14/82

IN THE PRIVY COUNCIL No.15 of 1981

ON APPEAL

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

BETWEEN:

EFFIE ASHWORTH	Appellant (Defendant)
- and -	
STANDARD CHARTERED BANK (ISLE OF MAN) LIMITED (formerly JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED)	Respondent (Plaintiff)

RECORD OF PROCEEDINGS

PHILIP CONWAY THOMAS & CO. 61 Catherine Place, London SW1E 6HB	SLAUGHTER AND MAY, 35 Basinghall Street, London EC2V 5DB
Solicitors for the Appellant	Solicitors for the Respondent

IN THE PRIVY COUNCIL No.15 of 1981

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- and -

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

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

EXHIBITS

Exhibit Mark	Description of Document	Date	Page No.
P1	Guarantee, Effie Ashworth to Julian S. Hodge Bank (Isle of Man) Ltd.	20th March 1974	111
P2	Guarantee, Effie Ashworth to Julian S. Hodge Bank (Isle of Man) Ltd.	3rd March 1975	115
P3	Guarantee, Effie Ashworth to Julian S. Hodge Bank (Isle of Man) Ltd.	14th June 1976	119

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

Description of Document	Date
IN THE STAFF OF GOVERNMENT DIVISION	
Legal Aid Certificate	28th July 1978
Company File of Ashworth Transport Company Limited	
Accounts of Ashworth Transport Company Limited (including copies which follow the Judgment of His Honour Deemster R.K. Eason)	
Order dismissing Petition, taxing Petitioner's costs and refusing leave to appeal to Her Majesty in Council	27th April 1979
Petition of Julian S. Hodge Bank (Isle of Man) Limited	-
Order of His Honour The Deemster Luft requiring Julian S. Hodge Bank (Isle of Man) Ltd. to £250 into Court for costs, staying the proceedings until such action is complied with	15th June 1978
Order of His Honour The Deemster Luft discharging Order of 15th June	9th October 1978

Description of Document	Date
Notice of Motion: Sitting of Staff of Government, Civil Jurisdiction on 31st July 1978 to dismiss Appeal under Order XLV Rule 23 of the Rules of the High Court of Justice of the Isle of Man	26th July 1978
Order dismissing Notice of Motion	31st July 1978
Notice of Motion by M. Moroney Advocate for the Petitioner designating hearing date for discharging order for security for costs.	-

IN THE PRIVY COUNCIL No. 15 of 1981

ON APPEAL

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

BETWEEN:

EFFIE ASHWORTH — Appellant (Defendant)

- and -

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

RECORD OF PROCEEDINGS

In the High Court

No.1
Particulars of Claim
(Undated)

No. 1

PARTICULARS OF CLAIM

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

COMMON LAW DIVISION SUMMARY JURISDICTION

BETWEEN:

JULIAN S. HODGE BANK
(ISLE OF MAN) LIMITED Plaintiff

- and -

EFFIE ASHWORTH
Towneley
Phildraw Road
Ballasalla
Malew Defendant

The Plaintiff's claim is for £45,000.00 being:-

1. £10,000.00 the amount due under a guarantee in writing bearing date the 20th day of March

1974 given by the Defendant to the Plaintiff in respect of the indebtedness of Ashworth Transport Limited to the Plaintiff together with interest thereon at the rate of 12½ per centum per annum from the 23rd day of October 1976 being the date upon which demand was made by the Plaintiff on the Defendant under the said guarantee until payment

2. £10,000.00 the amount due under a guarantee in writing bearing dated the 3rd day of March 1975 given by the Defendant to the Plaintiff in respect of the indebtedness of Ashworth International Limited to the Plaintiff together with interest thereon at the rate of 12½ per centum per annum from the 22nd day of October 1976 being the date upon which demand was made by the Plaintiff on the Defendant under the said guarantee until payment

3. £25,000.00 the amount due under a guarantee in writing bearing date the 14th day of June 1976 given by the Defendant to the Plaintiff in respect of the indebtedness of Ashworth International Limited to the Plaintiff together with interest thereon at the rate of 12½ per centum per annum from the 22nd day of October 1976 being the date upon which demand was made by the Plaintiff on the Defendant under the said guarantee until payment

Issued by DICKINSON, CRUICKSHANK & CO. Advocates, Athol Street, Douglas

Payment of this Claim may be made at the above address

Costs of Summons if the claim is settled before the Court £4.20

No. 2

DEFENCE

In the High Court

No.2
Defence
(Undated)

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

COMMON LAW DIVISION SUMMARY JURISDICTION

B E T W E E N :

JULIAN S. HODGE BANK
(ISLE OF MAN) LIMITED Plaintiff

- and -

EFFIE ASHWORTH
Towneley
Phildraw Road
Ballasalla
Malew Defendant

D E F E N C E

It is denied that any sum is owing by the Defendant to the Plaintiff as alleged in the summons or at all. The document purported to be a guarantee by the Defendant to the Plaintiff is of no validity in that

(1) The Plaintiff's Manager did not witness the signature of the Defendant in the Defendant's presence

(2) The Plaintiff failed to warn the Defendant of the danger inherent in the signature of such document

(3) The Plaintiff was aware that the Defendant had funds with the Plaintiff which the Plaintiff purports to off set against the indebtedness of Ashworth Transport Limited

(4) The Plaintiff failed in its fiduciary duty to the Defendant and in particular did not advise the Defendant to obtain legal advice

(Sd) M. Moroney
Advocate for the Defendant

To the Plaintiff
per Messrs. Dickinson Cruickshank & Co.,
its Advocates

In the High Court

No.3
Amended Reply

10th March 1977

No. 3

AMENDED REPLY

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

COMMON LAW DIVISION SUMMARY JURISDICTION

B E T W E E N :

JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED Plaintiff

- and -

EFFIE ASHWORTH Defendant

R E P L Y

1. The Plaintiff avers that all monies claimed by it in the summons are due and owing to it by the Defendant and further that the guarantees in respect of which such monies are claimed are perfectly valid

2. The Plaintiff refers to paragraph 1 of the Defence and avers that the Plaintiff's Manager did witness the Defendant's signature in the Defendant's presence but even if he did not such omission would not invalidate the guarantees

3. The Plaintiff refers to paragraph 2 of the Defence and avers that there were no dangers inherent in the signature of the guarantees of which the Plaintiff should have warned the Defendant and did not

Amended pursuant to Order of Court dated 17th November 1977
(Sd) N.C.Teare

4. The Plaintiff refers to paragraph 3 of the Defence and agrees that it was aware that the Defendant had funds with it but denies that the Plaintiff is purporting to set off such funds against the indebtedness of Ashworth Transport Limited. The Plaintiff avers that it has exercised its lien as a Banker over such funds pending determination of this claim

5. The Plaintiff refers to paragraph 4 of the Defence and admits that it did not advise the Defendant to obtain legal advice but denies that it was under any obligation to

do so. The Plaintiff denies being in breach of any fiduciary duty it owed to the Defendant and denies the existence of any such duty between it and the Defendant as regards the execution of the guarantees in favour of the Plaintiff in respect of which this claim has been brought

Dated this 10th day of March 1977

(Sd) N.C. Teare

Advocate for the Plaintiff

To: the Chief Registrar,
General Registry,
Douglas.

No 4

PROCEEDINGS

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

COMMON LAW DIVISION SUMMARY JURISDICTION

JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED
Plaintiff

v.

EFFIE ASHWORTH Defendant

MINUTES taken by His Honour DEEMSTER R.K. EASON, at Douglas, the 21st day of November 1977

Mr.N.C.Teare for Plaintiff
Mr. Moroney for Defendant

Any witnesses giving any corroborative evidence are required to leave the Court.

The Court raises the question with Counsel as to who has the right to begin - the Court looks at the Pleadings to answer this.

In the High Court

No.4
Proceedings

21st November 1977

(continued)

Mr. Moroney agrees that he should have the right.

Mr. Moroney states that in his defence, in the use of the word 'document' he is referring to each of the 3 documents referred to in the particulars of claim.

Mr. Moroney calls :-

Defendant's Evidence

No.5
Effie Ashworth

Examination

No. 5

EFFIE ASHWORTH

Effie Ashworth:-(Sworn)

I live at The Flat, 92 Berry Lane, Near Preston. I am the Defendant in this action. There are 3 documents - which I now produce to the Court. (Mr. Moroney states that these 3 documents have been handed to him by Mr. Teare for the Plff. - under a notice to produce). These are exhibits P1, P2 and P3.

On looking at P1 - I do not remember signing this document. There is a signature at the end of this document - this signature could be mine. It is a guarantee for £10,000 to the Bank - by me. It was guaranteeing a debt of Ashworth Transport Ltd. I had one share in this Company - I was a Director of this Company - I know there were other Directors but I do not know what their shareholdings are.
I did not attend any directors meeting of this company at any time near its date - the 20/3/74. I have met Mr. Smith of Hodge Bank Ltd. - once only - I was asked to go to Hodge Bank because they needed a copy of my signature. I went - I signed a paper for them -at the counter - Mr. Smith was at the counter. He was called down-stairs to see me sign it. He saw me sign it. There was no discussion about the document. He just said he was pleased to see me. I have money in a deposit a/c at Hodge Bank Ltd. I had several deposit a/cs at that Bank - they were all for expiry on different dates. When a date for expiry would arrive, they would write me - and ask what I wanted to do - whether to renew or to take it out. My son and I would talk about it, and he would take the message back to Mr.Smith. This was what usually happened.

I had no idea that the document which I was signing was a guarantee. My son had opened for me, a current a/c at Hodge Bank - Mr. Smith asked that I should call to sign to open that a/c. I do not know what date it was.
I now look at exhibit P2 - it is a guarantee for £10,000 - to the Bank for Ashworth International Ltd. It is dated 3/3/75. This signature could be mine - I have no recollection of signing it. The witness was Mr. Smith - My address is not in my writing but it is correct.
I have never had any shares in Ashworth International Ltd -nor was I ever a director of the company. I was not aware at that time of the financial state of that company. I have no recollection of having signed this document. It could be my signature. I had no contact with any one at the Bank other than Mr. Smith.
When the expiry of any one of my deposit a/cs was about to become due by the expiry of the period, the Bank would write to me - asking me what I wanted to do - my son and I would discuss this and he would take the message back. My son would bring back to me a form to sign for the renewal of the deposit.
I now look at the 3rd guarantee - it is a guarantee for Ashworth International Limited - to Hodge Bank for £25,000 - dated 14/6/76 - this is Ex.P3.
My signature appears twice on this document. These two signatures could be mine - but I don't recollect signing either of them, and this applies to the statement there about not having taken legal advice.
I am aged 86 yrs.
The total amount involved in these guarantees is £45,000. I owned a bungalow at Phildraw - Ballasalla - this was sold for £25,000. I also had about £21,000 on deposit bearing interest.

All these 3 documents were news to me since this case started.
I produce a letter 21/3/75 - I remember signing this letter - I did not write it - my son wrote this letter. (This letter is produced by Mr. Teare on notice to Produce). It is exhibit P.4.
I knew all about this letter - I was asked by my son would I guarantee a Bond for £5000 in connection with the haulage business to the Hodge Bank - and my son's firm was to take out an insurance against my losing that sum. The last paragraph of the letter tells the Bank what to do with the balance of my money on deposit there.

In the High Court

Defendant's Evidence

No.5

Effie Ashworth

Cross-examination

21st November 1977

XXED by Mr. Tears.

I have no idea of the date on which I went into the Bank to see Mr. Smith - but I am certain it was about my current a/c at that Bank. I would question the fact that my current a/c was opened in June 1975. I thought that the document which I signed at the Bank was for the opening of a current a/c at the Bank. If Mr. Smith says no signature was necessary for the opening of a current a/c, I don't agree with him.
Generally I can recognise my signature. All I say about those 3 guarantees - is that I go no further than say I don't remember ever having signed those documents.

(Mr. Teare now puts to the witness 13 letters -which appear to bear her signature - ranging in date from Ap.1974 to Sept.1976. This is Exhibit P5.)

I agree that each of these documents were signed by me - I was well aware of all that these documents involved.

(Mr. Teare now puts to the witness a bundle of cheques drawn on Hodge Bank - apparently by this witness - dated between 1975-6.) Ex. P.6

I agree that each of these cheques - bear my signature and that they are drawn on the current a/c in my name at that Bank.
I say that I agree these two sets of signatures because I know to what they relate. I don't know what the guarantees relate to - and I don't now say that I can remember signing them.

(Mr. Teare now puts to the witness a form of application for a deposit a/c at Hodge Bank Ltd. -It is dated 15/1/74 which appears to be signed by the witness.) Exh. P.7

I accept this document as bearing my signature. I cannot remember the precise time, and place, of the signing.

I was a Director of Ashworth Transport Ltd. and I still am.

(Mr. Teare puts to the witness a document which he says is a certified copy of a Debenture passed to the Bank dated 4/8/75) Ex. P.8

The witness agrees that this document contains her signature - but again she doesn't know how

or when it was signed. I agree that I know something about this document. I don't remember going to the advocates office to sign this deed.
I knew that my son was forming this company - that I was to have 1 share. But I knew this deed was a Debenture - I do not remember granting a loan to the company of £4,000 - and for this I got a Debenture for this loan.
I do not remember signing the Debenture - nor do I remember it being repaid - this is the Debenture to me for £4,000.
I am quite sure I was never the secretary of that company.

(Mr. Teare now puts to the witness a form of application to Hodge for the opening of an a/c at the Bank for Ashworth Transport Co.Ltd. - it is dated 5/12/73)

I have no recollection of this document - although it appears to have my signature as secretary.
It may be my signature. (It is Exhibit P.9.)

The Court adjourned at 1 p.m.
The Court resumes at 2.30 p.m.

Having had read over to me the contents of the document Ex.P9 - I still say that I have no recollection of signing - nor did I attend any meeting of the company on the 5th December 1973 referred to in that document. If this is not my signature I would not know if those resolutions had been passed.
I agree that I knew that Ashworth Transport Ltd. had an a/c at that Bank at that time.
I don't agree that my memory is good about my own affairs but not good about the affairs of the companies.
I was not the secretary of Ashworth Transport Ltd.in 1973 - I have never been secretary of this company.
Nor do I know anything whatever about a Bank A/c of this company - whether it was in debit or in credit.
My son did not discuss this matter with me.
I knew that in 1976 a Receiver had been appointed -but I did not then know what was the amount of the indebtedness to the Bank. I got to know about the Court proceedings against the company just a few days before the sitting of the Court - but even then I did not know what the amount was.
I did not receive any letters from the Bank in 1976.

(Mr. Teare asks the leave of the Court to put to the witness certain letters written to the witness about this matter - and which letters had been sent by Recorded Delivery. Mr. Teare states that a notice to produce these specific letters was served. Mr. Moroney raises no objection to the production of the carbon copies.)

(The Court gives this leave.)

I left the Island in November 1976 - it may have been October - I have been away ever since - I don't know what happened to my mail. I don't understand this letter - I did not return any form to the Bank - so far as I know. The second letter is of the same date and refers to the debt owing by me under the guarantee for Ashworth International Ltd. I know nothing about this either.

(These are Ex. P.10 and P.11)

I agree that in my letter of the 21/3/75 to the Bank, I refer to my setting aside a sum of £5,000 of my money to cover a possible liability under my guarantee to the Bank for the a/c of Ashworth Transport Ltd.
I agree that the word guarantee means that I would be responsible up to that sum of £5,000 if the company couldn't find it. I understood that the company had promised me that it would take out a policy of insurance to cover me if I had to pay this sum - I have not enquired about this.
I have never seen the Deed of Mortgage by which I gave security to the Bank - I have never heard of a Deed of Mortgage which was prepared secured on Towneley which I owned - I was not aware that in July 1976 a deed of this nature - granting a mortgage on the bungalow to the Bank had been handed to my son Harry for me to sign. I was not aware that Ashworth Transport Ltd. was a shareholder in Ashworth International Ltd.

(By consent of Counsel, Mr. Teare produces to the Court two Annual Returns to the Company Registry in the Isle of Man (i) is dated 20/12/75 of Ashworth Transport Ltd. (Ex.P.12) and (ii) dated 20/12/75 for Ashworth International Ltd. - Ex. P.13)

I did not ever know that Ashworth Transport Ltd. was a shareholder in Ashworth International Ltd. I did not know anything about those two companies as to their working or how they were faring. My son never discussed these matters with me.

I never asked again about the affairs of this company. I have only been to the Bank once. I never asked the Bank for any advice. I understood the form I was signing was a form to open a current a/c. I did not read it - I did not ask anyone to read it to me - I did not ask what it was.
I am sure that the document which I then signed was not one of the 3 documents of guarantee shown to me today. I have never sought any advice of any description from the Bank - nor did anyone at the Bank purport to advise me about anything.
I have ever only spoken to Mr. Smith once and I would not have known him again - this same answer applies to the other two guarantees.
Mr. Smith is telling a lie if he says he ever explained the nature of either of those 3 documents of guarantee.
I never knew the indebtedness to the Bank of either Ashworth Transport Ltd - or of Ashworth International Ltd.
I did know that in June 1977 a judgment was granted by the Court in favour of the Bank against Ashworth International Ltd. but I didn't know the amount but I now know it was £59,932.92.
I do not know what amount has been recovered from the company nor from the other company.
I repeat that I do not remember signing either of these 3 documents.

Re-examination

RE-EXD.

I am certain that it was a current a/c I went to the Bank to open on the only occasion I ever met Mr. Smith.

By the Court

Up to the end of September 1976, I was quite competent to deal with my own financial matters and also to deal with any company matter about which I might have been informed.
I have never attended a Directors' Meeting of either company - nor been asked to go - I have never seen a Minute Book - this applies to either of the companies - I may have seen a Balance Sheet of Ashworth Transport Ltd.
The only place where these 3 guarantee deeds could have been signed by me would be at home.- and I do not remember signing either of them at home.

Adjourned to 22/11/77
at 10.30 a.m.

R.K. Eason

In the High Court

Defendant's Evidence

No.6
Harry Ashworth

Examination

22nd November 1977

No. 6

HARRY ASHWORTH

At Douglas
22nd November 1977
(by adjournment)

Mr. N.C.Teare for Plaintiff
Mr. Moroney for Defendant.

Mr Moroney calls :-

Harry Ashworth. Sworn.

I live at 90 Berry Lane, Longridge, near Preston. I am the son of the Defendant in this case. I have been a Director of Ashworth Transport Co. Ltd. since its formation to this day.
When this was first formed, the shareholding was either 1 or 2 to each of us - my mother and myself.
As the company became more prosperous about 1972 - or 3, a certain amount of profit was capitalised - according to what profit was shown. This was capitalised to me - because I was the sole person concerned in the management and control of the company. I think that the amount of the shares to me was either 9,998 or 9,999. For these I paid no cash.
My mother was a Director and still is. My mother was Company Secretary for the sake of company returns only. She played no active part in the running of the business at all. Formal Board meetings were never held, so the question of her attendance at board meetings never arose. When the company was first formed its bank a/c was I think at Martins - which then became Barclays - and from Barclays to Lloyds and then from Lloyds to Julian S. Hodge Bank Ltd.
I think it was transferred from Lloyds Bank to Hodge Bank in 1974 - and from Barclays to Lloyds in 1972
Up to the transfer from Lloyds to Hodge Bank in 1974 my mother and I were the only directors of the company.
My mother took no part in these transfers.
At the date of the transfer in 1974 to Hodge Bank this company was thriving.
The a/cs of the company up to 1973 were audited each year by Callow Matthewman & Co. Accountants and after that for the year 1974 by Mr. Crossley - Accountant. I prepared the a/c for the year ending 31/12/75 - I gave them for audit to Mr. Crossley - the audit was not completed and

Mr. Crossley was asked to hand over all the documents in October 1976.
I prepared no a/c of this company after the year ending 1975.
In my dealings with Hodge Bank, I have always dealt with Mr. Smith - with whom I had a good business relationship.

(Mr. Teare hands to Mr. Moroney the Bank Pass Sheets of Ashworth Transport Co. for 7/12/73 to 8/10/76 - the date of the receivership. Mr. Moroney asks that these be produced - and they are produced)
P.14 Exhibit

There was another company Ashworth International Ltd. - I think it was formed in 1972 - the shareholders at the beginning were 5 - namely myself - 3 shares, Mary Thompson 2 shares, A. Welding - 2 shares - Ashworth Transport Ltd. 2 shares and John Webber 1 share - 10 shares.
The Directors were - I think - the four named - namely myself, Mary Thompson - Allan Welding and John Webber.
Shares in the company were allotted in Sept.1974 to Peter Thompson, myself, Mary Thompson and Ashworth Transport Ltd. I can't be certain of the figures - a total of 1990 in bring the total allotted shares to 2000 - to do this.
I don't know how many shares I have - I think Mary Thompson, Peter Thompson and myself each had 24% - and the balance was held by Ashworth Transport. These shares were not paid for in cash - all these shares were capitalised from profits of Ashworth Transport Ltd. There is a minute book for Ashworth Transport Ltd. - I gave this book to Mr. Crossley when I handed the book to him for the year ending Dec. 1974.
Equally the minute book of Ashworth International Coy.Ltd. were handed to Mr Crossley at the same time.
On looking at the file of Ashworth Transport Ltd. - I see that the shareholdings are as follows :-

Myself	1002
Mary Thompson	992
John S.Webber	1
C.A. Welding	2
Ashworth Transport Ltd.	3

These figures of shareholdings are not what I had said. They were allotted from the profits of Ashworth Transport Ltd.
On looking at this company's file - I see an allotment dated 4/3/75 -allotment of the following shares:

Myself 1000
Mary Thompson 990

This appears to be an allotment for cash namely £1990.
No cash was paid for those shares. I paid no cash for these shares and so far as I know no one else did.
On looking at the company file of Ashworth Transport Limited - I see that the annual return for the year ending 31/12/75 - shows the following shareholders - (i) Myself - 7499
(ii) Effie Ashworth 1

The return is signed by Mr. Pennington - as Secretary.
This return was presented for filing by Mr. Crossley.
I see the allotment of shares dated 22/11/71 - The allotment shows 4998 shares allotted payable in cash. These shares were allotted to me.
They are allotted to me for cash - but I paid no cash for those shares.
I see the return of allotments - dated 16/7/73 - showing 2500 shares allotted - allotted to me. I paid no cash for these shares.
The Hodge Bank provided additional facilities for Ashworth International Ltd.- particularly in foreign currencies - some of which required special attention.
I see the letter Ex.P.4 - This letter was written by me. I had asked her if she would put aside into a special a/c the sum of £5,000 to be held as a Bond against a claim by the Road Haulage Association - which might arise in the event of any irregularities in customs documentation. This was to enable the Ashworth International to extend its business. She agreed to do this - I am satisfied that Mr. Smith drafted the letter - and this I then wrote out in my hand - and I asked my mother to sign. She signed it - I can't remember whether she signed it in my presence - but I assume she gave it to me and I would send it to the Bank.
There is produced to me the guarantee dated 20/3/74 (Ex.P.1).
There is no writing of mine on this document - nor is there on the document of the 3/3/75, but the address of the guarantor - now Phildraw Rd. Ballasalla on the guarantee dated 14/6/76 is in my writing.
I cannot distinctly remember the guarantee dated 20/3/74 - but I think I may have seen it before.

If I have seen this before it would be a day before the 20th March 1974. This is a guarantee for £10,000. I first became aware of the value of the guarantee in November or December 1976.
I knew before then that the document had been signed. I knew this approximately on the 20/3/74 and it was acted on by the company.
I do not know what made the guarantee to be prepared - I assume it was required by the Bank to enable the company to expand.
I think I would be asked to get this Bond signed by my mother by a flippant remark to me by Mr. Smith. There were never any deep discussions about this with Mr. Smith - but for about a fortnight before the 20th Mr. Smith said to me in a flippant way that he would want some more cover. He did not say who from. He handed me a form but I can't be certain it was this form, Exh. P1, and asked me to get my mother to sign it. I assumed that he thought my mother would do this. There was no discussion about this with my mother. I did not discuss this with my mother - I told my mother that the Bank had asked that she would sign this document. I say that this is what happened on the 20th March 1974. I took the form back - she signed this and gave it back to me - and I brought it back to Mr. Smith.
As regards the document 3/3/75 - (Exh.P2) - the form is the same except the guarantee is for Ashworth International Limited - I say the same procedure happened as what I have said about the guarantee Ex.P1.
As regards the document 14/6/76 (Ex.P3) - I say that this document was given to me by Mr.Smith along with a notepaper slip in long hand - I think in Mr. Smith's handwriting with a request that my mother copy out the words on that note on to the guarantee form. I took it to her - again no discussion with my mother - she signed it in my presence - she wrote the words on it in my presence - I wrote the address shown on this letter - I then took it back to the bank. I did not discuss the contents of it with my mother.

(Mr. Teare hands to Mr. Moroney the Bank Pass Sheets for the company from 1/1/74 to 24/8/77 - but the a/c stops on the 8/10/76 on the appointment of the Receiver.)

On the 14/6/76 - there appears from the Bank Pass Sheets a debit of £33,455.68.
On the appointment of the Receivership, the debit was £56,453.83.
I never told my mother about the financial state of Ashworth International.

In the High Court

Defendant's Evidence

No.6
Harry Ashworth

Cross-examination

23rd November 1977

The Court adjourns at 1 p.m. to tomorrow Wednesday the 23rd inst. at 10.30 a.m.

R.K. Eason

At Douglas
23rd November 1977
(by adjournment)

XXED by Mr. Teare

Mr.N.C.Teare for Plaintiff
Mr.Moroney for Defendant

Mr. Moroney produces two minute books - one of Ashworth Transport Ltd. and the other of Ashworth International Ltd. (Exh. D16, D17). Mr. Teare asks for an opportunity to inspect these books, before proceeding with his XXtn of this witness.

Mr.Moroney raises no objection.

The Court adjourns for 15 minutes for this purpose.

The Court adjourns at 10.50 a.m.
The Court resumes at 11.15 a.m.

Mr. Teare proceeds with his XXtn of this witness.

Harry Ashworth - (already sworn) is now XXed.

Ashworth Transport Ltd. first became connected with the Hodge Bank - I think - towards the end of 1973. To the best of my knowledge the authority to the Bank was completed by the company. On looking at this authority (Ex.P.9) I see two signatures - one is mine - and the other is that of my mother Effie Ashworth. On looking at the Minute Book of this company, (Ex.D.16) this also refers to a meeting of the Directors on the 5/12/73. At that time, so far as I know my mother and I were the only Directors of this company. I say now - that my mother was present at that meeting - although I at first said she was not present. On looking at the Minute Book of this company - I see that my mother is stated to have been at 14 meetings of this company between 27/6/69 to 27/9/74. It would appear from this Minute Book that there are no minutes of any meeting of this company since that date. I say my mother was present at the meeting of the 27/6/69, the meeting of 13/4/70, the meeting of the 26/9/70, the meeting of the 1/7/71, the meeting of the 17/7/72, the meeting of the 16/7/73,

the meeting of the 5/9/73, the meeting of the 27/9/74 - eight of those meetings.
All these minutes except the last meeting (27/9/74) are signed by me - and by doing that I was certifying their accuracy - when in fact they were inaccurate. The minute book tells the truth in every respect except the names of those who attended the meetings.
On looking at the minute of a meeting of the Directors - on the 22/1/70, it shows that two Directors of the company were present - there were only two Directors at that time - it shows that at this meeting it was resolved that the company buy from me - the business which had up to then been carried on under the name of Ashworth Transport and of which I was then the sole owner.
The minute shows that the price to be paid to me was to be a price to be agreed immediately on the completion of the final a/cs of Ashworth Transport up to 31/12/69. My mother was not present at the meeting - I thought it was alright to do this.
I did not disclose my personal interest.
When I said yesterday that no formal meetings of this company were ever held and then the question of my mother attending meetings arose, I was referring in my mind to Board Meetings dealing with the day to day running of the company. I should have said that my mother did attend the Annual General Meetings - All the A.Genl. Meetings of the Company were held at its Registered Office 'Towneley', Ballasalla - the accounts would be accepted and the matters on the agenda prepared by the Accountants.
The accounts of the Company were passed at each Annl.Genl. Meeting. On being shown these a/cs, my mother would ask me to show her where the profit figure was shown - I would show this to her - this was all she would want to know. My mother would know the profitability of the Company.

(Mr. Teare produces to the witness the Balance Sheets - all audited - for the years ending (i) 31/12/72 (ii) 31/12/73 (iii) 31/12/74). (These 3 a/cs are Ex.P18)

I agree that I have seen no a/cs of this company since those for 2 years ending 31/12/74.
I did myself prepare a/cs for the year ending 31/12/75 - I think these were given to Mr. Crossley for audit - about March or Ap. 1976 - I asked Mr. Crossley about this, but he said he was working on them. My mother was interested in money and knew what was going on in the company - she had means of knowing what the assets

of the company were - and whether it was profitable.
When showing her the a/cs I pointed her to the profit shown to have been made by the company during the year. I did not point her to the statement contained in the Directors Report that the Directors did not recommend the payment of any dividend. My mother did not know that the Directors had decided that she knew nothing about it - and I did not draw her attention to this. It was always assumed by my mother and myself that dividends would never be paid.
The first guarantee is dated 20/3/74 - I say I picked this form up from the Bank - I took it my mother - I told her that Mr. Smith at the Bank asked if you will sign this form for him - Mrs. Ashworth did sign the form - I took it then to the Bank - and I gave it personally to Mr. Smith.
I have no doubt about the signature on that deed of the 20/3/74 and it was signed in my presence.

The Court adjourns at 1 p.m.
The Court resumes at 2.30 p.m.

At this time, my mother would virtually have no knowledge of the company's affairs - the last thing she would know would be of the last balance sheet - namely for the year ending 31/12/73 if there was one and if there had been one, I would only have pointed her to the profit. I would not have pointed out to her whether there was an overdraft at the Bank or whether the company's account was in credit.
From the Bank Pass Sheet now shown to me, the a/c was on the 26/3/74 overdrawn to the extent of £2,772.13 - and also there was an overdraft at the Bank at the end of Dec. 1973.
I have often discussed this company's a/c with Mr.Smith but I cannot remember any details.
My mother would know about the a/c being overdrawn at that time.
My mother would not be at the Directors meeting said to have been held on the 27/12/73.
I know that a Bank wants a guarantee as a security for a loan.
I agree that my mother in 1974 was quite capable of managing her affairs.
If my mother had been told that this document - i.e. P1 - was a guarantee to the Bank for the company's overdraft, she would have understood.
I brought the document to her - she signed it - and I took it away. She did not read it.
I did not read it to her.

I think Mr. Smith is mistaken if he says this deed was signed in his office.
As regards the next guarantee - dated 3/3/75 - this was given for Ashworth International Ltd. - I think this company opened its a/c with Hodge in 1974.
This company sought an overdraft from the Bank - in fact a resolution as to this is dated 14/8/74.
There were no Annual General Meetings of this company between Aug. 1974 and March 1975.
I don't know whether there has ever been an Annl. Genl. Meeting of this company since its formation - I am not aware of any minutes of any such meetings. The last statement of a/c - i.e. for the year ending 31/10/73 showed a loss of £6,548.12.
It is true that Ashworth Transport Ltd. had a much greater interest in Ashworth International Ltd. than its 3 shares - Ashworth Transport loaned £8,339.00 as shown in balance sheet 31/12/72 to Ashworth International, and this increased during the next year to £13,397.00 in 1973 and in 1974 A/cs it is shown as £16,613.00. This amount has not been repaid; I don't think my mother would ever know anything about this - nor would it ever be mentioned at any meeting at which she might have been present.
I don't know what the indebtedness of Ashworth International to Hodge was at the time of the signing of the 2nd guarantee Ex. P.2 - dated 3/3/75 - but I would accept the figure of the indebtedness to the Bank on that date as being £4,741.46 as shown in the Bank Pass Sheets.
Mr.Smith often said he would want additional cover - and it would be for this reason that the guarantee 3/3/75 was obtained. They took Debentures - and they took other guarantees - as well - one from me - mine and also my mother's were for each of the companies.
On paper, it would appear that there was plenty of security. As regards the signing of this guarantee dated 3/3/75, I repeat precisely what I said about the completion of the guarantee dated 12/3/74 - because I dealt with it in exactly the same way.
I was not at the Bank with my mother at any time round the date 3/3/75 or 12/3/74. I may have been at the Bank but not with my mother.
I think that in March 1975 Ashworth International would be solvent provided that the loan granted to it by Ashworth Transport for 16,613 was not claimed - but if the lender of that money - namely £16,000 or whatever the amount from time to time would be, were to claim its repayment,

the company, Ashworth International would be insolvent.
The financial success of this company declined from 1976 Feb - and this continued - and we realised alternative plans had to be made about it.
We sold some vehicles in the Middle East - with advantage. Mr. Smith was kept informed - our plans took a little longer than we thought - eventually we sold our first vehicle there on the 10/10/76 for £12,000. Its value in England would be about £6,000 to £7,000.
2nd Feb. 1976 the overdraft of Ashworth International at the Bank was £23,078.00 - and at the end of the a/c namely on the 8/10/76 - when the receiver had been appointed the a/c had got up to £56,453.00. If I followed the same course with this 3rd guarantee in June 1976 as I did with the 2 former guarantees and brought the guarantee back to Mr. Smith signed by my mother - then I would presume that the facilities thereupon granted by the Bank would be in reliance of that 3rd guarantee.
I do not suggest that the Bank exercised any pressure on my mother to sign these guarantees - I did not induce my mother to sign either of the 3 documents. She signed each of them under her own free will. I do think that the Bank Manager should have warned my mother about these guarantees - even though she was a shareholder in Ashworth Transport - and a Director, and even though Ashworth Transport was a shareholder (3 shares) in Ashworth International Ltd.
I agree that the Bank consequent upon this guarantee of June 1976 permitted the debit of Ashworth International to go from £29,000 in June to £56,000 in October 1976 when the receiver was appointed.
When I returned this guarantee to Mr. Smith who had given it to me, I made no mention of any fact to Mr. Smith nor gave him any impression that it was other than a document upon which he could properly act.
I do not know whether any money has been recovered under any other guarantee - I know Peter and Mary Thompson gave a guarantee for £20,000 - I have given personal guarantees for £70,000 - I don't know about any others - if there is one given by John Fleming (Anstrugther) Ltd. - I never heard of this.
I deny that I was ever given by Mr. Smith a Deed of Mortgage (conditional) to be secured on Townley (Ballasalla) - to have signed or for perusal by my mother. I never saw or touched any such document

RE-XD by Mr. Moroney

Since October I have no knowledge of the affairs of either company - I have enquired from the receiver since then without any success and from the Bank.

By the Court

I never paid any cash for any shares in Ashworth Transport Ltd. -nor in Ashworth International Ltd. No cash was paid for any of the shares in either company.
I have no doubt that my mother signed each of those three deeds - I did not induce her to sign them - nor do I suggest that the Bank did.

No. 7

PETER ROBIN WHITELAND-SMITH

At Douglas
29th November 1977
(by adjournment)

Mr N.C.Teare for Plaintiff
Mr.Moroney for Defendant.

Mr Teare calls :-

Peter Robin Whiteland-Smith - (Sworn)

I am a Chartered Accountant - my practice is located at Ballabrooie House, Douglas.
I am the Receiver appointed by the Plaintiffs in respect of the two companies - i.e. Ashworth Transport Ltd. and Ashworth International Ltd. - I was appointed on (i) the 13/10/76 - for Ashworth International Ltd. and (ii) on 19/10/76 for Ashworth Transport Ltd.
I am still the receiver of these two companies. Very little has been recovered from this receivership.

1. Ashworth International Ltd. the total recovery made by me amounted to £3,952.63 - sundry items of debts, vehicles, road tax refunds.

2. Ashworth Transport Ltd. the total sum recovered was £10,900 - of which £6,000 had to be paid to Hire Purchase companies - £4,900.00.

The receivership has been complicated because inquiries had to be made and these inquiries necessitated extensive costs. I believe that Ashworth International Ltd. will find itself either with a deficiency on the Receivership a/c of approx. £9,250 - which will be a further loss to the Bank - or if I am successful in a claim which I am making to National Westminster Bank Ltd. - and if I can recover V.A.T. from Germany then I would have a surplus in the receivership of £4,700 - subject to legal charges.
With regard to Ashworth Transport Ltd.- after allowing for bad debts I estimate that the company will not be able even to pay its preferential creditors - so nothing will become available to the Bank in the Receivership.

Cross-examination

XXED by Mr. Moroney :-

At the time of my appointment the debit at the Plaintiff of Ashworth International was £56,450.
The affairs of these two companies have been carefully scrutinised in depth, from 1976 - January to the date of my appointment. I can't say whether in January 1976 Ashworth Transport was then solvent - but I think it is highly improbable that it was solvent. I base this view on the fact that on a perusal of the situation in October 1976 the company was possibly insolvent to the extent of £156,000 - but this is not based on any audited statement of a/cs.
As regards Ashworth International Ltd., I regard this company as being insolvent or most probably so, in January 1976. I base this view on the fact that there was a deficiency to creditors of £101,000.
This means a total indebtedness of the two companies, together totalled about £250,000 - but these figures are capable of being disputed by the Directors. I do not think that these companies could have lost £25,000 a month - that is between January and October 1976. I have been unable to discover any assets or investments which can explain these deficiencies - many hundreds of hours have been taken up in looking for any such assets.
I am not able to say anything about the inter-company loan a/cs - because I have no records of these.
I produce copies of a very provisional statement of the affairs of both companies at the time of my appointment. This preliminary statement of affairs treated both companies as one unit - I was not nor could be aware of any inter-company

loans because the books were inadequate for this purpose.

RE-EXD by Mr. Teare

I asked for the Minute Books both from the Directors and from the auditor (Mr. W.L. Crossley) - I have never seen these books. I have frequently sought to obtain a documentation in respect of each company - with partial success - but I have never recovered any books relating to any period prior to January 1976. I know that very relevant papers were concealed.

By the Court

These documents were concealed from me by Mr. Edward Moreland at a warehouse in Leyland in Lancashire. He was an employee of Greenway Transport, which was a company in which either Ashworth International or Ashworth Transport had 25% interest - and the records of these two latter companies were kept at the office of the former company. I find now that it was Ashworth Transport which had 25% interest in Greenway Transport and they also had the same directors.
If the debit at the Plaintiff in the a/c of Ashworth International Ltd.went from £13,540 at 31/12/75 to £56,453 in Oct. 1976, I am not able to say where this money went - but enquiries are in hand.
If the debit at the Plaintiff in the a/c of Ashworth Transport Ltd.went from £60,543 on 31/12/75 to £71,186 in Oct. 1976 - I again am not able to say where this went but I have good reason to believe - that some monies were diverted.
Taking these two companies together, £13,772 was diverted away from the companies' Bank a/cs with the Plff. - and ostensibly beyond the reach of me as Receiver or any other Receiver - there maybe another £5,000 as well as this.

No. 8

DEREK SMITH

Derek Smith - (Sworn)

I live at 10 Highview Road, Douglas - I am the Manager of the Plaintiff Bank at its Douglas office.
I knew Mr. Harry Ashworth and Mrs. Mary Thompson

while I was in my former employment - these two persons were involved in Ashworth Transport before I came to Hodge Bank Ltd. Ashworth Transport Ltd. opened an a/c with the Plff. Bank on 7/12/73 - the Bank mandate now produced to me Ex.P9 relates to this company. I did not know who Effie Ashworth was at the time this mandate was signed. Since 1974 however, she has been a customer at the Plff. Bank. It was a deposit a/c. The document now produced to me (P1) is a guarantee from Effie Ashworth to the Bank. The writing on the first page of this document is mine. The signature on the reverse side of the document is Effie Ashworth - her address is in my handwriting.

Around the 10th - to the 13th March 1974 Mr. Harry Ashworth called on me to discuss certain banking facilities which he wanted for the company.

I cannot remember the entire conversation which then took place - but I do remember asking for information on the financial affairs of the company - i.e. by audited a/cs - I also asked for a Debenture in favour of the company - and the guarantee of Mrs.Ashworth - who was to the Bank to be the security and who was a Director of the company. The Bank was also aware that Mrs.Ashworth had a deposit a/c at the Plff. Bank. At the initial interview Mr. Harry Ashworth said that he would arrange for the various security to be given to the Bank. As regards his mother's guarantee, he would ask her to call and see me. So far as I can recall, Mrs. Effie Ashworth called at the Bank on the 20/3/74 - I generally explained the deed to her in my office - she said she had spoken about this to her son Harry - and so she knew all about it - and she signed the guarantee.

I don't go through the document word by word, when dealing with a guarantee, but I would explain to Mrs. Ashworth the nature of her liability - namely if the company failed to meet its obligations to the Bank she would be personally responsible and liable to give the amount to the bank, namely £10,000. Nothing else was said. Mrs. Ashworth raised no question as to this deed. Mrs. Ashworth remained a customer after the guarantee.

The documents Ex.P5 now shown to me show the deposit of Mrs. Ashworth - I would arrange for these notices to be sent to Mrs.Ashworth and invariably they would be returned to the Bank by delivery by Mr.Harry Ashworth.

The a/c with the Bank for Ashworth International Ltd. was opened - in 1/4/74.

The document now produced to me (Ex.P2) is a guarantee by Mrs. Ashworth of the a/c of Ashworth International Ltd. up to £10,000. Mr. Ashworth called on me some time prior to 3/3/75 to discuss further facilities and a renewal of the existing Bank facilities for another year.
The result of this was that I told him I must have a further guarantee from Mrs. E.Ashworth and a Debenture on the company Ashworth Transport Ltd. which had been promised to me in March 1974 but had not been completed - we decided at that time not to bother with this Debenture - this would be Oct. or Nov. 1974.
I did, however, ask for up to date a/cs for both companies.
I can recall seeing Mrs. Ashworth in my office on the 3/3/75 - and the guarantee was then signed. I believe that Mr. Harry Ashworth was present at that interview. I can't remember the exact conversation, but I presume that I would do exactly the same as I had done in the case of the previous guarantee.
My name is there as a witness - it is my writing. I witnessed this document.
I received the Debenture from Ashworth Transport Ltd.to the Bank a little later - this is the document of which Ex.8 is a certified copy.
This Debenture is dated 4/8/75.
Prior to May 1976, I did get a Debenture from Ashworth International Ltd. Other guarantees were taken from other persons prior to May 1976.
I remember a day - 20/1/76 - a meeting of both companies was arranged at the request of the companies' accountants in both cases - the meeting was held at the accountant's house in Ballakillowey, Isle of Man. Three people besides the accountant and me were present - namely Mary Thompson, Peter Thompson - and Mr. Harry Ashworth. Mrs. E.Ashworth was not there.
I took a joint and several guarantee from Mary and Peter Thompson in the sum of £20,000 - in favour of Ashworth International Ltd. - I also took a personal guarantee from Mr. Ashworth for £70,000 - for Ashworth International Ltd. I also arranged for a guarantee to be given by a Scottish company - John Fleming (Anstrugther) Ltd. which I knew to be an associated company in the Ashworth group and of which Mr. Peter Thompson was a Director.
I also called upon the accountant for a statement of the a/cs and I said I would want a further guarantee from Mrs. Ashworth and I took other guarantees. Steps have been taken to enforce all these other guarantees - and nothing has been recovered as yet - but judgments may have

been given -perhaps against Mrs. Thompson.
The document now produced to me (Ex.3) is dated 14/6/76 - it is a guarantee to the Bank in favour of the a/c of Ashworth International Ltd.
The writing on the front page is my writing - and on the reverse, the signature is that of Mrs.Ashworth.
There is a note in Mrs.Ashworth's handwriting about legal advice. I witnessed her signature. 10
There is also an address of Effie Ashworth on the reverse side - this is in the handwriting of Mr. Harry Ashworth.
This document was executed in my office in the new premises. I think three of us were there - me - Mr. Ashworth - and Mrs. Ashworth.
I would explain the document to them - as I had done on the previous occasions and Mrs. Ashworth would then sign the document.
Invariably at that time, it was the practice 20
of the Bank when legal advice was not sought, it was the common practice to add this note.
I would write out the words on a piece of paper - and place it before the guarantor and she would copy it out, Mrs.Ashworth did this.
Before she signed it, I did say to her "If you are not happy - you must take legal advice" - I do this invariably - these words do not appear on the previous two guarantees - this was an oversight on my part - due I think to working 30
conditions at that time. This applies only to the writing of the note. I certainly used the words to her on each of all occasions.
I had asked for a debenture from Ashworth International Ltd. and this debenture came to hand some time later.

(Mr. Teare produces this Debenture - dated 3/8/76) This is Exhibit P.22.

The Bank balance on the date of this 3rd guarantee - namely 14/6/76 - was in debit 40
£33,455.00 - the account was closed on the Receivership coming into effect - the account was frozen - on the 8/10/76 - and the debit then was £56,453.00.
The company Ashworth International was wishing to expand its trade to and from the Middle East - and so Mr. Ashworth had called at the Bank for facilities for this purpose. This was agreed subject to the further security becoming available - that is company's Debenture to the Bank and 50
Mrs. Effie Ashworth's guarantee. The Bank was also still seeking the audited a/cs of the company.
After the receiver was appointed I wrote the letters to Mrs. E. Ashworth - copies of which are

Ex. P10 and P11 - dated 21/10/76 and the other 21/10/76 - they were - one on the 21/10/76 and the other on the 22/10/76.
I produce 2 account sheets which record the transactions of each of these 2 companies respectively for the period of 6 months prior to the date of the calling in of the guarantees (Ex.P23-P24).
I have met Mrs. Effie Ashworth on 3 occasions only - namely on the signing of the 3 guarantees. She signed a deposit a/c application in January 1974 - (Ex.P7) - she signed an application to the Bank for borrowing - it was a resolution of the Ashworth Transport - but this was not signed at the Bank.
She opened a current a/c - which she opened in Apr.1975 - by a transfer from her deposit a/c - but she would not sign any new form for this current a/c.
I felt Mrs. Ashworth was a competent lady in spite of her age - her bank dealings showed this.
Exhibit P4 now produced to me is an authority to the Bank as to her Bank A/c - I acted on that instruction.
I became uneasy in late 1975 because of certain entries in the Bank Pass sheet - but these were explained to me
The rate of 12½% interest referred to in the letters to Mrs. Ashworth was the legal maximum - for interest in the Isle of Man and 1½% was charged by commission.

The Court adjourns at 1 p.m.
The Court resumes at 2.30 p.m.

Our Bank (Hodge) offers current a/c facilities and deposit a/c facilities - we do not offer any other facilities - but not other services like other local Banks do - by this I mean Trust business - investment advice and taxation.
No services were given to Mrs.Ashworth other than deposit a/c and current a/c facilities - nor did she seek any other facilities.

XXED by Mr. Moroney

Cross-examination

The only brochures which our Bank produce are the deposit a/c brochures.
I met Mrs. Ashworth 3 times. I think Mr.Ashworth asked me about our deposit a/c rates for his mother - and this is how the deposit a/c was opened by Mrs. Ashworth.
I agree I had a good business relationship with Mr.Ashworth.
When I was dealing with the first two guarantees, I was working in premises which were temporary -

and difficult for both me and the customers. The lack of the written note on the 1st two guarantees was an oversight. I did not write the words on the other guarantees I took from other persons - because they were directors of the company concerned.
I did not know that Mrs. Ashworth was the holder of one share in Ashworth Transport.
I know that one or two - or perhaps more - cheques drawn on Ashworth International were returned Refer to Drawer - I agree that the letters put to me show these 5 cheques - 4 of £50 - and 1 of £35 - all payable Ashworth International to Mrs. M.Thompson were returned marked "Refer to Drawer". I did not tell Mrs. Ashworth when she signed her guarantee in June 1976 that their cheques had been stopped.
I say that these cheques were not stopped because they included the words "refer to drawer - please represent". These cheques were presented again by the negotiating bank and were paid - so that when Mrs. Ashworth signed the guarantee these cheques had been met.
The last statement of accounts I ever saw for either company was for the year ending 31/12/74.
I did not have knowledge of the company's a/cs - but I was frequently in touch with the accountant - and did not become aware of anything - but after the company debentures had been signed - I asked Mr. Harry Ashworth and his accountant for information and only got small pieces of paper with a note on - which was no use to me.
I did not explain this to Mrs. Ashworth.
On the 31/12/74 the a/c of Ashworth Transport Ltd.was overdrawn £2,394.13 - and on that date, the a/c of Ashworth International was in debit £2,433.48.
The Bank did not lend monies to the company purely and simply on the supply of audited a/cs - other factors were taken into consideration.
The Bank does have a file for the information received from the Directors of Ashworth International - setting out what business was done with the customer - it contains notes and information received by the Bank from the customer.
The guarantee was signed by Mrs. Ashworth 14 months after receiving the last copies of accounts - those for the year ending 31/12/74.
I don't agree that it was highly probable that these companies were insolvent in January 1976 - nor yet in June 1976.
I learnt that a Director of Ashworth International Ltd. had bought a property in Burnley - and there was no evidence that the monies for that purpose had come from either Ashworth Transport or

Ashworth International. I contacted this Director on the phone - I was told that the monies had been accumulated elsewhere but had come from the bank a/cs of the group. I then asked for the solicitor acting for the purchaser for details - and I was told that it was in the process of being conveyed to the name of another associated company. On hearing this I immediately went back to the Director concerned and said the house should be in the name of one of this group of companies - i.e. either Ashworth Transport or Ashworth International and I understood this would be done - but it was put right eventually. I raised this with the Directors in January 1976 - and when the property was resold - the proceeds did come back to the company - namely Ashworth Transport or Ashworth International on the 29/6/76 - This was one of the reasons why I was returning cheques prior to that date.
Mr. Crossley kept telling me that he was unable to get proper and sufficient information about these two companies - I kept asking for them - so were the accountants - Mr. Harry Ashworth kept telling me that he had given the information to the accountants. I did not doubt Mr. Ashworth's word - yet the accountant kept saying that they had not the sufficient a/cs. But I did not ever become largely suspicious.
Mr. Harry Ashworth did not have an a/c at the Bank.
I did not disclose anything concerning Mrs. Ashworth's affairs.
I did not ask Mr. Harry Ashworth to leave the room.
In 1974 it was Mrs. E.Ashworth alone in the room with me. I probably said to Mr. H.Ashworth - I will have to have more cover and he said "I'll ask Mother."
I did not hand the guarantees to Mr. Harry Ashworth - nor did Mr. H. Ashworth bring them to me at the Bank.
My name could not have been put on the guarantee if it was signed at Townlea. I deny that the words written at the foot of the 3rd guarantee were not written in the presence of Mr. Smith - i.e. my presence.
I was aware Mrs. Ashworth had bonds - I understood also she owned her house. I did not discuss with Mrs. Ashworth the rate of interest. When the last guarantee was signed - I did not mention to her that the company might go to the wall.
I did not discuss anything with Mrs. Ashworth. At the signing of each of the guarantees, the affairs of the companies were not discussed.

I did not regard myself under any duty to warn Mrs. Ashworth over either of these 3 guarantees. Both Mr. H.Ashworth and Mr. Peter Thompson both agreed in Oct. 1976 that the Bank should appoint a receiver.

RE-EXD by Mr. Teare

The rate of interest varies from time to time - it depends upon the circumstances at any given time.

Mr. Teare closes his case.

No.9
Address for the Defendant

9th December 1977

No. 9

ADDRESS FOR THE DEFENDANT

At Douglas
9th December 1977
(by adjournment)

Mr.N.C.Teare for Plaintiff
Mr.Moroney for Defendant

Mr. Moroney addresses the Court for the Defendant.

Execution of this Deed

At no time has there been a denial of the execution of the Deeds by Mrs. Ashworth. The question is the duty of the Bank.

He refers to the conflicting stories as to the execution of these deeds - Mr. Smith's version - he witnessed all 3.

Mrs. Ashworth's story - once at the Bank only - Mr.Ashworth's story - all signed in his presence.

Mr. Moroney asks the Court to accept the evidence given by the witnesses called by him as to the execution of these deeds. He says that his pleading in the defence filed was intended to refer to all 3 guarantees.

In this circumstance the duty of the Bank would be :-

(a) to be satisfied that Mrs. Ashworth was clearly aware of what she was doing - and of the dangers inherent in her signing

that document - and of the advisability of taking independent advice.

He cites Lloyds Bank Ltd.v.Bundy 1974 3 A.E.R. 757

He refers to p. 765
and p. 772.

The liability which Mrs. Ashworth was entering by these 3 documents - was such as to create a duty on the Bank

Mrs. Ashworth took no part in the running of the companies - this to the Bank's knowledge.

If the evidence of Mr. Smith is accepted - then the duty of the Bank arises even more strongly.

These guarantees were more of benefit to Mr. Ashworth than to his mother. The Bank owed a duty to the Dft. to warn her.

If Mr. Smith witnessed the guarantee in the absence of the lady, a more difficult situation must arise. The Bank had to advise their customer it was a wise course for her to take.

No. 10

ADDRESS FOR THE PLAINTIFF

Mr. Teare replies to these submissions :-

He refers to the grounds of the defence.

(1) The Bank Manager did not witness the signature of the lady. There is no law which requires that a guarantee must be witnessed. All that is necessary is that the guarantee be in writing and signed by the party to be charged - he says the first grounds of the defence fails. He says this point in the defence is bad law.

If it is alleged that Mr. Smith did not witness the signature, his signature at some later time would not affect the legality of the signature.

It is the legal character of the document which is important.

Davidson v Cooper 13 M & W 334.

Use of a seal.

In this case, even if the Manager did not put his signature on the document until some time

later, it does not affect its legal nature - it does not alter the legal pattern of the document.

Second ground. The Bank failed to warn the Deft. of a danger inherent in the signing of the guarantee.

What warning should have been given?

Mr.Smith's evidence is that he did explain the nature of the document. He submits that Mr. Smith did all that he should have done.

Third ground. That the Plff. was aware that Mrs. Ashworth had funds to meet any claim.

There can be no merit in this claim.

Fourth ground. The Bank's fiduciary duty - did not advise the Defendant to obtain legal advice.

The onus of proof against a guarantee is on the person who alleges that the guarantee is bad.

He refers to page 763 in the case cited by Mr. Moroney, and the 4 grounds upon which it is proposed to found a plea that the deed is bad - p.763-4.

The duty must be established - and then the breach of duty must be established.

None of these principles can be raised in this case.

Mr. Teare distinguishes this case of Bundy from this case :-

(i) Mr. Bundy had lived in the neighbourhood all his life. Mrs. Ashworth came here in 1969.

(ii) Both Mr.Bundy and his son - customers of the Bank for many years.

(iii) The company in Bundy's case first got into difficulties in 1961.

(iv) The Bank only had a guarantee in this case.

(v) There was a history in Bundy's case - as regards banking - and the dishonouring of cheques.

(vi) In Nov. 1969 Lloyds Bank suggested to the son of Mr.Bundy that the company might have had to cease trading - when the last guarantee was taken certain conditions were imposed.

No conditions whatever were laid down in the case before me.

(vii) In the Bundy case the father said that he relied completely on the Bank.

Mrs. Ashworth says she had never sought any advice from the Bank - nor of Mr. Smith offering advice or opinion as to any matter such as this. The Bundy case has no application to the facts of this case.

"Inequality of bargaining power"

He submits the Defendant has not rebutted the presumption of the completion method - the evidence of the Defence is suspect - and unreliable.

The Bank should have execution for the sums claimed.

No. 11

REPLY FOR DEFENDANT

Mr. Moroney replies.

He alleges that the Bank has a duty to its customers - it is a question of degree on the facts of each case.

The duty of the Bank to the Defendant was a special one. These considerations are even greater in the case of the 3rd guarantee.

C.A.V.

No. 12

PROCEEDINGS

At Douglas
23rd February 1978
(by adjournment)

Mr. N.C.Teare for Plaintiff
Mr.Moroney for Defendant

Judgment delivered.

Judgment and execution for £45,000 with interest as claimed; the Defendant to pay costs.

R.K.Eason

In the High Court

No.13
Judgment
23rd February 1978

No. 13

JUDGMENT

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

COMMON LAW DIVISION

SUMMARY JURISDICTION

JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED — Plaintiff

v.

EFFIE ASHWORTH — Defendant

J U D G M E N T

delivered by His Honour DEEMSTER R.K. EASON at Douglas, the 23rd day of February 1978

In this suit, the Plaintiff claims against the Defendant the sum of £45,000 made up as follows :-

1. £10,000.00 the amount due under a guarantee in writing bearing date the 20th day of March 1974 given by the Defendant to the Plaintiff in respect of the indebtedness of Ashworth Transport Limited to the Plaintiff together with interest thereon at the rate of 12½ per centum per annum from the 23rd day of October 1976 being the date upon which demand was made by the Plaintiff on the Defendant under the said guarantee until payment;

2. £25,000.00 the amount due under a guarantee in writing bearing date the 14th day of June 1976 given by the Defendant to the Plaintiff in respect of the indebtedness of Ashworth International Limited to the Plaintiff together with interest thereon at the rate of 12½ per centum per annum from the 22nd day of October 1976 being the date upon which demand was made by the Plaintiff on the Defendant under the said guarantee until payment.

The Defendants by her defence denies that any sum is owing by the Defendant to the Plaintiff as alleged, or at all.

She further alleges that the document purported to be a guarantee by her to the Plaintiff is of no validity, in that -

(1) The Plaintiff's Manager did not witness the signature of the Defendant in the Defendant's presence;

(2) The Plaintiff failed to warn the Defendant of the danger inherent in the signature of such document;

(3) The Plaintiff was aware that the Defendant had funds with the Plaintiff which the Plaintiff purports to offset against the indebtedness of Ashworth Transport Limited;

(4) The Plaintiff failed in its fiduciary duty to the Defendant and in particular did not advise the Defendant to obtain legal advice.

By its reply, the Plaintiff maintains its claim against the Defendant for the amount claimed and alleges that the guarantees in respect of which those monies are claimed are perfectly valid. The Plaintiff further avers that the Plaintiff's Manager did witness the signature of the Defendant in the presence of the Defendant and avers that even if he did not, such omission would not invalidate the guarantees. The Plaintiff refers to paragraph 2 of the defence and avers that there were no dangers inherent in the signature of the guarantees of which the Plaintiff should have warned the Defendant and did not. The Plaintiff also refers to paragraph (3) of the defence and agrees that it was aware that the Defendant had funds with the Plaintiff but denies that the Plaintiff is purporting to set off such funds against the indebtedness of Ashworth Transport Limited. The Plaintiff avers that it has exercised its lien as a banker over such funds, pending the determination of this claim.

The Plaintiff also refers to paragraph (4) of the defence and admits it did not advise the Defendant to obtain legal advice but denies that it was under any obligation to do so. The Plaintiff denies being in breach of fiduciary duty it owed to the Defendant and denies the

existence of any such duty between it and the Defendant as regards the execution of the guarantees in favour of the Plaintiff in respect of which this claim was brought.

At the hearing before me, Mr. N.C.Teare appeared for the Plaintiff and Mr. Moroney appeared for the Defendant. Mr. Moroney stated that he had the right to begin, with which Mr. Teare concurred.

Mr. Moroney referred to his defence and stated that in paragraph 1 he intended that the word "document" there referred to meant each of the three documents referred to in the Particulars of Claim.

Mr. Moroney, after opening his case, called the Defendant. The guarantee referred to in paragraph 1 of the Statement of Claim was shown to the witness and she said she did not remember signing this document, but she agreed that the signature could be hers. She agreed that it was a guarantee for £10,000 to the Bank - guaranteeing a debt of Ashworth Transport Limited of which company she was a director and in which she held one share. She said she knew there were other directors, but she did not know what their shareholdings were. She said she did not attend any directors' meetings of this company at any time near this date - the 20th March 1974. She said she had met Mr. Smith of the Plaintiff Bank once only, when she went to the Bank because they needed a copy of her signature and she went there to do this. She said she signed the paper at the counter and in Mr. Smith's presence. She said there was no discussion about the document.

She said she had money in the deposit account at the Plaintiff Bank and several deposit accounts there. She said that the deposit accounts would expire on different dates and, when any date of expiration occurred, the Plaintiff Bank would write to her and ask what she wanted to do - whether to renew the deposit or to take it out. She said that she would talk to her son about it and he would take the message back to Mr. Smith.

She said she had no idea that the document she was signing was a guarantee. She said her son had opened a current account for her at the Plaintiff Bank and that Mr. Smith had asked that she should call at the Bank to sign for the opening of that account.

The matter of the guarantees referred to in paragraph 2 of the Statement of Claim was then put to her. She said that that signature could have been hers, but she had no recollection of signing it. She said the witness on the document appeared to be Mr. Smith; she said the address there shown is correct but it was not in her writing. She said this guarantee was for Ashworth International Limited, of which she had never been either a director or a shareholder. She said she was not aware at that time of the financial state of that company and that she had no recollection of having signed the document, although it could be her signature. She said, however, that she had no contact with anyone at the Bank other than Mr. Smith.

The guarantee referred to in paragraph 3 of the Statement of Claim was then put to the witness. This was a guarantee for £25,000 for Ashworth International Limited. She agreed her signature appeared twice on this document and that those two signatures could be hers, but she had no recollection of signing either of them, nor had she any recollection about her not having taken legal advice.

She said she was 86 years of age; that she owned a bungalow at Phildraw, Ballasalla, which has been sold for £25,000 and that she had about £21,000 on deposit at the Plaintiff Bank. She said that all these three documents were news to her since the case started.

She said she remembered a letter dated 21st March 1975 - she remembered signing this letter but that it had been written by her son. She acknowledged that she knew all about this letter and that she had been asked by her son to guarantee the Bank for £5,000 in connection with the haulage business which was her son's firm, to enable them to take out insurance against her losing that sum. She agreed that the last paragraph of the letter tells the Plaintiff Bank what to do with the balance of her money on deposit there.

On cross-examination, she said she had no idea of the date on which she went into the Bank to see Mr. Smith, but she was certain it was about her current account there. She said she thought the form she signed at the Bank was for the opening of a current account at the Bank. She said she would not agree with Mr. Smith if he said no signature was necessary for the opening

of a current account. She said that generally she recognised her signature, but she maintained that she did not remember ever signing any of them.

Mr. Teare then put to the witness thirteen letters, each of which bears her signature ranging in date from April 1974 to September 1976. The witness agreed that each of those documents had been signed by her and that she was well aware of the contents of each. Mr. Teare also put to her a series of cheques drawn on the Bank in 1975 and 1976. She agreed that each of these was signed by her and was drawn on the current account in her name at that Bank. She agreed that there were two sets of signatures, because she knew to what they related. She maintained that she did not know to what the guarantees related and could not remember them.

On a certified copy being produced to her of a debenture passed to the Plaintiff dated 4th August 1976 which bears her signature, she said that she knew something about this document, but she did not remember going to any advocate's office to sign it. She said she did know that her son was forming a company, in which she was to have one share. She could not remember granting a loan to the company of £4,000, nor signing the debenture to secure that loan, nor did she remember it being repaid. She said she had no recollection of a form of application dated 5th December 1973 for the opening of an account at the Plaintiff Bank for Ashworth Transport Limited, but she said that the signature thereon appeared to be hers. She said she had no recollection of this document, nor of attending any meeting of the company on that date; but she was aware that Ashworth Transport Limited had an account at that time.

She denied that while she had a good memory for her own affairs, she could not remember the affairs of the companies. She said she had no knowledge of the bank account of Ashworth Transport Limited and that her son did not discuss the affairs of this company with her; she was aware that a receiver had been appointed in 1976, but she was then off the Island and had been since then. She went on to say that she had never seen the deed of mortgage of 1976 secured upon her bungalow, Towneley; that she never knew anything about the two companies - as to their working or finance -

and that her son never discussed matters with her, nor did she ever ask. She said she understood the form she signed at the Bank was to open an account; that she never asked for any advice, nor did she ask what the document was. She denied that Mr. Smith had explained each of the three documents to her; she said she had never asked the Bank, nor had she received any advice. She said she never knew the indebtedness to the Bank of either Ashworth Transport Limited nor of Ashworth International Limited; but she did know that in June 1977 a judgment had been granted against Ashworth International Limited and that the indebtedness to the Bank was £59,932.92.

In reply to me, the Defendant said that up to September 1976 she was quite capable of dealing with her own personal affairs and of dealing with any company matter of either company if she was told about them; that she had never been called to, nor attended at any company meeting, nor had she seen a minute-book or balance sheet. She said the only place those three deeds of guarantee could have been signed was at her own home and she could not remember signing any of those deeds there.

Mr. Moroney then called Mr. Harry Ashworth, the son of the Defendant, who said that when Ashworth Transport Limited was formed, he and his mother held one or two shares each and they were the only directors; that when the business of the company prospered in 1972/1973, a certain amount of profit was capitalised to him and he was allotted 9,998 or 9,999 shares for which he had made no payment; that his mother was the secretary of the company but played no part in its business; that no board meetings were ever held. He said the bank accounts were transferred from Lloyds Bank to Barclays Bank in 1972 and from Barclays Bank to the Plaintiff Bank in 1974, down to which latter date he and his mother were the only director; but his mother had never played any part in either of these transfers.

He said that Ashworth International Limited was formed in 1972 and that a total of two thousand ordinary shares had been issued, but he did not know how many shares he owned - he thought 24%. He said that no payment was made by anyone for any of those shares - they were all paid for in cash out of the capitalised profits of Ashworth Transport Limited. On the file of Ashworth Transport Limited being shown to him, he agreed that the number of shares there

shown as having been allotted was quite different from what he had previously stated and he agreed that none of these shares had been paid for in cash as was shown in the company file.

On the company file of Ashworth International Limited being shown to him, he agreed that the number of shares allotted had been quite incorrectly stated by him and that there had been no payment of cash for any of those shares, although the return of the allotments showed that cash had been paid. He agreed that his evidence as to the issue of shares in each of these companies had been quite wrongly stated by him and that no cash had been paid for any of the shares in either company.

Referring to Exhibit P4 which was shown to him, he said that that letter had been written by him from a draft prepared by Mr. Smith and he had asked his mother to sign it and that he then took it to the Bank.

He said that the guarantee dated 20th March 1974 contained no writing by him, nor did the guarantee dated 3rd March 1975, but he agreed that he had written the address on the guarantee of the 14th June 1976.

He said he could not remember the guarantee of the 20th March 1974, although he had seen it before, and that he first became aware of the amount of this guarantee in November or December of 1976, but he knew before then that the document had been signed on or about the 20th March 1974 and that the company had acted on it. He said he thought the Bank Manager had asked him a fortnight before for a guarantee, but that he did not say from whom, and that Mr. Smith had given him a form for this purpose; that he assumed that Mr. Smith thought his mother would do this. He said he did not discuss it with his mother, but that the Bank had asked that she should sign it and that she had signed it on the 20th March 1974 and he took it then to the Bank.

He said the same procedure happened about the guarantee of the 3rd March 1975, except that this was for Ashworth International Limited; that the guarantee of the 14th June 1976 was given to him by Mr. Smith together with a handwritten note - which he thought Mr. Smith had written - with a request that his mother should copy out the wording of that note on to the guarantee; that he took it to his mother, there was no

discussion about it, that she wrote the words on it and signed it in his presence and that he, the witness, had written the address on it.

He agreed that the Bank pass-sheets produced to him for Ashworth International Limited showed a debit on the 14th June 1976 of £33,455 and that on the appointment of the receiver on the 8th October 1976, that debit had become £56,453.83. He said he had never told his mother about the financial position of this company.

In cross-examination, he agreed that the minute-book produced to him referred to a meeting of the directors on the 5th December 1973; he then said that his mother - the Defendant - was present at that meeting. He agreed that the minute-book showed that his mother was present at fourteen meetings of the directors of this company between 26th June 1969 and 27th September 1974, and that there had been no minute of any meeting since that latter date. He said that all those minutes except one had been signed by him, that his mother had been present at eight of those meetings. He said the minutes speak the truth except for the names of those who attended the meetings.

On being shown the minutes of the meeting of directors on the 22nd January 1970, he said the minutes said that his mother was present; but that this was not correct. He agreed that at that meeting it was agreed that Ashworth International Limited would buy from him the assets of the business carried on by him by Ashworth Transport Limited at a price to be fixed as soon as the accounts for the year ending 31st December 1969 were available. He said he thought it was quite in order to do this. He agreed that there had been no accounts of this company since those for the year ending 31st December 1974; that he had shown his mother the accounts for the previous years and had pointed out to her what the profit was and she was quite satisfied. He agreed that he had not shown her the statement contained in the report of the directors that no dividend would be paid and he did not tell her anything about it. He said he was quite satisfied that his mother had signed the guarantee dated 20th March 1974 in his presence and that he had taken it to the Bank; that at that time his mother would have no knowledge of the state of the company's affairs, her only knowledge would be of the balance sheet for the year ending 31st December 1973 if there

had been accounts, and even if there had been one he would only have shown his mother the amount of the profit, and not the amount of the overdrawn account at the Bank. He said there was an overdraft at the Bank at the end of December 1973 and that on the 20th March 1974 the amount of that overdraft was £2,722.13; that his mother would not have been present at the meeting of the directors said to have been held on the 27th December 1973.

He said that in 1974 his mother was quite capable of managing her affairs. He said -and I quote - "If my mother had been told that the document was a guarantee for the company's bank account, she would have understood. I brought the document to her, she signed it and I took it away. She did not read it and I did not read it to her."

As regards the guarantee of 3rd March 1975, this was for Ashworth International Limited, the resolution being dated 14th August 1974. He said he was not aware of any meetings of this company since its formation; that the last statement of accounts for the period ending 31st October 1973 showed a loss of £6,548.12; he said that up to April 1974 Ashworth Transport Limited had loaned £16,613 to Ashworth International Limited, but his mother had no knowledge of this, nor was it ever mentioned at any meeting at which she may have been present. He agreed the Bank balance sheet showed that the overdrawn account at the Bank of Ashworth International Limited at 3rd March 1975 was £4,741.46. He adhered to his evidence as to the signing of the two guarantees by his mother of 20th March 1974 and 3rd March 1975.

He said that in March 1975 he thought Ashworth International Limited would be solvent so long as the Ashworth Transport Limited loan amounting to £16,613 was not claimed. If it was claimed, that company would be insolvent. He agreed that in February 1976 the overdraft of Ashworth International Limited was £23,078 and that by 8th October 1976, on the appointment of the receiver, it had gone up to £56,453.

He said that he followed the same course with the third guarantee in June 1976. He took it to his mother and took it back to the Bank signed by her. Then he would presume that the facilities then granted by the Bank would be on reliance of that third guarantee. He said he did not suggest that the Bank exerted any

pressure on his mother to sign these guarantees that he did not induce his mother to sign any of the three deeds, but she signed each of her own free will. He said he thought the Bank should have warned his mother about the guarantees; that when he returned the guarantees to the Bank he did not give any impression to Mr.Smith that those guarantees were other than documents upon which the Bank could properly act. He said he was not aware of what monies, if any, had been recovered from the other guarantors. He denied that he was ever given, by Mr. Smith, a deed of Conditional Mortgage to be secured on Towneley and to be signed by his mother. He said he had never seen nor touched any such document. He said that since October 1976 he had no knowledge of the affairs of either company - that he had enquired from the receiver and from the Bank.

Mr. Moroney then closed his case.

Mr. Teare then called Mr. P.R.Whitehead-Smith, a chartered accountant in practice in Douglas and who is the receiver appointed by the Plaintiff Bank in respect of the two companies - that is, Ashworth Transport Limited and Ashworth International Limited. He said he was appointed for the former on the 13th October 1976 and for the latter on the 19th October 1976 and that he was still receiver of these two companies. He said that very little had been recovered from this receivership - the recovery from Ashworth International Limited amounted to £3,952.63, this being sundry items of debts, vehicles and road tax refunds. In respect of Ashworth Transport Limited, the amount recovered was £10,900 of which £6,000 had to be paid to hire-purchase companies, leaving a balance of £4,900 only.

He said the receivership had been complicated because of extensive enquiries which had to be made. He thought the conclusion would be that Ashworth International Limited would find itself either with a deficiency on the receivership account of approximately £9,250, which would be a further loss to the Plaintiff Bank, or, if the witness was successful in a claim made against National Westminster Bank Limited to recover Value Added Tax, then he would have a surplus in the receivership of £4,700 subject to legal charges. He said that in Ashworth Transport Limited, after allowing for bad debts, he estimated that this company would not be able even to pay its preferential creditors, so that

nothing would become available to the Bank on the receivership.

In cross-examination by Mr. Moroney, he said that at the time of his appointment, the debt to the Plaintiff Bank from Ashworth International Limited was £56,450. He referred to the enquiries which have had to be made in respect of these two companies - he could not say whether in January 1976 Ashworth Transport Limited was then solvent, although he thought that highly improbable. As regards Ashworth International Limited, he regarded this company as insolvent, or probably so, in January 1976.

This meant that the indebtedness of the two companies, together totalled about £250,000. He thought that these companies could not have lost £25,000 a month, that is, between January and October 1976. He said that although many hours had been spent, he had been unable to discover any assets or investments which would explain these deficiencies He produced copies of a very provisional statement of the affairs of both companies at the time of his appointment.

In re-examination by Mr.Teare, he said he had asked for the minute-books, both from the directors and the auditor, but he had never seen these books; that he had frequently sought to obtain documents in respect of each company with partial success, but he never recovered any books relating to any period prior to January 1976 and he thought that very relevant papers had been concealed.

In answer to me, he informed me of the reason for his statement that documents had been concealed and I minuted the facts which he then gave me.

He went on to say that if the debit at the Plaintiff Bank in the account of Ashworth International Limited went from £13,540 on the 31st December 1975 to £56,453 in October 1976, he was not able to say where this money had gone, but enquiries were still in hand. He added that if the debit in the account of Ashworth Transport Limited went from £60,543 on the 31st December 1975 to £71,186 in October 1976, he was again not able to say where this money went. He concluded by saying that taking the two companies together, £13,772 was diverted away from the companies' bank accounts with the Plaintiff Bank and ostensibly beyond the reach

of him, as receiver, or any other receiver, and there was another £5,000 as well as this.

Mr. Teare then called Mr. Derek Smith, the manager of the Plaintiff Bank at its Douglas office at the material time He said he knew Mr. Harry Ashworth and Mrs. Mary Thompson while both of them were involved in Ashworth Transport Limited before he had come to the Plaintiff Bank. He said that Ashworth Transport Limited had opened an account with the Plaintiff Bank on the 7th December 1973. He said he did not know who Effie Ashworth was at the time this mandate was signed. Since 1974, however, she had been a customer at the Plaintiff Bank, where she held a deposit account. As regards the first guarantee from Effie Ashworth to the Bank, the writing on the first page of the document was his - the signature on the reverse side was that of Effie Ashworth - her address was in the handwriting of the witness. He said that between the 10th and 13th March 1974, Mr.Harry Ashworth called to discuss with the witness banking facilities for this company. The witness said he remembered asking Mr. Ashworth for some information as to the financial affairs of the company and that he also asked for a debenture in favour of the company and the guarantee of Mrs. Ashworth, who was known to the Bank to be the secretary and director of that company. He said he was also aware that Mrs. Ashworth had a deposit account at the Plaintiff Bank. At that interview, Mr.Ashworth said that he would arrange for the various security to be given to the Bank and that as regards his mother's guarantee, he would ask her to call and see him.

He said that so far as he could recall, Mrs. Ashworth called at the Bank on 20th March 1974. He said he explained the deed to her in his office; that she had said she had spoken about this to her son, Harry, and so knew all about it, and she signed the guarantee. He said he did not usually go through the document word by word when dealing with a guarantee, but he would explain to Mrs. Ashworth the nature of her liability, namely, if the company failed to meet its obligation to the Bank, she would be personally responsible and liable up to the amount of her bond, namely, £10,000. Nothing else was said. Mrs. Ashworth raised no question as to this deed and she remained a customer with the Plaintiff Bank after that date. The document then produced to the witness dealt with the deposit account in her name at the

Bank. When these deposits became repayable, he would arrange for the notices to be sent to her and invariably they would be returned to the Bank, being delivered there by Mr. Harry Ashworth.

He said the account with the Plaintiff Bank for Ashworth International Limited was opened on the 1st April 1974. As regards the second guarantee by Mrs. Ashworth for the account of Ashworth International Limited up to £10,000, he said that Mr. Ashworth called on him some time prior to the 3rd March 1975 to discuss further facilities and a renewal of the existing banking facilities for another year. He said he told Mr. Ashworth that there would have to be a further guarantee from Mrs. Ashworth and a debenture secured on the property of Ashworth Transport Limited which had been promised to him in March 1974 but had not been completed. He said they decided at that time not to bother with this debenture. He said this would be in October or November 1974. He said he did, however, ask for up-to-date bank accounts for both companies. He said he could recall Mrs Ashworth being in his office on the 3rd March 1975 when this guarantee was signed. He said he thought Mr. Harry Ashworth was with her. He said he could not remember the exact conversation, but he presumed he would do exactly the same as he had done in the case of the previous guarantee.

He said he received the debenture from Ashworth Transport Limited to the Plaintiff Bank a little later. It was dated 4th August 1975, a copy of which was produced to the witness. He said that prior to May 1976 he did get a debenture from Ashworth International Limited, and other guarantees were taken from other persons prior to May 1976. He said he remembered that a meeting of both companies had been arranged to be held on 20th January 1976, the request having been made by the companies' accountants in both cases, and it was held at the accountant's home in Ballakillowie, Isle of Man. He said three people besides the accountant and himself were present, namely, Mary Thompson, Peter Thompson and Harry Ashworth. He said Mrs Effie Ashworth was not present. Mr Smith said he took a joint and several guarantee from Mary and Peter Thompson in the sum of £20,000 in favour of Ashworth International Limited; that he also took a personal guarantee from Mr. Ashworth for £70,000 for Ashworth International Limited. He said he also arranged

for a guarantee to be given by a Scottish company which he knew to be an associated company in the Ashworth group and of which Peter Thompson was a director. He said he also called upon the accountant for a statement of accounts and told him he would want a further guarantee from Mrs Ashworth and he took other guarantees. He said steps had been taken to enforce all these guarantees and nothing has been recovered as yet, but judgments have been given, he thought against Mrs..Thompson. He said that the document of the 14th June 1976 was a guarantee to the Bank from Mrs. Ashworth for the account of Ashworth International Limited. He said the writing on the front page was his, and on the reverse, that the signature was that of Mrs. Ashworth. He said there is a note in Mrs. Ashworth's handwriting about legal advice. He said he witnessed her signature. There is also an address of Effie Ashworth on the reverse side. This is in the handwriting of Mr. Harry Ashworth. He said this document was executed in his office in the new premises. He said he thought Mr. Ashworth was with his mother on that date. He said he would explain the document to them as he had done on the previous occasions, and Mrs. Ashworth then signed the document. He said that invariably at that time it was the practice of the Bank, when legal advice was not sought, to add this note. He would write out the words on a piece of paper and place it before the guarantor and she would then copy it out, and this Mrs. Ashworth did before she signed it. He said that he did say to her, "If you are not happy you must take legal advice". Mr. Smith said he did this invariably, although they did not appear on the two previous guarantees, but he said this applied only to the writing of the note, but that he had certainly used the words referred to, to Mrs. Ashworth on each of all three occasions. He said he had asked for a Debenture from Ashworth International Limited and this debenture came to hand some time later. A copy of this debenture was produced.

He said the bank balance at the date of the third guarantee, namely, 14th June 1976, was in debit £33,455. He said this account was closed on the receivership coming into effect on 8th October 1976, by which date the debit had increased to £56,453. Mr. Smith said that Ashworth International Limited was wanting to expand its trade to and from the Middle East and Mr. Ashworth had called at the Bank for facilities for this purpose. He said he had

agreed, subject to the further security becoming available, that is, the company's debenture to the Bank and Mrs. Effie Ashworth's guarantee. The Bank was also seeking audited accounts of the company.

He said that after the receiver was appointed, he wrote the letters to Mrs.Ashworth, copies of which were produced. He also produced the sheet showing the transactions of the two companies with the Plaintiff Bank for the six months prior to the date of calling in the guarantee. Mr. Smith said he had met Mrs.Ashworth on three occasions only, namely, on the signing of the three guarantees. He said he thought Mrs.Ashworth was a competent lady, in spite of her age. Her bank dealings showed this. He said he had become uneasy in late 1975, because of certain entries on the bank-sheet, but these had been explained to him.

In cross-examination by Mr. Moroney, he agreed that he had a good business relationship with Mr. Ashworth and that when he was dealing with the first two guarantees he was working in premises which were temporary and presented difficulties, both for him and for the customers. He said the lack of a written note on the first two guarantees was an oversight by him, probably due to those difficulties. He said the last statement of accounts that he saw was for the year ending 31st December 1974, but he said he was in frequent contact with the accountants. He said that on 31st December 1974, the account of Ashworth Transport Limited was overdrawn by £2,394.13 and that of Ashworth International Limited by £2,433.48. He said the Plaintiff Bank did not lend monies to the companies purely and simply on the supply of audited accounts, but other factors were taken into consideration. The Bank has a file for the information received from the directors of Ashworth International Limited, setting out the business which was being done with its customers; that it contained notes and information received by the Bank from the customer.

The guarantee was signed by Mrs. Ashworth fourteen months after receiving the last copies of accounts, namely, those for the year ending 31st December 1974. He said he had learned that a director of Ashworth International Limited had bought a property in Burnley, but there was no evidence that the monies for the purchase came from either of these two companies.

He said he enquired about this, but was told the monies had accumulated elsewhere and had come from the bank account of the group. Mr. Smith said he repeatedly asked Mr. Crossley, the accountant, for the accounts of the two companies, but the accountants apparently were having the same difficulty in getting the information from Mr. Harry Ashworth. He agreed that he had said to Mr.Ashworth that he would want further cover, and very probably Mr. Ashworth had said "It would be mother". Mr. Smith said that his name could not have been put on the guarantee when it was signed at Towneley. He denied that the words written at the foot of the third guarantee had not been written in his presence. Mr. Smith made it quite clear that he did not, when talking to Mrs. Ashworth, discuss the financial affairs of the company. He said he did not regard himself under any duty to warn Mrs. Ashworth in respect of any of these three guarantees.

Further evidence is available from a consideration of the exhibits which were produced. At the hearing those which appeared to me to be significant are as follows:

1. On looking at the first guarantee (20th March 1974), it appears to have been signed by Mrs. Ashworth, with her address beneath and witnessed by Mr. Smith, the Bank Manager. The same observation applies to the second document of guarantee (3rd March 1975). As to the third document of guarantee (14th June 1976), this appears to have been signed by Mrs. Ashworth, with an address below her signature in a different handwriting and underneath which there appears a short memo, which appears to be in the writing of Mrs. Ashworth, with the date (14th June 1976) in her writing below. This appears as having been witnessed by Mr. Smith.

   At the hearing, I asked Mrs. Ashworth to write on a piece of paper the words which appear below her signature and address on the third document of guarantee with her signature and the date underneath. This paper is part of the Court record.

   I equally asked Mr. Harry Ashworth to write on a piece of paper "Phildraw Road, Ballasalla" and this paper also is part of the Court record. From this I am satisfied that the first and second documents of

guarantee are signed by Mrs. Ashworth and in one case the address appearing below the signature is in her handwriting. As regards the third document of guarantee, I am satisfied that the signature on that document is that of Mrs.Ashworth, but the address written below her signature is in the handwriting of Mr. Harry Ashworth and that the words written below are in the handwriting of Mrs. Ashworth, as is her signature thereto, with the date 14th June 1976.

2. The right to sign cheques on the account of Ashworth Transport Limited was given to Mr. Harry Ashworth alone, as the authority to the Bank shows.

3. A perusal of the minute-book of Ashworth Transport Limited shows that there are no minutes of any meeting of this company since September 1974 and that the minutes dated 5th December 1973 and 27th December 1973 are not signed. The minute-book of Ashworth International Limited shows that there were no minutes of any meeting of this company since 2nd August 1973, when the name of this company was changed to Ashworth International Limited. The minutes of the meeting of that date - 2nd August 1973 - are not signed, nor are the minutes appearing in the minute-book of the four meetings held prior to that date.

The issues in this suit are as follows:

The Plaintiff claims the monies due under each of three documents of guarantee - dated 20th March 1974, 3rd March 1975 and 14th June 1976 - with interest as from the date on which the demand for payment was made in respect of each of them respectively.

The defence refers to one document of guarantee only, without stipulating to which of the three documents of guarantee the defence relates. I treat the defence as relating to each of the three documents, this having been intimated to me by Mr. Moroney when I put this point to him at the commencement of the hearing.

The Defendant alleges - referring, as I assume, to all three documents of guarantee - that each of those documents is of no validity, in that :-

(1) The Manager of the Plaintiff Bank did not witness the signature of the Defendant. This is the only interpretation I can give to the words used in this plea.

(2) The Manager failed to warn the Defendant of the danger inherent in the signature on each of those documents by the Defendant.

(3) The Plaintiff knew that the Defendant had monies standing to her credit at the Plaintiff Bank, which monies the Plaintiff purports to set off against the indebtedness of Ashworth Transport Limited.

(4) The Plaintiff failed in its fiduciary duty to the Defendant and, in particular, did not advise the Defendant to obtain legal advice.

From a consideration of all the evidence adduced before me - and which has already been referred to in some detail in this judgment and which I therefore need not now repeat - I find the following facts :-

1. That the Defendant signed each of the documents of guarantee upon which the Plaintiff's claim is founded; in fact there is no allegation in the pleadings, nor in the evidence, that the signing of these documents by her is denied.

2. That the evidence given before me by Mr. Harry Ashworth in so many respects, in his conduct of the operation of each of the two companies concerned - and of which he was Chairman - and equally, the way in which he gave his evidence before me, is unconvincing and unsatisfactory. It is hard to believe that anyone could be so lacking in the discharge of his duties in relation to those two companies and particularly their finances. I am not required to say whether this disregard was wilful or merely neglectful, but I find that where his evidence differs from that of Mr. Smith, I prefer that of the latter.

3. Having considered the evidence given by the Defendant, I am satisfied that she rightly said she was at the material time well able to look after her own business

affairs, equally that in respect of these two companies she relied on her son, Harry Ashworth, and that she trusted him implicitly. In considering her evidence, I make allowance for her age at this time - 86 - and also for the fact that in October 1976 she suffered a severe illness, as a result of which she has since been off the Island, yet she gave her evidence before me at the hearing clearly and without hesitation, and making it quite clear that throughout the time material to this suit she was, and still is, quite capable of looking after her own affairs, but in regard to the affairs of these two companies she left them entirely to her son, Mr.Harry Ashworth. It may well be that her age and her recent illness may have impaired her memory as to the details of all that transpired prior to October 1976, of some of which she said she had no recollection, and this without any reflection on her.

4. That the three documents of guarantee were executed by the Defendant as Mr. Smith, the Bank Manager, had stated on oath, and the signature of the Defendant on each was witnessed by him, as the documents show - that is, they were executed at the Bank on the dates stated, the first when Mrs. Ashworth attended at the Bank alone and the second and third when Mr. Harry Ashworth was present with the Defendant. Mr. Smith described what transpired on each of those three occasions and, in the case of the third guarantee (14th June 1976), in particular the course he took on the third occasion when he handed to the guarantor before she signed the guarantee, a paper on which he had written what the Bank practice required when legal advice was not sought and, as Mr. Smith stated, this was written by Mrs. Ashworth as it appears on this form of guarantee, signed by her with the date. It is significant that this form shows the signature of Mrs. Ashworth at the foot of the guarantee followed, below, by her address which was written by Mr. Ashworth, and followed by the statement written by Mrs. Ashworth, copied from the paper supplied to her and signed by her with the date. Mr. Smith explained to the Court the reason why this additional statement had not been asked for from Mrs. Ashworth, on the two previous occasions,

Mr. Ashworth, in evidence, said each of these documents of guarantee had been handed to him by the Bank Manager and taken by him to Towneley, where they were signed by his mother and then on each occasion delivered back to the Bank by him. I do not accept this evidence given by Mr. Ashworth, and I am satisfied that his mother, the Defendant, is wrong in her recollection as to this.

5. That the giving of each of these guarantees by Mrs. Ashworth arose from a request by the Bank for further cover sufficient to warrant what was in the contemplation of each of the companies. Several guarantees were provided in consequence of this request, including those given by Mrs. Ashworth. There is no evidence given before me that Mr. Smith had ever approached, or asked, the Plaintiff or anyone else to give any guarantee; on the contrary, any approach to that end can only have been made by Mr. Ashworth. The Plaintiff and all the other persons by whom guarantees were given were connected with either or both of the two companies for which the guarantees were given.

6. That the Plaintiff acted upon each of these guarantees as and from when each of them was completed respectively.

7. No payment has so far been recovered under any of the other guarantees which might have reduced the liability of the Defendant under the guarantees signed by her. The evidence of the Receiver shows that there is no likelihood of any such payment forthcoming.

8. That before the execution of each of the three guarantees, Mr. Smith explained to the Defendant the nature of the deeds and of the liability which might follow, and the Defendant raised no question.

I now consider what are the principles of law which I must apply to the facts as I have found them, so as to determine the validity or otherwise of each of these three guarantees and which, in turn, involves a consideration of the duty of the Bank, through its servants, in matters of this nature.

In some cases there are facts which require special consideration arising, for instance, out

of the relationship of the parties, such as a guarantee being given by a wife to secure the bank account of her husband; but no such features arise in this connection and I base my judgment on the general law appertaining to the giving of a guarantee.

It would appear from the legal authorities that the general principles of this branch of the law have not materially changed for well over a hundred years. I refer to the following authorities.

1. Cooper v. National Provincial Bank Ltd. 1945 2 A.E.R., page 641.

In this case, the plaintiff claimed that two guarantees which he had given to the defendant bank in support of an account at that bank for one of its customers, who was a married woman, were void and should be set aside. The plaintiff was himself at all material times also a customer of that bank at another of its branches. The plaintiff contended that the bank had not disclosed to him -

(i) That the husband of the woman whose account at the bank he had guaranteed was an undischarged bankrupt;

(ii) That the husband had a power to draw on his wife's account;

(iii) That the account had been operated in an improper and irregular way.

The defendant bank did not allege that it had disclosed any of these matters and contended that there was no duty on it to do so, and counterclaimed for the amount due under the two guarantees.

After reciting the facts, L.J. Lawrence said, at page 645 :-

" Of the authorities which have been cited to me, the most in point was London General Omnibus Co.Ltd. v. Holloway (1) because there the authorities were fully reviewed, although that was a case of a fidelity guarantee, which differs, of course, from a bank guarantee. In that case Farwell, L.J., refers to what Lord Campbell said in Hamilton v. Watson (2) which is cited with approval in all the cases upon bank guarantees. Lord Campbell

said (12 Cl. & Fin. 109, at p.119):

'Your Lordships must particularly notice what the nature of the contract is. It is suretyship upon a cash account. Now the question is what, upon entering into such a contract, ought to be disclosed? And I will venture to say, if your Lordships were to adopt the principles laid down and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account; because no bankers would rest satisfied that they had a security for the advance they made, if as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept; whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; for all these things are extremely material for the surety to know. But, unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure: and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But, if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires.' "

At the end of that citation, L.J.Lawrence said -

"That passage has frequently been cited, and never criticized, so far as I am aware."

On reading this authority, I consider that apart from the principles there laid down, it is significant that the guarantor was a customer at the defendant bank at the time of the giving of those two guarantees - and furthermore - the form of each of the guarantees was prepared by the bank and signed by the guarantor there in the presence of an officer of the bank. There is the further fact that the evidence of the officer of the bank - whose evidence the Lord Justice accepted - was that he had prepared the first guarantee and had told the guarantor that it was the usual form of guarantee - that he read out the name of the guarantor and the amount guaranteed - and that no question was asked, and the plaintiff signed it.

2. Gallie v Lee and another, 1969 1 A.E.R. page 1062.

In this case the plaintiff sought a declaration that a Deed of Assignment on her dwelling house to the first defendant was void and for the delivery up of the title deeds to her. The dispute had arisen because the deeds of the property had been used by the first defendant to obtain a loan from a building society which, on default of the repayment of the loan, sought to recover possession of the premises. The plaintiff had signed the Deed of Assignment without reading it, relying on an assurance given to her by the first defendant, and the building society had advanced money for what it believed to be a valid legal document. The importance of this case is the consideration of this branch of the law in the Court of Appeal in coming to a unanimous decision. I cite one passage which is representative of the views of that court. The Master of the Rolls, Lord Denning, said, at pages 1066/1067 :-

> "What is the effect in law when a man signs a deed, or a contract, or other legal document without reading it; and afterwards it turns out to be an entirely different transaction from what he thought it was? He says that he was induced to sign the document by the fraud of another, or, at any rate, that he was under a fundamental mistake about it. So he comes to the court and claims that he is not bound by it.
>
> In such a case, the legal effect is one of two: Either the deed is not his deed at

all (non est factum): Or it is his deed, but it was induced by fraud or mistake (fraud or mistake). There is a great difference between the two. If the deed was not his deed at all, (non est factum) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity, just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document. On the other hand, if the deed was his deed, but his signature was obtained from him by fraud or under the influence of mistake (fraud or mistake), the document is not a nullity at all. It is not void ab initio. It is only voidable; and in order to avoid it, the person who signed the document must avoid it before innocent persons have acquired title under it. If a person pays out money or lends money on the faith of it, not knowing of the fraud or mistake, he can rely on the document and enforce it against the maker. It avails the maker nothing, as against him, to say it was induced by fraud or mistake."

This case went to the House of Lords under another styling - Saunders (Executrix of the Estate of Rose Maud Gallie, deceased) v. Anglia Building Society (formerly Northampton Town and County Building Society), 1970 3 A.E.R. page 961, in which the judgment of the Court of Appeal and the principles of law there set out were confirmed. I cite from the judgment of Lord Pearson, at pages 977/978, in which he quotes with approval a passage from the judgment of Lord Denning in the Court of Appeal :-

" I must, however, deal specifically with the broad principle stated by Lord Denning MR as his conclusion from his investigation of the law. It was this :

'Whenever a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature - by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences -then, if he does not take the trouble to read it, but signs it as

> it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document; and once they act on it as being his document, he cannot go back on it, and say it was a nullity from the beginning.'

In applying the principle to the present case, Lord Denning MR said :

> '. . . the plaintiff cannot in this case say that the deed of assignment was not her deed. She signed it without reading it, relying on the assurance of /Mr. Lee/ that it was a deed of gift to Mr. Parkin. It turned out to be a deed of assignment to Mr. Lee. But it was obviously a legal document. She signed it; and the building society advanced money on the faith of its being her document. She cannot now be allowed to disavow her signature.' "

After having cited those two paragraphs from the judgment of Lord Denning in the Court of Appeal, Lord Pearson said :-

> "There can be no doubt that this statement of principle by Lord Denning MR is not only a clear and concise formulation but also a valuable guide to the right decision to be given by a court in any ordinary case."

3. Lloyds Bank Limited v. Bundy, 1974 3 A.E.R page 577.

This case was cited and relied upon by Mr. Moroney for the Plaintiff in his address to me, and I have considered this decison very carefully.

Here again, the facts are important and these I summarise as follows :

This action was brought by the plaintiff bank to enforce rights given to it under four deeds of guarantee executed by the defendant in support of his son's account at that bank, of which the defendant was also a customer. The plaintiff bank foreclosed under the last of those four guarantees and, as mortgagees under that guarantee, claimed possession of the farmhouse

which was the only asset of the defendant. The defendant admitted having signed the first guarantee, but alleged that he had been induced to execute that guarantee whilst acting under the influence of one Mr. Head, the agent of the plaintiff bank; he alleged that the first three deeds of guarantee had all been superseded by the fourth; and as to the fourth he alleged that this guarantee and the legal charge it created was not his deed, or alternatively that he had been induced to execute that legal charge while acting under the influence of the bank agent, Mr. Head. The defendant therefore counterclaimed for an order setting aside that guarantee and legal charge, or declaring them to be void and for delivery up and cancellation of the documents - with other relief.

At the court of first instance, judgment had been given for the bank, making an order for possession of the property and dismissing the defendant's counterclaim. From this decision the defendant appealed. A perusal of this decision shows that it differs from those to which I have already referred, in that no question here arose as to whether the last guarantee - which was the one in issue - had been voidable by the guarantor on the ground of fraud or misrepresentation, but rather that that guarantee was void on the grounds of "inequality of bargaining power to such a degree as required the intervention of the court" - amounting on the facts of this case to undue influence.

In the decision of the Court of Appeal, we again have the benefit of a judgment given by Lord Denning, Master of the Rolls. Before I refer to his judgment and those of the other judges in the Court of Appeal, it is necessary to refer to certain facts as to which there does not appear to have been any dispute. It appears that in 1969 the affairs of the company in respect of which that guarantee had been given had gone from bad to worse; that a new assistant manager - Mr. Head - had informed the son that the situation could not continue and that the son had suggested that the company's difficulties were only temporary and that the defendant would provide further money; that in consequence of this - in December 1969 - the assistant manager with the son saw the defendant at his home, bringing with him a form of guarantee and a form of charge, already filled in with the defendant's name, ready for signature; that that meeting was a family gathering. The defendant and the mother

were present, as were also the son and the son's wife. Evidence was given by Mr. Head - the assistant manager - that the defendant, that is, the father, had asked him what, in his opinion, was wrong with the company and its position; that Mr. Head had told him - it is Mr. Head's own words - "I did not explain the company's accounts very fully - but I did say that the company had a number of bad debts although I was not satisfied about this because I thought the trouble was more deep-seated - I would think the father relied on me implicitly to advise him about the transaction as bank manager." Mr. Head also said that he knew the defendant had no other assets except the farm-house. Mr. Head had also told the defendant that the bank would require the father to give a guarantee of the company's account in the sum of £11,000 and to give the bank a further charge on the house of £3,500 so as to bring the total charge up to that figure. The evidence was that the father then signed the guarantee and the legal charge, and Mr. Head witnessed them there and then, the defendant having had no independent advice. The father had said in evidence, "... always thought Mr. Head was genuine. I have always trusted him . . . no discussion how business was doing that I can remember. I simply sat back and did what they said."

I now cite certain passages from the judgment of Lord Denning to show his approach to those facts and how that his decision in this appeal was based on the effect of those facts on the state of mind of the defendant when he signed that guarantee.

At page 763 Lord Denning sets out what he styles "the general rule".

> " Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing

in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks.

Yet there are exceptions to this general rule. There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court. "

At page 764 he deals with "undue influence" in the following words :-

"The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as a parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford LC in Tate v. Williamson :

> ' Wherever the persons stand in such a relation that, whilst it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his

position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.' "

I now refer to the conclusion of that judgment, at page 765 :-

" The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on them implicitly to advise him about the transaction. The father trusted the bank. This gave the bank much influence on the father. Yet the bank failed in that trust. They allowed the father to charge the house to his ruin."

I now quote from the judgment, in that Court of Appeal, of Sir Eric Sachs in which he shows quite clearly the facts upon which he had come to a conclusion in this case. I cite from the judgment at page 770 :-

" It is, of course, plain that when Mr. Head was asking the defendant to sign the documents, the bank would derive benefit from the signature, that there was a conflict of interest as between the bank and the defendant, that the bank gave him advice, that he relied on that advice, and that the bank knew of the reliance The further question is whether on the evidence concerning the matters already recited there was also established that element of confidentiality which has been discussed. In my judgment it is thus established. Moreover reinforcement for that view can be derived from some of the material which it is more convenient to examine in greater detail when considering what the resulting duty of fiduciary care entailed.

What was required to be done on the bank's behalf once the existence of that duty is shown to have been established? The situation of the defendant in his sitting-room at Yew Tree Farm can be stated as follows. He was faced by three persons anxious for him to sign. There was his son Michael, the overdraft of whose company had been, as is shown by the correspondence, escalating rapidly; whose influence over his father was observed by the judge - and can hardly not have been realised by the bank; and whose ability

to overcome the difficulties of his company was plainly doubtful, indeed its troubles were known to Mr. Head to be 'deep-seated'. There was Mr. Head, on behalf of the bank, coming with the documents designed to protect the bank's interest already substantially made out and in his pocket. There was Michael's wife asking Mr. Head to help her husband.

The documents which the defendant was being asked to sign could result, if the company's troubles continued, in the defendant's sole asset being sold, the proceeds all going to the bank, and his being left penniless in his old age. That he could thus be rendered penniless was known to the bank - and in particular to Mr. Head That the company might come to a bad end quite soon with these results was not exactly difficult to deduce (less than four months later, on 3rd April 1970, the bank was insisting that Yew Tree Farm be sold).

... ...

Over and above the need any man has for counsel when asked to risk his last penny on even an apparently reasonable project, was the need here for informed advice as to whether there was any real chance of the company's affairs becoming viable if the documents were signed. If not, there arose questions such as, what is the use of taking the risk of becoming penniless without benefiting anyone but the bank; is it not better both for you and your son that you, at any rate, should still have some money when the crash comes; and should not the bank at least bind itself to hold its hand for some given period? The answers to such questions could only be given in the light of a worthwhile appraisement of the company's affairs - without which the defendant could not come to an informed judgment as to the wisdom of what he was doing.

No such advice to get an independent opinion was given; on the contrary. Mr. Head chose to give his own views on the company's affairs and to take this course, though he had at trial to admit: 'I did not explain the company's affairs very fully I had only just taken over.' (Another answer that escaped entry in the learned judge's original notes.) "

I also cite from his words at the foot of page 771 :-

" The conclusion that the defendant has established that as between himself and the bank the relevant transaction fell within the second category of undue influence cases referred to by Cotton LJ in Allcard v Skinner is one reached on the single issue pursued on behalf of the defendant in this court. On that issue we have had the benefit of cogent and helpful submissions on matter plainly raised in the pleadings. As regards the wider areas covered in masterly survey in the judgment of Lord Denning MR, but not raised arguendo, I do not venture to express an opinion - though having some sympathy with the views that the courts should be able to give relief to a party who has been subject to undue pressure as defined in the concluding passage of his judgment on that point."

. . . .

" . . . nothing in this judgment affects the duties of a bank in the normal case where it is obtaining a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When, however, a bank, as in this case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may - not necessarily must - be crossing the line into the area of confidentiality so that the court may then have to examine all the facts, including, of course, the history leading up to the transaction, to ascertain whether or not that line has, as here, been crossed."

Lord Justice Cairns gave judgment agreeing with the two judgments to which I have referred, with the result that the judgment in the Court of Appeal was set aside and the legal charge and guarantee voided.

I would like to point out that on reading that case, I note the detail with which, in their judgments, the learned judges set out the several respects in which the officer of the bank in that case put himself into a position far beyond that of a banker taking a guarantee for the account of a customer in the ordinary course of its business, but rather had, in the

several ways to which the judges refer, put himself into the position of one whose influence was the motive force in the form of guarantee being executed. There can be no doubt that the conduct of the officer of the bank was the basis upon which in that case the guarantee and the legal charge were voided.

I conclude my review of the law on this subject by returning to the well-established principle that a contract of guarantee is not one to which the principles of 'uberrinae fidei' apply and that, in ordinary circumstances, there is no duty to make a disclosure of facts which, if disclosed, might affect the mind of a guarantor (see Davies v London and Provincial Marine Insurance Company, 1878 8 Ch.Div. page 469 at page 475). In a contract of this nature there is no universal obligation to make disclosures

A totally different position arises, however, if, leading up to the completion of a form of guarantee, a banker volunteers information as to the affairs of the person in respect of whom the guarantee is to be given, or - if asked by anyone considering the completion of guarantee - as to the affairs of the person in respect of whose account is to be guaranteed; for in any of those circumstances a very complete and obvious duty arises in the banker.

It is significant that the three guarantees in issue in this action given by the Defendant were each of them given by her at a time when she was a director and a shareholder in Ashworth Transport Limited, and which company was a shareholder in Ashworth International Limited. Mr. Smith in his evidence spoke about other guarantees which, early in 1976, he had taken from other persons to secure the account of Ashworth International Limited and he named these guarantors. He told the Court of the request which had been made to the Bank for additional accommodation for that company and of the purpose for which that additional accommodation was to be used, and that he had told Mr. Harry Ashworth that the Bank would do this if sufficient additional security was provided He named all the persons from whom he had then taken guarantees for Ashworth International Limited - one of whom was the chairman of directors of that company and of Ashworth Transport Limited, another was a director of both those companies and another was a director of an associated company within

the Ashworth group. The guarantee given by the Defendant on the 14th June 1976 was also for Ashworth International Limited, of which Ashworth Transport Limited - of which she was a director - was a shareholder.

The result is that no guarantee was ever taken by the Plaintiff for either of the two companies from the date of their incorporation down to the appointment of the Receiver in October 1976 from anyone who was not one of the personnel of the company for whose account the guarantee was given. No guarantee was ever taken from one who was a stranger - meaning by that one who was not actually at that time personally interested in the obtaining, from the Plaintiff, of the accommodation the company was seeking. The request was made to the Bank for accommodation - the Bank stated what it would require to enable this to be done and the company came forward with the guarantees from its own members.

In applying the law to the facts of this case, I determine that the three guarantees signed by the Defendant were dealt with by the Plaintiff Bank as in the ordinary course of its business; that there was no circumstance which imposed on the Bank any greater duty than that which its Manager carried out, namely, to inform the Defendant of the nature of the deed which was placed before her and of the possible consequences which might ensue therefrom.

I find no merit whatever in either of the matters contained in the defence filed by the Defendant. I am satisfied that each of the three deeds of guarantee was signed by the Defendant in the presence of Mr. Smith as he has described; that he informed her on each occasion of the nature of the deed she was about to sign and of its possible consequences; that the Bank performed every duty in regard to the execution of each of these guarantees; and that the Plaintiff Bank was perfectly justified in exercising its lien on the monies standing to the credit of the Defendant as each deed of guarantee provides, pending the determination of this claim.

There will therefore be judgment for the Plaintiff in the sum of £45,000 with interest thereon as claimed, and the Defendant must bear the costs of this action.

I would add that the Court in this action

has only had to concern itself with the relationship of the Plaintiff Bank towards the Defendant in respect of these three guarantees. The relationship of any other person towards the Defendant in that respect does not arise in the action.

In the High Court

No.13
Judgment
23rd February 1978
(continued)

No. 14

PETITION

In the Staff of Government Division

No.14
Petition
Undated

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

STAFF OF GOVERNMENT DIVISION

B E T W E E N :

EFFIE ASHWORTH — Petitioner

- and -

JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED — Respondent

TO: THE PRESIDENT AND MEMBERS OF THE STAFF OF GOVERNMENT DIVISION

THE HUMBLE PETITION of EFFIE ASHWORTH of The Flat 90 Berry Lane Longridge near Preston Lancashire.....

S H E W E T H :

1. Your Petitioner was a Defendant in a suit brought on the Summary Division of the High Court of Justice of the Isle of Man by the Respondent for -

(i) £10,000 plus interest being the amount due under a guarantee dated 20th March 1974 in respect of Ashworth Transport Limited

(ii) £10,000 plus interest being the amount due under a guarantee dated 3rd March 1975 in respect of Ashworth International Limited

(iii) £25,000 plus interest being the amount due under a guarantee dated 14th June 1976 in respect of Ashworth International Limited

2. By a Judgment bearing date the 23rd day of February 1978 the said Honourable Court gave judgment in favour of the Respondent.

3. Your Petitioner is desirous of appealing the said judgment on the following grounds :-

(a) the statement on page 42 of the said judgment of 23rd February 1978 that there was no circumstance which imposed on the Respondent any greater duty than that which its Manager carried out namely to inform the Defendant of the nature of the Deed and the possible circumstances which might ensue is incorrect in the light of the following circumstances

(b) all the Guarantees

(i) The Petitioner has less than 0.05% of the Share Capital of Ashworth Transport Limited and less than one millionth of the Share Capital of Ashworth International Limited so that her financial interest in the execution of the Guarantee was minimal

(ii) The Respondent's Manager only saw the Petitioner to execute the said Guarantee which could bring no financial benefit to the Petitioner yet the Petitioner had a substantial deposit with the Respondent and was owed an amount by the Respondent which was not discharged

(iii) The close relationship between the Respondent's Manager and Mr. Harry Ashworth prevented the Respondent from giving impartial advice to Mrs. Ashworth which it was within his duty to do in view of the above

(iv) The Respondent's Manager did not regard himself as under a duty to warn in respect of the said Guarantees

(v) The Petitioner was a lady who was a substantial depositor with the Respondent and to whom the Respondent owed a duty of care which was not discharged by the Respondent's Manager

(c) The second and third Guarantee of 3rd March 1975. This was witnessed in the presence of Mr. Harry Ashworth which prevented a private discussion with the Respondent's Manager and the Petitioner.

(d) The third Guarantee of 14th June 1976. The Respondent's Manager failed in his duty to disclose to the Petitioner -

(i) that he had been unable to obtain any accounts from Mr. Crossley the Auditor of Ashworth International Limited

(ii) he did not point out the steep rise in the indebtedness of Ashworth International Limited from January 1976 until 14th June 1976

(iii) he did not point out he had referred cheques of Ashworth International Limited to drawer in April and May 1976

4. By reason of the premises the Petitioner avers -

(a) that the Respondent did not disclose to the Petitioner adequate facts and/or advise the Petitioner properly and/or disclose to the Petitioner the importance of obtaining the Guarantee of 14th June 1976 in view of the steep rise in the indebtedness of Ashworth International Limited

(b) that the circumstances of the relationship between the Respondent and the Petitioner did imply a duty of care which was not discharged by the Respondent

AND Your Petitioner humbly prays a hearing hereof and that this Honourable Court may reverse the decision of the High Court of Justice of the Isle of Man and Your Petitioner will ever pray etc. etc.

(Sgd) M.Moroney

Advocate for Petitioner

To the Respondent
per Dickinson, Cruickshank & Co.
its Advocates

In the Staff of Government Division

No.15
Minutes taken by Deemster A.C.Luft

26th and 27th April 1979

No. 15

MINUTES TAKEN BY DEEMSTER A.C. LUFT

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

STAFF OF GOVERNMENT DIVISION

CIVIL JURISDICTION

JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED

v.

EFFIE ASHWORTH Appellant

Appeal against judgment dated 23rd February 1978.

MINUTES taken by His Honour DEEMSTER A.C. LUFT at Douglas the 26th day of April 1979

Mr. Moroney for Appellant

Mr.N.C. Teare for Julian S.Hodge Bank (Isle of Man) Limited

Mr Moroney wishes to hand in copies of guarantees P1, P2, P3 and a letter P4 and copies of the Exhibited Bank Statements P14 rearranged in chronological order.

Mr.Moroney explains nature of appeal.

Refers to 3 guarantees

Grounds of appeal set out in paragraph 3 of the Petition.

Wishes to address Court on facts first.

Relationship of shareholders in the Ashworth Transport 1972.

1 share Appellant 4,999 to H. Ashworth.

Page 127 16 July 1973 2,500 allotted to H.Ashworth 7,499 shares H. Ashworth

1 share Appellant.

No change to date of Receivership Ashworth Transport Company Limited, Ashworth International Limited

To February 1975 10 issued shares

Page 195 Annual Return to 14th October 1974

Page 198, 199, 200

Return of Allotments
1,000 to Harry Ashworth
990 to Mary Thompson

203. Return same

206. Directors of Ashworth International.
Appellant never a director
Harry Ashworth had 1,002 shares.

$\frac{1}{75,000}$ proportion of appellant's holding in Ashworths.

Ashworth Transport had holding in International.

Appellant's interest in Ashworth International is $\frac{1}{7,000} \times \frac{3}{2,000}$

$\frac{1}{5,000,000}$ interest in Ashworth International.

Accounts of Companies page 304 Ashworth Transport Year ending 31.12.1972 Page 306, 307

Net Profit £7,000

Year ending 1973 page 305

Net profit £11,602

Date of 18th July 1973 is error.

Final accounts. December 1974. Pages 309, 319. Profit.

Loan to International page 30 increased from 13,397 to 16,613

Director's loan account page 310 4,237

1973 Accounts page 304.

Unsecured loan appellant to company £385 and £90.

Ashworth International Limited accounts pages 313, 314

Year ending 31st October 1973

Loss

Dated 19th June 1975

Not available for second guarantee.

Shows loss £6,548.12

Loan from Ashworth Transport £14,032 page 314

Bank balances of Companies with Respondent Bank

Ashworth 20.3.74 indebtedness £3,674

June 1974 £4,000 to £9,500
August 1974 £10,000
December 1974 £3,977.77
17th March 1975 £6,988 Transport
March 1975 rises
18th March 1975 £14,876
10th April 1975 £23,810
to
July £18 - £27,000
22nd July 1975 £31,700
July and October £31 to £34,000
October £44,600
November £55,800
December 1975 £60,500
February 1976 £74,000
End of June £72,000
September 1976 £70,800
Increase of £60,000

Indebtedness of International with Bank

1974 small £3,000 to £5,000

Transport £6,988 overdraft remained.

Overdraft for International dramatically increased

account 3rd March 1975.

Ashworth International

June 1974 June 1976

End November 1975 £6,000 overdrawn

December 1975 £15,638
March 1976 £19,833
April 1976 £32,472

End June 1976 £33,713

267. August 1976 £54,302

266. Last sheet October £63,709

February 1976 May 1976

£18,500 £32,000

Sharp rise in borrowing.

Accounts of Receiver

page 218

International no assets but £103,000 deficiency.

Transport £165,990

Two companies £269,320

Page 153, 155 Transport account

Adverse balance of Receiver's trading of £12,874

Page 213 International £10,909 deficiency.

218

Page 22, 23

Evidence of Derek Smith

Page 24

As to first guarantee execution

Page 25

meeting 20.1.76

Page 26

27 Cheques returned RD

Page 28 accounts did not explain to Appellant

I do not agree that it was highly improbable.

I understand Mr. Smith was saying I don't agree it was highly improbable that these companies were involved.

Page 29

Should the Appellant's Manager have become suspicious.

Ans. Banker should have exercised more care.

I am not appealing on the findings of fact. Two findings of fact Page 56 2 & 3

Page 58 paragraph 5

Page 59 Relationship no special

I submit that a special relationship does arise. General law re guarantees has been misapplied.

Page 59

Special features.

No accounts of company, no trade accounts, accounts which company did not have information. No recent accounts. Relationship Mother and son. Relationship because of knowledge of manager of company and his knowledge of lack of knowledge.

By June 1976 more than likely company headed for a sticky end.

Getting near to fraud when Bank on facts known to bank Liquidator would be likely to be appointed.

Facts were so serious cheques of small amount bouncing.

Not getting information.

Steep rise in indebtedness.

Serious financial circumstances can raise

In the Staff of Government Division

No.15
Minutes taken by Deemster A.C.Luft

26th and 27th April 1979

(continued)

the relationship to require disclosure.

If it was likely that a reasonable man would consider on the presence or absence of facts known to him that it was probable this the effect of facts on which guarantee given would be insolvency and it was likely guarantor would be called on he should warn the prospective guarantor of such facts.

Likelihood beyond normal commercial risk.

If Manager has information that it is likely that guarantor will be called upon then he should without being asked inform the proposed guarantor.

Woods v Martins Bank 1959, 1 Q.B. p.55.

Dover v London Provincial Bank 1878 8 Chn. p.469 or 1878 18 L.T. 478

Suretyship not uberrimae fidei

I do not say it is.

Adjourned to 2.15 p.m.

Duty of Bank to a customer.

Hedley Bryne 1963 2 A.E.R. 575

Under general relationship Banker and customer involves duty of disclosure.

Banker customer relationship raises duty of Bank towards customer in relation to any transaction concerning Bank having solicited guarantee from Harry Ashworth.

Request for guarantee.

Prudent Banker would have been highly suspicious.

Complete trust and reliance on Harry Ashworth.

She Appellant negotiated guarantees with this man.

Mr. Ashworth in room when guarantees signed.

Lloyds v Bundy 1974 3 A.E.R. at 764(c)

Guarantee to benefit bank should be set aside on ground of undue influence.

There should have been in the circumstances a full disclosure.

Zanneth v Hyman 1961 3 A.E.R. 933.

Bank of Montreal v Stuart 1911 A.C. 120.

Mr. Smith took advantage of Harry Ashworth's influence over his mother.

MacKenzie v Royal Bank of Canada 1934 A.C. 468.

Married woman

Deemster Eason says Mrs.Ashworth trusted her son implicitly.

I relate undue influence to all three guarantees.

Harry Ashworth present on 2nd and 3rd guarantee execution.

Appellant did understand nature of liability but Mr. Smith did not tell her.

Presence of Mr. Ashworth there and Mr.Smith.

Lloyds Bank v Bundy 1974 3 A.E.R.

Less than 4 months between June 14th 1976 to Oct.

Increased from £32,000 to £56,000 in the same period.

No chance hereof probability.

Advice given there.

"Was there a need for informed advice."

Page 50 statement.

It is not case of a normal bank guarantee.

Cooper v. N.W.Prov. 1946 1 K.B. at 5

Not disclosed that l/c was overdrawn.

Mr. Moroney concludes.

Mr. N. Teare addresses the Court

Submissions amount to 2.

Judge of Appeal suggests 3.

1. There was a duty to disclose by reason of banker and customer and banker's knowledge of serious state of Coy.
2. Duty owed by reason of customer broken relationship.
3. Mother and son relationship.

Minimal share appellant had in Coy.

Coy. file shows 1971 she had Debenture for £4,000 not discharged until 1st August 1975.

Directors loan a/c

Ashworth International borrowed £16000 Ashworth Transport.

Profitability of companies from 3 annual

In the Staff of Government Division

No.15
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26th and 27th April 1979

(continued)

a/cs 1972, 1973, 1974 healthy profit.

1973 International loss

Incomplete 1972

1st year of trading.

Motor vehicles. None when winding up but there were vehicles flying around.

Bank a/cs if 2 Coys. in June 1976

International indebtedness.

June 1976 guarantees taken

£20,000 Thompson

£20,000 H. Ashworth

Big stake required for Middle East.

Increase of overdraft shows confidence.

Bank has file of information page 28.

Good working relationship between Harry Ashworth and Bank Manager.

Bank not running for cover and to cover bad debt.

It advanced £35 to £37,000 over the guarantees.

Rosy accounts produced

Debenture shock. Other securities.

What Mr. Smith said as to his knowledge of state of companies.

Agrees Mr. Moroney's version.

June 1976 state of affairs with hindsight might

Note case of Bundy that Bank did not act upon guarantee.

Appellant was secretary of the company.

Lloyds Bank v Bundy at 772

4 stages.

1. Basic duty of bank generally to advise, nature of Deed and sums involved.

2. Crossing line of confidentiality. Court must consider case notes.

3rd stage Court must look to see whether there is a duty of disclosure.

If such a duty arises -

4th Has that duty been broken

Bank had gone beyond, (1)

In Bundy, Bank assured customer no risk.

No possibility of arising in the case of Mrs. Ashworth she did not get advice.

Bundy - Bank mentor and adviser.

Bank here could not know that Mrs.Ashworth had relied on them.

Bank did not enquire as to income tax.

Lack of reliance leaves the appeal which should be dismissed.

Must go through stages of trust and confience.

Bundy - implicit trust knew of true facts.

Bank here did not know whether any trust.

Did not know if any influence exercised by son over mother

Bank not aware of undue influence. No shred of evidence to support the contrary.

Bundy Bank had a pretty good idea the firm going to the wall.

Court held Bank was running for cover. Not the case here.

Not for 1st two anyway.

Not in case of 3rd because facilities in excess of figure granted.

He would have been mad to advance if he had doubt.

He had faith in the company.

Questionable indirect benefit to appellant through guarantee.

Mr. Smith did not know troubles deep seated. Would not have advanced £25000 over.

Mr. Ashworth not anxious to have guarantee signed.

Appellant able to attend to her own affairs because she trusted him implicitly she wouldn't do what he wanted.

All elements in Bundy not present here.

Arguments for appellant do not show duty on Bank.

Stress on Banker Customer relationship.

Solicitor/client relationship cannot be imported into Banker customer relationship.

Influence of H.Ashworth over mother - no duty can be found.

If she was not exercising individual will because of influence of her son and Mr. Smith knew this or deliberately shut his eyes to fact.

Bank of Montreal v Stowell 1911 A.C.120.

Onus would be on appellant to prove undue influence.

She was independent.

Adjourned to 10.30 a.m. tomorrow.

Mr. Teare continues his address.

Relationship of appellant and her son.

Could this fall into class of relationship referred to in Allcard v Skinner in particular in the 2nd Class

Lloyds Bank v Bundy at page 764

Any undue influence would have to be proved.

Element of confidentiality does not arise automatically.

Parent and child not within this relationship.

Intervention of Bank Manager here. There is no question of confidentiality between Bank Manager and appellant merely because of relationship between appellant's son and herself. No such relationship here but if Manager knew of that no authority for this. There must be first the element of say the parent going to Bank for advice.

L.J.Sachs in Lloyds v Bundy (b)

Every case advice was given.

Law in Lloyds v Bundy is the same.

Obiter comments of Lord Denning not confirmed by his brother judges.

Mere knowledge on part of Bank of relationship insufficient. I refute any suggestion that Mr. Smith knew of any relationship.

Letter P4 shows her as being able to deal with her affairs.

Duty to disclose cannot arise. If held that it does one must look to see if a conflict of interest arises.

She had an interest in both companies for which guarantees were given.

In Bundy case son had no interest in the

company.

Concedes that Mr. Smith did not give full disclosure.

Appellant could have ascertained for herself information on the accounts of the companies.

He could assume she had the information of the a/cs but he could not assume she knew of withdrawals from company account at Bank.

Summarising.

In such a case as this when guarantee given to Bank basic duty of Managers generally to inform guarantor of nature of guarantee and sums involved.

2. If Manager goes further at the invitation or otherwise of Guarantor and advises on matters germane to wisdom of transactor Court must see if special relationship arises between Manager and guarantor.

3. If special relationship does arise then a fiduciary duty arises on the part of the Manager and that duty must be to ensure that guarantor at very least has the opportunity of forming an informed opinion of the transaction.

Lloyds v Bundy Judgment of Sir E.Sachs

Advice must be asked.

Special relationship not pleaded.

No relationship arising.

That Bank manager knew of influence of Ashworth over his mother is not known.

Mr. Smith's knowledge of parlous state of company.

Evidence is against this because Smith continued to act.

No reason why Mr. Smith should be suspicious.

Mr. Moroney replies

Signature of 2 guarantees page 29. No discussion of affairs.

Page 25 Meeting Appellant knew nothing of it.

This shows influence.

Lloyds v Bundy p.776
Cooper Landin v Davies

In the Staff of Government Division

No.15
Minutes taken by Deemster A.C. Luft

26th and 27th April 1979

(continued)

Do not say duty is merely to ask Guarantor to sign.

Totality of facts to be considered.

Adjourned to 3 p.m.
Resumed 3.15 p.m.

Judgment of the Court delivered by His Honour the Judge of Appeal.

Appeal dismissed.

Mr. Teare asks for an order under Section 7 Schedule 1 of the Legal Aid (Isle of Man) Act 1973.

Test in U.K. is whether such an award is just and equitable.

1978 Hals. Cum. Supplement p. 185.

further section added to para.933 of vol 30 933A.

Saunders v. Anglia Building Society No.2 Case Sequel to Gaillie 1971 1 A.E.R.

Order made under section 7(1) of the Legal Aid (Isle of Man) Act 1973.

A.C. LUFT

Application by Mr. Moroney for leave to appeal to the Privy Council refused.

A.C. LUFT

No. 16

MINUTES TAKEN BY HIS HONOUR I.D.L.GLIDEWELL J.A.

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

STAFF OF GOVERNMENT DIVISION
CIVIL JURISDICTION

JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED

v.

EFFIE ASHWORTH Appellant

Appeal against judgment dated 23rd February 1978.

MINUTES taken by His Honour I.D.L. GLIDEWELL, Q.C. Judge of Appeal, at Douglas the 26th day of April 1979

Mr. Moroney for Appellant

Mr. N.C.Teare for Julian S.Hodge Bank (Isle of Man) Limited

Moroney

Documents produced.

Copies of the 3 guarantees Ex.3 P1, 2 & 3 + Ex. P4 and copies of Bank Statement P.14.

Appeal against Deemster giving judgment in 3 guarantees.

(1) 20 Mar.1974 - £10,000 - A Transport Ltd.
(2) 3 Mar.1975 - £10,000 - A Int. Ltd.
(3) 14 June 1976- £25,000 - A Int. Ltd.

Grounds of appeal read

Facts:

(1) Shareholdings in Ashworth Transport p. 123/3 Annual Return of A.Transport to 31/7/1972.
Appellant - 1 share
Son - 4999 shares

Moroney

p.127/8/9. Allotment of a further 2500 shares to son.
16th July 1973
Last Annual return 145/148
Show son 7499
Applt. 1 share
As at 20 Dec. 1975.

Ashworth Int.

To Feb. 1975 only 10 issued shares.
pp. 195/6 Annual return to 14 Oct. 1974
Applt - none
A. Transport 3
Son 2
198/199/200 Allotment
Son 1000
Mrs. Thompson 990
Position unchanged at 20 Dec/1975
203/206
H. Ashworth controlling interest.

Applt. had 1/7500 of A. Transport
1/5m of A. International

Moroney

Trading Position

A. Transport

y/e 31 Dec. 1972 p. 306
net profit £7561

Dated July 1973

y/e 31 Dec. 1973 p. 305
net profit £11,602

Dated Dec. 1974

y/e 31 Dec. 1974 309/310 (dated 16 June 1975)
Net profit £10,634

Loan to International increased from £13,397 at 31 Dec. 1973 to £16,613 at 31 Dec. 1974.

Directors Loan A/C
p. 304 - Loan to Coy £475

A. International

p.313

y/e 31 Oct 1973 dated 19 June 1975
Loan £6548 against receipts £10849
Loan from A. Transport £14,032.

Moroney

Bank position
A. Transport Ltd.

20 Mar. 1974

Indebtedness	£3674
June 1974	£4500 - £9500
Aug. 1974	£10,000
Dec. 1974	£3974
Feb. 1975	Over £10,000

Mar. 1975 back to under £7000
Then sharp rise

18 Mar. 1975	£14876
22 July 1975	£31,700
By end of Oct. 1975	£44,600
end Nov.75	£35,800
Dec. 75	£60,500
Feb. 76	£74,600
June 76	£72,600
Sept. 76	£70,800

Moroney

Bank position A. International Ltd.

1974 to June 1975 £3000 - £5000
Second guarantee is in respect of Int.

Int. overdraft remained more or less static until June 75.

But Transport o'draft dramatically increased following guarantee to Int.

Then inc. - Oct.

Dec. 75	£15,630
Mar. 76	£19,833
Apl. 76	£32,472
June 76	£33,713
p.267 End Aug.	£54,000
266- Close	£63,000

Accounts of Receiver p.218

Both Coys Total indebtedness £269,320

A. Int. - no assets
A. Transport- £6000

Transport pp. 153 - 155 Adverse balance £17,438

In the Staff of Government Division

No.16
Minutes taken by His Honour I.D.L.Glidewell J.A.

26th April 1979

(continued)

Int. p.213 £10,909 Adverse balance.
EV Print p. 22/23
Whiteland-Smith xx p.23

Smith p.24 1st guarantee
line 9 p.25 2nd guarantee
other guarantees 20 Jan 76
p.26 3rd guarantee

Ought Smith to have got suspicious?

Judgment

p.59. I submit relationship of parties in this case such that a special relationship does arise.

Propositions

(1) Relationship of son/mother imposes duty on bankers.

(2) In light of Smith's knowledge of state of International Coy, anddifficulty in obtaining further information. At June 1976, owed duty to any potential guarantor to give information.

Moroney

If it was likely that a reasonable man would consider on the presence or absence of facts known to him that it was probable that the company was or would be insolvent and that it was likely that the guarantee would be called on, should warn the prospective guarantee of such facts or absence of facts.

Woods v Martins Bank(1959)1 Q.B. 55.

Davies v London & Provincial Insurance Co. (1878) 8 Ch. 469

Deemster quite rightly said suretyship not a contract uberrimae fidei

See pages 474 - 475 for summary.

(3) Duty owed to Mrs. Ashworth as Depositor.

(3) Relationship of Bank to Mrs. A. as customer of Bank.

Hedley Byrne v Heller (1964) A.C. 465

Ld. Devlin at 528/9.

Where there is a general relationship eg. as banker and customer there is a duty.

Relates to third guarantee especially.

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(1) Relationship of son/mother.

Complete reliance on son.

Fact that Ashworth had said Mrs.A. wd. supply guarantee means Smith should warn her.

Moroney

Lloyds Bank v Bundy (1974) 3 A.E.R.757 764 C

Bank took advantage of influence A had over his mother

Bank of Montreal v Stuart (1911) AC 120

Mackenzie v Royal Bank of Canada (1934) AC 468

Smith said he had no information about Company's trading position.

'If you are not happy you must take legal advice' not sufficient to meet the duty.

Cooper v National Provincial Bank (1946) 1 KB 1

Teare

Mrs.Ashworth minimal shareholding

1971 - £4000 Debenture Ashworth Transport Ltd.

Discharged 1 Aug. 1975

Directors' Loan A/C £475

Ashworth International borrowed £16,000 from Ashworth Transport.

Ashworth Transport relatively prosperous.

Smith p.28 - Bank's file of information.

Ashworth

Bank not advancing money for a bad debt.

Bank's faith in continued operation of Coys. : £25000 advance.

In the Staff of Government Division

No.16
Minutes taken by His Honour I.D.L.Glidewell J.A.

26th April 1979

(continued)

Rosy accounts.

Bank acted soon after each guarantee.

Should have been plain to Mrs.Ashworth.

Who was Director and Secretary.

Bundy v Lloyds Bank p. 772

4 stages.

(1) Basic duty of Bank generally to advise as to nature of deed and sums involved. Smith did.

Teare

(2) When Bank goes further and advises on more general matters different considerations apply.

Must consider whether confidentiality arises.

(3) A conflict of interest? If so a duty arises.

(4) Has duty been broken.

In this case as in Woods v Martins Bank Bank did advise generally. No suggestion Mrs.Ashworth sought any advice. Bank was financial adviser - had been for years.

Bank had never been involved with Mrs. A. in any way except as depositor.

Lack of advice dooms this appeal to failure.

Influence Bank knew influence Bundy exerted over father.

No ev. here bank knew of special influence.

Moroney said - bank aware of undue influence - no ev. to support it.

Bank had clear idea Bundy Jnr's Coy. going to the wall.

He had admitted doubts when took guarantee.

Not so here - after 3rd guarantee facilities utilised to extent greater than guarantee.

Possible indirect benefit to Mrs. A.

No knowledge of influence

Ashworth had - we know nither trusted him.

None of elements in Bundy are established

Relationship of banker and Customer does not impose any duty.

Bank of Montreal v Stuart (1911) A.C.

Mrs. Ashworth not dependant.

Friday 27th Apl. 1979

27th April 1979

Hodge Bank v Ashworth

Teare

Cd. relationship between mother & son fall into category of undue influence.

Lloyds Bank v Bundy Lord Denning at 764.

This relationship could exist, but no presumption of it - such undue influence has to be proved.

If proven, state of confidentiality wd. exist - so if child obtained benefit or advantage Ct. wd interfere.

Here. intervention of Bank.

Even if Bank manager knew of confidentiality between parent & child, not sufficient.

Law set out clearly in Bundy.

I do not concede Smith knew such relationship bet. Ashworth and Mrs. A. Therefore duty to disclose cannot arise.

Was there conflict of interests.

Mrs. Ashworth had a financial interest in both companies.

In Bundy Mrs. B had no interest in son's company.

Mr. Smith did not say had not obtained accounts of Int. Coy.

In the Staff of Government Division

No.16
Minutes taken by His Honour I.D.L.Glidewell J.A.

27th April 1979

(continued)

She was entitled to know no a/cs of the International Coy. since Oct. 1973.

Summary

(1) Basic duty of Bank Manager is to generally inform proposed guarantor of nature of deed, nature of liability and sums involved.

(2) If Bank Manager goes further at invitation or otherwise of proposed guarantor and advised on wisdom of transaction Ct. must see whether relationship of trust & confidence between Bank Manager and guarantor.

(3) If relationship does arise, Manager has fiduciary duty and that duty must be to ensure that proposed guarantor at least has opportunity of forming informed opinion of wisdom of proposed transaction.

Without second stage, third stage cannot arise.

Moroney

p.29 - ev. that at meetings at Bank affairs of Coy. not discussed.

p.25.

Appeal dismissed

Teare

Application for costs under Legal Aid (IOM) Act 1973 s.7

Hal. Supp. 1978 para. 933.

Saundey v Anglia Building Society (1971) 1 A.E.R. 243

See Headnote p.244 (iii) and (iv)

Appeal dismissed

Leave to Appeal to Privy Council not granted. Respondents to have costs of appeal out of general revenue, under s.7 L. Aid (IOM) Act 1973.

General Registry,
Douglas, Isle of Man.

I certify that the foregoing is a transcript of the Minutes taken by His Honour I.D.L. Glidewell Q.C., Judge of Appeal, at the hearing of the Appeal of Effie Ashworth on the 26th day of April 1980

This 3rd day of February 1981.

(Sd) S.A.Rissal
Chief Registrar

No. 17

10 REASONS FOR JUDGMENT

IN HER MAJESTY'S HIGH COURT OF JUSTICE OF THE ISLE OF MAN

STAFF OF GOVERNMENT DIVISION
CIVIL JURISDICTION

In the matter of the suit between:

JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED — Plaintiff

- and -

EFFIE ASHWORTH — Defendant

20 Appeal of EFFIE ASHWORTH

Transcription of the REASONS FOR JUDGMENT delivered by His Honour I.D.L. GLIDEWELL, Q.C. Judge of Appeal, at Douglas the 27th day of April 1979.

This is an appeal against the judgment of His Honour Deemster Eason given on 23rd February, 1978, giving judgment for the respondent Bank for a total sum of £45,000.00 plus interest which was due under three guarantees

signed by the appellant. The guarantees respectively are; first, dated 20th March, 1974, for £10,000.00 guaranteeing a loan by the Bank to Ashworth Transport Limited; secondly, on 3rd March, 1975, a further guarantee for £10,000.00 in respect of Ashworth International Limited and, thirdly, on 14th June, 1976, guaranteeing a sum of £25,000.00, again in respect of Ashworth International Limited. The appellant, the defendant in the Court below, Mrs. Ashworth, is an elderly lady. She was 86 at the time of trial and inevitably one must start with great sympathy for a lady of that age against whom an action in respect of so large a sum is brought. Nevertheless of course the Court can not be activated by sympathy alone and must apply the relevant rules of law as they apply generally. At the relevant times Mrs. Ashworth lived in a house owned by her at Ballasalla with her son Harry Ashworth. In the years 1974, 1975 and 1976 both Mr. Ashworth and his Mother were the sole shareholders and directors of Ashworth Transport Limited which I will call the Transport Company. But though I put it in that way, of the total of the issued shares, by that time some 7,500, Mrs. Ashworth held 1 and Mr. Ashworth held the remaining 7,499. The son was also a shareholder in the International Company. From 26th February, 1975, when there was a further issue of shares that company had 2,000 issued shares of which Mr. Ashworth held 1,002 thus having a small absolute majority. 992 were held by a Mrs. Thompson. The Transport Company held 3 and two other gentlemen held 1 and 2 respectively. Thus Mrs. Ashworth had no direct interest in that company but she did have a minimal indirect interest through her shareholding in the Transport Company. The appellant has at all times admitted that the signatures on the guarantees were, or at any rate appeared to be, hers and certainly has never asserted that she did not sign them. But four matters were raised in the original defence as grounds for saying that she was not liable. These were, firstly, that the plaintiff's manager did not witness the signature of the defendant in the defendant's presence; secondly, that the plaintiff failed to warn the defendant of the danger inherent in the signature of such a document; thirdly, that the plaintiff was aware that the defendant had funds with the plaintiff which the plaintiff purports to offset against the indebtedness of Ashworth Transport Limited and, fourthly, that the plaintiff failed in its fiduciary duty to the defendant and in particular did not advise the

defendant to obtain legal advice. On the first of those matters as will shortly appear His Honour the First Deemster made a finding of fact in the plaintiff's favour and that disposed of the first ground of defence. Essentially he also made a finding of fact on the second matter raised in the defence. He held - and this matter is not raised in the appeal at all - that there was no relevance in the third matter that is to say, that the plaintiff was seeking to offset against the indebtedness of Ashworth Transport Limited funds which the defendant had. In fact what the Bank was seeking to do was to exercise a lien on those funds until such time as the guarantees were met and thus, essentially, there remains, out of the matters pleaded in the defence, the fourth matter - the question of the plaintiff's alleged fiduciary duty to the defendant.

At the trial the witnesses for the defence were the appellant herself and her son, Mr. Ashworth. The appellant said that she signed the first guarantee in the presence of the manager of the Douglas office of the plaintiff Bank, a Mr. Smith, but that she had no recollection of signing either of the other two guarantees though, as I have said, she did not deny that what appeared to be her signature on those documents was indeed her signature. The witnesses for the Bank were Mr. Smith and a Mr. Whiteland-Smith, a chartered accountant, who is the Receiver appointed by the Bank in respect of the two companies on two different dates in October of 1976. Certain facts were specifically found by His Honour Deemster Eason and I will refer to some of these. He found first, and this is an important general point, that where the evidence of Mr. Ashworth, and I emphasise Mr. Ashworth, and Mr. Smith differed, he preferred the evidence of Mr. Smith. And then he made the following specific findings and I am reading from page 56 of the print selectively. First that the defendant signed each of the documents of guarantee upon which the plaintiff's claim is founded. Next, this is number three as numbered in the print, that he was satisfied that Mrs. Ashworth rightly said she was at the material time well able to look after her own business affairs and equally he was satisfied that in respect of these two companies she relied on her son, Harry Ashworth, and that she trusted him implicitly. And the learned Deemster went on "In considering her evidence I make allowance for her age at this time, 86, and also for the fact that in October 1976 she suffered a severe illness, as a result of

which she has since been off the Island. Yet she gave her evidence before me at the hearing clearly and without hesitation, making it quite clear that throughout the time material to this suit she was, and still is, quite capable of looking after her own affairs. But in regard to the affairs of these two companies she left them entirely to her son, Mr.Harry Ashworth." And then in his next finding he held, or he found, "that the three documents of guarantee were executed by the defendant as Mr. Smith, the Bank Manager, had stated on oath and that the signature of the defendant on each was witnessed by him as the documents show, that is they were executed at the Bank on the dates stated, the first when Mrs. Ashworth attended at the Bank alone and the second and third when Mr.Harry Ashworth was present with the defendant." And then further on he found "there is no evidence that Mr. Smith had ever approached or asked the Defendant or anyone else to give any guarantee." The learned Deemster by that must mean had never directly asked the Defendant. "On the contrary any approach to that end can only have been made by Mr. Ashworth. The Defendant and all the other persons by whom guarantees were given were connected with either or both of the two companies for which the guarantees were given." And at the bottom of that page, "Before the execution of each of the three guarantees, Mr. Smith explained to the defendant the nature of the deeds and of the liability which might follow and the defendant raised no questions." Moreover on the third guarantee, that dated June 1976, there appears below what the learned Deemster has thus found was the defendant's, the appellant's, signature, the following words 'whilst I have not taken legal advice I fully understand the nature of the liability incurred.' His Honour found that those words also were written by the defendant and there follows a second signature of hers with the date 14th June, 1976.

In addition to those specific findings by His Honour Deemster Eason there are certain other matters of fact which have been put before us and are relevant to this appeal and are not in dispute because they are matters to be found in the documents which have been agreed between the parties and they relate to the financial position of the two companies at the relevant dates and also to certain other guarantees which were obtained. As far as the financial position is concerned I will deal with this in relation

to each of the three dates at which a guarantee was given. At 20th March, 1974, accounts of the Transport Company for the year ending 31st December, 1972, had been prepared and signed in July 1973. They were the latest available accounts and they showed a net profit of some £7,561. I should say that accounts for subsequent years were prepared for that company for the year ending 31st December, 1973, they are dated December, 1974, showing a net profit of £11,600 in round figures and the accounts for the year ending 31st December, 1974, were dated June, 1975, and showed a net profit of £10,600. And so even though the accounts for the year ended December 1973 were not available in March 1974, if they had so been available they would have shown an increase in profit. At March 1974, the Bank indebtedness of that company was the relatively small figure of £3,674. At 3rd March 1975, the date of the second guarantee, the relevant position is really that of the International Company but it is probably relevant to consider the position of both companies. I have already dealt with the accounts of the Transport Company. As far as the International Company was concerned only one set of accounts were produced and they were the accounts for the year dated 31st December, 1973, but by March 1975, they had still not been produced and, therefore, as far as that company was concerned there were no issued accounts. The position as far as the Bank accounts were concerned is that at about that date the Bank indebtedness of the International Company was varying between about £4,000 and £5,000, it tended to go up and down to some extent but remained approximately between those figures. And as far as the Transport Company is concerned it had risen to some £7,000 having shortly before been as high as about £10,000. After that date however the Bank indebtedness of both companies increased fairly rapidly. By December, 1975, the Transport Company's indebtedness had gone up from £7,000 to £60,000, over £60,000, and the International Company's indebtedness not quite so rapidly to £15,600. Before I deal with the position at June 1976, I interpolate information relating to other guarantees, that is to say guarantees taken from persons other than the defendant. This is not a matter specifically dealt with, I believe I am right in saying, by His Honour Deemster Eason in his findings but it was dealt with in evidence by Mr. Smith and it was not contradicted and indeed of course it is not controversial. His evidence was that on 20th

January, 1976, a meeting of both companies was arranged at the request of the companies' accountant which was held at the accountant's house. Besides the accountant and himself there were present Mr. Harry Ashworth and Mr. & Mrs.Thompson. Mrs. Ashworth was not there. And at that meeting Mr. Smith took a joint and several guarantee from Mary and Peter Thompson, Mr.& Mrs. Thompson, in the sum of £20,000 in favour of Ashworth International Limited and he also took a personal guarantee from Mr. Ashworth for £70,000 which was also for Ashworth International Limited. And he also arranged for a guarantee to be given by a Scottish company called John Fleming Anstruther Limited which he knew to be an associated company in the Ashworth group and of which Mr. Peter Thompson was a director. He also called upon the accountant for a statement of the accounts and "I said I would want a further guarantee from Mrs. Ashworth and I took other guarantees." It is not clear from that last phrase whether that meant further guarantees apart from those to which he refers though the Court understands that it does not mean that. He went on "steps have been taken to enforce all these other guarantees and nothing has been recovered as yet but judgment may have been given perhaps against Mrs. Thompson." Now following that meeting at which, as I have said, the defendant Mrs. Ashworth was not present, although Mr. Smith asked that a further guarantee should be obtained from her, for some time no such further guarantee was obtained but the guarantees had been given by Mr. Ashworth and Mr. & Mrs.Thompson and the overdrafts of the two companies continued to increase so that by June 1976, the Transport Company's overdraft was about £72,600 and that of the International Company some £33,700.

Mr. Smith in his evidence then dealt with three other matters. He said that one or two and eventually he agreed that it was as many as five cheques payable by Ashworth International to Mrs. Thompson were returned marked 'Refer to Drawer'. They were four cheques for £50 each and one for £35 and he said he did not tell Mrs. Ashworth when she signed the guarantee in June 1976, that the cheques had been stopped. The cheques were presented again by the negotiating bank and were paid so that when Mrs. Ashworth signed the guarantee these cheques had been met. Secondly, so far as the International Company's accounts were concerned he said "I

did not have knowledge of the company's accounts." I should have added that by this time the accounts for the year ended, that is to say by June 1976, the accounts for the International Company for the year ending 31st December, 1973, had been produced but no others. And Mr. Smith said "I did not have knowledge of the company's accounts but I was frequently in touch with the accountant and did not become aware of anything but after the company's debentures had been signed I asked Mr. Harry Ashworth and his accountant for information and only got small pieces of paper with a note on which was no use to me. I did not explain this to Mrs. Ashworth." And then finally so far as his knowledge about the likelihood that the companies, or certainly the International Company, would be able to continue trading was concerned, there is a sentence on page 28 of the print of appeal which, unfortunately, appears on the face of it not to be an accurate record of precisely what was said. Both counsel agree that the effect of it was that Mr. Smith said "I do not agree that it was highly probable that these companies were insolvent in January 1976, nor yet in June 1976." There are other possible readings of the sentence but both counsel agree that that is the sense of it. It was put to him by Mr. Moroney in cross-examination that in January 1976, and in June 1976, that it was probable that the companies were insolvent which Mr. Whiteland-Smith had said was his opinion at least as far as June 1976, was concerned and he, Mr. Smith the Bank Manager, said, "No I do not agree with that, I do not think that it was probable that they were insolvent at that time." At any rate that was his opinion at that time. The Receiver of course was looking at the matter with the benefit of hindsight.

Now, in this appeal, Mr. Moroney makes three points, all of which are different aspects of the fiduciary duty question which he raised as the last ground of defence in his pleading and in the order that the Court considers logical these points are as follows. First, that the influence exercised by the son over the defendant, Mrs. Ashworth, amounted to what in law is called undue influence and that in turn this imposed a duty on the Bank. Secondly, that because Mrs. Ashworth quite apart from these transactions was a customer of the Bank with whom she had a deposit account and I believe also a current account, the Bank

owed her a duty arising out of that relationship in respect of the guarantee transactions. And, thirdly, a point which on some little examination transpires only to relate to the third guarantee and does not affect the first and second guarantees, Mr. Moroney argues that Mr. Smith's knowledge of the state of the financial affairs of the International Company in June 1976, including in a sense his lack of knowledge, that is to say the fact that he had only received accounts for the year ending December 1973, with scraps of information as to the trading position of the company after that, imposed on Mr. Smith a duty to any potential guarantor who was being asked to sign a guarantee to cover any further advance to that company at that date. In each case, whatever the source of the duty, the duty alleged is as the Court understands it the same. It is a duty either to give such information as Mr. Smith had about the state of the company at the relevant time and to give a warning arising out of the lack of up to date accounts and of relevant information and/or to advise that the potential guarantor should seek independent advice. The duty is put in other words by Sir Eric Sachs, formerly Lord Justice Sachs, in his judgment in an authority to which much reference has been made during the course of the argument in this case and from which in the course of his judgment His Honour Deemster Eason made extensive quotations -that of Lloyds Bank v. Bundy which is reported at (1974) 3 A.E.R. at page 757. Since His Honour has made such extensive quotations the Court does not find it necessary in this judgment to rehearse much of the judgments in that important case but there is a passage - I shall be referring to a number of passages in this judgment - there is one passage in the judgment of Sir Eric Sachs at page 768(d) to (e) where he shortly describes the duty to which I am referring as :- "The duty has been well stated as being one to ensure that the person liable to be influenced has formed 'an independent and informed judgment' or to use the phraseology of Lord Evershed the Master of the Rolls in Zamet v Hyman 'after full, free and informed thought'" the italics in each case, said His Lordship, are mine.

I will deal with each of the submissions made by Mr. Moroney in turn. And, firstly, the influence exercised by the son over his mother. In his address to us this morning Mr. Teare has conceded that such a relationship

can create a relationship of undue influence. This matter is also dealt with in the judgment of Lord Denning in Lloyds Bank v Bundy at page 764 where His Lordship said "The third category is that of 'undue influence' usually so called. These are divided into two classes as stated by Lord Justice Cotton in Allcard v Skinner. The first are those where the stronger has been guilty of some fraud or wrongful act - expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient spiritual adviser over follower. At other times a relationship of confidence must be proved to exist." If there is in this case such a relationship it clearly falls into the second not the first of the classes to which Lord Denning was there referring and Mr. Teare submitted and this Court agrees that the facts of this case are not such as to raise a presumption of undue influence, that is to say that though there can be a relationship equivalent to undue influence where an elderly parent is under the influence of an adult son or daughter nevertheless there is no presumption that such influence exists, if it is to be found it must be proved and the onus is of course on the person asserting such influence to prove it. Secondly, if such influence is proved then a relationship of confidence exists between, in this case, the son and the mother. And the next question the Court has to consider is how that affects the Bank. Mr. Moroney relies here also on Lloyds Bank v Bundy on the passage to which I have just referred and also on another passage from the judgment of Sir Eric Sachs at page 770 where His Lordship dealing with the facts of that case said, "The situation of the defendant in his sitting-room at Yew Tree Farm can be stated as follows - He was faced by three persons anxious for him to sign. There was his son Michael, the overdraft of whose company had been as is shown by the correspondence, escalating rapidly; whose influence over his father was observed by the judge - and can hardly not have been realised by the Bank; and whose ability to overcome the difficulties of his company was plainly doubtful, indeed its troubles were known to Mr.Head (the Bank Manager in that case) to be deep-seated. There was Mr.Head, on behalf of the

Bank, coming with the documents designed to protect the Bank's interest already substantially made out and in his pocket. There was Michael's wife asking Mr. Head to help her husband." And Mr. Moroney asks us to deduce from that if it be shown that the Bank knows that a son has influence over his mother or father that the Bank is thereby put under a duty to the mother or father. He relies also in this respect on the decision of the Privy Council in a case of the Bank of Montreal v Stuart reported in (1911) Appeal Cases page 120. This is a husband and wife case and the facts though involving the Bank are complicated by the fact that there was the intervention of a solicitor but the solicitor was also the solicitor for the Bank as well as being the solicitor for the husband and was held by the Judicial Committee of the Privy Council to be acting on behalf of the Bank and so to all intents and purposes was the Bank. The head note reads, "In an action by a wife living with her husband against the appellant Bank to set aside a series of transactions in relation to a company spreading over eight years and resulting in her surrendering to the Bank all her extensive estate, real and personal, and in her being left without any means of her own, it appeared that the plaintiff, who was a confirmed invalid, acted throughout in passive obedience to her husband's directions, had no means of forming an independent judgment, and at the trial repudiated any misrepresentation or any undue influence by her husband, alleging that she acted of her own free will to relieve her husband's distress; and that the solicitor who acted in all or most of the transactions was solicitor to the Bank and to the husband and was a director, secretary, shareholder and creditor of the company:- Held, affirming the judgment of the Supreme Court but for different reasons, that these transactions could not stand, the wife being in fact wholly under the husband's influence and the solicitor in a position in which he could not advise fairly." I have made the point about the solicitor because it seems to the Court that in this particular case he was in effect acting in the position of the Bank not independently as a solicitor. And at the end of the judgment of Lord McNaughton who gave the judgment of the board, there appears this passage - it is the last two pages from page 137 to 139 :- "It may well be argued (said His Lordship) that when there is evidence of over-powering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is

complete. However, that may be, it seems to their Lordships that in this case there is enough, according to the recognised doctrines of Courts of Equity, to entitle Mrs. Stuart to relief. Unfair advantage of Mrs. Stuart's confidence in her husband was taken by Mr. Stuart, and also it must be added by Mr. Bruce (that is the solicitor). Their Lordships do not atttibute to Mr. Bruce intentional unfairness but Mr.Bruce was in a position which it would have been almost impossible for any man to act fairly. He was solicitor for the Bank. He was the legal adviser of Mr. Stuart. He took upon himself to enter into negotiations with his fellow shareholders on behalf of Mrs. Stuart. Above all, he had, as the managers of the Bank well knew, a strong personal interest in procuring Mrs. Stuart to give the guarantee. He knew that all Mr. Stuart's means were embarked in the company, and no one knew better than he that unless someone came forward and guaranteed the Bank in respect of further advances his own interests, and the interests of his associates as shareholders were worth nothing, and his claim as a creditor in all probability equally valueless. He and his associates other than Mr. Stuart were unwilling to risk their own monies. Mr. Stuart had no money to risk. The game Mr. Stuart was playing was desperate. It was the throw of a gambler with money not his own. No man in his sense with any regard for the interest of Mrs.Stuart or the interest of Mr. Stuart could have advised Mrs.Stuart to act as her husband told her to do. The Bank left everything to Mr. Bruce and the Bank must be answerable for what he did. Without communicating with Mrs.Stuart, Mr. Bruce of his own motion extended the guarantee to past advances from the Chatham Branch. More than that, he took upon himself to act on behalf of Mrs. Stuart in procuring the transfer of shares to her by way of consideration for undertaking a risk which neither he nor any of his solvent associates were willing to accept. And the consideration, as he must have known if he had considered the matter, was absolutely illusory. It was worse than illusory, for it fixed Mrs. Stuart with a common interest in the fortunes of the company, and no doubt relieved her husband from any feeling of compunction in getting his wife to make so great a sacrifice for the benefit of the shareholders and afterwards dragging her deeper into the mire. Now it has been laid down in the House of Lords that the husband's solicitor owes a duty to the wife in transactions

between the husband and wife where her interests are concerned." I think I do not need to read the quotation that follows because it is relevant specifically to husband and wife matters. And then His Lordship went on: "That observation seems to apply with peculiar force to a case like this where the solicitor takes upon himself to intervene on behalf of the wife. Mr.Bruce undertook a duty towards Mrs. Stuart but he left her in a worse position than she would have been if he had not interfered at all. His course was plain. He ought to have endeavoured to advise the wife and to place her position and the consequences of what she was doing fully and plainly before her. Probably if not certainly she would have rejected his intervention. And then he ought to have gone to the husband and insisted on the wife being separately advised, and if that was an impossibility owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the Bank why he did so."

Now, Mr. Teare points out that both cases contain factual matters which goes very much beyond the question of the influence of the son in the one case and the husband in the other case over the wife. Firstly, in both cases there was advice requested and given. In Bundy's case the father specifically requested the advice of Mr. Head the Bank Manager and Mr. Head in an answer which Sir Eric Sachs describes as vital, though it took a little sorting out because it was not accurately recorded in the judge's notes, accepted that he knew that Mr. Bundy was relying on his advice. In the Stuart case, although Mr. Bruce did not directly advise Mrs. Stuart, he purported,acting as her solicitor, to take it upon himself to act on her behalf and so to inform the Bank. And, secondly, in both cases the financial position differs very much from that in the present case. In the Bundy case the Bank was not willing to make any further advance and was not taking the last guarantee from Mr. Bundy to cover any further advance but only to cover the continuation of the existing situation whereas in the present case, and I shall advert to this later, as Mr.Teare points out with force following the granting of the third advance by Mrs.Ashworth the Bank did indeed increase the overdraft of both companies and so far as the International Company is concerned by a further £26,000 or so. And in the Stuart case the person who was giving the advice and effectively acting on behalf of the Bank, Mr. Bruce, had a

substantial personal interest in the granting of the guarantee. It was substantially to his personal advantage. Thus both cases, said Mr. Teare, are cases in which there were a number of factors not merely the factor of the influence of husband over wife or son over father and knowledge by the Bank or its agent, the solicitor. The Court agrees with that and the Court accepts that there is no authority cited to it or known to it in which the influence of one party over another and knowledge by the Bank of that influence alone without any other factors has been held to impose a duty on the Bank. Nevertheless the Court takes the view that in an appropriate case such a duty could arise. If the facts are clearly proved, that is to say that one party is in a relationship to another where the other is exercising undue influence, and those facts are known to the Bank then it does seem to the Court that there is a duty on the Bank, either to ensure that the party from whom the guarantee is sought obtains independent advice before the guarantee is entered into or at any rate to place before the party entering into the guarantee all the facts and circumstances which might be considered relevant at the time. Only so can the Bank be sure that the potential guarantor, Mrs. Ashworth in this case, is exercising an independent judgment. But, having expressed the opinion that that is the legal position the Court does not find that the necessary facts to substantiate such a position in this case are proved. Firstly, so far as undue influence is concerned I have already read the finding of His Honour Deemster Eason about the capabilities and relationship of the mother and the son. The passage is on page 56 of the print of evidence at which His Honour said "I am satisfied that she rightly said that she was at the material time well able to look after her own business affairs, equally that in respect of these two companies she relied on her son, Harry Ashworth, and that she trusted him implicitly." And then over the page again "she was and still is quite capable of looking after her own affairs but in regard to the affairs of these two companies she left them entirely to her son, Harry Ashworth." That is not a categorical finding of undue influence. Indeed so far as the Court can ascertain the assertion of undue influence in terms was not put before His Honour or if it was at any rate he did not apparently regard it as being put before him in a way which required him to make a finding one way or another of undue influence. Without a clear finding of

such influence the necessary facts to support what the Court accepts would be an extension of, or at any rate an addition to, what had hitherto been found by the Court as imposing a duty on the Bank does not exist. And, secondly, there is no clear finding that Mr. Smith, the Bank Manager, knew that Mr. Ashworth, the son, was exercising such influence over his mother that she was not capable of forming an independent judgment of her own. Indeed from the passage in His Honour's judgment to which I have just referred it might well be inferred that Mr. Smith might think that Mrs. Ashworth was perfectly capable of forming an independent judgment of her own and what is more, since, albeit elderly she was apparently perfectly capable of appreciating matters put to her, he may have thought that since she was a director of and a shareholder in the Transport Company that she was capable of having and had some knowledge of that company's affairs such as he had himself. In this sense, of course, her position was quite unlike a potential guarantor who was not a member of the company since she was entitled to have information about the Transport Company's accounts and bank account and the International Company's accounts, though not the bank account which would not be open to a person not in that position in relation to the company. And to this extent His Honour Deemster Eason did make a specific finding when he referred to the fact that all the persons who gave guarantees were members of and directors of one company or another. It follows that though as a matter of law the Court is of opinion that such a duty can in appropriate circumstances exist, the Court is not satisfied on the facts of this case that such a duty arises in this case.

I turn to consider the question of the alleged duty owed by the Bank to the appellant because she was a customer of the Bank with a deposit and a current account, if indeed it was a current account. So far as the Court can see this particular point was not argued at all in the Court below, a quite different point being made about the relationship of the appellant to the Bank in the Court below. That is to say that it was complained that the Bank was seeking to set off the defendant's deposit account against her indebtedness in this action which was held, quite properly in the Court's view, not to be a proper ground of defence. This is a new point but Mr. Teare has not objected in any sense to it being raised and indeed has sought

to answer it and the Court will therefore deal with it. Mr. Moroney did not cite to the Court any specific authority for this proposition but he relied upon passages from two authorities. First, a very short passage from the judgment of the House of Lords in the well-known case of Hedley Byrne v Heller (1964) Appeal Cases at 465 where at pages 528 and 529 Lord Devlin said in his judgment:- "I think, therefore, that there is ample authority to justify Your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v Lord Ashburton are 'equivalent to contract' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or advisor knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the advisor is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a Bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the Bank if their deals fell through because the Bank had refused to testify as to their credit when it was good." And then later in the next paragraph he said:- "I do not understand any of Your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or Banker and customer, is created, or specifically in relation to a particular transaction." Now, Mr. Moroney plucks out of that passage the reference to the

general relationship of Banker and customer and asks the Court to hold that Lord Devlin was saying in effect that the relationship of Banker and customer necessarily involves a fiduciary duty. The Court agrees with Mr.Teare that in this respect Mr. Moroney has fallen into the trap of taking a short passage from a judgment or a speech out of context and seeking to erect that short passage into a statement of principle. It must be remembered that what was being dealt with in Hedley Byrne v Heller was the question whether a Bank owes a duty to a person who enquires of it about the status of a customer to answer that question with proper care. Such a duty of course can not arise out of a contract because there is no contractual relationship normally between the enquirer and the Bank and the essence of the decision is that, save where there is an exception clause which there was in that particular case, there is a duty of care under the ordinary laws of negligence that is to say in tort. His Lordship in the passage to which I have just referred was saying that certain types of relationship do create a general duty and such a duty might arise between solicitor and client or Banker and customer and the Court understands His Lordship there to be considering the sort of enquiry relevant to Hedley Byrne v Heller being made by customer to Banker about for instance another customer and His Lordship to be adverting to that situation and not to intend that brief passage to import a general view that Bank owes a fiduciary duty to its customers who have accounts with it to advise them in relation to other transactions which they may have with the Bank. The second authority to which reference was here made was that of Davies v London and Provincial Insurance reported in the 8th volume of the Chancery Division Reports - the volume for the year 1878 - at page 469. This is authority for the proposition that a party who is entering into a contract with another is entitled to keep silent about matters which would be material to the other's decision whether to enter into the contract or not, but if he has made a statement about material facts which he believes to be true and then discovers in the course of negotiation that it is untrue, he is under a duty to correct that statement before the contract is entered into. Clearly a misrepresentation, albeit innocent, becomes a wrongful misrepresentation if it is discovered that it is untrue and that really is the essence of the decision in this matter. But in the course

of his judgment Mr. Justice Fry said this at page 474:- "Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to show that the duty existed. Now, undoubtedly that duty does in many cases exist. In the first place, if there be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and cestui que trust, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the agent, by the solicitor, by the guardian or by the trustee. The pre-existing relationship involves the duty of entire disclosure." The Court understands that passage to be relating to a relationship which gives to the principal, or the solicitor, or the guardian, or the trustee, knowledge of matters which are germane to the question in issue and thus imposes upon him a duty to disclose that knowledge before he allows the person with whom he is seeking to enter into a contract to enter into that contract in ignorance of those facts. The Court does not understand that passage to be dealing with a general duty, that is to say that a principal owes a duty to his agent when entering a contract with the agent to inform the agent of any facts which are relevant and which he knows are relevant to the matter under consideration. But if at some later date there is some other relationship between the parties that does not mean in the Court's view that a similar duty necessarily follows. Again the Court agrees that this is a statement which can not be held to have the general application for which Mr. Moroney contends. The Court, as have said, knows of no authority which imposes upon a Bank any greater duty to a person about to sign a guarantee because he happens also to be a customer of the Bank than it does to a person who is not a customer. It may be that as a matter of practice Banks normally treat their customers perhaps somewhat differently from those who are not, but that is a matter of practice not a matter of law. The Court cannot find this argument advanced by Mr. Moroney is justified by any authority.

The third ground relates to an alleged duty arising from the state of Mr. Smith's knowledge of the affairs of the International Company.

At my invitation, Mr. Moroney, during the course of his address, formulated this point in this way. If it was likely that a reasonable man would consider on the presence or absence of facts known to him that it was probable that the company was or would be insolvent and that it was likely that the guarantee would be called on he should warn the prospective guarantor of such facts or absence of facts. And he referred again to Davies v London and Provincial Insurance and also to Woods v Martins Bank (1959) 1 Queens Bench at page 55. In Bundy there is another passage which may be held also to be material here. Again in the judgment of Sir Eric Sachs at page 770 he pointed out about half way down the page :- "That the company might come to a bad end quite soon with these results" - that is to say that Mr. Bundy would be left penniless in his old age - "was not exactly difficult to deduce (less than four months later, on 3rd April, 1970, the Bank were insisting that Yew Tree Farm be sold)." And it is true that by co-incidence the period of four months is the period which is relevant here too. Because within four months after the granting of the guarantee in June 1976, the Receiver was appointed in relation to both the companies. And so the question is, if the principle is correct, did the Bank know that the company was likely to fail and take the guarantee in that knowledge? The Court agrees that there is a principle as advanced by Mr. Moroney in this respect. Indeed if a Bank quite openly takes a guarantee in the full knowledge that the company whose account is then guaranteed is almost certain to fail and is really undertaking the guarantee in order to protect its own existing situation without any intention of making any further advance to the company, the situation that existed in the Bundy case, then it might be held to amount to fraud although fraud was not alleged in that case and was specifically not found and of course no fraud is alleged in this case. But, certainly, fraud or no fraud, it is the view of the Court that such facts would impose a duty. In other words if the guarantee were taken solely for the benefit of the Bank and not at all for the benefit of the company where the true position was that the company was bound to fail anyway and thus the sooner that matter was brought to a head the better without involving the guarantor in any further liability. But Mr. Teare argues that on the facts of this case there are two matters which show that that was not known to the Bank. First, he relies upon

the answer of Mr.Smith to which I have already referred and set out on page 28 of the print of evidence where he said and it must be remembered that although His Honour did make a specific finding about this particular sentence, he had said that he accepted the evidence of Mr. Smith though it differed from that of Mr. Ashworth. He said and obviously nobody could contradict him that it was his view that it was not highly probable that the company was insolvent in June 1976. I understand that to mean that he was saying that in June 1976, it was not apparent to him that it was highly probable that the company was insolvent. And secondly, and there is a great deal of force in this, Mr. Teare points out that unlike the Bundy case, having got the guarantee he sought Mr. Smith then promptly made advances or allowed the Bank to make advances for amounts greater than the amount of the guarantee because the overdraft of the International Company went up in the next three months by slightly more than the total amount of the latest guarantee and Mr. Teare argues that it is clear that Mr. Smith far from thinking the company was going to fail was hopeful that the company was going to continue to be able to trade otherwise what was the point in allowing that indebtedness to continue to increase; after all, guarantee or not, says Mr. Teare in effect, he was risking the Bank's money. It may be that other Bank Managers faced with the situation known to Mr. Smith in June 1976, might have taken a more cautious line. It is quite right, as Mr. Moroney points out, that the two companies' indebtedness at that stage had been rising very rapidly and it is also right that Mr. Smith might well have been put off suspicion by the fact that he had not any accounts from the International Company for the past two years and he had not really been able to obtain any clear information about the trading position of the International Company. Nevertheless, on the facts put before His Honour Deemster Eason, this Court can not find that Mr. Smith's answer to which I have referred was false and certainly can not find that the Bank knew that the Company was likely to fail when it asked Mrs. Ashworth to give her guarantee in June 1976. Thus an essential element in the formulation of the test, as Mr. Moroney puts it forward, or at any rate as the Court thinks it should be formulated, that is to say if it was likely if the Bank did know on the facts known to it or if at the worst it blinded itself to

In the Staff of Government Division

No.17
Reasons for Judgment

27th April 1979

(continued)

the fact and thus should be held to have known that it was highly probable that the company was insolvent, which is the way the Court thinks the test ought to be formulated, then it might well be that the Court would be able to find for the appellant on this ground, but in the state of the evidence the Court is unable to find that this ground either is made out. As I have already said in those cases in which a guarantee was set aside, notably the Bundy case and the Stuart case, there was a combination of circumstances. Whether any one of the points argued so ably by Mr. Moroney would in itself have been sufficient the Court has not decided and does not decide. But having dealt with all three the Court has found in the event that none of them has been made out and it follows that the appeal therefore fails and must be dismissed. The Court would like to end by thanking both counsel for the clarity and care with which they have made their submissions.

(Sgd) Iain Glidewell

In the Privy Council

No.18
Order granting Special Leave to Appeal to Her Majesty in Council

17th December 1980

No 18

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 17th day of December 1980

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 27th day of November 1980 in the words following viz :-

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Effie Ashworth Petitioner in the matter of an Appeal from the Staff of Government Division of the High Court of Justice of the Isle of Man between the

Petitioner and Julian S. Hodge Bank (Isle of Man) Limited Respondent setting forth that the Petitioner prays for special leave to appeal from a Judgment of the said Staff of Government Division of the High Court dated 27th April 1979 dismissing the Petitioner's Appeal from the Judgment of the High Court dated 23rd February 1978 ordering payment by the Petitioner as guarantor of three sums of £10,000, £10,000 and £25,000 to the Respondent and interest and costs: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment of the Staff of Government Division of the High Court of Justice of the Isle of Man dated 27th April 1979 and for further or other relief:

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto and having been informed by Counsel that the correct name of the Respondent is now Standard Chartered Bank (Isle of Man) Limited Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the Staff of Government Division of the High Court of the Isle of Man dated 27th April 1979 the Respondent to such appeal being Standard Chartered Bank (Isle of Man) Limited (formerly Julian S. Hodge Bank (Isle of Man) Limited):

" And Their Lordships do further report to Your Majesty that the proper officer of the said Staff of Government Division of the High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution

In the Privy Council

No.18
Order granting Special Leave to Appeal to Her Majesty in Council

17th December 1980

(continued)

WHEREOF the Lieutenant Governor or Officer administering the Government of the Isle of Man for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N.E. LEIGH

EXHIBIT P1
GUARANTEE

A Guarantee by an Individual/Individuals

To JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED (hereinafter referred to as "the Bank") whose Registered Office is situate at 57a Athol Street in the Borough of Douglas

IN CONSIDERATION of the Bank giving accommodation to Ashworth Transport Ltd. of Hills Meadow, Douglas (hereinafter referred to as "the Principal") I Effie Ashworth of Phildraw Road Ballasalla hereby guarantee on demand in writing being made to me or my personal representatives the discharge of all liabilities of the Principal to the Bank Provided that (subject as mentioned in paragraph 2 below) the amount for which I shall be liable to the Bank hereunder shall not exceed TEN THOUSAND POUNDS and interest on that amount or on such less amount as may be due day by day

I confirm and agree with Bank as follows :-

1. The Bank may without further consent from me and without affecting my liability hereunder renew any accommodation given to the Principal hold over renew or give up in whole or in part and from time to time any security received or to be received from the Principal or from any other person or persons and grant time or indulgence to or compound with the Principal or any other person or persons and this guarantee shall not be discharged nor shall my liability under it be affected by anything which would not have discharged or affected my liability if I had been a principal debtor to the Bank instead of a guarantor

2. I have not taken and will not take without the written consent of the Bank any security from the Principal in connection with this guarantee and in the event of my having taken or of my taking any security in contravention of this provision the maximum amount for which I am to be liable under this guarantee as mentioned above shall be increased by the amount by which any dividend in bankruptcy liquidation or otherwise payable by the Principal to the Bank is thereby lessened

EXHIBITS

P1

Guarantee

20th March 1974

(continued)

3. In respect of my liability hereunder the Bank shall have a lien on all stocks shares securities and property or properties of mine from time to time held by the Bank whether for safe custody or for security to the Bank or otherwise and on all moneys from time to time standing to my credit with the Bank on any account whatever

4. This guarantee is a continuing guarantee

5. This guarantee shall not be affected by my death nor by the death of my personal representative and shall remain in force until determined by me or my personal representative by six months' notice in writing

6. This guarantee shall apply to the ultimate balance owing by the Principal to the Bank and until such balance has been paid in full I shall not be entitled to participate in any security held or money received by the Bank on account of that balance or to stand in the place of the Bank in respect of any such security or money nor until such balance has been paid in full shall I take any step to enforce any right or claim against the Principal in respect of any moneys paid by me to the Bank hereunder or have or exercise any rights as surety in competition with the Bank the statutes of bankruptcy and the rules of law and equity to the contrary notwithstanding

7. In case this guarantee shall be determined or called in by demand made by the Bank the Bank may continue its account with the Principal notwithstanding the determination or calling in and my liability in respect of the amount due from the Principal at the date when the determination or calling in takes effect shall remain regardless of any subsequent dealings in the account

8. This guarantee shall be additional to any other guarantee of the Principal given by me to the Bank at any time

9. In any proceeding or otherwise under this guarantee the amount for the time being due from the Principal to the Bank shall be conclusively proved by a copy signed by an officer of the Bank of the Principal's account contained in the books of the Bank or of such account for the preceding six

months if the account shall have extended beyond that period

10. This guarantee shall not be discharged nor shall my liability under it be affected by the fact that any security given or to be given to the Bank may be void or defective in substance or in form either by mistake or otherwise or that any dealings with or borrowing from the Bank by the Principal may be ultra vires the powers of the Principal

11. A demand hereunder shall be made in writing signed by any Director or other officer of the Bank Such demand may be addressed to me by name at my address last known to the Bank and a demand so addressed and posted by ordinary letter post by recorded delivery or registered post as the Bank may decide shall be effective 24 hours after it is posted notwithstanding that it be returned undelivered and notwithstanding my death Such a demand made on my personal representatives whether immediate or not shall also be effective

12. Herein where the context so admits :-

(a) "The Bank" includes its successors and assigns and any company with which it may merge or amalgamate

(b) "Giving accommodation" to the Principal includes opening or continuing an Account (whether already existing or not) and giving credit or time and in any case to the Principal either alone or jointly with any other person

(c) "Liabilities" of the Principal include indebtedness sole several or joint in respect of advances bills promissory notes guarantees interest commission banking or legal charges and expenses

(d) "Security" includes bill note mortgage charge or lien sole several or joint and whether made incurred or discounted before on or after the date hereof

(e) Where the Principal is or includes more than a single person or body words importing only the singular shall include also the plural and this guarantee shall remain effective regardless of any change by death

EXHIBITS

P.1

Guarantee

20th March 1974

(continued)

retirement appointment addition or otherwise in the personality or identity of the Principal

(f) If this Guarantee is by more than one person the obligations hereunder shall be joint and several and words importing the singular number only shall include the plural number and vice versa and

(g) Words importing the masculine gender shall include the feminine gender and a corporation

13. So far as may be necessary to give effect to the provisions of this guarantee I waive absolutely in favour of the Bank all rights which but for this waiver I might exercise or enforce against the Bank or the Principal

Dated 20/3/74

GUARANTOR(S)

Signature E.Ashworth

Address "Towneley" Phildraw Road Ballasalla

WITNESS:
Signature A.Smith

Address JULIAN S. HODGE BANK (ISLE OF MAN)LTD. 57a ATHOL STREET, DOUGLAS, ISLE OF MAN

Description Bank Manager

HIGH COURT OF JUSTICE
COMMON LAW DIVISION
SUMMARY JURISDICTION

Julian S.Hodge Bank (Isle of Man) Limited & Effie Ashworth
Exhibited in this Cause marked with the letter P1 and so certified

GENERAL REGISTRY
ISLE OF MAN
13 OCT 81
EXAMINED AND CERTIFIED
A TRUE COPY
Sd.
ASSISTANT CHIEF REGISTRAR

EXHIBIT P2
GUARANTEE

A Guarantee by an Individual/Individuals

To JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED (hereinafter referred to as "the Bank") whose Registered Office is situate at 57a Athol Street in the Borough of Douglas

IN CONSIDERATION of the Bank giving accommodation to Ashworth International Limited of Hills Meadow, Douglas, isle of Man (hereinafter referred to as "the Principal") I Effie Ashworth of Towneley, Phildraw Road, Ballasalla Isle of Man hereby guarantee on demand in writing being made to me or my personal representatives the discharge of all liabilities of the Principal to the Bank Provided that (subject as mentioned in paragraph 2 below) the amount for which I shall be liable to the Bank hereunder shall not exceed TEN THOUSAND POUNDS (£10,000) and interest on that amount or on such less amount as may be due day by day

I confirm and agree with Bank as follows :-

1. The Bank may without further consent from me and without affecting my liability hereunder renew any accommodation given to the Principal hold over renew or give up in whole or in part and from time to time any security received or to be received from the Principal or from any other person or persons and grant time or indulgence to or compound with the Principal or any other person or persons and this guarantee shall not be discharged nor shall my liability under it be affected by anything which would not have discharged or affected my liability if I had been a principal debtor to the Bank instead of a guarantor

2. I have not taken and will not take without the written consent of the Bank any security from the Principal in connection with this guarantee and in the event of my having taken or of my taking any security in contravention of this provision the maximum amount for which I am to be liable under this guarantee as mentioned above shall be increased by the amount by which any dividend in bankruptcy liquidation or otherwise payable

EXHIBITS

P.2

Guarantee

3rd March 1975

(continued)

by the Principal to the Bank is thereby lessened

3. In respect of my liability hereunder the Bank shall have a lien on all stocks shares securities and property or properties of mine from time to time held by the Bank whether for safe custody or for security to the Bank or otherwise and on all moneys from time to time standing to my credit with the Bank on any account whatever

4. This guarantee is a continuing guarantee

5. This guarantee shall not be affected by my death nor by the death of my personal representative and shall remain in force until determined by me or my personal representative by six months' notice in writing

6. This guarantee shall apply to the ultimate balance owing by the Principal to the Bank and until such balance has been paid in full I shall not be entitled to participate in any security held or money received by the Bank on account of that balance or to stand in the place of the Bank in respect of any such security or money nor until such balance has been paid in full shall I take any step to enforce any right or claim against the Principal in respect of any moneys paid by me to the Bank hereunder or have or exercise any rights as surety in competition with the Bank the statutes of bankruptcy and the rules of law and equity to the contrary notwithstanding

7. In case this guarantee shall be determined or called in by demand made by the Bank the Bank may continue its account with the Principal notwithstanding the determination or calling in and my liability in respect of the amount due from the Principal at the date when the determination or calling in takes effect shall remain regardless of any subsequent dealings in the account

8. This guarantee shall be additional to any other guarantee of the Principal given by me to the Bank at any time

9. In any proceeding or otherwise under this guarantee the amount for the time being due from the Principal to the Bank shall be conclusively proved by a copy signed by an

officer of the Bank of the Principal's account contained in the books of the Bank or of such account for the preceding six months if the account shall have extended beyond that period

10. This guarantee shall not be discharged nor shall my liability under it be affected by the fact that any security given or to be given to the Bank may be void or defective in substance or in form either by mistake or otherwise or that any dealings with or borrowing from the Bank by the Principal may be ultra vires the powers of the Principal

11. A demand hereunder shall be made in writing signed by any Director or other officer of the Bank Such demand may be addressed to me by name at my address last known to the Bank and a demand so addressed and posted by ordinary letter post by recorded delivery or registered post as the Bank may decide shall be effective 24 hours after it is posted notwithstanding that it be returned undelivered and notwithstanding my death Such a demand made on my personal representatives whether immediate or not shall also be effective

12. Herein where the context so admits :-

(a) "The Bank" includes its successors and assigns and any company with which it may merge or amalgamate

(b) "Giving accommodation" to the Principal includes opening or continuing an Account (whether already existing or not) and giving credit or time and in any case to the Principal either alone or jointly with any other person

(c) "Liabilities" of the Principal include indebtedness sole several or joint in respect of advances bills promissory notes guarantees interest commission banking or legal charges and expenses

(d) "Security" includes bill note mortgage charge or lien sole several or joint and whether made incurred or discounted before on or after the date hereof

(e) Where the Principal is or includes more than a single person or body words importing

EXHIBITS

P2

Guarantee

3rd March 1975

(continued)

only the singular shall include also the plural and this guarantee shall remain effective regardless of any change by death retirement appointment addition or otherwise in the personality or identity of the Principal

(f) If this Guarantee is by more than one person the obligations hereunder shall be joint and several and words importing the singular number only shall include the plural and vice versa and

(g) Words importing the masculine gender shall include the feminine gender and a corporation

13. So far as may be necessary to give effect to the provisions of this guarantee I waive absolutely in favour of the Bank all rights which but for this waiver I might exercise or enforce against the Bank or the Principal

Dated 3.3.75

GUARANTOR(S)

Signature E.Ashworth

Address "Towneley" Phildraw Road
Ballasalla

WITNESS:
Signature A.Smith

Address JULIAN S.HODGE BANK (ISLE OF MAN) LTD.
57a ATHOL STREET, DOUGLAS, ISLE OF MAN

Description Bank Manager

HIGH COURT OF JUSTICE
COMMON LAW DIVISION
SUMMARY JURISDICTION
Julian S.Hodge Bank
(Isle of Man) Limited &
Effie Ashworth
Exhibited in this Cause
marked with the letter
P2 and so certified

GENERAL REGISTRY
ISLE OF MAN
13 OCT 81
EXAMINED AND CERTIFIED
A TRUE COPY
Sd.
ASSISTANT CHIEF REGISTRAR

EXHIBIT P3
GUARANTEE

A Guarantee by an Individual/Individuals

To JULIAN S. HODGE BANK (ISLE OF MAN) LIMITED (hereinafter referred to as "the Bank") whose Registered office is situate at 57a Athol Street in the Borough of Douglas

IN CONSIDERATION of the Bank giving accommodation to Ashworth International Ltd. of Phildraw Road, Ballasalla, Isle of Man (hereinafter referred to as "the Principal") I Effie Ashworth of Towneley, Phildraw Road, Ballasalla Isle of Man hereby guarantee on demand in writing being made to me or my personal representatives the discharge of all liabilities of the Principal to the Bank Provided that (subject as mentioned in paragraph 2 below) the amount for which I shall be liable to the Bank hereunder shall not exceed TWENTY-FIVE THOUSAND POUNDS (£25,000) and interest on that amount or on such less amount as may be due day by day

I confirm and agree with Bank as follows :-

1. The Bank may without further consent from me and without affecting my liability hereunder renew any accommodation given to the Principal holdover renew or give up in whole or in part and from time to time any security received or to be received from the Principal or from any other person or persons and grant time or indulgence to or compound with the Principal or any other person or persons and this guarantee shall not be discharged nor shall my liability under it be affected by anything which would not have discharged or affected my liability if I had been a principal debtor to the Bank instead of a guarantor

2. I have not taken and will not take without the written consent of the Bank any security from the Principal in connection with this guarantee and in the event of my having taken or of my taking any security in contravention of this provision the maximum amount for which I am to be liable under this guarantee as mentioned above shall be increased by the amount by which any dividend in bankruptcy liquidation or otherwise payable by the Principal to the Bank is hereby lessened

EXHIBITS

P3

Guarantee

14th June 1976

(continued)

3. In respect of my liability hereunder the Bank shall have a lien on all stocks shares securities and property or properties of mine from time to time held by the Bank whether for safe custody or for security to the Bank or otherwise and on all moneys from time to time standing to my credit with the Bank on any account whatever

4. This guarantee is a continuing guarantee

5. This guarantee shall not be affected by my death nor by the death of my personal representative and shall remain in force until determined by me or my personal representative by six months' notice in writing

6. This guarantee shall apply to the ultimate balance owing by the Principal to the Bank and until such balance has been paid in full I shall not be entitled to participate in any security held or money received by the Bank on account of that balance or to stand in the place of the Bank in respect of any such security or money nor until such balance has been paid in full shall I take any step to enforce any right or claim against the Principal in respect of any moneys paid by me to the Bank hereunder or have or exercise any rights as surety in competition with the Bank the statutes of bankruptcy and the rules of law and equity to the contrary notwithstanding

7. In case this guarantee shall be determined or called in by demand made by the Bank the Bank may continue its account with the Principal notwithstanding the determination or calling in and my liability in respect of the amount due from the Principal at the date when the determination or calling in takes effect shall remain regardless of any subsequent dealings in the account

8. This guarantee shall be additional to any other guarantee of the Principal given by me to the Bank at any time

9. In any proceeding or otherwise under this guarantee the amount for the time being due from the Principal to the Bank shall be conclusively proved by a copy signed by an officer of the Bank of the Principal's account contained in the books of the Bank or of such account for the preceding six

months if the account shall have extended beyond that period

10. This guarantee shall not be discharged nor shall my liability under it be affected by the fact that any security given or to be given to the Bank may be void or defective in substance or in form either by mistake or otherwise or that any dealings with or borrowing from the Bank by the Principal may be ultra vires the powers of the Principal

11. A demand hereunder shall be made in writing signed by any Director or other officer of the Bank Such demand may be addressed to me by name at my address last known to the Bank and a demand so addressed and posted by ordinary letter post by recorded delivery or registered post as the Bank may decide shall be effective 24 hours after it is posted notwithstanding that it be returned undelivered and notwithstanding my death Such a demand made on my personal representatives whether immediate or not shall also be effective

12. Herein where the context so admits :-

(a) "The Bank" includes its successors and assigns and any company with which it may merge or amalgamate

(b) "Giving accommodation" to the Principal includes opening or continuing an Account (whether already existing or not) and giving credit or time and in any case to the Principal either alone or jointly with any other person

(c) "Liabilities" of the Principal include indebtedness sole several or joint in respect of advances bills promissory notes guarantees interest commission banking or legal charges and expenses

(d) "Security" includes bill note mortgage charge or lien sole several or joint and whether made incurred or discounted before on or after the date hereof

(e) Where the Principal is or includes more than a single person or body words importing only the singular shall include also the plural and this guarantee shall remain effective regardless of any change by death

EXHIBITS

P.3

Guarantee

14th June 1976

(continued)

retirement appointment addition or otherwise in the personality or identity of the Principal

(f) If this Guarantee is by more than one person the obligations hereunder shall be joint and several and words importing the singular number only shall include the plural and vice versa and

(g) Words importing the masculine gender shall include the feminine gender and a corporation

13. So far as may be necessary to give effect to the provisions of this guarantee I waive absolutely in favour of the Bank all rights which but for this waiver I might exercise or enforce against the Bank or the Principal

Dated 14.6.76

GUARANTOR(S)

Signature E.Ashworth

Address Phildraw Rd
Ballasalla

WITNESS:
Signature A.Smith

Address JULIAN S. HODGE BANK (ISLE OF MAN) LTD
57a ATHOL STREET, DOUGLAS, ISLE OF MAN

Description Bank Manager

HIGH COURT OF JUSTICE
COMMON LAW DIVISION
SUMMARY JURISDICTION
Julian S.Hodge Bank (Isle of Man) Limited & Effie Ashworth
Exhibited in this Cause marked with the letter P3 and so certified

GENERAL REGISTRY
ISLE OF MAN
13 OCT 81
EXAMINED AND CERTIFIED
A TRUE COPY
Sd.
ASSISTANT CHIEF REGISTRAR

Whilst I have not taken legal advice I fully understand the nature of the liability incurred
Sd. E.Ashworth
14.6.76

IN THE PRIVY COUNCIL No.15 of 1981

ON APPEAL

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

BETWEEN:

EFFIE ASHWORTH — Appellant (Defendant)

- and -

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

RECORD OF PROCEEDINGS

PHILIP CONWAY THOMAS & CO.
61 Catherine Place,
London SW1E 6HB

Solicitors for the
Appellant

SLAUGHTER AND MAY,
35 Basinghall Street,
London EC2V 5DB

Solicitors for the
Respondent