ING Bank N V v Inselatu Co Pte Ltd and Others
[2000] SGHC 81

Case Number : Suit 1005/1999

Decision Date : 08 May 2000

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Susan Tang (Francis Khoo & Lim) for the plaintiffs; Alvin Tan (Wong Thomas & Leong) for the third defendant

Parties : ING Bank N V — Inselatu Co Pte Ltd; Kohar Widjaja alias Kho Sioe Thiam; Chu Mei Hu

JUDGMENT:

GROUNDS OF DECISION

Facts

1. The Plaintiffs are a bank incorporated in the Netherlands with a branch office in Singapore.. The 1st Defendants are a private limited company incorporated in Singapore, having as its only two directors the 2nd and the 3rd Defendants who, at the material time, were husband and wife. The 1st Defendants obtained banking facilities from the Plaintiffs and were sued as principal debtor whilst the claim against the 2nd and 3rd Defendants was in their capacity as sureties.

2. On 11 February 2000, the Plaintiffs obtained summary judgment against all three defendants pursuant to Order 14 Rule 3 of the Rules of Court. This is the appeal brought by the 3rd Defendant only against the summary judgment granted by the learned Senior Assistant Registrar.

3. The Plaintiff granted banking facilities to the 1st Defendant by way of letters of offer. In the Statement of Claim they pleaded specifically, a letter dated 27 January 1997 whereby short-term multi-currency facilities up to US$2,500,000.00 were offered. This letter in effect increased an earlier facility granted in October 1996 by US$500,000.00. It was a term of the offer that the facilities would be secured *inter alia* by the joint and several continuing personal guarantees of the 2nd and the 3rd Defendants. The other material terms were as follows:

> (1) the Plaintiffs shall be entitled to charge interest and commission on the facilities at such rates as particularized in the letter of offer, and in particular the interest chargeable on the overdraft facility shall be the rate of 2.5% above the Plaintiffs' cost of funds,
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> (2) all legal and out of pocket expenses incurred by the Plaintiffs in connection with the enforcement of their rights under the letter of offer and under any security document shall be payable by the Borrower (i.e. the 1st Defendants), and
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> (3) save as amended, revised or superseded by the letter of offer of 27 January 1997, the Plaintiffs' earlier letters to the 1st Defendants for credit facilities shall continue to apply.

4. In their claim against the sureties, the Plaintiffs relied on a Deed of Guarantee dated 16 October 1996

signed by the 2nd and 3rd Defendants which provided that,

> 'In consideration of the [the Plaintiffs] .. extending or continuing to extend loans, advances, accommodation, credit or other financial facilities of any kind whatever from time to time .. to [the 1st Defendant] … we [the 2nd and 3rd Defendants] HEREBY JOINTLY AND SEVERALLY GUARANTEE on demand in writing being made to us to pay and satisfy to the [Plaintiffs] all sums of money which are now or shall at any time be owing to the [Plaintiffs] anywhere on any account whatsoever ..

and further,

> 'This guarantee shall be binding as a continuing guarantee on us, our executors, administrators and legal representatives until the expiration of three(3) calendar months after the Bank shall have received notice in writing given by us … to discontinue or determine this guarantee…. '

5. In April 1999, the Plaintiffs advised the 1st Defendants that the sums of Japanese Yen 314,399,788 together with interest of Japanese Yen 157,200, and US$822.18 together with interest of US$1.03 were due and owing. The 1st Defendants failed to make payment. As at 5 July 1999, the sum had increased to Japanese Yen 316,790,007, US$1,262.22 ('the principal sums') and interest of Japanese Yen 131,635 as well as US$1.37. These were the sums claimed in the Writ together with further interest which continued to accrue.

6. In their Defence, the 1st Defendants admitted owing the Plaintiffs the principal sums claimed but denied that the Plaintiffs were entitled to the interest portions. Judgment was entered on 16 September 1999 pursuant to Order 27 Rule 3 of the Rules of Court against the 1st Defendants for the principal sums. The 1st Defendants made some payments to account in August and October 1999 which were used by the Plaintiffs to set off against the interest accrued on both the Japanese Yen and US$ accounts. As at 1 November 1999, the Plaintiffs certified the amount due and owing by the 1st Defendants to be Japanese Yen 318,951,638 comprising the principal of Japanese Yen 318,925,061 and interest of Japanese Yen 26,577).

7. The Plaintiffs sought in their application for summary judgment the following:

> (a) against the 1st Defendant, the sum of Japanese Yen 2,161,631 less US$1,262.22 (equivalent to the amount owing as at 1 November 1999 less the judgment sum of Japanese Yen 316,790,007 and US$1,262.22),
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> (b) against the 2nd and 3rd Defendants, the sum of Japanese Yen 318,951,638,
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> (c) against all three defendants, further interest at the rate of 2.5% above the Plaintiff's cost of funds, and
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> (d) costs on an indemnity basis.

The Defences raised in the affidavits

8. Although this appeal is by the 3rd Defendant only, I will mention briefly the defences raised by the 2nd

Defendant as the 1st Defendants did not file any affidavit to oppose the application for summary judgment. The 2nd Defendant filed two affidavits, the first purportedly on behalf of himself and the 3rd Defendant and the second on his own behalf. After the 2nd Defendant's affidavit was filed, the 3rd Defendant instructed separate solicitors and sought leave to file her own affidavits to oppose the summary judgment application.

9. In essence, the 2nd Defendant contended that he should be entitled to defend the action on the basis that the 27 January 1997 letter of offer required a fresh guarantee to be executed by both the directors. The guarantee signed on 16 October 1996 was for the purpose of securing facilities under a letter of offer dated 3 October 1996 which was subsequently not utilized by the parties. The guarantee signed on 16 October 1996 was therefore not applicable to the facilities offered in the 27 January 1997 letter. These submissions were rejected by the learned Senior Assistant Registrar, and rightly so, as the guarantee was a continuing guarantee which would extend to all future loans and facilities.

10. The Plaintiffs had explained in their affidavit that the letters of offer dated 3 October 1996 and 27 January 1997 were not the first two letters of offer made to the First Defendants. The first such letter was in October 1989 and a continuing guarantee was executed by the 2nd and the 3rd Defendants that same month. The credit facilities were subsequently revised on numerous occasions without the need for a separate guarantee. The balance drawn on the existing credit facilities was carried forward to the new facilities upon acceptance of each letter of offer. Therefore, although no drawdown was made after the execution of the 1996 letter of offer, the facilities had been activated. The 2nd and the 3rd Defendants were not required to execute a fresh guarantee for each revised letter of offer because the 1989 and the 1996 guarantees were continuing ones. The only reason the 1996 guarantee was required was that new terms were inserted therein in response to jurisdictional issues and the effect of the Indonesian Civil Code. All other terms in the two guarantees remained the same.

11. The 3rd Defendant deposed to the following after leave was granted for her to file her affidavits:

> (1) She was estranged from her husband and had entered into a Deed of Separation in August 1996. She was also suffering from asthma and herpes. She had decided to relocate to the United States and was organizing her move there after returning from visiting friends and relatives on or about 27 September 1996.
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> (2) The 2nd Defendant who was then in Singapore requested her to sign the guarantee to the Plaintiffs for facilities up to US$2million. She refused as they had already entered into the Deed of Separation. The previous guarantee that she had signed was for facilities secured by a property owned by the 2nd Defendant.
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> (3) The 2nd Defendant then subjected her to harassment both in and out of the home and the office. She was also the victim of his abusive behaviour, his vulgarities and his threats of violence.
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> (4) She was fearful that the 2nd Defendant would create problems for her in regard to the removal of items in the matrimonial home to the United States, that he would renege on his agreement to maintain their children and that he would oppose her divorce petition.
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> (5) She therefore succumbed to his demand to sign the guarantee under pressure of these difficult circumstances.

(6) When she signed the guarantee in the premises of the 1st Defendants, there was no witness present. She was not advised on the terms of the guarantee nor the circumstances requiring it.

(7) She also queried the propriety of the transactions in the account and the utilization of the facilities which were not for the benefit of the 1st Defendants but credited to the 2nd Defendant's personal account.

12. The 2nd Defendant denied the 3rd Defendant's allegations of undue influence or duress on his part. On the use of the funds, he further stated that he had kept the 3rd Defendant generally informed of the affairs of the company. He also pointed out that the 3rd Defendant had been involved in the affairs of the company as she had contacted the Plaintiffs to discuss the indebtedness of the company and to ask for time for the 2nd Defendant to settle the outstanding amounts.

13. In response to the 3rd Defendant's allegations, the Plaintiffs filed the affidavit of one Diana Tee Gek Cher who had attended at the premises of the 1st Defendants to witness the signatures of their directors although she said she had forgotten to append her own signature on the document as witness. I should add here that the guarantee document exhibited to the Plaintiffs' 1st affidavit did not show any witness' signature. The Plaintiffs also filed a further affidavit exhibiting searches at the Registry of Companies showing that the 3rd Defendant herself had experience in business being a director and major shareholder of another company, Noahtu Trading Pte Ltd since 1992.

The issues

14. The main contention of the 3rd Defendant was that she had been subject to the undue influence of the 2nd Defendant, her then husband, in signing the guarantee. Relying on the authority of ***Barclays Bank plc v O'Brien*** *[1993] 4 All E R 417*, her counsel contended that the Plaintiffs as bankers ought to have known of this undue influence and taken steps to advise her that she should seek independent legal advice. The other argument raised by the 3rd Defendant was that the irregularities in the account called for further inquiry and hence, summary judgment was not appropriate.

15. The issues I had to consider in this appeal were therefore:

(1) In signing the guarantee, was the 3rd Defendant subject to the undue influence of the 2nd Defendant?

(2) Should the Plaintiffs as bankers be fixed with constructive notice of the alleged undue influence on the 3rd Defendant?

(3) Did the Plaintiffs' failure to inform the 3rd Defendant that she should take independent legal advice prior to signing the guarantee entitle her to set aside the guarantee?

(4) Was the absence of the signature of the witness on the Deed of Guarantee sufficient to raise a defence to the Plaintiffs' claim?

(5) Were there irregularities in the use of the funds such that further inquiry was warranted?

16. As this is an appeal from a summary judgment application, the burden is on the 3rd Defendant to satisfy the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason be a trial.

The law on undue influence

17. The facts in ***Barclay's Bank plc v O'Brien*** as summarized in the headnotes of the report are as follows:

> "The husband, a shareholder in a manufacturing company, which had a substantial unsecured overdraft, arranged with the manager of the company's bank that the company would be allowed an overdraft facility of 135,000, reducing to 120,000 after 3 weeks, and that as security the husband would guarantee the company's indebtedness, his liability in turn being secured by a second charge over the matrimonial home jointly owned by the husband and the wife. The bank prepared the necessary security documents, which included the guarantee to be signed by the husband and a legal charge over the house to be signed by both the husband and the wife. However, although the manager gave instructions that the husband and wife should be made fully aware of the nature and effect of the documents they were signing and should take independent legal advice if they were in any doubt, those instructions were not followed by the bank staff responsible for arranging for the husband and wife to sign the documents. The husband signed the documents without reading them and the next day took his wife to the bank, where she also signed the documents without reading them. The company's indebtedness increased beyond the agreed limit and the bank brought possession proceedings against the husband and the wife to enforce payment under the guarantee.
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> By her defence, the wife contended (i) that her husband had put undue pressure on her to sign and that she had succumbed to that pressure, and (ii) that her husband had misrepresented to her the effect of the legal charge and that although she knew she was signing a mortgage of the matrimonial home she believed that the security was limited to 60,000 and would only last three weeks.
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> The judge gave judgment for the bank, holding that the husband's liability under the guarantee had been established, that the husband had not unduly influenced the wife and that although he had falsely represented to her the effect of the charge the bank was not responsible for the husband's misrepresentation.
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> The wife appealed to the Court of Appeal, which held that married women who provided security for their husband's debts were to be treated as a specially protected class of sureties, that, if in such a situation the relationship between the debtor and the surety and the consequent likelihood of influence and reliance was known to the creditor, the creditor was under a duty to take reasonable steps to try and ensure that the surety entered into the transaction with an adequate understanding of the nature and effect of the transaction and the

surety's consent to the transaction was true and informed consent, and that the creditor would not be permitted to enforce the security if, by leaving it to the debtor to deal with the surety or otherwise, he failed to carry out that duty even though he might have had no knowledge of and could not have been responsible for the vitiating feature of the transaction."

18. The House of Lords dismissed the bank's appeal but rejected the reasoning of the Court of Appeal that wives were to be accorded special rights in relation to surety transactions. Lord Browne-Wilkinson (with whom the other Law Lords agreed) in his judgment at p 428 to 429 of the report started by saying that he could find no basis in principle for affording special protection to a limited class in relation to one type of transaction only. His Lordship went on to analyze as follows :

"In my judgment, if the doctrine of notice is properly applied, there is no need for the introduction of a special equity in these types of cases. A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (eg against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity. Although there may be cases where, without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence. The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction.

The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it. Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety.

...

Therefore, in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

It follows that, unless the creditor who is put on inquiry takes reasonable steps

to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights.

What, then are the reasonable steps which the creditor should take to ensure that it does not have constructive notice of the wife's rights, if any? Normally the reasonable steps necessary to avoid being fixed with constructive notice consist of making inquiry of the person who may have the earlier right (ie the wife) to see whether such right is asserted. It is plainly impossible to require of banks and other financial institutions that they should inquire of one spouse whether he or she has been unduly influenced or misled by the other. But in my judgment the creditor, in order to avoid being fixed with constructive notice, can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to take independent advice. .. in my judgment a creditor will have satisfied these requirements if it insists that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice. If these steps are taken in my judgment the creditor will have taken such reasonable steps as are necessary to preclude a subsequent claim that it had constructive notice of the wife's rights."

19. On the facts, the House of Lords held that the bank knew the parties were husband and wife and should therefore have been put on inquiry as to the circumstances in which the wife had agreed to stand as surety for the debt of her husband. The failure by the bank to warn the wife when she signed the security of the risk that she and the matrimonial home were potentially liable for the debts of the company or to recommend that she take legal advice fixed the bank with constructive notice of the wrongful misrepresentation made by the husband to her and she was therefore entitled as against the bank to set aside the legal charge on the matrimonial home. I should add here that Lord Browne-Wilkinson, in summarizing his views (at page 431), extended the above stated principles beyond the husband-wife relationship to include cohabitees.

20. It would appear that their Lordships, both in the Court of Appeal and the House of Lords, were constrained to treat the wife with more "tenderness" on the justification that (as shown at p 422 of the report) "*although the concept of the ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal. In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions."*

21. The policy considerations that might have influenced the learned Law Lords would obviously not apply in every case and certainly not to the facts of the case before me, as will appear later in my judgment. It is important to take heed of the cautionary note sounded by the House of Lords to "keep a sense of balance in approaching these cases" and not allow a law designed to protect the vulnerable to render the matrimonial home unacceptable as security to financial institutions and, I would add, render the female partner in a relationship immune to legal liability. With the greatest of respect, I am not sure the courts here should impose a burden on financial institutions to ensure that in every husband-wife or cohabitee situation, where the transaction appears to be of no real financial benefit to the wife/cohabitee, the financial institution must arrange a meeting separately with the wife to warn her of her potential liability and to advise her to take independent legal advice. It may be taking rather too narrow a view of the marital relationship to look only at the apparent financial benefit to a spouse from a commercial transaction entered into by the other. If the law should presume undue influence arising in such relationships (and the mother – son relationship as in *Lim Lie*

Hoa v Ong Jane Rebecca [1997] 2 SLR 320), should it not likewise presume financial benefit accruing to a wife from the commercial (and therefore bread-earning) activities of the husband ? If so, then a wife who stands as surety for her husband in a loan transaction should be presumed to derive at least an indirect interest in the funds being made available to the husband.

22. *Barclays Bank v O'Brien* has been followed recently in Singapore in the case of *Bank of India v Sujanani Thakur Rochiram & Others (High Court Suit No. 600005/1998 - unreported).* In that case, Lee Seiu Kin JC found on the facts that a son had been subject to the undue influence of his father when he executed guarantees and mortgages required by the bank to secure the facilities granted for the use of the partnership business of his parents. From evidence adduced at the trial, the Court came to the conclusion that the son had been completely overwhelmed and dominated by the father and the bank had actual notice of the father's undue influence on the son.

23. The *Bank of India* decision is unique in its facts and I do not see how it assists the 3rd Defendant in the instant case. There is no evidence in the affidavits of the 3rd Defendant to show that, being the wife, she was so completely subjugated by the will of the husband that she could do nothing but obey him, and that the Plaintiffs knew or ought to have known of these circumstances.

No undue influence; Lack of witness' signature

24. The facts of this case are clearly distinguishable from *Barclays Bank v O'Brien* in any event. Unlike Mrs O'Brien, the 3rd Defendant was a shareholder as well as director of the 1st Defendants. Mrs O'Brien was misled by her husband on the effect of the document she signed to secure his debt. This is certainly not the case with the 3rd Defendant. I note that in October 1996 when she was called upon to sign the Deed of Guarantee, she was *de facto* free of the husband, having entered into the Deed of Separation just two months back in August 1996 which declares, among other things, that she and her then husband have agreed "to live and will live separate and apart from each other effective from 27th June 1996". Further, the 3rd Defendant was required to guarantee the debts of a company in which she had an interest and continues to do so up to the hearing of this appeal although her interest and involvement in the business were significantly less than the husband's. It cannot therefore be said that she secured no financial benefit from the facilities offered to the 1st Defendants for which she stood surety. In fact, as the Deed of Separation contemplates the transfer of her shareholding to her youngest daughter upon her attainment of the age of majority and of whom the 3rd Defendant has custody, I would imagine that, as the mother, she would seek to ensure that the shareholding to be given to her child would not be worthless.

25. The 3rd Defendant is a businesswoman, being the director and majority shareholder of another company, Noahtu Trading Pte Ltd. and must be aware of the obligations she undertook as surety. As disclosed in the Deed of Separation, she also held the entire legal and beneficial interest in another company called Tamtu Investment Pte Ltd. She was therefore no stranger to the world of bankers and financial obligations. She had in fact participated in the management of the 1st Defendants' business and had communicated with the Plaintiffs herself in her capacity as director. It was also revealed that after the facilities under the 27 January 1997 offer had been utilized, she even had the business acumen to instruct the Plaintiffs to convert the outstanding debt from US$ to Japanese Yen which unfortunately for the Defendants caused the debt to increase due to the appreciation of the Yen *vis-a vis* the US Dollar.

26. It was not the wife's case that she did not sign the guarantee or even that she did not know what she was signing. She was well aware of the obligations that she undertook. Hence, the fact that the guarantee document does not bear the signature of a witness is completely immaterial to the case.

27. The affidavit of the intended witness, Diana Tee, is however significant as it shows that at the time the guarantee was signed by the wife there were no circumstances out of the ordinary that should have put the Plaintiffs on notice of the alleged undue influence operating on the 3rd Defendant. Neither did the 3rd Defendant allege that anyone else other than herself knew what pressures she had been facing.

28. In my opinion, no undue influence has been shown by the 3rd Defendant and even if the 2nd Defendant had attempted to exert such influence on her, it could have had no effect on her free will whether to sign or not to sign the Guarantee.

Irregularities in the account

29. Counsel for the 3rd Defendant submitted that the irregularities in the account would afford the wife a partial defence. I do not see how this allegation, even if true, can affect the wife's liability under the guarantee. The Plaintiffs, as bankers, surely cannot be expected to police the use of the funds by their customer and to ensure that the funds are properly applied to the customer's business operations. This would be an unduly onerous duty to impose on any financial institution. If there were abuses of the funds, that would be a matter entirely between the 2nd Defendant and the company and its shareholders.

Conclusion

30. Judgment was entered against the 1st and 2nd Defendants as they clearly had no defence. The 1st Defendants had practically conceded judgment. The complaints made by the 3rd Defendant, both on undue influence and irregularities in the account, may perhaps found a claim against the 2nd Defendant as co-surety but they cannot stand as defences to the Plaintiffs' claim on the Deed of Guarantee. The wording of the Guarantee is in clear and unambiguous terms - it is binding as a continuing guarantee covering all monies due to the Plaintiffs by the 1st Defendants with no limit on the liability of the guarantors to any fixed duration or to quantum. Accordingly, I dismissed the 3rd Defendant's appeal with costs of the appeal fixed at $4,500.00.

TAY YONG KWANG

JUDICIAL COMMISSIONER