Pertamina Energy Trading Ltd v Credit Suisse
[2006] SGHC 4

Case Number : Suit 1222/2003

Decision Date : 16 January 2006

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Anjali Iyer (Anjali Iyer and Associates) and Oommen Mathew (Haq and Selvam) for the plaintiff; K Shanmugam SC and Muthu Arusu (Allen and Gledhill) for the defendant

Parties : Pertamina Energy Trading Ltd — Credit Suisse

Banking – Banker's set-off – Plaintiff depositing money with bank under fixed deposit contract – Drawdown by plaintiff under credit facility – Whether bank entitled to set off loan against money held in fixed deposit -Whether bank put on notice as to forgery or fraud

16 January 2006

Tay Yong Kwang J:

1 The plaintiff, a Hong Kong company, is a wholly-owned subsidiary of PT Pertamina ("Pertamina"), the Indonesian national oil company. The defendant is a foreign company registered in Singapore as such and is a branch of a bank which has its headquarters in Switzerland.

2 The claim here is for the return of the sum of US$9m deposited by the plaintiff with the defendant under a fixed deposit contract made on or about 15 February 2002. At the centre of the dispute is a drawdown of US$8m under a credit facility granted by the defendant in the name of the plaintiff and the subsequent setting off of this loan by the defendant with the money held in the said fixed deposit. The plaintiff alleged that it did not instruct any drawdown and therefore demanded the repayment of its fixed deposit with all accrued interest from 15 February 2002 to 26 November 2003, the date of its letter of demand. The plaintiff also claimed that it terminated the banking relationship with the defendant by the same letter of demand and was therefore entitled to a detailed statement of the interest earned on the fixed deposit. The defendant contended that the drawdown was effected according to instructions given by the plaintiff and that the plaintiff was aware of the loan at all material times.

3 At all material times, the plaintiff had two directors, Muchsin Bahar ("Bahar") and Burhanuddin Hassan ("Hassan"), both of whom were based in Jakarta, Indonesia. The top senior executive officers of the plaintiff were Soekono Wahjoe ("Wahjoe"), the President of the company, and Zainul Ariefin ("Ariefin"), the Vice President of Finance and Administration. These two officers were stationed in Singapore.

4 Haji Dedy Budhiman Garna ("Dedy") was a businessman who controlled a company known as Aceasia Commercial Enterprises Pte Ltd ("Aceasia"), a private banking client of the defendant. Wahjoe and Ariefin knew Dedy as they had previously discussed a proposal for a financial scheme between Aceasia and the plaintiff. In late 2001, Dedy introduced the plaintiff to the defendant's then relationship manager, Lim Chee Chien ("Lim C C"). At that first meeting, the plaintiff informed Lim C C that it wished to open an account with the defendant.

5 A second meeting was held around 19 November 2001 in a Singapore hotel. Ariefin and other officers of the plaintiff met Lim C C. Dedy also attended that meeting. The plaintiff indicated that it

wanted to open an account with the defendant in order to diversify the investment opportunities of the US$40m it had in an account with BNP Paribas and to secure more business opportunities with Dedy/Aceasia in respect of oil tankers. Lim C C was told that Dedy/Aceasia had contacts with European oil trading companies and would be able to facilitate business deals between the plaintiff and those companies. Lim C C was also told that the plaintiff wanted to utilise the deposit with the defendant to generate higher returns and for loans and guarantee facilities.

6 On 17 January 2002, at a meeting held in Jakarta, Bahar and Hassan signed a directors' resolution which had the following material terms:

> **OPEN BANK ACCOUNT WITH CREDIT SUISSE, SINGAPORE BRANCH**
>
> RESOLVED:-
>
> (a) That an Account ("The Account") be opened in the name of the Company with Credit Suisse, Singapore Branch.
>
> (b) That the account and such other accounts as may from time to time be established by the Company with Credit Suisse, Singapore Branch be operated by any one of the following authorized signatories signing singly:
>
> | Authorized Signatories | Title | Specimen Signature |
> |---|---|---|
> | Soekono Wahjoe | President | (signed) |
> | Zainul Ariefin | Vice President - Finance & Administration | (signed) |
>
> (c) That the use of the Common Seal of the Company be approved and be affixed to the related bank documents regarding opening of the account.

7 On or about 14 February 2002, Ariefin told Lim C C that the plaintiff was opening an account with the defendant and that he should expect a remittance of US$9m for that purpose from BNP Paribas in Hong Kong. Wahjoe testified that the opening of the plaintiff's account with the defendant was in accordance with the plaintiff's standard operating procedure. Hassan was aware that the account was to be opened.

8 Lim C C then submitted to his senior management a Politically Exposed Persons ("PEP") Report, which assessed the plaintiff's creditworthiness, and a Due Diligence checklist on the plaintiff. The senior management gave approval for the opening of an account for the plaintiff on the condition that the necessary account opening documents be submitted by the end of February 2002.

9 On 15 February 2002, Ariefin authorised the transfer of US$9m from BNP Paribas to the defendant. Wahjoe, who was in Iran then, had asked Ariefin to wait until he returned to Singapore so that they could discuss the matter further but Ariefin apparently disregarded his instructions. Nevertheless, Wahjoe did not pursue this issue as the plaintiff had already decided to move its banking operations to Singapore and the defendant was one of the banks that it was looking to for support. Wahjoe told Ariefin that he had three months to obtain the letter of credit facilities from the defendant. The money was deposited into an account in the plaintiff's name and this was confirmed by a statement from the defendant dated 18 February 2002 sent to the plaintiff's office here.

10 The defendant then received the following documents dated 18 February 2002 signed by Wahjoe and Ariefin on behalf of the plaintiff:

(a) Company Mandate;

(b) Account Opening Conditions;

(c) Specimen signature card containing the signatures of Wahjoe and Ariefin;

(d) Order relating to the retention of correspondence;

(e) Risk Disclosure Statement; and

(f) Certificate of Foreign Status of Beneficial Owner for US tax withholding.

11 Clauses 2 and 3 of the Company Mandate provided:

> 2 The Bank be authorised to honour any instructions relating to any activity acceptable to the Bank from time to time provided such instructions are signed by
>
> Soekono Wahjoe singly
>
> Zainul Ariefin singly
>
> (being an "authorised signatory" or "authorised signatories" of the Company for all the purposes of this mandate.
>
> 3 The Bank be authorised and instructed at its absolute discretion to accept any instructions which it believes to be genuine from authorised agents of the Company whether given orally by telephone facsimile telegraph or cable and the Company agrees to bear the damages or any other losses resulting from reliance by the Bank upon any false forged or otherwise legally deficient instructions from the Company or from a third party purporting to act on its behalf and the Company agrees to bear any damages or other losses due to transmission by post telegraph, telephone, telex or any other mode of communication and resulting from losses, delays, misunderstanding mutilations or duplications except in the case of wilful or gross negligence on the part of the Bank and more particularly:
>
> …
>
> Clause 6 of the Company Mandate conferred on the defendant the right of set-off of money standing to the credit of the plaintiff against its outstanding liabilities.

12 Clause 1.2 of the Account Opening Conditions provided that the plaintiff authorised the defendant, at the defendant's absolute discretion and until the defendant received from the plaintiff notice in writing to the contrary, to honour and comply with written instructions from either Wahjoe or Ariefin. Clause 15 of the same provided that the plaintiff would indemnify the defendant and hold both the defendant and its employees harmless from and against any and all losses, claims, actions, proceedings, *etc* unless arising solely from the defendant's gross negligence or wilful default, which the defendant might incur or sustain from or by reason of the defendant acting or carrying out any instructions purportedly given to it pursuant to the said conditions.

13 The plaintiff also requested (see sub-para (d) at [10] above) that statements of its account be kept on a retained mail basis by the Customer Services Department of the defendant.

14 In addition, the plaintiff submitted the following to the defendant for the opening of the plaintiff's account:

(a) the plaintiff's directors' resolution dated 17 January 2002;

(b) the plaintiff's Memorandum and Articles of Association and Certificate of Incorporation; and

(c) copies of the passports of Bahar, Hassan, Wahjoe and Ariefin.

15 According to Wahjoe, he signed the above documents in blank and without reading them when they were put before him by Ariefin. This was because he trusted Ariefin and Ariefin had already signed the same. He also trusted the defendant to complete the forms properly and truthfully. However, Wahjoe was aware that the documents were to be used to open a bank account with the defendant but did not appreciate that among the documents presented to him by Ariefin were documents that only the plaintiff's directors could sign. Wahjoe was generally in charge of the trading activities while Ariefin took charge of the financial matters, including dealings with banks. There was no system of reporting to Hassan and Bahar before a bank account was opened. The opening of the account with the defendant was in accordance with the plaintiff's standard procedure for opening bank accounts.

16 On 18 February 2002, Ariefin made an oral request to Lim C C for the urgent drawdown of a sum of money from a credit facility to be established by the defendant in the plaintiff's favour. This sum of money was to be remitted to Aceasia. Ariefin and Dedy informed Lim C C that the drawdown was urgently required as the plaintiff owed money to Aceasia for oil contracts and oil tankers which had already been delivered. The plaintiff had originally requested that a bank guarantee be issued by the defendant to Aceasia. That request was, however, turned down as the transaction would involve two parties both of whom were the defendant's customers.

17 Accordingly, the defendant approved conditionally a trading and credit facility and a multi-currency commercial line of credit facility for the plaintiff, limited to the amount of US$10m. These credit facilities were to be secured by a charge over the plaintiff's deposit in its account with the defendant. However, before any drawdown was permitted under the multi-currency credit facility, the plaintiff had to ensure the following:

(a) all account opening documents were in order;

(b) the facility letters had to be signed by the plaintiff's authorised officers;

(c) a charge on cash amounts ("the charge") was to be executed and it had to bear the plaintiff's company seal and be registered with the Hong Kong registry of companies; and

(d) a board of directors' resolution had to be passed accepting the credit facilities.

18 On 26 February 2002, Ariefin handed to Lim C C a letter addressed to the defendant requesting a drawdown of US$8m on the plaintiff's credit facility. The money would be transferred to Aceasia's account with the defendant. Lim C C was told by Ariefin and Dedy that the money was the plaintiff's payment to Aceasia for oil contracts and oil tankers that had already been supplied.

However, the defendant's credit risk management department did not allow the drawdown as the facility letters were signed by Wahjoe and Ariefin instead of Hassan and Bahar and the charge document did not have the plaintiff's company seal.

19 The next day, the plaintiff faxed over to the defendant an undated directors' resolution ("the ratification resolution") apparently signed by Hassan and Bahar. The ratification resolution purported to acknowledge that the credit facilities were in the interest of and for the benefit of the plaintiff and that the plaintiff accepted the conditions set out in the facility letters. It also purportedly "ratified, confirmed and approved" the facility letters and the charge executed by Wahjoe and Ariefin and authorised them jointly and severally to execute all future amendments to the facility letters and related documents.

20 On 4 March 2002, the charge was sealed with the plaintiff's company seal at the office of the plaintiff's then company secretary in Hong Kong. It was also registered with the registry of companies in Hong Kong that day. Subsequently, a certificate of registration was issued by the said registry.

21 In accordance with the defendant's protocols, the defendant's credit risk management department verified that all the relevant documents had been accepted and approved by the plaintiff's authorised officers. On 5 March 2002, the drawdown of US$8m from the plaintiff's account was effected and the money was credited to Aceasia's account with the defendant. The terms of the loan were confirmed in a letter entitled "Fixed Term Loan Drawdown" dated 12 March 2002, which was marked "Private and Confidential" and sent to the plaintiff's Singapore address. The loan was booked as a utilisation of the credit facilities granted by the defendant to the plaintiff.

22 By a letter dated 18 March 2002 signed by Ariefin, the plaintiff requested that all mail marked "Private and Confidential" be forwarded to Ariefin's home address in Singapore as the plaintiff was relocating its Singapore office at Wisma Atria to Ngee Ann City. As the reason given was an entirely logical one, the defendant complied with that request and forwarded all such mail with effect from 25 March 2002. This included bank statements on the loan.

23 In the meantime, in the months after February 2002, Wahjoe asked Ariefin from time to time about when the defendant would be extending the letter of credit facilities to the plaintiff. Ariefin informed him that the matter was progressing well and that the final approval of the president of the defendant in Switzerland was imminent. Wahjoe believed Ariefin. By early June 2002, there was still no news from the defendant about the said facilities. Wahjoe then instructed Ariefin to transfer the deposit in the account with the defendant to Pertamina's account with Bank Negara Indonesia ("BNI"). A few days later, Ariefin informed Wahjoe that he had already given the instructions to the defendant on 7 June 2002. Again, Wahjoe believed Ariefin. In fact, in a projected cash flow statement that Ariefin produced for the week 10 to 14 June 2002, it was stated that the US$9m deposit had already been transferred to BNI.

24 In early July 2002, Wahjoe discovered that the US$9m had not been transferred to BNI. Ariefin explained that he had made a mistake when preparing the cash flow statements and would look into the matter. Later in the week, when Wahjoe confronted Ariefin again about this, Ariefin told him that the funds had to remain with the defendant because of an arrangement that the defendant had structured which involved Aceasia. When Wahjoe asked him for details, he was not able to explain the arrangement but promised that he would do so shortly. Wahjoe was concerned as he had met Dedy of Aceasia before and was not comfortable with him. Although Dedy dressed like a Muslim holy man, he bragged about grandiose plans and did not give satisfactory answers when asked about his purported immense wealth.

25 Ariefin assured Wahjoe that there was no cause for alarm as the deposit was safe with the defendant except that it was locked in until 15 March 2003. Wahjoe was not satisfied with Ariefin's assurances as he could not understand what the arrangement was all about. Wahjoe then called Lim C C, their relationship manager and their only contact in the defendant. Lim C C confirmed what Ariefin had said to Wahjoe earlier. Wahjoe could not understand Lim C C's explanation about the arrangement other than Lim C C's assurance that the plaintiff's deposit was not at risk with the only restriction being that the deposit was blocked for one year and could not be moved.

26 On 18 and 22 July 2002, Wahjoe met Dedy at the plaintiff's offices in Jakarta and in Singapore to seek clarification about the arrangement with Aceasia. On 9 August 2002, Wahjoe ran into Dedy at a mosque here and asked him to go with him to the plaintiff's office. At that meeting, Wahjoe informed Dedy that the plaintiff wanted to transfer the deposit with the defendant to BNI. Dedy told Wahjoe that the deposit was being used as security for a contract between the plaintiff and Aceasia. This meeting was made known to Ariefin and other officers in the plaintiff. Wahjoe reported to Hassan about the existence of this contract.

27 In late August or early September 2002, when Wahjoe walked into Ariefin's office, he saw a photocopy of a document entitled "Asset Management Agreement" on Ariefin's table. It was said to be an investment management agreement dated 27 February 2002 made between Aceasia as Asset Manager and the plaintiff as Asset Owner and was signed by Dedy and Ariefin respectively. Under the agreement, the plaintiff agreed to place US$8m with Aceasia for it to manage the money. Wahjoe could not understand this agreement and asked Ariefin to explain it to him. Ariefin was not able to do so and Wahjoe became very angry with him. At that point, Ariefin broke down and admitted that he also did not understand the document. He claimed that he had only signed the agreement recently because Wahjoe had been pestering him for documentation and he was concerned that he had nothing in writing with Aceasia. He thought that signing the agreement would protect the plaintiff's interests. He also claimed that he had backdated the document to make sure that the deposit was protected from the beginning. Ariefin also claimed that he had been forced to sign the agreement by Lim C C and Dedy. Since the agreement had been signed, Wahjoe thought that they could do nothing except wait till the end of the period stated in the agreement, namely 15 March 2003, before transferring the deposit to BNI.

28 In August 2002, the finance division of Pertamina asked Ariefin for all the documents pertaining to the defendant and Aceasia. In October 2002, an audit was conducted on the plaintiff's accounts. Pertamina's internal auditor wanted confirmation from the defendant regarding the status of the plaintiff's account. In November 2002, the defendant provided the plaintiff's deposit and loan details to the internal auditor. These included a copy of an account statement dated 31 October 2002 which showed that a loan of US$8m had been utilised by the plaintiff and that the deposit with the defendant was subject to a set-off if the loan was not paid.

29 In December 2002, the internal auditor, in his report, recommended that the plaintiff's management "really put efforts to avoid company's loss by being responsible and judging the best for company and considering all the risks would still be at [the plaintiff's] management, and also [the plaintiff's management] keep on continuing the efforts optimally in securing the asset of US$9m by looking at legal and financial aspect".

30 In early March 2003, Wahjoe telephoned Lim C C and asked about the deposit. Lim C C told him that it was safe and could be transferred by 15 March 2003. Wahjoe felt reassured. When Wahjoe telephoned Lim C C again around 17 March 2003 to enquire about the matter, he was told that Lim C C had resigned from the defendant.

31 On 21 March 2003, after the deadline of 15 March 2003 in the agreement had passed, Wahjoe met Dedy to discuss the plaintiff's deposit with the defendant. Dedy informed him that there had been a slight delay and that he was arranging a remittance of US$28m shortly and upon that being effected, the defendant would release the money in the deposit. Dedy also said that Lim C C had joined Aceasia.

32 On 4 April 2003, representatives from the plaintiff's subsidiary, Pertamina Energy Services Ltd ("PES"), having been authorised by Wahjoe to review the account with the defendant, went to the defendant and took away copies of the account and credit facility documents.

33 On 7 April 2003, the plaintiff held a meeting to discuss the recent events. At this meeting, Ariefin broke down and denied all knowledge of the loan to the plaintiff or of its disbursement to Aceasia. Ariefin alleged that his signature on the drawdown letter of 26 February 2002 was forged. It was not on the plaintiff's letterhead and had no reference number. Ariefin also denied having signed the mail re-direction letter. Wahjoe believed him as that letter appeared to have been faxed to the defendant from a facsimile machine named "HDG", which were the initials of Dedy's full name. Although Ariefin was questioned severely by Wahjoe, he maintained his innocence and stated that he was willing to make a police report about the alleged forgeries. Wahjoe then accepted that Ariefin must have been duped by Lim C C and Dedy. He asked Ariefin to arrange a meeting with those two men. The plaintiff then instructed lawyers in Singapore. The defendant was not told about Ariefin's allegations or about any dispute concerning the opening of the account, the loan or the drawdown.

34 On 9 April 2003, a further meeting was called by Wahjoe. He was unsure whether it was possible to close the account with the defendant and whether the defendant would return the full amount of US$9m. He tasked Ariefin to look into this.

35 That afternoon, Ariefin and the finance manager of PES, who was Wahjoe's representative, met the defendant's Joseph Sim, a director, and Conrad Lim, the then head of Legal and Compliance, at the defendant's premises. There, Ariefin gave oral and written instructions to the defendant to set off the plaintiff's outstanding loan amount of some US$8.25m against its deposit. Ariefin also signed a Summary of Holdings statement authorising a change in the correspondence address from his residence to the plaintiff's new office address at Ngee Ann City. This summary included information about the loan.

36 Later that day, Ariefin confirmed his instructions on the set-off by faxing to the defendant a formal request on the plaintiff's letterhead asking that the loan amount be repaid from the plaintiff's deposit and that the remaining US$890,413.91 in the account be "put on weekly rollover". The defendant notified the plaintiff through Wahjoe by fax at 11.25am on 10 April 2003, repeating Ariefin's instructions about the set-off and stating that "unless you have any further instructions, which should reach us before 4.30pm today, we will proceed to act on Pertamina's instructions". That same morning, Dedy went to the plaintiff's office. Wahjoe demanded an explanation from him and demanded the return of the deposit money. Dedy explained that there had been some unexpected delay at his end and promised to put the matter right soon.

37 Wahjoe did not see the fax from the defendant about the set-off until late in the afternoon of 10 April 2003 as he was busy dealing with the crisis. He was taken aback and asked Ariefin what it was all about. Ariefin explained that the request about the set-off was prepared by the defendant and that he had signed it because he felt pressurised to do so. Realising that the matter was now out of control, Wahjoe wanted time to brief his directors and to seek legal advice. He therefore faxed a letter to the defendant's Conrad Lim at about 7.29pm that day stating:

We refer to your fax dated 10 April 2003 regarding the above mentioned subject. We would like to inform you as follows:

1 After reading your fax, we hereby would like to extend the whole amount of the deposit in your bank for another week i.e. till 17 April 2003.

2 We understand that we have to give our reply by 4.30pm on 10 April 2003. However, I was not able to reply during the required time as I only returned from my meeting at 5.15pm.

We regret to have caused you any inconvenience but we hope you are able to accede to our above request.

38 However, the defendant had already effected the set-off at about 5.30pm on 10 April 2003 as no contrary instructions were received by 4.30pm that day. The defendant wrote to Wahjoe the next day explaining the sequence of events and declining to reverse the set-off.

39 On 17 April 2003, Ariefin made a police report here. A photocopy of the drawdown letter of 26 February 2002 said to be signed by Ariefin was sent to the Health Sciences Authority ("HSA") for analysis. The HSA opined that "there is no evidence to show that the questioned signature of [Ariefin] as shown in the photocopy "A" was made by [Ariefin]". According to Wahjoe, Ariefin was a very secretive man who always kept things very private to himself. He did not know that Ariefin had been in communication with Aceasia. Ariefin left the plaintiff in the middle of 2003 and Wahjoe did not know his whereabouts. Dedy had also disappeared. From the defendant's audio recording of telephone conversations between Lim C C and Ariefin, or between Lim C C and Dedy and his associates, Wahjoe believed that Lim C C was working actively with Dedy and his associates to siphon off the plaintiff's funds to Aceasia as Lim C C was disclosing and discussing details of the plaintiff's account in complete breach of the duty of confidentiality. Wahjoe believed that the scam was perpetrated by Dedy, who had no legitimate business anywhere, and Lim C C through Ariefin and that the money could have been siphoned off to some terrorist group.

40 In August 2003, Pertamina's internal audit team carried out an investigation into the roles played by Wahjoe and Ariefin in the matter of the account and the loan. Wahjoe made statements to the effect that he, Ariefin, Hassan, the plaintiff and Pertamina knew about the loan, the agreement between the plaintiff and Aceasia and the fact that the deposit was subject to a charge as early as June 2002. The internal audit team was of the opinion that Wahjoe was directly or indirectly involved in a collaboration concerning the plaintiff's deposit with the defendant.

41 Although the plaintiff asked the defendant for the return of the undisputed balance (US$890,413.91) in its account on 26 November 2003, without prejudice to the issue of the set-off, the defendant only released the money on 16 July 2004. The final amount returned was US$899,120.36. After that, the account was closed.

42 The thrust of the plaintiff's case was that:

(a) the account with the defendant was not properly opened as the directors' resolution of 17 January 2002 (see [6] above) authorised Wahjoe and Ariefin to operate, not open, the account;

(b) Wahjoe and Ariefin did not have the authority to accept the loan on the plaintiff's behalf;

(c) the drawdown letter, the directors' resolution which purported to ratify the loan and the mail re-direction letter of 18 March 2002 were forgeries; and

(d) the loan was for an improper purpose and not for the benefit of the plaintiff.

43 The directors' resolution of 17 January 2002 authorised the opening of the account with the defendant without specifying who was to do so. A reasonable interpretation of this resolution must lead to the conclusion that the persons imbued with the authority to operate the account were also meant to open it, unless there were words specifying otherwise and clearly, there was none. After all, the directors did not pursue the matter of the opening of the account after having made the resolution, but left it entirely in the hands of Wahjoe and Ariefin. Wahjoe admitted to the internal audit team that he believed the resolution did authorise him to sign the account opening documents and that the opening of the account with the defendant was in accordance with the plaintiff's normal practice. The plaintiff's solicitors' letters to the defendant in November 2003 made no mention that the opening of the account was disputed and neither did the Statement of Claim. It was only in the plaintiff's affidavits of evidence in chief that Wahjoe's and Ariefin's authority to open the account became a matter of contention.

44 The plaintiff produced account opening documents, resolutions and Company Mandates in respect of all the accounts that PES and the plaintiff had with other banks to show that in every single instance, the account opening forms were signed by the directors or where they were signed by executive officers, that was pursuant to an express resolution authorising them to sign the said forms. However, if that was the particular interpretation that the plaintiff had of its resolution in practice, that fact was not made known to the defendant, with whom the plaintiff was dealing for the first time, and the ordinary meaning of the language used in the resolution certainly did not lend itself to this somewhat strained interpretation. It also begged the question why Ariefin would go ahead and open the account with the defendant despite knowing that the resolution was not meant to confer on him and Wahjoe such authority. At any rate, there was never any issue raised about the opening of the account until after these proceedings had started and the evidence showed that the management of Pertamina was aware of the account when it instructed that the deposit be transferred to BNI in June 2002. Between July and September 2002, Hassan advised Wahjoe to check with the defendant whether the Asset Management Agreement between the plaintiff and Aceasia would have any implications on the plaintiff's deposit, again showing that there was knowledge of the account. In October 2002, Pertamina's internal auditors also made enquiries with the defendant about the account and they were given the relevant information.

45 In its solicitors' letter of demand in November 2003 and in its Statement of Claim, the plaintiff accepted that credit facilities had been given by the defendant but claimed that they were not utilised. It was only in the Reply that the plaintiff appeared to dispute the existence of credit facilities. The evidence showed that the plaintiff had knowledge of the drawdown in 2002 and 2003 and did not dispute the loan before the defendant effected the set-off. Although the directors' resolution of 18 February 2002 was rejected by the defendant because Wahjoe and Ariefin were not the directors on record, it showed that Wahjoe knew about the credit facilities being offered to the plaintiff. As stated by him to the Pertamina internal audit team, Ariefin had explained the said resolution to him briefly. The ratification resolution was apparently signed by the directors and it purported to ratify and confirm the credit facilities and the charge on deposit executed by Wahjoe and Ariefin. The signatures on the ratification resolution were verified by the defendant internally. The charge on deposit was sealed in accordance with the plaintiff's practice. This involved the signing of documents by the directors in Jakarta and the forwarding of the documents to the plaintiff's company secretary in Hong Kong where the seal would be affixed. Ariefin had the authority to instruct the company secretary to do this. The charge was properly registered in Hong Kong and remains so

registered. The charge was entered in the plaintiff's register of charges in Hong Kong and remained there without dispute for more than a year. Section 83(2) of the Hong Kong Companies Ordinance (Cap 32) provides that the Registrar of Companies' certificate of registration shall be conclusive evidence that all the requirements for registration have been complied with. The defendant only allowed the drawdown on the loan one day after due registration in Hong Kong.

46 The Company Mandate (see [11] above) was signed by Wahjoe and Ariefin as one of the account opening documents. As stated above, the terms of the resolution of 17 January 2002 were wide enough to confer authority on these two officers to sign such a mandate which, on its face, would absolve the defendant from liability even if subsequent documents were not genuine, save for wilful or gross negligence on the part of the defendant. The defendant, however, is not relying on this mandate to establish its defence.

47 The drawdown on the loan was effected on 5 March 2002. One week later, a bank statement showing that the loan was booked as a utilisation of the credit facilities was issued to the plaintiff. This statement was retained by the defendant as instructed (see sub-para (d) at [10] above). Pursuant to this order on the retention of correspondence, all correspondence retained by the defendant was considered delivered to the plaintiff which assumed full responsibility for the consequences and any damages that might result from such retention. Thereafter, monthly statements were issued and sent to Ariefin's residential address as instructed by the mail re-direction letter of 18 March 2002. These statements showed that a loan of US$8m had been taken by the plaintiff. The mail re-direction letter was a document that could be signed by Ariefin in the operation of the plaintiff's account. If it was also forged, as alleged by the plaintiff, it was extremely strange that Ariefin made no issue about the contents of the bank statements. It also defied belief that Ariefin would subsequently feel pressurised into authorising a set-off if there never was a loan in the first place.

48 Pursuant to cl 1.3(b) of the Account Opening Conditions, the plaintiff agreed to examine all statements supplied by the defendant setting out transactions on any of the accounts and agreed that:

> … unless the [plaintiff] objects in writing to any of the matters contained in such statement within 14 days of the date of such statement, the [plaintiff] shall be deemed conclusively to have accepted all the matters contained in such statement as true and accurate in all respects.

"Conclusive evidence" clauses such as this have been held to preclude bank customers from denying the transactions listed in the statements duly sent to them if they failed to register their objections within the specified period (*Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828; *Stephan Machinery Singapore Pte Ltd v Overseas-Chinese Banking Corporation Ltd* [2000] 2 SLR 191). The plaintiff here is similarly precluded from denying the loan and the drawdown.

49 By June 2002, Wahjoe was at least aware that the plaintiff's deposit was somehow subject to a charge until 15 March 2003. He had several meetings with Dedy about this matter subsequently. The existence of the Asset Management Agreement was reported to and discussed with Hassan. As mentioned earlier, Pertamina's internal auditors were given documents, upon their request, by the defendant in November 2002 which showed the US$8m loan. Pertamina's internal auditors' report in December 2002 also evidenced knowledge that the plaintiff's deposit with the defendant was subject to a charge. It was therefore clear that the parent company of the plaintiff knew about the loan and the charge on the deposit and, by logical extension, since Bahar and Hassan were very senior officials in Pertamina, so did the plaintiff. Despite such knowledge, the plaintiff did not challenge the fact of

the loan and the drawdown. Even when the defendant informed Wahjoe about the impending set-off on 10 April 2003, his late response (see [35] above) did not dispute the loan.

50 It was argued that although Wahjoe and Ariefin did not have the legal title of directors, they were the *de facto* directors of the plaintiff. It appeared from the evidence that companies in Indonesia adopt a two-tier management structure comprising a board of directors and a board of commissioners. The former runs and represents the company and makes the management decisions while the latter plays a supervisory and advisory role (Arts 1(4), 1(5), 82 and 97 of Indonesian Law No 1 of 1995 on Limited Liability Companies). The defendant contended that as the plaintiff was registered in Hong Kong where the concept of commissioners did not exist, the plaintiff's commissioners became directors in name while the senior executives performed the functions of directors in fact. This was evident from the "Guidelines for the management of subsidiary and joint venture companies of Pertamina" dated 10 October 2001, sections 10 and 15 of which provided:

> 10(1) Senior Executives are an organ of the Company with responsibilities to undertake the management of the Company … and to represent the Company in and outside legal court;
>
> (2) Senior Executives are responsible for the management of the Company according to the Act No. 1 (1995) on Limited Liability Companies, all laws applicable in place where the Company is registered and its Memorandum and Articles of Association; …
>
> 15(1) Board of Directors are an organ of the Company with responsibilities to undertake supervision and to advise the Senior Executives in the management of the Company …
>
> (2) Board of Directors undertake its duties and responsibilities according to the Act No. 1 (1995) on Limited Liability Companies, all laws applicable in place where the Company is registered and its Memorandum and Articles of Association; …

51 The defendant said that this framework accorded with the reality in this case. Wahjoe and Ariefin were based in Singapore out of which the plaintiff's operations were run while the directors in name were based in Jakarta. Both Wahjoe and Ariefin had the authority to operate the plaintiff's account as single signatories. These two men were making all the decisions for the plaintiff, including its finances and its dealings with banks and had discussions with Bahar and Hassan on the plaintiff's performance only every now and then. The defendant submitted that it followed that Wahjoe and Ariefin were *de facto* directors and that both had actual authority to borrow and to sign loan documents for the plaintiff. Alternatively, the defendant argued, they had the apparent authority to do so by virtue of the plaintiff's representation, "through its conduct over a long period of time, that Wahjoe and Ariefin had the authority to execute other directors' functions as well".

52 I do not accept the defendant's contentions on this point. If the defendant's arguments are correct, a good number of chief executive officers and chief financial officers would likewise be deemed *de facto* directors by virtue of their high-level responsibilities in the companies. As for apparent authority, the only contact that the defendant had with the plaintiff before the loan transaction was Ariefin himself. The evidence did not bear out the defendant's contention that there was such alleged representation by the plaintiff, other than by Ariefin himself, and it certainly was not for a "long period of time".

53 Where the documentation was concerned, the defendant could not be accused of negligence or recklessness simply because it did not comply meticulously with all its internal guidelines and procedures in a particular case. A bank's internal guidelines and procedures are instituted for its own administrative efficiency and protection, and compliance with such is not for an outsider to enforce

by way of allegations of negligence. Conversely, a bank which has complied dutifully with all its internal guidelines and procedures is not thereby insulated against a claim in negligence. One must still examine whether what was done meets objective standards of care.

54 Lim C C might have stated that he had verified the photocopies of the directors' passports or witnessed signatures when he had not done so but that was merely a breach of the defendant's internal guidelines for which he could perhaps face disciplinary action. There was no dispute that the photocopies were indeed true copies of the passports in any event. The defendant was informed that the loan request was an urgent one. The defendant did what was necessary to protect its interests in the loan transaction by gathering the relevant information through Lim C C, the plaintiff's relationship manager. It had no reason to suspect any irregularities in the documentation given by the plaintiff, in particular, the ratification resolution. The defendant was not put on notice that the company seal on the charge was not affixed with the authority of the directors and was therefore entitled to rely on the formal validity of the document (see *Northside Developments Pty Ltd v Registrar-General* (1990) 93 ALR 385). In practice, the plaintiff did not comply with the requirement in its Memorandum and Articles of Association that the seal be affixed in the presence of its directors because of the fact that the company seal and the directors were in different countries. Although the sealing was done in the defendant's Hong Kong solicitors' office, the company seal had been brought there by the staff of the plaintiff's Hong Kong office on the instructions of Ariefin. The drawdown letter of 26 February 2002 was not on the plaintiff's letterhead but the plaintiff had only one account with the defendant and Ariefin was expressly conferred the authority to sign documents singly.

55 The plaintiff also alleged that the loan was not for a proper purpose and that it did not benefit the plaintiff, thus making the loan irrecoverable by the defendant. It has to be noted that there was nothing in the plaintiff's Memorandum and Articles of Association which limited the purposes for which a loan could be taken out by the company. There was also no evidence to show that the purported object of the loan transaction as represented by Ariefin was improper. Ostensibly, the loan was to pay off a supplier in a business that the plaintiff was engaged in and there appeared no good reason why the defendant should have to inquire further into the matter. If it was for the purpose of asset management by Aceasia, that would not necessarily make it an improper purpose. Wahjoe's surmise that the money could have gone to some terrorist organisation remained just that – a surmise. In any event, even if the loan was for an improper purpose, the evidence did not clearly implicate Lim C C as being a knowing party to any alleged fraud.

56 Three documents (see sub-para (c) at [42] above) were alleged to be forgeries by the plaintiff. In an interesting attempt to shift the burden of proof of forgery, the plaintiff submitted that since it disputed the authenticity of these documents, the defendant bore the burden of proving that the signatures on these documents were not forgeries. The defendant rightly pointed out that all it was required to do was to prove that the documents were original and that it had done that for all three documents. The burden of proving forgery still falls on the party alleging such and the standard of proof required to establish forgery or fraud is higher than the ordinary civil standard of proof on a balance of probabilities (*Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258).

57 The plaintiff did not plead that the mail re-direction letter of 18 March 2002 signed by Ariefin was a forgery. The allegation of forgery was first raised by Wahjoe in his Affidavit of Evidence-in-Chief. By virtue of O 18 r 8 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), such an allegation must be specifically pleaded. The plaintiff could not therefore be permitted to rely on this allegation. It was also said that while Ariefin had the authority to inform the defendant as to where the statements should be sent, the authority was confined to electing the particular office address of the plaintiff since the plaintiff had several offices and the authority did not extend to directing that the statements be sent to his residential address. I fail to see why there should be an implied limitation of

this nature in Ariefin's authority. If the appointed operator of the account chose Pertamina's office address or any other address as the mailing address, the defendant would have to comply. It was also argued that the mail re-direction letter was a fax sent not from the plaintiff's offices but from Dedy's office as shown by the fax details at the top of the letter and that it was signed off as "Mr Zainul Ariefin" instead of the usual "Zainul Ariefin". The plaintiff argued further that the fact that there was no reference number on the said letter, which all outgoing correspondence of the plaintiff had, pointed to the letter not being a genuine one. In my view, there was nothing on the face of the letter that ought to put the defendant on notice that there was something amiss about it. The oddities pointed out by the plaintiff might have been obvious to someone working in the plaintiff and with hindsight but where one chooses to fax documents from and the addition of a common honorific to one's name, are not matters that call for attention. In any event, Ariefin should be cross-examined on his assertion of forgery but he was not offered as a witness for the plaintiff.

58 The handwriting experts called by the parties differed in their opinions about the authenticity of Ariefin's signature in the drawdown letter of 26 February 2002. I accepted that this letter was received by the defendant from Ariefin himself. Ariefin also instructed the defendant to execute the set-off in April 2003. By then, Ariefin knew that inquiries by Pertamina into the loan and the charge on the deposit were well under way. It was much too convenient for him to claim to Wahjoe that he had been pressurised to instruct the set-off. What sort of pressure was exerted on him and by whom? There are many things which only Ariefin could throw light on but we do not know the answers because Ariefin was not called as a witness by the plaintiff which claimed to have lost contact with him despite knowing that he was crucial to any legal action against the defendant.

59 The experts of both parties were agreed that the signatures on the ratification resolution were probably forged. However, there was nothing to put the defendant on notice that this resolution was flawed in any way. The first directors' resolution dated 17 January 2002 for the opening and operation of the account was also tendered by Ariefin. In any event, the plaintiff was estopped from asserting forgery as it knew about the loan subsequent to the drawdown but failed to notify the defendant in any way. It would also be bound by cl 1.3(b) (the "conclusive evidence" clause) of the Account Opening Conditions.

60 A bank customer owes a duty to his bank not to facilitate the commission of forgery or fraud (*Khoo Tian Hock v Oversea-Chinese Banking Corporation Limited* [2000] 4 SLR 673). The plaintiff was negligent in not having a proper system of checks over Ariefin, who, in the light of the evidence and his failure to come forward to explain himself, must have betrayed the trust reposed in him by the plaintiff, and it was he who caused the loss to the plaintiff. As testified by Wahjoe, from the start, Ariefin was apparently in a great hurry to transfer money to the plaintiff's account with the defendant. He was equally anxious to draw down on the loan. What connection did Ariefin have with Dedy and Aceasia? Was he truly the ignorant pawn made use of by others? Again, we do not have the answers because the plaintiff did not ensure that Ariefin would be in court. Indeed, he was relieved of his duties in the plaintiff on 11 April 2003, one day after the set-off was effected. On the other hand, the defendant put forth Lim C C for cross-examination despite the fact that he left the defendant in rather unhappy circumstances unrelated to the facts of this case. Dedy, as acknowledged by Wahjoe, had also disappeared. His evidence would be useful where the Asset Management Agreement was concerned but it was not crucial for the defendant's case which centred on instructions from the plaintiff rather than Aceasia, even if Lim C C was also in contact with Dedy who was also a customer of the defendant.

61 The set-off by the defendant was authorised by the Account Opening Conditions (cl 17) and the charge (cl 2). In any event, it was effected pursuant to the instructions given by Ariefin on behalf of the plaintiff and the defendant took the additional precaution of informing Wahjoe about it.

62 It follows from the above that the set-off by the defendant was lawfully effected and the plaintiff's claim must fail. Accordingly, I dismissed the plaintiff's claim. Pursuant to the contractual documents between the parties, the plaintiff was ordered to pay costs to the defendant on an indemnity basis. I also granted a certificate for two counsel to the defendant on account of the complexity of this case.