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5. BANKING LAW

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I. Performance bonds

A. No preliminary requirement for separate determination or arbitration before indemnity performance bond can be called on

5.1 The Court of Appeal case of *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd*[1] ("*AXA v CTC*") involved a refurbishment and upgrading project at the Nanyang Technological University ("the Project") of which Chiu Teng Construction Co Pte Ltd ("CTC") was the main contractor and QBH Pte Ltd ("QBH") a subcontractor. Pursuant to the terms of the subcontract, QBH applied for a performance bond in favour of CTC, and this was issued by AXA Insurance Pte Ltd ("AXA"). Disputes arose between QBH and CTC, leading CTC to make a first unsuccessful call on the bond, which need not be discussed here. The subject of the dispute in the current case is the second call on the performance bond by CTC on 13 March 2020. By this time, QBH (the account party) had been put in liquidation, and the action was between CTC (the beneficiary) and AXA (the issuer). It was common ground between the parties that the bond in question was an indemnity performance bond. AXA refused to pay on the bond, arguing, *inter alia*, that QBH's breach of the subcontract and any loss suffered by CTC had to be established by an independent determination by a court or tribunal in proceedings between CTC and QBH, or by an admission by QBH, before CTC could call on the bond. The Court of Appeal dismissed this argument, deciding that it was not necessary for the beneficiary to present a separate determination or admission before a valid call on the bond could be made. The Court of Appeal upheld the High Court's finding that CTC had sufficiently proven the breach and loss, and that AXA was liable to CTC under the bond.[2]

1 [2021] 2 SLR 549.
2 *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234.

5.2 Clause 1 of the bond provided as follows:[3]

> In the event of the Sub-Contractor failing to fulfil any of the terms and conditions of the said contract, we shall indemnify [CTC] against all losses, damages, costs, expenses or otherwise sustained by [CTC] thereby up to … [the Guaranteed Sum] upon receiving your written notice of claim for payment made pursuant to Clause 4 hereof.

The Court of Appeal interpreted this clause to mean that CTC needed only to establish that QBH had breached the subcontract and caused loss to CTC in order to call on the bond. The Court of Appeal pointed out that there was no reference in the bond to a determination by a court or tribunal or an admission from QBH. Breach of the subcontract by QBH and loss to CTC could be proved by other means, not necessarily by way of an independent determination, arbitral award or admission.[4] The Court of Appeal took the opportunity to clarify a statement made in the court below, where Lee Seiu Kin J stated that "an independent determination, arbitral award or admission [was] necessary for [CTC] to definitively prove its losses".[5] The Court of Appeal stated that this statement should not be construed to mean that AXA's liability as the issuer would only be definitively established by a determination obtained by CTC (the beneficiary) against QBH (the account party) or an admission by QBH.[6] The Court of Appeal explained that, instead, Lee J's intended contrast was between a determination or admission between the beneficiary and issuer (which could be undertaken by the court hearing the application to enforce the bond) on the one hand, and the mere provision of documents on the other, which, "regardless of the volume and specificity, is insufficient to conclusively prove the matter".[7] The Court of Appeal referred with approval to Lee J's observation that:[8]

> … [a] beneficiary under such a bond is always entitled to call on the bond if, in its opinion, it has suffered actual losses. Accompanying such a call will naturally be the provision of sufficient documents and evidence adduced to prove the breach of the underlying contract and the consequential losses suffered. If the guarantor under the bond accepts such documentation and pays the amount secured under the bond, that is the end of the matter. *If the documents are not accepted as proof, the parties would inevitably have to proceed to an independent*

3 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [40].
4 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [41].
5 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [11], referring to *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 at [17] and [18].
6 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [81].
7 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [86]–[87].
8 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [86].

> *determination, as in the present instance.* … [emphasis added by the Court of Appeal]

The Court of Appeal highlighted that in using the words "in the present instance", Lee J was stating that he was making that independent determination himself and was not referring to a requirement for a separate independent court or arbitral determination as between the beneficiary and the account party.[9]

5.3 The decision in *AXA v CTC* usefully explores the main differences between a guarantee and an indemnity on the one hand, and between an on-demand bond and a conditional bond on the other. In brief, the essential difference between a guarantee and an indemnity is that the guarantor under a guarantee only has a secondary liability, whereas the indemnifier under an indemnity has a primary liability. A secondary liability is one that is subject to the principle of co-extensiveness, in the sense that the scope of the guarantor's liability is affected by the scope of the liability of the party whose obligation is guaranteed, that is, the principal, whereas this principle does not apply in relation to an indemnity.[10] The essential difference between on-demand bonds and conditional bonds is that an on-demand bond is payable upon a mere demand or a presentation of documents, whereas a conditional bond is conditioned upon facts, usually that the account party has breached the contract and the beneficiary has suffered loss.[11] In *AXA v CTC*, the parties were in agreement that the relevant bond was an "indemnity bond" and not an on-demand bond. This is consistent with the decision in *JBE Properties Pte Ltd v Gammon Pte Ltd*[12] ("*JBE Properties*"), where the Court of Appeal decided that a performance bond that was *in pari materia* with the one in *AXA v CTC* was an indemnity bond rather than an on-demand bond. In *AXA v CTC* and *JBE Properties*, the term "indemnity bond" was used interchangeably with "conditional bond" (and in contrast to "on-demand bond") to refer to a bond which requires the beneficiary to prove actual loss in order to recover under the bond. Although the Court of Appeal in *AXA v CTC* adopted the term "indemnity performance bond" to refer to the type of bond in the case before them, the court made clear that it was not necessarily endorsing this terminology. In the view of the Court of Appeal, the legal character of conditional performance bonds, including one *in pari materia* with the bond in *JBE Properties* and *AXA v CTC*, may have to be re-examined to see whether they should be characterised as guarantees or indemnities, but the court did not want to prejudge the

9 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [87].
10 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [21]–[22].
11 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [33].
12 [2011] 2 SLR 47.

issue.[13] The Court of Appeal felt that it was "potentially odd" to describe a conditional performance bond as an indemnity when the obligation to pay under the bond was conditional on proof of breach by the account party and loss suffered by the beneficiary,[14] and that the conditional nature of such bonds "could arguably be construed as strong grounds in favour of characterising them as guarantees".[15] The Court of Appeal also suggested that if the classification of conditional bonds were to be revisited, the courts might have to consider how to distinguish between an indemnity and a guarantee where the obligation to pay was conditional upon breach of the underlying contract.[16] The Court of Appeal did not think that such re-examination would introduce uncertainty in practice as the legal classification of conditional bonds would not be significant in most cases. A conditional bond would usually require breach and loss to be established regardless of whether the bond was characterised as an indemnity or guarantee.[17] Further, regardless of whether an indemnity or a guarantee was involved, the beneficiary could proceed directly to sue the guarantor/surety or the indemnifier without first suing the account party.[18] The Court of Appeal was of the view that legal characterisation of conditional bonds would not affect the commercial operation of such instruments in most cases and the courts could address any issues arising in the limited situations where the distinction was relevant.[19] These questions will have to be further considered in future cases. It may be that the answer depends on the construction of the individual conditional performance bond concerned: some conditional bonds might be in the nature of guarantees, others in the nature of indemnities, and yet others neither of these. In this connection, it is useful to note that on-demand performance bonds have been said to be distinct from *both* guarantees and indemnities.[20] An argument might be made that conditional performance bonds too are distinct from both guarantees and indemnities: they should not be classified as guarantees as they impose a primary and not a secondary liability, and they should not be classified as indemnities because they are conditional on proof of breach and loss. Given that there is some controversy about whether a conditional

13 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [36].
14 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [35].
15 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [35].
16 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [35]–[36].
17 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [37].
18 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [22] and [37].
19 For an explanation of the limited situations in which the distinction between classification of a conditional bond as a guarantee or an indemnity might be relevant, see *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [35]–[36].
20 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [24].

performance bond is to be classified as a guarantee or an indemnity,[21] and also that this distinction often has no relevance to the resolution of the cases concerned, one step towards regularising the position could be for the courts and the legal community to stop using the potentially misleading term "indemnity performance bond" to refer to a conditional performance bond. Ultimately, it might be unnecessary to embark on the task of legally classifying a conditional performance bond in individual cases unless the resolution of an issue in the case at hand turns upon the difference between a guarantee and an indemnity.

B. Other issues relating to performance bonds

5.4 A few other 2021 decisions on performance bonds were published on LawNet. The High Court decision of *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance Ltd*[22] ("*Sompo v RSA*") concerned a call on a performance bond by the beneficiary's insurer. The main questions that arose in this case will be mentioned only briefly as they involve the specialised area of insurance law. Here, the Singapore government ("the Government") entered into a contract of carriage with Geometra Worldwide Movers Pte Ltd ("Geometra"), pursuant to which a performance bond was issued by Sompo Insurance Singapore Pte Ltd ("Sompo") in favour of the Government. Subsequently, some of the cargo was damaged during discharge. The Government's position was that Geometra was liable for the loss and damage. Eventually, Royal & Sun Alliance Insurance plc ("RSA"), the Government's underwriter in respect of the cargo, indemnified the Government for the full quantified loss. RSA's solicitors then issued a letter to Sompo on behalf of the Government, calling on the performance bond. Sompo refused to pay, arguing that RSA lacked authority to call on the bond, and that RSA's right of subrogation as insurer extended only to rights against the person who was responsible for the Government's loss, that is, Geometra, and not Sompo. The District Court did not accept these arguments and found in favour of RSA. On appeal, the High Court upheld the District Court's decision. The High Court found that the only requirement in the bond was that the call should be by way of the "Government's" first demand in writing, and there was no need for the demand to be accompanied by evidence that RSA had the Government's authority to make the call.[23] On the facts, it was clear that the demand for payment was made by RSA

21 *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] 2 SLR 549 at [26]–[27].

22 [2021] 5 SLR 934.

23 *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance Ltd* [2021] 5 SLR 934 at [24].

on behalf of the Government.[24] As regards the extent of subrogation, the High Court was of the view that the insurer, upon payment to the insured, was subrogated to the insured's rights even on a contract (the performance bond) that was given not by the person responsible for the loss (Geometra) but by someone else (Sompo), as long as that contract concerned the subject matter of the insured loss.[25] This requirement was satisfied in *Sompo v RSA* as the loss suffered by the Government from the breach of the contract of carriage by Geometra was the loss that was insured by the insurer, RSA, and this same loss was covered by the performance bond issued by Sompo.[26]

5.5 One District Court case that was published on LAWNET was *E-Tech Building Services Pte Ltd v Foreign Domestic Worker Association for Social Support and Training (FAST)*[27] ("*E-Tech v FDWA*"), a case concerning an on-demand bond provided by the plaintiff (the account party) for the benefit of the defendant (the beneficiary). Leaving aside issues which were specific to the facts of that case, the general point of the decision was that a performance bond that was issued pursuant to a non-existent contract was invalid. The performance bond in *E-Tech v FDWA* made reference to the account party's agreement to comply with the provisions of a "Letter of Award" and the bond was expressed to be issued in consideration and in lieu of a cash deposit as stipulated under the Letter of Award. There was no such Letter of Award, and the District Judge was of the view that this went to the root of the bond agreement, making it an invalid agreement on which no call could be made. The District Judge in *E-Tech v FDWA* was of the view that the facts in that case were similar to those in the High Court decision of *Pender Development Pte Ltd v Chesney Real Estate Group LLP*[28] ("*Pender Development*"), where the borrower had to procure an insurance bond as a precondition of a loan agreement. The bond that was eventually issued in *Pender Development* expressly referred to a design and build agreement signed on a particular date and not to the loan agreement. There was no such building agreement, and the High Court decided that in those circumstances, the issuer's obligation to pay on the performance bond could not be triggered

24 *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance Ltd* [2021] 5 SLR 934 at [25].

25 *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance Ltd* [2021] 5 SLR 934 at [39].

26 *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance Ltd* [2021] 5 SLR 934 at [38].

27 [2021] SGDC 195. Another was *First Construction & Engineering Pte Ltd v Yim Hon Yuen* [2021] SGDC 120, a straightforward case where the District Court hearing an application for an injunction to restrain a call on a performance bond decided that there was no evidence to prove that the call was fraudulent or unconscionable.

28 [2009] 3 SLR (R) 1063.

by an alleged breach of the loan agreement.[29] Despite reaching the same result that the issuer was not liable to the beneficiary, the respective judges took different approaches in *E-Tech v FWDA* and *Pender Development*. There was no finding by the High Court in *Pender Development* that the performance bond was invalid. The court found merely that breach of the loan contract was not covered by the bond; therefore, the issuer was not liable to pay. In *E-Tech v FDWA*, the bond guaranteed performance of the obligations specified in the non-existent Letter of Award. It is not clear from the report of the case exactly what obligations the beneficiary claimed had been breached by the account party, and it was probably more convenient for the judge to decide generally that the performance bond was invalid. If the High Court in *Pender Development* had put their mind to the question of the validity of the performance bond in that case, they would most likely have decided, consistently with *E-Tech v FDWA*, that the bond was invalid.

II. Letters of credit

5.6 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd*[30] ("*BOC v BP*") arose out of the collapse of one of Asia's largest oil traders, Hin Leong Trading Pte Ltd ("Hin Leong"), in 2020. Bank of China Ltd, Singapore Branch ("BOC") issued three letters of credit in respect of three contracts for the purchase of oil by Hin Leong from BP Singapore Pte Ltd ("BP"). Unbeknownst to BOC, each of these sale contracts was on a back-to-back basis, that is, Hin Leong purported to sell to BP the same quantity of gasoil that BP later purported to sell back to Hin Leong at a higher price. This arrangement to repurchase gasoil at a loss appeared to have no commercial benefit to Hin Leong except to allow it to obtain financing and generate additional liquidity. BOC paid on complying presentations made by BP under the credits. Subsequently, Hin Leong was placed under judicial management and was wound up before it had reimbursed BOC for these amounts. BOC brought an action to rescind the three letters of credit and recover the sums paid and/or damages and other relief. Four causes of action were asserted by BOC against BP: fraud; negligence; conspiracy; and unjust enrichment. BP applied to strike out all BOC's claims against it, arguing that the statement of claim disclosed no reasonable cause of action. BOC and BP both appealed against the decision made by the Registrar in the striking-out application. This led to the current case, where the High Court considered both appeals and declined to strike out any of BOC's claims. In coming to this decision, the

29 *Pender Development Pte Ltd v Chesney Real Estate Group LLP* [2009] 3 SLR(R) 1063 at [17].

30 [2021] 5 SLR 738.

High Court applied the principle that a claim should only be struck out if it was obviously unsustainable, the pleadings unarguably bad and it was impossible, not just improbable, for the claim to succeed.[31]

5.7 The most important discussion of general application in *BOC v BP* concerned BOC's negligence claim. This had been struck out by the Registrar, who relied on *DBS Bank Ltd v Carrier Singapore (Pte) Ltd*[32] ("*Carrier*"). In *Carrier*, the judge expressed the view, *obiter*, that an issuing bank had no cause of action in negligent misrepresentation against the beneficiary of a letter of credit. He reasoned that if one were to accept the contention that "a bank may rely on negligent misrepresentation by a beneficiary to recover any money it had paid out to the beneficiary", the law would also have to accept that "banks are entitled to invoke negligent misrepresentation by the beneficiary as a ground for not paying the beneficiary in the first place".[33] In the judge's view, this would "unravel the narrow fraud exception" to the autonomy principle and undermine the underlying framework of documentary credits whereby sellers who presented conforming documents were given an "assured right" to be paid despite any disputes in the underlying contract, unless there was fraud on the part of the beneficiary.[34]

5.8 In *BOC v BP*, Andre Maniam JC overruled the Registrar's decision and reinstated BOC's negligence claim for three main reasons. First, Maniam JC was of the view that the situation of refusing payment was different from the situation of recovering payment. He felt that although a beneficiary's negligent misstatements in documents that were presented did not entitle a bank to refuse payment, this did not logically mean that the bank could not recover payments that have been made. He referred to the "pay now sue later" nature of letters of credit, which made them the equivalent to cash in hand.[35] A beneficiary was entitled to be paid upon conforming documents, but the account party could still sue the beneficiary for breach of contract later, and if he succeeded, the beneficiary would have to disgorge the payment.[36] Maniam JC was of the view that the same principle could apply to the issuer, so that it too could pay first and sue later.[37] The second reason was based on the legal argument that although a beneficiary does not generally owe a duty of care to an issuing bank in presenting third-party documents, he may

31 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [21].
32 [2008] 3 SLR(R) 261.
33 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [99].
34 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [99]–[100].
35 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [33]–[34].
36 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [31].
37 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [35].

nevertheless be under a duty of care in the preparation of documents that he himself issues. Maniam JC referred to the English case of *Niru Battery Manufacturing Co v Milestone Trading Ltd*[38] ("*Niru Battery*"), where the issuing bank successfully sued surveyors who had negligently issued an inspection certificate stating that the goods had been loaded when in fact they had not. Maniam JC was of the view that the position in the case before him was not necessarily different just because unlike in *Niru Battery*, BP was not a third party but the beneficiary. He referred to the English Court of Appeal case of *Montrod Ltd v Grundkotter Fleischvertriebs GmbH*[39] ("*Montrod*"), where the beneficiary signed an inspection certificate thinking that it had been authorised to do so by the applicant, when in fact it had not. The applicant reimbursed the issuing bank that had paid on the credit and brought an action against the beneficiary in negligence. The English Court of Appeal decided that a beneficiary did not owe the applicant a duty to take reasonable care in presenting documents for payment. The beneficiary's agreement to the terms of a letter of credit alone was insufficient to give rise to a duty of care. However, the English Court of Appeal accepted that a beneficiary could be under a narrower duty of care in relation to the documents that it had issued, signed and presented (on the facts of *Montrod*, this was to ensure that it had the applicant's instructions to sign and issue the documents and that the documents were valid).[40] The contest in *Montrod* was between the applicant and the beneficiary, whereas the one in *BOC v BP* was between the issuing bank and the beneficiary, so *Montrod* was not directly applicable. But it was significant that although a beneficiary is not generally under a duty of care in relation to documents presented, the English Court of Appeal in *Montrod*, nevertheless, allowed the narrower negligence claim in respect of the inspection certificates that the beneficiary had signed and presented. The third point raised by Maniam JC was that the decision in *Carrier* (that a bank cannot sue a beneficiary in negligence) was based on equating the grounds for a bank refusing payment to the grounds for it recovering payment. Maniam JC was of the view that this was not the correct approach. He felt that the evaluation of whether to allow payment to be recovered should be based on the general principles for determining the existence of a duty of care in Singapore that were laid down by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[41] ("*Spandeck*"). This test involved a preliminary requirement of factual foreseeability, followed by a first-stage test of legal proximity, then a second-stage test of whether there were policy considerations that

38 [2004] 1 Lloyd's Rep 344.
39 [2002] 1WLR 1975.
40 *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2002] 1 WLR 1975 at [63].
41 [2007] 4 SLR(R) 100.

should negate any duty that arose. However, as *BOC v BP* concerned only the question of whether the claim should be struck out for disclosing no reasonable cause of action, Maniam JC did not have to decide on the substance of the claim, but just that it was not so unmeritorious as to be struck out.

5.9 This author respectfully agrees with the result reached by Maniam JC in *BOC v BP*, that the negligence claim should be reinstated. The autonomy principle in letters of credit should not, in itself, prevent an issuing bank from suing the beneficiary in the tort of negligence. The operation of the autonomy principle requires that the issuing bank must pay upon facially conforming documents regardless of any disputes in the underlying contract unless there is fraud on the part of the beneficiary. In the absence of fraud, the bank has to pay even if the beneficiary behaved negligently. An important aim of using letters of credit and performance bonds is for the beneficiary to be paid without argument once the requirements of the letter of credit or performance bond (for example, the presentation of conforming documents or the making of a valid demand) are satisfied. Once the beneficiary has been paid, this aim is satisfied. He who is in the money has the upper hand. The principle of autonomy does not mean that the beneficiary, having received the money, should be shielded from other legal actions that might deprive him of the funds obtained as a result of this initial advantage, as long as the party bringing the action can establish his legal right to do so. It was not disputed in *BOC v BP* that a beneficiary, in presenting documents under the credit, generally does not owe a duty of care in relation to this presentation. This is arguably because the first stage of the *Spandeck* test has not been satisfied. There is no assumption of responsibility by the beneficiary just by virtue of his agreeing to the terms of the letter of credit. However, if one asks the narrower question of whether there was any duty of care in relation to the preparation of the documents, the answer might be different, and there is no reason why the mere fact that the plaintiff is an issuing bank suing the beneficiary of a credit should prevent it from bringing such an action. This approach is supported by the English Court of Appeal decision in *Montrod*, discussed above.

5.10 Another letter of credit case decided by the High Court in 2021 was *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd*.[42] This case concerned technical questions of civil procedure and conflict of laws and will not be discussed in this review.

42 [2021] SGHC 245.

III. Bills of exchange

5.11 *Genuine Pte Ltd v HSBC Bank Middle East Ltd, Dubai*[43] ("*Genuine v HSBC*") raised a few classic legal issues relating to bills of exchange in the context of an appeal to the High Court against the Registrar's dismissal of an application to set aside a default judgment. HSBC Bank Middle East Ltd, Dubai ("HSBC") granted a financing facility to Phoenix Global DMCC ("Phoenix") whereby HSBC would discount bills of exchange drawn on Phoenix's customers. Pursuant to this agreement, Phoenix requested HSBC to finance two bills of exchange drawn on Genuine Pte Ltd ("Genuine") and granted HSBC security over the bills of exchange. HSBC discounted the bills of exchange and credited the corresponding sums of money to Phoenix's account. Genuine accepted the bills of exchange between April and May 2020. In June 2020, HSBC's solicitors sent a letter of demand to Genuine demanding payment of the sums due under the bills of exchange. Genuine did not make payment and explained that there was a set-off agreement between Genuine and Phoenix relating to their mutual trade relations where they sold goods to each other. Genuine asserted that under the running account between themselves and Phoenix, Phoenix owed them sums in excess of the amounts due under the two bills of exchange, so that Genuine's debts to Phoenix, if any, should be set off against this larger amount, and no sums were payable by them to Phoenix under the bills of exchange. After settling some issues relating to civil procedure, the judge had to assess whether the Registrar correctly dismissed Genuine's application to set aside the default judgment awarded against it. The High Court upheld HSBC's judgment in default against Genuine, as the court found that Genuine had not shown a *prima facie* defence which raised triable or arguable issues. The following points were discussed by the High Court. First, Genuine had accepted the two bills of exchange generally without attaching any conditions and had thereby undertaken that it would pay the bills accordingly.[44] Further, it is a well-established legal principle that a bill of exchange contract is distinct from the original and underlying contract. Applying this principle, the alleged right of set-off was between Genuine and Phoenix and had nothing to do with HSBC's rights under the bills of exchange; therefore, Genuine had no right of set-off against HSBC.[45] In its defence, Genuine also attempted to rely on s 21(3) of the Bills of Exchange Act[46] which provided:

> As between immediate parties, and as regards a remote party other than a holder in due course, the delivery —

43 [2021] 5 SLR 1186.
44 *Genuine Pte Ltd v HSBC Bank Middle East Ltd, Dubai* [2021] 5 SLR 1186 at [28].
45 *Genuine Pte Ltd v HSBC Bank Middle East Ltd, Dubai* [2021] 5 SLR 1186 at [29].
46 Cap 23, 2004 Rev Ed.

> (*a*) in order to be effectual must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be;
>
> (*b*) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

Genuine accepted that HSBC was not an immediate party but argued that HSBC was "a remote party other than a holder in due course" because HSBC had not given valid consideration for the bills of exchange. The High Court dismissed this argument, being of the view that HSBC had provided consideration by providing financing to Phoenix and discounting the bills of exchange.[47] The High Court's findings on the points discussed above are uncontroversial. *Genuine v HSBC* is a straightforward decision that illustrates the application of some basic legal principles concerning bills of exchange.

IV. Bank financing: Assignment of book debts

5.12 It is common for a bank that provides credit facilities to take security over book debts of the borrower. *Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd v CIMB Bank Bhd*[48] ("*Italmatic v CIMB*") concerned trade financing facilities provided by CIMB Bank Bhd ("CIMB") to Panoil Petroleum Pte Ltd ("Panoil") that were secured by Panoil's book debts. In July and August 2017, Panoil entered into contracts to sell marine fuel to Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd ("Italmatic"), pursuant to which Panoil issued seven invoices to Italmatic. Soon after, Panoil faced financial difficulties and on 29 August 2017, CIMB issued a notice of assignment to Italmatic in respect of the debts owed by Panoil under the seven invoices, requiring Italmatic to pay CIMB instead of Panoil. Italmatic refused, pointing to a 2015 agreement between Italmatic and Panoil which allowed either party to set off any undisputed debts owed to the other. It argued that the seven invoices had either been set off by way of an exchange of letters on 13 August 2017 or, alternatively, had been cancelled on 18 August 2017. These arguments failed on the facts as the Court of Appeal agreed with the court below that the set-off letters of 13 August 2017 were not authentic, and that the cancellation was fabricated. While these findings were sufficient to dispose of the case before them, the Court of Appeal went on to raise a question of general interest. The Court of Appeal reiterated the principle that an assignee of a book debt took subject to equities that existed prior

47 *Genuine Pte Ltd v HSBC Bank Middle East Ltd, Dubai* [2021] 5 SLR 1186 at [31].
48 [2021] 2 SLR 416.

to the notice of assignment being received by the debtor, because an assignee of a chose in action took it as it was and could not be in a better position than the assignor. The Court of Appeal then stated that there was some authority that such equities would include a contractual set-off agreement made prior to notice of assignment being received by the debtor,[49] but declined to make a determination on this point in *Italmatic v CIMB* as it was neither argued nor pleaded.[50]

5.13 Italmatic's set-off defence failed as the Registrar and, later, the judge felt that the evidence did not establish that there was an agreed set-off between Italmatic and Panoil on 13 August 2017 based on the exchange of letters. If they had been convinced that there had been such a set-off, the effect would have been that Italmatic no longer owed Panoil money under the invoices after 13 August 2017 and would therefore have been under no obligation to pay CIMB upon receiving the notice of assignment on 29 August 2017. An alternative defence that could have been put forward is one based on the equities between the assignee and the debtor. The Court of Appeal's low-key reference in *Italmatic v CIMB* to the existence of "some authority" that a set-off agreement entered into between the assignor and the debtor prior to notice of assignment would have priority over the assignee's interest might cause a reader to underestimate the strength of such authority, but in fact, this principle seems well accepted.[51] If Italmatic had mounted a defence based on this principle, the result of the case might have been different. Italmatic could have argued that the set-off agreement was an equity binding on the assignee, and CIMB as assignee took the book debts subject to the set-off agreement. Under this principle, it was possible for debts to be set off even after the notice of assignment was given, provided that there was an existing debt owing by the assignor to the debtor before the debtor received the notice of assignment. If a debt had accrued prior to notice, the assignee would take subject to an agreement to set off this debt, even if the actual debit of the debt took place after the notice.[52] However, one potential complication on the facts of *Italmatic v CIMB* might be that the set-off covered by the set-off agreement was not automatic but only

49 *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA v Motorola Electronics Pte Ltd* [2010] 3 SLR 48 at [91].

50 *Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd v CIMB Bank Bhd* [2021] 2 SLR 416 at [18].

51 See, *eg*, *Roxburghe v Cox* (1881) 17 Ch D 520 and Noel Ruddy, Simon Mills & Nigel Davidson, *Salinger on Factoring* (Sweet & Maxwell, 4th Ed, 2006) at p 211, as referred to in *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA v Motorola Electronics Pte Ltd* [2010] 3 SLR 48 at [91].

52 See *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA v Motorola Electronics Pte Ltd* [2010] 3 SLR 48 at [103], where the court referred to Rory Derham, *The Law of Set Off* (Oxford University Press, 3rd Ed, 2003) and the English case of *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578 at 585.

applied to undisputed amounts in the invoices. It is unclear whether this might have meant that Italmatic would be prevented from setting off amounts owing to it if Panoil did not confirm that these amounts would not be disputed.