

4. BANKING LAW

POH Chu Chai

LLB(University of Singapore), LLM, LLD (London);

Advocate and Solicitor (Singapore);

Associate Professor, Faculty of Law, National University of Singapore.

Banker and customer

4.1 When a bank is confronted with conflicting claims over a bank account, it is entitled by way of an interpleader to have the ownership of the account determined by the courts. In *Australia and New Zealand Banking Group Ltd v Ding Pei Chai* [2004] 3 SLR 489, the Australia and New Zealand Banking Group Limited (“ANZ Bank”) issued an interpleader summons after it received conflicting instructions from the parties controlling an Asian Currency Unit (“ACU”) account. Belinda Ang Saw Ean J granted the relief after reviewing the evidence presented by the parties. The three key persons interested in the account, Ding Pei Chai (“Ding”), Phua Swee Khiang (“Phua”) and Lee Wan Hoi (“Lee”) were business associates who came together to invest and develop certain properties in Melbourne, Australia. Part of the proceeds from the sale of the properties was deposited into an ACU account kept in the name of Gracedale Technology Limited (“Gracedale”), a British Virgin Islands company. The interests in the account were represented by two groups. The account required two signatories, with one signatory coming from each of the groups. In Group A, the signatories were Lee and his wife, Cheng Wai Yong (“Cheng”) and in Group B, the signatories were Phua and Soh Yoke Mui, Ding’s nominee. The bank later received conflicting instructions from Ding and Phua and Lee and Cheng as the persons authorised to operate the account. Touching on the issues raised by the parties, Ang J at [3] said:

Seen in this light, the single question for determination from the point of view of ANZ Bank is: who is lawfully authorised to give instructions to the bank on behalf of Gracedale? In answering this single question, I have to consider whether or not Lee agreed to cede control of Gracedale and the ACU account to Ding and Phua. If the answer is yes, then there is the question of whether or not the issuing of additional bearer shares and the resolution dated 1 May 2002, contravened the articles of association of Gracedale or the laws of the British Virgin Islands or both. If the answer is no, it follows that the original mandate to ANZ Bank continues to apply.

4.2 After reviewing the evidence Ang J made the following order at [61]:

In view of my finding that there was an agreement to entrust control of Gracedale and the ACU account to Ding and Phua, I am accordingly satisfied that the just thing to do in the circumstances of this case is to make the following orders:

- (a) The moneys in the ACU deposit account no 468488 are to be retained in the account until further order.
- (b) Both parties are to have general liberty to apply in connection with the order made pursuant to this judgment.

Negotiable instruments

Right to sue

4.3 The most valuable right a holder of a negotiable instrument has is the right to bring an action on the instrument in his own name. In an action based on a negotiable instrument, the courts will in practice give summary judgment to the plaintiff unless the defendant is able to raise a defence impinging directly on the contract relating to the instrument. Section 30(2) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed) makes a *prima facie* presumption that every holder of a bill of exchange is a holder in due course. This *prima facie* title is sufficient to allow a holder of the instrument to successfully bring an action on the instrument unless there is a defect in the title to the instrument. There is no need for a holder to assert that he is a holder in due course if no defect in title to the instrument is put in issue. However, in *Sutanto Henny v Suriani Tani* [2004] SGHC 7, Belinda Ang Saw Ean J decided, *inter alia*, that there was nothing in the Bills of Exchange Act to preclude the payee of a cheque from asserting that he was a holder in due course of the cheque. The plaintiff granted loans amounting to \$670,000 to the first defendant, Suriani Tani (“Suriani”). The second defendant was the owner of a sole proprietorship, known as Global Standard Marketing (“Global”). As partial repayment of the plaintiff’s loans, Suriani gave the plaintiff five cheques. Two cheques, totalling \$150,000, were drawn by Suriani on his bank account. The other three cheques for sums totalling \$515,000 were post-dated and drawn on Global’s account. Suriani was an authorised signatory of Global’s bank account. The second defendant had the plaintiff’s claim struck out on the grounds that it disclosed no reasonable cause of action, was frivolous and vexatious and an abuse of process. He relied on two main grounds. First, that he was not the drawer of the three cheques as he was not the signatory. Second, there was no consideration for the cheques as he did not borrow money from the plaintiff. The plaintiff’s appeal was

allowed by the court on the ground that Suriani was an authorised signatory of Global's account and this fact was not challenged by the second defendant. The court further decided that there was sufficient consideration for the cheques arising from the plaintiff's forbearance to sue on the post-dated cheque. Ang J said at [14]:

When a cheque has been post-dated, in the absence of express evidence, it is possible to imply a promise to forbear from claiming the debt from the drawer until the date of the post-dated cheque. That forbearance is sufficient consideration.

4.4 The court went on to find that the plaintiff was a holder in due course of the cheques. Ang J cited the *dictum* of Fletcher Moulton LJ in *Lloyd's Bank, Limited v Cooke* [1907] 1 KB 794 at 807–808:

It is suggested, however, that these conclusions are negated by the language of s. 29, sub-s. 1, which states the conditions under which a person is a "holder in due course." I can find nothing in the language of that subsection which throws any doubt on the view that "holder in due course" would include a payee who has given value in good faith, unless we are to construe the word "negotiated" as being merely equivalent to "indorsed". But, when the definition of "negotiation" given by s. 31, sub-s. 1, is looked at, it appears clear that the Legislature intended to make it apply also to the original operation of transferring the bill to the payee. It lays down that "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." It carefully abstains from prescribing that the transferor must be a "holder." All that is necessary to constitute "negotiation" of the bill is that it should have been transferred from one person to another in such a manner as to constitute the transferee the "holder of the bill," i.e. – if we replace "holder" by its definition in the Act – "payee or indorsee who is in possession of the bill." A cheque, therefore, payable to a particular person, which is handed by the drawer to that person for value, would be "negotiated" within the meaning of the Act.

4.5 The court's decision raises a number of interesting issues. First, the court held that consideration for a post-dated cheque could come from the payee's implied forbearance to sue the drawer before the due date of the post-dated cheque. This approach is rather novel even though consideration for a cheque may be constituted by the presence of a past debt. Under s 27(1)(b) of the Bills of Exchange Act, past consideration constitutes good consideration for a bill of exchange including a cheque. The second interesting issue involves the right of a holder to sue on the cheques. Must a holder establish that he is the holder in due course of the cheques? The issue as to whether a plaintiff is a holder in due course of a cheque has little significance if no

allegation of defects in title to the cheque is raised by the parties. The views expressed by the court that a payee of a cheque could qualify to be a holder in due course, however, appears to be contrary to a long-standing decision of the House of Lords in *R E Jones, Limited v Waring and Gillow, Limited* [1926] AC 670 where Viscount Cave LC said at 680:

I do not think that the expression “holder in due course” includes the original payee of a cheque. It is true that under the definition clause in the Act (s. 2) the word “holder” includes the payee of a bill unless the context otherwise requires; but it appears from s. 29, sub-s. 1, that a “holder in due course” is a person to whom a bill has been “negotiated,” and from s. 31 that a bill is negotiated by being transferred from one person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a “holder in due course” within the meaning of the Act. Sect. 21, sub-s. 2, which distinguishes immediate from remote parties and includes a holder in due course among the latter, points to the same conclusion.

Gaming transactions

4.6 When a negotiable instrument is issued in payment of a wagering contract or for a debt owed as a result of a gaming or wagering transaction, the instrument is unenforceable as it is given without consideration for a debt declared to be null and void under s 5 of the Civil Law Act (Cap 43, 1999 Rev Ed) (“CLA”). In *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22, the Singapore Court of Appeal decided that an action brought in Singapore to enforce a loan granted by a foreign casino to enable a customer to gamble at the casino was unenforceable on grounds of public policy. Yong Pung How CJ said at [30] and [31]:

What then is this aspect of local public policy that militates against the recovery of moneys won in foreign wagering contracts which are valid and enforceable overseas? It is clear that gaming and wagering contracts were never considered to be illegal in common law. The distinction which the law makes between wagering contracts and others is therefore entirely the creation of statute. In line with the position in England, the Singapore legislature has long departed from the historical position that gambling and gaming, especially when on credit, is a social vice that has to be eradicated at all costs. It now recognises that gambling can be permitted for its entertainment value if it is strictly controlled and regulated by the relevant authorities. Gambling per se is no longer considered to be contrary to the public interest and this accounts for the various forms of legalised gaming and gambling which currently exists in Singapore such as 4-D, Toto, the Big Sweep, the Singapore Turf Club, etc. Therefore there is no general principle of public policy in Singapore, against the recovery of money lent for the

purposes of gambling abroad, so long if the transaction is indeed a genuine loan and one which is valid and enforceable according to that foreign law.

However, what is objectionable is courts being used by casinos to enforce gambling debts disguised in the “form” of loans. Valuable court time and resources that can be better used elsewhere are wasted on the recovery of such unmeritorious claims. The machinery of the courts cannot be used indirectly to legitimise the recovery of moneys won upon wagers overseas when similar relief would be refused for moneys won upon wagers in Singapore. Hence in order to give full effect to s 5(2) of the Civil Law Act, which provides that no action can be brought or maintained to enforce gambling debts, the courts of the forum cannot be prevented by foreign law from investigating into the true nature of the transaction. The courts of justice must remain out of bounds to claims for moneys won upon wagers, however cleverly or covertly disguised: *Star Cruise Services v Overseas Union Bank* (supra). It is in this sense that the earlier decision in *Las Vegas Hilton Corp v Khoo Teng Hock Sunny* (supra) can be distinguished; having felt that there is no public policy against gambling per se, the court naturally did not go further to re-characterise the transaction. However, once it is recognised that the courts should not, as a matter of principle and public policy, act as gambling debt collectors for foreign casinos, we are then obliged to investigate further according to the *lex fori*.

4.7 The Court of Appeal’s strong stance against the courts in Singapore being used as gambling debt collectors for foreign casinos appears not to apply when a foreign casino seeks to enforce a foreign judgment obtained against the gambler in respect of a gambling debt. In *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690, the Singapore Court of Appeal decided that public policy considerations did not apply with the same rigour when it came to the enforcement of a foreign judgment in respect of a gambling debt. A Mr Liao went to Burswood’s hotel in Perth where he made use of Burswood’s cheque cashing facility (“CCF”) to buy a chip purchase voucher. Liao issued a cheque for S\$52,900 and was given a voucher of A\$50,000. The voucher was exchanged for A\$50,000 worth of gambling chips which Liao later lost in the casino. Liao’s cheque was dishonoured and Burswood obtained a judgment in the District Court of Western Australia for A\$78,331.50 together with costs of A\$2,765.28. Burswood applied for the judgment to be registered in Singapore. This move was opposed by Liao on grounds of public policy. The Court of Appeal decided that public policy considerations in the enforcement of a foreign judgment were not based on the same standards as the enforcement of a domestic wagering contract. Touching on the issues raised in the case, Yong Pung How CJ said at [24] and [25]:

In our evaluation, s 5(2) of the CLA and s 3(2)(f) of the RECJA [Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed)] encapsulate different standards of the public policy defence. While s 5(2) of the CLA elucidates Singapore's domestic public policy on the enforcement of gambling debts, a rule of our public policy as it applies to registration of foreign judgments under the statute in question is clearly different. Section 3(2)(f) of the RECJA requires a higher threshold of public policy to be met in order for registration of a foreign judgment to be refused. As such, we could not countenance Liao's attempt to get around s 3(2)(f) of the RECJA by arguing that s 5(2) of the CLA would have precluded this court from entertaining Burswood's cause of action. ...

In our view, the crucial issue in the present case was whether registration of the Australian judgment was contrary to public policy considerations under s 3(2)(f) of the RECJA.

4.8 Holding that gambling was *per se* not against public policy, Yong CJ said at [44] and [45]:

[W]e observed in *Star City* [*Star City Pty Ltd v Tan Hong Woon*] at [30] and [31] that:

[Singapore] now recognises that gambling can be permitted for its entertainment value if it is strictly controlled and regulated by the relevant authorities. Gambling *per se* is no longer considered to be contrary to the public interest and this accounts for the various forms of legalised gaming and gambling which currently [exist] in Singapore ...

However, what is objectionable is courts being used by casinos to enforce gambling debts disguised in the 'form' of loans. Valuable court time and resources that can be better used elsewhere are wasted on the recovery of such unmeritorious claims. The machinery of the courts cannot be used indirectly to legitimise the recovery of moneys won upon wagers overseas when similar relief would be refused for moneys won upon wagers in Singapore.

As we recognised two years ago, gambling *per se* is not contrary to the public interest in Singapore. To date, the stand we took in *Star City* has been bolstered by the fact that Singapore's societal attitudes towards gambling have evolved even further, as evinced by the fact that the Government is giving serious consideration to the idea of building a casino on the island of Sentosa.

4.9 The court further decided that there were no public policy grounds militating against the registration of Burswood's judgment. Yong CJ said at [46]:

We did not think that there were any public policy grounds militating against registration of the Australian judgment which would offend a fundamental principle of justice or a deep-rooted tradition of Singapore. Neither did we have any evidence before us to indicate that the general community in Singapore would be offended by the registration of a foreign judgment on a gambling debt that was incurred in a licensed casino. If anything, we were of the opinion that the prevalent conception of good morals in the Singaporean community at large would be against Singaporeans who ran up gambling debts in overseas jurisdictions and sought to evade their responsibility for those debts when judgment had been issued against them.

Guarantees

Consideration

4.10 Like any other contract, a guarantee is not enforceable against a guarantor if no consideration is provided by a creditor for the guarantee. Consideration for a guarantee must move from a creditor to a guarantor if the agreement is to be binding. The consideration for a guarantee may emanate from a creditor in a number of ways. The most common route through which consideration may be manifested is through a principal debtor since a guarantor normally assumes the liability solely for the benefit of the principal debtor. In practice, the consideration for a guarantee comes in the form of a benefit provided by a creditor to a principal debtor, and this is normally done at the request of the guarantor. Equally, consideration may be provided by a creditor if he suffers a detriment in responding to a guarantor's request. At common law, past consideration does not constitute good consideration for a contract. Generally, a debt incurred by a principal debtor before a guarantee is provided constitutes past consideration. A guarantee is not binding unless a creditor provides fresh consideration to a guarantor. This is usually done when a creditor provides new advances to a principal debtor. The past liability of a principal debtor may, however, constitute good consideration for a guarantee if the creditor undertakes, at the request of a guarantor, to refrain from suing the principal debtor for his past liability. A guarantee may also expressly cover the past, present as well as the future liabilities of a principal debtor. If no reference is made in a guarantee to the past and present liabilities of a principal debtor, the guarantee is construed to cover only the future liabilities of the principal debtor. Consideration for such a guarantee comes from the future advances to be made by the creditor. However, if a guarantee is expressly made to cover the past, present and future liabilities of a principal debtor, consideration for the past liability of the principal debtor comes from the creditor's

forbearance to sue the principal debtor for his past debts. A guarantee stipulated as a continuing guarantee is wide enough to cover the past, present and future liability of a principal debtor. Consideration for a continuing guarantee comes from a creditor's promise to provide future credit to a principal debtor and from the creditor's forbearance to sue the principal debtor for his past and present debts.

4.11 In *Empire International Holdings Ltd v Mok Kwong Yue* [2004] 4 SLR 820, Tan Lee Meng J decided, *inter alia*, that a continuing guarantee was wide enough to cover the past as well as the future liabilities of a principal debtor. Mr Mok and Mr Subbarao owned a company known as Subba Mok LLC and they used the company to acquire a majority stake in International Microelectronics Products Inc ("IMP"), a NASDAQ-listed company based in California making and selling electronic products in the semiconductor industry. IMP went in search of investors for the newly acquired company. It entered into a memorandum of understanding ("MOU") with Empire International Holdings Limited ("Empire"), an investment and holding company incorporated in Mauritius. Empire agreed to provide funds to assist Subba Mok LLC in its acquisition of IMP. Mok and Subba executed a continuing guarantee in favour of Empire to cover the indebtedness of Subba Mok LLC. The guarantee provided, *inter alia*, that:

The Guarantor hereby unconditionally and irrevocably guarantees and undertakes, as a continuing obligation, to pay to Empire upon first written demand by Empire all amounts and discharge all obligations and liabilities which are now or shall at any time or times be owing or repayable by the Borrower to Empire ...

On 30 November 2002, Mok acknowledged in writing that Empire's loan account with the principal borrower stood at US\$8,998,763.78. Empire obtained summary judgment against Mok for the sum owed by the principal debtor.

4.12 Mok appealed against the judgment relying on four main contentions. Firstly, the guarantee was unenforceable because Empire did not furnish consideration for the guarantee. Secondly, he was entitled to a set-off against Empire's claim. Thirdly, the loans to the principal debtor were illegal moneylending transactions under the Moneylenders Act (Cap 188, 1985 Rev Ed). Finally, summary judgment should not be granted as Empire had not accounted for the shares given as security. The court rejected all the above contentions. Holding that there was good consideration for the guarantee, Tan J said at [9]:

Mok's assertion that the Guarantee could not be enforced by Empire, because consideration was not furnished by the latter for his promise to guarantee the principal debtor's loans, will first be considered. As the Guarantee was a continuing guarantee, this assertion did not rest on solid ground. That a promise to advance additional funds may be consideration for a promise to guarantee the repayment of debts already incurred as well as future advances, has been reiterated on innumerable occasions.

4.13 The present debt of a principal debtor may constitute good consideration for a guarantee if there is a request by the guarantor to the creditor to refrain from suing the principal debtor for the debt. Such a request may be expressly stated in the guarantee or be implied from the conduct of the parties or the circumstances surrounding the provision of the guarantee. Forbearance by a creditor to sue a principal debtor in order to constitute good consideration for a guarantee must be at the request of the guarantor. In *Malayan Banking Bhd v Lauw Wisanggeni* [2003] 4 SLR 287, Tan Lee Meng J decided, *inter alia*, that a request by a person providing security to a creditor to forbear suing a principal debtor constituted good consideration for the transaction. Malayan Banking Berhad ("MBB") had granted banking facilities to a number of companies owned or controlled by a Mr Kang Hwi Wah ("Kang"). The companies included Eurocar Pte Ltd, Alps Investments Pte Ltd, Conic Heavy Equipment Pte Ltd and Victory Electronic Pte Ltd. Kang ran into financial difficulties and he sought help from the defendant, Wisanggeni Lauw ("Lauw"). Lauw agreed to help by executing a memorandum of charge where E-Infohigh Ltd ("E-Info"), a company wholly-owned by Lauw, provided a first fixed charge over its 30 million shares in United Fiber System Ltd ("UFS") in favour of MBB. When the bank sought to enforce the security, Lauw contended that the bank provided no consideration for the undertaking. The court decided that the consideration for the undertaking came from the bank's forbearance to sue the principal debtor. Tan J said at [11]:

Lauw clutched at straws when he claimed that the bank furnished no consideration for his Deed of Undertaking. It is well established that a forbearance to sue, even for a short time, may, in appropriate circumstances, be consideration for a promise (see *Alliance Bank Ltd, The v Broom* (1864) 2 Dr & Sm 289; (1864) 62 ER 631). Lauw admitted that Kang, who was then in financial trouble, persuaded him to provide credit support by furnishing security to the bank. There is no doubt that MBB furnished consideration for Lauw's Deed of Undertaking by giving more time to Kang to repay his outstanding debts. Lauw, who had his own reasons for helping Kang, knew about the benefit that Kang would receive if E-Info's UFS shares were forwarded to the bank.

Undue influence

4.14 When a guarantee is affected by undue influence, it will not be upheld unless the creditor is able to show that the influence was no longer operative when the guarantor provided the guarantee. The creditor will be able to discharge this burden of proof if he advises the guarantor to take independent advice on the transaction. If there are no exceptional circumstances surrounding a guarantee, this precaution is normally sufficient to discharge a creditor's obligation to ensure that the guarantor fully understands the nature and extent of the transaction. However, if exceptional circumstances are present, for instance, when the transaction is manifestly disadvantageous to a guarantor providing a personal guarantee and he refuses to take independent advice on the transaction, the creditor's obligation may have to go beyond meeting the guarantor and advising him to seek independent advice. In practice, a creditor who suspects that a guarantor might be under the undue influence of a principal debtor should insist on meeting the guarantor personally, apart from the principal debtor, in order to advise the guarantor on the nature of the transaction and to recommend that the guarantor obtain independent advice on the transaction. The creditor may have to ensure that the guarantor has indeed been independently advised before proceeding with the transaction. When a guarantee is given in a commercial setting, there is less reason for a creditor to be put on notice of circumstances which might give rise to undue influence.

4.15 In *The Bank of East Asia Ltd v Mody Sonal M* [2004] 4 SLR 113, Andrew Ang JC (as he then was) decided, *inter alia*, that a creditor bank was not put on notice in respect of guarantees provided by the directors of a company. The Bank of East Asia Ltd, a bank incorporated in Hong Kong, provided overdraft facilities to MTM Trading Pte Ltd, through its branch in Singapore. The facilities were secured by a mortgage on an apartment at 83 Meyer Road #07-02. The three defendants, all family members, provided a joint and several guarantee to cover the liabilities of the company. The first and third defendants were respectively the daughter and the wife of the second defendant. All three guarantors were directors of the company with the first defendant holding 10% and the third defendant 20% of the company's shares. The second defendant did not hold any shares. The mortgaged property was sold by the bank at a public auction on 17 April 2003 for \$1.14m leaving an outstanding balance of \$639,293.19. The bank claimed the outstanding sum and interests from the guarantors. The first and third defendants contended that the guarantee was procured by the undue influence of the second defendant and that the bank had failed to obtain the

best price for the property. The court decided that there was no evidence that undue influence was present and the circumstances surrounding the transaction did not put the bank on constructive notice, especially in the case of a commercial guarantee. Ang JC quoted Lord Nicholls of Birkenhead in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 who said at [88]:

Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.

4.16 The court further decided that the evidence did not support the presence of undue influence. Ang JC said at [11] and [12]:

In the present case, the personal guarantee of the first and third defendants were not given to secure the second defendant's indebtedness or that of a company in which he held an interest. While they held shares in the Company, he held none. Their guarantees were given as directors of the Company. Contrary to their assertions that they had nothing to gain but everything to lose, they, as shareholders of the Company, of course stood to gain if the Company were to use the facilities to advantage. In this connection, I noted that when cross-examining the plaintiff's witness Raymond Cheng, the second defendant had declared that he had never taken a salary or other remuneration from the Company and that in fact he had helped it financially.

In these circumstances, the Bank was not put on inquiry. Accordingly, it cannot be fixed with constructive notice for not having taken steps to satisfy itself that the agreement of the first defendant and the third defendant to stand surety had been properly obtained.

4.17 The court also decided that the sale was properly conducted by the bank. Ang JC said at [33] and [34]:

The auction was preceded by seven newspaper advertisements placed by the auctioneers Colliers International Singapore Pte Ltd. The auction itself drew a crowd of about 100 persons and although the opening bid by the auctioneers was S\$1.28m the eventual price at which it was sold was \$1.14m, there having been about 13 bids all in.

On the above facts, I cannot see how the second defendant could have alleged bad faith on the part of the Bank. Neither have the defendants made out a case for saying the Bank did not use reasonable care to obtain the true market value of the Property at the moment they chose to sell it.

Security held by creditor

4.18 Security obtained by a creditor from a principal debtor under a guarantee arrangement is primarily intended to satisfy the indebtedness of the principal debtor. When a guarantor discharges the liability of a principal debtor, he is entitled to the benefit of all securities held by the creditor. A creditor who is paid by a guarantor is under a duty to hand over to the guarantor the securities obtained from a principal debtor. If the securities are not voluntarily surrendered to a guarantor, the guarantor is entitled to bring legal proceedings to recover the securities from the creditor. When a guarantor pays a creditor, he discharges the principal debtor's liability. Once a principal debtor's liability is discharged, a creditor has no further claim on the securities.

4.19 In *Salim Anthony v Sumitomo Corp Capital Asia Pte Ltd* [2004] 3 SLR 331, Lai Siu Chiu J decided, *inter alia*, that once a guarantor discharged a principal debtor's liability, he was entitled to the securities held by the creditor. A joint venture company, PT Satomo Indovyl Monomer ("the Borrower"), was set up in Indonesia to establish a manufacturing plant. The three joint venture partners were Sumitomo Corporation ("Sumitomo"), PT Sulfindo Adiusaha ("Sulfindo") and Brenswick Limited ("Brenswick"), with each party holding 25%, 51% and 24% of the shares in the Borrower respectively. A consortium of banks, Mizuho Corporate Bank Ltd ("the third defendant"), Norinchukin Bank ("the fourth defendant"), Sumitomo Trust & Banking Co Ltd ("the fifth defendant"), Sumitomo Mitsui Banking Corporation ("the sixth defendant") and Dresdner Bank Aktiengesellschaft ("the seventh defendant") agreed to extend banking facilities of US\$94,500,000 to the joint venture company. Land on which the manufacturing plant was sited, the plant, its machinery and other movable assets were used to secure the banking facilities. The plaintiff, Anthony Salim, was the sole owner and shareholder of Sulfindo and Brenswick and a 75% majority shareholder of the joint venture. He provided a guarantee to the lenders to cover the liability of Sulfindo and Brenswick. On 2 January 2003, the banks demanded payment from the three joint venture partners. Sumitomo paid on 27 February 2003. The plaintiff made a payment of US\$38,915,000 for value on 5 September 2003. The amount paid was greater than that demanded in the lenders' default notice. The payment provided an allowance for interest charges after the deadline of 29 August 2003 for payment until the actual payment date of 5 September 2003. By a letter dated 5 September 2003, the lenders informed the plaintiff that they had assigned their present and future rights and interests under the facility agreement to the first defendant. The plaintiff took the view that the assignment was not

valid since he had fully discharged his obligations under the guarantee and was entitled to be subrogated to the rights of the lenders in respect of the securities held by the lenders.

4.20 The court decided on the evidence that the plaintiff had paid the lenders before the date of the assignment and the plaintiff's right to the security was not affected by the assignment. Lai J said at [107] and [110]:

[The plaintiff] had paid on 4 September 2003 by way of the MT100 message *before* the Lenders transferred or assigned the outstandings to the first defendant. ...

I am of the view that the Notice of Assignment and the Assignment itself are invalid against the plaintiff and do not operate to deprive him of his rights of subrogation.