(2020) 21 SAL Ann Rev 135
(Published on e-First 18 August 2021)

5. BANKING LAW

Dora **NEO**
MA (Oxford), LLM (Harvard);
Barrister (Gray's Inn), Advocate and Solicitor (Singapore);
Associate Professor and Director, Centre for Banking & Finance Law,
Faculty of Law, National University of Singapore.

I. Customer claim against bank for investment losses: Misrepresentation

5.1 *Sheila Kazzaz v Standard Chartered Bank*[1] ("*Sheila Kazzaz v SCB*") was an appeal to the Court of Appeal against a judgment of the Singapore International Commercial Court.[2] The plaintiffs/appellants (Sheila Kazzaz and her son, Ahmed Kazzaz) were UK citizens who lived in Dubai. They had sold one of their family properties in the UK and sought the advice of Standard Chartered Bank ("SCB") as to how best to invest the proceeds. SCB structured a property financing arrangement ("PFA") for the plaintiffs that was supposed to generate sufficient income to meet certain interest costs. When the income generated by the PFA was not sufficient, the bank terminated the credit facilities that were part of the arrangements, and the plaintiffs suffered investment losses. The plaintiffs sued the bank and its representatives, claiming, *inter alia*, that they had been induced to enter into the PFA by misrepresentations made by the bank's representatives.

5.2 A customer who suffers investment losses after a misrepresentation has been made to him by his bank can bring a claim for damages under the tort of negligent misrepresentation, or under s 2(1) of the Misrepresentation Act.[3] Regardless of which of these two causes of action is pursued, the requirements for an actionable misrepresentation must first be satisfied: there must be a false representation of fact made to the plaintiff which induced him to enter into the contract, and which has caused him loss. These elements are easy to state, but the assessment of whether there has been an actionable misrepresentation is not always

1 [2021] 1 SLR 1.

2 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1.

3 Cap 390, 1991 Rev Ed. In *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1, the relevant events took place outside Singapore and the trial judge questioned whether Singapore's Misrepresentation Act (Cap 390, 1991 Rev Ed) ("the Act") would apply, but as the defendants had not challenged the applicability of the Act, the trial proceeded on the basis that the Act was applicable to the alleged misrepresentations: *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [131].

straightforward and may sometimes involve the court in detailed examination of the facts of the case. For instance, a statement of opinion is not regarded as a statement of fact, except in so far as it amounts to an implicit statement that the opinion was reasonably held.[4] As the decisions involving the Kazzaz family in the Singapore International Commercial Court and the Court of Appeal show, it may not be easy to show an operative misrepresentation, nor to persuade an appellate court to overturn the decision of the trial judge on this issue.

5.3 Two allegations of misrepresentation were particularly relevant to the appeal in *Sheila Kazzaz v SCB*. The first was that SCB and its officers misrepresented to Ahmed that the returns on the investments under the PFA would cover the interest payments for a mortgage and a loan for an insurance premium, both of which were part of the arrangement (referred to by the Court of Appeal as "Alleged Misrepresentation (1)"). The second was that SCB and its officers had misrepresented to Ahmed that the PFA was suitable for the Kazzaz family's needs (referred to by the Court of Appeal as "Alleged Misrepresentation (3)"). The trial judge disagreed with both allegations. The plaintiffs appealed against these findings, and the Court of Appeal dismissed the appeal.

5.4 In relation to Alleged Misrepresentation (1), the Court of Appeal agreed with the trial judge's assessment that the statement that the PFA would generate sufficient returns to cover the interest on the insurance premium and mortgage loans was a statement of opinion and not one of fact. Although the statement amounted to "an implicit representation that the maker knew of facts that might reasonably have led the maker to believe that the proposed financial arrangements could generate sufficient returns to cover the relevant interest payments in the future",[5] this representation was not false, as it was based on a reasonable assumption on the part of the bank officer.[6] Further, the representation was not that the PFA would be guaranteed to have that effect, only that it had the potential to do so.[7] This assessment also did not take into account the possibility that Ahmed might negatively affect the ability of the portfolio to be self-funding by taking out substantial loans against the value of the portfolio, as he subsequently did.[8] The approach taken by the Court of Appeal in dealing with the issue of whether there was an operative misrepresentation is particularly instructive in wealth management disputes, where bank representatives typically make statements about

4 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [142].
5 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [79], quoting from *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [134].
6 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [80].
7 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [80].
8 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [80].

the future. A bank cannot escape liability simply by claiming that the statement made by its representative was one of opinion and not fact. However, this does not mean that the bank will be easily found to be liable. The court will carefully interpret the implicit statement of fact embodied in the statement of opinion (for example, as referring to potential returns and not guaranteed returns), and find it to be true if the bank representative had reasonable grounds for holding that opinion.

5.5 As regards Alleged Misrepresentation (3) that the arrangement was suitable for the Kazzaz family's needs, the plaintiffs argued that the trial judge's rejection of this allegation was incorrect and against the weight of evidence. The plaintiffs pointed out that the judge did not assess whether the PFA, which was highly leveraged and could result in a 71% potential loss over five years in the worst-case scenario, was suitable for someone of Ahmed's risk profile. They argued that the PFA was "unsuitable" as it was complicated and Ahmed did not have sufficient experience to appreciate its risk and that it was not suitable for a person of Ahmed's net worth, income and access to cash.[9] The Court of Appeal did not accept these arguments and was persuaded instead by SCB's submission that the suitability of a financial arrangement was to be assessed by reference to a relevant objective or goal. Judged against the goal of family estate planning (generation of capital growth and ring-fencing the family's assets from forced heirship under French and *shari'a* law) and not immediate investment risk/return, the bank officer rightly formed the view that the proposed arrangements were suitable.[10] SCB also argued that the plaintiffs had misstated the risk of the PFA based on a worst-case scenario of a total potential loss over five years. It asserted that a distinction must be made between the concept of a total potential loss as compared to risk assessed based on a worst-case scenario. This was supported by the trial judge's observation that "it is in the nature of even conservative financial products … that … the entire value of an investment might be lost".[11] This is an illuminating and useful distinction that might not be fully appreciated by many investors seeking to sue their bank when they incur investment losses. Finally, SCB argued that, based on the trial judge's findings that Ahmed had ample actual knowledge of financial concepts, he was capable of understanding the risk and benefits of the PFA.[12] This argument also found favour with the Court of Appeal.

5.6 The Court of Appeal's willingness in *Sheila Kazzaz v SCB* to accept SCB's submissions as discussed above is a reminder that wealth

9 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [91].
10 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [93].
11 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [94].
12 *Sheila Kazzaz v Standard Chartered Bank* [2021] 1 SLR 1 at [95].

management is not an exact science. A bank cannot foretell the future, and it is likely to be insulated from a claim in misrepresentation as long as there is a reasonable basis for any statement made by its representatives to its clients, even if actual events subsequently turn out differently. On the other hand, clients who understand the risks of financial arrangements proposed to them by their banks and choose to proceed with the arrangements cannot easily shift responsibility for their own decisions to the banks when they lose money on their investments, by claiming to have limited knowledge or understanding. These issues involve an evaluative judgment of the facts by a trial judge, whose findings will not be overturned by an appellate court unless the trial judge is shown to be wrong.

II. Bank's claims in relation to fraudulently obtained credit facilities

5.7 Where a bank has been induced to grant credit facilities by a fraud that has been perpetrated on it and subsequently fails to get paid, it can bring a number of legal claims to recover its losses. This situation is illustrated by *National Bank of Oman SOAG Dubai Branch v Bikash Dhamala*,[13] which came before the High Court in 2020. The plaintiff, the National Bank of Oman SOAG Dubai Branch ("NBO"), offered an invoice discounting credit facility to Kismat International FZC ("Kismat FZC"), a company incorporated in the United Arab Emirates, which was owned by two individuals, Bikash and Prakash. Pursuant to these credit facilities, NBO disbursed four loans ("the Loans") to Kismat FZC in respect of, *inter alia*, invoices issued by Kismat FZC to British Petroleum Co Pte Ltd ("BPCPL") and Total Singapore Pte Ltd ("TSPL"). In doing so, NBO was deceived into believing that it was dealing with BP Singapore, the real McCoy being a multinational oil trader, and a company legitimately related to another real McCoy, Total SA, a major global petroleum corporation. The truth was that BPCPL and TSPL were incorporated in Singapore by Zu Lwin (who later became a director and shareholder of Kismat Singapore Pte Ltd ("Kismat Singapore")) on Bikash's instructions in order to impersonate these top petroleum companies. A series of transactions followed, in which the money lent by NBO to Kismat FZC was dissipated. The relevant transactions included the following: (a) Kismat Singapore received moneys from Kismat FZC; (b) Kismat Singapore remitted sums to TSPL as well as Bikash and Prakash; (c) Kismat Singapore bought US$6m worth of gold bars; (d) Kismat Singapore transferred a total of more than US$7m to Joshi Trading Pte Ltd (a Singapore incorporated company owned by Bikash's

13 [2021] 3 SLR 943.

and Prakash's nephew); (e) Joshi Trading bought more than US$5m worth of gold bars and remitted a total of US$35,000 to a bank account held by Madhu (Prakash's wife); and (f) Joshi Trading issued an invoice for the sale of 128kg of gold bars to Zu Lwin and Madhu for more than US$7m.

5.8 NBO brought the present action against 15 defendants, but in the period since the action commenced, NBO discontinued some claims and obtained final or default judgments in relation to others, so that the only remaining claims dealt with in the judgment were those against five defendants: Kismat FZC, Kismat Singapore, Zu Lwin, Madhu and Joshi Trading (collectively, "the Defendants"). The following discussion aims to give an overview of the various types of claims that might be available in such cases, without a detailed discussion of the applicable legal principles in relation to each claim. During the hearing, the Defendants submitted that there was no case to answer. In light of this submission, the Court of Appeal was of the view that NBO only needed to establish its claims on a *prima facie* basis. After considering the various claims, the court found that NBO had established *prima facie* claims for fraudulent misrepresentation, unlawful means conspiracy, knowing receipt and unjust enrichment.

A. Fraudulent misrepresentation

5.9 The Court of Appeal found that NBO had shown a *prima facie* case of fraudulent misrepresentation against Kismat FZC, who had, through Bikash and Prakash, represented to NBO that it had dealings with and was owed trade receivables by multinational oil companies. NBO was induced to act upon these representations to make the Loans to Kismat FZC, as the result of which NBO suffered loss when Kismat FZC defaulted on the Loans.

B. Unlawful means conspiracy

5.10 The Court of Appeal also found that NBO had shown a *prima facie* case of unlawful means conspiracy against the Defendants. The elements of this tort were that: (a) two or more persons combined to do certain acts; (b) the alleged conspirators intended to cause damage or injury to the plaintiff by those acts; (c) the acts were unlawful; (d) the acts were performed in furtherance of the agreement; and (e) the plaintiff suffered loss as a result of the conspiracy.[14] On the facts of the case, the

14 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [32].

court found that these elements had been established.[15] The Defendants conspired by unlawful means to fraudulently induce NBO to extend the Loans to Kismat FZC and to receive, dissipate, conceal and/or wrongfully retain the moneys from the Loans, with the intention of causing loss to the NBO, and did cause such loss. The damages that NBO could claim for fraudulent misrepresentation included all losses it had suffered in reliance on the misrepresentation, regardless of whether such losses were foreseeable, and the Defendants as co-conspirators were jointly and severally liable to NBO for these losses.[16]

C. Constructive trust

5.11 The Court of Appeal found that when each of the Defendants received moneys and/or assets which were traceable to NBO's moneys, they knew that these moneys and/or assets had been obtained fraudulently arising from their conspiracy to defraud the NBO. The Defendants' state of knowledge made it unconscionable for them to keep these moneys and/or assets. The court therefore imposed a remedial constructive trust on the relevant moneys and/or assets.[17]

D. Knowing receipt

5.12 The Court of Appeal found that NBO had *prima facie* established its claim in knowing receipt against Kismat Singapore, Joshi Trading and Madhu, in relation to the moneys which had been acquired pursuant to the conspiracy to defraud NBO. The requirements of this claim were: (a) disposal of the plaintiff's assets in breach of trust/fiduciary duty; (b) beneficial receipt by the defendant of assets which were traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets received were traceable to a breach of trust/fiduciary duty, such that it was unconscionable for the defendant to retain the benefit of the receipt.[18] The first requirement was satisfied as the moneys received by Kismat FZC from NBO were subject to a remedial constructive trust as discussed above. When Kismat FZC transferred these moneys to the other Defendants, the second requirement was satisfied as the moneys were disposed of in breach of Kismat FZC's duties

15 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [47], [63] and [64].

16 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [49] and [50].

17 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [55] and [66].

18 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [56].

as constructive trustee. The Defendants knowingly received moneys and/or assets which were traceable to Kismat FZC's breach of its duties as constructive trustee, which made it unconscionable for the Defendants to retain the benefit of such moneys and/or assets.[19]

E. Unjust enrichment

5.13 Finally, the court also found that NBO had established a *prima facie* case of unjust enrichment against Kismat Singapore, Joshi Trading and Madhu as (a) these three defendants were enriched or had benefitted; (b) their enrichment was at NBO's expense; (c) the enrichment was unjust; and (d) there were no applicable defences available to them.[20] Kismat Singapore, Joshi Trading and Madhu had clearly been enriched by the moneys they received. There was a link between the NBO's moneys and the moneys received by Kismat Singapore, Joshi Trading and Madhu. The three defendants had no defence, as there was a total failure of consideration for NBO's disbursement of the Loans, because the basis of the Loans was that they were to be used for discounting invoices issued by Kismat FZC but the moneys were instead dissipated by Bikash, Prakash and the Defendants.[21]

III. Summary judgment on dishonoured cheque

5.14 In *Quek Jin Oon v Goh Chin Soon*[22] ("*Quek Jin Oon*"), the plaintiff made five loans to the defendant. In exchange, the defendant gave the plaintiff five post-dated cheques totalling $3m. The plaintiff successfully obtained summary judgment from the assistant registrar in respect of these cheques. The defendant appealed to the High Court against the assistant registrar's decision. The court granted summary judgment in respect of four of the five cheques for a total of $2.5m, and gave the defendant leave to defend against the plaintiff's remaining claim of $500,000 on the fifth cheque.

5.15 In order to obtain summary judgment under O 14 rr 1 and 3 of the Rules of Court,[23] an applicant must show that he has a *prima facie* case for summary judgment, and if this is established, the tactical burden shifts

19 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [57], [67] and [68].
20 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [58].
21 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 at [59] and [69].
22 [2020] SGHC 246.
23 Cap 322, R 5, 2014 Rev Ed.

to the defendant to show that there is a fair and reasonable probability that he has a real or *bona fide* defence, that is, that there is a triable issue.[24] As the plaintiff's claim was premised on the defendant's dishonoured cheques, the law relating to bills of exchange applied. The court in *Quek Jin Oon* reiterated the rule that "a bill of exchange constitutes a separate contract, and creates obligations for the drawer and rights for the drawee that are independent of any underlying transaction pursuant to which the bill is issued".[25] This meant that a bill of exchange was to be treated as cash. The court found that, pursuant to s 55 of the Bills of Exchange Act[26] ("BEA"), "upon drawing the defendant's cheques, the defendant engaged that on due presentment, the cheques would be accepted and paid according to their tenor, and that if they be dishonoured, he would compensate the holder (*ie*, the plaintiff)".[27] However, under s 21(3)(*b*) of the BEA, in order for a holder to enforce this right, the cheques must have been unconditionally delivered to him.

5.16 The first defence mounted by the defendant rely on s 21 to argue that delivery of the five cheques was conditional. The defendant stated that the first to fourth loans were given to him by the plaintiff under an oral agreement for the purpose of funding mediation proceedings between the defendant and the Chinese government, pursuant to which the defendant was to pay the proceeds of any settlement into a designated bank account. The plaintiff's performance of this alleged purpose was to be secured by the defendant's first to fourth cheques. The plaintiff's encashment of the cheques was conditional upon the proceeds of any settlement being paid into the bank account ("the first condition precedent").[28] When it was clear that the People's Republic of China ("PRC") mediation was not going to lead to an agreement, the defendant claimed that the plaintiff attempted to persuade the defendant to enter into a new agreement whereby the plaintiff would give the defendant a sum of $500,000 for the purpose of funding a proposed arbitration between the defendant and the Chinese government. The plaintiff's performance of the alleged purpose was to be secured by the defendant's fifth cheque, the encashment of which was conditional upon the conclusion of the PRC arbitration and the division of proceeds in the proportion that had been agreed upon ("the second condition precedent"). However, the proposed second agreement was never entered into.[29] The defendant's case was that the first and second conditions precedent were both not satisfied.

---

24 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [20]; *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [17]–[18].
25 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [24].
26 Cap 23, 2004 Rev Ed.
27 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [28].
28 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [15].
29 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [16].

5.17 The court in *Quek Jin Oon* adopted the views of the High Court in *Millennium Commodity Trading Ltd v BS Tech Pte Ltd*[30] that the fundamental question in relation to s 21(3)(*b*) of the BEA was whether a transferor intended without qualification to confer title to the cheque upon the transferee; and whether the transferor had clearly communicated this intention to the transferee.[31] Strong evidence would be required to show that the transferor of a bill of exchange did not intend for the bill to pass to the transferee upon delivery.[32] After assessing the facts of the case, the court in *Quek Jin Oon* rejected the defendant's claim, that delivery of the five cheques was conditional, as being unsupported by the evidence.[33]

5.18 Two further defences were raised by the defendant: that the first to fourth loans were loans made by an unlicensed moneylender and therefore illegal and unenforceable under the Moneylenders Act,[34] and that the first to fifth loans constituted illegal funding of litigation which offended against public policy at common law as these were contracts prejudicial to the administration of justice.[35] To assess these defences, the court applied the well-established principle that an application for summary judgment on a dishonoured cheque will succeed, unless the defendant could raise an arguable case of fraud, illegality or a total or quantified partial failure of consideration.[36] Applying the relevant law of illegality to the facts of the case, the court found, in relation to the first and fourth cheques, that both the illegal moneylending and illegal funding of litigation defences were not arguable, had no reasonable prospect of succeeding, and granted summary judgment in relation to these claims.[37] However, the court found that the illegal litigation funding defence that was raised in relation to the claim on the fifth cheque was at least arguable at law and ought to be determined at trial, and gave the defendant leave to defend against the fifth claim.

30 [2018] 3 SLR 98.

31 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [29]; *Millennium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [69] and [70].

32 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [29]; *Millennium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [69] and [70].

33 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [30].

34 Cap 188, 2010 Rev Ed, s 14(2). There was a detailed discussion of the provisions of the Moneylenders Act (Cap 188, 2010 Rev Ed) in *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 which need not be considered in the present chapter.

35 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [29]; *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [42].

36 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [32]; *Millennium Commodity Trading Ltd v BS Tech Pte Ltd* [2018] 3 SLR 98 at [90]; *Cassa di Risparmio di Pama e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 at [151].

37 *Quek Jin Oon v Goh Chin Soon* [2020] SGHC 246 at [41] and [58].

IV. Garnishment of joint bank account

5.19 The question to be decided in *Timing Ltd v Tay Toh Hin*[38] ("*Timing v Tay*") was whether, where two persons had a joint bank account on which either could draw, the account could be attached in respect of a debt owed by one of them. The answer to this question is of practical importance to banks, judgment creditors as well the joint account holders. It was a question that had been answered in the negative four years earlier by the High Court in *One Investment and Consultancy Ltd v Cham Poh Meng*[39] ("*One Investment*"), which found highly persuasive certain Commonwealth authorities that were "near unanimous" on this point.[40] However, the High Court in *Timing v Tay* was of the opinion that the facts of the present case could be distinguished from those of *One Investment*, and therefore reached a more nuanced conclusion.

5.20 In *Timing v Tay*, the plaintiff had obtained leave to enforce a foreign arbitral award in Singapore, and judgment was entered in terms of the award which required the defendants to pay the judgment sums of more than US$34m on a joint and several basis. The defendants did not satisfy the judgment sums. The plaintiff subsequently took out a summons for a garnishee order for Standard Chartered Bank ("SCB") to show cause why the first defendant's four bank accounts with SCB, which he held jointly with his wife, should not be garnished. The assistant registrar dismissed the summons based on the authority of *One Investment*, and the plaintiff appealed to the High Court.

5.21 In *Timing v Tay*, the High Court found that *One Investment* and the Commonwealth cases cited therein did not necessarily preclude a garnishment order on the facts of the present case. The judge in *Timing v Tay*, Aedit Abdullah J, was of the view that the courts in *One Investment* and the Commonwealth cases reached the decision that they did because it was not possible, in the cases before them, to determine the precise ownership of the moneys in the joint account. The situation was different in *Timing v Tay*, where the judge found that there was strong *prima facie* evidence that all the money in the four joint accounts belonged to the first defendant.[41] In this situation, the judge felt that a garnishment order could be granted even in respect of a joint account. He concluded that the present case could be distinguished from *One Investment*, and took

38 [2020] 5 SLR 974.
39 [2016] 5 SLR 923.
40 These are discussed in *Timing Ltd v Tay Toh Hin* [2020] 5 SLR 974 at [11] and [14]–[15].
41 *Timing Ltd v Tay Toh Hin* [2020] 5 SLR 974 at [21].

the view that if the judgment in *One Investment* precluded a garnishment order on the facts of *Timing v Tay*, it should not be followed.[42]

5.22 The court in *One Investment* had highlighted several policy reasons for not granting a garnishee order in relation to joint accounts.[43] For instance, if a garnishee order were granted, banks and joint account holders would suffer prejudice. It would be difficult for banks to ascertain the respective contributions of joint account holders to determine the correct proportion to attach to a garnishee order. This would be exacerbated where a judgment debtor had multiple bank accounts with different bank account holders, and banks would have to incur extra financial and administrative costs, which would ultimately be passed on to the judgment creditors and debtors. Further, other joint account holders would be prejudiced if joint accounts were liable to garnishment. There was no requirement under the Rules of Court that a joint account holder be notified of the garnishment proceedings, nor any mechanism for a joint holder to seek determination of the judgment debtor's interest in the joint account. However, these reasons have to be considered against the reasons that might point towards an opposite conclusion. In particular, protecting a joint account from garnishment would provide a judgement debtor with a loophole that would allow him to put his money out of the reach of his creditors by putting it into a joint account.[44] In *Timing v Tay*, the court was of the view that where there was strong *prima facie* evidence that all the money in a joint account belonged to the judgment debtor, the creditor should be able to, at the very least, have the garnishee show cause why the joint account should not be garnished. Abdullah J stated:[45]

> To hold otherwise would permit debtors to insulate their assets by holding them in joint accounts, and would result in an arbitrary position where the recoverability of a judgment debt depended in large part on the manner in which the debtor had decided to organise his personal finances. Such a position would unduly undermine the position of judgment creditors, and would permit judgment debtors to, fortuitously or otherwise, frustrate the rulings of a Court.

5.23 In order to alleviate potential prejudice to the garnishee bank and the non-judgment-debtor joint account holder, the court in *Timing v Tay* suggested that certain practical requirements be imposed on an applicant who was seeking to garnish a bank account.[46] First, the applicant must show that there is at least a strong *prima facie* case that all

42 *Timing Ltd v Tay Toh Hin* [2020] 5 SLR 974 at [29].
43 *One Investment and Consultancy Ltd v Cham Poh Meng* [2016] 5 SLR 923 at [16]–[22].
44 *One Investment and Consultancy Ltd v Cham Poh Meng* [2016] 5 SLR 923 at [24].
45 *Timing Ltd v Tay Toh Hin* [2020] 5 SLR 974 at [24].
46 The three requirements that follow were set out in *Timing Ltd v Tay Toh Hin* [2020] 5 SLR 974 at [26].

the moneys in the joint account belong to the judgment debtor. Second, the applicant must serve notice on any joint account holder at the very latest by the show cause hearing. Third, the applicant must provide an undertaking to pay for any costs and reasonably foreseeable losses of the garnishee, or joint account holder, if the court is satisfied that the moneys subject to the show cause order are not in fact payable in whole or in part to the judgment debtor. With respect, this appears to be a good compromise that balances the interests of the various parties. Although this solution would work well in cases where the evidence suggested that the moneys in the joint account belonged only to the judgment debtor alone, Abdullah J acknowledged that the result might be different where multiple accountholders had made contributions to the joint account. If such a case were to arise in future, a court would have to determine how the money in the account should be divided, and such calculation might affect the availability of garnishment.[47] Nevertheless, reading the judgments in *Timing v Tay* and *One Investment* together, it would seem that where the relative contributions of the various joint account holders cannot be established, the position taken in *One Investment*, that a garnishee order should not be granted in this situation, was not questioned by the court in *Timing v Tay*. Focusing on the two specific legal principles that were necessary to decide each of the two cases, these cases are not inconsistent with each other.

V. Liability of co-mortgagor under "all moneys" clause

5.24 *Oversea-Chinese Banking Corp Ltd v Lim Sor Choo*[48] ("*OCBC v Lim*") provides a cautionary tale for borrowers who sign mortgages containing wide terms that could potentially make them liable for sums far exceeding the loans in respect of which they originally executed the mortgages. In *OCBC v Lim*, Oversea-Chinese Banking Corp Ltd ("OCBC") granted the defendant and her husband a $2.7m loan facility to purchase a property, secured by a mortgage executed by the two of them. Clause 1.1 of annex 1 of the mortgage required the defendant and her husband to pay all outstanding sums of money owed by the mortgagor to the mortgagee "either as principal or as surety and either solely or jointly" and "whether on the said Accounts or otherwise in any manner whatsoever or for all other liabilities".[49] Clause 7 of annex 1 further provided that where the expression "the Mortgagor" included two or more persons, the covenant stipulations referring to "the Mortgagor" would apply and be binding upon all such persons jointly and severally.[50]

47 *Timing Ltd v Tay Toh Hin* [2020] 5 SLR 974 at [34].
48 [2020] 5 SLR 463.
49 *Oversea-Chinese Banking Corp Ltd v Lim Sor Choo* [2020] 5 SLR 463 at [3].
50 *Oversea-Chinese Banking Corp Ltd v Lim Sor Choo* [2020] 5 SLR 463 at [14].

The defendant's husband subsequently gave a guarantee to OCBC's Hong Kong branch to secure loan facilities granted to two companies. When the companies started having financial difficulties, OCBC called on the guarantee and obtained default judgment against the defendant's husband for more than US$131m, after which it started the present action to claim the judgment debt against the defendant. The defendant argued that upon a proper construction of the mortgage, she was not jointly and severally liable for the judgment debt. This argument was rejected by the assistant registrar. The defendant appealed against the assistant registrar's decision. The only question for the High Court on appeal was whether, on proper interpretation of the terms of the mortgage, the language of cl 1.1 was broad enough to include the judgment debt. The court found that it was and dismissed the appeal. The defendant had argued for a purposive and contextual approach towards interpreting the facility documents, but the court found that this approach was misconceived. Based on the authority of the Court of Appeal's decision in *Yap Son On v Ding Pei Zhen*,[51] the text of the agreement was of first importance in ascertaining the parties' objective intentions.[52] If the language was unambiguous, the court must apply it.[53] These established principles of contractual interpretation applied equally to "all-obligations" clauses, such as the clause in question. After a detailed analysis of the relevant clause, the court in *OCBC v Lim* found that on a plain reading of the language of the clause, the defendant was liable for a range of liabilities, including the judgment debt.

5.25 As distressing as the decision would have been for the defendant, widely drafted "all moneys" mortgages are common in banking practice. Each clause must be carefully interpreted, and details will vary from clause to clause. The widest versions of such clauses typically render a co-mortgagor jointly and severally liable not just for his own debts, but also for debts incurred by the other co-mortgagor or mortgagors, either jointly or severally, in respect of all other transactions, past and future. The clause would be binding regardless whether the co-mortgagor had knowledge of the level of indebtedness of his co-mortgagor before entering into the mortgage, or of the co-mortgagor incurring new

51 [2017] 1 SLR 219.

52 *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30], referred to in *Oversea-Chinese Banking Corp Ltd v Lim Sor Choo* [2020] 5 SLR 463 at [17]. See also *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 at [32] and *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [3].

53 *Oversea-Chinese Banking Corp Ltd v Lim Sor Choo* [2020] 5 SLR 463 at [18].

liabilities thereafter.[54] This interpretation of "all-sums" clauses is supported by judicial authority in Singapore,[55] the UK,[56] as well as Hong Kong.[57]

VI. Bank loans: Crystallisation of floating charge

5.26 A bank that lends money to a company will typically take a floating charge over the company's assets as security. The floating charge is flexible as it enables the borrower to carry on dealing with the charged assets in the ordinary course of business, for example, to sell the assets, or to use them as security for a loan by another lender. Because of this implied permission to deal with the charged assets in a floating charge, the chargor is able to pass a good title to a purchaser if it sells the assets; or if a fixed charge over part of the assets is created in favour of a subsequent lender, the subsequent lender will have priority over the security interest of the first lender. There are two caveats. First, the subsequent transactions must be in the ordinary course of business of the company. Next, the borrower's implicit permission to deal with the charged assets comes to an end when the floating charge crystallises. At this point, the floating charge becomes a fixed charge. Any dealings with the charged assets thereafter will be subject to the bank's security interest. The precise time at which crystallisation occurs is therefore of paramount importance in order to determine the rights of the bank *vis-à-vis* a subsequent purchaser of the charged assets, or a subsequent lender who takes security over the charged assets. Crystallisation can occur by agreement according to the terms of the debenture, for example, by the giving of notice or automatically on the occurrence of some predefined event. Crystallisation can also occur by operation of law when the company ceases to trade as a going concern. Crystallisation by operation of law is typically brought about by two types of events: the winding up of the company or the *de facto* cessation of trading by the company. It should be noted that floating charges are often used together with negative pledge clauses, which change the legal position discussed above, but the complexities of these arrangements need not be discussed for present purposes.

5.27 In *Malayan Banking Bhd v Bakri Navigation Co Ltd*[58] ("*MBB v Bakri*"), Malayan Banking Bhd ("MBB") granted credit facilities to NGV

54 *Oversea-Chinese Banking Corp Ltd v Lim Sor Choo* [2020] 5 SLR 463 at [40], citing the Hong Kong decision of *Standard Chartered Bank (Hong Kong) Ltd v Pak Kwan Ho* [2018] HKEC 580 at [26].
55 *Re Tararone Investments Pte Ltd* [2001] 3 SLR(R) 61.
56 *AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94.
57 *Standard Chartered Bank (Hong Kong) Ltd v Pak Kwan Ho* [2018] HKEC 580.
58 [2020] 2 SLR 167.

Tech Sdn Bhd ("NGV") between 2004 and 2012, on the security of a debenture that created a fixed and floating charge over NGV's undertaking, which included *Hull 1118*, together with its sister vessel *Hull 1117*. These vessels were in the process of being constructed for Bakri Navigation Co Ltd ("Bakri") pursuant to two shipbuilding contracts signed in 2007. By novation, Red Sea Marine Services Ltd ("Red Sea"), which was part of the Bakri group of companies, became the buyer of *Hull 1118* in 2007 and subsequently acquired title to it in 2011. Two mechanisms for the crystallisation of the floating charge were set out in the debenture. First, under cl 4.2, MBB could crystallise the floating charge by giving notice in writing to NGV. Second, cl 4.3 ("the automatic crystallisation clause") provided that the floating charge would crystallise automatically if NGV "encumbered" in favour of a third party any property which was subject to the floating charge. In February 2013, NGV defaulted on its repayment obligations to MBB and in March 2013, MBB served two notices on NGV pursuant to cl 4.2 of the debenture to crystallise its floating charge. In the High Court, MBB claimed that its interest in *Hull 1118* was superior to Red Sea's interest. The success of this claim turned upon the question of when the floating charge crystallised. MBB argued that the transfer of *Hull 1118* to Red Sea in May 2011 and the retention of this by NGV in its shipyard until August 2012 amounted to an encumbrance within the meaning of cl 1.2 of the debenture, as this was a "sale with right of retention". MBB further argued that the effect of this retention was that the automatic crystallisation clause was triggered, and the floating charge crystallised and became a fixed charge in May 2011. The High Court rejected MBB's arguments, and this was upheld by the Court of Appeal, which dismissed MBB's appeal. The Court of Appeal was of the view that even if it were assumed that "sale with right of retention" in the debenture referred to a right to retain possession, just because *Hull 1118* remained in the possession of NGV did not necessarily mean that NGV had the right to retain such possession, and there was no evidence to show that it had such legal right.[59] This meant that the floating charge did not crystallise under the automatic crystallisation clause.[60] A second argument raised in favour of MBB was that the floating charge had crystallised by operation of law. This would happen when an event occurred which was incompatible with the continuance of trading by the chargor company as a going concern. MBB's case was that there were certain transactions entered into between NGV and Red Sea between 2009 and 2012 without MBB's knowledge ("the Impugned Transactions") that were outside the

59 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [68].

60 In reaching this decision, the Court of Appeal upheld the High Court's decision not to follow the Malaysian case of *NGV Tech Sdn Bhd v Ramsstech Ltd* [2015] 1 LNS 1017, in which the High Court of Malaya, after considering similar debentures in favour of Malayan Banking Bhd, held that the transaction did trigger an identical automatic crystallisation clause.

ordinary course of NGV's business, and that these caused the floating charge to crystallise as a matter of law.[61] The Court of Appeal rejected this argument as being unsupported by case authorities or academic writings, and held that transactions outside the ordinary course of business of the chargor did not necessarily crystallise the floating charge as a matter of law. It would only do so if these transactions amounted to a cessation of business.[62] Another argument for MBB concerned certain agency agreements ("the Agency Agreements") which MBB had entered into with another company to take over the construction of *Hull 1117* and *Hull 1118*, authorising the other company to agree to the terms of the delivery to Red Sea and empowering it to deliver title and possession of the vessels. The question arose as to whether NGV had stopped operating as a going concern as a result of the Agency Agreements. The Court of Appeal held that even if the powers of management no longer remained with the company, this did not mean that it had ceased to trade as a going concern. In any event, the Agency Agreements had no effect on NGV's ability to manage the rest of its business, particularly in relation to the construction of other vessels.[63]

5.28 The Court of Appeal's rejection of the arguments relating to automatic crystallisation and crystallisation by operation of law meant that the floating charge only crystallised in March 2013 when MBB served notice on NGV as provided for in cl 4.2 of the debenture. This meant that Red Sea had acquired *Hull 1118* in 2011 free of MBB's security interest.

5.29 In any case, the Court of Appeal was of the view that the Impugned Transactions were not outside NGV's ordinary course of business. The test of whether a transaction is in the ordinary course of business is a two-stage one, as set out in the English case of *Ashborder BV v Green Gas Power Ltd*[64] ("*Ashborder*") and affirmed by the Singapore Court of Appeal in *Diablo Fortune Inc v Duncan, Cameron Lindsay*.[65] In the first stage, the court must ascertain, as a matter of fact, whether an objective observer with knowledge of the company would view the transaction as having taken place in the ordinary course of its business.[66] If the answer

61 The details of the Impugned Transactions are set out in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [17]–[24].
62 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [86].
63 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [91].
64 [2004] EWHC 1517 (Ch).
65 [2018] 2 SLR 12.
66 *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch) at [277]; *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [80].

is "yes",[67] then in the second stage, the court must consider whether, on the proper interpretation of the document creating the floating charge, the parties nonetheless did not intend that the transaction should be regarded as being in the ordinary course of business for the purpose of the charge.[68] The Court of Appeal in *MBB v Bakri* was of the view that "a transaction will be within the ordinary course of business even if it is extraordinary or exceptional in character",[69] and quoted the judgment of the court in *Ashborder* which stated that:[70]

> … the mere fact that a transaction is unprecedented, exceptional, liable to be avoided in liquidation as a fraudulent or wrongful preference, or even made in breach of a director's fiduciary duty does not necessarily preclude the transaction from being in the ordinary course of the company's business.

5.30 The Court of Appeal referred to Mahoney JA's statement in the New South Wales Court of Appeal case of *Reynolds Bros (Motors) Pty Ltd v Esanda Ltd*,[71] that "ordinary" was not to be confined to what was in fact ordinarily done in the course of the particular business of the company, and that transactions would be within this principle even if they were, in relation to the company, exceptional or unprecedented.[72] The Court of Appeal also referred to the English case of *In re Automatic Bottle Makers, Ltd*,[73] where the court stated that the expression "in the ordinary course of business" of the company should be construed in a commercial sense to refer to the carrying on of commercial transactions that were the object of the company's incorporation.[74] This was supported by the academic view that a transaction is not within the ordinary course of business if it was not a business transaction effected within the powers of the company and within the directors' powers, or if it was fraudulent.[75] In this context, fraudulent dealings referred to those dealings which were

67 This qualification was not explicitly stated in *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch), but it would explain how the second stage would fit with the first stage.

68 *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch) at [277]; *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [80].

69 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [83].

70 *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch) at [277]; *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [80].

71 (1983) 8 ACLR 422.

72 *Reynolds Bros (Motors) Pty Ltd v Esanda Ltd* (1983) 8 ACLR 422 at 428, referred to in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [83].

73 [1926] Ch 412.

74 *In re Automatic Bottle Makers Ltd* [1926] Ch 412 at 421, referred to in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [84].

75 William James Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) at pp 208–209, referred to in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [84].

not in good faith for the purposes of the chargor's business, as these were outside the implied licence of a floating charge.[76]

5.31 In light of the Court of Appeal's view,[77] that a transaction outside the ordinary course of business did not necessarily crystallise a floating charge, this very helpful discussion of the meaning of "ordinary course of business" was not necessary to resolve the question of whether the floating charge had crystallised by operation of law in *MBB v Bakri*. However, it would be very relevant to the general question of whether a third party dealing with the company would be free of an uncrystallised floating charge or be subject to it. The implied permission to deal with the assets in a floating charge only applies to transactions in the ordinary course of business, so that a third party would take subject to the floating charge if the transaction is outside the ordinary course of business of the company. As seen in the discussion above, it may not be easy to establish that a transaction is outside the ordinary course of business of a company.

VII. Performance bonds

5.32 Several cases concerning performance bonds were decided by the courts in 2020. The majority of the performance bonds that have been considered by the Singapore courts have been "on-demand bonds", where the issuer is obliged to pay upon the beneficiary's demand, regardless of any disputes in the underlying contract between the applicant and the beneficiary and without the beneficiary having to prove its losses. It is settled law in Singapore that the courts will restrain a beneficiary from calling on an "on-demand performance bond" only if a strong *prima facie* case can be made out that the call was either fraudulent or unconscionable.[78] As fraud is difficult to show, most of the cases that have come before the courts have concerned unconscionability. Performance bonds can also take the form of indemnity bonds where the issuer will pay only if the beneficiary has suffered loss, as in one of the cases decided this year and discussed below.[79]

76 William James Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) at pp 208–209, referred to in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [85].

77 See paras 5.27–5.30 above.

78 See, *eg*, *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 and *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352.

79 See paras 5.42–5.43 below.

A. Was the call on the on-demand bond unconscionable?

(1) Temporary finality of adjudication determinations under the Building and Construction Industry Security of Payment Act

5.33 The question of whether a call on a performance bond was unconscionable has come up many times for decision in the Singapore courts. This depends very much on the facts of the case. In *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd*,[80] the Court of Appeal considered this question in the context of the legislative scheme embodied in the Building and Construction Industry Security of Payment Act[81] ("SOPA"). The main contractor, Samsung C&T Corp ("Samsung") was employed by the Land Transport Authority to construct a Mass Rapid Transit station and tunnels. It engaged Soon Li Heng Civil Engineering Ltd ("SLH") to carry out excavation and disposal works. SLH procured the issue of an on-demand performance bond in favour of Samsung. Several of the payment claims made by SLH were disputed by Samsung, who eventually called on the performance bond. Two disputes between the parties had been referred to adjudication under the SOPA. At the time of the call on the performance bond, the adjudicator had come to a decision on one of the disputes and had ordered Samsung to pay SLH more than $2m, while the other adjudication was ongoing. The Court of Appeal upheld the High Court's decision to grant SLH an order restraining Samsung from receiving any money on the performance bond on the ground that the call was unconscionable. The Court of Appeal noted that SLH did not merely rely on the fact that an adjudication determination existed, but also on the fact that Samsung's reasons for making the demand under the performance bond had already been considered and rejected by the adjudicator.[82] The Court of Appeal was of the view that to call on the bond in such circumstances was unconscionable as it would negate the adjudication determination prior to any final determination between the parties.[83] This was because the legislative structure of the SOPA provided in s 21(1) that a determination made under the Act was to be binding on the parties to the adjudication unless and until one of several events happened, including final determination of the dispute by a court or tribunal, or settlement of the dispute by agreement between the parties. None of these stipulated events had happened. Further, s 36 of the SOPA provided that the provisions therein shall have effect notwithstanding any contrary contractual provision, thereby prohibiting the parties from

80 [2020] 2 SLR 955.
81 Cap 30B, 2006 Rev Ed.
82 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [22].
83 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [22].

contracting out of its provisions. The effect of these provisions of the SOPA was that the adjudication determination had temporary finality. Samsung could only challenge the decision of the adjudicator only in final dispute resolution proceedings between the parties in a court or other tribunal. If Samsung were required by the adjudicator to pay SLH a certain amount of money but was allowed to recover this payment by calling on the performance bond, this would undermine the temporary finality of the adjudication determination.[84] In these circumstances, the court found that Samsung's call on the bond was unconscionable. This decision will provide useful and clear guidance in cases where an adjudication determination has been made under the SOPA.

(2) "Qualified person" under the Building Control Act

5.34 *CEX v CEY*[85] also involved an application for an injunction to restrain the call on an "on-demand performance bond" on the ground of unconscionability. In this case, CEY, the developer of six houses, employed CEX as the main contractor for the project, and was the beneficiary under an on-demand performance bond procured by CEX. The project was delayed and CEY called on the performance bond as it was of the view that the persistent delays were due to CEX's failure to carry out the contract with due diligence and expedition. CEX argued that many of the delays were beyond its control. Amongst other things, CEX pointed out that its progress was affected by the hospitalisation and the subsequent death of John Seah, CEY's architect, who was the "qualified person" authorised to carry out structural works under the Building Control Act ("BCA").[86] When Seah was hospitalised, he wrote a letter to authorise Ng How Theong to cover his duties. Pursuant to this authority, Ng issued a notice to CEX to proceed with due diligence and expedition. Later, after Seah's demise, Ng issued a termination certificate on behalf of Seah. In reliance on the termination certificate and on account of CEX's persistent failure to carry out contract works with due diligence and expedition, CEY issued a notice of termination to CEX, and later sought to recover losses arising from CEX's alleged breach of contract. CEX refused to pay, denying any breach and claiming that its employment had been wrongly terminated. CEY called on the performance bond, and CEX applied for an injunction to restrain the call, on the ground of fraud and unconscionability. The High Court found that the call on the performance bond was unconscionable and granted the injunction.

84 *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 at [58].
85 *CEX v CEY* [2021] 3 SLR 571.
86 Cap 29, 1999 Rev Ed.

5.35 The first issue was whether Seah, the holder of the permit to carry out structural works under the BCA, ceased to be a "qualified person" under the Act when he became incapacitated due to his illness. The court answered this question in the affirmative. The BCA required a qualified person for the building works at all times, and CEY should have appointed a replacement and notified the Commissioner of Building Control immediately. The court found that the permit to carry out structural work lapsed when Seah was hospitalised. From that time, it would have been illegal for CEX to continue with the building work until a new qualified person was appointed. That being the case, the second issue was whether the call on the performance bond was unconscionable. The court found that it was, for a clear and straightforward reason. The deciding factor was that a beneficiary could not rely on an illegality in calling upon a performance bond. As it was illegal for CEX to carry out the works, it was unconscionable for CEY to penalise CEX for failing to do so by calling on the bond.

5.36 The requirements for an injunction to restrain a call on an on-demand bond on the ground of unconscionability have been discussed in detail in many judicial decisions. Three steps were identified by the court in *CEX v CEY*.[87] First, the bond had to be construed, to ensure that it is an on-demand bond. Next, it must be ascertained whether the call came within the terms of the bond. For example, the bond may require that the call take a certain format, such as including a statement by the beneficiary that the applicant had breached the contract. Finally, it had to be evaluated whether a strong *prima facie* case of unconscionability had been shown. The court in *CEX v CEY* highlighted that this was a high threshold to be met, but explained that the court was not in a position to enter into a protracted consideration of the merits of the case to assess the substantive entitlements of the parties, as the application was an interlocutory one.[88] The court helpfully set out a non-exhaustive summary of factual situations in which unconscionability was most often manifested:[89]

> (i) calls for excessive sums;
>
> (ii) calls based on contractual breaches that the beneficiary of the call itself is responsible for;
>
> (iii) calls tainted by unclean hands, *eg*, supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures;
>
> (iv) calls made for ulterior motives; and

87 *CEX v CEY* [2021] 3 SLR 571 at [11].
88 *CEX v CEY* [2021] 3 SLR 571 at [20].
89 *CEX v CEY* [2021] 3 SLR 571 at [11].

(v) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

5.37 In relation to the merits of a beneficiary's case, the court stated that an inference might be drawn that the call on the bond was abusive if the beneficiary's basis for calling on the bond was baseless. However, it is important to note, as the court explained, that this inference may not always be drawn, as a beneficiary may have been mistaken about its contractual entitlement and called on the bond owing to an honest mistake, in which case, the call would be legitimate.[90]

(3) Existence of genuine dispute

5.38 In *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd*[91] ("*Sulzer Pumps v Hyflux*"), Hyflux Membrane Manufacturing (S) Pte Ltd ("Hyflux") was a subcontractor for a project involving the design and construction of a desalination plant in Oman. Hyflux in turn engaged Sulzer Pumps Spain, SA ("Sulzer Pumps") as its subcontractor to supply and install pumps. Sulzer Pumps guaranteed its obligations by procuring the issue of an on-demand performance bond in favour of Hyflux. When the pumps failed, Hyflux alleged that this was caused by design flaws, whereas Sulzer argued that the failure was caused by Hyflux's use of the pumps outside the recommended and permitted speed and flow range. Hyflux called on the performance bond, and after a failed negotiation to try to persuade Hyflux to withdraw its call on the bond, Sulzer applied for an *ex parte* injunction to restrain Hyflux from calling on the bond on the ground of unconscionability. An injunction was granted, and the present hearing concerned an application to discharge the injunction.

5.39 Hyflux raised several arguments that challenged settled legal principles relating to performance bonds. These were dismissed by the court, which confirmed that the standard of proof for granting an injunction in performance bonds cases was the same as in letter of credit cases,[92] and that unfairness alone was not sufficient as a ground for granting an injunction, as unfairness was not equivalent to unconscionability.[93] One of the arguments put forward by Hyflux was particularly interesting and raised the question of whether there might be any significance in the fact that there was a genuine dispute between the parties. In particular, did the mere existence of a genuine dispute *ipso facto* support a finding that

90 *CEX v CEY* [2021] 3 SLR 571 at [22].
91 [2020] 5 SLR 634.
92 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [35]–[40].
93 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [42].

a call on the bond was *prima facie* unconscionable? This is an important question of general application. The answer given by Aedit Abdullah J, the judge in *Sulzer Pumps v Hyflux*, was "no". The court therefore rejected Hyflux's proposition that where there was a genuine dispute, the court should grant an injunction to protect the obligor from unfairness. To support this proposition, Hyflux had relied on *Arab Banking Corp (BSC) v Boustead Singapore Ltd*[94] ("*Arab Banking*") and *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd*[95] ("*Min Thai*"). However, Abdullah J found that *Arab Banking* did not support Hyflux's contention.[96] The judge was further of the view that if *Min Thai* seemed to support this contention, it contradicted later Court of Appeal decisions in *Eltraco International Pte Ltd v CGH Development Pte Ltd*[97] ("*Eltraco*") and *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd*[98] ("*Mt Sophia*"), and should not be followed.[99] Abdullah J highlighted that the correct principle, based on the *Eltraco* and *Mt Sophia* authorities, was that calling on a bond where there was a genuine dispute did not amount to unconscionability.[100] The judge decided to lift the injunction as Sulzer had not discharged its burden to prove a strong *prima case* of unconscionability. He was satisfied that there was a genuine dispute between the parties and that the call on the performance bond did not lack *bona fides*.[101]

5.40 It is useful to highlight two specific findings here. First, Sulzer failed to persuade the court that the delay in calling on the bond (two years after the pump failures began, and six months after the pumps were fixed) amounted to unconscionable conduct. Whether a delay was unconscionable depended on the facts of the case. The court was of the view that a long-drawn dispute may require a longer time for the beneficiary to monitor the situation and to decide whether to call on the bond.[102] Second, the court also rejected Sulzer's argument that if there was any doubt about the existence of unconscionability, an injunction should be granted as Hyflux was undergoing restructuring so that any payment made by Sulzer would be difficult to recover if it turned out that

94 [2016] 3 SLR 557.
95 [1998] 3 SLR(R) 961.
96 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [46]–[49].
97 [2000] 1 SLR(R) 198.
98 [2012] 3 SLR 352.
99 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [51].
100 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [45].
101 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [67].
102 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [70].

Sulzer was not in breach of the contract. The court highlighted that it is important to remember that a performance bond was a security that had been bargained for and the court should not lightly disrupt the status quo unless the applicant had proven a *prima facie* case of unconscionability or fraud, and this approach should be taken even if the applicant was in financial difficulty.[103]

(4) Court's power to grant freestanding prohibitory injunction

5.41 An interesting argument raised in *Sulzer v Hyflux* concerned the jurisdiction of the court to grant a freestanding prohibitory injunction that was not based on an underlying cause of action. The court explained that the injunction being considered in the case was a prohibitory injunction because it prohibited Hyflux from calling on the bond, and a freestanding injunction because it was not an interlocutory injunction. An interlocutory injunction is sought as an ancillary relief to a separate substantive claim whereas the sole purpose of an application for a freestanding injunction was to obtain the injunction, nothing more. Hyflux had argued that an injunction restraining an unconscionable call on a performance bond cannot be issued if there was no underlying cause of action. The court rejected this argument and emphasised that the lack of an underlying cause of action was no obstacle to the grant of an injunction to restrain an unconscionable call on a bond. The court pointed out that an example of a successful case could be seen in *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd*,[104] where an injunction to restrain a call on the bond was granted on the ground of unconscionability despite the fact that the obligor had not started substantive proceedings against the beneficiary under the relevant contract.[105] Abdullah J explained that a contrary position would be illogical. For instance, in a situation where a beneficiary called on a bond although neither of the parties had breached their obligations to each other under the underlying contract, it would be clear that the call was made in bad faith as there was no breach and no dispute. If the only type of injunction that could be sought was an interlocutory one, this would mean that the obligor would have no recourse in this situation as the obligor had no cause of action against the beneficiary. In contrast, if an injunction were granted, this would enable the obligor to avoid bringing a cause of action against the beneficiary for restitution of the amount of the bond. An injunction in this situation would serve to preserve and protect the existing legal

103 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [52]–[53].

104 [2019] 4 SLR 1324.

105 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [81].

rights of the obligor. The other argument raised by Hyflux was that an injunction could not be freestanding. The court rejected this argument. The court pointed out that an injunction to restrain a beneficiary from making an unconscionable call on a performance bond was based on the court's exercise of its equitable jurisdiction to achieve equity and justice, and that this inherent jurisdiction of the court was confirmed by O 92 r 4(1) of the Rules of Court.[106] On the jurisdictional point, the court's final conclusion was that it had the power to grant a freestanding prohibitory injunction that was not sought as an ancillary relief to a separate claim. Nevertheless, despite having this power, the court decided to discharge the injunction on the ground that Sulzer failed to show a strong *prima facie* case of unconscionability.

B. Indemnity bonds

5.42 While the majority of the performance bonds cases that have come before the Singapore courts have involved on-demand bonds, the bond in question in *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd*[107] was, exceptionally, an indemnity bond. In the course of its judgment, the court in this case re-examined the propositions set out in two previous cases involving indemnity bonds, *JBE Properties Pte Ltd v Gammon Pte Ltd*[108] ("*JBE*") and *York International Pte Ltd v Voltas Ltd*[109] ("*York International*"). The dispute in this case was between the issuer of the performance bond, AXA Insurance Pte Ltd ("AXA") and the beneficiary, Chiu Teng Construction Co Pte Ltd ("Chiu Teng"). The beneficiary, Chiu Teng, was the main contractor of a refurbishment and upgrading project at the Nanyang Technological University. QBH Pte Ltd ("QBH") was a subcontractor for this project and applied for a performance bond in favour of Chiu Teng. The relevant clause of the bond stated that the issuer was obliged to indemnify the beneficiary only against "all losses, damages, costs, expenses or [*sic*] otherwise sustained by [the beneficiary]".[110] As the bond in question was *in pari materia* with the bonds in *JBE* and *York International*, which had been ruled by the courts to be indemnity bonds, there was no argument about this and both parties accepted the characterisation of the bond as an "indemnity

106 *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] 5 SLR 634 at [91]; *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 1 SLR(R) 198 at [36].

107 [2020] SGHC 234.

108 [2011] 2 SLR 47.

109 [2013] 3 SLR 1142.

110 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [13], reproducing the reasoning in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 as summarised in *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 at [21].

bond". This meant that the beneficiary could only call on the bond if and when it actually suffered loss arising from any breach by the obligor of its obligations under the underlying contract. Chiu Teng called on the bond but AXA resisted payment on the ground that Chiu Teng's call on the bond was defective. One of the reasons put forward to support this assertion was that Chiu Teng had failed to prove that it had suffered loss as a result of QBH's breach, as was required under an indemnity bond. It was clear that an indemnity bond was conditioned on facts, unlike an on-demand bond, which only required the production of documents or a mere demand. The question was how a beneficiary was to prove its loss before being entitled to claim on an indemnity bond. AXA had argued that in order to prove its claim, Chiu Teng had to refer the dispute to arbitration and obtain an arbitral award. The court accepted AXA's argument that an independent determination, arbitral award of admission was necessary for Chiu Teng to definitively prove its losses,[111] but did not agree that the only way of doing this was by obtaining an arbitral award. The judge, Lee Seiu Kin J, explained the usual procedure involved in a call on an indemnity bond:[112]

> A beneficiary under such a bond is always entitled to call on the bond if, in its opinion, it has suffered actual losses. Accompanying such a call will naturally be the provision of sufficient documents and evidence adduced to prove the breach of the underlying contract and the consequential losses suffered. If the guarantor under the bond accepts such documentation and pays the amount secured under the bond, that is the end of the matter. If the documents are not accepted as proof, the parties would inevitably have to proceed to an independent determination, as in the present instance.

5.43 On the facts of the present case, as neither of the parties had chosen to refer the claim to arbitration, the court had the power to deal with the matter of proof.[113] The court was satisfied that on the facts produced by Chiu Teng to support its claim of specific losses, there was sufficient evidence of loss of such amount that would justify its claim on the bond.[114]

111 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [17].

112 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [20].

113 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [24].

114 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [25] and [27].