

O N A P P E A L

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

B E T W E E N :

EFFIE ASHWORTH

(Defendant)
Appellant

- and -

10 STANDARD CHARTERED BANK (ISLE OF
MAN) LIMITED (formerly Julian S.
Hodge Bank (Isle of Man) Limited)

(Plaintiff)
RespondentC A S E F O R T H E A P P E L L A N T

1. This is an appeal from the Judgment of the Staff of Government Division of the High Court of Justice of the Isle of Man (His Honour Deemster Luft and His Honour I.D.L. Glidewell Q.C. Judge of Appeal) dated the 27th April 1979 dismissing the Appellant's appeal from the Judgment of His Honour Deemster Eason of the 23rd February 1978 ordering payment by the Appellant as guarantor of three sums of £10,000, £10,000 and £25,000 to the Respondent, and interest and costs.

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2. The Appellant in 1974 was an elderly widow aged 82 years. She lived with her son Harry Ashworth ("Harry"). Harry held 7,499 out of the issued 7,500 shares in a private company, Ashworth Transport Limited ("Transport"), and the Appellant held the odd share. Harry and the Appellant were the sole directors of Transport. Harry also held 1,002 out of the issued 2,000 shares in another private company Ashworth International Limited ("International"). Transport held 3 shares in International. The Appellant had no interest in International save through her holding of 1 share in Transport. The Appellant was competent to manage her own affairs, but in respect of the two companies, the Appellant relied on her son and trusted him implicitly and left their affairs to him entirely.

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3. The Respondent were the bankers of the Appellant and also of Transport and International. The Respondent allowed overdraft facilities to International and Transport, but required of Harry that he obtain the guarantees of the Appellant. Harry in pursuance of such requirement obtained the signature of the Appellant to three guarantees which are the subject of these proceedings. The guarantees were as follows:-

p.111 (1) dated the 20th March 1974 ("the 1974 Guarantee") for £10,000 in respect of an advance to Transport; 10

p.115 (2) dated the 3rd March 1975 ("the 1975 Guarantee") for £10,000 in respect of an advance to International;

p.119 (3) dated the 14th June 1976 ("the 1976 Guarantee") for £25,000 in respect of an advance to International.

4. On the occasion of the giving of each guarantee, Mr. Smith, an officer of the Respondent, explained to the Appellant the nature of the document and the liability that might follow, and the Appellant asked no questions. On the occasion of her signature to the 1976 Guarantee, the Appellant wrote on the guarantee that, whilst she had not taken legal advice, she fully understood the nature of the liability incurred. On the occasion of execution of the 1975 and 1976 Guarantees Harry was present at the interview and witnessed the Appellant's signature. 20 30

5. Only one set of accounts were produced of International and these were for the year ended 31st March 1973 and produced by June 1976. The last accounts of Transport prior to the 1976 Guarantee were for the year ended 31st December 1972 and were prepared and signed in July 1973. These showed a net profit of £7,561. In March 1975, Transport owed to the Respondent £7,000 and International owed to the Respondent £4,000. Thereafter the debts rapidly rose, and in December 1975 Transport owed to the Respondent £60,000 and International owed to the Respondent £15,600. In June 1976, Transport owed the Respondent £72,600 and International owed to the Respondent £33,700. By that date, the Respondent had returned 5 cheques of International marked "Refer to Drawer" and these were later paid on representation. Also the Respondent had requested of both companies information regarding trading, but no satisfactory information had been forthcoming. The Respondent did not disclose to 40 50

10 the Appellant at any time that any cheque had been returned, anything about the absence of up to date accounts or the failure to supply satisfactory information or advise the Appellant to obtain independent advice. His Honour Deemster Eason held that at the date of the 1976 Guarantee the Respondent did not think it highly probable that the Companies were insolvent or would fail and indeed thereafter made further advances, but in fact the Respondent appointed a receiver of both Companies within 4 months.

6. The Respondent commenced proceedings in the Summary Division of the High Court of Justice of the Isle of Man claiming payment of the sums of £10,000, £10,000 and £25,000 under the three Guarantees together with interest and costs. By a Judgment dated the 23rd February 1978, His Honour Deemster Eason gave judgment for the Respondent.

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20 7. The Appellant lodged an Appeal on the Staff of Government Division of Her Majesty's High Court of Justice of the Isle of Man, who dismissed the appeal on the 27th April 1979 and refused leave to appeal to Her Majesty in Council.

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8. It is the contention of the Appellant that in the circumstances herein set forth:

- 30 (1) there was at the date of the execution of each of the Guarantees a fiduciary relationship or relationship of trust and confidence between Harry and the Appellant;
- (2) the Appellant executed the Guarantees by reason of the existence of such relationship;
- (3) the Respondent used Harry as its instrument or agent to obtain the Guarantees and the advantage thereby obtained of the trust and confidence reposed in Harry by the Appellant;
- 40 (4) the Respondent as the Appellant's bankers at all times owed to her a duty of care, a duty to advise and protect her from entering into improvident or disadvantageous transactions and a duty not to let such duty and the Bank's self-interest to be in conflict;
- (5) Harry and the Respondent at the time of execution of the Guarantees were under a fiduciary duty and a duty of care to the Appellant before obtaining her signature to

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the Guarantees (so as to ensure (a) that her decision should be that of an independent and informed judgment and made after full and free thought; (b) that there should be no conflict between their self-interest and their duty to the Appellant and (c) that no advantage was taken of the Appellant) (i) to disclose to her and/or her advisers the information possessed by the Respondent regarding the financial position of the Companies (being information which must be relevant and at least potentially disquieting to a guarantor); and (ii) to advise her to obtain legal and/or other independent advice in particular whether to execute the Guarantees before committing herself to the far-reaching liabilities thereunder;

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- (6) by reason of their default in discharging such duty when obtaining the signature of the Appellant and the consequent failure on the part of the Appellant to receive such information or advice, the Respondent is precluded from enforcing the Guarantees.

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9. His Honour Deemster Eason and the Staff of Government rejected these contentions, holding that in the absence of proof of actual undue influence on the part of Harry over the Appellant and knowledge of such undue influence on the part of the Respondent no such duty existed on the part of the Respondent. On the 27th November 1980 Your Majesty in Council granted special leave to appeal.

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10. The Appellant respectfully submits that the judgments of His Honour Deemster Eason and the Staff of Government were wrong and ought to be reversed, and that the appeal ought to be allowed with costs for the following (amongst other)

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- (1) BECAUSE the Respondent was at the dates of execution of the Guarantees under fiduciary duties and duties of care to the Appellant;
- (2) BECAUSE the Respondent obtained the execution of the Guarantees by the Appellant in breach of such duties;
- (3) BECAUSE it is unconscionable in the circumstances that the Respondent should enforce the Guarantees.

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GAVIN LIGHTMAN

M. MORONEY

IN THE PRIVY COUNCIL

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CASE FOR THE APPELLANT

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