BANKS AND EXCLUSION OF LOSSES FOR FORGED CHEQUES

Is it Reasonable?

Banks in Singapore typically exclude liability for payments of forged cheques drawn on a customer's account. The exclusion is contrary to the common law, which allocates the risk of forgery to the bank. It is argued here that such exclusions are unreasonable in the light of the customer's other duties and liabilities under the banking contract. However, having regard to the modern banking environment, it may be reasonable to impose other defined duties on the customer, beyond those recognised by the common law. Whether a customer should be saddled with the loss after a breach of those duties is a more difficult question and insurance should be explored for an equitable solution.

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I. Introduction

1 The old problem of allocating loss for forgery between bank and customer was recently in the spotlight when the President of the Law Society, Mr Michael Hwang SC, challenged the widespread banking practice in Singapore of excluding liability for forged cheques.[1] Mr Hwang's comments came in the aftermath of allegations in 2008 that a Singapore lawyer had misappropriated client funds in the region of $6m after forging his partners' signatures on cheques.[2] According to Mr Hwang, the bank that paid the cheques was "disputing liability" for

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1 Michael Hwang SC, "Apathy and Independence", *Law Gazette* (September 2009) at p 1; see also "Forged cheques: Should banks be liable for losses?" *The Straits Times* (3 October 2009).

2 "He flew to Philippines and billed his firm," *The Straits Times* (2 January 2008).

the forgeries, leaving the law firm with "heavy liabilities".[3] Third-party dishonesty provides the background to many commercial disputes, and banking law has, over the centuries, frequently had to grapple with the dilemma of which of two relatively innocent parties, bank or customer, must bear the loss in circumstances where Murphy 's Law suggests that the rogue or the funds, most likely both, will have disappeared.

2 It is right to question the Singapore banking practice of excluding liability for forged cheques: it is long settled in the common law that the risk of loss caused by third-party forgery falls on the bank. A bank can only pay monies from a customer's account with the customer's authority, commonly referred to as his mandate. It is irrelevant whether the bank was innocent or negligent in making the payment; if the cheque is forged, there is no mandate from the customer.[4] This position is reflected in the Bills of Exchange Act,[5] which provides that a forged signature is "wholly inoperative", and that a bank cannot rely on it to make a payment unless the customer is "precluded" from disputing his mandate.[6]

3 The circumstances in which a customer is precluded from disputing his mandate include those in which he is estopped from disputing the authenticity of his signature. The classic example, recognised by the House of Lords in *Greenwood v Martins Bank Ltd*[7] ("*Greenwood*"), is where the customer is in breach of the duty to notify the bank after becoming aware of forgery perpetrated on the account (the "*Greenwood* duty"). Apart from reporting known forgery, a customer also owes his bank a duty to exercise care in drawing his cheques (the "*Macmillan* duty"). This was settled by the House of Lords in *London Joint Stock Bank Ltd v Macmillan and Arthur*[8] ("*Macmillan*"). What must be noted about this duty is that it has no application in the context of forged signatures: the *Macmillan* duty only arises where the customer has drawn the cheque negligently, facilitating alteration, usually of the name of the payee and/or the amount. A bank that wishes to argue, for example, that the customer should have detected forgeries by examining his bank statements, or that the customer facilitated the

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3 Michael Hwang SC, "Apathy and Independence", *Law Gazette* (September 2009) at p 3; also "Forged cheques: Should banks be liable for losses?" *The Straits Times* (3 October 2009).

4 There is a lot of authority for this proposition, including *Hall v Fuller* (1826) 108 ER 279; *The Kepitigalla Rubber Estates Ltd v The National Bank of India Ltd* [1909] 2 KB 1010; *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80; *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273.

5 Cap 23, 2004 Rev Ed.

6 Bills of Exchange Act (Cap 23, 2004 Rev Ed) s 24.

7 [1933] AC 51.

8 [1918] AC 777.

forgery through the careless storage of his chequebook, will find no support in the common law (with the possible exception of Singapore, as discussed below), for a customer is not required to examine his bank statements or exercise care in such extraneous matters as the storage of the chequebook.[9]

4 Courts have, with few exceptions, resisted arguments advanced by banks that a customer's duties should be more extensive.[10] One of the best-known examples of this resistance came from the Privy Council in the Hong Kong case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[11] ("*Tai Hing Cotton Mill*"). In Singapore, however, the argument for a general duty of care on the customer to avoid loss through fraud found favour in *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd*[12] ("*Khoo Tian Hock*" and the "*Khoo Tian Hock* duty"). The High Court reviewed authorities in Singapore, the UK, Australia, New Zealand and Canada, and made a deliberate decision not to follow *Tai Hing Cotton Mill*. It held that a customer had an implied duty to the bank not to facilitate fraud. Its reasoning is summarised in the words: "To draw a distinction between the drawing of cheques on the one hand and other steps or omissions on the other hand is to create an artificial and unrealistic distinction. After all, fraud is not facilitated by the careless drawing of cheques alone."[13] This bold move has, however, not been confirmed by the Singapore Court of Appeal and there are indications from the highest court, in *Pertamina Energy Trading Ltd v Credit Suisse*[14] ("*Pertamina*"), that such confirmation may not be forthcoming. V K Rajah J said, *obiter*, that *Khoo Tian Hock* had "obscured" the legal position in Singapore and that a revision of the law in *Macmillan* and *Tai Hing Cotton Mill* was "unnecessary and perhaps even undesirable".[15]

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9 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80. It was accepted in this advice of the Privy Council, on appeal from the Hong Kong Court of Appeal, that English law and Hong Kong law were the same in regard to the issues raised.

10 An early rejection of wider duties came in *The Kepitigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010; that view was endorsed by the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80 at 105–107; see also the decisions of the Supreme Court of Canada in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1987) 40 DLR (4th) 385; the Australian decisions of *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd* (1981) 148 CLR 304, *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 and *Fried v National Australia Bank Ltd* (2001) 111 FCR 322; and in New Zealand, *National Bank of New Zealand Ltd v Walpole and Patterson Ltd* [1975] 2 NZLR 7 and *Bank of New Zealand v Auckland Information Bureau (Inc)* [1996] 1 NZLR 420.

11 [1986] 1 AC 80.

12 [2000] 3 SLR(R) 55.

13 [2000] 3 SLR(R) 55 at [221].

14 [2006] 4 SLR(R) 273.

15 [2006] 4 SLR(R) 273 at [54].

5 The perception among banks is that the customer's *Macmillan* and *Greenwood* duties are inadequate to protect them from the problem of fraud and forgery prevalent in their business. While the wider *Khoo Tian Hock* duty would probably address most of their concerns, its survival in the Singapore banking landscape is uncertain and it lacks precision.[16] Singapore banks have thus responded with the powerful tool that they wield in the form of standard terms and conditions ("T&C").[17] These are inserted into the contract concluded with customers on the opening of an account. Bank T&C in Singapore contain numerous clauses that shift risk to the customer, including the exclusion of liability for forged cheques; the forgery exclusion may be qualified, *eg*, by the proviso that the bank was not at fault. Other examples of exclusions that can be found in bank T&C range from those for delay or unavailability of services through to exclusions for failure to act in good faith, and include broad exclusions for losses arising from the use of electronic and automated banking facilities. Not all the risk-shifting provisions take the form of exclusion clauses; they may be drafted as increased customer duties or as indemnities given by the customer to the bank, or both. Thus, bank T&C may include a clause requiring the customer to prevent, for example, forgery; with a later provision excluding liability or taking an indemnity for any breach of duties by the customer. Most customers are unlikely to be aware of these provisions. Some, perhaps many, customers are unaware that there are extensive T&C that govern their account relationship. A customer's ignorance of the T&C or failure to comprehend their importance is evident in two Singapore cases, *Stephan Machinery Singapore (Pte) Ltd v Oversea-Chinese Banking Corp Ltd*[18] and *Elis Tjoa v United Overseas Bank*.[19] It is thought that this would be typical for the majority of customers. The reason for this ignorance is attributable to the way in which the contract for a bank account is concluded.

II. The contractual process

6 A customer wishing to open a bank account in Singapore is typically asked to sign an application form that states that the account will be governed by the bank's standard T&C, a copy of which should be given to the customer. The Singapore Code of Consumer Banking Practice ("the Banking Code"), published by the Association of Banks in

16 Banks may prefer to give content to the general duty to prevent forgery by identifying non-exhaustive steps that customers should take to prevent forgery, such as verifying bank statements.

17 For the purposes of this article, the standard T&C for a current or deposit account of five banks offering retail-banking services to the Singapore public were examined.

18 [1999] 2 SLR(R) 518 at [6].

19 [2003] 1 SLR(R) 747 at [7].

Singapore ("ABS"),[20] says that the T&C will be made "readily available" to the customer.[21] A prudent bank may ask the customer to sign a copy of the T&C for the bank's file. Where the customer does not sign the T&C, but only the application form stating that the contract will be governed by the T&C, the terms are imported by reference, a recognised method of incorporating terms into a contract.[22] In both cases, namely, actual signature of the T&C or signature only of the application form that incorporates the T&C by reference, the customer will in all likelihood not have read the T&C or even the fine print in the application form. What is significant though, in both cases, is that there is a signed contract and the customer is bound by it, subject to limited exceptions such as fraud and misrepresentation.[23] In the words of Hobhouse LJ[24] in *AEG (UK) Ltd v Logic Resource Ltd*,[25] there is a "fictional element of consent which has nevertheless to be accepted by contract law in the interests of having a coherent objective scheme".[26] The reason for its acceptance is the need for certainty in the interests of business efficacy. However, in *Ocean Chemical Transport Inc v Exnor Craggs Ltd*,[27] the Court of Appeal (England) thought that there may be a duty to bring "particularly onerous or unusual" terms, even in a signed contract, to the attention of the other contracting party, but this view was rejected by the Singapore High Court in *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd*.[28]

7 Without challenging the merits of the policy that holds persons to terms that they have put their signature to, irrespective of their

20 Available on the website of The Association of Banks in Singapore at <http://www.abs.org.sg> (accessed 1 February 2010).

21 Code of Consumer Banking Practice (effective November 2009) cl 9.a.i.

22 See *Elis Tjoa v United Overseas Bank* [2003] 1 SLR(R) 747 at [6] and *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 at [39]. The position may be different where the terms to be incorporated are not made available despite the request of the other party, see *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427 at 433; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 275E.

23 See *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805; *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113; *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 at [29]; *Stephan Machinery Singapore (Pte) Ltd v Oversea-Chinese Banking Corp Ltd* [1999] 2 SLR(R) 518 at [6]; *Elis Tjoa v United Overseas Bank* [2003] 1 SLR(R) 747 at [81].

24 Hobhouse LJ dissented on the issue of incorporation.

25 [1996] CLC 265.

26 *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 278B–C. Later, at 278H: "[I]t is a necessary incident of a law of contract that in various commercial and other situations parties must objectively be taken to have agreed to clauses even though they have not actually applied to those clauses, and indeed may never have taken steps to inform themselves of their content."

27 [2000] 1 Lloyd's Rep 446 at [48].

28 [2003] 1 SLR(R) 712 at [39]; see also *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 at [29].

knowledge of such terms, there is every reason why banks should not be content to rely on this objective appearance of consent tolerated by general contract law. Drawing a customer's attention to a term may be unnecessary to incorporate it into the contract, but it can only benefit the bank to do so. While the law operates on the basis that the customer is familiar with the T&C, the bank knows that he is not. Drawing the customer's attention to the term informs him of something he was unaware of and an informed customer is likely to be a better customer. It is not suggested that disclosure alone will render a harsh and one-sided term acceptable, but procedural fairness can promote the achievement of substantive fairness. Banks should pay attention to the reality of the customer's consent against a contractual background that tolerates objective (as opposed to subjective) consent to give rise to a binding contract,[29] and they should strive to achieve the former rather than rely on the latter.

III. Reasonableness of exclusions of liability

8 The revered principle of freedom of contract upholds the prerogative of contracting parties in most circumstances to alter the common law rules that would otherwise govern their contract. The legitimacy of shifting the risk attendant on forged cheques onto customers is to this limited extent indisputable. However, the foisting of one-sided, standard T&C by a dominant contracting party onto a weaker party, who has neither the time nor the ability (having regard to their complexity) to comprehend them, and who is captive because of his need for the goods or services in question and who, because of industry standardisation, cannot avoid the exclusion clauses, is controversial. Courts and commentators have had much to say on the subject, mostly reflecting poorly on the dominant party.[30] This concern about standard term contracts justifies an inquiry into how acceptable it is for banks to exclude liability for forged cheques. Indeed, the Unfair Contract Terms Act[31] ("UCTA") requires the bank's exclusion of liability for forged cheques to be reasonable. The main ground for this requirement under the UCTA is that the clause excuses the bank for

29 Words based on the dicta of Hobhouse LJ (dissenting on the issue of incorporation) in *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 279A. The desirability of informed consent is reflected in the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), where, in the Second Schedule, it is listed as a factor to be taken into consideration in determining the reasonableness of an exclusion or limitation clause.

30 See *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 406C–D; *A Shroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at 1316; Edwin Peel, *The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at pp 238–239; Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 2nd Ed, 2008) at pp 396–397.

31 Cap 396, 1994 Rev Ed.

breach of contract, namely, payment without a mandate;[32] alternatively, it may excuse the bank from liability for negligence;[33] and it arguably enables the bank to render performance that is substantially different from what the customer reasonably expected.[34] The issue of the reasonableness of the forgery exclusion extends beyond forged cheques to forgery of other payment orders such as funds transfer instructions and dishonest access to electronic and automated banking facilities.

9 So, is it reasonable for banks to contract out of liability for forgery and fraud? It is argued here that an important factor in determining the reasonableness of an exclusion of liability for forgery or fraud is the remainder of the T&C, including in particular the verification and conclusive evidence clause. A verification and conclusive evidence clause imposes a duty on a bank customer to examine his bank statements and notify the bank of any errors within a specified period of time, failing which the statement is taken as conclusive evidence of its contents and the customer is precluded from disputing any entries thereafter. The implication, and this is important, is that unauthorised or erroneous entries (most pertinently, debits), that are notified to the bank within the stipulated period, will be reversed, subject (it must be assumed) to the bank verifying the facts including that the debit did not result from a breach by the customer of his duties.[35]

10 The verification clause addresses, from the bank's perspective, the shortcomings of the *Greenwood* duty, which only arises where the customer has actual knowledge of a forgery.[36] The clause is controversial for a number of reasons, including that it enlarges the scope of the customer's duties by imposing an obligation to examine bank statements, something that the common law has persistently declined to

32 In terms of s 3(2)(*a*) of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), an exclusion of liability for breach of contract must be reasonable.

33 In terms of s 2(2) of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), an exclusion of liability for negligence not causing death or personal injury, must be reasonable.

34 In terms of s 3(2)(*b*)(i) of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), a contractual term entitling a party to render performance in a manner substantially different from what was reasonably expected, must be reasonable.

35 Primarily the *Macmillan* duty, and possibly the more general duty articulated in *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd* [2000] 3 SLR(R) 55, subject to the doubts expressed in *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273. In addition, there are the numerous additional duties imposed on the customer by the T&C, which if breached, the bank may raise to resist a claim for reinstatement of an unauthorised debit notified to them by a customer. This aspect will be discussed below.

36 See *Price Meats Ltd v Barclays Bank plc* [2000] 2 All ER (Comm) 346; *Patel v Standard Chartered Bank* [2000] 1 Lloyd's Rep Bank 229 at [63]; *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273 at [72].

do; it can apply to errors of which the customer is not aware and, if invoked by the bank, has the consequence of precluding a customer from objecting to an unauthorised debit on his account. This could happen while, for example, the customer is absent from home and unable to read his statement within the stipulated time,[37] a scenario prompting Dr Poh Chu Chai, a staunch critic of the clause, to describe it as "very draconian"[38] and, in effect, a forfeiture clause.[39] Indeed, the clause can be criticised for its harsh effect on a dilatory customer; yet it has been upheld by Singapore courts as reasonable under the UCTA[40] on a number of occasions,[41] including most recently by the Court of Appeal, although the carefully reasoned decision was confined to the context of a commercial customer.[42] As such, the clause, for present purposes, must be accepted as a contractual reality in T&C in Singapore. A detailed analysis of the verification and conclusive evidence clause will not be undertaken here but it will be argued that it is not reasonable for banks to shield themselves from the risks of third-party dishonesty through the use of both a forgery exclusion and the verification clause; further, that the verification clause is more defensible than the forgery exclusion: and, finally, that it is reasonable for banks to augment the customer's duties in other specific ways that are designed to reduce the likelihood of forgery.

IV. The modern banking environment

11 It is appropriate, first, to consider whether banks should enjoy greater protection, in any form, from third-party dishonesty than that given by the *Macmillan* and *Greenwood* duties. It is submitted that they should. Since 1933, when *Greenwood* recognised a customer's duty to report forgeries, the environment in which banks operate has changed dramatically. Banks are bigger; they operate in larger geographical areas than before with multiple branches thereby facilitating banking services to the masses.[43] Unavoidably, banking has become impersonal.[44] In the

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37 The example given by Poh Chu Chai, *Law of Banker and Customer* (LexisNexis, 5th Ed, 2004) at p 918.

38 Poh Chu Chai, *Law of Banker and Customer* (LexisNexis, 5th Ed, 2004) at p 918.

39 Poh Chu Chai, "Banking Law" (2006) 7 SAL Ann Rev 73 at 78, para 4.14.

40 Cap 396, 1994 Rev Ed.

41 *Stephan Machinery Singapore Pte Ltd v Oversea-Chinese Banking Corp Ltd* [1999] 2 SLR(R) 518; *Elis Tjoa v United Overseas Bank* [2003] 1 SLR(R) 747; see also *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195.

42 *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273 at [56]–[62].

43 The UK's Jack Report "Banking Services: Law and Practice Report by the Review Committee", (HMSO, London, Cm 622 February 1989) at p 9 referred to the "vast increase in the banked population". It put the figure at 30% of the adult population in 1959, and 87% in 1984. It considered this figure had risen possibly to 89% by 1989. According to the British Bankers Association, in 2007, banks were providing

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smaller, more intimate environment of the 18th and 19th centuries, banks, through the manager and other staff, would be acquainted with their customers and perhaps with their signatures. "It was a commercial reality in the 18th century, a time when the number of literates was small and merchant numbers even smaller, that traders knew each other's signature if not each other's face."[45] Customers are no longer known at their branch by sight, even less are their signatures recognised on sight. The impersonal nature of the bank-customer relationship is the reality of modern banking. Technology has facilitated new and quicker ways of doing the business of banking. Computerisation has reduced the importance of the branch and led to the centralisation and specialisation of bank activities. There is recognition of this in the judgment of Staughton J in *Libyan Arab Foreign Bank v Bankers Trust Co*:[46] "In the age of the computer it may not be strictly accurate to speak of the branch where the account is kept."[47] The bank's mandate, in the sense of being the means of verifying the customer's instruction,[48] is no longer confined to a written signature. It may now take more varied forms, such as a username and PIN for internet banking, or a card and a PIN for an ATM machine. It is to be expected that customer signatures are not recognised on sight.

12 The common law rule rendering banks liable for unauthorised debits from their customers' accounts developed in the horse and cart era, quite alien to the modern world. People were nowhere near as mobile as they are today and communication then was largely done in person or in writing delivered by messenger or post. It is trite that modern forms of transport and communication have altered the way in which we live and the conduct of banking business is no exception. An uncontroversial illustration is to be found in the seminal case of *N Joachimson v Swiss Bank Corp*[49] ("*Joachimson*") where Atkin LJ famously summarised the implied terms governing the banking relationship. The terms included the obligation on the bank to repay a deposit to the customer during banking hours and at the branch of the

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banking services to 95% of the British population; see <http://www.bba.org.uk>, "Top 10 facts" (4 June 2007) (accessed 15 November 2009).

44 See Emil Hayek, "*Canadian Pacific Hotels Ltd v Bank of Montreal*" (1988) 14 Can Bus LJ 361 at 369. In support of a broader common law duty on the customer, he points to the "depersonification of banking", a product of greater customer numbers, large corporate customers, volume of transactions and electronic processing.

45 *Per* John F Dolan, "Impersonating the Drawer: A Comment on Professor Geva's 'Consumer Liability in Unauthorised Electronic Funds Transfers'" (2003) 38 Can Bus LJ 282 at 283.

46 [1988] 1 Lloyd's Rep 259.

47 [1988] 1 Lloyd's Rep 259 at 270.

48 See the analysis of the banking mandate by Ross Cranston, *Principles of Banking Law* (Oxford University Press, 2nd Ed, 2002) at p 140.

49 [1921] 3 KB 110.

bank where the account was kept.[50] Today, a customer would be astonished if his bank were to tell him that withdrawals were possible only during business hours and at the branch of the account; any bank taking this position would certainly lose customers to rivals offering 24-hour automated and electronic banking facilities. This development in banking practice was relatively recently acknowledged by the Singapore Court of Appeal in *Damayanti Kantilal Doshi v Indian Bank*.[51] Citing the dramatic changes in banking since the 1920s due to technological developments, the court doubted whether the requirement for a demand at the branch where the account was kept was still good law.[52]

13 Arguments opposed to the enlargement of the customer's duties are often based on the historical allocation of risk that assumes a factual context that no longer exists, as discussed above, or on the bank's greater ability to bear the loss. In *The Kepitigalla Rubber Estates Ltd v The National Bank of India Ltd*[53] ("*Kepitigalla*"), Bray J said: "[T]he number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible."[54] In the words of Lord Scarman in *Tai Hing Cotton Mill*,[55] the "business of banking is the business not of the customer but of the bank".[56] And, forgery "is a risk of the service which it is their business to offer".[57] Despite the opposition of these cases to enlarged customer duties, they all recognised the right of banks to contract for additional protection.[58] The greater ability of banks to bear the loss from fraud or forgery is a relevant consideration, and this is reflected in the UCTA,[59] but a blunt application of a "means test"[60] is not compatible with the general approach of the law to loss allocation.[61] Arguments for

50 [1921] 3 KB 110 at 129–130.
51 [1999] 2 SLR(R) 1123 at [28].
52 [1999] 2 SLR(R) 1123 at [28].
53 [1909] 2 KB 1010.
54 [1909] 2 KB 1010 at 1025–1026.
55 [1986] 1 AC 80.
56 [1986] 1 AC 80 at 106.
57 [1986] 1 AC 80 at 106.
58 *The Kepitigalla Rubber Estates Ltd v The National Bank of India Ltd* [1909] 2 KB 1010 at 1025; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80 at 110; See also *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273 at [55].
59 Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) s 11(4). It is a relevant factor where liability is restricted "to a specified sum".
60 Term used by E P Ellinger in "Reflections on Recent Developments Concerning the Relationship of Banker and Customer" (1988) 14 Can Bus LJ 129 at 132.
61 Elisabeth Peden notes its limitations in "Policy Concerns behind Implication of Terms in Law" (2001) 117 LQR 459 at 471.

liability based on who is best able to bear it or insure against it were described by Professor P S Atiyah in 1995 as "going out of fashion".[62] The context of Professor Atiyah's comment was the Privy Council's decision of *Tai Hing Cotton Mill*.[63] Taken to its logical extreme, the means test could lead to the downfall of a bank.

14 Fraud and forgery perpetrated through the banking system are a worldwide problem costing millions if not billions of dollars each year.[64] There are some forgeries and alterations that, even with the exercise of due diligence by the bank, cannot easily and confidently be identified. The Court of Appeal in *Pertamina* recognised the "onerous, if not near impossible task of detecting forgeries given the advent of modern technology".[65] The difficulty in detecting forgery puts the bank in an invidious position for it is under a duty to comply promptly with a valid payment instruction[66] and faces liability for damages if it fails to do so.[67] Thus, a bank faced with a skilled, undetected (and maybe undetectable) forgery will comply with the mandate promptly, unaware that it should refuse payment.

V. The forgery exclusion and the verification clause compared

15 A comparison of the forgery exclusion and the verification clause reveals that they operate quite differently. The verification clause does not relieve banks from the responsibility of paying only on a valid mandate, although, in an *ex post facto* sense, banks may rely on the clause to escape the consequences of an unauthorised payment when no notification of the error has been given to them. This consequence resonates with *Greenwood* where the customer's failure to comply with his duty to report known forgery relieved the bank of responsibility from paying without a mandate. The difference between *Greenwood* and the verification duty is that under the latter the customer is penalised

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62 P S Atiyah, *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 5th Ed, 1995) at p 206.

63 [1986] 1 AC 80.

64 Tony Wojciechowski and Geoff Newiss, using data obtained from the British Home Office, put the value in the UK in 2001 of payment fraud at £75m, and plastic card fraud at £114m. Forged cheques made up a significant component of the payment fraud statistic: see *Crime in England and Wales 2001/2002: Supplementary Volume* (Claire Flood-Page & Joanna Taylor eds) (RDS Publication, 2003) at pp 78–79 at <http://www.homeoffice.gov.uk/rds/pdfs2/hosb103.pdf> (accessed 1 February 2010).

65 *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273 at [61].

66 See *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 824; *N Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 119; *Westminster Bank v Hilton* (1926–1927) 43 TLR 124 at 129; *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176 at 184.

67 See *Marzetti v Williams* (1830) 109 ER 842; *Rolin v Steward* (1854) 139 ER 245.

irrespective of whether he was aware of the error. The forgery exclusion clause, on the other hand, excuses banks from non-compliance with their mandate whenever there is forgery. The outcome is in this sense predetermined. To illustrate, in a scenario of a forged cheque being paid, the bank will ordinarily be liable to re-credit the diligent customer's account once notified of the erroneous payment in accordance with the verification clause; the outcome is therefore dependent on the customer's verification and notification. On the other hand, if there is an exclusion clause for forged cheques, the bank can refuse to reverse the erroneous debit. Thus, the impact of the verification clause on the customer is less drastic than the forgery exclusion; it gives the customer the opportunity to avoid the loss by identifying in a clear and straightforward way what action is required – verify and notify. In contrast, allocating the risk of forgery to the customer indirectly forces him to take steps to prevent forgery. He is not told what those steps might be, thus making it a more diffuse and, therefore, a more difficult obligation to meet.

16 It is also apparent that there is potential for a clash between the verification clause and the forgery clause. In terms of the verification clause, a customer who diligently verifies and notifies will be entitled to demand that unauthorised transactions be reversed, but in the very scenario that the verification clause is targeted at, namely, fraud or forgery, there is a separate clause excusing bank liability for forgery. In other words, diligent verification will be of no assistance to the customer in the event of forgery. For these reasons, it is submitted that the verification clause is fairer to the customer; it does less offence to the bank's common law obligation to honour the mandate while at the same time giving the bank protection from third-party dishonesty. For these reasons, the forgery exclusion is rejected for being unreasonable, unnecessary in the light of the verification clause and incompatible with it.

17 The application of the UCTA to an exclusion of liability for forgery has already been mentioned. The possibility of recourse by the customer under the Consumer Protection (Fair Trading) Act[68] ("CP(FT)A") should also be considered.[69] The CP(FT)A, effective since 2004, was amended in 2008 to extend to transactions that were previously excluded, including contracts for financial products and services. It enables a customer (meeting the definition of a consumer – essentially an individual acting in his private capacity) to sue a bank for an unfair practice. An unfair practice occurs, *inter alia*, when the bank omits to do or say anything that may mislead or deceive the customer or where the bank takes advantage of the customer if the bank knows that

68 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed).

69 The author is grateful to the anonymous referee for making this point.

the customer is not able to protect his own interests or understand the transaction.[70] An unfair practice may happen before, during or after the transaction in question.[71] The CP(FT)A gives a non-exhaustive list of specific unfair practices;[72] those that are pertinent in this context include representing, in a way that is deceptive or misleading, that a transaction does or does not involve rights, remedies or obligations,[73] taking advantage of a consumer by the use of terms that are harsh or so one-sided that they are unconscionable[74] and using small print to hide or mislead a material fact.[75] The reasonableness of the bank's conduct is relevant to the determination of whether there has been an unfair practice.[76] This underscores the argument made earlier about the desirability for greater disclosure by the bank at the time of opening the account. The provisions of the CP(FT)A cannot be contracted out of,[77] and ambiguous provisions are interpreted against the bank.[78] One limitation on the use of the CP(FT)A by an aggrieved customer is the claim limit of $30,000,[79] although any excess can be abandoned,[80] an option that a customer with a slightly larger claim may contemplate. Remedies under the CP(FT)A include damages, restitution of money and variation of the contract.[81]

VI. Additional customer duties

18 Irrespective of one's view on the merits of the argument for a greater role on the part of the customer in preventing dishonesty in the banking system, it is a contractual reality that banks in Singapore expect more from their customers than does the common law. Even those opposed to any enlargement of the customer's traditional duties to the bank, surely accept that certain additional duties are essential or cannot be avoided. The best illustrations lie in the area of electronic banking. Here the customer's mandate takes the form of a combination of a username, PIN number(s) and a card. While the codes themselves are unique, their deployment is not and a fraudulent instruction can be indistinguishable from an authentic one. It is obvious that banks cannot operate a system of electronic banking without requiring customers to safeguard their means of access to the electronic systems. Some T&C for

70 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 4.
71 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 5.
72 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) Sched 2.
73 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) Sched 2, para 9.
74 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) Sched 2, para 11.
75 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) Sched 2, para 20.
76 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 5.
77 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 13.
78 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 18.
79 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 6(6).
80 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 6(5).
81 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 7(4).

electronic services spell out the security duties of the customer. These include the duty to look after an ATM card, to report loss or theft of the ATM card, not to write the PIN number on the card, not to record a PIN in a way that will be easily recognisable; to log off after accessing a bank account *via* the Internet, *etc*. The need for these safeguards is stressed in the Monetary Authority of Singapore ("MAS") Guidelines[82] and the Banking Code.[83] The verification clause, on its own, provides inadequate protection in such a situation. A customer's account may be emptied in the period between statements once the security of the electronic mandates has been breached. Of course, the bank is responsible for setting up a safe system, and implementing safeguards such as daily withdrawal limits, customer profiling to detect out-of-character transactions and system inspections and monitoring,[84] but the safest system in the world will be brought to its knees by customers who are reckless in safeguarding the means of access to these payment channels.[85]

19 If it is accepted in the context of electronic banking that customers must safeguard their access cards and PINs, it is only a small step to justify analogous duties for other payment mechanisms, such as cheques. While it may be unreasonable for banks to saddle customers with liability for forged cheques, is it unreasonable to require customers to safeguard their chequebooks? In addition to the exclusion for forged cheques, bank T&C in Singapore have terms requiring customers to safeguard their chequebooks and to notify the bank of non-receipt of a new chequebook or of loss or theft of cheques/a chequebook. These duties are specific examples of how a customer may reduce the risk of forgery. The exact provisions differ among banks. Of those examined, all impose a duty of safekeeping on the customer but some articulate the duty as a duty of care while others are absolute.

20 The bank's concern is obvious: a chequebook in the wrong hands can lead to payments without a mandate. Diligent verification of bank statements is an effective way in which to identify when a chequebook has fallen into the wrong hands, but prevention is better than cure. The case of *Khoo Tian Hock*[86] is in point. The customer (a husband and wife with a joint current account) claimed against the bank for monies paid out on cheques, which the court found had been

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82 MAS, *Internet Banking and Technology Risk Management Guidelines* (2 June 2008), see Section 11, "Customer Education".

83 Code of Consumer Banking Practice (effective November 2009), Appendix I "2. Protect Your Accounts".

84 This is reflected in the MAS, *Internet Banking and Technology Risk Management Guidelines* (2 June 2008), see cl 5.2, "Security Practices".

85 A scan of T&C for electronic banking services reveals that banks are concerned about the potential for loss in this area and commonly render the customer liable for any transaction processed using the correct access data.

86 [2000] 3 SLR(R) 55.

forged by their son, who had a previous history of dishonest conduct. On the face of it, the bank had no mandate to make the payments and the customer was therefore entitled to have the debit entries reversed. The bank claimed, however, that the customer had been negligent in a number of ways. The court held that a customer has an implied duty to the bank not to facilitate fraud and the customer had breached this duty by allowing their son to have access to the chequebooks. They were accordingly not entitled to succeed in their claim.

21 The case illustrates the importance of safeguarding a chequebook where there is a known fraudster in one's midst. More broadly, the threat of opportunist crime is prevalent enough for customers to know the need to safeguard their assets, whether in the banking context or otherwise. For this reason, duties to safeguard chequebooks and to notify their loss or theft are surely reasonable; but tricky questions can arise. For example, can the customer carry the chequebook around on his person without breaching the duty, is the duty met by keeping the chequebook in a drawer at home or must the chequebook be kept under lock and key? The case of *Khoo Tian Hock*[87] illustrates that what may be reasonable for one customer may not be reasonable for another and banks should allow for flexibility in this regard. This suggests that a duty of care is more appropriate than an absolute duty. Coupled with the verification clause, specific duties such as these to safeguard cheques and report their loss, provide a bank with good protection from dishonesty. The point is that banks should identify where the vulnerabilities lie, and if it is with the customer, the T&C should specify what avoidance measures are expected from him. It is not acceptable, however, for banks to simply exclude liability for forgery because this undermines the fundamental requirement of a mandate and there are fairer ways for banks to reduce the risk with customer co-operation. A blanket exclusion for forgery means banks are washing their hands of a risk inherent in their business.

22 The reasonableness of a duty to notify the bank of non-receipt of a new chequebook is more problematic. Again, there are drafting variations; some T&C exclude bank liability for chequebooks not received, others put the risk of loss from failed delivery of a new chequebook on the customer. Some banks automatically send a new chequebook to the customer when their computer system alerts them that the customer is approaching the end of his chequebook. In such a case, a customer will not have the receipt (or non-receipt) of the chequebook on his mind. He will have no yardstick by which to measure an unusual delay in receipt of the chequebook. T&C should take account of this; the problem can be remedied, for example, by mailing a separate letter informing the customer of an automatic dispatch of a

87 [2000] 3 SLR(R) 55.

chequebook, coupled with a direction to notify the bank in the event of non-receipt. Additional security measures should also be taken, such as shrink-wrapping, that may reveal tampering with the cheque book before it reaches the customer. A duty to notify apparent tampering with the chequebook is reasonable and would probably be required under the broad *Khoo Tian Hock* duty. It is submitted that the duty to notify non-receipt of a cheque book would be reasonable if the customer is informed by separate communication that a cheque book has been posted. The T&C will usually give the bank the right to choose the method of delivery of the chequebook, and will typically state that the risk of delivery is on the customer. In dispatching chequebooks to customers, banks must act reasonably; they cannot, by passing the risk of delivery to the customer, ignore realities of which they are aware. Thus, if it is known that the postal system is unreliable or that there is a high incidence of chequebooks being stolen in the course of posting, banks should not be able to turn a blind eye to the risk and rely on their T&C to protect them when losses ensue. The delivery clause would be improved by inserting the requirement that the bank act reasonably in choosing the method of delivery.

23 If it is accepted that a bank is entitled to impose on the customer, additional, defined and reasonably attainable duties to combat particular vulnerabilities, a more troublesome question is whether it is justified for a bank to saddle the customer with the loss from a forgery where the customer has breached any of these additional duties such as to safeguard, or notify non-receipt of, a chequebook. As drafted, the typical T&C would entitle the bank to deny liability for a breach of these additional obligations. Having regard to the amount involved, the nature of the customer's "fault" and the bank's role in the payment, which may or may not be negligent, is it equitable for the customer to bear the loss? The equities will vary according to the facts of each case but it is not difficult to imagine a realistic scenario in which it would be reasonable to penalise the customer at least to some extent. A fairer outcome may only be possible by apportioning the loss between the parties. The UK's Jack Report recommended that a bank should be able to raise a defence of contributory negligence where the customer has been so neglectful that it is inequitable for the bank to bear all the loss.[88] Practically, however, it may be difficult and expensive to establish the parties' respective degrees of fault and these factors will invariably disadvantage the customer.[89] Without detracting from the need for

88 *Banking Services: Law and Practice Report by the Review Committee* (HMSO, London, Cm 622, February 1989), p 48, Recommendation 6(1).

89 See the criticism of the fault-based system in the banking context by E Rubin in "Efficiency, Equity, and the Proposed Revision of Articles 3 and 4" (1991) 42 Ala L Rev 551 at 569–570. Also see Benjamin Geva, "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 288.

additional customer duties to reduce third-party dishonesty, the best solution may lie in the creation of an insurance safety net.

VII. An insurance solution

24 Losses from dishonest third-party activity on an account may be crippling for the customer, as observed by the court in *Kepitigallla*.[90] In these circumstances, an insurance option should be investigated. The possibility of an insurance solution has been suggested before, for instance by Professor Benjamin Geva. In 1998, Professor Geva put forward a proposal for the allocation of loss between bank and customer arising from a forged cheque.[91] His goals were loss reduction and loss distribution. In summary, Professor Geva's proposal is that the risk of forgery should primarily be on the bank but some loss may be passed on to the customer if the bank was not negligent in making the payment and the customer did not report loss or theft of his chequebook/cheque forms to the bank. In such cases, the customer should be liable for a small sum to encourage diligence in the conduct of the account. The proposal envisages that the bank may insure against the risk, and that the costs may be passed on to customers in the form of insurance premiums or lower returns on deposits.[92] Two additional aspects of Professor Geva's scheme are that the customer would also have a duty of care to verify his bank statements and customers that repeatedly offend with occurrences of forged cheques on their accounts should face additional sanction.

25 It would be unfortunate for an insurance solution to become a subsidy by the greater customer body of careless, and in some cases, reckless customers, who, in turn, have no incentive to change their habits.[93] Loss reduction is superior to loss distribution and this underscores the view expressed above that reasonably attainable, defined duties may reasonably be imposed on the customer to reduce the risk of dishonest third-party activity on his bank account. Nevertheless, it may be possible to supplement this approach with a suitably structured insurance scheme that neither penalises diligent customers unduly nor encourages complacency among careless customers. There are numerous questions which would need to be resolved, including who should organise such a scheme, who should pay for it, should it be

90 "To the individual customer the loss would often be very serious; to the banker it is negligible": [1909] 2 KB 1010 at 1026.

91 Benjamin Geva, "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 288–290.

92 Benjamin Geva "Allocation of Forged Cheque Losses" (1998) 114 LQR 250 at 288–289.

93 See these views expressed by Keith W Perrett in "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245 at 271.

compulsory or optional, at what level should premiums be set, and other details relating to the cover. There are many possible permutations, the details of which will have to be left to the experts. However, some tentative comments follow. The Singapore banking industry is in a position to negotiate collectively for coverage at a competitive rate. As Mr Hwang has pointed out,[94] insurers and reinsurers already offer what the industry calls a "Banker's Blanket Bond", an insurance product for banks that covers a range of banking risks, including forgery on cheques. Thus, banks can, and presumably do, insure against the risk of loss from dishonesty but customers are not afforded the benefit of this cover. The availability of insurance to protect the bank against loss from forged cheques would be a relevant factor in determining the reasonableness of the exclusion under the UCTA,[95] as illustrated by *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*.[96] Furthermore, an exclusion of liability for forgery despite having insurance for forgery in place, may be unreasonable under the UCTA and possibly an unfair practice under the CP(FT)A.[97]

26 If existing insurance options are not suitable, a non-profit, mutual scheme devised and operated by Singapore banks, and perhaps other financial institutions, may be viable. However the insurance may be procured, it should be more visible and promoted appropriately to account holders. The costs, which should be kept to a minimum, will ultimately be borne by customers, thus a transparent, direct levy may help to bring home the problem of dishonesty and the need for vigilance although it may also be appropriate for banks to accept that they should subsidise such cover.

VIII. Conclusion

27 Dishonesty through the banking system is a collective problem that warrants a collective response. Additional responsibilities on the customer promote bank and customer co-operation in the fight against fraud. The aim, to use the words of Montgomery J in the Canadian case of *Canadian Pacific Hotels Ltd v Bank of Montreal*,[98] is "so that both the bank and its customer are jointly engaged in prevention and

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94 Michael Hwang SC, "Apathy and Independence", *Law Gazette* (September 2009) at p 1.

95 It is a relevant factor where liability is restricted "to a specified sum", see Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) s 11(4)(*b*). It is submitted that it is also relevant where liability is excluded.

96 [1983] 2 AC 803. The author is grateful to the anonymous referee for this point. In *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*, the relevant statute was the predecessor of the UK's Unfair Contract Terms Act.

97 Cap 52A, 2009 Rev Ed.

98 (1981) 122 DLR (3d) 519.

minimization of losses occurring through forgeries".[99] The problem is bigger than the issue of apportionment of liability between bank and customer; it is about reducing the occurrence of dishonesty for the greater prosperity of society.

28 Mutuality is a desirable goal in the allocation of duties and risk in the bank-customer relationship. It harnesses the commendable ideal of two parties in an ongoing, long-term contractual relationship, each making their contribution to its success.[100] The three seminal cases of the 20th century concerning the bank customer's duty all recognised and upheld the ideal of mutuality in principle. Thus, in *Macmillan*, Viscount Haldane spoke of reciprocal, correlative and complementary obligations;[101] and Lord Shaw of "reciprocal obligations".[102] In *Joachimson*, Atkin LJ said the banking contract involves "obligations on both sides",[103] and in *Greenwood*, in the Court of Appeal, Scrutton LJ spoke of mutual duties[104] and corresponding duties[105] in the bank-customer relationship.

29 The need for mutual responsibility in banking is particularly evident in the area of self-service electronic banking. This is recognised by the bank regulatory authority in Singapore, the MAS,[106] and reinforced by the Singapore Banking Code, which says the security of self-service systems "also relies on your co-operation".[107] The fast processing of cheques and funds transfers and the availability of automated banking facilities are ways in which banks are able to meet the needs of their customers. Customers cannot on the one hand demand the benefits of 24-hour banking facilities, rapid clearance of cheques, fast processing of funds transfer instructions and relatively low charges, while on the other hand insisting on a meticulous, manual examination of all instruments and bespoke execution of transactions. Banks can deliver the greater volume and speed which is expected but in return they require some vigilance from customers in relation to their own affairs.

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99 (1981) 122 DLR (3d) 519 at 533. Montgomery J was referring to a sophisticated commercial customer having a duty to implement internal controls to minimise forgeries. The decision of the trial court was overruled by the Canadian Supreme Court, see (1988) 40 DLR (4th) 385.

100 See a similar view and argument by M H Ogilvie in "Bank Accounts and Obligations" (1986) 11 Can Bus LJ 220 at 225–226.

101 *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 814.

102 *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 824.

103 *N Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127.

104 *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 at 380.

105 *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 at 381.

106 The important role of the customer is reflected in the MAS, *Internet Banking and Technology Risk Management Guidelines* (2 June 2008), particularly cll 10 and 11.

107 Code of Consumer Banking Practice (effective November 2009) Appendix I, cl 2.

30 At the same time, banks must be careful not to abuse their dominant contractual positions. The focus here has been the exclusion of liability for forged cheques but, as has been pointed out, the T&C weave a web of protection around banks, in the form of the verification and conclusive evidence clause and numerous other exclusions, customer duties and indemnities. Only some of these have been highlighted. If an identifiable vulnerability can be addressed through reasonable customer action, it should be drafted as a duty so as to specify what is required from the customer and he should be informed of it at the time of contracting. Duties that are reasonably necessary to safeguard against the threat of third-party dishonesty may be acceptable; each must be considered in its context. To the extent that no reasonably attainable customer action can combat the risk, it should lie where it falls under the common law, *ie*, on the bank. The argument against the forgery exclusion is partly premised on the existence of a verification and notification duty in bank T&C and on the view that a suitably drafted verification and conclusive evidence clause is reasonable. Indeed, the reasonableness of the clause has been upheld by the Singapore courts in the face of challenges under the UCTA.[108] However, an analysis of the issues that arise under the clause are beyond the scope of this article.

31 It is desirable for banks to pay attention to their contractual procedures when customers open bank accounts. A more transparent process offers real benefits: it reflects well on the bank that is seen to be contracting more fairly despite its dominant contractual position; it is likely to produce a better customer, more in harmony with the bank and their mutual desire to avoid dishonest activity affecting the customer's bank account; and in appropriate situations, in a dispute with the customer, it allows the bank to insist on its contractual rights with a clearer conscience. Customers should be made aware of the risks attendant on the operation of a bank account. Their attention should be drawn to their duties and the risks flowing from neglect of those duties, and banks should accept responsibility for customer education in these matters. There is a growing emphasis on the need for banks to assume an educational responsibility toward their customers.[109] Telling the

108 *Elis Tjoa v United Overseas Bank* [2003] 1 SLR(R) 747; *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273 at [56]–[62]; see also *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195; *Stephan Machinery Singapore Pte Ltd v Oversea-Chinese Banking Corp Ltd* [1999] 2 SLR(R) 518.

109 See, for example, the Jack Report "Banking Services: Law and Practice Report by the Review Committee", (HMSO, London, Cm 622, February 1989) at p 48. Recommendation 6(3). recommended that banks be required to give customers "a fair and balanced view" of their terms "and of the rights and obligations that exist on each side". The Singapore Banking Code (effective November 2009) reflects similar sentiments: see cl 3.e, "Transparency" relating to products and

(*cont'd on the next page*)

customer what is expected of him under the contract weakens the argument that a clause is unreasonable. From a practical perspective, if bank staff are trained to spend five minutes highlighting the important clauses setting out the customer's duties, the level of customer compliance is likely to be higher. The education process should not stop at the account-opening stage. Singapore banks print messages to customers in bank statements on matters ranging from interest rates to spending incentives. Prominent, timely reminders of the need for vigilance would go a long way in keeping the duties current in the customer's consciousness.

32 Finally, as alluded to earlier, it is appropriate to consider whether there is an insurance solution to the problem of forged cheques. In the newspaper story that prompted this article, the ABS is reported as saying that insurance was not the solution because of the increased costs that would be passed on to customers. It is not self-evident, however, that the cost would be at such a level as to pose an obstacle. On the other hand, the moral hazard of customers being complacent about their exposure to losses because of insurance protection should be avoided. To achieve this, a sophisticated combination of premium levels, payment thresholds and no-claims rewards may be required, taking into consideration the size of the account, level of activity on the account and whether it is a business or personal account. Any insurance solution should respect, and not undermine, the underlying premise of this article, that customers must accept greater responsibility for the integrity of their bank accounts than required by the *Macmillan* and *Greenwood* duties.

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services; cl 5, "Information"; cl 9, "Terms and Conditions". Also the MAS, *Internet Banking and Technology Risk Management Guidelines* (2 June 2008), particularly cl 11, "Customer Education".