Hwang Cheng Tsu Hsu (by her litigation representative Hsu Ann Mei Amy) *v* Oversea-Chinese Banking Corp Ltd
[2010] SGHC 160

Case Number : Suit No 610 of 2008

Decision Date : 25 May 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Michael Khoo SC (counsel instructed), Josephine Low with Andrew Ee Chong Nam (Andrew Ee & Co) for the plaintiff; Adrian Wong Soon Peng, Jansen Chow (Rajah & Tann LLP) for the defendant.

Parties : Hwang Cheng Tsu Hsu (by her litigation representative Hsu Ann Mei Amy) — Oversea-Chinese Banking Corp Ltd

Banking

25 May 2010 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This dispute between the defendant Overseas-Chinese Banking Corporation Limited ("the Bank") and its customer, Hwang Cheng Tsu Hsu, also known as Nellie Hwang ("the plaintiff"), arose when the Bank refused to allow the plaintiff to close her accounts with the Bank and withdraw her funds therefrom. The plaintiff has since passed away (on 11 May 2010). The plaintiff had visited the Bank at its main branch at No. 65, Chulia Street, OCBC Centre ("the Bank's premises") on 13 May 2008, accompanied by her adopted daughter Amy Hsu ("Amy"), to close her fixed deposit accounts but her instructions were not complied with. The plaintiff had been a customer of the Bank since 1989 and its private banking customer since December 2005.

Background

2 The plaintiff formally adopted Amy in 1967 when she was 48 years of age and when Amy was two years old. The plaintiff retired from teaching after the adoption in order to take care of and bring up Amy. The plaintiff was widowed in 1987 and in 1999 purchased an apartment at No, 11 Tanjong Rhu #02-02, Singapore ("the Waterside") where she resided until her death. Amy lived with the plaintiff until she moved out after her marriage in 2007.

3 On or about 5 November 1999, the plaintiff executed a Will in which she provided for several beneficiaries ("the 1999 Will'). She also executed a codicil to her 1999 Will on 22 October 2007 ("the October Codicil"). Dr Teo Sek Khee ("Dr Teo"), a consultant and head of the geriatic unit at Raffles Hospital, was a witness to the execution of the October Codicil. In her third affidavit filed on 18 December 2008, Amy testified that the 1999 Will and the October Codicil were unfair to her and were not in accordance with the plaintiff's instructions.

4 The plaintiff executed a power of attorney on 19 August 2004 ("the 2004 Power of Attorney") appointing her nephew Michael Hwang ("Michael") and her niece, Frances Hwang ("Frances") as her

attorneys. This power of attorney was purportedly revoked by a Deed of Revocation dated 28 May 2008. A fresh power of attorney was purportedly executed by the plaintiff on 29 May 2008 giving Amy the power to *inter alia* institute legal proceedings on the plaintiff's behalf, and to do all acts that were necessary or expedient to manage the plaintiff's property ("the 2008 Power of Attorney").

5 According to Dr Teo, in March 2008 Amy informed him that the plaintiff wanted to change her will and requested Dr Teo to confirm that the plaintiff was competent to do so. Dr Teo testified that he did not so confirm as he was concerned that the discomfort caused by her constipation problem (for which she was warded at Raffles Hospital) might have clouded the plaintiff's cognitive functions. Nevertheless, the plaintiff executed a new will on 24 March 2008 ("the March 2008 Will"). At trial, it was revealed that the March 2008 Will was changed twice, once in May 2008 and again in August 2008 ("the August 2008 Will"). Amy revealed that she was appointed the sole executrix and was also the sole beneficiary under the August 2008 Will.

The plaintiff's medical history

6 The plaintiff had been seeing a doctor at Tan Tock Seng Hospital for memory disorder since the year 2000. The plaintiff then consulted Dr Teo on 26 May 2003 for xerodermatitis (dry skin). Subsequently, Dr Teo attended to the plaintiff several times. Frances would usually bring the plaintiff for her appointments with Dr Teo. In June 2003 Frances initiated discussions about getting a carer or nurse to help the plaintiff with her medication as Dr Teo discovered that the plaintiff sometimes forgot to take her prescriptions.

7 On or about 7 February 2008, the plaintiff sustained a fall at home. She suffered a hip fracture and was hospitalized at Raffles Hospital where she underwent hip replacement surgery. Ms Chen Ching Ling ('Ching Ling'), who was the plaintiff's then relationship manager ("RM") in the private banking division of the Bank informed Ms Lim Sar Lee, ('Sar Lee'), the Bank's (group) regional marketing manager that Amy had telephoned and had told Ching Ling that the plaintiff had sustained a fall and was hospitalised. Amy claimed that the plaintiff had difficulty issuing her own cheque to pay for the hospital bill and asked Ching Ling to help clear the plaintiff's cheque. In mid-February 2008, Ching Ling and Sar Lee visited the plaintiff in Raffles Hospital. Sar Lee requested the plaintiff to sign her signature on a piece of paper which the plaintiff did. The plaintiff's signature was consistent with the specimen signature kept in the Bank's records. No cheques were signed by the plaintiff in Sar Lee's presence during that hospital visit.

8 According to Amy, at the hospital, Sar Lee and Ching Ling had suggested that the plaintiff should open a joint account with Amy so that Amy could help the plaintiff to operate the joint account. Amy claimed that she and the plaintiff agreed to this suggestion. Sar Lee's evidence on the other hand was that neither she nor Ching Ling had made any suggestion to the plaintiff or Amy to open a joint account during that visit. Ching Ling left the employment of the Bank on 30 April 2008 and Chua Eng Leong ('Eng Leong') took over her role as the plaintiff's RM with effect from 1 May 2008.

9 On or about 16 February 2005, Dr Teo diagnosed the plaintiff as suffering from mild Alzheimer's dementia. He also gave evidence that the plaintiff could not recall her hip surgery when he attended to her on 4 March 2008. He further testified that Amy was overheard shouting at the plaintiff for about two to three minutes in the hospital ward. In his report dated 17 June 2009, Dr Teo noted that the plaintiff's dementia had worsened between 2003 and 2007 while under his care and her condition deteriorated further between 2007 and 2008 with problems of her personal grooming and poor nutrition becoming apparent.

10 The plaintiff was attended to by several doctors aside from Dr Teo from March to May 2008, namely a psychiatrist Dr Lim Hsin Loh ("Dr Lim"); a clinical psychologist Dr Zena Kang ("Dr Kang"); and a specialist in geriatic medicine Dr Sitoh Yih Yiow ("Dr Sitoh"). The plaintiff was examined by Dr Lim on 28 March 2008. In the examination, the plaintiff was found to have deficits in recent memory and orientation. After five minutes, the plaintiff could not recall a name or an address that had been given to her. Neither could she recall three simple items (a clock, a book, a chair) after the same interval. However, the plaintiff's memory for past events was good as she could tell Dr Lim her life history. The plaintiff told Dr Lim that she owned two properties, one at Mandarin Gardens and the other at the Waterside. Dr Lim believed that the plaintiff's recent memory deficiency was serious enough to warrant a further medical examination. Hence he referred her to Dr Kang, a clinical psychologist, for assessment of the plaintiff's mental state and cognitive functioning.

11 Dr Kang examined the plaintiff on 1 and 3 April 2008. She gave evidence that the two sessions basically involved the administration of one test. When Dr Kang asked the plaintiff how old her daughter was, the plaintiff replied that she was not allowed to reveal a woman's age. Dr Kang conducted a brief neuropsychological test called the Mini Mental State Exam ('MMSE') to assess the plaintiff's mental status and cognitive function. She testified that the MMSE was not intended for a diagnostic purpose and was not sufficient to determine whether one has dementia but was merely indicative of the level of cognitive impairment. In conducting the MMSE, Dr Kang had asked the plaintiff what was the date, day, month and year on that day. The plaintiff was unable to answer and explained that every day was the same to her. When asked to repeat the three objects (an apple, a clock and a table) *immediately after* Dr Kang had told the plaintiff what they were, the plaintiff was only able to repeat apple and clock on the first try. The plaintiff made three attempts before she was able to recall all three objects. After an interval of less than five minutes, Dr Kang asked the plaintiff if she could remember the three items mentioned a few minutes earlier; the plaintiff could not.

12 The plaintiff did better at the Wechsler Adult Intelligence Scale test. This test assesses a person's thinking and reasoning skills. When asked what was the similarity between an 'egg' and a 'seed', the plaintiff replied that they are both the 'beginning of life'. The plaintiff also answered that 'republic' and 'monarchy' were similar in that both were 'forms of government'. Dr Kang concluded in her report that the plaintiff's deficits were mainly in her short term memory which had an impact on her ability to learn new information. There was no impairment in her speech, language and reasoning skills. Dr Kang opined that the plaintiff's previous diagnosis of dementia was of a mild form.

13 Dr Sitoh saw the plaintiff between 8 April 2008 and 28 July 2009. On the plaintiff's first visit, Dr Sitoh made a general assessment of her health. Although the assessment covered both the physical and mental aspects of her health, Dr Sitoh cautioned that his report on that assessment was not intended to reflect the plaintiff's mental competence in anyway as he was not requested to assess her decision-making capacity at that time. Dr Sitoh's assessment of 8 April 2008 found that the plaintiff required some physical assistance with bathing and toileting, probably attributable to the hip replacement surgery the plaintiff had undergone earlier. The plaintiff was unable to name the year (2008) and the then Prime Minister. She could not complete the Clock Drawing Test as she was unable to recall the time to be represented.

14 On 12 May 2008, Dr Lim examined the plaintiff for the second time. As with the first examination, it is not disputed that Dr Lim examined her for the purpose of determining the plaintiff's testamentary capacity. Dr Lim was of the opinion that the plaintiff knew the nature and consequences of making a will. When Dr Lim asked what a will was, the plaintiff replied "before you die, to make a will to give away your property; you cannot carry away".

15 Based on Dr Lim's examinations on 28 March 2008 and 12 May 2008 and Dr Kang's psychometric

assessment report, Dr Lim diagnosed the plaintiff in his report dated 24 May 2008 as suffering from *mild dementia*. Her dementia was characterised mainly by the impairment of her *short term memory*. Dr Lim found that the plaintiff's judgment and reasoning had remained intact, and he concluded that she was fit to make a will.

16 It is pertinent to note that the Bank did not have access to the medical information and reports referred to above until much later. The Bank's pleaded case was that it did not know of the plaintiff's dementia until after legal proceedings had commenced (on 29 August 2008) when an affidavit was filed by Dr Lim on 3 October 2008.

The visit of the plaintiff and Amy to the Bank on 13 May 2008

17 On 13 May 2008, the plaintiff and Amy attended at the Bank's premises to give instructions for the opening of a new joint account. The plaintiff and Amy were attended to in a meeting room on the 31st floor by Kang Eu Jin ('Eu Jin') a client services officer of the Bank. Eu Jin introduced himself as the assistant to Eng Leong, Amy introduced herself as the plaintiff's daughter and informed Eu Jin that the plaintiff wished to transfer monies then held by the Bank by way of fixed deposits to a new joint account to be opened in her name and the name of the plaintiff.

18 Eu Jin testified that the plaintiff appeared dazed, and was 'staring into blank space' all the time. He felt uncomfortable as he noticed that while the plaintiff's accounts with the Bank were in the plaintiff's sole name, the instructions to transfer the monies from the plaintiff's accounts to a new joint account came from Amy. Eu Jin consulted Sar Lee because he was concerned over whether the plaintiff knew what transaction she was entering into and what Amy had wanted to do. On Sar Lee's advice, Eu Jin proceeded with filling the account opening forms although he informed Amy that the opening of the joint account would be subject to the Bank's management's approval. When he attempted to explain to the plaintiff details about opening the account, Amy cut him off and said 'Qin Meng!' [签名!] to the plaintiff (which words mean 'sign' in the Cantonese language) in a stern and peremptory tone. The plaintiff was startled but complied by signing the account opening form.

19 Eu Jin remained concerned and approached Sar Lee to inform her of what had transpired. Later, Eu Jin also briefed Eng Leong. Both then approached Sar Lee to discuss the matter. On the other hand, Amy testified that Eu Jin "never said a word" to the plaintiff throughout the meeting The day after the visit of Amy and the plaintiff, Sar Lee and Eng Leong decided that as a prudent measure, they should meet with the plaintiff to verify her instructions to open a joint account. Eng Leong tried to make an appointment by telephoning the plaintiff several times that day but to no avail – she was not contactable.

The home visit on 15 May 2008

20 On 15 May 2008, Sar Lee and Eng Leong visited the plaintiff at her residence at the Waterside. Amy was in Australia at that time. It was Amy's contention that the Bank made the visit knowing full well Amy was away from Singapore. During the visit, the plaintiff walked out of her room unaided. Sar Lee and Eng Leong introduced themselves to the plaintiff and informed her that they were visiting as part of the Bank's customer care services.

21 That was the first time Eng Leong had met the plaintiff. He introduced himself as her new RM. The plaintiff did not appear to recognise Sar Lee from the latter's visit at Raffles Hospital. According to Sar Lee, the plaintiff just smiled when Sar Lee asked if the plaintiff remembered her Sar Lee testified that the plaintiff warmed up to her and became chattier. When Sar Lee asked the plaintiff how old she was so as to be able to recover so fast from her surgery, the plaintiff replied that a

woman's age was a secret. The plaintiff eventually told Sar Lee she was 80 years old (she was actually 90 at that time).

22 Sar Lee asked if the plaintiff had attended at the Bank's premises on 13 May 2008 and whether the plaintiff wished to open any joint account. The plaintiff replied that she did not recall either event. Sar Lee then asked how long the plaintiff had been the Bank's customer. The plaintiff replied that she had been a 'long-time' customer. Subsequently, Sar Lee asked the plaintiff a second time whether she remembered going to the Bank's premises to open a joint account, the plaintiff replied that she could not remember. However, the plaintiff could recall that she had, at one time, gone to the Bank's premises to check her safe deposit box but could not remember when that took place.

23 Sar Lee then specifically asked if the plaintiff wanted to open a joint account, and the plaintiff replied '*No*'. Further, when Sar Lee asked the plaintiff if she had a daughter, the plaintiff replied '*No*'. Subsequently however, the plaintiff said that she had a daughter who was overseas on vacation. The plaintiff told Sar Lee that the daughter lived with her, and that her maid had been working for her for about 2 years. However, before their departure, Sar Lee was told by the maid that the plaintiff lived alone and that the maid had only started working for her about three months back.

Events after the home visit of 15 May 2008

24 The home visit on 15 May 2008 lasted for about half an hour. When Sar Lee and Eng Leong left, they discussed the observations they made regarding the plaintiff and her inconsistent answers. They were concerned about the plaintiff's mental capacity. On the same day, Sar Lee and Eng Leong had a meeting with Olivier Denis ("Denis"), the head of private banking of the Bank. They reported to Denis what Eu Jin had observed of the plaintiff on 13 May 2008 at the Bank's premises and what they had noted on 15 May 2008 at the plaintiff's residence. Subsequently, Denis had about four internal meetings which involved Sar Lee, Eng Leong as well as the Bank's legal and operational risk management and compliance departments.

25 On 20 May 2008, Eng Leong received a call from Amy who enquired whether the joint account had been opened. After Eng Leong informed Amy that the Bank's management was still considering the issue, Amy replied that if it was so difficult for the joint account to be opened, the plaintiff would close her accounts with the Bank instead. Amy said she would come by with the plaintiff on 22 May 2008 to close all the latter's accounts. Eng Leong conveyed Amy's message to Denis, who decided that the Bank's senior management would meet the plaintiff on 22 May 2008 to determine if she understood what she was doing.

26 On 22 May 2008, Siau Kee Liam ("Siau") (who is the Bank's head of operational risk management & compliance) sent an email to Eng Leong setting out the questions ('list of questions') he had prepared to ask the plaintiff at the meeting that same day. The email was copied to Denis, Sar Lee, Peter Wong and Christian Wong (both were from the Bank's legal department).

The meeting at the Bank's premises on 22 May 2008

27 Amy and the plaintiff arrived at the Bank's premises at around 4pm. That was the first time Eng Leong met Amy. Eng Leong led them to a room to meet Denis, Siau and Jo Goh, who is a compliance officer with the Bank. (All the Bank's representatives at the meeting testified at the trial.) Amy introduced herself as the plaintiff's daughter and informed those present that the plaintiff wished to close all her bank accounts with the Bank. Siau informed Amy that since the plaintiff's accounts were in the plaintiff's sole name, the Bank would have to receive instructions to close her accounts directly from the plaintiff.

28 According to Siau, Amy became agitated on hearing his request. She spoke to the plaintiff in Cantonese, saying that the Bank was suspecting Amy of trying to cheat the plaintiff of her money. Amy then told the plaintiff in a very commanding and loud voice that if the plaintiff did not transfer the money to her and close all her accounts without the Bank, the plaintiff would lose all her money. Siau viewed Amy's statement as involving elements of threat and control. The plaintiff kept silent when Amy was speaking to her. After making those statements, Amy agreed to leave the meeting room. Eng Leong and Siau noticed that the plaintiff became at ease after Amy left. On the other hand, Amy's version of the incident was that the plaintiff was upset that Amy had to leave the meeting room as she wanted Amy to be 'her ears' at the meeting.

29 The Bank began the meeting by asking the plaintiff based on the list of questions which it intended only to use as a guide. However, the Bank was only able to ask the plaintiff questions 1 to 4 and question 12 on the list of questions during the meeting.

30 Eng Leong asked the plaintiff whether she knew where she was, the plaintiff shook her head and said she did not know. When he told the plaintiff that she was at the Bank's premises, she replied that she had an account with the Bank. Eng Leong then asked the plaintiff if she remembered who he was. The plaintiff shook her head and said no. Eng Leong further asked the plaintiff whether she knew why she was at the Bank's premises. The plaintiff shook her head and responded that she did not know why she was there. She however said that she was a customer of the Bank. Next, Eng Leong questioned the plaintiff whether she knew how much money she had deposited with the Bank. The plaintiff replied that she was not sure but she knew she had banked with the latter for many years and should therefore have quite a lot of money with the Bank.

31 Crucially, Eng Leong asked the plaintiff whether she wanted to close her accounts with the Bank. The plaintiff replied that there was no need to as she had no problems with the Bank. When Eng Leong asked the plaintiff who was the lady who had accompanied her to the Bank's premises, she said that it was her niece. When Eng Leong asked the plaintiff who was Amy Hsu, the plaintiff said that Amy was her daughter. Eng Leong asked *for the second time* whether the plaintiff wanted to close her joint account. The plaintiff replied that she was happy with the Bank and there was no need to close her accounts. The meeting lasted about ten minutes.

32 Denis was silent throughout the meeting. He did not speak to the plaintiff nor did he ask her any questions. The other officers present translated to him in English what Amy had said to the plaintiff in Cantonese. Denis expressed shock at what Amy told the plaintiff at [28] above, that the plaintiff would lose all her money if she did not transfer it out of the Bank.

33 It was the Bank's evidence that the meeting with the plaintiff was interrupted and ended abruptly when Amy stormed into the room and demanded that its officers stop talking to the plaintiff. Amy told the Bank's officers that they would hear from her lawyers, slammed the door and left. When Eng Leong asked who Amy's lawyer was, she replied 'AE'.

34 Contrary to Amy's assertion (in para 18 of the statement of claim), Eng Leong denied that he had suggested to Amy that it would facilitate the operation of the plaintiff's accounts if Amy procured a power of attorney from the plaintiff. I find it highly improbable that Eng Leong would make such a suggestion when he and his colleagues were already very concerned about the mental state of the plaintiff's health or that he would follow Amy out after she had slammed the meeting room door in his face and left in a huff.

Exchange of correspondence subsequent to the meeting of 22 May 2008

35 By a letter dated 28 May 2008, Amy's solicitor AE demanded an apology and an explanation from the Bank on the plaintiff's behalf for the Bank's non-compliance with her instructions. Denis testified that the Bank was convinced that the 28 May 2008 letter had not been written on the plaintiff's instructions due to the plaintiff's answer at the 22 May 2008 meeting that she did not want to close her accounts with the Bank. The Bank informed AE by a letter dated 6 June 2008 that the Bank needed confirmation from the plaintiff that the Bank was authorised to disclose privileged customer information to AE.

36 By a letter dated 10 June 2008, AE enclosed a letter dated 6 June 2008 which stated that AE was fully authorised to write to the Bank by the letter dated 28 May 2008. However, the Bank's position was that this letter dated 6 June 2008 was a 'red flag' of possible fraud against the plaintiff, because *the signature on the letter was inconsistent with the plaintiff's specimen signature* on record with the Bank. Denis testified that it was a basic practice on the part of a banker to compare signatures, and highlighted the inconsistencies in the plaintiff's signature in the letter dated 6 June 2008.

37 First, Denis observed that the signature there was an extended signature with a slight angle. Second, the 'H' of the specimen signature was a straightforward one with two vertical bars and one horizontal bar, whereas the 'H' in the signature found on the 6 June letter was a complex one with a spiral on one of the vertical bars. Third, the 'W' and 'G' were different. Siau, Jo, Eng Leong, Eu Jin, as well as staff from the Bank's fraud department had compared the plaintiff's signature on the letter dated 6 June 2008 with the Bank's specimen of her signature and agreed that it was not the plaintiff's signature. Denis contended that the signature could have been made by Amy.

38 The Bank wrote on 17 June 2008 to AE, to say that as the signature in the letter dated 6 June 2008 differed from the plaintiff's specimen signature, the Bank was unable to disclose any customer information to AE. The letter requested to be furnished with a fresh consent in writing from the plaintiff which bore the same signature as that kept in the Bank's records.

39 On 18 June 2008, the Bank received a letter dated 16 June 2008 purportedly written by the plaintiff that appointed Amy "with the power to authorise all [the plaintiff's] correspondence and instructions with immediate effect". The letter of appointment was signed by Amy on behalf of the plaintiff ("the self-authorizing letter").

40 The Bank replied on 19 June 2008 to the plaintiff to say that the self-authorizing letter dated 16 June 2008 was ineffective as it had not been signed by the plaintiff. AE replied on 24 June 2008 to inquire how much longer the Bank intended to prolong the charade. The letter enclosed a letter dated 20 June 2008 apparently signed by the plaintiff before a notary public, confirming it was her signature on the letter dated 6 June 2008.

41 AE wrote on 24 June 2008 in reply to the defendant's letter dated 17 June 2008 and repeated the demand for an explanation for the alleged non-compliance with the plaintiff's instructions. The Bank replied to AE on 9 July 2008 stating it had not had sight of a Warrant to Act signed by the plaintiff appointing AE as her solicitors.

42 The Bank wrote to the plaintiff separately 9 July 2008, stating that as her bankers, they had a duty at law to "take reasonable steps to ensure that [the Bank] act only in accordance with [the plaintiff's] instructions and not otherwise". The letter stated that the Bank had concerns with the plaintiff's "current state of health", as well as the self-authorizing letter of Amy dated 16 June 2008. The Bank proposed a face-to-face meeting with the plaintiff, so as to allay the Bank's concerns and to verify the plaintiff's instructions.

43 AE responded on 15 July 2008 challenging the Bank to "state the basis, medical or otherwise, for [its] assertion that [the plaintiff's] health is a matter of concern". AE added, "if [the Bank had] a medical report to support [its] allegation, please forward the same for [AE's] perusal". AE rejected the Bank's proposal of a face-to-face meeting. AE claimed that the plaintiff was unwilling to subject herself to "another inquisition" adding that apart from mental stress and anxiety caused by the Bank's refusal to follow the plaintiff's instructions, her health was "*perfectly satisfactory*". AE also enclosed a copy of the 2008 Power of Attorney.

44 The Bank wrote to the plaintiff on 18 July 2008 pointing out that the 2008 Power of Attorney raised more questions than answers. The Bank said that if the 2008 Power of Attorney existed on 29 May 2008 and was genuine, it would have been produced to the Bank earlier and the self-authorizing letter of Amy would have been 'redundant'. The Bank added it was willing to carry out the plaintiff's mandate if, in the course of any court proceedings, it was established that the plaintiff was in a position to validly provide instructions.

45 By a letter dated 3 August 2008, Amy complained to the Bank's chairman. Denis replied on the Bank's behalf on 15 August 2008 stating that from its interaction with the plaintiff since around April 2008, the Bank came to believe that the plaintiff may not have the necessary mental capacity to provide the Bank with any instructions. The letter stated that "the Bank will act if a reputable specialist opinion regarding the customer's mental capacity is produced, or a committee of persons is appointed by the court". The Bank pointed out that the face-to-face meeting it proposed to the plaintiff was intended to explore the Bank's concerns. It requested the plaintiff to reconsider this proposal. Until the Bank's concerns were addressed, the Bank stated it could not accept instructions in relation to all of the plaintiff's accounts.

46 I should add that besides writing to the Bank's chairman, Amy also complained about the Bank's "unreasonable conduct" to the Monetary Authority of Singapore on 4 August 2008. She further complained to her Member of Parliament at "a Meet-the-People" session prompting the latter to write to the Bank's chief executive officer on 29 May 2009.

47 According to Denis, the Bank tried to be diplomatic and tactful. As such, it did not make a direct request for a medical report but instead highlighted its concerns about the plaintiff's "current state of health" in its aforesaid letter. However, due to the uncooperative stance taken by Amy and the plaintiff's solicitor as shown in the chain of correspondence set out in the preceding paragraphs, the Bank had no option but to write the letter dated 15 August 2008 stating its concerns about the plaintiff's mental capacity.

48 In a letter dated 21 August 2008 from AE to the Bank's solicitors ("R&T"), there was a *volte face* by the plaintiff. Contrary to the stand she had taken in AE's letter dated 15 July 2008, AE indicated that the plaintiff (accompanied by Amy) was willing to have a face- to-face meeting with Eng Leong with a view to an amicable resolution to her demand for closure of her accounts. However, AE added that there was no necessity for the plaintiff "to face a panel of three bank officials and the Bank's legal advisers". In its letter dated 28 August 2008, R&T accepted AE's proposal and indicated that besides Eng Leong, two other officers of the Bank would attend the meeting together with the Bank's counsel.

49 Notwithstanding the meeting proposed between the parties, the writ of summons herein was served on R&T on 2 September 2008. On 10 September 2008, AE replied to R&T to inquire who were the Bank's two other officers who would be attending the meeting, adding that the plaintiff was not comfortable with Denis and did not want to see him. This was a strange comment considering that Denis had not, at the meeting on 22 May 2008 (see [32]), said a word to the plaintiff or at all.

50 On 12 September 2008, R&T informed AE that the Bank no longer considered a meeting necessary, given that the matter was before the court. On 14 April 2009, the balance sum of monies in the plaintiff's accounts with the Bank ($8,805,843.14) was paid into Court pursuant to an Order of Court dated 26 March 2009. By the time of the trial, Amy had made three applications to court for payments out, from the monies paid into court. Subsequently, she made two similar applications to this court.

51 On 14 December 2009, Amy was appointed the plaintiff's litigation representative. By then, the plaintiff no longer had the capacity to act for herself because of her advanced dementia. In fact, the plaintiff did not/could not testify for her case. To all intents and purposes, this was Amy's suit against the Bank.

The Court Expert

52 Dr Francis Ngui ("Dr Ngui") was appointed as the court expert by order of court dated 5 December 2008. Dr Ngui conducted his first medical examination of the plaintiff *on 15 January 2009*. Dr Ngui observed that the plaintiff was a feisty lady with a witty personality. However, the plaintiff was disoriented as to day and date and she could not give her identity card number or full address. The plaintiff's Clock Drawing Test was satisfactory. In Dr Ngui's report dated 19 October 2009 (Dr Ngui's report) at para [37], he stated his finding that the plaintiff showed significant defects in orientation and memory recall.

53 On or about 8 August 2009, Dr Ngui conducted his second medical examination of the plaintiff in the presence of Dr Sitoh. Her condition had worsened by then. Dr Ngui observed that the plaintiff was frail, much thinner, and breathless at times. She appeared to have lost her ability to speak in English, and her Clock Drawing Test was grossly abnormal. The plaintiff was able to give her address as 'Waterside, second floor' and house number '02' correctly. However, she said she was in Turkey and then England.

54 Dr Ngui's report included his perusal of the medical reports of Drs Lim, Kang, Teo and Sitoh. In Dr Ngui's report, he concluded that up until the time he saw the plaintiff on 15 January 2009, the stage of her dementia had remained in the mild stage. Dr Ngui opined that the home visit by the Bank's officers on 15 May 2008 would have been somewhat daunting to the plaintiff, and she could have been overwhelmed and stressed by the questions put to her.

55 Dr Ngui added that up to 15 January 2009, the plaintiff had been mentally competent to manage her financial affairs as well as to provide instructions to others in relation to her bank accounts. Dr Ngui further stated that generally, cognitive functions in dementia fluctuate over time. He found that the plaintiff did have episodes where she was less lucid, due to physical infirmities which aggravated her cognitive function such that she could be temporarily deemed unfit to manage her financial affairs or to give instructions during those episodes of ill health.

The Pleadings

The plaintiff's case

56 In the statement of claim, the plaintiff claimed the sum of $8,832,862.30 representing the credit balance in the plaintiff's accounts maintained with the Bank. The plaintiff contended that the Bank was in breach of contract for its failure to follow her instructions as the customer, to close all her accounts with the Bank and to repay the monies standing to her credit in those accounts.

57 The plaintiff further contended that the Bank had failed in its duty of care to act prudently. The plaintiff complained that; (i) after having been attended by Eu Jin on 13 May 2008, Amy told Eu Jin to inform Eng Leong to contact Amy before she left for Australia but Eng Leong had made no attempts to call Amy before the home visit; (ii) between 13 May 2008 and 22 May 2008, Eng Leong should have done more to investigate the relationship between the plaintiff and Amy; (iii) the Bank as prudent bankers ought to have "done more than defer the opening of the joint account"; (iv) the Bank ought to have verified with its officers who had previously dealt with the plaintiff and Amy so as to establish their relationship; (v) the Bank should have acknowledged Amy as the plaintiff's authorised attorney under the 2008 Power of Attorney.

58 The plaintiff noted that the Bank's letter to Amy dated 15 August 2008 had claimed that the Bank would act if, *inter alia*, a reputable specialist opinion on the plaintiff's mental capacity was produced. The plaintiff argued that since the Bank had been served with Dr Lim's psychiatric report on 3 October 2008, the Bank should have acted thereon to close the plaintiff's accounts.

59 The plaintiff's position was that as a prudent banker would have done, the Bank should have checked if the plaintiff had other joint accounts with the Bank. The plaintiff had a joint account with her nephew Michael and on 13 March 2008, Michael had, jointly with the plaintiff, given instructions to the Bank to place a sum of $3,497,671.08 in a fixed deposit account in the plaintiff's name. The plaintiff submitted that the Bank should have verified with Michael the plaintiff's mental condition and that she had the capacity to give joint instructions with him on 13 March 2008.

60 In addition, the plaintiff asserted that the Bank's failure to close her accounts and to repay her the monies standing to her credit in those accounts had deprived her of the use of her monies, specifically the opportunity to purchase an apartment at a new development called 'De-Centurion' which was opposite The Waterside. The plaintiff claimed damages to be assessed in respect of the loss of bargain in the property market, alternatively, for the loss of use of the monies in her accounts. The plaintiff further sought an order from the court that the accounts she maintained with the Bank be closed.

The defendant's case

61 In its defence, the Bank contended that it had acted in accordance with the duty of care imposed on them by law to withhold payment and that any reasonable and prudent bank in the same circumstances would have been put on notice, and would have regarded its actions justifiable.

62 The Bank contended that it had no duty to contact Amy or to take her instructions as she was not the Bank's customer. At all times, the Bank was in a banker-customer relationship with the plaintiff only.

63 The Bank argued that it had no duty to investigate the relationship between the plaintiff and Amy and that it had no duty to do more than to defer the opening of the joint account as the plaintiff herself confirmed she did not want to open such an account. The Bank further contended that neither Amy nor Michael were qualified persons to confirm the plaintiff's mental capacity. The Bank was further prevented by banking secrecy from asking Amy or Michael on a customer's mental capacity.

64 The Bank contended that the medical reports by Drs Lim and Kang, as furnished to the Bank did not address the issue of the plaintiff's mental capacity to give instructions in relation to her bank accounts. The Bank emphasized that the request in its letter of 15 August 2008 for a reputable specialist opinion was meant to address its doubts as to whether the plaintiff had the necessary mental capacity to give instructions in respect of her accounts.

Issues

65 The main issue here is *not* whether the plaintiff had, on a balance of probabilities, the mental capacity to operate her bank accounts with the Bank. That is not the crux of the problem. The plaintiff's cause of action was for breach of contract. On the facts of this case, it is clear that the Bank had no knowledge of the plaintiff's dementia at the material time when the apparent instructions for her bank accounts were given in May 2008. Consequently, the issue is:

> Given the Bank's knowledge of the circumstances surrounding the apparent instructions from the plaintiff, did the Bank breach its contractual obligations by failing to:
>
> (a) follow the plaintiff's instructions to open a joint account and
>
> (b) to close all her accounts with the Bank and paying to her the amounts standing to her credit in those accounts?

The legal principles underpinning the relationship between a bank's duty to follow its customer's instructions and its duty to take reasonable care

66 The Court of Appeal in *Yogambikai Nagarajah v. Indian Overseas Bank and another appeal* [1996] 2 SLR(R) 774 ('*Yogambikai*') clarified that a bank's contractual duty to make payment on the demand of the account holder co-exists with a contractual duty to take reasonable care in all the circumstances as agent of the account holder. As Lai Kew Chai J observed at [53]:

> "The relationship between the bank and the deposit account holder is premised on the debtor-creditor relationship. It carries with it the obligation on the part of the bank to honour the customer's mandate as regards the payment of money from that account. The bank's duty to pay on the demand of an account holder however co-exists with a duty to take reasonable care in all the circumstances as agent of the account holder. The duty to take reasonable care in the discharge of its obligations under the contract between banker and customer *includes withholding payment* where there has been fraudulent conduct resulting in wrongful loss by a party. In *Bank of New South Wales v Goulburn Valley Butter Company Proprietary* [1902] AC 543, Lord Davey at 550 said: "The law is well-settled that *in the absence of notice of fraud or irregularity* a banker is bound to honour his customer's cheque." Of course, where somebody cries "Fraud!", it is not always the case that the bank must withhold payment. The question in every case, including the present, is whether the *bank behaved reasonably in view of all the circumstances and discharged its duty of care*.
>
> [emphasis added]"

67 The Court of Appeal in *Yogambikai* considered the decisions in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 Lloyd's Rep 289 ('*Cradock*') and *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 ('*Lipkin Gorman*').

68 In *Cradock*, a bank's customer had been defrauded by the acts of the customer's agents. The customer alleged that its paying bank was liable for, *inter alia*, breach of contract. The relevant transaction involved the take-over of a company and it was carried out in a meeting attended by the company's directors and an officer of the company's bank. In the meeting, a cheque of a huge amount drawn on the company's account was exchanged for a banker's draft issued by the bank. The effect of this arrangement was that the company had lent money to a middleman, who had in turn undertaken to lend a similar amount to the makers of the take-over bid to finance the take-over. The

bank was unaware that such an arrangement was a breach of the financial assistance rule. The company went into liquidation and the Official Receiver sought to recover the money from the bank. Ungoed-Thomas J, in finding that the bank had failed its duty of care, observed at p 324:

> …a bank has a duty under its contract with its customer to exercise 'reasonable care and skill' in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. *An operation which is reasonably consonant with the normal conduct of business* (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) *of necessity does not suggest that it is out of the ordinary course of business*. *If 'reasonable care and skill' is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank*. What intervention is appropriate in that exercise of reasonable care and skill again depends on circumstances. Where it is to inquire, the failure to make inquiry is not excused by the conviction that the inquiry would be futile, or that the answer would be false.
>
> [emphasis added]

69 The Court of Appeal in *Yogambikai* endorsed Ungoed-Thomas J's formulation of a bank's duty of care but had expressed doubts over whether the law had been applied too harshly against the bank in that case. The Court of Appeal further considered the decision in *Lipkin Gorman* and accepted its position that when a bank is faced with what appears to be a genuine mandate presented by an agent acting within his authority, the bank's duty of care did not require it to do anything other than to honour the mandate in the absence of circumstances which put the bank on enquiry.

70 In *Lipkin Gorman*, Lloyds Bank plc had appealed against, *inter alia*, a finding of liability for breach of contract. A partner in a firm of solicitors who had become a compulsive gambler, misused his authority to draw cheques on the firm's clients' account. At certain times, the cheques made payable to "cash" were honoured by the bank over the counter when presented on the partner's behalf by a clerk. At other times, cheques were made payable to a building society from whose account the partner withdrew the proceeds, and at other times, the cheques were made payable to the bank itself. The branch manager had knowledge of the partner's gambling activities and was aware that the method used for the drawing of the cheques was unusual, but he had failed to inform the other partners in the solicitors' firm.

71 May L.J. found (at p 1356) that Ungoed-Thomas J had in *Cradock* stated the duty of care too highly and held that in the absence of abnormal circumstances which put a bank on inquiry, the paying bank would have to honour the customer's mandate in making payment out to the customer; he said:

> The relationship between the [Bank and customer] is contractual. The principal obligation is on the bank to honour its customers' cheques in accordance with its mandate on instructions. There is nothing in such a contract, express or implied, which could require a banker to consider the commercial wisdom or otherwise of the particular transaction. Nor is there normally any express term in the contract requiring the banker to exercise any degree of care in deciding whether to honour a customer's cheque which his instructions require him to pay. In my opinion any implied term requiring the banker to exercise care must be limited. To a substantial extent the banker's

obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that contract, the banker must honour it save in what I would expect to be exceptional circumstances.

72 In *Barclays Bank plc v. Quincecare* [1992] 4 All ER 363 ('*Quincecare*'), the Court held that it was an implied term of the contract between a bank and its customer that the bank would observe reasonable care and skill in and about executing the customer's orders. Steyn J held that a bank was under a duty to refrain from executing an order (given by the agent of the bank's customer) if and for so long as he was put on inquiry in the sense that he had *reasonable grounds* (although not necessarily proof) for believing that the order was an attempt to misappropriate the customer's funds. Steyn J was of the view that if a bank acted on the order despite knowing the order to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable bank would do, the bank would plainly be liable.

73 The position in *Quincecare* has been applied in *Verjee v. CIBC Bank Trust (Channel Islands) Limited* [2004] All ER (D) 183 ('*Verjee*'). In *Verjee*, the customer had given a Mr Sonjy two blank cheques drawn on CIBC and signed by the customer on the understanding that Mr Sonjy would not present the cheques for payment except for the purpose of withdrawing commissions owing from their joint enterprise. Mr Sonjy presented the cheques, and even though the customer had a nil balance in his account and had not applied for overdraft facilities, the bank honoured the cheques. The court found that in the circumstances where the apparent signatory of the cheques is himself the account holder, there was no reason for the bank not to believe that the signature signed was not genuine, and as such, the bank was not placed on enquiry.

74 It is clear from the above authorities that the Bank's contractual duty to honour payment instructions in accordance with the customer's mandate is not an absolute one. There is no duty on the Bank to follow the customer's instructions to make payment under any circumstances because its obligation to honour payment instructions is qualified by its contractual duty to take reasonable care in carrying out its operations within its contract with its customer. The question is whether a reasonable and prudent banker with knowledge of the relevant circumstances would have withheld payment because of a serious or real possibility of an irregularity. The relevant irregularity differs from case to case, it could be that the customer might be defrauded, that the customer might make financial decisions regarding her accounts under undue influence or that the customer lacked the mental capacity to make financial decisions regarding her accounts. In particular, the English Court of Appeal decision of *Drew v. Nunn* [1879] 4 QBD 661 highlighted that any pre-existing mandate between an agent and the principal is revoked upon the agent's *knowledge* of the principal's incapacity. It was further observed in *Paget's Law of Banking* (13th Ed, LexisNexis Butterworths) p 478 that:

> If the state of the customer's mind is such that he does not know what he is doing, he can give no mandate and any existing mandate is revoked; but i*f the bank has no knowledge and no reason to suspect*, then the mandate is operative. *What is sufficient to entitle a banker to refuse to obey his customer's mandate, on the ground that he is suffering from a mental disorder depriving him of mental capacity, is not easy to define*. The opinion of the customer's medical practitioner would be a guide but not conclusive, though if he advised positively that his patient was of sound mind, the banker would normally be justified in paying.

75 The above view is reiterated in *Halsbury's Laws of Singapore 2007* reissue Lexis Volume 12 at p 195 para 140.223:

> A mentally ill or otherwise incapable person, as a general rule, cannot be a customer of a bank.

> Where a bank learns that one of its customers has become mentally ill, all operations on the account must be stopped, pending the establishment of any appropriate arrangement under the relevant statutory provision relating to mental illness.

76 Based on this general rule that a bank's pre-existing mandate is revoked by its *knowledge* of the customer's mental incapacity, it must *necessarily* be implied into the contract between a bank and its customer that the bank should not (and is entitled not to) proceed with the relevant banking transaction if the circumstances are such that they put the bank *on inquiry* of the customer's mental capacity. The evidence of suspicious circumstances must necessarily be based on an objective standard (per Slade L.J. in *Lipkin Gorman* at p 1378).

77 While the Bank should not question the commercial wisdom of the relevant transaction, if there are *reasonable* grounds to believe that the person attempting to make a withdrawal lacks authority (as an example of an irregularity) to give a valid mandate, then the Bank would be placed on enquiry. The mere suspicion of the Bank does not constitute reasonable grounds. In the determination of whether there are reasonable grounds of belief, reference could be made to banking practice and commercial realities. For instance, the Court of Appeal in *Lipkin Gorman* found that in view of the substantial number of cheques handled daily by the branch, and having regard to cheques drawn in the past by the partner, the bank there was not placed on enquiry.

78 If the answer to the test is 'no', such that the reasonable and prudent banker with knowledge of the circumstances would not consider that there was a serious possibility of the irregularity, then the Bank is not placed on inquiry and *all that the Bank's duty of care* requires it to do is to carry out the customer's mandate as per an *ordinary transaction* with due care and diligence. If however, the answer to the test is 'yes', such that the facts would have placed a reasonable and prudent bank on inquiry, the Court must decide whether a bank had acted reasonably *in the context of those irregular circumstances*. This is an objective standard. The test as stated in *Yogambikai* is whether a reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts as justifiable. Just as in the first inquiry, reference could be made to banking practice and commercial realities to determine what the reasonably prudent bank would have done, although it must be noted that banking practice evolves over time.

79 The important point is this – the reasonableness of the actions carried out by a bank would be decisively influenced by the nature of those irregular circumstances that placed the bank on inquiry. For example, if the bank had reasonable grounds to believe that there is i*n fact* no mandate, or that the customer lacks capacity to give instructions, the bank would, at most times, be justified in acting against the customer's apparent mandate by refusing payment of monies out of the customer's account. If so, there would have been no breach of the contractual duty to honour payment instructions in accordance with the customer's mandate. Nonetheless, the general principle remains that whether or not a bank has acted reasonably, and *the specific steps or inquiries* that it ought to make, must be decided in the light of all the relevant facts.

80 At this juncture, I make the observation that *Lipkin Gorman* did not change the test for a bank's duty of care as stated by Ungoed-Thomas J in *Cradock*. Given the facts in *Lipkin Gorman*, the Court of Appeal found that the circumstances were insufficient to place the bank there on inquiry. In *Cradock*, the Court's finding that the bank there had failed to take reasonable care *presupposed* that the circumstances in that case have placed the bank on inquiry. As such, the difference lies in the two courts' interpretation of the two different sets of factual circumstances, where only the factual circumstances in *Cradock* were (implicitly) found to have placed the bank there on inquiry. As the Court of Appeal observed in *Bank of America National Trust Savings Association v. Herman Iskandar and another* [1998] 1 SLR(R) 848 at para [47]:

Lipkin Gorman was concerned with how the reasonable banker test should be applied in the context of whether a bank had been negligent in honouring a cheque drawn within the authority of its customer's agent without enquiries. The formulation of the reasonable banker test in ordinary transactions remained the same, but the criticism only went to when the court should hold that the bank would be put on inquiry, and its failure to investigate amount to negligence.

81 I would add that if the factual circumstances in *Cradock* in 1968 were to be considered in line with present banking practice and commercial realities, a court would be slow to find that the bank there was put on inquiry, from the *mere* circumstance where a huge sum of monies standing to the credit of the customer's (a company's) account was lent to another financial institution.

82 It would be apposite at this point to refer to an article by the Australian Credit Union Dispute Resolution Centre, "*Financial Abuse of the Vulnerable Older Person*", May 2008, that provides guidance on a bank's duty of care to elderly customers. While the guidelines are not binding, I find that they are helpful in understanding how a reasonable bank might respond to allegations of impropriety. The article stated that apart from situations of criminal conduct and fraud, there is a grey area of financial abuse of the elderly. This happens where the conduct is 'improper', where an existing relationship of trust or dependence may cloud the question of consent; at p 4 of the article:

> What is meant by improper? We think it covers conduct by a third party which may fall short of criminal conduct but which is within the realm of civil law and equity – conduct which involves, for example, intimidation, deceit, coercion, emotional manipulation, physical neglect, psychological abuse, undue influence or empty promises.

83 It also explained that banks should not make payment when they are placed on notice of the customer's mental incapacity (at p 12):

> A credit union officer is not expected to be a detective and is entitled to proceed on the *prima facie* assumption that he or she is dealing with honest people – unless the indications are to the contrary. It is the indications to the contrary that are the important qualification. A credit union officer is not entitled to turn a blind eye to known facts that indicate that there is a serious possibility that a member is being defrauded or that the funds are being misappropriated.
>
> A credit union my also be exposed to liability for any loss if it is on notice of incapacity [of the customer]…
>
> …a person may lack the capacity to make a particular decision, or a range of decisions, if they have a disability – such as intellectual impairment, brain injury, mental disorder or dementia – which affects their ability to understand the nature of the decision and what they are doing by making it.

84 The article observed that a bank may be placed on actual or constructive notice, and the 'observable indications' of the customer's lack of mental capacity include (at p 13):-

> - The member *does not seem to understand the transaction*, or its effect on their account of financial position;
>
> - They *may not seem to understand what is being suggested by the credit union officer* or a third party, or what their options are;
>
> - They may be confused about the state of their account and, despite explanation, appear to

remain confused.

[emphasis added]

85 Further, the article cautioned bank officers to take note of the following red flags for elderly customers (at p 6):-

The red flags potentially visible to credit union staff include that the older person may:

- Be accompanied by a new acquaintance to make a large or unusual withdrawal of cash;

- Be accompanied by a family member or other person *who seems to coerce them into making transactions*;

- *Not be allowed to speak for themselves/the other party does all the talking* (particularly in combination with either of the two above situations)

…

.-.Not understand or be aware of recently completed transactions.

[emphasis added]

The Findings

The Bank's refusal to open a joint account

86 The evidence here showed several red flags that would place a reasonable and prudent bank on enquiry. The plaintiff had kept quiet and had appeared dazed when Eu Jin attended to her for the opening of the account on 13 May 2008. She was *staring into blank space* while Amy was the *one doing all the talking*. All the instructions to open the joint account came from a non-customer (Amy), to whom the Bank owed no contractual duties. This aspect of Eu Jin's testimony was not challenged by the plaintiff's counsel nor was evidence adduced to contradict what Eu Jin said.

87 When Eu Jin tried to stress to the plaintiff that her monies in the existing accounts would all be paid into the joint account, the plaintiff remained non responsive and *again stared into blank space*. The plaintiff did not even nod her head to give a response. Although Amy deposed in her affidavit (at [32]) that Eu Jin had not said a word to the plaintiff, her evidence was not put to Eu Jin during cross-examination. Eu Jin had no opportunity to respond to Amy's contrary assertion. This was so even when Eu Jin had reiterated several times in Court that the plaintiff had been staring into blank space despite repeated attempts to talk to her. Indeed, looking at the questions asked during his cross-examination, they were premised on Eu Jin having spoken to and given explanations to the plaintiff. It was also not put to Eu Jin that he had not spoken to the plaintiff at all.

88 In addition, Eu Jin gave evidence that when he was explaining the account opening procedure to the plaintiff, Amy suddenly interrupted and gave the peremptory command 'Qin Meng!' [签名!] requiring the plaintiff to sign the account opening form. The plaintiff then signed the account opening form without saying anything. Lead counsel ("Khoo") for the plaintiff did not dispute Eu Jin's account of events that fateful day. He sought to explain the plaintiff's behaviour by contending that as Eu Jin was attempting to speak in a polite manner, it was plausible that the plaintiff, being hard of hearing, did not hear Eu Jin and was therefore unresponsive. Eu Jin, however, satisfactorily disposed of Khoo's arguments when he testified that he was mindful of that possibility and therefore placed his hand in

front of the plaintiff and moved in closer and spoke louder to her, so as to let her know that he was talking to her. Eu Jin's evidence was that the plaintiff still stared blankly into space when he did that; I accept his evidence. Although it was pointed out to Eu Jin that this evidence was not stated in his affidavit, I find it curious that counsel for the plaintiff left it at that. More importantly, it was not even suggested to Eu Jin that Amy had not said 'Qin Meng' to the plaintiff.

89 I further accept Eu Jin's evidence as *undisputed* (*viz*, that the plaintiff had been staring into blank space during attempts at explaining the form to her and that Amy had interrupted his explanation with her peremptory command '*Qin Meng*' to the plaintiff) because *nothing* was said by Amy regarding the visit to the Bank's premises on 13 May 2008 that would deny or contradict Eu Jin's evidence. Even more telling, when counsel for both parties were given the opportunity to further amend their pleadings after the trial, the plaintiff did not seek leave of court to include any facts to deny or contradict Eu Jin's evidence. Having accepted Eu Jin's evidence, I find there to be a strong inference (from the plaintiff's non-responsiveness and staring into blank space), that she did not seem to understand the transaction of opening the joint account, nor the consequences of doing so. I find that any reasonable and prudent bank would have been alarmed by the sudden interruption by Amy.

90 On the home visit of 15 May 2008, the plaintiff could not recall that she had gone to the Bank with Amy just two days earlier. When asked the second time whether she remembered going to the Bank's premises to open a joint account, the plaintiff had said no. Further, when asked twice whether she wished to open a joint account, she had said no. More importantly, her counsel did not dispute that the plaintiff had given those answers. In fact, Amy herself admitted that the plaintiff could have had a lapse of memory during the house visit. In her AEIC (at para 11.3) she had said:

> I *do not deny that my mother could have had a lapse of memory* [,] however, she was on medication after hip surgery in late February 2008 and also on medication for her constipation. So it was possible that she 'appeared frail and disoriented' as alleged.

91 The fact that she did not remember going to the Bank's premises just two days earlier to open a joint account gave grounds to believe that the plaintiff had problems with her mental health. What mattered here was the undisputed evidence that the plaintiff could not remember that she had wanted to open a joint account. The *reasons* for her memory deficiencies may be numerous (according to the various doctors who testified) but they are not in issue here. Given that the plaintiff had twice said that she did not want to open a joint account as the Bank's customer, that meant that her instructions were diametrically opposed to the *apparent* instructions given by Amy a non-customer. I use the word 'apparent' to emphasize that a non customer is in no position to give instructions to the Bank. On the evidence therefore, I find that the home visit of 15 May 2008 *only served to reinforce* the Bank's duty of care which required the Bank to refuse to open the joint account. I accept Eu Jin's evidence of what transpired on 13 May 2008 as well as Sar Lee's and Eng Leong's evidence of what happened on 15 May 2008.

92 I should add that I am unconvinced by Khoo's interpretation of the evidence of the events that transpired at this meeting. He submitted that Sar Lee should not be surprised when the plaintiff said that she did not have a daughter because Sar Lee was never told that Amy was the plaintiff's adopted daughter. I am puzzled by this explanation. Regardless of whether Sar Lee and/or the Bank knew this fact, why would the plaintiff not inform Sar Lee and Eng Leong that Amy was her daughter if she has one? Further, Khoo argued that the plaintiff said that her age was 80 when it was in fact 90 because she did not want to reveal her true age. This piece of evidence may be equivocal if considered in isolation, but when viewed against the entire conversation it was clear to me that there were indeed reasonable grounds to entertain serious doubts as to the defendant's capacity to give valid instructions on her accounts with the Bank.

93 The plaintiff's counsel argued that, apart from its refusal to open the joint account, the Bank should have done more – it should have found out more about the relationship between the plaintiff and Amy. The plaintiff's argument missed the point. Although finding out the relationship between Amy and the plaintiff was a relevant consideration, there cannot be imposed upon the Bank a contractual *duty* to do so. After all, as Khoo himself had pointed out, there was nothing irregular *per se* about a customer opening a joint account with someone who was not the customer's family member or relative. It must be remembered what inquiry the Bank was being tasked to make; that of the customer's capacity to give valid instructions to the Bank to deal with her accounts. As such, the overriding consideration of the Bank would be to make further enquiries to satisfy itself whether the plaintiff had the capacity to give valid instructions to deal with her bank accounts. The Bank had done this as shown in the home visit on 15 May 2008 and the meeting on 22 May 2008.

94 Further, the evidence showed that Amy was a *stranger* as far as the Bank was concerned. Amy said that it was in May 2008 that she had for the first time had contact with the Bank in relation to the plaintiff's accounts. As such, Amy's contention that Eu Jin could have verified with the officers of the Bank who had previously dealt with the plaintiff and her daughter so as to establish their relationship was without basis.

95 The plaintiff pointed to the fact that the plaintiff's nephew, Michael, had given joint instructions together with the plaintiff to deposit a certain sum of money into a fixed deposit account in the plaintiff's name by way of a letter dated 13 March 2008. The plaintiff argued that the Bank could have, at that time, verified with Michael the plaintiff's mental capacity. This argument is wholly irrelevant. The depositing of monies into a customer's own account is vastly different from transferring monies out of the customer's account into a joint account. The risks to the customer in the latter transaction are much greater than the former. As such, Michael's actions had no relevance to the present matter.

96 From the above evidence, there were circumstances which would raise alarm bells with any bank officer. To proceed with the account opening despite the circumstances would be turning a blind eye against the serious possibility of the customer's lack of capacity and its consequent abuse. I therefore find that the Bank had not breached its contractual obligation to the plaintiff when it refused to open a joint account.

The Bank's refusal to close the plaintiff's accounts and pay the monies standing to the credit of the accounts

97 It is significant that the plaintiff and her counsel did not dispute what Amy said just before the meeting of 22 May 2008 begun – if the plaintiff did not transfer the money to Amy and close all her accounts with the Bank, the plaintiff would lose all her money. No evidence was adduced to contradict or deny this piece of evidence even when the plaintiff amended her pleadings after the trial. There was also undisputed evidence from the Bank's officers that the plaintiff seemed happier and more relaxed when Amy left the meeting room. I did not agree with Khoo that the plaintiff decided to close her accounts because she was upset with the Bank's alleged intrusion into her privacy. While Khoo had suggested to Siau that Amy was not necessarily being threatening and the Bank had no way of knowing her reasons for saying what she had said, I am of the opinion that the evidence speaks for itself. Read with the 'Qin Meng' incident on 13 May 2008, this episode presented a strong case to any reasonably prudent bank that the plaintiff's mental incapacity had been exposed to *coercion*. Indeed, Amy admitted at the trial that the Bank was *entitled* to be concerned that there was some form of undue influence when an elderly customer is accompanied by a very vocal child. In making this finding, I disregarded Dr Teo's evidence that Amy was overheard shouting at the plaintiff at Raffles Hospital on 13 March 2008 because that fact was unknown to the Bank at the time.

98 Although the plaintiff's answers and behaviour at the 22 May 2008 meeting showed that she had no intention to close all her accounts, she was also confused about her accounts and the nature of the transaction of closing the same. When asked why she was at the Bank's premises, she shook her head and said she did not know. When asked whether she knew how much money she had in her accounts, the plaintiff said she did not know. Such evidence presented serious doubts about the plaintiff's mental health to a reasonable and prudent bank. Eng Leong asked the plaintiff if she remembered who visited her at her home a week earlier and the plaintiff could not. Asked who was the lady (Amy) who had accompanied her to the Bank on the day of the meeting, the plaintiff said that it was *her niece*. The plaintiff was asked twice whether she wanted to close her accounts and had answered no, adding there was no need to as she had no problems with the Bank. This evidence, read with Eu Jin's account of events on 13 May 2008, and Sar Lee's evidence on the plaintiff's behaviour on 15 May 2008, provided reasonable grounds to believe that the plaintiff lacked capacity to give valid instructions. In any case, any reasonably prudent bank would have chosen not to carry out Amy's apparent instructions because they were inconsistent with the plaintiff's answers.

99 Khoo did not dispute the fact that Eng Leong had indeed asked the questions in [30] and [31] at the meeting on 22 May 2008, and that the plaintiff had given the answers Eng Leong testified to. Rather, Khoo tried to explain that the plaintiff had said she did not know where she was because the plaintiff was unsure if she had been taken to the meeting room on the 30th floor or 31st floor of the Bank's premises. I reject Khoo's explanation. The plaintiff could have simply said that she was at the Bank's premises or even that she was at a bank, it was not relevant which floor she was on.

100 I also dismiss the contention that the plaintiff had answered '*niece*' because Frances had on previous occasions accompanied her to the Bank. There was no evidence to prove this was true (there was only evidence that Frances had accompanied the plaintiff to medical appointments with Dr Teo and this had no bearing on the issue of the plaintiff's mental capacity).

101 At this juncture, I would stress that although there was nothing substantive in the plaintiff's affidavits to contradict the Bank's evidence, I am not prepared to admit into evidence any of the affidavits that she filed previously. Order 38 Rule 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") gives the court a wide discretion to disallow the admission of a witness' affidavit evidence if the person fails to attend trial. There was some suggestion in the course of the trial that the plaintiff may not have affirmed the affidavits purportedly stated to be in her name. Denis had speculated that if she was capable of giving instructions to her counsel for the contents in her affidavits, the plaintiff would have had no problems in giving equally clear instructions to the Bank which she could not. Khoo himself agreed with Denis' surmise as can be seen from the following extract of the notes of evidence (at p 2086):

> Olivier Denis: If Madam Hwang at this point of time was able to write this affidavit, she could have met with us, no problem, okay. She would have been very clear, and she would have been able to give us absolutely crystal clear instruction…from May…to November, had Madam Nellie Hwang been as clear as in the affidavit, she would have met with us, no problem, and she would have given us clear instruction, and it didn't happen.
>
> Mr Khoo: I agree with that.

There are serious doubts as to whether the plaintiff could have made those affidavits given her state of health. I will therefore disregard them.

102 As I have found that there are reasonable grounds to believe that the plaintiff lacked the capacity to give instructions to operate her bank accounts, I find that the Bank was justified in not

making payment to the plaintiff of the monies standing to the credit of those accounts. At most times, a bank would be justified in *acting against* the customer's *apparent* mandate by refusing payment of monies out of the customer's account if it has reasonable grounds to believe that there was *in fact* no proper mandate or, that the customer lacked the capacity to give instructions on her accounts to the bank. This flowed naturally from the general rule that a bank has no mandate on which to act if the customer is mentally incapacitated and the bank is aware of the fact. The bank however, cannot suspend the banking transaction and hold on to the money in the accounts indefinitely. On the other hand, it would be impractical and commercially unworkable to expect the bank to investigate into the degree of mental incapacity of its own customer. In this case, the Bank could only act on the basis of the facts available and with the cooperation (or lack thereof) of the customer and her family. The Bank's officers are not doctors. All that the Bank could have done (and did) was to carry out face-to-face meetings with its own customer to evaluate for itself the appropriate measures to be taken. In the given circumstances where such meetings had placed the Bank on inquiry of the plaintiff's capacity to give valid instructions, the Bank had acted correctly and reasonably in refusing to close all the plaintiff's accounts and make payment of monies therefrom based on the instructions of a non-customer, Amy.

The correspondence between the Bank and AE and the Power of Attorney

103 The 2008 Power of Attorney was only served on the Bank on 15 July 2008. The plaintiff contended that the Bank was in breach of contract for failing to acknowledge Amy as her duly authorised attorney thereunder. The issue is not to determine whether the document was forged but whether in the context of the factual matrix, the Bank had *reasonable grounds* to believe that the same was not authentic. If it had reasonable grounds to do so, the Bank's duty of care in fact dictated that the Bank should not pay out monies from the customer's account without further verification of the customer's instructions.

104 The 2008 Power of Attorney cannot be viewed in isolation. On a contextual analysis, a prudent bank would have reasonable grounds to believe that the document was not authentic. First, it had been prepared and certified as a 'true copy' by AE. The evidence presented doubt on whether AE was indeed the plaintiff's solicitor. Right after the meeting of 22 May 2008 when Amy interrupted the Bank's interview of the plaintiff, Amy told the Bank's officers that they would hear from *her lawyer*. When Eng Leong asked, Amy replied the person was AE. This evidence was not disputed nor denied by Amy. Further, AE ignored the Bank's request to see a Warrant to Act signed by the plaintiff appointing him as her solicitor.

105 Second, the 2008 Power of Attorney was served on the Bank about a month after the Bank had received a letter dated 6 June 2008 purportedly from the plaintiff, where the signature was *inconsistent* with the plaintiff's signature in the Bank's records. This evidence was not challenged by Amy or her counsel. When the Bank asked AE for proof that his letter dated 28 May 2008 had been written under the plaintiff's instructions, what it received in return was the letter dated 6 June 2008 with the dubious signature and which raised even more questions. As such, the *apparent* forgery would have stayed in the mind of a reasonable and prudent banker at the time it received a copy of the 2008 Power of Attorney. Moreover, Denis' evidence that in the banking industry, an inconsistent signature is a huge red flag was not disputed.

106 Third, the defendant's suspicions would have been raised even higher when *just after* the Bank received the letter of 6 June 2008 with the *inconsistent* signature of the plaintiff, it received Amy's letter dated 16 June 2008 where she authorised herself with the power to handle all of the plaintiff's correspondence and instructions. The letter dated 16 June 2008 reads:

I have *legally appointed my daughter*, Hsu Ann Mei, with the *power to authorise* all my correspondence and instructions with immediate effect.

[emphasis added]

107 Amy herself signed that self authorising letter. Without any evidence to show (and indeed none was adduced) that the plaintiff had authorised Amy to legally appoint herself with the power to authorise the plaintiff's transactions, the self-serving letter of 16 June 2008 was meaningless, as far as the authorization of Amy went. Further, if the 2008 Power of Attorney had indeed existed on 28 May 2008, there was no reason why (and none was offered) it was not given to the Bank on 16 June 2008 instead of the self-authorising letter.

108 The events leading up to the service of the 2008 Power of Attorney were disturbing and reading the evidence in totality, I find that a reasonable and prudent bank in the Bank's position would have reasonable grounds to believe that the document was not validly executed. Therefore, the Bank had not acted in breach of its contractual obligations when it made the decision not to close any of the plaintiff's accounts and not to make payment of monies out of those accounts.

The Bank's receipt of the medical reports

109 Khoo argued that the Bank ought to have changed its position given the medical reports certifying the plaintiff's mental competence. I am of the view that a reasonable and prudent bank in the Bank's position, having been served with the reports of Dr Lim and Dr Kang on 3 October 2008, would be justified in choosing not to close the plaintiff's accounts and paying out moneys therefrom.

110 First, the Bank did not have access to those medical reports when it made its initial assessment of the appropriateness of following the plaintiff's apparent instructions. This was not a case where the Bank had gone ahead to deny making payments from a customer's bank account despite medical reports certifying the customer's mental competence. By the time the Bank received the medical reports after this action was commenced, there was ample reason for the Bank to suspect the apparent instructions did not reflect the plaintiff's intentions. Indeed, the Bank had received a letter from AE dated 15 July 2008 where it was alleged, apart from mental stress caused by the Bank's refusal to follow the plaintiff's instructions, the plaintiff's health was *perfectly satisfactory*; yet both Dr Lim's report dated 24 May 2008, and Dr Kang's report made in April, had agreed that the plaintiff suffered from *mild dementia*. This would raise serious concerns in any reasonable bank's mind. The reasonable concern would be that, if AE's letter of 15 July 2008 was correct, the authenticity and basis of the medical reports would be in serious doubt. It is noteworthy that at the time the medical reports were served on the Bank, it had no contact with either Dr Lim or Dr Kang. There were no avenues to verify their doubts.

111 Second, the Bank had stated in its letter 15 August 2008 that it would act if a reputable specialist opinion (from a clinical psychologist or neuropsychologist) *regarding the customer's mental capacity* was produced, or a committee of persons was appointed by the Court. The phrase 'customer's mental capacity' referred to the plaintiff's capacity to give instructions to deal with her bank accounts; it did not/could not refer to any other capacity. The evidence here suggested that Dr Lim and Dr Kang's reports were *not* concerned with the plaintiff's capacity to give instructions to deal with her bank accounts. Dr Lim's examinations of the plaintiff and his medical report dated 24 May 2008 were made for the purpose of determining the plaintiff's testamentary capacity, not to determine the plaintiff's capacity to operate her bank accounts. As for Dr Kang's report, she had testified that the tests she conducted were not purpose-specific, neither were the tests designed to make a diagnosis. The tests served only as an *indication* of the degree of cognitive impairment.

Moreover, Dr Kang did not give any diagnosis of the degree of dementia, she had merely stated that she was of the 'impression' that the plaintiff's earlier diagnosis of dementia was of a mild one. This was merely descriptive of Dr Teo's 2005 diagnosis that the plaintiff had 'mild dementia'.

112 Third, notwithstanding the *medical* consequences of a diagnosis of *mild dementia*, a reasonable bank with access to the reports would have entertained serious doubts over whether the plaintiff could, for all *practical* purposes, give valid instructions to deal with her accounts. The reports showed that the plaintiff's short term memory deficiency was quite serious. For Dr Lim's examination, the plaintiff could not recall three simple items (clock, book, chair) after an interval of five minutes. The plaintiff fared worse in Dr Kang's examination. The plaintiff was asked to repeat three items ('apple, clock, table') *immediately after* she was told what the objects were and she was only able to repeat apple and clock. Dr Kang had to tell the plaintiff the three items for the third time before the plaintiff could recall them all. Dr Kang's report itself stated that the plaintiff's short term memory deficiency would impact on her ability to learn new information.

113 I pause here to emphasise that the court's task here is not to determine whether the medical reports showed on a balance of probabilities that the plaintiff had the capacity to give valid instructions. The issue is whether a prudent bank with access to those reports would have been satisfied that the plaintiff had the capacity to give valid instructions. I find that a prudent bank with access to those reports should in fact entertain very serious doubts of the customer's capacity, and would therefore require further (and possibly more independent) medical evidence to satisfy itself that her cognitive abilities were functioning normally.

114 I therefore conclude from the evidence that the Bank had not acted unreasonably when it continued to defend the plaintiff's claim in the light of the medical reports produced.

The plaintiff's mental capacity

115 Both sides made submissions on the evidence that allegedly showed that the plaintiff was not mentally capable to manage her bank accounts with the Bank during the material month of May 2008. The plaintiff has unfortunately passed away and it is not strictly necessary for me to make a finding on her mental capacity now. Her affairs will in future be managed by the executor of her estate. There was no allegation that the plaintiff lacked mental capacity when she entered into the initial contract with the Bank. The defence pertained to the situation where the plaintiff was found to lack mental capacity *after* the formation of the contract, specifically in *May 2008*. Unfortunately, neither party adequately explained the effect of the plaintiff's mental incapacity (if established on the evidence) on the Bank's existing contractual obligations, specifically the obligation to follow the customer's instructions.

116 One *possible* analysis would be the principle as discussed earlier that there is no mandate if the Bank has knowledge of the customer's mental incapacity. Even if the plaintiff was found to be mentally incapacitated, the evidence did not show that the Bank had *knowledge* of this incapacity at the time when the apparent instructions had been given by Amy purportedly on the plaintiff's behalf. The evidence showed that at best the Bank was *placed on inquiry* of its customer's mental incapacity. The Bank did not submit any authorities that there would be *no mandate* merely because the Bank was placed *on inquiry* of its customer's mental incapacity. I do not think the Bank can be allowed to argue retrospectively and on hindsight, that there was no mandate, based on the argument that the customer was mentally incapable, when the Bank had *no knowledge* of this fact at the material time.

117 I must first emphasise the difference between the situation where a customer is *in fact, on a*

balance of probabilities, mentally incapacitated to give valid instructions; and the situation where *a prudent bank* has reasonable grounds to believe that a customer is mentally incapacitated and cannot give valid instructions. The two are not necessarily related. A person can be perfectly sane and yet behave in such an irrational manner that a reasonable and prudent bank would in its duty of care, choose not to follow his instructions pending further verification. A bank would not be in breach of its contractual duties in such a situation. Conversely, a person can be mentally incapacitated on a balance of probabilities for the purpose of giving valid instructions to deal with his account. Yet if such a person behaves normally when doing his banking transactions, such that no reasonable and prudent bank would have reasonable grounds to believe that there are any irregularities, the bank does not breach its duty in following the customer's apparent instructions. Of course, if the bank *has knowledge* or has been given notice of the customer's mental incapacity, it must not follow the customer's apparent instructions until further inquiries have been made to verify those instructions. As such, the outcome of this case does not depend on whether the plaintiff was in fact mentally incapacitated. As Khoo rightly pointed out, the Bank's officers are not medically trained and are in no position to formally assess a customer's mental health. What matters is the behaviour of the customer as perceived by the Bank and whether those perceptions constitute reasonable grounds of belief, based on the information available to the Bank at the time when apparent instructions were given.

118 That is not to say the plaintiff's mental capacity is irrelevant. If the customer was *in fact* mentally incapacitated at the material time, this could be corroborative of the prudent bank's reasonable belief that the customer was mentally incapacitated.

119 Dr Ngui opined that *up to 15 January 2009*, the plaintiff had been *mentally competent* to manage her financial affairs as well as to provide instructions on her bank accounts. With respect, I am unable to accept his opinion. First, Dr Ngui's medical examination of the plaintiff was done on 15 January 2009 and 8 August 2009, he did not examine the plaintiff in May 2008. Second, Dr Ngui had based his finding of the plaintiff's mental capacity before 15 January 2009 on third parties' medical reports and not on his own assessment of the plaintiff. At [55] of his report he said:

> Up to the time I saw her on 15 January 2009, the stage of her dementia remained in the mild range. This can be inferred from observations made by Dr Teo Sek Khee, Dr Lim Hsin Loh, Ms Zena Kang and Dr Sitoh.

120 Dr Ngui relied on Dr Teo's observations (at para 57 of Dr Ngui's report) that the plaintiff was seen unkempt with long fingernails in *April 2007*. This was slightly a year before May 2008. He then made reference to the test scores conducted by Dr Teo. However, Dr Teo had already stressed that his assessment was not meant to determine the plaintiff's decisional capacity in any way.

121 Indeed, apart from mentioning how he used Dr Teo's evidence, Dr Ngui failed to justify why and how he had used the reports of Drs Lim, Sitoh and Kang to draw those 'inferences' in his report. As has already been observed, none of those reports were prepared for the specific purpose of assessing the plaintiff's capacity to give instructions on her bank accounts. Consequently, I find Dr Ngui's opinion unconvincing given that he failed to explain how he had arrived at his opinion based on those reports or even how he had used them.

122 Third, Dr Ngui was himself of the opinion that the mental capacity of dementia patients fluctuates, such that there would be intervals of lucidity. This opinion was shared by Drs Lim, Sitoh and Teo. This evidence does not gel with Dr Ngui's general opinion – if the plaintiff had intervals of lucidity, his general statement that '*up to 15 January 2009*' she had the mental capacity to give instructions, cannot stand.

123 I make the further observation that Dr Ngui's opinion "that the Home visit by the Bank's officers on 15 May 2008 *would have been somewhat* daunting to the plaintiff and *she could have been* overwhelmed and stressed by the questions put to the plaintiff", is at best speculative and hearsay. Dr Ngui was not present at the home visit on 15 May 2008. His opinion is without basis as none of the medical reports he relied on covered this incident.

124 It was not in dispute that on 14 March 2008, the plaintiff had no recollection of a major surgery (hip-replacement) that she had undergone in February 2008. The plaintiff's inability to retain information was clear – as of 28 March 2008, the plaintiff could not recall three simple items a mere five minutes after they were told to her. As of 3 April 2008, the plaintiff was unable to tell the date, day, month and year. When asked to repeat three simple items immediately after she was told, she could not. The plaintiff managed to name all three items only after three attempts. Less than five minutes later, when asked what those three items were, she could not recall a single item. Although it is outside the purview of this court to determine whether on a balance of probabilities the plaintiff lacked the requisite mental capacity, the totality of the evidence presents a strong inference that the plaintiff lacked the ability to give proper instructions on her bank accounts in the months leading up to May 2008.

125 My comments are made without reference to the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("MCA") which defined 'mental incapacity' in sections 4 and 5. The definition of 'mental incapacity' in the MCA is of no assistance to this case as the legislation came into operation on 1 March 2010 after the conclusion of the trial. Had the MCA applied, I believe that the plaintiff was not in the frame of mental health to give proper instructions on her bank accounts in the months leading up to May 2008.

Terms and Conditions Governing Deposit Accounts

126 After the trial had concluded but before parties tendered their closing submissions, I directed both sides to consider amending their respective pleadings so that the evidence adduced in the course of the trial accorded with each party's pleaded case. The plaintiff sought leave to amend the statement of claim to include Amy's evidence on the first day of trial that although she believed the Bank had acted prudently, the Bank had not done enough and should have done more, specifically to find out more about her relationship with the plaintiff. The Bank similarly applied to amend its defence to include the Terms and Conditions Governing Deposit Accounts ('Terms and Conditions') pertaining to the plaintiff's accounts.

127 There was no irremediable prejudice caused to either side by the amendments. The plaintiff suffered no prejudice by the Bank's amendments as the Terms and Conditions were incorporated into one of the bundles before the court and were exhibited to Denis' AEIC. Khoo could have cross-examined Denis on the Terms and Conditions had he wished to do so. He did not object to the Bank's amendments. In any case, the original defence made reference to the Terms and Conditions as the indemnity clause (cl 28) was pleaded.

128 As I have found that the Bank had not acted in breach of contract and had taken reasonable care as a prudent bank, I will not belabour the point of the Bank's alternative defence which relied upon several clauses found in the Terms and Conditions. Suffice it to say that the clauses were in clear and unequivocal language. Notably however, the clauses only applied to the plaintiff's deposit accounts; they did not apply to the current account she maintained with the Bank.

129 The Terms and Conditions extended to customer's instructions by cl 2 which said:

> 2.1 All Instructions in respect of an Account must be given by or on behalf of the Customer

strictly in accordance with the authorization or mandates for the time being in effect in respect of such Account. All Instructions shall be given to the Bank in writing or in such other mode(s) and/or method(s) agreed by the bank from time to time.

…

2.4 The specimen signatures and signing powers of the Customer or its authorised signatories communicated to the Bank in writing shall remain in effect until such time as the Bank receives written revocation of the same from the Customer.

…

2.7 If there is any *ambiguity* or *inconsistency* or *conflict* in the instructions, the Bank may choose not to act upon them unless and until the ambiguity or conflict has been *resolved to the Bank's satisfaction* or the Bank may choose to act only on the instructions of all the authorised signatories notwithstanding that any relevant existing mandate or instructions require otherwise.

[emphasis added]

130 Clause 2.7 is of particular significance. I had highlighted how Amy's purported and apparent 'instructions' had been inconsistent with the plaintiff's own instructions. In the face of those inconsistencies, the Bank had the contractual right not to carry out any purported instructions until the inconsistencies were resolved to the Bank's satisfaction. The home visit on 15 May 2008 reinforced the inconsistencies revolving around the instructions to open a joint account. The answers given by the plaintiff clearly showed she had no intention to close all her accounts with the defendant. Her instructions were diametrically opposed to the purported 'instructions' given by Amy to the Bank.

131 The other Terms and Conditions included restrictions on the customer's right to withdraw monies from the accounts. Significantly, cll 6 and 20 state:

6.5 Withdrawals may be made only upon receipt by the Bank of *withdrawal instructions satisfactory to it* and the Customer shall be liable on all such instructions irrespective of whether the relevant Account is in credit or otherwise, provided that the Bank is not bound to honour any withdrawal request if there are insufficient funds in the Customer's Account in the absence of any express agreement to the contrary. … Except with the prior written consent of the Bank, no withdrawal may be made otherwise than in writing and *signed in accordance with specimen signatures and authorisations received by the Bank.*..

[emphasis added]

…

20.2 If the Customer wishes to terminate any Account(s), the Customer shall provide written instructions of the same to the Bank and comply with such procedures as the Bank may determine from time to time at its sole and absolute discretion.

132 I have already dealt with the letter of 6 June 2008 in [36] which contained a signature inconsistent with the plaintiff's signature on record with the Bank. I have also dealt with the ineffectiveness of Amy's self-authorising letter in [107]. In view of those factors, I find that there were no proper instructions given to the Bank to close all the plaintiff's accounts. Therefore, the Bank

was entitled to rely on cll 6 and 20 of the Terms and Conditions to refuse to close all her accounts and return the monies forthwith.

133 Further, cl 27 of the Terms and Conditions included an exemption from liability for the Bank. As I have held that the Bank was not in breach of contract, it would not be necessary to deal with cl 27 as the question of exemption from liability does not arise.

Loss of opportunity to purchase a flat at De Centurion

134 As there was no breach of contract, there is no issue of loss of opportunity. I would add that the plaintiff's contention of loss of opportunity has no merit. The evidence did not show any intention on the part of the plaintiff to purchase a unit at De-Centurion.

135 The plaintiff (through Amy) had made several applications for interim payments, one being the application on 31 December 2008 where another court allowed the monthly payment out of $11,300 from the monies in her accounts with the Bank. In a later application made on 12 February 2009, the court ordered the sum of $8,357.80 to be paid out from the plaintiff's accounts On 26 March 2009, the court ordered a further sum of $25,000 to be paid out from the plaintiff's accounts. The dates of these applications coincided with the plaintiff's pleaded case that the loss of opportunity occurred between December 2008 and March 2009. However, in all those applications for interim payments, not once did the plaintiff or Amy apply to withdraw monies for the payment of the booking/option fee for De-Centurion nor did they mention any desire to use the monies in the accounts for the purpose of purchasing a property.

136 The plaintiff had pleaded in the statement of claim (Amendment No. 1 and 2) that "By reason of the defendant's refusal to comply…the plaintiff was deprived of the use of her monies in her said accounts opportunity to buy properties…" When asked what the properties were, the plaintiff clarified in the Further and Better Particulars of Statement of Claim (Amendment No. 1) that "the plaintiff was denied opportunity to purchase ***a flat*** at a new development called De-Centurion at Tanjong Rhu Road…" Any attempts to claim an intention to purchase *more than a flat* was unsupported by the pleadings and are therefore rejected.

137 In this regard, I found the expert testimony of Lim Soo Chin ("Lim") to be of no assistance. Lim's AEIC made no reference to De-Centurion and he admitted that his evidence of a 10% fall in market value was an arbitrary judgment call made without basis. He had based his findings on properties that were not comparable to De-Centurion as the comparative properties were not situated in district 15 where the De-Centurion was located.

Conclusion

138 On the facts and evidence presented before this court, I hold that the Bank was not in breach of its contractual duties to the plaintiff. It was under no absolute duty to make payment out of the plaintiff's bank accounts in the circumstances that prevailed in May 2008. Banks cannot turn a blind eye to facts which would have shown a serious possibility of irregularities in the apparent mandate it received from its customer.

139 The Bank admirably acted to ensure payment was made only if it had the actual mandate from its customer. Indeed, the Bank tried to protect the interests of its customer and found itself sued in the process. By standing its ground, the Bank risked damaging its reputation and its relationship with its other existing customers. Considerable (adverse) publicity was also generated by this trial. The Bank did the right thing by its conduct and lived up to its social responsibilities in this case.

140 As it is my finding that the evidence presents a strong inference that the plaintiff was not in the proper frame of mental health to give valid instructions on her accounts in the months leading up to May 2008, it must follow that doubts are also raised on the validity and/or authenticity of the Deed of Revocation executed on 28 May 2008. I note that the execution of the Deed of Revocation as well as the 2008 Power of Attorney was not witnessed by a medical practitioner, unlike the October Codicil to the 1999 Will. Needless to say, the validity of the August 2008 Will is also cast in doubt.

141 By all accounts, the plaintiff (when she was in full possession of her faculties) and even when she started becoming forgetful (due to the onset of mild dementia) was a witty, lively and cheeky lady. The doctors who treated her (Dr Teo being one of them) described her as "delightful". (They fondly referred to her as "Nellie"). Even when she could not remember certain things such as her own age, the plaintiff would skilfully parry the doctors' question by saying no woman would want to reveal her age.

142 It is a pity that the plaintiff was no longer the lively personality she used to be from around May 2008 until her demise. It is also sad that the incidents in 2008 involving the Bank showed that her only child Amy did not seem to treat the plaintiff with the affection and respect that she rightly deserved. The payments out sought by Amy from the sum paid into court reinforces my observation. Suffice it to say that this court and other courts disallowed some items claimed by Amy in those applications as either being unjustified or unnecessary or if justified, were inflated. One is left to speculate, had the plaintiff been lucid, would this suit have been pursued to the bitter end? Denis was steadfast in his belief that this action was completely out of character where the plaintiff was concerned.

Costs

143 I note that the Terms and Conditions contained an indemnity provision in cl 28 in favour of the Bank. As the plaintiff's submissions contained no arguments why cl 28 should not apply, I award costs to the Bank on an indemnity basis.

144 Who should bear the costs of this litigation? Should it be the plaintiff's estate or Amy personally as the plaintiff's litigation representative? Order 76 r 12(3) of the Rules gives the court a wide discretion to order payment of costs from the monies kept in court:

> Control of money recovered by person under disability (O.76, r. 12)
>
> 12.–(1) Where in any proceedings –
>
> …
>
> (b) money paid into Court is accepted by or on behalf of a plaintiff who is a person under disability,
>
> the money shall be dealt with in accordance with directions given by the Court.
>
> …
>
> (3) Without prejudice to paragraphs (1) and (2), directions given under this Rule may include any general or special directions that the Court thinks fit to give and, in particular, directions as to how the money is to be applied or dealt with and as to any payment to be made, either directly or out of the amount paid into Court, to the plaintiff, or to the litigation representative in respect

of moneys paid or expenses incurred for or on behalf or for the benefit of the person under disability or for his maintenance or otherwise for his benefit to the plaintiff's solicitor in respect of costs.

145 I find that a litigation representative is *prima facie* liable for the costs of an action that has been dismissed. When proceedings are brought by a third party on behalf of a mentally incapacitated party, that third party has represented himself as having the authority to bring proceedings and will be personally liable for costs, regardless of whether he has knowledge of such mental incapacity and regardless of whether he has knowledge that his actual authority has or has not ceased (see *Yonge v Toynbee* [1910] 1 K.B. 215). I direct that the costs awarded to the Bank on an indemnity basis shall be borne by Amy personally.