Pertamina Energy Trading Limited v Credit Suisse
[2006] SGCA 27

Case Number : CA 116/2005

Decision Date : 15 August 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah J

Counsel Name(s) : C R Rajah SC (Tan Rajah & Cheah), Anjali Iyer (Anjali Iyer & Associates), Oommen Mathew, RajMohan (Haq & Selvam) for the appellant; K Shanmugam SC, Muthu Arusu, Edward Tiong, Ramesh Selvaraj (Allen & Gledhill) for the respondent

Parties : Pertamina Energy Trading Limited — Credit Suisse

Banking – Banker's set-off – Company opening deposit account with bank with knowledge of bank's right of set-off under bank's conditions for opening of account – Credit facility secured by charge over company's deposit account fraudulently opened with bank in company's name by company's employee – Bank facilitating drawdown on credit facility and setting off sum against moneys in deposit account pursuant to charge and right of set-off – Whether bank entitled to exercise right of set-off – Whether bank put on notice of fraud or forgery

Civil Procedure – Pleadings – Bank seeking to rely on defence of estoppel – Bank failing to expressly plead defence in pleadings and failing to particularise and prove alleged detriment – Whether bank may rely on defence of estoppel

Contract – Contractual terms – Express terms – Company opening deposit account with bank with knowledge of conclusive evidence clause under bank's conditions for opening of account – Credit facility secured by charge over company's deposit account fraudulently opened with bank in company's name by company's employee – Bank facilitating drawdown on credit facility – Whether bank acting without valid mandate – Whether bank entitled to rely on conclusive evidence clause as defence

Contract – Contractual terms – Express terms – Whether bank may modify customer's common law duties by express terms in contract with customer – Applicable principles

Credit and Security – Charges – Certificate of registration of charge issued – Effect of registration – Whether conclusiveness of certificate of registration of charge operating only vis-a-vis third parties – Whether chargee or chargor may challenge validity of charge inter se even where certificate of registration issued

15 August 2006 *Judgment reserved.*

V K Rajah J (delivering the judgment of the court):

Introduction

1 A fraudulent employee causes his company substantial losses in an audacious scam. An eager bank officer fails to heed alarm bells in his zeal to facilitate and sustain a banking relationship with that company. Who should bear the losses?

2 This is an appeal against a decision dismissing the claim of Pertamina Energy Trading Limited ("the appellant") for the return of approximately US$8m deposited under a fixed deposit contract with Credit Suisse ("the respondent") (see *Pertamina Energy Trading Limited v Credit Suisse* [2006] SGHC 4 ("the GD")). The focal point of the dispute is whether the sum claimed had been legitimately set-off against an alleged drawdown by the appellant of a credit facility in favour of a third company, Aceasia Commercial Enterprises Pte Ltd ("Aceasia"), also a private banking client of

the respondent.

Dramatis personae

3 The appellant is a Hong Kong company and a wholly owned subsidiary of PT Pertamina ("Pertamina"), the Indonesian national oil company. Its operations in Singapore are in turn handled by another subsidiary company, Pertamina Energy Services Pte Ltd ("PES"). The appellant's directors at the material time, Muchsin Bahar ("Bahar") and Burhanuddin Hassan ("Hassan"), were both based in Jakarta, Indonesia. The senior executive officers of the appellant based in Singapore were Soekono Wahjoe ("Wahjoe"), the president of the company, and Zainul Ariefin ("Ariefin"), the vice president of finance and administration. As will become apparent shortly, Ariefin was primarily responsible for the operations of the appellant's financial affairs and banking relationships in Singapore, while Wahjoe, quite content to rely on Ariefin's judgment and expertise, was involved only minimally.

4 The respondent is the Singapore branch of Credit Suisse. The appellant's liaison in Credit Suisse was Lim Chee Chien ("Lim"), a client relationship manager.

5 Aceasia was controlled by an Indonesian businessman Haji Dedy Budhiman Garna ("Dedy"), who appeared to have a close relationship with Ariefin.

6 Wahjoe and Lim testified at the trial on behalf of the appellant and respondent respectively. Ariefin and Dedy absconded long before the trial commenced.

Factual matrix

7 The train of events culminating in this appeal was set in motion when Dedy introduced Wahjoe and Ariefin to Lim sometime in late 2001. In that encounter, Wahjoe and Ariefin informed Lim that the appellant intended to open an account with the respondent. At a subsequent meeting on 19 November 2001, Ariefin and other officers of the appellant met Lim again to confirm that the appellant would open an account with the respondent in order to diversify the appellant's investment opportunities.

8 On 17 January 2002, Bahar and Hassan signed a directors' resolution authorising the opening of a bank account with the respondent ("the 17 January 2002 resolution") on the following 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.

[emphasis added]

9 On 15 February 2002, the appellant transferred US$9m to the respondent. Its receipt was confirmed by a statement issued on 18 February 2002 that was duly sent to the appellant's office in Singapore. At around the same time, the respondent received various documents dated 18 February 2002, which had been signed by Wahjoe and Ariefin. These documents included:

(a) "Company Mandate";

(b) "Account Opening Conditions";

(c) specimen signature card;

(d) order relating to the retention of correspondence by the bank;

(e) "Risk Disclosure Statement";

(f) "Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding";

(g) the 17 January 2002 resolution;

(h) the appellant's memorandum and articles of association ("M&AA") and certificate of incorporation; and

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

10 Clauses 2 and 3 of the Company Mandate provided:

[I]t was resolved:

…

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 …

Clause 6 of the Company Mandate conferred on the respondent the right of set-off of money standing to the credit of the appellant against its outstanding liabilities.

11 Clause 1.2 of the Account Opening Conditions provided that the appellant authorised the respondent, at the respondent's absolute discretion and until the respondent received from the appellant notice in writing to the contrary, to honour and comply with written instructions from either Wahjoe or Ariefin. Clause 1.3(b) of the same document obliged the appellant to examine all statements, slips, notes and other documents issued by the respondent setting out transactions on the appellant's account and to notify the respondent within 14 days of the issue of such statements if there were any discrepancies; failing which, the respondent was entitled to treat as conclusive evidence all the matters contained in the statements (see [67]–[71] below). Clause 17.1 of the Account Opening Conditions also conferred on the respondent a contractual right of set-off.

12 The appellant also requested that statements of its account be kept on a "retained mail" basis by the customer services department of the respondent. This arrangement meant that the statements of account would not be sent to the appellant. The respondent would retain the statements for the appellant's inspection if and when required.

13 Shortly thereafter Ariefin orally requested that Lim effect the urgent drawdown of money from a credit facility of US$10m to be established in the appellant's favour. Lim was off-handedly told that this money was to be remitted to Aceasia as the appellant owed money to Aceasia for oil contracts and oil tankers, which had already been delivered. In order to establish the credit facility, the respondent required a charge over the appellant's deposit. It also sought the following additional documentation from the appellant:

(a) the countersigned copy of the facility letter;

(b) Account Opening Conditions;

(c) Company Mandate;

(d) a certified true copy of a current M&AA;

(e) a specimen signature card;

(f) Risk Disclosure Statement;

(g) a certificate of incorporation;

(h) a charge on cash amounts ("the charge") to be executed as security for the appellant's obligations and liabilities to the bank; and

(i) a board of directors' resolution accepting the credit facility.

14 Wahjoe and Ariefin jointly signed the Account Opening Conditions, the Risk Disclosure Statement, the charge, the credit facility letters (there were two), and a resolution dated 18 February 2002 purporting to accept the offer of credit ("the 18 February 2002 resolution"). Ariefin singly signed the Company Mandate. These documents, together with a drawdown request letter

dated 26 February 2003 ("the drawdown letter"), also singly signed by Ariefin, were handed over to Lim.

15 The respondent's credit risk management department ("CRMD"), upon scrutinising these documents, rejected the application for the drawdown as neither Wahjoe nor Ariefin had the mandate to sign the charge, the credit facility letters, and the 18 February 2002 resolution. The CRMD also noted that the charge was not affixed with the company seal and that the Company Mandate ought to have been signed by the directors of the appellant, not by Ariefin. Such discrepancies were itemised by the CRMD in an email that was internally circulated to, *inter alia*, Lim. No concerns were raised in relation to the validity of the Account Opening Conditions, which Wahjoe and Ariefin were authorised to sign pursuant to the 17 January 2002 resolution.

16 In order to facilitate the drawdown, the respondent drafted a resolution to ratify the discrepant documents ("the ratification resolution"), but continued to insist that the company seal be affixed to the charge.

17 It is a matter of some controversy whether Lim handed the ratification resolution directly to Dedy or whether he handed a copy to Ariefin for him to procure the signatures of the appellant's directors. At any rate, an undated copy of the ratification resolution purportedly bearing the signatures of Hassan and Bahar was faxed to Lim. Both the appellant and the respondent now accept that Ariefin forged the signatures on this ratification resolution.

18 On 1 March 2002, the appellant appointed a solicitor in Hong Kong to attend to the affixation of the company seal on the charge signed by Wahjoe and Ariefin. Karen Poon, an office secretary of the appellant in Hong Kong, was instructed by Ariefin to obtain the company seal from the company secretary and to despatch it to the Hong Kong solicitor. The company seal was then affixed in the solicitor's office in the absence of the appellant's directors. Lim had earlier signed the charge as a witness attesting to the affixation of the seal to the charge even though he was not physically present at the material time. The charge was subsequently registered with the Registry of Companies in Hong Kong and formally notified on the appellant's register of charges. The Registry of Companies, Hong Kong, duly issued a certificate of registration.

19 Upon receipt of both the signed ratification resolution and the charge on 5 March 2002, the respondent was satisfied that the formalities had been complied with and permitted the sum of US$8m to be drawn down from the appellant's account. In compliance with Ariefin's request, the money was credited to an account that Aceasia also maintained with the respondent. Upon receipt of the money Aceasia promptly effected a transfer of the entire amount to a third party in another jurisdiction.

20 The terms of the credit facility were stipulated in a letter dated 12 March 2002. The respondent pursuant to express instructions received from the appellant on 18 February 2002 retained this letter. However, after mid-March 2002, bank statements, particularising movements in the appellant's accounts as well as the balances therein were sent to Ariefin's residential address in Singapore pursuant to a mail re-direction letter dated 18 March 2002, signed by Ariefin. The letter stated that the appellant's relocation of its Singapore office from Wisma Atria to Ngee Ann City necessitated this change. The trial judge remarked that this being an entirely logical reason, the respondent ought not to be criticised for complying with such an instruction; in any event, Ariefin had been properly authorised by the 17 January 2002 resolution to give such instructions. We are inclined to agree with this finding.

21 The following narration of events is relevant. The sequence is based essentially on Wahjoe's testimony as well as documentary evidence. For reasons that we shall elaborate on later, Wahjoe's

testimony has to be cautiously evaluated.

22 Wahjoe testified that sometime in February 2002 he questioned Ariefin about the extension of credit facilities from the respondent. Ariefin told Wahjoe that approval was imminent. When he received no further news by June 2002, Wahjoe allegedly instructed Ariefin to transfer the funds deposited in the account with the respondent to the appellant's account with another bank. Ariefin informed Wahjoe that instructions for this transfer had been complied with on 7 June 2002. A projected cash flow statement drawn up by Ariefin for the week of 10 to 14 June 2002 also purportedly confirmed that the US$9m had been transferred as instructed.

23 According to Wahjoe, on or around 9 July 2002, he discovered that the transfer had actually not been effectuated. Wahjoe promptly confronted Ariefin who said that he would look into the matter. Later that week, Wahjoe again pressed Ariefin about the transfer and was told that, because of a structural arrangement that involved Aceasia, the respondent would not release the funds. When asked for details, Ariefin was unable to explain the precise nature of the arrangement but assured Wahjoe that he would soon do so. Wahjoe claims his concerns stemmed from his previous encounter with Dedy and his ensuing unease with the latter's unsubstantiated claims about his immense wealth.

24 Though Ariefin sought to assure Wahjoe that there was no cause for alarm, Wahjoe remained unconvinced. He then called Lim, who allegedly more or less echoed what Ariefin had earlier disclosed to him. Wahjoe testified that he failed to grasp the explanation about the arrangement and relied on Lim's assurance that the deposit was not at risk but merely subject to a restriction that could not be removed until 15 March 2003; see [28] below.

25 Wahjoe then attempted to clarify the precise nature of the arrangement with Aceasia and met Dedy at the appellant's offices in Jakarta and Singapore on 18 and 22 July 2002, respectively. On 9 August 2002, Wahjoe ran into Dedy at a mosque in Singapore and requested for a further meeting at the appellant's Singapore office. Wahjoe informed Dedy that he wanted to transfer the subject deposit but Dedy claimed that the deposit was currently being employed as security for a contract between the appellant and Aceasia. These discussions were duly communicated by Wahjoe to Ariefin, Daniel Purba (the appellant's finance manager), and Hassan, among others.

26 Sometime in late August or early September 2002, Wahjoe chanced upon a copy of a document entitled "Asset Management Agreement" on Ariefin's table. It was an investment management agreement dated 27 February 2002 made between Aceasia as asset manager and the appellant as asset owner. Ariefin and Dedy had signed it. Pursuant to that agreement, the appellant agreed to place US$8m with Aceasia and permit it to manage the fund. When Ariefin was asked about the intent and purport of that document, he was initially unable to explain it. After Wahjoe expressed his unhappiness, Ariefin broke down and claimed that he had signed the agreement in order to protect the appellant's deposit. Ariefin also claimed to have been coerced into signing the agreement by Lim and Dedy. Wahjoe decided that since the agreement had already been signed, he would just wait until 15 March 2003 to transfer the deposit. He did not immediately communicate his deep misgivings to either his superiors or the respondent.

27 In August 2002, the finance division of Pertamina learnt about the purported transaction and asked Ariefin for all relevant documents pertaining to the relationship between the appellant and Aceasia. An internal audit was conducted in October 2002. Pursuant to that audit, a request was made to the respondent to provide details of the appellant's deposit and credit facility. The trial judge found that by November 2002, this request had in fact been complied with when the respondent had sent a copy of an account statement dated 31 October 2002. However, counsel for the appellant chose to argue before us that the appellant never received the statement. This controversy is not

crucial. What is highly pertinent, as will be seen, is the internal audit report that followed on 30 December 2002; see [81] below.

28 As 15 March 2003 approached, Wahjoe called Lim once again to ascertain the status of the deposit. Lim purportedly reassured Wahjoe that the deposit could be released on 15 March 2003. However, when Wahjoe attempted to call Lim again on 17 March 2003, he was told that Lim had already resigned. Wahjoe then met with Dedy on 21 March 2003 to discuss the appellant's deposit. Dedy told him that there had been an unexpected delay and that he was in the process of arranging a remittance of US$28m from another transaction to the respondent; once that was effected, the respondent would promptly release the appellant's deposit. It should be observed at this juncture that Lim's recollection of his discussions with Wahjoe was on the other hand quite different. Lim emphatically asserted that he gave no assurances about the release of the deposit. During cross-examination Lim's evidence was as follows:

> Q: I am telling you what [Wahjoe] has told us: [Wahjoe] says that he called you in the first week of March, because in June you had told him that the deposit cannot be withdrawn until 15th March. So he called you in the first week of March, and he tells us that you again assured him that everything is fine, that on 15th March, the deposit can be drawn out.
>
> A: *I do not recollect the conversation, sorry.*
>
> Q: [Wahjoe] says that is why he called you again on 17th March because he was now wondering about the deposit, why it had not been drawn out, because you said it could not be released after 15th March?
>
> A: Did he call my mobile or my office phone on 17th March?
>
> Q: He says he called your office.
>
> A: *And if he called my office, it should be registered; right?*
>
> [emphasis added]

Indeed, while counsel for the appellant attempted to argue that Wahjoe did call Lim on two occasions in March 2003, he was not able to point us to any records showing that the alleged calls in March 2003 took place.

29 Wahjoe later authorised representatives from PES to review the deposit arrangements with the respondent. On 4 April 2003, these representatives visited the respondent and obtained copies of the appellant's account and credit facility documents.

30 Three days later, on 7 April 2003, some of the appellant's key officers held a meeting to take stock of the situation. At this meeting, Ariefin denied all knowledge of either the credit facility or its disbursement to Aceasia. He also alleged that his signature on the drawdown letter (see [14] above) had been forged and that the mail re-direction letter dated 18 March 2002 (see [20] above) had not been signed by him. According to Wahjoe, Ariefin appeared convincing because the drawdown letter neither bore the appellant's letterhead nor contained any reference number and appeared to be faxed from a machine named "HDG" which were Dedy's initials. Wahjoe concluded at that point that Lim and Dedy had deceived Ariefin. Only then did the appellant engage solicitors in Singapore to protect its interests. Interestingly, in its solicitors' letter of demand sent in November 2003, the appellant did not dispute the existence of the credit facilities; it merely claimed that there had been no drawdown.

31 Wahjoe called for a further meeting on 9 April 2003, asking Ariefin to look into the option of closing the account with the respondent in order to obtain the immediate return of the full deposit from the respondent. That very afternoon, Ariefin and the finance manager of PES (who was Wahjoe's designated representative) met with a director of the respondent, Joseph Sim Hwee Yeow, and its regional head of legal and compliance, Conrad Lim Cheng Lock. This meeting took place at the respondent's premises. In the course of the meeting, Ariefin issued both oral and written instructions to set off the outstanding loan amount of some US$8.25m against its deposit. Ariefin also signed a "Summary of Holdings" statement instructing that mail be redirected to the appellant's new office address. The set-off instruction was confirmed by a fax with the appellant's letterhead later that day.

32 The respondent notified the appellant by fax on the morning of 10 April 2003 that they had received instructions to set off the loan against the deposit and that unless contrary instructions were given by 4.30pm that very day, the set-off would be effected. Wahjoe however only saw the fax after the stipulated deadline. His attempt to avert the set-off with a fax voicing his objections, which was despatched at about 7.29pm, proved to be futile. The respondent had already effected the set-off at 5.30pm. The respondent reverted to Wahjoe the next day refusing to reverse the set-off.

33 In August 2003, Pertamina conducted another internal audit in order to investigate the roles played by Wahjoe and Ariefin. What emerged crucially from this audit is Wahjoe's declaration that *he*, Ariefin, Hassan, and the management knew about the loan, the agreement between the appellant and Aceasia and *also* the fact that the deposit was subject to a charge, as early as in June 2002. The internal audit team concluded that Wahjoe was directly or indirectly involved in a conspiracy that had "prejudiced" the appellant's deposit with the respondent.

34 The appellant's account with the respondent was eventually closed, with the respondent returning only US$899,120.36. The appellant then claimed the difference between this amount and the US$9m it had initially deposited.

The decision below

35 The following findings were made by the trial judge.

36 First of all, the deposit account with the respondent was validly opened, contrary to the appellant's original contention that the 17 January 2002 resolution merely authorised the operation of the account and not its opening. The appellant quite appropriately has now chosen to abandon this argument.

37 Secondly, on the question of which documents had been forged, the trial judge determined: (a) the alleged forgery of the mail re-direction letter dated 18 March 2002 was not specifically pleaded, contrary to O 18 r 8 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) and to that extent could not be relied upon by the appellant; (b) in respect of the drawdown letter, this was not forged and had in fact been handed to the respondent by Ariefin himself; (c) the ratification resolution was probably forged; and (d) the charge was properly affixed with the appellant's seal as evidenced by the issuance of the certificate of registration from the Registry of Companies, Hong Kong.

38 Thirdly, the trial judge held that the appellant was precluded from denying that it had validly accepted the credit facilities as it had knowledge of such facilities all along. He relied on Wahjoe's admission to the Pertamina internal audit team that Ariefin had indeed explained the purport of the documents to him, albeit briefly. Further, the appellant was estopped from asserting forgery because it knew about the drawdown of the credit facilities, at the very latest by June 2002, but chose

thereafter to remain silent on the issue. In any event, the appellant was also bound by cl 1.3(b) of the Account Opening Conditions, which obliged the appellant to challenge any transaction within 14 days of the issuance of the bank statements. A bank statement reflecting the drawdown had been issued on 5 March 2002 (though this was retained by the respondent pursuant to the mail retention instructions by Ariefin on 18 February 2002).

39 Finally, the trial judge held that the various discrepancies in the documents, such as the mail re-direction letter being signed off as "Mr Zainul Ariefin" instead of the usual "Zainul Ariefin" or the fact that the drawdown letter contained no reference number and appeared to be faxed from a machine named "HDG", were cumulatively insufficient to put the respondent on notice. He also found that the reason given by Ariefin to the respondent to justify the drawdown, *viz*, that the appellant owed money to Aceasia for oil contracts and the delivery of oil tankers, was ostensibly a proper purpose. There was no reason for the respondent to have made further inquiries.

40 Accordingly, the claim was dismissed.

The issues on appeal

41 Upon closer analysis, the relevant issues crystallise into two critical questions. The first and foremost question is whether the documentation initiating the authorisation and/or drawdown of the credit facility had been properly authorised or whether it was unauthorised and/or forged. Needless to say, if the documentation was authorised, the claim against the respondent must necessarily fail at the very outset. On the other hand, if the documentation was in fact vitiated by fraud and/or if the drawdown had not been properly authorised, then the second question arises: are there any appropriate defences to resist the appellant's claim? In answer to this, the respondent has two strings to its bow. The first is contractual: the conclusive evidence clause found in cl 1.3(b) of the Account Opening Conditions purports to exclude liability if a customer fails to apprise the bank of discrepancies in the bank statements (see [11] above). The second defence that the respondent seeks to invoke is the equitable doctrine of estoppel, *viz*, that the appellant kept silent when it knew about the fraud and had a duty to speak and thereby caused the respondent detriment. In light of these defences the respondent asserts that the appellant cannot in fact or in law now be allowed to mount a claim arising from and engendered by its own employee's complicity in a fraud.

The propriety of the documentation leading to the drawdown

42 We turn now to the first issue, *ie*, whether the documents supporting the drawdown were properly executed and, if not, whether the drawdown was a nullity. It is crucial to note that the chain of documents leading to the drawdown commenced with the documents establishing the appellant's deposit account with the respondent. If the appellant's account had not even been properly opened, there would be no substratum for the drawdown and the eventual exercise of the right of set-off. On this issue, we concur with the trial judge's finding (see [43] and [44] of the GD) that the 17 January 2002 resolution (see [8] above) properly authorised *both* the opening and the operation of the deposit account with the respondent. As pointed out earlier, this point was in any event no longer in issue when the appeal was heard.

43 It would also follow that we accept the trial judge's interpretation of the 17 January 2002 resolution that Wahjoe and Ariefin were authorised to sign the relevant account opening documents, which, crucially, included the Account Opening Conditions. This means that the respondent could, as a matter of contract between the appellant and the respondent, rely on cll 1.3(b) (the conclusive evidence clause) and 17.1 (which confers on the respondent a contractual right of set-off). As far as the right of set-off is concerned, the respondent can also fall back on its common law right *qua*

banker to combine two or more accounts belonging to a customer for the purposes of satisfying the indebtedness incurred by the customer. The basis for this right was explained by Sir WM James LJ in the *locus classicus*, *In re EUROPEAN BANK* (1872) LR 8 Ch App 41 at 44:

> It was only for convenience that the loan account was kept separately … In truth, as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account.

The bank's common law right of set-off was affirmed by the House of Lords in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785; and followed again in *In re K (Restraint Order)* [1990] 2 QB 298, where Otton J held at 304:

> In my judgment, the right of a bank to combine [accounts] is well established and is fundamental to the bank/customer relationship. It is a means of establishing the indebtedness of the customer to the bank and the bank to the customer. In exercising this right a bank is not asserting a claim over the moneys, nor is it in conflict with the claims of the Crown. It is merely carrying out an accounting procedure so as to ascertain the existence and amount of one party's liability to the other. This can only be ascertained by discovering the ultimate balance of their mutual dealing.

44 There are of course circumstances where this common law right of a bank to set off one customer's account against another of his accounts may be abrogated. In this respect, the case of *T and H Greenwood Teale v William Williams Brown and Company* (1894) 11 TLR 56 is instructive. Wright J articulated three such exceptions in that case: first, where there was an implied or express agreement to the contrary; second, where a special item of property was paid to the bank for a given purpose; and third, where a bank had express knowledge that the account against which it wished to set off its customer's private account was an account which, if drawn upon by the customer, would involve fraud or a breach of trust. See also, E P Ellinger, Eva Lomnicka, and Richard Hooley, *Ellinger's Modern Banking Law* (Oxford University Press, 4th Ed, 2006) ("*Ellinger's Modern Banking Law*") at 205–213.

45 The authorisation and/or drawdown of the credit facility had to be contractually authorised (see [13] above). As the appellant's directors did not sign several of these documents, the documents had to be properly ratified if they were to be accorded any legal significance (see [14] and [15] above). The two critical documents necessary for the drawdown were the ratification resolution and the charge affixed with the appellant's company seal. As pointed out earlier, it is no longer disputed that the ratification resolution was indeed a forgery that was never signed by the appellant's directors. As regards the legal efficacy of the charge, we respectfully disagree with the trial judge's conclusion, first that the appellant was precluded from challenging it since it had been registered and further, that the issue of the registrar's certificate was conclusive evidence of this particular matter: see [45] of the GD.

46 It is true that pursuant to s 83(2) of the Hong Kong Companies Ordinance (Cap 32), the registrar's certificate is conclusive evidence of the validity of the *registration* of the charge: *Sun Hung Kai Bank Ltd v Attorney General* [1986] HKLR 587 ("*Sun Hung Kai*"). Thus, a charge registered even if it is out of time cannot be challenged: *Regina v Registrar of Companies, Ex parte Central Bank of India* [1986] QB 1114. But this must be distinguished from a situation where a party seeks to challenge not the *fact* of registration but that the very charge itself is ineffective for some reason other than that the procedural requirements of registration were not met: *per* Slade LJ in *Regina v Registrar of Companies, Ex parte Central Bank of India* at 1177. *A fortiori*, it has been held that if a charge fraudulently deceives the registrar, a creditor personally damaged by the fraud can take

proceedings *in personam* despite the registration: *In re CL Nye Ltd* [1971] Ch 442. As Chao Hick Tin JC (as he then was) observed, the certificate is conclusive evidence not of the correctness of the particulars stated in the certificate itself, but of compliance with the requirements of the statute: *Re Lin Securities (Pte)* [1988] SLR 340 at 358, [68]. In addition, the conclusiveness of the registration of a charge operates only *vis-à-vis* third parties and does not operate to disentitle the chargee or the chargor from questioning the validity of the charge *inter se*. Given that the Hong Kong legislation is *in pari materia* with the comparable Singapore and English provisions, and considering that *Sun Hung Kai* does not purport to hold that the *contents* of the charge cannot be challenged, we are of the view that it *is* open to the appellant to challenge the validity of the charge itself as *vis-à-vis* the respondent.

47 It is undisputed that the charge was unauthorised, improperly signed by Wahjoe and Ariefin (instead of the directors of the appellant) and that the affixation of the seal was contrary to Art 129(a) of the appellant's M&AA, which is couched in the following terms:

> 129. (a) The Directors shall provide for the safe custody of the Common Seal of the Company. *The Seal of the Company shall not be affixed to any instrument except by the authority of a resolution of the Board of Directors and in the presence of one of the Directors* and such persons shall sign every instrument to which the Seal of the Company is so affixed in his or his presence. [emphasis added]

Therefore, given that (a) none of the appellant's directors were present at the sealing; and (b) no board resolution had been passed authorising the affixation of the seal to the charge document, we determine that the charge was not properly sealed and to that extent defective. For the avoidance of doubt, we also find that the ratification resolution could not have cured this forgery because even if the ratification resolution had been proper (which it is not), cl 4 of the ratification resolution itself makes clear that any sealing of documents should be done in accordance with the M&AA of the appellant:

> IT WAS … RESOLVED that:-
>
> …
>
> 4. Infosar as any such documents are required to be executed under seal, the common seal of the Company be so affixed thereto in accordance with the Memorandum and Articles of Association of the Company.

This had clearly not been complied with.

48 The validity of the ratification resolution and the charge is paramount in determining whether the drawdown was legitimately authorised. This will in turn determine whether the appellant's case falters and fails at the very first hurdle. To reiterate, if the drawdown was legitimate and properly authorised, the appellant's case must fail *ab initio*. Given our findings thus far, we are of the opinion that the ratification resolution was forged; the drawdown was not properly authorised; and further, the charge document was not properly sealed and therefore of no legal significance or effect.

49 For the sake of completeness, we shall also briefly examine two other documents. The first is the drawdown letter. We respectfully concur with the trial judge that the letter was not a forgery. In this regard, the appellant's complaint that the trial judge was wrong in rejecting the evidence of the appellant's handwriting expert is, with respect, entirely without substance. The trial judge correctly noted and appropriately emphasised the fact that Ariefin had himself delivered the drawdown letter to

the respondent and that because he had himself expressly given instructions to set off the drawdown against the appellant's deposit, it could not have been a forgery. In short, it made no sense at all for Ariefin to authorise the set-off of a drawdown that he had never authorised in the first place. Suffice it to say also that the trial judge was perfectly entitled to prefer one expert's opinion over another's: *Tan Mui Teck v PP* [2003] 3 SLR 139. Further, the trial judge's analysis of the objective evidence is consistent with the judicial approach taken in decisions such as*R Mahendran v R Arumuganathan* [1999] 2 SLR 579 at [16] and *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam* [1992] 1 MLJ 1 at 8. Handwriting analysis is, ultimately, merely just an item of evidence, the probative weight of which ought to be considered in the context of all the relevant circumstances.

50 With respect to the mail re-direction letter dated 18 March 2002, the trial judge was entirely justified in holding that the appellant could not rely on the alleged forgery because it was not specifically pleaded. We would add that in any event, Ariefin authorised *vide* a "Summary of Holdings" statement on 9 April 2003 that the mail should again be re-directed from his residential address to the appellant's office premises. This step implicitly acknowledges that he was indeed the source of the previous re-direction instruction (on 18 March 2002). Furthermore, if the earlier re-direction letter had indeed been forged, a bewildered Ariefin would have received numerous bank statements at his home and would thus have been instantly alerted that a fraud had been perpetrated; assuming of course that he was an innocent party. There is on the contrary, nothing on record to indicate that Ariefin was surprised or concerned about receiving mail at his residential address. Indeed, how could he have been when he was working hand in glove with Dedy to deceive both the appellant and the respondent.

The defences open to the respondent

51 What then is the legal effect of the credit facility and the drawdown being improperly authorised? The answer is obvious. As a matter of common law, a bank has no mandate to pay on a forged instrument of a customer, and if it makes payment thereon, it is liable to its customer. The only established exceptions to this general principle are instances when the customer itself is in breach of its duty to its bank by failing to observe one or both of the following duties:

(a) a duty to refrain from drawing a payment order or instruction in such a manner as to facilitate fraud or forgery: *London Joint Stock Bank, Limited v Macmillan and Arthur* [1918] AC 777 ("*Macmillan*"); and

(b) a duty to inform the bank of any forgery or unauthorised drawing of a payment order or instruction as soon as the customer becomes aware of it: *Greenwood (Pauper) v Martins Bank, Limited* [1933] AC 51 ("*Greenwood*").

These exceptions articulated in *Macmillan* and *Greenwood* were applied by the High Court in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828 ("*Consmat*").

52 Periodic attempts have been made by the banking industry to extend the common law obligations of its customers beyond the *Macmillan* and *Greenwood* duties. Such efforts have come to nought, most notably in the seminal Privy Council case, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 ("*Tai Hing*"). In that case, Lord Scarman (at 105–106) expressly rejected the bank's argument that "the obligations of care placed upon banks in the management of a customer's account which the courts have recognised have become with the development of banking business so burdensome that they should be met by a reciprocal increase of responsibility imposed upon the customer". Lord Scarman with his customary acuity observed at 106:

> [The banks] can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection. *But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change*. The business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer. [emphasis added]

5 3 *However*, while the Privy Council in *Tai Hing* refused to extend the customer's common law duties any further, it also expressly accepted the possibility that banks may, in principle, expressly impose additional duties by contract. These twin holdings in *Tai Hing* have now been expressly endorsed in a number of Commonwealth jurisdictions: see *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 ("*Hokit*"); *Fried v National Australia Bank Ltd* (2001) 111 FCR 322; *National Bank of New Zealand Ltd v Walpole and Patterson Ltd* [1975] 2 NZLR 7; *Canadian Pacific Hotels Ltd v Bank of Montreal* (1987) 40 DLR (4th) 385; *Canara Bank v Canara Sales Corporation* [1988] LRC (Comm) 5.

54 In considering the issue of whether a customer's common law duties extend "thus far and no further" than those laid down in *Macmillan* and *Greenwood*, we do observe that, notwithstanding considerable judicial opinion elsewhere, particularly in such major financial centres as Hong Kong and London, the position in Singapore is somewhat obscured by the decision in *Khoo Tian Hock v Oversea-Chinese Banking Corp Ltd* [2000] 4 SLR 673. In that case, Woo Bih Li JC (as he then was) held that business efficacy dictates that there should be a term implied by law in a customer-banker contract such that a customer is under a general duty not to facilitate fraud by his negligence, quite apart from the drawing of his cheques. As Woo JC saw it, there is no reason to draw a distinction between the drawing of cheques and other steps or omissions that facilitate the fraud or forgery. Because no occasion arises for us to revisit this particular issue in these proceedings, suffice it to say that a court should be slow to intervene and imply a term in a contract as a matter of law. It should do so only if the term to be implied is, in all the circumstances, fair, reasonable and sound in policy: see *Crossley v Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 at [33]–[46]. We would also respectfully endorse the view of the New South Wales Court of Appeal in *Hokit*, where Mahoney P (with whom Waddell A-JA agreed) and Clarke JA declined to widen the customer's duty on the basis that such a duty lacked precise definition as to its scope and content. We further add that the fact that the banking industry has continued to flourish in the jurisdictions that have followed *Tai Hing* notwithstanding the limited duties of banking customers demonstrates that a reconsideration of this point is unnecessary and perhaps even undesirable. In fact, the prevalence of conclusive evidence clauses in contracts between banks and their customers (in order to preclude customers from asserting a claim if they fail to notify the bank of discrepancies in their bank statements) suggests that the banks are perfectly capable of protecting their own interests.

55 What *is* of critical relevance to this case is whether, notwithstanding the position at common law, a bank may modify its customers' common law duties by express terms in the contract. As stated above, it is widely acknowledged that a bank may indeed do so. For the purposes of this appeal, we are concerned only with a specific genre of contractual terms, commonly referred to as verification clauses or conclusive evidence clauses. In essence, these clauses place the onus on the bank's customers to verify their bank statements and to notify the bank if there is any discrepancy within a certain period of time. If the customer fails to do so, he is precluded from asserting that the statements do not represent the true state of his accounts with the bank. In other words, he may

not make a claim against the bank for his loss. In this regard, the Canadian courts have been at the forefront in accepting the validity of such conclusive evidence clauses. The pioneering case is *Columbia Graphophone Co v Union Bank of Canada* (1916) 34 DLR 743, where Middleton J held (at 744) that such clauses were "intended to be real agreements, and to define the relation between the parties, and relieved the bank from all liability". More recently, the Canadian Supreme Court held that the verification agreement provided the bank with a complete defence to the action: *Arrow Transfer Co Ltd v Royal Bank of Canada* (1972) 27 DLR (3d) 81; see also Mark Hapgood, *Paget's Law of Banking* (Butterworths LexisNexis, 12th Ed, 2003) at para 11.8, G A Weaver *et al*, *The Law Relating to Banker and Customer in Australia* (Law Book Co, 2nd Ed, 1990) at para 2.160.

56 While this court has not previously had the opportunity to rule on whether such conclusive evidence clauses are valid, the High Court has, on at least three prior occasions, considered the issue and held that such clauses were indeed valid. In *Consmat*, L P Thean J (as he then was) upheld the validity of a conclusive evidence clause, defined in the following terms:

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

Thean J (at 835, [18]) construed the term as imposing the following responsibilities:

> The exercise of verification required or contemplated by the undertaking necessarily involves the customer examining the statement of account and the cheques against his books and other records to see: (i) whether the exact amounts drawn by the cheques have been debited to the account; (ii) whether any amount paid to the bank for the credit of the account has been credited; (iii) whether any amount has been debited to the account without his mandate; (iv) whether any of the cheques have been forged or unauthorized; and (v) whether there is any error in the bank crediting or debiting any sum to the account.

In *Stephan Machinery Singapore Pte Ltd v Overseas-Chinese Banking Corp Ltd* [2000] 2 SLR 191 ("*Stephan Machinery*"), Lai Kew Chai J held the following clause to be valid:

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

In *Elis Tjoa v United Overseas Bank* [2003] 1 SLR 747 ("*Elis Tjoa*"), Woo JC also upheld a similar conclusive evidence clause. What sets *Elis Tjoa* apart from the previous two cases is that this case involved an individual (*ie*, non-corporate) customer. It also bears mention that neither in *Stephan Machinery* nor in *Elis Tjoa* did the bank return the cheques to the customer to verify against their

bank statements. We will revisit these points at a later juncture.

57 We pause here to address some criticisms that have been levelled at this particular line of cases upholding the validity of conclusive evidence terms. Prof Poh Chu Chai, in his book *Law of Banker and Customer* (LexisNexis, 5th Ed, 2004) makes the following points. First, Prof Poh says (at p 921) that it is difficult for anyone reading the clauses in question to realise that his right to raise the issue of forgery is effectively being taken away. In other words, he argues, if a bank wishes to prevent its customers from raising fraud even if they fail to notify it of any discrepancies in their statements within a fixed time, the bank should insert an express term to that effect. Second, he says (at pp 897–907) that these clauses are potentially unreasonable under s 3 of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the UCTA"). Finally, he points out (at p 922) that in *Consmat*, Thean J had placed much emphasis on the fact that the bank in that case had adopted the practice of returning the cheques paid by the bank to the customer in order for it to verify the signatures on them. Prof Poh contends that in cases where this is not the practice (the present appeal would be such an example), there is room for argument that a term requiring a customer to verify whether there has been forgery is both unreasonable and unfair.

58 With respect, we do not find much persuasive force in any of these criticisms. In relation to the first objection, it goes without saying that a contractual term must be both wide and clear enough in its import for it to impose an obligation on a party. The clauses reproduced above from *Consmat* and *Stephan Machinery* are sufficiently explicit, in our view to "bring home to the customer either "the intended importance of the inspection he is being expressly or impliedly invited to make", or the fact that they are intended to have conclusive effect against him if he raises no query, or fails to raise a query in time, upon his bank statements": *Tai Hing* at 109. Contrary to what Prof Poh is implying, it was decidedly not the view of the Privy Council in *Tai Hing* that such clauses should, *inter alia*, spell out so explicitly that the failure to report any discrepancy would necessarily bar the customer from asserting fraud or forgery. In our opinion, if a clause is worded widely enough to the effect that "all" discrepancies or matters will be deemed conclusive unless reported within a reasonable time, it is not open to a customer to argue that a fraud or forgery does not fall within the scope of such a clause. To do otherwise would be to "approach the task of construction with too nice a concentration upon individual words": *Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 12-044, citing *Ford v Beech* (1848) 11 QB 852 at 866.

59 With regard to Prof Poh's second criticism, though he correctly points out that s 3 of the UCTA is applicable to conclusive evidence clauses, that itself is a statement of the obvious. Section 3(1) of the UCTA mandates that terms seeking to exclude liability in respect of the breach of one's own contractual obligations (which effectively is what conclusive evidence clauses do) must satisfy the requirement of reasonableness. The Second Schedule to the UCTA lays down a few guidelines in assisting the court's determination of whether such terms are reasonable; see generally *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Singapore & Malaysian Ed, 1998) at pp 336–342.

60 The real question of whether conclusive evidence clauses can, as a matter of principle, meet these requirements was considered with admirable lucidity in *Consmat* at 837, [26]. We respectfully endorse the views of Thean J that in principle conclusive evidence clauses employed in a banker and corporate customer relationship afford a practical and reasonable device for pragmatic management of risk allocation. There is nothing intrinsically objectionable about such clauses provided they are properly and reasonably defined.

61 It bears emphasis that in holding that conclusive evidence clauses if and when properly and reasonably defined are enforceable, we restrict such a conclusion to cases where the customers are

commercial entities. In the context of banks on the one hand (which would otherwise bear the onerous, if not near impossible task of detecting forgeries given the advent of modern technology) and commercial entities on the other (which only have to check their own records), we do not find it onerous or unreasonable to place the risk of loss on the latter if this has already been agreed upon. However, we are not required to express a general opinion as to the reasonableness of conclusive evidence clauses as and when applied to individuals and non-corporate customers since the issue does not arise in the present context. Each case will entail a careful examination of its own peculiar factual matrix starting with a careful scrutiny of the conclusive evidence clause that is being questioned.

62 Nor are we persuaded by Prof Poh's third criticism that it ought to make a difference in principle whether or not the bank has a practice of returning the cheques paid by the bank to the customer so that the latter may verify the signatures on them. As we observed above, neither Lai J (in *Stephan Machinery*) nor Woo JC (in *Elis Tjoa*) viewed the failure of the bank to return the cheques to their customers as fatal to its claim (see [56] above). This must be correct as a matter of principle and practice. A corporate customer will invariably possess its own debit and credit records, which it may check to ensure that the bank statements it receives tally with its own records. Hence, we do not see why a corporate customer which has the option of examining its bank statements to ensure conclusively that they are accurate, is precluded from verifying transactions simply because its bank is not in the practice of returning such cheques or the relevant payment instructions. It must be recognised and acknowledged that with the advent of technology and electronic banking many types of bank accounts neither contemplate nor require the issuance of cheques. It would clearly not accord with present commercial reality to restrict the operation of conclusive evidence clauses to cheque accounts and even then only to accounts where cheques are returned to the customer. In this regard, we agree with the following observation of the learned authors of *Ellinger's Modern Banking Law*, whose considered opinion (at p 220), is that:

> [B]oth *common sense* and *good business practice* require the bank's customer to verify the entries made in his account. If such a perusal is not required, what is the object of the dispatch of a statement or of the making by the bank of detailed entries in a pass-book? If the object is merely to inform the customer of the amount standing to the credit of his account, it would be sufficient to provide him periodically with a statement of his balance … If [the customer is interested in this information], then surely the customer can be expected to peruse the statement submitted to him with a view to detecting errors or shortfalls! [emphasis added]

We must stress that in any event the issue of the returning of cheques simply does not arise in the context of this case. This claim does not involve a cheque account.

63 It is noteworthy that the employment of conclusive evidence clauses is not peculiar to bank accounts. Such clauses may be found in guarantees or in certificates of engineers and architects found in construction contracts. In all these cases, it is not doubted that such conclusive evidence clauses are valid and binding on the parties: *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668; *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437; *Dobbs v The National Bank of Australasia Limited* (1935) 53 CLR 643; *Lishman v Christie & Co* (1887) 19 QBD 333 at 338; *Chip Hua Poly-Construction Pte Ltd v Housing and Development Board* [1998] 2 SLR 35; *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345. It istherefore abundantly clear that conclusive evidence clauses are neither uncommon nor alien in a myriad of commercial matrices. In the end, the relationship between a bank and its customer is governed by contract; and the parties are at liberty to expressly agree on any peculiar arrangement to define and determine their relationship, including the imposition of obligations and responsibilities not usually recognised at common law. The freedom of the parties to contract is however circumscribed by legislation (such as

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

64 Finally, it is interesting also to note that conclusive evidence clauses now have the force of legislation in the United States. Pursuant to § 4-406(c) of the Uniform Commercial Code ("the UCC"), a customer is obliged to exercise reasonable promptness in examining the statement issued in order to determine whether any payment was not authorised. If, based on the statement, a customer should have discovered the unauthorised payment, the customer must promptly notify the bank. According to § 4-406(d), the failure of a customer to comply with these obligations will preclude the customer from asserting a claim against the bank in respect of his loss. It is also pertinent to observe that under the UCC, a bank need not return the cheques to the customer in order to verify the bank statements, although it should certainly not dispose of them in case a customer should request to examine them. This too is entirely consistent with our holding at [62] above. Yet another pertinent point is that the UCC neither envisages nor embraces an unmitigated freedom of contract. Under § 4-406(e), if a customer can prove that the bank itself has failed to exercise ordinary care that has caused or contributed to the customer's loss, the loss can be allocated between the parties.

65 It should also be pointed out that a conclusive evidence clause would come into operation only if the statements have been effectively dispatched. The bank bears the burden of proving this: *Ri Jong Son v Development Bank of Singapore* [1998] 3 SLR 64 at [53].

66 With these principles in mind, we turn to address the respondent's defence to the appellant's claim. As already stated, it argues that cl 1.3(b) of the Account Opening Conditions prevents the appellant from relying on the forgery as it was obliged to inform the bank within a stipulated period of any discrepancies in the bank statements; it further argues that on the basis of *Greenwood*, the appellant is in any event estopped from denying the validity of the set-off.

The conclusive evidence clause

67 The conclusive evidence clause, in the Account Opening Conditions which we have determined were properly signed by Wahjoe and Ariefin (see [43] and [44] above), reads as follows:

> 1.3 The Customer hereby agrees:
>
> …
>
> (b) To *examine all statements of account, bank statements, printed forms, deposit slips, credit advice notes, transaction advices and other documents* (hereinafter in this Clause referred to collectively as "statements") *supplied by the Bank setting out transactions on any of the Accounts* and *agrees that unless the Customer objects in writing to any of the matters contained in such statement within 14 days of the date of such statement*, the Customer *shall be deemed conclusively to have accepted all the matters contained in such statement as true and accurate* in all respects … [emphasis added]

68 The clause imposes two concurrent duties on a customer. First, the customer is obliged to examine all statements issued by the bank setting out the transactions involving the accounts it has with the bank. The customer is to check whether all debits or credits to its accounts as reflected in the statements are accurate and have been properly authorised. The customer should also compare the bank statements against its own financial records in order to ascertain if there are any discrepancies. Secondly, should any inaccuracies or discrepancies appear in the bank statements, or

the slightest suspicion that sums have been debited without proper authorisation prevail, it is incumbent on the customer to write to the bank within 14 days from the date of the bank statements to dispute their contents. If the customer fails to do so, the bank is legally entitled (though not compelled) to treat the bank statements as conclusive evidence of "all the matters" contained in the statements. This includes, *inter alia*, the particulars of any transactions stated therein, the amounts debited and credited, the balance indicated and/or any indication in the statement that the account is subject to some form of security or charge or lien.

69 As such, we are satisfied that the ambit of the phrase "unless the Customer objects in writing to *any* of the matters contained in such statement … the customer shall be deemed conclusively to have accepted *all* the matters contained in such statement" is wide enough to exonerate the respondent from the consequences of a fraud perpetrated on the appellant, if the latter fails to notify it of the relevant discrepancy within the stipulated period from the date of the relevant bank statements. In other words, if the respondent can show that it had properly issued (and despatched) bank statements reflecting the appellant's drawdown, the appellant is bound by the fact that it failed to point out the alleged discrepancy within 14 days of the issuance of the statements. We also find that the period of time given for objections to be raised (on the basis the statements are immediately despatched) is reasonable and does not impose too harsh a burden on the appellant. The appellant is a commercial entity and would have had little trouble in checking its bank statements if it were so inclined. Having further regard to the Second Schedule to the UCTA (see [59] above), we also find that there is no evidence suggesting that the parties were not on equal bargaining terms or that the appellant had been coerced or induced into entering into the contract or, indeed, that it had no knowledge of the terms of the Account Opening Conditions. Indeed, in this regard counsel for the appellant never suggested or submitted that the UCTA should apply to vitiate the conclusive evidence clause in the Account Opening Conditions.

70 There can be no dispute that the appellant failed to inform the respondent of any discrepancies in the bank statements at any material time. Moreover, the appellant displayed absolutely no interest in examining its accounts from the outset. The bank statements had been issued both immediately after the drawdown on (12 March 2002) and at regular intervals in the following months; only they were retained, in the first instance, by the respondent as instructed on 18 Feb 2002 and later directed to Ariefin's residential address pursuant to instructions on 18 March 2002. If the appellant's officers had examined any of the relevant bank statements they would have noticed the *single* glaring debit entry arising from the drawdown. Given our finding that these instructions had not been forged, the appellant must bear the legal consequences of Ariefin, an authorised signatory, diverting its correspondence to his home address. Then, we find, as more fully discussed below at [74]–[84], even despite having knowledge that its account was subject to a charge and that a drawdown had been made on its credit facility probably as early as in February 2002 (if not, by June 2002 at the latest), the appellant did not see fit to call for and verify its bank statements. It was only in October 2002 that a request was made to the respondent to provide details of the appellant's deposit and credit facility pursuant to an internal audit. Subsequently, notwithstanding the internal audit team's report dated 30 December 2002 to "really put efforts to avoid company loss", the appellant took no action until 9 April 2003 when it attempted to terminate its account with the respondent. The management of the appellant was both wanton and lacking in seeking to protect its own interests. The appellant's failure to inform the respondent of its already prevalent concerns and grave misgivings in relation to the operation of the account is incomprehensible and absolutely indefensible. Why did the appellant allow the situation to deteriorate irremediably? Did it hope against all odds that despite serious doubts and misgivings about Dedy he would nonetheless make good his "promises" to return the "loan"?

71 In the circumstances, we hold that cl 1.3(b) of the Account Opening Conditions operated to

exonerate the respondent from any liability in respect of acting on the forged documents leading to the drawdown. Our finding on this issue is sufficient to dispose of this appeal, but out of deference to counsel's efforts, we shall also deal with the alternative defence of estoppel invoked by the respondent.

The estoppel

72 We now turn to the respondent's alternative stance: that the appellant is in any event estopped from asserting that the drawdown was invalid and a nullity. In *Greenwood*, the House of Lords held that in order for estoppel to succeed, three conditions must prevail: (a) a representation or conduct amounting to representation intended to induce a course of action on the part of the person to whom the representation was made; (b) an act or omission resulting from the representation by the person to whom the representation was made; and (c) detriment to such person as a consequence of the act or omission. It was also declared that silence can indeed amount to a representation if there is an existing duty to disclose knowledge. In essence, where the customer has actual knowledge of any forgery or unauthorised issuance of payment instructions and fails to inform the bank accordingly, the customer is prevented from raising the forgery.

73 The first fact to establish is whether the appellant knew of the unauthorised credit facility. We are satisfied that it did. While it is debatable precisely when that knowledge was acquired by the appellant, we find that the appellant must have known probably as early as in February 2002 and, in any event, certainly by December 2002. Our finding is premised on the following facts.

74 As early as in February 2002, Wahjoe signed both the 18 February 2002 resolution purporting to accept the credit facility as well as the credit facility letters themselves. As Wahjoe himself admitted to the Pertamina internal audit team, he was aware of the terms of the credit facilities. In fact, Wahjoe had, according to his own evidence, questioned Ariefin regularly about the approval of that facility since he signed those documents. Moreover, these particular credit facilities were clearly sought for the sole purpose of securing the moneys to be remitted to Aceasia. It also bears mention that the Pertamina internal audit team, after inquiring into all the relevant circumstances, concluded:

(a) "… there is a real intention directly or indirectly from Petral's [the appellant's] officer to do the investment and fund conversion" [*sic*];

(b) Wahjoe was either "directly or indirectly … involved in the collaboration of Petral's [the appellant's] fund conversion with amount of US$8 million"; and

(c) Ariefin's instructions for the set-off clearly meant that the appellant acknowledged the loan.

It is noteworthy that the appellant did not produce this investigation report in discovery. The respondent obtained it from other sources. In the result, we are satisfied that, at the very least, Wahjoe, and hence the appellant, must be deemed to have known of the credit facilities and the intended remittance to Aceasia as early as in February 2002.

75 When the drawdown was effected on 5 March 2002, the terms of the loan were spelled out in a letter dated 12 March 2002. The bank pursuant to the appellant's instructions retained this letter. Bank statements were also issued on a regular monthly basis thereafter, although they were retained by the respondent pursuant to the "hold mail" arrangement and later directed to Ariefin's residential address. It is incontrovertible that Ariefin received these statements. Indeed, Wahjoe's evidence stipulates that Ariefin admitted receiving these statements. Had any of the appellant's officers and

Wahjoe in particular expressed any interest or exercised even a modicum of care in safeguarding its interests, the appellant ought to have realised something was seriously amiss. We categorically reject Wahjoe's rather paltry attempts to minimise both his role and knowledge of Ariefin's deception. The Pertamina internal audit team rightly concluded that Wahjoe was "directly or indirectly involved" in the "conversion … of US$8million". The facts speak for themselves.

76 Subsequently, sometime in June 2002, Wahjoe was informed by Ariefin that the appellant's deposit could not be transferred because of a structural arrangement. Lim confirmed this over the phone. In his own words, Wahjoe admitted that while he was uncertain about the exact arrangement between the appellant and Aceasia, he appreciated that the deposit was subject to a restriction until 15 March 2003 (see [26] above). It is pertinent to reproduce a brief extract of Wahjoe's responses elicited in the course of cross-examination in connection with this issue.

> Q: So in June 2002, you knew that this money that [the appellant] had with Credit Suisse could not be transferred because of some arrangement between [the appellant], Credit Suisse and Aceasia; correct?
>
> A: Yes.
>
> Q: We talk very coyly [about] some arrangement but if it is your money you are entitled to take it out unless it is subject to some kind of lien or pledge or charge; right?
>
> A: That's right.
>
> ….
>
> Q: Can you agree with me that the only possibility, based on what [Ariefin] told you, the only possibility is that in some way your money was used for Aceasia, based on what he told you?
>
> A: That was what I was concerned about…
>
> Q: The answer to my question is "yes", correct?
>
> A: Yes, because I was concerned about that.

77 It is clear to us that this is tantamount to an admission that Wahjoe knew about the charge over the appellant's deposit, the drawdown of the credit facilities and that the money from the drawdown was to be remitted to Aceasia. That this was indeed Wahjoe's understanding is further confirmed by his subsequent admission to the Pertamina internal audit team that he had arranged to meet Dedy on 18 and 22 July 2002 in order to seek "clarification, [regarding] contract and liabilities and responsibility of Aceasia". Again, when on 9 August 2002 Wahjoe met Dedy, Dedy had explicitly told Wahjoe that the appellant's deposit could not be transferred because it was being used as a "contract guarantee" between the appellant and Aceasia. The contents of this meeting were then reported to the other key officers of the appellant. If, as the appellant tenuously contends, it had not the faintest inkling that something was amiss, there would have been no need for Wahjoe's urgent and persistent meetings with Dedy. Nor would it have been necessary to report the matter to the other key officers (see [25] above). We should also point out that Wahjoe met Dedy once again on 17 March 2003 when he could not reach Lim to discuss the status of the appellant's deposit (see [28] above). This completely undermines Wahjoe's purported ignorance of Dedy's involvement in the structural arrangement that Ariefin and Lim had adverted to earlier.

78 Additionally, it bears mention that Wahjoe was informed by Ariefin of the Asset Management Agreement between Aceasia and the appellant sometime in late August or early September 2002. Wahjoe had even perused a copy of this agreement. It is pertinent that, under cross-examination, Wahjoe admitted that it was clear from the agreement that US$8m had been placed with Aceasia. That might explain why he also admitted that he had discussed the agreement with Hassan in September 2002.

79 In the meantime, in August 2002, the finance division of Pertamina contacted Ariefin and asked for all documents relating to the respondent and Aceasia. Subsequently, the internal auditor wrote to the respondent through Ariefin requesting information in a letter dated 21 October 2002. It is useful to reproduce the relevant contents of the letter:

> Regarding to our assignment to audit Pertamina Energy Trading Ltd (Petral), we would like to have your confirmation and detail information on:
>
> a. Petral's deposit in Credit Suisse Bank Singapore Branch Ac. No. … related to Asset Management Agreement no. … between Petral and Aceasia dated February 27th, 2002. Please inform us the latest balance of the account and we would like to confirm that the abovementioned deposit has no restriction or being guaranteed for Aceasia's business.
>
> b. Agreement between Aceasia and Credit Suisse Bank Singapore Branch related to Petral Deposit as stated in Asset Agreement between Petral and Aceasia. If it is possible would you please provide us with a copy of the agreement.
>
> [emphasis added]

This letter starkly demonstrates that Pertamina's internal audit team also knew by that point of an arrangement between Aceasia and the appellant that involved the appellant's deposit with the respondent.

80 There is some dispute over whether the respondent actually responded to this request. According to counsel for the appellant, the respondent despatched a faxed letter dated 23 October 2002 signed by Lim in response to the request. This letter did not provide any documentation in relation to the account and merely reiterated that the appellant's deposit stood at approximately US$9m. In fact, the letter was worded somewhat tersely, stating that it was "ludicrous" that the appellant's internal auditors should ask the respondent for the Asset Management Agreement, given that it was signed by the appellant and Aceasia. Counsel for the respondent on the other hand drew our attention to a letter dated 8 November 2002 which was signed by the respondent's head of operations and head of operations control. The letter complied with the appellant's internal auditor's request (see [79] above) and even enclosed a bank statement as of 31 October 2002 showing the drawdown. The appellant now denies ever having received this particular letter.

81 We do not need to concern ourselves too much with whether the appellant's or respondent's summary of events in relation to this issue is correct. We do however find that the respondent must at some point have responded to the appellant's internal auditor whether through the letter dated 8 November 2002 or otherwise. This is because an internal memo written by the head of the internal audit team dated 30 December 2002 recommended that the appellant'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 appellant's] management, and also [the appellant's management] keep on continuing the efforts optimally in securing the asset of US$9m

by looking at legal and financial aspect. [emphasis added]

It is difficult to escape the conclusion that the internal audit team had in fact concluded that the appellant's account with the respondent was at risk and that there was a possibility of some loss. The "loss" mentioned in the report must be an allusion to the drawdown, or at the very least is evidence of knowledge that the account was subject to a charge. It is axiomatic that the appellant's internal audit team would not have known the state of the appellant's account with the respondent if the respondent had failed to respond to the internal audit team's request for information in the first place.

82 Even more illuminating are Wahjoe's responses to queries made by the internal audit team in April 2003. We reproduce just three of these questions.

> 75. When was this case revealed by Petral and what was the reaction of Petral's President and Finance VP Petral towards this case? Did you see any cooperation between the President and Finance VP to settle this case?
>
> > 75. It was revealed at the *end of June 2002* (By not shifting the fund in CSFB to BNI Gambir).
>
> 76. Why the management seemed [*sic*] very slow in securing the investment in partnership with Aceasia, because the Pertamina's Internal Audit report (Ref. Memo Head of Internal Audit No. … dated 30 December 2002 has recommended Petral's Management to 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 [*sic*] Petral's Management, and also Petral's Management keep on continuing the efforts optimally in securing the asset of US$9million by looking at legal and financial aspect?
>
> > 76. Petral must be very careful in settling this case, so it won't create an open case, remembering Petral's position as "High Level Trader" in Singapore. The internal steps continued to proceed, followed by using "Law Firm" Singapore in attempt to get the US$8 million.
>
> …
>
> 82. Did you realize with the order of off-setting means that Petral acknowledged about the loan but the fact was that Petral never took the loan?
>
> > 82. To CSFB the Loan Petral is legit. According to police, Singapore law underlines every loan taken that dues [*sic*] will be automatically disbursed.
>
> [emphasis added]

There was no doubt in the minds of the appellant's internal audit team that the appellant knew about the loan, at the latest, by June 2002. In fact, the internal audit team went further and observed that the order to set off the loan against the appellant's account was a representation that the loan was legitimate. Most resonant, in our view, is Wahjoe's deafening silence throughout the interview, in respect of whether he ever informed the respondent of his knowledge that there was a possible forgery involving the appellant's deposit account with the respondent.

83 The inexorable inferences to be drawn from these facts are (a) that the appellant must have known that its account with the respondent was subject to a charge, (b) that a drawdown had been

made on the credit facility, and (c) that the Asset Management Agreement with Aceasia had been acted on. Yet, despite both the appellant's and Wahjoe's grave and profound misgivings, at no point did the appellant deign to inform the respondent that these transactions were irregular, improper or unauthorised.

84 Counsel for the appellant tried to deflect these inferences by pointing out that Wahjoe had called Lim on at least two occasions to try and ascertain what had happened. As we have noted above, at [28], there is no evidence that these conversations between Lim and Wahjoe even occurred in the first place. In any event, even taking the appellant's case at its highest, the fact remains that Wahjoe did not take the extra, necessary and indeed critical step to inform the respondent of what he must surely have known by then: namely that a fraudulent scheme had been perpetrated by Ariefin and Dedy. The alarm bells had sounded loud and clear but Wahjoe did nothing to alert the respondent about the information he possessed or the concerns he entertained. The evident scepticism and probing questions within the internal audit team report as to why the appellant had been gravely remiss in resolving the matter speaks volumes.

85 Our conclusion that the appellant chose to keep silent, knowing by June 2002 (if not earlier) that a fraud had been perpetrated, does not by itself satisfy the requirements of estoppel. The third and critical criterion for the defence to apply requires that the failure of the party who remained silent must have caused detriment to the party relying on the estoppel. The party relying on the estoppel must (a) plead and identify what steps it would have taken and (b) prove that it would have had a real chance of protecting or improving its situation and that it would have taken that chance: see *Fung Kai Sun v Chan Fui Hing* [1951] AC 489 at 505–506; *Scottish Equitable plc v Derby* [2000] 3 All ER 793; see also Piers Feltham, Daniel Hochberg and Tom Leech, *Spencer Bower's The Law Relating to Estoppel by Representation* (LexisNexis UK, 4th Ed, 2004) at para V.5.5. It is in relation to the third criterion that the respondent's submission on estoppel must fail. First and foremost, the respondent omitted to plead this point in its defence. It is futile to argue, as counsel for the respondent has attempted to, that the *appellant* had failed to raise this point in the court below therefore denying it (the respondent) the opportunity to amend its pleadings. The onus remains on the respondent (or any party for that matter) to plead its case fully and properly. Second, we are not satisfied that in this case, the respondent did, in fact, lead satisfactory evidence demonstrating that its chances of recovering the loan moneys from either Aceasia or Dedy (or even Lim) had been materially prejudiced by the appellant's silence, thereby causing it to suffer detriment. Indeed, upon the drawdown of the appellant's account, the moneys were promptly transferred out of the jurisdiction. To that extent, the respondent's bare and unsubstantiated assertion that the respondent would have taken action had it known of the forgery falls far short of discharging the burden to show that the appellant stood a "real chance" of recovering the moneys. Accordingly, the defence of estoppel must fail.

Conclusion

86 While we are of the view that the evidence necessitates the dismissal of this appeal, we wish to point out that Lim's conduct in this case bordered precariously on negligence. Had the appellant pleaded and properly pressed a case for contributory negligence, it would have required little persuasion to apportion liability. Lim, as the evidence amply illustrates, was only too eager to please his clients. However, he was, in the final analysis, more naïve than knave. He appended his signature as a witness to the sealing of the charge despite being physically absent from the sealing. He indicated that he had viewed the original passports of the appellant's directors even though he had only seen the faxed copies. Furthermore, notwithstanding that the appellant and Aceasia constituted two separate and distinct legal and corporate identities, his point of contact was often Dedy. In fact, despite earlier internal concerns that the proper parties did not sign the documents, he continued blithely to get Dedy (and perhaps Ariefin) to obtain the signatures of the appellant's directors for the

ratification resolution rather than contact the directors directly. Lamentably, the respondent appears to have been somewhat remiss in the conduct of its relationship with the appellant. Due to the lack of proper supervision, Lim took unwarranted liberties. It must be recognised that a bank officer is more than a mere conduit and that he is accountable for each and every responsibility he owes both to the bank as well as its customers.

87 Nonetheless, these facts do not attest to Lim being a party to the fraud or having knowledge of the fraud. This was a finding of fact by the trial judge that we are loath to interfere with. We also accept the trial judge's finding that the irregularities in some of the documents did not put the respondent on notice. Thus, while Lim's conduct has caused us some disquiet, it does not attract legal consequences in these proceedings.

88 In the circumstances, while we find that the key documents leading to the drawdown were nullities, the defence successfully raised by the respondent in respect of the conclusive evidence clause precludes the appellant from asserting the forgery. We do, however, hold that the elements of estoppel not being satisfied, such a defence must fail. Since the defences are pleaded in the alternative, the appeal is dismissed with costs and the usual consequential orders.

Appeal dismissed