4. BANKING LAW

POH Chu Chai
LLB (University of Singapore), LLM, LLD (London);
Advocate and Solicitor (Singapore);
Associate Professor, Faculty of Law, National University of Singapore.

Banker and customer

Bank statement

4.1 A bank is exposed to a potential business risk when a third party fraudulently withdraws funds from a customer's account by forging the customer's signature or by other fraudulent means. To provide the bank with some measure of relief against this risk, the courts have recognised that a customer owes an implied duty of care in writing out his instructions so that the bank will not be misled. The courts, however, stopped short of implying an additional duty that the customer is to exercise care to prevent forgery of his signature. However, the Singapore High Court in *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd* [2000] 4 SLR 673, departing from a long line of authorities, decided that a customer's duty to prevent the forgery of his signature could be implied from the banker and customer contract. This decision has now been doubted by the Singapore Court of Appeal.

4.2 In practice, there is a world of difference between a customer's duty to write his cheques carefully and the duty to prevent the forgery of his signature. The alteration of a customer's instructions is not easy to detect if the customer is careless in drawing up his instructions. The forgery of a customer's signature, however, stands on an entirely different footing. A banker is expected to know a customer's signature. A banker's inability or reluctance to verify a customer's signature constitutes a serious breach of contract as the customer's signature is his sole key to the account. A customer's confidence in the banking system will be severely undermined if a bank is excused from carrying out this basic duty of recognising the customer's signature. For this reason, the courts have been extremely reluctant to extend a customer's duty of care to cover the forgery of the customer's signature. What the common law does not give to a bank, the bank can always appropriate by means of an express term. In the past, banks have made bold attempts to impose a duty on a customer to prevent the forgery of his signature indirectly through the use of bank statements by requiring the customer to check the statements. However, all these attempts failed and were flatly rejected by the Privy Council in *Tai Hing Cotton Mill*

Ltd v Liu Chong Hing Bank Ltd [1986] AC 80. While the common law rejected such a duty, Canada and the US recognised that such a duty could be created by a bank through the use of a verification agreement containing a conclusive evidence clause.

4.3 In Singapore, such a term was used by the Bank of America and upheld by the Singapore High Court in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828, following the Canadian Supreme Court's decision in *Arrow Transfer Co Ltd v Royal Bank of Canada* (1972) 27 DLR (3d) 81. Such a term is highly controversial in a setting where the common law does not recognise the duty. In addition, the provision operates as an exemption clause and is often couched in ambiguous terms without referring directly to the risk the bank is seeking to exclude. Thus, in *Arrow Transfer Co Ltd v Royal Bank of Canada* (1972) 27 DLR (3d) 81, Laskin J, delivering the dissenting opinion in the Canadian Supreme Court, observed (at 98):

> I find it strange that a bank which seeks by contract to throw the risk of all forged drawer signatures upon its customer should be so reticent about referring expressly to such an eventuality.

Further, a term literally transplanted from Canada and the US has to be viewed against the background of our own consumer protection laws, especially the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") and other consumer protection legislation. Close scrutiny should be made to see whether the banks are justified in imposing such a term as most bank customers are not in a position to negotiate terms with the bank. Equally, decisions which uphold such a term should take into account consumer interests.

4.4 However, in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273, the Singapore Court of Appeal decided that a conclusive evidence clause requiring a customer to object "in writing to any of the matters contained" in a bank statement was wide enough to cover a fraudulent withdrawal from the customer's account. The court, however, limited its holding to a corporate customer but reserved its views in respect of an individual customer. The court further decided that the UCTA was applicable to the term but the term was not unfair to a corporate customer.

4.5 Pertamina Energy Trading Limited, the appellant, was a Hong Kong company and a wholly owned subsidiary of PT Pertamina ("Pertamina"), the Indonesian national oil company. The appellant's Singapore operations were managed by Soekono Wahjoe ("Wahjoe"), the company president, and

Zainul Ariefin ("Ariefin"), its vice-president of finance and administration. The appellant deposited a sum of US$8m under a fixed deposit with Credit Suisse, the respondent. The appellant's contract with the bank required the appellant:

> To examine all statements of account, bank statements, printed forms, deposit slips, credit advice notes, transaction advices and other documents (hereinafter in this Clause referred to collectively as 'statements') supplied by the Bank setting out transactions on any of the Accounts and agrees that unless the Customer objects in writing to any of the matters contained in such statement within 14 days of the date of such statement, the Customer shall be deemed conclusively to have accepted all the matters contained in such statement as true and accurate in all respects.

4.6 Ariefin, without proper authority, established a US$10m credit facility secured by a charge over the US$8m fixed deposit account. The funds in the credit facility were diverted to Aceasia Commercial Enterprises Pte Ltd ("Aceasia"), a private banking client of the respondent. The appellant sought to recover the US$8m placed on fixed deposit with the bank. The bank pleaded that the credit facility and drawdown of the credit were duly authorised by the appellant. In addition, the bank also relied on the conclusive evidence provision in the agreement and common law estoppel. The court found that the credit facility and the drawdown were not properly authorised by the appellant and the bank had acted without proper authority. V K Rajah J (as he then was), delivering the court's judgment, said at [48]:

> Given our findings thus far, we are of the opinion that the ratification resolution was forged; the drawdown was not properly authorised; and further, the charge document was not properly sealed and therefore of no legal significance or effect.

4.7 The court further decided that common law estoppel was not applicable as the bank did not adduce evidence to show that it was prejudiced by the appellant's failure to inform the bank about the unauthorised transactions. Rajah J said at [87]:

> Second, we are not satisfied that in this case, the respondent did, in fact, lead satisfactory evidence demonstrating that its chances of recovering the loan moneys from either Aceasia or Dedy (or even Lim) had been materially prejudiced by the appellant's silence, thereby causing it to suffer detriment. Indeed, upon the drawdown of the appellant's account, the moneys were promptly transferred out of the jurisdiction. To that extent, the respondent's bare and unsubstantiated assertion that the respondent would have taken action had it known of the forgery falls far short of

> discharging the burden to show that the appellant stood a "real chance" of recovering the moneys. Accordingly, the defence of estoppel must fail.

4.8 The court, however, decided that the conclusive evidence clause operated against the appellant as a corporate customer to preclude its claim against the bank. Rajah J said at [61]:

> It bears emphasis that in holding that conclusive evidence clauses if and when properly and reasonably defined are enforceable, we restrict such a conclusion to cases where the customers are commercial entities. In the context of banks on the one hand (which would otherwise bear the onerous, if not near impossible task of detecting forgeries given the advent of modern technology) and commercial entities on the other (which only have to check their own records), we do not find it onerous or unreasonable to place the risk of loss on the latter if this has already been agreed upon. However, we are not required to express a general opinion as to the reasonableness of conclusive evidence clauses as and when applied to individuals and non-corporate customers since the issue does not arise in the present context. Each case will entail a careful examination of its own peculiar factual matrix starting with a careful scrutiny of the conclusive evidence clause that is being questioned.

4.9 In the course of its judgment, the court affirmed a number of basic principles of banking law and made a number of observations. Firstly, the court reiterated that at common law, a customer did not owe a duty to a bank to prevent the forgery of his signature. In so doing, the court doubted the correctness of the High Court decision in *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd* (*supra* para 4.1). Rajah J said at [54]:

> In considering the issue of whether a customer's common law duties extend "thus far and no further" than those laid down in [*London Joint Bank, Limited v Macmillan and Arthur* [1918] AC 777] and *Greenwood* [*v Martins Bank, Limited* [1933] AC 51], we do observe that, notwithstanding considerable judicial opinion elsewhere, particularly in such major financial centres as Hong Kong and London, the position in Singapore is somewhat obscured by the decision in *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd* [2000] 4 SLR 673. In that case, Woo Bih Li JC (as he then was) held that business efficacy dictates that there should be a term implied by law in a customer-banker contract such that a customer is under a general duty not to facilitate fraud by his negligence, quite apart from the drawing of his cheques. As Woo JC saw it, there is no reason to draw a distinction between the drawing of cheques and other steps or omissions that facilitate the fraud or forgery. Because no occasion arises for us to revisit this particular issue in these proceedings, suffice it to say that a court should be slow to intervene and imply a term in a contract as a matter of law. It

> should do so only if the term to be implied is, in all the circumstances, fair, reasonable and sound in policy: see *Crossley v Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 at [33]–[46]. We would also respectfully endorse the view of the New South Wales Court of Appeal in [*National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377], where Mahoney P (with whom Waddell A-JA agreed) and Clarke JA declined to widen the customer's duty on the basis that such a duty lacked precise definition as to its scope and content. We further add that the fact that the banking industry has continued to flourish in the jurisdictions that have followed *Tai Hing* [*Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80] notwithstanding the limited duties of banking customers demonstrates that a reconsideration of this point is unnecessary and perhaps even undesirable.

4.10 On the issue of the conclusive evidence clause, the court observed that such a term was now commonly found in banking agreements in the US and Canada. There is no doubt that such terms are clearly entrenched in the US and Canada. In fact, the term was introduced into Singapore by the Bank of America when it first litigated on the term in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* (*supra* para 4.3). It may be pertinent to observe that apart from Singapore, banks in countries with financial centres like the UK, Australia, Hong Kong and New Zealand have not seen the need to incorporate such a term into their banking contracts. There is no doubt that banks in many of these countries have deliberately refrained from incorporating such a provision whenever a strong consumer protection culture is present.

4.11 The court further observed that conclusive evidence clauses were commonplace in commercial contracts. Rajah J said at [63]:

> It is noteworthy that the employment of conclusive evidence clauses is not peculiar to bank accounts. Such clauses may be found in guarantees or in certificates of engineers and architects found in construction contracts. In all these cases, it is not doubted that such conclusive evidence clauses are valid and binding on the parties.

4.12 With due respect to the court, this comparison is not entirely apposite for a couple of reasons. First, a conclusive evidence clause in a guarantee or architect's certificate performs a very different function from a conclusive evidence clause in a bank statement. A conclusive evidence clause in a guarantee or architect's certificate is intended solely to facilitate the recovery of money owed but does not finally settle the liability between the parties. It allows the creditor to recover the sum owed in summary proceedings without being hindered by disputes over the actual quantum of the debt. If the sum certified in a guarantee eventually proves to be erroneous, the creditor has to account to the guarantor for the error at a later stage. Thus, in *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, the English Court of Appeal in dealing with a conclusive evidence clause in a guarantee decided that the court was not precluded from looking into the accuracy of the certification at a later date. As Lord Denning MR said (at 440):

> [I]t seems to me the notice of default given by the English brokers is perfectly good. There is no public policy against it. On the contrary, public policy is in favour of enforcing it. ... This does not lead to any injustice because if the figure should be erroneous, it is always open to the French trading company to have it corrected by instituting proceedings against the brokers, in England or in France, to get it corrected as between them.

4.13 Similarly, in *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345, V K Rajah J, referring to a conclusive evidence clause in a guarantee, said at [25]:

> In the result, I do not accept the plaintiff's contention that the relevant conclusive evidence clause in the instant case precludes any inquiry into the legitimacy of the claim. The clause as drafted refers to the "indebtedness" of the defendant.

4.14 A conclusive evidence clause in a bank statement is essentially a forfeiture provision as it attempts to forfeit what rightly belongs to a customer at common law. Such a clause in a bank statement effectively precludes a customer from challenging the bank over the accuracy of the balance in his bank account unlike a conclusive evidence clause in a bank guarantee. This fundamental difference between these two types of conclusive evidence provisions should give the courts sufficient reasons to scrutinise a conclusive evidence clause in a bank statement much more closely.

Debt owing to bank

4.15 A bank's provision for a customer's bad debts is not to be equated with a release of the customer from the debts. The bank is entitled to recover the debts from the customer unless it is precluded from doing so by its own conduct. In *Oversea-Chinese Banking Corp Ltd v Moey Keng Weng* [2006] 3 SLR 538, Tay Yong Kwang J decided that a bank earmarking a customer's liability as a bad debt did not preclude the bank from recovering the debt from the customer. On 15 August 1998, Tat Lee Bank became a subsidiary of Keppel Bank and the two banks became Keppel TatLee Bank. The plaintiff bank, Oversea-Chinese Banking Corp Ltd, later merged with Keppel TatLee

Bank taking over all its assets and liabilities. The three defendants were the parents and their daughter. The daughter obtained overdraft facilities from Tat Lee Bank in 1996 and 1997 amounting to $15.14m. The facilities were guaranteed by the parents and secured against two properties in Jalan Ampang. The defendants wanted to subdivide the two properties to build four bungalows on the subdivided plots at 46, 46A, 48 and 48A Jalan Ampang. The plaintiff bank sought possession of 46, 48 and 48A Jalan Ampang and the repayment of the two principal amounts with interest. The defendants' main defence was that the debts had been written off by Tat Lee Bank prior to its merger with Keppel Bank. According to the defendants, sometime in 1998, prior to the merger, Tat Lee Bank's chairman, Goh Eng Chew ("Goh") mentioned to the father that his daughter's loan was among the debts written off by the bank as part of its fair value adjustment exercise conducted for the merger. Goh further indicated that this would provide the father with some relief. The court found that there was no evidence that the bank had written off the debts so there was nothing to preclude the plaintiff bank from recovering them from the defendants. Tay J said at [27] and [35]:

> The only evidence in respect of the alleged write-off of the defendants' debt was essentially the father's oral testimony that that was what he had been told by Goh. The mother and the daughter knew only what the father told them. Philip Lee's evidence was that, according to his knowledge and the documents in his possession, there was no such writing off of the defendants' debt. This was buttressed by the evidence of the plaintiff's witnesses and those subpoenaed by the defendants. As Ong Lay Khiam had testified, Tat Lee Bank was a properly-run bank with established rules of corporate governance. It would therefore be highly surprising that a write-off of millions of dollars of debt was not even documented or evidenced in writing in any way.
>
> …
>
> Even if the defendants were right about the alleged write-off, that would not have afforded them a defence to the plaintiff's claim. A write-off of a debt in the account books of a creditor because it was deemed irrecoverable did not amount to an agreement to release the debtor from the debt ([*Greyson*] *v Commonwealth Bank of Australia* [2005] FCA 1108 at [19]). There was also no term in any of the contractual documents here which provided for the release of the defendants from liability in the event of a write-off by the bank. In my opinion, even if a creditor had written off a debt, he could still pursue his legal remedies against the debtor, subject of course to the law on limitation of actions by time bar. If it was a judgment debt that had been written off, the creditor would still be able to file a proof of debt in the debtor's bankruptcy or liquidation, as the case may be.

Joint account

4.16 When a joint account is opened by a person standing in a special relationship, like a husband and wife or a person *in loco parentis*, there is a presumption of advancement in favour of the other joint account holder even though he or she does not contribute anything to the account. This presumption is *prima facie* in nature and may be rebutted by circumstances surrounding the establishment of the account pointing to the presence of a contrary intention. For a presumption of advancement to arise, is the beneficiary obliged to show that he is in financial need and the account is opened for his benefit?

4.17 There are currently two High Court judgments holding opposing views. In *Low Geok Khim v Low Geok Bian* [2006] 2 SLR 444, Kan Ting Chiu J decided, *inter alia*, that a presumption of advancement was not dependent on a beneficiary being in financial need provided the donor intended to benefit him. A Low Kim Tah died in December 1997 at the age of 91. He had six sons and four daughters but two sons and one daughter predeceased him. The deceased left moneys in six joint accounts with his youngest son, the first defendant, Low Geok Bian. The deceased's estate claimed that the moneys in the joint accounts belonged to the estate. The first account was opened in 1983 while four other accounts with substantial deposits amounting to more than $4m were opened in 1995 when the deceased was suffering from mild dementia. The court was asked to look into the beneficial ownership of the accounts. It found that even though the deceased was suffering from mild dementia, his mental capacity to open the accounts was not affected. It further decided that there was a presumption of advancement in the joint account holder's favour and there was no evidence to rebut this presumption. Kan J said at [60]:

> After giving the matter careful consideration, I find it more probable than not that when the deceased opened the six accounts, he intended the first defendant to have the moneys upon his death. Consequently, the presumption of advancement is not rebutted.

4.18 In holding that a presumption of advancement operated in this case, the court disagreed with the views expressed 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. Kan J said at [42] and [43]:

> Counsel also cited *Ang Toon Teck v Ang Poon Sin* [1998] SGHC 67 where Judith Prakash J stated at [48] that:

> The presumption of advancement should not apply as between a father and son in these circumstances as there is no need for the one to make financial provision for the other.

> and found that the presumption of advancement could not apply between a father and a 50-year-old financially self-supporting son, but she went on to say that if that approach was wrong, the presumption did not apply because it was rebutted on the facts.
>
> There is a significant difference between taking the position that the presumption cannot apply when there is no need for financial provision, and finding that the presumption is rebutted. The former states a proposition of law applicable to all similar cases, while the latter is a finding that is made on the facts of a particular case.

4.19 Holding that the beneficiary was not obliged to show that he was in financial need for a presumption of advancement to arise, Kan J said at [47]:

> As the presumption operates as an exception to the rule on resulting trusts, the rationale for the presumption should be considered. The underlying reason for having an exception is that the parent would have intended the child to have the benefit of the property because of the parent-child relationship between them. There is no necessity to restrict the operation of the presumption of advancement to a child in need of financial support. There is no reason to suppose that a parent could have intended the child to have the benefit if the latter was financially dependent, but not if he was financially sound.

4.20 However, in *Shih Shin Wang-Liu v Tsai Pei Lun Betty* [2006] SGHC 196, Judith Prakash J decided, *inter alia*, that a presumption of advancement arose when a donor was under a legal or equitable obligation to maintain the beneficiary. It would not arise when a beneficiary was not financially dependent on the donor. The plaintiffs transferred funds from their UBS AG London branch account to their son, Stanley Tsay-Shing Kim's UBS AG Singapore branch account on various occasions. On 9 January 2004, Stanley died intestate. His assets included a US$1,726,958 balance in his UBS AG Singapore branch account. The plaintiffs claimed that Stanley was holding the money in trust for them. Stanley's estate contended that the money constituted a gift from the plaintiffs. The court decided, *inter alia*, that the funds were held on a resulting trust for the plaintiffs as no presumption of advancement arose since Stanley was not financially dependent on the plaintiffs. Prakash J said at [48]:

> Taking the second point first, in *Ang Toon Teck v Ang Poon Sin* [1998] SGHC 67, I expressed the view that the presumption of advancement

should not apply as between a father and a 50-year-old financially self-supporting son because in such circumstances, there was no need for the one to make financial provision for the other. This observation was based on the premise that the presumption of advancement would only apply where the party making the transfer was under some obligation, legal or equitable, to support the transferee. My view was not accepted by Kan Ting Chiu J when he decided the case of *Low Geok Khim v Low Geok Bian* [2006] [2 SLR 444]. Although he quoted para 23-02 of *Snell's Equity*, (Sweet & Maxwell, 31st Ed, 2005) which states:

> The presumption of advancement applies to certain transfers between parties where it may be readily inferred that A would have intended to make a gift to B. It is found therefore where A is under an equitable obligation to support or make provision for B. Examples are where A is the husband or father of B. It is, in effect, a counter-presumption which provides prima facie evidence about A's intentions as to where the beneficial interest in the property should lie. Its effect is to negative any initial presumption that the transfer creates a resulting trust.

[A]fter considering other authorities, Kan J concluded that the underlying reason for applying the presumption of advancement as an exception to the rule on resulting trust was that a parent would have intended the child to have the benefit of the property because of the parent-child relationship between them and there was no necessity to restrict the operation of the presumption of advancement to a child in need of financial support. I have considered Kan J's views but, with respect, will maintain the view that I previously expressed. It is clear from the passage quoted from *Snell's Equity* that equity's readiness to infer a gift in a transfer from a father to a child or a husband to a wife arises from the equitable obligation of the transferor to support the transferee. Where there is no such obligation, there is no reason to infer a gift and the normal principles should apply, *ie*, that the transfer creates a resulting trust unless the transferee is able to show evidence of an intention to make a gift.

4.21 The above High Court decisions raise some fundamental issues concerning when a presumption of advancement would arise. A presumption of advancement usually arises in situations where a donor is under a legal obligation to maintain the beneficiary. Thus, it arises between a husband and wife, in the wife's favour; and between a parent and child, in the child's favour. However, there is no presumption of advancement between a parent and his adult children as there is no obligation on the parent to maintain his adult children. In *Tinsley v Milligan* [1994] 1 AC 340 Lord Browne-Wilkinson, in the House of Lords, had this to say on the presumption of advancement. He said (at 372):

> On a transfer from a man to his wife, children or others to whom he stands in loco parentis, equity presumes an intention to make a gift. Therefore in such a case, unlike the case where the presumption of resulting trust applies, in order to establish any claim the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in so doing will normally have to plead, and give evidence of, the underlying illegal purpose.

4.22 The views expressed by Lord Browne-Wilkinson that a presumption of advancement arose in the presence of a special relationship between the parties represent a correct statement of the law. It thus appears that the court in *Low Geok Khim v Low Geok Bian* had applied the correct principles in holding that for a presumption of advancement to arise there was no additional requirement for a beneficiary to show that he was financially dependent on the donor. The test is whether the beneficiary falls within the class of persons for whom the law makes a presumption of advancement. Thus, in *Damayanti Kantilal Doshi v Shobhana J Doshi* [1998] 1 SLR 530, MPH Rubin J decided that a father-in-law was not a person who stood *in loco parentis* to his daughter-in-law and there was no presumption of advancement in the daughter-in-law's favour when a joint unit trust account was opened by the father-in-law in their joint names.

4.23 However, the holding in *Ang Toon Teck v Ang Poon Sin* (*supra* para 4.18) and *Shih Shin Wang-Liu v Tsai Pei Lun Betty* (*supra* para 4.20) that a beneficiary had to be financially dependent on a donor before a presumption of advancement would arise appears to be contrary to accepted principles. While this additional requirement of financial dependence may not affect dealings between parents and their adult children since there is no presumption of advancement in favour of an adult child, it would operate against a rich wife or a rich minor. With this additional requirement, a wife who is financially independent would not be able to benefit from a gift provided by her rich husband. Similarly, a minor who is financially independent would not be able to benefit from a gift made by his equally rich parents. The issue as to which of the two views is to be preferred has to be settled by the Court in Appeal in the future.

Letter of credit

Provision of credit facilities through use of letter of credit

4.24 If an importer in Singapore wishes to buy goods from an overseas seller, he will first enter into a contract of sale with the seller. In the contract of sale, the parties will agree on the price and the mode of payment. If payment is to be effected by means of a letter of credit, the type of credit required will also be specified. In Singapore, there is a commercial practice whereby a letter of credit facility is often used to finance a third-party importer when he does not have a letter of credit facility arrangement. An applicant of the letter of credit will allow the letter of credit to be used by a third party for a fee or commission. Is the provision of such credit financing to a third party through the use of a letter of credit a moneylending transaction?

4.25 In *Pankaj s/o Dhirajlal v Donald McArthy Trading Pte Ltd* [2006] 4 SLR 79, Kan Ting Chiu J decided that a financing arrangement using a letter of credit to pay for a third party's import of goods constituted a form of credit financing rather than a moneylending transaction. This decision was recently affirmed by the Singapore Court of Appeal in *Donald McArthy Trading Pte Ltd v Pankaj s/o Dhirajlal* [2007] 2 SLR 321. The Court of Appeal decided that it would uphold such a transaction on policy grounds as it represented an established commercial practice in Singapore. The plaintiff, Pankaj s/o Dhirajlal, was the sole proprietor of Topbottom Impex, while the first defendant was a limited company, Donald McArthy Trading Pte Ltd. The company was controlled by the second and third defendants, a husband and wife. The parties entered into an arrangement whereby the company was allowed to utilise letters of credit issued by the plaintiff's bankers for goods purchased by the company. For the service, the company agreed to pay the plaintiff the principal sum together with a commission charge and interest. On 14 January 2005, the plaintiff quantified the company's debts as US$361,459.66 owing on principal and US$239,441 for interest. The defendants contended that the debts could not be recovered because the agreement was a moneylending transaction and it infringed the Moneylenders Act (Cap 188, 1985 Rev Ed). The High Court decided that the agreement was not a moneylending transaction but a credit facility agreement. Kan J said at [22] and [23]:

> Is this moneylending? As far as I know, the authorities administering the Act have not prosecuted any such operators for any offence under the Act. In *Nissho* [*ie*, *Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd* [1995] 3 SLR 268], Lim Teong Qwee JC stated at 274, [18]:
>
>> This is a practice well known to those concerned with the import and export trade and I think not a few importers who use the available letter of credit lines of banking facilities of their business associates from time to time would be surprised if they were told that they were borrowing money by doing that and that their business associates would require a licence under the Moneylenders Act … In my judgment there is no loan here at all … [Such] transactions are not loans in nature or in form.

> I agree with his conclusion. Like the purchase of book debts and the discounting of bills, the provision of letters of credit facilities is distinct from moneylending. It is a form of financial assistance that one party offers to another, usually for a profit, but unless we take all forms of financial assistance for a profit as moneylending, the arrangement between the plaintiff and the first defendant is not moneylending because no money is lent.

4.26 The Court of Appeal affirmed Kan J's views. Chan Sek Keong CJ said at [26] and [27]:

> In *Nissho Iwai*, Lim JC said at 274, [18]:
>
>> … I think not a few importers who use the available letter of credit lines of banking facilities of their business associates from time to time would be surprised if they were told that they were borrowing money by doing that and that their business associates would require a licence under the Moneylenders Act.
>
> This was said in 1995 concerning an arrangement that was made in 1991. Lim JC recognised that this kind of arrangement was already an established feature of commercial practice in Singapore and confirmed its status as a non-moneylending arrangement or transaction. Businessmen have since regarded *Nissho Iwai* as having settled the legal status of such arrangements, in spite of the fact that it was a first instance decision. Many attempts have been made by less than honest parties to such arrangements to have *Nissho Iwai* declared as bad law or distinguished on the facts, as can be seen by the judicial decisions referred to earlier. Every such attempt has been rebuffed by the courts.
>
> More importantly, *Nissho Iwai* is well known to the policy makers in our financial sector. The MLA [Moneylenders Act] has been amended several times since *Nissho Iwai* was decided. In the recent decision of [*City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR 733], Rajah J made some pertinent observations (at [49]) on the need for the MLA to be reviewed and fine-tuned to meet current consumer needs in a social and business environment which is very different from that prevailing at the time when the first moneylending legislation was enacted in England in 1900 (on which the MLA is based). In April 2006, Rajah J's comments were referred to in Parliament when the Moneylenders (Amendment) Bill 2006 (No 12 of 2006), was debated. In the debate, Parliament recognised the need to fine-tune the legislative framework to keep pace with changes in the consumer credit industry. The amendments in the Bill are not relevant to the nature of the arrangement which is the subject matter of this appeal. Nevertheless, the fact that Parliament has taken no step to address the social or commercial desirability of arrangements to loan or rent L/C facilities

> must mean that as a matter of policy, Parliament does not consider that such arrangements are contrary to the legislative purpose of the MLA.

Buyer's obligation to establish letter of credit

4.27 When the parties to a contract of sale agree that payment is to be made by means of a letter of credit, the buyer's obligation to establish the letter of credit constitutes a condition precedent to the seller's liability to deliver the goods. If the buyer fails to establish the letter of credit, he is in breach of contract and the seller is entitled to treat the contract as repudiated and bring a claim for damages. However, if the seller does not exercise his option to repudiate the contract, the contract continues and the seller may be considered to have waived the buyer's breach of contract.

4.28 In *HG Metal Manufacturing Ltd v Nam Tat Hardware Co* [2006] SGHC 37, Woo Bih Li J decided, *inter alia*, that a seller could not rely on a buyer's failure to establish a letter of credit if he took no steps to repudiate the contract of sale. The plaintiff company, HG Metal Manufacturing Ltd ("HG"), a steel stockist, agreed to sell its entire stock of steel to the defendant, Nam Tat Hardware Company ("Nam Tat"), for $4.2m. Payment was to be effected by two letters of credit. The first letter of credit was to be issued within seven days from the date of the contract while the second letter of credit was to be issued within 14 days from the contract date. Delivery of the first consignment was made without any letter of credit being tendered. The plaintiff, however, obtained payment after submitting the delivery order and invoice to its banker for presentation to the defendant's banker. A dispute arose over subsequent deliveries and the plaintiff sued the defendant for breach of contract. The court considered, *inter alia*, whether the contract had been terminated by the defendant's failure to tender the letters of credit. It decided that even though the defendant was in breach of contract by failing to tender the letters of credit, the plaintiff did not repudiate the contract but continued with the contract. The plaintiff could sue for breach of contract but it was only entitled to nominal damages as no actual damage had been shown. Woo J said at [26] and [28]:

> As for the evidence, I was of the view that Mr Kwa was irate and did say that the Contract was useless or words to that effect. However, I was of the view that what Mr Kwa meant was that the Contract was useless if HG was not abiding by its terms. He had not intended to and he did not in fact terminate the Contract there and then but was merely expressing his frustration at this sudden and unwelcome development. The idea of his having terminated the Contract by accepting the repudiation was an after-

> thought. Indeed in the response dated 28 October 2004 from Nam Tat's solicitors … there was no assertion that the repudiation had been accepted.
>
> …
>
> Accordingly, I found that the Contract had not been terminated then and that the subsequent arrangements about the first and second collections were variations of the mode of payment only.

Rejecting a tender of documents

4.29 When an issuing bank rejects documents tendered by a negotiating bank it has to indicate in clear terms that it is rejecting the documents. It should also return the documents to the negotiating bank without any undue delay. If an issuing bank fails to reject the documents tendered within a reasonable time, it is considered to have accepted the tender. In addition, the issuing bank is also under a duty to return the documents to the negotiating bank or to indicate that it is holding the documents at the negotiating bank's disposal. If a negotiating bank makes a second tender and the tender is again rejected by the issuing bank on the same grounds, is the issuing bank obliged to state its reasons for the second rejection and to return the documents?

4.30 In *Korea Exchange Bank v Standard Chartered Bank* [2006] 1 SLR 565, Andrew Ang J decided, *inter alia*, that an issuing bank rejecting a second tender of documents by a negotiating bank was obliged to state the reasons for its rejection even though they might be the same as the first rejection. It is also obliged to return the documents tendered. The appellant, Korea Exchange Bank, issued two letters of credit for Petaco Petroleum Inc ("Petaco"), a South Korean company. The letters of credit were payable to Trafigura Beheer BV Amsterdam ("Trafigura") from whom Petaco was purchasing gas oil. They were for US$800,000 each with a percentage credit amount tolerance of 10/10. The letters of credit were subject to the Uniform Customs and Practice for Documentary Credits 1993 (International Chamber of Commerce Publication No 500) ("UCP 500"). Standard Chartered Bank, the respondent, negotiated the letter of credit for the beneficiary. On 16 December 2003, the respondent made a tender under the letters of credit. The appellant rejected the tender on 27 December 2003, stating, *inter alia*, "Amount Overdrawn". The respondent made a second tender on 29 December 2003 containing the same discrepancy as to overdrawing as the first tender. The appellant did not send a notice rejecting the tender and it also did not return the tendered documents. The respondent obtained summary judgment against the appellant on the letters of credit on the basis that there was no valid rejection of the tender. The summary judgment was affirmed by the High Court. Ang J said at [42], [44] and [45]:

> Support for the respondent's position may also be found in the judgment of Evans J in *Floating Dock Ltd v The Hongkong & Shanghai Banking Corporation* [1986] 1 Lloyd's Rep 65 at 80. In what appears to be *obiter dicta*, the learned judge opined that the failure of an issuing bank, in its second notice of refusal, to cite a valid discrepancy which it had properly cited in its first notice of refusal precluded the bank from relying on such discrepancy. *A fortiori* in the present case where even if there was a valid discrepancy, the appellant simply gave no second notice of refusal.
>
> …
>
> I do not see how the re-presentation of the Tendered Documents (with amendment to the seller's authorisation) could be criticised as lacking in good faith. The respondent was convinced that the Tendered Documents were compliant and were well entitled to re-present them for payment. It was surely no hardship for the appellant to respond a second time even if it was only to reject the Tendered Documents once again.
>
> I agree with the respondent that to read into the UCP 500 an overriding requirement of good faith may require banks to go beyond documentary examination. This would be contrary to the fundamental principle in documentary credit that banks deal only with documents. In similar vein, albeit not entirely *apropos*, Art 15 of UCP 500 provides, *inter alia*, that "[b]anks assume no liability or responsibility … for the good faith … of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever".

Performance bond

4.31 A performance bond is essentially an undertaking or guarantee provided by a bank or other financial institution to a third party on behalf of an applicant that the applicant will duly carry out his contract with the third party. The bond constitutes a contractual undertaking and will usually provide a time frame for its operation. If no time limit is set for the bond, the bond becomes unenforceable once the normal limitation period runs out under the Limitation Act (Cap 163, 1996 Rev Ed). Under s 6 of the Limitation Act, the limitation period for actions founded on contract is six years.

4.32 In *Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd* [2006] 4 SLR 501, the Singapore Court of Appeal decided that a beneficiary of a performance bond could not sue on the bond once the underlying contract became time-barred. The court reversed the High Court's decision in *Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd* [2006] 3 SLR 165, where Woo Bih Li J decided that a performance bond could be enforced even after the underlying contract was time-barred. On 6 July 1992, Jurong Town Corporation ("JTC") engaged Econ Piling Pte Ltd ("Econ") to install bored piles at its International Business Park site located in Jurong. The Insurance Corporation of Singapore Ltd ("ICS") and Econ jointly provided a performance bond for $173,400 to cover Econ's due performance of the contract. The bond provided, *inter alia*, "if, on failure or default by [Econ] or [its] successors or assigns so to do, [ICS/Aviva] shall, without proof or conditions, pay to [JTC] the full amount of the above-written Bond". Econ completed the piling work on 25 November 1992 and it submitted its final progress claim on 31 December 1992 after passing the tests on the piles. Another contractor, Teow Aik Realty (S) Pte Ltd ("TAR"), was engaged by JTC to carry out excavation works at the site. In the course of the work, it was discovered that the piles were damaged. JTC terminated TAR's contract and referred the matter to arbitration. On 31 March 2003, the arbitrator found that Econ was responsible for the damaged piles. On 1 December 2003, JTC called for payment under the performance bond. Econ contended that JTC could not make the demand on the bond because its claim in respect of the piling contract was time-barred, having been instituted more than six years after it discovered the defective piles. This contention was upheld by the court. Lai Siu Chiu J, delivering the Court of Appeal's judgment, said at [21] to [23]:

> We do not disagree with the judge's reasoning that the Bond was a default bond. He was of the view that under sub-cl (2), "default" on the part of Econ had to be established before a demand could be made on the Bond. We agree and would add that under sub-cl (1), the Bond would become null and void on Econ's full performance of the Contract. The discharge of the obligations under the Contract would therefore extinguish the obligations under the Bond. That meant that the Bond did not give rise to independent primary obligations which are the hallmark of an on-demand bond. Such secondary obligations are characteristic of default bonds.
>
> We would however depart from the judge's view … that JTC's call on the Bond was valid because the Bond was a separate contract from the Contract, even though its claims under the Contract were time-barred.
>
> Granted, there was no express provision in the Bond releasing Econ from liability in the event of the expiry of the limitation period for claims, but neither was there any clause that extended the time-bar period. What is important to bear in mind is that the purpose of the Bond (as with all performance bonds) was to secure the performance of the building contract

> by the contractor. Econ had furnished the Bond jointly with ICS/Aviva as security for any claims JTC might have had under the Contract. As the underlying claim was time-barred by 28 June 1999, Econ was entitled to restrain JTC from calling on the Bond in the same way it could have pleaded limitation as a defence had JTC sued on the Contract. JTC's only recourse for its claim would be to the retention sum that it still held, and for which a similar time bar precluded Econ from recovery.

4.33 The distinction drawn by the Court of Appeal between on-demand bonds and bonds based on default is interesting. The court expressed the view that on-demand bonds gave rise to independent primary obligations whereas default bonds gave rise to secondary obligations. In referring to secondary obligations, is the court saying that default bonds are more akin to ordinary guarantees where a guarantor's liability is secondary to that of a principal debtor? Even though the analogy seems attractive, it does not appear to be borne out by the terms of the bond. The performance bond provided, *inter alia*, that it was payable "if, on failure or default by [Econ] or [its] successors or assigns so to do, [ICS/Aviva] shall, without proof or conditions, pay to [JTC] the full amount of the above-written Bond". The bond provided that apart from stating that a default has taken place, the beneficiary is not obliged to prove the default. A performance bond, whether it is on demand or subject to conditions, is quite a different instrument from an ordinary guarantee. The primary object of a performance bond is to ensure that there is swift payment when the event specified in the bond arises. In respect of an on-demand bond, a simple demand is sufficient to trigger off the payment obligation under the bond. Where the bond is payable on a contractor's default, a statement by the beneficiary that the contractor is in default is sufficient to impose an obligation to pay under the bond. It is an accepted principle governing performance bonds that ordinarily a beneficiary is not obliged to establish an actual default even though he is required to state that a default has taken place. This is based on the principle that a bank issuing a performance bond is not concerned with the parties' underlying contract.

4.34 Thus, in *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546, the English Court of Appeal decided, *inter alia*, that in a performance bond payable upon the default of a contracting party, a bank was not obliged to inquire into whether a default had actually taken place. A performance bond, whether it is an on-demand bond or a bond payable upon a contractor's default, is more akin to an indemnity contract rather than an ordinary guarantee. Under an indemnity contract, the indemnity is payable upon the occurrence of a specified event and the liability is primary. However, under a guarantee, the guarantor's liability is secondary to that of the principal debtor and the creditor is obliged to establish the principal debtor's liability before he can recover from the guarantor.

Guarantee

4.35 In practice, a guarantee is taken by a creditor with the sole object of ensuring that he will be speedily paid by a guarantor if the principal debtor defaults on his liability. In view of this commercial objective, a creditor suing a guarantor is, in principle, entitled to summary judgment once it is established that a principal debtor has failed to pay his debts. However, a guarantor comes under a legal liability to pay a creditor only if there is a default by the principal debtor as the guarantor undertakes to answer for the debt or default of the principal debtor. A judgment or award obtained by a creditor against a principal debtor does not constitute *prima facie* evidence that there has been a default by the principal debtor unless it is expressly agreed to by the parties that the judgment or award is to constitute evidence of a default by the principal debtor. In the absence of any such agreement, the creditor is obliged to show actual default by the principal debtor before he is entitled to call upon the guarantor to make payment under the guarantee. A guarantor may apply for leave to defend a creditor's claim if he is able to raise an arguable defence or a serious question of law against the claim.

4.36 In *Oversea-Chinese Banking Corp Ltd v Ang Thian Soo* [2006] 4 SLR 156, Choo Han Teck J decided, *inter alia*, that a guarantee constituted a separate contract from the creditor and principal debtor contract, and a guarantor was entitled to leave to defend if he had valid defences against the creditor. However, in this case, as the guarantor's defence was shadowy, he would be allowed to defend only if he provided appropriate security. Infocommcentre Pte Ltd, an investment company, owned a substantial piece of vacant land at Tagore Drive/Tagore Avenue. The Bank of Singapore ("BOS") granted a US$17m short-term advance facility to the company in 1995 to "supplement the working capital requirements" of the company. Clause 17 of the facility provided that "the facility is subject to our periodic reviews and the Bank reserves the right to continue with the facility herein offered" (see *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd* [2005] 4 SLR 30 at [1]). In 1998, the facility was restructured and converted into a Singapore dollar denominated overdraft facility stated to be "repayable on demand". The facility was guaranteed by the defendant, Dr Ang Thian Soo, a director of the company. BOS was later acquired by the plaintiff, Oversea-Chinese Banking Corp Ltd, and the bank granted several extensions of time to the company to develop the vacant land. No development took place and on 16 April 2002, the bank demanded repayment of the facilities from the company. The bank later obtained summary judgment against the company. It sought to obtain summary judgment against the defendant. The defendant applied for leave to defend, contending, *inter alia*, that the facility to the company could not be recalled prior to the development of the land. The court decided that leave to defend would be granted on the condition that the defendant provide appropriate security as his defence was shadowy. Choo J said at [6] and [8]:

> Reverting to Mr Mathew's arguments on behalf of the defendant that he had in law a right to a separate defence as a guarantor, and that although Rajah J had found him an unreliable witness, another judge was entitled to take a different view. Counsel realised that the defendant would only be entitled leave to defend if he could persuade me that his defence was independent of that of the company. A contract of guarantee is a separate and independent contract from the principal contract and thus may have defences that might not be available or applicable to the principal contractor. Misrepresentation is a ready example. The guarantor might have been misled into providing a guarantee to the principal debtor even though the principal debtor may himself not be misled in any way. In the present case, the misrepresentation issues had been dealt with by Rajah J and the Court of Appeal. I do not think that there was any remaining issue of misrepresentation in this appeal before me that was not common with those dealt with by Rajah J.
>
> …
>
> Ordinarily, where a court has determined that there is an issue that ought to be tried, but that the defence is a shadowy one, as I find to be the case here, it means that the court has strong doubts as to the likelihood of a successful defence. However, that is a circular proposition in that until the defence has been tested at trial, the court cannot make a final determination of the merits of that defence. Nonetheless, if the overall circumstances in law and the available evidence in such a case indicate that the likelihood of the defence succeeding is very small, the court would require the defendant to pay the money claimed into court or provide a banker's guarantee for the amount claimed. That would be a usual condition to secure the opportunity of proving that his defence was a valid one after all. In addition to that, the court may also require him to provide security for costs.