Lie Hendri Rusli v Wong Tan and Molly Lim (a firm)
[2004] SGHC 213

Case Number : Suit 721/2003

Decision Date : 23 September 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : Andrew John Hanam and Lim Chong Boon (PKWA Law Practice LLC) for plaintiff; Molly Lim Kheng Yan SC, Philip Ling Daw Hoang and Ambrose Chia Heng Guan (Wong Tan and Molly Lim LLC) for defendant

Parties : Lie Hendri Rusli — Wong Tan and Molly Lim (a firm)

Legal Profession – Conflict of interest – Plaintiff mortgaging property to secure banking facilities extended to his supplier – Whether solicitor negligent in failing to disclose to plaintiff that he was concurrently representing supplier and bank – Solicitor's duty when acting for multiple parties in conveyancing transaction

Legal Profession – Duties – Client – Whether solicitor properly advising plaintiff on import and consequences of "all moneys clause" in mortgage documents

23 September 2004

V K Rajah JC:

1 In these proceedings a former client claims against a law firm for failing to advise him on or alert him as to the nature and purport of legal documentation he has signed. Issues of adequate disclosure, conflict of interest in acting for multiple parties and a conveyancer's responsibilities have all been squarely raised. It is also contended that a solicitor who fails to keep contemporaneous minutes of discussions with a client ought not to be believed. Can this be correct?

2 This case raises some interesting points of legal practice. Out of deference to counsel's arguments, I shall set down my findings and views on these points, at the risk of overburdening a factually straightforward case.

Dramatis personae

3 The plaintiff is an Indonesian businessman of Chinese descent. He is the principal director cum shareholder of PT Bangun Persada Tata Makmur ("PTB"), an Indonesian distributor of electronic goods. PTB is an established business with an average annual turnover of $10m. The plaintiff also operates two other Indonesian companies, which were set up as tax shelters. Richard Tong ("RT"), a banker from Malayan Banking Berhad ("MB"), describes him as a "seasoned businessman". In so far as his linguistic skills are relevant, the plaintiff asserts that while he completed his secondary school education in Singapore, his command of English is weak. His preferred language of business communication in Singapore is Mandarin.

4 The defendant used to be a firm of solicitors. It was dissolved in 2002. For the avoidance of doubt, it should be pointed out that the events culminating in these proceedings were not in any way responsible for this dissolution. Tan Yah Piang ("TYP") was the senior conveyancing partner with the defendant and is its protagonist in these proceedings. After graduating from the National University of Singapore in 1984, he joined the Singapore Legal Service ("SLS"). Initially appointed an Assistant Registrar of Titles and Deeds, he was in due course promoted to the position of a Deputy Registrar. In 1985 he left SLS for private practice and was admitted to the Bar in 1986. He thereafter practised for

varying periods of time in a few established law firms, namely, Freshfields, Arthur Loke & Partners and Wong Yoong Tan & Molly Lim, prior to joining the defendant in 1993. His principal area of practice has been and continues to be in conveyancing and he is, by all accounts, an experienced conveyancer. He has a working knowledge of Mandarin and secured an "O" level pass in the subject.

5 From about 1997, PTB established a significant and substantial business relationship with a group of related electronic distributors in Singapore. These companies were Alps Investment Pte Ltd ("Alps"), Macon Holdings Pte Ltd ("Macon") and Victory Electronic Pte Ltd ("Victory") (collectively referred to as "the Alps Group"). As business strengthened and the relationship matured, the Alps Group granted substantial enhanced credit facilities for goods supplied directly to PTB. By mid-1999, PTB was permitted credit ranging from between $1m to $1.5m for a 30 to 45-day grace period.

6 The principal officer in the Alps Group servicing PTB was its marketing manager, Agnes Goh ("AG"). AG testified that the Alps Group was one of the largest suppliers of goods to PTB and that PTB was in turn one of its largest customers. Most of the electronic goods supplied by the Alps Group to PTB originated from Samsung, a well-known Korean manufacturer of electronic appliances. PTB and the Alps Group shared a cordial, closely-knit relationship and each party at different points of time went so far as to quaintly describe the other "as part of the family". The plaintiff and AG shared a similarly close and friendly working relationship; indeed AG ventured forth to give evidence on the plaintiff's behalf in these proceedings despite having left the Alps Group in 2002.

Factual matrix

7 In or around November 1999, PTB's business in Indonesia was severely tested when the Indonesian economy was confronted with the maelstrom of the 1997 Asian financial crisis. PTB faced severe cash flow problems. The plaintiff and PTB were unable to obtain financing to tide them over this period. By November1999, PTB owed the Alps Group about $4.5m, an amount well in excess of the agreed credit limit of $1m to $1.5m. The Alps Group pressed the plaintiff to settle PTB's debts, putting a strain on the hitherto cordial "family" relationship. The plaintiff was in desperate, dire need of further financing to tide over his business liabilities.

8 With a view to resolving this unsatisfactory state of affairs, the plaintiff had discussions with AG in late 1999 about using Alps' existing banking facilities. He learnt that Alps already had various facilities with MB and was in the process of applying for additional facilities. AG informed the plaintiff that if he were to mortgage his recently purchased apartment at 26 Paterson Road, #06-06 The Paterson Edge ("the property") to MB "for Alps' benefit", PTB would be entitled to obtain a higher credit limit utilising Alps' letter of credit ("LC") arrangements. In short, by mortgaging the property as part of the security arrangements between Alps and MB, PTB could potentially obtain access to a further $3.2m in credit facilities. The plaintiff readily agreed to AG's proposal; it was to all intents and purposes an extremely attractive proposal. By offering his property, valued at about $1.7m as security, PTB would obtain additional facilities, for almost twice that value. In addition, his existing debt of $4.5m would be benignly dealt with by the Alps Group. It bears mention that AG, testifying on the plaintiff's behalf, confirmed that if the plaintiff had not acceded to this arrangement, the Alps Group would have curtailed his existing overdue credit arrangements. This would have created a crisis for PTB and the plaintiff.

9 After these initial discussions, matters proceeded briskly. By an agreement dated 30 November 1999 ("the 30 November Agreement"), the plaintiff agreed to mortgage the property "to ALPS' financier/banker as a third party mortgage *to secure the credit facilities so offered* by the financier/banker to ALPS". The plaintiff also confirmed in the 30 November Agreement that he would not redeem the property as long as PTB owed money to the Alps Group. This document was prepared

by Anthony Koh ("AK") the Administrative Executive of Macon, the holding company in the Alps Group. When AK consulted TYP for input on the proposed draft, TYP's suggestions were of a purely cosmetic nature. Pursuant to the 30 November Agreement the plaintiff undertook to permit his property to be mortgaged to secure *all* facilities extended by MB to Alps. There was no express constraint or limitation to the facilities that MB would extend to Alps. The plaintiff has at no point asserted that he did not comprehend the terms of the 30 November Agreement as explained to him by AK.

10 The plaintiff testified that in agreeing to the proposed mortgage, he relied on the sound financial strength of the Alps Group and the standing of its alter ego, Datuk Kang Hwi Wah ("Kang") an established presence in the electronics wholesale industry in Singapore. He admitted that it had never crossed his mind at the time that the Alps Group might ever fail financially or default in its obligations to MB. He also claimed, "my own thinking was that if I were to lose, the most I would lose would be my property".

11 The plaintiff did not appoint the defendant directly. At that point in time, another firm of solicitors had been acting for him in the purchase of the property. Title for the property had not been issued. Upon AK's suggestion, he agreed to engage the defendant to act for him in the completion of the property purchase as well as in securing the proposed bank facilities. He was aware that the defendant also represented the Alps Group.

12 On 10 December 1999, TYP received instructions from AK to act for Alps in its restructured banking facilities with MB. AK also informed TYP that the plaintiff would be instructing the defendant to act for him in the completion of his property purchase as well as in the proposed mortgage to MB. TYP agreed to act in all these matters. Around the same time the defendant also received instructions from MB to act for it in the restructured facility arrangement with Alps.

13 AG liaised with AK and the plaintiff and the parties eventually fixed 21 December 1999 for the signing of the relevant papers at the defendant's office. In the meantime, TYP had prepared a deed of assignment and mortgage-in-escrow ("mortgage documents") to secure the proposed mortgage of the property to MB for Alps' credit facilities. In addition, he prepared documentation for a few other properties, owned by a relative of Kang, that were to be concurrently mortgaged as security for the facilities. The preparation of the mortgage documents was a routine assignment for TYP. Included in all the mortgage documents was a clause stipulating that a mortgagor was to be *personally liable* for any outstanding facilities. This is a fairly prosaic clause that banks in Singapore routinely insert in their documentation to enhance their recovery prospects in the event of a default. It is usually referred to as an "all moneys clause".

14 On 21 December 1999, AK arranged to meet the plaintiff and they proceeded together to TYP's office. There are differing accounts with reference to the duration of the meeting and as to what transpired during the meeting. It is undisputed that TYP used both English and Mandarin in explaining to the plaintiff the legal responsibilities and liabilities he would be undertaking by signing the mortgage documents. The extent to which either language was used is however a matter of some controversy. The plaintiff did not ask any questions or communicate any concerns to TYP prior to and after signing the documents. The plaintiff claims in essence that TYP did not disclose to him that by signing the mortgage documents he would be exposing himself to personal liability for Alps' debts; *ie*, that he would become a surety for all Alps' debts to MB. He claims he was under the *distinct* impression that all he was placing at risk was the property. Both TYP and AK vehemently dispute this. They are adamant that TYP unequivocally drew to the plaintiff's attention his potential *personal* liability in the event of an Alps' default. It is accepted that TYP proffered no advice on the wisdom of the transaction; nor did he question or probe the plaintiff's reasons for placing his property as security for Alps' facilities.

15 Nothing of consequence happened until on or about 12 January 2000. According to the plaintiff, AG then asked him to seek a letter of confirmation from Alps stipulating that the property would be released as security for Alps' facilities to MB once PTB's outstandings were settled. AG denied this assertion. She testified that the request for a written confirmation for the release of the property upon settlement of PTB's outstandings came directly from the plaintiff. AK stated that upon receiving the plaintiff's request, conveyed through AG, he prepared the requisite release letter. TYP was not involved in the preparation of this document.

16 I shall return to this letter in due course. In light of the conflicting versions given by the plaintiff and AG it is imperative to determine the genesis of the letter, given that this will shed light on the plaintiff's actual knowledge and concerns about the facility arrangements.

17 When the plaintiff signed the mortgage documents in December 1999, PTB owed the Alps Group about $4.44m. The outstandings thereafter rose to an all time high of $6.8m in March 2000. This amount was gradually reduced as PTB's dealings with the Alps Group decreased. The Alps Group lost the Samsung distributorship rights in early 2002. These distributorship rights had been the fulcrum of the relationship between PTB and the Alps Group. Perhaps, as a consequence of this, the Alps Group faced serious financial difficulties.

18 On 17 October 2002, the plaintiff's present solicitors PKWA Law Practice LLC ("PKWA") sent MB a notice of redemption. It appears that it was AG who had advised the plaintiff, paradoxically, to redeem the property, given the now unsatisfactory financial position of the Alps Group.

19 On 29 October 2002, MB's solicitors responded to the redemption notice stating that the redemption amount was $16.9m. On 6 November 2002, PKWA responded by "noting" that the redemption amount was $16.9m and seeking confirmation that this was indeed correct. On 7 November 2002, without waiting for a response to their earlier letter, PKWA proposed redeeming the property for just $1.3m. After further correspondence, MB agreed to release the property upon receipt of $1.3m, subject to executing only a partial discharge of mortgage. (A partial discharge of mortgage, it is pertinent to note, discharges the subject property from further encumbrance while retaining the enforceability of the personal covenants.) PKWA then wrote to AK directly on 13 November 2002 asking the Alps Group to issue a cashier's order for $1.3m in favour of MB to effect the redemption. During the exchange of correspondence with MB's solicitors and the Alps Group, PKWA never placed on record his current position on personal liability.

20 Eventually, with Alps paying $700,000 and the plaintiff paying $600,000 to MB, the property was discharged by way of a partial discharge of mortgage. The personal covenant that the plaintiff had undertaken in the mortgage documents continued to subsist. In his affidavit evidence, the plaintiff asserts that he redeemed the property in order to re-mortgage it to his new supplier, Prosperity Electronic Co Pte Ltd ("Prosperity"). It is interesting that in the re-mortgage, the plaintiff entered into an almost identical arrangement with Prosperity and its banker, United Overseas Bank Limited ("UOB"). The plaintiff however claims that in so far as the re-mortgage is concerned, PKWA had *expressly* advised him that by signing the mortgage he was "opening himself up to unlimited liability". The plaintiff painstakingly points out that unlike the mortgage to MB, the re-mortgage to UOB was signed "with full knowledge of my actions and the implications arising from it". Recognising the incongruity between his present claim and the re-mortgage to secure Prosperity's facilities, he has strenuously emphasised that while he undertook personal liability in the re-mortgage, Prosperity had agreed not to augment their loan without his prior consent – a provision that had also been made amply clear to Prosperity's banker. This he claims is a critical difference as contrasted with the earlier arrangement he had purportedly entered into with the Alps Group and MB.

21 On 11 March 2003, MB commenced proceedings against the plaintiff as well as members of the Alps Group, its guarantors and relevant mortgagors. The amount claimed in those proceedings was $12.86m. After protracted negotiations, MB accepted a sum of $500,000 from the plaintiff in full and final settlement of all claims it had against him. The plaintiff thereafter commenced these proceedings against the defendant on 10 July 2003. The plaintiff claims that he has suffered a loss of $500,000 (exclusive of legal costs) as a result of TYP's negligence in failing to explain to him and/or advise him on the consequences that could arise from the signing of the mortgage documents. He had, it is claimed, unwittingly assumed responsibility as surety for MB's loan facilities to Alps.

Evaluation of evidence

22 While other contemporaneous events may be both relevant and significant and need to be carefully scrutinised, the most crucial aspect of the plaintiff's claim hinges on the meeting he had with TYP on 21 December 1999. This was their first and only meeting. TYP did not keep an attendance note. In the circumstances, I paid particular attention to the credibility of the two protagonists evaluated against the factual backdrop.

23 It is crystal clear that the plaintiff was in financial difficulties in November 1999. It was difficult for him to obtain any financing given the economic crisis. He not only owed the Alps Group substantial amounts but was also experiencing cash flow problems with PTB's Indonesian business. He remained anxious not only to preserve but also to enhance his relationship with the Alps Group. LC facilities for business arrangements with third parties were also needed. Whilst the property was unencumbered, a normal financing arrangement would only yield banking facilities to the extent of the property's market value, which was estimated at about $1.7m. At the same time, he had to address the Alps Group's persistent and pressing requests to reduce his outstanding debt, which by that point swelled to about $4.5m. It is therefore hardly surprising that he opportunistically seized AG's suggestion to offer the property as security for Alps' banking facilities in exchange for an enhanced relationship with the Alps Group and LC facilities for PTB's other business commitments. This seemed to be the ideal and immediate solution to all PTB's pressing financial problems.

24 It is clear from the agreement he signed on 30 November 1999 that he was aware that the proposed mortgage of the property was intended to secure *not* merely PTB's arrangements with Alps but *all* "the credit facilities" extended by MB to Alps. In his evidence, the plaintiff initially attempted to portray his knowledge of his potential liability as rather vague and somehow generally limited to the value of the property, *ie* $1.7m. Under cross-examination, however, he accepted that the arrangement contemplated all debts owing to Alps by PTB. Despite this, he stoutly maintained that he was neither informed nor advised that signing the mortgage documents would entail a concurrent personal liability.

25 Given his close relationship with the Alps Group, the plaintiff was content to permit AG and AK to implement all the formalities in relation to the proposed mortgage. While he did have a meeting with MB prior to signing the mortgage documents, nothing of consequence was discussed between him and RT, who was the head of MB's Business Development Group. As the plaintiff did not have a prior established relationship with any firm of solicitors he readily accepted AK's suggestion that he engage the Alps Group's solicitors, *ie* the defendant. Indeed, he instructed AK to inform the defendant that he would appoint the firm to act in the completion of the purchase of the property. He appeared to be of the view that the signing of the mortgage documents was a mere formality that did not warrant any anxiety; if he was tentative or anxious this was certainly not conveyed to any party. Although AG gave evidence indicating that she thought that the security arrangements only extended to the property, neither AG nor AK had informed the plaintiff that his potential liability would in fact be limited only to the property. Nor did AG or AK inform him that he would be undertaking a concurrent personal

liability for the MB facilities extended to Alps.

26 The plaintiff conceded under cross-examination that he "did not care" about the extent of the facilities that Alps had obtained from MB or whether the facilities could or would be varied. Despite this, he anomalously maintained in these proceedings that he would not have signed the mortgage documents if he had been informed by TYP that the total banking facilities offered by MB were in the region of $30m. This assertion appears to have been inspired with the benefit of hindsight. I conclude from his testimony that at the material time he was not concerned about the amount owed by Alps to MB; at that point of time he neither expected nor contemplated that Alps would be unable to repay its debts to MB. Furthermore, he apparently envisaged that if there were any problems the shareholders and directors of the Alps Group would attend to it. As far as he was concerned, Kang and the Alps Group had impeccable and rock solid financial credentials. His focus in November 1999 was to procure an additional credit line of up to $3.2m in exchange for securing his property valued at about $1.7m. This was a financial arrangement that was not only too good to miss but one that was also critical for PTB's business ventures to stay afloat.

27 Prior to joining the Alps Group in 1999, AK was Vice President of the Legal Administration Department of Societe Generale, a well-known international bank. While AK was not legally qualified, he was by all accounts conversant with most aspects of legal documentation pertaining to bank facilities. AK did not have a personal or close relationship with TYP. AK had appointed the defendant, an established and reputable firm, from time to time when the Alps Group had legal matters to resolve. Neither AK nor TYP considered the arrangement with the plaintiff to be an unusual one. It was purely a business arrangement on standard banking terms. As far as TYP was concerned, the plaintiff had a close business relationship with the Alps Group and was an experienced Indonesian businessman in the electronics industry. When TYP was instructed by MB to prepare the documentation for the facilities, he proceeded to prepare the usual standard documents he had employed in the past for MB. It is not disputed that the "all moneys clause" was a boilerplate clause in MB's mortgage documents. In summary, as far as TYP was concerned there was nothing neither remarkable nor unusual about the facility arrangement between two business associates. It is pertinent to note that the plaintiff's counsel did not press him as to why the clause had been included in the mortgage documents.

28 The plaintiff claimed that the meeting at TYP's office lasted only about 10 minutes and that TYP spoke mainly in English interspersed with a smattering of Mandarin. He also gave slightly varying accounts of what transpired at the meeting in his affidavits in the MB proceedings, in the pleadings and finally his affidavit evidence in the current proceedings. In essence, he claimed that the only explanation TYP gave him was that he was "executing a mortgage for the benefit of Alps and upon default by Alps, the plaintiff would lose his property to MB". The plaintiff neither asked any questions nor gave any information or instructions to TYP before signing the mortgage documents. He attempted to convey the impression that TYP had a brusque conversation with him during which he barely stated, let alone explained to him, the nature of the documents he was signing.

29 TYP, on the other hand, testified that he had spent about half an hour with the plaintiff and had explained to him in some detail the intent and purport of the mortgage documents. He had made it clear to the plaintiff at the outset that while he had a working knowledge of Mandarin; it was by no means a language he claimed any mastery over. TYP also clarified convincingly that over the years he had become familiar with explaining mortgage documents in Mandarin and in explaining the effect of the "all moneys clause". Most of his communications to the plaintiff were conducted in Mandarin, and at no point did the plaintiff intimate, however slightly, that he had not understood the information and advice conveyed. Indeed, when TYP specifically asked the plaintiff if he understood what had been said, the plaintiff nodded in acknowledgement and confirmed that he had no questions.

30 AK, who was also present throughout the meeting, broadly supported TYP's account and flatly contradicted the plaintiff's version of events. He recollected that TYP had specifically explained the purport of the "all moneys clause" to the plaintiff. He also corroborated TYP's assertion that he had spoken mainly in Mandarin to the plaintiff.

31 I am satisfied after observing and listening to TYP and AK, as well as the Mandarin translation of portions of their testimonies in court, that both of them had a credible working knowledge of Mandarin. TYP was comfortably able to convey the essential intent and purport of the mortgage documents. I find plaintiff's counsel's misgivings about TYP's competence in Mandarin misplaced. TYP struck me as a cautious and experienced solicitor who would not have continued with the meeting had he entertained any reasonable doubts about the plaintiff's comprehension of his advice. The plaintiff admitted having his discussions with AK "mostly" in Mandarin. It appeared to me that TYP's command of Mandarin was at least as good as AK's.

32 All things considered, I have grave concerns about the veracity and reliability of the plaintiff's evidence in connection with what had occurred during that eventful meeting. The plaintiff appeared in several instances to be prone to a rather slippery malleability in his testimony. In cross-examination he had stated initially that he was unaware that the property was part of a group of properties to be given as security for the MB facilities. Only after he was confronted with documentary evidence to the contrary did he concede that his evidence was incorrect. He then claimed that there were portions of TYP's explanation and advice that he did not understand. Yet inexplicably, he also admitted that he failed to inform TYP that he could not purportedly fathom what TYP sought to convey. He had no alternative but to concede ultimately that TYP could not have known that he did not "comprehend" portions of the advice. Despite initially denying it, he also reluctantly accepted, that TYP had indeed asked him if he had understood what had been conveyed to which he had responded affirmatively and further stated that he had no queries. Crucially, he also conceded that his affidavit evidence asserting that TYP had not advised him about personal liability could have been the result of "not understanding" what had been said or because he had "forgotten". He finally forlornly retreated to a narrow plank disingenuously complaining, "what actually went wrong was the lawyer did not clearly explain to me the amount that was owed". He had conveniently forgotten that he had earlier given evidence that he did "not care what was amount of facilities that Alps got from Maybank" and more specifically "did not care what was amount owing by Alps to Maybank". Was this a further instance of amnesia? Perhaps. The problem, unfortunately for the plaintiff, was that the drama of this prevarication and contradiction occurred in court for one and all to see and hear.

33 When defendant's counsel pressed the plaintiff to agree that his personal liability to MB was not an important issue given his confidence in Alps' standing, he was both evasive and inconsistent in his responses. The entire exchange is illuminating, to say the least, and is therefore reproduced in full:

> Q: Is it possible that TYP told you that you would be personally liable but you do not remember?
>
> A: It could be that. It is probably that I did not understand or it was not important.
>
> Q: Your personal liability to Maybank not important because as far as you were concerned, Alps would take care of it?
>
> A: There are two possibilities. One, I might not have understood what was being said at that time. *Secondly, if I understood it, that may not be important to me because Alps would take care for me. Because at that time, my own thinking was that if I were to lose, the most I*

would lose would be my property.

Q: One possibility was that you may not have understood; why didn't you clarify?

A: First, I might not have understood what was being said. Second, to my mind at that time, I thought the most I would lose at that time was my property. That is the reason why I did not ask.

Q: Why didn't you clarify what you didn't understand?

A: 2 possibilities. First, I might not have understood what was being said. Second is that if I were to lose, the most I would lose is the property.

Q: *The thought of losing property was your own thinking and not what TYP told you?*

A: *Yes, my own thinking.*

Q: Your thinking was that your loss would be only [your own] property and this was not based on what TYP said?

A: At that time, my own thinking was my loss was my own property. *I also did not hear TYP saying if I were to lose, not only would I lose my property, I would also lose my personal security as well. I might not have understood what was being said.*

Court: There were parts of TYP's explanation you may not have understood and TYP would not have known that because you did not ask him to clarify?

A: That is correct.

…

Q: TYP had asked you if you had any questions and whether you understood him and you said yes?

A: Yes, I said that.

[emphasis added]

34 I found both TYP's and AK's testimonies to be consistent, assured and candid – given without any fencing. Any minor creases that appeared in their evidence were in my estimation insignificant. Not only did they corroborate each other on all material points, their evidence was consistent and unshaken throughout the entire episode, from the time of the notification of the claim and all the way through cross-examination. In addition, TYP satisfactorily explained and confirmed why his recollection of the meeting with the plaintiff was clear. I determined that his evidence is not an instance of "happy hindsight". The plaintiff's case on the contrary appeared to be a case of "happy oversight".

35 Prior to the commencement of these proceedings, when MB first made a claim against the plaintiff, PKWA had queried AK whether TYP had explained to the plaintiff the purport of the "all moneys clause". AK had unequivocally replied in the affirmative. AK had made this unprompted assertion without any reference whatsoever to TYP.

36 I accept TYP's account of what he had conveyed to the plaintiffs during the meeting and his

evidence that he had in fact spent some time with the plaintiff in explaining the purport and intent of the mortgage document. In the circumstances, I also see no reason to question his evidence that it was not his practice to maintain attendance notes for routine matters. While it is good practice to maintain such contemporaneous notes, the absence of such notes, in the event of a dispute, does not inexorably mean that a solicitor is to be disbelieved (see [63]–[64]). The fact that AK corroborated his evidence in a convincing and consistent manner also attenuates any underlying concern about the absence of written corroborative evidence in the guise of attendance notes.

37 There is another subsequent event that further reinforces TYP's evidence. On 3 January 2000, MB routinely wrote to the defendant asking, *inter alia*, if it was necessary to obtain a memorandum of understanding from the plaintiff and the other mortgagor apropos the facilities as they had both executed "all moneys" mortgages in favour of the bank. TYP responded on 5 January 2000 stating:

> [W]e do not consider it necessary for "memorandum of understanding" to be signed by Mr Rusli and Mr Keng.
>
> The so-called memorandum of understanding (in the form prescribed by MayBank) merely served as a confirmation by the mortgagor that he understands the nature and the extent of his liabilities to MayBank under the "all moneys owing [*sic*] mortgage". The respective mortgages were in each case signed by Mr Ruslie [*sic*] and Mr Keng in the presence of Tan Yah Piang of our office, *after the latter had explained to each mortgagor the provisions of the respective mortgages*. In the circumstance, the so-called memorandum of understanding is superfluous.
>
> [emphasis added]

I do not think that TYP would have so confidently sent this confirmation had he entertained any doubt over the plaintiff's comprehension of or acceptance of personal liability in the transaction. This letter is a contemporaneous document and is cogent corroborative evidence of TYP's testimony.

38 In early January 2000, a further twist of events came to pass. The plaintiff out of the blue asked AG to confirm in writing that the property would be released if PTB settled all debts with the Alps Group. It bears emphasis that the plaintiff adamantly and inexplicably insisted in his testimony that he had *not* requested for the letter from Alps. He asserted that either AK or AG "wanted me to request for this letter". AG, who was testifying on his behalf, flatly contradicted him on this material point. She insisted that it was the plaintiff who had called her and asked her for a written confirmation. She then asked AK to send such a confirmation to the plaintiff. AK testified that AG had asked for the letter "to be fair to the plaintiff who had given an all monies mortgage". While AG did not recollect this conversation, I am prepared to accept AK's evidence. AK sent the confirmatory letter on 12 January 2000. He sent this letter without consulting or referring to TYP. In the letter, Alps confirmed that upon "full satisfaction of all amounts due" it undertook to arrange with MB for the property to be "released back" to the plaintiff.

39 Plaintiff's counsel attempted to downplay this discrepancy in the plaintiff's evidence as being "not material" but conceded that it was indeed the plaintiff who had made the request. Why did the plaintiff attempt to misstate the position on this rather significant point? It appeared to me that implicit in this request was both knowledge and concern about his ability to redeem the property prior to the settlement of the Alps facilities. This request took place sometime after the meeting with TYP. He had surprisingly not communicated this concern to TYP at that meeting or thereafter. He once again chose not to articulate his concerns, his thoughts and beliefs. I can only infer that the plaintiff must have entertained some residual concerns after the meeting with TYP on 21 December 1999.

After some rumination, the concerns materialised into this request for a confirmation letter from Alps. This request also ineluctably demonstrates that the plaintiff had a sound understanding of the structure of the banking facilities. In my judgment an unsophisticated layperson would not have made such a request. Perhaps that is why the plaintiff was keen in his testimony to pass the responsibility for making such a request to someone else. It should be noted that AK's testimony of the discussion he had with AG where she had asked for fairness in light of the "all moneys clause" ineluctably points to the plaintiff having knowledge of his potential personal liability.

40 The plaintiff's evidence was a mixture of dissemblance and feigned naïvety. He appeared to me to be a shrewd and canny businessman who was attempting to hide behind a smokescreen of purported linguistic difficulties. While he was clearly not comfortable with English, he had a basic knowledge of English, quite appropriately described by RT as "lower secondary" school English. His weak command of English was upon closer scrutiny not a critical issue. In the final analysis, this was not a case about *miscommunication* or even lack of communication but all about "*missed communication*". The plaintiff by his own admission concedes that TYP gave advice that he did not "understand" or query. Assuming *arguendo* this was true, why did he not immediately inform TYP of this? He was not by any stretch of imagination green at the gills, testing business waters for the first time. He was and is at the helm of a multi-million dollar business distribution network in Indonesia. The cumulative effect of all the "mistakes" he has made suggests a disquieting preference for dissemblance over candour and a cavalier indifference to the true facts.

An overview of a solicitor's responsibilities

41 The plaintiff in this case has raised several issues pertaining to TYP's conduct in discharging his responsibilities under his retainer. In addition to the alleged failure to explain the mortgage documents it is also pleaded that TYP failed to advise the plaintiff that it was manifestly disadvantageous to sign the mortgage documents; that he was in a position of conflict of interest in acting for multiple parties; that he failed to advise the plaintiff that he should seek independent legal advice; and that he failed to keep proper notes in writing of his advice. It is imperative to examine the legal position in relation to these issues. As an aside, it should be noted that any reference to a solicitor henceforth should embrace an advocate *mutatis mutandis*.

The retainer

42 It is hornbook law that a solicitor is expected to exercise the care and skill of a reasonably competent solicitor in discharging his duties under the retainer. In assessing the standard of care to be reasonably expected of a solicitor, the factual backdrop is of paramount importance. Abstract notions of skill and competence often add little to resolving the situation and have to be applied with vigilance when meandering through the undergrowth of facts. It must be appreciated that there is no magic formula that can reconcile the myriad of case law principles and any attempt to distil such principles must be tinged with pragmatism. In other words, no single touchstone will suffice to illuminate or unravel the existence and extent of a duty in any given matrix.

43 In reality the so-called *reasonably competent solicitor* is a mere legal fiction judiciously deployed from time to time to justify risk allocation. The court is ever anxious to maintain and police the standards of the legal profession, which performs a vital role in a society that is predicated, and places a premium, on the rule of law. In the discharge of its duty to uphold the legal system, the legal profession must seek not only to jealously maintain high standards but to unfailingly remain alert and acutely conscious of the fact that the public perception and the standing of the profession is indivisibly determined by the standards it embraces and observes. Rule 2 of the Legal Profession (Professional Conduct) Rules 1998 (Cap 161, R 1, 2000 Rev Ed) ("Professional Conduct Rules")

explicitly prescribes that solicitors have the following obligations:

1. to maintain the Rule of Law and assist in the administration of justice;

2. to maintain the independence and integrity of the profession;

3. to act in the best interests of his client and to charge fairly for work done; and

4. to facilitate access to justice by members of the public.

High standards, however, are not synonymous with impractical standards. Expectations of the profession must be tied to reality. A solicitor is not an underwriter for a client's business or generally speaking the commercial wisdom of a transaction. Nor is legal advice equivalent to a warranty that a legal transaction will be free of risk and problems.

44 The real issue, in any given case, is whether the court views the standards applied and skills discharged by the particular solicitor as consistent with the legal profession's presumed responsibilities and obligations to its clients. This is not a fossilised concept and standards periodically evolve as well as vary in different factual matrices. It bears mentioning that adopting the practice of the entire profession does not by itself exonerate a solicitor from the acid test of reasonableness measured by adequate competence and skill: *Edward Wong Finance Co Ltd v Johnson Stokes and Master* [1984] AC 296. The efflux of time or general acceptance cannot legitimise any neglect of duty by the profession as a whole.

45 The scope of a solicitor's duty in any particular case depends on his retainer. The retainer is to be defined by reference to what the solicitor is instructed to do by the client and how he is expected to discharge his responsibilities in accordance with the notion of a reasonably competent solicitor. This inevitably must vary from case to case.

Conflict of interests

46 Situations of conflict of interests arise when the principles of client loyalty and confidentiality are worryingly compromised. Prudent and practical wisdom is called for in obviating situations of conflict. An innocent but incorrect decision may open Pandora's box.

47 Solicitors should not act in a matter where there is or will be a real risk of potential conflict of interests or actual conflict between different clients in a transaction. In the final analysis, it is the *integrity* and common sense of the solicitor that will provide the answer as to whether to proceed in any proposed transaction – a balance between principle and expediency must be struck.

Acting for multiple parties

48 In *Clarke Boyce v Mouat* [1994] 1 AC 428 at 435, the Privy Council noted that "[t]here is no general rule of law to the effect that a solicitor should *never* act for both parties in a transaction where their interests may conflict" [emphasis added]. This is no more than a reflection of the historical common law position and also represents the position in Singapore. That said, the standard of skill and care expected of a solicitor acting for multiple parties *vis-à-vis* each client must be at least equivalent to that of the solicitor acting for a single party. The solicitor cannot prefer the interests of one client to the others. At times, it may be difficult to precisely define the standard, particularly if the interests of the clients collide. The solicitor's duty certainly extends to drawing attention to and, where appropriate, advising on the legal ramifications of a particular transaction. If

the solicitor comes across a potential trap or unusual incident, he ought to draw this to the client's attention notwithstanding any concern that it might incur the displeasure of the other clients. Solicitors must at all times appreciate that they owe clients in any transaction a duty of candour free from any inhibition. Rule 25(b) of the Professional Conduct Rules stipulates:

> During the course of a retainer, an advocate and solicitor shall advance the client's interest unaffected by any interest of any other person.

49 A solicitor who, objectively speaking, reaches the crossroads where he has difficulty in advising and dealing with multiple clients competently, evenly and consistently ought to discharge himself from further involvement in the subject matter. If he fails to do this, he might find himself at the short end of negligence proceedings and face other disparate consequences. Alternatively, in some cases he must seek express consent, underpinned by full disclosure, from the parties involved and/or when there is a reasonable doubt, to at least ask the client to seek independent legal advice: see the *dicta* of Chao Hick Tin JC (as he then was) in *Goh Jong Cheng v MB Melwani Pte Ltd* [1990] SLR 951 at 960, [40]).

50 There is often an inherent risk in proceeding with cases of *actual* conflict because of the varying levels of disclosure of *confidential information* that might be dictated by the circumstances. In practice this often creates a serious conundrum when there are multiple representations by the same solicitor or firm. There will be tension between the conflicting requirements of confidentiality and disclosure owed concurrently to the multiple clients: What to disclose? When to disclose? Whom to disclose to? How to disclose? What to confirm? How to confirm? What to advise? When to advise? Quite aside from the contractual duties imposed and/or presumed by the retainer, a solicitor also has a fiduciary duty to maintain confidentiality. For these reasons and more, many solicitors quite rightly shy away from acting for multiple clients in all but the most straightforward and anodyne transactions.*This prudent approach does not, however, call into question the actual legitimacy of the practice of acting for multiple parties.* Solicitors *must* appreciate and appraise the inherent risks involved before they embark on such a course of action. They should bear in mind that courts in several jurisdictions have come down hard on solicitors in multifarious situations when acting for multiple parties in the same transaction.

Conveyancing transactions

51 It is not uncommon for a solicitor to act for more than one party in a conveyancing transaction. Indeed, this is the norm in Singapore. In such a situation, the solicitor is not invariably in a position of conflict. The parties share a communality of interests in completing the transaction. In *Spector v Ageda* [1973] Ch 30 at 47, Megarry J stated:

> The courts have often pointed out the undesirability of a solicitor acting for both parties in a conveyancing transaction, as by acting for both vendor and purchaser; yet the practice remains widespread, sustained, it seems, by beliefs such as those of economy, efficiency and speed, and, no doubt, others. In such cases, the solicitor, of course, has a double duty to perform: he must safeguard the adverse interests of each of his clients. *In the absence of any personal interest to impel him to one side or the other, a solicitor can, and doubtless in the vast majority of cases does, stand indifferent, and, at some risk, discharge his duty of acting impartially in the interests of each of his clients*. [emphasis added]

The conflict arises if and when a solicitor cannot fairly and objectively discharge his responsibility to protect each client's interest with the same competence and skill that a solicitor acting for a single party would demonstrate.

52 In dealing with*standard* banking documentation in straightforward loan arrangements, there will usually be no potential or actual conflict of interests *provided* that the solicitor clearly and adequately explains to the parties the ambit and purport of the documentation generating their responsibilities and liabilities. It must be recognised that in instances of personal facilities the borrower and/or the mortgagor are almost invariably in *no* position to have the lender's standard terms re-negotiated or altered. There is very little scope for a conflict of interests in these types of transactions. An obvious example would be the documentation involved in Central Provident Fund charges. The solicitor's primary responsibility in such cases is to ensure that the multiple clients to loan transactions understand the responsibilities, liabilities and obligations that they are assenting to and/or undertaking. It would be wholly inappropriate to stigmatise the conduct of solicitors who can properly discharge their obligations in such situations as being either unethical or improper. In this context I have found the *dicta* of Sir John Donaldson MR in*Wills v Wood* (1984) 3 Tr L 93 of some assistance:

> *If the terms of the loans are agreed by the clients without their advice and the solicitors are merely being asked to give legal effect to the parties' common intention, there may well be no problem*. But if either party is seeking advice or the solicitors are involved in the negotiations of terms or either party may thereafter seek to say that sufficient was known to the solicitor to create a duty to advise, the solicitors are clearly exposing themselves to risk of criticism. This may be thought not to be in the interests of the profession as a whole. [emphasis added]

53 It is also sometimes forgotten that there is a public interest element in allowing multiple representations in certain matters; where the conflict often exists more in principle than in fact. Such a practice assists in lowering transactional legal costs in standard matters. There was direct sanction for the practice of multiple representations in the guise of the Legal Profession (Solicitors' Remuneration) Order 1974 (Cap 161, 1996 Rev Ed, O 1) ("1974 Remuneration Order"), which provided for different scales of costs when solicitors acted for multiple clients in the same transaction. The 1974 Remuneration Order was revoked on 1 February 2003 and substituted by the Legal Profession (Solicitors' Remuneration) Order 2003 (S 40/2003) ("2003 Remuneration Order") which is now silent on this point. It is clear that the present omission of any reference to multiple representations was not intended incidentally, by way of a side wind, to signify any disapproval of the prevailing practice. It was merely intended to remove the notion of rewarding solicitors for conveyancing work on the basis of scale fees. Indeed r 28 of the Professional Conduct Rules appears to expressly sanction the acceptance of multiple instructions. It states:

> **Potential Conflict of Interests**
>
> 28. When accepting instructions to act for more than one party in any commercial or *conveyancing transaction* where a diversity of interests exists between the parties, an advocate and solicitor shall advise each party of the potential conflict of interests and of the advocate and solicitor's duty if such conflict arises.
>
> [emphasis added]

For completeness, I should add that a breach of this rule would not ineluctably entail civil liability. In every case a causal link would have to be shown between a breach and the purported loss.

54 If terms are required to be negotiated or a situation of potential conflict is anticipated or encountered, it would be prudent to advise clients to seek independent representation. A solicitor should not be seen to advance the interests of one party over another in order to complete a transaction. One such instance that needs to be carefully thought through, *in every case*, is where a

family member (like a wife or child) is a party to the facility arrangement. Such relationships bristle with variegated conflicts and may, in addition, raise issues of undue influence that need to be addressed by independent advice: see *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 and the *dicta* of Lai Siu Chiu J in *Standard Chartered Bank v Uniden Systems (S) Pte Ltd* [2003] 2 SLR 385 at [65]. Commercial relationships, for obvious reasons, do not usually engender the same concerns unless active negotiations between the parties and/or the lender are necessary or the transaction is out of the ordinary.

55 This is not to say that a solicitor advising multiple clients in a standard loan transaction performs a purely routine or ministerial task discharged by merely greeting clients and reciting a standard incantation. He ought to use his discretion, in every case, on the degree of detail, wealth of explanation and extent of advice required to bring home the ramifications of the legal documentation. There is obviously an appreciable difference between the level of explanation and circumspection required in dealing with a sophisticated or shrewd businessman as compared with the proverbial layman. It might be said that an impoverished explanation to a client with an impoverished knowledge about worldly matters may in itself be evidence of negligence. This is to be contrasted with the situation of the sophisticated or shrewd businessman who can usually be assumed to have a measure of knowledge pertaining to the purpose and purport of legal documentation coupled with an innate ability to quickly size up and grasp the gist of his responsibilities. Donaldson LJ (as he then was) accurately observed in *Carradine Properties Ltd v D J Freeman & Co* (1982) 126 SJ 157; [1982] CA Transcript 8260, in relation to the solicitor's duty of care to his client that:

> [T]he precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client.

The crux of the matter is that it can usually be assumed that a businessman will not hesitate in raising queries to resolve any doubts. Language will seldom be an issue with such individuals; by dint of their business background they will employ the necessary measures or take steps to ensure they have a grasp of any responsibilities they are undertaking.

56 In passing, it can be observed that in a sale and purchase situation, the reality of an actual conflict is usually not only more apparent, but also real, as the documentation is hardly ever identical even though common templates are relied upon and the Law Society's Conditions of Sale 1999 are usually incorporated. Indeed, even when standard contracts are statutorily prescribed, there is a statutory prohibition against acting for both a developer and purchaser in the same housing development until a certificate of fitness for occupation has been issued: see s 79 of the Legal Profession Act (Cap 61, 2001 Rev Ed). For this reason, prudent solicitors, in all but the plainest cases, do not usually act for both the vendor and purchaser in the same transaction (*cf* Scrutton LJ in *Moody v Cox* [1917] 2 Ch 71 at 91; *Goody v Baring* [1956] 1 WLR 448).

57 I note that the Council of the Law Society in England has, pursuant to, *inter alia*, to the Solicitors' Practice Rules 1990 and the Solicitors' Practice (Lender and Borrower) Amendment Rules 1999, spelt out in detail various practices that solicitors ought to adopt in preventing and/or ameliorating conflict situations. Care should be exercised in importing these rules of conduct unwittingly into Singapore without adequate recognition of the different practices and policy considerations in the two jurisdictions. In the interests of the profession and the public, the Law Society should now give further consideration as to whether clearer policies and rules ought to be formulated in approaching issues of conflicts of interests especially in conveyancing and loan transactions. The present position, bereft of clear guidelines, is far from satisfactory.

Informed consent and disclosure of representation

58 After making the observations adverted to in [48] above, Lord Jauncey of Tullichettle, who delivered the judgment of the Privy Council in *Clarke Boyce v Mouat*, further noted at 435–437:

> There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. *Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other.* If the parties are content to proceed upon this basis the solicitor may properly act.
>
> ...
>
> In determining whether a solicitor has obtained informed consent to acting for parties with conflicting interests *it is essential to determine precisely what services are required of him by the parties*.
>
> ...
>
> *Another case of breach is where a solicitor acts for both parties to a transaction without disclosing this to one of them or where having disclosed it he fails, unbeknown to one party, to disclose to that party material facts relative to the other party of which he is aware*. A fiduciary duty concerns disclosure of material facts in a situation where the fiduciary has either a personal interest in the matter to which the facts are material or acts for another party who has such an interest.
>
> [emphasis added]

59 In cases of multiple representations, solicitors ought to candidly disclose at the outset to all their clients precisely whom they are acting for. There are at least a few reasons for this. First, it is implicit in every retainer that there is a duty to act in the client's best interests and to disclose all material facts; see r 28 of the Professional Conduct Rules ([53] *supra*). The act of multiple representations is a material fact and should therefore be duly disclosed. Secondly, the client's knowledge and agreement to the multiple representations will amount to implied, if not express, consent to the arrangement. This could debilitate subsequent claims of conflict of interests. Thirdly, in instances where issues of confidentiality of information may be relevant, the solicitor has a concurrent fiduciary duty to place on the table all material facts.

60 The omission to disclose the fact of multiple representations could result in a spectrum of diverse consequences. It could be characterised as a breach of fiduciary duty and/or negligence or a mere oversight that has no legal significance. The factual matrix will be decisive. The reason for the solicitor's omission will also be relevant in each case. An intentional omission is hardly ever likely to be viewed charitably.

Commercial advice

61 The English Court of Appeal in *Yager v Fishman & Co* [1944] 1 All ER 552 unequivocally rejected any suggestion that the defendant solicitors were negligent in failing to advise a client that

he ought to determine a lease as opposed to keeping it in existence while searching for a tenant. Scott LJ stated at 555:

> To impose on a solicitor the legal responsibility of answering such a business question would require both unequivocal instructions and unqualified acceptance; for it is no part of a solicitor's normal duty to profess the skill and experience for giving such advice.

Goddard LJ concurred and added at 556:

> The nature and amount of advice which, in a matter of this sort, a solicitor would be expected to give to a person wholly unacquainted with business may differ very materially from what he would offer to an experienced business man, who would naturally decide for himself the course he thought it in his interest to take.

The *dicta* of Sir John Vinelott in *Birmingham Midshires Morrgage Services Ltd v David Parry & Co* (1996) 51 Con LR 1 at 14 has at the very least some tangential relevance to the present proceedings. He observed in the context of a lender and borrower relationship that:

> [A] solicitor is not required to investigate the borrower's financial position and *is entitled to assume that the mortgagee has himself made such inquiries as he thinks necessary* … [emphasis added]

62 A solicitor's role, in the absence of specific instructions and special circumstances, is plainly to give legal as opposed to commercial or financial advice. There could, however, be unusual cases where there is some difficulty in drawing a distinct line between legal advice, financial consequences and the wisdom of the transaction. In determining whether such a duty arises, several imponderables figure in the assessment. Particular regard ought to be given to the client's background and to the context in which the retainer is to be defined and deciphered.

Maintaining contemporaneous notes

63 The plaintiff's counsel has submitted that "no weight should be placed on [TYP's] evidence" as he was "not able to refresh his memory from looking at his attendance note because he has not kept such a note". Reliance is placed on the following extract from a leading treatise, *Jackson & Powell on Profession Negligence* (5th Ed, 2002) at para 10-174:

> However admirable and comprehensive the advice which a solicitor gives, it is of no benefit to his defence unless it can be proved what advice was given. The solicitor is unlikely to recall after a period of several years what advice he gave to his client on a routine matter. *The best he can do is to describe his usual advice in the particular circumstances or to speculate as to what he "must" have said, which is unlikely to carry as much weight as the recollection of the plaintiff*. There is no substitute for a proper attendance note, recording the gist of the advice that was given. The lack of attendance notes has materially increased the number of successful claims that are brought against solicitors. It is prudent to confirm advice and instructions in writing. The Law Society recommends that "Solicitors should consider whether it is appropriate to confirm in writing the advice given and the instructions received." [emphasis added]

This extract is, in my view, no more than a sound exhortation and salutary reminder to the legal profession to maintain attendance notes. It is quite another matter altogether to assert that the absence of an attendance note is either tantamount to negligence or robs a solicitor's testimony of all significance. Such a contention is *per se* incorrect. There is much to be said in favour of the practice

of maintaining accurate attendance notes. They will undoubtedly be of real assistance in clarifying matters and corroborating a solicitor's testimony in the event of a dispute over what has transpired. However, all that can fairly be said of the absence of contemporaneous notes is that the solicitor may find himself handicapped when the credibility of his evidence is assessed. The solicitor will have to satisfy the court that his recollection of events is case specific and not a convenient reconstruction of events. Given the constant stream of matters that solicitors handle, the solicitor will have to convincingly persuade the court that he is rendering an accurate recollection of a particular discussion in a particular transaction, as opposed to giving testimony reiterating his general practice.

64 It should also be pointed out that even if such notes were produced, the court will not automatically accept them as conclusive evidence of what has been said or unsaid. Ingenious counsel should not invariably split hairs over the adequacy of such notes. For completeness, I should add that there are no practical or legal requirements to maintain verbatim notes of discussions save in unusual cases.

Overview

The claimant's onus

65 Millett LJ in *Briston and West Building Society v Mothew* [1998] Ch 1 at 11 noted:

> *Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice should have been given and (on a balance of probabilities) that if such advice had been given he would not have entered into the relevant transaction or would not have entered into it on the terms he did. The same applies where the client's complaint is that the solicitor failed in his duty to give him material information*.
>
> …
>
> Where, however, a client sues his solicitor for having negligently given him incorrect advice or for having negligently given him incorrect information, the position appears to be different. In such a case it is sufficient for the plaintiff to prove that he relied on the advice or information, that is to say that he would not have acted as he did if he had not been given such advice or information. It is not necessary for him to prove that he would not have acted as he did if he had been given the proper advice or the correct information.
>
> [emphasis added]

The present case is one that *ex facie* falls within the first category, though it has elements of the second category. The plaintiff's principal plank is that TYP failed to advise him on the existence and purport of the "all moneys clause"; in other words, that the plaintiff was to act as a surety for Alps' outstandings to MB. I have found that TYP had indeed given the proper advice on the existence and purport of the "all moneys clause". For the avoidance of doubt, I also determine that the plaintiff *would* have signed the mortgage documents in any event, assuming *arguendo*, that I am mistaken in my primary finding. He cannot satisfactorily establish that if TYP had "informed" and/or "advised" him about the "all moneys clause" this would have altered his intention to proceed with the facility arrangement. A claim under the second category would also fail.

Findings

66 I am satisfied that the plaintiff was content to leave the selection of the defendant as his

solicitors to AK who had appointed the defendant for untainted reasons. The plaintiff had unalloyed confidence in the Alps Group and AG. The scope of the retainer the plaintiff had with the defendant required TYP to explain the legal implications of the mortgage documents and to complete the transaction. The plaintiff did not expect, nor was TYP required to proffer, any advice on the wisdom of the transaction. The incisive observations of the Privy Council in *Clark Boyce v Mouat* ([48] *supra*) at 437 are helpful:

> When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

It is also profitable to bear in mind the pragmatic observation by Lord Nicholls of Birkenhead in *Royal Bank of Scotland plc v Etridge (No 2)* ([54] *supra*) at [88] that:

> Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.

67 The nub of the matter is whether TYP had advised the plaintiff that the plaintiff was undertaking a personal liability as a surety for any default not just of PTB but also of Alps. At first blush, it may seem somewhat inconceivable as to why the plaintiff should have agreed to such an undertaking. However, taking into consideration the factual backdrop and his anxiety at that juncture over his dire financial predicament compounded by his desperate need for urgent additional financing (see [23] above) – his acceptance of the personal undertaking seems not only plausible but also highly probable. I am satisfied that not only did TYP offer the requisite explanation but also the plaintiff understood it and was content to live with the risks – given his own unstable financial plight, as contrasted with his confidence and certitude in the financial standing of the Alps Group and Kang. I reject the plaintiff's version of what transpired at his meeting with TYP. Regrettably, I have concluded that the plaintiff's evidence is tarnished by evasiveness, elasticity and exaggeration.

68 TYP has candidly admitted that he did not expressly inform the plaintiff that he was concurrently acting for Alps and MB as well. Plaintiff's counsel takes issue with this and contends that this is a further indicium of negligence. With respect he is once again barking up the wrong tree. It appears that TYP assumed that the plaintiff was aware of both these facts. This is certainly correct in so far as TYP's representation of Alps is concerned. The plaintiff was fully aware of this. This cannot therefore be the basis of any legitimate quibble. What about his acting for MB? It would be right to say that this ought to have been expressly stated and disclosed to the plaintiff. Having said that, no sinister or improper motive can or should be attributed to TYP for what is patently an oversight born out of a misplaced assumption. It was a slip between the cup and the lip. I do not however think this is a material omission that can in any way be linked to the plaintiff's subsequent conduct and or loss. In my view, TYP's disclosure that the defendant concurrently acted for MB would not have made the slightest difference to the plaintiff at the material time. He would have forged ahead with the transaction regardless. What is pivotal is that TYP did not allow his representation of MB to affect or inhibit his conduct of the matter *vis-à-vis* the plaintiff. I am satisfied that he would have given the plaintiff precisely the same advice and information if the plaintiff had been his only client. I should also add that defendant's counsel did not have the benefit of cross-examining the plaintiff on this issue since it only surfaced when TYP was cross-examined.

69 The plaintiff did not actively seek legal advice. The meeting with TYP was, as far as he was concerned, a ritual he had to accede to in order to secure the attractive new financial arrangements.

That of course did not absolve TYP of his duty to explain the ambit and purport of the legal documentation; the scope of his retainer required this and TYP duly discharged his duty. When the plaintiff met TYP, he did not "*hear*" what TYP advised; he only "*heard*" what he wanted to hear and has conveniently "*forgotten*" the gist of TYP's advice. He took a business view of his legal commitment and was conscious of all the attendant risks. Like Mrs Mouat in the Privy Council case of *Clarke Boyce v Mouat* ([48] *supra*), the plaintiff was not concerned about the wisdom of the transaction. He was shrewd enough to immediately appreciate what personal liability as a surety entailed. In any event, as he unwittingly conceded, he was not concerned about the amount due to MB from Alps. He was focused on solving his immediate financial problems and took a considered view that the financial likelihood of Alps defaulting was remote, if not non-existent. That his risk assessment has turned out to be inaccurate surely cannot afford him a springboard for legal recourse against the defendant. The plaintiff repeatedly and vehemently complained that TYP did not inform him that he was undertaking a personal responsibility. The crucible of cross-examination reduced this complaint to a snivel that he was not informed by TYP about the extent of Alps' outstandings. Such a contention is tenuous, to say the least, given that TYP did not have a duty, in the concatenation of circumstances, to ascertain the magnitude of Alps' debt. This would, in any event, be a constantly fluctuating amount.

Conclusion

70 In the ultimate analysis, the principal issue in this case is straightforward. Did TYP inform the plaintiff that he was undertaking personal liability as a surety for Alps? The answer to this is yes. Ought TYP to have questioned the wisdom of this and advised the plaintiff to ascertain the extent of this liability? In the circumstances of this case, the answer is no. The plaintiff's claim is dismissed. The defendant is to have the taxed costs of these proceedings.

71 This case should serve as both an invaluable and a practical reminder to the legal profession to:

(a) document the nature and scope of retainers with clients;

(b) maintain reliable minutes of discussions with clients; and

(c) carefully consider whether to document through correspondence significant advice rendered.

Unlike some other jurisdictions, there are currently no mandatory legal provisions specifically prescribing such practices; however, observing such practices, even for routine matters, would be an exercise in precaution and prudence. The defendant has been exonerated in this case simply by dint of the plaintiff's lack of credibility. Nonetheless, it has been unpleasantly subjected to and sorely tested by a montage of variegated claims, not to mention the embarrassment of adverse publicity. With the benefit of *hindsight* it is now apparent that these proceedings could perhaps have been thwarted *in limine* if reliable written records of what had transpired had been maintained. Would it be too much to expect members of the legal profession to take this case as a cue to exercise *foresight* in future by maintaining satisfactory written records of dealings with and for their clients?

Claim dismissed.