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5. BANKING LAW

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I. Bank payments

A. Sending bank's implied promise to reimburse beneficiary's bank in an international funds transfer

5.1 When a customer ("sender") instructs its bank ("sending bank") to transfer funds electronically to a recipient ("beneficiary") in another country, the sending bank will usually contact the beneficiary's bank to ask it to pay the beneficiary. In return, the sending bank will pay the beneficiary's bank, and claim payment from its customer, the sender. This is typically done through a chain of correspondent banking relationships, facilitated by messages sent through the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") system. The contract between the sending bank and the recipient's bank in an international funds transfer was examined in *Malayan Banking Bhd v Barclays Bank plc* ("*Maybank v Barclays*"),[1] a decision of Jeremy Cooke IJ in the Singapore International Commercial Court. There, the defendant bank ("Barclays") sent a SWIFT "MT 103 STP" to the claimant bank ("Maybank"), asking Maybank to transfer US$871,080.61 to the account of PLG International Pte Ltd ("PLG"), one of Maybank's customers in Singapore. At around the same time, Barclays also sent a SWIFT "MT 202 COV" message to its correspondent bank in New York, US, to transmit funds to Maybank's correspondent bank in New York to "cover" the MT 103 STP. The next step in this transaction would have been for Maybank's correspondent bank in New York to send the funds to Maybank in Singapore to reimburse it for crediting the beneficiary's account. However, Barclays later sought to cancel both the MT 103 STP and the MT 202 COV as it had information that the funds to be transferred had been received by its customer in questionable circumstances, and was concerned that a fraud may have been committed. Barclays' correspondent bank in New York cancelled the MT 202 COV as requested, but Maybank in Singapore had already credited the relevant amount to PLG's account. Maybank sought PLG's consent to reverse the credit that had been made, but PLG refused,

1 [2019] 4 SLR 109.

as they claimed that the payment had been for a genuine business transaction. Barclays refused to reimburse Maybank for the payment made to PLG, and Maybank brought an action claiming that there was an implied contract between Barclays and Maybank under which Barclays was bound to reimburse Maybank the funds in relation to the MT 103 STP.

(1) Implied contract

5.2 The court found that there was an implied contract between Barclays and Maybank that Barclays would reimburse Maybank for payment to PLG. It applied the law relating to implied contracts set out by the Court of Appeal in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd*,[2] where it was observed that in an implied contract, the consent of the parties could be manifested by communications between the parties and by conduct.[3] The court in *Maybank v Barclays* was of the view that the contract "had to necessarily be implied from the sending of the MT 103 STP and the acceptance of the unconditional instruction within it, when making the payment".[4] With respect, this is clearly right. As the court explained: "The bank of one party seeking to pay another party does not give instructions to another bank to pay that party without being obliged to reimburse the latter for the payment in question, if it is made."[5] The instruction to pay contained in the MT 103 STP could be withdrawn before it was acted upon by Maybank, but it could not be revoked once payment had been made in accordance with the instruction given. In its defence, Barclays argued that Maybank had acted in a manner inconsistent with market practice by making the credit transfer to PLG's account without having first received a cover payment from its correspondent bank in the US, and that this was an internal credit risk decision which Maybank took, for which it should bear the consequences. The court followed the approach taken by Colman J in the English case of *Tayeb v HSBC Bank plc*[6] ("*Tayeb*") that there must be clear and cogent evidence to meet the stringent test applied to implying a term by reason of market custom or usage. After considering the evidence, the court in *Maybank v Barclays* concluded:[7]

2 [2011] 2 SLR 63.

3 *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [46], referred to in *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [20].

4 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [24].

5 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [24].

6 [2004] 2 All ER (Comm) 880.

7 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [89].

> [I]t is clear that Barclays cannot discharge the burden of proof of showing that there was an established banking practice which constitutes a usage or custom that was notorious, certain and reasonable that Receiving Banks do not to pay on MT 103 STPs until a cover payment is received, let alone a usage of lack of entitlement to be reimbursed when payment is made before receipt of the cover payment. There is nothing which could impact on the implied contract which necessarily exists when one bank instructs another to make a payment on its behalf. To the contrary, the evidence shows that such payments have continued to be made and of necessity, have to be made in some circumstances, if same day value is to be given.

On the facts of the case, there would be a time lag of around 12 hours between an MT 103 STP instruction being received in Singapore and an MT 202 COV being acted on in New York. The only way that same day value could be assured in these circumstances would have been for Maybank to act on the MT 103 STP without waiting for confirmation of the cover payment.[8]

(2) Illegality and industry practice

5.3 Barclays further argued that if it had proceeded to transfer the funds to Maybank in relation to the MT 103 STP, it might have breached para 5.5 of the SWIFT General Terms and Conditions, which provided, *inter alia*, that, "[in] using SWIFT services and products and in conducting its business, the customer … must comply with good industry practice and all relevant laws" and that the customer must "ensure not to use … SWIFT services and products for illegal, illicit or fraudulent purposes".[9] Barclays maintained that if it had not cancelled the MT 202 COV and the MT 103 STP, it ran the risk of committing a money laundering offence under s 327 of the UK Proceeds of Crime Act[10] ("POCA"), and breaches of various regulatory provisions enforced by the UK Financial Conduct Authority ("FCA"). The court was of the view that an offence under s 327 of the POCA would only be committed if the property transferred was truly "criminal property", meaning that it must constitute a person's benefit from criminal conduct or represent such a benefit.[11] On the facts, it was not shown that the funds were fraudulently obtained.[12] Indeed, Barclays did not argue that making the payment required by the MT 103 STP would have made it liable to an offence. It argued that there was a risk of such liability, based on the information available to the bank at the relevant time, that no responsible bank would have paid out in

8 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [88].
9 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [91].
10 c 29.
11 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [96].
12 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [92].

those circumstances, and that it would have been reckless for Barclays to have ignored the risk and done so.[13] The court referred to its finding that Barclays had made a contractual commitment to reimburse Maybank for the sums paid out by it pursuant to Barclays' instructions, and stated that Barclays was bound to make this payment unless the defence of illegality applied. The court found that Barclays could have reimbursed Maybank by at least two other means which did not involve using the suspicious funds. One would have been to use other funds belonging to its customer (assuming these were sufficient) to reimburse Maybank. Another would have been to use its own funds first and later recoup the expenditure from its customer if the suspicions of fraud were allayed, or if fraud was proven, to bear the loss of its customer's fraud, rather than to pass this loss to Maybank.[14] The court was of the view that if Barclays had taken either of these courses of actions whilst making appropriate disclosures to the authorities of suspected fraud or money laundering in accordance with the obligations imposed in other sections of the POCA, it would not have run any risk of liability under the POCA or the money laundering regulations.

5.4 The relevant FCA regulations set out the requirement "to establish and maintain policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing"[15] and:[16]

> … to ensure the establishment of policies and procedures which include systems and controls that enable the entity concerned to identify, assess, monitor and manage money laundering risk and are comprehensive and proportionate to the nature, scale and complexity of its activities.

Further, the FCA's Principles for Businesses require that "an entity conduct its business with integrity and take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems".[17] The court found that there was no evidence that Barclays had failed to maintain such policies and procedures.[18] The only danger of falling foul of these regulations may have arisen from Barclays paying Maybank, but even this would not have been an issue if Barclays had avoided debiting its customer's account of the questionable sums

13 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [97].
14 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [99] and [102].
15 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [103], referring to regs 19 and 20 of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017 No 692).
16 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [104], referring to Financial Conduct Authority, *Senior Management Arrangements, Systems and Controls Sourcebook* at para 6.3.
17 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [105].
18 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [103].

and had instead used either of the two alternatives, as suggested by the court,[19] above to reimburse Maybank.

(3) Lessons for financial institutions

5.5 In addition to the helpful general analysis on how to find an implied contract, two important lessons that are especially relevant to the banking industry can be drawn from the decision in *Maybank v Barclays*. First, the decision reiterates the point that the contract between a bank and its customer is independent from its contract with its correspondent bank. Each contract has to be fulfilled according to its own terms. This can be illustrated by examining the two pairs of banking relationships, between Barclays and Maybank and between each of them and their respective customers, namely, the sender and the beneficiary of the funds transfer. For instance, when the funds were credited into the beneficiary's account, this became a debt owed by Maybank to the beneficiary, and Maybank could not reverse the credit without the beneficiary's consent, despite the fact that Barclays purported to cancel the MT 103 STP instruction. Maybank had to seek redress, if any, from Barclays, which had instructed it to transfer the funds in the first place. Another illustration of these separate obligations can be found in the implicit opinion of the court that Barclays had the contractual duty to reimburse Maybank, regardless of whether it could recoup the money from its customer.[20]

5.6 Second, where a bank's statutory duty to fight against financial crime conflicts with its contractual duties, whether towards its customer or third parties, the bank will be caught in a bind, with possibly no choice but to breach one or other of its obligations. The court in *Maybank v Barclays* observed:[21]

> This court would wish to encourage all banks to fulfil their obligations in respect of suspected fraud or money laundering but the possibility of a customer being involved in wrongdoing of this kind which impacts upon the bank's own obligations to other banks is an occupational hazard.

This tension was illustrated in *Maybank v Barclays*. In *Tayeb*,[22] HSBC Bank plc ("HSBC") froze a customer's account and returned funds that had been credited to that account to the sender of the funds, based on its suspicions regarding the nature and origin of the funds. It did this in order not to potentially commit the offence of receiving proceeds of

19 And discussed at para 5.3 above.
20 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [99].
21 *Malayan Banking Bhd v Barclays Bank plc* [2019] 4 SLR 109 at [100].
22 See para 5.2 above.

criminal conduct.[23] Two questions arise in such situations. First, did the circumstances surrounding the transaction justify the bank in being suspicious? This has to be judged at the time of the transaction and not with the benefit of hindsight. Put another way, was the bank's suspicion reasonable? It would appear that the answer to this question was "yes", in both *Maybank v Barclays* and *Tayeb*, although in both cases, the funds concerned turned out to be innocent and honest. The second question is what the bank should do in these circumstances. If the bank had already taken action, was it justified in acting as it did, given its suspicions? On the facts, the answer was "no", in both *Maybank v Barclays* and *Tayeb*. The discussion above[24] explains what the court in *Maybank v Barclays* thought the bank should have done to avoid breaking the law. In *Tayeb*, the court decided that the transfer to the customer was final under the rules of the Clearing House Automated Payment System ("CHAPS"), and could not be reversed. The court in *Tayeb* was of the view that there was no ordinary banking practice which justified HSBC's returning the funds in a departure from the CHAPS rules and from their contractual obligations to their customers on the basis of their reasonable suspicions of unlawfulness.[25] Instead, HSBC should have credited the funds into the customer's account and availed itself of the statutory defence by reporting the suspicious transaction.[26]

5.7 Looking at the facts of *Maybank v Barclays* or *Tayeb* in the context of Singapore, the statutory rules are of broadly similar effect. Under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[27] ("CDSCA"), a bank commits an offence if it transfers funds that it knows or has reasonable ground to believe, in whole or in part, directly or indirectly, represents another person's benefits from drug dealing or criminal conduct.[28] This statute provides a defence to these offences if the bank concerned had given information about the matter to a Suspicious Transaction Reporting Officer as soon as practicable after the knowledge or suspicion came to its attention.[29]

23 Under ss 93A to 93D of the UK Criminal Justice Act 1988 (c 33) (read together with the Money Laundering Regulations 1993 (SI 1993 No 1933)).

24 See para 5.3 above.

25 *Tayeb v HSBC Bank plc* [2004] 2 All ER (Comm) 880 at [92].

26 *Tayeb v HSBC Bank plc* [2004] 2 All ER (Comm) 880 at [84].

27 Cap 65A, 2000 Rev Ed.

28 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ss 46 and 47.

29 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSCA") s 40. Banks have a duty to report suspicious transactions under s 39 of the CDSCA and also under Monetary Authority of Singapore, *Notice 626: Notice to Banks on Prevention of Money Laundering and Countering the Financing of Terrorism* (24 April 2015; revised 30 November 2015).

II. Bank's liability for investment losses

5.8 Several decisions last year concerned actions brought by customers against banks for investment losses. Typical causes of action were misrepresentation, breach of contract and breach of tortious duty of care in negligence. Three of these decisions will be explored to reiterate the relevant legal principles and to illustrate the application of the law. The cases that will be discussed are *Koh Kim Teck v Credit Suisse AG, Singapore Branch*[30] ("*Koh Kim Teck*"), and *Zillion Global v Deutsche Bank AG, Singapore Branch*[31] ("*Zillion Global*"), both unreported decisions of the Singapore High Court, and *Sheila Kazzaz v Standard Chartered Bank*[32] ("*Sheila Kazzaz*"), a decision of the Singapore International Commercial Court.

A. Misrepresentation

5.9 Misrepresentation is one of the most common causes of action brought by customers against their banks when they suffer investment losses. Customers may allege, for instance, that the bank had misrepresented the risks or the potential returns of particular investments that were made. The legal requirements of an action in misrepresentation are easy to state. There must be a false representation of fact made to the plaintiff which induced it to enter into the contract, and which has caused it loss. These elements must be shown in order to establish an operative misrepresentation, which is the first step towards a successful claim under either the Misrepresentation Act[33] or the tort of negligent misrepresentation. However, the assessment of whether the plaintiff has made out its claim in misrepresentation is often a difficult one that involves the court in a long and detailed examination of the facts of the case. Misrepresentation was pleaded in both *Zillion Global* and *Sheila Kazzaz*, and as these cases show, it is not easy for a plaintiff to succeed.

5.10 In *Sheila Kazzaz*, the plaintiffs were a mother and son who were UK citizens who lived in Dubai. They had sold one of the family properties in the UK and sought the advice of the defendant bank as to how best to invest the proceeds. The bank structured a property financing arrangement for the plaintiffs which eventually could not generate sufficient income to meet certain interest costs, and the credit facilities that were part of the arrangements were eventually terminated by the bank. In *Zillion Global*, the plaintiffs were two companies incorporated in the British

30 [2019] SGHC 82.
31 [2019] SGHC 165.
32 [2020] 3 SLR 1.
33 Cap 390, 1991 Rev Ed.

Virgin Islands and their purpose was to hold the assets of their beneficial owner. The plaintiffs suffered investment losses and their accounts were closed out after margin calls were not met. In both of these cases, the plaintiffs alleged that various statements made by the respective banks were operative misrepresentations. Not much will be gained by going into the specific facts of the cases here. It suffices to highlight that after a detailed examination of each of the alleged misstatements, the court in both cases made findings that prevented an operative misrepresentation from arising, for instance, that the alleged representation was not made; or that even if the representation had been made, it was not false; or that the alleged representation was not a statement of fact but a statement of opinion; or that the alleged statement had not induced the plaintiff to enter into the contract.

5.11 That a statement of opinion does not amount to a statement of fact is particularly relevant in the realm of investment banking, where it is common for the bank's representative to make statements about the future, such as those relating to the potential returns of an investment. At face value, these are statements of opinion, and therefore cannot be the basis of an operative misrepresentation. However, a statement that is ostensibly one of opinion might be taken by the court to amount to an implicit representation that the maker knew of facts that might reasonably have supported the stated opinion, and this would be a representation of fact[34] which could be the basis of an operative misrepresentation if the opinion had not been reasonably formed. In *Sheila Kazzaz*, the court was of the view that the statement that the property financing arrangement would generate sufficient returns to cover the interest on the insurance policy and the mortgage loans forming part of the arrangement was a statement of opinion. The court considered whether the bank's representative knew of facts that might reasonably have led to this opinion being held, and concluded that the plaintiff's representative could not be faulted for making the implicit statement. The misrepresentation claim based on this statement therefore failed.[35]

5.12 The relevant events in *Shelia Kazzaz*[36] took place outside Singapore. Anselmo Reyes IJ pointed out that where a foreign tort was involved, Singapore law applied a double actionability test. Since misrepresentation was actionable as a tort in Singapore, and the defendants accepted that misrepresentation would be actionable as a civil wrong under the law of Dubai or the Dubai International Financial Centre ("DIFC"), the double actionability test was met. The court then applied the law of the forum

34 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [142].
35 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [146]–[148].
36 See para 5.8 above.

(Singapore) in evaluating whether, as a matter of fact, there had been a misrepresentation for which damages were claimable. Reyes IJ had some doubt whether Singapore's Misrepresentation Act would apply in this case, where the alleged misrepresentations had taken place in the DIFC and not in Singapore.[37] The learned judge explored the history and purpose of the Misrepresentation Act, and questioned whether the Act was intended to regulate conduct or protect classes of persons outside Singapore territory. He expressed the view that the purposes of the statute "would not appear to be enhanced if the Misrepresentation Act were applicable to misrepresentations occurring outside Singapore territory in relation to contracts governed by foreign law".[38] However, as the defendants had not challenged the applicability of the Misrepresentation Act, the court proceeded on the basis that the Act was applicable to the alleged misrepresentations.[39]

5.13 A point of general interest relates to Reyes IJ's comments in *Sheila Kazzaz* on the correct measure of damages under s 2(1) of the Misrepresentation Act. The English Court of Appeal had established, in the case of *Royscot Trust v Rogerson*,[40] that damages for misrepresentation under the English equivalent of s 2(1) should be assessed based on the tort of deceit rather than that on negligent misrepresentation. Reyes IJ disagreed with this interpretation of s 2(1), stating that as a matter of principle, "it would be wrong for a person who was merely negligent to be treated as if he or she had acted fraudulently". The learned judge highlighted that this was a matter of ongoing debate in Singapore, as the Court of Appeal had raised similar queries in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd*.[41]

B. Breach of contract

5.14 As the relationship between the customer and the bank is one that is based primarily on contract, it seems almost counter-intuitive that an action for breach of contract, particularly breach of an express terms of the contract, is not necessarily the easiest action to bring against a bank. In *Koh Kim Teck*,[42] the plaintiff, Koh, invested in structured products known as knock-out discount accumulators and dual currency investments with Credit Suisse, the defendant bank. The investments in

37 The judge's views on this matter arose from the guidance provided by the case of *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [104].
38 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [131].
39 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [131].
40 [1991] 2 QB 297 at 301.
41 [2015] 1 SLR 997 at [83]–[85].
42 See para 5.8 above.

Koh's account were mainly funded by credit, in return for which he had to maintain sufficient collateral. The global financial crisis of 2008 caused a substantial collateral shortfall in Koh's account, and he received a close out notice from the bank, giving him four hours to provide a top up of US$5.7m. When the top up was not provided, the bank closed out all the account's open investment positions and liquidated all the assets in the account, causing Koh to suffer a loss of US$26m. Koh claimed that the bank owed him a duty in both contract and tort to take reasonable care when giving him advice, including advice about managing his account. The court highlighted that the question of whether the bank owed a duty of care to the plaintiff depended on the responsibilities which it had assumed in its dealings with the plaintiff, and the starting point of this inquiry would be the contractual relationship between the parties.[43]

(1) Express terms of the contract

5.15 In *Koh Kim Teck*, the court noted that in both the account opening documents as well as the incorporation documents, Koh specifically accepted that he was the one responsible for managing the account.[44] The "Limited Power of Attorney for Asset Manager" signed by Koh stated that the bank "bears no responsibility for the investment decisions of the Attorney [that is, Koh]".[45] The account opening conditions showed that the account was opened as a non-discretionary account, which meant that such assets were to be managed by the bank only in accordance with the customer's specific instructions.[46] Further, there was no investment advisory agreement signed between Koh and the bank.[47] Based on all these facts, the court found that there was nothing in the contractual arrangement between parties which suggested that the bank had undertaken the responsibility of advising Koh and managing his account, and dismissed Koh's claim based on the contractual duty to advise.[48]

5.16 The case of *Zillion Global*[49] also involved a closing out of the plaintiffs' positions under their investment accounts. However, the alleged breach of contract in *Zillion Global* was more specific than in *Koh Kim Teck*. The plaintiffs in *Zillion Global* alleged that the closing out of its accounts had been done by the bank unilaterally without prior notice. This claim was disposed of by the court after a detailed examination of the facts, as the court found that the bank had given the requisite notice

43 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [26].
44 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [30].
45 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [30].
46 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [31].
47 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [32].
48 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [35].
49 See para 5.8 above.

before closing out the positions under the plaintiff's accounts and was therefore not in breach of contract.[50]

(2) Implied terms of the contract

5.17 In *Zillion Global*, the plaintiffs also argued that the bank had breached an implied term of the contract which obliged them to provide regular updates about the state of the plaintiffs' accounts and the transactions. Specifically, the plaintiffs argued that there was an implied term that the bank should provide daily updates, including information on the total assets, total liabilities, net assets/liabilities, outstanding notional values, collateral value, total exposure, mark-to-market value and notional value (collectively referred to as "Specific Details").[51] Any allegation of breach of implied term in Singapore must naturally lead to a discussion of the Court of Appeal's decision in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[52] ("*Sembcorp Marine*"). This case set out a three-step process to be used for implying a term in a contract as follows:[53]

> (a) First, a gap in the contract must have arisen because both parties did not contemplate the gap – a term will not be implied where one party had expressly contemplated the gap.
>
> (b) Second, it must be necessary in the business or commercial sense to imply a term in order to give the contract efficiency, that is, the proposed term must be necessary for business efficacy.
>
> (c) Third, the proposed term 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 the time of the contract, that is, the proposed term must pass the officious bystander test.

5.18 The first step, that there must have been a gap in the contract that both parties must not have contemplated, is not an easy requirement to satisfy in general situations, and even more challenging in financial contracts which are usually tightly drafted by the bank's lawyers and set out extensively the rights and obligations between the parties.[54] Such an environment might lead to the conclusion that any provision that has been omitted from the contract was omitted intentionally, as a matter of

50 *Zillion Global v Deutsche Bank AG, Singapore Branch* [2019] SGHC 165 at [286].
51 *Zillion Global v Deutsche Bank AG, Singapore Branch* [2019] SGHC 165 at [75].
52 [2013] 4 SLR 193.
53 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101].
54 See, *eg*, *Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 4 at [99].

design. In *Zillion Global*, the court found that in entering the contracts with the plaintiffs, the bank did contemplate the type and frequency of the updates that it would provide to the plaintiffs. The contract stated that the bank would provide the plaintiffs with "bank statements", but the contract did not stipulate the information that was to be in these bank statements or how frequently these statements had to be provided. On the other hand, the contract stipulated that the bank was not required to provide some of the Specific Details to the plaintiffs unless the plaintiffs requested them. The court did not accept the plaintiffs' submission:

> … that just because the contractual documents were based on [the bank's] standard form contracts and were not negotiated between the parties, this meant that the parties did not and could not have contemplated the issue as to whether [the bank] was to provide the Specific Details.

The court was of the view that the bank was aware of what information its client statements would provide and it chose not to provide more information initially. The court was also of the view that if the plaintiffs had considered the additional information to be important enough, they could have asked for the client statements to include such information. In the circumstances, the court decided that there was no gap in the contracts as to the bank's obligation to provide updates on the accounts. The argument that the parties did not contemplate the gap, and the first step of the *Sembcorp Marine* test, failed.[55] The court also decided that, in any case, the alleged implied term was not necessary for business efficacy under the second step.[56]

5.19 In *Koh Kim Teck*,[57] one of the plaintiff's claims was that there was an implied term in the contract that a reasonable period would be given for the provision of additional collateral in the event of a shortfall. The court applied the test for an implied term set out in *Sembcorp Marine*, and pointed out that no term could be implied that contradicted the express terms of the contract, as such a term would fail the officious bystander test.[58] In *Koh Kim Teck*, the credit facility application form which governed the collateral requirements stated in cl 8 that the bank reserved the right to decide the length of time to be given where a collateral top-up was sought from the borrower, and that this period "may, in certain circumstances be less than 24 hours".[59] Clause 9 of the form went on to state that if the borrower did not comply with its obligations, the bank

55 *Zillion Global v Deutsche Bank AG, Singapore Branch* [2019] SGHC 165 at [81]–[87].
56 *Zillion Global v Deutsche Bank AG, Singapore Branch* [2019] SGHC 165 at [108].
57 See para 5.8 above.
58 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [37], referring to *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [98]–[100].
59 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [38].

had the right to close out the account.[60] The court decided that given the clear and express words of these clauses, there was no gap in the contract that could justify an implication of the term sought by the plaintiff.[61]

C. Tortious duty of care

5.20 All three cases discussed in this part included a pleading of breach of tortious duty of care. From first principles, in order to establish liability in the tort of negligence, the plaintiff must show that the defendant owed the plaintiff a duty of care, that this duty was breached, and that this breach caused the plaintiff to suffer loss. The leading case in Singapore to determine the existence of a tortious duty of care is *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology*[62] ("*Spandeck*"). This case decided that in order to establish a duty of care, a threshold test of factual foreseeability must be passed. Following that, the first stage was to establish legal proximity based on a voluntary assumption of responsibility and reliance, and the second stage was to ask if there were any policy factors that might negate the duty.[63]

5.21 Sometimes, the customer's claims for breach of duty might be dismissed on the facts, without the need for a detailed consideration of the law. This is illustrated in *Sheila Kazzaz*,[64] where the plaintiffs raised seven specific instances of breach of common law duty of care by the defendants, including matters such as (a) failing to explain the full extent of the plaintiffs' liabilities; (b) failing to highlight the currency risk inherent in the financing arrangements; and (c) failing to explain the significance of being a "Professional Client".[65] The court found that none of the breaches were made out on the facts of the case, even assuming that a duty was owed by the defendant to the plaintiffs.[66]

5.22 The existence of a tortious duty of care in banking-related situations is closely related to the contractual duties of the defendant, since contractual provisions feature prominently in such relationships. In

60 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [38].
61 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [38].
62 [2007] 4 SLR (R) 100.
63 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology* [2007] 4 SLR(R) 100 at [77], [81], [83] and [115]. See also the Court of Appeal decision in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [40a], [40b] and [41], on the proximity requirement in the tortious duty of care, summarised in *Zillion Global v Deutsche Bank AG, Singapore Branch* [2019] SGHC 165 at [126].
64 See para 5.8 above.
65 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [7].
66 *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [152], [161] and [175].

Koh Kim Teck,[67] the court followed the guidance of *Deutsche Bank AG v Chang Tse Wen*[68] ("*Deutsche Bank v Chang*") and pointed out that if an examination of the contractual relationship between the parties led to the conclusion that the bank undertook no obligation to advise and manage the plaintiff's account, he would "face an uphill battle in respect of his claim in tort".[69] The court in *Koh Kim Teck* went on to state that where the defendant is found to have no contractual duty towards the plaintiff, there would be little basis to find that the defendant owed the plaintiff a duty of care in tort, unless it could be shown that the defendant had acted in a manner which deviated from its contractually defined role.[70] The court applied these principles to the facts of the case, and concluded that no tortious duty of care existed between the parties. The court found that the bank "had acted within the bounds of its legal relationship with Koh. Whatever 'advice' it gave to Koh, be it through recommendations or updates, was simply a goodwill gesture extended to a client".[71] It was the plaintiff who had the ultimate responsibility over his own investment decisions and in monitoring the credit limit of his account.[72]

5.23 One interesting aspect of *Koh Kim Teck* can be seen in the court's discussion of the scope of the Unfair Contract Terms Act[73] ("UCTA"), when Aedit Abdullah J referred to the Court of Appeal's *obiter* view expressed in *Deutsche Bank v Chang* that whether a contractual provision is subject to the test of reasonableness under the UCTA depended on its substantive effect rather than its form.[74] In *Deutsche Bank v Chang*, the Court of Appeal had disapproved of the view that clauses which define the scope or nature of the relationship between the parties are different in kind from those which exclude liability for breach of an existing duty. The Court of Appeal referred to s 13(1) of the UCTA, which prevented a party "from excluding or restricting liability by reference to a contractual term or non-contractual notice *which excludes or restricts the relevant obligation or duty*" [emphasis in original], and concluded that this seemed "to preclude any material distinction being drawn between clauses which exclude liability and those which restrict the scope of the duty or the obligation".[75] The views of the Court of Appeal were of special interest to the banking

67 See para 5.8 above.
68 [2013] 4 SLR 886.
69 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [26].
70 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 ("*Koh Kim Teck*") at [26]. The court in *Koh Kim Teck* relied on the approach set out by the Court of Appeal in *Deustche Bank AG v Chang Tse Wen* [2013] 4 SLR 886 at [51].
71 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [70].
72 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [70].
73 Cap 396, 1994 Rev Ed.
74 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [71].
75 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886 at [63].

community as these were particularly relevant to the question of whether non-reliance clauses, which are common in investment contracts, are subject to the UCTA. Although the Court of Appeal's views were *obiter*, this could be seen as an indication of how the Court of Appeal would decide if the issue were to come before it, and also as a guidance to the lower courts as to what the correct legal position should be. In *Koh Kim Teck*, Abdullah J stated that he "was satisfied" that the Court of Appeal's views, though *obiter*, "are consonant with a purposive interpretation of UCTA".[76] Although the statement of the law is relatively clear, it may not be easy to discern in practice whether a clause restricts a relevant obligation or duty. In view of such potential uncertainty, it is useful to be able to identify what type of contractual provision would not be subject to the UCTA. Some guidance is provided by Abdullah J's firm view that the contractual provisions considered in his decision "did not have the effect of restricting or excluding a tortious duty" but were "intended to merely regulate the relationship of the parties *vis-à-vis* each other and define the legal proximity of the parties".[77] As set out above,[78] these provisions were to the effect that Koh was the one responsible for managing the account, that the bank bore no responsibility for the investment decisions of Koh, and that the account was a non-discretionary account. The learned judge distinguished these from provisions that negated a tortious duty, such as a disclaimer that the aggrieved party accepts and waives liability for negligent acts on the tortfeasor's part.[79]

D. Reality check for customers

5.24 Ultimately, in all three cases considered in this part, the customers did not succeed against their banks. The concluding statement by Abdullah J in *Koh Kim Teck* is one that a bank customer would be wise to note, and it might also be one which underlines the approach taken by the Singapore courts:[80]

> It is always important to bear in mind that the relationship between a client and a bank is governed by the contractual documents that are signed. Contrary to the advertisements that are often put out, this is not a pastel-coloured relationship that is almost familial: a bank looks out for itself and has many lawyers. While exceptions to such relationships may exist, they are likely to be rare, exclusive and expensive for the client.

76 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [72].
77 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [72].
78 See para 5.15 above.
79 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [72].
80 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [141].

III. Performance bonds

5.25 In a typical construction contract, a subcontractor ("the applicant") will guarantee the performance of its obligations under the subcontract by applying to a financial institution to issue a performance bond in favour of the main contractor, who is the beneficiary under the bond. The applicant and the beneficiary typically agree in the underlying contract that the beneficiary can claim upon the bond when the applicant has breached the contract. In the performance bond, the issuer promises the beneficiary that it will pay the sum stated in the bond upon the beneficiary's demand, regardless of any disputes in the underlying contract between the applicant and the beneficiary. It is settled law in Singapore that the courts will restrain a beneficiary from calling a performance bond only if a strong *prima facie* case can be made out that the call was either fraudulent or unconscionable.[81] As fraud is difficult to show, most of the cases that have come before the Singapore courts have focused on unconscionability. While unconscionability is easier to show than fraud, cases where the plaintiff succeeds in obtaining an injunction based on the unconscionability exception are probably still more uncommon than those where the plaintiff fails,[82] and it is interesting that the plaintiffs in two out of the three 2019 cases considered in this section were successful. The prevalence of applications for injunctions to restrain calls on performance bonds based on the unconscionability exception has led to a practice, most probably initiated by beneficiaries, whereby the applicant agrees in the underlying contract that it will not rely on the unconscionability exception to prevent the beneficiary's call on the bond, but will confine itself only to the fraud exception. This type of clause was held to be valid by the Court of Appeal in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd*.[83]

A. Construing the terms of a performance bond to determine its scope

5.26 It is important to construe the terms of a performance bond to determine its scope, in order to ascertain what obligations are covered

81 See, *eg*, *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 and *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352.

82 See Tang Hang Wu, "Equity in the Marketplace" in *Equity, Trusts and Commerce* (Paul Davies & James Penner eds) (Hart Publishing, 2017) at p 51. The author looked at reported and unreported cases in Singapore 2000–2015 involving applications for injunctions to restrain calls on performance bonds on the basis of the unconscionability exception and found that out of 31 cases, 13 were successful, with the successful numbers tapering out in the period from 2010 to 2015, where only four out of 11 cases were successful (at p 66).

83 [2015] 3 SLR 1041.

under the bond. In a straightforward situation, the bond will apply to breach of the applicant's obligations under the contract in conjunction with which the bond was procured, usually referred to as the underlying contract. Sometimes, a bond may have a wider scope, and may cover also breaches of the applicant's obligations in other contracts. The scope of the performance bond was an issue in *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd*[84] ("*Ryobi Tactics*"). The plaintiff ("Ryobi") was engaged by the first defendant ("UES") as a subcontractor for three construction projects: the "Chestnut project", the "Changi project" and the "Jurong project". The agreement for these projects was set out in four separate subcontracts, each of which required an on-demand performance bond in lieu of a cash deposit. Four performance bonds were duly issued by the second defendants for the benefit of UES. Subsequently, UES called on all four performance bonds for their full value, asserting that it had suffered losses in excess of $4.5m as a result of Ryobi's defective work in relation to the Chestnut project. Ryobi applied for an injunction, arguing that the calls on the four performance bonds were fraudulent and/or unconscionable, and that the subcontracts for the Changi and Jurong projects did not give UES the right to call on the performance bonds issued under those subcontracts for losses suffered in relation to the Chestnut project. Before considering the question of fraud or unconscionability, the court thought it was crucial to first decide whether the terms of the performance bonds allowed for a call to be made for consolidated liabilities under all the four contracts for the three projects. There was no issue in relation to the performance bond provided pursuant to the subcontract for the Chestnut project, as the call clearly related to sums owed under that project, and was therefore covered under that performance bond. Since there were genuine disputes between the parties in relation to the Chestnut project, the subcontractor could not show that there was a strong *prima facie* case of unconscionability in the call of this bond. That left the other three performance bonds to be construed to see whether they were triggered in relation to amounts due under the Chestnut contract. The court looked at the terms of the performance bonds and decided that they were each issued in respect of a particular project and a particular subcontract entered into for that project.[85] Some of the factors that were considered by the court in reaching its decision included the fact that each performance bond had as its subject the project name of the particular project to which it related, and started with a preamble pertaining to that project and subcontract; that "subcontract" in each performance bond was defined as the subcontract for a particular project; and that the operative clause of the performance bond continued to make reference

84 [2019] 4 SLR 1324.

85 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [26].

to that "subcontract".[86] The court concluded that UES could only call on a particular performance bond in connection with matters arising out of the corresponding subcontract. This meant that UES had no right to call on the other three performance bonds on the basis of sums owed in relation to the Chestnut project, and an injunction would be granted to restrain those calls.

5.27 As *Ryobi Tactics* highlights, construction of the provisions of a performance bond is of utmost importance to determine its scope. An appropriately drafted bond may guarantee sums owed by the applicant to the beneficiary not just under the contract pursuant to which the performance bond was issued, but also under other contracts between the applicant and beneficiary. An example of such a bond can be seen in *Chip Hua Poly-Construction Pte Ltd v Housing and Development Board*[87] ("*Chip Hua Poly-Construction*"), where the relevant provision of the bond stated that:[88]

> The [beneficiary] may demand payment of a sum or sums under this Bond in satisfaction of moneys due from the [applicant] to the [beneficiary] under the provisions of [the said Contract or] any other contract made between the [applicant] and the [beneficiary].

However, this clause was not wide enough to cover the situation that arose in *Chip Hua Poly-Construction*, where the beneficiary called on the bond for claims which were owed to the beneficiary by the applicant jointly with another party. The Court of Appeal in that case held that on a true construction of the bond, while the employer could call on the bond to satisfy, settle or reduce the contractor's liability under "any other contract" made between the contractor and the employer, the bond was intended to secure the liability of the contractor alone to the beneficiary, and not the joint liability of the contractor and another party to the beneficiary.[89]

5.28 The court used two alternative lines of analysis to reach the conclusion that the call on the other three performance bonds in *Ryobi Tactics* was unconscionable. First, the court applied the rule that a call that is made in breach of the underlying contract could in appropriate circumstances be restrained on grounds of unconscionability. This is

86 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [26]–[27].
87 [1998] 1 SLR(R) 544.
88 *Chip Hua Poly-Construction Pte Ltd v Housing and Development Board* [1998] 1 SLR(R) 544 at [10].
89 *Chip Hua Poly-Construction Pte Ltd v Housing and Development Board* [1998] 1 SLR(R) 544 at [10].

so, notwithstanding that a performance bond is independent from the underlying contract. The court referred to the view that:[90]

> … an increasing corpus of common law authorities suggests that a call upon a performance bond ought to be restrained where 'the principal contract itself imposes some precondition or limitation which has not been satisfied'.

On this analysis, the court found that the express wording of the subcontracts showed that the parties had intended the performance bonds to be called when UES had reason to believe that the corresponding subcontract had been breached. It was clear on the facts that UES was claiming on the performance bonds only in relation to matters arising under the Chestnut contract. Allowing a call on the other subcontracts in these circumstances would condone a breach of the relevant subcontract.

5.29 The court was of the view that an alternative analysis could be made that UES's call on the three performance bonds was unconscionable because it was "in essence attempting to dip into the security of the other projects when it only had the belief that it had legitimate claims in respect of the Chestnut project".[91] This view accords with the general principle that a call on a performance bond would be unconscionable if the beneficiary did not have an honest belief that there was a non-performance in respect of the obligations guaranteed by the bond. The court referred to the well-established proposition that genuine disputes between the parties did not render a call unconscionable, and pointed out that this referred to "*genuine disputes as to whether the underlying subcontracts were breached*, not genuine disputes as to a *legal entitlement* to call" [emphasis in original].[92] The court found that there were no genuine disputes as to any breach of the Changi and Jurong project subcontracts.[93] UES had not alleged any such breaches. Instead, UES erroneously believed that it could call on the performance bonds for the Changi and Jurong project subcontracts based on Ryobi's breaches in respect of the Chestnut project, but this belief could not justify the call.[94] UES's call on the subcontracts for the Changi and the Jurong projects might have been a proper call if it had the honest belief that Ryobi was in breach of its obligations under those subcontracts. But this was not the case. The parties were primarily in dispute over Ryobi's purported breach of the subcontract for the Chestnut project. The court concluded that this was a case where "[t]he

90 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [36], quoting Wayne Courtney, John Phillips & James O'Donovan, *The Modern Contract of Guarantee* (Thomson Reuters, 3rd Ed, 2016) at paras 13-026–13-028.
91 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [38].
92 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [38].
93 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [38].
94 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [38].

first defendant misread and misinterpreted the terms of the performance bonds and the subcontract. Such misinterpretation on the first defendant's part was not a genuine dispute".[95]

5.30 UES appealed to the Court of Appeal but its appeal was dismissed with no written grounds of decision rendered. The Court of Appeal found that none of the clauses in the performance bonds in respect of the Changi or Jurong projects permitted UES to call on the performance bonds for claims which emanated under the Chestnut project. The Court of Appeal agreed with the High Court judge that the first defendant's calls on the performance bonds under those circumstances were unconscionable.[96]

B. Clauses precluding the applicant from relying on the unconscionability exception

5.31 *Bintai Kindenko Pte Ltd v Samsung C&T Corp*[97] ("*Bintai Kindenko*") concerned a project to upgrade the Suntec City Convention Centre, wherein a performance bond had been procured by the mechanical and engineering subcontractor ("the Subcontractor") in favour of the main contractor ("the Contractor"). Various stages of the subcontract work were not completed on time, and the Contractor sought to hold the Subcontractor responsible for the delays. Eventually the Contractor demanded payment on the banker's guarantee. The Subcontractor applied for an *ex parte* interim injunction to restrain the Contractor from calling on the guarantee and the bank from paying out on the guarantee. The judge below initially granted the *ex parte* interim injunction, but subsequently discharged it after hearing both parties. The Subcontractor appealed against the discharge of the interim injunction, which was the subject of the current case before the Court of Appeal. The agreement between the Contractor and Subcontractor was set out in a Letter of Agreement ("LOA"), and this was signed by representatives of the Subcontractor, who confirmed the acceptance of all the terms and conditions stated therein. The LOA provided, *inter alia*, that the subcontract should be the Singapore Institute of Architects ("SIA") Conditions of Sub-Contract,[98] including all particular conditions as set out in the main contract, which was based in the form of the SIA Lump Sum Contract.[99] The particular conditions of main contract and particular conditions of subcontract each purported to incorporate various additional terms and amendments to the main contract and the subcontract, including similarly worded

95 *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [38].
96 See editorial note in *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324.
97 [2019] 2 SLR 295.
98 4th Ed, 2010.
99 9th Ed.

exclusion clauses, which were the subject of contention in the dispute. The exclusion clause in the SIA Conditions of Sub-Contract was inserted as a new cl 14A(5), and provided that except in the case of fraud, the Subcontractor should not for any reason whatsoever be entitled to restrain the Contractor from making any call on the performance bond, on any other ground including the ground of unconscionability. In the appeal by the Subcontractor to reinstate the injunction that had been discharged, the Contractor argued that the Subcontractor was precluded by the exclusion clauses from applying for an injunction on the ground of unconscionability. The Court of Appeal dismissed the Subcontractor's appeal, and a few interesting points of the decision will be discussed here.

5.32 The Court of Appeal clarified that when an applicant for a performance bond sought to restrain the beneficiary from calling on the bond, the applicant had to show that the call was either fraudulent or unconscionable, but there was no need for the applicant to show, in addition, that it was not disentitled to rely on the fraud or unconscionability exceptions. If the beneficiary wished to raise the argument that the applicant was not entitled to rely on these exceptions, the beneficiary bore the burden of showing that the applicant's right was contractually excluded. The Subcontractor argued that the exclusion clauses were not incorporated into its contract with the Contractor, but the Court of Appeal rejected this argument. It found that the LOA had incorporated the terms of the particular conditions of main contract and particular conditions of subcontract by express reference. The court found that:[100]

> … if a term in a signed contract incorporated some or all the terms of a separate document by making reference to those terms, the parties to the contract would be bound by those separate terms, even if they did not have any knowledge of what those terms were at the time of contracting.

As the Subcontractor did not dispute that the exclusion clauses, if incorporated, had the effect of precluding it from relying on the unconscionability exception,[101] the finding that the clauses were incorporated into the contract was fatal to the Subcontractor's appeal to reinstate the injunction, and the Court of Appeal upheld the High Court's decision that the Subcontractor was contractually precluded from relying on the unconscionability exception.

5.33 At the appeal hearing, the Subcontractor attempted to argue that even if the exclusion clauses were incorporated into the Subcontract, the clauses should be unenforceable under the UCTA. This was a new point that was not raised in the High Court, and the Court of Appeal did not

100 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [59].
101 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [64].

allow this point to be raised for the first time on appeal. The Court of Appeal was of the view that this would prejudice the Contractor, who would be deprived of an opportunity to raise evidence relating to the circumstances at the time of contracting, which would be relevant to the determination of the reasonableness of the exclusion clauses under the UCTA.[102] It is a pity that the Court of Appeal did not have occasion to fully consider the point whether the exclusion clauses were reasonable. This is an issue of special relevance to the construction industry, as the clause in question is one that is being increasingly included into standard form contracts such as the SIA Lump Sum Contract and the SIA Conditions of Sub-Contract. The Court of Appeal in *Bintai Kindenko*[103] did nevertheless make some limited observations in response to the Subcontractor's submission that:[104]

> … all exclusions clauses which excluded an obligor's right to rely on the unconscionability exception are 'inherently unreasonable' because they exclude the court's ability to intervene in circumstances where intervention has already been deemed reasonable.

The Court of Appeal stated that it would not have been inclined to accept this argument because this contradicted the clear principle laid down in *Koh Lin Yee v Terrestrial Pte Ltd*[105] that:[106]

> [W]hether or not a clause is (or is not) reasonable under the UCTA would depend not only on the various factors enunciated in the UCTA itself as well as in the case law … but also (and perhaps more importantly) on the precise facts of the case itself.

5.34 The segment in *Bintai Kindenko* where this point was discussed is very short, as there was no need for the court to decide on this matter. Hopefully, there will be opportunity for more in depth analysis in future. The Subcontractor's submission conflates two assertions: First, that a clause which excludes an obligor's right to rely on the unconscionability exception is unreasonable because it excludes the court's ability to intervene in circumstances where intervention has already been deemed reasonable. And second, that all such clauses are inherently unreasonable and should be treated the same way. The reason given by the Court of Appeal for its inclination to reject the Subcontractor's submission suggests that the court was focusing on the submission that "all" such clauses should be treated this way. There was no sign that the Court of

102 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [68].
103 See para 5.31 above.
104 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [70].
105 [2015] 2 SLR 497.
106 *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [70]–[71], referring to *Koh Lin Yee v Terrestrial Pte Ltd* [2015] 2 SLR 497 at [37].

Appeal had considered whether the exclusion clauses in the case had the effect of excluding the court's ability to intervene in circumstances where intervention has already been deemed reasonable, or whether a clause that had this effect was unreasonable under the UCTA. In any case, there may be a preliminary question that needs to be examined, which is whether a clause which precludes the applicant from applying to restrain the beneficiary from claiming on a performance bond on the ground of unconscionability falls under the control of the UCTA. In *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd*[107] ("*CKR*"), which was the first time that such a clause was held to be enforceable in Singapore, the Court of Appeal did not state definitively that the clause would be subject to the reasonableness requirement in the UCTA. Andrew Phang Boon Leong JA, in giving judgment for the Court of Appeal in *CKR*, said that the innocent party could also pray in aid "where applicable" the relevant provisions of the UCTA.[108] He stated:[109]

> 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 …).

When the issue of the validity of such a clause comes up for adjudication before the courts, it would be desirable first to establish that the clause in question is of a type that must meet the requirements of the UCTA. Once that is established, the court's assessment of whether the clause is reasonable is likely to be applicable to other cases involving clauses of the same type. Although each case must still be considered according to its own facts and circumstances, the circumstances which would be relevant to the inclusion of such a clause in the underlying contract are likely to be similar in many, if not most, instances.

C. Was the call on the performance bond unconscionable?

5.35 Whether a call on a performance bond is unconscionable depends on the facts of the case, and it is not easy to predict if a court will find a particular call to be unconscionable. This assessment is particularly difficult as unconscionability does not lend itself to a precise definition. The general guidance given by the courts on the meaning of

107 [2015] 3 SLR 1041.
108 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 at [20].
109 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 at [23].

unconscionability, such as a lack of *bona fides*, is often quoted. In addition, it is important to take heed of the approach to be taken in the process. In *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp*[110] ("*Soon Li Heng*"), the court emphasised that "[i]n determining whether a call on a bond is unconscionable, *the entire picture* must be viewed, taking into account all the relevant factors" [emphasis added by the High Court].[111] It also drew attention to the guidance given by the Court of Appeal in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd*,[112] which is worth setting out in full here:[113]

> [A] finding of unconscionability is a conclusion applied to conduct which the court finds to be so lacking in *bona fides* such that an injunction restraining the beneficiary's substantive rights is warranted. Sufficient reasons must be given to the court to enable it to come to such a conclusion, and it is necessary that these reasons are drawn from a thorough consideration of the relevant facts as viewed in the entire context of the case, taking into account the parties' conduct leading up to the call on the bond. This should not be confused with a consideration of the merits of the case, for the inquiry here is concerned with breadth rather than depth and remains a *prima facie* inquiry. With all that said, we reiterate that it is very difficult for a single piece of evidence, read without the benefit of the context surrounding its making, to be definitive proof of a strong *prima facie* case of unconscionability.

5.36 These principles were applied by the court in *Soon Li Heng* to consider whether the relevant facts, as viewed in the entire context of the case, supported the subcontractor's contention that the contractor's call on the performance bond was unconscionable. Although each case ultimately turns on its own facts, the decision in *Soon Li Heng* is a useful illustration of a few situations in which a call on a performance bond might be found to be unconscionable. The main contractor was employed by the Land Transport Authority to construct a Mass Rapid Transit station and tunnels, and by the time that the performance bond was called, several payment claims had been made by the subcontractor under the Building and Construction Industry Security of Payment Act[114] and two disputes between the parties had been referred to adjudication. The subcontractor alleged that the main contractor's call on the performance bond was unconscionable for three reasons. The first reason was that the call was made when the claim was in the process of being assessed in adjudication

110 [2019] SGHC 267.

111 *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp* [2019] SGHC 267 at [35]. Ang Cheng Hock J was quoting from the judgment of the Court of Appeal in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [31].

112 [2012] 3 SLR 352.

113 *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp* [2019] SGHC 267 at [35].

114 Cap 30B, 2006 Rev Ed.

proceedings. The court did not accept this argument as it was of the view that it might well have been legitimate for a beneficiary to call on a bond even when its claim was before an adjudicator in adjudication proceedings. As long as this was done prior to the determination by the adjudicator, a beneficiary would not necessarily be regarded as acting unconscionably in invoking its contractual rights to call on its security.[115] The second reason given by the subcontractor was that the call was motivated by an improper purpose in the sense that the main contractor's aim was to revisit the same points which had been made and rejected in an earlier adjudication. After a detailed examination of the facts and law, the court accepted this argument. The court found that the beneficiary's motive behind the call on the performance bond was not a proper one as it sought to undermine the temporary finality of the adjudication.[116] The third reason put forward by the subcontractor was that the call on the performance bond was inconsistent with the terms of the subcontract. The judge was of the view that the subcontract was relevant because it showed the agreement between the parties regarding the purpose of the contract, and a call for a purpose that was not contemplated by the subcontract would constitute evidence of unconscionability.[117] The premise for the main contractor's call under the performance bond was that the subcontractor, in breach of the subcontract, had over-claimed, and the main contractor had overpaid, an amount in excess of the current value of the performance bond in relation to works which the subcontractor claimed to have performed under the subcontract.[118] The court was of the view that as the subcontract made it clear that the sums to be claimed under the performance bond must be sums due under the subcontract, and as the beneficiary's claim was for the recovery of payments, which was in the nature of restitution, the call was not for a purpose for which a call under the performance bond was allowed, and was not consistent with the subcontract.[119] For the second and third reasons put forward by the subcontractor, the court found that the call on the performance bond was unconscionable and ought to be restrained.

115 *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp* [2019] SGHC 267 at [51].

116 *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp* [2019] SGHC 267 at [91].

117 *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp* [2019] SGHC 267 at [92].

118 *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp* [2019] SGHC 267 at [27].

119 *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp* [2019] SGHC 267 at [101]–[102].