4. BANKING LAW

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Negotiable instruments

4.1 Under normal circumstances, a cheque holder has to present the cheque for payment before he is entitled to sue on the cheque. A holder's failure to present a cheque for payment leads to a discharge of the drawer and indorser. Further, the fact that a holder has reason to believe that a cheque will on presentment be dishonoured does not dispense with the need for presentment. However, a holder is excused from presenting a cheque for payment under s 46(3)(*c*) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed) where "the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented". One situation where a drawee is not bound to pay a cheque is when a drawer has no funds in his account and the drawer has no reason to believe that the cheque will be paid if presented. In *Fiorentino Comm Giuseppe Srl v Farnesi* [2005] 1 WLR 3718, Deputy High Court Judge Nicholas Warren QC, decided, *inter alia*, that a payee was excused from presenting a cheque for payment if the drawer had no reason to believe that the cheque would be paid because he had no funds in his account.

4.2 The onus of showing an absence of funds in a drawer's account rests with a payee. If a payee is able to show that a drawer did not have funds in his account to pay the cheque, he is excused from presenting the cheque for payment. In *City Hardware Pte Ltd v Goh Boon Chye* [2005] 1 SLR 754, V K Rajah J decided, *inter alia*, that when a drawer had no funds in his account, a payee was excused from presenting the cheque for payment. The defendant was the managing director of Kenrich Electronics Pte Ltd ("Kenrich"), while a Mr Lau Chui Chew was the managing director of City Hardware Pte Ltd. To show his support for Kenrich's business, the defendant gave Lau a signed blank cheque in March 2000, saying that the cheque could be used if Kenrich defaulted on its obligations. When Kenrich defaulted, the plaintiff filled up the cheque on 30 June 2003 for $576,621.54. The cheque was deposited into the plaintiff's bank account but the cheque was returned by the bank without being presented to the drawee bank since the cheque was not in the approved format for automated clearance and could not be

electronically processed. No attempt was made by the plaintiff to present the cheque manually. On 8 March 2004, the plaintiff commenced legal proceedings against the defendant on the cheque. The court decided, *inter alia*, that presentment of the cheque for payment was excused since there was sufficient evidence to show that the defendant did not have funds in his account to pay the cheque. Rajah J said at [20]–[21] and [26]:

> The plaintiff has in the alternative pleaded that the defendant had insufficient funds in his account at all material times and in the circumstances, the necessity for physically presenting the Cheque had been dispensed with. It bears mention that the defendant conceded during cross-examination that he never had sufficient funds in his account to settle the invoiced amounts due to the plaintiff from time to time. Indeed he acknowledged that he had, during the entirety of the material period, less than $1,000 in his account. It is therefore pertinent, at this juncture, to pause and consider the sustainability of the defence of non-presentment in an instance where the drawer has insufficient funds in his account and the holder does not reasonably believe that the instrument will be paid if presented.
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> *Prima facie* all bills of exchange, inclusive of cheques, must be presented for payment in order to engage the payment undertaking of a drawer or indorser: s 45(1) BEA [Bills of Exchange Act]. If not so presented the drawer and indorser will be discharged: s 45(2) BEA. Generally speaking, presentment ought to be effected even if it might be ineffective …
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> … I am satisfied, given the history of their relationship and the defendant's "ownership" of Kenrich, that it was reasonable for the plaintiff to conclude that the Cheque would not be paid on presentment and that it would be pointless to effect a direct presentment of the Cheque on the defendant. As it turns out, the facts have subsequently vindicated the plaintiff's course of action. The defendant had not made, and could not make, any arrangements with his bank to effect payment on the Cheque.

4.3 The second situation where a payee is presumably excused from making a presentment for payment arises under s 46(3)(*c*) of the Bills of Exchange Act when a cheque is countermanded by a drawer. If a drawer countermands a cheque, he "has no reason to believe that the bill would be paid if presented". If a payee is excused from presenting a cheque for payment when the drawer has no funds, he should equally be excused if the cheque is countermanded by the drawer. However, in *Henny Sutanto v Suriani Tani* [2005] SGHC 82, Lai Siu Chiu J decided, *inter alia*, that a payee was not excused from presenting a cheque for payment even though the drawer had informed the payee that the cheque had been countermanded. The plaintiff, Henny Sutanto ("Sutanto"), granted loans amounting to

$670,000 to the first defendant, Suriani Tani. The second defendant, Chandra Suwandi ("Chandra") was the sole proprietor of a firm, Global Standard Marketing ("Global"). In partial repayment of the plaintiff's loans, Suriani gave Sutanto five cheques. Two cheques, totalling $150,000, were drawn by Suriani on his bank account. The other three cheques totalling $515,000 were post-dated and drawn on Global's account. Suriani was an authorised signatory of Global's bank account. The plaintiff obtained a judgment in default of appearance against the first defendant on 9 May 2003. The claim against the second defendant went to trial before Lai J. The second defendant raised a number of defences. Firstly, the cheques were issued without proper authority. Secondly, there was no consideration for the cheques as he did not borrow any money from the plaintiff. Thirdly, the loans were moneylending transactions and the plaintiff was not a licensed moneylender. Fourthly, there was a subsequent compromise as well as accord and satisfaction. Finally, the plaintiff failed to present the three cheques for payment on their due dates. The court found that the plaintiff was not a moneylender but upheld the second defendant's remaining defences. Lai J said at [56]:

> In summary (contrary to the submissions made on the plaintiff's behalf), the second defendant was not a drawer as he did not sign any of the three cheques (see s 23(1) of the BEA). The plaintiff was the payee, not the holder in due course, of the three cheques, there being no negotiation of any of the three cheques (s 29(1) of the BEA) to the plaintiff. No consideration was provided by the plaintiff to the second defendant for any of the three cheques (s 27 of the BEA). The three cheques were not presented for payment under s 45(1) of the BEA and the plaintiff could not bring herself within any of the exceptions to presentment under s 46(3) thereof. Indeed, s 46(4) of the BEA required the plaintiff to present the three cheques for payment, even if she knew they would be dishonoured when presented.

4.4 The plaintiff's appeal was considered by the Court of Appeal in *Henny Sutanto v Chandra Suwandi* [2005] SGCA 45. The Court dismissed the appeal on the ground that the plaintiff's failure to present the cheques for payment was fatal to her claim. Tan Lee Meng J, delivering the court's judgment, said at [12]:

> Mdm Henny contended that she was entitled to rely on s 46(3)(*e*) of the said Act but the trial judge found that there was no proof that the presentment of the three cheques had been waived. As we had no reason to disagree with the trial judge's finding, Mdm Henny's claim against Chandra had no leg to stand on and it was unnecessary for us to consider whether her other grounds of appeal had any merit.

4.5 The decision in *Henny Sutanto v Chandra Suwandi* pertaining to a payee's obligation to present a cheque for payment raises a number of interesting issues. On the issue of waiver of presentment, both the trial court and the Court of Appeal decided against the plaintiff. While it is true that a plaintiff seeking to raise a particular defence bears the burden of proof, it would appear that sufficient evidence was adduced to allow an inference of waiver to be drawn. The trial court found (at [10]) that:

> The first defendant instructed UOB to stop payment on the three cheques on 28 January 2002. According to the plaintiff, the first defendant told her not to present the three cheques for payment as otherwise they would be dishonoured.

This evidence gives rise to two possible inferences. First, if the payee is told by the drawer not to present a cheque for payment because the cheque has been countermanded, there is an obvious inference that the drawer is expressly waiving the need for presentment. Even if the plaintiff's evidence on the first defendant's conduct is not accepted, there is the further evidence on record that the bank was instructed to stop payment on the cheques on 28 January 2002. This evidence is sufficient to give rise to an implied waiver of the plaintiff's duty to present the cheques for payment. If a payee is told by a drawer that a cheque has been countermanded by the drawer, it is futile for the payee to go through the motion of presenting the cheque for payment if he is not going to be paid. It may be said in such a situation that there is an implied waiver by the drawer of the payee's duty to present the cheques for payment. The second inference is that a drawer's countermand of his cheque leads to a situation where a payee is excused from making a presentment for payment under s 46(3)(*c*) of the Bills of Exchange Act since the drawee is not bound to pay the cheque and the drawer "has no reason to believe that the bill would be paid if presented".

Banker and customer

Cheque truncation

4.6 In the past, cheques presented by a bank customer for collection were normally cleared through an inter-bank system for cheque clearance. Payments and debits between the various banks participating in this inter-bank clearing scheme were settled at the end of each business day. This manual presentation of cheques for clearance was recently replaced by an electronic cheque clearance system known as the "Cheque Truncation System" ("CTS"). This electronic form of clearance was brought about by the enactment of ss 89 and 90 of the Bills of Exchange Act. The new electronic

clearing system is intended to reduce the costs of cheque clearance by eliminating the need for physical presentation and replacing it with the transmission of an electronic image of the cheque. To facilitate its operation, banks were required to issue a standard cheque form tailored specially for the electronic clearing system. The new electronic cheque clearing system does not preclude a paying banker from requesting for a physical presentation of a cheque. Apart from changing the way a cheque is presented for clearance by a collecting banker, the new provisions do not alter a payee's obligation to present a cheque to a paying banker before he is entitled to be paid. The electronic clearing system is also not intended to change a cheque's legal nature.

4.7 In *City Hardware Pte Ltd v Goh Boon Chye* (*supra* para 4.2), the drawer of a cheque issued before the introduction of the CTS, contended that a holder could not rely on the cheque as a negotiable instrument as it was not issued in conformity with the new CTS. Rajah J decided, *inter alia*, that the CTS was not intended to alter the basic nature of a cheque as a negotiable instrument. He said at [16]–[17]:

> The Defence's contention pertaining to the CTS is yet another red herring. The CTS was introduced to facilitate and to automate the clearance of cheques in Singapore. It was not intended to affect the legal nature of cheques in Singapore. Indeed the Bills of Exchange Act (Cap 23, 1999 Rev Ed) ("BEA") was amended in 2002 to acknowledge and legitimise the reliance by banks on automated clearances by electronic means: see ss 89 and 90 of the [Bills of Exchange Act (Cap 23, 2004 Rev Ed)]. The CTS dispenses with the need for physical presentation of cheques which comply with the prescribed CTS format. The physical cheque remains at the original bank of deposit and is thereafter presented and cleared by using electronically captured cheque data and images. Multiple steps of paper presentation and processing have thus been eliminated. The CTS is an arrangement reached between banks and the clearing house for the expedient electronic presentation and clearance of cheques. It does not preclude customers and banks from effecting a physical presentation of a cheque if they so desire.
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> The crux of the matter is that an instrument that is intended to be a negotiable instrument did not and does not lose the attributes of negotiability and its legal efficacy by a side wind through the introduction of the CTS. The CTS was not intended to modify contractual obligations or liabilities on instruments and agreements arrived at prior to, as well as after, its implementation. I am of the view that the plaintiff was under no obligation to request a replacement cheque from the defendant. The Cheque continued to be a valid negotiable instrument when the plaintiff completed it and deposited it with its bank.

Overdraft account

4.8 Credit facilities provided by a bank to a customer can take the form of an overdraft or a term loan. An overdraft is liable to be withdrawn by a bank if a customer breaches its terms, for instance, by making withdrawals beyond the overdraft limit. However, if a bank grants a customer a term loan, the customer is entitled to assume that the bank will not recall the loan until after the end of the term period. If a bank recalls a term loan without proper justification, the bank is in breach of contract.

4.9 In *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd* [2005] 4 SLR 30, V K Rajah J decided, *inter alia*, that an overdraft account payable on demand could be recalled by the bank at its discretion. The defendant, an investment company, owned a substantial piece of vacant land at Tagore Drive/Tagore Avenue. The Bank of Singapore ("BOS") granted a US$17,000,000 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". 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 Dr Ang Thian Soo, a director of the defendant company. BOS was later acquired by Oversea-Chinese Banking Corp Ltd, the plaintiff, and it granted the company several extensions of time to develop the vacant land. No development took place and on 16 April 2002, the bank demanded repayment of the facilities. The company contended, *inter alia*, that the facility could not be recalled prior to the development of the land. The court decided that there was nothing in the parties' agreement to preclude the bank from recalling the facility at its discretion. Rajah J said at [54]–[55]:

> A term loan, on the other hand, is a facility for a fixed period that contemplates payment at or before the end of that period. An overdraft for a fixed period, *eg* a bridging loan, is a hybrid creature bearing characteristics of both a term and overdraft facility. In such a case a bank has to exercise prudence in unequivocally spelling out its contractual rights. In the absence of a clear stipulation, a bank may find that general clauses (say, in printed forms) contemplating an "on demand" discretionary right to recall an "overdraft" facility might be viewed as inconsistent with or repugnant to the express purpose of that facility. In short, an express term that an overdraft facility is repayable on demand will usually be given effect to although this is not invariably the position, particularly if the purported right is repugnant to an agreement the parties have reached on the express purpose and/or duration of the facility. Banks and their advisers should

> take pains to spell out clearly the parties' intentions and rights. From time to time a bank may find that reliance on a standard printed term conferring a general right of recall may be found to be misplaced if such a general right collides plainly with the agreed intent and/or purpose of a loan.
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> It seems plain to me that whether a facility is recallable on demand or not is in the final analysis simply an issue of interpretation. Substance takes precedence over form. Labelling a term loan "an overdraft facility" will not alter the substance of that facility. In every case the court should be astute enough to probe the relevant factual matrix to ascertain the purpose of the loan and the lender's rights that prevail within that matrix. Have the parties expressly or impliedly agreed to any term relating to the length and/or duration of the facility? Is an "on demand" recall of the facility inimical or contrary to the agreed purpose of that particular facility? Also, knowledge of the usage of a particular facility should not as a matter of course be conflated with an agreed purpose or an agreement to extend a facility for a particular period.

Guarantees

Guarantor's obligation to contribute

4.10 A guarantor's duty to contribute towards a co-guarantor's liability does not arise from the terms of the guarantee but is founded in equity, flowing from the common situation of the guarantors. The right to contribution is not dependent on whether the guarantee is joint or joint and several. A co-guarantor is equally liable to contribute even though separate guarantees are given provided the guarantees cover the same liability of the principal debtor. In *Teo Song Kwang v Vijayasundram Jeyabalan* [2005] SGHC 60, Tan Lee Meng J decided, *inter alia*, that a guarantor was liable to contribute towards a co-guarantor's liability even though they had signed separate guarantees to cover a principal debtor's liability. The first plaintiff, Teo Song Kwang alias Richard ("RT"), was a majority shareholder in Seng Hup Realty Pte Ltd ("Seng Hup"), the second plaintiff. Seng Hup was involved in the lighting business. The plaintiffs decided to venture into the Indonesian timber market but the venture failed, resulting in heavy losses. Liability was also incurred to the banks and in particular to an Indonesian bank, PT Internationale Nederlanden Indonesia Bank ("ING Bank"). RT settled the bank's claim for US$200,000. He sought contribution from his co-guarantor, Mr Vijayasundram Jeyabalan ("VJ"), the defendant. VJ, a former employee of Seng Hup, had signed a separate guarantee to cover the principal debtor's liability. The court decided that the defendant was liable to contribute towards the payment even though he had signed a separate guarantee. Tan J said at [40] and [42]:

> It is trite law that a creditor is entitled to sue any of the guarantors of the sum loaned. It is also a well-established rule founded upon natural justice and equitable principles that if one guarantor is asked to pay a sum, his co-guarantors are liable to contribute their share of the amount paid if they benefit from such a payment to the creditor. …
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> Admittedly, VJ and RT signed separate documents in relation to the ING Bank guarantee, but it is not the case that co-guarantors need not contribute towards a claim merely because separate guarantee documents had been signed (see, for instance, *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd* [1998] 2 SLR 649). Much depends on the facts of each case and on whether the papers signed by the parties were part of the same transaction.

Undue influence

4.11 In addition to specific relationships where there is a presumption of undue influence, there are many situations where the parties entering into a transaction are placed in a relationship of trust and confidence. When such a relationship exists, it is easy for a case of undue influence to be made out. Such a relationship can exist between family members, like spouses, siblings and parents and children. If there are circumstances present to suggest to a creditor that a guarantor might be under the undue influence of a principal debtor, it is important for the creditor to ensure the guarantor obtains independent advice before he enters into the guarantee. This may help the creditor avoid becoming tainted by the undue influence. In practice, it is always prudent for a bank to ensure that a guarantor is advised by an independent adviser rather than take on the task of advising the guarantor. If a bank decides to use its own adviser to advise a guarantor, its legal position may be severely compromised. A bank's adviser occupies a position where he is not seen to be acting independently but as the bank's agent. If a bank uses its own solicitor, it assumes the added responsibility of ensuring that the advice given is truly independent. An adviser who advises a person subject to undue influence owes a duty of care in providing the advice. This duty entails that the person receiving the advice is made aware of the practical consequences of entering into the transaction. In addition, the person must also be told that he or she has a choice to refuse to enter into the transaction. If the adviser fails to properly advise the party, he may become liable in negligence to the bank as well as the person he is advising.

4.12 In *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong* [2005] 2 SLR 694, Kan Ting Chiu J decided, *inter alia*, that a solicitor engaged by a bank to advise a mortgagor owed a duty of care to ensure that the mortgagor was

fully aware of the consequences of entering into the transaction. A Mdm Pang Jong Wan ("Mdm Pang") mortgaged her 64/64A Serangoon Garden Way property to Keppel TatLee Bank Ltd ("KTB") to guarantee a term loan of $1,000,000 and an overdraft of $500,000 granted to her youngest son, the second defendant. She was an illiterate Hainanese lady in her 70s and not in good health. When Mdm Pang executed the mortgage on 3 November 1999, she was recovering from two strokes she had suffered in July 1997 and in August 1999. KTB's successor, Oversea-Chinese Banking Corporation Limited, the plaintiff, sought to enforce the mortgage. The first defendants, members of the committee appointed under the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed) to manage Mdm Pang's estate, contended that the mortgage was obtained under the borrower's undue influence. The bank brought in its solicitor as a third defendant for failing to properly advise Mdm Pang before she executed the mortgage. The court decided that there was sufficient evidence of the borrower's undue influence in the transaction. On the issue of undue influence, Kan J said at [39]–[40]:

> At the time the mortgage was executed, the parent-child relationship between Mdm Pang and the second defendant had largely been reversed. Mdm Pang was feeble through age and ill health whereas the second defendant was able and energetic and was the only son who was close to her. She was staying with him and his wife, and he managed the family business. She was illiterate whereas he knew English. She trusted him and was dependent on him. They were in a Class 2(B) [presumed undue influence] situation.
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> On these primary facts, the transaction was manifestly one-sided and not readily explicable by the mother-son relationship. The onus was on the second defendant to rebut the presumption that he had exerted undue influence on his mother.

4.13 The court further decided that the bank's solicitor was negligent in not properly advising the mortgagor. Kan J said at [54]–[57]:

> Nevertheless, I find that a solicitor in the position of Ms Yap who is acting for a client like Mdm Pang should have had a private meeting with her, should have explained the risks and liabilities she would be exposed to, and should have advised her that she had the right not to proceed with the transaction.
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> Ms Yap's own account of her dealings with Mdm Pang fell short of that. The manner in which the documents were explained to Mdm Pang before she executed them was also unsatisfactory. Ms Yap had arranged for a Hainanese interpreter, Mr Loh Lim, to be present. She handed him the

> documents and left him to explain them to Mdm Pang, without any input from her. This was not sufficient. She should have explained the meaning and effect of the documents to Mdm Pang in a way that a lay person like Mdm Pang can understand, and have Mr Loh interpret that into Hainanese to Mdm Pang. When a solicitor advises a client on a document, that is not accomplished by just reading it to the client. The documents must be explained in a manner the client can understand, and if the client has any queries, further explanation should be given. The situation was not helped by the fact that Mr Loh admitted that he did not fully understand the documents himself.
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> Consequently, I find that Ms Yap had not taken due care when she attended on Mdm Pang on 3 November 1999 for the execution of the mortgage.
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> The mortgage executed in these circumstances was voidable. Mdm Pang, or the first defendants when they were appointed her committee, had the option to affirm or avoid it.

Even though there was evidence of undue influence, the first and second defendants had affirmed the mortgage. The court decided that the bank was only entitled to nominal damages against the solicitor since it did not suffer any substantial loss as it still had the security of the mortgage.

4.14 An interesting issue as to whether there is a presumption of undue influence in a transaction involving a parent and an adult child arose for consideration in *Gan Cheng Chan v Gan Meng Hui* [2005] SGHC 55. Lai Siu Chiu J decided, *inter alia*, that there was a presumption of undue influence in favour of an adult daughter transacting with her father. The defendant, a 22-year-old university graduate, worked in her parent's company. She signed an agreement to make a loan of $750,000 to her father as part of a family settlement to get him to withdraw from the company. She contended that she entered into the agreement under her father's undue influence. The court decided, *inter alia*, that there was no evidence of actual undue influence but there was a presumption of undue influence arising from the parent and child relationship. It, however, found that the transaction was not disadvantageous to the defendant. Lai J said at [49]–[50]:

> Counsel for the defendant acknowledged that there was no actual undue influence in this case. Certainly, the defendant had not furnished any facts or particulars to support such a defence. The defendant based her case entirely on presumed undue influence for which her own counsel acknowledged that the following conditions must be present:
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> > (a) the existence of a special relationship which enabled one party to it to influence the decision of the other; and

> (b) the resulting transaction was manifestly disadvantageous to the person subject to the influence.
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> The first condition was undoubtedly fulfilled due to the parent-daughter relationship between the plaintiff and the defendant. I was of the view, however, that the defendant had failed to satisfy the second condition. The Agreement could not be said to be manifestly disadvantageous to the defendant …

4.15 A presumption of undue influence applies in a minor's favour in a transaction involving the minor and his parent. In *Lancashire Loans Ltd v Black* [1934] 1 KB 380, the English Court of Appeal decided, *inter alia*, that there was a presumption of undue influence in a transaction involving a minor and his parent. Children who are adults are no longer presumed to be under their parent's dominion. Equally, there is no presumption of undue influence in a parent's favour in a transaction involving the parent and his children. With the exception of a minor, whether there is any undue influence in a transaction involving a parent and his children or between the children and their parent depends very much on what actually takes place in the transaction. In *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 3 SLR 802, Judith Prakash J expressed the view that the relationship between a father and his adult children did not give rise to a presumption of undue influence.

4.16 It is unfortunate that the court in *Gan Cheng Chan v Gan Meng Hui* (*supra* para 4.14) did not touch on this difference. The presumption of undue influence in a minor's favour might continue to apply to a minor newly come of age. In *Powell v Powell* [1900] 1 Ch 243, Farwell J decided that there was a presumption of undue influence in a gift made by a child, who recently came of age, to her parents. A case of undue influence may be easily made out in an adult child's favour if the child is solely dependent on his parents. In *Lim Lie Hoa v Ong Jane Rebecca* [1997] 2 SLR 320, an adult son who was totally dependent on his mother for funds signed a deed releasing his share to the father's estate. The Singapore Court of Appeal decided, *inter alia*, that the release was obtained by his mother's undue influence. There is also no presumption of undue influence in a parent's favour. In *Malayan Banking Bhd v Hwang Rose* [1997] 2 SLR 1, the Singapore Court of Appeal decided, *inter alia*, that when a parent was an experienced businessman, it was more difficult for him to establish that he was acting under his children's undue influence. However, if a parent is old and illiterate, a case of undue influence may be easily made out in the parent's favour. In *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, the English Court of Appeal found that a charge executed by an elderly couple over their home was induced by their

accountant son's undue influence. Similarly, in *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong* (*supra* para 4.12), Kan Ting Chiu J decided, *inter alia*, that an illiterate widow in ill health, who was dependent on her son, entered into a mortgage under her son's undue influence.

Conclusive evidence clause

4.17 When a conclusive evidence clause is incorporated into the terms of a guarantee, a creditor's certification of a principal debtor's liability is conclusive between the creditor and the guarantor as to the principal debtor's liability. Such a provision facilitates a creditor's claim against a guarantor by enabling the creditor to obtain summary judgment swiftly against the guarantor without being hindered by any dispute over the quantum of the debt. A certificate or statement of account issued under a conclusive evidence clause is binding if it is given in good faith and there is no manifest error on the face of the certificate or statement. A creditor is entitled to obtain summary judgment based on the amount stated in the certificate. However, in *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345, V K Rajah J decided, *inter alia*, that the court was not precluded from reviewing the propriety of a bank's claim against a guarantor based on a statement made under a conclusive evidence clause even though there was no evidence of fraud or error on the face of the statement. The plaintiff bank granted banking facilities by way of a term loan and an overdraft to its customer, Ceramic Technologies Pte Ltd (formerly known as S H Soil Works Pte Ltd). The borrower was a subsidiary of the defendant, Neocorp International Ltd. The defendant guaranteed the banking facilities for $1.5m together with interest. The guarantee authorised the bank in cl 17.1 to issue a "conclusive evidence" certificate. Clause 17.1 stated:

> A certificate signed by any officer or solicitor of the Bank as to any amount due at any time from the Customer [*ie*, the borrower] and/or the Guarantor [*ie*, the defendant] to the bank in respect of the Guarantee (including the calculation of any amount of any interest payable) shall, in any legal proceedings against the Guarantor, be conclusive evidence of the indebtedness at such date of the Customer and/or the Guarantor to the Bank and shall be binding on the Guarantor.

4.18 When the borrower went into liquidation, the bank made a demand on the guarantor certifying a sum of $1,712,938.36 as owing from the borrower. The sum comprised a disbursement of $1.5m together with accrued interest. The defendant disputed the bank's statement on the borrower's indebtedness. The court was asked to consider, *inter alia*, whether it was precluded by the conclusive evidence clause from reviewing the legal

basis of the bank's claim. The court decided, *inter alia*, that the terms of the conclusive evidence clause did not preclude it from reviewing the bank's claim even though the court eventually found the defendant liable to the bank. Rajah J said at [20], [23] and [25]:

> This leads to two corollary issues: can the parties preclude a legal review of the basis for the claim simply by inserting a term making the claimant the sole arbiter of the existence of the payee's legal liability? Is the court only entitled to review the propriety of a "conclusive evidence" claim when there is evidence of fraud or an error on the face of the demand?
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> … Axiomatically, the effect of any such clause must turn on its particular wording – it is a matter for interpretation. I am not therefore suggesting that a court would never give effect to a well-drafted conclusive evidence clause in the event that such a clause purports unequivocally to arrogate to a contractual party the sole right to determine issues impacting on the other party. The point is that there will generally be a rebuttable presumption in commercial documents that a party has *not* agreed to confer on the opposing party an exclusive right to determine conclusively *all* matters pertaining to an adversarial claim. This situation is separate and distinct from one where the parties agree that a neutral party, such as an arbitrator or an expert, should resolve a dispute. A party should not, generally speaking, be allowed to use the fig leaf of a conclusive evidence clause to make an unlawful claim.
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> 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. This ought to be construed as a reference only to the quantum of the outstandings being claimed. *The Oxford English Dictionary* (Clarendon Press, 2nd Ed, 1989) defines the word to mean, *inter alia*, "the extent to which one is indebted; the sum owed; the actual debt". The clause *ex facie* does not preclude an inquiry into the propriety of the demand.