4. BANKING LAW

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Banker and customer

Financial services

4.1 Under s 26 of the Financial Advisers Act (Cap 110, 2007 Rev Ed), a financial adviser is to refrain from making any false or misleading statement with intent to deceive. Such statements may cover the amount payable under an investment product and the effect of the contract terms. An omission to disclose any matter material to the statement may be construed as misleading. However, no civil remedies are specifically provided for an aggrieved consumer under s 26. Similarly, under s 27, a financial adviser is not to make any recommendations where he has no reasonable basis for so doing. Under s 27, a financial adviser is liable for a resulting loss if he makes a recommendation without any reasonable basis. The adviser is liable to a consumer in damages. At common law, a financial adviser has to exercise reasonable care in providing advice. Even though the Financial Advisers Act does not expressly provide for any civil liabilities against an errant financial adviser under s 26, the Act might indirectly assist an aggrieved investor in his common law action by setting the standard of care the adviser is required to observe. This will free an aggrieved client from having to establish the required standard of care when he brings an action against an adviser for breaching his common law duty of care. However, in practice, in spite of the Financial Advisers Act, financial advisers might seek to escape from their common liability by expressly throwing the responsibility of due diligence on their customer through the incorporation of non-reliance clause in their contracts with the customer. In *Orient Centre Investments v Societe Generale* [2007] 3 SLR 566, the Singapore Court of Appeal decided that a customer's agreement with a bank incorporating a non-reliance clause was sufficient to preclude the customer from suing the bank for breach of representations, fiduciary and contractual duties and negligence of its employee. Orient Centre Investments Ltd ("Orient") opened an investment account with Société Générale ("SG") on 18 May 1998 to invest in certain structured financial products including equities and warrants, options, foreign exchange transactions and derivatives. Orient

claimed that it invested US$9.6m and suffered losses in excess of US$1m. It claimed damages from SG for breach of representations, breach of fiduciary and other duties and for negligence in relation to the investments. Orient alleged that Kenneth Goh Tzu Seoh ("Goh"), SG's assistant vice-president and client relationship manager, had represented that investments were capital preserved and income guaranteed to the extent of 10% per annum. SG relied on its agreement with Orient stipulating that:

> The Depositor hereby represents and warrants for the benefit of SG, that: — it has concluded the present transaction after having carried out its analysis of the transaction, particularly in the light of its financial capacity and its objectives; — it is fully aware that the Deposit Final Value may be less than the Outstanding Deposit Amount; — it has examined and is familiar with the content of this Agreement and that it agrees and accepts its terms, and that it has examined and is familiar with the terms of the Prospectuses of the Funds.

4.2 The court decided that the non-reliance clause was sufficient to relieve the bank from the alleged breach of duties. Chan Sek Keong CJ said (at [50]):

> In our view, the combined effect of the express general and specific terms and conditions applicable to the structured products provides an insuperable obstacle to any claim by the appellants against SG based on the alleged breach of representations or duties, fiduciary or contractual or on negligence on the part of Goh. In the face of Orient's own representations and warranties with respect to each of the structured products, it is not possible for the appellants to argue that Orient had relied on any alleged representation on the part of Goh that he would ensure that the appellants' capital would be preserved and that it would earn a return of 10% per annum on each deposit. It was therefore unnecessary for the Judge to determine the factual merits of the appellants' allegations before determining the legal merits of SG's defence.

Presumption of advancement

4.3 The issue as to whether a beneficiary is obliged to show that he is in financial need before a presumption of advancement would arise in his favour has finally been settled by the Singapore Court of Appeal. The controversy arose from two High Court judgments holding opposing views. In *Low Geok Khim v Low Geok Bian* [2006] 2 SLR 444, Kan Ting Chiu J decided that a presumption of advancement was not dependent on a beneficiary being in financial need provided the donor intended to benefit him. The court disagreed with the views expressed by Judith Prakash J in *Ang Toon Teck v Ang Poon Sin* [1998] SGHC 67 that for a presumption of advancement to arise, the beneficiary must be in financial need. However, in *Shih Shin Wang-Liu v Tsai Pei Lun Betty*

[2006] SGHC 196, Judith Prakash J again decided that a presumption of advancement arose when a donor was under a legal or equitable obligation to maintain a beneficiary. It would not arise when a beneficiary was not financially dependent on a donor. The Singapore Court of Appeal, hearing an appeal from *Low Geok Khim v Low Geok Bian*, affirmed in *Low Gim Siah v Low Geok Khim* [2007] 1 SLR 795 that a presumption of advancement involving a husband and wife, parent and child, remained relevant to modern day Singapore. In addition, the presumption of advancement arose from the relationship of the parties. The court while agreeing with Kan Ting Chiu J that the presumption of advancement applied in the joint account holder's favour, however, found that there was sufficient evidence to rebut the presumption. In addition, the court reiterated that the presumption of advancement in husband and wife and parent and child cases remain relevant to modern day Singapore. Chan Sek Keong CJ said (at [44]):

> It is obvious that the intention of both parties would not be relevant in the traditional type of relationship where the provision or advancement is made unilaterally by the provider. In the traditional relationship of father-and-child or husband-and-wife, where one provides for the other, it is always the intention of the provider alone that is relevant. The presumption of advancement has been applied in England in such relationships for over two centuries and justified on the basis of a moral or equitable obligation on the part of one to care for the other. Such moral obligations do not change even if social conditions change. Hence, we find it difficult to accept an argument that in modern Singapore, fathers and husbands have somehow changed their paternal or marital obligations so radically that the presumption is no longer applicable or should not be applied. There is no doubt that many married women in Singapore are financially independent of their husbands. But there are also many of them who are not or who choose to be housewives in order to look after their husbands, their children and their homes. Infant children will always be financially dependent on their fathers and mothers. In our view, in the case of such relationships, there is no reason to treat the presumption of advancement as having lost its robustness or diminished in its vigour, and there is no reason why it should not be applied to resolve questions of title in the absence of any evidence indicating otherwise.

4.4 Have the Singapore courts made a conscious departure from the English position concerning the issue of advancement in a wife's favour? In *Yeo Guan Chye Terence v Lau Siew Kim* [2007] 2 SLR 1, Lai Siu Chiu J decided that a presumption of advancement in a wife's favour was easily rebutted. Two sons from a testator's first marriage sued their step-mother from a third marriage over two properties registered in the couples' joint names. The plaintiffs contended that the properties were held on a resulting trust for the estate since their late father had funded the purchase of the properties. In reply, the step-mother relied on the

presumption of advancement and on the principle of survivorship as the properties were in joint ownership. The court found that there was a resulting trust of the properties in the estate's favour and the presumption of advancement was rebutted by the evidence. Each party was entitled to the properties in proportion to their contributions. The court expressed the view that in modern day Singapore, the presumption of advancement in a wife's favour was no longer applicable in the absence of evidence to support the presumption. As Lai J said (at [65]–[66]):

> I reject the defendant's argument — I find that the presumption of a resulting trust was not displaced in this case by the presumption of advancement. I would add that Singapore courts have moved away from the presumption of advancement on the basis that the presumption of advancement is no longer applicable in modern times unless there is evidence to support the same. … Thus the current judicial approach towards the presumption of advancement is to treat it as an evidential instrument of last resort where there is no direct evidence as to the intention of the parties rather than as an oft-applied rule of thumb.

4.5 On the question of survivorship, the court decided that equity would operate to defeat the right. Lai J said (at [73]):

> It is well established that in a joint tenancy, there is a right of survivorship when one of the co-tenants die. In the present case, it was axiomatic that the right of survivorship dictated that the entire property in a joint tenancy belongs to the defendant. However, this will result in the deceased's estate being left with nothing. This seems to be unfair and unjust. Case law states that equity intervenes to ensure that although the deceased and the defendant remain joint tenants *at law*, they are actually tenants in common *in equity*, according to the proportion of their respective financial contributions. Accordingly, I hold that the existence of a resulting trust overrides the right of survivorship in the joint tenancies of both Minton Rise and 18 Jalan Tari Payong.

4.6 With due respect to the court, the observations pertaining to the current trend in Singapore in respect to an advancement in a wife's favour do not appear to find much support from the Court of Appeal's recent decision in *Low Gim Siah v Low Geok Khim* [2007] 1 SLR 795, where the Court of Appeal took great pains to point out that in the context of Singapore, the concept of advancement had not lost its robustness. Similarly, the courts in Malaysia have also taken the view that the presumption of advancement in a wife's favour remained relevant in modern day Malaysia. In *Lew Pa Leong v Chi Shen Lan* [2007] 1 CLJ 603, the Malaysian Court of Appeal decided that when a husband registered a property in his wife's name, there was a presumption of advancement in the wife's favour.

Guarantees

Formalities

4.7 Even though no particular form of instrument is prescribed by law, there is a legal requirement that a contract of guarantee has to be in writing and signed by the person sought to be made liable under the guarantee. With the use of computer technology, an offer to provide a guarantee can now be communicated through electronic means, like text messaging or short message service ("sms") and e-mail. Would an e-mail constitute a sufficient memorandum in writing for a guarantee to be enforceable? In *J Pereira Fernandes SA v Mehta* [2006] 2 All ER 891, Judge Pelling QC decided that an e-mail offer to provide a guarantee constituted a sufficient memorandum in writing but the guarantee was unenforceable as it was not signed by the guarantor (as his name did not appear on the e-mail).

4.8 However, if a person sending an e-mail also attaches his name to the e-mail or his name is attached automatically by the e-mail provider, then there is less difficulty in inferring that the sender's signature appears in the e-mail. In Singapore, it has been decided that an e-mail was capable of constituting a sufficient signed memorandum in writing under s 6(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed). In *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651, Judith Prakash J decided that an exchange of e-mails satisfied the requirements of s 6(*d*) of the Civil Law Act for a lease to be embodied in a signed written memorandum. Similarly, in *Kim Eng Securities Pte Ltd v Tan Suan Khee* [2007] 3 SLR 195, Belinda Ang Saw Ean J decided that an e-mail acknowledgment by a guarantor was sufficient to revive a time-barred debt.

Duty of Disclosure

4.9 A creditor does not owe a duty of disclosure to a guarantor as the transaction does not arise from a bargain between the parties but comes about from the guarantor's willingness to help a principal debtor borne out of friendship or kinship with the debtor. A guarantor can be expected to know of a principal debtor's indebtedness to a creditor. A creditor comes under a duty to disclose only when there are unusual circumstances surrounding the transaction. A principal debtor's indebtedness to a creditor is not a circumstance requiring disclosure. In Singapore, if a creditor is a bank, it has a duty to keep the affairs of the customer, the principal debtor, confidential. Thus, any duty of disclosure may be further complicated by a banker's duty of confidentiality. These issues arose for the High Court's consideration in *Susilawati v American Express Bank Ltd* [2008] 1 SLR 237. The plaintiff,

a wealthy Indonesian lady, became a customer of the defendant's private banking division on 27 August 1997. On 11 February 1998, the plaintiff executed a third party liability charge over her account to cover her son-in-law's liabilities towards the bank. Between 1998 and 2006, her son-in-law, Lim Thian Long ("Tommy"), incurred substantial losses arising from foreign exchange transactions and loans from the bank. By March 2006, Tommy's liabilities amounted to US$17.4m. When Tommy failed to pay the bank, the bank deducted the amount from the plaintiff's account. The plaintiff contended that the bank had no right to do so on two main grounds. First, the charge was executed under Tommy's undue influence and secondly, the bank owed her a fiduciary duty to disclose the transactions involving Tommy's account. The court found there was no evidence of undue influence. The relationship between the bank and the plaintiff was not fiduciary in nature and the bank did not owe a duty to disclose the information about Tommy's account. In addition, the bank's duty of disclosure must take into account its statutory duty of confidentiality. Lai Siu Chiu J said (at [94]):

> At the end of the day, the principles culled from case law must be interpreted in the context of our statutory regime, which effectively negates the doctrine of implied consent to disclosure. Where a guarantor requests for information, a bank is best advised to ensure that it has the customer's explicit written authority to override its statutory duties of confidentiality which, if refused, should prompt the intending guarantor to draw the appropriate conclusions and realise the risks attendant to giving the guarantee requested.

Duty of care

4.10 A creditor has sole discretion in deciding when to sell a security provided by a debtor. However, if a creditor exercises his power of sale, he owes a duty to the debtor and any guarantor to exercise care in selling the security to obtain its true market price. In *Beckkett Pte Ltd v Deutsche Bank AG* [2007] SGHC 153, Kan Ting Chiu J decided that a creditor's duty of care when he sells a security was owed to both a principal debtor and a guarantor. Deutsche Bank AG ("Deutsche Bank") provided PT Asminco Bara Utama ("Asminco"), an Indonesian company, with a US$100m Bridging Loan. Asminco was part of the Swabara Group of companies. The loan was guaranteed by its parent company, Beckkett Pte Ltd ("Beckkett"), together with a pledge of all the shares in a subsidiary, PT Swabara Mining and Energy ("SME"). The borrower defaulted on the loan and the bank sold the pledged SME shares for US$800,000 in a private sale. The court decided that the bank breached its duty of care in selling the shares but it was not established that the shares were sold at an undervalue. Kan J said (at [152]):

> Having so reviewed the issues of law and fact raised by the parties, I find and order on the claims and the counterclaim that: (a) Beckkett has made out a case that Deutsche Bank failed to discharge its duties

> as pledgee when it sold the SME shares, but has failed to show that Deutsche Bank had in fact sold those shares at an undervalue, so I award to Beckkett nominal damages of $1000.

Time-barred debt

4.11 In a guarantee payable on demand, time does not run against a creditor until he demands payment from a guarantor. In *Kim Eng Securities Pte Ltd v Tan Suan Khee* [2007] 3 SLR 195, Belinda Ang Saw Ean J decided that time did not run against a creditor under a guarantee payable on demand until the creditor demanded payment from the guarantor. Further, the mere fact that the principal transaction had become time-barred did not affect the guarantor's liability. The defendant was a remisier working with the plaintiffs' stockbrokers, Kim Eng Securities Pte Ltd ("Kim Eng"). The parties' agency agreement required the defendant to "indemnify the Company against all damages, liabilities" arising from the agreement. Between 1994 and 1997, contra losses were incurred arising from the defendant's clients' defaults. On 1 July 2004, the defendant ceased to be a remisier with Kim Eng. On 8 July 2004, Kim Eng, through its solicitors, demanded payment from the defendant of $383,237.85 together with interest for liabilities arising under the agency agreement. The defendant contended that Kim Eng had no cause of action against him because its claims against his clients were time-barred. The court considered whether Kim Eng's claims in its writ issued on 10 May 2006 was time-barred and alternatively whether the defendant had acknowledged liability through his e-mail communications with Kim Eng. The court decided, firstly, that the mere fact that the defendant's clients' liability had become time-barred did not extinguish the defendant's liability as his liability only arose after Kim Eng made a demand on the defendant on 8 July 2004. Ang J said (at [16], [23], [24] and [31]):

> It was common ground that Kim Eng's claims against the four persons named in para 15 of the amended statement of claim were statute-barred under s 6 of the Act. Those claims were in respect of transactions in the securities dealt by or made through the defendant as a remisier of Kim Eng and in the name of Kim Eng between 1994 and 1997. … In my judgment, the defendant's time bar defence was untenable. Mr Lim argued, and rightly so, that no cause of action arose under cl 7.3 of the Agency Agreement until the demand for payment was made and the limitation period therefore, ran from that point in time. Mr Lim cited *Bradford Old Bank, Ltd v Sutcliffe* [1918] 2 KB 833 for the proposition he advanced. In the case of a demand guarantee, as a matter of principle, it is no defence for the guarantor to argue that the claim by the creditor against the guarantor was out of time because of the existence of a statute-barred principal transaction. In such a case, the creditor is allowed more time to enforce the demand guarantee. … For these reasons, there is no time bar defence

available for the defendant. Kim Eng's claims were not statute-barred, even though its claims against the principal debtors were out of time.

4.12 In coming to the decision that a guarantor's liability was not affected even though a principal debtor's liability had become time-barred, the court relied on certain dicta in *Carter v White* (1883) 25 Ch D 666. In *Carter v White*, the English Court of Appeal decided that the mere fact a creditor chose not to enforce a security obtained from a principal debtor did not discharge a surety from his bond. This holding is a well-established legal proposition. However, the Singapore High Court interpreted *Carter v White* to cover a situation where a guarantor remained liable even though the debtor's liability was time-barred. Thus, even though the remisier's clients debts had become time-barred because they were incurred between 1994 and 1997, the remisier remained liable to Kim Eng in 2004. This holding is rather surprising. It is doubtful whether the court in *Carter v White* contemplated the situation which arose in the Singapore case and it is equally doubtful that *Carter v White* stands for the proposition extracted by the Singapore court. While it is clear that a guarantor becomes liable to a creditor the moment a liability is incurred by a debtor, the creditor has six years to pursue the guarantor on this liability. If a demand is made a pre-condition to a guarantor's liability, time runs against the guarantor from the moment the creditor demands payment from the guarantor. During the time a creditor has against a guarantor, the principal debtor's liability might become time-barred. In this situation, there is little doubt that the guarantor's liability remains alive even though the debtor's liability becomes time-barred. This was not the situation which arose in the Singapore case. In the Singapore case, the principal debt had become time-barred before the creditor made a demand on the guarantor. This holding is contrary to a basic principle pertaining to guarantees, and that is that a guarantor assumes a secondary liability to that of a principal debtor. A guarantor is not liable unless a principal debtor is liable to a creditor. This proposition is firmly established in Singapore, Malaysia and England. Thus, in *Swan v Bank of Scotland* (1836) 10 Bligh NS 627, the House of Lords decided that a guarantor was not liable if a creditor and principal debtor contract was null and void in law. Similarly, in *Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd* [2006] 4 SLR 501, the Singapore Court of Appeal decided that a beneficiary could not sue on a performance bond once the underlying contract became time-barred. In the Singapore case, if the principal debt had become time-barred before the creditor made a demand on the guarantor, how is it possible for the guarantor's liability to arise? It is respectfully submitted that the court's holding in *Kim Eng Securities Pte Ltd v Tan Suan Khee* [2007] 3 SLR 195 is not consistent with the basic principles governing a guarantor's liability.

4.13 Kim Eng also relied on the remisier's admission of liability in an e-mail sent to Kim Eng on 23 February 2004. The remisier contended that the e-mail headed "Subject: Amnesty of Bad Debt" was privileged communication as being part of an implied "without prejudice" negotiations. This contention was rejected by the court on the ground that the evidence did not show that this was a negotiation to compromise a disputed liability. Ang J said (at [51]):

> Here, there was no dispute on liability on the face of the e-mail of 23 February 2004. It was an open communication to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability. From the words used in the e-mail such as "Amnesty" in the subject heading and reference to "forgiving" a debt in the main body of the text (in this case 40% of $348,000), the e-mail contained an admission of liability by the defendant of the debt of $348,000. Moreover, the tenor of the e-mail was not to compromise an existing dispute but to repay the debt of $348,000 by way of forgiveness of debt (in this case 40% of $348,000) and some time to repay the remaining balance. Thus, the e-mail was only explicable on the footing that liability to satisfy the indebtedness of $348,000 was admitted by the defendant. In context, the e-mail made no sense at all without that premise. The request in the e-mail for Kim Eng's accommodation was necessarily predicated upon (and it was implicit from the request) the defendant's admission of the debt from which a promise to pay is to be implied. Lastly, based on the extrinsic evidence, the e-mail had not initiated a negotiation to settle a disputed debt and could not be properly characterised as one which initiated any negotiation. The e-mail was plainly admissible in evidence. It constituted an acknowledgement of a debt of $348,000 for the purposes of s 26(2) of the Act and satisfied the formal requirements of s 27(1) of the Act.

4.14 The court further decided that even if the remisier's liability was time-barred, the liability was revived by the remisier's e-mail acknowledgments of the liability. Ang J said (at [53]):

> In my view, there had been an acknowledgment preventing the defendant from setting up the statute of limitation. The e-mail contained an acknowledgment sufficient to set time running afresh under s 26(2) of the Limitation Act. It follows that Kim Eng could, in the alternative, recover the contra losses and accumulated interest under cl 10 of the Agency Agreement.