Re Tararone Investments Pte Ltd
[2001] SGCA 57

Case Number : CA 600022/2001

Decision Date : 04 September 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Leslie Chew SC and Chan Kia Pheng (Khattar Wong & Partners) for the appellants; Ronald Choo and Chio Yuen-Lyn (Rajah & Tann) for the respondents

Parties : —

Banking – Lending and security – Charge on monies in fixed deposit account to secure banking facilities – Construction of clauses – Nature and scope of charge – Whether charge in respect of all monies owing to Bankt from any account – Whether termination of overdraft facility affects validity or enforceability of charge over fresh facilities – Whether Bankt estopped from enforcing charge – Whether obligated to inform surety of 'unusual features'

(delivering the judgment of the court): This appeal raises a question of construction as to the scope of a charge over money in a fixed deposit account maintained by the respondents (`Tararone`) with the appellant bank (`DBS`).

The facts

The circumstances giving rise to the matter before us are not in dispute and are briefly as follows. In early March 1998, Sogo Department Stores (S) Pte Ltd (`Sogo`), an associate company of Tararone, was indebted to DBS to the tune of $18m in an overdraft account. There were some discussions between Sogo and DBS. On 4 March 1998, DBS informed Sogo (`the facility letter`) that they would be willing to continue granting the latter overdraft facility of up to $18m, subject to Sogo reducing the overdraft outstanding in accordance with the following repayment schedule:

31 Jul 1998	8,000,000	10,000,000
30 Oct 1998	1,000,000	9,000,000
29 Jan 1999	1,000,000	8,000,000
30 Apr 1999	1,000,000	7,000,000
30 Jul 1999	1,000,000	6,000,000
29 Oct 1999	1,000,000	5,000,000
31 Jan 2000	1,000,000	4,000,000
28 Apr 2000	1,000,000	3,000,000
31 Jul 2000	1,000,000	2,000,000
31 Oct 2000	1,000,000	1,000,000
31 Jan 2001	1,000,000	0

Repayment Schedule **Repayment Date Repayment Amount Balance Outstanding After Repayment** In addition, DBS also required, as a condition, that security be furnished and it was set out in the letter in these terms:

Security

The above facility together with all monies and liabilities which may be owing to the Bank from time to time shall be secured by:

(i) [not relevant]

(ii) a fixed deposit (FD) of S$18 million or its equivalent in ACU deposits to be placed with DBS Bank. In this connection, the pledgor of the FD, Tararone Investments Pte Ltd, shall furnish us with a Resolution (Specimen 1 attached) confirming its agreement to stand as surety and execute the charge document in a form acceptable to DBS Bank. The pledgor shall be permitted to withdraw sums from the FD corresponding to the amount of repayment made by your Company under the Repayment Schedule.

Accordingly, on 18 March 1998, Tararone executed a charge in respect of a $18m fixed deposit (`FD`), which they placed with DBS, to secure the facilities granted or to be granted to Sogo. The pertinent clauses of the charge are as follows:

*1 In consideration of (the DBS) agreeing at (Tararone`s) requests* ***to grant or continue to grant to Sogo ... advances, loans, credit and/or other banking facilities or accommodation (hereinafter collectively called the `banking facilities`*** *which expression shall include any part thereof) to such an extent and for so long as (the DBS) shall deem fit, (* ***Tararone*** *)* ***hereby covenant to pay to you on demand all sums of money which now or hereafter from time to time and at any time shall be owing or remained unpaid to you in respect of the banking facilities*** *or incurred or assumed by (the DBS) on (Sogo`s) behalf ... and all (Sogo`s) other liabilities ... (the aggregate of all such moneys and liabilities being hereafter called the `Obligations` which expression shall include any part thereof).*

2 ***We hereby charge with the payment of the Obligations and with payment of all moneys owing by (Sogo) and the discharge of all liabilities ... to you*** *(hereinafter called the `Borrower`s Liabilities`) by way of first fixed charge the sums which have been or may from time to time hereafter be deposited by (Tararone) with (the appellants) under (the DBS) FD account ...* ***(Tararone) hereby agree and confirm that the FD shall be held by (the DBS) as continuing security for the due payment or satisfaction to (the DBS) of all the Obligations and the Borrower`s Liabilities from time to time owing to (the DBS)*** *until the same have been fully paid and discharged subject as provided in clause 4.*

3 (Tararone) hereby irrevocably authorise (the DBS) at any time and from time to time whenever (the DBS) think fit, without notice to (Tararone), to appropriate and apply all or any part of the FD ... towards payment or satisfaction of all or any of the Obligations or the Borrower`s Liabilities.

4 Without prejudice to paragraph 1(d)(i) of your letter of offer dated 4th March

1998 so long as any part of the Obligations or the Borrower`s Liabilities remains outstanding or owing, we shall not withdraw any sum from or assign, charge, mortgage, or create any security interest over or otherwise deal with the Fixed Deposit save that, upon the Borrower making repayment to you in respect of the Overdraft Facility extended by you to the Borrower under your said letter of offer in accordance with the repayment schedule specified therein, we shall be entitled to withdraw sums from the Fixed Deposit corresponding to the amount of repayment made by the Borrower.

6 Notwithstanding the other provisions of this Charge on FD, ***it is hereby declared that this Charge on FD shall be and remain a continuing security for all moneys and liabilities from time to time owing by (Sogo) to (the DBS) in respect of the banking*** *facilities for a sum not exceeding ($18 million) in respect of principal moneys owing to (the DBS) under or in respect of the banking facilities. [Emphasis is added.]*

This arrangement effectively meant that, while DBS would continue granting facilities to Sogo, the bank also ensured that their exposure to Sogo would be gradually reduced. Following the execution of the charge, Sogo made payments and reduced the sums owing to DBS accordingly. In turn, pursuant to cl 4, Tararone also made corresponding withdrawals from the FD.

However, by mid-July 2000, following the insolvency of Sogo`s parent company in Japan, Sogo was in grave financial difficulties. Thus, on 15 July 2000, DBS`s solicitors notified Sogo of DBS`s decision to terminate the overdraft facility granted to Sogo with immediate effect and demanded the payment of $365,873.87, being the amount owing by Sogo on that account as at 14 July 2000, plus further interest accruing thereon. By another letter of even date, DBS also notified Tararone of the same and demanded that Tararone repay the sum of $365,873.87.

On 17 July 2000, the Managing Director of Sogo wrote to DBS protesting against the latter`s decision to terminate the overdraft facility and not to honour further cheques of Sogo. The letter stated:

... we have until today not defaulted on our loans, and together with cash in current account, fixed deposits, and also the bank guarantee issued by Industrial Bank of Japan Ltd, we are in a credit position with you.

If you will not honour our cheques when we are still in credit with you, we shall hold you responsible for breach. This will go beyond damages for dishonour as you, being our main bank, will precipitate the collapse of our business.

On 18 July 2000, DBS in a letter to Sogo, after referring to the termination of the overdraft facility, stated that, on a without prejudice basis, they would, in their absolute discretion, `honour specific cheques drawn on the loan accounts as well as permit certain deductions from such accounts which have now been terminated and/or recalled` provided that the deductions or the amount drawn in those cheques did not result in the total outstanding due under the banking facilities exceeding the amount of the security held by DBS. As a result, by 19 July 2000, 33 cheques drawn by Sogo, and three GIRO deductions, were honoured or allowed. On 24 August 2000 a sum of $46,889.54 was also deducted from the overdraft facility, being the amount owing by Sogo to DBS on account of a payment made by DBS on a letter of guarantee.

In the meantime, on 19 July 2000, both Sogo and Tararone were placed under interim judicial management by orders of the High Court. On the same day, the interim judicial managers instructed DBS to close all of Sogo`s accounts maintained with them. However, that instruction was only received by DBS at 5.58pm, by which time all the 33 cheques had been cleared, and the overdraft account debited.

On 8 September 2000, a judicial management order was made against Tararone. By 13 September 2000 the sum owing by Sogo in the overdraft account was $2,878,586.28 and the principal amount standing in the FD account was $3,025,241. On 15 September 2000, DBS`s solicitors wrote to the solicitors for the judicial managers seeking the consent of the latter, pursuant to s 227D(4)(d) of the Companies Act (Cap 50, 1994 Ed), to enforce the charge on the FD by appropriating the moneys in the FD account to satisfy the debt of Sogo in the overdraft account, plus all accrued interest. By a letter of 11 October 2000 of their solicitors, the interim judicial managers explained that they had to consider a couple of questions before a reply was possible. But as of the date the present originating summons was filed, ie 28 November 2000, the consent of the judicial managers had not been received.

At the hearing before the High Court, there was only one issue that troubled the judicial managers. It was whether DBS were entitled to enforce the charge against liabilities incurred by Sogo after the overdraft facility had been terminated on 15 July 2000. They were advised by their solicitors that any advances made by DBS to Sogo after 15 July 2000 amounted to a new facility which was not secured under the charge.

Decision of the court below

The judge below held that the charge was only to secure the $18m overdraft debt which Sogo owed to DBS at the time the charge was created and that the phrase `all moneys and liabilities which may be owing to the Bank from time to time` appearing in the facility letter related to ancillary debts such as interests and costs arising under the facility; it could not mean any money or liability outside the facility. He was of the view that while the wording of the charge seemed to be wide, the clauses therein must be read together to determine the parties` intention. Clause 4 referred to the termination provision of the facility letter and the right of the chargor to withdraw such amount from the FD as was commensurate with the sums repaid by Sogo in accordance with the repayment schedule. Clause 6 referred to Tararone`s obligation to keep the charge as a continuing security up to $18m and the expression `continuing security` ought not be given a wider meaning than was plain in the context of the facility letter and the charge. He felt that it could not have been the intention of the parties that the charge should secure any further loans made by DBS to Sogo when the overdraft facility granted under the letter of 4 March 1998 had been terminated.

Issues

Before us the main issue centred on the nature and scope of the charge. The second issue is whether, having informed Tararone that the overdraft facility was terminated, DBS was under a duty to inform Tararone that the former was proposing to restore the overdraft facility. The third issue is whether a fresh approval or resolution of the board of directors was necessary to enable the facilities granted to Sogo after 15 July 2000 to be secured under the charge.

Nature of charge

Tararone seek to construe the charge in the light of the facility letter where it was provided that the overdraft facility, `together with all monies and liabilities which may be owing to (DBS) from time to time` would be secured by the FD. Tararone argue that the expression `all monies and liabilities` must mean, in the context, all moneys and liabilities under the overdraft facility and nothing else.

We would observe that, if that was the intended meaning, then the word `thereunder` should appropriately have appeared after the phrase `may be owing`. Indeed, if that was the intention, there would have been no necessity to refer to `all monies and liabilities which may be owing to the bank from time to time`. It would have sufficed to merely state `The above facility shall be secured by ...`

We shall now turn to consider the provisions in the charge. Under cl 1, the charge was expressly stated to be in respect of `advances, loans credit and/or other banking facilities or accommodation` given to Sogo, all of which facilities are collectively referred to as `the banking facilities`. Under that clause, Tararone covenanted to pay to DBS, on demand, all sums of money owing by Sogo in respect of those banking facilities. Clause 2 charged the FD with the repayment of all moneys owing by Sogo to DBS. Tararone further confirmed that the FD would be held by DBS as a continuing security for the due payment of all of Sogo`s liabilities owing from time to time to DBS. Clause 3 authorised DBS, without notice to Tararone, to appropriate all or any part of the FD towards payment of all of Sogo`s liabilities to DBS. Finally, cl 6 reaffirmed that notwithstanding the other provisions, the charge `shall be and remain a continuing security for all moneys and liabilities from time to time owing by Sogo to DBS in respect of the banking facilities`. In the light of the terms of these clauses, there cannot be any doubt that this was an `all money` charge.

While it is true that the original reason for the creation of the charge was the $18m overdraft facility which DBS had then granted to Sogo, and which DBS were prepared to continue to extend to Sogo, the express terms of the charge clearly go beyond that. Nowhere is it stated, nor can it be implied, that the charge merely secures the payment of the overdraft facility. The court ought to give effect to what the document expressly and specifically stated.

In this connection reference may be made to **Bank of India v Trans Continental Commodity Merchants** [1983] 2 Lloyd`s Rep 298 and **Re Rudd & Son** [1986] 2 BCC 98. Admittedly, in these two English cases, the charging provisions were not identical to that of the present case and they also specified `on any account whatsoever` or `any other account`, which are not to be found in our instant charge. However, in our opinion, these differences notwithstanding, they do not render the charge here any less an `all-money` charge. While the words `any other account` do not appear in the present charge, it must be borne in mind that cl 1 refers to `advances, loans, credit and/or other banking facilities or accommodation`. It is a very wide clause. If the intention was merely to secure that specific overdraft account, it would have easily so stated. Furthermore, Tararone also covenanted to pay on demand `all sums of moneys ***which now or thereafter from time to time and at any time*** shall be owing` in respect of the aforesaid banking facilities. This is again inconsistent with any intention to only repay the debt in the overdraft account.

In our judgment, the charge is truly a charge in respect of all moneys from any account which are owed by Sogo to DBS. We would reiterate that, if the overdraft account was all that the parties had in mind, they would have simply referred to that and would not have widened the clause to cover any `advances, loans, credit and/or other banking facilities`. Most of the clauses in the charge may well be standard provisions (as cl 4 is clearly not) but there is no canon of construction which allows the court to ignore the express words in a document, or to rewrite the terms which the parties have agreed, unless a plain construction of the words would lead to absurdity.

In this regard, it would be useful to examine the case of ***Bank of India v Trans Continental Commodity Merchants*** (supra) and glean the purposive and practical approach taken by the court in relation to a wide `all money` clause in a guarantee given to a bank. There, the operative wording was `in consideration of the (bank) ... affording banking facilities` to the borrowers, the guarantors agreed to pay the bank `all and every sum and sums of money which are now or shall at any time be owing to the bank anywhere on any account whatsoever`. In that case the claim related to losses suffered by the borrowers on some 12 foreign exchange contracts. The arguments advanced by the guarantors were that the foreign exchange transactions did not come within the terms `banking facilities`. Both the English High Court and the Court of Appeal refused to let the wide terms of the guarantee be circumscribed by the opening words of the clause. At first instance, Bingham J said ([1982] 1 Lloyd`s Rep 506 at 512):

> *I am, however, of opinion that the language of this guarantee was deliberately drawn in the widest possible language so as to cover any liability of the company to the bank arising out of their mutual relations as banker and customer, however that liability might arise and whether it arose out of what may be called a pure banking activity or not. I consider the language of the substantive clause so clear as to obviate the need for reference to the introductory recital, but even if regard is paid to that recital and "banking facilities" were assumed not to include foreign exchange facilities I could not read the recital as cutting down in any way the deliberately wide language which follows. I would not, in any event, construe `banking facilities` as excluding foreign exchange facilities offered by and through the bank. It is true that these are not what I have called pure banking activities. It is however indisputable that the major international banks conduct a large and regular business in foreign exchange dealing, which operations play a very large part in the business of some of them. It would, I think, be unrealistic in the modern financial world to treat facilities for the conduct of foreign exchange deals by and through banks as not being banking facilities, even though these are not facilities exclusively offered by banks.*

This view of Bingham J was affirmed by the Court of Appeal where Robert Goff LJ said ([1983] 2 Lloyd`s Rep 298 at 301):

> *... there is no ambiguity in the body of the guarantee justifying recourse to the introductory words to resolve any such ambiguity; but even if such recourse were justified, I would not myself read the words "banking facilities" in those introductory words as excluding foreign exchange transactions of the type which were entered into in the present case. I am therefore unable to accept this argument.*

In ***Re Rudd & Son*** (supra), the issue was whether contingent liabilities were secured by the mortgage, which provided that `all ... sums ... owing anywhere on the current account of the firm (the borrower) or any other account ... ***including*** ` and naming various kinds of liability. The contingent liabilities were counter-indemnities given by the firm to the bank in respect of performance bonds given by the bank to a local authority in connection with road works to be carried out by the firm. The liquidators of the mortgagor company argued that the contingent liabilities were not secured by the mortgage. It should be mentioned that, sometime after the liquidation of the mortgagor company, the local authority did call on the performance bonds. The Court of Appeal, reversing the High Court, took into account commercial sense in arriving at its decisions. Dillon LJ said (at p

98,959):

> *in my view it does not make commercial sense that the mortgage should cover contingent liabilities once they are called but not otherwise.*

Nicholls J, the second member of the panel, said (at p 98,961):

> *In the proviso for redemption there are several references to transactions which at their inception would give rise to a contingent liability of the firm to the bank. I mention some of them. When a bill is discounted the liability of the firm to the bank will be contingent on the bill being dishonoured, which may not happen. Likewise, if the credit is made for the accommodation or at the request of the firm, the firm`s liability to the bank in respect of this will be contingent until payment is made by the bank under the letter of credit. Again, liability of the firm to the bank as surety will normally be contingent on the primary debt accruing due as a present liability.*
>
> *To my mind it is abundantly clear that the security was intended to embrace these contingent liabilities. But that intention will not be given effect to if the proviso is read in such a way that only money which is shown as presently owing on a current or other account of the firm is covered by the security.*
>
> *For my part, I can see no justification for so reading the proviso. A common, if not strictly accurate, usage of the word "including" by draftsmen is to refer to matters which are not embraced by the preceding words. So used, the word "including" enlarges, or extends, as well as particularises. I think it is evident that the word "including" is so used in this mortgage document.*
>
> *So construed, the security created by this mortgage will extend to contingent liabilities, notwithstanding that the provision at the beginning of the proviso refers only to payment to the bank of `all and every the sum and sums of money which shall for the time being be owing to the Bank by the Firm anywhere on the current account of the Firm or any other account.*

We have considered these two cases purely to gauge judicial attitudes in relation to such `all money` clauses. We recognise that in each case, the relevant document must be considered as a whole in order to obtain its true sense. More significantly, the court has to interpret such clauses in accordance with its commercial sense, in order to give effect to the parties` intention.

Alleged contradiction

At this juncture, we would refer to an alleged contradiction between cl 1 and cl 4, as contended by Tararone. The judge below, in arriving at his conclusion, felt that cl 4 was relevant to determining the scope and intent of the charge. Here, we would refer to what DBS`s counsel, Mr Leslie Chew, submits is an erroneous reference made by the judge. The judge said that cl 4 `referred specifically to the termination provision under the facility letter`. Mr Chew pointed out that there is no termination provision in the facility letter. We note that the opening of cl 4 provides that `without prejudice to para 1(d)(i) of the facility letter`. Paragraph 1(d)(i) of the facility letter states that `DBS reserves the right to review the above banking facility from time to time at its absolute discretion` which

would undoubtedly give DBS the right to terminate the facility. In our view, this was probably what the judge had in mind when he stated that cl 4 referred specifically to the termination provision under the facility letter. Of course, a clause giving the bank a power to review should not be regarded as a termination provision. A review need not necessarily lead to termination. To this extent, to describe para 1(d)(i) of the facility letter as a termination provision is not entirely correct.

The contention of Mr Ronald Choo, counsel for Tararone, is that implicit, if not explicit, in cl 4 is the acknowledgement that the charge is really intended to cover the overdraft facility and nothing else. This is because the clause permits Tararone to withdraw sums from the FD in line with the repayment of the sum outstanding in the overdraft account. If the charge was intended to cover all debts or liabilities due from Sogo on any account with DBS, besides the overdraft account, then Tararone should only be allowed to withdraw sums from the FD in line with the total liabilities of Sogo to DBS and not just based on what was outstanding in the overdraft account to DBS.

Mr Chew, however, argues that cl 4 does not affect the `all money` nature of the charge set out in cl 1. It is effectively a provision which sets out how much moneys can be withdrawn by Tararone from the FD. For example, in accordance with the repayment schedule, as at 31 July 1998, the maximum limit of the overdraft account had to be reduced from $18m to $10m and in turn Tararone could withdraw $8m from the FD. Similarly, on the day preceding the date the overdraft facility was terminated, in accordance with the repayment schedule, the maximum overdraft allowed to Sogo was $3m. What Tararone could withdraw from the FD at that point in time was such sum as would leave behind in the FD a sum of not less than $3m.

On a true construction, we would agree with counsel for DBS that what cl 4 really provides is a right for Tararone to withdraw sums from the FD in accordance with the repayment schedule. It is really a provision of a consequential nature, because, with the compliance of Sogo with the repayment schedule, the maximum accommodation which DBS would allow to Sogo was to be reduced in stages. In line with that, there would be no reason for DBS to hold onto the original FD of $18m but to allow Tararone to withdraw therefrom corresponding with DBS`s exposure. Just as an illustration; on 28 April 2000, Sogo would have reduced the outstanding amount owed to DBS to $3m. So from that day onwards DBS would only grant Sogo facilities up to that limit and no more. Of course, the account being a current overdraft account, the amount outstanding therein would vary from day to day but under no circumstances would DBS grant facilities beyond that limit. Thereafter, the next milestone would be 31 July 2000 when Sogo would only be accorded facilities of up to $2m. Between 28 April 2000 and 31 July 2000, even though there might well be some days where the sum in debit in the account might be very much less than $3m, say $1.5m, there would still be no right on the part of Tararone to request a further withdrawal of $1.5m from the FD. The right of withdrawal of Tararone must follow the milestones set out in the repayment schedule. Sogo was entitled to expect DBS to accord to it the facilities up to the extent as specified in the repayment schedule. Tararone could not demand the acceleration of withdrawal from the FD based on the day to day variations in the outstanding sum in the overdraft account.

Accordingly, it is our opinion that cl 4 is not inconsistent with cl 1, where the scope of the charge is set out.

Finally, we ought to mention that counsel for Tararone relied upon the following passage of Young J in the Australian case **Estoril Investments v Westpac Banking Corp** [1993] 6 BPR 13 to contend that, in relation to the present charge, it should sensibly be read down to circumscribe its application:

> *However, in my view it is valid to say in Australia that when one sees a mortgage in wide words and, as I believe is the situation in the instant case,*

> *one would get absurdities if one read the wide words literally, one should pause to see whether the parties intended when they entered into the mortgage that it should cover the circumstance which has now arisen.*

We do not see how this passage assists Tararone when the crucial qualification in that passage is `one would get absurdities if one read the wide words literally`. The absurdities which counsel thought existed in the present charge was the alleged contradiction between cl 1 and cl 4. We have explained above the consistency between the two clauses. To give cl 1 of the charge its plain meaning would not lead to any absurdity. It is a common phenomenon for banks, in granting facilities, to require the execution of an `all money` charge. It is also a common feature for banks to set a limit to the facilities it would accord to the borrower, which facilities would be secured by a charge.

Letter of 15 July 2000 and estoppel

We now turn to consider the letter of 15 July 2000 of DBS (`15 July letter`) notifying Tararone of the termination of the overdraft account and demanding that Tararone repay the sum of $365,873.87 then outstanding in that account. The effect of that notification is no more, and no less, than what it stated - that the overdraft account had been terminated and that the outstanding debt was $365,873.87 and that Tararone as the guarantor, should pay up the same to DBS. It did not refer to the charge in any way. Therefore, it could not have impinged on the continued validity or enforceability of the charge.

It is not reasonable to infer from the letter that DBS would not grant any further facility to Sogo, or for that matter, to revive the overdraft account (effectively granting a fresh facility). As the coverage of the charge is in very wide terms and as it is an `all money` charge, then, until the charge is validly withdrawn, it would cover all sums which Sogo may be owing from time to time to DBS, including any new facility extended by DBS to Sogo.

Counsel for Tararone has argued before us that the 15 July letter, by stating that the overdraft facility had been terminated, had represented that DBS would not permit further drawings or offer new facilities to Sogo. It seems to us that this argument raises the question of estoppel.

For estoppel to apply, three elements must be satisfied and they are encapsulated in three words: representation, reliance and detriment. It is clear that the 15 July letter (a) notified Tararone of the termination of the overdraft facility and (b) demanded payment from Tararone as the guarantor of what was outstanding then in the account of $365,873.87. Looking at the letter objectively, we do not think anything more can or should be read into it. This is very much the usual letter of demand issued by a bank to a guarantor. It says nothing with reference to the charge. We do not think it warrants any inference that DBS would not be offering any fresh facility to Sogo or that the amount stated in the letter was the final amount that Tararone would be liable under the charge and that the charge would effectively come to an end. To find an estoppel, a representation must be clear and unambiguous. This can hardly be said to be satisfied here. Accordingly, we hold that the first element to raise estoppel is not met.

We would further add that the second element of reliance is also not fulfilled. Tararone argued that they could have withdrawn the charge subject to putting up adequate security for the outstanding sum owing by Sogo under the overdraft account. This, Tararone said, was the reliance. To constitute reliance, there must be substantive evidence on that. There is, in truth, no evidence whatsoever of any reliance. There is no evidence that Tararone was contemplating withdrawing the charge and had

refrained from doing so on account of the alleged representation that Tararone`s liability under the charge was fixed at $365,873.87 and that thereafter the charge would be of no effect. This alleged reliance smacks entirely of an ex post facto rationalization. Accordingly, as there was no reliance, there could not have been any damages suffered on account of that.

In this regard, it is pertinent to point out that Mr Takeshi Tsujita, who was the Managing Director of Sogo and who wrote the letter of protest of 17 July 2000 to DBS, was also the Managing Director of Tararone. He was clearly running both Sogo and Tararone. So we are unable to see how Tararone can claim to be ignorant of what transpired between DBS and Sogo. It is significant that no one from Tararone has affirmed any affidavit to say that Tararone was not aware of the further accommodation extended by DBS to Sogo on 17 July 2000.

Other issues

In [para]13 above, we have identified two other issues raised by Tararone. In our judgment, they are without merits and may be disposed of shortly.

In the light of our views as to the nature and scope of the charge, there was no necessity for DBS to obtain the approval of the board of Tararone before DBS could extend fresh facilities to Sogo after the termination of the overdraft account.

The other point is whether, DBS, having informed Tararone of the termination of the overdraft facilities, was under a duty to further inform Tararone when the bank intended to revive the overdraft account or grant further facilities to Sogo. Tararone put this argument on the basis that a bank must disclose to a surety `unusual features` relating to a transaction and reliance was placed on **Habibullah Mohamed Yousuff v Indian Bank** [1999] 3 SLR 650 , which was a case where the Court of Appeal granted leave to a guarantor to defend the claim in an O 14 application. Unlike the situation there, there is nothing unusual for a bank to terminate a facility and later, upon representation, to either revive the facility or offer fresh facilities. Indeed, such a situation clearly falls within the terms of cl 1 of the present charge. The situation in ***Habibullah Mohamed Yousuff*** was really quite different.

Judgment

In the result, we would allow the appeal and declare that the further facilities, extended by DBS to Sogo after 15 July 2000, were secured under the charge. DBS were, therefore, entitled to recover the outstanding amount in the overdraft account of Sogo from the FD of Tararone.

The appellants shall have the costs here and below. The security for costs, together with any accrued interest, shall be refunded to the appellants.

Outcome:

Appeal allowed.