

CACV000178/2000

CACV 178/2000

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF APPEAL

CIVIL APPEAL NO. 178 OF 2000

(ON APPEAL FROM HCMP 3050 OF 1998)

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BETWEEN

THE CHINA STATE BANK LIMITED

Plaintiff

AND

FUNG CHIN KAN and LEE YUEN WAH

1st Defendant

HOLDGOOD HOLDINGS LIMITED

2nd Defendant

LAU LEUNG KONG and LAU CHENG SIU

3rd Defendant

FONG

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Coram: Hon Rogers VP, Keith JA and Le Pichon JA in Court

Date of Hearing: 21 June 2001

Date of Handing Down of Judgment: 4 July 2001

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J U D G M E N T

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**Hon Rogers VP:**

1. This is an appeal from a judgment of Acting Master H C Wong. Judgment was given for the plaintiff against the 1st defendant in the sum of \$16,211,786.34 with interest at the rate of \$5,648.91 per day from 31 July 1998 to the date of judgment and thereafter at the judgment rate. The 1st defendant was also ordered to deliver up vacant possession of Flat D on the 11th floor of Block A at Greenland Garden, 67 Lyttelton Road (the "Greenland Garden flat").

2. This action had been commenced by originating summons on 2 July 1998. The relief sought in the summons was payment of all monies due to the plaintiff from the 1st, 2nd and 3rd defendants under four legal charges and delivery up of four properties. Only the first charge and the Greenland Garden flat concerns the 1st defendant and only the 1st defendant is concerned in this appeal. On 17 July 1999 the registrar ordered that the hearing of the originating summons be adjourned to a day to be fixed to be heard before a master in open court for trial on the issue as to whether there had been misrepresentation inducing the execution of the legal charge against the 1st defendant. On 15 October 1999, further directions were given by a master. It was ordered that there be an additional issue as to whether there had been undue influence on the second named 1st defendant inducing the execution of the legal charge by the second named 1st defendant.

3. It can be mentioned that the advisers of the 1st defendant have both orally before the court and even on affidavit by the 1st defendant indicated that it would be more suitable for the proceedings to be conducted as if commenced by writ. Clearly in circumstances where issues of misrepresentation and undue influence have to be decided that would almost always be the case. Despite, what appears to have been repeated requests on behalf of the 1st defendant this sensible suggestion went unheeded. Some of the difficulties in this case, no doubt, stem from the fact that the proceedings were continued on the basis of the originating summons procedure. Some of the other difficulties may well stem from the fact that the hearings in this matter were scattered in time. There were two hearing days in December 1999, two hearing days at the end of February 2000 and a further day's hearing towards the end of March of that year. It cannot assist the appreciation of the evidence nor of the issues in a case, if those hearing cases at first instance are compelled to suffer long adjournments in the course of the hearing.

*The background facts*

4. There are two persons named as the 1st defendant. For convenience they will be referred to as Mr Fung and Madam Lee. They are husband and wife. Mr Fung is a decorator. He is not highly educated although he did attend secondary school for a period.
5. Mr Fung was acquainted with those who operated a company by the name of System Management Consultancy Limited ("SMC"). The shares in SMC were held by a Mr Paul Lau and a Mr Cheng Sze Ming. Mr Lau was a director of SMC as was the wife of another person who features in the case, a Mr Simon Ngan. In February 1996 Mr Fung and Madam Lee had charged their flat at Flat D, 11th floor, Block A, Greenland Garden to the Wing Hang Bank to the amount of \$4 million in respect of general banking facilities for SMC. It should be noted that Mr Fung had no interest whether financially or otherwise in SMC.
6. Sometime in early April 1997 Mr Ngan asked Mr Fung to have the Greenland Garden flat recharged to the plaintiff for a sum of \$3.3 million to finance the business of SMC. In return Mr Fung was to be given certain benefits. In particular, the previous charge to the Wing Hang Bank would be repaid.
7. It appears that the first event which took place in relation to the charge, which is the subject of the present proceedings, was a visit to the offices of Lai, Chan, Lo and partners, a firm of solicitors. The person who was seen at that firm was Mr Lo Hang Fong, also apparently known as Hank Lo. Mr Lo was a partner of the firm. His evidence was that he was in charge of commercial matters. As part of that, shortly prior to April 1997 his firm had started to be instructed, from time to time, on behalf of the plaintiff.
8. The Greenland Garden flat had been mortgaged to Wing Hang Bank for \$4 million. This was the amount which Mr Fung estimated the flat was worth. Mr Fung said in evidence that he agreed to a transfer of the mortgage on two conditions first that it would be a smaller loan than the previous amount borrowed against his flat and the second is that there was to be a commercial contract protecting Mr Fung and his wife.
9. Accordingly to Mr Fung's evidence Mr Lau arranged for Mr Fung to go to Mr Lo's office to meet Mr Lo on 8 April 1997. It would appear that Mr Lau, Mr Ngan and Mr Fung did go to Mr Lo's office on that day. It should be said at once that it would appear that by that time the plaintiff had not yet given instructions to Mr Lo or his firm. A copy of the plaintiff's instructions to the firm was in evidence. That, indeed, has the date chop of Mr Lo's firm. The instructions are dated 9 April 1997. The date

chop appears to be a double digit date in April. It is, in my view, impossible to tell the date on the date chop save that it seems to be 10 April or later.

10. Apart from the fact that Mr Lo recollected seeing Mr Fung at his office on one occasion before the relevant charge was executed, Mr Lo was unable to say when Mr Fung visited his office. Furthermore, the records in the file and otherwise of the solicitors seems to be of no assistance in this regard. One thing is clear, however, that on 9 April 1997 Mr Lo sent Mr Fung a fax. The fax is signed simply "Hank". Mr Lo acknowledged that to be his signature. Apart from the cover sheet the fax consisted of four documents. The first was a copy of a draft declaration of trust to be executed by Mr Ngan in respect of shares in Grandtel International Limited ("GIL"), second was a blank transfer form in respect of GIL shares for Mr Ngan to sign, third were bought and sold notes for GIL shares. Finally, there was a letter of undertaking from SMC. The terms of that undertaking were as follows:

"In consideration of your execution of an all monies legal charge in favour of The China State Bank, Limited in respect of General Banking Facilities (for the time being agreed at HK\$3,500,000.00) granted to our company, we hereby undertake that we shall be responsible for the payment of all interest and other expenses arising out of and in connection with the said legal charge and for the repayment of the said general banking facilities and the discharge of the said legal charge on or before 30 September 1997."

The draft undertaking was addressed to Mr Fung and Madam Lee and referred to the Greenland Garden flat.

11. This document only emerged as a result of Mr Fung being asked whether he had had a solicitor advising him in April 1997. His answer was that he had not. He said that Mr Lo had drafted a commercial agreement for him. He said that they had had a meeting and on the following day Mr Lo had faxed him this "commercial agreement". Mr Lo had by that time completed his evidence. After the documents were produced the plaintiff was given an opportunity of filing further evidence in respect of them. Mr Lo made an affidavit. His affidavit was to the effect that he had no memory of drafting the four documents which formed part of the fax. He also said that the file in relation to the charge in respect of the Greenland Garden flat did not contain any reference to it. His affidavit concluded with a surmise on his part that he might have had a conversation with Mr Ngan or Mr Lau on or about 9 April and that pursuant to those conversations the fax had been prepared. He said that according to the file which related to the legal charge "It would appear to be unlikely that prior to the

preparation of the fax, I had any discussion or meeting with any of the 1st defendant." Given the fact that Mr Lo can remember nothing of the fax and given the fact that he did not dispute its authenticity, as indeed it would have been difficult for him to do, Mr Lo's conjecture would seem to have its difficulties. There was no opportunity to cross-examine Mr Lo upon this affidavit. During the course of his evidence Mr Lo was at pains to emphasise the importance of the commercial work with which he was used to dealing. It would be surprising if a solicitor would address a person whom he had never met and never discussed the matter with in the terms of the fax. The fax simply says "Dear Mr Fung, we enclose herewith the following documents for your review ... please let us have your approval of the same." More surprisingly in respect of a solicitor addressing a person unknown to him, the fax concluded "with best regards Hank."

12. Whatever else is to be derived from that fax, it is clear that it was not drafted on the instructions of or on behalf of the plaintiff. It may well have been drafted on the instructions of Mr Ngan or Mr Lau or both of them. It is also clear that the letter of undertaking was a letter prepared to protect Mr Fung's interest. It is also clear that Mr Lo was aware at the time that there was to be a limit to the money charged in favour of the plaintiff. There is no suggestion in the fax that Mr Fung should take the undertaking to a solicitor or consult another firm upon it.

13. Mr Fung said in evidence that on 21 April 1997 he received by fax a copy of the instructions which the plaintiff sent to Messrs Lai, Chan, Lo and partners. Mr Fung said that he received it from SMC who had requested it from the plaintiff. The curious feature of the copy of the instructions which is contained in the court bundles is that it does indeed have a fax header at the top which indicates that it is the second page of a two page fax from the plaintiff to SMC sent at 15:25 on 21 April 1997. There is a further header indicating that the fax was sent on from SMC to another fax number at 15:51 on the same day. Again it appears to be the second page of that fax. The peculiarity of this fax is that it also has the received chop of the solicitors, Lai, Chan, Lo and partners.

14. Comment has already been made about the date: The plaintiff's instructions were addressed to Mr Hank H.F. Lo. The instructions were to prepare a first legal charge. The property was to be the Greenland Garden flat and that the chargor was to be Mr Fung and Madam Lee. The principal party was named as SMC. There then followed three different categories of items. The first was type of charge, the second was headed remarks and the third headed title deeds. Item 3 under type of charge read:

"All monies in respect of General Banking Facilities (including facilities granted against trust receipts) (for the time being agreed at HK\$3,300,000.00) together with interest at 14.25% per annum (subject to fluctuation) with monthly rests. Repayable on demand."

In the box against item 3 was a cross. Remarks item 14 read:

"We inform you that the caption facilities also guaranteed by Mr Lau Ka Hing Paul and Mr Ngan Man Wai under a letter of guarantee for HK\$16,500,000.00 which will be delivered to them for execution by us later."

15. It will be necessary to comment upon the terms of this instruction letter later. However, at present it can be observed that the instruction was to prepare a charge and not a guarantee. There was a limit of HK\$3,300,000.00 expressed to be an agreed limit. In contrast it was said that there were guarantees by Mr Lau and Mr Ngan for the amount of \$16,500,000.00.

*The guarantee and legal charge*

16. On 14 May 1997 Mr Fung and Madam Lee signed the document which is the subject of the present proceedings. It is headed "This legal charge". Mr Fung and Madam Lee are named as the chargor, SMC is named as the principal and the plaintiff is named as the lender. The recitals referred first of all to the chargor as being the beneficial owner and in possession of the Greenland Garden flat. Recital (2) states:

"The Principal has through the Chargor requested the Lender to provide general banking facilities to the Principal and the Lender has agreed to provide the same to such extent and upon and subject to such terms and conditions as shall from time to time be mutually agreed to be stipulated by the Lender upon the Principal and the Chargor entering into the covenants and obligations hereinafter contained and upon the Chargor of furnishing security for the same and for all moneys payable or which may at any time or from time to time become payable by the Principal to the Lender or which may be or become payable ..."

17. Whereas clause 2 of the document reflects the requirement to provide security and contains the clause whereby Mr Fung and Madam Lee charged the Greenland Garden flat as security for repayment of the facility, clause 1 is very different. That provides that:

"... the Chargor hereby jointly and severally covenant to pay on demand to the lender

(a) all present and future indebtedness of the Principal of the Lender according to the Books of the Lender on any current or other account together with all bank charges thereon; and

(b) all costs charges in expenses however incurred by the Lender or by any receiver or any delegate appointed by the Lender in relation to this Legal Charge on a full indemnity basis; and

(c) all other liabilities of the Principal to the Lender according to the Books of the Lender whether present future actual or contingent or as principal or guarantor and whether due alone or with any other person,

and interest on all of the foregoing in accordance with the provisions of Clauses 3 and 7 hereof."

18. It can be seen at once that the document which Mr Fung and Madam Lee signed was far from being a simple charge on their property. It was a guarantee in respect of all sums which SMC might owe the plaintiff.

19. Approximately a year later on 26 May 1998 Madam Lee called unannounced at Mr Lo's office and asked to speak to him. It would appear that she had with her, as the acting master accepted, a copy of the instructions from the plaintiff to the solicitor and a copy of the legal charge and guarantee. She did not inform Mr Lo that she was recording the conversation. Mr Lo was called out of a meeting which he says was concerned with an initial public offering, which had required a considerable amount of concentration on his part. Madam Lee asked Mr Lo to confirm that the extent of the liability was only \$3,300,000.00. She was obviously showing Mr Lo documents. At one point the conversation went:

"Lo According to here, of course it was written three million three hundred thousand.

Lee I see, that is, the liability was just to the extent of three million three hundred thousand.

Lo But his/her friend, what's *for the time being agreed (spoken in English)*, what's *for the time being agreed (spoken in English)*.

Lee You should have one yourself."

20. From that it might well be deduced that Madam Lee was showing Mr Lo a copy of the bank instructions. The interview ended with Mr Lo saying that he needed further

time to consider the matter and would get in touch with Madam Lee later. He never did.

21. Eventually, these proceedings were commenced. As is obvious from the heading of the originating summons and indeed from the founding evidence, the proceeding did not relate only to the "guarantee - legal charge" which Mr Fung and Madam Lee had executed. There were two other similar documents which had been executed by Holdgood Holdings Limited and one further document in respect of which by Lau Leung Kong and Lau Cheng Siu Fung were the chargors. The copy exhibited appears to have been executed by Mr Lau Kar Ming, the same party who executed the Holdgood Holdings Limited documents. These were all in almost identical form to the "guarantee - legal charge" executed by Mr Fung and Madam Lee. They contained charges over three separate properties.

### *Misrepresentation*

#### *The amount*

22. Throughout the written and oral evidence both Mr Fung and Madam Lee were consistent that they had understood that their property had been charged to the extent of \$3.3 million only.

23. Although Mr Lo referred to Mr Fung coming to his office on a date prior to the signing of the "guarantee - legal charge", Mr Lo was unable to identify that date. As already mentioned, it emerged in the course of evidence that there were no records of Mr Fung's visit to Mr Lo's office. It is unnecessary to comment upon the failure of the solicitor to keep notes of such a meeting. The lack of care and attention is obvious. The necessary deduction from the evidence is that the only visit which Mr Fung made prior to the signing of the "guarantee - legal charge" was on 8 April 1997. At that date Mr Lo and his firm had not yet received any instructions from the plaintiff. As already deduced in paragraph 9 above, those instructions must have been received by Mr Lo and his firm no earlier than 10 April or thereafter.

24. It follows therefore that whatever document Mr Lo provided Mr Fung on 8 April he could not have provided a draft of the "guarantee - legal charge". Mr Lo and his firm had not yet received instructions to prepare it. All Mr Lo could have provided would have been a copy of the blank form of "guarantee - legal charge" with everything, from the names of the parties to all the details, left to be completed.



25. The only document which Mr Fung had from the plaintiff or the solicitors setting out the terms of what was to be agreed by them was the faxed copy of the plaintiff's instructions to the solicitors. This had been faxed by the plaintiff to SMC. They related solely to Mr Fung and Madam Lee's charge and were clearly for use by SMC and Mr Fung and Madam Lee.

26. In my view, the instructions from the plaintiff to Mr Lo and his firm were clear. They were that a first legal charge should be prepared over the Greenland Garden flat owned by Mr Fung and Madam Lee. The charge was to be in respect of all monies within the general banking facilities. Those facilities included facilities granted against trust receipts. For the time being the amount agreed was HK\$3,300,000.00. There were no instructions to prepare a guarantee of an unlimited amount in respect of SMC's liability to the plaintiff. Indeed, in contrast, in point 14 under remarks, it is stated that Mr Lau and Mr Ngan had entered guarantee(s) for HK\$16,500,000.00 which would be delivered to them for execution by them later.

27. In my view, any person reading that letter of instructions from the plaintiff to the solicitor would conclude two things, first that it was to be a charge on the property and second that it was to be limited to HK\$3,300,000.

28. There would have been no difficulty in making a minor addition to the standard form "guarantee - legal charge" either to delete clause 1 entirely or to limit the guarantee and the legal charge to HK\$3,300,000.00. Mr Lo said in evidence that it was not his experience as a solicitor, of all of 8 years standing at the time, except in a few cases, that there should be a limitation as to the extent of the liability. I find my sentiments in this regard to be akin to those of Millett L.J. (as he then was) in **Credit Lyonnais Bank Nederland NV v Burch** [1997] 1 All ER 144. It would have been a simple matter to include such a limit. It is no answer, in my view, as Mr Lo tried to say in evidence, that because the legal charge was in respect of all monies on general banking facilities there had to be an unlimited guarantee. Even, as has been seen, the guarantees which the bank was preparing for Mr Lau and Mr Ngan to sign were to be limited in amount.

29. Mr Tse who was Mr Lo's conveyancing clerk, also suggested that it was natural that there would be a guarantee from the chargor to cover the shortfall between what was realised on the sale of the property and the amount owing, in case of default by the lender. In a normal situation when a borrower is providing security for a loan or loans which he has borrowed, that, of course, would be the case. But where a third party is providing security for somebody else's liabilities there is no reason why that

should be the case. The most that he might do is warrant that the security which he provided was worth a specified amount.

30. It appears that the acting master accepted Mr Lo's evidence that the reference in the instruction letter to \$3,300,000 was inserted by the plaintiff to indicate to the solicitors the level of charges which they should make. Had I been the judge at first instance I would have had no hesitation in saying that that suggestion was fanciful, in view of the terms of the letter of instructions. For present purposes, I would content myself with saying that this is not a meaning that the normal reader would attach to this letter of instructions and clearly was not a meaning that Mr Fung and Madam Lee attached to that reference in the letter of instructions.

31. Hence on the facts of this case it is clear that the plaintiff informed Mr Fung through SMC that its instructions to the solicitor were to prepare a charge, not a guarantee, limited to \$3,300,000.00. In my view, a representation had been made by the plaintiff as to the effect of the documents which Mr Fung and Madam Lee would be signing. That representation had been made by faxing the instructions which related to Mr Fung and Madam Lee to SMC.

32. For the purposes of these proceedings Mr Lo, in the position as solicitor of the bank, was the bank's agent. He was made aware on 8 April of the arrangement between Mr Ngan and Mr Lau on the one side and Mr Fung and Madam Lee on the other. As a result of that he drafted the undertaking by SMC which was sent with the fax of 9 April. He therefore knew that it was Mr Fung's understanding that his liability would be limited to something in the same order, namely HK\$3.5 million.

33. It may well be that Mr Lo had forgotten the details of his meeting on 8 April by the time the "guarantee - legal charge" came to be signed. Clearly he had no written record of the meeting. His written evidence, filed after the fax of 9 April was produced, confirms that certainly by the time of the originating summons he had no recollection at all of those events.

34. In my view, it was the duty of the plaintiff either by itself or through its agents to make clear to Mr Fung and Madam Lee that the document that they were signing exposed them to liability which was far in excess of \$3.3 million and was not simply a charge on their flat but was a guarantee. The effect of a guarantee and a charge on the flat was, in the circumstances of this case, very different. The acting master accepted Mr Fung's evidence that the Greenland Garden flat was worth about \$4 million.

35. When considering the question of misrepresentation the acting master said amongst other things:

"... no fraudulent intent on the part of Lo and Tse had been shown nor any evidence adduced as to why they should be acting in collusion with the borrower, neither were any reasons offered as to why they should deceive Mr Fung and Madam Lee, it does not follow that Lo and Tse would deliberately make such a misrepresentation to either Fung or Madam Lee. I can find no basis from the evidence that Lo and Tse had negligently misrepresented to either Fung or Madam Lee that the limit of their liability under the legal charge was \$3.3 million."

36. It is clear that the acting master not only failed to consider the relevant matters which I have indicated above but also was applying a test wholly inappropriate to misrepresentation and appropriate to fraud. The acting master did not consider the effect of the receipt by Mr Fung and Madam Lee of the copy of the bank's instructions to the solicitors. She also failed to consider the implication of the indemnity which Mr Lo had drafted, namely the knowledge which would Mr Lo would have had as to Mr Fung's understanding.

*Charge and not guarantee*

37. Very similar considerations apply in respect of the fact that Mr Fung and Madam Lee signed a guarantee as well as a charge on their Greenland Garden flat. Their Greenland Garden flat was worth approximately \$4 million. If they had simply signed a charge without a guarantee their liability would have been limited to the value of that property. That is what would have been understood from the letter of instructions.

38. Indeed one might go further. The heading of the proceedings in the court below related to the properties and the legal charges in respect thereof. The affidavits of Mr Lo and the affirmations of Mr Tse referred only to legal charges and mortgages. Nowhere in their affidavits do they suggest that the documents were guarantees.

39. Both Mr Lo in his affidavit and Mr Tse in his affirmation speak in terms of explaining to Mr Fung and Madam Lee that they were executing a legal charge which was mortgaging their property. Paragraph 7 of Mr Lo's first affidavit reads:

"Both of myself and Mr. Tse Sai Kwong, my staff member of Messrs. Lai, Chan, Lo & Partners on separate occasions, have clearly explained to the 1st Defendant that the Legal Charge of the 1st Property is an all monies legal charge, pursuant to which the 1st Defendant mortgaged the 1st Property to the Plaintiff to secure all monies

advanced to SMC Limited by the Plaintiff and all other moneys together with all interest thereon which may be due to the Plaintiff from SMC Limited and/or the 1st Defendant."

40. Mr Tse's affirmation contains an almost identical paragraph. If that was the explanation which the solicitors gave Mr Fung and Madam Lee it was not merely inadequate but it was misleading. Any person told that he was charging his property worth \$4 million with somebody else's debt would not understand that he was committing himself to a guarantee of an open ended extent.

41. Despite the fact that the court maintained the originating summons procedure and hence the affidavits should have stood as evidence-in-chief, Mr Lo gave extensive evidence-in-chief orally. There had been no witness statement covering what he would say. In chief, however, when asked as to the manner in which he explained to Mr Fung and Madam Lee as to the meaning of the document which they were signed, he said:

"I explained to the two named defendants that this legal charge is all monies legal charge and that it is a three parties' legal charge, which means the borrower is different from the chargor; the borrower is in the name of the company called System Management Consultancy Limited. So basically this all monies legal charge will cover all monies borrowed by System Management Consultancy Limited from the China State Bank and their liability will be up to all the outstanding amount still from System Management to the China State Bank."

42. Clearly anybody hearing that explanation would consider that their liability was limited to the legal charge on the property.

43. It is clear on reading Mr Lo's evidence that he had little or no recollection of what happened when Mr Fung and Madam Lee signed the "guarantee - legal charge". When asked to explain what he told Mr Fung and Madam Lee he did so on pages 18 and 19 of the transcript, in terms of what he would "usually" do. He used the word three times in that one paragraph. It was only at the very end of that paragraph that Mr Lo referred to the document being what in effect was a guarantee. In my view, there was no evidence upon which the court should have concluded that Mr Lo had explained that the "guarantee - legal charge" constituted a guarantee and not simply a charge on the Greenland Garden property.

44. As for the oral evidence given by Mr Tse that was no better. Indeed it should be observed here that Mr Tse suggested in evidence that he had translated a complicated

33-page document in 10 or so minutes. When his powers of interpretation were sought to be questioned by asking him to demonstrate them in court, the acting master refused to allow counsel to do so. In my view, given the importance that was attached to the explanation of the documents by Mr Tse that was a highly material matter for the court to consider. It emerged in cross-examination that Mr Tse was ignorant of at least one clause in the document that was to the chargor's benefit.

45. At the end of his explanation of what he told Mr Fung at the time that Mr Fung came to sign the "guarantee - legal charge" Mr Tse said:

"And there are several points to take note that unless you had the consent of the China State Bank the property cannot be leased to any other party. Also, the bank has the right to demand the full payment of the loan any time, and if the value of the property should fall below the mortgage loan, it has the right to demand for other pledges."

46. Even that explanation, in my view, would only be confusing to a person who considered that he was mortgaging his property to the extent of \$3.3 million.

47. Even taken at its highest, these explanations given when Mr Fung signed the document in the presence of Mr Lau Ka Hing who signed similar documents on behalf of Holdgood Holdings Limited are, in my view, insufficient. It was a highly inappropriate occasion on which to give such important legal advice. This is quite apart from the fact that it was Mr Fung's evidence that no such legal advice was ever tendered to him.

48. It has to be said that, in reaching her conclusion, the acting master failed to consider the significance of the addition of the guarantee to what was said in the plaintiff's instructions to be a legal charge. Throughout the judgment except in one place the judge refers to the document as being a legal charge.

49. There was a further issue as to whether Mr Fung and Madam Lee had been advised to take separate legal advice. For the reasons which I have explained it is unlikely that on 8 April 1997 Mr Fung would have been so advised. The fax of the following day is, in my view, indicative that this point had not arisen. Since that was the only occasion when Mr Fung attended the solicitor's office prior to the signing of the "guarantee - legal charge", Mr Lo's evidence that he thought that Mr Fung had obtained separate legal advice is, at best, speculation.

50. Two further matters, however, are significant in this respect. In the first place Mr Lo and Mr Tse admitted in evidence that it was a practice of their firm to ask persons

signing legal documents such as mortgages and guarantees to confirm in writing that they had been advised to obtain separate legal advice. There were no such forms in the solicitor's file and the conclusion to be derived from that is, again, obvious.

51. Perhaps, even more significantly, after Mr Fung had filed evidence saying that he had not been advised to take separate legal advice, Mr Lo swore in his affidavit in paragraph 6 as follows:

"To the best of my knowledge and information, I recall that the 1st Defendant had indeed taken independent legal advice and had in fact instructed their lawyer to prepare separate indemnity document(s) in their favour executed by SMC Limited and/or its director(s) in respect of any loss or damages to be sustained by the 1st Defendant as a result of their execution of the Legal Charge of the 1st Property."

52. If that paragraph were to have any relevance to the case it would relate to Mr Lo's knowledge at the time prior to the signing of the "guarantee - legal charge". Mr Lo admitted in evidence that he had no knowledge of the indemnity document until SMC was already in default and these proceedings were imminent. He had not seen the indemnity agreement until it was exhibited in the affidavit. In those circumstances one can only conclude that Mr Lo's evidence has to be scrutinised with a great deal of care.

*Madam Lee*

53. At the commencement of these proceedings Mr Fung and Madam Lee were represented by the same lawyer. It was only later that they had separate representation. Hence it was only later that Madam Lee's case of undue influence came into the case.

54. There is no dispute between the parties that the law as to undue influence has been set out in **Barclays Bank Plc. v. O'Brien & another** [1994] 1 AC 180. At pages 189 to 190 Lord Browne-Wilkinson considered the circumstances in which there could be held to be undue influence. He referred to the classification that had been made in the case of **Bank of Credit and Commerce International S.A. v Aboudy** [1990] 1 QB 923. For present purposes it is sufficient to refer to the fact that there may be undue influence where there is a relationship of trust and confidence between the complainant and the wrongdoer of such nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter the impugned transaction.

55. Lord Browne-Wilkinson then went on to say that even in cases where the presumption would not be raised as a matter of law:

"... the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

56. In her first affirmation which was filed after she was separately represented Madam Lee said :

"6. He again told me that our liability would be limited to \$3,300,000.00 but I argued that as he (my husband) told me earlier that Mr. Ngan would soon return the property to us, Mr. Ngan should not make such a request to re-mortgage the property which would mean that the property would not be released for another period of time and we should not entertain such request.

7. However, my husband said that the dealing would be beneficial to him and that I was not to raise any question and told me to sign as requested.

8. I argued that as I did have a share in the property, I was entitled to raise question.

9. My husband then further behaved violently by hitting on the table with a remote control and looked fierce and in such circumstances, I had no alternative but conceding to his request as I did not want any impairment to our marriage while on the other hand, I was assured by my husband that our liability would be limited to \$3,300,000.00".

57. Madam Lee amplified that evidence during the course of her oral evidence. Indeed, she was heavily questioned by the acting master as follows:

"COURT: You are saying you were influenced by your husband?

A. Yes, because I did not want to re-mortgage my property and I would like Ngan Man-wai to redeem the mortgage for us as soon as possible.

COURT: Why did you agree to sign when it's neither early redemption nor any payment of any part of the money originally mortgaged to Wing Hang?

A. I did not receive any payment.

COURT: Exactly. Why would you do it?

A. I don't really understand.

COURT: You didn't want your property to be mortgaged. This man, Ngan, is only your husband's friend. You received no benefit from this mortgage. Why would you agree?

A. Because on occasion my husband lost his temper. I did not want this to affect my marriage.

COURT: Did you not also lose your temper? Why didn't you insist that your husband should get rid of the mortgage as soon as possible? You can throw as much a tantrum as you wish, after all he is only your husband. You are not a very reserved lady, are you?

A. I'm worried that it may affect my marriage and my husband has the say on our financial resources.

COURT: Madam, are you an emotional person? Did you cry in front of your husband when he asked you to re-mortgage this?

A. Seeing that he's lost his temper and I am worried that it may affect my marriage, so in the end I consent to it, because I've never seen him acting like this.

COURT: Why was he in such a temper, did you try to find out?

A. It is because he said he agreed to it with other people and those other people have done a lot of things and there is a commercial agreement protecting his interests.

COURT: And he'd rather risk his marriage with you in order not to let his friends down?

A. It is because there is an agreement protecting his right and he asked me not to worry and the liability is smaller and our liability will be limited to 3.3 million. And on the day of the execution I asked Mr Lo if the liability would be 3.3 million, he said yes, otherwise I would not have signed. If I had to take up the responsibility, of course I would not sign, but it's like signing your own death warrant.

MR S LAM: Master, it seems that the witness is saying a sentence, personally liable instead of responsible - responsibility.



COURT: You have to produce another interpreter who will certify to give a different version."

58. I break there to observe that that was perhaps an unnecessary reaction of the acting master, when it is remembered that the initial discussion at the opening of the case was that all parties, including the court, were prepared to conduct the trial in Cantonese.

"COURT: Have you gone to the bank to find out before you signed this document?

A. No.

COURT: Have you talked to your husband's friends, Mr Lau and Mr Ngan?

A. No, I'm not familiar with them.

COURT: Had you seen the document that your husband said is already prepared at the promise of his friends?

A. No. I was only told by him.

COURT: Did you ask him for those documents and ask a lawyer to look over it to reserve your rights?

A. No, that did not occur to me.

COURT: Why not? You will still be liable for 3.3 million.

A. But on the day of the execution I did ask Mr Lo, he represented me. We went there to...

COURT: You understand that Mr Lo was representing you at the time, did you?

A. I was told by my husband.

COURT: Why did you agree to the 3.3 million anyway? 3.3 million is a lot of money.

A. It is because I don't want that to affect my marriage and I trusted my husband. He said there is an agreement to protect his interest and I believed him, and he said the property would be redeemed a little bit later.

COURT: You realised at this stage your property was only worth \$4 million.

A. Which period of time?

COURT: At the time when the mortgage with Wing Hang Bank was taken out.

A. Yes, I was told by my husband.

COURT: And you were prepared to guarantee the whole sum of \$4 million, the whole of the worth of the property.

A. Yes, because the first time when my husband told me, he said there was an agreement to protect his interest and Ngan Man-wai said if he was willing to do that he would be given some shares and he wanted to help his friends.

MR WANG: Master, I have no further questions for Madam Lee."

59. This evidence was not referred to by the acting master in her judgment. In my view, it establishes that Madam Lee did repose trust and confidence in her husband. What appears to have been a hostile cross-examination by the court did not shake the strength of Madam Lee's testimony. There is no reason to suppose that her husband told her otherwise than that the liability under the document that she signed would be limited to \$3.3 million and that the most that she could lose was the flat in which she lived.

60. There are a number of matters arising from the evidence which require comment. In the first place Mr Lo in his affidavit and Mr Tse in his affirmation made the following statement:

"The 1st Defendant Fung Chin Kan and Lee Yuen Wah have attended the offices of Messrs. Lai, Chan, Lo & Partners on more than one occasion and took away draft legal charge of the 1st Property on each time for the consideration of their lawyer. As a matter of good practice, we have also recommended them to take independent legal advice."

61. The implication from that statement would be that Mr Lo or at least Mr Tse had met Madam Lee on more than one occasion in their offices and had given her that advice. Again the accuracy of the evidence from the solicitor and his clerk falls far short of what would be expected. When Mr Lo gave evidence all he could say was that he had understood from Mr Tse that Madam Lee had telephoned the office and asked for a copy of the "legal charge" and one had been left at the reception which had been picked up. There was no documentary supporting evidence, whether it be a

chit book or otherwise, to show that any document had been collected. Neither was there any record in the solicitor's file showing that Madam Lee had been given a copy of the draft "guarantee - legal charge". Mr Lo's evidence was thus entirely based upon what he said Mr Tse had told him.

62. This had been explored to a sufficient extent in Mr Lo's evidence that it was clear that Mr Tse would be expected to give evidence confirming the fact that he had prepared a copy of the draft document for Madam Lee's collection. However, when Mr Tse gave evidence he was asked by the plaintiff's counsel as to whether he had made any other copies of the draft "guarantee - legal charge" and he denied doing so. Mr Tse never attempted to suggest that Madam Lee had telephoned him at any time prior to her coming to the solicitor's office late in the afternoon of 14 May 1997 to sign the "guarantee - legal charge". At the trial it was implicit from all the evidence that that was her first visit to the firm. The suggestion that Madam Lee was given a copy of the draft legal charge prior to her signing it therefore fell to the ground. That is even without her own evidence denying any such thing. Regrettably the acting master said that:

"Madam Lee was given a photocopy not only of the draft legal charge before-hand, she was also given a copy of the Plaintiff's instructions to Lo's firm, though those instructions were meant for PW1's firm only, it was given to her at her request."

63. The acting master appears to have overlooked the fact that the evidential basis for Madam Lee having received a copy of the draft document had failed. She also does not appear to have analysed the meaning of the plaintiff's instructions on a normal and fair reading.

64. Furthermore, in reaching her conclusion as to undue influence, the acting master referred to Madam Lee being registered as a partner in her husband's decoration business and for that reason appears to have considered that she entered into the transaction freely. It should also be pointed out that the acting master considered that it would have been unlikely that Madam Lee would have refused to "re-mortgage" the property to the plaintiff when it had been previously charged to the Wing Hang Bank. In so saying the acting master has clearly overlooked the significance of an unlimited guarantee as opposed to a legal charge.

65. Not only was there no evidence that Madam Lee did receive a copy of the draft "guarantee - legal charge" but there is clearly no evidence that at any time prior to signing the document, had she been given any advice to take legal advice separate from that of her husband, not to say separate from the plaintiff.

66. As explained by Lord Browne-Wilkinson in the **O'Brien** case a wife is given no special position as regards undue influence than any other party. Nevertheless, as explained at page 195, if a wife has been induced to stand as surety by her husband's undue influence or misrepresentation her right to have the transaction set aside will be enforceable against third parties if the third party's agent had actual or constructive notice of the facts which gave rise to her equity. Two matters were said to be relevant in considering whether a creditor was put on enquiry when a wife stood as surety for what was, in effect, her husband's transactions. The first was whether the transaction was on its face not to the financial of the advantage of the wife and, secondly, that there was a substantial risk that the husband had committed a legal or equitable wrong that entitled the wife to set aside the transaction.

67. As already explained, the acting master, in my view, wrongly attributed a financial advantage to the re-mortgaging of the property to the plaintiff when in fact it was a clear disadvantage. As to the legal and equitable wrong there was indeed the same misrepresentation which had been made to both Mr Fung and Madam Lee as has already been stated. At page 196G of the **O'Brien** case Lord Browne-Wilkinson said:

"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 advise her to take independent advice. As to past transactions, it will depend on the facts of each case whether the steps taken by the creditor satisfy this test. However for the future 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."

Nothing of the sort was done in the present case. Madam Lee went to the solicitor's office late in the afternoon of 14 May 1997. Her husband and the plaintiff's representative had signed the "guarantee - legal charge" before lunch that day. They had been accompanied by others involved, who no doubt signed their documents. The evidence of Mr Lo and Mr Tse does not even begin to be of the nature that could satisfy a court that Madam Lee was properly advised to seek independent advice. The only conclusion which can be drawn from the evidence is that Madam Lee was not advised as to the true nature of the document she was signing.

68. In my view, Madam Lee is clearly, independently of Mr Fung, entitled to have the transaction set aside.

69. It is unnecessary to dwell further on the events of 26 May 1998, when Madam Lee saw Mr Lo in his office. The acting master considered that this was a deliberate attempt to trap Mr Lo by Madam Lee who knew full well that she was personally liable. That was an inference drawn. It was clearly not a necessary inference. There are other inferences. It is not an inference which I would have drawn.

70. In my view, this appeal should be allowed, the judgment against the 1st defendant should be set aside and there should be an order for costs here and below in favour of the 1st defendant.

**Hon Keith JA:**

71. I agree with the judgment of Rogers Vice-President. There is nothing which I can usefully add.

**Hon Le Pichon JA:**

72. I agree.

(Anthony Rogers)

Vice-President

(Brian Keith)

Justice of Appeal

(Doreen Le Pichon)

Justice of Appeal

Representation:

Mr Justin K W Wang, instructed by Messrs Wat & Co., for the Plaintiff/Respondent

Fung Chin Kan, the 1st named 1st Defendant/Appellant, in person

Mr Simon H W Lam, instructed by Messrs Alvan Liu & Partners, for the 2nd named 1st Defendant/Appellant

