# 5. BANKING LAW

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## Performance bond

### *Conditional bonds*

5.1 Before a beneficiary of a performance bond is entitled to receive payment under the bond, he has to make a call on the issuing bank to make payment on the bond. In making a call, the beneficiary has to comply with the terms which allow him to make the call on the bond. Where a performance bond is made payable subject to conditions, the beneficiary may not be able to obtain payment under the bond unless those conditions are met. In *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142, the plaintiff, York International Pte Ltd, agreed to supply, deliver, test and commission five chillers for a district cooling plant on Sentosa Island, to the defendant, Voltas Ltd. Under the contract, the plaintiff was to provide a performance bank guarantee for 10% of the contract price. Clause 26 of the contract stipulated that the "Performance Bank Guarantees shall be unconditional, without any demur, without recourse to [the plaintiff]". The bank guarantee that was eventually issued stipulated (at [5]) that:

> [i]n the event of [the plaintiff] failing to fulfil any of the terms and conditions of the said [Purchase Agreement], we shall indemnify [the defendant] against all losses, damages, costs, expenses or otherwise [*sic*] sustained by [the defendant] thereby up to the sum of Singapore Dollars five hundred twenty three thousand only (SGD523,000.00) ('the guaranteed sum') upon receiving your written notice of claim for payment.

On or about 25 May 2011, the defendant informed the plaintiff that some of the motors in the chillers had ceased to function and requested the plaintiff to undertake urgent repairs. The plaintiff duly performed and completed extensive work in reinstating the functionality of the motors. However, the two parties could not agree on what caused the chillers to fail. The dispute between the parties eventually led the defendant to make a call upon the bank guarantee. The defendant wrote to the bank as follows (at [14]):

> Please be notified that [the plaintiff] has failed to fulfill certain terms and conditions of the Purchase Agreement dated April 3, 2008 and we therefore invoke the guarantee.

The plaintiff filed an originating summons seeking to restrain the defendant from receiving payment under the guarantee from the bank pending the outcome of arbitral proceedings. Andrew Ang J decided that where a performance guarantee was properly construed as a conditional performance guarantee, a call for payment under the guarantee must at least assert a breach of the underlying contract and state the loss incurred by the beneficiary. The court found that the performance guarantee was conditional in nature and the demand for payment had not complied with the conditions stated in the guarantee. Ang J said (at [38], [39] and [40]):

> In sum, the deliberate omission of the word 'unconditional', coupled with the *contra proferentem* rule, led me to the inexorable conclusion that the Guarantee was conditional in nature and was premised on there in fact having been a breach of the underlying contract leading to loss.
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> Assuming *arguendo* that the Guarantee is not conditional in nature, the Guarantee is, at the bare minimum, of a type whereby the written claim must assert a breach of both the underlying contract and of loss incurred. …
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> The use of 'In the event of … we shall indemnify' clearly indicates that the written notice of claim must, at the bare minimum, contain allegations that: (a) the plaintiff has failed to fulfil any of the terms of the underlying contract; and (b) that the defendant has thereby suffered loss. This was not done. The defendant merely stated that the Purchase Agreement was breached but did not go on to further state that it had thereby suffered loss. …
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> [emphasis in original omitted]

### *Unconscionable demand*

5.2 In Singapore, apart from fraud, the beneficiary of a performance bond may be restrained from calling for payment under the bond if the demand for payment is considered to be unconscionable. A demand for payment by a beneficiary is considered to be unconscionable if the beneficiary's call involves unfairness or conduct which is reprehensible or lacking in good faith such that a court of conscience would not assist the beneficiary. Whether these factors are present in any given case depends very much on the evidence presented to the court. Allegations of unconscionability can cover a myriad of conduct including the beneficiary acting oppressively or using bullying tactics and being vindictive in making the demand for payment. In *Ryobi-Kiso (S) Pte Ltd v Lum Chang Building Contractors Pte Ltd* [2013] SGHC 86, the first defendant, a civil and building contractor, was engaged by the Land Transport Authority ("LTA") as its main contractor to design and construct the "Station at Bukit Panjang and Tunnels for Downtown Line Stage 2 at Woodlands Road and Upper Bukit Timah".

The first defendant engaged the plaintiff, a piling specialist, as its subcontractor on 11 February 2010. The second defendant was an insurance company which issued a performance bond for $1.88m on behalf of the plaintiff. The performance bond stated (at [23]) that the:

> … Insurer hereby *unconditionally* undertakes and covenants to pay *on demand* any sum or sums which may from time to time be demanded in writing by the Main Contractor. [emphasis in original]

According to the first defendant, the plaintiff exceeded the maximum time stipulated for the completion of some of the works by 152 days and 332 days respectively. This eventually led the first defendant to terminate the subcontract on 4 June 2012. On 13 July 2012, the first defendant called upon the performance bond on the grounds of the plaintiff's breaches of the subcontract. The plaintiff commenced proceedings to restrain the first defendant from calling on the bond contending that the call for payment was unconscionable as there was a genuine dispute between the parties and the call was not made in good faith, was clearly oppressive, and should be construed as a bullying tactic by the beneficiary. The plaintiff also asserted that the call was vindictive. Quentin Loh J decided that a case of unconscionability had not been made out even though the plaintiff had claimed that there was a genuine dispute between the parties and that the beneficiary was not acting in good faith but was being oppressive, using bullying tactics and might even be vindictive. Loh J said (at [35]):

> In sum, the Plaintiff did not even adduce a *prima facie* strong piece of evidence illustrative of the 1st Defendant's unconscionable conduct, much less a strong *prima facie* case required of it to justify the restraining of the Call (see *BS Mount Sophia* at [40]). Having regard to the overall tenor and context of the entire conduct of the parties, I am unable to conclude that the 1st Defendant's conduct was 'so lacking in *bona fides*' (see *BS Mount Sophia* at [45]).

## Negotiable instruments

5.3 A negotiable instrument issued to pay a gambling debt in Singapore is generally unenforceable as the consideration for the instrument is declared to be null and void under s 5(1) of the Civil Law Act (Cap 43, 1999 Rev Ed). Thus, a cheque or promissory note issued to settle an ordinary gambling debt incurred by the drawer is unenforceable as the consideration for the instrument is null and void. In addition, the courts would not allow the enforcement of the instrument as it is against public policy to enforce a contract in respect of a gambling transaction. However, an exception is now made in respect of a negotiable instrument issued to a casino in Singapore under the Casino Control Act (Cap 33A, 2007 Rev Ed) ("CCA"). Casinos in Singapore would generally require a patron to issue a personal cheque or execute a

promissory note to cover any credit extended by the casino to the patron. Such instruments are now recoverable from the patron even though they cover the gambling debts of the patron at the casino. In *Marina Bay Sands Pte Ltd v Ong Boon Lin Lester* [2013] 4 SLR 593, the plaintiff, Marina Bay Sands Pte Ltd, brought a claim against a casino patron, Ong Boon Lin Lester, to recover a gambling debt of $240,868 incurred by the patron. The casino's credit agreement with the patron required the patron to provide, as security for the issuance of credit, a personal cheque or other form of acceptable negotiable instrument in the amount of casino chips transferred to the patron. The casino was authorised to apply the cheque towards payment and to complete any portion of the cheque that might be missing or left blank, including the amount of the outstanding credit balance, the date of the cheque and the bank or account number. The patron incurred losses and the casino demanded payment from the patron. The casino presented the patron's cheque of $240,868 for payment but the cheque was dishonoured. The patron contended that the casino's extension of credit to him did not comply with all the relevant controls and procedures approved by the Casino Regulatory Authority ("CRA") because he was not a "premium player" ("Premium Player") under the CCA. This contention was rejected by Lai Siu Chiu J who decided that the gambling debt incurred by the patron at the casino was recoverable by the casino. Lai J said (at [13]–[14] and [66]):

> 13 The starting point is that gaming and wagering contracts are null and void by virtue of s 5 of the Civil Law Act (Cap 43, 1999 Rev Ed) …
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> 14 However, s 40 of the CCA provided that s 5 of the Civil Law Act did not apply to certain contracts relating to gaming where such contracts were for transactions permitted under s 108 of the CCA …
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> …
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> 66 In the present case, the Defendant had in fact made a prior request for credit in the form of submitting a written application for credit of $1m before chips on credit were provided to him on 3 May 2010. Therefore, the Plaintiff had complied with reg 6 and the corresponding Guiding Principle.

## Banking

### *Customer's instructions*

5.4 When a customer disputes that he has given certain instructions to a bank, the bank is obliged to prove that the instructions were indeed given by the customer if the bank seeks to rely on those instructions. In *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573, the defendant, Teo Wai Cheong ("Teo"), was a private banking client of the

plaintiff, Crédit Industriel et Commercial ("CIC"). The bank agreement with the customer stipulated that:

> These private banking services have been designed for sophisticated and experienced investors ('High Net Worth Individuals' as defined in the Guidelines issued by the Monetary Authority of Singapore) who have the expertise, the understanding of financial product, as well as the desire and financial capacity to invest in domestic and international markets.

The dispute between the parties turned upon whether or not Teo had given instructions to the bank to purchase certain accumulators. Accumulators were complex over-the-counter structured equity products. The bank claimed payment of $2,782,803.66 from the customer for China Energy ("CE") shares delivered under the terms of five disputed accumulator agreements and another sum of $3,625,393.11 for the closing out cost for the disputed CE accumulators. The transactions were carried out by the bank's relationship manager, Ng Su Ming ("Ng"), who managed Teo's account. The High Court initially decided for the bank. The defendant appealed against the High Court's decision and an order was made by the Court of Appeal directing CIC to produce certain previously undisclosed documents. At the retrial, Chan Seng Onn J decided that based on the evidence before the court, Teo must have given Ng the requisite instructions to enter into the Disputed Accumulator transactions. The Court of Appeal disagreed with the decision of the High Court in the retrial on the ground that the evidence of Ng would have been material to the issue as to whether Teo had given instructions for the disputed transactions. It was not possible for the bank to admit Ng's evidence given at the first trial under s 33 of the Evidence Act (Cap 97, 1997 Rev Ed). Sundaresh Menon CJ said (at [54]–[55] and [84]):

> 54 In the circumstances, we hold that the cross-examination of Ng at the First Trial was materially impaired and this was brought about by the Bank's breach of its discovery obligations. Accordingly, we hold that proviso (*b*) to s 33 was not satisfied in this case.
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> 55 We therefore hold that in so far as Ng's evidence in her affidavits of evidence-in-chief and oral testimony at the First Trial relates to facts which are disputed between the parties, they are not admissible under s 33 of the EA and are thus to be excluded. …
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> 84 The Bank as the plaintiff bore the burden of proving that Ng had been authorised by Teo to establish each of the five Disputed Accumulators on their exact terms. In all the circumstances, and especially given:

> (a) that the Bank cannot rely on Ng's evidence;
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> (b) Ng's unexplained inaction from 3 to 11 October 2007; and
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> (c) Ng's deliberate attempts to lie and mislead even her own colleagues in the Bank;
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> we find that the Bank has failed to discharge its burden of proving that Teo had specifically authorised the establishment of the Disputed Accumulators.
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> [emphasis in original omitted]

### *Investment banking*

5.5 When a bank handles a customer's investments, disputes might arise between the parties on various issues including whether the bank owes a duty of care to the customer in advising the customer or in making the investments. In addition, there might also be potential allegations by the customer that the bank has misrepresented the investments to the customer. To avoid some of these potential disputes, banks often incorporate a non-reliance clause into their agreements with their customers. Whether a bank owes a duty of care to a customer in such a situation will depend on what actually takes place in a particular transaction. In addition, whether a bank has misrepresented an investment to a customer is often a question of fact. In *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, the plaintiff, Deutsche Bank AG ("DB"), claimed from its customer, the defendant, Chang Tse Wen ("Chang"), a repayment of US$1,788,855.41 (with interest) that was outstanding on his private wealth management account with DB's Singapore branch. The defendant counterclaimed for damages arising from actionable misrepresentation, fraudulent misrepresentation, breach of a duty of care and breach of fiduciary duty against DB and DB's relationship manager ("RM"). The plaintiff denied Chang's counterclaims. They further relied on the banking documents (specifically, the non-reliance, own-judgment, non-advisory clauses in these documents) to operate as evidential or contractual estoppels that would preclude Chang from establishing the necessary legal elements of his claims. The customer's losses resulted from the bank's management of a sum of US$118m which the customer had received from the sale of Tanox Inc founder shares. The bank's non-reliance clause stipulated that:

> We may (but need not) give advice or make recommendations. If we do so, such advice or recommendations are given and on the basis you will make your own assessment and rely on your own judgment.

In the High Court, Philip Pillai J found the bank liable as it had assumed a duty of care towards managing the wealth of the customer and for a financially inexperienced customer, the customer was not affected by the

bank's service agreement disclaimers or the derivative disclaimers. The bank appealed against the High Court decision, and this appeal was allowed by the Court of Appeal on the ground that, on the evidence, the bank had not assumed a duty of care to advise the customer. Sundaresh Menon CJ said (at [19], [31] and [58]):

> 19 It is important to note at the outset that this case did not involve any allegation that DB had engaged in the mis-selling of a financial product. Counsel for Dr Chang, Mr K Muralidharan Pillai ("Mr Pillai"), clarified during the hearing before us that Dr Chang's case was not that he did not know of or understand the risks inherent in investing in DSPPs. Rather, his case was that he had not been given sound or appropriate strategic investment advice as to the management and structuring of his portfolio as a whole. This is a critical point. …
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> 31 … On the contrary, the facts are that prior to August 2007 when the DB account was opened:
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> (a) DB had not undertaken to do anything;
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> (b) Dr Chang had no expectation that DB would do anything;
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> (c) consistent with this, DB had no duty to do anything; and
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> (d) DB in fact did nothing on its own initiative for Dr Chang.
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> …
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> 58 A key plank of the judge's conclusion on the existence of a duty of care was his finding that DB undertook to Dr Chang during the 15 March 2007 meeting that it was able to and would advise Dr Chang in managing his new wealth. For the reasons stated above, this was erroneous. Even the judge appeared to think that no duty of care came into existence on 15 March 2007. The fact that Dr Chang suffered horrendous losses should not be allowed to divert attention from the key inquiry, which is whether DB came under a duty of care in managing his wealth. If one has proper regard to what transpired after that fateful day, it remains clear, in our judgment, that no duty of care ever came into existence.
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> [emphasis in original omitted]