avoid the consequences of giving time or indulgence to the principal debtor and cannot convert what is in reality a guarantee into an indemnity.*

82 51.The respondents` contention was that the decision in ***Fletcher Organisation Pty Ltd v Crocus*** lays down a general principle that defences available to a defendant qua guarantor would not avail him if he has also contracted to be liable as a principle debtor and that consequently, the appellant would still be liable as a principal debtor even if there is a valid guarantor`s defence based on the ***Amadio*** principle requiring disclosure of `unusual features`. In the light of the above authorities however, it is uncertain if such a broad contention can be substantiated.

83 52.We were of the view that the respondents could not rely on the decision in ***Fletcher Organisation Pty Ltd v Crocus*** to contend that the ***Amadio*** defence is not available to the appellant. Firstly, the contention of the respondents was dependent on the ability of a `principal debtor` clause to convert what would otherwise be a contract of guarantee into a contract of indemnity. However, the correctness of the decision in ***Fletcher Organisation Pty Ltd v Crocus*** that a guarantor is not released from his liability where there is a loss of securities is in itself doubtful for the reason given by the authors of ***The Modern Contract of Guarantee*** at p 416, cited above. The dominant view taken is that a `principal debtor` clause does not convert a contract of guarantee into a contract of indemnity. Secondly, the appellant`s argument is that because of the failure to disclose, the entire guarantee should be set aside. However, the `principal debtor` clauses in the guarantee, cll 17 and 18 are themselves

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embodied in the guarantee and we are doubtful if they can operate for the benefit of the respondents in a situation where the validity of the entire guarantee is disputed. Thirdly, the statement of claim proceeds against the appellant on the basis of his liability as a guarantor and not as a principal debtor. Paragraph 7 of the statement of claim states `[the] plaintiffs claim against the second defendant ... for the same amounts as guarantors of the first defendants`.

84 53. ***Conclusion***

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86 For the reasons given above, the appeal was allowed and the appellant given unconditional leave to defend. The costs of the appeal and of the action in the court below were awarded to the appellant, with the costs of the action before the assistant registrar in the cause.

Karthigesu JA
L P Thean JA

Harpreet Singh Nehal and Siraj Omar (Drew & Napier) for the appellant
Tan Teng Muan and Wong Khai Keng (Mallal & Namazie) for the respondents

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