5. BANKING LAW

Dora **NEO**
MA (Oxford), LLM (Harvard);
Barrister (Gray's Inn); Advocate and Solicitor (Singapore);
Associate Professor and Director, Centre for Banking & Finance Law,
Faculty of Law, National University of Singapore.

Banker and customer

Bank's liability for unauthorised transactions

5.1 There were not many banking cases decided in 2018, and of these, *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd*[1] ("*Major Shipping*") arguably concerns the most significant banking law issues to have arisen in the course of the year. The decision itself, however, has not garnered much attention: the High Court decision in January 2018 has not been reported, and the plaintiff's appeal to the Court of Appeal was dismissed in September 2018 with no written grounds of decision rendered.

5.2 In *Major Shipping*, the plaintiff was a company incorporated in the British Virgin Islands and was in the business of trading and shipping cement clinker. The beneficial owners of the company were Majnu and Alam. The plaintiff sued the bank for making four unauthorised transfers totalling more than $1.8m to third parties from the plaintiff's bank account ("the Four Instructions"). The transfer instructions were given in the form of remittance application forms that bore signatures consistent with the specimen signature in the bank's records for Majnu. These forms were attached to e-mails sent to the bank from Majnu's Yahoo e-mail account and were also faxed to the bank. The plaintiff denied that the transfer instructions were given by Majnu. It argued that the bank was not authorised to act on the four instructions, that the bank had breached its duty to use reasonable care and skill and that the bank breached its duties to have the necessary facilities in place to prevent unauthorised transfers. The learned judge identified three main issues that had to be decided:

(a) Did the bank breach its duties to the plaintiff?

(b) Did the exclusion clause in the bank's standard terms ("the Standard Terms") and the letter of indemnity ("LOI") exclude the bank's liability for the plaintiff's loss?

1 [2018] SGHC 4.

(c) Was there contributory negligence on the plaintiff's part?

The first and second issues will be explored below.

Good faith

5.3 One question that was relevant to the first and second issues was the meaning of the term "good faith". Under the Standard Terms, the bank was authorised to act on the customer's payment instructions,[2] which meant instructions in relation to any account, transaction or service which the bank "believe[s] in good faith has been given by an Authorised Person".[3] Further, under the LOI, the customer acknowledged the risks involved in sending instructions via electronic communication and agreed to bear all risks, and the bank would not be liable for any losses or damages arising provided it had "acted in good faith".[4] The plaintiff argued that the meaning of "good faith" had to be understood in its context and this included (a) the other provisions of the account opening documents, particularly the term that required the bank to act with reasonable care and skill; (b) the bank's internal procedures; and (c) relevant banking practices in Singapore.[5] The plaintiff's position was that the bank had to act in accordance with these standards before it could be said to have acted in good faith, and contended that it had not. The judge applied the decision in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*[6] ("*HSBC Trust v Toshin*"), where the Court of Appeal stated:[7]

> … At its core, the concept of good faith encompasses *the threshold subjective requirement of acting honestly*, as well as *the objective requirement of observing accepted commercial standards of fair dealing* in the performance of the identified obligations. … [emphasis added by the High Court in *Major Shipping*]

2 See cl 4.6 of the Standard Terms, set out in *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [8].

3 See cl 1.1 of the Standard Terms, set out in *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [6].

4 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [11].

5 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [45].

6 [2012] 4 SLR 738.

7 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [47], quoting *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45].

The Court of Appeal in *HSBC Trust v Toshin* explained that what these accepted commercial standards of fair dealing require "will depend heavily on the commercial nature and purpose of the contract in question".[8] The plaintiff in *Major Shipping* argued that the bank would not have acted in good faith if it had acted without reasonable care. The judge was of the view that the concept of good faith "incorporated the subjective element of acting honestly, and the objective element of a lack of gross negligence or recklessness".[9] He rejected the argument that the objective aspect of good faith required the bank to act with reasonable care. He was of the view that the objective component of good faith required only that the bank acted without gross negligence or recklessness.[10] This interpretation was consistent with the exclusion clause in the LOI, which excluded the bank's liability for all loss except to the extent that such loss was caused by "fraud, gross negligence or wilful misconduct" on the bank's part.[11] The judge also rejected the plaintiff's argument that the bank had to obtain call-back confirmation of the plaintiff's instructions before executing them, so as to be considered as acting in accordance with "the spirit of its own internal policies and procedures" and relevant banking practices in Singapore, and therefore to be said to have acted in good faith.[12] The gist of this argument was that the bank would only have acted in good faith if it had obtained call-back confirmation of the plaintiff's payment instructions before acting on them.[13] The judge found that such a requirement would be inconsistent with the clauses in the Standard Terms and the LOI, which envisaged that the bank was not required to obtain further confirmation with the plaintiff before acting, and would not be a legitimate interpretation of the term "good faith".[14]

Authorisation

5.4 The plaintiff argued that Majnu did not issue the Four Instructions, and that the plaintiff had been a victim of an unknown

8 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [49], quoted in *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [47].

9 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [53].

10 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [53].

11 Letter of Indemnity cl 10.1. See *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [51].

12 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [52].

13 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [52].

14 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [52].

fraudster who had issued the Four Instructions to the bank. The bank's case was that the plaintiff had to adduce clear evidence of the fraud that it alleged, and it had failed to meet this evidentiary burden. After a detailed examination of the facts, the judge found on the balance of probabilities that Majnu did not issue the Four Instructions to the bank.[15] The relevant question then became whether the bank had nevertheless believed in good faith that Majnu had issued the Four Instructions, and was therefore authorised to execute them under the Standard Terms,[16] as explained above. In view of the judge's interpretation of "good faith", he considered that the bank would have believed in good faith that Majnu issued the instructions if it held this belief honestly, and without recklessness or gross negligence on its part. The judge went through the evidence in detail in his consideration of whether the bank was negligent or grossly negligent in believing that Majnu had issued the instructions, and concluded that it not been negligent, let alone grossly negligent, in so believing. He therefore concluded that the bank was acting within its authority under the Standard Terms in executing the Four Instructions.

Implied terms

5.5 One of the plaintiff's arguments in *Major Shipping* was that the bank had breached implied terms to (a) act in accordance with its internal risk management procedures; (b) take steps and/or have the necessary facilities to prevent unauthorised fund transfers; and/or (c) comply with the relevant Monetary Authority of Singapore regulations and guidelines.[17] The judge referred to the three-stage test in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[18] for the implication of terms:[19]

> (a) The first step is to ascertain how the gap in the contract arises. *Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.*
>
> (b) At the second step, *the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy*.

15 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [64].
16 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [65].
17 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [97].
18 [2013] 4 SLR 193.
19 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [98].

> (c) Finally, the court considers the specific term to be implied. *This must be one which the parties, having regard to the need for business efficacy, would have responded 'Oh, of course!' had the proposed term been put to them at time of the contract.* If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.
>
> [emphasis added by the High Court in *Major Shipping*]

Applying this test, the judge did not accept that there were implied terms as asserted by the plaintiff. He stated:[20]

> First, the plaintiff argued that there was a gap in the contracts because they did not make any provision regarding the duties that the plaintiff contended for. In my view, the Account Opening Documents extensively set out the duties owed by the Bank to the plaintiff. There was no gap to be filled by an implied term. Secondly, I found that it was not necessary in the business or commercial sense to imply the duties that the plaintiff contended for. Finally, I found that none of the implied duties that the plaintiff contended for satisfied the officious bystander test.

As the *Major Shipping* decision shows, the requirement in Singapore law that a precondition for a term to be implied is that there must be a gap in the contract which has arisen because the parties did not contemplate the gap could be hard to satisfy in banking contracts which have set out the parties' duties in detail.

Exclusion of liability

5.6 Given the judge's conclusion that the bank was acting within its authority under the Standard Terms in executing the Four Instructions, there was no need for him to consider the plaintiff's arguments that the bank could not rely on the exclusion clauses in the Standard Terms and the LOI to exclude its liability to the plaintiff. However, he proceeded to do so, for the sake of completeness. Of greatest general interest in this part of the judgment is the discussion of whether cl 10.1(a) of the Standard Terms contravened ss 2(2) and 3(2) of the Unfair Contract Terms Act[21] ("UCTA") on the basis that it unreasonably restricted the bank's liability for negligent conduct. Section 10.1(a) of the Standard Terms provided:[22]

20 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [99].

21 Cap 396, 1994 Rev Ed.

22 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [10].

> We are not liable for any Loss that You suffer or incur as a result of, arising from or in relation to, any Service, Channel, System Materials or Transaction (and the provision or execution of any of the foregoing), any act or omission, breach of contract or duty or any tort on Our part. … We remain liable for Your direct loss to the extent it is caused by any fraud, gross negligence or wilful misconduct on Our part …

Under s 11(1) of the UCTA, the test for reasonableness is whether the term was:

> … a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

Assessing the reasonableness of cl 10.1(a), the judge stated:[23]

> In my judgment, cl 10.1(a) satisfied this test of reasonableness. The plaintiff is a commercial entity who entered into a contractual relationship with the Bank in the course of its business. The banking experts agreed that cl 10.1(a) was a clause which is 'commonly found in the account opening documents and standard terms of Singapore banks'. I saw nothing unreasonable in the Bank seeking to exclude liability for negligence given the volume of transactions it handles for various customers. In the circumstances, I found that cl 10.1(a) of the Standard Terms did not contravene the UCTA.

This is probably the first time that a decision to this effect (albeit *obiter*) has been categorically made in the Singapore High Court: that it is reasonable under the UCTA for a bank to exclude liability for negligence in carrying out its customer's instructions.

5.7 Four observations will be made here. First, cl 10.1(a), set out above, did not attempt to exclude liability for fraud, gross negligence or wilful misconduct on the bank's part. Therefore, a line must be drawn between these types of acts, and acts which were negligent without being grossly so. It was exclusion of liability for the latter which fell to be considered in the *Major Shipping* decision, and which, in the opinion of the judge, satisfied the reasonableness test in the UCTA. Second, the judgment seems to suggest that the fact that a clause is "commonly found in the account opening documents and standard terms of Singapore banks" would be a factor which pointed towards its reasonableness. On this issue, some guidance may be had from a leading local contract law textbook that "while the fact that a particular clause is normal and commonly found in the trade may point towards it

23 *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [107].

being reasonable, this fact by itself is inconclusive".[24] Differing approaches have been taken in the Singapore courts regarding this issue. In *Kenwell & Co Pte Ltd v Southern Ocean Shipping Co Pte Ltd*,[25] the High Court observed that if the majority of industry players use the equivalent of the clause in question as their standard term, one can hardly speak of choice. The court further stated that: "A provision that is commonly found in an industry may be reasonable by reason of being in common use. But on the other hand, it could be unreasonable nonetheless."[26] At the opposite end of the scale, one might argue that the widespread use of a term may reflect that "the clause is reasonably necessary to meet the legitimate business needs in the defendant's industry hence its ubiquity".[27] Third, the conclusion of the court in *Major Shipping* that cl 10.1(a) was reasonable seems to be in line with the general perception relating to the reasonableness of another type of clause commonly used by banks: the verification clause, also known as the conclusive evidence clause. Such clauses typically impose a duty on bank customers to check their bank statements and to inform the bank of any discrepancy within a certain period, failing which the statement would become conclusive evidence of the correctness of the account and bank would be free from all claims in respect of the account. The view has been expressed in several Singapore cases that verification clauses are reasonable under s 11(1) of the UCTA.[28] Fourth, whether a contractual clause is reasonable depends very much on the facts of each particular case, and a result reached in one case may not necessarily apply in another. That said, guidance can nevertheless be had from decided cases where the clause and the circumstances are typical of those commonly occurring in the industry. It is therefore a pity that the issue of whether it is reasonable for a bank to exclude liability for negligence in carrying out its customer's instructions was not subject to detailed discussion in *Major Shipping* because determination of this issue was not necessary for the court's decision. It would have been useful to have had an authoritative ruling from the Court of Appeal on this point, but it is not known if the reasonableness of cl 10.1(a) was an

24 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 07.142.

25 [1998] 2 SLR(R) 583 at [59].

26 *Kenwell & Co Pte Ltd v Southern Ocean Shipping Co Pte Ltd* [1998] 2 SLR(R) 583 at [59].

27 Sandra Booysen, "Twenty Years (and More) of Controlling Unfair Contract Terms in Singapore" [2016] SingJLS 219 at 230.

28 See, *eg*, *Consmat Singapore (Pte) Ltd v Bank of America National Trust and Savings Association* [1992] 2 SLR(R) 195 at [24]–[26]; *Tjoa Elis v United Overseas Bank Ltd* [2003] 1 SLR (R) 747 at [92]–[96]; and *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR (R) 273, especially at [60]–[61]. Contrast, however, *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246, where a bank's attempt to exclude liability for the fraud of its employees was seen to be unreasonable.

issue that arose when *Major Shipping* went up on appeal as this was dismissed without a written judgment.[29]

Caution to customers

5.8 The *Major Shipping* decision suggests that the Singapore courts may be receptive to clauses which exclude a bank's liability for negligence in carrying out its customer's instructions and may hold them to be reasonable under the UCTA. However, too much should not be made of this since the judge's observations on this point were brief, and every case would depend on its own facts. The decision also serves as a warning to customers using electronic means to issue instructions to their bank that standard clauses in banking contracts, such as those used in this case, have the effect of placing the risk of fraudulent instructions on the customer rather than the bank.

Investment advice

Duty of relationship manager

5.9 In *Sabyasachi Mukherjee v Pradeepto Kumar Biswas*[30] ("*Mukherjee*"), the plaintiffs (husband and wife) sued the defendant, their investment adviser and close family friend, for losses of US$3.45m from seven investments which they claimed were inappropriate for them, but which they had believed to be appropriate as a result of the defendant's proposals and statements. The plaintiffs also questioned the authenticity of the investments, referring to them as "shams" or "purported investments". The facts were complicated and the High Court discussed each investment in detail, considering whether either of the two alternative causes of action, breach of fiduciary duty and the tort of deceit, were made out in each case. The main point of general interest to be gleaned from *Mukherjee* is that a person who is employed as a relationship manager by a bank might in certain circumstances be seen to assume an additional role towards the bank's customers that is separate and independent from his employment with the bank, and is not limited by such employment. In *Mukherjee*, the defendant first met the plaintiffs, an elderly couple who owned a Singapore company, at a social gathering when he was a relationship manager at Citibank. The parties developed a personal friendship over a period of almost ten years,

29 See LawNet editorial note at the beginning of the report at *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4, where it was stated that Civil Appeal No 180 of 2017 was dismissed by the Court of Appeal with no written grounds of decision rendered.

30 [2018] SGHC 271.

over the course of which the plaintiffs became private banking customers and account holders with the various banks that the defendant was employed at, and the defendant was the relationship manager assigned by the banks to the plaintiffs. The defendant maintained that in his role as relationship manager, it was his job to present or introduce to the plaintiffs any investment opportunities that he was aware of, but he did not advise them to invest as he was not employed by the various banks to be an investment adviser. It was not disputed that the plaintiffs' account with the bank concerned was not a discretionary account where the bank would be given a mandate to invest for the customer. However, the plaintiffs were not suing the defendant as a relationship manager employed by the banks. They were suing the defendant personally, on matters of a private nature quite separate and independent of his bank employment. The judge was satisfied on the facts that the defendant had assumed a second role *vis-à-vis* the plaintiffs, over and above his role as relationship manager, wherein he also introduced investment opportunities that were non-bank products, which he came to learn of from business and finance contacts.

5.10 The judge highlighted that the correct characterisation of a relationship and whether it gives rise to a fiduciary obligation is a matter of law. The court would examine the facts of the case to see if fiduciary obligations are undertaken and if so, the scope of such obligations. Although it was the plaintiffs who made the decision whether to make any particular investment, once that decision was made, they relied on the defendant in relation to "post-decision activities".[31] In particular, the defendant alone would interface with the investee company as counterparty, contract with the counterparty on behalf of the plaintiffs, monitor and on maturity (or whenever desired by the plaintiffs) redeem the investments on their behalves.[32] The judge referred to the definition of agency as:[33]

> … the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to effect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation …

and was of the view that in respect of the post-decision activities, the defendant was acting as the plaintiffs' agent and had the duties of a fiduciary.[34] With this finding in place, the judge applied the law of

31 *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 at [36].
32 *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 at [36]
33 *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 at [36].
34 *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 at [58].

fiduciaries[35] to each of the disputed investments and assessed that there had been a breach of fiduciary duty in six out of the seven cases.[36]

Bills of exchange

Summary judgment on a cheque

5.11 A person who has signed a cheque is bound to honour it as a bill of exchange. Where a cheque has been dishonoured or countermanded, it is common for the payee to bring an action for summary judgment against the drawer, claiming that there is no defence to the action, in order to bring the matter to a speedy conclusion. In *Ong Keh Choo v Paul Huntington Bernardo*,[37] the plaintiff sued the defendant for countermanding a cheque. The defendant justified her act by claiming that there was no contract between her and the plaintiff, and that even if there was, this had been induced by the plaintiff's fraud. Fraud or failure of consideration for the cheque would be exceptional situations that would allow her to legitimately countermand the cheque. In allowing the defendant's appeal against the award of summary judgment by the Registrar, the High Court pointed out the difference between the right to sue on the cheque and the right to obtain summary judgment for it. The plaintiff would not be entitled to summary judgment if the defendant could show a plausible and coherent defence, even if the defendant might fail when the case went to trial.[38] On the other hand, "[e]ven pleading fraud is not enough to stave off a summary judgment if the claim of fraud seems on its face and in the circumstances too dubious".[39]

Performance bonds

5.12 A number of cases were decided this year relating to applications for injunctions to restrain calls and payments on performance bonds issued by banks or insurance companies, namely, *Milan International Pte Ltd v Cluny Development Pte Ltd*[40] ("*Milan International*"), *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills*[41] ("*Sunrise Industries*"), *AES Façade Pte Ltd v Wyse Pte Ltd*[42] ("*AES*

35 *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 at [46]–[48].
36 *Sabyasachi Mukherjee v Pradeepto Kumar Biswas* [2018] SGHC 271 at [272].
37 [2018] SGHC 175.
38 *Ong Keh Choo v Paul Huntington Bernardo* [2018] SGHC 175 at [10].
39 *Ong Keh Choo v Paul Huntington Bernardo* [2018] SGHC 175 at [11].
40 [2018] SGHC 33.
41 [2018] SGHC 145.
42 [2018] SGHC 163.

Façade"), *Bintai Kindenko Pte Ltd v Samsung C&T Corp*[43] ("*Bintai Kindenko*") and *Hup Seng Lee Pte Ltd v Jaclyn Patrina Reutens*[44] ("*Hup Seng Lee*"). These cases broadly concerned a similar issue: whether the call on the performance bond in question was *prima facie* unconscionable or fraudulent such that an injunction should be granted to the applicant to restrain the beneficiary from claiming on the bond. These cases were all unreported at the time of writing, and in all the cases, the High Court decided that the plaintiff was not entitled to an injunction.

5.13 The legal principles in this area of the law are generally well settled, and the cases turned upon the judge's assessment, based on the facts of the case, of whether the call on the bond was *prima facie* unconscionable or fraudulent. The main principles relating to grant of an injunction to restrain a call on performance bonds may be summarised briefly as follows:[45]

(a) In an unconditional performance bond, the beneficiary of the bond is entitled to be paid upon demand, without having to prove a breach of the underlying contract on the part of the contractor/applicant.

(b) There are two exceptions to the rule of autonomy under Singapore law, when an injunction might be granted to restrain payment on a performance bond. These are where there is a strong *prima facie* case of fraud or of unconscionability.

(c) Fraud and unconscionability are separate grounds. Fraud involves dishonesty, whereas unconscionability includes elements of abuse, unfairness and a lack of good faith. Mere breaches of contract, the existence of a genuine dispute, or unfairness do not by themselves amount to unconscionable conduct.

(d) The threshold is a high one, and calls on performance bonds will be restrained only in a narrow class of cases.[46]

43 [2018] SGHC 191.

44 [2018] SGHC 249.

45 See generally *Milan International Pte Ltd v Cluny Development Pte Ltd* [2018] SGHC 33 at [27]–[31]; *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills* [2018] SGHC 145 at [28]–[33]; *AES Façade Pte Ltd v Wyse Pte Ltd* [2018] SGHC 163 at [16]–[19]; *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGHC 191 at [25]; and *Hup Seng Lee Pte Ltd v Jaclyn Patrina Reutens* [2018] SGHC 249 at [10]–[11].

46 *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [24] and [31].

(e) In hearing an application for an injunction, the court is not required to engage in a protracted consideration of the merits of the case or to decide on the substantive entitlements and rights of the parties.[47]

5.14 In *Bintai Kindenko*,[48] the High Court discharged an *ex parte* injunction that had been earlier granted in favour of the applicant of the performance bond (the plaintiff), restraining the beneficiary (the first defendant) from claiming and the issuer from paying on the bond. This case involved a clause whereby the plaintiff, as the provider of the bond, agreed that it would not rely on the unconscionability exception to restrain a call on the bond by the beneficiary ("the Exclusion Clause"). The High Court first considered the question of whether the Exclusion Clause was incorporated into the subcontract between the applicant and the beneficiary, and was satisfied that it was. The High Court then applied the decision of the Court of Appeal in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd*[49] ("*CKR*"), where a similar exclusion clause was held to be enforceable. The presence of the Exclusion Clause therefore meant that the plaintiff in *Bintai Kindenko* was precluded from relying on unconscionability as a ground for its application, and had to rely on the only other ground, which was fraud. The High Court discussed the standard of proof that was to be satisfied before an injunction was granted. It accepted that the appropriate standard was that of a "strong *prima facie* case of fraudulent or unconscionable conduct" and explained that the entire context of the case had to be thoroughly considered and an injunction granted only if the entire context was malodorous.[50] The judge expressed the view that there was "not a significant difference, if any, between the phrases 'clear case' [of fraud] … and a 'strong *prima facie* case'".[51] He stated, "In the final analysis, the court has to be satisfied that the evidence shows the possible existence of fraud; though fraud need not be probable, conclusive or determinative."[52] After considering the facts of the case, the judge was of the view that the ground of fraud was not made out, "whether on the basis of dishonesty, or recklessness or indifference to the truth".[53]

5.15 There was one aspect of the Court of Appeal decision in *CKR* that invited further analysis in future cases, and that was whether a clause precluding the applicant from restraining a call on a performance

47 *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [40].
48 See para 5.12 above.
49 [2015] 3 SLR 1041.
50 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGHC 191 at [37].
51 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGHC 191 at [38].
52 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGHC 191 at [38].
53 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGHC 191 at [47].

bond on the ground of unconscionability was one that fell under s 3 of the UCTA so as to be subject to the reasonableness test.[54] The words used by the Court of Appeal in *CKR* were tentative. In stating that the beneficiary in such cases was not without remedy, Andrew Phang Boon Leong JA, giving judgment for the court said that the innocent party could also pray in aid "where applicable" the relevant provisions of the UCTA.[55] He stated:[56]

> Such a clause might also be at least potentially subject to the UCTA and might be unenforceable if held unreasonable pursuant to, for example, s 3 of that Act. Nevertheless, as this last-mentioned argument was not run in the present case, we say no more about it – save to note that the policy underlying the operation of performance bonds … does point (on a *prima facie* level at least) in favour of the reasonableness of such clauses (subject, of course, to the precise language and context of the clause concerned since the reasonableness of a clause under the UCTA is dependent on a number of factors as well as facts …).

In *Bintai Kindenko*, the High Court judge did not examine the applicability of the UCTA to the exclusion clause, save to refer to the view of the Court of Appeal set out in the quote above, and to conclude that he was "not persuaded that the circumstances surrounding the Exclusion Clause in this case were so unreasonable as to render it unenforceable".[57]

5.16 As the bank or insurance company that issued a performance bond would generally just comply with any restraining order made by the court, it would, even if added as a defendant to an action, generally play a passive role in the proceedings, leaving the arguments to be made between the issuer and the beneficiary of the bond. However, where no restraining injunction has been granted, the issuer has to pay upon demand. This was highlighted in *Hup Seng Lee*,[58] where the insurance company that had issued the bond did not pay even though a written demand was made on the bond. They did this as they had received instructions from the plaintiff not to pay because the plaintiff would be taking out an injunction application. The judge reiterated that in an unconditional on-demand bond, the issuer was obliged to pay within a reasonable time once a written demand was made. In this case, the judge ordered the issuer, which was represented at the hearing and appeared as a non-party, to pay costs and disbursements jointly and severally with the plaintiffs, "given the substantial delay of two months

54 See (2015) 16 SAL Ann Rev 124 at 137–138, para 5.23.
55 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 at [20].
56 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 at [23].
57 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGHC 191 at [35].
58 See para 5.12 above.

in paying out the monies under the Performance Bond, coupled with the fact that it had inexplicably aligned itself with the interests of the plaintiff".[59]

59 *Hup Seng Lee Pte Ltd v Jaclyn Patrina Reutens* [2018] SGHC 249 at [21].