Datin Hjh Edah Bte Hj Mohamed Noor … Appellant

AND

Baiduri Bank Berhad … Respondent

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 5 of 2009)

Before: Power, P; Mortimer and Davies, JJ.A.
12th November, 2009.

Allegation of guarantee executed in consequence of undue influence. Consideration of the application of Section 16(2) and (3) of the *Contracts Act*. Consideration of the application of general equitable principles.

Mr. Rudi Lee Kim Boon of Messrs. Fathan Rudi Lee & Associates for the Appellant.
Mr. Navasiwayam Palaniandy of Messrs. Ahmad Isa & Partners for the Respondent.

Cases cited in the Judgment:

Barclays Bank PLC v O'Brien and Another [1993] UKHL 6
Lloyds Bank Limited v Bundy [1974] EWCA Civ 8.
Royal Bank of Scotland v Etridge (AP) [2001] UKHL 44.

Davies, J.A.:

The appellant was the third defendant in an action by the respondent plaintiff bank against her for moneys due under a guarantee executed on 12 July 2001. The respondent also sued the first defendant, which was the principal debtor, and the second defendant, another guarantor.

On 27 July 2009 the Senior Registrar gave summary judgment against the second and third defendants each for the sum of $2,530,000 together with interest and legal fees. The appellant appealed against that judgment to a Judge in Chambers who dismissed the appeal on 8 August 2009. It is from that judgment that this appeal lies.

The respondent's case was straightforward. It advanced moneys to the first defendant pursuant to certain facilities. The second and third defendants each guaranteed repayment by the first defendant of the amount advanced up to $2,530,000. The first defendant failed to repay the amount advanced. The respondent called on each of the guarantors to pay and both failed to do so.

Before turning to the defences advanced by the appellant, two matters should be mentioned.

The first is that the appellant has at no time contended that the first defendant or the second defendant was in a fiduciary relationship with the appellant or any other kind of relationship with her in which either might acquire influence over her. Indeed there was no evidence of what, if any, relationship there might have been between either of them and the appellant. Nor did the appellant contend that, in any other way, undue influence was exercised over her by the first defendant or the second defendant.

And the second is that she has at no time contended that the amount claimed was not owed by the principal debtor.

The defences raised by the appellant, below and, initially, in this Court, were:

1. That there was, in effect, no consideration for the giving by the appellant of her guarantee. As the appellant put it, the consideration for the guarantee was "past" consideration, being an already existing liability of the first defendant.

2. That the guarantee was executed under economic duress, the duress consisting of a compulsion to execute the guarantee in order to have the appellant's term deposit loan released from a lien by way of security for the advances.

3. That the guarantee was executed under undue influence, the undue influence consisting of the compulsion referred to in 2. In making her submissions in support of this defence the appellant called in aid a presumption of undue influence which she contended arose because of the relationship between the appellant and the respondent.

The appellant then proceeded to make further contentions which could follow only from a finding of undue influence or a finding that the respondent was in a position to exercise undue influence over the appellant. Because, as will appear, we conclude that neither of these findings can be made, it is unnecessary to consider these further contentions.

Before this Court, Mr Rudi Lee, for the appellant, sensibly abandoned the first two grounds of appeal, leaving for argument only the third ground, based on the contention of undue influence. Accordingly, we turn to that argument.

In order to understand this contention it is necessary to say something further about the guarantee and about the facts leading up to the execution of the guarantee.

The guarantee document executed on 12 July 2001 stated in paragraph 1:

> *"In consideration of you, Bauduri Bank Berhad, granting or continuing to make advances or otherwise giving credit or affording banking facilities.....or other financial accommodation for so long as you may think fit to IPANDO..... I, the undersigned hereby guarantee".*

It appears to be common ground (the appellant relies on these facts for her argument based undue influence) that the guarantee was given at least partly in consideration of the respondent Bank releasing a lien over a term deposit of the appellant and two other persons with the respondent in the sum of US$1,560,895 88 which had been

given as security for a facility which the respondent had granted to the first defendant and which it agreed to continue by its facility of 9 July, 2001. The appellant sought a release of that lien in order that she might have access to that money or part of it. The respondent agreed to release that lien but only upon condition that the appellant execute the subject guarantee. This the appellant agreed to do. All of this may be inferred from paragraph 5 (c) of the second affidavit of Raymond Albert Bariou, exhibit H to that affidavit and exhibit DEN 1 to the appellant's affidavit.

Section 16 (1) of the *Contracts Act* Cap 106 defines undue influence as follows:

> *"(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."*

It can be seen that, under the law in Brunei, undue influence has two requirements: first the relationship between the parties must be such that one of them is in a position to dominate the will of the other; and secondly the first party must use that position to obtain an unfair advantage over the other.

Neither of these requirements was established in the present case. There was no such relationship here. Moreover, the respondent's position after the transaction seems to have been less advantageous than it was before. If either party obtained an advantage from this transaction, it was probably the appellant.

However Mr Lee sought to rely on some presumptions which he contended arose either under section 16 (2) and (3) or under equitable doctrine. In the latter respect, he sought to rely on two decisions of the House of Lords, *Barclays Bank PLC v O'Brien and Another* [1993] UKHL 6 and *Royal Bank of Scotland v Etridge (AP)* [2001] UKHL 44. We should start with section 16 (2) and (3). These provide:

> *"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another -*
>
> > *(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or*
> >
> > *(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.*
>
> *(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."*

We may start our consideration of these provisions by excluding the relevance of subsection (2)(b). We turn then to subsection (2)(a). This subsection does not operate here unless the respondent held real or apparent authority over the appellant or stood in a fiduciary relation to her. And subsection (3) then requires, for its operation, that the transaction was unconscionable.

It is not arguable that the respondent had any real or apparent authority over the appellant. Nor is there any general principle that a bank stands in a fiduciary relationship to a prospective guarantor or to its customers. Whether it does so in a specific case must depend upon the facts of the case.

Mr Lee, who argued the appeal with his usual high competence, no doubt realised that he was in difficulty when asked by the Court to state the facts on which the appellant relied to prove that the respondent stood in a fiduciary relationship to the appellant. He could point only to the following facts:

1. that the appellant was a customer of the respondent;

2. the circumstances of the term deposit and the appellant's need to release it; and

3. the policy of the respondent as set out in its letter of 23 March, 2001 to finance projects outside Brunei only upon security of property within Brunei and the consequent need, if it were to be replaced, to replace it with a personal guarantee.

Mr Lee initially contended that the relationship between the appellant and the respondent was non commercial. However he later conceded that there was no evidence to support that proposition.

Nor could he point to any authority which would support a proposition that, on the above facts alone, a fiduciary relationship should be inferred. The relationship of banker and customer is not, without more, a fiduciary one. In the case of *Lloyds Bank Limited v Bundy* [1974] EWCA Civ 8, relied on by Mr Lee, there was much more than just that. There the manager of the Bank knew, when seeking a guarantee from the appellant, that the company whose account he was asking the appellant to guarantee was deeply in debt, that the appellant was unaware of that and that the appellant was giving the guarantee to support his son. Lord Denning MR stated the law in this way:

> *"...the English law gives relief to one who, without independent advice, enters into a contract or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."*

It can be seen from the facts stated earlier that the consideration here was by no means grossly inadequate; and nor was the bargaining power of the appellant grievously impaired.

We should add that, as mentioned earlier, this is not a case, like the House of Lords cases referred to above, in which it is contended that there was a fiduciary relationship between the principal debtor and the guarantor and the lender was put on inquiry as to the existence of such a relationship.

Moreover, for reasons already given, the guarantee is not, on the face of it or in the circumstances in which it was given, unconscionable nor was there any evidence from which that could be inferred.

It is plain, therefore that the appellant derives no support from section 16(2) and (3). It is necessary now to consider whether she derives any support from the above cases.

In *Barclays Bank* Lord Brown-Wilkinson, at pages 7 and 8, set out circumstances in which, in England and Wales, undue influence may be presumed; see also *Royal Bank of Scotland* at paragraphs 13 to 19, 21. Those circumstances are, for Brunei, comprehensively set out in sections 16(2) and (3) of the *Contracts Act.* His Lordship's categorisation, therefore, has no application here.

In *Royal Bank of Scotland* the House of Lords expressed the opinion, obiter (see per Lord Nicholls of Birkenhead, at paragraphs 82 to 89), that the existence of a non commercial relationship between a prospective guarantor and the principal debtor was sufficient to put a lender on inquiry as to the possibility of the exercise of undue influence by the principal debtor over the prospective guarantor, and went on to consider the consequent obligations of the lender. It is unnecessary to consider whether, in the light of section 16, so wide a principle applies in Brunei. As mentioned earlier, there is no evidence of the relationship between the appellant and the first defendant or between the appellant and the second defendant; and no contention by the appellant of any undue influence having been exercised by either the first defendant or the second defendant over the appellant.

It follows that the appeal must be dismissed.

Orders

1. Appeal dismissed;

2. Order nisi that appellant is to pay the respondent's costs unless application is made before 9.30 a.m. on Monday 16th November 2009.

Power, P.

Mortimer, J.A. **Davies, J.A.**