Hongkong & Shanghai Banking Corporation Ltd v Jurong Engineering Ltd and Others [2000] SGHC 20

Case Number : Suit 1755/1998

Decision Date : 11 February 2000

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : K Shanmugam SC, Yang Ing Loong and Steven Lo (Allen & Gledhill) for the plaintiffs; Davinder Singh SC, Harpreet Singh and Siraj Omar (Drew & Napier) for the defendants

Parties : Hongkong & Shanghai Banking Corporation Ltd — Jurong Engineering Ltd

Agency – Competency of agents – General manager not expressly authorised to commit first defendants – Whether general manager has apparent authority to commit first defendants to compromise agreement

Banking – Lending and security – Loan to first defendants' subsidiary – First defendants furnishing letters of awareness to plaintiffs as part of loan agreement – Whether plaintiffs relying on letters of awareness – Whether plaintiffs has legal recourse against first defendant

Contract – Intention to create legal relations – Plaintiffs making loan to defendants' subsidiary – First defendants furnishing letters of awareness to plaintiffs as part of loan agreement -Subsidiary going into liquidation – Plaintiffs suing first defendants for subsidiary's debt – Intentions of parties in relation to letters of awareness not expressly stated – Presumption of intention to create legal relations – Whether parties intend to create legal relations – Whether letters of awareness have contractual effect

Contract – Contractual terms – Operative clauses in letters of awareness ambiguous and general – Effect of operative clauses

: ***Introduction***

The plaintiffs` claim in this action is for the sum of $8,843,545.55, plus interest and costs. After considering all the evidence and submissions, I dismissed the plaintiffs` claim.

There are four defendants to the suit. The first defendants are a government-linked public company incorporated in Singapore, engaged in the business of mixed construction activities. The source of the first defendants` current troubles stemmed from the financial difficulties, and subsequent collapse, of Huge Corporation Pte Ltd (`Huge`). Huge was an associated company of the first defendants between the years of 1991 and 1994. In 1994, it became a subsidiary of the first defendants, and in 1996, it reverted to being an associated company. When Huge was wound up in August 1998, it owed debts to the plaintiffs under credit facilities which the plaintiffs had extended to it. This led the plaintiffs to initiate this suit against the first defendants, alleging that the latter had incurred liability in relation to these credit facilities in circumstances which will be elaborated on later in this judgment.

The second, third and fourth defendants were, at all material times, officers in the employ of the first defendants. The second defendant was the General Manager (Finance and Administration), whereas the third defendant was the Senior General Manager. Both the second and third defendants were also actively involved in the management of Huge. The fourth defendant was a legal manager in the first defendants` legal department. The plaintiffs say that the second, third and fourth defendants had, on various occasions, given oral warranties to the plaintiffs in their capacity as officers of the first defendants and the personal claims against them are in relation to these oral warranties.

Background facts

The relationship between the parties can be traced back to June 1992, when the plaintiffs` representatives first approached the second defendant to offer credit facilities to the first defendants. At that time, the first defendants already had ample sources of funds themselves and the discussion turned instead to the provision of credit facilities to Huge. The first defendants owned 50% of Huge`s shares and played a key role in its management.

Between June and August 1992, three meetings were held between the first defendants and the plaintiffs. In the course of the negotiations, the plaintiffs were told that the first defendants would not give a corporate guarantee to secure any credit facilities which might be extended to Huge. Instead, it was agreed that the first defendants would issue a Letter of Awareness to the plaintiffs as part of the facility agreement. In or around 6 August 1992, the plaintiffs extended credit facilities totalling $4m to Huge. Subsequently, the plaintiffs drew up a draft Letter of Awareness in accordance with their internal guidelines and forwarded it to the first defendants for execution. The first defendants requested that the word `undertake` in the draft be replaced with the word `ensure`, and this slight change of wording was accepted by the plaintiffs without any comment. Thereafter, the first defendants` Board of Directors passed a resolution approving the Letter of Awareness. This Letter of Awareness dated 28 August 1992 (`the first Letter of Awareness`) read as follows (with the deleted words in brackets and the amendments in italics):

> *Letter of Awareness*
>
> *We confirm that we are aware that you have offered to grant/continue banking facilities to Huge Corporation Pte Ltd (`the borrower`) for $4m and approve the terms and conditions of such banking facilities.*
>
> *We also confirm that so long as any amount is outstanding to you under such banking facilities:*
>
> *1 We will continue to maintain our 50% ownership of the borrower and hereby [undertake] ensure to advise you forthwith in the event of any decision being taken to dispose of the whole or part of our shareholding in the borrower.*
>
> *2 We will cause the borrower to be operated and maintained in such a way as to be in a financial position to meet all its obligations from time to time to you. If the borrower is unable for any reason to meet its obligations, we will, on demand, immediately either:*
>
> *(a) make funds available to the borrower sufficient to meet its obligations, or*
>
> *(b) have funds made available to the borrower by others in amounts sufficient to enable the borrower to meet its obligations*
>
> *3 We will not take any action which will result in the borrower being unable to carry on its business or otherwise being unable to meet all its obligations from time to time to you and hereby [undertake] ensure to advise you forthwith of any circumstances which may affect the continuing operation of the borrower.*

4 We will furnish you with our consolidated annual audited financial statements and accounts and will procure that the borrower will furnish you with annual audited financial statements and accounts together with such additional financial information as may be reasonably required.

This letter is to be interpreted according to Singapore Laws.

In October 1993, the plaintiffs increased the credit facilities of Huge to $ 6m. The increased facilities were supported by a fresh Letter of Awareness from the first defendants dated 20 April 1994 (`the second Letter of Awareness`). This Letter of Awareness, which had been drawn up by the plaintiffs, was identical to the first Letter of Awareness save in two aspects. First, the first defendants did not replace the word `undertake` with the word `ensure`. Secondly, the words `will on demand immediately` in cl 2 were substituted with `shall endeavour` at the request of the first defendants.

Around June 1994, the first defendants increased their shareholding in Huge by 1%. This effectively converted Huge from an associated company to their subsidiary. On 16 June 1994, a meeting was held between the representatives of the first defendants, Huge and the plaintiffs. At this meeting, the first defendants requested the plaintiffs to grant an additional $20m in facilities to Huge to finance Huge`s activities in Taiwan, which took place through a 60% Huge-owned subsidiary, Huge Corporation Taiwan Ltd (`HCTL`). The plaintiffs were agreeable to this and increased Huge`s credit facilities from $6m to $ 26m in August 1994.

To support the full facility of $26m, the first defendants furnished a fresh Letter of Awareness dated 19 September 1994 (`the third Letter of Awareness`) to the plaintiffs. At the request of the first defendants, the phrase ***`shall endeavour`*** in cl 2 was substituted with ***`will endeavour`*** . The relevant parts of the third Letter of Awareness stated (with the deleted words bracketed and the changes italicised):

Letter of Awareness

We confirm that we are aware that you have offered to grant/continue banking facilities to Huge Corporation (S) Pte Ltd (`the borrower`) for SGD26,000,000 as per your Letter of Offer dated 3 August 1994 and approve the terms and conditions of such banking facilities.

We also confirm that, so long as any amount is outstanding to you under such banking facilities:

1 We will continue to maintain our [50%] 51% ownership of the borrower and hereby undertake to advise you forthwith in the event of any decision being taken to dispose of the whole or part of our shareholding in the borrower.

2 We will cause the borrower to be operated and maintained in such a way as to be in a financial position to meet all its obligations from time to time to you. If the borrower is unable for any reason to meet its obligations, we [shall] will endeavour to either:

(a) make funds available to the borrower sufficient to meet its obligations, or

(b) have funds made available to the borrower by others in amounts sufficient to enable the borrower to meet its obligations.

3 We will not take any action which will result in the borrower being unable to carry on its business or otherwise being unable to meet all its obligations from time to time to you and hereby undertake to advise you forthwith of any circumstances which may affect the continuing operation of the borrower.

4 We will furnish you with our consolidated annual audited financial statements and accounts and will procure that the borrower will furnish you with annual audited financial statements and accounts together with such additional financial information as may be reasonably required.

This letter is to be interpreted according to Singapore Laws.

Like the previous two Letters, the third Letter of Awareness was approved by a board resolution from the first defendants` Board of Directors.

From early 1995, Huge and HCTL began to experience financial difficulties. The plaintiffs were not aware of this. In January 1995, the plaintiffs renewed the credit facilities to Huge with no change in the amounts, on the basis that the facilities continued to be secured by the third Letter of Awareness. In August 1995, Huge`s credit facilities were reduced to $16m, but this was due to non-utilisation. The reduced facilities of $16m continued to be supported by the third Letter of Awareness.

It was only around 20 August 1996 that the plaintiffs discovered Huge`s situation, following an article in the Straits Times outlining HCTL`s financial difficulties. In reaction to the news, the plaintiffs reduced Huge`s facilities from $16m to $11m on 24 August 1996. Later, around 16 October 1996, the first defendants decided to dispose of 1% of its shareholding in Huge. This disposal was effected in November 1996 and Huge thereby reverted to being merely an associated company of the first defendants. The plaintiffs were not informed of this disposition by the first defendants and only discovered it on 13 December 1996 through articles in the Straits Times and Business Times. Upon discovering this, the plaintiffs further reduced Huge`s credit facilities to $8.25m in December 1996. These facilities continued to be supported by the third Letter of Awareness.

Following this, several meetings and negotiations took place between the representatives of the first defendants, Huge and the plaintiffs in an effort to reach an agreement as to how Huge`s debts to the plaintiffs would be repaid. In particular, the plaintiffs received a letter on the first defendants` letterhead on 2 June 1997, containing a proposed repayment schedule for Huge`s debts. It stated:

Attention: Ms Linda Kan, Manager	`Without Prejudice`
Dear Madam,	
Re Notice of Demand - Huge Corporation Pte Ltd	
We refer to your Notice of Demand served on Huge Corporation Pte Ltd, our associate company, on 6 May 1997 a copy of which was copied to us.	

As a gesture of goodwill and for continued business relations, we are prepared to ensure that Huge Corporation Pte Ltd settle repayments by the following instalments.

	Amount	Payment date		
(1)	Overdraft of SGD 905,214.89	Middle of June		
(2)	Standby Documentary CreditSGD5,000,000.00	1m	-	end of June
		2m	-	end of July
		2m		end of August
(3)	We enclose our cheque for SGD38,437.50being payment for DC Opening Commission			

Regarding Standby Documentary Credit No 3 for SGD2.25m, Huge Corporation Pte Ltd will review its financial position and revert to you as soon as possible.
Please note, however, that the above payment proposal is made strictly without admission of any liability on JEL`s part whatsoever.
We shall be grateful for your immediate confirmation of the above.
Yours faithfully,
Roland Tan
Finance, GM

The letter was signed by the second defendant and was set out on the first defendants` letterhead. It was accompanied by a cheque for $38,437.50, being the payment for the `DC Opening Commission` owed by Huge to the plaintiffs, in accordance with the repayment schedule. The plaintiffs banked in the cheque and sent out a reply letter on 4 June 1997, addressed to the first defendants, stating:

Attention: Mr Roland Tan, Finance General Manager
Dear Sirs
Our Notice of Demand for Repayment of Facilities Granted to Huge Corporation Pte Ltd
Thank you for your letter dated 2 June 1997.
We await full repayment on the overdraft and the SGD5,000,000 Standby Documentary Credit No 1 in accordance with your repayment schedule.
We further await your confirmation of a repayment schedule on the SGD2,250,000 Standby Documentary Credit No 3 where we would like to see full repayment within a six-month schedule.

Yours faithfully,
Linda Kan
Manager
Jurong Corporate Banking Centre

Despite these efforts, the debts owed by Huge to the plaintiffs remained outstanding. Towards the end of August 1997, the plaintiffs suspended the credit facilities granted to Huge. On 6 October 1997, the plaintiffs sent a second notice of demand to Huge demanding payment of the sum of $ 8,207,809.57. Subsequently, in March 1998, another judgment creditor of Huge filed a petition to wind up Huge. Huge was wound up in August 1998 after proposals of a scheme of arrangement fell through. The plaintiffs sought payment of the amount owing from the first defendants. When the first defendants refused to pay, the plaintiffs commenced this action against them on 2 October 1998. Subsequently, the statement of claim was amended three times, to join the second, third and fourth defendants as parties to the suit.

The plaintiffs are claiming against the first defendants on three grounds:

(i) breach of the third Letter of Awareness dated 19 September 1994 issued by the first defendants to the plaintiffs in relation to credit facilities extended by the latter to Huge;

(ii) breach of an alleged compromise agreement, entered into on or around 4 June 1997 (`the compromise agreement`), under which the first defendants had promised to repay Huge`s outstanding debts to the plaintiffs; and

(iii) breach of oral warranties, made on the first defendants` behalf by the second and third defendants, that the first defendants would financially support Huge and cause Huge to repay its outstanding debts to the plaintiffs.

In addition to their claims against the first defendants, the plaintiffs allege that the second and third defendants had made oral warranties on behalf of the first defendants on various occasions, assuring the plaintiffs that the first defendants would financially support Huge and cause Huge to repay its outstanding debts to the plaintiffs. These oral warranties were allegedly made during a meeting on or about 25 February 1997, in a telephone conversation in or around June/July 1997 and in the course of two meetings on 6 August 1997 and 7 August 1997. It is the plaintiffs` case that the second and third defendants had the requisite authority to make these oral warranties on behalf of the first defendants. However, if the court was to find otherwise, the plaintiffs seek to recover damages and loss from the second and third defendants for breach of implied warranty of authority.

As for the fourth defendant, the plaintiffs allege that she had, in the course of a telephone conversation on 12 May 1997, represented to them that the second defendant had the requisite authority to commit the first defendants to the compromise agreement of 4 June 1997. Should the court decide that the second defendant lacked the requisite authority to bind the first defendants under the compromise agreement, the plaintiffs seek to recover damages and loss from the fourth defendant for breach of her oral warranty as to the second defendant`s authority.

Prior to the trial, the parties applied for certain issues to be tried as preliminary issues under O 33 r 2 of the Rules of Court. Thus, although the pleadings covered a wider range of issues, the trial before me was essentially confined to the following preliminary issues:

(i) whether the third Letter of Awareness dated 19 September 1994 created legally enforceable obligations between the parties;

(ii) whether the facts pleaded resulted in a legally binding and enforceable compromise agreement on or around 4 June 1997, so that the first defendants became legally liable to repay Huge`s outstanding debts to the plaintiffs; and

(iii) whether the second, third and fourth defendants had made the alleged oral warranties.

The plaintiffs` case

At the trial, the plaintiffs called three witnesses. The first witness was Low Kay Pang (`Low`), who was the Deputy Manager of the plaintiffs` Jurong Branch until his transfer in late February 1997. Low was actively involved in the negotiations and transactions between the plaintiffs, Huge and the first defendants between 1992 and 1994. His evidence essentially related to the circumstances in which the plaintiffs extended credit facilities to Huge and the circumstances surrounding the issuance of the three Letters of Awareness. The plaintiff`s second witness, Linda Kan (`Kan`), was the `Manager Group Audit` of the plaintiffs from late 1995. The third witness was Goh Yew Chai (`Goh`). Goh replaced Low as the Deputy Manager of the plaintiffs` Jurong Branch. Two other witnesses for the plaintiffs, namely, Jean Leong and Christopher Yip, were not called upon to testify at the trial.

The plaintiffs contend that there was a common understanding between them and the first defendants that the Letters of Awareness were legally binding and that none of the first defendants` representatives had, at any time during any of the negotiations, intimated that the Letters of Awareness were not to be legally enforceable or binding. Although they concede that the first defendants had made it clear that they would not give a corporate guarantee to secure credit facilities extended to Huge, the plaintiffs say that it did not follow from this that the Letters of Awareness had no legal effect. Indeed, they argue that the Letter of Awareness had been agreed upon as an alternative form of security for the facilities. Low testified that the second defendant had assured him at one point that the first defendants` preference to issue a Letter of Awareness instead of a corporate guarantee was only to avoid tax complications.

According to Low, the plaintiffs would certainly not have extended any credit to Huge in the first place if they had not been provided with a legally enforceable Letter of Awareness from the first defendants containing the requisite covenants. One of the main reasons for the plaintiffs` decision to extend credit facilities to Huge was its relationship with the first defendants - the first defendants were a reputable blue-chip company and demonstrated a healthy capital structure and ample liquidity in 1992. According to the plaintiffs, they had regarded the first defendants` status as being relevant, not only for the purposes of generating business for Huge, but also to provide `comfort` and `security` for the credit facilities to be extended to Huge. Thus, Low`s initial recommendation in 1992 was that the plaintiffs should grant credit facilities to Huge if the first defendants stood behind Huge and maintained management control.

The same considerations applied to the plaintiffs` subsequent decision to increase Huge`s credit facilities from $6m to $26m in August 1994. The fact that the first defendants had decided to increase their shareholding of Huge by 1% around June 1994 was the determining factor for the plaintiffs` decision to increase Huge`s credit facilities by $ 20m. The 1% increase in shareholding effectively converted Huge from an associated company to their subsidiary and the plaintiffs felt that this deepened the first defendants` commitment to Huge. Although they realised that the credit risk was ultimately the performance of HCTL, they put great emphasis on the fact that the first

defendants remained heavily involved in the management of Huge, which in turn had majority ownership and control of HCTL in Taiwan. Indeed, Low testified that when the parties met to discuss the issue on 16 June 1994, the overall impression given by the first defendants` representatives was that the first defendants were committed to Huge and that this commitment was underpinned by their majority ownership, technical support and, where necessary, financial support as well. The extent of the first defendants` involvement was demonstrated when the second defendant informed the plaintiffs that any draw-down of the $26m worth of facilities by HCTL must first be approved by the first defendants in writing. It followed from all this that the undertakings in the third Letter of Awareness of 19 September 1994 were meant to be legally binding on the first defendants and were not merely moral obligations.

The plaintiffs say that they were unaware of Huge and HCTL`s growing financial difficulties throughout 1995. Even in April 1996, when Kan conducted the routine half-yearly interim review of Huge`s account, her recommendation was for the plaintiffs to maintain the existing credit facilities to Huge. It was only around 20 August 1996 that the plaintiffs learnt of Huge`s situation, following the article in the Straits Times outlining HCTL`s financial difficulties. To calm the plaintiffs` fears, Huge extended an invitation to Low in September 1996 to conduct a site visit of the existing projects undertaken by HCTL so as to allow him to monitor the financial position of HCTL. Low accepted this invitation and travelled to Taiwan on 16 September 1996. Upon his return, he compiled a report which recommended that, given the down-turn of the construction industry, the plaintiffs should seek a gradual reduction of risk exposure in relation to Huge. According to Low, he did not recommend more drastic action as he was impressed by the support and commitment that the first defendants were giving to Huge and additionally relied upon the assurances given in the third letter of awareness, that such support would continue.

Sometime at the end of January 1997, an anonymous letter was sent to the plaintiffs indicating that the first defendants were distancing themselves from Huge and were insulating themselves from the financial difficulties of HCTL. The letter also contained information concerning an action brought by Deutsche Bank AG against Huge for the recovery of loans amounting to NT$59,998,164. Furthermore, sometime in mid-February 1997, the plaintiffs obtained information relating to the mismanagement of Huge and HCTL. Alarmed by this news, the plaintiffs arranged for a meeting with the first defendants and Huge on 25 February 1997 to discuss the increasingly dire situation.

The first defendants were represented at the meeting of 25 February 1997 by the second defendant and one Lee Cheng Kiat. The plaintiffs were represented by Kan and Goh, together with Ronnie Chan and Jean Leong from the plaintiffs` Credit Control, Credit and Risk Management Division. Low was not present at the meeting, as he was being transferred from his post around this time and had ceased to be actively involved in the matter. Goh, who had taken over Low`s duties only recently, did not actively participate in the meeting. Instead, he acted more as an observer, and much of his evidence in this suit related to what he observed at the meeting. He testified that at the meeting, the plaintiffs expressed their serious concerns that the first defendants had reduced their shareholding in Huge. He also remembered that the second defendant stated that the first defendants were not legally bound by the third Letter of Awareness to support Huge in any way. In response, Ronnie Chan suggested that the first defendants should secure Huge`s credit facilities by way of a corporate guarantee. However, the second defendant turned down this request, as he considered that this would `open the floodgates` to similar requests from other banks. It was then agreed that the first defendants would issue to the plaintiffs a new Letter of Awareness in terms thought suitable by the plaintiffs. The new Letter of Awareness was to be more strongly-worded than the third Letter of Awareness of 19 September 1994. The format of the new Letter of Awareness was to be drawn up by the plaintiffs. Goh also recalled that the second defendant stated that this new Letter of Awareness would have to be approved by the first defendants` Board of Directors.

Following the meeting, Kan sent the format of the new Letter of Awareness on 7 March 1997 for the first defendants` perusal and execution. She claimed that she received no reply from the defendants, even after she made follow-up calls, and wrote to the first defendants on 22 March 1997 to remind them of the matter. Finally, Low, who was then in the plaintiffs` Credit and Risk Division, managed to contact the second defendant on 26 March 1997. The second defendant informed Low that it was necessary, for administrative purposes, to have a formal letter of offer before the first defendants` Board of Directors could consider the issuance of the new Letter of Awareness.

On 2 April 1997, Kan sent out a formal letter of offer to Huge on behalf of the plaintiffs, confirming the continuance of the existing credit facilities ($8.25m) conditioned upon the issuance of a fresh Letter of Awareness in the new format. The offer was expressed to be open until 23 April 1997. However, on 8 April 1997, Goh spoke with the second defendant and was informed that the first defendants` Board would only meet at the end of April. The plaintiffs therefore granted an extension of the offer until 5 May 1997. Despite this, the plaintiffs received no response from the first defendants relating to their offer.

After the 5 May 1997 deadline had passed, the plaintiffs served a notice of demand dated 6 May 1997 on Huge asking for full repayment of all the outstanding sums due to the plaintiffs under the credit facilities by 12 May 1997. On 12 May 1997, Kan received a call from the fourth defendant who told her that the second defendant had prepared a proposal for repayment of the sums owed by Huge to the plaintiffs. The fourth defendant orally outlined the details of the proposed repayment schedule to Kan over the phone. It was then arranged that a letter, accompanied by the repayment schedule, should be sent to the plaintiffs shortly on the first defendants` letterhead. However, the matter was delayed as the second defendant fell seriously ill and was hospitalised. The plaintiffs only received a letter on the matter from the first defendants on 2 June 1997. According to Kan, the 2 June 1997 letter reiterated the repayment schedule which she had previously discussed with the fourth defendant over the telephone.

It is the plaintiffs` case that the 2 June 1997 letter contained an offer from the first defendants to repay Huge`s debts to the plaintiffs according to the repayment schedule proposed therein in consideration for the plaintiffs` act of refraining to take legal action against Huge. The plaintiffs allege that, upon acceptance, the offer of 2 June 1997 became a legally enforceable compromise agreement binding on the first defendants and this was what transpired when Kan wrote to the first defendants on behalf of the plaintiffs on 4 June 1997 accepting the proposed repayment schedule.

Furthermore, the plaintiffs say that as far as they were concerned, the second defendant had either actual or apparent authority to make this offer on behalf of the first defendants and to commit the latter to the compromise agreement. Indeed, they claim that the fourth defendant had given a warranty of the second defendant`s authority during her telephone conversation with Kan on 12 May 1997.

The first defendants did not make any payments to the plaintiffs under the repayment schedule. On 7 July 1997, the plaintiffs wrote to the first defendants to complain. The letter was addressed to the second defendant as well as the first defendants` Managing Director, Masao Ueda. At that point, the sums which had fallen due under the repayment schedule amounted to $2m. Following this, Goh received a telephone call from the third defendant on 14 July 1997. The third defendant was the General Manager (Corporate Affairs) of the first defendants. He assured Goh that the sum of $2m, overdue at that point under the repayment schedule, would be repaid by the end of the week, as soon as facilities offered to Huge by a Taiwanese bank were in place. Apparently, in another telephone conversation in or around July 1997, the third defendant also assured the plaintiffs` Ronnie

Chan (whose evidence was not adduced) that the first defendants `would not walk away from Huge`.

Despite all that had transpired, the plaintiffs received no payments under the repayment schedule. On 25 July 1997, when it had become clear to the plaintiffs that the first defendants had no intention of making any more payments on behalf of Huge, Kan transferred Huge`s account to the plaintiffs` Credit Control Division for stronger recovery action. Thereafter, the matter was taken over by Ronnie Chan and Jean Leong, and Kan and Goh ceased to have any further active involvement.

On 6 August 1997, Ronnie Chan and Jean Leong met with the second defendant, the third defendant and Ueda to discuss the matter. Another meeting took place on 7 August 1997. Despite these meetings and discussions, the repayment schedule was not complied with.

Originally, the plaintiffs indicated that they would also call Jean Leong and Christopher Yip (whose affidavit exhibited the evidence of Ronnie Chan). However, these two witnesses were withdrawn in the course of the trial. Thus, the court did not have the benefit of their evidence as to what transpired after 25 July 1997.

The defendants` case

It is the defendants` case that it had been clearly understood by both parties that none of the Letters of Awareness issued by the first defendants to the plaintiffs was intended to create legal obligations and that the plaintiffs were well aware at all times that the first defendants were not going to undertake any legal liability for Huge`s debts. Nevertheless, the plaintiffs agreed to extend credit facilities to Huge as they were extremely eager to establish a business relationship with the first defendants.

The second defendant, who was the first defendants` General Manager (Finance and Administration), said that when the plaintiffs` representatives approached him in June 1992 to explore business opportunities, the first defendants had ample sources of funds and were in a strong bargaining position. During the negotiations, he had made it patently clear to the plaintiffs` representatives that the first defendants did not intend to undertake legal liability in respect of Huge`s debts. He had told the plaintiffs to evaluate for themselves the risk of extending banking facilities to Huge, having regard to Huge`s track record. In particular, he stated from the start that the first defendants would not give a corporate guarantee to secure any credit facilities extended to Huge. Like all the other banks, the plaintiffs would have to extend such facilities on a `clean basis` or `simply on the basis of a comfort letter from the first defendants`. The plaintiffs` representatives were informed that even DBS Bank, which was the first defendants` pre-eminent banker and which had previously been given a corporate guarantee by the first defendants, had recently had that corporate guarantee replaced by a letter of comfort.

The second defendant also testified that when the plaintiffs provided the first defendants with the original draft of the first Letter of Awareness, the first defendants replaced the word `undertake` with the word `ensure`. This was intended to reinforce what was already clearly understood between the parties, namely, that the Letter of Awareness was not meant to embody any legally binding obligations and that it contained only moral obligations. For the same reasons, the first defendants changed the words `will immediately on demand` to `shall endeavour` when they saw the original draft of the second Letter of Awareness. In the third Letter, to make it even clearer, the words `shall endeavour` were changed to `will endeavour`. On each occasion, the plaintiffs had accepted the amendments without question and no real negotiations ever took place over the contents of any of the Letters of Awareness.

Indeed, the defendants contend that the fact that the first defendants had stated clearly that no corporate guarantee would be given to the plaintiffs spoke for itself. It had always been the practice of the first defendants to execute corporate guarantees when they intended to undertake legal obligations and to execute a Letter of Awareness or Letter of Comfort if they did not intend to undertake legal obligations. Moreover, the plaintiffs were well aware that the three Letters of Awareness given to the plaintiffs were not reflected in the first defendants` annual accounts. In addition, counsel for the defendants referred to various internal memoranda and records belonging to the plaintiffs in which the plaintiffs` own officers had referred to the first defendants` `moral obligations` under the third Letter of Awareness.

Counsel for the defendants pointed out that although the plaintiffs knew from the start that the first defendants would not execute a corporate guarantee to secure the credit facilities to Huge, they made repeated requests that this should be done. Indeed, the second defendant testified that the meeting on 25 February 1997 was specifically arranged by the plaintiffs with the intention to `push` for a corporate guarantee from the first defendants, because they were well aware that the third Letter of Awareness contained only moral obligations. Not only did the second defendant turn down their request for a corporate guarantee, he claimed that he had also stated clearly at the meeting that the first defendants were not legally liable to the plaintiffs under the third Letter of Awareness. None of the plaintiffs` representatives had disputed his statement. Towards the end of the meeting, Ronnie Chan asked the first defendants to issue a revised Letter of Awareness to the plaintiffs. Ronnie Chan then extended the revised format to the second defendant. The wording of cl 2 had been changed so that the words `we will endeavour to ...` were replaced with the words ` ***we will further ensure to*** ...`. More significantly, the last sentence of the revised Letter of Awareness stated:

> *This letter shall be construed and determined under and may be enforced in accordance with the Singapore law* ***and is intended to create legal relations between the parties hereto****. [Emphasis added.]*

The second defendant said that he had told Ronnie Chan there and then that the first defendants would not agree to issue this revised Letter of Awareness, as its terms flew in the face of their express understanding that the first defendants would not undertake any legal obligations in relation to the banking facilities extended to Huge.

Despite his clear words at the meeting, the second defendant said that he received two calls from Goh after the meeting between 25 February 1997 and 7 March 1997. On both occasions, Goh asked that the revised Letter of Awareness be executed. The second defendant told Goh on both occasions that the first defendants would not agree to execute the revised Letter of Awareness. Nevertheless, on 7th March 1997, the plaintiffs sent a letter to Huge, signed by Goh and Kan, enclosing the same revised Letter of Awareness, with the request that it be executed by the first defendants. The second defendant said that he then telephoned Kan and informed her that the first defendants would not be executing this Letter of Awareness.

With regard to the alleged oral warranties, the second and third defendants denied having ever made any representation or assurance to the plaintiffs that the first defendants would financially support Huge or cause it to repay its outstanding debts to the plaintiffs. In relation to the meeting on 25 February 1997, the second defendant testified that he had stated clearly on that occasion that he needed to obtain Board approval for any new Letter of Awareness. This evidence was supported by the plaintiffs` own witness, Goh. From this, counsel for the defendants pointed out that far from giving any oral warranty on behalf of the first defendants, the second defendant had clearly stated

that he had no authority to make any commitment whatsoever on behalf of the first defendants to assume legal responsibility for Huge and that only the Board of Directors could give such a commitment. Similarly, the second and third defendants denied having ever represented during the course of the two meetings on 6 and 7 August 1997 that the first defendants would financially support Huge or cause Huge to repay its outstanding debts to the plaintiffs.

In relation to the alleged `compromise agreement` of 4 June 1997, counsel for the defendants argued that the second defendant did not have any actual authority to make the agreement on behalf of the first defendants. Furthermore, at no time did the second defendant have any apparent authority to make such an agreement on behalf of the first defendants. Counsel for the defendants pointed out that the plaintiffs knew, from previous course of dealings that board approval was needed every time a fresh Letter of Awareness was issued by the first defendants in favour of the plaintiffs. This in turn meant that the plaintiffs knew that board approval must be obtained before the first defendants could be bound by any commitment to pay for Huge`s liability, regardless of whether the commitment took the form of a corporate guarantee or any agreement or promise to pay Huge`s liabilities. In any event, the defendants pointed out that the letter of 2 June 1997 was headed `without prejudice`, which showed that the parties were still in the course of negotiations and that no concrete offer was being made by the first defendants via that letter.

Finally, the fourth defendant denied that she had made any warranty as to the second defendant`s authority to enter into the alleged compromise agreement on behalf of the first defendants. Counsel for the defendants pointed out that Kan herself testified that she could not remember the exact details of the telephone conversation which she had with the fourth defendant on 12 May 1997. According to the fourth defendant herself, the issue of authority was not even discussed during the conversation.

The decision of the court

Effect of the Letter of Awareness

Letters of Awareness, or comfort letters, are commonly issued by a parent company to the lender giving comfort to the lender for a loan made to a subsidiary company. They are usually used where the parent company is not willing to undertake some other legal commitment. For example, it may not be willing to give a guarantee because doing so would infringe guarantee limits in its constitution or because it does not wish a contingent liability to appear on its balance sheet. Letters of Awareness commonly contain a statement of awareness of the financing, a commitment to maintain ownership interest and a statement as to the degree of support required by the lender. Disputes arising over these documents usually concern whether the obligations that are contained therein are enforceable in law. Although such documents have been used in the commercial world for some time, the term `Letter of Awareness` itself has yet to acquire a precise meaning in law that is descriptive of the precise liabilities to be assumed by the issuer of such a document. Thus, in each case, one must look beyond the name of the document and see exactly what was intended by the parties.

In the present case, the parties did not expressly state their intention in writing in relation to the effect of the Letter of Awareness. The case of **Edwards v Skyways Ltd** [1964] 1 All ER 494[1964] 1 WLR 340 establishes that in the absence of express intentions, there is a presumption that the parties intended to create legal relations if an agreement is made in a commercial context. Since the Letters of Awareness were made in a commercial context as part of a commercial transaction in this case,

the presumption operates to shift the burden of proof onto the first defendants to show that there was no intention to create legal relations. However, the operation of the presumption does not detract the court from its fundamental task, which is to ascertain the true bargain between the parties, to seek the substance and reality of the transaction and to ascertain what common intentions should be ascribed to the parties. In carrying out this task of construction, the court is to have regard to the surrounding circumstances as well as the specific text of the Letter of Awareness. Since the effect to be attributed to each Letter of Awareness is essentially a matter of construction, each case turns on its own facts. Past cases concerning Letters of Awareness are not precedents in the strict sense of the word and only provide useful guidelines for the court.

The defendants pointed out that the circumstances surrounding and leading up to the issuance of the third Letter of Awareness showed clearly that the parties had understood that any Letter of Awareness issued by the first defendants to the plaintiffs would only create moral obligations. The fact of the matter was that it was the plaintiffs who had first approached the first defendants in June 1992 with offers of funds and banking facilities. At that time, the first defendants were already over-banked, with ample sources of funds. They were in a very strong bargaining position. Under cross-examination, the plaintiffs` witnesses conceded that the plaintiffs were very eager to establish business relations with the first defendants. This was quite understandable. They knew that they were in a very competitive environment, and that they had to be flexible and quick in accepting the first defendants` terms. As Low put it,

> *We are in a very competitive environment. To get the business relationship, we got no choice. We either have to accept it [ie the first defendants` terms] or not at all.*

The first defendants made it clear to the plaintiffs from the outset that they would not grant any corporate guarantee to secure the credit facilities to Huge. The plaintiffs were told that other banks which had granted facilities to Huge did so either on a clean basis or simply on the basis of a comfort letter from the first defendants and they were told that they would not be preferred. They were also asked to evaluate for themselves the risk of extending banking facilities to Huge, having regard to Huge`s track record.

It is also clear from the evidence that the plaintiffs had some reservations about accepting a Letter of Awareness from the first defendants instead of a corporate guarantee. Between June 1992 and August 1992, the parties held three meetings and at all three meetings, the plaintiffs` representatives asked for a corporate guarantee, despite this same request having been repeatedly turned down. Whatever their initial reservations, the plaintiffs eventually extended credit facilities to Huge on 6 August 1992 on the first defendants` terms. The plaintiffs now claimed that in doing so, they had placed great reliance on the first defendants` promise to issue the first Letter of Awareness to them containing those specific obligations. Similarly, the plaintiffs claimed that they would not have increased the credit facilities to Huge in October 1993 and August 1994 if the first defendants had not agreed to issue the second and third Letters of Awareness to them.

I am unable to accept the plaintiffs` submissions that the Letters of Awareness had featured significantly in their decisions to extend or to continue credit facilities to Huge or that they had placed such great reliance on the Letters. The plaintiffs forwarded the draft Letter of Awareness to the first defendants for their approval only ***after*** they had extended credit facilities to Huge on 6 August 1992. There were no negotiations between the parties as to the wording or content of the Letter ***prior*** to the extension of the facilities. The same thing happened when the credit facilities to Huge were subsequently increased in October 1993 and August 1994. On each occasion, the plaintiffs

met up with the first defendants for negotiations before actually increasing Huge`s facilities, yet there was no discussion on the content or wording of the fresh Letter of Awareness that was to be issued in support of the increased facilities. If the plaintiffs had viewed the Letters of Awareness as being important, they would surely have discussed the content of the Letters ***before*** actually extending or increasing facilities to Huge. If they had believed that the Letter of Awareness to be issued by the first defendants would contain legally binding obligations, it seems odd to me that they would be so indifferent in their attitude towards the content of those Letters. In sharp contrast, the plaintiffs had repeatedly broached the subject of a corporate guarantee even after having been repeatedly turned down.

Even after the actual extension or increase of credit facilities to Huge, no real negotiations ever took place between the parties as to the content and wording of the Letters of Awareness. On each occasion, the plaintiffs simply drew up a draft of the Letters according to their internal guidelines and forwarded the same to the first defendants for approval. Each time, the first defendants adopted the format substantially after amending a few words. These changes were always accepted by the plaintiffs without any comment. In the first Letter, the first defendants replaced the word `undertake` with the word `ensure`. In the second Letter, the words `shall immediately on demand` in cl 2 were changed to `shall endeavour`, and in the third Letter, the words `shall endeavour` in cl 2 were changed to `will endeavour`. It can hardly be said that the Letters of Awareness were the product of any real negotiations or compromise between the first defendants and the plaintiffs and any suggestion made by the plaintiffs to that effect would be an overstatement.

The fact that there were virtually no negotiations as to the wording and content of the Letters of Awareness indicates that these Letters were not intended to be legally binding. Otherwise, the plaintiffs and first defendants would surely have sought to secure their respective positions by paying close attention to the wording of the documents. It is unlikely that a public-listed company and a reputable international bank would be so casual in their treatment of documents which they had intended to contain important legal obligations. In their written submissions, the plaintiffs` counsel relied heavily on the case of **Banque Brussels Lambert SA v Australian National Industries Ltd** [1989] 21 NSWLR 502. However, that case is clearly distinguishable on its facts. In ***Banque Brussels*** , the plaintiffs` original draft of the letter of comfort in question underwent no less than seven revisions, showing clearly that there had been serious and protracted negotiations over the exact wording and terms of the Letter of Awareness, as each side sought to secure their respective positions. Moreover, the plaintiffs in Banque Brussels produced evidence in the form of correspondence, internal memoranda and records of negotiations, which showed that they had told the defendants that they wanted a `strong commitment` and that the defendants had acknowledged this. In contrast, there was no evidence whatsoever of such strong expressions of intention in our case in relation to any of the three Letters of Awareness.

I mentioned earlier that on each occasion, the first defendants only replaced one or two words in the original drafts of the Letters of Awareness that had been sent to them by the plaintiffs. I found that although only a few words were changed, the changes themselves were actually significant in the court`s construction of the parties` intentions. Unknown to the first defendants, the plaintiffs had a set of internal guidelines called their `Business Instruction Manual`, which graded Letters of Awareness in the following manner: Grade 1 indicated `a very strong letter of awareness containing covenants regarding financial assistance, management control and retention of shareholding`; Grade 2 indicated `a less strong Letter of Awareness which may include only two out of the three conditions in a Grade 1 Letter`; Grade 3 indicated `all other Letters of Awareness which are effectively no more than an acknowledgement that the facility had been granted`. Each time the plaintiffs forwarded a draft Letter of Awareness to the first defendants, they always sent a draft which complied with the sample `Grade 1` Letter of Awareness in their Business Instruction Manual. The first defendants then

made changes to the original drafts and the plaintiffs` internal memoranda showed that after the changes, the first Letter of Awareness could no longer be classified as a `Grade 1` Letter of Awareness. Instead, the plaintiffs classified it internally as a `Grade 2` Letter. Similarly, after the amendments made by the first defendants, the second and third Letters of Awareness were also considered to be `Grade 2` Letters of Awareness by the plaintiffs. Clearly, although the first defendants only changed one or two words in the plaintiffs` original drafts, these changes actually cut down the plaintiffs` legal rights as interpreted by the latter`s internal guidelines. Yet, the plaintiffs accepted the `Grade 2` Letters of Awareness without protest.

I was also influenced by the fact that the first defendants had refused from the outset to grant a corporate guarantee to the plaintiffs to secure the credit facilities to Huge. Counsel for the defendants argued that this fact alone showed that the plaintiffs must have known that the first defendants were not prepared to undertake any legal liability whatsoever for Huge`s outstandings and that the parties had clearly intended the Letter of Awareness to contain only moral obligations. In reply, the plaintiffs argued that it did not automatically follow from the fact that the first defendants had refused to issue a corporate guarantee in the plaintiffs` favour that all the subsequent Letters of Awareness had no legal effect. During her cross-examination, Linda Kan disagreed with the defendants` counsel that it was inconsistent to say that the Letters of Awareness were legally binding when they had already conceded that the first defendants had refused to grant a corporate guarantee. She pointed out, quite rightly, the differences between the liability of the defendants on a formal guarantee and the ease of enforcement of that liability on the one hand and the liability and attendant problems of enforcement under a Letter of Awareness on the other hand.

I agree with the plaintiffs insofar as they are stating the simple proposition that the mere fact that the first defendants had refused to give a formal guarantee did not automatically mean that there was no further scope for the possibility that contractually binding obligations could be enshrined in the Letter of Awareness that was subsequently issued. To that extent, their submissions are correct, for the first defendants` refusal to grant a corporate guarantee is only one factor to be considered in this case and not the sole determining factor that bridges the gap left by the parties` failure to state their intentions expressly. Nevertheless, I cannot agree with the plaintiffs when they go on further to argue that the Letters of Awareness had been understood by the parties as being `tantamount to a corporate guarantee`, and that the first defendants` preference to issue a Letter of Awareness instead of a corporate guarantee was only to avoid tax complications. On the contrary, I found that the first defendants` refusal to grant a corporate guarantee was consistent with the other circumstances of this case, so as to show clearly that the parties had intended the Letters of Awareness not to have any legal effect. I noted the fact that the plaintiffs were responsible for drawing up the original drafts of all three Letters of Awareness. The Letters were certainly not worded so as to be `tantamount to a corporate guarantee`. Moreover, although the plaintiffs could easily have included an express term stating that the Letter of Awareness in question was to have binding legal effect, they failed to do so. Since the Letter of Awareness dated 19 September 1994 was drafted by the plaintiffs and since the plaintiffs are now relying on this Letter, the contra proferentum rule applies against the plaintiffs if there is ambiguity in the wording of the Letter. The question is whether the words of the Letter, which are not in the form of an express contractual promise, are on the evidence to be treated as intended to have been such a promise. Having regard to the first defendants` prior refusal to provide a corporate guarantee and to the resort by the parties to what was referred to as a Letter of Awareness, it seems to me that there is sufficient ambiguity to apply the contra proferentum rule. Thus, the first defendants are entitled to rely on the fact that if the plaintiffs had required a legal promise as to the defendants` future policy, it was open to them as experienced bankers to draft the Letter of Awareness in those terms.

During the trial, counsel for each party referred to numerous internal documents belonging to the

other party, which included internal memoranda, board minutes, correspondence and internal audit reports, in order to show that the other party was guilty of inconsistency in their language and treatment of the Letters of Awareness throughout the years. For example, the plaintiffs` counsel referred to the minutes of a meeting of the first defendants` board on 4 February 1997, where the company secretary was minuted as saying that the first defendants could be liable under a Letter of Awareness that was issued to Banque Nationale de Paris. There were other instances when the first defendants` Board of Directors expressed concern over whether the company would be exposed to legal liability by the Letters of Awareness which had been issued. Under cross-examination, the first defendants` Chairman, Chee Keng Soon, admitted that sometime from 1994 onwards, the first defendants` Board of Directors had been concerned whether the Letters of Awareness could create legal exposure for the first defendants.

Similarly, counsel for the defendants pointed to various instances in 1997 when the plaintiffs` own officers had referred to the third Letter of Awareness as a `moral obligation`. Among other things, counsel for the defendants referred to the plaintiffs` REF (Relationship Evaluation Form) of 26 November 1997, which described the third Letter as a `moral obligation`. He also referred to an internal file note dated 9 December 1997 prepared by the plaintiffs` officer, Jean Leong, which again described the third Letter as imposing a `moral obligation`.

Having perused all the evidence as to the parties` subsequent conduct, I found that both the plaintiffs and the first defendants were guilty of subsequent shifts in tone. However, I did not feel that too much emphasis should be placed on this. All that the documents revealed was that both the plaintiffs and first defendants had, at times, been unsure about the effect of the Letters of Awareness. Bearing in mind the fact that the law on Letters of Awareness was not settled, the parties were probably influenced by legal advice along the way.

For the same reasons, I did not put too much significance in the parties` treatment of the Letters of Awareness when it came to audit practice. Indeed, I found that there was no standard auditing practice in this case with regard to the Letters of Awareness. On the one hand, it was an undisputed fact that at all material times, the first defendants` external auditors never reflected any of the Letters of Awareness issued to the plaintiffs as contingent liabilities in the first defendants` annual accounts. The plaintiffs themselves were aware of this fact throughout the years. On the other hand, some of the internal audit reports prepared by the first defendants` Internal Audit Department described the Letters of Awareness as exposing the company to contingent risks and reflected the Letters as `collateral` or `security` for loans given to the first defendants` subsidiaries. Moreover, the 1996 audited accounts of Huge also described the third Letter of Awareness issued by the first defendants to the plaintiffs as `a commitment and contingency`.

I will now turn to the text of the third Letter of Awareness. In construing the text of the Letter, I did not find it useful to engage in a minute and protracted examination of every single word or term used in the document. Instead, I looked at the general tone of the Letter of Awareness, bearing in mind the surrounding circumstances of the case. The plaintiffs submitted that they had always regarded the Letters of Awareness, including the third Letter, as `Grade 1` or `Grade 2` Letters, According to their Business Instruction Manual, `Grade 1` and `Grade 2` Letters of Awareness created legal relations. However, that was only their subjective belief and knowledge, since the first defendants were never privy to the contents of their Business Instruction Manual. All things considered, I found the third Letter to be drafted in language of deliberate equivocation, in keeping with a `gentleman`s agreement` where the issuer confirms that he will abide by his moral obligations. I was not convinced that experienced and prudent bankers would or should rely wholeheartedly on such a document as security. Clause 1, which was the ownership clause, did not expressly prohibit the first defendants from disposing of any part of the shareholding of Huge. It merely confirmed that the first defendants

would continue to maintain their 51% ownership of Huge and that they undertook to advise the plaintiffs of any decision being taken to dispose of any part of the shareholding of Huge. Clause 3 confirmed that the first defendants would not take any action which would result in Huge being unable to carry on its business or otherwise being unable to meet its obligations to the plaintiffs and that they undertook `to advise the plaintiffs of any circumstances which might affect the continuing operation of Huge`. In the light of the surrounding circumstances, and in the absence of clearer language, it is hardly conceivable that the first defendants were binding themselves to be legally obliged to promptly inform the plaintiffs of every commercial decision regarding Huge which they might be considering in the privacy of their Boardroom or to divulge sensitive information regarding Huge to the plaintiffs.

I also found cl 2 to be worded in a general and open-ended manner. The first part of cl 2 confirmed that the first defendants would cause Huge to be `operated and maintained in such a way as to be in a financial position to meet all its obligations from time to time` to the plaintiffs. There was no indication as to what exactly the first defendants were obliged to do. For example, would the first defendants be liable to the plaintiffs for the poor management of Huge, or alternatively, would the first defendants be liable to the plaintiffs if Huge made losses despite good management ? All considered, I found this part of the clause to be of such limited and ambiguous effect that it did not give rise to any substantial legal rights. The second part of cl 2 was clearer - it stated that should Huge be unable for any reason to meet its obligations, the first defendants would endeavour to either (a) make funds available to Huge sufficient to meet its obligations, or (b) to have funds made available to Huge by others in amounts sufficient to enable Huge to meet its obligations. The qualification of this part of cl 2 with the words `will endeavour` show that the first defendants were only stating that they would try to carry out what was stated there. In the light of the general tenor of the document, and the other surrounding circumstances, I saw this sentence as no more than an acknowledgement by the first defendants of their moral obligation to do their best to support Huge if the latter got into trouble.

On the facts of this case, I found that the parties did not intend to create legal relations in relation to the Letters of Awareness issued by the first defendants to the plaintiffs. The fact that the plaintiffs were receiving only moral assurance instead of a corporate guarantee had clearly been that part of the business transaction which the plaintiffs had not been entirely happy with. But they took the risk and extended credit facilities to Huge so as to achieve their main objective of establishing business relations with the first defendants. No doubt they consoled themselves with the thought that all would go well and that they would not need to rely on the Letters of Awareness. Of course, things did not work out as expected; and the court is left to construe the common intentions of the parties objectively. The factual background explains and fits in with why the plaintiffs drafted and agreed to proceed on a Letter of Awareness which, on its plain meaning, merely imposed vague obligations on the first defendants in relation to the liabilities of Huge. I therefore found against the plaintiffs on the first preliminary issue.

The compromise agreement

The next issue for the court`s consideration is whether there is a valid and binding compromise agreement between the plaintiffs and first defendants under which the first defendants undertook legal liability to ensure that Huge repay its debt. The plaintiffs allege that the compromise agreement was concluded on or around 4 June 1997. According to the plaintiffs, the first defendants` letter of 2 June 1997 was an offer to ensure that Huge repay its debt to the plaintiffs according to the repayment schedule set out in the letter. The plaintiffs claim that their subsequent letter on 4 June 1997 was effective acceptance of the offer. Although there was no definite promise by the plaintiffs

to forbear to sue Huge, the consideration pleaded in this case was the plaintiffs` actual act of forbearing to sue Huge for the outstandings, which was valid consideration in law as was illustrated in the cases of ***Alliance Bank v Broom*** (1864) 2 Drew & Sm 289; 62 ER 631 and **Brikom Investments Ltd v Carr** [1979] QB 467, 490.

One of the defences to this part of the plaintiffs` claims is that the second defendant had no authority, either actual or apparent, to make the alleged offer on behalf of the first defendants, nor the authority to commit the first defendants to the alleged compromise agreement. I will deal with the question of the second defendant`s authority first, since if he is found to lack the requisite authority, then the entire issue of the alleged compromise agreement can be disposed with without having to consider whether the compromise agreement existed.

It is trite law that there can be no actual authority, whether express or implied, if the agent exceeds the express limits placed on his authority, or when he does something which his principal has expressly prohibited. There were such express prohibitions on the second defendant`s authority so as to negate the possibility that he had any actual authority, whether express or implied. The first defendants` 1997 policy manual sets out expressly that as the General Manager of Finance and Administration, the second defendant`s authority to approve of any payment was limited to $ 250,000. The position was different prior to August 1996. Between June 1990 and August 1996, the second defendant, as General Manager of the first defendants, had express authority to authorise transfers of over $ 250,000 to Huge under a $5m line of credit which had been extended by the first defendants to Huge. However, his authority in relation to the $5m line of credit was expressly revoked on or around 19 August 1996, when the management of the first defendants was expressly instructed to stop all further remittance of funds to Huge until the Board of Directors` further instructions. Thus, the second defendant clearly did not have actual authority to commit the first defendants to the alleged compromise agreement in June 1997 in the absence of approval from the Board of Directors.

That is, however, not the end of the matter, for the second defendant may still be found to have had apparent authority. As Diplock LJ put it in the English case of **Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal)** [1964] 2 QB 480:

> *An `apparent` or `ostensible` authority is a legal relationship between the principal and the contractor, created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority so as to render the principal liable to perform any obligations imposed upon him by such contract.`*

Under the doctrine of apparent authority, a principal who has placed express restrictions on the actual authority of its agent can nevertheless be bound by the prohibited acts of the agent in relation to a third party if there has been `holding out` or some representation made by the principal to the third party as to the agent`s authority, inducing the third party to rely on this representation to change his position. In such a situation, the principal is estopped in law from denying the agency.

As a general rule, for a principal to be bound under the doctrine of apparent authority, the representation as to the agent`s authority must emanate from the principal himself - ***Freeman & Lockyer v Buckhurst Park Properties*** . In relation to corporations, where representations can only be made through agents, the translation of the general rule has produced the consequence that in order for a corporation to be bound under the doctrine of apparent authority, the representation as to the authority of the agent must be made by some other intermediate agent within the corporate

structure, who has actual authority to do the very act that he represents the other person as having authority to do. The decision of the English House of Lords in the case of **British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd** [1983] BCLC 78 illustrates this rule. Sun Life was an insurance and mortgage company. In running its operations in the United Kingdom, Sun Life adopted a type of organisation well known and similar to that of other insurance companies - it divided the country into six regions, and appointed a manager in charge of each region. In turn, each region had about six or seven branches, each staffed with a branch manger and one or more unit managers. By their contracts of service, neither the regional managers, branch managers nor the unit managers had the authority to give final approval to applications for life insurance or mortgages. The power to do that was expressly reserved to authorised offices at Sun Life`s headquarters. In the course of operations, a unit manager from Sun Life`s City Branch executed undertakings to pay moneys to the plaintiff bank. The first such undertaking was signed on a form which stated that the form had to be executed on behalf of Sun Life by its duly authorised representatives. Uneasy about the fact that the form was only signed by a unit manager, the plaintiff bank`s manager wrote a letter, addressed to the `General Manager of Sun Life` at Sun Life`s City Branch, asking for a confirmation of the respective unit manager`s authority to sign the form on behalf of Sun Life. In reality, there was no such functionary as a `General Manager` at the branch. Instead, the branch manager of the City branch, holding himself out as the `General Manager`, replied to the plaintiff bank confirming that the unit manager had the authority to sign the form on behalf of Sun Life. On the basis of this confirmation, the plaintiff bank then accepted two more undertakings executed by the respective unit manager. The House of Lords held that Sun Life was not bound by such undertakings. The unit manager who actually signed the undertakings did not have actual authority to do so on behalf of Sun Life. He also did not have apparent authority to sign the undertakings just by virtue of his position as unit manager. Although the branch manager represented to the plaintiff bank that the unit manager had actual authority to sign the undertakings on behalf of Sun Life, the branch manager himself did not have actual authority to sign the undertakings himself and therefore had no authority to make such a representation about the unit manager.

Similarly, in ***Freeman & Lockyer v Buckhurst Park Properties Ltd*** , the defendant company was held liable under contracts which had been concluded by one of its directors with the plaintiffs, even though the director in question was not formally appointed as a Managing Director and even though only the Managing Director or the Board of Directors could conclude such contracts. It was held that the company`s board of directors, who had actual authority under its constitution as a board to manage the company`s business, and who had permitted one of their numbers to run the company as the de facto Managing Director, had thereby represented to all persons dealing with him that he had authority to enter on behalf of the company into contracts of a kind which a Managing Director usually enters into in the ordinary course of business.

Unlike in the case of ***Freeman & Lockyear v Buckhurst Park Properties*** , there is no question in our present case of the second defendant ever acting as de facto Managing Director for the first defendants. Although the second defendant had dealt with the plaintiffs on behalf of the first defendants all along, he had done so in his capacity as the General Manager of Finance and Administration. In law, the ability to commit the first defendants to the compromise agreement was not an act which fell within the authority that a General Manager would usually possess. Thus, in law, the second defendant did not have apparent authority to commit the first defendants to the alleged compromise agreement ***simply by virtue*** of having dealt with the plaintiffs in his position as General Manager of the first defendants. In order to establish that the second defendant had apparent authority, the plaintiffs must go further than merely asserting that they had dealt with the second defendant all along.

The plaintiffs allege that the fourth defendant had represented to their representative, Kan, during a

telephone conversation on 12 May 1997 that the second defendant had authority to make the offer and commit the first defendants to the alleged compromise agreement. Even if such a representation was made, the first defendants would not be bound under the doctrine of apparent authority since the fourth defendant, being only a legal manager, did not have actual authority to commit the first defendants to the alleged compromise agreement and could not effectively represent that the second defendant had authority to do so. Only the Managing Director and the Board of Directors of the first defendants had actual authority to commit the first defendants to the alleged compromise agreement, yet neither the Board nor the Managing Director had made any representation to the plaintiffs that the second defendant had authority to commit the first defendants to the alleged compromise agreement. Where then did the `holding out` or `representation` as to the second defendant`s authority emanate from? I found that the representation which the plaintiffs claim to have relied upon was the letter of 2 June 1997 itself, which had been sent by the second defendant himself. This is borne out by the evidence of the plaintiffs` own witnesses - during cross-examination, Kan stressed repeatedly that the second defendant, being the General Manager of Finance, should know his authority, and therefore she saw no reason to question his authority when she received his letter of 2 June 1997.

Under the general rule, where the third party knows that an agent would not normally have authority to commit his principal to a transaction, the third party is usually put on enquiry as to the actual limitation on the agent`s authority if either (a) the agent represents that he has authority (**A-G for Ceylon v Silva** [1953] AC 461), or (b) the agent notifies the third party that his principal has given approval of the transaction (**Armagas Ltd v Mundogas SA** [1986] AC 717). In both situations, the principal would not be bound under the doctrine of apparent authority. In the case of ***Armagas Ltd v Mundogas*** , the third party knew that the agent had no general authority to conclude the charterparty in question on behalf of his principal. The English House of Lords affirmed the Court of Appeal`s decision that, with this knowledge, the third party could not rely on the agent`s own representation that approval of the transaction had been given by his principal, even though the principal had employed the agent to a senior position in its organisation. An agent who lacked apparent authority to enter into a transaction did not possess apparent authority to notify or communicate to the third party that approval of the transaction had been given by his principal.

There is, however, a narrow exception to the general rule stated above: if the company has expressly authorised the agent to make representations on its behalf, then any representation made by that agent that he himself has authority to do an act is a good representation for the purposes of conferring apparent authority on the agent to do that act, even if he has been expressly prohibited to do it, and even if it is not something that agents in his position usually have power to do. The leading authorities on this exception are the two English cases of **The Raffaella; Soplex Wholesale Supplies Ltd and PS Refson & Co Ltd v Egyptian International Foreign Trade Co** [1985] 2 Lloyd`s Rep 36 and **First Energy (UK) Ltd v Hungarian International Bank Ltd** [1993] 2 Lloyd`s Rep 194.

In the case of ***The Rafaella*** , the plaintiffs sued the defendant bank on a letter of guarantee signed solely by the bank`s credit manager, Mr Booth. At the trial, it was common ground that, under the bank`s internal rules, Mr Booth did not have actual authority to bind the bank to the guarantee on his sole signature. At the time he signed the guarantee, Mr Booth had assured the plaintiff`s representative that one signature was sufficient to bind the bank. The trial judge, and the Court of Appeal, held that Mr Booth had apparent authority to bind the bank to the guarantee by virtue of his designation as credit manager and because of what the bank had permitted him to do in the past. In his judgment, Browne Wilkinson LJ stated:

> *It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the*

> *transaction cannot hold himself out as having authority to enter into the transaction so as to affect the principal`s position. But suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied upon as part of the holding out of Y by the company ? By parity of reasoning,* ***if a company confers actual or apparent authority on A to make representations on the company`s behalf but no actual authority on A to enter into the specific transaction, why should a representation made by A as to his authority not be capable of being relied on as one of the acts of holding out? There is substantial authority that it can be ...****If, as I am inclined to think, an agent with authority to make representations can make a representation that he has authority to enter into a transaction, then the judge was entitled to hold, as he did, that Mr Booth, as the representative of Refson in charge of the transaction, had implied or apparent authority to make the representation that only one signature was required and that this representation was a relevant consideration in deciding whether Refson had held out Mr Booth as having authority to sign the undertaking. [Emphasis mine.]*

Similarly, in ***First Energy (UK) Ltd v Hungarian International Bank Ltd*** , the English Court of Appeal held that in certain circumstances, an agent had ***apparent authority to communicate his principal`s approval for him to enter into a particular transaction on behalf of the principal*** , even though the third party was aware that the agent did not normally have authority to enter into such transactions. In that case, the agent (J) was the senior manager of the regional bank office of the defendant bank (HIB). The plaintiffs (First Energy) approached J to enquire about long term finance facilities and were informed by him that he had no authority to sanction finance facilities. Whilst negotiations continued over the long-term facilities, First Energy approached J over finance for certain specific projects. J wrote to First Energy offering finance facilities for these projects and First Energy accepted that offer. But HIB refused to supply finance for the specific projects, arguing that J had no authority to make an offer of such facilities. Upholding the judgment of the trial judge, the Court of Appeal held that J had no actual or apparent authority to sanction or enter into the transaction himself, but that he did have apparent authority to communicate that the necessary approval had been obtained from HIB for him to make the offer, and that J`s letter of offer contained a representation to that effect. The Court of Appeal pointed out that such apparent authority arose from HIB having placed J in the position of senior manager. As senior manager, J had usual authority to sign and send letters on behalf of HIB and therefore had apparent authority to represent by letter that he had obtained authorisation from HIB to make an offer on their behalf. The Court of Appeal stressed that their judgment was consistent with the reasonable expectations of the parties, and that, in the circumstances, it was unrealistic to have expected First Energy to have checked with HIB`s Head Office in London as to whether an employee as senior as J had obtained necessary approval to make the offer. The Court of Appeal was able to distinguish ***Armagas Ltd v Mundogas SA*** , for in that case, Lord Keith had not said as a matter of law that an apparent authority to communicate approval could never arise where there was no authority in the agent on his own to enter into the transaction.

I found that the facts of the present case fall squarely within the exception embodied in ***First Energy (UK) v Hungarian International Bank SA*** . In the present case, the second defendant had been placed by the first defendants in the position of General Manager of Finance and Administration. As General Manager, the second defendant had usual authority to sign and send letters on behalf of the first defendants to the plaintiffs. Moreover, the first defendants had acquiesced to the second defendant`s past conduct of making representations to the plaintiffs on behalf of the first defendants in relation to matters concerning Huge`s credit facilities. Thus, the second defendant clearly had

apparent authority to communicate that the necessary authority and approval had been obtained from the first defendants for him to make any offer which might be contained in the letter of 2 June 1997. In my judgment, the second defendant`s letter of 2 June 1997 was representation to that effect, and this representation was effective to bind the first defendants under the doctrine of apparent authority.

In summary, I found that even though the second defendant did not have actual authority to commit the first defendants to the alleged compromise agreement, he had the apparent authority to do so. Thus, I must move on to consider whether the letter of 2 June 1997 contained an offer that the first defendants would undertake legal liability to ensure that Huge repay its debt in accordance with the repayment schedule proposed therein, and if so, whether a valid and binding compromise agreement resulted between the first defendants and the plaintiffs. When considering the letter of 2 June 1997, it is important to bear in mind the fact that the first defendants were in no way admitting any pre-existing liability to the plaintiffs by sending the letter of 2 June 1997, for the letter was headed `without prejudice` and stated expressly that the proposal contained therein was made `strictly without admission of any liability` on the first defendants` part whatsoever. The question for the court is whether the first defendants became legally liable to the plaintiffs by virtue of what was contained in that letter itself.

In considering the letter of 2 June 1997, I adopted a global view of matters. It follows from my findings in relation to the Letters of Awareness that, all along, the parties had proceeded on the basis that the first defendants did not owe any legal liability to the plaintiffs in relation to the credit facilities granted to Huge, and that they were only morally obliged to do what was set out in the Letters of Awareness. The evidence shows that at all material times prior to June 1997, the first defendants did not have any intention of assuming legal liability in respect of the banking facilities extended by the plaintiffs to Huge. A few months prior to the exchange of letters in June 1997, the second defendant had made it clear to the plaintiffs` representatives at the meeting of 25 February 1997 that the third Letter of Awareness was only a `moral obligation`. He also made it abundantly clear that the first defendants would not guarantee Huge`s outstandings to the plaintiffs. By early May 1997, it became apparent that the first defendants were not even prepared to execute the revised Letter of Awareness which had been drawn up by the plaintiffs, although the plaintiffs were about to serve a letter of demand on Huge.

Such were the facts leading up to the letter of 2 June 1997. Despite these surrounding circumstances, the plaintiffs contend that there was a sudden change of heart in the first defendants around 12 May 1997, which was the dateline stipulated in the letter of demand dated 6 May 1997 for Huge to repay its outstandings to the plaintiffs. According to the plaintiffs, the first defendants, faced with the imminent collapse of Huge, decided to communicate their willingness to undertake a legal commitment in relation to Huge`s debt on 12 May 1997 and this was subsequently followed up by the letter of 2 June 1997. I was unable to agree with this. There was no evidence to support the allegation that such radical change of heart had occurred or to negate all the surrounding circumstances. The first defendants had known for some time that Huge was facing severe financial difficulties and threatened collapse. The first defendants` Board had also known for sometime the potential impact of Huge`s collapse on the first defendants. Yet, the first defendants had adamantly refused to undertake any legal liability whatsoever in relation to Huge`s debts to the plaintiffs. They even refused to issue the revised Letter of Awareness in May 1997. They stuck to their position that they were morally obliged not to `walk away` from Huge and to attempt to find a solution for Huge`s problems, but had always maintained that their obligations ended there. In my judgment, the letter of 2 June 1997 was sent on the same premise - the first defendants were merely restating their moral obligations. I did not find the fact that the letter was accompanied by a cheque of $ 38,437.50 to be inconsistent with this view.

Indeed, I found that the evidence supported the first defendants` contention that they never had any intention to make an offer to undertake legal liability when they sent the letter of 2 June 1997. Nevertheless, the court is not just concerned with the first defendants` subjective intentions. The objective test of agreement applies, and the alleged offeror may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention. In short, even though the first defendants did not intend to make an offer when they sent out the letter of 2 June 1997, the letter would constitute a valid offer if, objectively speaking, it appeared to be one.

Having applied this objective test, I found that the letter of 2 June 1997 would not have induced a reasonable person to believe that the first defendants intended to be bound by the words in the letter. Apart from the surrounding circumstances which I have already mentioned, the actual text of the letter of 2 June 1997 also indicated that it was merely a restatement of the first defendants` moral obligations. On the face of the letter, there was no consideration expressed. Instead, it expressly stated that the proposal contained therein was being made `as a gesture of goodwill and for continued business relations`. Furthermore, instead of saying that the first defendants would ensure that Huge comply with the repayment schedule, the letter merely stated that the first defendants `were prepared to ensure` that this happened.

Even if I am wrong in the above analysis and it is found that the letter of 2 June 1997 would have induced a reasonable person to believe that the first defendants intended to be bound by the contents of the letter, I found that the plaintiffs lacked the requisite state of mind to have relied on any such `apparent offer` emanating from the first defendants. In the ***Law of Contract*** (9th Ed), Treitel considers the circumstances in which an alleged offeror (`A`), who had no requisite intention to make an offer, nevertheless becomes bound by his `apparent` offer. He states (at pp 8-9):

> *Whether A is actually bound on acceptance of his apparent offer depends on the state of mind of the alleged offeree (B); to this extent, the test is not purely objective. With regard to B`s state of mind, there are three possibilities. First, B actually believes that A intends to be bound: here the objective test is satisfied so that B can hold A to his apparent offer even though A did not, subjectively, have the requisite intention. The general view is that there is no further requirement that A must also be aware of B`s state of mind. Secondly, B knows that, in spite of the objective appearance, A does not have the requisite intention: here A is not bound; the objective test dos not apply in favour of B as he knows the truth about A`s actual intention. Thirdly, B has simply not formed any view about A`s intention, so that B neither believes that A has the requisite intention nor knows that A does not have this intention: this situation has given rise to a conflict of judicial opinion. One view is that A is not bound: in other words, the objective test is satisfied only if A`s conduct is such as to induce a reasonable person to believe that A had the requisite intention and if B actually held that belief. The opposing view is that (in our third situation) A is bound: in other words, the objective test is satisfied if A`s conduct is such as to induce a reasonable person to believe that A had the requisite intention so long as B does not actually know that A does not have any such intention. This latter view no doubt facilitates proof of agreement, but it is hard to see why B should be protected in the situation to which it refers. Where B has no positive belief in A`s (apparent) intention to be bound, he cannot be prejudiced by acting in reliance on it; and the purpose of the objective test is simply to protect B from the risk of suffering such prejudice. The test embodies a principle of convenience; it is not based on any inherent superiority of objective over subjective criteria. It is therefore submitted that the objective test should not apply to our third situation since in it B`s state of mind is such that there is no risk of his suffering any prejudice as a result of the objective appearance of A`s*

intention.

In short, the first defendants will not be bound by the letter of 2 June 1997 if it is shown that the plaintiffs either knew that the first defendants did not intend for the letter to be an offer, or if the plaintiffs never addressed their minds to the question of the first defendants` intention. It cannot be denied that the plaintiffs knew that the first defendants` position thus far was that they were only under moral obligations in relation to Huge`s debts. The plaintiffs also knew that the first defendants had adamantly refused to undertake any legal liability in relation to Huge`s debts, whether in the form of a corporate guarantee, a revised Letter of Awareness or otherwise. There was no reason for the plaintiffs to suppose that the first defendants would suddenly undertake legal liability to ensure that Huge repay a debt of $6m within three short months. Moreover, during cross-examination, Linda Kan testified that the words `gesture of goodwill` contained in the letter of 2 June 1997 had meant nothing to her, and that the fact that that letter was headed `without prejudice` had also failed to signify anything to her. Either she had known that the letter was only a restatement of their willingness to carry out their moral duty, or she had not addressed her mind to the first defendants` intention at all.

Extrinsic evidence in the form of the subsequent conduct of the parties is admissible for the purposes of determining whether the letters of 2 June 1997 and 4 June 1997 constituted valid offer and acceptance. Several aspects about the plaintiffs` subsequent conduct led me to the conclusion that no compromise agreement had been reached in June 1997. After the exchange of letters on 2 June 1997 and 4 June 1997, the plaintiffs sent two more letters in or around June and July 1997, asking the first defendants for payment under the repayment schedule. After this, the subject of the repayment proposal sank completely into obscurity. For nearly two years thereafter, the plaintiffs failed to mention to the first defendants that they were liable under any compromise agreement. There was no internal record of any discussion by the plaintiffs` Credit Control officers, either among themselves or with their solicitors, of bringing any legal action against the first defendants under any compromise agreement. Similarly, there was no reference to either the letters of June 1997 or a compromise agreement in the plaintiffs` solicitors` demand letters of 22 July 1998 and 18 September 1998 to the first defendants. The existence of the alleged compromise agreement only arose when the plaintiffs amended their statement of claim on 15 July 1999 to include the matter as an alternative claim. Since the plaintiffs withdrew the evidence of Jean Leong and Christopher Yip, the court did not have the benefit of hearing their explanations as to this curious state of affairs. In the light of the circumstances of the case, I found the only viable explanation to be that the plaintiffs themselves had never treated the first defendants` letter of 2 June 1997 as any offer to undertake legal liability. I found that there was no acceptance by the plaintiffs of any offer from the first defendants to undertake legal liability to ensure that Huge repay its debt according to the proposed repayment schedule, and no compromise agreement had been concluded between the parties in June 1997.

The oral warranties

The final issue to be dealt with is the plaintiffs` allegations that the second, third and fourth defendants had made various oral warranties to them.

In relation to the second and third defendants, the plaintiffs pleaded that the oral warranties had been made on four separate occasions: firstly, by the second defendant at the meeting of 25 February 1997; secondly, in or around June and July 1997 during a telephone conversation between the plaintiffs` Mr Ronnie Chan and the third defendant; thirdly, on or around 6 August 1997 at a

meeting between Ronnie Chan, Jean Leong and the second and third defendants; fourthly, on or around 7 August 1997 at a meeting between Ronnie Chan, Jean Leong and the second and third defendants. Apart from the meeting of 25 February 1997, all the other allegations can be dismissed outright, since there was no evidence at all to support these allegations. The evidence of Jean Leong and Christopher Yip (whose affidavit of evidence in chief exhibited the evidence of Ronnie Chan) was withdrawn by the plaintiffs and none of the documents given in discovery evidenced the alleged oral warranties on those occasions.

As for the meeting on 25 February 1997, in the absence of the evidence of Jean Leong and Ronnie Chan, the plaintiffs can only rely on the memory and evidence of Linda Kan and Goh Yew Chai, who were present at the meeting. Neither Linda Kan nor Goh Yew Chai made any references to the alleged oral warranties made by the second defendant in their affidavits of evidence in chief. Furthermore, Linda Kan testified under cross-examination that she did not recall any such warranty having been made by the second defendant at the meeting of 25 February 1997. There is also a complete lack of written record of the alleged oral warranties made during the meeting of 25 February 1997. Since there is no evidence as to what was actually warranted, the plaintiffs have failed to prove this aspect of their case.

Finally, there is also the allegation that the fourth defendant had made an oral warranty to the plaintiffs` representative Linda Kan during their telephone conversation on 12 May 1997. Apparently, the fourth defendant had warranted that the second defendant had the requisite authority to make the alleged offer of a compromise agreement on behalf of the first defendants, and to commit the first defendants to the alleged compromise agreement. I have said that the letter of 2 June 1997 was not an offer by the first defendants to undertake legal liability under a compromise agreement. I also found that the fourth defendant was merely informing Linda Kan about the contents of the repayment schedule and conveying the first defendants` expression of their attempts to fulfil their moral obligations. She had made no oral warranty as to anyone`s authority. Thus, I also dismissed the plaintiffs` claim against the fourth defendant.

The plaintiffs therefore failed in all the preliminary issues before me. Accordingly, their claim against each of the four defendants was dismissed with costs.

Outcome:

Plaintiffs` claim dismissed.