5. BANKING LAW

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Banking confidentiality

5.1 A bank owes a duty to keep the affairs of a customer confidential. This is one of the basic duties owed by a bank to a customer and this duty is normally implied into the banker and customer relationship as the duty is hardly, and in most cases cannot be found, in the bank's written agreement. In Singapore, there is in addition, s 47 of the Banking Act (Cap 19, 2008 Rev Ed), which imposes a statutory duty of confidentiality on a bank. A bank incurs a criminal liability for a breach of s 47. A very vexed question pertaining to a banker's duty of confidentiality arises in Singapore owing to the presence of s 47 of the Banking Act. Where is a banker's contractual duty of confidentiality to be found in Singapore? Is it to be found in s 47 or is the duty to be implied from the banker and customer relationship? The correct solution to this question has profound implications for the banker and customer relationship in Singapore. The Singapore Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 sought to provide a definitive answer to this question. The court's decision arose from an appeal in *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237, where the appellant sought leave to adduce further evidence. The appellant, a wealthy Indonesian lady, became a customer of the respondent's private banking division on 27 August 1997. On 11 February 1998, the appellant executed a third party liability charge over her account to cover her son-in-law's liabilities towards the bank. Between 1998 and 2006, her son-in-law, Lim Thian Long ("Tommy"), incurred substantial losses arising from foreign exchange transactions and loans from the bank. By March 2006, Tommy's liabilities amounted to US$17.4m. When Tommy failed to pay the bank, the bank deducted the amount from the appellant's account. The appellant contended that the bank had no right to do so on two main grounds. First, the charge was executed under Tommy's undue influence, and, secondly, the bank owed her a fiduciary duty to disclose the transactions involving Tommy's account. The court found that there was no evidence of undue influence. The relationship between the bank and the appellant was not fiduciary in nature and the bank did not owe a duty to disclose the information about Tommy's account. Lai Siu Chiu J decided that the bank's implied duty of confidentiality must take into account its statutory duty of confidentiality and the bank was prohibited by s 47 of the Banking Act (Cap 19, 2003 Rev Ed) from disclosing the information.

Even though the Court of Appeal dismissed the appellant's appeal, the court felt that it was necessary to give a definitive view on a bank's contractual duty of confidentiality in Singapore. It decided that a banker's contractual duty of confidentiality in Singapore was governed exclusively by s 47 of the Banking Act and there was no room for the implied common law duty of confidentiality. V K Rajah JA said (at [66] and [67]):

> We note that the trial judge's overview may give the impression that the case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 ('*Tournier*') remains applicable in Singapore, and that the four general exceptions to a banker's implied duty to keep the affairs of a customer confidential stated therein run parallel to the statutory exceptions provided for under s 47 of our Banking Act (Cap 19, 2003 Rev Ed) ('Banking Act'). We therefore feel compelled to address this issue to ensure that the position is free from doubt.
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> Section 47(1) of the Banking Act states categorically that:
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> > Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person *except as expressly provided in this Act*. [emphasis added]
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> In light of the plain wording of s 47, our current statutory regime on banking secrecy leaves no room for the four general common law exceptions expounded in *Tournier* to co-exist. They have been embraced within the framework of s 47 of the Banking Act, which is now the exclusive regime governing banking secrecy in Singapore. Section 47 makes it plain that no customer information shall be disclosed by a bank in Singapore or any of its officers except as expressly provided for in the Banking Act. A breach of any of the prescribed statutory obligation amounts to a criminal offence. The Third Schedule to the Banking Act sets out, in illuminating detail, the circumstances, conditions, and details of permissible disclosure. It is axiomatic that, in terms of details and scope, this is a more comprehensive regime than that articulated in *Tournier*. There is simply no room, in Singapore, for the less sophisticated and more general common law rules articulated in *Tournier* to have any further relevance save for the perspective of historical evolution and context it provides.

5.2 The views expressed by the Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 do not adequately address the problems raised by s 47 of the Banking Act (Cap 19, 2008 Rev Ed). It is also regrettable that the court did not provide any detailed analysis as to how it arrived at the view that s 47 now exclusively governs the issue of a bank's contractual duty of confidentiality. Indeed, the views expressed by the court ignore the fundamental distinction between the statutory role of s 47 and a banker's contractual duty of confidentially. It is not the stated intention of s 47 to legislate on a banker's contractual duty of confidentiality but to provide a minimum

statutory threshold which the banker transgresses at the risk of committing a criminal offence. Indeed, Parliament recognised that a bank can adopt a higher contractual standard of confidentiality if it so wishes. In moving the second reading of the Banking (Amendment) Bill during the 16 May 2001 sitting of Parliament, to amend s 47, Deputy Prime Minister, BG Lee Hsien Loong, said: "These measures ensure that by law, all banks will provide a basic level of customer confidentiality to all their customers. Beyond this legal minimum, individual banks and customers may reach their own contractual arrangements offering higher standards of confidentiality. The Act does not compel a bank to invoke the newly introduced exceptions if the bank deems this to be in the best interests of its business and its customers." (See *Singapore Parliamentary Debates, Official Report* (16 May 2001) vol 73 at cols 1689 and 1690.) Indeed, s 47(8) of the Banking Act expressly stipulates that: "For the avoidance of doubt, nothing in this section shall be construed to prevent a bank from entering into an express agreement with a customer of that bank for a higher degree of confidentiality than that prescribed in this section and in the Third Schedule." It is therefore clear that s 47 is not intended to replace a bank's contractual duty of confidentiality.

5.3 Further, it is by no means clear that s 47 of the Banking Act (Cap 19, 2008 Rev Ed) is intended to legislate on a bank's contractual duty of confidentiality. There is no indication in s 47 that a bank's breach of the provision will provide a customer with a contractual remedy for breach of statutory duty. Indeed, it might even be argued by a bank that since a customer has a contractual remedy for breach of confidentiality against the bank, the customer should not be allowed to rely on the bank's breach of statutory duty to bring a contractual claim. To treat s 47 as the sole and exclusive provision governing a bank's contractual duty of confidentiality in Singapore might yield many unintended consequences. First, under the Third Schedule to the Banking Act, a bank is allowed to disclose customer information in many situations without obtaining the customer's consent. The situations covered under the Third Schedule include matters touching on the acquisition of another bank, the outsourcing of data processing and the transfer and sale of credit facilities. In addition, a bank may provide information on a customer's credit-worthiness to a third party without the customer's consent in connection with a *bona fide* commercial transaction. It may also supply information to a credit bureau on a customer's credit-worthiness without the customer's consent. A bank is also permitted to disclose a customer's name, identity, address and contact number in connection with the promotion of financial products and services made available in Singapore by other financial institutions. This again may be done without the customer's consent. Many of these disclosures would constitute a breach of a bank's common law duty of confidentiality. In *Turner v Royal Bank of Scotland*

plc [1999] 2 All ER (Comm) 664, the English Court of Appeal decided that a disclosure of information pertaining to a customer's credit-worthiness to other banks constituted a breach of the bank's contractual duty of confidentiality. Similarly, a disclosure of a customer's name, identity, address and contact number to other financial institutions would clearly constitute a breach of a bank's common law duty of confidentiality.

5.4 Disclosure of information listed under the Third Schedule of the Banking Act (Cap 19, 2008 Rev Ed) will not constitute an offence under s 47 but will it constitute a breach of a bank's contractual duty of confidentiality? Following the Court of Appeal's approach in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, such disclosures by the bank will no longer constitute a breach of the bank's contractual duty of confidentiality since s 47 is now the "exclusive regime governing banking secrecy in Singapore" and "[t]here is simply no room, in Singapore, for the less sophisticated and more general common law rules articulated in *Tournier* to have any further relevance" (at [67]). Indeed, many bank customers will be very surprised that confidential information about their accounts could be disclosed by the bank to third parties with such impunity and without the customers' consent. In view of these unintended consequences, the approach taken by the Court of Appeal raises more questions than it seeks to resolve.

5.5 In view of these unintended consequences, the approach taken by the trial court in *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237 is to be preferred. Under the trial court's approach, a bank's contractual duty of confidentiality is an obligation to be implied from the banker and customer relationship, and this is rightly so because it is a well-known fact that bank agreements are notoriously one-sided agreements. A bank agreement will always spell out a customer's obligations but none of the bank's duties and this is how banking law has developed with the courts intervening to imply certain essential duties owed by the bank. A bank's duty of confidentiality is one such duty seldom to be found in any bank agreement but has been painstakingly implied by the courts. Much of the gains made by the common law over the years for the protection of customer information would be lost if the approach taken by the Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 is adopted in making s 47 of the Banking Act (Cap 19, 2008 Rev Ed) the sole regime to govern a bank's contractual duty of confidentiality in Singapore. Apart from the fact that the statutory protection provided under s 47 requires a customer's written consent in some situations, the overall protection conferred by s 47 may in many situations be lower than that provided under the common law duty of confidentiality. Under the Third Schedule to the Banking Act, customer information may be disclosed by a bank to third parties without the customer's consent when the bank

provides information on a customer's credit-worthiness in connection with a *bona fide* commercial transaction or when the bank supplies information to a credit bureau on the customer's credit-worthiness or when the bank discloses the customer's name, identity, address and contact number in connection with the promotion of financial products and services made available in Singapore by other financial institutions. All these instances would constitute a breach of a bank's duty of confidentiality at common law. It is indeed surprising that s 47 which professes to set a minimum standard for a bank's duty of confidentiality in Singapore should result in eroding much of the protection conferred by the bank's common law duty of confidentiality. Further, since it is not abundantly clear that s 47 is intended to provide a bank customer with a contractual remedy for breach of its provisions by way of an action for breach of statutory duty, the customer might be left with no contractual remedy if the bank breaches its duty of confidentiality since this duty can no longer be implied by law according to the Court of Appeal.

5.6 However, under the trial court's approach in *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237, a customer's contractual right to confidentiality is enhanced and not diminished by the presence of s 47 of the Banking Act (Cap 19, 2008 Rev Ed). It is therefore submitted Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, the approach taken in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 ("*Tournier*") is central in giving a bank customer in Singapore a contractual remedy against a bank for that contrary to the views of the Court of breach of its duty of confidentiality. Even though the four exceptions mentioned in *Tournier* cannot be applied in their entirety in Singapore owing to the presence of local circumstances, it can still be applied after taking into account s 47.

5.7 At common law, a banker's contractual duty of confidentiality is implied from the banker and customer relationship. In Singapore, a similar duty can be implied from the banker and customer relationship unless s 47 of the Banking Act (Cap 19, 2008 Rev Ed) is construed as giving the customer a contractual claim for breach of statutory duty. In implying a term into a contract, one operative cardinal principle is that the term to be implied must be reasonable and not be contrary to law. If a Singapore court is asked to imply a term touching on a banker's duty of confidentiality, it has to imply a term which is not contrary to s 47; otherwise the court will be implying a term proscribed by law. In order to imply a term which is not contrary to s 47, the court has to take into account the fact that the exceptions provided under s 47 are narrower in some ways than those available at common law. More particularly, there are two main differences between a bank's common law duty and s 47. First, the common law exception allowing for disclosure to be made under a duty to the public is nowhere

to be found in s 47. Secondly, the common law exception allowing for disclosure to be made under a customer's implied or oral consent finds no parallel under s 47. Thus, a banker's contractual duty of confidentiality in Singapore may be summarised in the following manner. A banker in Singapore owes a contractual duty to keep the affairs of a customer confidential which is to be implied from the banker and customer relationship. Of the four exceptions recognised by the common law as entitling a bank to make disclosure in spite of its duty of confidentiality, only two of these exceptions apply in Singapore without any need for modifications. The first is when disclosure is made under compulsion of law. The second is when a bank's interests require disclosure. As to the third common law exception, disclosure made under a duty to the public, that exception does not apply in Singapore as it contravenes the prohibition under s 47. With respect to the fourth exception under the common law, disclosure made with a customer's consent, this exception has to be modified to take into account the fact that s 47 only allows for disclosure if it is made with a customer's written consent. Under a bank's common law duty of confidentiality, a customer's consent may be express or implied. In addition, express consent may be oral or written. In Singapore, no disclosure by a bank is allowed based on a customer's implied consent as this is prohibited under s 47. Similarly, a customer's oral consent is not sufficient to authorise a bank to make the disclosure since s 47 requires written consent. Thus, a bank in Singapore is entitled to disclose customer information only if it has a customer's written consent.

5.8 Once the presence of s 47 of the Banking Act (Cap 19, 2008 Rev Ed) is taken care of by making the necessary modifications, the protection accorded by the common law is in many ways more extensive than that provided under s 47.

Conclusive evidence clauses

5.9 In its contract with a customer, a bank in Singapore may deploy two types of conclusive evidence clauses with varying effects on the customer's rights. The first type of conclusive evidence clause is employed by the bank to facilitate the recovery of debts owed by a customer. When a bank makes a demand on a customer for the repayment of a debt, the bank has to quantify the amount of its claim. If an amount is specified by a bank, a customer may dispute the accuracy of the quantification and thus delay the recovery of the debt. To avoid any possible disputes over the quantum of the claim, a term, now popularly referred to as a conclusive evidence clause, is very often incorporated into the terms of the bank's contract with the customer. The object of such a clause is to render a certification by a bank as to the amount owed conclusive as between the bank and the customer of the

debt owing by the customer. In the absence of fraud or patent error on the face of the statement, the statement is binding on the customer. This type of clause is seen as facilitating banking business without carrying any sinister connotations as the bank is, at the end of the day, accountable to the customer for any error made by the bank. Thus, in *Bache & Co (London) Ltd v Banque Vernes Et Commerciale De Paris SA* [1973] 2 Lloyd's Rep 437 at 440, Lord Denning MR said: "This does not lead to any injustice because if the figure should be erroneous, it is always open to the French trading company to have it corrected by instituting proceedings against the brokers, in England or in France, to get it corrected as between them."

5.10 The first type of conclusive evidence clause has to be carefully distinguished from the second type of conclusive evidence clause used by banks which is much more objectionable in character and impact, and for some peculiar reason has found its way into bank agreements in Singapore but not the bank agreements used in the UK, Australia, New Zealand and Hong Kong. One possible reason for the absence of the provision in these other countries could be the presence of a stronger consumer protection lobby. The second type of conclusive evidence clause seeks to make a bank statement rendered by the bank conclusive as to the state of a customer's account with the bank. The second form of conclusive evidence clause is more objectionable in character and nature. First, the clause is intrinsically unfair to a customer because it is in reality an exclusion provision seeking to protect a bank against its liability for breach of some of the fundamental duties it owes to the customer, such as making payment on a customer's valid mandate. If a customer does not raise an objection to the bank statement, usually within seven or 14 days from the rendering of the statement, the statement is deemed to be correct and the customer is precluded from challenging the account, including the forgery of the customer's signature and any wrongful debits from the account.

5.11 Both these types of conclusive evidence clauses were relied upon by the bank in *RBS Coutts Bank Ltd v Shishir Tarachand Kothari* [2009] SGHC 273. The defendant, a customer, opened an account with the plaintiff bank, a private banking business, in August 2006, to engage in investment and forex trading activities. The defendant was involved in various forex transactions involving the US dollar and all went well until the end of 2007 when the US dollar weakened and this led to the bank closing the defendant's positions in the forex transactions leaving a debt of US$569,109 owing to the bank. The bank agreement stipulated in cl 58 that: "A certificate signed by any authorised representative of RBS Coutts showing the amount of Obligations from time to time due from you to RBS Coutts shall be conclusive evidence as against you of the amount so owing." On 17 December 2008, the bank issued a conclusive certificate of indebtedness stating a sum of US$569,109 to be due and

owing from the defendant. Based on the certificate of indebtedness, the bank obtained summary judgment against the defendant. The defendant applied to set aside the summary judgment and for leave to adduce further evidence. Both applications were dismissed by Judith Prakash J. The court decided that the defendant was bound by the certificate of indebtedness issued by the bank and the application to adduce further evidence was misconceived since there was no evidence to show why it could not have been adduced before the assistant registrar who granted summary judgment. It also expressed the view that even though the court was not precluded from reviewing the propriety of the bank's demand, the defendant was bound by the certificate in the absence of fraud or manifest error on the face of the certificate. Prakash J said (at [8] and [9]):

> It is axiomatic that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the certificate, *determinative of the amount due*. …
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> Clause 58, however, in my view, does not preclude a legal review by the court into the propriety of the demand itself. In this regard, I agree with the views of V K Rajah J in *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345 ('Standard Chartered Bank'), a decision which was not referred to me by either counsel but certainly warrants a mention.
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> [emphasis in original]

5.12 The bank also relied on its statements of account rendered to the defendant under its second conclusive clause which stipulated that: "At the end of the period of 90 days, the Account as kept by RBS Coutts and the details set out in the Statement shall be conclusive evidence without any further proof that the Statement, the entries and details therein are correct (subject to the right of RBS Coutts, which may be exercised by it at any time, to adjust any entries in the Account or details in the Statement where they have been wrongly or mistakenly made by it)." The court decided that the defendant was bound by the bank statements rendered under the second conclusive evidence clause as he had not disputed the statement within the time stipulated. Prakash J said (*RBS Coutts Bank Ltd v Shishir Tarachand Kothari* [2009] SGHC 273 at [18]):

> I take a similar view in the present case. The time period provided for dispute was a generous one and gave the Defendant more than adequate time to examine all transactions in detail. The Statements, not having been disputed during the relevant periods, were conclusive evidence that the Forex Transactions were authorised.

Negotiable instruments

Gambling transactions

5.13 When a negotiable instrument is issued in Singapore in payment of a wagering contract or for a debt arising from a gambling transaction, the instrument is unenforceable as it is given without consideration since a gambling debt is declared to be null and void under s 5 of the Civil Law Act (Cap 43, 1999 Rev Ed). In addition, it would also be against public policy to allow recovery of a gambling debt. Would the recovery of a gambling debt meet with a similar fate if the debt were incurred in a foreign country? The Singapore Court of Appeal in *Star City Pty Ltd v Tan Hong Woon* [2002] 1 SLR(R) 306 took a strong stand against allowing the Singapore courts to be used as gambling debt collectors for foreign casinos. However, in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690, the Singapore Court of Appeal decided that public policy considerations would not apply with the same rigour when it came to enforcing a foreign judgment obtained in respect of a gambling debt. In *Desert Palace Inc v Poh Soon Kiat* [2009] 1 SLR(R) 71, the Singapore High Court followed the Court of Appeal's decision in *Liao Eng Kiat v Burswood Nominees Ltd*. The defendant gambled at Caesars Palace, a casino in Las Vegas, on various occasions between 1992 and 1998. The casino obtained a default judgment against the defendant in Nevada on 29 March 1999 for US$2m. On 2 June 1999, a further default judgment for US$2,453,126.33 was obtained in the Superior Court of the State of California for the County of Santa Clara. The casino filed a claim in Singapore on 19 October 2007 for the recovery of US$4,378,927.63 in respect of the judgments obtained in the US. The defendant relied on two main defences. First, the claim was for the recovery of a gambling debt and this was rendered unenforceable under s 5(2) of the Civil Law Act (Cap 43, 1999 Rev Ed). The second defence was that the claim was time-barred under the Limitation Act (Cap 163, 1996 Rev Ed). Both these defences were rejected by the trial court. Chan Seng Onn J acknowledged that while the enforcement of a gambling debt would not be sanctioned by the courts in Singapore as it would be governed by s 5 of the Civil Law Act, however, different public policy considerations applied to the enforcement of a foreign judgment obtained on a gambling debt. This decision has been reversed by the Singapore Court of Appeal in *Poh Soon Kiat v Desert Palace Inc* [2009] SGCA 60. The court decided that the trial court was wrong in holding that the 2001 California judgment was a foreign money judgment enforceable by a common law action. On the issue of public policy, the court distanced itself from its earlier decision in *Liao Eng Kiat v Burswood Nominees Ltd* on the ground that Singapore's public policy would apply with equal force to the enforcement of a foreign judgment obtained on a gambling debt. Chan Sek Keong CJ said (at [114]):

> Turning to s 3(2)(*f*) of the RECJA, this court held in *Burswood Nominees* (at [41]) that 'Liao would have to surmount [a] higher public policy threshold in order to prevail upon [the court] to refuse registration of the [WA] [J]udgment on grounds of public policy'. In our view, there is no legal basis for reading this requirement into s 3(2)(f). This provision expressly states that a Commonwealth judgment shall not be registered if '*the judgment was in respect of a cause of action which for reasons of public policy* or for some other similar reason *could not have been entertained by the registering court*' [emphasis added]. These words are absolutely clear. The public policy referred to in s 3(2)(*f*) of the RECJA is the public policy of Singapore, whether it be our common law public policy or our statutory public policy. Section 5(2) of the CLA expresses the public policy which precludes the enforcement of any cause of action based on a gambling debt. In *Burswood Nominees*, the cause of action on which the WA Judgment was based was a gambling debt. No doubt, the gambling debt in question was a valid debt, but s 5(2) of the CLA applies to all gambling debts. Accordingly, the court should have accepted Liao's argument that the WA Judgment could not be registered under s 3(2)(*f*) of the RECJA on the ground that that judgment was based on a cause of action which could not, by virtue of the public policy encapsulated in s 5(2) of the CLA, be maintained in Singapore. In our view, the decision in *Burswood Nominees* is, with respect, unsound and should be reviewed if a similar issue were to come before this court in the future.

5.14 The court decided that the California judgment was not enforceable in Singapore as a common law action as it was not a foreign money judgment but a judgment which arose from a gambling transaction, and it was against public policy to enforce the claim. Chan Sek Keong CJ said (*Poh Soon Kiat v Desert Palace Inc* [2009] SGCA 60 at [127]):

> In summary, our finding in this appeal is that the 2001 California Judgment was not enforceable by way of a common law action as it was not a foreign money judgment as defined at [14] above. On this basis, we allow the present appeal. As for the Limitation Issue and the Section 5(2) CLA Issue, although they are not live issues given our ruling that the 2001 California Judgment could not be enforced by way of a common law action in Singapore, we proffer the following observations:
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> (a) the six-year limitation period under s 6(1)(*a*) of the LA applies to common law actions on foreign judgments; and
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> (b) it appears that (although, as stated at [120]–[121] above, we do not wish to express any conclusive opinion on this particular point) s 5(2) of the CLA would bar a common law action on a foreign judgment (whether emanating from a Commonwealth country or a non-Commonwealth foreign country) whose underlying cause of action is a gambling debt.

5.15 The court further expressed the view that public policy in Singapore towards gambling transactions had not changed even with the establishment of the integrated resorts, unlike the views expressed earlier in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690. Chan Sek Keong CJ said (*Poh Soon Kiat v Desert Palace Inc* [2009] SGCA 60 at [98], [100] and [103]):

> To reiterate, the existence of regulated gambling is not inconsistent with unregulated gambling and gambling on credit being against public policy in Singapore. Furthermore, the court's affirmation at [45] of *Burswood Nominees* ([10] *supra*) of its earlier stand in *Star City* (CA) ([17] *supra*) – *viz*, that gambling per se is no longer contrary to Singapore's public policy – is also not justified in view of the *elaborate legislative and regulatory framework* set out in the current CCA, which was enacted by Parliament (initially as the Casino Control Act 2006 (Act 10 of 2006) ('the 2006 CCA')) to, *inter alia*, 'make provision for the operation and regulation of casinos and gaming in casinos' (see the preamble to the 2006 CCA).
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> If gambling were not contrary to public policy in Singapore, such an extensive and detailed legislative and regulatory framework as that set out in the current CCA would not be necessary at all. Furthermore, if gambling in general were no longer contrary to Singapore's public policy, Parliament would have repealed s 5 of the CLA *in its entirety*. Parliament did not, however, do so. Instead, it restructured s 5 of the CLA to make ss 5(1) and 5(2) inapplicable to all forms of *regulated* gambling. Currently, s 5 of the CLA, as restructured, reads as follows:
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> Clearly, if gambling contracts issued by '*legal* gambling operators in Singapore, such as the Singapore Pools and the Singapore Turf Club' [emphasis added] (see *Singapore Parliamentary Debates* (13 February 2006) at col 2329) that are based on credit 'shall continue to be unenforceable … to ensure that the local gambling operators do not promote gambling to locals by giving out credit' (*ibid*), the general position that gambling is against public policy must be unchanged.
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> [emphasis in original]

Conversion of cheque

5.16 The right to sue for the conversion of a cheque resides with the person who has the right to the immediate possession of the cheque at the time of the conversion and he is usually the true owner of the cheque. A person drawing a cheque is not liable on the cheque until he puts the cheque into circulation by delivering the cheque to the payee. Until the cheque is validly delivered to the payee, the drawer retains the right to the immediate possession of the cheque and is able to sue a tortfeasor for the conversion of the cheque. Delivery may be actual,

constructive or conditional. However, the fact that a cheque drawer intends the payee to use the cheque proceeds for a certain purpose does not render the delivery of the cheque to the payee conditional.

5.17 When a cheque is converted by a third party, the true owner of the cheque may maintain an action for the conversion of the cheque or for money had and received. The true owner is entitled to obtain a judgment for one of the remedies but not for both remedies. In opting to recover payment in an action for money had and received instead of claiming damages for conversion, the true owner is commonly said to waive the tort of conversion. There is in fact no waiver of the tort of conversion but a mere exercise of an option to prefer one remedy over another. A true owner would not be able to maintain an action for money had and received if he has no right to sue for the conversion of the cheque. The right of a cheque drawer to sue in conversion or alternatively to maintain an action for money had and received was raised for the consideration of the Singapore Court of Appeal in *Yeow Chern Lean v Neo Kok Eng* [2009] 3 SLR(R) 1131. The appeal arose from the decision in *Neo Kok Eng v Yeow Chern Lean* [2008] SGHC 151, where the defendant, the general manager of a construction company, was alleged to have received for his own benefit three cheques for amounts of $80,000, $100,000 and $260,000. The cheques were issued by a Mr Neo ("Neo"), the company's managing director, to a Mr Lim Leong Huat ("Lim"), a shareholder and the company's project and executive director, as loans to the company whenever the company was in need of money. Neo later discovered that the cheques were given over for the use of the defendant. All three cheques were payable to "bearer" and not made out to the order of the company. The first two cheques for $80,000 and $100,000 were paid into the defendant's bank account while the third cheque for $260,000 was passed to a company constructing a house for the defendant. When Neo confronted the defendant about the cheques, the defendant claimed that the cheques were loans from Lim to assist the defendant in the purchase of a house. Neo sued the defendant for the conversion of the cheques and in the alternative for money had and received. Lai Siu Chiu J found on the evidence that the defendant was aware that the cheques came from Neo and should not have accepted them without making further inquiries. The trial court held the defendant liable in conversion and in the alternative for money had and received. The defendant appealed against the trial court's decision contending that Neo had no right to sue in conversion as he did not have the right to the immediate possession of the cheques. The Court of Appeal agreed with the defendant's contention that the cheques had been validly delivered to the company and the company and not Neo was the proper party to bring the action. The court decided that the cheques had been validly delivered to the company through its agent, Lim, contrary to Neo's arguments that the delivery was conditional on the proceeds being used for the company's purposes. Chao Hick Tin JA

said (*Yeow Chern Lean v Neo Kok Eng* [2009] 3 SLR(R) 1131 at [43] and [46]):

> Therefore the delivery of a cheque is conditional only if the transferor intends its delivery to remain inchoate until a certain condition is satisfied or if the delivery was made for some purpose other than that of transferring the title to the cheque to the transferee and makes this intention clear to the transferee. Section 21(3)(*b*) is therefore only concerned with conditions pertaining to the *delivery* of the cheque and not the *use of its proceeds*. Conditions specifying the manner in which the proceeds are to be used are different for they do not relate to the delivery of the cheque. In fact, they presuppose good delivery for only if delivery was good and the cheque effective, could the proceeds be withdrawn in the first place to be used in the manner specified by the condition. Consequently, even if we accept that Neo had imposed a condition on the use of the cheque proceeds, there was still good delivery of the cheques. Moreover, we would add that it is not open to Neo to contend that the condition for the delivery of the cheques to Lim was that they were to be deposited into the Company's account as loans to the Company. This is because the cheques were not made out to the order of the Company; neither did Neo cross out the "bearer" status of the cheques. Obviously Neo had contemplated that the cheques could be negotiated. Hence, on the facts before the court, we are of the view that Neo had intended at all times to pass property of the cheques to Lim as agent for the Company. He had relinquished title to the cheques and, in turn, his right of possession with the result that his claim in conversion must fail.
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> … Here the cheques were given by Neo as loans to the Company. The cheques were handed to Lim as the agent for the Company. By handing the cheques over to Lim, delivery was complete. No condition was imposed in respect of the delivery. Moreover, there is one other factor which undeniably showed that Neo did not care how the Company would deal with the cheques. By not crossing out "bearer" on the cheques, Neo intended that the Company could endorse them over to whomsoever it deemed fit. By leaving the cheques as bearer cheques, Neo could not have intended that the cheques should only be credited into an account of the Company.
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> [emphasis in original]

5.18 The court further decided that since Neo could not bring an action in conversion, there was no right to bring an action for money had and received since the claim for money had and received was contingent upon a right to sue in conversion. Chao JA said (*Yeow Chern Lean v Neo Kok Eng* [2009] 3 SLR(R) 1131 at [52]):

> Neo's alternative claim for moneys had and received is contingent on him proving his claim in conversion. It fails along with his inability to prove the existence of the tort. This is so because Neo's alternative claim in restitution is premised on a 'waiver of the tort'. The House of

> Lords has made it clear in *United Australia v Barclays Bank Ltd* [1941] 1 AC 1 that the 'waiver' was really an election to take a gain-based rather than loss-based award for the tort. In the absence of the tort, this claim in restitution fails. … Since Neo's claim for conversion is unsustainable, it follows that his claim for restitution of the tort also fails. Simply put, he cannot 'waive the tort' when there is no tort to waive in the first place. In any event, as the cheques were issued as loans to the Company, if any loss was suffered, it was on the part of the Company.

Guarantees

5.19 A contract of guarantee, like any other contract, is only enforceable if it is given for valuable consideration. Consideration for a guarantee must move from a creditor to a guarantor if the agreement is to be binding. The consideration for a guarantee may emanate from a creditor in a number of ways. The most common route through which consideration is manifested is through a creditor benefiting a principal debtor since a guarantor assumes liability under a guarantee solely for the principal debtor's benefit. In practice, consideration for a guarantee comes from the benefit provided by a creditor to a principal debtor at the request of a guarantor. Equally, consideration is also provided by a creditor when he suffers a detriment in responding to a guarantor's request. However, a guarantee under seal is not subject to proof of consideration. The affixing of a corporate seal on a guarantee by a corporate guarantor would not raise the presumption that it had intended to execute the guarantee as a deed, but would lend some support to the assertion that the guarantee was executed as a deed. In *Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd* [2009] 2 SLR(R) 806, the defendant, Asia Pulp & Paper Co Ltd, the parent company of APP Chemicals International (Mau) Ltd ("APP Chemicals") provided a corporate guarantee to the plaintiff, Cytech Industries Pte Ltd, to cover APP Chemicals' purchase of chemicals from the plaintiff. The guarantee stated that: "Whereas, at the request of the Guarantor, the Supplier has entered into or will enter into a purchase agreement … with APP Chemicals International (Mau) Limited, a subsidiary of Guarantor. … The Guarantor hereby unconditionally and irrevocably guarantees and promises to duly and punctually pay to Supplier on written demand of Supplier, if the Guaranteed Party fails to pay any of its obligations on their respective due dates." The defendant executed the guarantee using the company seal on 28 February 2000, but the guarantee was backdated to 25 October 1999. The defendant contended that no purchase agreement ("PA") had been entered into between APP Chemicals and the plaintiff, and this meant that the guarantee was unenforceable for want of consideration. The plaintiff, however, contended that the guarantee was executed as a deed or, alternatively, consideration had been furnished since the guarantee covered pre-PA purchases made by

APP Chemicals. Choo Han Teck J decided that even though the affixing of the defendant's corporate seal on the guarantee did not raise the presumption that the defendant had intended to execute the guarantee as a deed, the fact that the defendant had affixed its seal went some way to support the plaintiff's contention that the defendant had executed the guarantee as a deed. Choo J said (at [4], [5], [6] and [9]):

> … In my view, therefore, the fact that the company seal had been affixed on a document does not *per se* raise any legal presumption that the parties intended it to be executed as a deed. However, evidentially, it could lend weight to a party's assertion that the document was intended to be and had in fact been executed as a deed.
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> … On balance, however, I am of the view that the Guarantee had in fact been executed as a deed. First, the fact that it was sealed lends support to the contention that it was intended to be executed as a deed. Second, it was somewhat unusual, in today's commercial context, to set out the 'consideration' in the Preliminary Statements or recitals …
>
> Third, the contracting parties saw it fit to backdate the Guarantee to October 1999 despite knowing that no consideration had been provided by either party then. In the premises, I am satisfied that it was more likely that the parties had intended to execute the Guarantee as a deed to formally avoid the issue of consideration.
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> …
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> … In my view, consideration for the guaranteeing of the pre-PA obligations was furnished by the plaintiff by its entry into pre-PA transactions with APP Chemicals, and the PA is 'consideration' only for APP Chemical's payment obligations under a PA. The latter has no relevance to any pre-PA transactions.

5.20 A guarantor comes under a legal liability to pay a creditor only if there is a default by a principal debtor since the guarantor undertakes to answer for the principal debtor's debt or default. In the absence of an express agreement, a creditor is obliged to show actual default by a principal debtor before he is entitled to call upon a guarantor to make payment under the guarantee. In *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 ("*Re Kitchin*"), the English Court of Appeal decided that a guarantor came under no legal liability to a creditor unless the creditor was able to show a default by a principal debtor and an arbitration award obtained by the creditor against the principal debtor did not *per se* constitute evidence of a default by the principal debtor unless this had been expressly agreed to in the guarantee. The applicability of *Re Kitchin* in Singapore was called into question before the Singapore Court of Appeal in *PT Jaya Sumpiles Indonesia v Kristle Trading Ltd* [2009] 3 SLR(R) 689. PT Tambang Batubara Asam (Persero) ("PTBA"), an Indonesian government company, granted PT Gunung Bayan Prarama Coal ("GBPC"), on 15 August 1994, the right to develop coal reserves in

designated zones in Kalimantan, Indonesia. This right was novated through a number of novation agreements to the respondent, Kristle Trading Ltd ("Kristle"), who in turn novated its rights and obligations to International Coal Pte Ltd ("ICP"). As consideration for the novation by Kristle, ICP agreed to pay Kristle US$4.5m in five instalments. Low, the managing director and majority shareholder of both ICP and PT Jaya Sumpiles Indonesia ("PTJS"), agreed to execute a deed of guarantee and indemnity in Kristle's favour. The novation agreement provided that: "Any and all differences and disputes of whatsoever [nature] arising out of this Agreement shall be put to arbitration in Singapore." Following a dispute over the instalment payments, an arbitration award on 31 January 2001 ordered ICP to pay Kristle US$3.5m ("Outstanding Sum") together with accrued interest of US$289,972.60 and other amounts. On 26 March 2001, Kristle made a formal demand on the guarantors for payment of the award with interest. Kristle obtained a judgment against the guarantors for the award and interest. The guarantors applied for leave to amend their notice of appeal by introducing a new ground of appeal that they were not liable to Kristle for any of the sums set out in the award as the guarantee did not cover that award. The court decided, *inter alia*, that the arbitration award obtained by the creditor against the principal debtor did not constitute evidence of a default by the principal debtor under the guarantee. Chan Sek Keong CJ said (at [39], [42], [43] and [49]):

> The present appeals raised for the first time before this court the status of the principle laid down in *Re Kitchin* ([22] *supra*) ('the *Re Kitchin* principle') …
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> …
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> *Re Kitchin* ([22] *supra*) lays down the principle that a judgment or an award against a principal debtor is not binding on the guarantor and is not evidence against the guarantor in an action by the creditor against the guarantor based on the judgment or the award. Instead, should the creditor sue the guarantor, it must prove the guarantor's liability in the same way as it must prove the principal debtor's liability if it were to bring an action against the principal debtor. In the court below, the Judge held that the facts of *Re Kitchin* were 'vastly different' (see the Judgment at [135]) from the facts before her (see also *id* at [134]–[136] generally). Before this court, counsel for Kristle made a faint (and, in our view, entirely unmeritorious) attempt to argue that the *Re Kitchin* principle should not be followed because, when *Re Kitchin* was decided, the English courts did not have much faith in arbitration, whereas arbitration is today well regarded and widely accepted as a creditable form of alternate dispute resolution.
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> The authority of *Re Kitchin* ([22] *supra*) has stood for more than 100 years.
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> …

> To summarise, in view of the numerous authorities affirming the decision in *Re Kitchin* ([22] *supra*) and the principle laid down therein, the *Re Kitchin* principle remains good law in Singapore and is applicable in the present appeals.

Performance bonds

5.21 In Singapore, apart from fraud, unconscionability constitutes a sufficient ground for restraining a beneficiary from obtaining payment under a performance guarantee or bond. The origin of this new ground is interesting but shrouded in controversy and may be seen as a deliberate departure from prevailing English law after having been affirmed in numerous decisions by the Singapore Court of Appeal. In *Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp* [2009] SGHC 7, J-Power Systems Corp ("JPS") was awarded a contract to install undersea pipelines. It subcontracted part of the works to Leighton Contractors (Singapore) Pte Ltd's ("LCS"). LCS provided JPS with a performance bond equivalent to 5% of the subcontract price. The performance bond issued by Hongkong and Shanghai Banking Corp Ltd ("HSBC") for $956.395 was unconditional or "on-demand", stipulating HSBC's obligation to make payment "upon receipt of your demand in writing and your written statement that the Principal is in breach of his obligations under the underlying contract". LCS sought to restrain the beneficiary from receiving and the bank from making payment on the performance bond, contending that the beneficiary's demand for payment was unconscionable since the beneficiary was not a fair and honest contractor. In particular, LCS relied on the fact that it had obtained three adjudication awards in its favour, and even though there were outstanding works, they were "minor" and would be resolved during the defects liability period. Choo Han Teck J decided that even though the standard of proof resting on LCS was one of establishing a strong *prima facie* case of unconscionability, this was not supported by the evidence adduced by LCS. Touching on the law applicable to a demand on a performance bond, Choo J said (at [2]):

> The law in relation to performance bonds in Singapore is not in dispute. For an unconditional performance bond, the issuing bank is generally not concerned with the underlying contract on which the bond is based and has no duty to ascertain whether there had in fact been a breach of the underlying contract. Actual proof of default is also not required when calling upon the bond. A summary can be read in Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit*, (LexisNexis, 5th Ed, 2003) at pp 855–863 and 876–881. The aforementioned is however subject to the fraud and unconscionability exceptions: see *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] [3 SLR(R) 44] ('GHL').

5.22 The court further decided that LCS had not established a strong *prima facie* case of unconscionability. Choo J said (*Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp* [2009] SGHC 7 at [9] and [12]):

> As for the 15 or so alleged breaches, I am mindful of the fact that the Performance Bond was an 'on-demand' one and no actual proof of breach was required on the part of JPS. Nonetheless, if LCS were able to demonstrate conclusively that there had in fact been no breach, then that would lend weight to its assertions that JPS had acted unconscionably. …
>
> …
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> In the premises, I am of the view that LCS fell short of demonstrating a strong prima facie case of unconscionability on JPS's part. Accordingly, the application to restrain JPS and HSBC from receiving and making payment respectively under the Performance Bond is dismissed and the interim injunction granted earlier is to be lifted. My opinion here was made on the limited evidence and the nature of the application before me, my views expressed herein are neither final nor conclusive in respect of a actual dispute of the performance of the contract. I will hear the parties on costs at a later date.

5.23 A performance bond may be issued with or without conditions attached. When a performance bond is made payable without any conditions attached, a simple demand by a beneficiary is sufficient to bring on an issuing bank's obligation to make payment under the bond. When a valid call for payment is made by a beneficiary, a bank issuing the bond comes under an immediate liability to make payment under the bond. There is no necessity for a beneficiary making a demand on a bank to specify when payment is to be made by the bank. A performance bond may also be issued with conditions attached. When conditions are attached to the payment of a performance bond, a demand for payment has to comply strictly with the terms and conditions set out in the bond. The courts have to determine whether as a matter of construction, the demand for payment comes strictly within the terms of the bond. In *Pender Development Pte Ltd v Chesney Real Estate Group LLP* [2009] 3 SLR(R) 1063, Chesney Real Estate Group LLP ("Chesney LLP") sought to recover $8.284m which it claimed to have loaned to Bravo Building Construction Pte Ltd ("Bravo"). Chesney LLP contended that the loan was secured by an insurance bond issued by India International Insurance Pte Ltd ("India Insurance"). Bravo, however, said that the loan was not really a loan but a deposit under a broader agreement between Chesney LLP and Pender Development Pte Ltd ("Pender") where Chesney LLP was engaged as its marketing agent for the housing units it was proposing to build and that Chesney LLP was not entitled to a refund of this deposit. The insurance bond stipulated that: "In the event of the Turnkey Main Contractor fails to fulfil any of the terms and conditions of the Agreement in connection

with the Turnkey Main Contract Works for the Design & Build for New Erection of Condominium Development … we shall indemnify the Lender against all losses, damages, expenses, or otherwise sustained by the Lender up to the sum of Not Exceeding Singapore Dollars Eight Million Two Hundred and Eighty-Four Thousand Only (S$8,284,000.00) ('the Guaranteed Sum') upon receiving your written notice." Chesney LLP argued that it had provided the loan because Bravo required an injection of cash in order to fund some of its projects. Andrew Ang J decided that before the insurance bond was payable, the beneficiary had to comply strictly with the terms of the bond and there was no reference in the bond to the loan provided by Chesney LLP but the "Turnkey Main Contract Works". The court decided that Chesney LLP was not entitled to payment under the bond but was entitled to recover the loan from Bravo. Ang J said (at [17]):

> Counsel for Chesney LLP submitted that '[o]n plain reading, the Insurance Bond is shown to be in respect of the Loan Agreement'. With respect to learned counsel, I am unable to agree. It is important to bear in mind that, save in exceptional circumstances, it is necessary to observe strict compliance with the conditions stipulated in a performance bond which trigger the financial institution's obligation to pay. This is so as to ensure a high degree of certainty necessary for the functioning of such institutions (see Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit* (LexisNexis, 5th Ed, 2003) at p 867). In this instance, on a plain reading of the wording of the Insurance Bond, it is clear that there is no direct reference to the Loan Agreement. Instead, in the recital, reference is made to an agreement entered into between Bravo and Chesney LLP on 3 July 2007. This could not have been the Loan Agreement (for it was not even in existence on that date) or any other agreement for that matter (for it was common ground that there was no agreement between Chesney LLP and Bravo dated 3 July 2007). Second, the agreement referred to in the Insurance Bond was not described as a loan agreement. Instead, it was described in cl 1 as an agreement for the 'Design & Build for New Erection of Condominium Development … On Lot 01904X MK1 [Pender Court]'. For these reasons, *ex facie*, there was no reference to the Loan Agreement. When these points were raised in cross-examination, Vincent was compelled to agree that the true purpose of the Insurance Bond was encapsulated in the words set out in cl 1 of the Insurance Bond. He conceded that India Insurance's liability was engaged only if there was a failure to fulfil any of the terms and conditions of the Agreement and not the Loan Agreement.