Jiang Ou *v* EFG Bank AG
[2011] SGHC 149

Case Number : Suit No 1055 of 2009

Decision Date : 09 June 2011

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Lawrence Quahe, Chenthil Kumarasingam and Kenneth Lim (Lawrence Quahe & Woo LLC) for the plaintiff; Siraj Omar (Premier Law LLC) for the defendant.

Parties : Jiang Ou — EFG Bank AG

Banking – Statement of account – Verification clauses

9 June 2011 Judgment reserved.

Steven Chong J:

Introduction

1 Conclusive evidence or verification clauses, commonly found in banking documentation, have consistently been upheld by the courts, *inter alia*, on the premise that banks who insert them "*are known to be honest and reliable men of business who are most unlikely to make a mistake*" (per Lord Denning MR in *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437 at 440). Such clauses have been upheld to exonerate banks from liability in honouring cheques that were *subsequently* established to bear the forged signatures of their customers. From my survey of the case law, there has been no occasion where the courts have had to pronounce on the validity of such a clause when invoked to exculpate a bank from liability of the fraud of its own employees engaging in unauthorised trades. If such clauses were to be upheld in relation to such unauthorised trades, the risk of fraud of the bank's employee, entirely within the sphere of control of the bank, would be shifted to the customer. Are such clauses, even if worded broadly enough to encompass the fraud of the bank's employee, enforceable? Is the lack of case authority explained by banks' intuitive recognition that such liability cannot be validly excluded or perhaps by reason of other commercial considerations? This is precisely the principal issue that presented itself before me for determination in the instant case.

Material Facts

Parties to the dispute

2 The plaintiff, Jiang Ou ("Mdm Jiang") is a citizen of the People's Republic of China ("China") and a permanent resident of Singapore. At all material times, Mdm Jiang was a substantial shareholder, the General Manager and Managing Director of Liaoning New Wentai Paper Industries Co Ltd, a company engaged in the business of manufacturing of paper and paper products.

3 The defendant, EFG Bank AG ("EFG Bank") is a bank incorporated in Switzerland, licensed to operate as a bank in Singapore.

Background to the dispute

4 In 2008, Mdm Jiang and her husband applied for permanent residence under the Monetary Authority of Singapore ("MAS") Financial Investor Scheme ("FIS"). Under this scheme, an individual can apply for permanent residence in Singapore by depositing a sum of at least S$5 million with an approved bank regulated by the MAS, for a continuous period of five years.

5 In support of her application for permanent residence under the FIS, Mdm Jiang opened a *non-discretionary* account (Account No XXX) ("the FIS Account"), with EFG Bank on or around 2 June 2008. A non-discretionary account is distinct from a discretionary account in that Mdm Jiang's instruction or mandate (written or oral) was required prior to the valid execution of any transaction by EFG Bank. Mr Ng Ton Yee ("Mr Ng"), an employee of the EFG Bank as well as Mdm Jiang's client relationship officer, purported to witness Mdm Jiang signing the account opening documentation in China though it was not disputed that Mr Ng was not present in China at that time.

6 In the customer information profile, Mdm Jang was described by EFG Bank as someone with "*little level of understanding of financial products*" [note: 1] and her objective was clearly stated as achievement of capital growth balanced with an emphasis on "*Capital Protection*". [note: 2] Additionally, from the transcript of a voice log conversation between Mdm Jiang and Mr Ng on 5 September 2008, [note: 3] it appeared that Mr Ng was fully aware that she did not understand English and needed him to explain the relevant EFG Bank documents to her.

Mr Wu (Mr Ng):	Yah, yah. Er, I want to report to you, normally every month I will let my client, that is to say let him have an understanding about his *portfolio*, which is what is your investment result.
Jiang Ou:	Ah-huh.
Mr Wu (Mr Ng):	Let you know because whatever you receive, **all of them are in English version, correct? So (you) don't understand them**.
Jiang Ou:	Ah.

[emphasis added]

7 While Mdm Jiang initially denied being bound by the terms stated in the account opening documents (on the basis that the documents were not explained to her), she eventually accepted that the relationship between the parties was governed, *inter alia*, by the following (collectively "the Agreement"):

(a) Account Mandate and Trading Terms;

(b) General Conditions;and

(c) Risk Disclosure Statement.

8 EFG Bank's Account Mandate and Trading Terms provide, *inter alia*, that: [note: 4]

2.1 The Bank is *authorised to act on Instructions given by the Client in accordance with the signing authority* set out below (or as the same may be amended by the Client from time to time).

[emphasis added]

9 Also, the General Conditions define "*Instructions*" as follows: [note: 5]

Instructions given by the Client or an Authorised Representative in accordance with the Account & Trading Mandate

...

2.3 All written instructions must be in accordance with the terms of the Account & Trading Mandate and must bear signatures(s) which, in the Bank's sole opinion, corresponds to the specimen signature(s) of the Client(s) and/or the Authorised Representative(s) as provided to the Bank. Instructions may not be given by e-mail.

...

2.7 The Bank may at its discretion record telephone instructions by writing and/or tape recording and/or any other method, and save in the case of manifest error the Bank's record of such instructions shall be conclusive and binding. *All telephone conversations between the Client and the Bank made in the course of Transactions will be recorded*.

[emphasis added]

10 From 24 July 2008 until 14 August 2008, Mdm Jiang deposited a total of US$4,999,957.50 into her FIS Account. On or about 15 August 2008, Mdm Jiang, on the advice of Mr Ng, opened another portfolio account to deposit the excess FIS monies (*ie* the difference between the US$4,999,957.50 deposit and the required S$5 million for the FIS Account). On or about 16 August 2008, Mr Ng advised Mdm Jiang to convert the FIS monies into Australian Dollars to benefit from the higher interest rates to which Mdm Jiang agreed. [note: 6] She also accepted that Mr Ng could engage in "minor" transactions involving currency conversion of the FIS monies to benefit from the higher interest rates. It is noteworthy that this was the *only* type of transaction authorised by Mdm Jiang.

11 Between 5 August 2008 and 1 April 2009, EFG Bank through Mr Ng executed a series of 160 high-volume and/or high risk leveraged foreign exchange and securities transactions ("the 160 transactions") purportedly on behalf of Mdm Jiang. None of the 160 transactions fell within the "minor" transactions which Mr Ng was authorised to carry out for the currency conversion of the FIS monies.

12 On 1 April 2009, at a meeting with Mdm Jiang and her husband in Shenyang, China, Mr Ng "confessed" that he had entered into the160 transactions without the knowledge or consent of Mdm Jiang which resulted in losses to her FIS Account. Mr Ng pleaded with Mdm Jiang for time to make good the losses within three months. [note: 7] When Mr Ng failed to do so, Mdm Jiang and her husband arranged to meet the Managing Director of EFG Bank, Mr Kees Stoute ("Mr Stoute") on 11 September 2009. At this meeting, Mdm Jiang averred that Mr Ng admitted in the presence of Mr Stoute that he had entered into the 160 transactions without her authority. [note: 8] On 18 September 2009, Mdm Jiang together with her solicitor had a meeting with EFG Bank's representatives, Mr Tan Kay Siong and Mr Ong Beng Guan ("Mr Ong") at which time she was informed

that EFG Bank was undertaking an internal investigation and that she would be informed of the outcome. EFG Bank has since claimed privilege over the internal investigation report and has not informed Mdm Jiang of the outcome of its investigations.

13 It was common ground between the parties that as a result of the 160 transactions executed by Mr Ng, Mdm Jiang's FIS Account suffered a loss of US$2,338,278.68. EFG Bank denied liability for the losses and consequently Mdm Jiang commenced this action by way of writ on 15 December 2009, seeking recovery of the said sum of US$2,338,278.68 from EFG Bank on the principal basis that the 160 transactions were executed without her knowledge or consent.

EFG Bank's case

14 From 15 December 2009 until 28 March 2011 (the first day of the trial), in its Defence, EFG Bank specifically denied Mdm Jiang's assertion in her Statement of Claim that the 160 transactions were executed without her knowledge or consent and instead alleged that Mdm Jiang "*was aware, of each and every one of the transactions that were carried out under the FIS Account*". [note: 9] On the premise that the 160 transactions were authorised, EFG Bank further alleged that although Mdm Jiang had received all the transaction confirmation slips in respect of the 160 transactions as well as the other bank statements (collectively "the transaction documents"), she did not protest that the 160 transactions were unauthorised. Consequently EFG Bank asserted that Mdm Jiang was "*estopped* from now denying that the trades were authorised". [note: 10]

15 Conspicuously, no particulars of estoppel were pleaded. Neither did EFG Bank plead any specific clause in the Agreement in support of the estoppel defence. In fact the only clauses of the Agreement pleaded by EFG Bank in its Defence were cll 6 and 8 of the Account Mandate and Trading Terms which dealt with investment advice provided by EFG Bank and its entitlement to charge fees for services rendered to Mdm Jiang.

16 On 28 March 2011, in its Opening Statement, counsel for EFG Bank, Mr Siraj Omar ("Mr Omar"), made a complete about-turn and conceded that, "[t]he Bank *does not have any record of specific instructions* given by Mdm Jiang in respect of the Transactions". [note: 11]

17 Upon EFG Bank's admission that it did not have any record of written instructions or voice logs of specific instructions given by Mdm Jiang in relation to the 160 transactions, it became clear that EFG Bank accepted *for the first time* that the 160 transactions were in fact unauthorised. Arising from EFG Bank's admission, Mr Lawrence Quahe, counsel for Mdm Jiang ("Mr Quahe") was able to streamline the causes of action pursued by Mdm Jiang to an action for breach of the Agreement; abandoning the alternative causes of action for breach of fiduciary duties, breach of implied terms, breach of duty of care and undue influence. In support of her original causes of action, Mdm Jiang engaged the services of an expert witness, Ms Janice Chua Bee Lian ("Ms Chua") whose expertise in fraud prevention and corporate risk management was procured to assist the court on the prevailing private banking practices in Singapore. She submitted an expert report, *inter alia*, to demonstrate that the prevailing industry practice dictated that EFG Bank should have obtained and recorded the instructions or authorisation from Mdm Jiang prior to the execution of any of the 160 transactions in respect of her non-discretionary FIS Account. [note: 12] As regards Mdm Jiang's breach of duty claim, Ms Chua provided a comparative analysis of EFG Bank's conduct, the prevailing industry practice and safeguards commonly put in place in relation to, *inter alia*, a non English speaking client, compliance with the client's risk profile and the frequency and mailing of transaction documents. However, following EFG Bank's admission that the 160 transactions were in fact unauthorised, Ms Chua's testimony was no longer necessary and was therefore not adduced. In light of the mandatory

requirement of instructions in respect of her non-discretionary FIS Account, Mdm Jiang submitted that the unauthorised transactions were void and that EFG Bank should bear the loss of US$2,338,278.68 occasioned by the 160 transactions.

18 Having conceded that the 160 transactions were unauthorised, EFG Bank's defence at trial was that by reason of receipt of all the transaction documents, pursuant to the conclusive evidence clauses set out in the Agreement under cll 3.1and 3.2, as well as the presumption of delivery of the transaction documents under cl 4 of the General Conditions, Mdm Jiang was precluded from disputing the unauthorised transactions. What was regrettable was the glaring omission that EFG Bank had failed to plead cll 3.1, 3.2 or 4 of the General Conditions which formed the heart of its defence at the trial.

19 Mdm Jiang claimed that prior to April 2009 she did not receive any of the transaction documents from EFG Bank save for the 18 documents she had received from 29 July 2008 to 5 January 2009. [note: 13] Of the 18 documents received by Mdm Jiang, 12 were transaction confirmation slips while the remaining six were non-transactional in nature. Of the 160 transactions listed in Schedule A of the Statement of Claim (Amendment No 1), Mdm Jiang accepted that she received the transaction confirmation slips for the unauthorised transactions listed as serial numbers 1, 19, 20, 51, 57, 58, 61, 62, 75, 76, 77 and 86. [note: 14] Contrarily, EFG Bank submitted that all the transaction documents for the 160 transactions were sent by ordinary mail to Mdm Jiang.

Discovery of the internal protocols relating to EFG Bank's mail system

20 An understanding of the factual background of this dispute would not be complete without a detailed review of the discovery process in respect of the various internal protocols of EFG Bank. It was common ground between the parties that in order to rely on cll 3.1 and 3.2, cl 4 of the General Conditions must first be satisfied. While EFG Bank pleaded that all of the transaction documents were sent by ordinary mail to Mdm Jiang, only *at the trial* did it rely on cl 4 to argue that Mdm Jiang was deemed to have received them. This was because prior to the commencement of the trial, EFG Bank's case was that the 160 transactions were validly authorised by Mdm Jiang.

21 Prior to the trial, Mdm Jiang sought discovery of a wide range of EFG Bank's internal documents including its internal protocols relating to the "*post mailing system of the Defendant with respect to the transmission of account statements, transaction confirmation slips and other relevant documents to local and overseas clients of the Defendant*". [note: 15] Mdm Jiang requested discovery of EFG Bank's internal protocols including the protocol relating to its postal mailing system on three separate occasions: [note: 16]

(a) By a letter dated 1 April 2010, Mdm Jiang's solicitors requested EFG Bank to disclose a range of documents including its internal protocol relating to the postal mailing system. In reply, in a letter dated 26 April 2010, EFG Bank's solicitors took the position that the internal protocols (*even if they existed*) were irrelevant and privileged.

(b) Mdm Jiang then filed an application pursuant to Summons No 2174/2010 on 17 May 2010 for discovery of the internal protocols. EFG Bank stated that the160 transactions were *authorised* and thereby the internal protocols were irrelevant. The Assistant Registrar ("AR") agreed with EFG Bank and dismissed the application on the ground of *irrelevance* as the issue relating to posting or receipt of the transaction documents did not arise from the pleadings.

(c) On 16 September 2010, Mdm Jiang then amended her Statement of Claim to include a claim

against EFG Bank for breach of an implied term in failing, *inter alia*, to "implement processes and procedures to ensure prompt confirmation of transactions to facilitate timely detection of unauthorised transactions". [note: 17] This amendment was introduced in an effort to bring the internal protocol relating to the postal mailing system into issue to warrant discovery of the same. The application for specific discovery pursuant to Summons No 5921/2010 was filed on 21 December 2010. The AR again dismissed Mdm Jiang's application on the ground of *irrelevance*.

22 In the affidavit filed by Mr Ong to resist the discovery applications, there was no mention that no such written protocol existed. At the discovery hearing, Mr Omar highlighted to the AR that "*the touchstone* [of any discovery application] *is relevance and this is determined by the pleadings*". [note: 18] Mr Omar's main submission to oppose the discovery applications was that since the 160 transactions were "*not unauthorised*", *ie* "authorised", the internal protocols would not be able to address the issue of whether the transactions were authorised.

23 It became clear on the first day of the trial that the discovery applications were successfully resisted by EFG Bank on the wrong and somewhat disingenuous premise that the 160 transactions were authorised. EFG Bank would have known by the time of the discovery applications or even by the time of the request from Mdm Jiang's solicitors that the 160 transactions were unauthorised. It would have been plain and obvious to EFG Bank by then that there were no written or oral instructions to support the 160 transactions since it had initiated investigations in September 2009, long before the first discovery application was filed. It was on the basis that the 160 transactions were authorised that the ARs found on two separate occasions that the internal protocols were irrelevant. More will be said about the discovery of the internal protocols when I evaluate the quality and reliability of EFG Bank's sole witness for the trial, Mr Ong.

The issues

24 Following EFG Bank's long overdue admission that the160 transactions were unauthorised, the remaining issues for determination are as follows:

(a) Whether EFG Bank has discharged the burden of proof that the transaction documents were sent to Mdm Jiang?

(b) Whether cll 3.1 and 3.2 of the General Conditions cover unauthorised transactions carried out by EFG Bank's own employee?

(c) If cll 3.1 and 3.2 cover unauthorised transactions carried out by EFG Bank's own employee, whether they are unenforceable under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA")?

(d) Whether, on the facts of this case, it was unconscionable for EFG Bank to rely on cll 3.1 and 3.2 to exclude liability for the unauthorised 160 transactions?

25 I will address each of these issues *in seriatim*.

Were the transaction documents sent to Mdm Jiang

Burden of Proof

26 Mdm Jiang claimed that prior to April 2009, she did not receive any of the transaction documents save for the 18 documents received between the period of 29 July 2008 and 5 January 2009. As stated above, on the other hand, EFG Bank alleged that all of the transaction documents were sent by ordinary mail and relied on cl 4 of the General Conditions which provides as follows:

> 4 All statements, confirmations and other communications from the Bank as well as correspondence or notifications received from third parties relating to the Account, including any documents which may have legal consequences to the Client ... *shall be deemed to have been validly given to the Client upon actual delivery by hand or by mailing* [them] *by ordinary mail* to the last address supplied by the Client for this purpose or by sending it in any other manner (including fax) as the Bank may reasonably consider appropriate. The date of issue appearing on any statement or communication from the Bank or in the case of third party communications the date specified on the copy (if any) retained by the Bank or otherwise in the dispatch list in the possession of the Bank shall be considered to be the date of delivery in the case of Correspondence sent by post, and in the case of fax transmission the date shown in the Bank's transmission record shall be the applicable date of delivery.
>
> [emphasis added]

27 As this was essentially a factual inquiry, it would be useful to first address the question as to which party bore the burden of proof of posting. In *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273 ("*Pertamina*"), the Court of Appeal followed *Ri Jong Son v Development Bank of Singapore Ltd* [1998] 1 SLR(R) 824 ("*Ri Jong Son*") at [65] and held that prior to undertaking any analysis of the relevant conclusive evidence clause, the defendant bank bore the burden of first proving that the account statements were effectively dispatched. In the face of such a clear statement of the law, Mr Omar conceded that the burden was indeed on EFG Bank to prove on a balance of probabilities that the transaction documents were sent by ordinary mail to Mdm Jiang and that failure to discharge the burden would be fatal to EFG Bank's entire defence.

28 Before embarking on a detailed analysis of cl 4, it is apposite to mention that cl 4 was not specifically pleaded by EFG Bank. This was probably another reason why the ARs ruled that the internal protocols were irrelevant.

Ambit of clause 4

29 As a preliminary point, Mr Quahe raised the argument that cl 4 did not apply to transaction confirmations:

(a) He highlighted that while the term "Transaction Confirmation" is found in cll 3.1 and 3.2 (this was strictly incorrect as cl 3.1 does not include this term), the prefix "transaction" was missing from "confirmation" in cl 4. [note: 19] On this premise, he submitted that from the standpoint of the reasonable business person surveying the Agreement, the term "confirmation" in cl 4 would not be wide enough to include transaction confirmations.

(b) Secondly, applying the objective principle, Mr Quahe further submitted that the omission of the prefix "transaction" from "confirmation" in cl 4 should be construed as the deliberate intention of the parties to exclude transaction confirmations from the ambit of cl 4.

(c) Thirdly, he alluded to the perverse situation that could arise if "customers of a bank could be exposed to indeterminate liability by the mere fact that a transaction confirmation slip or statement was sent to the customer at the last known address and was not challenged within the time prescribed". [note: 20] He submitted that this eventuality could be avoided if cl 4 was interpreted to exclude transaction confirmations. The illustration of a Singapore Armed Forces serviceman away on a relief mission unable to challenge otherwise unauthorised transaction confirmations within the 30-day window was advanced in support of the unreasonable outcome hypothesis.

(d) The crux of Mr Quahe's argument was that the deliberate omission of "transaction" from the general breed of "confirmations" referred to under cl 4 was to avoid such a perverse outcome. Mr Quahe submitted that, if cl 4 were determined not to apply to transaction confirmations, EFG Bank would have to prove on the balance of probabilities that the transaction confirmations for the 160 transactions were in fact sent and delivered to Mdm Jiang.

30 Mr Omar submitted that the effect of cl 4 was straightforward. If EFG Bank was able to show that the transaction documents were sent to Mdm Jiang by way of one of the modes of delivery set out therein, by operation of cl 4, the transaction documents would be deemed to have been validly sent and delivered to Mdm Jiang. Mr Omar submitted that it was clear that cl 4 was wide enough to encompass all of the transaction documents, including transaction confirmations. While the precise term "transaction confirmation" may be absent from cl 4, EFG Bank submitted that "transaction confirmations" would be included under the phrase "documents which may have legal consequences to the client [Mdm Jiang]".

31 In my view, Mr Quahe's interpretation of the omission of "transaction" from "confirmation" in cl 4 was overly technical and ignored the fact, as rightly pointed out by Mr Omar that transaction confirmations would fall under the rubric of "documents which may have legal consequences". It is undeniable that the transaction confirmations forming the subject matter of this enquiry have legal consequences to Mdm Jiang.

32 Additionally, while Mr Quahe sought to establish that the transaction documents were not posted to Mdm Jiang because they might have been intercepted by Mr Ng or someone acting at his behest, it must be made clear that Mdm Jiang has no burden to prove the interception. In other words, a finding that EFG Bank had, on the evidence, failed to discharge the burden of proof of posting was not tantamount to a finding that the transaction documents were *in fact* intercepted prior to posting to Mdm Jiang.

Proof of sending

33 Under cl 4, the transaction documents were deemed to have been validly delivered to Mdm Jiang upon proof of one of the following modes of delivery:

(a) actual delivery by hand; or

(b) mailing by ordinary mail to the last known address of Mdm Jiang; or

(c) any other manner which EFG Bank may reasonably consider appropriate. This could

encompass delivery by facsimile or electronic mail.

Upon delivery by any of the above modes, the dates of issue appearing on the transaction documents shall be considered as the dates of delivery to Mdm Jiang.

34 In the present case, EFG Bank relied on proof of posting by ordinary mail and sought to discharge its burden of proof by calling its only witness, Mr Ong, the Head of Operations, for the trial. EFG Bank did not adduce any other form of evidence, written or through the testimony of other witnesses, to prove and/or corroborate its case. EFG Bank was therefore content to rest its *entire* factual defence on one sole witness. All other personnel who had any involvement with Mdm Jiang's FIS Account (*ie* Mr Ng, Ms Linda Lee and Ms Alicia Ng who assisted Mr Ng and Ms Jessie Tan, Head of Private Banking, whom Mr Ng reported to) had either been terminated by EFG Bank or had since left its employ and were not called to testify on behalf of EFG Bank. [note: 21] The quality of Mr Ong's evidence was accordingly pivotal to EFG Bank's defence. Prior to my evaluation of the quality of Mr Ong's evidence, it is perhaps useful to review decisions where the same issue was considered to assist my determination of whether the burden in this case has been satisfactorily discharged.

35 In *Ri Jong Son*, the plaintiff claimed that remittance instructions which the defendant bank had complied with to transfer funds from an account bore his forged signature and consequently sought a declaration that the transfer was without his authority and of no legal effect. The defendant bank denied liability and relied on its clause that all bank statements sent by post shall be deemed to have been received by the plaintiff.

36 Ms Tan, an officer from the administration department of the defendant bank, rather than the person who actually dealt with the mailing of statements, testified in relation to the defendant bank's procedure for sending the weekly, quarterly and yearly statements of accounts to the bank's customers. She explained that based on the defendant bank's procedure, she believed that the disputed statements were duly generated and mailed to the customer. In support, the defendant bank produced some computer generated checklists in relation to the documents which were sent out. Ms Tan explained that crosses were marked on a checklist by the mail room operators when they had completed their jobs and ticks were marked on another checklist to indicate that the documents had been posted. However, on examination of the checklists, the court found that the entries in some of the checklists were unmarked, some were marked with crosses but without ticks and none of the markings were dated.

37 Under these circumstances, the court held that the person who dealt with the statements and made the crosses and ticks would have been the appropriate witness to explain the checklists. Further, although Ms Tan stated in her affidavit of evidence-in-chief ("AEIC") that the statements were sent to the customer, she did not explain the basis and source of her belief or knowledge. For these reasons, in *Ri Jong Son*, the court held that Ms Tan's evidence was not sufficient to discharge the burden on the defendant bank of proof of posting of the disputed statements.

38 In *Tjoa Elis v United Overseas Bank* [2003] 1 SLR(R) 747 ("*Tjoa Elis*"), the defendant bank had a two-part system in place for dispatching bank statements to its customers. The first part involved the printing of statements and the second part involved inserting these statements into envelopes, sealing them and delivering them to the post office. While the first part was carried out by the bank, the second part was carried out by a third party, Datapost Pte Ltd ("Datapost").

39 Evidence was given by the operations manager of Datapost as to how monthly statements of account were printed and packed by the defendant bank and then picked up by Datapost. A copy of

the summary report was to be given to Datapost when they picked up/collected the statements and Datapost would produce a reconciliation report reflecting the total number of statements processed by them. Although the evidence of the bank officer in charge of the mailing system of the bank and the operations manager of Datapost was not challenged, the plaintiff nevertheless submitted that the bank had failed to discharge its burden of proof that the disputed statements were *in fact* posted to the mailing address of the plaintiff. It was in this context that Woo Bih Li JC (as he then was) observed at [34] that the plaintiff:

> [C]ould not be serious in suggesting that there should be someone who could testify that he or she remembered putting the particular statement... into an envelope each month and then delivering it to Singpost, even though there may be hundreds, if not thousands, of such statements.

40 Further, the plaintiff had admitted to receiving statements until the beginning of 2000 and did not complain to the defendant bank when she ceased to receive statements even though she admitted that she was very concerned about not receiving her monthly statements. Under these circumstances, the court in *Tjoa Elis* had no hesitation in finding that the defendant bank had indeed discharged its burden of proof that the disputed statements were sent to the plaintiff.

41 From *Ri Jong Son* and *Tjoa Elis*, it is clear that the court's focus was rightly on the quality of the bank's evidence when determining whether the burden of proof as regards posting had been discharged. In *Ri Jong Son*, the court held that it was imperative for the bank's witness (Ms Tan) to explain the basis of her belief and knowledge of the bank's mailing system and more importantly, where the mailing system was capable of corroboration, evidence was to be led from the person with the requisite personal knowledge. Crucially in *Tjoa Elis*, the evidence of the bank's officer and Datapost on the mailing system was not challenged by the customer. It is also relevant that in *Tjoa Elis*, independent evidence of the mailing system through Datapost supported by the summary and reconciliation reports were adduced.

42 Turning our attention back to the present case, EFG Bank argued that all the transaction documents were sent to Mdm Jiang at her stated address in the account opening documents, namely, "Room 231, No. 27 Zongzhan Street, Heping District, Shenyang, Liaoning, P R China". Mdm Jiang confirmed in court that this address was the correct one. [note: 22] Mdm Jiang had also acknowledged that she received the 18 documents sent by EFG Bank over a period of five months. Mdm Jiang's receipt of the 18 documents was presented by EFG Bank as sufficient evidence to support the submission that EFG Bank's postal mailing system was working properly and that the address to which the transaction documents were sent was the correct one.

43 In its effort to discharge its burden of proof, EFG Bank submitted that Mr Ong as Head of Operations was in charge of and had overall knowledge of, and responsibility for its back room operations which included the system of dispatching the transaction documents to customers including Mdm Jiang. However, Mr Ong was extremely economical in his description of EFG Bank's mailing system in his AEIC and his evidence, unlike *Tjoa Elis*, was challenged by Mdm Jiang. The sum total of his evidence on EFG Bank's mailing system was limited to one brief paragraph in his AEIC:

> 27 Once the transactions have been executed, it is keyed into the Bank's system and the backroom operations staff sends a transaction confirmation directly to the customer. The Bank's practice of sending the confirmations directly to the customer (and not via the CRO) is a form of check to ensure that the transactions were correctly executed. The Bank would expect the customer to highlight any error in transactions upon receipt of the confirmations.

44 Mr Ong did not provide any basis for his belief or knowledge of EFG Bank's mailing system. No corroborative evidence whatsoever was adduced. Under cross-examination, additional details of EFG Bank's mailing system were revealed. Mr Ong testified that: [note: 23]

(a) He did not have personal knowledge that the transaction documents were in fact mailed to Mdm Jiang's address.

(b) Every morning, the transaction confirmations would be automatically downloaded into the system which was located within a controlled environment in EFG Bank's Operations Room. Only members of the Operations Department (including the CEO of EFG Bank) had access to the system. A designated person from the Operations Department, one Mr Selva, who was in charge of the mail room at all material times, would access the controlled room, print out all the downloaded transaction confirmations, sort them out by way of the different accounts and place them into envelopes.

(c) Mr Selva would then bring the mail to the receptionist for franking after which the mail would be returned to Mr Selva, placed in a mail bag and then sent to Singapore Post's branch at UOB Centre. All this was apparently done on a daily basis by Mr Selva.

(d) The Client Relationship Officers ("CROs") of EFG Bank including Mr Ng did not have access to the controlled room. The transaction documents were sent out on daily basis directly by the Operations Department without any involvement of the CROs.

45 In re-examination Mr Ong volunteered additional information. He testified that all transaction confirmations would be downloaded into a spool file on a daily basis. Mr Selva would then check to ensure that the total number of downloaded transaction confirmations tallied with the quantity printed out. [note: 24]

46 I have noted that none of the above details were stated in Mr Ong's AEIC. From Mr Ong's testimony in court, it appeared to me that the integrity of the mailing system was largely if not solely dependant on Mr Selva and yet EFG Bank failed to call Mr Selva (he was still with EFG Bank at the time of the trial) as a witness. Mr Quahe submitted that Mr Selva was the best person to shed light on the mailing system as described by Mr Ong. I agree. Further, the receptionist could also have been called to corroborate Mr Ong's evidence on the alleged segregation of duties between "the front and back offices".

47 Mr Quahe also submitted that even taking Mr Ong's evidence at face value, there must be some record of the daily automatic downloading of the transaction confirmations into the spool file to corroborate his testimony, but none was produced. In addition, EFG Bank also failed to produce any record of the limited access to the controlled environment of its Operations Room alluded to by Mr Ong. EFG Bank could also have called other CRO(s) to confirm Mr Ong's evidence that CRO(s) were not involved in the mail process at the material time or at all. It was immediately apparent to me that while EFG Bank had ample opportunity to adduce evidence to substantiate or corroborate Mr Ong's evidence, curiously enough, it failed to do so completely. Finally, cl 4 (excerpted at [26]) referred to a "*dispatch list*". Again EFG Bank did not disclose any records of the dispatch list. Instead, it elected to rely solely on the evidence of Mr Ong.

48 Quite apart from the fact that Mr Ong did not explain the source of his belief or knowledge of the alleged mailing system of EFG Bank either in his AEIC or his oral testimony, I entertained serious doubts about the reliability of his evidence. When he was questioned about the average number of

daily transactions in July 2008, he estimated that it was between 20 to 30 transactions. [note: 25] However, on my direction, after checking EFG Bank's records, he corrected himself that actually about 200 transactions were carried out per day. [note: 26] Perhaps it may not be fair to Mr Ong to attribute too much weight to this discrepancy.

49 However what was more troubling was his evidence in relation to EFG Bank's internal protocol relating to the mailing of transaction documents. As explained in ([20]–[23]) above, EFG Bank had successfully resisted discovery of the internal protocol on the ground that it was not relevant. As observed earlier, when the discovery applications were heard before the ARs, EFG Bank's case was that all the 160 transactions were authorised and cll 3.1, 3.2 and 4 of the General Conditions were not even expressly pleaded. However, when it became clear on the first day of the trial that these clauses were pivotal to the defence, the relevance of EFG Bank's internal protocol relating to the mailing system was unquestionable. Under these changed circumstances, I directed Mr Ong to produce the internal protocol and he agreed to do so with the concurrence of Mr Omar. [note: 27] However, the following day, Mr Omar informed the court that he was instructed that there was no such *written* protocol. [note: 28]

50 This was an entirely unsatisfactory development given that EFG Bank had resisted discovery on the ground of irrelevance on three separate occasions without once stating that there was no such written protocol to begin with. By informing the court that no such written protocol existed despite having earlier informed the court that the protocol would be disclosed, Mr Ong either did not have adequate knowledge of EFG Bank's mailing system or decided to withhold disclosure because it would be adverse to EFG Bank.

51 Giving Mr Ong the benefit of doubt, at the very least, his knowledge of EFG Bank's mailing system was less than satisfactory or plainly unreliable. How could the Head of the Operations Department who purported to testify on EFG Bank's mailing system not know whether a written protocol for the mailing system existed? Why did EFG Bank fail to inform the court and Mdm Jiang at any stage of the lengthy discovery process that no written protocol existed for the mailing system? Viewed in this context, it was indeed puzzling that EFG Bank elected not to call other available witnesses to substantiate or corroborate Mr Ong's evidence. Furthermore no reason was offered to explain its decision not to call the other *available* witnesses.

52 Unlike the production of the checklists in *Ri Jong Son* (which was held to be unsatisfactory upon the court's examination) or the summary and reconciliation reports in *Tjoa Elis*, there was no objective evidence forthcoming from EFG Bank of any system to verify whether all the transaction documents were posted to Mdm Jiang. Again, in light of the shortcomings of Mr Ong's evidence, while in re-examination he alluded to the fact that Mr Selva would check to ensure that the downloaded documents tallied with the printed quantity, this was not corroborated at all. As the daily quantity of post was about 200 and not 20 to 30 transaction confirmations as was initially but incorrectly estimated, I would have thought that there should have been some kind of checklist or dispatch list as provided for in cl 4 and yet none was provided. At the very least, Mr Selva should have been called as a witness.

53 Mr Omar's submission was that since Mdm Jiang had admitted to receiving the 18 documents, her admission in and of itself was proof that EFG Bank's mailing system was working properly and therefore she must have received the rest of the transaction documents. First, under the customer profile information, Mdm Jiang had instructed EFG Bank to send the statement of accounts to her on an annual basis. [note: 29] Mr Ong agreed that this meant that the statement of account should have been sent to Mdm Jiang in January of each year. [note: 30] Yet Mdm Jiang gave unchallenged evidence

that she was provided with a statement of account dated April 2010 at her specific request because she was not provided with any statement of accounts prior to 1 April 2010. This corroborated her evidence that she did not receive the transaction documents save for the 18 documents. Further, as a matter of simple logic there was no reason for Mdm Jiang to deny receiving the rest of the transaction documents after having admitted to receiving the 18 documents since it was not disputed that Mr Ng knew that she did not understand the nature of the transaction documents. In other words, since Mdm Jiang did not understand the nature of the transaction documents, there was no reason for her to have selected the 18 documents which she admittedly received and none was suggested by Mr Omar.

54 Mdm Jiang further testified that when she received the first batch of the 18 documents, she contacted Mr Ng to enquire about the status of the documents as she did not understand them. Mdm Jiang stated in her Supplemental AEIC that she asked Mr Ng whether the documents were supposed to be balance sheets of her FIS Account to which Mr Ng answered in the negative. [note: 31] This was also not challenged.

55 I have also examined the 18 documents myself and it was not apparent to me on the face of the 18 documents that Mdm Jiang's FIS Account had incurred any loss from any of the unauthorised transactions. Her evidence that Mr Ng informed her that the documents related to her deposits or to her one-off conversion of the FIS monies to Australian Dollars was not challenged either. In any event, it was not suggested to Mdm Jiang that she knew or ought to have known from the 18 documents that Mr Ng had engaged in unauthorised transactions on her behalf. Finally, unlike *Tjoa Elis* where the plaintiff did not request for her bank statements after she ceased receiving them, Mdm Jiang testified that she had requested, to no end, on several occasions between August 2008 and April 2009, that Mr Ng provide her with her account balance statements and the same were eventually provided *only* in April 2009.

56 Having carefully considered the evidence adduced by EFG Bank through Mr Ong, I find that EFG Bank has failed to discharge its burden of proof that the transaction documents were sent and therefore the presumption of delivery as provided for in cl 4 of the General Conditions did not arise.

57 As EFG Bank's substantive defence, premised on the legal effect of cll 3.1 and 3.2, was entirely dependent on establishing proof of posting under cl 4, my finding that the burden of proof has not been discharged effectively disposes of its defence. On this ground alone, Mdm Jiang's claim is allowed as it is common ground that the 160 transactions were all unauthorised.

58 For completeness, I shall nonetheless consider the applicability of cll 3.1 and 3.2 to exclude EFG Bank's liability for the 160 transactions, on the premise that the transaction documents were in fact posted to Mdm Jiang.

The conclusive evidence clauses

59 EFG Bank's defence was ultimately based on cll 3.1 and 3.2 of the General Conditions which provide as follows:

> 3.1 Subject to paragraph 3.2, the Bank shall send the Client *periodic* confirmations or advices of all Transactions *carried out by the Client and/or the Authorised Representative* and all deposits placed with, and cleared by, the Bank for the account of the Client, and periodic statements reflecting such Transactions and balances in the Account. The Client undertakes to carefully examine and verify the correctness of each confirmation, advice and statement of account and agrees that reliance may only be placed upon original confirmations, advices,

and/or statements of account issued by the Bank. The Client further undertakes to inform the Bank promptly in writing and in any event within fourteen (14) days from the date of any such confirmation or advice, and within thirty (30) days from the date of such statements of account, of *any discrepancies, omissions, incorrect or inaccurate entries* in the Account or the contents of any confirmation, advice or statement of account or the *execution or non-execution of any order*, failing which the Bank may deem the Client to have approved the original confirmations, advices or statements of account as sent by the Bank to the Client, in which case they shall be conclusive and binding upon the Client without any further proof that the Account is and all entries therein and the execution of all Transactions are correct, and *the Client shall be deemed to have waived all Claims against the Bank in respect of the Account and all such Transactions, even if the Bank had not exercised the usual diligence in relation thereto*.

3.2 A *Transaction Confirmation* in respect of each Transaction concluded will be sent to the Client in the same manner as any other confirmation no later than the end of the next Business Day after the date upon which the relevant Transaction is entered into. The details contained in the Transaction Confirmation shall be evidence of the particulars of the Transaction concluded between the Bank and the Client and shall be binding and conclusive on the Client. The Client must notify the Bank in writing within fourteen (14) Business Days after the date of the relevant Transaction of *any claimed discrepancy between the Instructions and the Transaction Confirmation*. The Bank may deal with the matter in such manner as the Bank may in its sole and absolute discretion consider appropriate, and if no such notification is received by the Bank in writing within the time stipulated, the Client will be deemed to have waived all further rights to raise any objection or query thereto, and to have waived all Claims against the Bank in respect of the relevant Transaction, even if the Bank had not exercised the usual diligence in relation thereto.

[emphasis added]

60 Conclusive evidence clauses, such as cll 3.1 and 3.2, impose two concurrent duties on EFG Bank's customers. First, it places the onus on the customers to verify their bank statements and second, it requires the customers to notify the bank if there is any discrepancy (See *Pertamina* at [68]). If the customer fails to do so within the stipulated time, he or she would be precluded from challenging the correctness of the statement.

61 It is critical to stress that a defence under conclusive evidence clauses such as cll 3.1 and 3.2 is a contractual defence which is *separate* and *distinct* from estoppel. In fact, as illustrated in *Pertamina* at [72–85], the defence of the bank under the conclusive evidence clause succeeded while the alternative estoppel defence failed on the evidence. In *Pertamina*, despite the fact that the Court of Appeal found that the appellant was aware of the unauthorised transactions, the estoppel defence nevertheless failed simply because the respondent had failed to plead and prove any detriment arising from the appellant's silence. It is instructive that the Court of Appeal remarked at [85] that to rely on estoppel, the party must "(a) plead and identify what steps it would have taken and (b) prove that it would have had a real chance of protecting or improving its situation and that it would have taken that chance". This was not done by EFG Bank and might explain why Mr Omar readily accepted that estoppel was not made out on the evidence before the court. [note: 32]

62 In the present case, in spite of the fact that EFG Bank recognised that the transactions were in fact unauthorised, and therefore knowing that its defence was entirely based on cll 3.1 and 3.2, it was unfortunate, to say the least, that these clauses and similarly cl 4, were not specifically pleaded.

63 EFG Bank was in effect pursuing a defence at the trial which was not specifically pleaded and in fact ran counter to its pleaded case. This objection, though mentioned by Mr Quahe in passing during the oral closing submissions, was not seriously pursued before me. In any event, as the rationale underpinning rules relating to pleadings relates to guarding against prejudice and surprise, and since full submissions were made by both counsel on this issue which is essentially a question of construction and law, I shall consider whether the defence has been made out notwithstanding its lack of specific pleading and EFG Bank's failure to satisfy the burden of proof of posting ([42]–[58]).

64 My analysis of the conclusive evidence clause defence entails an examination of the rationale and genesis of such clauses and the appropriate construction of cll 3.1 and 3.2. The question of whether they were worded sufficiently wide to exclude liability for unauthorised transactions carried out by EFG Bank's own employees is central to this analysis. I will also examine, as a matter of public policy, whether banks should be able to exclude liability for the fraud or unauthorised dealings of its employees even if the clauses were wide enough to encompass such a situation.

Genesis and rationale of conclusive evidence clauses

65 It is a feature of any banking relationship that banks would periodically send various types of correspondence including statements of accounts and transaction confirmation slips to their customers. Given the sheer volume of such correspondence, it is perhaps inevitable that mistakes and errors may occur at times, however uncommon they might be. The following passage by Lord Scarman in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others* [1986] AC 80 at 106 ("*Tai Hing Cotton*") acknowledged that the risk of a bank paying without legal mandate was a necessary incident of the service inherent in the customer-banker relationship:

> One can fully understand ... that the banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have it the past, to seek to persuade the legislature that they should be granted by statute further protection. *But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank*. They offer a service ... [i]f they pay out upon cheques which are not his [the customer], they are acting outside of their mandate and cannot plead his [the customer] authority in justification of their debit to his account. *This is a risk of the service which it is their business to offer*.
>
> [emphasis added]

66 As early as 1909 in *The Kepitigalla Rubber Estates Limited v The National Bank of India Limited* [1909] 2 KB 1010 ("*Kepitigalla*"), Bray J held that in the absence of any express agreement, a customer does not owe a duty to the bank to check his bank statements. In *Tai Hing Cotton*, the Privy Council held that in the absence of properly drafted provisions in the banking documentation, the common law would not impose a direct duty on the customers to verify their bank statements for discrepancies as a means to exclude liability of the bank. Following the Privy Council, an identical position was also adopted by the Supreme Court of Canada in *Canadian Pacific Hotels Ltd* v *Bank of Montreal* [1988] 40 DLR (4th) 385. Similarly, the Malaysian Supreme Court in *United Asian Bank Bhd* v *Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 remarked at 189:

> [A]t common law, in the absence of a contract to the contract, [no] duty [is] imposed upon the customer to inspect his periodical bank statements to ensure that his account [is] being properly maintained by the bank.

67 Banks have traditionally attempted to shift the consequences of such errors onto their customers. However, this desired outcome could only be achieved if there was a duty on the customer to check and verify the statements received from the bank. Persistent attempts by banks to persuade courts to impose this direct duty on customers have met with outright failure all over the Commonwealth. In fact, *Tai Hing Cotton* has been referred to or followed in principle in a number of Commonwealth jurisdictions wherein absent a contractual provision to the effect, customers are not duty bound to inform the bank of discrepancies or errors in their bank statements: see *Fried v National Australia Bank Ltd* [2001] 111 FCR 322; *National Bank of New Zealand Ltd v Walpole and Patterson Ltd* [1975] 2 NZLR 7; *Canadian Pacific Hotels Ltd v Bank of Montreal* [1987] 40 DLR (4^{th}) 385; *Canara Bank v Canara Sales Corporation* [1987] (2) AIR SC 1603; *Big Dutchman (South Africa) v Barclays National* Bank [1979] (3) SA 267 (WLD.) at 283; *Holzman v Standard Bank* [1985] (1) SA 360 (WLD) at 363. In fact, in *Pertamina* at [54], the Court of Appeal observed in *obiter* that the court should be slow to intervene and imply a term into a contract as a matter of law, that a customer is under a general duty not to facilitate fraud by his negligence and that also, such an implied duty "lacked precise definition as to its scope and content."

68 The steadfast reluctance of the courts to impose this direct duty on customers has resulted in banks taking it upon themselves to contractually create the customer's duty to check bank statements; taking the form of terms commonly known as verification or conclusive evidence clauses. Of historical interest is the fact that the introduction of these clauses in Singapore was pioneered by Bank of America, heralding from the United States, where statutory protection under Art 406(c) of the Uniform Commercial Code ("UCC") expressly legitimises the incorporation of conclusive evidence clauses in banking contracts. However, no equivalent statutory instrument exists in Singapore.

69 In contrast, it is worth mentioning that paying heed to strong consumer protection cultures, banks in the United Kingdom and Australia appear to have refrained from incorporating such clauses in their banking documentation. Benjamin Geva in "Allocation of Forged Cheque Losses – Comparative aspects, policies and a model for reform" (1998) Law Quarterly Review 250 at 252 remarked, in general, that banks in the United Kingdom are reluctant to incorporate such clauses in their standard form account agreements. The UK Law Commission on Contributory Negligence as a Defence in Contract (London: Law Com No 219, 1993) at [5.21] also stated that:

> [A]s we pointed out in the consultation paper, it is open to banks to stipulate in their contracts, subject to UCTA, that the customer should take reasonable precautions to prevent forged cheques being presented, or to check bank statements. **As we have already said, a number of respondents thought that this point was important and suggested that the reason that banks did not do this was fear of losing business in a competitive market**…
>
> [emphasis added]

70 In *National Bank of Australia v Hokit Pty Ltd* [1996] 39 NSWLR 377 at 405–406, resisting the attempt to impose a direct duty on customers, the New South Wales Court of Appeal observed:

> It has always been open to banks to contract upon the basis of an express term imposing the duty contended for on the customer. **No doubt for good commercial reasons the bank in the present case has not elected to take that course**. It is inconceivable that it [the bank] would not have been aware of the long line of authority rejecting the wider principle for which it argues and where, in that authority rejecting the wider principle for which it argues and where, in that knowledge, it declines to provide contractually for the duty there appear to me to be no grounds to impose it on the customer.

[emphasis added]

71 Accordingly, cll 3.1 and 3.2 of the General Conditions should be construed within the context of the creation and development of conclusive evidence clauses, with the knowledge that such clauses essentially seek to protect the bank's inherent instinct to contractually shift the risk and corresponding liability arising from *erroneous* transactions to the customer.

72 Mr Omar cited several local decisions in support of the proposition that conclusive evidence clauses similar to cll 3.1 and 3.2 have been construed to exclude banks' liability for unauthorised transactions such as those bearing forged signatures of the customers. On the strength of his understanding of those authorities, Mr Omar advanced the argument that EFG Bank was not liable for the 160 admittedly unauthorised transactions on the mistaken belief that the transaction documents were posted (the contrary was found at [42] to [58] above). Notwithstanding, I will turn my attention to review the relevant authorities to determine whether, in theory, they support EFG Bank's submission.

An overview of the case law: judicial approach to construction of conclusive evidence clauses

73 Poh Chu Chai's Law of the Banker and Customer (LexisNexis, 5th Ed, 2004) at 854 states:

> In carrying out the instructions of a customer, a banker acts under the *mandate of the customer* (*London Joint Stock Bank Ltd v Macmillian & Arthur* [1918] AC 777, per Lord Finlay L.C at 789; *Tai Hing Cotton* per Lord Scarman at 106.)
>
> ...
>
> [I]f a bank fails to ensure that the requisite signatures are present on the instructions given to the bank, the bank has no authority from the customer to carry out the instructions.
>
> [emphasis added]

74 It is important to note that a bank in making payment on cheques drawn by its customers acts upon the mandate given by its customer. The mandate comes into operation when the customer issues a cheque or other order or direction. If the customer's signature is forged or unauthorised, pursuant to s 24 of the Bills of Exchange Act (Cap 23, 2004 Rev Ed), the signature is inoperative. Hence in the absence of a common law or contractual duty to inform the bank of errors and discrepancies, the bank has no mandate to pay on the forged cheques and is consequently liable to the customer if it does so.

75 Forged instructions vitiate the customer's mandate. However, the customer's express agreement to accept the duty to alert the bank of discrepancies by way of conclusive evidence clauses has acted as a shield to banks' liability in some instances. The pertinent question is if unauthorised transactions by reason of forgery have been found to be within the reach of conclusive evidence clauses, why should the 160 unauthorised transactions in the instant case be treated any differently? For this reason, it was imperative to examine the cases where the relevant clauses have been found to exclude the liability of the defendant banks for paying against cheques bearing forged signatures or otherwise unauthorised transactions.

76 In *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 ("*Consmat*") the plaintiff company was a customer of the defendant bank. From May 1982 to March 1983, the defendant bank honoured and paid out fifteen forged cheques (by an

unknown individual) totalling $94, 355.32. The relevant conclusive evidence clause stated:

> I/We hereby undertake to verify the correctness of each statement of account and accompanying cheques or vouchers received from you and to inform you within seven (7) days from the receipt of any discrepancies, omissions or debits wrongly made to or inaccuracies or incorrect entries in the account as so stated and that at the end of the said period of seven (7) days the account as kept by you shall be conclusive evidence without any further proof that, *except* as to any alleged errors so notified and *any payments made on forged or unauthorised indorsements*, the account is and entries therein are correct, and except as provided above you shall be free from all claims in respect of the account.
>
> [emphasis added]

77 The conclusive evidence clause in *Consmat* relieved the defendant bank of *all* claims in respect of "any discrepancies, omissions or debits wrongly made to or inaccuracies or incorrect entries in the account" subject only to two specific exceptions of which "payments made on forged or unauthorised indorsements" was one. However, following the majority's reasoning in the Canadian Supreme Court decision of *Arrow Transfer Co Ltd v Royal Bank of Canada* (1972) 27 DLR (3d) 81, L P Thean J at [19] held that this exception only related to forged indorsements and not to forged signatures of the drawer. His rationale for the distinction was simply the recognition that "*forged indorsements would not be apparent to the customer upon their verifying the statement of account and the cheques, as contrasted with forged signatures on the cheques*". Given that this exception was not applicable, he held that the 15 forged cheques fell within the scope of "debits wrongly made" or "incorrect entries in the account". However, there was no dispute in *Consmat* that the defendant bank in honouring the forged cheques had acted in good faith unlike the present case when Mr Ng carried out the 160 transactions knowingly without any instructions or approval from Mdm Jiang. I will explore the issue of good faith in detail below at [103] –[104] . As such, the reasoning adopted in *Consmat* to construe forged cheques within the ambit of "debits wrongly made" or "incorrect entries" does not assist EFG Bank in its attempt to exclude liability for the 160 transactions executed in the absence of instructions.

78 In *Tjoa Elis*, the plaintiff's account with the defendant bank had been debited pursuant to fax instructions bearing her signature which was forged by the plaintiff's sister. The defendant bank paid against the allegedly forged instructions and sought to rely on the following conclusive evidence clause:

> The Account holder is under a duty to (i) monitor the balance of the Account at all times (ii) examine all entries in the statement of account (iii) within fourteen (14) days of the date of the statement of account notify the bank in writing of any omission from or debits/credits wrongly made or made *without authority* or inaccurate entries in such Statement of Account; and (iv) sign and return any confirmation slip, including any required for audit purposes (if requested to do so).
>
> If the Bank does not receive any written notification pursuant to Clause 4(b)(iii) within 21 days from the date of the Statement of Account, then, at the end of the said 21 days, the Account as kept by the Bank shall be conclusive evidence, without any further proof that except as to any alleged errors so notified, the Accounts contains all credits that should be contained therein and no debits that should not be contained therein and all the entries therein are correct and further the Account Holder shall be bound by such entries in the Account and the Bank shall be free from all claims in respect of the Account. Notwithstanding the foregoing, the Bank reserves the right upon giving notice to the Account Holder to add to and/or alter the entries in the

Account in the event of missing and/or incorrect entries or amounts stated therein.

[emphasis added]

79 Woo JC did not hesitate to find that the defendant bank had a valid defence since the plaintiff failed to report the error in the bank's statement of accounts within the specified time. The relevant conclusive evidence clause in *Tjoa Elis* made specific reference to transactions "*without authority*", covering cheques bearing forged signatures.

80 Next, in *Pertamina*, the appellant deposited US$9 million in a deposit account it had opened with the respondent bank. The appellant company also authorised the bank to take instructions from its vice president of finance and administration. The drawdown documents on the appellant's credit facility had been forged, permitting a transfer of US$8 million to a third party. Subsequent bank statements were sent to the authorised signatory (the appellant's fraudulent employee) instead of the customer (appellant), pursuant to a validly executed mail-redirection letter. The Court of Appeal held that the appellant was to bear the legal consequences of its authorised signatory diverting the bank statements to his home address, and that the respondent bank was shielded from liability by reason of the conclusive evidence clause which stated:

(b) To examine all statements of account, bank statements, printed forms, deposit slips, credit advice notes, transaction advices and other documents (hereinafter in this Clause referred to collectively as "statements") supplied by the Bank setting out transactions on any of the Accounts and agrees that unless the Customer objects in writing to *any* of the matters contained in such statement within 14 days of the date of such statement, the Customer shall be deemed conclusively to have accepted *all the matters* contained in such statement as true and accurate in all respects …

[emphasis added]

81 The clause relied upon by the defendant bank in *Pertamina* was drafted widely, covering "*any*" and "*all* the matters contained in such statement". Given the width of the language used, the Court of Appeal held that it encompassed unauthorised transactions by reason of forgery committed by the customer's agent.

82 Mr Omar also referred me to the decision of the High Court in *Stephan Machinery Singapore Pte Ltd v Oversea-Chinese Banking Corp Ltd* [1999] 2 SLR(R) 518 ("*Stephan Machinery*"). In that case, the plaintiff had opened a current account with the defendant bank and for the sake of convenience had authorised the use of a facsimile signature for cheques drawn on the account. One of the plaintiff's employees had fraudulently misapplied the plaintiff's authorised facsimile signature on 57 of its cheques and subsequently encashed them. The defendant bank denied liability and relied on the following conclusive evidence clause:

A statement of the customer's account generated by the Bank's Computer (bank statement) will be sent to the Customer every month unless there is no transaction during that month. The customer shall be under a duty to examine the entries in every bank statement and to report immediately to the bank if there *are any errors or discrepancies*. If the customer does not within fourteen days after the date of the bank statement object to *any of the matters* contained in such statements, *he shall be deemed conclusively to have accepted all the matters* contained in such statement as true and accurate in all respects. Subject to the rights of the Customer to object as aforesaid, the bank statement shall be accepted by the Customer as conclusive evidence of the balance in the account and of the particulars of the account.

[emphasis added]

83 Lai Kew Chai J held that the plaintiff had agreed to the conclusiveness of the bank statements and that it could not be allowed to breach its agreement by asserting that the 57 debits were errors and discrepancies by operation of the conclusive evidence clause. The court, in endorsing *Consmat*, took the position that forged cheques fell within the term "wrong debits" or "errors" and held that the conclusive evidence clause was operative to exclude its liability. However, similar to *Consmat*, the loss in *Stephan Machinery*, unlike the present case, was not caused by unauthorised trades of the bank's employee and consequently was of no assistance to EFG Bank.

84 Accordingly, it is apparent from the examination of the conclusive evidence clauses in *Consmat*, *Tjoa Elis*, *Pertamina* and *Stephen Machinery* that the defendant banks were able to shield themselves from liability as each of the clauses were drafted sufficiently wide to cover forgery.

85 Mr Omar relied on two further decisions which did not concern forgery. In *RBS Coutts Bank Ltd v Shishir Tarachand Kothari* [2009] SGHC 273 ("*RBS Coutts*") the court observed in *dicta* that the relevant conclusive evidence clause was wide enough to cover unauthorised transactions. In *RBS Coutts*, the defendant had opened an account with the plaintiff bank for the purposes of, *inter alia*, engaging in investment and forex trading activities. Towards the end of the six-month trading period, market forces turned against the defendant's position and the bank informed the defendant to inject more funds or close out some transactions to cut his losses. The defendant did neither and eventually the plaintiff exercised its rights under the account terms and conditions, closed out the defendant's positions in the various forex transactions and proceeded against the defendant for the sum of US$569,109 owing under the account. The defendant alleged that some of the transactions were unauthorised. In response to this allegation, the plaintiff relied on the following conclusive evidence clause:

> 17.1 RBS Coutts will, unless it receives written instructions from you to the contrary, send to your address of record a Statement on any Account at periodic intervals.
>
> You agree that it will be your sole responsibility to ensure that you receive Statements in due time and to make enquiries with and obtain the same from RBS Coutts immediately if not duly received. *You undertake to verify the correctness of (a) each Statement; and (b) any accompanying cheques or vouchers received from RBS Coutts, and to inform RBS Coutts within 90 days from the receipt thereof of any discrepancies, omissions or inaccurate or incorrect entries in the account or details so stated in the Statement*.
>
> At the end of the period of 90 days, the Account as kept by RBS Coutts and the details set out in the Statement shall be conclusive evidence without any further proof that the Statement, the entries and details therein are correct (subject to the right of RBS Coutts, which may be exercised by it at any time, to adjust any entries in the Account or details in the Statement where they have been wrongly or mistakenly made by it)...
>
> [emphasis added]

86 On the face of the above clause, it did not specifically cover unauthorised transactions. However, the court in *RBS Coutts* held at [18] that:

> The time period provided for dispute was a generous one and gave the Defendant more than adequate time to examine all transactions in detail. *The Statements, not having been disputed during the relevant periods, were conclusive evidence that the Forex Transactions were*

authorised.

[emphasis added]

87 Mr Omar submitted that the language of the conclusive evidence clause in *RBS Coutts* was very similar to cll 3.1 and 3.2 in the present case and that a similar outcome should ensue. It is, however, relevant and critical to note that in *RBS Coutts*, the court specifically found that the transactions were authorised. Further, while the defendant claimed that some of the transactions were unauthorised, the purported unauthorised transactions were not identified by the defendant. Finally, there was also no dispute in *RBS Coutts* that the defendant was notified by way of email and/or written confirmation after each of the forex transactions had been carried out and on no occasion did the defendant object to any of the particulars stated therein. In the circumstances, in *RBS Coutts*, the court was not concerned with a situation like the present case, where EFG Bank had admitted to unauthorised trading by its employee, Mr Ng.

88 As noted above at [86], the court upon being satisfied that the defendant did receive the transaction confirmation slips, remarked that failure to dispute the statements was "*conclusive evidence that the Forex Transactions were authorised*." Given the court's finding that the transactions were authorised, there was understandably no detailed analysis in *RBS Coutts* as to how and why the relevant wording of the particular conclusive evidence clause was capable of applying to transactions executed in the absence of a valid mandate.

89 One must keep in mind that the operation of a conclusive evidence clause is not a substitute to the customer's mandate or simply put, does not create authorisation where there was none. In fact as examined below ([101]–[102]) cl 3.3 of the General Conditions in this case clearly limits the effect of receipt of transaction confirmations for "record purposes only". In my view, conclusive evidence clauses merely impose a duty on the customer to verify his or her bank statements and to inform the bank of discrepancies failing which the customer is precluded from disputing the *correctness* of the transaction. Accordingly, as stated in the operative clause in *RBS Coutts*, the confirmation slip sent by the bank was conclusive evidence of the *correctness*, rather than capable of operating as retrospective "*authorisation*" of the transaction though the outcome would be no different.

90 While EFG Bank also relied on *Banque National de Paris v Tan Nancy & Anor* [2001] SGCA 76 ("*Tan Nancy*") in support of its contention, this decision provided no assistance to its defence. The employee of the claimant bank in *Tan Nancy* effected share and foreign exchange transactions using the accounts of the 1st and 2nd defendants. The defendants were found to be liable for the trades done by the employee. Significantly, various telephone logs showed that the 1st and 2nd defendants (ex-wife and former brother-in-law of the bank's employee respectively) had discussed and agreed to a number of the transactions with the employee. Furthermore, on no less than five occasions, the 1st defendant instructed the bank employee to transfer profits from the disputed transactions to the 2nd defendant's account.

91 The Court of Appeal was persuaded by the cogent evidence presented that the defendants were *fully cognisant* of the trades executed by the employee on their accounts and *acquiesced to and condoned* his actions. The crucial finding underpinning this decision was the court's satisfaction that the employee had actual or apparent authority to perform the trades in the defendants' accounts. Therefore, *Tan Nancy*, like *RBS Coutts*, concerned transactions that were found to have been authorised by the customers.

True construction of clauses 3.1 and 3.2

92 In the final analysis, whether a particular risk of loss due to error, discrepancy, forgery or just plain unauthorised transaction is shifted onto the customer is a question of construction of the relevant clause. It is worth noting that the approach taken by the Court of Appeal in *Pertamina* at [61], in upholding the conclusive evidence clause against a commercial entity, limited its reasoning to the same. As such, the preferred approach to the construction of such clauses in the context of a private individual or a non-commercial entity was intentionally left unanswered. The Privy Council decision of *Tai Hing Cotton* held, on a question of construction, that each of the three clauses did not constitute a valid "conclusive evidence clause":

> If banks wished to impose upon their customers an express obligation to examine their monthly statements and to make those statements in the absence of query, unchallengeable by the customer after expiry of a time limit, *the burden of the objection and of the sanction imposed must be brought home to the customer*.
>
> The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. *Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts*.
>
> [emphasis added]

93 The guiding principle articulated in *Tai Hing Cotton* was simply that if a bank seeks to contractually allocate the burden and responsibility of the duty to inform of any forgery or unauthorised drawing or instruction on the customer, no less than *clear and unambiguous* reference will suffice. Sufficiently wide language ascertainable by a reasonable person to include the specific liability borne by the customer would also, in theory, suffice.

94 Thus, in order for EFG Bank to successfully rely on cll 3.1 and 3.2, it would have to overcome the following hurdles:

(a) Discharge its burden of proof that the transaction documents were sent by ordinary mail to give rise to the presumption of delivery under cl 4. As I have found at [42] to [58] above, EFG Bank has failed to cross this first hurdle.

(b) Assuming the burden was successfully discharged, whether cll 3.1 and 3.2 are sufficiently wide or expressly cover unauthorised transactions executed in the absence of instructions.

(c) Even if the language is sufficiently wide or expressly covers unauthorised transactions, whether cll 3.1 and 3.2 are applicable to unauthorised transactions carried out fraudulently by EFG Bank's employee.

(d) Finally, if the clauses expressly or impliedly apply to unauthorised transactions carried out by EFG Bank's employee, whether such clauses should be upheld as a matter of public policy and/or under UCTA.

Ambit of clauses 3.1 and 3.2

95 For ease of reference, cll 3.1 and 3.2 are repeated below.

> 3.1 *Subject to paragraph 3.2*, the Bank shall send the Client *periodic* confirmations or advices of

all Transactions *carried out by the Client and/or the Authorised Representative* and all deposits placed with, and cleared by, the Bank for the account of the Client, and periodic statements reflecting such Transactions and balances in the Account. The Client undertakes to carefully examine and verify the correctness of each confirmation, advice and statement of account and agrees that reliance may only be placed upon original confirmations, advices, and/or statements of account issued by the Bank. The Client further undertakes to inform the Bank promptly in writing and in any event within fourteen (14) days from the date of any such confirmation or advice and within thirty (30) days from the date of such statements of account, of *any discrepancies, omissions, incorrect or inaccurate entries* in the Account or the contents of any confirmation, advice or statement of account or the *execution or non-execution of any order*, failing which the Bank may deem the Client to have approved the original confirmations, advices or statements of account as sent by the Bank to the Client, in which case they shall be conclusive and binding upon the Client without any further proof that the Account is and all entries therein and the execution of all Transactions are correct, and *the Client shall be deemed to have waived all Claims against the Bank in respect of the Account and all such Transactions, even if the Bank had not exercised the usual diligence in relation thereto*.

3.2 A *Transaction Confirmation* in respect of each Transaction concluded will be sent to the Client in the same manner as any other confirmation no later than the end of the next Business Day after the date upon which the relevant Transaction is entered into. The details contained in the Transaction Confirmation shall be evidence of the particulars of the Transaction concluded between the Bank and the Client and shall be binding and conclusive on the Client. The Client must notify the Bank in writing within fourteen (14) Business Days after the date of the relevant Transaction of *any claimed discrepancy between the Instructions and the Transaction Confirmation*. The Bank may deal with the matter in such manner as the Bank may in its sole and absolute discretion consider appropriate, and if no such notification is received by the Bank in writing within the time stipulated, the Client will be deemed to have waived all further rights to raise any objection or query thereto, and to have waived all Claims against the Bank in respect of the relevant Transaction, *even if the Bank had not exercised the usual diligence in relation thereto*.

[emphasis added]

96 The first noteworthy point is that cl 3.1 was subject to cl 3.2. As such, the limitations applicable to cl 3.2 were equally applicable to cl 3.1. Secondly, while cl 3.1 generally related to "*confirmations*, advice and statement of account", further inspection revealed that the *confirmations* in cl 3.1 related to *periodic* confirmations. The use of the term "*periodic*" indicated a lower level of frequency.

97 On the other hand cl 3.2 specifically related to "*transaction confirmations*" and all confirmations were required to be sent to the customer "no later than the end of the next Business Day after the date upon which the relevant transaction is entered into". Clause 3.2 clearly catered to specialised transaction confirmations for trading activity which by its very nature (such as forex trading) is frequent and regular, ensuring that the customer is promptly informed upon the execution of each transaction. The 160 unauthorised transactions forming the subject matter of this dispute fell squarely within the targeted *type* of transaction and *trading pattern* envisioned under cl 3.2 while the statements of periodic nature such as statements of account would more likely be governed by cl 3.1. During closing oral submissions, Mr Omar agreed that cll 3.1 and 3.2 should indeed be construed as such.

98 However, the principal argument advanced by Mr Quahe on the construction of cll 3.1 and 3.2 was more fundamental. He submitted that both clauses contemplated EFG Bank acting on *instructions* from the customer and as such had no bearing on transactions carried out in the absence of instructions. First, cl 3.2 expressly limited the client's duty of notification to "*any claimed discrepancy between the Instructions and the Transaction Confirmation*". From the plain wording of the clause, the mischief EFG Bank sought to shield itself from were errors which could have taken place between the specific order/instruction given by the customer and the execution thereof. This would presuppose the giving of instructions by the customer.

99 Under cl 3.1, the customer was required to inform EFG Bank of "any discrepancies, omissions, incorrect or inaccurate entries in the Account of the contents of any confirmation, advice or statement of account or the *execution or non-execution of any order"*. In addition, cl 3.1 covered "periodic confirmations or advices of all Transactions *carried out by the Client and/or Authorised Representative*". Thus, the language of cl 3.1 also contemplated transactions executed on instructions by the customer or his or her authorised representative. Furthermore, both cll 3.1 and 3.2 should be construed as consistent with each other especially since cl 3.1 is to be read subject to cl 3.2.

100 There was no reference in cll 3.1 or 3.2 to the exclusion of liability for transactions carried out in the *absence of instructions*. In fact, the contrary was apparent. Curiously, Mr Omar during closing oral submissions claimed that "*Instructions*" under cll 3.1 and 3.2 were wide enough to include "*no instructions*". This submission was plainly misconceived. To begin with, "*Instructions*" was specifically defined under the General Conditions as "Instructions given by the Client or an Authorised Representative in accordance with the Account & Trading Mandate".

101 Furthermore, the tenor of the language used in cl 3.3 was instructive as, similar to cl 3.2, it specifically related to "Transaction Confirmation[s]" and in effect, reiterated the central importance of the customer's instructions for the transactions. Clause 3.3 states:

> *Any Transaction Confirmation is provided for record purposes only*, and any Instructions given or authorised, if accepted, are accepted at the time of the same being given or authorised and not at the time of the Transaction Confirmation.
>
> [emphasis added]

102 Clause 3.3 provides that the transaction confirmations were *only* for *record purposes*. Therefore, delivery or receipt of the transaction confirmations alone was not treated as instruction having been given for the transaction in question. Clause 3.3 guarded against the conflation of the customer's mandate or authorisation solicited *prior to* the execution of transactions, with the transaction confirmations sent *subsequent to* the execution of the transactions. By express reference to "*instructions*", specific to cll 3.1, 3.2 and 3.3, it was clear that the Agreement did not intend for unauthorised transactions executed in the absence of any instructions from the customer to be included within the ambit of the clauses. Instead, in my view, cll 3.1 and 3.2 would only protect EFG Bank from liability against "discrepancies" and/or "omissions" in the execution of the customer's instructions. As such, I agree with Mr Quahe's submission that the clear and unambiguous wording of cll 3.1 and 3.2 exclude from the scope of its protection transactions carried out *without* any instructions from the customer.

Unauthorised transactions performed by bank's employee

103 Both Mr Omar and Mr Quahe confirmed that, to their knowledge derived from their research,

there is no authority where a conclusive evidence clause has been invoked by a bank, let alone upheld by any court, to exclude liability for unauthorised transactions carried out fraudulently by its employee in the absence of instructions. In *Consmat*, *Tjoa Elis*, *Pertamina*, *RBS Coutts*, *Nancy Tan* and *Stephen Machinery*, the courts in each of the cases were concerned with situations where at the time when the transactions were executed, the banks believed in good faith that they were acting in accordance with the customers' mandate or instructions. The mandate was subsequently found in some of the cases to have been vitiated by reason of forgery which the banks were not aware of at the time when the transactions were executed. In the result, the transactions were not authorised since the mandate had been vitiated. None of the cases concerned the fraud or forgery of the bank's employee or the bank acting in the *absence of instructions*.

104 In the present case, the situation is materially different. EFG Bank managed Mdm Jiang's FIS Account through Mr Ng. At the time when the 160 transactions were executed, EFG Bank knew through Mr Ng that it had no mandate/instruction to do so. There was therefore no question of EFG Bank acting on "instructions" in good faith when the transactions were executed. Given that the 160 transactions were executed *knowingly* by Mr Ng on Mdm Jiang's non-discretionary FIS Account, without any instruction from Mdm Jiang, it must follow on the facts of the present case that such transactions were in effect carried out fraudulently by EFG Bank's employee, Mr Ng. It was not suggested by Mr Omar that the 160 transactions were carried out by Mr Ng either negligently or inadvertently.

Clauses to exclude liability for the fraud of banks' employees

105 No sensible bank, to my knowledge, has sought to incorporate a conclusive evidence clause in its banking documentation to exclude liability for unauthorised transactions fraudulently carried out by its own employees. There is probably a logical reason why this is so. If such a risk is provided for in the relevant clause, the law would require the bank to bring it to the specific attention of the customer. It would be difficult to imagine that any reasonable customer would agree to assume such an outrageous risk given the wide range of choices offered by alternative banks. There is *dicta* in at least two local decisions where the courts have cautioned that such clauses would not be enforceable. In *Tjoa Elis*, Woo JC expressed the view at [96], that:

> However, this is not to say that if UOB had inadvertently and unilaterally make a wrong debit *without any instructions whatsoever*, it would still be entitled to rely on cl 13 [the conclusive evidence clause]. In such a situation, it *may be* against public policy or *may be* unreasonable to allow UOB to rely on cl 13.
>
> [emphasis added]

In fact, Woo JC's observation was made in relation to debits *inadvertently* made without instructions. Here, the court is concerned with a higher degree of fault wherein transactions were *fraudulently* carried out in the absence of instructions.

106 In *Pertamina* at [63], the Court of Appeal made a more direct observation which specifically related to transactions carried out by the fraud of the bank's employee:

> For example, if a bank attempted to exclude liability for the fraud of its own employees, we would have *no hesitation* in declaring such a clause unreasonable and invalid.

107 From the concluding words of cll 3.1 and 3.2, *ie* "even if the Bank had not exercised the usual diligence in relation thereto", it is clear that EFG Bank, at best, sought to exclude liability for errors

caused by its lack of due diligence. It is also clear from other provisions of the General Conditions that EFG Bank did not intend for cll 3.1 and 3.2 to exclude liability caused by the fraud or wilful misconduct of its employees. In this connection, Mr Quahe drew my attention to cl 7.1 of the General Conditions which provided, *inter alia*, as follows:

> Neither the Bank nor any of the Bank's Affiliates shall be liable for any Claims, or for any diminution of value of or loss or damage to any property or security under the Account, or in respect of the Services, or for any lost opportunity whereby the value of such property or security could have been increased, or for any other reason, or for the acts of any Agent, broker, custodian, nominee or correspondent appointed by the Bank in good faith, *save where the same arises directly from their respective gross negligence, wilful misconduct or fraud*.
>
> [emphasis added]

108 The risk of fraud by the bank's employee is a unique risk that typically resides with the bank. If EFG Bank had intended to shift such risk to its customers including Mdm Jiang, in my view, nothing short of express reference in the relevant clause to such a risk would have sufficed. Clauses 3.1 and 3.2 clearly did not expressly or impliedly cover unauthorised transactions carried out fraudulently by its employee in the absence of instructions. In any event, as explained below, conclusive evidence clauses which purport to exclude liability for the fraud of banks' employees would, in my judgment, stand contrary to public policy considerations and would run foul of the reasonableness test under UCTA.

Void under UCTA and/or contrary to public policy

109 First and foremost, one must bear in mind that on my construction of cll 3.1 and 3.2, their validity for what they stand for is without question. I was, however, dismayed that EFG Bank sought to exclude its liability for transactions executed in bad faith without any instructions from Mdm Jiang, particularly in the absence of express wording to that effect under any clause in the Agreement (*especially* in light of the plain wording of the clauses supporting the contrary proposition). However, EFG Bank's underlying contention that in theory, a conclusive evidence clause could exclude liability of the bank for unauthorised transactions executed by a fraudulent bank employee merited closer analysis.

110 I think it is fair to start from the presumption that when parties enter into contracts they contemplate honesty and good faith in the performance of their obligations. In the House of Lord's decision of *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349 ("*HIH Casualty*") at [68] Lord Hoffman remarked:

> *I think that in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the persons involved will behave honestly*.
>
> [emphasis added]

111 However, if a clause expressly contemplated the exclusion of liability for fraud or wilful misconduct by the bank through its agents, it would be confronted with the reasonableness test under s 11 of the UCTA regime. In *Consmat* at [23], the court took the position that there was no reason to "import" the Unfair Contract Terms Act 1977 of the United Kingdom under s 5 of the Civil Law Act (Cap 43, 1988 Rev Ed) to interpret conclusive evidence clauses as their validity could be determined by reference to s 24 of the Bills of Exchange Act. In 1994, Parliament enacted UCTA in

Singapore, materially altering the statutory landscape which formed the basis of the decision in *Consmat* in determining the non-applicability of UCTA. Any residual doubt as to the applicability of UCTA to conclusive evidence clauses, was clarified by the Court of Appeal in *Pertamina* as V K Rajah JA remarked at [59]–[63]:

> The freedom of the parties to contract is however circumscribed by legislation (such as the UCTA) and public policy considerations.
>
> Section 3(1) of the UCTA mandates that terms seeking to exclude liability in respect of the breach of one's own contractual obligations (*which effectively is what conclusive evidence clauses do) must satisfy the requirement of reasonableness*. The Second Schedule to the UCTA lays down a few guidelines in assisting the court's determination of whether such terms are reasonable.
>
> [emphasis added]

112 Pursuant to s 3 of UCTA, exclusion of contractual liability falls within the reasonableness test:

> 3. —(1) This section applies as between contracting parties where one of them deals as *consumer* or on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term —
>
> (a) *when himself in breach of contract, exclude or restrict any liability of his in respect of the breach*; or
>
> (b) claim to be entitled —
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
>
> except in so far as (in any of the cases mentioned in this subsection) *the contract term satisfies the requirement of reasonableness*.
>
> [emphasis added]

113 In respect of contracts in which one of the parties is a consumer, by operation of s 3 of UCTA, a conclusive evidence clause excluding liability for the fraud or wilful misconduct of an agent would be subject to the reasonableness test set out under s 11:

> 11.(1) In relation to a contract term, the requirement of reasonableness ... is that the term shall have been *a fair and reasonable* one to be included *having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*.
>
> 11.(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.
>
> [emphasis added]

114 As provided for under s 11(5), the burden of satisfying the reasonableness requirement clearly falls on the party seeking to exclude its own liability (*ie* EFG Bank in this case). In applying the reasonableness test, the court may have regard to the matters specified in Schedule 2 of UCTA though it does not preclude it from taking into account other principles of law in determining the enforceability of exclusion clauses.

115 Unequal bargaining power is a relevant consideration under Schedule 2 in determining the validity of any conclusive evidence clause. Articulating a preference to the non-interventionist approach to the reasonableness test in the context of commercial contracts, in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 Lord Wilberforce said (at 843):

> [I]n commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said for leaving the parties free to apportion the risks as they think fit for respecting their decisions.

116 In similar vein, the Court of Appeal in *Pertamina* upheld the widely drafted conclusive evidence clause in that case, at [61] but expressly limited its analysis to commercial entities, cautioning that the reasonableness of such clauses in a non-commercial context was decidedly open:

> It bears emphasis that in holding that conclusive evidence clauses if and when properly and reasonably defined are enforceable, *we restrict such a conclusion to cases where the customers are commercial entities*. ...*However, we are not required to express a general opinion as to the reasonableness of conclusive evidence clauses as and when applied to individuals and non-corporate customers since the issue does not arise in the present context*. Each case will entail a careful examination of its own peculiar factual matrix starting with a careful scrutiny of the conclusive evidence clause that is being questioned.
>
> [emphasis added]

117 However, the dispute before me concerned a private individual. As I have found that cll 3.1 and 3.2 were not applicable to the unauthorised transactions carried out by EFG Bank's employee in the absence of instructions, there was strictly no necessity for me to examine the issue of whether the clauses should be upheld in the case of an individual. I shall therefore refrain from expressing a view on the matter particularly since neither counsel made significant submissions on this point. No doubt this point will be revisited when the appropriate occasion arises.

118 Notwithstanding that on my construction of cll 3.1 and 3.2, the situation in question does not arise, it appears to me that it is plainly unreasonable that a bank should be able to shift the risk of unauthorised transactions by a fraudulent employee (within its own sphere of control) to an innocent customer by way of a conclusive evidence clause. The purpose or introduction of conclusive evidence clauses was to enable banks to contractually allocate risks which were better managed by customers, brought about by tainted transactions outside the purview of the bank. In recognition of this rationale, conclusive evidence clauses have been upheld due to the relative ease of detection of forgeries by the customer as opposed to the bank. In *Pertamina* at [61] the Court of Appeal recognised this underlying principle as support for the validity and reasonableness of conclusive evidence clauses, *albeit* in a commercial context:

> In the context of banks on the one hand (which would otherwise bear the onerous, if not near impossible task of detecting forgeries given the advent of modern technology) and commercial

entities on the other (which only have to check their own records), we do not find it onerous or unreasonable to place the risk of loss on the latter if this has already been agreed upon.

119 However, the converse must be true as regards transactions executed fraudulently by banks' employees. Allocation of the risk of fraud or wilful misconduct of banks' employees to the customers by way of conclusive evidence clauses is contrary to the somewhat compelling rationale underpinning the genesis of such clauses in that banks rather than the customers would be in a better position to effectively detect the fraud of its own employees. This allocation of risk was implicitly recognised in *Pertamina* at [60]:

> [In] principle conclusive evidence clauses employed in a banker and corporate customer relationship afford *a practical and reasonable device for pragmatic management of risk allocation*.

120 One must not lose sight of the foundational legal rule that fraud unravels all: *fraus omnia corrumpit*. As Lord Denning correctly observed in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712, once fraud is proved, "it vitiates judgments, contracts and all transactions". I am, however, dealing with the nuanced question of whether liability for the fraud of agents or specifically, employees of banks should be capable of contractual exemption. For example, in the UCC which gives legislative force to conclusive evidence clauses in the United States, Art 4-406(d)–(e) makes it clear beyond doubt that banks are not at liberty to exclude liability or shift losses attributable from transactions executed through its employees in bad faith. Using conclusive evidence clauses to allocate the risk of fraud of an employee of the bank to the customer is not only devoid of pragmatism, but also appears to be entirely inconsistent with the core rationale underpinning the court's willingness to uphold these clauses in the first place, as the allocation of the risk of fraud of the bank's employees, by reason of the relative ease of detection and control, should rightfully and reasonably be borne by the bank.

121 While it is extraordinarily unlikely that a customer seeking to open a bank account would knowingly agree to a term which expressly excludes liability for fraud of the employees of a bank, the question of whether such a clause is unreasonable by reason of UCTA turns on the relevant factors identified (*ie* unfair bargaining power (commercial, individual, non-corporate customer), inducement and knowledge of the clause in question) as well as public policy considerations.

122 Individuals and corporations entrust banks and employees of banks with their savings and investments. Public confidence in the banking system is therefore fundamental to the integrity of the system and is no doubt founded upon mutual trust and a reasonable expectation of honest dealings by employees of banks. Shifting the attendant risk and liability for the fraud or wilful misconduct of employees of banks by way of conclusive evidence clauses, strikes at the very heart of the presumed integrity of the system. The negative impact on public confidence and trust in the modern banking system would, in my view, render such clauses to be unreasonable under UCTA as well as void as a matter of public policy.

Unconscionable conduct of EFG Bank

123 This was Mdm Jiang's alternative submission in the event EFG Bank succeeded in its defence under cll 3.1 and 3.2 and on the premise that the clauses were not unenforceable under UCTA. Mr Quahe expressly stated that he was not seeking to rely on his alternative submission to vitiate the Agreement. [note: 33] In support of his alternative submission, Mr Quahe relied principally on Mdm Jiang's lack of proficiency in the English language as well as the exorbitant fees earned by EFG Bank totalling approximately US$1 million (comprising of US$456,000 in commissions and over

US$500,000 in net option fees) from the 160 unauthorised transactions. In light of my findings that EFG Bank has failed to discharge its burden of proof of posting as well as my construction of cll 3.1 and 3.2, this issue did not arise for consideration.

Conclusion

124 By reason of my findings, I make the following orders:

(a) Judgment in the sum of US$2,338,278.68 to be paid by EFG Bank to Mdm Jiang;

(b) Interest at the rate of 5.33 per cent on the judgment sum of US$2,338,278.68 from 15 December 2009 till the date of judgment; and

(c) Costs on a standard basis to be paid by EFG Bank to Mdm Jiang to be taxed if not agreed and such costs shall include the cost of the expert witness.

[note: 1] Agreed Bundle of Documents, ("AB") (Volume II) at 287.

[note: 2] AB (Volume I) at 181.

[note: 3] Defendant's Bundle of Documents at 30.

[note: 4] AB (Volume I) at 15.

[note: 5] AB (Volume I) at 61–62.

[note: 6] Statement of Claim (Amendment No 1) at [18].

[note: 7] Plaintiffs Bundle of Affidavits (Volume I) at 33 to 35, 37 ("PBOA"); Mdm Jiang's Affidavit Evidence-in-Chief ("AEIC") at [72] –[75], [79] – [81].

[note: 8] PBOA (Volume I) at 39; Mdm Jiang's AEIC at [86].

[note: 9] Bundle of Pleadings ("BP") at 118; Defence (Amendment No 1) at [21].

[note: 10] *Ibid*.

[note: 11] Transcript 28 March 2011 p 26 line 5 to p 27 line 22.

[note: 12] AEIC of Chua Bee Lian, 18 March 2011 at 18–28.

[note: 13] BP at 160; Statement of Claim (Amendment No 1) at [37.5].

[note: 14] PBOA (Volume I) at 28–30; Mdm Jiang's AEIC at [57] 𔄣[60].

[note: 15] Summons 2174/2010, 17 May 2010 at [1(d)(iv)].

[note: 16] Plaintiffs Closing Submissions ("PCS") at [51].

[note: 17] BP at 93; Statement of Claim (Amendment No.1) at [23(b)].

[note: 18] Summons 2174/2010, 23 June 2010, AR Francis Ng's Minute sheet at 2.

[note: 19] PCS at [59].

[note: 20] PCS at [63].

[note: 21] PCS at [130]; Transcript 29 March 2011 p 2 lines 2 to 5 (Ng); Transcript 29 March 2011 p 42 line 29 to p 43 line 5 (Linda Lee); Transcript 30 March 2011 p 47 lines 8 to 22 (Alicia Ng); Transcript 30 March 2011 p 34 line 28 to p 35 line 8 (Jessie Tan).

[note: 22] Transcript 29 March 2011 p 6 line 7 to 17.

[note: 23] Transcript 30 March 2011 p 14 line 27 to p 17 line 4.

[note: 24] Transcript 30 March p 49 lines 22 to 28.

[note: 25] Transcript 29 March 2011 p 59 line 4 to 10.

[note: 26] Transcript 30 March 2011 p 3 line 38 to p 3 line 3.

[note: 27] Transcript 29 March 2011 p 72 line 12 to 15.

[note: 28] Transcript 30 March 2011 p 1 line 11 to 31.

[note: 29] PBOA (Volume II) at 149; AEIC of Mdm Jiang dated 11 March 2011 at 149.

[note: 30] Transcript 30 March 2011 p 46 line 3 – 29.

[note: 31] Supplemental AEIC of Mdm Jiang, 24 March 2011 at [6].

[note: 32] Transcript 30 March 2011 p 42 lines 8 to 21

[note: 33] PCS at [123].