5. BANKING LAW

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Performance bonds and guarantees

Underlying principles

5.1 The law pertaining to performance bonds and guarantees was first developed by the English Courts in the 1960s and certain principles have emerged from this development. Performance bonds were supposed to have their origins in the realms of letters of credit so that many of the principles applying to letters of credit were also applied to performance bonds. What Lord Denning MR said in *Edward Owen Engineering Ltd v Barclays Bank International* [1978] 1 QB 159 at 169 and 171 on the legal nature of a performance bond bears repeating:

> A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit.
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> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

5.2 A performance bond like a letter of credit is in practice used as an instrument to effect payment to a beneficiary. In order to give effect to this object, a number of principles operate to ensure its efficacy as an instrument of payment. These principles were succinctly identified by the Singapore Court of Appeal in *Bocotra Construction Pte Ltd v Attorney-General* [1995] 2 SLR(R) 262 ("*Bocotra Construction*") at [34]–[35], to include the following principles:

> (a) The 'autonomy' principle – the guarantee constitutes a separate contract from the underlying transaction. The appellants are not privy to the guarantee.
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> (b) The 'cash in hand' principle – reflecting the importance of promoting commercial efficacy and certainty in the use of letters, guarantees and bonds. This ties in with the 'autonomy' principle.
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> (c) The 'fraud' exception – the sole exception to the 'autonomy' and 'cash in hand' principles arises where the plaintiff can establish fraud in the circumstances of the call or payment. This permits injunctive relief.
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> (d) There is no distinction between cases where an injunction is to restrain a bank (on payment) or the beneficiary under the guarantee (on calling for payment).

Principles (a) to (c) above were all alluded to and supported by the judge below. The weight of authority suggests that these principles are well entrenched. It is important to establish at the outset principle (d) above: contrary to the appellants' submissions, there is no distinction between the principles to be applied in cases dealing with attempts to restrain banks from making payment or those dealing with restraint of callers from calling for payment.

5.3 The above principles clearly represent the law as developed by the English courts and endorsed by the Singapore Court of Appeal in *Bocotra Construction*.

Developments in Singapore

5.4 However, in Singapore, the courts now embrace a further exception based on unconscionability, apart from fraud, to restrain payment under a performance bond. This exception is now deeply entrenched in the Singapore legal system having been affirmed and applied in numerous decisions emanating from the Singapore Court of Appeal. The origin of this new exception is shrouded in controversy. In *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 ("*GHL*"), the Singapore Court of Appeal traced the development of this new exception to *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] 2 SLR(R) 520 ("*Royal Design Studio*"). LP Thean JA, delivering the judgment of the Court of Appeal, said (*GHL* at [54]):

> *Royal Design Studio* was decided on the ground of unconscionability, although the word 'unconscionability' was not expressly used there; but the circumstances in which the injunction was continued were clearly those warranting the description of unconscionability.

5.5 In *Royal Design Studio*, LP Thean JA granted an injunction to restrain a beneficiary from calling for payment under a performance

bond on the ground that (*Royal Design Studio* at [20]): "We are not concerned with the 'irrevocable nature of the obligation assumed by the relevant bank'; we are concerned with the relationship between the parties under the main or underlying contract they made and the dispute arising from such relationship." The decision in *Royal Design Studio* is clearly inconsistent with the subsequent Court of Appeal decision in *Bocotra Construction* (above, para 5.2), where the court categorically decided that "there is no distinction between the principles to be applied in cases dealing with attempts to restrain banks from making payment or those dealing with restraint of callers from calling for payment." The court in *Royal Design Studio* specifically decided that it was not bound by the fraud exception because it was dealing with an attempt to restrain the beneficiary and not the bank. The only conclusion one can draw from these two cases is that *Royal Design Studio* must have been wrongly decided as it is entirely inconsistent with the clear principles enunciated in *Bocotra Construction*, and in particular, the holding that no distinction was to be made between the bank and the beneficiary when an attempt was made to restrain payment under a performance bond or guarantee.

5.6 The unconscionability principle is targeted primarily at the beneficiary of a performance bond and not the bank. In practice, the unconscionability principle has no practical impact on a bank as its role is merely to make payment on the bond. In *Bocotra Construction*, the court decided that no distinction was to be drawn between an attempt to restrain a bank and an attempt to restrain a beneficiary. The significance of this principle is that if the bank cannot be restrained from making payment except on the ground of fraud, a similar standard also applies to the beneficiary. This means that if the bank cannot be restrained except when it is acting fraudulently, the beneficiary equally cannot be restrained unless he is acting fraudulently. This may explain why the English courts only recognised one exception based on fraud to restrain payment as they have consistently held that no distinction is to drawn between restraining a bank and restraining a beneficiary.

5.7 In *New Civilbuild Pte Ltd v Guobena Sdn Bhd* [1998] 2 SLR(R) 732 ("*New Civilbuild*"), Lee Seiu Kin JC (as he then was) expressed the view that *Bocotra Construction* did not in fact establish that unconscionability constituted a separate ground, apart from fraud, for restraining payment under a performance bond. However, in *GHL* (above, para 5.4), the Singapore Court of Appeal disagreed with the decision in *New Civilbuild*. LP Thean JA, delivering the judgment of the court, said (*GHL* at [51]):

> We should add that the concept of 'unconscionability' was adopted after deliberation, and was not inadvertently inserted as a result of a slip; nor was it intended to be used synonymously or interchangeably with 'fraud'. There is nothing in that judgment which can be said to

> indicate or suggest that the court did not decide that 'unconscionability' alone is not a separate ground as distinct from fraud. We accept that to that extent, *Bocotra* is a departure, and if we may respectfully say so, a conscious departure, from the English position.

5.8 Apart from the use of terminology like "fraud" or "unconscionability" in *Bocotra Construction* (above, para 5.3) the unconscionability principle has no room to operate when it comes to a bank. A bank may act fraudulently when it seeks to make payment to a beneficiary knowing that the beneficiary has no right to receive the payment. This may occur when the beneficiary tenders forged documents to substantiate his demand for payment and the bank is aware of the forgery. Apart from fraud, in what situation can a bank be said to act unconscionably in effecting payment to the beneficiary? It is clear that the unconscionability principle does not operate against the bank. If this is the case, the court in *Bocotra Construction* cannot be seen as creating a new exception based on unconscionability. This has to be so since the court in *Bocotra Construction* clearly stated that no distinction was to be drawn between the bank and the beneficiary, when an attempt is made to restrain payment under a performance bond or guarantee. A similar standard should apply to both the bank and the beneficiary. Given that the unconscionability principle cannot apply to a bank, it equally should not apply to the beneficiary since no distinction is to be drawn between the two parties.

5.9 It is worthy of note that in *Royal Design Studio* (above, para 5.4) as well as *GHL* (above, para 5.4) and many other Singapore decisions, the courts have placed great reliance on the dicta of Everleigh LJ in *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19, as providing the basis for the development of the principle of unconscionability. It is interesting to note at the same time that the English courts, on the other hand, have almost completely if not totally ignored what Everleigh LJ said in that case. This alone speaks volumes for the soundness of Everleigh LJ's dicta.

5.10 Even though the unconscionability principle rests on fairly shaky foundations, it might be too late in the day to argue that it has no application in Singapore. This development might be better seen as a conscious departure made by the Singapore courts. The Singapore Court of Appeal in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] SGCA 46 ("*JBE v Gammon*") sought to provide a juridical basis for the unconscionability principle. JBE Properties Pte Ltd ("JBE"), developing an eight-storey residential building at Handy Road, awarded a construction contract to Gammon Pte Ltd ("Gammon") for $11,515,000. The contractor was required to provide a cash security deposit to cover the due performance and observance of the building

contract. However, the contract permitted, in lieu of the cash deposit, a guarantee for an equivalent amount from a bank approved by the employer. Accordingly, a bond for S$1,151,500.00 or 10% of the contract price was issued by BNP Paribas Singapore. The bond stipulated that "[i]n the event of [Gammon] failing to fulfil any of the terms and conditions of the said contract, [the Bank] shall indemnify [JBE] against all losses, damages, costs, expenses or [sic] otherwise sustained by [JBE] thereby up to the sum of Singapore Dollars One Million, One Hundred and Fifty One Thousand and Five Hundred Only (S$1,151,500.00) ('the Guaranteed Sum') upon receiving your written notice of claim made pursuant to Clause 4 hereof." There were various defects in the construction of the building, and it was in respect of the alleged cost of rectifying some of these defects that JBE made a call on the bond. Gammon applied for an interim injunction to restrain JBE from receiving payment under the bond from the issuing bank. The trial court decided that the bond was an on-demand performance bond, and that JBE should be restrained from calling on the bond based on unconscionability. The Court of Appeal, however, decided that the bond was not an on-demand bond but an indemnity performance bond and that JBE had failed to show that, at the date of its call on the bond, it had suffered actual loss arising from Gammon's breach of the Building Contract as proof of such actual loss was essential for a valid call for payment under the bond. Even if the bond was construed as an on-demand performance bond, JBE's call on it was unconscionable since the evidence adduced by JBE of its alleged actual loss arising from Gammon's breach of the Building Contract indicated that "there was gross exaggeration of the costs of rectification" in support of JBE's call on the bond. The court expressed the view that the juridical basis for adopting unconscionability as a relevant ground separate from and independent of fraud for restraining payment was based on the equitable nature of the injunction. Chan Sek Keong CJ said (*JBE v Gammon* at [13]):

> In our view, the Singapore position on the circumstances in which the court may restrain a call on a performance bond is justified for the functional and commercial reasons mentioned earlier (at [10]–[12] above). The juridical basis for adopting unconscionability as a relevant ground (separate from and independent of fraud) lies in the equitable nature of the injunction. Considerations of conscionability are applicable in relation to the use of the injunction in other areas of the law, and there is no reason why these considerations should not be applied for the purposes of determining whether a call on a performance bond should be restrained so as to achieve a fair balance between the interests of the beneficiary and those of the obligor.

5.11 The approach adopted by the Singapore courts towards restraining payment on a performance bond based on the ground of unconscionability may result in beneficiaries losing confidence in

Singapore law and abandoning it in favour of English law where such bonds are more readily payable. We see an instance of this in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 ("*PT Merak*"). PT Merak, an Indonesian company, embarked on plans to commence operations in power plant development and management. It entered into a US$108m contract with Shanghai Electric, a company incorporated in China, for the design, engineering, manufacturing, procurement, construction, start-up, testing, commissioning and completion of a coal fired electricity and steam generating power plant located in West Java. The contract required PT Merak to pay Shanghai Electric an advance payment of 10% of the contract price. Shanghai Electric, on its part, provided a performance bond for US$10.8m made out in favour of PT Merak. The substantive requirement for payment under the bond was a letter from PT Merak to the Bank stating the amount to be paid, that this was due to PT Merak pursuant to the Contract and that Shanghai Electric had been given notice of default. The governing law clause in the bond stipulated that Singapore courts have non-exclusive jurisdiction over any proceedings arising out of it and the bond shall be governed by and construed in accordance with the laws of England. A dispute arose between the parties pertaining to the performance of the contract and PT Merak made a written call on the bond stating, *inter alia*, "that Notice of Default was previously given" to Shanghai Electric. Shanghai Electric sought to restrain PT Merak from receiving payment under the bond, contending that PT Merak had acted fraudulently and/or unconscionably in making the demand. The issue raised for the consideration of the court was whether Singapore law was the applicable law in an application to restrain a call on an on-demand bond which provided that English law was the governing law. This issue was significant because Singapore law had departed from English law on whether fraud was the only basis upon which the court would restrain a call on an on-demand bond. Lee Seiu Kin J decided that Shanghai Electric's application for the injunction involved a substantive right vested in PT Merak under both the contract as well as under the performance bond. Any restraint on the right of the beneficiary to receive immediate payment upon a demand on the bond would effectively deprive him of such right to immediate payment. The attempt to restrain the call on the bond was properly governed by English law rather than the *lex fori*. Lee Seiu Kin J said (*PT Merak* at [16]):

> Therefore it is not unexpected that as soon as Singapore law departed from English law on this issue, a party drawing a contract that called for an on-demand bond would prefer to have it governed by English law rather than Singapore law as it would be more difficult to obtain an injunction, fraud being a higher threshold to clear than unconscionability. It is not known whether this was the consideration in the present case, but there was certainly no disadvantage to PT Merak in specifying English law in the Bond even though it

> provided for arbitration under the Singapore Industrial Arbitration Centre ('SIAC') and for the non-exclusive jurisdiction of Singapore courts.

5.12 The court further decided that there was no evidence that PT Merak had acted fraudulently in making the call on the bond and equally PT Merak could not be considered to have acted unconscionably. Lee J said (*PT Merak* at [35] and [47]):

> Shanghai Electric contended that PT Merak had acted fraudulently and/or unconscionably in making the Demand. I had held in [30] that English law governs the restraint on the calling of the Bond. Fraud therefore remains the only ground on which an injunction will be granted to restrain PT Merak from calling on the Bond and the Bank from making payment. However, for the sake of completeness, I will also make my finding on whether, even if Singapore law applied to this application, PT Merak had acted unconscionably in making the Demand.
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> In the present case, the situation is reversed. The employer has alleged that the contractor was unable to perform despite having been provided the finance. It does not seem to me that it would be unconscionable for the employer to make a call on the bond under these circumstances. Indeed it would appear to me to be unconscionable to restrain him from doing so.

5.13 An attempt to restrain a beneficiary from calling for payment under a performance bond based on the fact that the call was unconscionable was rejected by the Singapore High Court in *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd* [2011] 1 SLR 449 ("*Astrata*"). The plaintiff, Astrata (Singapore) Pte Ltd ("Astrata"), was a company incorporated in Singapore. The company formed part of the Astrata group of companies, Astrata Group Incorporated ("AGI"), a company incorporated in Nevada, USA. Astrata's business involved the design and development of advanced location based information technology combined with global positioning systems, wireless communication (satellite or terrestrial) and geographical information technology. The technologies allowed customers to monitor, trace and control the movement and status of machinery, vehicles, personnel or other assets. The first defendant, Tridex Technologies Pte Ltd ("Tridex"), was a company incorporated in Singapore and it acted as the contracting entity for customers, usually the state, arranging for the installation, testing and delivery of the system. Tridex entered into a Supply Agreement with Astrata for US$95.6m, to provide for the ongoing supply, testing and installation of the system over a period of time. The supply agreement required Astrata to provide a performance bond worth US$490,000, which was to be released only upon the successful completion of the command and control backend acceptance

test procedure within the time frame prescribed. The performance bond was issued by OCBC Bank and the terms of the performance bond required OCBC Bank to "pay upon presentation of your first written demand specifying the amount claimed hereunder and certifying that the supplier has failed to fulfil its obligation to you under the supply agreement". A dispute arose between the parties over the system supplied by Astrata and Tridex made a call on the performance bond. Astrata applied for an injunction to restrain Tridex from making the call, and OCBC Bank from making payment under the bond. Astrata contended that Tridex's call on the bond was unconscionable because Tridex had unilaterally declared that Astrata had failed the CAT 1B Static Test and withheld all the means by which Astrata could verify Tridex's declaration that it had failed this test. Philip Pillai J decided that there was nothing unconscionable or improper on the part of Tridex in calling on the bond even though the parties were involved in a dispute over the supply contract. Pillai J said (*Astrata* at [87]):

> The only question before me is whether Astrata has on the basis of its submissions made out a strong *prima facie* case of unconscionability such as to merit an injunction on the call and payment of the performance bond. It is evident that there are ongoing disputes between Astrata and Tridex which the parties have agreed to resolve by arbitration but this by itself does not warrant an injunction to call on what by its terms appears to be an on-demand performance bond. In these circumstances, Astrata has not met the burden that a strong *prima facie* case of unconscionability has been made out to restrain the call and payment of the performance bond according to its terms. There is nothing unconscionable or improper on the part of Tridex in calling on the bond. The disputes that might exist between Astrata and Tridex with respect to the Supply Agreement remain to be resolved by their chosen arbitration proceedings.

Accounting after payment

5.14 When a performance bond is given to protect a buyer against a seller's potential defaults, the bond is more likely to be construed as a security for the buyer to cover the seller's breach of contract. In this situation, payments made under the performance bond may be brought into account for assessing the parties' final liability in the transaction. If a buyer is overpaid under the bond, he has to account to the seller for the excess payment. The party calling for payment under the performance bond is under an implied obligation to account for any overpayment. In *Pun Serge v Joy Head Investments Ltd* [2010] 4 SLR 478 ("*Pun Serge*"), the plaintiff, Serge Pun, agreed to purchase the interests of the defendant, Joy Head Investments Ltd, in Winner Sight Investments Ltd ("WSIL"), a company incorporated in Hong Kong, for a total consideration of HK$84,974,780. These interests comprised 2,000 sale shares in the issued capital of WSIL and an outstanding

shareholder's loan by the vendor to WSIL. The purchaser eventually acquired the vendor's interests in WSIL on 15 December 2008, having earlier failed to complete the transaction on the contractually agreed date of 9 December 2008. The vendor called upon a S$1m on-demand performance bond furnished by the purchaser immediately following the purchaser's breach of the parties' agreement on 9 December 2008. The main issue between the parties was whether the vendor was entitled to keep the full amount paid under the performance bond even though it had suffered no loss as a result of the purchaser's breach of the agreed completion date of 9 December 2008. Belinda Ang Saw Ean J decided that the performance bond functioned as a security and there was an inherent duty under the performance bond for mutual accounting between the parties. Any shortfall between the full amount of the security and the vendor's loss would have to be additionally made good by the purchaser subsequently; conversely, any excess of the security after taking into account the amount needed to cover the vendor's loss would have to be accounted for by the vendor. Ang J said (*Pun Serge* at [12] and [38]):

> On the facts, the Performance Bond functioned as a form of security; and, as with any secured creditor, the Vendor was entitled to the security provided, but was nonetheless subject to the full extent of its claim. Any shortfall between the full amount of the security and the Vendor's loss would have to be additionally made good by the Purchaser subsequently; conversely, any excess of the security after taking into account the amount needed to cover the Vendor's loss would have to be accounted for by the Vendor.
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> In view of this, I find that the sum due under the Performance Bond must have necessarily remained in the nature of a *security*, albeit a security that was not exhaustive in terms of quantum or remedy and which served only to guarantee the performance of the Purchaser under the Agreement. It should be noted in passing here that had the Vendor suffered greater losses for which it wished to bring a claim under an action of its own, it was entirely entitled to do so pursuant to cl 6.8 of the Agreement, which expressly left the door open to the Vendor with respect to other remedies 'otherwise available at law, in equity, by statute or otherwise'.

Guarantees

5.15 A guarantee is often stipulated to be payable on demand. Such a stipulation would require a creditor to make a demand for payment on a guarantor as a pre-condition to bringing legal proceedings against the guarantor. In practice, the creditor's demand is usually conveyed to a guarantor through a notice of demand. The guarantee may further provide for the manner in which the guarantor is to be notified of the creditor's demand. However, if the guarantee does not provide for the

manner of notification, the creditor is obliged to show that the guarantor has actual notice of the demand. Proof of receipt of the notice of demand may come in various forms including actual service of the notice on the guarantor either personally or by registered post. This requirement for actual service is to ensure that the guarantor is aware of the creditor's demand. If a guarantor is aware of the creditor's demand, the creditor would have satisfied his obligation to notify the guarantor. In *United Overseas Bank Ltd v Tru-line Beauty Consultants Pte Ltd* [2010] SGHC 363 ("*Tru-line*"), United Overseas Bank Limited ("UOB") granted two lines of banking facilities to its customer, Tru-line Beauty Consultants Pte Ltd. The facilities comprised a S$450,000 trust receipt facility and an overdraft of S$90,000. The banking facilities were guaranteed by Lee Hwee Loo and Tan Wei Hong. The guarantee stipulated that the guarantors "unconditionally guarantee that we will on demand in writing made on us pay to you or discharge on a full indemnity basis all moneys and liabilities whatsoever which shall for the time being be due owing or incurred by [the Borrower]". The borrower defaulted on the facilities and the bank's lawyers wrote to the borrower and the guarantors. The lawyers' letters were served on the borrower and the guarantors by way of AR Registered Mail and Certificate of Posting. The letters to the guarantors were not sent to their address as stated in the guarantees but were instead sent to their addresses as stated in an enhanced instant search on the borrower which UOB conducted on 14 August 2009. The borrower and the guarantors did not dispute UOB's claim that they had acknowledged receipt of the lawyers' letters. UOB applied for summary judgment. The guarantors contended that the service of the letters of demand on the guarantors by AR Registered Post was bad because the notices were not sent to the guarantors' address as stated on the last page of the guarantees. Woo Bih Li J decided that since the guarantors had acknowledged receipt of the lawyers' letters, effective notice of the demand was given to the guarantors by the bank. Woo J said (*Tru-line* at [34] and [39]):

> Secondly, whilst it would have been advisable for R&T to have sent the letters of demand to both the Guarantors' address as stated in the Guarantees as well as the Guarantors' last-known addresses, its failure to do the former did not affect UOB's claim against the Guarantors.
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> The purpose of making a written demand on the Guarantor is to ensure that he is made aware when his obligation is triggered and to give him an opportunity to meet his obligation. As mentioned, the Guarantors did not dispute that they had in fact received the letters of demand. The Guarantors need not have been direct recipients of the letters of demand from UOB.

Banker and customer

5.16 A customer's contractual relationship with a bank is based on that of principal and agent, the customer being the principal and the bank the agent. An agent's authority to carry out a principal's mandate comes to an end when the agent is aware of the principal's mental incapacity. Similarly, a bank's authority to carry out a customer's instructions comes to an end when the bank is aware of the customer's mental incapacity. If a bank is aware of circumstances which would put a reasonable banker on notice of a customer's mental incapacity, the banker is entitled to suspend the operation of the customer's account until it has ascertained that the customer has the mental capacity to transact with the account. A refusal to carry out a customer's instruction under such circumstances would not constitute a breach of contract as the banker owes a duty to protect the customer's interests. In *Hwang Cheng Tsu Hsu v Oversea-Chinese Banking Corp Ltd* [2010] 4 SLR 47 ("*Hwang Cheng*"), Hwang Cheng Tsu Hsu, also known as Nellie Hwang ("the plaintiff"), was a customer of the defendant Oversea-Chinese Banking Corp Ltd ("the bank"). The plaintiff became a customer in 1989 and on 13 May 2008, the plaintiff, who was then 90 years old, visited the bank accompanied by her adopted daughter Amy Hsu ("Amy"). Amy introduced herself to Mr Kang Eu Jin ("Eu Jin"), a client services officer of the bank, as the plaintiff's daughter and she informed Eu Jin that the plaintiff wished to transfer moneys then held by the bank on fixed deposits to a new account to be opened jointly in the names of Amy and the plaintiff. Eu Jin became concerned when he noticed that the plaintiff appeared dazed, and was "staring into blank space" all the time. He was also uncomfortable with the instructions to transfer the moneys from the plaintiff's accounts to a new joint account as they came from Amy who appeared to have control over the plaintiff. Having doubts over the instructions, the bank did not carry out the instructions pending its investigation into the instructions. After seeing the plaintiff alone at her home and at the bank, the bank formed the view that the plaintiff had no intention to close her bank accounts and therefore did not carry out the instructions to close the accounts. The plaintiff later sued the bank for breach of contract for its failure to follow her instructions as the customer to close all her accounts with the bank and to repay the moneys standing to her credit in those accounts. The bank contended that it had acted in accordance with the duty of care imposed on them by law to withhold payment since any reasonable and prudent banker in the same circumstances would have been put on notice, and would have regarded the actions justifiable. Lai Siu Chiu J saw the issue before the court as not one pertaining to the plaintiff's mental capacity to operate her bank accounts but whether the bank was in breach of its contractual obligations by failing to follow the plaintiff's instructions to open the joint account and later to close her accounts, given the bank's knowledge of the circumstances surrounding the apparent instructions

from the plaintiff. Lai J decided that there was no duty on the bank to follow the customer's instructions to make payment under any circumstances because its obligation to honour the customer's payment instructions was qualified by its contractual duty to take reasonable care in carrying out its contract with the customer. The question was whether a reasonable and prudent banker with knowledge of the relevant circumstances would have withheld the payment because of a serious or real possibility of an irregularity. The bank could not turn a blind eye to facts which would have shown a serious possibility of irregularities in the apparent mandate it received from the customer. Lai J said (*Hwang Cheng* at [65] and [138]):

> The main issue here is *not* whether the plaintiff had, on a balance of probabilities, the mental capacity to operate her bank accounts with the Bank. That is not the crux of the problem. The plaintiff's cause of action was for breach of contract. On the facts of this case, it is clear that the Bank had no knowledge of the plaintiff's dementia at the material time when the apparent instructions for her bank accounts were given in May 2008. Consequently, the issue is: Given the Bank's knowledge of the circumstances surrounding the apparent instructions from the plaintiff, did the Bank breach its contractual obligations by failing to: (a) follow the plaintiff's instructions to open a joint account and (b) to close all her accounts with the Bank and paying to her the amounts standing to her credit in those accounts?
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> On the facts and evidence presented before this court, I hold that the Bank was not in breach of its contractual duties to the plaintiff. It was under no absolute duty to make payment out of the plaintiff's bank accounts in the circumstances that prevailed in May 2008. Banks cannot turn a blind eye to facts which would have shown a serious possibility of irregularities in the apparent mandate it received from its customer.

5.17 The plaintiff's appeal was dismissed by the Court of Appeal in *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] SGCA 3 ("*Hsu Ann Mei*"). The Court of Appeal agreed with the trial judge reasoning. The court decided that the bank was put on notice and the steps taken by the bank were not unreasonable in the circumstances. Chan Sek Keong CJ said (*Hsu Ann Mei* at [28], [31] and [32]):

> To determine this issue, we asked two questions: (a) whether the respondent was put on notice, *ie*, had reason to suspect that Mdm Hwang's "instructions" did not represent her true wishes; and (b) whether the steps taken by the respondent that culminated in its decision not to carry out those instructions were reasonable.
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> In these circumstances, it was clear that the respondent was put on notice that the instructions conveyed by Amy might not have reflected

> Mdm Hwang's real intentions, or that Mdm Hwang might not have sufficient cognitive ability to understand the consequences of opening the Joint Account or of closing all her accounts. There was thus sufficient *prima facie* evidence for the respondent not to carry out Mdm Hwang's instructions until further inquiries could be made.
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> … The respondent had taken further steps to satisfy itself that Mdm Hwang was mentally capable of understanding the implications of opening the Joint Account with Amy as the joint account holder. The respondent's officers visited Mdm Hwang at her home on 15 May 2008 to verify her instructions regarding the opening of the Joint Account, and also insisted on speaking to Mdm Hwang alone at the 22 May 2008 meeting to ascertain whether Mdm Hwang's instructions to close her accounts should be complied with (although this exercise was unfortunately cut short by Amy). The respondent was further willing to meet Mdm Hwang and Amy face-to-face to resolve the impasse, although this attempt was also frustrated by Mdm Hwang's issuance of a writ against the respondent.

Private banking

5.18 A banker generally owes a duty of care in carrying out a customer's mandate in an ordinary banking account. Does this duty of care continue to apply in a private banking environment where the transactions for the customer may involve carrying out the customer's instructions to invest his funds? A bank may apply to the Monetary Authority of Singapore ("MAS") under s 100 of the Financial Advisers Act (Cap 110, 2007 Rev Ed) ("FAA") for exemption from the provisions of the Act when it deals with a high net worth individual. A high net worth individual is defined in the Guidelines issued by the MAS as an individual who has a minimum of S$1m of assets, or the equivalent in foreign currencies or in bank deposits, including structured deposits. It also includes a person whose total net personal assets exceed S$2m in value or the equivalent in foreign currencies or whose annual income is not less than S$300,000 or the equivalent in foreign currencies. MAS may grant exemption to a bank from ss 25, 27, 28 and 36 of the FAA as well as from certain written directions issued pursuant to s 58 of the FAA in respect of any financial advisory service provided to high net worth individuals. Banks which have been granted exemption by the MAS in their dealings with high net worth individuals often incorporate a disclaimer of liability in their agreements with these customers.

5.19 In practice, in spite of the FAA, financial advisers dealing with high net worth individuals may seek to disclaim their common liability by expressly throwing the responsibility of due diligence on their customers through the incorporation of a non-reliance clause in their contracts with the customers. In *Crédit Industriel et Commercial v Teo Wai Cheong* [2010] 3 SLR 1149 ("*Teo Wai Cheong*"), the defendant,

Mr Teo Wai Cheong, was a private banking client of the plaintiff, Crédit Industriel et Commercial. The bank agreement with the customer provided that "These private banking services have been designed for sophisticated and experienced investors ('High Net Worth Individuals' as defined in the Guidelines issued by the Monetary Authority of Singapore) who have the expertise, the understanding of financial product, as well as the desire and financial capacity to invest in domestic and international markets." It also stipulated that "The Bank highly recommends that you consult your lawyers, accountants, tax advisors, brokers and other professional advisers before making such investment. Accordingly, if you enter into transactions with the Bank, the Bank will assume that you understand and accept the characteristics and risks associated with such transactions." The dispute between the parties turned upon whether or not the defendant purchased certain accumulators. Accumulators are complex over-the-counter structured equity products. The bank claimed payment of S$2,782,803.66 from the client for China Energy ("CE") shares delivered under the terms of five disputed accumulator agreements and another sum of S$3,625,393.11 for the closing out cost for the disputed CE accumulators. The court considered the legal relationship between private bankers and their sophisticated clients. Philip Pillai JC (as he then was) decided that the bank was not acting as a trusted advisor of its client since its account opening form and risk disclosure statement highlighted to the client that he was responsible for the risks in the transactions. Pillai JC said (*Teo Wai Cheong* at [2], [8] and [84]):

> The present case raises a core question of law about private banking and sophisticated clients. When is a private bank acting as a trusted advisor of its client and when is it not? The answer to this question of law falls to be determined by the particular contractual documentation and conduct adduced in evidence in each case.
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> …
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> The contractual relationship between the plaintiff and the defendant is set out in a number of standard printed forms. These are standard form contracts, which private banking clients do not normally read, and if read, are not fully understood and rarely negotiated. Nevertheless, in the absence of fraud or misrepresentation, a person is bound by the express contractual terms of the documents which he has signed even though he has not read their content nor understood their language (see *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 and *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195).
>
> …
>
> A private bank is not acting as a trusted advisor of its client when (a) its account opening form and Risk Disclosure Statement highlight to the client that he is responsible for the risks in his transactions and recommends that he takes advice from other professional advisers,

including his accountants, lawyers and tax advisors, and further that the bank does not make recommendations or give advice and (b) this is borne out by the evidence of conduct.