25 of 1975

IN THE PRIVY COUNCIL No. 4 of 1974

ON APPEAL

FROM THE COURT OF APPEAL IN SINGAPORE

BETWEEN:

MARIA CHIA SOOK LAN — Appellant

- and -

BANK OF CHINA — Respondents

No. 5 of 1974

BETWEEN:

MARIA CHIA SOOK LAN — Appellant

- and -

BANK OF CHINA — Respondents

CASE FOR THE APPELLANT — RECORD

1. These are consolidated appeals from a judgment, dated 3rd May, 1973, of the Court of Appeal in Singapore (Wee Chong Jin, C.J., Chua and Kulasekaram, JJ.) dismissing appeals of the Appellant from a judgment, dated 6th July 1972, of the High Court in Singapore (Tan Ah Tah, J.) in two actions which, though not consolidated in Singapore, were tried together. — pp.226-254, pp.192-214

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2. In the first action the Respondents were the Plaintiffs, claiming $900,000, with interest, under three guarantees signed by the Appellant.

p.214 l.39 In this action Tan, J. gave judgment for the Respondents for $800,000, with interest, the balance of $100,000 having been paid previously by the Appellant. In the second action the Appellant was the Plaintiff, seeking to set aside an order of the High Court in Singapore declaring the Respondents to be equitable mortgagees of certain property of the Appellant and ordering the sale of the property on certain terms. Tan, J.

p.214 l.44 dismissed this action.

p.42 l.10 3. In 1958 the Appellant and her husband, Yo Kian Tjoan, and their five children, then Indonesian citizens, decided to make their permanent home in Singapore. The Appellant had been born in

p.42 l.13 China but had received her schooling in Indonesia at a Chinese school. Her mother tongue was Hakka, a Chinese language, and she also spoke some Mandarin and Malay, the latter being the national language of Indonesia. Her knowledge of English was very limited, although she had received some tuition in the language in the last year or two before leaving school. Her husband had been born and brought up in Indonesia during the period when it was still a Dutch possession. He was able to understand and speak simple English.

4. Before settling in Singapore the Appellant had received, in advance of his eventual death in 1961, a substantial part of her inheritance from her

p.43 l.4 father, and in 1959 she used part of this money to purchase No.28 Cuscaden Road, Singapore, referred to in the proceedings as "Cuscaden". This became the family residence, but although the purchase took place in 1959 the title deeds were not available until the latter part of 1961 due to the fact that the land in question was subject to re-survey by the Government.

5. The Appellant's experience of business affairs was limited to that gained from the small dressmaking business which she had carried on in Djakarta for some years, and at the time when she

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arrived in Singapore, at the age of approximately 40 years, she had never had a banking account and was unfamiliar with banking practice and procedure. p.43 l.11

6. In 1959, the Appellant opened a banking account with a Singapore bank and began to invest in stocks and shares and in October 1960 she was introduced to two officials of the Respondent bank, namely Loke Chan Hing and Djeng Hsueh Heng. p.43 l.26 Shortly thereafter she transferred her account to the Respondents and it is the relationship which developed between the Appellant and her husband and these two officials over the ensuing six years that resulted in the various transactions which became the subject of these proceedings. The Appellant desired to continue to buy and sell shares and the Respondents agreed to allow her by way of overdraft facilities an amount equivalent to 50% of the value of her shares deposited with them and accompanied by transfers signed by the Appellant. p.44 l.18 The Appellant's evidence was that, wishing to secure her position, should she exceed the limit of her permitted overdraft, she agreed with the Respondents to deposit the title deeds of Cuscaden, then still in the Singapore Land Registry, with them for that purpose. p.44 l.24 The Respondents wrote to the Appellant's solicitors in January 1961, and pursuant to the arrangements made, the latter sent the deeds to the Respondents in August 1961. The Appellant's contention throughout was that the purpose, and only purpose, of the arrangement made with the Respondents, the correspondence with her solicitors and the delivery by them of the deeds to the Respondents was to secure her own personal account beyond the limit governed by the value of her shares. In January 1961 the only account subsisting between the Yo family and the Respondents was her account, but in the following month her husband, who traded as Dwidaya Trading Company (hereinafter called "the Company"), opened an account in the Company's name with the Respondents. This account was in credit until October 1961, when Yo arranged for overdraft facilities. There was never any suggestion that the Appellant or her husband during this period up to October 1961 had mentioned Cuscaden in connection with the overdraft facilities which were later given

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to the Company, still less that the Respondents had broached the subject with the Appellant. During 1961 the Appellant's account was very active: she was trading in stocks and shares almost daily and was a frequent visitor to the bank. She dealt almost exclusively with Djeng since he spoke Mandarin, whereas Loke was unable to converse with her except in Malay, in which language he dealt w ith Yo regarding the affairs of the Company. The situation grew up, therefore, whereby Djeng was conversant with the Appellant's business with the Respondents while Loke was responsible for the affairs of the Company.

7. The Respondents' internal records show that on 1st October 1961 the Company applied for an overdraft of $200,000 (then approximately £25,000). The Appellant, upon her husband's request to do so and his assurance that funds shortly expected from Indonesia would soon discharge any obligation on h er part, agreed to guarantee the Company's account

pp.417-420 in the sum of $100,000. This document, exhibited at the trial as P1, was dated 2nd October 1961. The Appellant's case was that apart from P1 she at no time agreed to enter or did in fact knowingly enter into any other obligation towards the Respondents respecting the liability of the Company. The Respondents, however, relied upon another document, also dated 2nd October 1961, which it was contended was knowingly and intentionally entered into by the

pp.421-423 Appellant on that day. The document, exhibited at the trial as P4, purports to be a written confirmation of an equitable mortgage of Cuscaden previously created by the Appellant in favour of the Respondents for the benefit of the Company. On the Respondents' evidence the Appellant arrived at the bank on that day, P4 having been prepared in anticipation; it was explained to her by Djeng, whereupon she willingly executed it at the same time as she signed P1. The Appellant, while agreeing that she consented to enter into P1, contended that a

p.54 l.23 document purporting to be a guarantee for the $100,000 was signed in her own home in the presence of her husband whose signature appears thereon as the witness. She confirmed that both P1 and P4 contained her signature, but she could not identify

either document as having been signed by her at any particular time or place.

8. From 2nd October 1961 onwards, no reference was made by the Respondents to the existence of the mortgage of Cuscaden to secure the Company's account, until the middle of 1966, by which time the overdraft had grown to $1.2 million; throughout the intervening five years the Appellant had no knowledge whatever of, or concern with, the Company's affairs, nor did she receive bank statements or records from the Respondents indicating the very considerable increases in the Company's overdraft over and above the limit of $100,000 which she had agreed to guarantee in October 1961.

9. Concurrently with the mounting overdraft of the Company, the Appellant's own overdraft was increasing progressively during a period of economic and political optimism surrounding the future of Malaya and Singapore. The political concept of a unified territory in the area directly influenced the stock markets of the two countries, and the period 1960-1963 was one of buoyancy and confidence. Large as the Appellant's overdraft was, and continually increasing, it was, while share prices continued to rise, fully secured by the shares alone, and it was only with the advent of 'Confrontation', a state of passive belligerence between the newly-formed Malaysia and Indonesia which began in November 1963, that the tide of optimism gradually turned so that eventually, by the middle or end of 1964, the trend in the stock markets of Malaysia, i.e. Malaya and Singapore, gradually reversed itself. With those events, the Respondents became concerned about their oustanding positions, particularly having regard to the fact that in December 1964 the Malaysian Government had issued a decree terminating the Respondents' right to carry on business in Malaysia after August 1965.

10. In the intervening years, however, between October 1961, when P1 and P4 were signed, and November 1963, when Confrontation began, there were two other transactions with the Respondents which became the subject of these proceedings.

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11. According to the Respondents, a further guarantee was executed by the Appellant as security for the Company's overdraft on 12th January 1962. The version of the events given by Loke and Djeng was that the document, exhibited as P2 at the trial, having been prepared in advance, the Appellant, as in the case of P4, was summoned to the bank premises where the nature and contents of P2 were explained to her by Djeng, whereupon she signed the document without demur. The explanation given to her by Djeng was, on his own evidence, that P2 was a guarantee by the Appellant in the sum of $200,000 in favour of the Respondents in regard to moneys to become due by the Company in respect of trust receipts accepted by the Respondents. The Appellant denied that she at any time agreed to enter into P2; while admitting that the signature on P2 was undoubtedly hers, she recalled that she was requested by her husband to go to his office in order to re-execute the original guarantee for $100,000, P1, the original of which, she was given to understand, was not in proper form so that the Respondents required its re-execution. On her arrival at her husband's office, Loke had been there and a document had been produced which she had signed upon being given the explanation referred to. The Appellant had implicit trust in Loke and Djeng until the events of 27th January 1965 and did not ask for copies of the documents she was asked to sign, nor did it occur to her to seek independent advice before signing documents, the contents of which she could not read and the nature of which she could not necessarily understand.

p.107 l.24
pp.424-427
p.114 l.1
p.59 l.34

12. Having signed P2 in January 1962, it is not suggested that the Appellant was involved with the affairs of the Company, as far as the Respondents were concerned or at all, for the rest of 1962, 1963 and 1964. The Appellant had no knowledge of, or interest in, her husband's business affairs, although she knew him to be a person of adventurous disposition. By the middle of 1963, immediately before the establishment of Malaysia in August, the Appellant was a person of some substance. With the money inherited from her father, some $500,000, she had had the good fortune to carry on her operations

on the stock market for a period (1960-3) when it was continually rising. In May 1963 she purchased an area of land in Singapore, intended for development in the future. This land, referred to at the trial as "Thomson", having been conveyed to her, she deposited the deeds thereof with the Respondents as security for further advances on her own account. This document (Exhibited as P5 at the trial) a confirmation of deposit of title deeds by way of equitable mortgage, similar in form to P4, was in no way related to the affairs of the Company and only became relevant to the issues in the case in August 1966 after the disputes had arisen between the parties.

pp.438-440

13. After Confrontation in November 1963, and the gradually deteriorating situation during 1964, the next, and last, transaction occurred in January 1965. By then the Respondents had changed their attitude to the Company. The existence of Confrontation meant the cessation of any trade between Singapore and Indonesia, and it was with that trade that the business of the Company was mainly concerned. Moreover, the Company had no assets of its own, since its profits arose out of differences in the sales and purchases of commodities and commissions. At the beginning of 1965 its overdraft stood at over $1,000,000, at a time when, pursuant to the Malaysian Government's decree, the Respondents had approximately 7 months to get in all their outstanding accounts.

14. On 27th January 1965, according to the evidence of both Loke and Djeng who were positive on the matter, the Appellant's husband accompanied her to the bank where for the first time the extent of the Company's indebtedness was revealed to her. The Appellant was astonished and repudiated the suggestion that she should execute a guarantee for $600,000 in favour of the Respondents. Loke and Djeng informed the Appellant that in default of her executing such a guarantee they would take steps to sell her own shares and make her husband a bankrupt, and in the face of these threats, but with great reluctance, the Appellant executed the guarantee, exhibited at the trial as P3. At the trial it was

pp.441-444

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proved by the production of Yo's passport that he was not in Singapore on 27th January 1965 and that he could not therefore have accompanied the Appellant to the bank. One of the grounds of the Appellant's reluctance to sign P3 was the fact that she was alone and desired to discuss the matter with her husband. Nothing was said on that occasion during her meeting with Loke and Djeng regarding Cuscaden.

15. Between the 27th January and March, 1965 approximately $2,000 was drawn from the Company's account, but in March 1965 the Respondents stopped further withdrawals both from that account and from the Appellant's personal account and for the remainder of that year there was intermittent correspondence between them and Yo and the Appellant. The letters of Yo and the Appellant, in English, were entirely drafted and written by Yo's clerk in the offices of the Company, since Yo's and the Appellant's command of the language was insufficient for correspondence purposes. The Appellant, when necessary, appended her signature to such letters as required them, and she left all the negotiations with the Respondents arising out of the state of the overdrafts in the more experienced hands of her husband. Things went on in an uncertain fashion into 1966, the general hope being that Confrontation would end so that business confidence would return. However, in the middle of 1966, the Respondents began to take the first steps against the Appellant and her husband, later to lead tothe present litigation. The Respondents having demanded payment, the Appellant and Yo sought legal advice from a Mr Tan Wee Tiong, a Singapore advocate and solicitor. It was at this time that the Respondents wrote to the Appellant and Yo alleging that Cuscaden was mortgaged to them to secure the Company's overdraft. According to the Appellant's evidence, this was the first intimation that she had of the Respondents' claim to her property as security for that account. When litigation became imminent Mr Tan Wee Tiong recommended Yo and the Appellant to consult another firm of Singapore lawyers, Messrs. Lee & Lee, and they went to see Mr Selvadurai of that firm.

16. Both the Appellant's legal advisers apparently took the view that she was bound by the documents which she had signed, and that being so negotiations proceeded between them and the Respondents' solicitors on that assumption. The uppermost thought in the Appellant's mind was to save her home, Cuscaden, and the suggestion put forward was that Thomson, comprising 27 acres, would be sufficient to cover both overdrafts. In the period from June to August 1966 the Respondents had sold all the Appellant's shares, thereby reducing her overdraft to approximately $450,000. The crucial period of the correspondence between Messrs Lee & Lee and Messrs Donaldson & Burkinshaw, acting for the Respondents, was August and September 1966. The correspondence culminated in the parties arriving at an understanding that Cuscaden would not be sold until Thomson had first been sold in an endeavour to discharge the balance owing on both overdrafts, and that after the sale of Thomson, the sale of Cuscaden would be further postponed pending the payment of monthly instalments by the Appellant or her husband, or both, to the Respondents. The amount of the instalments was "to be agreed" between the parties.

17. It was on the basis of the arrangement referred to in the preceding paragraph that Mr Selvadurai consented on behalf of the Appellant to Orders being made by the High Court in Singapore on two applications by the Respondents as follows :-

(1) In Originating Summons No. 185 of 1966 an Order dated 12th September 1966 declaring that the Respondents were entitled to be considered as mortgagees of Cuscaden to secure the sum of $1,218,009.49 (the amount of the Company's overdraft as at 30th June 1966) with interest thereon from 30th June 1966 to date of payment at the rate of 8% per annum, giving the Respondents liberty to sell Cuscaden out of Court, and consequential directions.

(2) In Originating Summons No. 269 of 1966 an Order dated 10th November 1966 declaring that the Respondents were entitled to be considered as mortgagees of Thomson to secure the sum of

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$1,936,084.71 (being the aggregate of the sums of $458,501.51, due from the Appellant on current account, $1,246,154.20, the amount of the Company's overdraft, and $231,429, due under trust receipts by the Company, all as at 30th September 1966) with interest thereon from 1st October 1966 to date of payment at 8½% per annum, giving the Respondents liberty to sell Thomson out of Court, and consequential directions.

18. In the correspondence, virtually all the instructions to Mr Selvadurai were given by the Appellant's husband to him. According to the Appellant she saw Mr Selvadurai on only one occasion; according to him, two.

19. The steps taken to protect Cuscaden failed to achieve their object. During 1967, in the aftermath of Confrontation which had come to an end in September 1966, it was found impossible to sell Thomson at a realistic figure which would have sufficed to discharge both overdrafts. In effect, the Appellant's interests were injuriously affected by the Consent Orders of September and November 1966, for while prior to those Orders being made the Respondents had no recourse to Thomson in respect of the Company's overdraft, since it had never been suggested that that property was mortgaged to the Respondents for the Company's benefit, after 10th November 1966 the Respondents were entitled to look towards Thomson for that purpose.

20. In late 1967 the Respondents instituted Suit No.1809 of 1967 being a claim based on the 3 guarantees, P1, P2 and P3. By this time the Appellant had consulted another solicitor, Mr Redrup, who took a different view from that of his predecessors on the enforceability against his client of the documents, and thereupon the Appellant instituted Suit No. 1909 of 1967 to set aside the Order of 12th September 1966.

pp. 1-5

21. By their specially endorsed Writ of Summons in Suit No. 1809 of 1967 the Respondents claimed the sum of $900,000 being the aggregate amount claimed to be due to them on P1, P2 and P3. By her

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Amended Defence the Appellant admitted liability for the sum of $100,000 under P1, but denied liability for the amounts claimed under P2 and P3. As to P2, she pleaded that she was unaware of the nature and import of the document when she executed it, that she had no independent advice in respect thereof and that she received no consideration thereunder. As to P3, she admitted signing that document but pleaded that she did so under pressure exercised by the Respondents and pursuant to threats made against her, and that she had no independent advice in respect thereof and received no consideration thereunder. By her Amended Counterclaim the Appellant claimed that she was entitled to be discharged from liability under P2 upon the ground that the Respondents had falsely represented to her that the execution of the same was required in substitution for P1 which was defective. In regard to P3, she made a similar claim upon the ground that her execution of the same had been procured by undue influence. By their Amended Reply and Defence to Counterclaim the Respondents pleaded that in regard to P2, the Appellant fully realised and understood the contents and significance thereof and that she signed the same voluntarily. They further denied that it had been represented to the Appellant that the document was required in substitution for P1. As to P3, the Respondents pleaded that the Appellant fully understood the document and signed the same voluntarily. They denied that their representative Loke threatened or intimidated the Appellant or used pressure upon her and pleaded that the consideration for the document was as stated therein. In the premises the Respondents denied that the Appellant was entitled to any of the reliefs claimed.

pp.6-8

pp.8-10

pp.10-13

22. Suit No. 1909 of 1967 was instituted by the Appellant against the Respondents two weeks after Suit No. 1809 of 1967, by a generally endorsed Writ of Summons. By her Amended Statement of Claim, the Appellant asked for a declaration that P4 was not the Appellant's document (non est factum); alternatively, that the same was voidable against her on the ground of fraud, or, alternatively, that the same was invalid and unenforceable against her on the ground that it was not admissible in evidence

pp.13-16
pp.16-22

RECORD

in the proceedings or in the proceedings in Originating Summons No. 185 of 1966 by virtue of Section 5 of the Registration of Deeds Ordinance, or, alternatively, that the same was only enforceable against her for a sum of $100,000, and the Appellant prayed that P4 and the Order of Court obtained in Originating Summons No. 185 of 1966 be set aside and for an injunction restraining the Respondents from selling Cuscaden pursuant to the said Order of

pp.25-29 Court. By their Amended Defence the Respondents denied that the Appellant was entitled to any of the relief claimed, and further that if she was entitled to the same, then she was nevertheless estopped or in equity precluded from relying on the allegations made by her.

23. The trial took place before Tan J. over 19 days commencing 27th March 1971 during which 8 witnesses gave evidence for the Appellant and 5 for the Respondents.

pp.192-214 24. In his reserved judgment delivered on 6th July 1972, the learned Judge :

(i) after reciting the issues between the

p.196 l.38 parties concluded that the Appellant was a shrewd woman with considerable business ability. He found that apart from Hakka, her mother tongue,

p.196 l.42 she was fluent in Mandarin and had some knowledge

p.197 l.31 of English and Malay. He accepted the evidence of Tann Wee Tiong, Selvadurai and Redrup that they were able to converse with the Appellant in a mixture of English and Malay without an interpreter.

p.198 l.28 (ii) found that early in October 1961 Yo had applied to the Respondents for overdraft facilities for the Company and that he had arranged to deposit the title deeds of Cuscaden with the Respondents to

p.198 l.40 secure the account; that on 2nd October 1961 the Appellant and Yo came to Loke's room where Djeng explained in Mandarin the contents of P1 and P4 to

p.199 l.25 her, the relevant details having already been typed in the printed forms: that the Appellant fully

p.199 l.7 understood the contents of both documents which she signed, Yo adding his signature as a witness to both P1 and P4.

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(iii) having recited the events leading up to the execution of P2, found that it was arranged between Yo and the Respondents that the Appellant should execute a guarantee in favour of the Respondents for $200,000, that P2 was accordingly prepared, and that the Appellant, having had the contents explained to her by Djeng in Mandarin, signed P2 in the Respondents' premises and that she knew and understood its contents. p.199 l.37 p.199 l.42 p.200 l.30 p.200 l.38

(iv) As to the circumstances surrounding the execution by the Appellant of P3 on 27th February 1965, rejected the evidence of the Respondents' witnesses that Yo accompanied his wife to the Respondents' premises on that day and was present when Djeng explained the contents to the Appellant. He found, however, that Loke and Djeng had had lapses of memory in giving evidence to this effect. He found that the Appellant signed P3 with reluctance and after being informed by Loke that in default of her signing P3 Yo would be made bankrupt and her shares would be sold. In the learned Judge's opinion, neither Loke nor Djeng exercised undue influence over the Appellant nor did they use pressure, threats or intimidation to make her sign P3. Further, he held that there was consideration for P3 in that the Respondents permitted the Company to continue to operate its account and in the Respondents' forbearing to sell the Appellant's shares or to take bankruptcy proceedings against Yo. p.201 l.38 p.202 l.2 p.202 l.21 p.202 l.30

(v) found as a fact that neither Yo nor Loke nor Djeng exercised undue influence over the Appellant in respect of P2, P3 or P4. On the question of independent advice, he took the view that the Appellant did not need it, and that there was no evidence that she wished to obtain the same. p.203 l.25 p.203 l.32 p.203 l.39

(vi) expressed the opinion that none of the documents signed by the Appellant were affected by fraud; the transactions and the documents were explained to her, and she fully understood what she was doing. Similarly, he thought there was no misunderstanding, least of all a fundamental misunderstanding, regarding either the character or the contents of the documents signed by the Appellant. p.203 l.45 p.204 l.6 p.204 l.10

RECORD

p.204 l.15 The case of Saunders v. Anglia Building Society [1971] A.C. 1004, relied upon by her, did not assist her case.

(vii) recited the facts relating to the deposit of the title deeds of Cuscaden with the Respondents.

p.205 l.2 He accepted the evidence of Djeng that Loke had informed him in December 1960 that the title deeds of Cuscaden were required for the Company's contemplated overdraft sometime in the future. He

p.205 l.4 found as a fact that on or before 1st October 1961 Yo and Loke had discussed the question of an overdraft for the Company. It was arranted between them

p.205 l.7 that the title deeds of Cuscaden, already in the hands of the Respondents, should be treated as having been deposited as security for the overdraft;

p.205 l.11 it was also arranged between them that the Appellant should sign a letter of guarantee. During such

p.205 l.13 discussion Yo was acting as the Appellant's agent in so far as the deposit of the title deeds and guarantee were concerned.

p.205 l.46 (viii) dealing with the Appellant's contention that P4 was void and unenforceable against her having regard to the Registration of Deeds Ordinance,

p.206 l.33 referred to the case of The Ho Hong Bank v. Too Chin Chay (1929) S.S.L.R. 195, and stated that in his

p.207 l.33 opinion P4 was not rendered inadmissible in evidence.

p.208 l.17 (ix) dealt with the Appellant's contention that even if P4 was in all other respects valid it was nevertheless only security for $100,000, the

p.208 l.23 Respondents' records showing that this sum was the amount of the security contemplated. The learned

p.208 l.26 Judge referred to the verbal agreement recited in P4 whereby the title deeds were to be held for the payment of all moneys then or at any time becoming owing to the Respondents. He held the terms of P4

p.208 l.40 binding upon the Appellant and her liability therefore unlimited.

pp.208-210 (x) dealt with the events leading up to the Order made on 12th September 1966 in Originating

p.211 l.12 Summons No. 185 of 1966. He found as a fact that the Appellant had instructed Selvadurai to consent to orders for the sale of Cuscaden and Thomson. On

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the question whether there was a concluded contract between the parties, although the amount of the monthly instalments tobe paid by the Appellant to the Respondents had not been determined, he held that an agreement which left one or more matters to be dealt with at a later date could nevertheless be a concluded contract. He held that the said correspondence amounted to a concluded contract. Accordingly he held that there was no basis as far as the Appellant was concerned for setting aside the Order of 12th September 1966.

p.211 l.32
p.211 l.35
p.212 l.27

(xi) assuming that the facts as found by him could not be supported by the evidence, nevertheless held that the Appellant was estopped or in equity precluded from relying on her allegations, that P4 was not her document, or was void or unenforceable, or was security only for $100,000, or that Selvadurai was not instructed to consent to the ORDER OF L"TH September 1966.

p.212 l.30
p.212 l.41

(xii) of the witnesses in the case, found Tan Wee Tiong, Selvadurai, Loke, Djeng, Low Sim Chan and Ng Ling Cheow to be honest in all that they said. There had been lapses of memory about certain events on the part of Loke and Djeng. As to the Appellant and Yo, he held that they were prepared to, and did, tell a number of lies.

p.214 l.10
p.214 l.24

25. In the result, Tan J. gave judgment for the Respondents in Suit No. 1809 of 1967 for $800,000 together with interest and costs and dismissed the Appellant's claim in Suit No. 1909 of 1967.

p.214 l.39
p.214 l.44

26. The Appellant having appealed against the whole of the judgment of Tan, J., her appeal came on before the Court of Appeal (Wee Chong Jin, C.J. Chua and Kulasekaram, JJ) in February 1973. The hearing occupied four days and the reserved judgment of the Court was delivered on 3rd May 1973.

p.226-254

27. In their judgment their Lordships, after setting out an outline of the circumstances leading to the proceedings, and a statement of the issues between the parties as appeared from the pleadings:

p.226-244

(i) found that the issues were issues of fact

p.244 l.40

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mostly, the determination of which depended almost entirely on the credibility of the Appellant, of the officers of the Respondents and of the solicitors who had acted from time to time for the Appellant.

p.245 l.9 (ii) set out in formal manner the submissions of the Appellant's Counsel on the issues of undue influence and the doctrine of non est factum, but came to no conclusion on the submissions of law on
p.247 l.23 undue influence, holding that the establishment of undue influence depended upon the facts and
p.247 l.28 circumstances of the particular transaction. They held that those facts and circumstances in relation to P3 entitled the Judge to conclude that the Appellant had failed to establish undue influence, and that the Court ought not to interfere with his finding.

p.247 l.40 (iii) set out the submissions of the Counsel for the Appellant with regard to P4 and P2 in relation to undue influence and rejected them upon the ground
p.248 l.33 that the Respondents were entitled to require security for moneys intended to be lent by them on
p.248 l.36 overdrafts; that the Respondents and the Appellant were in an equal position in that the Appellant was not obliged to enter into P4 or P2, and that the
p.248 l.40 fact that the Appellant was herself a debtor to the Respondents on her own personal account and that she eventually became liable for a sum of $1½ million
p.248 l.48 to the Respondents on the Company's account were irrelevant circumstances. They held that the
p.249 l.3 burden was on the Appellant to establish undue influence and that the Judge was entitled to conclude that she had failed to establish the same.

p.249 l.9 (iv) dealt with Counsel's submissions on the doctrine of non est factum in regard to P4 and P2. After referring to the case of Saunders v. Anglia Building Society and to the evidence of the
p.249 l.33 Respondents' witness, Djeng, which the Appellant's Counsel relied upon to establish that the Appellant had been misled as to the nature and contents of P2,
p.250 l.41 they held that, assuming Tan, J. had failed to apply the principles established by Saunders' Case, they were nevertheless unable to accept that P2 was "fundamentally" or "radically" or "entirely"

different from the document which the Appellant believed it to be, having regard to the Appellant's business acumen and to the fact that three months earlier she had signed P1. As to P4 and the Respondents' evidence which established that the Appellant was told that her liability was limited to $100,000, relied upon by Appellant's Counsel to bring P4 within the principles of Saunders' Case, they rejected this argument on the ground that there was no suggestion or evidence that the price of $70,000 paid for Cuscaden in 1959 was below the market value or that the value of Cuscaden on 2nd October 1961 was much in excess of that figure. In those circumstances it was impossible to find that P4 was "fundamentally" or "essentially" or "radically" or "entirely" different from what she believed it to be. They held that the question of the requirement of the exercise of such care as was to be expected of a normal person did not arise but that if it had arisen they would have found the Appellant careless in that sense. They found that although the Appellant's evidence established that at the material time her English was poor and that she could not communicate properly in English or understand properly when spoken to in English, that did not establish that she could not read simple English or, in particular, that she could not read P4 with understanding so that she would realize that her liability thereunder was not $100,000 but was unlimited. The burden was on the Appellant, and on her own evidence she started to learn English at the age of 14 or 15 and after leaving school at 16 had further tuition for one or two years. These facts, coupled with her business experience, did not point to a person who could not read English with a sufficient degree of proficiency to understand the difference between a document providing security up to a limit of $100,000 and one providing unlimited security.

RECORD

p.251 l.23

p.251 l.31

p.251 l.37

p.251 l.41

p.251 l.46

p.251 l.49

p.251 l.51

p.252 l.5

(v) considered the submissions of the Appellant's Counsel on the Consent Order of 12th September 1966, namely that the same ought to be set aside upon the ground that the agreement between the parties leading thereto was not a concluded agreement.

p.252 l.15

RECORD

p.252 l.38 They rejected these submissions upon the ground that it was clear from a consideration of the correspondence passing between the solicitors for the parties that there was a concluded contract between them prior to the making of the ORDER OF 12th September.

p.253 l.31 (vi) referred to the ground of appeal depending upon the true construction of Section 4 of the Registration of Deeds Ordinance, but did not deal with this ground of appeal in view of their decision that the Consent Order was valid and binding upon the Appellant. Similarly, the p.253 l.40 Respondents plea of estoppel was not considered.

p.253 l.42 (vii) referred to Counsel's criticisms regarding Tan, J's acceptance of the evidence of Loke and Djeng and his submissions that he gave inadequate consideration to or overlooked matters of vital importance when weighing the evidence. They did not deal with these matters in detail but accepted the findings of the learned Judge.

p.254 l.12 28. In the event the Court of Appeal dismissed both appeals with costs.

29. The first transaction to be considered is the deposit of the title deeds of Cuscaden with the Respondents in August 1961. They were deposited in accordance with an agreement made between the Respondents and solicitors acting for the Appellant in January 1961. Neither Court below found for p.205 ll.4-15 what purpose the deeds were deposited. Tan, J. held that Yo, acting on behalf of the Appellant, arranged on or before 1st October 1961 for the Respondents to hold the deeds as security for the Company's overdraft. The Appellant respectfully submits that the suggestion (first made by the learned Judge on the last day of the trial) that Yo acted on behalf of the Appellant in this way was quite unjustified, because it was not supported by any evidence at all.

pp.46-47 30. The Appellant's evidence, unchallenged in cross-examination, was that her Cuscaden deeds were deposited with the Respondents as further security for her own overdraft, and she never agreed with Yo,

Loke or Djeng that Cuscaden was to be security for the Company's overdraft. Djeng, it is true, said that he knew in January 1961 that these deeds were to be sent to the Respondents 'to cover Yo's future overdraft', because Loke had told him in December 1960 that Yo had told him (Loke) that he (Yo) was going to need an overdraft; but this was inconsistent with the evidence of Loke, who said he thought, when he saw the correspondence in January 1961, that the deeds were being deposited because the Appellant might herself want a further overdraft in the future, and it was in October 1961, after the deeds had reached the Respondents, that Yo spoke to him about an overdraft. There is no doubt that the Respondents agreed to accept the deposit of the Cuscaden deeds in January 1961. At that time the Appellant had an account with the Respondents, and that account was overdrawn. Yo did not open the Company's account until 2nd February 1961, and it then remained in credit until the following October. The strong probability, therefore, in the Appellant's submission, is that the deeds were deposited as security for the Appellant's overdraft, not as future security for a possible overdraft on another account which at the time of the agreement Yo had not even opened; and this strong probability accords with the evidence of the Appellant herself and of Loke.

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p.46 l.34
p.112 l.41
p.113 l.1
p.102 l.22
p.102 l.31
p.98 l.9

31. The Appellant therefore respectfully submits that the courts below ought to have held that the Cuscaden deeds were deposited in 1961 as security for the Appellant's overdraft, and there was no evidence that the Respondents ever held them on any other terms, except P4. P4, in the Appellant's submission, was not admissible in evidence, for reasons given in paragraph 34 below, but in any event P4 was not binding upon the Appellant because of (i) undue influence exercised by the Respondents, and (ii) *non est factum*.

32. As to undue influence, the Appellant respectfully submits that the circumstances of the transaction were such that P4 ought to be set aside. The document was in the Respondents' printed form, in the English language, and the evidence showed clearly (in the Appellant's submission) that in 1961 she could not understand a legal document in English, and

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had no experience of banking documents; the Appellant signed it without any independent advice; she was naturally anxious to help her husband; she herself had an account with the Respondents which was overdrawn; the document was very beneficial to the Respondents, but only of limited benefit to Yo, because the Respondents did not undertake to allow him an overdraft up to any particular sum or for any particular time; and the Respondents produced no satisfactory evidence that the Appellant executed the document as a result of the exercise of her own full, free and informed judgment.

33. As to non est factum, the Appellant respectfully submits that she executed P4 under the belief that the liability which it created was radically different from what in fact it was. P4 in fact made Cuscaden security for the Company's overdraft without limit; but Djeng told the Appellant before she executed it that it created a security only up to a limit of $100,000. This, in the Appellant's submission, is the effect of the evidence of Loke, who was present. Tan, J. found that Djeng explained 'the contents' of P4 to the Appellant before she signed it. Djeng did not say what explanation he gave, and his memory of the occasion was not very clear; and the learned Judge (and the Court of Appeal) ignored on this point the evidence of Loke.

pp.104-105

pp.199 l.25

34. Further, the Appellant respectfully submits that P4 was not registered under section 4 of the Registration of Deeds Ordinance (Cap.255) (wrongly identified in the pleadings as section 5) which (so far as material) was in the following terms :

> "From and after the commencement of this Ordinance ..... and subject to this Ordinance and any rules made thereunder, all assurances thereafter or theretofore executed or made...., by which any land.....is affected and which have not been registered under... the Registration of Deeds Ordinance, 1886, may be registered in such manner as is hereinafter directed, and unless and until so registered shall not be admissible in any Court as evidence of title to such land."

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Section 4 of the Registration of Deeds Ordinance has since the commencement of these actions become section 4 of the Registration of Deeds Act, which is to the like effect, and P4 has not been registered under that section either. Accordingly the Appellant submits that P4 was not admissible in the proceedings in Originating Summons No. 185 of 1966 (and is not now admissible in the present or any other proceedings) as evidence of the Respondents' title to their alleged mortgage of Cuscaden. Oral evidence of any alleged arrangements pursuant to which the title deeds of Cuscaden were deposited with the Respondents by way of security was (and is) in the Appellant's submission inadmissible under section 91 of the Evidence Ordinance (now section 91 of the Evidence Act), which provides that when the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself (or secondary evidence of its contents in cases where the same is admissible). The Appellant submits that there is therefore no evidence that the Cuscaden deeds were ever held as security for the Company's overdraft.

35. The Appellant respectfully submits that P2 was not binding upon her, because of undue influence and non est factum. As to undue influence, the Appellant relies upon the circumstances and the relationship between her and the Respondents set out in paragraph 32 of this Case. As to non est factum, Djeng admittedly told the Appellant before she signed P2 that it was a guarantee of sums due upon trust receipts; in fact it was a general guarantee, limited to $200,000, of the Company's indebtedness to the Respondents, given in consideration of the Respondents' acceptance from the Company of trust receipts. p.114 l.1

36. The Appellant respectfully submits that P3 was not binding upon her because of the undue influence and coercion of the Respondents. Loke and Djeng got her to sign it in the absence of Yo (though they both swore that Yo was present, until his passport was produced showing that in fact he had been abroad at the time). In order to induce her to sign, Loke and Djeng admittedly told the p.100 l.30

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p.112 l.20 Appellant that if she did not sign the Respondents would make Yo bankrupt and, furthermore, would sell the Appellant's own shares, which had no connection at all with the Company's account but were held by the Respondents as security for the Appellant's overdraft. In the Appellant's respectful submission, a guarantee obtained by a bank by the exertion of such pressure cannot be allowed to stand.

p.203 l.25 37. Tan, J. purported to 'find as a fact' that neither Loke nor Djeng nor any other official of the Respondents exercised undue influence over the Appellant in respect of P4, P2 or P3. The Court of p.247 l.23 Appeal held that whether undue influence had been established depended upon 'the facts and circumstances', p.247 l.32 and considered that, upon well known authorities dealing with findings offact, they ought not to interfere with Tan, J.'s finding. The circumstances relevant to undue influence were not seriously disputed, and the pressure exerted by Loke and Djeng in relation to P3 was established by Loke's and Djeng's own evidence. The real question is not of fact, but of law; do the facts of the case amount in law to undue influence? The Appellant respectfully submits that Tan, J. omitted to consider this question at all, and the Court of Appeal considered it only in an inadequate way.

38. The Appellant respectfully submits that the Consent Order of 12th September 1966 is not binding on the Appellant and ought to be set aside on one or more of the following grounds, namely :

(1) The said Order was to be one term only of a contemplated agreement between the Appellant and the Respondents, the terms of such contemplated agreement being contained in correspondence passing between the solicitors for the Appellant and the Respondents. An essential term of such contemplated agreement was the payment by the Appellant to the Respondents of certain moneys alleged to be due from the Appellant to the Respondents by monthly instalments. The amount of the said monthly instalments was never agreed between the Appellant and the Respondents, so that no concluded agreement was ever reached.

(2) The Appellant and the Respondents, or alternatively the Appellant, were under a mistake as to their rights, in that at the time of the Consent Order they did not realise that P4 was void or voidable or unenforceable on one or more of the grounds hereinbefore mentioned.

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39. The Appellant respectfully submits that there was no, or no sufficient, evidence that the Respondents had in any way acted to their detriment in reliance upon the validity of the Consent Order. In the premises the finding of the trial judge that the Appellant was estopped or in equity precluded from claiming to have the Consent Order set aside (which finding was not considered by the Court of Appeal) was unsupported by the evidence.

p.212 l.41

40. The Appellant respectfully submits that importance 'facts' found by Tan, J. were not supported by any evidence; the learned Judge failed to appreciate critical features of the evidence; and the Court of Appeal made no serious re-examination of the evidence, in spite of the submissions made to them on the Appellant's behalf. In these circumstances, the rule of practice relating to concurrent findings of fact is not applicable to the present appeals.

41. The Appellant respectfully submits that the judgment of the Court of Appeal in Singapore was wrong and ought to be reversed, and these appeals ought to be allowed with costs, and the Respondents' action ought to be dismissed (save as to the sum of $100,000 for which the Appellant admitted liability), and in the Appellant's action the order of the High Court made on 12th September 1966 ought to be set aside, for the following (among other)

R E A S O N S

1. BECAUSE the title deeds of Cuscaden were never held by the Respondents as security for the Company's overdraft;

2. BECAUSE P4 was inadmissible in evidence by virtue of the Registration of Deeds Ordinance, section 4;

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3. BECAUSE P4 was executed by the Appellant as a result of undue influence exercised by the Respondents;

4. BECAUSE P4 was fundamentally different in substance from what the Appellant believed it to be when she executed it;

5. BECAUSE P2 was executed by the Appellant as a result of undue influence exercised by the Respondents;

6. BECAUSE P2 was fundamentally different in substance from what the Appellant believed it to be when she executed it;

7. BECAUSE P3 was executed by the Appellant as a result of undue influence exercised by the Respondents;

8. BECAUSE the order made by the High Court on 12th September 1966 by consent of the parties was not based on a concluded agreement of the parties;

9. BECAUSE the parties, or alternatively the Appellant, consented to the said order under a mistake as to their, or her, rights;

10. BECAUSE the Appellant was not estopped or precluded from claiming to have the said order set aside;

11. BECAUSE there was no evidence to support findings of fact made by Tan Ah Tah, J. and followed by the Court of Appeal;

12. BECAUSE neither Tan Ah Tah, J. nor the Court of Appeal considered the evidence properly.

J.G. Le QUESNE

A.J. BALCOMBE

K.E. HILBORNE

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL IN SINGAPORE

No. 4 of 1974

MARIA CHIA SOOK LAN

- v -

BANK OF CHINA

No. 5 of 1974

MARIA CHIA SOOK LAN

- v -

BANK OF CHINA

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