5. BANKING LAW

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Letters of credit

Duties of issuing bank and nominated bank

5.1 The most difficult banking law decision of 2016 must have been the Court of Appeal's decision in *Grains and Industrial Products Trading Pte Ltd v Bank of India*[1] ("*Grains and Industrial Products (CA)*"), on appeal from the decision of Lee Kim Shin JC in the High Court.[2] The Court of Appeal delivered a split 2:1 decision, with Sundaresh Menon CJ and Andrew Phang Boon Leong JA forming the majority, and Chan Sek Keong SJ in the minority. Chan SJ agreed with the majority judges on the outcome of the appeal, but differed partially on the reasons for their decision, in respect of the relationship between a nominated bank and the issuing bank.

5.2 The plaintiff, Grains and Industrial Products Trading Pte Ltd, was the beneficiary of a Letter of Credit ("LC") issued by Indian Bank, the second defendant. The first defendant, Bank of India, was named as the nominated bank under the LC, which was stated as being available by acceptance with Bank of India. The LC was subject to the Uniform Customs and Practice for Documentary Credits 600 ("UCP 600") and had an expiry date of 25 March 2012. On 15 March 2012, the plaintiff sent the required documents under the LC to Bank of India, which were received by the latter on 16 March 2012. Bank of India transmitted the documents to the issuer, Indian Bank, on 18 April 2012, which was after the expiry date of the credit. On 19 April 2012, Indian Bank informed Bank of India that it was rejecting the documents and was not honouring the LC because of the late negotiation and expiry of the LC. The plaintiff then started an action against the two banks.

5.3 The plaintiff's case against Bank of India rested on its obligations as "confirming bank" and/or "negotiating bank" under the LC. The trial judge, Lee JC, after a detailed analysis of the facts, found

1 [2016] 3 SLR 1308.
2 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2015] 1 SLR 1213.

that Bank of India did not assume the role of a confirming bank and also did not negotiate the credit. The plaintiff appealed against the judge's decision that Bank of India did not negotiate the LC, but the Court of Appeal did not find sufficient basis to interfere with this finding. This issue involved a largely factual examination and will not be further discussed here.

5.4 The plaintiff's case against Indian Bank was based on its liability as the "issuing bank" under the LC. The plaintiff asserted that because complying documents were presented to Bank of India (the nominated bank) within the validity period of the LC, Indian Bank (the issuing bank) was bound to honour the credit to the full amount of US$9,993,239.54. The judge found in favour of the plaintiff and this decision was upheld by the Court of Appeal, as discussed below.

5.5 Indian Bank and Bank of India claimed and counterclaimed against each other, seeking an indemnity and/or contribution from the other should they be found liable to the plaintiff. As the Court of Appeal found that Indian Bank was liable to honour the LC at its maturity, this led to the question whether Bank of India would be liable to indemnify Indian Bank. The Court of Appeal upheld the judge's decision that it was not, and this is explained further below.

Liability of an issuing bank

5.6 The Court of Appeal was of the view that Indian Bank's liability to honour the credit as the issuing bank stemmed from Art 7(a) of UCP 600, which states:

> (a) Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:
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> …
>
> iv. acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity.
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> …
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> [emphasis by the Court of Appeal in *Grains and Industrial Products (CA)* omitted]

Under this article, the timely presentation of complying documents by the beneficiary triggers the issuing bank's liability to honour the credit at maturity. The Court of Appeal highlighted that presentation could be made by the beneficiary to either the nominated bank or the issuing bank. The issuing bank had to honour the credit even if the nominated

bank had not agreed to act on its nomination, and in these circumstances, there was no need for the beneficiary to make a further presentation to the issuing bank. This was because the issuing bank "[was] taken to have authorised the beneficiary to present the documents to the nominated bank".[3] As the Court of Appeal pointed out, such interpretation of Art 7(a) of UCP 600 had widespread support from academics and commentators.[4] This is readily apparent if we remember that a typical LC transaction consists of several contracts including:

> (a) the underlying contract between the buyer and the seller/beneficiary;
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> (b) the main LC contract between the issuing bank and the beneficiary;
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> (c) the contract between the confirming bank and the beneficiary (if applicable); and
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> (d) the contract between the issuing bank and the nominated bank.

These contracts are separate from each other. The contract currently under discussion is the one between the issuing bank and the beneficiary, which incorporates Art 7(a) of UCP 600, wherein the issuing bank has promised to honour the credit as long as the beneficiary satisfies the stated conditions. Under these circumstances, any wrongdoing of the nominated bank should not adversely affect the beneficiary's rights against the issuing bank. As the Court of Appeal pointed out:[5]

> [I]t is for the issuing bank to determine such matters as … which bank it wishes to nominate; and having made those determinations, it takes the consequences that flow from the acts or omissions of the nominee at least as far as the issuer's liability to the beneficiary is concerned.

5.7 Although Indian Bank did not dispute the legal principles discussed in the preceding paragraph relating to the issuing bank's liability to the beneficiary, Indian Bank argued that, on the facts, the plaintiff/beneficiary did not make a valid or complying presentation to Bank of India within the meaning of UCP 600. Their argument was that the LC authorised Bank of India to "accept" the draft, but instead, Bank of India was approached to "negotiate" the draft, which was a

3 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [50].

4 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [51]–[52], [53] and [54].

5 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [57].

transaction that took place outside the credit. The Court of Appeal disagreed. They were of the view that the fact that the plaintiff requested Bank of India to negotiate the credit did not preclude the conclusion that the documents were also presented to Bank of India as the nominated bank, and found on the facts that the latter was indeed the correct conclusion. They, therefore, dismissed Indian Bank's appeal on this issue.

Duties of a nominated bank

5.8 Was Bank of India (the nominated bank) liable to indemnify Indian Bank (the issuing bank) in respect of the latter's liabilities to the plaintiff under the LC? Indian Bank argued that Bank of India, as the nominated bank, was its agent and owed it agency duties to act with reasonable care so as not to cause it to suffer losses, including a duty to forward the documents with reasonable despatch.[6] As will be discussed below, the majority judges accepted the argument that Bank of India was Indian Bank's agent. But this was not directly relevant to the Court of Appeal's decision on the indemnity. All members of the Court of Appeal agreed that Indian Bank's claim for an indemnity against Bank of India should be dismissed as Indian Bank's liability to the plaintiff resulted from the application of Art 7(a) of UCP 600, which imposed a duty on the issuing bank to honour a credit if complying documents had been presented to a nominated bank and the nominated bank did not accept a draft drawn on it. The majority judges made a distinction between a claim for an indemnity and a claim for damages based on breach by Bank of India of its express or implied duties as agent. Although this was not fully discussed by the Court of Appeal, it would seem that an indemnity was a compensation for loss or damage, whereas the issuing bank's duty to pay under UCP 600 did not amount to loss or damage, but was a liability that the issuing bank had undertaken as a result of issuing the LC. If, instead, Indian Bank had claimed for damages for breach of contract, the majority judges were of the view that it might have been able to succeed if it had been able to prove that it had suffered a loss independent of its liability to the plaintiff under the terms of the LC.[7] However, as Indian Bank's pleadings did not include a claim for damages for breach of contract by Bank of India, and it did not bring up evidence relating to any loss that it might have suffered, the majority judges did not go on to consider this point.[8]

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6 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [68] and [159].

7 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [112]–[114].

8 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [112]–[114] and [120].

5.9 Although Chan SJ agreed with the majority judges on the result of the appeals, he was of the view that the agency analysis they adopted was not necessary for the disposition of the case. In particular, Chan SJ disagreed with the majority judges on the crucial point of their analysis that Bank of India was an agent of Indian Bank. Chan SJ was of the view that Bank of India was not an agent of Indian Bank. He felt further, that on the facts of the case, "any claim by Indian Bank against Bank of India for damages for breach of duty, arising out of the Letter of Credit was bound to fail".[9] This was because he was of the view that Bank of India had not acted on its nomination.[10] He also pointed out that on the facts, Indian Bank had not rejected the documents on the ground of breach of duty to forward them promptly,[11] and that Indian bank could not have been able to prove any loss as it was holding a cash security, and in any case, would have been entitled to be reimbursed by the beneficiary.[12]

5.10 The decision of the Court of Appeal regarding the relationship between the issuing bank and a nominated bank in an LC transaction provide a novel analysis of this area of the law and is the most significant aspect of the case. Further interest is added by the fact that Chan SJ took a different view on this matter. The conclusion of the majority judges regarding the agency relationship between the issuing bank and a nominated bank was summarised by Chan SJ as follows:[13]

> In an extensive analysis of the principles of agency and the facts in this case, the majority judges, made the following findings
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> (a) a nominated bank can and will be an agent of the issuing bank if the conditions of an agency relationship are satisfied (see MJ [69]–[75]);
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> (b) Bank of India was or became an agent of Indian Bank as its conduct satisfied the conditions (see MJ [76]–[80]); and
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> (c) Bank of India as agent owed Indian Bank agency duties, in particular the duty to inform and to forward the documents timeously to Indian Bank as the issuing bank (see MJ [81]–[108]).

9 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [163].

10 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [282].

11 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [283].

12 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [284].

13 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [160].

5.11 The decision in *Grains and Industrial Products (CA)* is long and the reasoning is detailed and complex. A review of this nature cannot do justice to the case. Three important general questions arising from the case will be discussed here:

(a) Is a nominated bank an agent of the issuing bank?

(b) When will a nominated bank be taken to have accepted and acted on its nomination?

(c) Does a nominated bank have a duty to forward the documents to the issuing bank?

Is a nominated bank an agent of the issuing bank?

5.12 The majority judges were of the view that a nominated bank "*can* be an agent of the issuing bank to the extent of the issuing bank's mandate. The agency relationship *will* arise in so far as the nominated bank *accepts* the authority granted by the issuing bank for it to transact with the beneficiary on its behalf"[14] [emphasis in original]. In other words, when a nominated bank that is authorised by the issuing bank to transact with the beneficiary acts upon its nomination, it transacts on behalf of the issuing bank and is the agent of the issuing bank to the extent of the authority granted. Many judicial and academic authorities were quoted by the majority judges in support of this proposition.[15] The majority judges gave two illustrations of the operation of this relationship.[16] First, when an issuing bank authorises a nominated bank to accept a draft and the nominated bank, acting upon such authority, accepts a presentation of documents from the beneficiary, the issuing bank is bound by such acceptance and is precluded from asserting that the presentation was a non-conforming one by virtue of matters such as late presentation or the presence of discrepancies. However, one may observe that, depending on the facts of the case, the issuing bank may not be unduly prejudiced by this as it can refuse to reimburse a nominated bank that has wrongly paid on non-conforming documents.[17] The second example given by the majority judges is that the beneficiary can turn to the issuing bank to honour the draft in a situation where a nominated bank accepts the documents but does not make payment at maturity.[18]

14 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [69].

15 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [72].

16 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [73].

17 Uniform Customs and Practice for Documentary Credits 600 Art 7(c).

18 Uniform Customs and Practice for Documentary Credits 600 Art 7(a)(iv).

5.13 Chan SJ took a categorically different view, that there is no agency relationship between the issuing bank and a nominated bank. Instead, he felt that a nominated bank acting upon its nomination acts on its own account. Chan SJ suggested that two of the academics[19] relied upon by the majority judges as supporting the principle that there is an agency relationship between the issuing bank and a nominated bank were only saying that there is a relationship analogous to that of agency.[20] Chan SJ also referred to a commentary arguing that a nominated bank is not the agent of the issuing bank, even if the relation is sometimes described as one of "agency" in a very loose and imprecise sense of a person who acts in concert with another for a common end.[21] Chan SJ was of the opinion that there is no need to employ agency principles to govern the relationship of the issuing bank and a nominated bank. He stated:[22]

> The rights and obligations of a nominated bank and the issuing bank are governed by and flow from the articles set out in UCP 600. The articles operate as contractual provisions between the parties to the letter of credit which has incorporated them. The articles make no mention of agency, and it is suggested that agency reasoning is not necessary to their operation as contractual provisions.

When will a nominated bank be taken to have accepted and acted on its nomination?

5.14 As the credit in question was an acceptance credit, the majority judges noted that the authority granted to the nominated bank extended to examining the documents presented by the beneficiary to determine whether they constituted a complying presentation, and accepting the documents if they complied or rejecting them if they did not.[23] The majority judges were of the view that it could be inferred that Bank of India had consented to being a nominated bank and, upon their analysis as explained above, thereby had become an agent of the issuing bank. To support this finding, they pointed to Bank of India's conduct of

19 See John F Dolan, "The Correspondent Bank in the Letter-of-Credit Transaction" (1992) 109 Banking LJ 396; Ali Malek QC & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed, 2009).

20 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [190].

21 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [187]; see also James E Byrne, Vincent M Maulella, Soh Chee Seng & Alexander V Zelenov, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2010) at p 714.

22 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [189].

23 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [71].

receiving the documents which the plaintiff presented subject to UCP 600 and then holding on to them and participating in active discussion with the plaintiff to negotiate the LC.[24] The majority judges also pointed out that if Bank of India did not wish to accept its appointment as nominated bank to receive documents on Indian Bank's behalf, it could refuse the delivery of the documents and inform Indian Bank of this fact, and tell the plaintiff to forward the documents directly to Indian Bank.[25] Ultimately, the majority judges were satisfied that Bank of India by conduct accepted its appointment as nominated bank and it was, therefore, properly constituted as the agent of Indian Bank for the purpose of receiving the documents.[26]

5.15 Chan SJ referred specifically to the terms of the LC and found that Bank of India was nominated to honour (that is, accept and pay upon maturity) the draft drawn by the plaintiff, and also to discount the draft. On the facts, the plaintiff presented documents to Bank of India (through Standard Chartered Bank) for the purpose of negotiation. In the High Court, the judge found that Bank of India did not wish to negotiate the documents until the plaintiff had opened a current account with it, and this had not been done. It was not disputed that Bank of India did not accept or discount the draft (which it was nominated to do), as it was not requested to do so by the plaintiff. The judge, therefore, found that Bank of India did not act upon its nomination. Chan SJ agreed with the judge on this point.

5.16 It is clear that under UCP 600, a nominated bank has no obligation to accept its nomination, unless it has otherwise expressly agreed to do so. Art 12(a) of UCP 600 states: "[u]nless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary."[27] Further, a nominated bank will not be easily seen to have acted pursuant to its nomination. This is recognised in Art 12(c) of UCP 600, which provides: "[r]eceipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to

24 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [77].

25 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [77].

26 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [80].

27 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [239].

honour or negotiate, nor does it constitute honour or negotiation."[28] Against these articles, it seems incongruous that receipt and retention of the documents by Bank of India was sufficient to constitute acceptance of its nomination. Indeed, Chan SJ felt that Bank of India's acceptance of Indian Bank's mandate to receive the documents, together with the act of receiving them, did not mean that Bank of India had accepted and acted on its nomination. It would not have acted on its nomination if it chose to return the documents to the plaintiff or to hold them on the plaintiff's behalf, which was what it did in this case.[29] This is consistent with Art 12(c) of UCP 600 reproduced above. Although the finding by the majority judges that Bank of India acted pursuant to its nomination is based on the particular facts of the case, this fact pattern of receipt of documents by a nominated bank is likely to be a common one that is likely to arise in future cases. The decision also reflects a strict attitude towards nominated banks that may be carried over, generally, to future LC cases, contrary to the more liberal attitude of UCP 600 towards nominated banks.

Does a nominated bank have a duty to forward the documents to the issuing bank?

5.17 The duty of a nominated bank to forward documents is addressed in Art 15(c) of UCP 600, which provides: "[w]hen a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank."[30] The majority judges were of the view that Bank of India, after examining the documents within five days to assess whether the presentation was a complying one, had the obligation to forward the documents to the issuing bank with reasonable promptness and that, in general, reasonable promptness meant no later than the end of the next banking day after the determination had been made unless there was compelling reason for any delay.[31] Article 15(c) is silent about a nominated bank's duty to forward the documents where it has determined that a presentation is complying but does not honour or negotiate. The majority judges were of the view that Art 15(c) should be construed purposively, such that the nominated bank would also be obliged to forward the documents with reasonable promptness to the

28 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [239].

29 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [199].

30 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [93] and [236].

31 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [97], [101] and [108].

issuing bank once it determines that the presentation is complying, "whatever course it should decide to take in relation to the credit by virtue of its having accepted its nomination" (in other words, whether or not the nominated bank honours or negotiates).[32] Factors considered by the majority judges in the purposive interpretation included the expectation of the market and the protection of the issuing bank from acting to its detriment due to its lack of knowledge about the complying presentation.

5.18 In addition to a purposive interpretation of Art 15(c) of UCP 600, the majority judges also found that the nominated bank had an implied duty at common law to forward documents when it determined that a presentation was complying but did not honour or negotiate. The majority judges were of the view that the requirement of necessity for implying a term laid down in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[33] ("*Sembcorp*") was satisfied as it was "completely untenable to argue that the nominated bank can hold on to the documents indefinitely without forwarding it to the issuing bank after it has decided not to honour or negotiate the credit".[34] The majority judges noted that this reflected the general common law duty of an agent to return documents and provide information to its principal.[35] Further, where an agent has an obligation to perform a certain act for a principal and no time is stipulated for performance, the law implies an obligation to perform it within a reasonable time.[36]

5.19 The majority judges summarised their findings as follows:[37]

> (a) … Bank of India was properly constituted as the agent of Indian Bank for the purpose of receiving the documents.
>
> (b) Once it received the documents, Bank of India had a period of up to five days to determine whether there was a complying presentation of the documents and thereafter decide whether it was going to honour or negotiate the credit.
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> (c) Once it determined that there was a complying presentation and decided not to make payment itself, Bank of India had thereafter

32 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [101].
33 [2013] 4 SLR 193.
34 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [103].
35 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [104].
36 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [107].
37 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [108].

> to forward the documents to Indian Bank with reasonable promptness to enable it to honour the credit.

However, the learned judges declined to go on to consider whether Bank of India breached its duty, for the reasons explained at para 5.7 above.

5.20 In contrast, Chan SJ was of the view that the meaning of Art 15(c) is clear and that the purposive interpretation was inappropriate. His Honour was of the opinion that "[a]bsent an express agreement to the contrary, where the nominated bank does not honour or negotiate, Art 15(c) does not require it to forward the documents to the … issuing bank".[38] As regards the implied term approach taken by the majority judges, Chan SJ suggested that the Court of Appeal, being the apex court, should act with restraint in implying a term into UCP 600.[39] Even if a term were to be implied, he felt that the test of necessity laid down in the *Sembcorp* case would not be satisfied.[40] He felt that it was not necessary for such a contractual term to be implied as there was a market expectation in LC transactions that even if a nominated bank elected not to act pursuant to its nomination, it would forward the documents to the issuing bank,[41] referred to by Chan SJ as the *Byrne Expectation*.[42]

5.21 James E Byrne *et al*'s *UCP600: An Analytical Commentary*[43] ("*Byrne*") put forward the view that strictly speaking, a nominated bank has no legal obligation to forward the documents to anyone even if it has acted pursuant to its nomination, as Art 15(c) merely means that the nominated bank must forward the documents to the confirming bank or issuing bank in order to get reimbursed after having paid on conforming documents. The majority judges saw this as a "purely theoretical point" and felt that the phrase "*must forward*" [emphasis by the Court of Appeal in *Grains and Industrial Products (CA)*] in Art 15(c)

38 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [240].

39 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [264].

40 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [236].

41 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [94(d)].

42 See James E Byrne, Vincent M Maulella, Soh Chee Seng & Alexander V Zelenov, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2010) at p 714; see also *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [228].

43 James E Byrne, Vincent M Maulella, Soh Chee Seng & Alexander V Zelenov, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2010) at p 714, referred to in *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [241].

must be taken to mean what it says.[44] On the other hand, as stated above, *Byrne* also highlighted the commercial expectations of the parties to a letter of credit transaction that even if a nominated bank elects not to act pursuant to its nomination, it will forward the documents to the issuing bank.

5.22 The distinction between a nominated bank's legal duty to forward documents to the issuing bank as found by the majority judges, and the expectation amongst commercial parties that it would do so is an interesting one. Where a legal duty is not met, there are legal repercussions, whilst if a commercial expectation is not met, there are commercial repercussions at most, if at all. One may wonder why a person who agrees that there is an expectation as regards the nominated bank's conduct will not also feel that this should be elevated to a legal duty.

5.23 Perhaps part of the answer lies in the freedom of action that the scheme of UCP 600 gives to nominated banks. Barring a specific arrangement between correspondent banks, a bank will generally be named as a nominated bank in an LC without first having agreed to perform this role. For example, UCP 600 envisages in Art 2 that a credit can be available with any bank and in this case, any bank can be a nominated bank. In this situation, it is only appropriate that Art 12(a) of UCP 600 provides that there is no obligation on a nominated bank to honour or negotiate, unless the bank is also a confirming bank, or when it has expressly agreed to do so and communicated its assent to the beneficiary. A bank should not be loaded with obligations that it did not invite. Where a nominated bank has not accepted its nomination, it is fair that it should not have the legal obligation to inform the issuing bank about its refusal, or if documents are presented to it by the beneficiary, it should not have the legal obligation to forward these to the issuing bank. This has its parallel in various situations, for example, an offeree is not taken to have accepted an offer by silence, not a recipient of unsolicited goods to have agreed to buy the goods by virtue of not returning them.

5.24 However, this consideration of not burdening a nominated bank may not apply where the nominated bank has accepted its nomination and acted on it. One challenge in such cases is to determine when acceptance and action has taken place, as receipt and examination of the

44 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [98].

documents may not in themselves indicate that the nominated bank has accepted and acted on its nomination.[45]

5.25 This author is of the view that a nominated bank should not be too easily taken to have accepted and acted upon its nomination, and with respect, that Chan SJ's position, which endorses the finding of the High Court, is a fair one. However, where a nominated bank has accepted its nomination, the concern of the majority judges in *Grains and Industrial Products (CA)* that it should forward documents to the issuing bank when it determines the presentation to be complying even if it has decided not to honour or negotiate is, with respect, reasonable. Nevertheless, this is a situation that the letter of credit community seems to prefer to deal with by market expectation rather than legal obligation. Chan SJ pointed out that UCP 600 Drafting Group recognised the importance of the forwarding of documents and yet chose not to include such a legal obligation in cases where the nominated bank chose not to honour or negotiate.[46]

5.26 One potentially troubling aspect of *Grains and Industrial Products (CA)* is the implication of a term into UCP 600. The Court of Appeal is not the first court to have done so. The UK courts, for example, have done the same in several cases, as mentioned in the Court of Appeal decision.[47] UCP 600 is incorporated into a huge number of trade-financing contracts in many countries around the world. One of its advantages is the uniformity of contractual terms that thereby results. In these circumstances, the words of Chan SJ provide an important caution:[48]

> It may not be wise for national courts to act as super-drafters of the UCP. The court will no longer be construing the UCP but reconstructing it to meet its own understanding of the purpose of the particular article. It is suggested that this is not the business of the courts to cause a regime change in the law and practice of letters of credit under the UCP. It is suggested that if there is a lacuna in UCP 600, the lacuna should be filled by express contractual terms or by revising UCP 600.

45 See Uniform Customs and Practice for Documentary Credits 600 Art 12(c); *cf* para 5.14 above.

46 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [244].

47 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [264].

48 *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308 at [265].

Performance bonds, counter guarantees, and indemnities

Claims counter-guarantees and indemnity agreements

5.27 In *Arab Banking Corp (BSC) v Boustead Singapore Ltd*[49] ("*ABC v Boustead (CA)*"), the Court of Appeal dismissed the appeal of Arab Banking Corporation against the High Court decision in *Boustead Singapore Ltd v Arab Banking Corp (BSC)*[50] ("*Boustead v ABC (HC)*"). The facts were as follows: Boustead Singapore Limited ("Boustead"), acting through a joint venture, was employed by the Organisation for Development of Administrative Centres ("ODAC"), a Libyan entity, to undertake a Public Works Contract in Libya. The construction contract provided for a performance bond ("PB") and an advance payment guarantee ("APG") to be issued in favour of ODAC. At Boustead's request, the PB and the APG in ODAC's favour, both governed by Libyan law, were furnished by a Libyan Bank, the Bank of Commerce and Development ("C&D Bank"). These were guaranteed by two counter-guarantees ("CGs") in C&D Bank's favour, which were governed by English Law and furnished by a Bahrain bank, Arab Banking Corporation ("Arab Bank"), pursuant to Boustead's instructions.

5.28 The PB, APG, and CGs were all on-demand guarantees, which required payment on demand as opposed to payment on proof of breach or loss. Boustead's relationship with Arab Bank was governed by a facility agreement ("FA") governed by Singapore law, under which Boustead was obliged to reimburse or indemnify Arab Bank for any amounts demanded or paid under the CGs. Under the FA, any demand from Arab Bank was to be conclusive evidence of the amount owing from Boustead to Arab Bank under the FA. When civil war broke out in Libya in 2011, Boustead had to abandon the construction site, and took the position that the civil war was a *force majeure* event which discharged the Public Works Contract. About a month before the PB and APG expired, ODAC required C&D Bank to extend the validity periods of the PB and APG or pay the full sums secured thereunder ("ODAC Notices"). These notices did not comply with the terms of the PB and the APG.

5.29 Nevertheless, C&D Bank made demands to Arab Bank for payments under the CGs, based on the ODAC Notices. Boustead heard about these demands, and successfully obtained an interim injunction restraining Arab Bank from making payment to C&D Bank under the CGs. Boustead then started an action seeking the continuance of the

49 [2016] 3 SLR 557.
50 [2015] 3 SLR 38.

injunction and a declaration that it was discharged of all liabilities and obligations to Arab Bank under the FA as far as they related to the CGs.

5.30 Following this, Arab Bank made a demand to Boustead under the FA for a sum equal to the total of the sums demanded by C&D Bank under the CGs. When Boustead refused to pay, Arab Bank commenced a countersuit against them claiming the sums under the FA or a declaration that Boustead was liable to pay Arab Bank the sums demanded in the FA demand, and seeking discharge of the injunction restraining payment to C&D Bank.

5.31 The High Court heard both suits together. Boustead argued that Arab Bank's demand on the FA was fraudulent because Arab Bank knew when it issued the demand that it did not in fact have any liability to C&D Bank under the CGs. Boustead also contended that it would be unconscionable for Arab Bank to receive payment from Boustead in the circumstances at hand.

5.32 The High Court found for Boustead on both counts and rejected Arab Bank's claims in the countersuit. The judge granted Boustead a fresh injunction replacing the earlier one, restraining Arab Bank from paying C&D Bank under the CGs. He also decided that Boustead was not liable to pay Arab Bank under the FA, and granted a permanent injunction preventing Arab Bank from receiving payment from Boustead. Arab Bank appealed against this decision and the Court of Appeal affirmed the judge's decision on both counts.

5.33 The Court of Appeal highlighted the well-established principle in demand guarantees that a guarantor bank is bound to pay upon a demand by a beneficiary, provided that the demand complies with the terms of the guarantee. This is so regardless of any dispute between the account party and the beneficiary in the underlying contract, unless there is fraud, in which case the guarantor bank should not make payment and if it does, it will not be entitled to be indemnified by the account party.[51] The basis of the fraud exception is an application of the maxim that "fraud unravels all": the courts will not allow their processes to be used by a dishonest person to carry out a fraud.[52] The typical category of cases in which the fraud exception applies is where the beneficiary has made a fraudulent demand and either the guarantor bank knows about this at the time that the guarantor bank pays on the guarantee, or this is the only reasonable inference in the circumstances.[53]

51 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [75].
52 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [64].
53 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [69].

The Court of Appeal also identified a second, less common category of cases where the fraud exception will apply. This is where:

> (a) the beneficiary's demand is in fact shown to be invalid; and
>
> (b) regardless of any fraud on the part of the beneficiary, it can be shown that the guarantor bank is itself acting fraudulently in either paying the beneficiary and/or in asking to be indemnified by the account party because it either knows that the beneficiary's demand is invalid, or has no honest belief that it is obliged to pay on the demand made by the beneficiary, or is recklessly indifferent as to whether it is obliged to do so or not.[54]

The Court of Appeal noted that in the second category of cases, the beneficiary's demand may be invalid either because of fraud on the part of the beneficiary or for some other reason. Although the Court of Appeal articulated the two categories clearly in its decision, it may be difficult in practice to know which category to use when the beneficiary has made a fraudulent and, therefore, invalid demand. Depending on the circumstances, this situation may fall under the first as well as the second category.

5.34 According to the Court of Appeal, what distinguishes the first category of cases from the second is that in the first category, there is no need to show the guarantor bank is fraudulent, as long as the fraud of the beneficiary is sufficiently brought home to it; whereas in the second category, a finding of fraud on the part of the guarantor bank is necessary.[55] One question that may be raised is whether the guarantor bank's action of paying the beneficiary or claiming on the indemnity with the knowledge of (or recklessness indifference as to) the invalidity of the beneficiary's demand will be sufficient to amount to fraud on its part and, therefore, sufficient to satisfy the fraud exception in the second category, or whether something more is required. If this is sufficient, it may be possible that the second category encompasses the first category: a bank that knows that the beneficiary has made a fraudulent demand under the first category should also know under the second category that it is not obliged to pay on the demand due to the presence of beneficiary fraud rendering the demand invalid, and that it may be seen to be fraudulent itself if it is to pay in such circumstances. It both cases, the guarantor bank will not be entitled to an indemnity from the account party.

54 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [67].
55 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [69].

5.35 In *ABC v Boustead (CA)*, the Court of Appeal affirmed the High Court's decision that Arab Bank's demand on the FA was fraudulent. The analytical framework of the second category of fraud exception cases was applied by the Court of Appeal. In this category, the first step in establishing the fraud exception is to show that the demand made by the beneficiary (C&D Bank) to the guarantor bank (Arab Bank) under the CGs was invalid. C&D Bank would only be entitled to make a claim under the CGs if a valid claim had been made by ODAC under the PB and the APG. ODAC's notices to C&D Bank did not satisfy all the conditions that had to be met for a demand made under the PB or the APG to be valid. Despite this, C&D Bank made demands under the CGs stating, as required by the terms of the CGs, that it had received a claim from ODAC which conformed to the terms of the APG and the PB. As indicated above, this was a false statement. The Court of Appeal looked at the facts of the case cumulatively and made four findings. First, the ODAC Notices were obviously non-compliant.[56] Second, the Court of Appeal found that C&D Bank had been told of the importance of making a complying demand and it could not be that its CG Demands just happened to contain patently false statements.[57] In reaching its conclusion that the statements must have been made fraudulently, the Court of Appeal stated that it was not necessary for "every possibility of an innocent explanation [to be] excluded".[58] Third, C&D Bank had a core duty to examine the documents put before it, and it would have been fraudulent in the sense of being recklessly indifferent to the truth or falsity of its assertions contained in the CG Demands if it had mechanically made the required statements without examining the documents.[59] Fourth, C&D Bank failed to answer allegations of abusive conduct and fraud that were made against it even though it had been given two opportunities to do so.[60] The Court of Appeal was satisfied that C&D Bank had made the CG Demands fraudulently, in the reckless sense, and that its demands were invalid.

5.36 The next step in evaluating the applicability of the fraud exception in the second category is to examine the behaviour of the guarantor bank. The Court of Appeal assessed the facts cumulatively and was of the view that Arab Bank (the guarantor bank) was recklessly indifferent as to whether it had an obligation to pay C&D Bank (the beneficiary) under the CGs when it demanded payment from Boustead (the account party) under the FA.

56 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [87].
57 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [90].
58 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [90], quoting *United Trading Corp SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554 at 561.
59 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [91].
60 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [92].

5.37 The facts taken into account by the Court of Appeal included the below.[61] Arab Bank was a financial institution that was experienced in dealing with demand guarantees. Arab Bank was aware that its obligations under the CGs would only be triggered if C&D Bank had received conforming demands from ODAC. Although C&D Bank did not provide Arab Bank with copies of the PB and APG when Arab Bank asked for these, Arab Bank eventually acquired them as they were part of the exhibits included in Boustead's court action. Arab Bank would have known, upon receipt of the court papers, that Boustead took the position that C&D Bank had not made any valid claims against Arab Bank on the CGs and that C&D Bank's demands against Arab Bank on the CGs were "abusive". Arab Bank relayed Boustead's position to C&D Bank but the latter did nothing to convince Arab Bank of the propriety of its CG Demands. By the time Arab Bank made its demand on the FA some 15 months after C&D Bank's CG Demands, Arab Bank was in possession of copies of the PB, the APG, and the ODAC Notices.

5.38 The Court of Appeal found that if Arab Bank had directed its mind to the PB, the APG, and the ODAC Notices before making the FA demand, as it either did or ought to have done, it could not have honestly believed that it was obliged to honour any demand from C&D Bank. The fraud exception was, therefore, made out.

5.39 The Court of Appeal affirmed the judge's decision in *Boustead v ABC (HC)* that the appropriate remedy in this case was the grant of a permanent injunction restraining Arab Bank from receiving payment from Boustead under the FA and from making payment to C&D Bank under the CGs.

5.40 A key legal principle relating to demand guarantees, similar to that relating to letters of credit, is that banks are not required to investigate the underlying facts but are entitled to rely on the documents alone to see if they correspond at face value to the terms of the guarantee. It will be reassuring for the banking community that the Court of Appeal emphasise that this principle remains intact and is not affected by its decision in *ABC v Boustead (CA)*. In a typical demand guarantee case, the guarantor bank is not obliged to make investigations as to the validity or genuineness of the documents presented to it, and the guarantor bank will be entitled to reimbursement from the account party if it goes ahead to pay the beneficiary based on the apparent conformity of the documents. The guarantor bank will be under no obligation to ask for all the documents that have been presented along

61 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [98].

the banking chain to satisfy itself that the demand it receives is in fact a valid one. The Court of Appeal felt that:[62]

> [The present case] truly is an exceptional case where the guarantor bank came into possession of such documents in circumstances where it would have been reckless for it not to have directed its mind to those documents. Had it given those documents due consideration, it would have been impossible for it continue to hold any honest belief that the beneficiary was entitled to payment …

The standard of proof for fraud is a high one: the account party must be able to show that the only realistic inference to be drawn on the available evidence is that the guarantor bank has no honest belief that it is obliged to pay the beneficiary or is recklessly indifferent as to whether it has to pay. The Court of Appeal observed that it expected that "it would only be in truly exceptional circumstances that the account party would be able to discharge this [burden]".[63]

5.41 In view of its findings that Arab Bank had acted fraudulently in making the demand under the FA, the Court of Appeal did not find it necessary to express a concluded view as to whether it would be unconscionable for Arab Bank to receive payment from Boustead under the FA demand in the circumstances of this case. Nevertheless, the Court of Appeal made a few observations in relation to this claim. A potential preliminary hurdle was whether the unconscionability exception could form the basis for an order restraining Arab Bank from receiving payment from Boustead on facts such as the present, where there had been a full trial and determination of Boustead's liability to Arab Bank under the FA demand.[64] The Court of Appeal discussed the rationale for the development of unconscionability as a distinct ground for the grant of injunctions to restrain payment on a demand made under a performance bond. A beneficiary in a performance bond is guaranteed payment on the performance bond upon a valid demand, even where there is a dispute in the underling contract between the account party and the beneficiary. The performance bond performs a valuable commercial function but is potentially an instrument of oppression if the beneficiary makes an abusive call on a bond. The Court of Appeal observed:[65]

> [O]n one view, the unconscionability exception serves to protect the account party from unfair demands by the beneficiary to have the secured sum in hand in circumstances where there has not yet been a final determination as to whether he is actually entitled to that sum.

62 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [99].
63 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [82].
64 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [100].
65 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [104].

> On this view, it would be doubtful whether the unconscionability exception has any relevance where the substantive dispute under the primary contract has been finally resolved …

Indeed, in this situation, it would seem that there will no longer be any need to assess whether it will be fair to allow the beneficiary to receive payment under the performance bond as the court will have already determined whether there is an entitlement to payment or not. There could be room for discussion on this point in future cases, as the Court of Appeal did not make a definitive ruling on it.

Bills of exchange

Whether a promissory note falls within the scope of an arbitration agreement

5.42 In *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*[66] ("*Rals v Cariparma (CA)*"), Rals International Pte Ltd ("Rals") entered into a supply contract to buy equipment from Oltremare SRL ("Oltremare") under which Rals agreed to pay Oltremare a sum of money in instalments, eight of which were to be paid by way of promissory notes ("Notes"). Oltremare sold the Notes to an Italian bank, Cassa di Risparmio di Parma e Piacenza SpA ("Cariparma"), under a discount contract, pursuant to which the Notes were assigned to Cariparma and endorsed and delivered to it. Cariparma presented four of the Notes for payment but each of them was dishonoured by Rals. Cariparma then commenced an action against Rals to claim the total face value of the four Notes presented. Cariparma also sought a declaration that it was a holder in due course of the Notes and that Rals was liable to pay Cariparma the face values of the remaining four Notes as and when they fell due and were presented for payment. In response, Rals filed an application seeking a stay of Cariparma's suit under s 6 of the International Arbitration Act[67] ("IAA"), as the supply agreement contained an arbitration agreement, which provided that all disputes arising in connection with the supply agreement would be referred to arbitration. The assistant registrar ("asst registrar") granted the stay, but the High Court allowed the appeal against the decision of the asst registrar in *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd*[68] ("*Cariparma v Rals (HC)*"). Rals appealed to the Court of Appeal, which dismissed the appeal and affirmed the decision of the High Court.

66 [2016] 5 SLR 455.
67 Cap 143A, 2002 Rev Ed.
68 [2016] 1 SLR 79.

5.43 Section 6(1) of the IAA provides:

> [W]here any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may … apply to that court to stay the proceedings so far as the proceedings relate to that matter.

Under s 6(5), a reference to a party under s 6(*a*) "shall include a reference to any person claiming through or under such party". Applying these sections, a court will have the power the stay proceedings only if:[69]

> (a) the claimant in the proceedings is a party to an arbitration agreement (either directly or because he is claiming 'through or under' such party); and
>
> (b) the subject matter of the proceedings is the subject of the arbitration agreement.

The High Court judge found that although Cariparma was not a party to the arbitration agreement, it was a party claiming "through or under" Oltremare and, therefore, fell under s 6(1) of the IAA. As Cariparma did not appeal against this finding, the Court of Appeal declined to decide the issue, but offered some observations on this point and expressed agreement with the judge's approach.

5.44 As regards the subject matter of the claim, the Court of Appeal was of the view that an arbitration clause in an underlying contract will generally not be treated as covering disputes that arise under an accompanying bill of exchange in the absence of express language or express incorporation.[70] In making this finding, the Court of Appeal overruled the High Court decision in *Piallo GmbH v Yafriro International Pte Ltd*,[71] which had been discussed and distinguished by the judge in *Cariparma v Rals (HC)*. The Court of Appeal in *Rals v Cariparma (CA)* pointed out that this position was supported by authority such as the UK House of Lords in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH*,[72] and gave effect to the commercial expectation of the parties when they selected a bill of exchange as the mode of payment. The Court of Appeal endorsed the view of the judge in *Cariparma v Rals (HC)* that it is difficult to see why any right-thinking merchant would choose to give up his rights in respect of bills of exchange, or why he would want to restrict the choice of a holder and

69 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [14].

70 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [42].

71 [2014] 1 SLR 1028.

72 [1977] 1 WLR 713.

possibly his endorsee as to the mode of dispute resolution that could be adopted.[73] This consideration is particularly cogent in light of the fact that the rules of most major arbitral institutions do not provide expressly for summary adjudication.

5.45 The Court of Appeal in *Rals v Cariparma (CA)* found that the fact that the obligations under the Notes were separate and autonomous from those arising out of the supply agreement supported a conclusion that a claim under the Notes, even by the supplier, would not have been subject to the arbitration agreement. There was no term in the arbitration agreement or the supply agreement that expressly stated that the arbitration agreement was to encompass disputes arising out of the Notes, nor was the arbitration agreement expressly incorporated into the Notes.[74] The Court of Appeal felt that it was clear that Cariparma could not be in a worse position compared to Oltremare with regard to this issue. This meant that Cariparma's claim on the Notes also did not fall within the scope of the arbitration agreement.

Banking

Bank secrecy: Order for pre-action discovery

5.46 Section 47 of the Banking Act[75] provides that banks have a duty to keep customer information confidential. Exceptions to the bank's duty of confidentiality are set out in the Third Schedule to the Act, for instance, where it is necessary to disclose customer information to comply with an order of the Supreme Court pursuant to its powers under Pt IV of the Evidence Act.[76] These provisions were considered by the High Court in *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd*.[77] In this case, the plaintiffs (two companies incorporated in the Cayman Islands) bought shares in a food and beverage business beneficially owned by Mdm Zhang. The bulk of the purchase price was paid into Mdm Zhang's bank account with Bank J Safra Sarasin, Hong Kong Branch ("Bank Sarasin"). The plaintiffs alleged that Mdm Zhang had made fraudulent misrepresentations which induced them to make the acquisitions, and that accounting and financial records had been manipulated. A disclosure order was obtained in Hong Kong against Bank Sarasin, which showed that money and securities

73 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [45].
74 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [49].
75 Cap 19, 2008 Rev Ed.
76 Cap 97, 1997 Rev Ed.
77 [2016] 4 SLR 1392.

from Mdm Zhang's Bank Sarasin account had been transferred to Success Elegant Trading Limited's ("SETL") bank account with Credit Suisse AG ("CS"). The plaintiffs took out originating summonses in Singapore and obtained orders from the asst registrar against CS and Deutsche Bank Aktiengesellschaft ("DB"), with whom SETL also had an account, for discovery of bank documents pertaining to the bank accounts of SETL. SETL obtained leave to intervene in the proceedings as a defendant, and appealed against the decision of the asst registrar.

5.47 The High Court dismissed SETL's appeal, which raised issues of civil procedure and bank secrecy, of which only the latter will be considered here. SETL pointed out that CS and DB were subject to the duty of bank secrecy. The plaintiffs argued that disclosure was permitted under the Third Schedule to the Banking Act, and that s 175 of the Evidence Act applied. Section 175(1) provides: "[o]n the application of any party to a legal proceeding, the court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings." The High Court found that s 175 is not meant to confer an independent right of discovery. A party has to demonstrate a substantive right to the documents, without relying on s 175, to succeed in obtaining an order under s 175 for disclosure. The High Court was of the view that s 175 was enacted to ease how evidence of bankers' books would be adduced in court, and that the "legal proceeding" in s 175 should be interpreted purposively such that the very application for disclosure (on the facts, the originating summonses against CS and DB) constituted "legal proceeding" within the meaning of s 175.[78] The court thought it undesirable that an independent set of legal proceedings should be required before pre-action disclosure was granted, as this would mean that banks will be generally exempt from pre-action disclosure orders unless there is an ongoing separate legal proceeding.[79] One might observe in passing, however, that this may not necessarily be a bad thing. The High Court further decided that the phrase "for any of the purposes of such proceedings" in s 175 will include "the purpose of tracing and following moneys which was the very *raison d'être* of the applications".[80]

78 *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd* [2016] 4 SLR 1392 at [92]–[93].

79 *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd* [2016] 4 SLR 1392 at [92].

80 *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd* [2016] 4 SLR 1392 at [93].

Garnishee order against a joint account

5.48 In *One Investment and Consultancy Ltd v Cham Poh Meng*,[81] the High Court decided that a joint account held at a bank cannot be subject to a garnishee order. The court pointed out that this position is supported almost unanimously by Commonwealth authorities and local academics. Indeed, there are clearly good policy reasons for this ruling.[82] On one hand, protecting a joint account from being subject to a garnishee order will provide a person with a loophole that will enable him to put his money out of the way of his creditors by putting it into a joint account.[83] But this has to be balanced against the prejudice that will be suffered by banks and joint account holders if the position is otherwise. It will be difficult for banks to ascertain the respective contributions of joint account holders to determine the correct proportion to attach to a garnishee order, and a judgement debtor may have multiple bank accounts with different bank account holders. Banks will incur extra financial and administrative costs, which will ultimately be passed on to the judgment creditors and debtors. Other joint account holders will be prejudiced if joint accounts are liable to garnishment.

5.49 Under O 49 r 3(1) of the Rules of Court,[84] joint account holders do not need to be informed about the garnishee order and there is no procedure for the joint account holder to seek determination of the judgment debtor's interest in the joint account. If some proportion of a joint account is frozen, the judgment debtor may still withdraw all the remaining money from the account, leaving his joint account holder to shoulder the whole of the debt.

81 [2016] 5 SLR 923.

82 See *One Investment and Consultancy Ltd v Cham Poh Meng* [2016] 5 SLR 923 at [16]–[19] and [20]–[22].

83 See *One Investment and Consultancy Ltd v Cham Poh Meng* [2016] 5 SLR 923 at [24].

84 Cap 322, R 5, 2014 Rev Ed.