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5. BANKING LAW

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Bank's remedies against guarantor of loan

5.1 The case of *Pereira, Dennis John Sunny v United Overseas Bank Ltd*[1] ("*Pereira v UOB*") concerned guarantees for bank loans that were secured by mortgages over two properties. The main question that arose was whether a court had the power to stay an execution of an order for the sale of mortgaged property until an open-ended date. The Court of Appeal highlighted that where a mortgagee is entitled to possession of property under a mortgage, a court generally has no power to refuse an order for possession.[2] The only exception to this principle is that a court can adjourn a summons for possession or stay an execution of an order for possession for a short period to allow the mortgagor a chance to redeem the mortgage in full, provided that there is a reasonable prospect that the mortgagor would be able to do so.[3] The Court of Appeal expressed the view that this applies equally whether a creditor is seeking to enforce security provided by the mortgagor or by the guarantor,[4] but emphasised that this is a very limited power that is subject to all the parameters mentioned in the previous sentence. Further, a court's jurisdiction to grant a short adjournment in this situation can only be exercised once, after which it would be spent, so that any further reasonable prospects of the mortgagor being able to redeem the mortgage in full would be irrelevant.[5]

5.2 Another interesting aspect of *Pereira v UOB* concerned the reinforcement by the Court of Appeal of the principle that "a creditor with several remedies at his disposal can choose which one to enforce, at what time, in which order, and in whatever way, subject only to the rule

1 [2018] 1 SLR 31.
2 *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2018] 1 SLR 31 at [17].
3 *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2018] 1 SLR 31 at [18] and [19].
4 See *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2018] 1 SLR 31 at [23], where the Court of Appeal clarified and applied their earlier decision in *Hong Leong Finance Ltd v Tan Gin Huay* [1999] 1 SLR(R) 755.
5 *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2018] 1 SLR 31 at [24] and [25].

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that he cannot recover more than [what] is due to him".[6] It follows from this that where one has guaranteed another person's debt, the guarantor has no right to require the creditor to proceed against the principal or against any security provided for the guaranteed debt before proceeding against himself.[7] No argument to the contrary appears to have been mounted against this well-established legal principle in *Pereira v UOB*, and it was applied as a matter of course by the Court of Appeal. This is a principle that any potential guarantor would do well to keep in mind. It stands side by side with the basic and more-often mentioned legal principle that a traditional bank guarantee imposes only secondary liability, and not primary liability, on a guarantor. The interaction of the two legal principles results in the position whereby although the secondary liability of a guarantor means that he will not be liable unless the principal debtor defaults on the loan, once such default has taken place, the creditor has a free choice whether to proceed against the principal debtor or the guarantor first. As *Pereira v UOB* shows, there is no requirement that a creditor must first exhaust its remedies against the debtor before proceeding against the guarantor. This poses a real risk for the guarantor in cases where the guarantor has deeper pockets than the principal debtor who may be in financial difficulties, as the creditor bank would naturally choose to proceed against the guarantor first, leaving the guarantor to enforce its own remedies against the principal debtor.

Requirements for bank merger under Banking Act

5.3 It is relatively unusual for questions of banking regulation to come before the Singapore courts. The Court of Appeal decision of *Jacob Agam v BNP Paribas SA*[8] ("*Jacob Agam v BNP*") was one such case, where an issue of banking regulation was relevant to determine the rights of the parties in a contract law dispute between a bank and the guarantors of certain bank loans. The facts of this case were that BNP Paribas Wealth Management ("Wealth Management"), through its Singapore branch, loaned €61.7m to the appellants' companies which were secured by personal guarantees from the appellants. When the loans were not fully paid on maturity, Wealth Management sued the appellants in the Singapore High Court to recover approximately €30m

6 This is *per* the Court of Appeal in *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 at [36], quoted in *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2018] 1 SLR 31 at [20].

7 *Ewart v Latta* (1865) 4 Macq 983 (HL) at 987 and 989, followed in *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 at [36] and *Pereira, Dennis John Sunny v United Overseas Bank Ltd* [2018] 1 SLR 31 at [20].

8 [2017] 2 SLR 1.

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under the guarantees. Subsequently, there was a merger effected under French law between Wealth Management and its parent company, BNP Paribas SA ("Paribas SA"), and Paribas SA applied to the Singapore International Commercial Court ("SICC") (to which the main proceedings had been transferred) to be substituted as a plaintiff in the proceedings originally brought by Wealth Management. SICC granted the application at first instance and the appellants appealed to the Court of Appeal.

5.4 The appellants argued that the substitution should not be allowed. The main argument related to the use of the word "subrogated" in the merger agreement. The appellants argued that the word should be given its common law meaning, which meant that Wealth Management would survive as a legal person in a way that permitted Paribas SA to sue in Wealth Management's name. This argument was dismissed by the Court of Appeal as such a reading would contradict the whole substance of the merger agreement, which envisaged that Wealth Management would be dissolved and its assets transferred to Paribas SA.[9]

5.5 The appellants' other arguments were based on ss 55B–55C and 14A–14C of the Banking Act.[10] Section 55B(1) sets out the conditions under which a bank may transfer the whole or part of its business to a transferee which is licensed to carry on business in Singapore. These conditions include the consent of the Minister or his certification that consent is not required, and the approval of the court for the transfer. Section 55B(2) goes on to provide that subsection (1) is without prejudice to the right of a bank to transfer the whole or any part of its business under any law. By rejecting the appellants' reading of the words "without prejudice" in s 55B(2), the Court of Appeal implicitly agreed with the court below that these words meant that a bank could transfer its business under any law without "any adverse operation that might otherwise apply by virtue of s 55B(1)".[11] In other words, s 55B(1) need not be satisfied if the merger was taking place under s 55B(2), meaning that no court approval was required. The Court of Appeal was satisfied that court approval was not required to ensure that the transferee was not an unsatisfactory entity who might affect Singapore's standing as an international banking and financial centre because s 55B only allowed transfer to a transferee which is licensed to carry on banking business in Singapore. Such an entity would already have satisfied MAS that it met the requirements for a licence. The Court of Appeal also decided that the phrase "under any law" in s 55B(2) meant under any law in the world and did not mean Singaporean law. This is to be contrasted with

9 *Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1 at [27] and [30].

10 Cap 19, 2008 Rev Ed.

11 *Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1 at [31]; see also [35].

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the phrase "any written law" which refers to the Singapore Constitution and to Singapore legislation.[12] The appellants also argued that once Wealth Management decided not to apply to the court under s 55B, it should have applied to the Minister under s 14A which provides for ministerial approval of applications for the mergers of banks and their wholly owned subsidiaries. The Court of Appeal rejected this argument, as it was of the view that the procedures under ss 14A and 55B(1) are not mandatory but permissive and a transferor need not chose one or the other but may proceed "under any law" if it wishes.[13] Whilst the Court of Appeal's interpretation of the merger provisions in the Banking Act might seem to be permissive in that a merger of a bank in Singapore with another bank can take place under foreign law without the approval of the court or ministerial approval in Singapore, the controls are very much in place as such mergers are by definition only possible between entities that have a licence in Singapore[14] and have therefore been approved by MAS for that purpose.

Post-dated cheque given as collateral

5.6 Several interesting questions relating to the law of cheques were discussed by the High Court in *Millenium Commodity Trading Ltd v BS Tech Pte Ltd*[15] ("*Millennium v BS Tech*"). The plaintiff (an investment company in Hong Kong) and defendant (a company incorporated in Singapore) entered into a financial joint venture agreement whose purpose was for the defendant to procure a standby letter of credit in favour of the plaintiff. Pursuant to this agreement, the plaintiff transferred €400,000 to the defendant, €200,000 of which was credited into the defendant's bank account and the other €200,000 to the personal bank account of the defendant's managing director, Tahir. Upon receipt of these amounts, the defendant drew a post-dated cheque for $678,016.94 in the plaintiff's favour, which, as agreed under cl 2 of the agreement, was to be returned to the defendant when the transaction was completed. Under the agreement, the defendant was supposed to procure a standby letter of credit in the plaintiff's favour by a certain date, but failed to do so. The plaintiff responded by presenting the cheque for payment, but it was dishonoured. The plaintiff brought an action on the cheque and sought summary judgment but failed as the assistant registrar granted the defendant conditional leave to defend the

12 *Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1 at [36]–[38].
13 *Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1 at [41]–[43].
14 See ss 55A and 2(1) of the Banking Act (Cap 19, 2008 Rev Ed) for the definitions of "transferee" and "bank"; see also s 55B(1).
15 [2018] 3 SLR 98.

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claim. On appeal by the plaintiff, the High Court upheld the assistant registrar's decision.[16]

5.7 One of the arguments raised by the defendant was that the cheque was not a bill of exchange under s 3 of the Bills of Exchange Act[17] ("the Act") because its delivery was conditional within the meaning of s 21(3)(*b*) of the Act as under cl 3 of the agreement, the defendant delivered the cheque to the plaintiff on condition that it be returned to the defendant upon completion of the transaction.[18] This argument conflated two different issues, which the court unpacked. The decision clarifies that the two sections of the Act are focused on different aspects of conditionality: s 3(1) on the conditionality of the payment order made to the drawee, and s 21(3)(*b*) on the conditionality of the delivery to the transferee of the bill. The effect of a conditional order under s 3 is that the instrument is not a bill of exchange,[19] whereas the effect of a conditional delivery under s 21(3) is that the holder of the bill will not be able to sue on it until delivery is completed.[20] As pointed out by the court, an unconditional order to pay can nevertheless be delivered conditionally.[21]

5.8 Under s 3(1) of the Act, a bill of exchange must be "an unconditional order in writing". As mentioned, the focus is on whether a condition is imposed on the drawee of the bill, not the payee or transferee. It is a basic principle of bills of exchange law that to satisfy the requirement of unconditionality, the order had to be imperative and not precatory. The drawee must be placed under an obligation to pay the value of the bill to the payee.[22] On the facts, the court found that the defendant did not give any evidence or raise any argument that the order to the bank (the drawee) was tentative or conditional, and therefore failed to show that the cheque was not unconditional for the purposes of s 3(1) of the Act.

5.9 With the court's rejection of s 3, the defendant's case turned on whether the cheque was "conditional" within the meaning of s 21(3)(*b*) of the Act. Section 21(3)(*b*) provides that delivery "may be shown to

16 The Singapore Law Reports only reported part of the judgment, with the remaining points being summarised in the headnotes of the law report. For the full judgment, see the unreported decision in *Millennium Commodity Trading Ltd v BS Tech Pte Ltd* [2017] SGHC 58.

17 Cap 23, 2004 Rev Ed.

18 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [39].

19 See s 3(2) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed).

20 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [79].

21 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [67].

22 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [68] and [80].

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have been conditional or for a special purpose only, not for the purpose of transferring the property in the bill". Section 13(2) makes it clear that a bill "is not invalid by reason only that it is antedated or post-dated", although it may be invalid for other reasons.[23] On the facts of the case, the question was whether the fact that the cheque was delivered as collateral meant that it was delivered conditionally within the meaning of s 21(3)(*b*). The court found that in order for this to be so, the transferor must intend to suspend delivery (in the legal as opposed to the factual sense) until a certain condition is satisfied, or to make delivery for some purpose other than to transfer title to the cheque to the transferee.[24] Such intention must be communicated clearly by the transferor to the transferee.[25] A party who asserts that physical delivery of a bill is conditional delivery within the meaning of s 21(3)(*b*) bears the burden of proof, and strong evidence is required.[26] The court was of the view that postdating a bill of exchange does not clearly and objectively establish that the transferor intended delivery to be conditional, but suggests only that the transferor intends the transferee to present the bill unconditionally on or after the date stated. Case law provides guidance as to situations where courts have found that delivery was conditional.[27] These include (a) the delivery of a bill as indemnity for a bond, where the transferee promised that he would return the bill in the event that the bond was cancelled,[28] (b) where a cheque was endorsed by the solicitors of a purchaser of land to solicitors of the vendor towards payment of a deposit, but on the condition that the cheque was to be "returnable on demand until we authorise you to effect an exchange",[29] and (c) where the transferee was presented with a post-dated cheque with specific instructions not to present the cheque until after a certain event had happened.[30] Where the initial delivery of a bill is conditional, delivery would be completed when the condition is fulfilled.[31] The holder would at this point obtain the title to the bill that was initially withheld, and be able to sue on the bill. On the facts of *Millennium v BS Tech*, it might have been possible to argue that cl 2 of the agreement which required the plaintiff to return the cheque upon

23 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [59] and [65].

24 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [69], following *Yeow Chern Lean v Neo Kok Eng* [2009] 3 SLR(R) 1131 at [43].

25 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [70] and [80].

26 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [77] and [80].

27 See *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [73]–[75].

28 *Alsager v Close* (1842) 10 M & W 576.

29 *Clifford Chance v Silver* [1992] 2 Bank LR 11.

30 *Marina Sports Ltd v Alliance Richfield Pte Ltd* [1990] 1 SLR(R) 385.

31 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [74].

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the completion of the transaction evidenced a clear communication by the defendant of its intention to withhold title to the bill at initial delivery. However, the court found that when the defendant failed to perform its obligations under the parties' agreement, it was implicit that the plaintiff would obtain title to the cheque, unless the defendant could prove otherwise, which it could not.[32]

5.10 The decision in *Millennium v BS Tech* raised two other points of banking law that were discussed in the part of the judgment which was unreported. The first is that a choice-of-law clause in an underlying contract does not apply in an action on a cheque that is given pursuant to that agreement, as a cheque constitutes a separate contract that is autonomous from the underlying transaction. The court in *Millennium v BS Tech* rejected the argument that the cheque was so closely connected to the agreement that the choice-of-law clause in the agreement applied to the cheque. This is based on the authority of the Court of Appeal decision in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*[33] which rejected the close-connection test in the context of whether an arbitration clause in a contract would be treated as covering disputes arising in an accompanying bill of exchange.[34] The second point is a reiteration of the well-established principle that an application for summary judgment on a dishonoured cheque will succeed unless an arguable case of fraud, illegality, or total or quantified partial failure of consideration is shown by the defendant, which the defendant succeeded in doing on the facts of the case.[35]

Pledge of shipping documents

5.11 The case of *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd*[36] ("*Pars Ram Brothers v ANZ*") will be of interest to banks that engage in trade financing. Where a bank grants a loan to a trader to finance the import of goods, it will commonly take a pledge of the shipping documents. As bills of lading are documents of title, delivery of the documents amounts to constructive delivery of the goods themselves. When the goods arrive, the bank will generally release the documents to the importer under a trust receipt for them to collect the goods, under which the importer agrees to hold the goods on trust for the bank, often with an obligation to store the goods separately

32 *Millenium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [84] and [86].
33 [2016] 5 SLR 455.
34 *Millennium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [52].
35 *Millennium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [90]–[112].
36 [2017] 4 SLR 264.

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on behalf of the bank. The issue in *Pars Ram Brothers v ANZ* arose because pepper stock bought by an insolvent company which had been financed by different banks under various trust receipts had been commingled in a warehouse such that it was impossible to identify which stocks were financed by particular lenders. The liquidators of the insolvent company applied to court to decide whether the sale proceeds of certain pepper stock should be held for the benefit of the general pool of the company's creditors, or paid to the lenders who could assert a security interest in the pepper stock which they financed. It was not undisputed that each lender had a security in the pepper stock which it financed, and the main question was whether the commingling of the pepper stock affected each lender's security interest in such a way that prevented it from claiming its interest in the proceeds of the sale in priority to the general creditors. The question of security interests in commingled stock is a novel one in the courts. Authorities based on ownership interests in commingled stock suggest that the proprietary interests of the owners are preserved despite the commingling of stocks in a mixed bulk, and that the contributors should hold the mixed bulk as co-owners in proportion to their respective contributions.[37] No authorities were cited specifically in relation to security interests in commingled stock, but the court's decision that the position should be the same as in the case of ownership interests is well-supported by academic commentary,[38] by Art 9 of the US Uniform Commercial Code[39] and on first principles. By virtue of their underlying pledge, the lenders already possessed a perfected security in the stocks prior to the mixture. Ascertainment of the bulk was therefore not necessary to create or perfect each lender's security interests in the stocks financed by them, and the failure to segregate the pledged goods did not negate the existence of the lenders' security.[40] The court therefore decided that the just solution was for the mixed stock to be divisible among the contributing secured lenders rateably in proportion to the value of their respective contributions.[41] With respect, this is a satisfactory solution, and accords with similar solutions adopted in the case of tracing

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37 *Indian Oil Corp Ltd v Greenstone Shipping SA (The Ypatianna)* [1987] 3 All ER 393 at 907; see also *Frank Stewart Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680 , *Hill v Reglon Pty Limited* [2007] NSWCA 295 and *Glencore International AG v Metro Trading International Inc* (No 2) [2001] 1 Lloyd's Rep 284, discussed in *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd* [2017] 4 SLR 264 at [9]–[10].

38 Philip R Wood, *Comparative Law of Security Interests and Title Finance* (Sweet & Maxwell, 2nd Ed, 2007) at para 1-041.

39 See § 9-336 of the US Uniform Commercial Code.

40 *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd* [2017] 4 SLR 264 at [15].

41 *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd* [2017] 4 SLR 264 at [17].

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through mixed funds in equity[42] and amendments to the Sale of Goods Act to allow property to pass in an undivided share of goods forming part of a bulk.[43]

Bank's liability to investors

5.12 A few unreported cases were decided by the Singapore High Court this year relating to a bank's liability to its investor customers. These cases turned largely on their own particular facts, which were complex and disputed by the parties, and will not be discussed at length here. It may be useful, however, to identify the types of claims and legal arguments that generally arise in this type of cases. *Tradewaves Ltd v Standard Chartered Bank*[44] ("*Tradewaves v SCB*") involved plaintiffs who had invested in and lost money on a company known as Fairfield Sentry, which turned out to be part of a Ponzi scheme perpetuated by Bernard L Madoff. They sued the bank that sold them the products, American Express Bank ("AEB"), which was later acquired by Standard Chartered Bank ("SCB"). The suit was based on the conduct of AEB and subsequently, SCB, after its acquisition of AEB (either of which was referred to as "the Bank" by the court). This case is typical of the type of claims that dissatisfied investors often allege against their banks. Chief amongst these was a claim in negligent or fraudulent misrepresentation. It is by no means easy to succeed in a misrepresentation claim. The plaintiff has to show, *inter alia*, that a false statement of material fact was made to him by the other party to the contract which he relied on and which induced him to enter into the contract. The plaintiff will therefore fail if he is unable to show that the alleged statement was made to him, or if the statement turns out to be true, or if he did not rely on the statement but on his own judgment. As long as one of the prerequisites for the action is not satisfied, the claim will fail and there is no need to consider the other elements of the action. An important issue even if a misrepresentation is found to have *prima facie* taken place concerns the effect of any non-reliance or exclusion clauses that are usually contained in the standard terms and conditions between the bank and its customer. The decision in *Tradewaves v SCB* illustrates the interplay of these factors. There was disagreement amongst the parties whether the alleged misrepresentations were made at all. But even assuming that they were, the judge found that none of these were actionable misrepresentations, and therefore the claim in misrepresentation failed without his having to go into related issues, such as whether the

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42 See *Re Diplock* [1948] 1 Ch 465, which was discussed in *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd* [2017] 4 SLR 264 at [17].

43 Sale of Goods Act (Cap 393, 1999 Rev Ed) s 20A.

44 [2017] SGHC 93.

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plaintiffs had relied on the representations and the effect of the non-reliance and non-representation clauses. It is common for the substance of the alleged misrepresentation to relate to the market risk of the investment, but *Tradewaves v SCB* was interestingly atypical in that the investment losses were not due to the movement of financial markets but to managerial fraud, so that the typical allegations in mis-selling cases, such as misrepresentations about the safety and soundness of the investment, were not particularly helpful to the plaintiffs.

5.13 Another common cause of action that an investor may assert against its bank is a breach of a duty of care either in contract or tort. The existence of a contractual duty of care would depend on the terms of the banking contract between the parties, whilst a tortious duty of care exists only where certain conditions are satisfied. A bank does not automatically owe a tortious duty of care to a customer to whom it sells investments. The High Court in *Tradewaves v SCB* reiterated the legal principles propounded by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[45] ("*Spandeck*") for establishing a tortious duty of care. The test is a two-stage one that is preceded by the threshold question of factual foreseeability. The first stage comprises proximity and, the second, policy considerations.[46] Proximity here refers to legal proximity, with a focus "on the closeness of the relationship between the parties, including physical, circumstantial and causal proximity, supported by the twin criteria of voluntary assumption of responsibility and reliance)".[47] As evident from the leading case of *Deutsche Bank AG v Chang Tse Wen*[48] ("*Deutsche Bank v Chang*"), it may be challenging for plaintiffs to establish sufficient proximity to support the existence of a duty of care. There, the Court of Appeal stated:[49]

> The introduction of products and the giving of recommendations form part of the normal role of a salesperson in the private banking context, and the mere fact that this transpired here is not sufficient by itself to give rise to an advisory relationship, with its accompanying tortious duties of care.

Another obstacle for the plaintiff in *Deutsche Bank v Chang* was that the Court of Appeal decided, despite the sentiment expressed in the *Spandeck* case that factual foreseeability was likely to be fulfilled in most

45 [2007] 4 SLR(R) 100.
46 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [109].
47 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [112].
48 [2013] 1 SLR 1310.
49 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [43], quoted in *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [115].

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cases, that factual foreseeability was not established on the facts of the case before them. The High Court in *Tradewaves v SCB* weighed the non-discretionary nature of the customer's account with the bank and the customers' considerable investment experience, both of which detracted from the establishment of a duty of care, with other contrasting factors that led to its decision that there was sufficient proximity. These were that the relationship managers in question did not just take instructions and make occasional recommendations as to what to buy or sell, but made it a point to have meetings with the plaintiffs to discuss and assess their portfolios, provided customers with information regarding investment products that had been approved by the bank, and worked closely with investment specialists who had specific knowledge of the investment products that were offered.[50] In addition, the High Court also found that factual foreseeability was obvious and that there were no policy reasons that would negate this duty.[51] Although these findings were sufficient to establish the bank's duty of care, the court found that the duty was not breached as the plaintiff had not satisfied their burden of proving that the bank's due diligence was inadequate.[52] The appropriate standard here was that of a reasonably prudent private bank performing due diligence on a feeder fund and not that of an auditor or other professional investigator.[53]

5.14 The court's finding that there was no breach of duty by the bank in *Tradewaves v SCB* meant that it did not have to rule on whether any duty that would otherwise have arisen would have been negated by exclusionary or conclusive evidence clauses in the contract between the bank and the investors. Nevertheless, the decision includes an interesting discussion on the status of the principle of contractual estoppel in Singapore. This concept is relevant in relation to non-reliance clauses, whereby a customer may be estopped from raising true facts contrary to the contractual term. For instance, a customer may be estopped from establishing that a bank had made a representation even though that did in fact occur. The plaintiffs argued that the Court of Appeal decision of *Orient Centre Investments Ltd v Société Générale*[54] ("*Orient Centre*"), which decided that contractual estoppel was part of Singapore law, should not be followed, as it was decided without reference to the earlier Court of Appeal case of *Fook Gee Finance Co Ltd v Liu Cho Chit*[55] ("*Fook Gee Finance*") where the analysis precluded contractual estoppel reasoning. The plaintiffs also argued that

50 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [113]–[114], [119] and [120]–[121].
51 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [111] and [125].
52 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [267].
53 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [196].
54 [2007] 3 SLR(R) 566.
55 [1998] 1 SLR(R) 385.

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the Court of Appeal cases of *Deutsche Bank v Chang* and *Als Memasa v UBS AG*[56] cast doubt on *Orient Centre*. The court in *Tradewaves v SCB* disagreed with these arguments and felt that *Fook Gee Finance* should not be taken to have ruled on the issue of contractual estoppel as it was decided before the landmark English case of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*,[57] which first developed the doctrine. Further, the judge was of the view that he was bound by *Orient Centre*, which he felt was not overruled by the Court of Appeal cases of *Deutsche Bank v Chang* and *Als Memasa v UBS AG*.

5.15 Two cases, *First Asia Capital Investments Ltd v Société Générale Bank & Trust*[58] ("*FAC v Soc Gen*") and *Asia-American Investments Group, Inc v UBS AG (Singapore Branch)*[59] ("*AIG v UBS*") involved investments commonly known as share accumulators, which were "the source of many investors' financial woes"[60] during the Global Financial Crisis in 2008 as they have the potential to cause huge losses.[61] The plaintiffs in both cases were investment-holding companies incorporated in the British Virgin Islands that were controlled by the same married couple, who were authorised signatories for each of the plaintiffs. These cases are good examples of situations where a plaintiff clutches at whatever legal arguments that might potentially allow him to disown the contract or hold the bank liable for a breach of its duties. In *FAC v Soc Gen*, one of the alleged misrepresentations related to the peripheral issue of whether the other authorised signatory had already given approval for the investments, although this claim was not successful eventually. In *AIG v UBS*, one of the main questions was whether the relationship manager had represented that she would only act with the written permission of the plaintiff's representatives, despite the bank's terms and conditions stating that the bank was entitled to take oral instructions. The arguments made in these cases show that allegations of misrepresentation in investor claims need not necessarily relate to the investments themselves. The cases also show that judges will not be sympathetic to unmeritorious claims brought by a plaintiff in a "misconceived attempt to shift responsibility for the consequences of its own investments to the bank".[62]

56 [2012] 4 SLR 992.
57 [2006] EWCA Civ 386.
58 [2017] SGHC 78.
59 [2017] SGHC 113.
60 *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [1], *per* Steven Chong JA.
61 See the explanation of how these transactions work in *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [2].
62 *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [7].

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5.16 A claim based on a breach of fiduciary duty is often raised against the bank, together with the other claims discussed above, but the courts seem to side-step this issue where they can. For instance, in *Tradewaves v SCB*, the claim for breach of fiduciary duty was rejected without discussion as the court felt that it did not add anything to the claims for misrepresentation and insufficient diligence which had already been dismissed.[63] The claims in *AIG v UBS* also included a breach of fiduciary duty but the court did not have to decide this issue as it was relevant only if the court had found that the transactions were made without the plaintiff's authorisation. In *FAC v Soc Gen*, the High Court applied the decision of the Court of Appeal in *Deutsche Bank v Chang* that in the context of a banker-customer relationship, the question is whether the bank "has undertaken, expressly or impliedly, to act as a fiduciary *vis-à-vis* the principal, *ie*, to put the principal's interests ahead of its own"[64] and found that there was no evidence of such an undertaking on the facts of the case.[65]

63 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [271].
64 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [110].
65 *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [77]–[78].

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