14, 1982

IN THE PRIVY COUNCIL No. 15 of 1931

ON APPEAL

FROM THE STAFF OF GOVERNMENT DIVISION
OF THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

BETWEEN:

EFFIE ASHWORTH Appellant

- and -

STANDARD CHARTERED BANK (ISLE OF MAN) LIMITED
(formerly JULIAN S. HODGE BANK (ISLE OF MAN)
LIMITED Respondent

CASE FOR THE RESPONDENT

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The Facts

1. The following facts were either specifically found by his Honour Deemster Eason or proved by agreed documents or by evidence which the learned Deemster accepted:

(1) On 20th March 1974 the Appellant executed a guarantee ("the first guarantee") by which she guaranteed the indebtedness of Ashworth Transport Limited ("Transport") to the Respondent ("the Bank") up to a limit of £10,000; p. 51 l.25

(2) At the date of the first gurantee -

(i) The most recent accounts for Transport were for the year ended 31st December 1972, showing a net profit of £7,561; p. 93 l.2

(ii) The company had in fact made a net profit of £11,602 in the year ended 31st December 1973 and had net assets of £27,055 at the latter date. It continued to make similar profits during 1974; p. 93 l.6

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(iii) The bank overdraft of Transport was £2,772.13p.

p. 51 l.25 (3) On 3rd March 1975 the Appellant executed a guarantee ("the second guarantee") by which she guaranteed the indebtedness of Ashworth International Limited ("International") to the Bank up to a limit of £10,000.

(4) At the date of the second guarantee -

p. 93 l.29 (i) No accounts for International had yet been produced;

(ii) The Company had in fact made a net loss of £6,558.12 during the year ended 31st October 1973;

p.93 l.35 (iii) The bank overdraft of International was £4,741.46p.

p. 51 l.25 (5) On 14th June 1976 the Appellant executed a guarantee ("the third guarantee") by which she guaranteed the indebtedness of International to the Bank up to a limit of £25,000.

(6) At the date of the third guarantee -

p. 95 l.1 (i) Although accounts existed for the year ended 31st October 1973, the Bank's manager Mr. Smith had no knowledge of them and despite his requests to Mr. Harry Ashworth and the company's accountants, he had not been able to obtain any useful information about the company's affairs;

(ii) The overdraft of International was £33,455.68, having risen from £13,540.55 at the beginning of the year.

p. 94 l.46 (iii) Four cheques each for £50 and one for £35, each drawn in April or May 1976 by International in favour of Mary Thompson, one of its directors, had been returned marked "Refer to Drawer - Please Re-present" but had been paid upon subsequent re-presentation;

p. 95 l.24 (iv) Mr. Smith did not think it probable that Transport or International or both were insolvent.

p. 51 l.46 (7) The Appellant, although an elderly lady, was at all material times well able to look after her

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own business affairs;

(8) At all material times the Appellant maintained and operated a deposit account and from June 1975 a current account with the Bank;

(9) The Appellant was a director of and a small shareholder in Transport. Transport was a small shareholder in and a substantial creditor of International;

(10) The Chairman and moving spirit of both Transport and International was the Appellant's son Harry Ashworth;

(11) The Appellant, although able to look after her own business affairs, did not inquire into the affairs of Transport or International but relied entirely upon her son Harry; p.52 1.14

(12) The Appellant signed each of the guarantees at the request of Harry, who had been asked by Mr. Smith to provide additional cover for future advances by the Bank to Transport or International respectively; p. 53 11.5 and 21

(13) In addition to the Appellant's guarantees, the Bank obtained the guarantees of Harry Ashworth, other directors of International and an associated company; p. 65 1.48

(14) The Appellant signed each of the guarantees at the premises of the premises of the Bank in the presence of Mr. Smith; p. 52 1.24

(15) Before the Appellant signed each guarantee, Mr. Smith explained to her the nature of the documents and the liability which she might incur. He also told her that if she was not happy about the transaction she should take legal advice. He did not tell her what he knew or did not know about the matters mentioned in sub-paragraphs (2), (4) and (6) above; p. 53 1.37

(16) At the time when she signed the third guarantee the Appellant wrote on the documents the words "Whilst I have not taken legal advice I fully understand the nature of the liability incurred" followed by her signature; p. 50 1.9

(17) On 13th October 1976 the Bank appointed a receiver of International. At that date the overdraft was £56,453 and (applying the rule in Clayton's case) the whole of this sum had been advanced since the date of the third guarantee; p. 43 1.27

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p. 43 l.28

(18) On 19th October 1976 the Bank appointed a receiver of Transport. At that date the overdraft was £71,186 and (applying the rule in Clayton's case) the whole of this sum had been advanced since the date of the first guarantee.

The Pleadings and Trial

2. The main defence pleaded and maintained by the evidence of the Appellant and her son at the trial was that the Appellant had signed the guarantees in her own home without any knowledge of what the documents contained, at the request of her son and with no other person present. This evidence was rejected by the learned Deemster who preferred the evidence of Mr. Smith that the Appellant had signed each of the guarantees at the Bank in his presence after he had explained to her the nature of the document and the liability which she might incur.

3. Apart from defences which failed on the facts, the only other defence pleaded by the Appellant was that "the Plaintiff failed in its fiduciary duty to the Defendant and in particular did not advise the Defendant to obtain legal advice".

p. 68 l.7

4. No facts were pleaded as giving rise to the alleged "fiduciary duty". In her grounds of appeal from the judgment of the learned Deemster to the Staff of Government Division, the Appellant relied upon -

(1) the fact that the Appellant had a very small financial interest in the two companies;

(2) the fact that at all material times, by virtue of the matters stated in paragraph 1(8) above, the Appellant was a customer of the Bank;

(3) The Bank's knowledge or lack of knowledge of the matters mentioned in paragraph 1(6) at the time of the execution of the third guarantee.

5. The pleadings contained no allegation that -

(1) The appellant had sought or relied upon any advice from the Bank;

(2) The Bank had exercised any duress, undue influence or improper use of superior bargaining strength in relation to the Appellant;

(3) Harry Ashworth had employed any duress,

undue influence or fraud to induce the Appellant to sign the guarantees;

(4) The Bank was in any way privy to improper conduct on the part of Harry Ashworth.

6. No evidence was given before the learned Deemster which might have supported any of the allegations mentioned in the last paragraph if it had been pleaded. Instead -

(1) The Appellant specifcally denied having asked the Bank for any advice;

(2) She made no allegations of duress, fraud or undue influence against her son;

(3) Harry Ashworth said that she signed the guarantees of her own free will and denied that he had induced her to do so;

(4) There was no evidence that Mr. Smith knew anything about the relationship between the Appellant and Harry Ashworth except that he was her son and that she was also a director of Transport.

7. The learned Deemster made no findings in support of any of the matters mentioned in paragraph 5 above.

The Law

8. The Respondent contends that the applicable rule of law is well settled. A contract of guarantee is not a contract uberrimae fidei and a bank taking a guarantee of a customer's indebtedness ordinarily owes no duty to the prospective guarantor to give him advice or to volunteer information about the state of the customer's account or the way in which it has been kept: Hamilton v. Watson (1845) 12 Cl. & F. 109, per Lord Campbell; London General Omnibus Company Ltd v. Holloway [1912] 2 K.B. 72 and Copper v. National Provincial Bank Limited [1946] K.B. 1.

9. There was no contract arrangement or understanding between the Bank and Transport or International which made the obligations undertaken by the Appellant different from what the Appellant might naturally have expected. All the matters mentioned in paragraph 1(2), (4) and (6) above constituted only what Kennedy L.J. in the London General Omnibus case (at p. 87) called "extrinsic circumstances" and did not affect the nature of the Appellant's obligations. Nor could Mr. Smith's

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silence on these matters fairly be regarded as an implied representation by him that the companies were not overdrawn or that the overdraft had not risen, that no cheques had ever been returned, or that he was in possession of information about the companies which showed them to be credit-worthy. The only possible implied representation was that Mr. Smith honestly believed that the Bank would make further advances to the companies against the security of the guarantees, which in fact it did.

10. The Respondent contends that the general rule stated in paragraph 8 above is not displaced by -

(1) the fact that the Appellant had virtually no financial interest in Transport or International. This is a common feature of guarantors;

(2) the fact that the Appellant was a customer of the Bank. The ordinary relationship between banker and customer is that of debtor and creditor and gives rise to no fiduciary obligations: Foley v. Hill (1848) 2 H.L.C. 28. A bank may assume fiduciary obligations on the facts of a particular case as in Lloyds Bank v. Bundy [1975] Q.B. 326 but no special facts giving rise to a fiduciary relationship were alleged or proved in this case.

11. The Appellant also relied (in submissions before the Staff of Government Division) upon the alleged influence of Harry Ashworth over the Appellant (as shown by the findings mentioned in paragraph 1(11) and (12) above) as giving rise to a fiduciary duty on the part of the Bank. The Respondent contends that such a duty could exist only if it had been pleaded and proved that -

(1) Harry Ashworth had obtained his mother's signature by undue influence or fraud; and

(2) The Bank had been privy to the conduct of Harry Ashworth by having knowledge of his fraud or undue influence or by failing to make inquiry in circumstances in which inquiry should reasonably have been made or by giving him general authority to obtain the Appellant's signature on the Bank's behalf.

12. On the need for fraud or undue influence by Harry Ashworth to be pleaded and fully particularised, the Respondent will rely on the observations of Lord Atkin in MacKenzie v. Royal Bank of Canada [1934] A.C. 468

at p. 475. On the need for fraud or undue influence to be affirmatively proved, the Respondent will rely on Howes v. Bishop /1909/ 2. K.B. 390 and Talbot v. Von Boris /1911/ 1 K.B. 854. On the facts, the Respondent relies on the matters set out in paragraphs 5 - 7 above.

13. The Respondent therefore humbly submits that your Lordships should advise Her Majesty that the appeal should be dismissed and the decision of the Staff of Government Division affirmed for the following among other

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(1) BECAUSE in the circumstances of the case, the Respondent owed no duty to the Appellant to do more than their manager did, namely to explain the nature of the guarantees and the liability which the Appellant might incur;

(2) BECAUSE the manager's silence as to other matters could not be construed as an implied misrepresentation of the true stateof affairs of the companies;

(3) BECAUSE no greater duty existed merely by virtue of the Appellant having at the material time maintained an account or accounts with the Bank;

(4) BECAUSE no greater duty existed merely by virtue of the Appellant being known by the Bank to be the mother of Harry Ashworth (there being no allegation of fraud or undue influence on his part or privity on the part of the Bank);

(5) BECAUSE the Staff of Government Division and learned Deemster were right.

LEONARD HOFFMANN Q.C.

N.C. TEARE.

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BETWEEN:

EFFIE ASHWORTH Appellant

- and -

STANDARD CHARTERED BANK (ISLE OF MAN) LIMITED (formerly JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED

Respondent

CASE FOR THE RESPONDENT

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