

Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and Another (committee of the estate of Pang Jong Wan, mentally disordered) and Others  
[2005] SGHC 61

**Case Number** : OS 614/2002

**Decision Date** : 30 March 2005

**Tribunal/Court** : High Court

**Coram** : Kan Ting Chiu J

**Counsel Name(s)** : K Muralidharan Pillai, Harveen Singh and Vivien Teng (Rajah and Tann) for the plaintiff; Prabhakaran Nair (Ong Tan and Nair) for the first defendants; The second defendant in person; Michael Khoo SC, Josephine Low, Andy Chiok and Cleophas Pfang (Michael Khoo and Partners) for the third defendant

**Parties** : Oversea-Chinese Banking Corp Ltd — Tan Teck Khong and Another (committee of the estate of Pang Jong Wan, mentally disordered); Tan Pian Meng; Ng Yap and Partners (sued as a firm)

*Credit and Security – Mortgage of real property – Discharge of mortgage – Whether mortgage unenforceable by plaintiff because executed under undue influence – Whether defendants affirming existence of mortgage by calling for its discharge*

*Equity – Undue influence – Presumed – Whether mortgage executed by mother voidable because executed under undue influence of son – Whether transaction readily explicable by mother-son relationship – Whether presumption of undue influence rebutted by son*

*Legal Profession – Duties – Client – Whether solicitor under duty to take particular care to advise and consult with client in situation of possible undue influence – Whether private consultation impossible in presence of interested party – Whether meaning and effect of documents satisfactorily explained to client by interpreter without explanation by lawyer*

*Tort – Negligence – Breach of duty – Whether solicitor failing to take sufficient and adequate steps to ascertain whether client having mental capacity and acting on own free will when executing mortgage – Whether solicitor negligent in failing to hold private consultation with client in situation of possible undue influence – Whether solicitor failing to ensure meaning and effect of documents satisfactorily explained to client*

30 March 2005

*Judgment reserved.*

**Kan Ting Chiu J:**

**The parties**

1 The plaintiff, Oversea-Chinese Banking Corporation Limited, is the successor-in-title of Keppel TatLee Bank Ltd (“KTB”). The first defendants, Tan Teck Khong and Tan Teck Hing, are the first and second sons of Pang Jong Wan (“Mdm Pang”), and are sued in their capacity as the committee of her estate pursuant to their appointment under an order of court dated 22 January 2001.

2 The second defendant, Tan Pian Meng, is the third son of Mdm Pang. The third defendant, M/s Ng Yap & Partners, is the firm of solicitors which acted for KTB, Mdm Pang and the second defendant in a mortgage.

**The mortgage**

3 This action arises out of a mortgage executed by Mdm Pang. She is an elderly Hainanese lady in her 70s. She is a widow with three sons. She executed a mortgage on 3 November 1999 (which was subsequently perfected and dated 22 November 1999) over her property known as 64/64A Serangoon Garden Way ("the Property") in favour of KTB to guarantee a term loan of \$1,000,000 and an overdraft loan of \$500,000 granted by KTB to the second defendant. Mdm Pang was not in good health when she executed the mortgage. She had suffered two strokes, in July 1997 and in August 1999. She underwent treatment, but continued to suffer some disabilities. On 22 January 2001, the first defendants were appointed the committee of her estate under the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed). Her mental capacity on 3 November 1999 has been a point of contention in the present proceedings and in an earlier action.

### **The earlier action**

4 An earlier action, namely Suit No 1072 of 2001, *Tan Teck Khong & Anor (suing as Committee of the Estate of Pang Jong Wan) v Tan Pian Meng* [2002] 4 SLR 616 was instituted by the first defendants (who were the plaintiffs in that action) against the second defendant (who was the defendant in that action). In the action, the first defendants alleged that a will was executed by Mdm Pang on 22 October 1997 and a second will, together with the mortgage, was executed by her on 3 November 1999 when she was physically and mentally incapacitated and was under the undue and improper influence of the second defendant.

5 The first defendants sought, *inter alia*, orders that the second defendant repay all moneys he borrowed from KTB to secure the discharge of the mortgage, and declarations that the two wills were null and void and of no effect.

6 The action was heard by Woo Bih Li JC (as he then was). In his judgment dated 17 July 2002 ("the earlier judgment"), Woo JC held at [248] that "even if Mdm Pang did have the mental capacity as at 3 November 1999 to execute the mortgage and her second will, she was unduly influenced by Pian Meng [the second defendant] to do so."

7 Pursuant to his finding, judgment was entered, declaring the two wills null and void, with an order that the second defendant was to account to Mdm Pang the amount owing to the plaintiff under the facilities granted after deducting some approved payments.

8 It is also significant that the first defendants did not bring the plaintiff or the third defendant into the earlier action, or seek any relief or remedy from them.

### **The present action**

#### ***The plaintiff's claims***

9 In the present action, the plaintiff sought different reliefs from the defendants. Against the first defendants and second defendant, the plaintiff claimed, *inter alia*, delivery of vacant possession of the Property, an order that the mortgage be enforced by the sale of the Property and payment of the sum due under the mortgage. The action, which began as an originating summons, was converted to and proceeded as one commenced by a writ of summons.

10 The plaintiff's claim against the third defendant was made on the contingency that the mortgage was unenforceable. In that event, it alleged that the third defendant had not discharged its duty as the plaintiff's solicitors and had failed to take sufficient and adequate steps to ascertain if Mdm Pang had the mental capacity to execute the mortgage and was acting on her own free will

when she executed the mortgage on 3 November 1999.

### ***The first defendants' defence and counterclaim***

11 The first defendants sought to rely on the earlier judgment which, they alleged, found that the third defendant "did not exercise reasonable care and diligence to ensure that Mdm Pang had the mental capacity to understand and execute the Mortgage"[\[1\]](#) and that for that reason, the first defendants and Mdm Pang were not liable under the mortgage. It is noteworthy that the Defence referred only to Mdm Pang's lack of mental capacity, with no allegation of her having acted under the undue influence of the second defendant.

12 The first defendants counterclaimed against the plaintiff for a declaration that the mortgage was null and void and that it be set aside. The plaintiff's defence to the counterclaim was to deny the whole of it, including the allegation that the mortgage was null and void.

### ***The second defendant's defence***

13 The second defendant was represented by counsel when his Defence and Affidavit of Evidence-in-Chief were filed. However, at trial, he was not represented and appeared in person. The only part of his Defence that specifically referred to the plaintiff's claim against him was "the 2<sup>nd</sup> Defendant contends that the Plaintiffs should be allowed to recover No 64/64A Serangoon Garden Way and to sell it to recover the outstanding banking facilities which the Plaintiffs are claiming".[\[2\]](#)

14 By taking this position, the second defendant impliedly accepted that the mortgage was valid and enforceable by the plaintiff, and that he wanted the plaintiff to recover its loans to him from the proceeds of the sale of the Property.

### ***The third defendant's defence***

15 The third defendant pleaded that:

At all material times, and in particular on 3 November 1999, Mdm Pang Jong Wan appeared to Ms. Annie Yap as being of sound mind and was acting of her own free will and mind and as having understood the nature and contents of the documents she had executed. There were no circumstances appearing to Ms. Annie Yap that Mdm Pang Jong Wan was suffering from or was under any undue influence of the 2<sup>nd</sup> Defendant or by anyone else.[\[3\]](#)

16 At the commencement of the trial, the third defendant obtained leave to amend its Defence to add an additional defence that:

Further or alternatively, any loss or damage that may be suffered by the Plaintiffs were caused and/or contributed to by the negligence of the Plaintiffs. At all material times, the Plaintiffs' bank and/or their officers did not meet or take any reasonable steps to meet Madam Pang Jong Wan personally. All communications regarding the mortgage of the said Property were made through the Second Defendant even though at all material times the Plaintiffs were aware that Madam Pang Jong Wan was and is the registered proprietor of the said Property.[\[4\]](#)

### ***The onus on the parties***

17 The merits of each party's case are best decided against a clear understanding of the onus of proof that was on each of them in relation to the main issues that have become identified.

18 The plaintiff has to prove that the mortgage was valid and enforceable, and that if it was not, the third defendant was negligent when it acted for the plaintiff and Mdm Pang in the execution of the mortgage. Ms Annie Yap ("Ms Yap"), a partner in the third defendant, was the solicitor who had acted in the mortgage and had dealt with Mdm Pang and the second defendant.

19 The onus was on the first defendants to prove that Mdm Pang executed the mortgage when she lacked the mental capacity to do so, or that she executed it while she was under undue influence from the second defendant, and that the mortgage was not valid and enforceable.

20 As the second defendant accepted the validity of the mortgage, there was nothing in his defence that he needed to prove.

21 The third defendant needed to make good its defence that it had properly carried out its professional duties. While the onus of proving negligence was on the plaintiff and the first defendant who alleged it, the burden shifted to the third defendant to explain and justify its conduct in relation to the execution of the mortgage.

### **The effect of the earlier judgment**

22 Much was made of the effect of the earlier judgment – that it was a decision *in rem*, that it gave rise to *res judicata*, and that it estopped the parties from taking positions inconsistent with the judgment.

23 It is important to ascertain what Woo JC's finding was. Although the validity of Mdm Pang's two wills was challenged on two grounds, *ie*, her lack of mental capacity and the undue influence asserted on her, Woo JC found only on the latter. While it would be fair to say that there were suggestions that he may have had doubts about Mdm Pang's mental state, Woo JC limited himself to a finding that she had executed the will and mortgage on 3 November 1999 while under undue influence, and he had declared them null and void on that basis alone. As the judgment was not a finding as to Mdm Pang's mental capacity at that time (a person of sound mind could act under undue influence), it cannot be a judgment *in rem*, assuming that a judgment based on a finding that a person did not have sufficient mental capacity to execute a mortgage is a judgment *in rem*.

24 Moving on from there, it is also important to note that the third defendant was not a party to that action. The issue before Woo JC was whether Mdm Pang had signed the two wills when undue influence was exerted on her. The issue was not whether Ms Yap was negligent in failing to discover that Mdm Pang was under undue influence. The first defendants had succeeded without alleging that Ms Yap was negligent. In theory, they would have succeeded even if Ms Yap was not negligent because the undue influence may have been undetected even if she had exercised due care. The nature of the second defendant's alleged culpability for exerting undue influence with regard to the mortgage and that of the third defendant's alleged culpability in negligence were different, and they shared no common interest in that action.

25 Evidence was produced before me regarding the circumstances in which the mortgage was executed. Ms Yap gave evidence, as well as Mr Loh Lim who interpreted the documents to Mdm Pang before she executed them.

26 Against this background, there was really no basis for raising any estoppel against the third defendant to prevent it from disputing that undue influence was exerted, or from refuting that Ms Yap was negligent for not detecting it.

27 I therefore deal with the case on the footing that the earlier judgment only bound the parties therein (the first defendants and the second defendant), and not the plaintiff or the third defendant, and that the allegations of of mental capacity and undue influence have to be dealt with by the plaintiff and the third defendant as though they have been brought up for the first time.

## **The issues**

### ***Did Mdm Pang have the mental capacity to execute the mortgage?***

28 This is a matter for which medical evidence is necessary. In the earlier action where the same issue was raised, the court heard the evidence of one neurologist and two psychiatrists. Even then, Woo JC did not make a specific finding on the issue.

29 No medical evidence was adduced before me. Counsel quoted to me Woo JC's judgment where he referred to the evidence. Following from my finding on the onus of proof on each party and the effect of the earlier action on the present proceedings, I find that there was no evidence before me on which I can make a finding on Mdm Pang's mental condition on 3 November 1999. The first defendants' defence, as pleaded, fails.

### ***Was Mdm Pang under undue influence when she executed the mortgage?***

30 When a person enters into a transaction, he may not be acting of his own free will. He may have been affected by the unacceptable conduct of others.

31 When improper pressure or coercion, or influence or ascendancy is brought to bear on a person to obtain an unfair advantage from him, equity offers him relief.

32 In these circumstances, the person is said to have acted under undue influence, and he can either apply to court to have the transaction declared null and void, or he can elect to affirm it.

33 Undue influence can be established by direct proof or by presumption, see *Bank of Credit and Commerce International SA v Abouody* [1990] 1 QB 923 and *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 ("*O'Brien*"). In the first situation where the party alleging undue influence has to prove it affirmatively, the undue influence is referred to as Class 1 undue influence, or actual undue influence. This can be done in any situation, but it has to be proved.

34 The law also presumes undue influence in some situations. Presumed undue influence, described as Class 2 undue influence, falls into two types, Class 2(A) and Class 2(B). Undue influence is presumed:

(a) where there is a legally recognised relationship of trust and confidence or ascendancy between the complainant and the wrongdoer (eg parent and child, solicitor and client, medical adviser and patient), and the transaction is not readily explicable by the relationship of the parties. This is Class 2(A) presumed undue influence; or

(b) where although there is no relationship of the type within sub-para (a) above between the parties, there is a relationship of trust and confidence or ascendancy and a similar inexplicability for the transaction. This is Class 2(B) presumed undue influence.

35 When a claim is made on the basis of the presumption, there must be proof of the existence of the relationship. When a Class 2(A) or Class 2(B) relationship is proved, and the transaction is not

readily explicable, a presumption arises that undue influence has been exerted. The presumption is rebuttable. It only shifts the burden of proof to the alleged wrongdoer to offer a proper explanation for the transaction.

36 The second defendant was Mdm Pang's favourite son and enjoyed her trust and confidence. He admitted in cross-examination:

Q: ... Is it not true that you were the apple of your mother's eye, so to speak?

A: Yes.

Q: You were the favourite son.

A: Yes.

Q: And the reason why your mother loved you best among the three sons, the reasons were you ran the business after your father's death; and you were the one who showed the most concern for your mother, among your brothers.

A: Yes.[\[5\]](#)

37 He did not seek to rebut the presumption in the present action. He deposed in his Affidavit of Evidence-in-Chief:

Even if my mother was then under my undue influence (a matter I deny but which I have to concede since I did not appeal against Judicial Commissioner Woo Bih Li's findings in High Court Suit 1072 of 2001/K, an action which the 1<sup>st</sup> Defendants took against me in their capacity as the committee of my mother ["the earlier suit"]) the obvious benefit which she obtained was that the Kwangtung Provincial Bank loan was re-paid.[\[6\]](#)

38 He conceded, albeit only because he had not appealed against Woo JC's finding, that he had exerted undue influence on his mother. The grudging concession was nevertheless made in clear terms. In his evidence from the witness box, he said nothing that countered the presumption.

39 At the time the mortgage was executed, the parent-child relationship between Mdm Pang and the second defendant had largely been reversed. Mdm Pang was feeble through age and ill health whereas the second defendant was able and energetic and was the only son who was close to her. She was staying with him and his wife, and he managed the family business. She was illiterate[\[7\]](#) whereas he knew English. She trusted him and was dependent on him. They were in a Class 2(B) situation.

40 On these primary facts, the transaction was manifestly one-sided and not readily explicable by the mother-son relationship. The onus was on the second defendant to rebut the presumption that he had exerted undue influence on his mother.

41 Ms Yap was aware of the relationship. Her counsel affirmed that "[i]t is not in dispute that the evidence shows that Madam Pang placed much trust and reliance on the Second Defendant".[\[8\]](#) Ms Yap regarded Mdm Pang as an old lady in her 70s who cannot read or write English and may not have formal education.[\[9\]](#)

42 Ms Yap said in her evidence:

[F]rom day 1, this woman, this old lady came to the office, I never, never, never thought that she was under any undue influence. If ever she was under any undue influence, I would have stopped them and tell them to go away. I never, never saw anything of undue influence. . . . His mother loves him. She loves him. I could see in the twinkle of the eyes she really loves him and when he spoke to me, he [*sic*] stroked his head. I could see. I know what [it] is to love a son. I have children and I love my son very much because somehow I could see in her she's not under any duress. She's not frightened. She's not, you know, afraid to speak. She may be old but she walks into the office on her own, she can sit down and she can speak, you know, with us in simple Hokkien, with my clerk and my secretary and myself. Never, never for one moment did I sense any fear or hesitation on her part.[\[10\]](#)

and:

If I had sensed this woman is afraid or she is going, you know, sense of fear in her face or actions or she's not very willing to do something, I would have stopped it.[\[11\]](#)

43 The mortgage Mdm Pang executed was clearly beneficial to the second defendant and disadvantageous to her. She placed her property, the main asset she had, to secure loans granted to the second defendant alone. There was no agreement between them on the use and repayment of the loans; she did not appear to have any say in these matters, except that \$500,000 of the facilities were earmarked to be used to discharge an earlier mortgage to Kwangtung Provincial Bank.

44 I find on the evidence that Mdm Pang executed the mortgage under the undue influence of the second defendant.

### **Was Ms Yap negligent?**

45 Part of Ms Yap's evidence is set out at [42] above. In her Affidavit of Evidence-in-Chief, she recounted the events of 3 November 1999:

I then asked Madam Pang Jong Wan, who confirmed that she want [*sic*] to proceed with the Mortgage to the Plaintiffs and also to make the new will leaving the Property to the 2<sup>nd</sup> Defendant. I also asked her to confirm that the purpose of the Mortgage was to secure a loan of \$1.5 million for the 2<sup>nd</sup> Defendant. Madam Pang Jong Wang agreed.[\[12\]](#)

and:

At this meeting, my firm had also arranged for one Loh Lim, a Court Interpreter from the Subordinate Courts of Singapore to interpret the mortgage documents and the will to Madam Pang Jong Wan in the Hainanese dialect.[\[13\]](#)

46 In her evidence, she admitted that when she dealt with the mortgage, she realised that it was possible that undue influence might have been involved. But she was thinking only of duress or coercion, and did not address her mind to undue influence arising out of trust and confidence, where a person under the influence may be happy and eager to do at the bidding of the party exerting the influence.

47 When she took the restricted view of undue influence she would not (and did not) take all the proper steps, as the solicitor acting for Mdm Pang and KTB, to ensure that Mdm Pang was really acting or exerting her free will when she executed the mortgage.

48 From her evidence, she took steps to ensure that Mdm Pang knew that she was executing a mortgage to the bank to secure her son's borrowings, but she did nothing to ensure, in the face of the obvious disadvantage that the transaction had for Mdm Pang without any countervailing compensation, that Mdm Pang was really acting on her own free will.

49 She did not have a private person-to-person consultation with Mdm Pang to ensure that she was acting on her own volition and that no undue influence had been brought to bear on her by the second defendant or anyone else. To the contrary, the second defendant was always present when she spoke with Mdm Pang. This was particularly unsatisfactory when she recognised at that time that there might have been undue influence.[\[14\]](#)

50 It must be apparent to a prudent solicitor that particular care must be taken when something as sensitive as undue influence by someone close to the client, is being probed. That would at all times be a difficult task, and it would be impossible to do this properly in the presence of the interested party.

51 In *O'Brien* ([33] *supra*), where the wife executed a mortgage over the matrimonial house to secure a loan to the husband's company, Lord Browne-Wilkinson held that the mortgagee bank should have required the wife to attend a private meeting (in the absence of the husband) with a representative of the bank, and that she should have been told of the extent of her liability as surety, warned of the risk she was running and urged to take independent legal advice.

52 In *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773 ("*Etridge*"), Lord Nicholls of Birkenhead was of the view that banks should not be required to undertake the exercise through their own officers, and that it was preferable for the task to be undertaken by an independent legal adviser acting for the wife. His Lordship shared Lord Browne-Wilkinson's view that the solicitor's discussion should take place at a face-to-face meeting in the absence of the husband. He identified four matters the solicitor had to cover as the core minimum: (a) explain the nature of the documents and the practical consequences they would have on the wife if she signed them, (b) point out to her the seriousness of the risks involved, (c) state clearly that the wife had a choice whether or not to sign the documents, and (d) check if she wished to proceed.

53 Those findings do not apply directly to our case because (a) the decision is not binding in Singapore, (b) in Singapore the mortgagee, mortgagor and surety can be represented by the same solicitor, and (c) we are not dealing with a spousal relationship or a matrimonial home.

54 Nevertheless, I find that a solicitor in the position of Ms Yap who is acting for a client like Mdm Pang should have had a private meeting with her, should have explained the risks and liabilities she would be exposed to, and should have advised her that she had the right not to proceed with the transaction.

55 Ms Yap's own account of her dealings with Mdm Pang fell short of that. The manner in which the documents were explained to Mdm Pang before she executed them was also unsatisfactory. Ms Yap had arranged for a Hainanese interpreter, Mr Loh Lim, to be present. She handed him the documents and left him to explain them to Mdm Pang, without any input from her. This was not sufficient. She should have explained the meaning and effect of the documents to Mdm Pang in a way that a lay person like Mdm Pang can understand, and have Mr Loh interpret that into Hainanese to Mdm Pang. When a solicitor advises a client on a document, that is not accomplished by just reading it to the client. The documents must be explained in a manner the client can understand, and if the client has any queries, further explanation should be given. The situation was not helped by the fact that Mr Loh admitted that he did not fully understand the documents himself.



56 Consequently, I find that Ms Yap had not taken due care when she attended on Mdm Pang on 3 November 1999 for the execution of the mortgage.

57 The mortgage executed in these circumstances was voidable. Mdm Pang, or the first defendants when they were appointed her committee, had the option to affirm or avoid it.

### **Was the mortgage affirmed?**

58 After they found out about Mdm Pang's two wills and the mortgage, the first defendants instituted the earlier action against the second defendant.

59 In that action, the first defendants showed that they were aware that the wills and the mortgage were not void, but were voidable. Further, in the earlier action they filed on 23 August 2001, they sought to have the wills declared void, but they did not seek a similar declaration for the mortgage. Instead, they wanted the second defendant to discharge the mortgage. By taking that position they were asserting that there was an existing mortgage to be discharged. They did not take any action to avoid the mortgage till they filed their counterclaim in this action on 30 May 2003, 21 months later.

60 The first decision to avoid the wills, and later decision to avoid the mortgage, are remarkably similar in material respects to the facts in *Allcard v Skinner* (1887) 36 Ch D 145, a leading case on undue influence and affirmation. In that case, the plaintiff joined a religious order and became a sister. While she was with the order, she made a will wherein she left her whole estate to the sisterhood and she also made gifts of large sums of money to it. Subsequently, she left the sisterhood. A year after that, she asked for the return of her will, and another four years later, she asked for the return of the money. Her action to recover the money was dismissed. When it went on appeal to the Court of Appeal, it was dismissed in a majority decision. Although the three appellate judges found the plaintiff was under undue influence, the majority held that by asking for her will and not seeking to avoid the gifts at the same time, she had ratified or confirmed the gifts, or, in the terminology of the present case, affirmed them.

61 Similarly, by their actions, the first defendants must be taken to have affirmed the mortgage.

### **Consequence of the affirmation**

62 By the affirmation, the first defendants' defence and counterclaim must fail.

63 The plaintiff's claim that the third defendant was negligent is established, but its claim for substantive relief fails because its rights under the mortgage remained intact when the mortgage was affirmed. Consequently, it is only entitled to nominal damages against the third defendant.

### **Negligence on the part of the plaintiff**

64 With my finding that the mortgage was affirmed, there is strictly no necessity to consider the third defendant's allegation of negligence against the plaintiff. However, as the plea touches on the duties of a mortgagee bank, I will address it.

65 The plea as set out in [16] hereof was that the plaintiff's officers did not meet Mdm Pang, and had relied on information provided by the second defendant.

66 When counsel for the third defendant applied to amend the Defence and Counterclaim to

include this plea, he referred to *Etridge* ([52] *supra*), particularly to Lord Nicholls' judgment at [50]–[57] which dealt with the steps a bank should take when it is put on inquiry regarding undue influence.

67        However, Lord Nicholls observed at [51] that the practice of banks generally is not to have a private meeting with the wife, and he continued at [53] and [54]:

[I]t is plainly neither desirable nor practicable that banks should be required to attempt to discover for themselves whether a wife's consent is being procured by the exercise of undue influence of her husband. This is not a step the banks should be expected to take. Nor, further, is it desirable or practicable that banks should be expected to insist on confirmation from a solicitor that the solicitor has satisfied himself that the wife's consent has not been procured by undue influence. As already noted, the circumstances in which banks are put on inquiry are extremely wide. They embrace every case where a wife is entering into a suretyship transaction in respect of her husband's debts. Many, if not most, wives would be understandably outraged by having to respond to the sort of questioning which would be appropriate before a responsible solicitor could give such a confirmation. In any event, solicitors are not equipped to carry out such an exercise in any really worthwhile way, and they will usually lack the necessary materials. Moreover, the legal costs involved, which would inevitably fall on the husband who is seeking financial assistance from the bank, would be substantial. To require such an intrusive, inconclusive and expensive exercise in every case would be an altogether disproportionate response to the need to protect those cases, presumably a small minority, where a wife is being wronged.

The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.

and at [55] and [56]:

... A bank may itself provide the necessary information directly to the wife. Indeed, it is best equipped to do so. But banks are not following that course. Ought they to be obliged to do so in every case? I do not think Lord Browne-Wilkinson so stated in *O'Brien*. I do not understand him to have said that a personal meeting was the only way a bank could discharge its obligation to bring home to the wife the risks she is running. It seems to me that, provided a suitable alternative is available, banks ought not to be compelled to take this course. Their reasons for not wishing to hold a personal meeting are understandable. Commonly, when a bank seeks to enforce a security provided by a customer, it is met with a defence based on assurances alleged to have been given orally by a branch manager at an earlier stage: that the bank would continue to support the business, that the bank would not call in its loan, and so forth. Lengthy litigation ensues. Sometimes the allegations prove to be well founded, sometimes not. Banks are concerned to avoid the prospect of similar litigation which would arise in guarantee cases if they were to adopt a practice of holding a meeting with a wife at which the bank's representative would explain the proposed guarantee transaction. It is not unreasonable for the banks to prefer that this task should be undertaken by an independent legal adviser.

... Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately.

68        I agree with these observations. Where there are solicitors acting, a bank should rely on the

solicitors, and not rely on its own officers. When the same solicitor acts for all the parties in a mortgage, the bank is entitled to rely on that solicitor.

69 There is, in any event, an underlying contradiction in the allegation of negligence. I do not understand the third defendant to dispute that Ms Yap's duty was to explain the mortgage to Mdm Pang and to ensure that she really understood the risks and liabilities involved and that she accepted them on her own free will. The third defendant cannot complain that the plaintiff was negligent for not doing through its officers something which the plaintiff had instructed the third defendant to do on its behalf.

## **Conclusion**

70 The plaintiff will have judgment against the first defendants and second defendant in terms of its pleaded claims for delivery of possession of the Property by the first defendants, for the sale of the Property, repayment of the loans with the contractual interest, as well as costs on an indemnity basis.

71 I order the third defendant to pay to the plaintiff nominal damages of \$200 as well as costs on the Subordinate Courts scale.

72 The parties shall have liberty to apply if there is any need for clarification of the orders.

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[\[1\]](#)Amended Defence and Counterclaim of the first defendants, para 5.

[\[2\]](#)Defence of the second defendant, para 5.

[\[3\]](#)Defence of the third defendants, para 3(n)

[\[4\]](#)Amended Defence of the third defendants, para 11A

[\[5\]](#)Notes of Evidence page 342

[\[6\]](#)AEIC of second defendant, para 11.

[\[7\]](#)Notes of Evidence page 448

[\[8\]](#)Third defendant's Closing Submissions, para 92

[\[9\]](#)Notes of Evidence pages 654, 658

[\[10\]](#)Notes of Evidence page 590

[\[11\]](#)Notes of Evidence page 592

[\[12\]](#)AEIC of Annie Yap, para 21.

[\[13\]](#)AEIC of Annie Yap, para 23.

[\[14\]](#)Notes of Evidence pages 641-642