5. BANKING LAW

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Banking

Financial advisers

5.1 The conduct of financial advisers employed by banks is now governed by the Financial Advisers Act (Cap 110, 2007 Rev Ed) ("FAA"). Financial advisers transacting with an ordinary bank customer have to comply with the standards required of financial advisers as set out in ss 25, 26 and 27 of the FAA. These cover the provision of information about an investment product, representations and recommendations in respect of the product. In providing information about an investment product to a client, a financial adviser has to disclose all material information about the product. Such information would include the terms and conditions, benefits, risks and costs of the product. In addition, a financial adviser is to refrain from making any false or misleading statement with intent to deceive. Such statements may cover the amount payable under the investment product and the effect of the contract terms. An omission to disclose any matter material to the statement may be construed as misleading. Similarly, a financial adviser is not to make any recommendations where he has no reasonable basis for so doing.

Private banking

5.2 A bank, however, may apply to the Monetary Authority of Singapore ("MAS") under s 100 of the FAA for exemption from the provisions of the FAA when it transacts with a high net worth individual in a private banking situation. A high net worth individual is defined by MAS as an individual who has a minimum of $1m of assets, or the equivalent in foreign currencies or in bank deposits, including structured deposits. It also includes a person whose total net personal assets exceed $2m in value or the equivalent in foreign currencies or whose annual income is not less than $300,000 or the equivalent in foreign currencies. MAS may grant exemption to a bank from ss 25, 27, 28 and 36 of the FAA as well as from certain written directions issued pursuant to s 58 of the FAA in respect of any financial advisory service provided to high net worth individuals.

Non-reliance clause

5.3 In practice, in spite of the FAA, financial advisers dealing with high net worth individuals might in addition seek to disclaim their common law liability by expressly throwing the responsibility of due diligence on their customer through the incorporation of a non-reliance clause in their contracts with the customers. In *Orient Centre Investments Ltd v Société Générale* [2007] 3 SLR(R) 566 ("*Orient Centre Investments*"), the Court of Appeal decided that a customer's agreement with a bank incorporating a non-reliance clause was sufficient to preclude the customer from suing the bank for breach of representations, fiduciary and contractual duties and the negligence of its employee.

5.4 A similar non-reliance clause was also incorporated in *Crédit Industriel et Commercial v Teo Wai Cheong* [2012] 3 SLR 287. The defendant, Teo Wai Cheong, was a private banking client of the plaintiff, Crédit Industriel et Commercial ("CIC"). The bank agreement with the customer provided 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." It also stipulated that "The Bank highly recommends that you consult your lawyers, accountants, tax advisors, brokers and other professional advisers before making such investment. Accordingly, if you enter into transactions with the Bank, the Bank will assume that you understand and accept the characteristics and risks associated with such transactions." The dispute between the parties turned upon whether or not the defendant purchased certain accumulators. Accumulators were complex over-the-counter structured equity products. The bank claimed payment of $2,782,803.66 from the defendant 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 High Court considered the legal relationship between private bankers and their sophisticated clients. Philip Pillai JC (as he then was) decided that the bank was not acting as a trusted adviser of its client since its account opening form and risk disclosure statement highlighted to the client that he was responsible for the risks in the transactions.

5.5 The defendant appealed against the High Court decision and an order was made by the Court of Appeal directing CIC to produce certain previously undisclosed documents ("Newly Disclosed Materials"). In the subsequent hearing, Chan Seng Onn J decided that based on the evidence before the court, Teo must have given the bank the requisite instructions to enter into the disputed accumulator transactions. Chan J said (at [118]):

> I will also state that even without the admission of the evidence of Ng under s 33 of the EA, I would still have given judgment for CIC because on the totality of the other evidence before me, much of it being circumstantial in nature, I do find that they lead me to the irresistible conclusion that Teo must have given Ng the requisite instructions on 2 October 2007 and 3 October 2007 to enter into the Disputed Accumulator transactions.

5.6 The parties to a contract are normally bound by the terms of the contract and the principle is equally applicable to a contract entered into between a bank and its customer in the sale of investment products to the customer. In *Soon Kok Tiang v DBS Bank Ltd* [2012] 1 SLR 397, the Court of Appeal decided that a bank customer was bound by the terms of his agreement with the bank and the agreement was not void for uncertainty as contended by the customer. The court added a reminder to members of the public that they were generally bound by the terms of a contract they had signed.

5.7 In carrying out a customer's instructions, a banker acts under the customer's mandate. Inherent in the mandate is a banker's duty to exercise care in carrying out a customer's instructions. A banker who fails to exercise care in carrying out a customer's mandate is liable to the customer for breach of contract. There is little doubt that a financial adviser also owes a duty of care at common law in rendering advice to a client. An adviser could become liable to a client if the advice is given negligently. Financial advisers dealing with high net worth individuals might seek to disclaim their common law liability by expressly throwing the responsibility of due diligence on their customers through the incorporation of a non-reliance clause in their contracts with the customers. In *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559, the Court of Appeal agreed with the High Court that the contractual terms between the bank and its customer did not expressly provide for an advisory relationship between the parties. The Court of Appeal, however, went on to decide that even though a bank's written agreement might not have expressly or impliedly imposed a contractual duty on the bank to advise the customer, there was still room for the bank's common law duty that it would exercise reasonable care and skill in advising the customer to operate when it actually advised the customer.

5.8 The Court of Appeal has now expressed the view that the courts should reconsider whether banks should be accorded full protection under non-reliance clauses in bank agreements when investment products are sold to unwary customers who are unsophisticated or linguistically and financially illiterate. In *Als Memasa v UBS AG*

[2012] 4 SLR 992 ("*Als Memasa*"), the second plaintiff, Tjo Bun Khai ("Tjo"), was a wealthy retired Indonesian businessman who was 95 years old and neither spoke nor wrote English. The first plaintiff, Als Memasa ("AM"), was Tjo's daughter who worked in a company in the family business. She was in her 60s and was unfamiliar with the English language. The plaintiffs had been customers of the Oversea-Chinese Banking Corporation Limited ("OCBC") for over 40 years. Sometime in late 2004 or early 2005, their accounts with OCBC came under the care of one Gary Yeo ("Gary"). About six months later, Gary informed the plaintiffs that he would be moving to UBS AG ("UBS"). In or around late 2006, the plaintiffs agreed to move their bank accounts worth about US$8m to UBS. Three accounts were opened with UBS. Two of them were joint accounts and the third was a sole account of Tjo. From the time the accounts were opened until September 2008, various transactions and investments were carried out under them, resulting in losses in transactions. The plaintiffs claimed in respect of all the losses on the accounts but the claims were dismissed by the High Court on various grounds. Among the disputed transactions was one particular transaction involving Russian bonds having a face value of US$4m which were purchased at a cost of about US$3.8m ("the Russian bonds") for one of the accounts on 3 September 2008. In respect of the Russian bonds claim, the High Court found that the Russian bonds might not have been purchased with the plaintiffs' prior instructions, but that AM had subsequently affirmed the transaction. In addition, the High Court also decided that even if the purchase was without the customers' consent, they were precluded from relying on any misrepresentation because of the presence of the non-reliance clauses in the bank agreement. In respect of this transaction, the Court of Appeal allowed the plaintiffs' appeal on the ground that there was evidence that the transaction had not been authorised and the matter should go to trial. Chan Sek Keong CJ (as he then was) said (at [20]):

> We are of the view that the Appellants' limited claim based on the losses arising from the purchase of the Russian bonds should be allowed to go to trial, given the lack of documentary evidence showing that AM had authorised the purchase of the Russian bonds. Further, we note that the judge's finding of a possible or likely lack of authority in the purchase of the Russian bonds by UBS would ordinarily have given rise to a triable issue, but for the finding that the Appellants had affirmed the purchase.

5.9 The Court of Appeal also expressed the view that in the light of the many allegations made against financial institutions for "mis-selling" complex financial products to linguistically and financially illiterate and unwary customers during the financial crisis in 2008, it might be desirable for the courts to reconsider whether financial institutions should be accorded full immunity for such "misconduct" by relying on non-reliance clauses which unsophisticated customers might have been induced or persuaded to sign without truly understanding their potential legal effect.

5.10 The views expressed by the Court of Appeal that the issue of whether a financial institution should be accorded full immunity under their non-reliance clauses when they transact with unsophisticated customers was considered by the High Court in *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310. The plaintiff, Deutsche Bank AG ("DB"), claimed from its customer, the defendant, Dr Chang Tse Wen ("Dr 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 plaintiffs denied Dr 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 prevent Dr 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 … on the basis you will make your own assessment and rely on your own judgment." Philip Pillai J decided that a bank's assumption of a duty of care towards managing the wealth of a customer who was financially inexperienced was not affected by the bank's service agreement disclaimers or the derivative disclaimers. Pillai J said (at [139]):

> It is my finding that the Derivative Agreement does not affect DB's liability for any assumption of a duty of care which had arisen previously and where the issue in question has nothing to do with the validity and effect of the DSPPs purchased under the Derivative Agreement.

5.11 The Court further distinguished the decision of *Orient Centre Investments* (above, para 5.3)on the basis that that case had involved financially sophisticated parties and that the court was more inclined to follow the views expressed by the Court of Appeal in *Als Memasa* when the bank customer was financially unsophisticated. Pillai J said (at [136] and [138]):

> DB relies on *Orient* to argue that the Service Agreement Disclaimers or the Derivative Disclaimers were sufficient to prevent any duty of care from arising or estopping Dr Chang. However, it is important to note that both plaintiffs in *Orient* were financially sophisticated parties: the first plaintiff was an investment company, whilst the

> second plaintiff was a knowledgeable financial investor. At least with respect to relatively unsophisticated customers, the Court of Appeal appears to have subsequently retreated somewhat from its previous position in *Orient* that express terms in banking documents provided an 'insuperable obstacle' to any claim based on alleged breaches or duties, whether fiduciary, contractual or tortious. Recently, in the Court of Appeal decision of *Als Memasa and another v UBS AG* [2012] 4 SLR 992 ('*Als Memasa*'), Chan Sek Keong CJ held at [29] that it may be desirable for the courts to reconsider whether financial institutions should be entitled to invoke such non-reliance clauses against unsophisticated customers …
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> Given the Court of Appeal's observations in *Als Memasa*, I would be extremely hesitant to apply the doctrine of contractual estoppel developed in the line of cases following *Peekay* … Although I am bound by the Court of Appeal's decision in *Orient*, that case can be distinguished from the present case on the basis that Dr Chang was known to the RM and DB to be financially inexperienced and the RM and DB themselves have the expertise and undertook pre-contractually to advise him in managing his new wealth. I further find that even if the doctrine of contractual estoppel did operate in Singapore, that the precondition to its operation, *viz*, the clear intention for it to operate, has not been established on the evidence before me.

Banker's duty of confidentiality

5.12 In Singapore, a bank is criminally liable under s 47 of the Banking Act (Cap 19, 2008 Rev Ed) for divulging customer information unless it is permitted to do so under the Third Sched of the Act. The exceptions provided under the Third Sched are entirely for the benefit of the bank and does not impose any additional duty on the bank to disclose the same information to the customer. This position was clarified by the Court of Appeal in *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185. The plaintiff opened a private banking account with the defendant bank in August 2009. In that same month, the plaintiff instructed the bank to enter into two commodity-linked premium current investments ("CPCI"). CPCI entailed the investment of a quantity of gold (expressed as "XAU", a unit of measurement of gold) by the plaintiff for a stated period of time. At the end of the investment period, the plaintiff received the principal sum together with interest in US dollars after the bank exercised its option under the investment agreement. A dispute arose over the investment and the plaintiff took the view that it was she, the customer, who had the option to redeem the investments either in XAU or US dollars. The plaintiff made an application for a pre-action discovery against the bank in contemplation of an action in contract and/or in tort to be commenced by the plaintiff against the bank in respect of the two investments. The plaintiff wanted the bank to produce all records, including mechanical, audio, written and computer records of the purported trades effected by the bank on the plaintiff's account. The bank declined to do so. The plaintiff further contended that the bank was obliged to disclose the information by virtue of s 47 of the Act. The plaintiff's application was rejected by both the High Court and the Court of Appeal. The Court of Appeal expressed the view that the exceptions provided under the Third Sched of the Act permitting the bank to disclose customer information did not impose a duty on the bank to disclose the same information to the customer. Chao Hick Tin JA said (at [45] and [46]):

> As rightly observed by the judge (at [18] of her grounds of decision), the object of the section was to loosen the previously tight banking secrecy laws to the benefit of banks and to strike a better balance between operational requirements of banks and the need to preserve customer confidentiality. This is supported both by the Parliamentary Debates (see *Singapore Parliamentary Debates, Official Report* (16 May 2001) vol 73 at col 1689 (BG Lee Hsien Loong, Deputy Prime Minister) as well as the wording of the section. Rather than placing an obligation on banks to disclose otherwise secret customer information, the section lifts the obligation of secrecy on banks in the circumstances provided for in the Third Schedule of the Act.
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> It will be noted that under s 47(2) a bank may, but need not, disclose customer information in the circumstances provided for in the Third Schedule. Discretion is given to the bank to furnish customer information in the specified circumstances. Row 4(*a*) of Pt I of the Third Schedule provides for disclosure in connection with proceedings between a bank and its customers. However, this does not mean that the bank is obliged to make such a disclosure. This is entirely consistent with the sub-heading to Pt I of the Third Schedule, which reads 'Further Disclosure Not Prohibited'. In our opinion, the Appellant's submission that the Respondent is under an obligation to provide pre-action discovery of the voice-logs by virtue of s 47 is therefore wholly without merit. We do not see how an entirely permissive provision could be read in the way in which the Appellant has contended.
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> [emphasis in original omitted]

Performance bonds and guarantees

Construing terms of guarantee

5.13 Whether a guarantee issued by a financial institution like an insurance company constitutes an on-demand performance guarantee depends on the construction of the terms of the guarantee. In *China Taiping Insurance (Singapore) Pte Ltd v Teoh Cheng Leong* [2012] 2 SLR 1, the defendant was a director of six companies in the SME group of companies ("SME Group") which employed 182 foreign workers as work permit holders. Under Immigration Regulations (Cap 133, Rg 1, 1998 Rev Ed), the companies were required to provide security bonds for these foreign workers in the form of a security deposit of $5,000 per foreign worker to secure the foreign workers' compliance with the conditions of the security bond and to ensure the observance of further conditions imposed on the employers in the security bond. The total security deposit for all 182 foreign workers would amount to $910,000. Instead of placing a cash security deposit of $910,000 with the Controller of Immigration ("the Controller"), the defendant requested the plaintiff, China Taiping Insurance (Singapore) Pte Ltd, to provide 47 guarantees to the Controller where the plaintiff would "guarantee and undertake as principal debtors to pay to [the Controller] at any time forthwith, on demand" the security deposit originally required under the security bonds. In consideration of the plaintiff providing the guarantees, the defendant concurrently executed 47 documents entitled "Indemnities" where the defendant undertook to fully and completely indemnify the plaintiff "against all claims, payments, demands, actions, suits, proceedings, losses, liabilities, costs and expenses whatsoever and however which may be taken or made against the plaintiff in any way arising from or in connection with the issue of the bonds". Between February 2009 and June 2009, the companies requested the plaintiff's assistance to repatriate the 182 foreign workers to prevent the forfeiture of the entire security deposit under the security bonds by the Controller. The companies had breached the conditions of the security bonds by failing in the upkeep and maintenance of the 182 foreign workers. However, instead of an automatic forfeiture of the entire security deposit, the plaintiff was called upon by the Ministry of Manpower ("MOM") to assist in resolving the problems of housing, meals, transport and unpaid wages for the 182 foreign workers and in their repatriation. In order to mitigate the loss, the plaintiff agreed to co-operate with MOM to avoid the forfeiture of the entire $910,000 in security deposits. Therefore, pursuant to the agreement with MOM, the plaintiff incurred a total cost of $449,896.98 including the payment of wages, air tickets, lodging, administrative fees and transport costs for the workers. The plaintiff claimed to be indemnified by the defendant for the expenses incurred contending that the Guarantees were "on-demand guarantees" payable upon demand without requirement of proof of any default on the part of the companies or linkage to the security bonds. The obligations under the security bonds were irrelevant to the liabilities of the plaintiff and the defendant under the Guarantees and Indemnities. The defendant, however, contended that the liabilities under the Guarantees and Indemnities were inextricably linked and necessarily circumscribed by the conditions of the security bonds, and token wages, transport and administrative fees were not covered under the conditions of the security bonds and therefore could not be claimed under the Indemnities. Chan Seng Onn J decided that whether a guarantee was an on-demand guarantee depended on the nature of the payment obligations undertaken by the parties based on the construction of the guarantee. Chan J said (at [16] and [22]):

> The parties tended to argue legalistically that because a certain document is an on-demand guarantee, a guarantee or an indemnity, certain obligations will naturally follow such a labelling of the document. This presumes that the titling of the document as a 'guarantee' becomes determinative of the nature of obligations within the document itself. However, that is putting the cart before the horse because whether the document is an on-demand guarantee, a guarantee or an indemnity depends on the *very nature of the obligations* undertaken in the documents themselves …
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> Undoubtedly as stated in [6] above, the commercial purpose of the Guarantees was to provide the Controller or MOM with a third party payment obligation from the Plaintiff that was as good as the cash that would have been held otherwise by the Controller or MOM as the cash security deposit. Each of the Guarantees is in reality an on-demand performance bond that is similar in nature to a promissory note. Clause 1 under the Guarantee makes it clear that the Plaintiff will pay the Controller the cash security deposit contracted for 'on demand' without any conditions, and thus the obligation to pay was not contingent on the Companies (or for that matter the Visit Pass Holders) having breached any of the conditions under the Security Bonds. Although the term 'guarantee' was used in the Guarantees, it was clear that the Plaintiff was not undertaking to perform only upon the default of the Companies but as a 'principal debtor' with a primary liability. There was no need for an actual default by the Companies under the Security Bonds.
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> [emphasis in original]

5.14 A performance bond may be issued with or without conditions attached. When conditions are attached to the payment of a performance bond, a demand for payment has to comply strictly with the terms and conditions set out in the bond. The courts have to determine, as a matter of construction, whether the demand for payment complies strictly with the terms of the bond. In *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125, the plaintiff, Labroy Offshore Ltd ("Labroy"), entered into a construction contract with the first defendant, Master Marine AS ("MM"), to construct a self-elevating offshore unit ("the Rig") for MM. Under the Construction Contract, MM was to make payment of the contract price in six instalments. The first five instalments were deemed to be "advances" to Labroy, with the sixth and final instalment due upon delivery. Labroy was required to provide Refund Guarantees for repayment of each of the first five instalments, and it provided banker's guarantees from the second, third and fourth defendants, the Oversea-Chinese Banking Corporation Ltd, United Overseas Bank Ltd and DBS Bank Pte Ltd respectively (collectively, "the Banks"). MM later purported to rescind the Construction Contract under various articles thereof and issued demands for payment under the Refund Guarantees to the Banks. Labroy applied for an injunction to restrain the Banks from paying MM and to enjoin MM from receiving payment thereby. In the High Court, Andrew Ang J decided that the beneficiary of a performance guarantee was not entitled to payment when the demand for payment did not comply strictly with the terms of the performance guarantee: *Labroy Offshore Ltd v Master Marine AS* [2011] SGHC 234.

5.15 The High Court decision was reversed by the Court of Appeal discharging the injunction to restrain the Banks from making payment to MM. The Court of Appeal decided that the Refund Guarantees were first demand bonds and the beneficiary had complied with the terms of the Guarantees. V K Rajah JA said (at [15] and [54]):

> Pertinently, all parties are in agreement that the New Demand Clause functions as a first demand performance bond. This is notwithstanding the instruments being titled 'Refund Guarantees'. However, we will venture even further to say that the entire Refund Guarantee operates as a first demand performance bond … It is suffice to say at present that it was clear the parties intended that the subject instruments act as cash equivalents payable on the beneficiary's demand *simpliciter* or where required, supported by specified documents …
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> To reiterate, the Refund Guarantees' most important feature was their availability as security for any claims made by MM pending delivery of the Rig. Once this security was compromised by a 'lapse' of the security, MM was entitled to exercise an entirely independent right to make a valid demand 'irrespective' of any other pending disputes the parties might have. This is so even if MM subsequently rescinded the Underlying Contract (as it did on 12 April 2011).
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> [emphasis in original omitted]

Unconscionability

5.16 In applying the ground of unconscionability to restrain a beneficiary from calling for payment under a performance bond, the Court of Appeal recently identified some of the markers in limiting the application of unconscionability. This includes a high threshold in establishing a strong *prima facie* case of unconscionable conduct against a beneficiary so that such an injunction would not be so easily obtained. However, the court stopped short of defining the precise scope of unconscionability, preferring to deal with each situation as it arises. In *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352, the defendant property developer engaged the respondent plaintiff contractor under a building contract dated 28 February 2008 ("the Contract"), to construct a residential condominium development at 95 Sophia Road, Singapore. The contract had a value of $9,688,800 and the plaintiff provided the defendant with a performance bond ("the Bond") to secure the performance of the contractor's obligations under the Contract for $484,440, or 5% of the value of the Contract. The bond was issued by Liberty Insurance Pte Ltd ("Liberty") which was not a party to the appeal. The bond stipulated that in consideration of the defendant not insisting on the plaintiff paying $484,440 as "a security deposit for the Contract, [Liberty] hereby irrevocably and unconditionally undertake[s] … to pay to you on demand any sum or sums which from time to time may be demanded by you up to a maximum aggregate of … $484,440". The bond further stipulated that "we irrevocably and unconditionally agree to pay the same to you immediately on demand without further reference to the [Plaintiff] and notwithstanding any dispute or difference which may have arisen under the Contract or any instruction which may be given to us by the [Plaintiff] not to pay the same". The defendant appellant made a partial call on the Bond for the sum of $360,084.62 on 27 July 2011, and the plaintiff applied for an injunction pending arbitration. An interim injunction was obtained pending arbitration of certain contractual disputes between the parties. The circumstances surrounding the defendant's call on the Bond and the contractual disputes between the parties related to the time for completion of the construction works under the Contract ("the works") and the consequent alleged liability of the plaintiff to pay the defendant liquidated damages. The court decided that there was a strong *prima facie* case of unconscionability justifying the continuance of the injunction restraining the defendant's call on the Bond pending arbitration. No single factor was conclusive but the entire chronology of the case showed that a strong *prima facie* case of unconscionability had been established. Andrew Phang Boon Leong JA, delivering the grounds of decision of the court, touched on the threshold of unconscionability that had to be met by an applicant seeking to restrain a beneficiary from calling for payment under a performance bond. Phang JA said (at [20]–[23]):

> Of greater significance in the context of the present appeal is the necessary threshold of unconscionability that has to be established before the court will exercise its discretion to grant an injunction. … Simply put, the threshold is a high one, and the burden that the applicant has to discharge is to demonstrate a strong *prima facie* case of unconscionability (see, for example, *Dauphin* at [57]). …
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> … We must emphasise that the courts' discretion to grant such injunctions must be sparingly exercised and it should not be an easy thing for an applicant to establish a strong *prima facie* case.
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> The reason for setting the barrier at such a high level is that the equitable remedy of the interim prohibitive injunction is a very harsh one. …

> … Unconscionability is a distinct and separate ground from fraud, and as stated earlier (at [19]), includes conduct such as unfairness and abuse that are broader than the conduct that would constitute fraud. In other words, the availability of unconscionability acknowledges that conduct exhibited by the beneficiary other than fraud might be sufficiently reprehensible to justify relief on the part of the obligor. For example, unfairness is an element of unconscionability, but it would not make logical sense to say that a beneficiary had thereby acted in such an egregiously unfair manner as to amount to fraud. This is because the concept of unfairness admits of other dimensions beyond the fraudulent dimension, and is assessed on different parameters from those with which we assess fraud. The most we can say is that such conduct does not necessarily constitute fraud.

Pledge of shares

5.17 When share certificates together with a signed, blank share transfer form are deposited with a creditor, the deposit of the certificates creates an equitable mortgage over the shares. In *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713, the plaintiff, State Bank of India, Singapore ("SBI SG"), entered into a Facility Agreement, in February 2007, with Baytech Inc ("Baytech"), a company incorporated in the British Virgin Islands, to provide a US dollar term loan facility of US$80m to Baytech. The "Final Maturity Date" was defined as 36 months from the date of drawdown and the entire loan facility was drawn down by Baytech in one tranche on 23 February 2007. As security for the facility agreement, the defendants deposited with SBI SG five share certificates representing 51% of the share capital of eSys Technologies Pte Ltd ("eSys") ("Pledged Shares"), together with a signed, blank share transfer form. The first defendant, Rainforest Trading Limited ("Rainforest"), was a company incorporated in the British Virgin Islands while the second defendant, eSys (now known as Haruki Solutions Pte Ltd), was a private company incorporated in Singapore. eSys was a wholly owned subsidiary of Rainforest. Baytech was a wholly owned subsidiary of Teledata Informatics Limited ("Teledata") and the loan from the bank was intended to finance Teledata's acquisition of a majority control of eSys. Following a default under the Facility Agreement, SBI SG sought to perfect its security in the Pledged Shares. SBI SG submitted that the deposit of the share certificates accompanied by a signed, blank share transfer form gave rise to an equitable mortgage with an implied power of sale upon the borrower's default. The bank initially sought an order for the enforcement of the "pledge" without further notice to the defendants and without reference to the articles of association of the company. The defendants contended that the Pledged Shares were procured and/or obtained through an elaborate fraud perpetrated by Teledata, Baytech and SBI SG. In the High Court, Steven Chong J (as he then was) decided that the deposit of the share certificates together with a signed, blank share transfer form created an equitable mortgage over the shares. The allegations of fraud raised in the affidavits by the defendants did not constitute sufficient evidence to warrant the conversion of the Originating Summons application to a writ action.

5.18 The defendants appealed against the High Court decision, raising an entirely new ground that the Pledged Shares was invalid and unenforceable because the consideration provided for the mortgage was past consideration. The defendants also continued to contend that the Originating Summons should be converted to a writ. Both grounds were rejected by the Court of Appeal. Andrew Phang Boon Leong JA said (at [31] and [38]):

> It was hence clear beyond peradventure that the Appellants understood, as the Respondent did, that the deposit of the Share Certificates and signed blank share transfer form was made pursuant to the Facility Agreement. It also bears emphasising that, by the very nature of the contract between the parties, the grant of an equitable mortgage over the Pledged Shares by the First Appellant could only have taken place after the entry by the Respondent into the Facility Agreement with Baytech. The substance and reality of the matter is that the relevant consideration and promise constituted part of a single transaction between the parties. …
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> … If there is a unifying, practical theme emerging from a consideration of the exception (as well as observation) discussed above, it would appear to us to be that, while the doctrine of past consideration remains part of our law, it would generally be difficult for a party to successfully argue that a perfectly sensible and legitimate commercial transaction is unenforceable simply because the consideration provided for the promise was past.
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> [emphasis in original omitted]

5.19 Rejecting the contention that the Originating Summons should be converted to a writ, Phang JA said (at [42]):

> At this point, we would like to make some observations on converting an originating summons to a writ action. While it was stated by this court in *Woon Brothers* ([23] *supra*) at [30] that a writ action is usually more appropriate when allegations of fraud are made, it cannot be the case that a conversion must be ordered the moment allegations of fraud are made by a defendant, for this would allow defendants to unnecessarily prolong and complicate otherwise straightforward and legitimate claims made against them, which is precisely the case here. Mr Chacko is wrong to cite *Woon Brothers* for the overly broad proposition that an originating summons must be converted the moment there are allegations of substantial disputes of fact, allegations of fraud or both. The alleged disputes of fact as well as allegations of fraud must be accompanied by the existence of at least a credible

matrix of facts and must be relevant to the dispute at hand, which was not the case here. [emphasis in original omitted]