IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 66

Civil Appeal No 7 of 2016

Between

Sudha Natrajan

… *Appellant*

And

The Bank of East Asia Limited

… *Respondent*

JUDGMENT

[Deeds and Other Instruments] — [Deed] — [Avoidance]

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Sudha Natrajan
v
The Bank of East Asia Ltd

[2016] SGCA 66

Court of Appeal — Civil Appeal No 7 of 2016
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
27 July 2016

29 November 2016 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 The core issue in the appeal is as it was before the learned judicial commissioner ("the Judge") who tried this matter and whose decision is reported as *The Bank of East Asia Limited v Sudha Natrajan* [2015] SGHC 328 ("the Judgment"): did the appellant execute a Deed of Assignment of Proceeds ("the Deed") in duplicate on 10 January 2014? The appellant testified that she did not sign the Deed. The signatures affixed on each copy of the Deed bore no resemblance to the appellant's usual signature. But the signing of the Deeds were evidently witnessed by a solicitor. The answer to the question comes down, first, to the inherent probabilities of the case advanced by each party, and second, to the evidence of two crucial witnesses – Mr Yap Bei Sing ("Mr Yap"), a consultant forensic scientist with the Document Examination Unit of the Health Sciences Authority ("HSA"); and Mr Johnny Cheo Chai Beng ("Mr Cheo"), the solicitor who witnessed the

signing of the Deed. The Judge favoured the evidence of the latter. For reasons which we set out below, we consider, having regard also to the probabilities inherent in each party's case, that the Judge erred in his analysis and evaluation of the evidence and we therefore allow the appeal.

Facts

Parties to the dispute

2 The appellant is a former Human Resource Manager of Tecnomic Processors Pte Ltd ("Tecnomic"), a company that has since been wound up. Her husband, Rajan Natrajan ("Rajan"), was the major shareholder and principal director of Tecnomic and was adjudicated a bankrupt on 12 June 2014, some months after the events that are central to this matter. The appellant and Rajan are joint owners of their matrimonial home located at 41 Eng Kong Place, Singapore 599113 ("the Property").

3 The respondent is a bank registered in the Hong Kong SAR, and carries on business in Singapore through its local branch. It is the beneficiary under the Deed, to which the appellant (allegedly) and Rajan are co-signatories.

Background to the dispute

4 Rajan was one of two guarantors under a guarantee dated 7 September 2012 ("the Guarantee") given in favour of the respondent. The other guarantor was one Sarada Devi Krishna Pillai Suresh Kumar ("Pillai"). Under the terms of the Guarantee, Rajan and Pillai were jointly and severally liable to pay on demand all sums owed by Tecnomic to the respondent in respect of banking facilities granted by the respondent to Tecnomic ("the Banking Facilities"). Tecnomic subsequently defaulted on its obligations to service the Banking

Version No 2: 27 Oct 2020 (22:40 hrs)

Facilities and as a result, the respondent terminated these on 2 December 2013. Rajan and the respondent then entered into discussions pertaining to the repayment of the outstanding sum and it was agreed between the respondent and Rajan that Rajan, the appellant and Tecnomic would jointly and severally covenant to pay the respondent all sums owed by Tecnomic to the respondent. Additionally, the Property (or the sale proceeds therefrom) would be furnished as collateral for these sums. In return, the respondent would forebear from instituting proceedings to recover the sums due in respect of the Banking Facilities. This agreement was reduced to writing in the Deed, which for avoidance of doubt, was executed as a deed. There is no evidence to suggest that the appellant was party to any of the discussions between Rajan and the respondent that culminated in these arrangements. Indeed it does not appear that the respondent ever communicated with the appellant at any time before it received copies of the Deed on 10 January 2014.

5 Rajan produced, on 3 January 2014, a first set of what appeared to be signed copies of the Deed ("the Original Copies"). But this was rejected by the respondent on the ground that the signing of the documents had not been witnessed. A week later, on 10 January 2014, Rajan returned with two signed copies of the Deed, this time with what purported to be the signatures of Rajan and the appellant. Additionally, the Deed itself indicated that Mr Cheo witnessed the signing of the document. The respondent accepted the copies and lodged a caveat against the Property ("the Caveat") on 20 January 2014 on the basis of its interest under the Deed.

6 Unknown to the respondent, winding-up proceedings had been commenced by a third party against Tecnomic on 20 December 2013 and Tecnomic was wound up 10 January 2014, which was the very day on which Rajan had produced the signed copies of the Deed that were accepted by the

Version No 2: 27 Oct 2020 (22:40 hrs)

respondent. In fact, Tecnomic had been wound up that morning. Rajan, as a director of Tecnomic, had stated on oath in an affidavit filed in the winding-up proceedings on 6 January 2014 that Tecnomic was indebted to the creditor seeking the winding-up order in the amount of $21.1m and that it would not resist its winding-up because it was unable to pay this debt. The Deed was allegedly signed by the appellant in the afternoon of 10 January 2014, by which time, Tecnomic had already been wound up. The respondent maintained that it only discovered this fact upon receiving notice of the liquidation from the liquidator of Tecnomic on or about 28 January 2014. It subsequently commenced Suit No 751 of 2014 ("S 751") against the appellant for the amounts due under the Deed, having received no payment in response to its letter of demand dated 17 March 2014 ("the LOD") that was addressed to the appellant. The appellant's defence was straightforward – she said that she had not signed the Deed.

Decision Below

7 The Judge found in favour of the respondent for the following reasons:

(a) He considered that the appellant's evidence was not credible. The fact that it had not been the appellant's case that Rajan had forged her signatures on the Deed appeared to have played a significant role in the Judge's reasoning (the Judgment at [30]).

(b) An adverse inference was drawn against the appellant on the basis of illustration (*g*) of s 116 ("s 116(g)") of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act") because she failed to call Rajan as a witness without good reason (the Judgment at [75]).

Version No 2: 27 Oct 2020 (22:40 hrs)

(c) The evidence of Mr Cheo, which was "clear and cogent", was preferred over that of Mr Yap (the Judgment at [46] and [66]).

8 The appellant contests each of these planks of the court's reasoning. Additionally, she says that any doubt as to whether she had signed the Deed should be resolved in her favour in light of the respondent's "poor and oppressive banking practices which deviated from industry norms", and that the Deed should be set aside in any case as it "shocks the conscience of the court". We first address the evidence that was before the Judge and then we consider the appellant's alternative arguments, which we must emphasise were not raised in the court below.

The findings of fact

The appellant's evidence at the trial

9 The first main plank on which the decision of the court below stood was the lack of credibility in the appellant's evidence and the case that she advanced. Her case was essentially that she had been ignorant of Rajan's financial dealings and more specifically, of the very existence of the Deed. She testified that when she subsequently confronted Rajan about the Deed, he denied forging her signature. Rajan told her that he had passed the Deed to Pillai with only his signature and Pillai then passed the signed Deed to the respondent. The Judge highlighted numerous deficiencies in the appellant's evidence at [39]–[44] of the Judgment and in our judgment, his scepticism as to the alleged role played by Pillai is entirely justified. The Judge outlined several pertinent considerations at [41] of the Judgment, of which we highlight two: (a) the assertion that Pillai had handed the Deed to the respondent was inconsistent with the police report filed by the appellant and the evidence of the respondent's employee, Mr Heng Juay Yong ("Mr Heng"), both of which

Version No 2: 27 Oct 2020 (22:40 hrs)

attest to the fact that it was Rajan who handed the Deed to the Respondent; and (b) there was no reason for Rajan to have handed the Deed to Pillai since it was the appellant's signature that was required. Furthermore, insofar as the appellant's evidence is intended to support the truth of the matters purportedly asserted *by Rajan*, it is hearsay evidence. Like the Judge, we are not satisfied that Pillai had any role to play in the alleged forgery. But this was only one aspect of the appellant's evidence. As the appellant stresses, all she has to prove is that she did not sign the Deed; it is not necessary for her to establish who the forger was.

10 The foundation for the Judge's reasoning is at [23]–[29] of the Judgment, where he spelt out the essence of his reasons for disbelieving the appellant. The first step in this process was the conclusion that Rajan must have intended the Deed to bind because it was not suggested by anyone (including Rajan) that his own signature had been forged. With respect, there is a fallacy here. The Deed needed the signatures of both Rajan and the appellant to be legally binding because the entire purpose of the Deed was to give the respondent security in the form of the appellant's and Rajan's home. It is not possible, in our view, to draw the conclusion that Rajan subjectively intended that the Deed should be binding just from the fact that he alone had evidently signed the Deed.

11 The next step in the Judge's reasoning was based on his first premise, which, as we have noted, is flawed. He reasoned that because Rajan intended the Deed to be binding, he would have acted *bona fide* and persuaded the appellant (as joint owner of the Property) to sign the Assignment. But since the basis of this second step, *ie* the Judge's first premise, is flawed, we do not think this step in the reasoning can stand either.

Version No 2: 27 Oct 2020 (22:40 hrs)

12 But there is more to be said about this. Given the disastrous state of Tecnomic's finances in early January 2014 (see [6] above), it seems unlikely to us that Rajan would have intended that the Deed should be valid and binding. What he might well have wanted, for whatever reason, was to give the respondent the appearance that he had furnished an executed deed. This however, as the appellant points out, raises the possibility that it was Rajan who forged the appellant's signature. Indeed, having excluded the possibility that Pillai forged the appellant's signature, we are left with only two other possibilities: that Rajan forged the appellant's signature or that the appellant did sign the Deed after all. The appellant alludes in this appeal to the former hypothesis, stating that "there are understandable emotional ties between husband and wife which may explain the reason for a wife to be reticent in asserting that her husband forged her signature". Once this possibility is contemplated, much of the force of the Judge's analysis is lost. We develop this by reference to specific factual findings that were made against the appellant.

13 First, based on his view that Rajan intended the Deed to bind, the Judge concluded that Rajan must have apprised the appellant of Tecnomic's dire financial plight in an effort to persuade her to sign the Deed. As against this, the appellant's evidence was that while she was generally aware in January 2014 that Rajan had been experiencing financial difficulties, she only came to know of the Banking Facilities, the Guarantee and the Deed after S 751 had been commenced against her. The Judge disbelieved her, largely on the ground that Rajan, as her husband, would have shared with her the details of these transactions given the extent of the exposure they carried with them and the financial problems he was facing at that time (the Judgment at [42]–

Version No 2: 27 Oct 2020 (22:40 hrs)

[44]). He bolstered this conclusion by the fact that the LOD and notice of the Caveat would have been sent to the Property (the Judgment at [32]–[34]).

14 This might all make sense *if* we were to assume that Rajan had discussed the furnishing of the additional security with the appellant who then agreed to go along with the Deed. But the appellant's case is that she was never told about this and if it was Rajan who forged her signature then it would be entirely consistent with this that he would have taken steps to *avoid* letting her know about these matters even to the extent of concealing related correspondence from her. In any case, she is also correct to note that the marital relationship is a textured one with its own nuances and complexities especially where the interests of the husband and the wife are not always aligned. This potentially explains why she had filed a police report alleging forgery and yet not followed up on it and more crucially, why she had not called her husband as a witness, a point to which we will return later. There is a further point in this regard: aside from the Deed, the appellant had no personal liability for Tecnomic's debts and her interest in the Property was not encumbered by Tecnomic's liabilities.

15 Second, the analysis below was not only premised on Rajan's intention for the Deed to bind but also on the premise that the appellant shared this intention. We are unable to see why this would ever have been the case. It would not be an overstatement to say that Tecnomic and Rajan were in desperate financial straits by the end of 2013. As we have noted at [6] above, winding-up proceedings had already been commenced against Tecnomic on 20 December 2013 on the basis of a statutory demand for a sum in excess of $59m and the application was advertised in major newspapers and in the electronic edition of the Government Gazette on 31 December 2013. By way of an affidavit dated 6 January 2014, Rajan had already admitted Tecnomic's

Version No 2: 27 Oct 2020 (22:40 hrs)

liability in the sum of $21.1m and indicated that Tecnomic would not be challenging the winding-up application as neither it nor he was able to make repayment. It was therefore apparent that the order for Tecnomic to be wound up *would* be granted at the hearing of 10 January 2014, and indeed it was, several hours before the appellant allegedly signed the Deed.

16 This brings us to the inherent probabilities of the case advanced by each party. The short point is this: the Deed had the effect of giving the respondent security over the Property which it did not previously have. This was to secure Tecnomic's liabilities under the Banking Facilities. By the time the Deed was allegedly signed, Tecnomic had already been wound up. In those circumstances, the effect of the Deed was to give the respondent a security interest it did not previously have and to oblige the appellant personally to undertake Tecnomic's liabilities. This transaction might have made sense if the rescue of Tecnomic was still viable, even if it was already distressed. But once it had been wound up, the sole effect of the Deed was to make the appellant jointly answerable for Tecnomic's debts, a liability she had not taken on at any point until then; and to give the respondent a security interest in the appellant's home.

17 The respondent takes the position that this is indeed the case, but provided no explanation as to *why* this would be so. With Tecnomic wound up and Rajan facing an inevitable tide of claims, there was no conceivable incentive for the appellant to have entered into the Deed. The respondent's case is that the Appellant knew the full extent of Tecnomic's and Rajan's indebtedness but yet agreed to undertake such onerous obligations for no tangible benefit. In our judgment, that is wholly implausible. This is a factor that must feature in the analysis of the evidence as a whole in circumstances such as the present where the appellant denies signing the Deed and that is the

Version No 2: 27 Oct 2020 (22:40 hrs)

central issue of fact. Beyond this, it also bears on the possibility of undue influence being found as in the case of *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 ("*Etridge*"). The respondent's conduct in obtaining the Deed without even seeing the appellant is shocking and reprehensible though we leave this to one side for the moment.

The failure to call Rajan as a witness

18 We turn to the second of the three planks we identified at [7] above. The Judge held at [74]–[75] of the Judgment that the appellant's failure to call Rajan warranted the drawing of an adverse inference under s 116(g) of the Act. This rested on his view that "Rajan's evidence could have been produced and if produced would have been unfavourable to the [appellant]". The relevant parts of s 116 read:

> **116**. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> …
>
> (*g*) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;
>
> …
>
> But the court shall also have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it:
>
> …
>
> as to illustration (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feeling and reputation of his family …

Version No 2: 27 Oct 2020 (22:40 hrs)

19 Illustration (g) of s 116 allows the court to draw an adverse inference as to any fact flowing from the nature of the evidence that would likely have emerged if evidence that could and should have been produced by a party is not so produced. As with most presumptions, this too must be applied having regard to whether, considering all the circumstances, it may properly be relied on or whether it has been displaced for some reason. The rationale for this presumption is one of "plain common sense": the natural inference from a party's failure to produce evidence which would elucidate a matter is that the party fears that the evidence would be unfavourable to it (see *Jones v Dunkel and another* (1958-1959) 101 CLR 298 at 320-321).

20 The drawing of an adverse inference must therefore in the final analysis depend on the circumstances of each case, and it is not the position that in every situation in which a party fails to call a witness or give evidence, an adverse inference must be drawn against that party: see Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Law of Evidence* (Wadhwa and Company Nagpur, 22nd Ed, 2006) at 1238. With specific regard to absent witnesses, broad principles governing the drawing of an adverse inference were set out in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 ("*Wisniewski*") and these principles were later endorsed by this court in *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 at [43]. They may be summarised as follows:

> (a) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the matter before it.

Version No 2: 27 Oct 2020 (22:40 hrs)

(b) If the court is willing to draw such inferences, these may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(c) There must, however, have been some evidence, even if weak, which was adduced by the party seeking to draw the inference, on the issue in question, before the court would be entitled to draw the desired inference: in other words, there must be a case to answer on that issue which is then strengthened by the drawing of the inference.

(d) If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn. If, on the other hand, a reasonable and credible explanation is given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or annulled.

21 As noted in *Wisniewski*, one situation where the presumption that underlies the drawing of an adverse inference should *not* be held to apply is where the failure to produce evidence is reasonably attributable to reasons other than the merits of the case or the issue in question: see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ("*Pinsler on Evidence*") at para 12.068 and [20(d)] above. In this regard, it is true that before the Judge, the appellant ran the case that her signature on the Deed had *not* been forged by Rajan. It is also true that we too find this unpersuasive. But as we have noted at [12] above, the appellant's case at trial on this issue might be viewed differently if regard were had to the nuances that inhere in the marital relationship.

Version No 2: 27 Oct 2020 (22:40 hrs)

22 The appellant's case is that she did not sign the Deed. One starts from the premise that she would have been expected to call her husband assuming he knew she did not sign the Deed. On the basis of the present facts, as noted at [12] above, if the appellant in truth had not signed the Deed, the only person who would realistically have forged her signature would have been Rajan. This then becomes of considerable significance. This is so because it seems very likely that Rajan's evidence, if adduced, could well have been unfavourable to *himself* had it emerged that *he* had committed the forgery since that would expose him to criminal liability. We think that the invidious position the appellant was placed in – essentially to require her husband to incriminate himself in order to absolve herself of civil liability – affords a sufficient explanation for the appellant's failure to call Rajan so as to prevent the drawing of an adverse inference against her.

23 This is sufficient on this aspect of the Judge's reasoning. However, we also observe that even if the appellant were reasonably expected to have called Rajan, the court would still not have been able to draw the inference that his evidence would have been that the appellant did sign the deed, since it is clear that he was not present when the appellant allegedly signed the Deed. While the inference to be drawn is not necessarily confined to the undisclosed evidence (see [32] below), s 116(*g*) does not afford the court the opportunity to speculate as to what the evidence may be without some basis for the drawing of the inference which the opposing party seeks to persuade the court to draw. That is, the court must put its mind to the *manner* in which the evidence that is not produced is said to be unfavourable when drawing the adverse inference under s 116(*g*).

24 In *Flack v Chairperson, National Crime Authority and another* (1997) 150 ALR 153 ("*Flack*"), the National Crime Authority ("NCA") executed a

Version No 2: 27 Oct 2020 (22:40 hrs)

search warrant on the premises of the applicant. The applicant was the sole tenant but her son would visit her twice a week and also held a key to the premises. During the search, the NCA found a bag containing $433,000, which it took away. However, no action was taken by the NCA in respect of the bag. The applicant disclaimed any knowledge of the bag when asked at the search, but later asserted a claim to the bag on the basis that she had the right to its possession. She nevertheless declined to give evidence at the trial, and it was submitted that not only should the court conclude that any evidence she would have given would not have supported the case, but that any inference favourable to her should not be drawn. Hill J rejected the latter submission, stating at 164:

> There is nothing in *Jones v Dunkel*, or for that matter the numerous cases which have followed or applied it, which supports so wide a proposition. It may well be the case that, where two inferences are equally open, one favourable and one unfavourable, and the evidence of the witness might confirm one inference, the failure of that witness to give evidence would lead to the conclusion that the other inference should be drawn. That may follow from the proposition that it can be assumed that the evidence of the witness who fails to give evidence would not support the witness' case. But except in a case where the inferences are equally open, each case will involve the court weighing up all the relevant evidence to determine whether an inference should be drawn. Put another way, I do not think that … where there are competing inferences one inference will, in all cases, of necessity have to be accepted by the court *where the inference to be drawn does not depend upon evidence which the non-participating witness might give, or even where it might, if other evidence justifies the drawing of the inference*. [emphasis added]

25 We note that notwithstanding the allusion to the possibility of Rajan having forged her signature (see [12] above), the position taken by the appellant in this appeal is that she did not know who forged her signature and that she did not sign the Deed. On *this* case, Rajan's evidence could only have been unfavourable to the extent he might have testified that he had not forged

Version No 2: 27 Oct 2020 (22:40 hrs)

the deed and as *Flack* suggests, the adverse inference that can be drawn from the appellant's failure to call Rajan should be similarly circumscribed. While this may have damaged the appellant's case in discrediting what seems to us to be the only plausible alternative case theory, there is no basis for an adverse inference that Rajan's evidence would have gone directly to whether she did in fact sign the Deed, a matter which would still remain to be proven by the respondent.

26 As for the appellant's submission that an adverse inference should be drawn against the respondent for its failure to call Mr Cheo's secretaries, we think this does not warrant the drawing of an adverse inference. In *Buksh v Miles* 296 DLR (4th) 608 at [30], the British Columbia Court of Appeal noted the link between the drawing of an adverse inference from the failure to call a witness and the best evidence rule, and endorsed the proposition that "the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be superior in respect to the fact to be proved". Having called Mr Cheo to provide direct evidence as to the alleged signing of the Deed by the appellant, we see no reason why the respondent would have been obliged to call on his secretaries, who only assisted in arranging for the signing and who wrote the date and names of Rajan and the appellant on the Deed, but did not themselves witness the signing of the Deed.

Mr Cheo's evidence

27 We turn to the third plank underlying the Judge's decision and it is the strongest evidence in the respondent's favour, namely the testimony of Mr Cheo, who had been subpoenaed. Mr Cheo's evidence was that his office was situated along the same corridor as Tecnomic's office and that from about 2010, Tecnomic's employees, including Rajan himself, would occasionally

Version No 2: 27 Oct 2020 (22:40 hrs)

request him to witness the execution of documents. Sometime in December 2013, Rajan had alluded to the financial difficulties of Tecnomic and asked if Mr Cheo could witness the signing of the Deed. Mr Cheo took the cue and agreed to do so without payment. However, it was not until days before 10 January 2014 that he was contacted by Rajan, and arrangements were made for Rajan and the appellant to come to his office for him to witness their execution of the Deed. However, when Rajan showed up on the morning of 10 January 2014, he came alone and informed Mr Cheo that the appellant would be coming in the afternoon instead. According to Mr Cheo, the appellant turned up at his office in the afternoon of 10 January 2014 and her execution of the Deed was only witnessed then, separately from Rajan's execution of the documents.

28 The cross-examination of Mr Cheo by counsel for the appellant was unremarkable, perhaps unsurprisingly so. This was because there was little to contradict his evidence aside from the testimony of the appellant. As noted at [50] of the Judgment, Mr Cheo was cross-examined on certain aspects of the Deed which suggested that he may not actually have witnessed the appellant signing it. For instance, the date "10 January 2014" was found to have been stamped on one copy of the Deed but handwritten on the other, and the signatures on the respective copies appeared to differ in colour and tone. These suggested, contrary to the evidence of Mr Cheo, that the documents may not have been executed contemporaneously. On this, we agree with the Judge that such aberrations, while probative of forgery, are not by themselves sufficient to impugn the credibility of Mr Cheo. We also find no merit in the appellant's submissions in respect of Mr Cheo's failure to advise the appellant as to the extent of her liability under the Deed and to keep attendance notes of his meeting with the appellant. Mr Cheo was only there to witness the

Version No 2: 27 Oct 2020 (22:40 hrs)

signature of the appellant. He had not been engaged to act on the appellant's behalf or to advise her. The extent of his obligation was to ensure that the document was in fact signed by the person who was named as the signatory and that it appeared to be done of his or her free will. It therefore cannot seriously be contended that he was under a duty to advise the appellant on the contents of the Deed.

29 Aside from the evidence of Mr Cheo, the respondent also led the evidence of Mr Heng, the Deputy General Manager, Operations of the respondent, but in truth there was really *nothing* that he could offer which might add to Mr Cheo's evidence or to the respondent's case in general. He was not the relationship manager in charge of Tecnomic's account and while he claimed to have personal knowledge of this matter by reason of his participation in the respondent's credit and debt recovery committees, his evidence fell well short in many areas. Crucially, he had no personal knowledge of anything pertaining either to the Original Copies that had been submitted without being witnessed on 3 January 2014, or to the execution of the Deed; he could not say whether the signatures of the appellant, Rajan and/or Pillai were there when the Original Copies were first submitted to the respondent on 3 January 2014; or whether the executed copies of the Deed were in fact the same as the Original Copies save with the addition of Mr Cheo's signature. Mr Christopher Sim, who had been Rajan's relationship manager and who would have knowledge of these matters, was no longer in the employment of the respondent by the time the matter was heard and was not called as a witness. During the course of Mr Heng's cross-examination, it came to light that much of his evidence was in fact based on a call report (variously referred to by Mr Heng as the "call report file", "the records" and "call report") which had apparently been prepared by Mr Sim, but which was

Version No 2: 27 Oct 2020 (22:40 hrs)

never disclosed by the respondents. For completeness we mention that from his evidence, the record(s) in question seemed to cover the events which transpired on both 3 and 10 January 2014, though not having seen the document(s), we decline to make an affirmative finding to this effect.

30 In our judgment, the respondent's failure to call Mr Sim as a witness made it even more unsatisfactory that the call report, which was a critical piece of evidence, was not produced by the respondent. As a result, there was no available evidence that was directly probative of what transpired between Mr Sim and Rajan on 3 or 10 January 2014. Mr Heng's evidence was largely a second-hand account of what had transpired between them and to that extent, it was inadmissible hearsay. While he was able to give evidence as to the commercial arrangements between the parties, such as the grant of the banking facilities to Tecnomic, it was clear from the outset that that was not the issue in dispute. The appellant's defence has always been that her signature on the Deed had been forged, and the Original Copies and the circumstances surrounding its rejection by the respondent are therefore vital issues on which *all* relevant evidence ought to have been disclosed.

31 The call report, as counsel for the respondent rightly conceded, falls within this category. Not only would the call report have contained the details of the telephone communications between Mr Sim and Rajan, it could have indicated whether copies had been made of the Original Copies and indeed, whether the Original Copies had been returned at all to Rajan as Mr Heng claimed (with or without copies being made by the respondent). It may also have indicated the time and the circumstances in which the Deed was given to the respondent on 10 January 2014. This is of particular relevance since Mr Cheo's evidence was that the appellant had signed the Deed in the later part of the afternoon of 10 January 2014. This would have left little time for the Deed

Version No 2: 27 Oct 2020 (22:40 hrs)

to be sent to the respondent by the end of the business day, as one would ordinarily expect, especially if it had to be first handed to Rajan, who was not with the appellant. Mr Heng, however, could not confirm whether the Deed had been given to the respondent in the morning or the afternoon though he seemed to think it was delivered to the respondent at some time on that day. Further, the copies or originals of the Original Copies, if annexed to the call report, could have formed the basis for comparison with the executed copies of the Deed. Despite all this, no reason was proffered as to why the call report was not produced.

32 Aside from the unsatisfactory state of the discovery offered by the respondent, the call report as a contemporaneous record of the discussion(s) and interaction(s) between Mr Sim and Rajan in relation to the Original Copies and possibly also the signed copy of the Deed would have been documentary evidence that unquestionably should have been but was not produced. This gives rise to an adverse inference being drawn under s 116(*g*) against the respondent that the call report, if produced, would have been unfavourable to the respondent. As to how the inference should be given effect, in our judgment, the omission by the respondent to produce the call report had a seriously detrimental impact on the weight to be accorded to Mr Cheo's evidence. As set out above (at [20(b)]), the drawing of an adverse inference is not confined to inferences drawn in respect of the undisclosed evidence, but could extend to the court's evaluation of any other evidence tendered. In *O'Donnel v Reichard* [1975] VR 916 at 929, the Supreme Court of Victoria held:

> … [I]n our opinion for the purposes of the present case the law may be stated to be that where a party without explanation fails to call as a witness a person whom he might reasonably be expected to call, if that person's evidence would be favourable to him, then, although the jury may not treat as

Version No 2: 27 Oct 2020 (22:40 hrs)

> evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person's evidence would not have helped that party's case; if the jury draw that inference, then they may properly take it into account against the party in question for two purposes, namely: *(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken*; and (b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken. [original emphasis omitted; emphasis added in italics]

33 In the present appeal, we consider that the respondent's failure to produce the call report invites a reassessment of Mr Cheo's evidence. We also find it helpful in this context to draw an analogy with the "right and opportunity to cross-examine" under s 33(*b*) of the Evidence Act and conclude that the appellant was materially impaired in her ability to cross-examine Mr Cheo because she did not have the call report. We considered the scope of s 33(*b*) in *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* [2013] 3 SLR 573 ("*Teo Wai Cheong*"). Section 33 reads as follows:

> **Relevancy of certain evidence for proving in subsequent proceeding the truth of facts therein stated**
>
> **33**. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable subject to the following provisions:
>
> (a) the proceeding was between the same parties or their representatives in interest;
>
> (b) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

Version No 2: 27 Oct 2020 (22:40 hrs)

> (c) the questions in issue were substantially the same in the first as in the second proceeding.
>
> *Explanation.*—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

34 In *Teo Wai Cheong*, the respondent bank sued for sums outstanding under accumulators that had been booked in the appellant's account. The key issue in that case was whether the appellant had authorised the respondent's relationship manager ("the RM") to enter into the accumulators. On appeal, we had ordered a retrial on the ground that the respondent had failed to disclose certain documents, including those that related to correspondence between the RM and the appellant, which appeared to be relevant to the key issue. During the retrial, the respondent sought leave to admit the RM's affidavit of evidence-in-chief under s 33 of the Evidence Act on the basis that she was no longer employed by the respondent and could no longer be found. We rejected the application, holding that the appellant's "right and opportunity to cross-examine" the former employee under the second proviso of s 33 was materially impaired by the non-disclosure of the relevant documents. This was because much of the newly-disclosed evidence was potentially prejudicial to the respondent's case and could have been used to undermine the RM's testimony. As we explained at [34] of *Teo Wai Cheong*, this right consists more than just the physical act and opportunity of questioning the witness, but extends to the right to do so unimpeded by any act or omission on the part of the opposing party:

> … The "right and opportunity to cross-examine" must refer to more than just the process of cross-examination having been available at the earlier proceedings. Even if there had been a physical opportunity to cross-examine the witness, if for some reason that opportunity was in fact materially impaired, then it cannot be said to have in fact existed for the purpose of satisfying this proviso to s 33. The right and opportunity to cross-examine must have been an effective one because it

Version No 2: 27 Oct 2020 (22:40 hrs)

> serves the crucial function of affording the party against whom hearsay evidence is sought to be used the security he would otherwise have had but for the fact that the witness cannot now be found (see above at [25]). Such security must be real and not illusory. This is also borne out by the other provisos which taken together establish that the previous opportunity to cross examine the witness must in essence have been on a similar substantive footing as would have been the case if the witness had in fact been present in the later proceedings.

35 The effect of the deprivation of an opportunity to cross-examine a witness on an undisclosed document has also been considered by the Supreme Court of the United Kingdom, albeit in the context of the Prosecution's failure to disclose material evidence that it held. In *Nat Gordon Fraser v Her Majesty's Advocate* 2011 SCCR 396 ("*Fraser*"), the appellant had been convicted of the murder of his wife, who had disappeared from her home. A critical piece of evidence that had led to his conviction was the discovery of the victim's wedding ring, engagement ring and eternity ring in her bathroom more than a week after her disappearance. The Prosecution's case was that the rings were not in the bathroom at the time of the victim's disappearance, and had been subsequently removed from her body and placed in the bathroom by the appellant in order to give the appearance that she had simply chosen to leave her life behind. Subsequent to the filing of the appeal, it came to the notice of the Crown Office that two police constables, who had visited the victim's house on the night of her disappearance and the morning after, recalled seeing jewellery in the bathroom during those visits. The Supreme Court held this undisclosed information could have materially weakened the prosecution's case or materially strengthened the case for the defence and, having satisfied itself that there was a real possibility that the jury could have arrived at a different verdict, allowed the appeal: *Fraser* at [35] and [40]. Pertinently, one of the ways in which the undisclosed information was considered possibly to have affected the respective cases for the prosecution

Version No 2: 27 Oct 2020 (22:40 hrs)

and the defence was the fact that "disclosure of this material before or during the trial would have opened up lines of cross-examination that were never pursued by the defence": *Fraser* at [34].

36 Similarly, in *Alvin Lee Sinclair v Her Majesty's Advocate* 2005 SCCR 446 ("*Sinclair*"), the conviction of the appellant was quashed due to the prosecution's failure to disclose certain eyewitness statements. The appellant had been convicted of assault based on the evidence of the victim and an eyewitness, who testified to seeing the appellant strike the victim with a hammer and a pair of scissors. However, the eyewitness had stated in her signed statements to the police that she only witnessed an assault with scissors and had only known of the victim's assault by a hammer after being told by the victim. The eyewitness' statements to the police were not disclosed to the appellant, and the Privy Council, hearing the appeal from the Scottish High Court of Justiciary, held that the defence had been prejudiced. Lord Rodger of Earlsferry noted at [43]:

> If the appellant's solicitor advocate had had a copy of that statement, he would have been able to use it to considerable effect in challenging the reliability, and perhaps also the credibility, of [the eyewitness'] evidence that she had seen the appellant hitting the complainer with the hammer. That would in turn have provided a platform for challenging her evidence as a whole. Therefore the conduct of the appellant's defence was materially affected by the fact that his solicitor advocate did not have access to this statement when cross-examining [the eyewitness].

37 The present appeal does not concern the admissibility of evidence given in earlier judicial proceedings or the setting aside of a criminal conviction. But in our judgment, the underlying principle, which is consistent also with the rule as to the effects of drawing an adverse inference, is sufficiently broad to warrant an appellate court re-evaluating the evidence upon learning of the non-disclosure of material documents that ought to have

Version No 2: 27 Oct 2020 (22:40 hrs)

been disclosed by one party, and which if disclosed, could have materially affected the cross-examination of an important witness. This stems from the importance of a party's discovery obligations, a point we touched on in *Teo Wai Cheong* at [41], as well as from the primacy of the role of cross-examination in an adversarial system such as ours. As noted at para 20.001 of *Pinsler on Evidence*:

> The adversarial process is not merely a matter of the parties producing evidence in the hope that it will be sufficiently persuasive to justify a favourable decision. For the court to come to a just decision, it is not enough to compare what each side has to offer. Evidence must be examined against the background of other facts or circumstances in the case to determine its reliability. *Reliability can only be assessed if the parties are able to challenge each other's evidence so that weaknesses may be exposed.* They need to cross their own boundaries and move into each other's territory to effect such a challenge. In this respect, one of the primary aims of cross-examination is to expose the evidence-in-chief of a witness, whether adduced through oral examination in court or his affidavit, by scrutinising the testimony with a view to weakening or neutralising its effect. Cross-examination has a fundamental role in ascertaining the truth of facts. … [emphasis added]

38 The short point in the present context is that because the call report was not disclosed (along with any other documents that may have arisen upon disclosure of the call report), the appellant did not have the opportunity to meaningfully challenge Mr Cheo's evidence on behalf of the respondent and it was therefore not possible to assess the reliability of that evidence. The effect of the respondent's failure to disclose the call report may have been ameliorated had it called Mr Sim as a witness, but as we have highlighted above, it did not do so. During the hearing, Mr Chua Beng Chye, who appeared for the respondent told us, in response to our question that he had not, himself, up to that moment seen the call report.

Version No 2: 27 Oct 2020 (22:40 hrs)

39 Given the relevance of the call report and the evidence of Mr Sim, it would have been open to us to exercise our powers under s 37(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to order their production and a re-trial as we did in *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* [2011] SGCA 13. However, we accept the appellant's submission that this is not the occasion for us to do so. The respondent ought not be given a chance to remedy the omission of the call report from discovery because there is no evidence that the respondent had been operating under a misapprehension as to the relevance or admissibility of the call report, especially since that was the basis upon which the ultimately inadmissible evidence of Mr Heng was based. Had the respondent called Mr Sim as a witness at the trial in the belief that his evidence would be sufficient to establish what happened on 10 January 2014, we imagine it would have been inevitable that the call report would have been disclosed; but whether or not that would have been so, the appellant would at least have had some opportunity to cross-examine Mr Sim about what transpired on 10 January 2014. Moreover, as we have noted, Mr Chua was not apprised of the contents of the call report even at the time he appeared before us. The respondent was represented by counsel throughout these proceedings and it must be taken to have been aware that the evidence of Mr Heng was ultimately inadmissible on and irrelevant to the central factual issue in the case. It must also be taken to be aware that the events of the day on which Original Copies had been submitted and also the day on which the Deed was allegedly signed would be of central importance and that any written evidence bearing on this had to be disclosed. They chose in effect to rest their case on the testimony of Mr Cheo, but on terms that denied the appellant a fair opportunity to test and challenge that evidence. Mr Cheo's evidence must therefore be reassessed in this light.

Version No 2: 27 Oct 2020 (22:40 hrs)

The expert evidence

40 We turn to the principal evidence adduced by the appellant, namely Mr Yap's evidence, much of which was elicited during cross-examination and which the Judge in the event largely rejected for reasons that are set out at [58]–[63] of the Judgment. Mr Yap's expert report was based on a comparison between the purported signatures of the appellant on the signed copies of the Deed and 10 other exhibits with her signature. The sole paragraph on his analysis and findings reads:

> On examination, I found the specimen signatures in "S1" to "S10" to show consistency in stroke fluency and pen pressure with a fair range of natural variation in respect of the formation and relative positioning of strokes among them. (Please see the Comparison Chart attached). On comparing the specimen signature with the corresponding portion 'Sudha' of the two questioned signatures in "Q1" and "Q2", I noted significant differences in the stroke fluency, pen pressure, slant and the formation and relative positioning of letters between them. (Please see the same Comparison Chart attached.) In view of the evidence, I am of the opinion that it is unlikely that the writer of the specimen signatures in "S1" to "S10" wrote the two questioned signatures respectively in "Q1" and "Q2".

The report was brief and perhaps for this reason, the respondent submits that it "lacks thoroughness and depth". However, Mr Yap's further evidence, elicited through cross-examination, was far more elaborate.

The standard and burden of proof

41 We begin with the standard of proof required to establish forgery. Reference was made in the court below to the decision of this court in *Yogambikai Nagarajah v Indian Overseas Bank and another appeal* [1996] 2 SLR(R) 774 ("*Yogambikai*") as standing for the proposition that the "bar to proving forgery is high": the Judgment at [56]. To the extent it is suggested

Version No 2: 27 Oct 2020 (22:40 hrs)

that the burden of proof is more onerous than the ordinary civil standard where allegations of fraud or forgery are involved, this was settled in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie Handoyo*") at [159], where we unequivocally rejected the suggestion that there is a third legal burden of proof straddling the civil and criminal burdens; and where we endorsed the proposition set out in *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [39] that insofar as proof of fraud or forgery is concerned, the distinction lies in the sphere of practical application rather than in the legal standard of proof.

42 In respect of *where* the burden of proof lies, it is plain that the legal burden to prove an allegation lies on the party making the assertion: *Alwie Handoyo* at [157]. But this is sometimes more easily expressed than it is applied. Clearly, it falls on the appellant to prove the alleged forgery of her signature. But it is the respondent that brings the action asserting that the appellant is bound by the Deed and so it remains for the respondent to discharge its burden of proving that the appellant had in fact signed the Deed. In *Seng Swee Leng v Wong Chong Weng* [2011] SGCA 64, the appellant sought specific performance of a sale and purchase agreement that the respondent claimed he had not signed. This court noted at [33] the numerous deficiencies in the respondent's case, but was at pains to emphasise that the legal burden remained with the appellant to prove that the respondent had signed the option.

43 In the present case, it is obvious that the signatures on the signed copies of the Deed bear little resemblance to the specimen signatures in the exhibits provided to Mr Yap. These signatures are reproduced at [53] of the Judgment and as the Judge acknowledged at [59] of the Judgment, the purported signatures of the appellant in the Deed are noticeably different from

Version No 2: 27 Oct 2020 (22:40 hrs)

those found in the exhibits; among other things, they do not include the appellant's maiden name and are sloped at an incline. The comparison exhibits come from sources that span a period of more than ten years, and include her signature on her Indian passport issued on 3 January 2002, her Singapore passport issued on 2 January 2008, and invoices and correspondence with the State Bank of India and various other individuals. There is no doubt, and it is not contended otherwise, that the signatures in those exhibits are genuinely those of the appellant. There is no evidence that the appellant has a second signature, let alone one which resembles that in the Deed.

Handwriting analysis

44 We turn to the Judge's reasons for dismissing the evidence of Mr Yap. His starting point was the observation of this court in *R Mahendran and another v R Arumuganathan* [1999] 2 SLR(R) 166 ("*Mahendran*") at [16], that "opinions of handwriting experts in particular should be approached with extreme caution and relied on to decide an issue of this importance *only in the absence of other credible evidence*" [emphasis added] (see the Judgment at [57]). While we appreciate that handwriting analysis that is conducted to determine the identity of its author or its genuineness may lack the precision and certainty of other forensic sciences, there is no bar to the admissibility of evidence of this nature. We observe that prior to the Evidence (Amendment) Act 2012 (No 4 of 2012), s 47(1) of the Act expressly recognised handwriting analysis as an area in which expert evidence could be given:

> **Opinions of experts**
>
> **47.**—(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to the identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity or

Version No 2: 27 Oct 2020 (22:40 hrs)

> genuineness of handwriting or finger impressions, are relevant facts.

45 Section 47 of the Act, as it currently stands, eschews the categorisation approach. Nevertheless, those categories set out in the former s 47(1) of the Act fall within the ambit of "scientific, technical or other specialised knowledge" under the present s 47(1) of the Act: *Pinsler on Evidence* at para 8.018. Handwriting analysis may therefore be probative of the facts in issue. Ultimately, like all other forms of evidence, the probative value of the opinion of an expert is to be assessed and weighed against contradictory evidence. Like the courts in many other jurisdictions, our courts have continued to rely on handwriting experts in cases from time to time and indeed, the evidence of Mr Yap himself was that he had testified in the High Court as well as the lower courts on more than 95 occasions.

46 In our judgment, it is significant that the expert opinion of Mr Yap was unchallenged by countervailing evidence from other experts. The respondent elected not to call an expert to testify on its behalf. This did not mean that the Judge was obliged to accept the evidence of Mr Yap but as we held in *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 ("*Saeng-Un Udom*") at [26] (citing *Halsbury's Laws of Singapore* vol 10 (Butterworths, 2000) at para 120.257), the court should be slow to reject expert evidence which is unopposed:

Version No 2: 27 Oct 2020 (22:40 hrs)

> … The court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences. While the court is not obliged to accept expert evidence by reason only that it is unchallenged (*Sek Kim Wah v PP* [1987] SLR 107), *if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence*. [original emphasis omitted; emphasis added in italics]

47 *Saeng-Un Udom* was applied in the context of handwriting analysis in *Mohd Ghalib s/o Sadruddin v Public Prosecutor* [2002] 2 SLR(R) 809. Yong Pung How CJ held at [16] that the trial judge was correct to have accepted the evidence of Mr Yap (who also testified there) notwithstanding that document examination was not an exact science and particularly given that no contrary evidence had been led. In this case, Mr Yap's evidence in the hearing below was rational and internally consistent. His conclusions were based not only on a visual comparison of the signatures, but also on his findings as to the consistency of stroke fluency, pen pressure and the natural variation in the formation and positioning of strokes. His conclusions were explained in the course of cross-examination and he concluded that beyond the patent dissimilarity between the samples and the signatures that were found on the Deed, he was satisfied that these signatures were made by *different persons*. Specifically, he concluded that there were differences in the pressure that was applied in specific strokes and parts of the reference signatures such that he was satisfied that the signatures on the Deed were made by someone other than the appellant. He maintained this view even when it was suggested to him that perhaps the appellant had deliberately signed the Deed in a way that was dissimilar to her normal signature, explaining that were this the case, he would have expected to find some points of similarity whereas there were none.

48 The Judge acknowledged at [60] of the Judgment, that to accept Mr Cheo's evidence would be to find that the appellant had not only signed the

Version No 2: 27 Oct 2020 (22:40 hrs)

Deed but had deliberately done so in a manner that departed from her usual signature. This gives rise to several points of difficulty. First, it faces the same hurdles that the Judge raised at [64]–[65] of the Judgment: why would the appellant have intentionally signed the Deed in a manner which barely resembled her actual signature? The Judge alluded to the possibility that she had done so in order to be able to raise the defence of forgery when the matter came to trial. This would not only have required remarkable forethought but as the appellant points out, the possibility that she had practised what is known as "auto-forgery" with a view to later disavowing the Deed had never been pleaded and was not suggested by the respondent to the appellant during her cross-examination even though by then, the respondent already had Mr Yap's report. It was only raised by the respondent for the first time during *Mr Yap's* cross-examination, which came after the appellant had testified. This engages the rule in *Browne v Dunn* (1893) 6 R 67, the effect of which is that "where a submission is going to be made about a witness or the evidence given by the witness which is of such a nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then if it has not been so put, the party concerned will not be allowed to make that submission": *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 at [42]. While we recognise that this is not a rule of inflexible application, in our judgment the allegation of auto-forgery amounted in essence to an assertion not only of fraud but of cheating in a criminal sense and it was of such vital importance that it ought to have been put directly to the appellant who should have been given the opportunity to address it. This was not done and as a matter of fairness, the respondent ought not to be allowed to advance this case now. This of course raises an immense difficulty for the respondent

Version No 2: 27 Oct 2020 (22:40 hrs)

given the patent dissimilarity between the signatures on the Deed and those which are admittedly the appellant's.

49 But beyond this, as we have noted above, Mr Yap testified that it would be difficult for a person to conceal his or her natural style when attempting to sign in a way that was different from his or her usual signature and he concluded that on balance it was improbable that the appellant had done so. The Judge rejected this evidence, concluding that it fell within the realm of "neuromuscular programming or psychology", which Mr Yap was not qualified to opine on: the Judgment at [62]. We do not agree with this. Mr Yap's evidence in essence was that it was unlikely that the signatures in the Deed were signed by the appellant because there would be traces of her usual signature in the disguised signature. He was not saying that it would have been physiologically or psychologically impossible for her to do so. In the final analysis, Mr Yap's evidence on this point turned on a comparison of the signatures and this is an issue that Mr Yap is likely to have frequently encountered in his role as an analyst with the HSA and in our judgment, it falls squarely within his area of expertise. We also note that his conclusion was not reached solely on the basis of the visible differences between the signatures in the Deed and the specimen signatures but, having regard to the consistencies (or lack of consistency) among the various features of the different signatures.

50 The respondent submits that Mr Yap's evidence was "ambivalent at best" given that he could not categorically rule out the possibility that the appellant had signed the Deed. Mr Yap was candid in cross-examination, conceding that handwriting analysis was not an exact science and that there was some degree of uncertainty that was inherent in the process. Mr Yap's evidence was that there were eight levels of certainty and his conclusion that the signatures on the Deed were not the appellant's was one he placed at the

Version No 2: 27 Oct 2020 (22:40 hrs)

second highest level of certainty. The only factor which prevented him from drawing a conclusion at the highest level of certainty was the fact that the sample signatures contained the appellant's maiden name while the signatures in the signed copies of the Deed did not. Even taking on board the intrinsic lack of scientific precision that lies in the analysis of handwriting, we find Mr Yap's evidence is sufficiently within the realm of his expertise and his evidence was probative of the issue before the court and ought not to have been rejected. This was especially so given that no expert evidence was called by the respondent to refute his evidence.

Conclusion

51 Weighing the evidence and assessing the parties' respective cases in the round, the position may be summarised as follows:

(a) The evidence of Mr Cheo which formed the main plank of the respondent's case withstood cross-examination but in our judgment, the weight to be attributed to that evidence is much diminished. This is because of the adverse inference drawn from the respondent's failure to disclose the call report, especially in the light of its failure to call Mr Sim without any explanation even though Mr Sim had direct knowledge of the events of 3 and 10 January 2014, at least from the respondent's perspective. Mr Heng, who was called to testify on these matters, did so based entirely on the call report and had no personal knowledge of what transpired on those days.

(b) The evidence of the appellant was weakened on several points in the course of cross-examination but her central point, that she did not sign the Deed, was not materially undermined. Moreover, it is manifestly clear that the signatures on the Deed are not at all like the

Version No 2: 27 Oct 2020 (22:40 hrs)

one she used in the ordinary course. The only explanation for this, on the evidence as it stood, would be that she deliberately altered her signature with a view to subsequently disavowing it. But this was a serious allegation of fraud and of criminal conduct that should have been but was not put to her by the respondent in the course of her cross-examination and as a matter of fairness, it could not then be advanced by the respondent as part of its case.

(c) Furthermore the evidence of the handwriting expert was that the signatures on the Deed were probably not signed by the appellant. This evidence was not undermined in the course of cross-examination. Nor did the respondent adduce evidence from any other expert to contradict this conclusion.

(d) The hypothesis that the Deed was not signed by the appellant was far more probable than the opposite hypothesis having regard to the surrounding circumstances. These include, in particular, the fact that the appellant stood to gain no personal benefit whatsoever from the Deed, which on the other hand imposed onerous obligations on her by way of a covenant to pay the debts of Tecnomic, a company that had already been wound up at the time the Original Copies were signed. Indeed the order for its liquidation was made several hours *before* the appellant allegedly signed the Deed.

52 In these circumstances, we are satisfied that the appeal should be allowed because on a balance of probabilities, the evidence does not support the finding that the appellant signed the Deed.

Version No 2: 27 Oct 2020 (22:40 hrs)

Extending *Etridge* to the law of evidence

53 Having allowed the appeal on the evidence alone, it becomes unnecessary for us to consider the rest of the appellant's arguments. We nevertheless touch on them briefly given that they advance novel propositions of law that were the subject of written and oral submissions by the parties.

54 The first of these arguments relies on the decision in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 ("*Credit Lyonnais*"), in which the defendant, a junior employee of a company, agreed to her employer's request to grant a second charge over her flat and to guarantee without limit all debts owed by the company to the plaintiff bank. Although the plaintiff bank had taken steps to apprise the defendant of the unlimited nature of the guarantee and advised her to obtain independent legal representation, she was never properly informed of the extent of her liability under the guarantee and the amount of the company's indebtedness to the plaintiff, and did not obtain independent legal representation. Lord Millet held at 152 that it was a transaction that "shock[ed] the conscience of the court" and that "[n]o court of equity could allow such a transaction to stand". The appellant submits that *Credit Lyonnais* is authority that a substantive doctrine of unconscionability can apply in isolated and egregious circumstances such as those we find in this appeal.

55 Nevertheless, a closer reading of *Credit Lyonnais* shows that it does not stand for the proposition which the appellant seeks to advance. Rather, the court in *Credit Lyonnais* held that there arose a *presumption* that the defendant had been acting under the undue influence of her employer, a presumption that was not rebutted given that she had not sought independent legal advice. In our judgment, *Credit Lyonnais* is of no relevance to the present case because

Version No 2: 27 Oct 2020 (22:40 hrs)

the appellant's pleaded case is not that she signed the Deed under the undue influence of Rajan or a third party. More critically, because the appellant's case has always been that she did not sign the Deed, rather than that she signed it in circumstances that would make it unconscionable for the court to uphold the transaction, it might have been inconsistent with her primary case if the appellant were to contend that the Deed should be set aside on the basis of a broader doctrine of unconscionability in the law of contract. Aside from this, it may also be noted that this aspect of the law is still unsettled: see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [101]. There is (and given her primary case that she never signed the document, could be) no evidence as to the appellant's state of mind or her financial literacy at the time of signing, or whether she had in fact been taken advantage of by a party in a stronger position. In the absence of such evidence, there is no basis in law for the Deed to be set aside solely on the ground that it reveals a transaction that is unconscionable.

56 The appellant's next argument is that any doubts as to the authenticity of her signature should be resolved in her favour because the respondent did not adhere to industry norms in relation to surety and security obligations undertaken by a wife. Some of these norms are set out in The Association of Banks in Singapore's Code of Consumer Banking Practice ("the Code"), which operates as a best practice guide for retail banks in Singapore. Clause 6 of the Code reads:

> **6. Being a Guarantor**
>
> Being a guarantor is a serious commitment which could have significant consequences for you. Some questions you should consider when asked to be a guarantor can be found in Appendix III.
>
> Note that:

Version No 2: 27 Oct 2020 (22:40 hrs)

> i. the bank to which you will be giving the guarantee has to advise you in writing of the quantum and nature of your liabilities in advance;
>
> ii. you should seek independent legal advice before you agree to be a guarantor.

57 It is plain, indeed indisputable, that cl 6 of the Code had not been complied with by the respondent in the present case. No written advice was dispensed by the respondent to the appellant in respect of her liabilities under the Deed; nor was she told to obtain independent legal advice before she purportedly signed the Deed and on either party's case, it is not suggested that she did get any such advice. In fact, none of the respondent's officers made any attempt to meet the appellant. The respondent instead tasked Rajan with obtaining her signature on the Deed and was happy to accept it without taking any reasonable steps to satisfy itself that the appellant had given informed consent. While we accept that the appellant is well educated and not wholly unfamiliar with commercial matters, the Deed was a fairly complex financial instrument that imposed onerous obligations on the appellant without any personal benefit to her. In these circumstances, the appellant's submission that she had been treated as a "mere appendage" to Rajan is not without basis.

58 In *Etridge*, the defendant wives had charged their interests in their homes in favour of banks as security for their husbands' (or their companies') debts. They then sought to set aside those transactions on the ground that they had agreed to the transactions under the undue influence of their husbands. The House of Lords held that a bank wishing to uphold a transaction involving a spouse that was sufficiently questionable as to put the bank on inquiry, was *obliged* to take certain steps *to ensure that the wife had made an informed decision of her own volition*. Lord Nicholls of Birkenhead held at [46] that a bank is put on inquiry when a wife offers to stand as surety for her husband's

Version No 2: 27 Oct 2020 (22:40 hrs)

debts. This is the case in this appeal. In such circumstances, it falls on the bank to "take reasonable steps to satisfy itself that the wife had had brought home to her, in a meaningful way, the practical implications of the proposed transaction": *Etridge* at [54]. The steps that the bank should take in order to satisfy itself are set out in *Etridge* at [79] by Lord Nicholls:

> … I consider the bank should take steps to check directly with the wife the name of the solicitor she wishes to act for her. To this end, in future the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank …
>
> …
>
> … If the bank is not willing to undertake the task of explanation itself, the bank must provide the solicitor with the financial information he needs for this purpose. Accordingly it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case.

59 The foregoing passage was cited in *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [16], albeit in the context of disciplinary proceedings against errant advocates and solicitors. Nevertheless, it is clear that the Court of Three Judges accepted that these are the steps that a bank should take in what we refer to, for convenience, as an *Etridge* situation, and this is a view that we too share.

60 However, the appellant did not plead, nor is it her case in this appeal, that a presumption of undue influence had arisen which had not been rebutted

Version No 2: 27 Oct 2020 (22:40 hrs)

by the respondent, such that the Deed should be set aside. Had she done so on the basis that on the case run by the respondent, the presumption of undue inference would have been triggered, then perhaps she might have succeeded. Without deciding the issue, since it is not necessary in the circumstances, it seems to us that such an argument which rests on how the law views certain transactions, might not have been inconsistent with the appellant's case that she never signed the Deed. In such a situation, because of how the law views such transactions, it is incumbent on those seeking to enforce a transaction to prove that they had done whatever was needed to purge the transaction of any presumptive taint. But the appellant did not plead or run that case. Instead, her argument before us seeks to transpose the substantive principle of equity laid down in *Etridge* to the sphere of the law of evidence. Dr Tang Hang Wu, who appeared for the appellant in the appeal ran the argument in this way: because the respondent was put on inquiry given the nature of the Deed, it ought to have taken the steps prescribed by Lord Nicholls in *Etridge* and under cl 6 of the Code. The appellant would have come to know of the Deed once she had been contacted by the respondent; but because the respondent had not acted in accordance with its obligations, any ensuing evidential ambiguity must be construed against the respondent. Further, Dr Tang submits that "it is illogical for the bank to be in a better position when the wife's signature has been forged as compared to a situation where the husband exercised undue influence over her to sign the guarantee".

61 There is an intuitive appeal to the appellant's submission. Viewed from an equitable perspective, the argument is that an errant bank that has failed to comply with its *Etridge* obligations would, with respect to a document that is purportedly forged, not be subject to a presumption of undue influence whereas it would have been if the innocent party, in this case the appellant,

Version No 2: 27 Oct 2020 (22:40 hrs)

had only contested the *quality* of the consent given and not the very *fact* of consent. To put it another way, the errant bank is seemingly placed in a better position where forgery is alleged because that allegation appears to take the focus away from the bank's own actions and whether it had discharged the duties outlined in *Etridge*, so much so that the bank no longer has to face the consequences of not having done so. Viewed from an evidential perspective, the appellant says that this is merely an application of the Latin maxim o*mnia praesumuntur contra spoliatorem* (everything is presumed against the wrongdoer), which is currently given effect under s 116(*g*). The wrongdoing in this case would be the respondent's breach of an obligation that is *factually* intertwined with the evidential dispute that has arisen, in the sense that there would have been no dispute as to the appellant's knowledge of and consent to the Deed had the respondent acted in accordance with its *Etridge* obligations.

62 As it was not necessary for us to reach a conclusion on this point, the observations that follow should be understood as provisional only and open to review on a subsequent occasion. Despite its intuitive appeal, we have reservations as to whether the appellant's approach, which we consider would be a significant departure from the law as it stands, can be justified. The appellant cites *In re Oatway; Hertslet v Oatway* [1903] 2 Ch 356 ("*Re Oatway*") in support for its submission that the maxim o*mnia praesumuntur contra spoliatorem* can been used to resolve evidential difficulties that have been caused by a defendant who has mixed trust monies with other funds. In *Re Oatway*, the trustee paid trust money into his own account in breach of trust. He subsequently withdrew money from his account for the purchase of shares and the balance in the account was dissipated. Joyce J held the trust money could be traced to the shares and that it could not be argued that it was the trust money that had been dissipated. *Re Oatway* is an exception to the

Version No 2: 27 Oct 2020 (22:40 hrs)

presumption in *In re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, which presumes that a trustee who has mixed trust money with money in his account is taken to have dealt with his own money first where sums are withdrawn from that account. *Re Oatway* was applied in *Shalson and others v Russo and others* [2005] Ch 281, which recognised the concern that underlies this exception, namely that a wrongdoer would otherwise benefit at the expense of his victim. Rimer J held at [144] that "[t]he justice of [the approach in *Re Oatway*] is that, if the beneficiary is not entitled to do this, the wrongdoing trustee may be left with all the cherries and the victim with nothing".

63 However, these are cases that concern the process of tracing, itself an evidential process governed by its own unique set of rules in the situation where wrongfully misappropriated trust money is mixed with the trustee's money and the mixed funds are used to purchase an asset. Because of the difficulty facing a claimant who must prove that the asset was purchased by trust money rather than money belonging to the wrongdoer, formalised rules of identification have been conceived to address this evidential difficulty: *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 30-056. These include punitive presumptions, such as that in *Re Oatway*, which were conceived with the aim of preserving the misappropriated trust money at the expense of the wrongdoer. But these presumptions do not apply simply because the wrongdoer has behaved deplorably; they apply because the wrongdoer *directly caused* the evidential "black hole": *Snell's Equity* at para 30-057. That is not the case here. The appellant's case is merely that the evidential uncertainty would have been *prevented* had the respondent acted properly in its dealings with her. This

Version No 2: 27 Oct 2020 (22:40 hrs)

seems to us to conflate an issue of improper dealing with a punitive evidential consequence that is not logically connected to the improper dealing.

64 As for the appellant's argument that there would be an "illogical distinction" if a document that could have been set aside on the ground of undue influence is found not susceptible to this where forgery is alleged to have been perpetrated, although both grounds for the setting aside of an agreement relate to the consent of a claiming party, they are entirely independent of each other. Forgery concerns the complete absence of consent while the exercise of undue influence *vitiates* consent. The latter is predicated on an act capable of being construed as giving consent while the former is premised on there having been no such act. Because of this essential difference in the defences, it seems to us that it might be plausible to hold that there is no necessary contradiction in having the appellant's claim on forgery fail even if the circumstances might give rise to a presumption of undue influence. To put it another way, the fact that the circumstances might give rise to a presumption of undue influence says nothing about whether the Deed was or was not forged. However, the presumption of undue influence was never pleaded or raised. Had it been pleaded, it might well have been possible for the case to be mounted that if the Deed was not forged, a presumption of undue influence would have arisen on the facts presented and that it was incumbent on the respondent to rebut that presumption for the reasons and in accordance with the principles set out in *Etridge*; and as we see it at present, this could possibly co-exist with the case on forgery as an alternative on the basis of what we have said at [60] above. This would seem to us to be consistent with the decision of the Queensland Supreme Court in *Le Neve Ann Groves v Edmund Stuart Groves* [2011] QSC 411 at [18] as well as the decision of this court in *Ng Chee Weng v Lim Jit Ming Bryan and another and*

Version No 2: 27 Oct 2020 (22:40 hrs)

another appeal [2015] 3 SLR 92 at [52]. But even assuming this were so, it was not raised in these proceedings until the appeal and that was simply too late. We reiterate that these are provisional views. We do recognise that there may be another perspective – in particular that the presumption of undue influence should be seen as nothing other than an evidential aid and if the case on undue influence is not available for the reasons we have outlined at [55] above, then it should remain so notwithstanding that reliance is placed on a presumption instead of on proof of primary facts. As we have said, it is not necessary for us to resolve this issue here and we leave the resolution of this issue open for another occasion.

65 Having said that, we do consider that the respondent's failure to adhere to the *Etridge* duties was reprehensible, as was the manner in which it went about securing the Deed with what appeared to be the appellant's signature.

66 In the circumstances, we allow the appeal with costs here and below which are to be taxed if not agreed. We also make the usual consequential orders for the release of the security for costs.

Sundaresh Menon	Judith Prakash	Tay Yong Kwang
Chief Justice	Judge of Appeal	Judge of Appeal

Tang Hang Wu (instructed counsel), Ng Lip Chih and Tan Jieying (NLC Law Asia LLC) for the appellant;
Chua Beng Chye, Raelene Pereira and Cherie Tan (Rajah & Tan Singapore LLP) for the respondent.

Version No 2: 27 Oct 2020 (22:40 hrs)