IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 240

Suit 2041/1998

Between

Malayan Banking Berhad

… Plaintiff

And

Jurong Engineering Limited

… Defendant

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (01:16 hrs)

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Malayan Banking Berhad v Jurong Engineering Limited

[1999] SGHC 240

Suit 2041/1998
Lee Seiu Kin JC
11 September 1999

1 **JUDGMENT:**

2 **GROUNDS OF DECISION**

3 The Plaintiffs are a bank incorporated in Malaysia with branches in Singapore. The Defendants are building and civil engineering contractors. In this suit the Plaintiffs claim against the Defendants the sum of $2,104,070.50 plus interest and costs. The Plaintiffs say that the Defendants' liability arises from certain legally binding obligations that they had undertaken in relation to credit facilities that the Plaintiffs had made available to Huge Corporation Pte Ltd ("Huge"), an associated company of the Defendants. Huge was an associated company of the Defendants between 1991 and 1994. It became a subsidiary of the Defendants in 1994 but reverted to becoming an associated company in 1996. Huge was placed under liquidation by order of court dated 28 August 1998. The Defendants deny that they had entered into any such legal obligations. At the end of the trial I dismissed the Plaintiffs' claims with costs. They have since appealed and I now give my grounds of decision.

4 The Plaintiffs' claims are based on the following:

> (i) the Defendants' letter dated 15 June 1994 which the Plaintiffs say contain certain legally binding obligations in relation to debts owed by Huge to the Plaintiffs; and
>
> (ii) an oral agreement between the Plaintiffs and the Defendants that they would use credit facilities granted by the Plaintiffs on 13 November 1997 to retire the debts of Huge.

5 Plaintiffs' evidence

6 The Plaintiffs' primary witness was Allen Ng Kian Guan ("Ng"), the Head of their Corporate Banking Division. Ng had been a banker since 1982 and was for a while with Bank of America as a credit and marketing officer. In 1986 he joined the Plaintiffs' corporate banking division and eventually became its head. While he was in Bank of America, Ng met Roland Tan Boon Hua ("Tan"), who is the Defendants' General Manager (Finance and Administration) and also a director of Huge. At that time, Tan was an accountant with a related company of the Defendants, Jurong Shipyard Ltd, which was a customer of Bank of America. Around September 1991, Ng met Tan to discuss about the possibility of the Plaintiffs granting credit facilities to the Defendants. Tan informed Ng that the Defendants were already adequately funded by several banks. However Tan asked if the Plaintiffs would consider granting such facilities to the Defendants' associate company, Huge. At the time, the Defendants held 50% of the shares of Huge and played a key role in its management. The other directors of Huge included Yasushi Konii, the Managing Director of the Defendants at the time, Leow Tet Sin, the Defendants' Senior General Manager and Khor Kim Lee, the Defendants' General Manager. Huge's registered office was at the Defendants' premises at Tanjong Kling Road and carried on business from there. According to Ng, Tan told him that the facilities were for use in Huge's Malaysian operations which were carried out through its subsidiary, Huge Engineering Sdn Bhd ("HESB").

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7 Ng said that the Plaintiffs were initially hesitant to extend credit to Huge, but after some deliberation, decided that they could do so provided the Defendants could provide a corporate guarantee. According to Ng, when he told Tan of this requirement, Tan told him that the Defendants could not execute such a guarantee because they did not want this to appear in their accounts. Tan acknowledged that at the time they had executed a guarantee to DBS Bank as security for facilities for Huge. But other banks, namely International Bank of Singapore, Standard Chartered Bank and United Overseas Bank had granted credit facilities to Huge without a formal guarantee from the Defendants. Ng said that Tan nonetheless assured him that Huge had the financial backing of the Defendants who would ensure that Huge was managed in such a way as to be in a position to meet its financial obligations and that the Plaintiffs would not suffer any financial loss as a result of the credit facilities. Ng said that on the strength of these assurances, the Plaintiffs made an offer of credit facilities to Huge on 6 November 1991 ("the First Offer"). Ng said that although on the face of the First Offer the line of credit was on a "clean" basis, the Plaintiffs had relied on the assurances given by Tan on behalf of the Defendants. The First Offer was accepted by Huge but not utilised until 26 February, after the Defendants confirmed on 20 February 1992 that the corporate guarantee they had given to DBS Bank had been discharged.

8 Later in 1992, the Defendants requested the Plaintiffs to continue granting the credit facilities to Huge. By this time, the Plaintiffs had learnt that the Defendants had given certain letters of assurance to Huge’s other bankers. The Plaintiffs also requested the Defendants to provide a similar letter, to which the Defendants agreed. Consequently the Plaintiffs made a second offer on 2 September 1992 ("the Second Offer"). Clause 3 of the Second Offer states as follows:

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> "**Security**
>
> The above Line of Credit shall be supported by a Letter of Awareness from Jurong Engineering Ltd as per our attached specimen copy."

9 The Defendants proposed to make amendments to covenants (c) and (d) of the specimen "Letter of Awareness". The Plaintiffs disagreed with the proposed amendment to covenant (c) but agreed to that for (d). Accordingly on 3 September 1992 the Defendants issued a letter to the Plaintiffs on the terms of the specimen "Letter of Awareness" but with an amended covenant (d). This letter, addressed to the Plaintiffs, goes as follows (with the deleted word ruled over and additional words underlined):

> "BANKING FACILITIES - HUGE CORPORATION
>
> LETTER OF AWARENESS
>
> We are glad to note that you have granted or agreed to grant to [Huge] the following credit facilities on such terms and conditions as you may at your sole discretion impose from time to time:-
>
> (a) Overdraft) S$ 1,000,000 (b) Letter of Credit, [etc]) S$ 2,000,000 (c) Standby Letter of Credit) M$1,000,000 (Huge Engineering Sdn Bhd) We hereby confirm and covenant with you as follows:- (a) We are fully aware and agree with the granting of the abovementioned credit facilities. (b) We hold 50% of the issued and paid-up capital of the abovementioned company and agree not to reduct [sic] our interest therein without your prior approval in writing. (c) We shall ensure that the company shall be managed on sound commercial and financial practice in such a way so as to be in a position at all times to meet its obligations to you and that you will not suffer any financial loss as a result of your extending the credit facilities to [Huge]. (d) It is our policy to see that no lending institution incur any loss from doing business with our subsidiary and that this policy will be followed in respect of credit facilities extended to [Huge] and we undertake ensure to make all necessary arrangement to ensure that for [Huge] to meet its commitments with you."

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10 The amendment that the Defendants proposed for covenant (c), which was rejected by the Plaintiffs, was for the first line to begin with "We shall endeavour to ensure that…" (additional words underlined).

11 In 1993 Huge requested an increase in the credit limit. The Plaintiffs issued a letter of offer dated 21 October 1993 ("the Third Offer"). The same provision for a "Letter of Awareness" is found in clause 3 under the rubric "Security". By their letter dated 20 April 1994, the Defendants purported to fulfil this requirement. However this letter contains the amendments to both covenants (c) and (d) that they had requested in respect of the 1992 letter. Thus, this letter is the same as the previous one except that covenant (c) begins with the words "We shall endeavour to ensure that …" and the last part of covenant (d) states "… we shall endeavour to make all necessary arrangement for …". A few months later, Huge requested a further increase to the credit limit. This led to the Plaintiffs issuing a letter of offer dated 10 June 1994 ("the Fourth Offer") on the same terms. The Defendants issued the requisite Letter of Awareness which is dated 15 June 1994, on the same terms of the previous one dated 20 April 1994.

12 In 1996 Huge showed signs of financial trouble. This arose out of its operations in Taiwan which caused it to suffer a loss of $7.5 million in the 1996 financial year. On 2 September 1997 the Plaintiffs' officers met with the Defendants', which included Tan, to discuss the problems faced by Huge. It was by then clear to the Plaintiffs that Huge was not in a position to repay their debts. This was what Ng said in his evidence-in-chief as to what transpired at the meeting:

> "34. At the meeting, the Defendants acknowledged their obligations to the Plaintiffs. They further acknowledged that Huge was in financial difficulties but reiterated that Huge's need for credit facilities from the Plaintiffs remained for the

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> group's Malaysian operations. The Defendants acknowledged that the bulk of the facilities to Huge was used to on-lend to HESB to finance HESB's activities. The Plaintiffs could not however justify continuing with the credit facilities to Huge in the face of Huge's financial instability. The parties then proceeded to discuss the restructuring of the credit facilities.
>
> 35. Several options were explored. One option was …
>
> 36. Another option was to convert the credit facilities granted to Huge to credit facilities to the Defendants. It was eventually agreed that the Plaintiffs will grant credit facilities of S$22 million to the Defendants. The Defendants will use a part of these facilities to repay the liabilities of Huge. The balance would be used for the continued financing of the operations in Malaysia through the Defendants' subsidiaries, HESB and Jurong Engineering (Malaysia) Sdn Bhd."

13 Ng said that pursuant to this agreement, the Plaintiffs issued a letter of offer dated 13 November 1997 for facilities comprising a revolving credit of $2 million, bank guarantee for up to $20 million and standby letter of credit ("SBLC") of $20 million. Ng said that it was agreed that the revolving credit facility would be used to retire the liabilities of Huge in its overdraft account, which stood at slightly over $2 million on 13 November 1997. The Defendants accepted this offer on 10 December. However by early January 1998 the Defendants had not used the facilities to discharge the liabilities of Huge. Ng arranged to meet the chairman of the Defendants' board of directors, Chee Keng Soon ("Chee") on 7 January 1998. Ng went with his colleague, Senior Manager Sng Peng Chye ("Sng"). This is how Ng described the meeting in paragraph 40 of his affidavit:

> "… At the meeting, I reminded him of the Letter of Awareness issued to the Plaintiffs by the Defendants. I also reminded him that the credit facilities granted to the Defendants were on the mutual understanding that part of the facilities were to be used to retire Huge's liability to the Plaintiffs. Chee acknowledged that the credit facilities granted to Huge were used for the Defendants' Malaysian operations through the Defendants' subsidiary in HESB. He told us that he would present to the Defendants' board our concerns over the delay in using the

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> facilities granted to the Defendants towards the discharge of Huge's liabilities."

14 Ng said that after that meeting, on 20 January, the Defendants applied for a SBLC for RM10 million in favour of the Shah Alam branch of Malayan Banking Bhd ("Maybank Shah Alam"). This was issued on 3 February and the Defendants used it to secure credit facilities for that amount granted by Maybank Shah Alam to HESB. As a consequence a RM2 million SBLC procured by Huge under its account with the Plaintiffs, which had been used to secure those HESB facilities, was cancelled. Ng said that on 16 February 1998 the Defendants also procured another SBLC, also for RM10 million, to secure the credit facilities granted to Jurong Engineering (M) Sdn Bhd by Maybank Shah Alam. However the Defendants failed to honour their agreement to discharge the overdraft of Huge standing at about $2 million. He and his officers tried in vain to get Tan to honour the commitments made and on 11 April 1998, the Plaintiffs withdrew the facilities granted to the Defendants. On 28 August 1998, Huge was ordered by the court to be wound up.

15 Defendants' evidence

16 Tan, the Defendants' General Manager (Finance and Administration), said that when Ng approached him in 1991, the Defendants had a panel of 12 banks and possessed ample sources of funds. Ng then asked if the Plaintiffs could offer banking or credit facilities to the Defendants' related companies instead. That was how Huge got into the picture. This led, in November 1991, to the First Offer of facilities of up to $3 million to Huge on an unsecured, or "clean", basis. Tan said that Ng had asked for a corporate guarantee from the Defendants, but was told that the board of directors would not agree to it. However one of the conditions of the facilities was that the Defendants' existing corporate guarantee to DBS Bank to secure credit facilities to Huge would be

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discharged. Ng had argued that it was unfair for DBS Bank, which held substantial shares in the Defendants, to be in a better position than other banks such as the Plaintiffs. The Defendants agreed and this was done by 20 February 1992.

17 In August 1992 Huge wanted an increase in the credit facilities. Ng again asked Tan if the Defendants could give a guarantee as security. When Tan said that they could not, Ng asked if the Defendants could give a "letter of comfort" instead. Tan said that Ng was aware that the Defendants had given such letters to Huge's other bankers. Tan asked Ng for a copy of the Plaintiffs' standard letter of comfort to have it vetted by his legal department. Tan could not explain why the first Letter of Awareness did not incorporate all the amendments recommended by his legal department. But he said that by the time the second Letter of Awareness was issued on 20 April 1994, he had conveyed to Ng that it was not meant to be a legally binding contract and Ng accepted this.

18 As regards the 2 September 1997 meeting with the Plaintiffs' officers, Tan said that they requested him to ask the Defendants' board to consider paying Huge's outstanding balance. Tan told them that the board would not agree to this. However, feeling bad about this, Tan decided to make up for this by placing more business with the Plaintiffs and agreed to accept the credit facility of $22 million contained in their letter of offer of 13 November 1997. However Tan said that it was not part of the agreement that the Defendants would use part of the facility to pay up Huge's debt. Tan pointed out that if it was, it would have been specified in the letter of offer. As for the meeting with the Defendants' chairman, Chee, on 7 January 1998, Chee testified that the Plaintiffs' officers did not mention that the credit facilities granted to the Defendants was on the understanding that part of it was to be used to retire Huge's liability to the Plaintiffs. However he recalled that the Plaintiffs' officers felt that the letter of

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awareness was binding on the Defendants. He said that what was clear to him at the end of the meeting was that the Plaintiffs claimed that they had a special case because the money they had lent to Huge did not go to the money-losing Taiwan operation but went instead to Malaysia.

19 Analysis of the evidence

20 The first limb of the Plaintiffs' case is based on the Letter of Awareness. However their witnesses gave evidence that appear to say that there was a separate oral agreement. Although that is not pleaded, I nevertheless first examine whether Tan had given the verbal assurances to the Plaintiffs' representatives. I have no doubt in answering this question in the negative. First of all, Ng had said in his evidence-in-chief as follows:

> "9. … Tan assured me that Huge had the financial backing of the Defendants. Further, the Defendants would ensure Huge was managed in such a way so as to be in a position to meet its financial obligations to the Plaintiffs and that the Plaintiffs would not suffer any financial loss as a result of the credit facilities. Finally, even without a formal guarantee, the Defendants would make all necessary arrangements for Huge to meet its commitments to the Plaintiffs."

21 In cross-examination, Ng said that the gist of the words used by Tan was *"We would give [Huge] financial support"*. Even if Tan had said exactly what Ng had described whether in evidence-in-chief or cross-examination, I cannot see how this can amount to a binding obligation to pay the debts of Huge in the circumstances. And even if the words were intended to have contractual effect, they fall far short of an obligation to pay Huge's debts the Plaintiffs. At most it was an obligation to ensure that Huge was properly managed and to give financial support to Huge. I also cannot see how anyone could have interpreted this to mean the sort of commitment alleged by the Plaintiffs. Ng had more than ten years' experience in banking and had risen to head the Corporate Banking

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Division of the Plaintiffs. His performance on the witness box certainly did not give me the impression that he is anything other than a hard-nosed banker. On his own evidence, he had asked for a corporate guarantee and was refused. In the circumstances, I cannot see how he could have relied on such a statement other than as a non-binding assurance that the Defendants would do their best to support Huge.

22 Secondly, there is the question of the lack of a written record of the oral promise to pay Huge's debts. When Huge applied for credit facilities for the first time in 1991, pursuant to the Plaintiffs' internal procedure, Ng put up a submission to their Credit and Loans Committee for its approval. Ng was asked why there was no mention in that submission of the verbal promise by Defendants to pay any debt that Huge was unable to pay, as the Plaintiffs had relied on this as a basis for the provision of the credit line. Ng replied that they could not put this down in writing because it was an oral agreement. This rather unusual answer was repeated by him several times. At a later stage of his evidence he said that the Defendants did not want this oral promise to be recorded anywhere because they did not want their other bankers to know of it. This begs the question of how this information could be obtained by them if it was only recorded in the Plaintiffs' internal documents. Furthermore, the Plaintiffs is a large organisation and the possibility of staff movement or attrition is always present. Ng himself joined them after a career in other banks. I find it incredible that Ng could have relied on such an oral promise without at least recording this down in some internal document for the purpose of preserving the information. In my view, it would be utterly reckless for him not to do so if indeed the facilities were granted to Huge on the basis of such security. However I do not think he is such a person and the real reason is that the facilities were not granted on that basis..

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23 Finally there is a disturbing aspect of the Plaintiffs' evidence. Ng said that the Defendants were prepared to give an oral guarantee to the Plaintiffs securing the facilities granted to Huge but did not want to disclose this as a contingent liability in their accounts. As the Defendants are a company listed on the Stock Exchange, what Ng said would amount to the Defendants practising a fraud on their investors and creditors. However I doubt that this was the case. In view of the circumstances I have outlined, I find that there was no verbal promise made on behalf of the Defendants to pay Huge's debts.

24 I next examine whether there was a promise by the Defendants to use the new facilities granted to them in November 1997 to pay off Huge's debts. On his first day in the witness box, Ng was asked whether, as an experienced banker, he would have considered it prudent to reflect the oral agreement in a side letter. His immediate response was that there was such a letter, the one dated 8 January 1998 addressed to Chee, which recorded what had transpired at their meeting on 7 January. But on the second day, when asked why the letter of offer did not state that the Defendants would use part of it to pay Huge's debts, Ng said that both parties agreed not to document this. When confronted with the evidence he had given the previous day, he said that this was because the Defendants had failed to fulfil their part of the bargain by then. I find it puzzling that, if the pledge to secrecy was such an important feature of the arrangement between them, Ng should not have mentioned this on the first day.

25 But if Ng's evidence is puzzling, the evidence of his colleague Sng is incredulous. Sng said in cross-examination that when he met Tan in September 1997 to discuss the facilities to be granted to the Defendants, the Plaintiffs had wanted the Defendants to pay off Huge's liabilities but this was rejected by Tan. When asked why he did not mention this in his affidavit evidence-in-chief, this bizarre exchange took place:

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> "Q: But at affidavit paragraph 12, you mentioned an option that was not taken up. Why didn't you mention 1st option in your affidavit?
>
> A: During the discussion, Roland Tan had insisted that we should not put anything in black and white. Professionally we agreed to that. Defendants would pay us for Huge Corporation's liability.
>
> Q: [Repeat question].
>
> A: It could be an oversight on my part not to mention it.
>
> Q: You said that Roland Tan said that he didn't want anything to be in black and white. Why isn't that mentioned in affidavit?
>
> A: Professionally, we had agreed not to put purpose of facility in writing. That's why I didn't mention it in my affidavit.
>
> Q: Allen Ng has told us about this condition that the purpose of facility was not to be put in writing. When I asked him whether he thought it prudent to document in some side letter, he said that this was done in AB 262. If as a professional, you felt that you ought not to put this oral agreement in black and white, why did you sign this letter?
>
> A: We had made an agreement that plaintiffs would grant facilities to JEL and plaintiffs fulfilled its part. But almost a month had passed after defendants accepted the facilities but nothing was done. That was why we chased JEL about this drawdown.
>
> Q: Doesn't that contradict what you said about why you could not put anything in black and white? If you can refer to it in letter at AB 262, why can't you refer to it in your affidavit?
>
> A: Roland Tan said he didn't want it to be in black and white. That's why I did not mention it in affidavit at all."

26 At the stage when Sng's affidavit evidence-in-chief was prepared, the Plaintiffs had taken out this writ against the Defendants. Quite how the Plaintiffs are still bound by any agreement not to put in writing the oral agreement to pay is beyond me. If they are bound not to give evidence on this and in compliance with this promise their witness do not do so, then surely the claim must fail! I can only conclude that this is a manufactured position on the part of the

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Plaintiffs' witnesses and one from which Sng, who is not as accomplished a witness as his colleague, was unable to extricate himself.

27 Ng claimed that the letter of 8 January 1998 corroborates his evidence that he and Sng had mentioned to Chee at their 7 January meeting that there was an oral agreement to use the facilities granted to the Defendants to pay off Huge's debts. This letter is addressed to Chee as chairman and goes as follows:

> " First of all, thank you for taking time from your busy schedule to meet us on 7 January 1998. It has been a pleasure meeting up with you.
>
> As mentioned during the course of our discussion Maybank entered into a relationship with Huge Corporation (S) Pte Ltd because of the latter's Malaysian operations and the banking facilities availed to Huge Corporation Singapore were onlent to its Malaysian subsidiary. To unwind the present flow of funds, we have proposed and agreed by your colleagues, that Huge Corporation (S) Pte Ltd discharged its liabilities to Maybank on condition that Maybank continues to make funds available to the Malaysian company through Jurong Engineering Ltd. In this regard, your kind understanding of the situation and assistance in solving this problem will be greatly appreciated.
>
> We look forward to hearing the good news from you."

28 I find this letter to be ambiguous at best as to whether there was any such agreement. It is certainly not clear as to the nature of the agreement. In my view it is a letter requesting Chee to agree to their proposal rather than a letter confirming such an agreement. With the exception of the words *"and agreed by your colleagues"*, that is the tenor of the entire letter. Ng claimed that Chee had agreed to present the Plaintiffs' concerns to his board of directors. If there was already an agreement by the Defendants to use the credit facilities to pay off Huge's debt, I cannot see how it would then be necessary for Chee to present the matter to the board. If Ng's version were true, it would appear that the approval of the board was not obtained before the promise was made to the Plaintiffs and more importantly, that Ng and Sng knew of this. Once again, I

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find it difficult to believe that Ng and Sng, who are at Senior Manager level and higher, can act in this manner. In the circumstances, I have no doubt that the words *"and agreed by your colleagues"* were added in the wishful hope that this would spur Chee into action. Therefore I conclude that there was no such binding promise made and Ng had no illusions about it.

29 I should add that even if there was an agreement between the parties that the Defendants would use the credit facilities granted to them to repay the debts of Huge, I cannot see how their failure to carry out this agreement would entitle the Plaintiffs to recover those debts from them. Huge's debts were already incurred at the time of the promise. As such, the only consideration for the Defendants' promise to repay those debts would be the grant of the facilities to them. By their failure to use the facilities to repay the debts, the Defendants were in breach of this agreement. The Plaintiffs would then be entitled to rescind the agreement and in turn sue the Defendants in breach of contract and recover damages. The question would be the nature of such damages. They cannot amount to the total sum of Huge's debts because these were already in existence at the time the agreement was made unless the Defendants, by their entering into this agreement or failure to perform it, had prejudiced the Plaintiffs' ability to recover those debts from Huge. But the Plaintiffs have made no such allegation. Accordingly, damages would be restricted to any costs incurred by the Plaintiffs in performing their part of the contract and its subsequent rescission. But no such damages are alleged.

30 Effect of the Letter of Awareness

31 I turn now to consider the effect of the Letter of Awareness. The relevant letter is the last one dated 15 June 1994 which is the same as the one dated 20 April 1994. The relevant terms are:

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> " We are glad to note that you have granted or agreed to grant to [Huge] the following credit facilities on such terms and conditions as you may at your sole discretion impose from time to time:-
>
> …
>
> We hereby confirm and covenant with you as follows:-
>
> (a) We are fully aware and agree with the granting of the above-mentioned credit facilities.
>
> (b) We hold 50% of the issued and paid-up capital of the above-mentioned company and agree not to reduce our interest therein without your prior approval in writing.
>
> (c) We shall endeavour to ensure that the company shall be managed on sound commercial and financial practice in such a way so as to be in a position at all times to meet its obligations to you and that you will not suffer any financial loss as a result of your extending the credit facilities to [Huge].
>
> (d) It is our policy to see that no lending institution incur any loss from doing business with our subsidiary and that this policy will be followed in respect of credit facilities extended to [Huge] and we shall endeavour to make all necessary arrangement for [Huge] to meet its commitments with you."

32 The Plaintiffs say that the use of the word "covenant" proves that the Defendants had intended to bind themselves legally to the promises set out. To this I would simply say that there is no magic formula in the use of this word, or indeed any other word. Although its use would be indicative of a promissory intention, the court must nevertheless look at what it is that the Defendant has "covenanted". Paragraph (a) clearly has no contractual effect. Paragraph (b) obliges the Defendants to maintain their 50% interest in Huge and could possibly be a legally binding promise but this is not relevant as there is no allegation that this term is breached. Paragraph (c) is qualified by *"we shall endeavour*". If this was intended by the parties to be a legally binding obligation, at most it obliges the Defendants to make an effort to carry out what is stated there. It clearly cannot be construed as obliging them to control Huge in such a manner that would make the Defendants liable to the Plaintiffs for any financial

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loss suffered by the Plaintiffs arising from the credit facilities. If this were the intention it would have to be expressed in clearer terms than these. Paragraph (d) is a statement of policy combined with a statement that the Defendants would *"endeavour to make all necessary arrangement"* for Huge to meet their commitments to the Plaintiffs. The latter statement is a pious declaration that the Defendants would do their level best to support Huge if they got into trouble. The Defendants were making use of their size and reputation to secure the best possible credit terms for their subsidiary. But there is no doubt that there is no binding obligation on the part of the Defendants to settle Huge's debts should they be unpaid. The entire document is drafted in such a loose manner that no prudent person, much less a banker, would rely on it. Furthermore, on the face of the document there is no consideration expressed. The first paragraph states that the facilities have been granted, or that the Plaintiffs had agreed to grant them.

33 Whether or not the Letter of Awareness has contractual effect, and if it does, what effect it has, depends on the terms of the letter and the circumstances of this case. However disputes involving similar letters, which are often called letters of comfort, have been adjudicated in the courts and I turn to examine these cases. The leading English authority is the decision of their Court of Appeal in *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785. At first instance, Hirst J held that the letter of comfort had contractual effect (see [1988] 1 All ER 714). However the defendants successfully appealed and the Court of Appeal reversed the decision. The material paragraph in the letter of comfort in that case, paragraph 3, is as follows:

> "It is our policy to ensure that the business of MMC Metals Limited is at all times in a position to meet its liabilities to you under the above arrangements."

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34 The English Court of Appeal found it "*impossible to hold that by the words of para 3 the parties must be held to have intended that the plaintiffs be given that security"*. In so holding, the court said that the context in which the letter was given was relevant although not conclusive. There the defendants had refused to give a guarantee and agreed only to provide the letter of comfort. The draft of the letter of comfort was provided by the plaintiffs and the defendants made some insubstantial amendments.

35 This approach was not followed by the Commercial Division of the Supreme Court of New South Wales. In *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502, Rogers CJ disagreed with the emphasis placed by the English Court of Appeal in *Kleinwort Benson* on the analysis of the text of the letter rather than on the intention of the parties. Rogers CJ said, at p 524F:

> " The Court of Appeal subjected the letters to minute textual analysis. Courts will become irrelevant in the resolution of commercial disputes if they allow this approach to dominate their consideration of commercial documents.
>
> Probably at the heart of the judgment delivered by Ralph Gibson LJ is the statement (at 792):
>
> "…In my judgment, the defendants made a statement as to what their policy was, and did not in paragraph 3 of the comfort letters expressly promise that such policy would be continued in future."
>
> That construction of the letter renders the document a scrap of paper. If the Lord Justice is correct, the writer has not expressed itself on anything relevant as a matter of honour."

36 Rogers CJ then went on to remark that the law in Australia, in determining whether a statement was promissory or only representational, was different from that in England.

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37 The court in *Banque Brussels* dealt with a letter of comfort that provided as follows:

> " We confirm that we are aware of the eurocurrency facility of US$5 million which your Bank has granted to Spedley Securities Limited, which is a wholly-owned subsidiary of Spedley Holdings Limited.
>
> We acknowledge that the terms and conditions of the arrangements have been accepted with our knowledge and consent and state that it would not be our intention to reduce our shareholding in Spedley Holdings Limited from the current level of 45% during the currency of this facility. We would, however, provide your Bank with ninety (90) days notice of any subsequent decisions taken by us to dispose of this shareholding, and furthermore we acknowledge that, should any such notice be served on your Bank, you reserve the right to call for the repayment of all outstanding loans within thirty (30) days.
>
> We take this opportunity to confirm that it is our practice to ensure that our affiliate Spedley Securities Limited, will at all times be in a position to meet its financial obligation as they fall due. These financial obligations include repayment of all loans made by your Bank under the arrangements mentioned in this letter."

38 In deciding that the parties had intended the letter to be contractually binding, the court found the following factors to be relevant. Firstly, this letter was the result of seven revisions from the plaintiffs' original draft. Both sides had sought to secure their respective positions in their proposals for revision. Secondly, there were oral and written communications between the parties in which the plaintiffs had informed the defendants that they wanted a *"strong commitment"* and did not wish for the bearing of the comfort letter to be reduced significantly by the phrase "*by using our influence"*. And in a discussion on the final draft, the following conversation took place between the plaintiffs' Mr Jacobsen and the defendants' Mr Craven in which Mr Jacobsen made clear the purpose of the letter:

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> "JACOBSEN: 'Look what we want is some comfort and commitment from ANI. The previous draft didn't give us that. The second paragraph is because ANI will have to give us 90 days' notice of any decision to sell any of its shares in Spedley Holdings. We can call on Spedley Securities during that time to redeem any outstanding facility within 30 days. That gives us comfort because ANI couldn't sell shares in a merchant bank if it had just defaulted. No-one would buy them.'
>
> MR CRAVEN: 'Yes I know. ANI can understand why you want such a letter and it will be forthcoming.'
>
> JACOBSEN: 'The last paragraph's also important because we want confirmation that during the facility, however long it lasts ANI will make sure that Spedley Securities will always remain creditworthy in the marketplace. If Spedley didn't then as a merchant bank it wouldn't be able to raise funds.'"

39 And thirdly, another of the defendants' representatives had admitted that he had regarded it as an obligation on their part to comply with paragraph 2 of the letter, i.e., to give the plaintiffs 90 days' notice before any disposal of their shares in the company concerned. He also admitted that the purpose of this provision was to give the plaintiffs an opportunity to get their money back before the shares were sold and conceded that if such notice had been given the defendants would have been unable to sell those shares.

40 Rogers CJ went on to hold that the terms of paragraph 2 of the letter were sufficiently promissory in nature and made a finding that it imposed an obligation on the defendants to give the plaintiffs 90 days' notice of the proposed sale of their stake in the subsidiary. As such notice would have entitled the plaintiffs to call for repayment of the loan within 30 days, in all likelihood the plaintiffs would have been able to recover it. This was one of the bases for the judgment given in favour of the plaintiffs. In my respectful view, the court's finding in this regard is beyond reproach. However in respect of the other basis, i.e., the court's finding in respect of the effect of paragraph 3 of the letter of

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comfort is, as the judgment admits, somewhat tenuous. After giving the reasoning in relation to paragraph 2, the judgment proceeds as follows:

> " The question whether the third paragraph of the letter of comfort is promissory is far more thorny. However, in my view, if the paragraph is read as follows: "it is our practice to ensure that Spedley is at all times in a position to repay all loans made to it by your Bank", its promissory nature is much clearer. I see no relevant difference between that and saying that "we promise to ensure that" Spedley will at all times be in a position to repay the plaintiff. The letter needs to be read in the light of the statement of policy ascribed to Mr Mather … "it is our corporate policy to support our subsidiaries.
>
> …
>
> In my view, the plaintiff has made out its claim that the defendant was in breach of two enforceable contractual promises." (emphasis added)

41 It can be seen that the main features in the *Banque Brussels* decision are the fact that there had been strong expressions by the plaintiffs of their intentions in respect of the letter of comfort, the fact that the defendants had acknowledged this, the course of negotiations over the draft and, not least, the affirmative nature of the text of the letter. Such features are not only absent in the case before me but the facts here are quite the opposite. The Defendants had refused to grant a corporate guarantee and the Plaintiffs had agreed to the amendments proposed by the Defendants, i.e. the addition of the word "endeavour" to qualify the commitment in paragraphs (c) and (d) of the Letter of Awareness.

42 I therefore find that the Defendants were not in breach of any of their obligations under the Letter of Awareness.

43 LEE SEIU KIN

44 JUDICIAL COMMISSIONER

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Lee Seiu Kin JC

Sarjit Singh Gill, S C and Dylan Lee (Shook Lin & Bok) for the plaintiffs
Alvin Yeo and Daniel Koh (Wong Pnrs) for the defendants

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