Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Another and Another Suit
[2009] SGHC 197

Case Number : Suit 774/2004, 763/2004

Decision Date : 31 August 2009

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Steven Chong SC, Rebecca Chew, Sim Kwan Kiat and Nigel Pereira (Rajah & Tann LLP) for the plaintiff in Suit No 774 of 2004; Alvin Yeo SC, Monica Chong, Sannie Sng, Tan Hsiang Yue, Deborah Liew and Sung Jingyin (Wong Partnership) for the plaintiff in Suit No 763 of 2004; Davinder Singh SC, Hri Kumar SC, Yarni Loi, Kabir Singh, Shivani Retnam and Alecia Quah (Drew & Napier LLC) for the first defendant in Suit No 774 of 2004 and the defendant in Suit No 763 of 2004

Parties : Skandinaviska Enskilda Banken AB (Publ), Singapore Branch — Asia Pacific Breweries (Singapore) Pte Ltd; Chia Teck Leng

Agency – Actual authority – Implied authority – Ostensible authority – Vicarious liability – Estoppel – Banks suing company for fraud of employee – Whether employee had actual or ostensible authority – Whether company was liable for acts of employee – Whether company was estopped from denying authority of employee

Restitution – Enrichment – Change of position – Bank suing company for fraud of employee – Whether company was being enriched – Whether change of position defence applied

Tort – Negligence – Duty of care – Breach of duty – Bank suing company for fraud of employee – Whether company had duty of care – Whether company was breaching its duty of care – Section 199(2A) Companies Act (Cap 50, 2006 Rev Ed)

31 August 2009 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 Chia Teck Leng ("Chia") was an inveterate gambler who unremittingly resorted to cheating and forgery in order to fuel and sustain his gambling addiction. For more than four years, whilst employed as the Finance Manager of Asia Pacific Breweries (Singapore) Pte Ltd ("APBS"), he deceived the Singapore branch offices of five international banks, by using his employer's name to obtain substantial credit and loan facilities purportedly made to APBS which he misappropriated. His fraud was audaciously conducted from his employer's premises during working hours. Chia was not called to give evidence. However, he was obviously able to commit and sustain this fraud for more than four years through a combination of confidence, interpersonal skills, guile and quick wittedness; and finally above all, by creating a façade of normalcy through his orchestration of honouring intermittent payments to the banks until he was found out after his arrest on 2 September 2003 by the Commercial Affairs Department. The use which Chia made of his employer's name in order to borrow with ease from the banks was just as much a fraud on APBS as it was on the banks. Chia hoodwinked his employer and others with whom he worked. In doing so, he misappropriated S$53m from APBS. Chia was eventually convicted of cheating and forgery and sentenced to 42 years imprisonment.

2 Civil proceedings were duly brought against APBS by four international banks for the frauds Chia practised on them. The four banks, as victims of Chia's fraud, had understood that they were dealing with Chia as an employee of APBS. The plaintiff in Suit No. 774 of 2004 ("Suit 774") is Skandinaviska

Enskilda Banken AB (Publ) ("SEB"). The plaintiff in Suit No. 775 of 2004 ("Suit 775") is Mizuho Corporation Bank Ltd ("Mizuho"). The plaintiff in Suit No. 763 of 2004 ("Suit 763") is Bayerische Hypo-Und Vereinsbank Aktiengesellschaft ("HVB"). The plaintiff in Suit No. 781 of 2004 ("Suit 781") is Sumitomo Mitsui Banking Corporation ("Sumitomo"). Chia was also sued by the banks. He did not defend the actions.

3 The four actions were listed for trial at the same tranche. The trial lasted over 47 days. The first tranche of the trial spanned from 1 October 2007 to 30 November 2007. The second tranche of four days started on 7 January 2008. On the seventh day of the trial, the two Japanese banks retreated by abandoning their actions with the following consequences: (a) Mizuho discontinued Suit 775 upon terms as ordered by this court; and (b) Suit 781 commenced by Sumitomo was dismissed with costs. The trial continued in respect of Suit 774 and Suit 763.

4 The claims in Suit 774 and Suit 763 are for the repayment of the loans misappropriated by Chia on the footing that (a) he had actual or ostensible authority to enter into the various credit and loan facilities on behalf of APBS, and as such, APBS was contractually liable to repay the outstanding loans and interest ("the agency issue" in the contract claim); (b) damages on the basis that APBS as Chia's employer was vicariously liable for his fraud ("the vicarious liability issue" in the tort claim); and (c) damages in tort for negligence against APBS ("the negligence claim"). Claims (a) and (b) are common to both banks. Claim (c) is made by HVB alone. Separately, SEB has an alternative claim against APBS in restitution ("the restitution claim"). APBS has denied liability in respect of all the claims. It has also brought a counterclaim in restitution, for knowing receipt and dishonest assistance against SEB.

5 This judgment is my decision on Suit 774 and Suit 763. Although the two actions are separate and each action arose from different factual matrices, and that different considerations apply to each separate case, there are important common legal questions that affect them all. In addition, some of the legal issues also overlap. For case management considerations, direction was given that evidence adduced at the trial in one action may be used in the other action where the evidence adduced in one action is relevant to the pleaded case in the other action. Obviously, evidence adduced in the one action that is to be used in the other is subject to the usual evidential rules on admissibility and hearsay; and the weight of the evidence must necessarily be circumscribed by the opportunity available to the opponent to test the evidence by cross-examination. Again for case management considerations, SEB began its case first and gave evidence. HVB followed thereafter. APBS opened its case and concurrently led evidence for both actions. In this judgment, any differences between the banks are distinguished and dealt with separately.

6 For convenience, I shall refer to the plaintiffs in Suit 774 and Suit 763, collectively as "the banks" and, where necessary, individually by name. It is appropriate to state at the outset that even though many issues and arguments have been advanced, most of them are peripheral; as such, they do not need to be explored in detail, and in some instances, not at all. However, some points are, nevertheless, relevant in that they throw light upon the central issues to be resolved. In the circumstances, the approach taken in this judgment is to discuss factual issues, and to make findings upon them, that the court considers are important to resolve the central issues in the respective actions. To adopt any other approach would make this judgment unnecessarily longer and even more burdensome than it otherwise would be. The same approach is adopted in respect of the many authorities cited by the parties. It must be noted that I have taken into account the various disputes recounted in the evidence when deciding the central issues even though I have not made specific findings on each and every one of them.

The witnesses

7 Three witnesses gave factual evidence on behalf of SEB. They were Mohammad Ali Mohd @ Eddie Amin ("Amin"), Valerie Hui Yin Tan ("Valerie Tan") and Gerard Lee Cheow Khim ("Gerard Lee"). The witnesses of facts called by HVB were Matthias Zimmermann ("Zimmermann"), Tan Hwee Koon ("Hwee Koon"), Peter Vassiliou ("Vassiliou") and Cheah Soo Lee. The witnesses of facts called by APBS were Christopher Leong Chi How ("Christopher Leong"), Teo Hun Teck, Jimmy Tan Haw Kong ("Jimmy Tan") and Quek Peck Leng. There were seven expert witnesses. Of the seven, David Norman Hudson ("Mr Hudson") and Tan Boon Hoo ("Mr Tan") gave expert evidence, on behalf of APBS, in relation to banking practice and procedure. Mr Paul James Laurence Rex ("Mr Rex") gave expert evidence, on behalf of HVB, in relation to banking practice and procedure. Mr Terence Michael Potter (Mr Potter") gave expert evidence, on behalf of HVB, on the system of internal controls in corporations. Mr Stephen Armstrong, on behalf of HVB, testified on the pre-employment screening that could have been done prior to hiring Chia. On the quantification issue in relation to the claim in restitution, Mr Kon Ying Tong ("Mr Kon") gave expert evidence, on behalf of SEB, and Mr Goh Thien Pong ("Mr Goh") gave expert evidence on behalf of APBS. I will be considering the evidence of the witnesses in this judgment in relation to the issues to be decided. Where required, I will record my impression of the witnesses, and my assessment of the evidence of the witnesses.

The undisputed facts

8 In the course of the judgment, I will deal with the facts that are strictly relevant to discuss the factual issues, and to make findings upon them. Notably, APBS does not challenge the various visit reports or call memoranda produced by SEB and HVB respectively. The reports are the bank officers' notes of meetings with Chia. Discussions on the different credit and loan facilities that Chia orally requested from time to time were recorded and they formed the basis of the applications put up to the various departments or committees in the banks for consideration and approval. A summary of the events leading to the facilities granted by SEB and HVB respectively are set out in Appendix I to this judgment. Notably, APBS accepts the banks' account of the different reasons given by Chia for the company requiring the credit and loan facilities. However, APBS takes issue with the reasonableness and/or plausibility of the reasons, arguing that there were "red flags" or warning signs that the banks failed to appreciate, and their misfortune was the consequences of their failure to take proper precautions. Significantly, an important feature of the case is the standard requirement of the banks that its corporate borrowers provide certified extract of the relevant minutes that recorded the board resolution approving the particular transaction and authorising execution of the contractual documentation including giving individuals signing delegated authority to sign it. This standard requirement was imposed as a "condition precedent" or "pre-condition" in the SEB facility letters and the HVB's Agreement for an Amortising Term Loan ("the HVB loan agreement") (see [19] - [23] below).

9 Chia's fraudulent activities involved cheating his employer, APBS, and the banks. It is common ground that Chia provided false documents and forged certified extracts of the different board resolutions to the banks to obtain credit and loan facilities. It is not disputed that the banks relied on the forged mandates thinking that they were genuine. The series of fraud on the banks involved the creation of credit and loan facilities that were not recorded or reflected anywhere in the books and balance sheet of APBS. The bank accounts with SEB, namely the US$ Account No. 709XXXXX and S$ Account No. 709XXXXX opened in 1999 and operated solely by Chia, were in the name of APBS with Chia as sole signatory (hereafter collectively referred to as "the SEB Accounts" or individually as "the SEB US$ Account" or SEB S$ Account"). Tay Yong Kwang J in the criminal trial of Chia noted that moneys drawn from the credit and loan facilities between 1999 and 2003 were channelled into the SEB Accounts. Chia transferred a large part of those moneys to his personal bank accounts (Account Nos. 022-XXXXXX-X and 001-XXXXXX-X) with DBS Bank Limited ("DBS Bank") in Singapore, before making remittances to casinos in Australia, United Kingdom, Hong Kong, Malaysia, Cambodia and the

Philippines for his gambling activities there. Separately, Chia misappropriated S$53m from APBS. At the time of Chia's arrest, moneys purloined from the company's bank account with Oversea-Chinese Banking Corporation Limited ("OCBC") had been returned with interest into the same bank account ("OCBC Account") ostensibly on "maturity" of fixed deposits placed with Citibank NA ("Citibank"). The movement of funds in and out of the various bank accounts like the OCBC Account and the SEB Accounts was a façade to give the impression to SEB that the SEB Accounts were actively used. It is understood that a collective sum of S$117m remains owing to the four international banks, HVB, SEB, Mizuho and Sumitomo, under their respective banking facilities.

10 In its Opening Statement, SEB accepts that Chia hoodwinked his subordinates, who were co-signatories of the OCBC Account, to countersign a total of 22 cheques that enabled Chia to draw on the OCBC Account. SEB's claim in restitution concerns 18 OCBC cheques. Chia had procured the signatures of the other co-signatories by misrepresenting the purpose of the drawings. The APBS fraud also involved the creation of false lists of time deposits known as "Schedule of Fixed Deposits Committed" to deceive Chia's subordinates into believing that the surplus funds which represented cash in excess of the company's operational requirements were placed with Citibank on time deposits to earn interest. In reality, no surplus funds were placed on fixed deposits with Citibank. The moneys were diverted and misappropriated by Chia to fund and settle his gambling activities and debts, and to service the loans from SEB and the Japanese banks. APBS did not discover the misappropriation as Chia returned the principal and interest ostensibly on "maturity" of the fixed deposits.

11 I now turn to the credit and loan facilities granted by the banks. Brief details of the facilities are as follows.

The facilities granted by SEB ("the SEB Facilities")

12 The first of the SEB Facilities was an overdraft facility ("OD facility") in the sum of S$500,000. A foreign exchange dealing line ("FX Line") with a settlement limit of US$5m was also made available to APBS. The facilities were orally requested by Chia on 28 December 1998 *before* he officially joined APBS on 20 January 1999. On 22 January 1999, SEB's officers met Chia at APBS's corporate headquarters. The OD facility and FX Line were approved on 1 February 1999. On 3 February 1999, Chia handed to SEB the following documents: (a) signed Facility Letter dated 2 February 1999; (b) account opening documents; and (c) a certified extract of the board resolution passed on 25 January 1999. On the same date, the SEB US$ Account and the SEB S$ Account were opened in the name of APBS with Chia as sole signatory. The certified extract of the board resolution passed on 25 January 1999 was returned to Chia as it was not in order, and a replacement certified extract of the board resolution passed on 3 February 1999 was handed to Amin on February 1999. The OD facility was for three months. It was extended in April 1999 from May 1999 to August 1999. On 21 July 1999, SEB extended the OD facility to 30 November 1999.

13 Between October and November 1999, Chia requested an increase of the OD facility to S$3m. He also requested an increase of the settlement limit of the FX Line to US$10m. By way of an Amendment Letter dated 11 November 1999, SEB offered the increases sought by Chia. On 12 November 1999, Chia handed to SEB the following documents: (a) signed Amendment Letter dated 11 November 1999; and (b) certified extract of the board resolution passed on 12 November 1999.

14 On 12 June 2000, Chia requested a short-term loan facility of US$8m. Approval was given by SEB's Regional Credit Committee, and by way of a Facility Letter dated 26 June 2000, SEB made an offer for the Money Market Facility ("MM Line") in the sum of US$8m. On 28 June 2000, Chia provided SEB with relevant documents including (a) the signed Facility Letter dated 26 June 2000; and (b) certified extract of the board resolution passed on 27 June 2000.

15 On 6 November 2000, Chia requested SEB to increase the MM Line to US$10m. SEB approved the application and the offer was made by way of an Amendment Letter dated 13 November 2000. On 22 November 2000, Chia handed to SEB (a) the signed Amendment Letter dated 12 November 2000; and (b) certified extract of the board resolution passed on 20 November 2000.

16 On 9 May 2002, Chia requested a further increase of the MM Line to US$15m. He also requested a medium term loan of US$20m. SEB was not agreeable to grant the medium term loan, but agreed instead to increase the MM Line by an additional US$5m to US$15m. Chia then asked for the MM Line to be increased to US$25m rather than US$15m. SEB agreed, and by way of an Amendment Letter dated 24 July 2002, SEB offered to increase the MM Line to US$25m. On 7 August 2002, Chia handed to SEB (a) the signed Amendment Letter of 24 July 2002; and (b) certified extract of the board resolution passed on 2 August 2002.

17 In January 2003, Chia again requested an increase in the MM Line to US$50m. SEB did not approve this request.

18 As at 24 October 2002, a total sum of US$25m was drawn down from the MM Line. It is SEB's case that the drawing instructions issued after 24 October 2002, namely, the two drawing instructions made on 24 March 2003 for US$13m, and on 21 May 2003 for US$12m, were rollovers of the drawings made earlier (see [324] below). SEB is seeking judgment for US$26,559,371.94 due and owing under the MM Line as at 31 August 2004; or alternatively, S$29,468,723.30 being moneys drawn down from the MM Line and unjustly received by APBS at the expense of SEB.

19 It was a common and standard requirement of SEB to ask, on each occasion a facility was granted or increased, for a certified extract of the corporate borrower's board resolution. That standard requirement was couched and expressed in terms of a condition precedent of the facility. Specifically, the Facility Letter dated 2 February 1999 for S$500,000 overdraft read as follows:

> 7 . Conditions Precedent: Availability of the Overdraft Facility is subject to the Lender having received all of the following prior to the utilisation of the Overdraft Facility:
>
> a) The copy of this Facility Letter duly signed and accepted.
>
> b) A certified true copy of the Borrower's board resolution approving the Overdraft Facility, accepting this Facility Letter, appointing authorised signatories to sign this Facility Letter and appointing the authorised signatories on the Signature Cards below.
>
> c) Signature Cards duly executed in duplicate.
>
> d) A certified true copy of the Certificate of Incorporation and Memorandum and Articles of Association of the Borrower.
>
> e) Such other documents as the Lender shall reasonably require.
>
> …

20 There was a similar condition precedent for the FX Line offered in February 1999. It read as follows:

> …

Prior to any utilisation of the FX Line, the Company shall deliver to the Bank, in form and substance acceptable to the Bank, the following:-

a) a copy of this letter signed by duly authorised officials accepting on behalf of the Company the terms and conditions set out herein;

b) a certified true copy, by a Director or the secretary of the Company, of a Board of Director's Resolution authorising the appropriate officials to act on behalf of and to bind the Company in the acceptance of the terms and conditions of the FX Line; and

c) a certified true copy, by the Director or the secretary of the Company, of the Certification of Incorporation and the Memorandum and Articles of Association of the Company.

…

21 A similar condition precedent appeared in the Facility Letter dated 26 June 2000 for the MM Line in the sum of US$8m, and it read as follows:

7. Conditions Precedent: Availability of the MM Facility is subject to the Lender having received all of the following prior to the utilisation of the MM Facility:

a) The copy of this Facility Letter duly signed and accepted.

b) A certified true copy of the Borrower's board resolution approving the MM Facility, accepting this Facility Letter, appointing authorised signatories to sign this Facility Letter and appointing the authorised signatories on the Signature Cards below.

c) Such other documents as the Lender shall reasonably require.

…

22 As for the increases to the existing facilities, two of the Amendment Letters called for board resolutions: (a) SEB's letter dated 13 November 2000 to amend Facility Letter dated 26 June 2000; and (b) SEB's letter dated 24 July 2002 to amend Facility Letters dated 26 June 2000 and 13 November 2000. The last paragraph of the SEB's letters concluded as follows:

In order to accept the above amendments, kindly execute, date and return to us a copy of this letter, together with a copy of the Board of Directors' Resolution certified as true copy by the Chairman and/or Secretary, duly authorising the acceptance of this amendment letter.

Loan granted by HVB pursuant to the agreement for an amortising term loan dated 21 March 2003 ("the HVB Facility")

23 Attempts to start a banking relationship with APBS began in 2001, but the earlier approach was not successful. In August 2002, discussions restarted between HVB and Chia, and this led to HVB granting in March 2003, a three-year amortising term loan for US$30m in the name of APBS. A formal loan documentation entitled "Agreement for an Amortising Term Loan" and dated 21 March 2003 was signed by Chia and witnessed by HVB's Hwee Koon ("the HVB Facility" or "the HVB loan agreement"). The loan was drawn down on 25 March 2003 purportedly to finance a new bottling line. The loan was disbursed to the SEB Accounts. It was a condition precedent of the HVB Facility that the corporate

borrower furnishes to HVB a certified true copy of the borrower's board resolution. Clause 2 of the HVB loan agreement read as follows:

> 2. CONDITIONS PRECEDENT
>
> The obligation of the Bank to advance and/or disburse any part of the Facility or allow any drawdown shall be subject to the condition precedent that the following documents in form and substance satisfactory to the Bank have been delivered to the Bank :-
>
> 2.1.1 A copy, certified true and up-to-date by a duly authorised officer of the Borrower of its Memorandum and Articles of Association and Certificate of Incorporation, evidencing the legality of the existence of the Borrower and its activities;
>
> 2.1.2 A copy, certified true by a duly authorised officer of the Borrower of the Corporate Resolutions of the Borrower for the transactions contemplated herein, authorising appropriate persons to accept, execute and deliver this Agreement on behalf of the Borrower and to take any action contemplated in this Agreement (including but not limited to the operation of the Facility), and to execute all other related documents;
>
> 2.1.3 A duly certified list of specimen signatures of the respective persons referred to in Clause 2.1.2 above;
>
> 2.1.4 General Business Conditions of the Bank duly executed by the Borrower;
>
> 2.15 Any other approval, consent or document which the Bank may reasonably require.

The claim in contract: The agency issue

General

24 At the forefront of the banks' case and central to their arguments is the authority of Chia which formed the basis of the claims in contract and in tort. In the contract claim, the question for decision is whether the SEB Facilities and the HVB Facility are binding on APBS so as to be enforceable by the banks against APBS. The answer to that question rests on the authority of Chia, whether classified as actual or ostensible authority, to bind APBS. The banks concentrate on two "internal documents", namely, the "Position Description" for the job of Finance Manager and the 1998 Group Treasury Policy dated 23 July 1998 ("1998 GTP") which was revised in the year 2000 by the Group Treasury Policy dated 28 November 2000 ("2000 GTP"), to argue that the "internal documents" as a matter of construction do not limit the scope of Chia's actual authority to enter into the SEB Facilities and the HVB Facility. However, relevant to the authority debate is the important standard requirement for a certified extract of a board resolution approving the particular transaction and authorising execution of the contract including giving individuals signing delegated authority to sign it. One consideration in the authority debate is the effect this standard requirement, if any, on the "internal documents". A question that arises is whether the office of Finance Manager and head of finance carried with it implied actual authority or ostensible authority to enter into the SEB Facilities and HVB Facility without the sanction of the board. One other pertinent question on ostensible authority is whether the banks' standard requirement for a certified extract of a board resolution itself sidelined the application of *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 ("*First Energy*"), which was not a forgery case, but upon which the banks placed heavy reliance.

25 Specifically, the banks argue that Chia had deceived the banks by putting forward forged

documents as genuine, and in doing so Chia was acting within his actual or ostensible authority. In examining this main issue, which depends on the normal principles of the law of agency, I have to first look at Chia's actual authority (express or implied) given the arguments advanced by the banks, and then his ostensible authority. In the end, the case as I see it turns solely on Chia's apparent authority.

Overview of the positions taken by the parties on the agency issue

SEB's case

26 In its closing submissions, SEB maintains that Chia had actual authority to: (a) approach banks to source for and secure adequate banking facilities on behalf of APBS; (b) communicate and warrant the validity of board resolutions; (c) manage credit facilities on behalf of APBS; (d) ensure the proper use of APBS's bank accounts; and (e) manage surplus funds on behalf of APBS. Furthermore, there is no basis for APBS to assert that SEB should have known of any purported restrictions imposed by any GTP on APBS's ability to deal with banks, or that SEB should have known of Chia's restrictions to deal with banks. SEB was entitled to deal with Chia as Finance Manager and head of finance of APBS. In his capacity as Finance Manager, he had all the usual (in the sense of implied actual authority) or ostensible authority to deal in all aspects of the banking relationship with SEB. Therefore, APBS is liable in contract to repay the sum of US$26,559,371.94 under the MM Line together with contractual interest at the rate of 4.25% per annum above SEB's cost of funds prevailing from time to time.

HVB's case

27 Chia's actual authority (express or implied) included:[note: 1]

(a) dealing, liaising and communicating with banks including HVB in relation to the HVB Facility;

(b) submitting to banks the requisite facility documents and/or executing the same including the HVB Facility documents;

(c) providing instructions to banks on the operation of the facilities and accounts; and

(d) making representations to banks on the requirements, requests and decisions of APBS, including the representation that the documents submitted to the banks are genuine and APBS's board had approved the HVB Facility.

28 In so far as HVB accepted the forged board resolution as the authorisation for APBS to enter into the HVB Facility, HVB was relying on Chia's representation that the certified extract of the board resolution was genuine and duly executed. In making such a representation, Chia was doing something he was actually or ostensibly authorised to do. Neither the presence of fraud or forgery, nor the Group Treasury Policy (which was internal and not disclosed to the banks at the material time) would affect the arguments on ostensible authority. In dealing with the banks, including representing that the documents submitted were genuine, Chia was doing what a Finance Manager would normally do. APBS is, therefore, liable in contract to repay the sum of US$32,002,332.85 (outstanding as at 20 September 2004) under the HVB Facility together with contractual interest at the rate of 5.036% per annum from 21 September 2004 to the date of actual payment.

APBS's case

29 APBS denies that Chia was acting within his authority, actual or ostensible. It was not within

Chia's authority to negotiate with the banks for banking facilities, forged board resolutions and documents, make himself sole signatory, and to deliver the forged documents to the banks in respect of the facilities. In closing submissions, APBS maintains that:

(a) The financial functions of APBS comprised accounting, costing, budgeting, payroll and bookkeeping. Treasury functions were outsourced to F&N Group Treasury. Chia's finance functions were purely operational; he ensured the proper use and operation of APBS's existing bank accounts and facilities, and he would only deal with banks with which APBS had an authorised relationship.

(b) It was not Chia's responsibility to provide the banks with the constitutional documents and board resolutions.

(c) What caused the fraud was the banks' willingness to take on huge unwarranted risks and lack of due diligence.

(d) APBS never once represented that Chia had any authority as alleged.

(e) In any event, the forged board resolutions constituted a nullity to begin with, particularly when the forgeries concerned are those in a "strict" sense, and not in a "loose" sense as distinguished by case law.

Actual authority (express or implied)

Express authority: The forged mandate

30 Actual authority in its express form is conferred where the company through its board of directors passes a resolution that expressly gives consent to the director or officer concerned to act on its behalf to negotiate and execute a particular contract. This is the most certain way to ensure that the person signing has authority, and the situation here was no different as the banks had asked for the appropriate board resolutions. In *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 ("*Hely-Hutchinson*"), Lord Denning MR (at 583) said:

> [A]ctual authority may be express or implied. It is *express* where it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their numbers to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office.
>
> [Emphasis added]

31 As stated, the undisputed evidence is that the banks required the credit and loan facilities discussed with Chia to be referred to the board of APBS for approval (see [19] - [23] above). Amin recalled passing to Chia, on his first visit to Chia's office on 22 January 1999, the account opening forms as well as a sample board resolution. In the case of HVB, Hwee Koon sent to Chia on 5 March 2003, HVB's checklist for account opening documents which listed down, amongst other documents required by the bank, a certified copy of the board resolution to authorise the acceptance of the facility. Clearly, the banks and Chia were talking to each other in the full knowledge and expectation that, at the end of the discussions, express authority to conclude the transaction in the form of an appropriately worded board resolution must be provided. The banks duly imposed as a condition

precedent of the facilities offered, production of certified extracts from the minutes of the directors' meeting to ensure that the appropriate resolutions have been passed approving the transactions, authorising execution of the transactions and giving the individuals signing delegated authority to sign the contracts. The condition precedent calling for the certified extract of a board resolution in and of itself carries the implication, and I so find, that the banks appreciated and knew that Chia had no actual authority to bind the company, and that the power to give approval to an application for a loan and to execute the documents necessary to give effect to the transaction was the domain of the board of APBS. A point to note is that the banks had also asked for and were given certified copies of APBS's Memorandum and Articles of Association. It is clear from the Articles of Association of the company that the borrowing powers are to be exercised only by the directors. In other words, the company requires the consent of the directors to borrow money for the company's purposes. It is not disputed, and the evidence is, that without a board resolution, the banks would not have gone ahead with the transaction.

32 Chia provided mandates purportedly as satisfactory assurance that the board of APBS had approved the transactions and gave Chia specific authority to execute singly on its behalf the contracts and to open the SEB Accounts in the name of APBS. However, in reality, there were no actual board approvals. The certified extracts were forged – they had not been executed by the persons who had purportedly signed them. Chia's "authority", if at all, emanated from the forged resolutions which his employer was not privy to. What is the effect of this evidence?

33 The certified extracts of the various board resolutions were false, and they were of no legal effect. APBS through its board of directors did not approve the SEB Facilities and HVB Facility, nor formally authorised Chia to enter into any of the facilities on its behalf. In my judgment, the invalidity of the SEB Facility Letters and HVB Facility signed by Chia followed as a matter of law from the fact that the delegated authority to Chia was a forgery. In *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep 373, a forged mandate was used to open an account in the name of a company. The court held that there was no banker and customer relationship between the bank and the company. Similarly, in *Ruben v Great Fingall Consolidated* [1906] AC 439 ("*Ruben*"), the secretary of the defendant company had forged the names of two directors on a share certificate and had affixed the company's seal without authority. The secretary obtained a loan of £20,000 through a firm of stockbrokers using the shares as security, and then absconded. The brokers claimed that the company was estopped from relying on the secretary's fraud to resist the claim. The House of Lords held that the brokers could not recover.

34 Therefore, in the absence of any express authority to act for the particular purpose of the transaction in question (in this case to establish a banking relationship with the banks by opening the SEB Accounts, and by binding APBS in respect of the SEB Facilities and HVB Facility), it follows, quite rightly and I so hold, that there was no implied actual authority which typically arose incidentally for the effective execution and performance of the express authority in the usual way.

35 As to whether a forged document is a nullity for *all* purposes, or is estoppel an exception that can be set up against a principal for the fraudulent act of the agent if the agent was acting within his ostensible authority, the matters outlined here are discussed below under the heading "Ostensible Authority".

General authority of the Finance Manager

36 This part of the judgment discusses the question whether the "internal documents" as a matter of construction allowed Chia to commit APBS to the SEB Facilities and the HVB Facility without the sanction of the APBS board. The banks' arguments on general authority of the Finance Manager are

as follows. Counsel for HVB, Mr Alvin Yeo, SC ("Mr Yeo"), points out that Chia was described in the "Position Description" for the job of Finance Manager as a member of senior management, and his duties include directing and controlling APBS's financial activities, determining funding requirements and managing relationships with banks and financial institutions. In addition, APBS had said that Chia as Finance Manager was also required to perform the duties set out in the 1998 GTP which was revised in the year 2000 by the 2000 GTP. For convenience, the 1998 GTP and 2000 GTP are collectively referred to as "the GTP". Mr Yeo's point is that Chia was authorised by the GTP to place short term fixed deposits, and that meant that Chia, so the argument develops, would necessarily have had to deal, liaise and communicate with banks and submit (or arrange to submit) the requisite documentation to the banks in his usual course of work. Given all these matters on the extent of Chia's duties as head of the Finance Department, the internal documents like the "Position Description" for Finance Manager and GTP are to be given a sufficiently wide interpretation to cover the entry into the HVB Facility. A second and separate argument canvassed by both Mr Yeo and counsel for SEB, Mr Steven Chong, SC ("Mr Chong"), is that Chiai would and did have the (actual) usual authority for representing that the board resolutions and documents he submitted to the banks were genuine.

37 Mr Yeo submits that other representations were made to HVB. They include:

(a) APBS was interested in negotiating for the HVB Facility;

(b) APBS's board had approved the HVB Facility;

(c) APBS's board had authorised Chia to execute the HVB loan agreement and the Notice of Drawdown;

(d) The bank account into which the amount under the HVB Facility was to be disbursed was a genuine account.

38 Mr Chong seeks to rely in these civil proceedings some of the facts in Tay Yong Kwang J's decision in the criminal trial against Chia (see *PP v Chia Teck Leng* [2004] SGHC 68); in particular, Tay J's description of Chia as the "commander of the guards" and not "a mere corporate sentry". Tay J noted that Chia was "the man responsible for all financial, accounting and bookkeeping matters of APBS". Mr Chong starts off by saying that given Chia's position in the APBS hierarchy, the evidential burden of establishing facts to support the defence raised by APBS, namely, the lack of authority in Chia, is on APBS. In the absence of APBS calling evidence to contradict Tay J's description of Chia as the "commander of the guards" in the company, Mr Chong urges the court to adopt the same findings as to Chia's unrestricted authority within the finance department of APBS. It is said that matters in the statement of facts admitted by Chia in support of the charges brought against Chia are to be taken as correct and admissible in these proceedings in the absence of evidence adduced by APBS. SEB also relies on Chia's statements in mitigation as Chia's admission that what he did was what he was allowed to do by APBS. I pause here to comment that if the statements have any evidential value (and I have reservations as to their admissibility), they would in the context of apparent authority fall on the side of the notion of a self-authorising agent. It is trite law that representations by Chia as to his own authority cannot assist the banks. Ostensible authority of Chia must be founded on words or conduct of the company and that topic will be discussed later in this judgment.

39 Counsel for APBS, Mr Davinder Singh, SC ("Mr Singh"), explains that within APBS, the Finance Manager heads the finance department of APBS, and it is the most senior finance position within APBS. He answers to the General Manager but he also has a functional reporting line to the Finance

Director of APBL. Apart from short-term placements of surplus funds in fixed deposits, the finance department's responsibility was to manage the day to day finance of the operations. As such, the finance department (and hence Chia) was not empowered to perform "treasury" functions like:

(a) sourcing, negotiating and documenting credit and other banking facilities;

(b) managing forex, money and capital market funding;

(c) liaising with banks for the purpose of opening and closing bank accounts, changes of signatories and bank guarantees.

40 Mr Singh said that the Agreement to provide Corporate Services signed in 1988 ("Corporate Services Agreement") passed responsibility to the F&N Group Treasury to arrange the opening of bank accounts and/or acceptance of facilities, which included communication of board approvals to the banks.

41 The banks disagree arguing that there is nothing in the GTP that expressly prohibits the Finance Manager from being involved in negotiations, discussions or communications with banks (whether solely or together with the F&N Group Treasury) for facilities or bank accounts. The Corporate Services Agreement was merely to provide "back-up services" in dealing with banks and other financial institutions in the provision of funds and other banking and credit facilities. Contrary to the position adopted by APBS, the internal documents like the GTP and the "Position Description" for the job of Finance Manager as submitted did not limit the scope of Chia's actual authority. The banks' assertions on the specific duties or matters that justify the conclusion that Chia was authorised (express or implied) to bind his employer as a senior employee of APBS relate to:

(a) Sourcing for and to secure adequate banking facilities;

(b) Communicating APBS's financing requirements to banks;

(c) Deposit surplus funds; and

(d) Representing the authenticity of resolutions and documents.

42 The banks' arguments have to be taken at two levels: express actual authority and implied actual authority. At the first level, the contention is that the "internal documents" are to be given a sufficiently wide interpretation to cover the authority to enter into the SEB Facilities and HVB Facility. At the second level, the argument is that it is to be inferred that Chia was authorised to commit the company. Professor Reynolds in *Bowstead & Reynolds on Agency* (Thomson Sweet & Maxwell, 18th Ed, 2006) ("*Bowstead*") describes, usual authority (*ie*, implied actual authority) at para 3-024 in the following manner:

> An agent who is authorised to conduct a particular trade or business or generally to act for his principal in matters of a particular nature, or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such trade or business, or of matters of that nature, or is within the scope of that class of acts, and whatever is necessary for the proper and effective performance of his duties; but not to do anything that is outside the ordinary scope of his employment and duties.

43 The short answer to the general authority question posed in [36] is clearly no. It must be

remembered that the banks uncompromisingly required board resolutions to cover the SEB Facilities and the HVB Facility, and imposed the requirement as a condition precedent. As such, it is my view that it is *not* an argument open to the banks to validly make that Chia had general authority under the "Position Description" for Finance Manager and the GTP to enter into the SEB Facilities and HVB Facility and bind APBS. The testimony of Zimmermann, HVB's head of International Desk at the material time, which is of general application, summed up the thinking and sentiments of the banks on the importance of a board resolution. Zimmermann said that the banks would talk to anyone from an organisation with some knowledge of what the corporate borrower wanted, but the banks, ultimately, would want to see a board resolution empowering specific individuals to commit the company to the transaction. HVB would still insist on a board resolution even if it had been negotiating with the Chief Executive Officer, or a director. The board resolution could give to either the same person the bank had been speaking to, or to a different individual or individuals delegated authority to sign and act on the company's behalf. In cross-examination, Zimmermann explained:[note: 2]

Q: … Hypo was satisfied that Chia Teck Leng could not without a board resolution, accept facilities?

A: Like … like every other customer, yes

Q: … In fact, as I said earlier, even if it was the CEO, Hypo would require a board resolution; right?

A: That's right

44 In any event, there are obstacles, both legal and factual, in the way of the banks' attempt to rely on the terms of the "Position Description" for Finance Manager, and the rules and guidelines in the GTP in support of the general authority of the Finance Manager to bind APBS so as to enforce the SEB Facilities and HVB Facility against it. In this regard, the focus is on, and depends upon, the contractual relationship between Chia and APBS. Naturally, what he does within the course and scope of his employment provides some evidence of his actual authority.

(1) The first consideration

45 It is an undisputed fact that Chia deceived the banks and his employer. The use of his employer's name was just as much a fraud on the banks as it was on APBS. As the evidence from the banks' factual witnesses clearly indicated, the reputation and creditworthiness of a corporate borrower is of great importance. The banks were generally concerned with the standing and financial soundness of APBS, and this included its cash-flow position. In my judgment, it has not been established that APBS was aware at the material time that its surplus funds were misappropriated by Chia. Neither has it been established that APBS was aware that credit and loan facilities were obtained in its name. As an aside, I note that Tay J stated in the criminal trial of Chia that the credit and loan facilities were obtained from the banks without the consent and knowledge of APBS. Coming back to the evidence before me, the company's knowledge of the fraud in question must be based on the rules of attribution, and no particular person in APBS has been identified as the person whose knowledge is attributable to the company as its directing mind. It is, consequently, not clear whose impropriety should be under scrutiny. In any case, in its Opening Statement, SEB accepts that Chia hoodwinked his subordinates who were co-signatories of the OCBC Account to countersign OCBC cheques that enabled Chia to draw on the OCBC Account for the alleged purpose of placing surplus funds on fixed deposits with Citibank. Notably and it is common ground that there is no record of the SEB Accounts in the company's financial records, and the bank was not asked to provide audit

confirmation of the borrowings. SEB was not named as one of its principal bankers in the 1999 and 2000 Annual Reports of APBS, and the Directors' Report and audited financial statements for the financial years 2001 and 2002. Only OCBC was named as APBS's principal banker. Reliance on bank statements relating to the credit facilities that were sent to the company's address but "intercepted" by Chia as well as the OCBC advices showing the remitting bank as SEB are insufficient to prove APBS's knowledge. Undeniably, Chia as employee breached his duty of fidelity and good faith owed to his employer.

46 In my judgment, Chia's fraud on his employer and the banks is necessarily determinative of the banks' authority debate. This is because Chia's actual authority (express or implied), if any, is impliedly subject to a condition that it is to be exercised honestly and on behalf of the principal. Essentially, fraud nullifies actual authority of the agent as was the case here, and I so hold. If legal authority is needed, I refer to *Hopkins v TL Dallas Group Ltd* [2005] 1 BCLC 543 ("*Hopkins v TL Dallas*"). Lightman J reiterated the principle at [88] as follows:

> The grant of actual authority to an agent will not normally include authority to act for the agent's benefit rather than that of his principal and therefore, without agreement, the scope of actual authority will not include this. The grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal: *Lysaght Bros & Co v Falk (1905) 2 CLR 421*. It follows that, if an act is carried out by an agent which is not in the interests of the principal, for example signing onerous unconditional undertakings, then the act will not be within the scope of the express or implied grant of actual authority. As a result there cannot be actual authority:
>
> > 'the agent is simply not authorised to act contrary to his principal's interests: and hence that an act contrary to those interests is outside his actual authority. The transaction is therefore void unless the third party can rely on the doctrine of apparent authority' (*Bowstead* para 8-218).

47 Lightman J at [89] concluded:

> … *Bowstead* suggests that … acting fraudulently or in furtherance of own interests will by its very nature nullify actual authority, but not apparent authority. I respectfully agree.

48 In the result, applying the principles stated, the case as put up by SEB and HVB respectively in reliance on the provisions of the "Position Description" for Finance Manager and the GTP as bases of actual authority, whether express or implied, to enter into the SEB Facilties and HVB Facility is unfounded and is accordingly rejected. It is also clear, and I so find, that Chia in putting forward the forged documents as genuine was not acting within his actual authority, whether express or implied.

(2) The second consideration

49 The issue of Chia's authority has to be considered and determined at the time of the particular transaction in question. The duties and responsibilities gathered from the "Position Description" for the job of Finance Manager and the GTP are inconclusive. What Chia was exactly required to do within the course of and scope of his employment would provide some evidence of his actual authority (express or implied). Accordingly, evidence must be led by the banks (and this legal and evidential burden has not been discharged) on what Chia was exactly asked to do, and in fact did, and whether his employer acquiesced in what he did. There is Christopher Leong's evidence that Chia had no authority to carry out treasury functions, and that he did not have authority to communicate board

approvals including board resolutions.[note: 3]

(3) The third consideration

50 This consideration follows from the second. Each specific duty, individually or in combination, relied upon by the banks to support the conclusion that Chia was authorised (express or implied) to bind his employer are factually and legally unsustainable. If anything, the duties gathered from the internal documents, namely the "Position Description" for Finance Manager and the GTP as a matter of construction do not confer any relevant authority upon Chia in the way contended by the banks. The banks' contention suggests that Chia as the head of the finance department would be authorised to enter into any credit or loan facility involving a commitment of any size, and the only qualification was that it be for the day to day operational needs of the company. I am unable to accept this contention because it is not justified by the wording of the "internal documents" or commercial logic for supposing that the employee can do anything of the kind to expose the company to unlimited risks. I will now deal with the banks' assertions on the specific duties of Chia that are mentioned in [41] above.

(A) SOURCING FOR AND TO SECURE ADEQUATE BANKING FACILITIES

51 SEB claims that it was Chia's duty to source for and to secure adequate banking facilities on behalf of APBS. HVB confines its main assertion to Chia's implied actual authority to, *inter alia*, represent and warrant the authenticity of the board resolution and documents. However, Mr Yeo submits that the GTP is merely a "guideline", and that there is nothing in there that expressly prohibits the Finance Manager from being involved in negotiations or to communicate with the banks (whether solely or together with F&N Group Treasury). HVB also takes issue with the fact that the Corporate Services Agreement only contractually obliged F&N to provide "back-up services in dealing with banks and other financial institutions in the provision of funds and other banking and credit facilities".[note: 4]

52 In my view, the provisions in the GTP are rules rather than guidelines. It is clear from the language of cl 3.4 that Chia was required to perform the duties set out in the 1998 GTP. Clause 3.4 of the 1998 GTP provides:

> Procedures for sourcing credit facilities
>
> 3.4.1 Opco Finance Manager (with approval from the General Manager) will forward request for new or increase in credit facilities to [F&N] Group Treasury (via [APBL] Group Finance) for review.
>
> 3.4.2 Group Treasury will evaluate Opco's proposal. If the proposal is justified, Group Treasury will proceed to source and negotiate the facilities. In general, not less than three (3) quotes will be obtained. In locations where the financial system is less developed, the minimum number of quotes may be reduced to two (2).
>
> 3.4.3 Loan Agreements and Letters of Offer with financial institutions should be cleared with Group Treasury prior to their submission to Opco Board and APBL Board for acceptance.
>
> 3.4.4 Group Treasury will submit its recommendation of the proposed facilities to Opco Board and APBL Board for approval.

53 As a matter of construction, cl 3.4 deals with new or increases in existing credit facilities. I agree with Mr Singh that it is only after the new or increased credit facilities are put in place that the Finance Manager takes over the management of the facilities. It is not disputed that as Finance Manager, Chia was responsible for ensuring that "each business unit has adequate banking facilities"[note: 5] and to "manage relationships with … banks and other external financial institutions".[note: 6] However, that responsibility does not come with the right or discretion to ignore or override cl 3.4, and this construction is reinforced by cl 1.0 of the 1998 GTP which requires APBS, unless authorised by its parent APBL, to operate within the four corners of the 1998 GTP. This is clear from cl 1.0 which provides as follows:

> Any temporary deviations from these Policy guidelines to meet a particular situation require the approval of the Chief Executive Officer of APBL and subsequently to be approved by the Executive Committee of APBL. Permanent changes of these Policy guidelines should be reviewed by the APBL Audit Committee and approved by the Board of APBL.

54 SEB points out that nothing in the GTP (including cl 3.4) or any other document prohibits the *board of APBS* from directly sourcing for banking facilities without going through F&N Group Treasury. This is probably correct in a qualified sense. Christopher Leong's answer in cross-examination by Mr Yeo is confined to the powers of the board of APBS.[note: 7]

> Q. Let's assume that APBS board had approved the facilities with, say, Hypo. I know, as a matter of practice, F&N should do it – as in deal with the banks – but if APBS Finance wanted to do it, themselves, they could do it; correct?
>
> A. Yes, he could do it.

55 Contrary to the position adopted by the banks that the "internal documents" do not limit the scope of Chia's actual authority, the important distinction here is between the APBS board's prerogative to source for and obtain credit facilities which is very different from saying that the Finance Manager is similarly empowered without prior sanction. As stated, any deviation by the APBS board of the GTP requires approval from the Chief Executive Officer of APBL as stipulated by cl 1.0 of the 1998 GTP (see [53] above). To illustrate, the internal arrangement within APBS is such that even an APBS executive director, General Manager or Finance Manager must seek APBS board and APBL's clearance before proceeding in a manner contrary to cl 3.4 (*ie*, bypassing F&N Group Treasury). A failure to do so would mean that the individual did not possess the actual authority to directly source for credit facilities. This is clear illustration that Chia was not given implied authority by the acquiescence of APBS as he had to seek prior board approval and clearance before proceeding.

56 The matters illustrated in [55] above is consistent with Christopher Leong's testimony that the APBS finance department and its finance manager did not have authority to perform treasury functions which included sourcing, negotiating and documenting credit and other banking facilities and liaising with banks for the purpose of opening and closing bank accounts. Treasury functions as described were the responsibility of F& N Group Treasury.[note: 8]

(B) COMMUNICATING APB'S FINANCING REQUIREMENTS TO BANKS

57 The banks contend that key officers of APBS have actual authority to approach and deal with banks including the discussion of an intended facility with a bank notwithstanding the GTP. Mr Chong quoted the expert witnesses, Mr Hudson and Mr Tan, who testified on behalf of APBS as agreeing that

there was nothing wrong with Chia being the first point of contact and that Chia as the Finance Manager would be the proper person with whom the banks could have discussions with on financial matters. SEB also point to the fact that it was "well-known" within APBS's finance department and APBL that Chia was openly dealing with Citibank, and not through the F& N Group Treasury. I make three observations.

58 First, I agree with Mr Chong that the bank saw Chia as the first point of contact, and that was all. I have earlier at [31] referred to the respective testimonies of Amin and Hwee Koon that each talked with Chia in the full knowledge that at the end of the discussions board approval to cover the transaction was required. I have also referred to Zimmermann's testimony on this topic (see [43] above). Any argument that builds narrowly on the question of the general authority of the Finance Manager incidental to the particular position without regard to the condition precedent imposed by the banks is not open to the banks to make. It is factually unreal and misleading

59 Second, as stipulated, any deviation from cl 1.0 of the 1998 GTP required the sanction of both APBS and APBL. It is not the banks' case that there was an approved departure from cl 1.0. Furthermore, in the context of cl 3.4 of 1998 GTP, the Finance Manager's general authority to liaise and discuss with banks on matters relating to the existing accounts does not include the specific function like sourcing of new credit and loan facilities. Notably, as I have stated, there is no evidence adduced by the banks on what Chia was actually asked to do and did, and whether his employer acquiesced in what he did (see [49] above).

60 Third, Chia's direct dealings with Citibank (which related to the reactivation or operation of a *deposit account*) was not compelling evidence in favour of the banks. One should not confuse authority to source for general banking facilities to deposit surplus funds *and* borrowing facilities. The two (deposit and borrowing) are quite distinct and SEB's approach to conflate the two is wrong and misleading. The responsibility for borrowing has been "devolved" to F&N Group Treasury. Even if APBS's board had the power to recall back this function, but until that was done, the responsibility remained with F&N Group Treasury. Notably, a director of APBS is not empowered to borrow on behalf of the company unless authorised by the board; what more in the case of the Finance Manager who is not a director but only a senior employee of a department. In the circumstances, Chia did not possess the actual authority (express or implied) to approach the banks on his own for new credit facilities without reference to APBS's board (*ie*, authorised by APBS's board). It is not surprising to find as was the case here evidence of the banks requiring from APBS certified extract of minutes of board meeting to ensure that the appropriate resolution has been passed approving the loan facility, authorising execution of the contract and giving selected individuals signing delegated authority to sign it. The true limit of Chia's authority would have been marked by the express authority given to him as the agent named in the resolution, if the certified extract of the board resolution was genuine. Significantly, and I repeat cl 3.1 of the 1998 GTP explicitly states that "*the terms and conditions of all borrowings of APBL and [APBS] must be approved by the [APBL's] Board of Directors*".

(C) DEPOSIT OF SURPLUS FUNDS

61 APBS admits that Chia had actual authority to place in fixed deposit surplus funds in excess of the operation needs of APBS. As stated earlier, placing money in fixed deposit is different from borrowing money for the company.

(D) AUTHORITY TO REPRESENT THE AUTHENTICITY OR GENUINENESS OF BOARD RESOLUTIONS AND DOCUMENTS

62 The assertion here is best understood as an argument that is being put forward on alternative bases. The concept of usual authority is understood in two senses as explained in *First Energy* where

Steyn LJ said (at 201):

> First, it sometimes means that the agent had implied actual authority to perform acts necessarily incidental to the performance of the agency. Secondly, it sometimes means that the principal's conduct in clothing the agent with the trappings of authority was such as to induce a third party to rely on the existence of the agency.

63 The first assertion is that as Chia was someone who had actual authority to deal with banks, he would also have the implied actual authority for representing that the documents he submits to banks were genuine. The second assertion, in the alternative, is that APBS had conferred apparent or ostensible authority on Chia to represent the genuineness of the board resolutions. The question there is whether Chia by putting forward forged documents as genuine was acting within his apparent authority. The latter inquiry extends to whether an agent who has no apparent authority to conclude a particular transaction binding on the employer as was the case here can still be held out as having apparent authority to make representations of fact such as to the authenticity of the resolutions and documents, or communicate the approval of the board. The second assertion is discussed in other sections of this judgment under the heading of "Ostensible Authority".

64 In this section of the judgment, the assertion that Chia was someone who had actual authority to deal with banks on APBS's financial requirements, and hence, he would have the implied actual authority for representing that the documents he submits to banks are genuine, is confined to usual authority in the first sense explained by Steyn LJ. I have already held that Chia did not possess any actual authority (express or implied) to negotiate and commit the company on the SEB Facilities and HVB Facility. To repeat, so far as actual authority is concerned, it is affected by the agent's fraud (see *Hopkins v TL Dallas*). It follows that there is no legal basis for the assertion that Chia had implied actual authority to represent the authenticity of any board resolutions or to put forward certified extracts of board resolution as genuine.

65 Moreover, Christopher Leong testified that Chia as the finance manager did not have the authority to communicate board approvals to the banks. This was the responsibility of F& N Group Treasury. Christopher Leong also clarified that board resolutions and constitutional documents would be handed over to the bank concerned by F&N Group Treasury (see his testimony set out in [74] below). He explained that this function was not expressly stated in the Corporate Services Agreement, but was a long and established practice. I have no reason to disbelieve Christopher Leong's testimony on this long and established practice borne out of a special relationship between F&N and APBS. Evidence of previous practice within a company would assist the court in determining what Chia as Finance Manager of APBS is reasonably expected to do within the context of the company. There is equally no countervailing evidence to the contrary, and I also found Christopher Leong to be a reliable witness. He came across as a fair-minded witness who gave his evidence in an impartial manner.

66 In fact, the banks' own evidence did not undermine Christopher Leong's testimony. In HVB's case, Zimmermann said that it did not matter by whom and how the board resolution was despatched.[note: 9] Hwee Koon said that even if the board resolution was delivered by courier, she would accept the board resolution as valid but would call Chia as a matter of courtesy to thank him for it.[note: 10] HVB would check and verify the certified extract of the board resolution. Again, the point here is that HVB's banking support department checked the documents received. Whether banking support checked properly is another matter.

67 Gerard Lee of SEB (head of Counterparty Risk Management ("CRM") at the relevant period)

agreed in cross-examination that the mere fact that it was the finance manager who had sent the forged documents to the bank was not sufficient by itself to satisfy the bank that board approval had been given. This is because CRM's officers were required to check and verify the documents including the certified extract of the board resolution upon receipt. Gerard Lee's answers in cross-examination are as follows:[note: 11]

Q: So therefore, *the mere fact that the finance manager sent these documents was not by itself sufficient to satisfy the bank that this account was authorised*, *and the facilities that were requested were authorised. The bank had to take further steps to verify*, right?

A: *Correct*

…

Q: Mr Lee, we are talking about chronology. Whoever sends the documents to you, *these are documents which purport to want to create a relationship with the bank; right?*

A: *Correct*.

…

Q: … *So in that context, whoever sends these documents to you, the bank still has to do its own verification to satisfy itself that these documents are proper, right?* …

A: *Correct*.

…

Q: … *So you agree with me that what Chia Teck Leng did and what you believed he had the authority to do, did not absolve the bank from doing its own checks, right?*

A: *Correct*.

…

Q: So you relied on the CEO's warranty that the information in the documents was correct; right?

A: Yes

[Emphasis added]

68 SEB's evidence is that CRM checked the documents and it was satisfied that they were "sufficient". Whether the CRM had checked properly is another matter, but the point here lies in SEB's evidence that documents that seek to establish a legal relationship between bank and the borrower must be checked. [note: 12]

69 In addition, the banks' standard requirement for the corporate borrower to provide a certified extract of a board resolution covering the transaction is objective evidence militating against their assertion that Chia had implied actual authority (incidental to his employment as Finance Manager) to warrant or put forward to the banks forged document as genuine. From this standard requirement, it is first plain that Chia as Finance Manager did not have actual authority (express or implied) to open bank accounts or borrow on behalf of the company unless so empowered by the board. Clause 3.1 of the 1998 GTP also explicitly states that "the terms and conditions of all borrowings of APBL and [APBS] must be approved by the [APBL's] Board of Directors". Zimmermann confirmed on behalf of HVB that without board approval, HVB would not have gone ahead with the credit and loan facilities.[note: 13] SEB's position is no different.

70 Second, the banks did not look upon Chia as someone with authority to warrant the genuineness of the certified extracts of the board resolutions. This is because the banks had expressly spelled out in the condition precedent clause the persons whom they regarded as being qualified to certify as a true copy the extract of the board resolution. For example, in cl 2.1.1 of the HVB loan agreement, certification of the extract of the board resolution was to be by a duly authorised officer (see [23] above). SEB had also asked for certification by a duly authorised officer or certification by either the chairman of the board, director or company secretary (see [19] - [22] above). Glaringly absent from the list of officers is the Finance Manager. The implication one draws from this is that the chairman of the board, director or company secretary are persons with direct and first-hand knowledge of the board meeting and of the resolution that was passed approving the particular transaction. The chairman of the board and the directors would know whether or not the directors had in fact resolved this in the terms of the board resolution. The company secretary whose function is to maintain accurate minutes of the resolutions of the directors is well placed to give the requisite certification. I am reinforced in my conclusion by Steyn LJ's observations in *First Energy*. Steyn LJ in *First Energy* stressed on the importance of first-hand knowledge at 204:

> … the managerial functions of a company secretary are today far greater than they once were. Mr. Ponting was HIB's company secretary. He attended negotiations in July. If he had been asked for a resolution of the board of directors of HIB approving the transaction, and if he had in error sent a document purporting to be such a resolution, it is surely possible, depending on the evidence, that he might have acted within his apparent authority by virtue of his position as company secretary. That would be so despite the fact that he plainly had no apparent authority to sanction the transaction. My reason for this tentative view is that a company secretary is known to be the employee specifically charged with keeping the minutes of board meetings.

71 As a reminder, one has to view the perspective of facts as they appeared to the banks at the relevant time that the transactions were purportedly accepted, and not as they subsequently appeared to the banks after Chia's arrest. The evidence is that it did not matter to the banks that the certified extract of the board resolution was not delivered by the finance manager. With that in mind, and from this perspective, certification in itself by an appropriate individual with personal knowledge of the terms of the board resolution runs counter to the banks' present assertion that Chia was authorised to indicate by communicating some consent on the part of the board of APBS to the transactions. Chia was not generally required at board meetings and, hence, did not have first-hand knowledge of board meetings. How could he then have implied actual authority to represent that the certified extracts of the board resolutions were genuine and the contents recorded in them were true; or to communicate the board's approval?

72 At all material times, the clear evidence is that the banks decided to accept the various

certified extracts of the board resolutions on the strength of the certification, ostensibly signed by directors of the company that the matters stated in the extracts had been passed as recorded, and it was *not* because Chia was putting forward forged documents as genuine. This verification of the documents point runs counter to the argument of Chia's implied actual authority to warrant that the certified extracts of the board resolutions were genuine or that the board had approved the transactions. The banks' position on verification of the signatures on the certified extracts of the board resolutions is discussed later (see [137] to [170] below). Suffice it to say that two important points - (i) verification of the certified extracts of the board resolutions received by the banks also include, in my judgment, checking the identity, designation and signature of the signatories to ensure that they have been properly executed, and (ii) the banks' case on Chia's ostensible authority (which will be addressed later) – run up against the same difficulties no less formidable than the allegation of implied authority under discussion here.

73 In response, SEB relies on cl l 3.5 of the 1998 GTP which it says places responsibility on Chia to ensure that APBS meets all stipulated obligations and financial covenants under borrowing facilities. SEB also referred to SEB's Facility Letter dated 26 June 2000 for the MM Line where in cl 18(b), SEB stipulated that "the execution and performance of this Facility Letter has been validly authorised by the appropriate corporate actions of the Borrower and when executed and delivered to the Lender will constitute valid and binding obligation of the Borrower in accordance with its terms."

74 The arguments there are misconceived. Consideration of the effect of cl 13.5 of the 1998 GTP, or cl 18(b) of the Facility Letter without reference to the terms of the condition precedent is akin to putting the cart before the horse. If anything, the terms of the condition precedent precede the operation of other clauses, and until the terms of the condition precedent are satisfied, none of the other clauses take effect. Moreover, cl 18(b) on the face of it is not intended to replace the operation of the condition precedent in question. Clause 13.5 cannot replace the bank's clear stipulations for certification. In my view, the argument fails on the ground of circularity. In addition, I accept Christopher Leong's testimony on cl 13.5. In re-examination, he explained:[note: 14]

…

Q: At what stage in the dealings with the banks are constitutional documents, such as the M&A and the board resolutions, handed to the bank?

A: After the board has approved.

Q: Right. And would that be before or after the acceptance by the company of the facilities?

A: No. It's together with the acceptance of the facility. It goes out in one bundle.

Q: Who would facilitate the handing over of these constitutional documents?

A: That's always been group treasury.

…

Q: … What is [cl] 3.5 meant to cover?

…

A: 3.5 is meant to cover subsequent use of the facility. There are certain covenants to be complied in every year, based on ratios, based on debt covenants. These are the things we are referring to.

A: We will have arranged the board resolution together with all the constitutional documents, together with the acceptance of the bank facility, with the specimen signature cards, all put together in one bundle, given to the bank.

Q: You say "we". Who do you mean?

A: Group treasury

75 In my judgment, for the reasons stated above, Chia had no implied actual authority to represent or warrant the genuineness of the certified extracts of the board resolutions, or to communicate to the banks board approval of the transactions. Furthermore, what instilled in the banks the impression that the certified extracts of the board resolutions were genuine and in order came from and was founded purely on the banks' own narrow and limited verification of the certified extract of the board resolutions (see [137] – [170] below), and their own perceived comfort that APBS is a sound and cash rich company.

Conclusion on actual authority (express or implied)

76 As far as actual authority is concerned, it is affected by Chia's fraud. Consequently, the SEB Facilities and HVB Facility were not executed by Chia with actual express authority from APBS. In addition, Chia, as Finance Manager of APBS did not have actual implied authority to negotiate and commit the company on the SEB Facilities and HVB Facility. He also did not have implied authority to represent or warrant the authenticity or genuineness of the certified extracts of the board resolutions or to communicate the approval of the board.

Ostensible authority

Basis of apparent or ostensible authority

77 Ostensible or apparent authority is the outward appearance of the authority of the agent as others see it (*per* Lord Denning in *Hely-Hutchinson* at 583). Of concern here is the type of representation where the appointment of the agent to the position carries with it a usual authority to bind the principal. Professor Reynolds in *Bowstead* at para 8-018 explains that this type of representation is of a general nature and more difficult to maintain than a case of genuine apparent authority:

> If the doctrine [of ostensible authority] is based on the idea of representation, it may be suggested that the cases can be divided into two types. *First*, cases where there is something that can be said to be something like a genuine representation (orally, in writing, by course of dealing or by allowing the agent to act in certain ways, *e.g.* entrusting him with the conduct of particular negotiations or allowing him to run a business that appears to be the principal's business) by the principal of the agent's authority, on which the third party relies: such cases could be called *cases of "genuine apparent authority"* and more easily (but not always perfectly) based on estoppel. *Secondly, cases where the representation is only of a very general nature, and arises only from the principal's putting the agent in a specific position carrying with it a usual authority, e.g. making him a partner or appointing him managing director*, or using the services of a professional agents, *viz.*, someone whose occupation normally gives him a usual authority to do things of a certain type, *e.g.* a solicitor. It is said that "by so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the course of his principal's business has usually 'actual' authority to enter into." *Here the notion of representation to the third party seems more artificial and the connection of the principal's liability with estoppel much more difficult to maintain*. It seems further that *in this category the authority which the third party is entitled to infer is that which would normally be implied between principal and agent, and it is of this that the court receives evidence. But the third party may be quite ignorant of what authority would be so implied, e.g. of what authority a "branch manager" of an insurance company normally has. In this respect the protection of the "reasonable third party" is limited*.
>
> [Emphasis added]

78 In the context of ostensible authority, the concept of usual authority in play, as was the case here, concerns "the principal's conduct in clothing the agent with the trappings of authority was such as to induce a third party to rely on the existence of the agency" (per Steyn LJ in *First Energy* at 201). Thus, if the only holding out by APBS to the banks was to invest Chia with the title of "Finance Manager", the representation which the banks is relying upon would be the representation that Chia has the powers usually enjoyed by a finance manager in a corporation similar to APBS.

79 As to the scope of the usual authority of a finance manager in a corporation similar to APBS, evidence will have to be adduced as was the case in *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd* ("*The Raffaella*") [1985] 2 Lloyd's Rep 36 (see also *Bowstead* at para 8-018 on the need to call evidence at [77] above). In that case, the litigants adduced expert evidence on the usual authority of the manager of a credit department. Evidence of the powers usually enjoyed by a manager in the credit department of a bank is needed as often the holding out or representation by the company consists solely of the fact that the company has appointed the person to a particular office (at 41). The only relevant inquiry as Brown-Wilkinson LJ pointed out is as to the powers normally enjoyed by branch managers in general (at 41). In *The Raffaella*, the inquiry was wider since the holding out there consisted of a course of conduct beyond the description of the office the agent was holding. Ultimately, the overall evidence has to be looked as part and parcel of the whole course of the principal's conduct in order to decide whether the totality of the principal's actions constituted a holding out of the agent as possessing the necessary authority (at 41).

80 The onus of proving ostensible authority is on the banks. It is important to bear in mind that the banks must fulfil the four factors in the well-known judgment of Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman & Lockyer*"). They are (at 506):

(1) … a representation that the agent has authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(2) … such a representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(3) … he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it;

(4) … under its Memorandum or Articles of Association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

Continuing, Diplock LJ explained:

The confusion which, I venture to think, has sometimes crept into the cases is in my view due to a failure to distinguish between these four separate condition, and in particular to keep steadfastly in mind (a) that the only "actual" authority which is relevant is that of the persons making the representation relied upon, and (b) that the memorandum and articles of association of the company are always relevant (whether they are in fact known to the contractor or not) to the questions (i) whether condition (2) is fulfilled, and (ii) whether condition (4) is fulfilled, and (but only if they are in fact known to the contractor) may be relevant (iii) as part of the representation on which the contractor relied.

Other relevant passages from the judgment of Diplock LJ (at 503) and (at 505) states as follows:

> In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal that is, apparent authority or upon the representation of the agent, that is, warranty of authority.
>
> …
>
> It follows that where the agent upon whose "apparent" authority the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.
>
> The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the "actual" authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such "apparent" authority that the agent had authority to contract on behalf of the company.

81 With these principles in mind, I now turn to the allegations raised by the banks.

Representation

82 The nub of the banks' case on ostensible authority is the alleged representation or holding out by APBS (which was intended to be acted on and was in fact acted on by them) that it was within Chia's apparent authority to warrant the genuineness of the documents presented to them; or to communicate the board's approval of the transactions. The dispute under consideration has two parts to it. The first part of the consideration, the legal inquiry, is whether a forged document is a nullity for all purposes, or is estoppel an exception to the forged documents still having legal effect. The second part of the consideration arises if estoppel is an exception, and the question is whether Chia as Finance Manager would ordinarily have apparent authority to communicate board approval; or to represent or warrant the board resolution as genuine.

83 Of the four factors identified by Diplock LJ, the factor we are really concerned with is representation (see [80] above).

Forgery and apparent authority

84 The legal inquiry as stated is whether a forged document is a nullity for all purposes, or is estoppel an exception to the forged document still having legal effect. It is convenient to first set out the arguments of the parties.

(1) The contentions

(A) APBS'S POSITION

85 Mr Singh argues as a preliminary issue of law that a forged board resolution is a nullity for *all* purposes, and accordingly, no estoppel on a forged document can be raised since the company had not made a representation to anyone. Mr Singh says that there are no Commonwealth cases where a court actually held that a company is bound by a forged board resolution on account of an agent's ostensible authority. In particular, the cases do not support the concept of ostensible authority in instances of strict forgeries involving counterfeit signatures and company seals. The reasons for these are: (a) it is impossible for any company to prevent a fraud of the nature of Chia's, whereas it is relatively simple for the banks to have done so; (b) it would be absurd if all kinds of employees can be argued as having the authority to bind their employers, regardless of whether they sit on the board; and (c) to say that individuals not sitting on the board have authority to represent the genuineness of board resolutions effectively gives such individuals licence to act without the authority of the board as they can set their own limits of authority through forged board resolutions. The decision of *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 ("*Northside Developments*") has distinguished cases of "strict" forgeries (actual counterfeit signatures) which are complete nullities and "loose" forgeries (not involving counterfeit signatures) for which a company could still be bound if the agent is held to have ostensible authority. On an examination of the cases, it can be seen that in all the occasions in which the courts have upheld ostensible authority the circumstances did not feature "strict" forgeries. In other words, the distinction in law is between forgery and abuse of authority.

86 APBS distinguishes the cases referred to by the banks. The following cases had either nothing to do with forgery, or had the necessary holding to constitute a representation:

(a) In *Lloyd v Grace, Smith & Co* [1912] AC 716 ("*Lloyd v Grace Smith*"), there was no issue that the firm represented the clerk as in charge of all conveyancing matters and that the widow relied on him. The clerk had acted within his ostensible authority.

(b) In *Freeman & Lockyer*, the board of directors had knowledge of and authorised the acts of the Managing Director.

(c) *First Energy* did not involve forgery, and in that case the senior manager was actually authorised by the bank to negotiate with the plaintiff and had many face-to-face negotiations with the plaintiff's representative to discuss the project.

(d) *The Raffaella* had nothing to do with forgeries, and the senior manager of the defendant company in that case had numerous past dealings with the plaintiff as the defendant's authorised representative in relation to the plaintiff's business. Further, the defendant's board knew that the senior manager had acted outside his authority.

(e) *Hongkong and Shanghai Banking Corporation Ltd v Jurong Engineering Ltd & Others* [2000] 2 SLR 54 ("*HSBC v Jurong Engineering*") had nothing to do with forgery and there was a

holding out.

(f) In *George Whitechurch Ltd v Cavanagh* [1902] AC 117, the limits of the secretary's authority were well known. The secretary of the defendant company, in collusion with a fraudster, certified upon the transfer of certain shares in the defendant company to the plaintiff as security for a debt owing to the plaintiff that the relevant share certificates were in the company's office. No certificates had been lodged with the defendant's office. It was held that the defendant was not liable for the acts of the secretary.

(g) In *Farquharson Brothers & Co v C King & Co* [1902] AC 325, there was no holding out. A confidential clerk of the plaintiff company, whom the plaintiff had trusted for years, sold the plaintiff's timber without authority to the defendant under the name of a phantom broker. It was held that there had been no holding out of the clerk as its agent to sell timber to the defendant.

(h) In *Armagas Ltd v Mundogas SA* [1986] 1 AC 717 ("*Armagas v Mundogas*"), the employer had done nothing to represent that the employee was authorised to do the acts in question.

(i) In *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK)* [1983] 2 Lloyd's Rep 9, there was no representation. In that case, a branch manager of the defendant company, without the defendant's authority, issued an undertaking to repay the plaintiff money advanced by the bank to a firm of property dealers. It was held that there was no representation by the defendant as there was no evidence that the defendant's knew or approved of any general or particular conduct of the branch manager towards their customers.

(B) HVB'S POSITION

87 HVB submits that the cases relied on by APBS are irrelevant or outdated. The distinction between "strict" and "loose" forgery cases, even if it is a legitimate distinction, does not render the agency principles irrelevant. In other words, the issue of ostensible authority can and will still arise even in the context of forged documents. Mr Yeo submits that the court must still undertake an analysis based on agency principles to determine if the conduct was within the scope of the agent's apparent authority, citing *Lee Feng Steel Pte Ltd v First Commercial Bank* [1997] 1 SLR 280 ("*Lee Feng Steel*") in support of the proposition . Moreover, the position in Singapore is consistent with that of other jurisdictions like New South Wales (see *Mercedes Benz (NSW) Pty Ltd v NA and National Mutual Royal Savings Bank Ltd* (1992) NSW Lexis 7008), Canada (see *Welcome Investments Ltd v Sceptre Investment Counsel Ltd et al* (2000) OTC Lexis 1046) and Malaysia (see *Negara Traders Ltd v Pesuroh Jaya Ibu Kota*, *Kuala Lumpur* [1969] 1 MLJ 123). HVB distinguishes the cases referred to by APBS, and also commented on the following cases:

(a) The House of Lords decision in the *Ruben* case is no longer authoritative. The English Court of Appeal decision in *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 1 KB 266 ("*Uxbridge*") has since clarified that the *Ruben* case does not stand for the proposition that a forgery *per se* will prevent the doctrine of apparent authority from applying (see also *Lee Feng Steel*, *supra*). This position is taken further in *First Energy*, *vis-à-vis* commercial realities and the reasonable expectations of parties in commercial transactions, and *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 ("*Panorama Developments")*, *vis-à-vis* the commercial view of a company secretary as taken in *Ruben* is no longer valid today. Finally, the view that HVB could have easily detected Chia's fraud was a purely theoretical argument, something that Lord James had actually conceded, albeit on the facts of *Ruben* (at 447). Both *Panorama Developments* and *First Energy* have made it clear that the risk that an agent may be dishonest is one undertaken by the principal, and not the third party.

(b) The Hong Kong Court of Appeal case of *Hua Rong Finance Ltd v Mega Capital Enterprises Ltd* [2001] 3 HKLRD 623 ("*Hua Rong*") is distinguishable mainly on the grounds that there were highly suspicious circumstances surrounding the production of the board minutes in that case, and the plaintiff lender had relied solely on those minutes and nothing else. There was no argument made as to the fraudster's apparent authority to submit the board minutes or to represent that the board minutes were genuine; the issue of apparent authority was focused on the execution of the mortgage deed and not on the forged board minutes. The upshot of *Hua Rong* is that the court must still deal with the issue of apparent authority even if the document is forged.

(c) *Northside Developments* did not involve a forged document (*ie*, it was a "loose" forgery case), and hence, the Australian High Court's remarks on the interpretation on the decision in the *Ruben* case in respect of the effect of a forged document (in the "strict" sense) constitute *dicta* only. Moreover, the Australian High Court's remarks were made in the context of the "indoor management rule", which HVB is not relying on, and were made without consideration of the issue of apparent authority to deliver the mortgage instrument or to represent that the mortgage instrument was genuine. Nonetheless, the Australian High Court did not rule that a court is precluded from considering the issue of apparent authority or estoppel simply because a document is forged (in the "strict" sense).

(C) SEB'S POSITION

88 SEB concentrates mainly on vicarious liability in that ostensible authority is effectively subsumed under the issue of vicarious liability. The thrust of SEB's argument is that the underlying public policy in question is which of the two innocent parties should bear the loss for the fraud of an employee, and the answer, settled for over 100 years is clearly the party that placed the employee in a position to perform the relevant classes of acts. SEB's comments on some of the cases are as follows:

(a) *Uxbridge* is not simply a case involving a fraudulent mortgage deed. It was not a case of "loose" forgery but a simple case of outright forgery and deceit. While the forged title deeds themselves did not contain forged signatures, the fact remains that the documents were fictitious and forged. In any event, the distinction between cases involving a fictitious signature ("strict forgery") and deceitful documents which do not involve counterfeit signatures ("loose forgery") is an illegitimate one.

(b) *Ruben* does not stand for the proposition that all attempts to introduce the doctrine of ostensible authority to forgeries involving counterfeit signatures must fail. The House of Lords held that an employer would be liable for the fraud and forgery of its servant if the wrongful acts in question fell within the class of acts that the servant was employed to perform. Conversely, the only cases where the employer had escaped liability for the fraud or forgery of its employee (as in *Ruben*, *Armagas v Mundogas*) were situations where the court specifically found as a fact that the employee had acted outside the classes of acts that he was engaged to perform.

(c) APBS has mischaracterised *Northside Developments*. The majority in that case held that if the acts of a forger come within the scope of authority, the doctrine will apply and bind the wrongdoer's employer.

(2) Discussion and decisions on forgery and apparent authority

89 The issue which falls for decision is the effect of forgery on the element of representation

which is one of the factors necessary to establish ostensible authority (see in *Freeman & Lockyer* and [80] above).

90 I begin with *Walter Woon on Company Law* (Thomson Sweet & Maxwell Asia, Revised 3rd Ed 2009) at paras 3.33 and 3.54 on apparent authority and forgery of a board resolution:

> A [representation by a person in authority] by the board of directors will usually suffice, as in *Freeman*'s case. Ideally, a person dealing with a company should ask for a resolution of the board to confirm that the agent is in fact authorized. *The resolution will also amount to a representation by the company upon which an estoppel may be based*, *provided of course that the resolution is not a forged one*. It is essential to wait for the resolution before acting; …
>
> …
>
> *If the seal is forged, or the signatures on the document are forged, the document is a nullity and cannot bind the company. There can be no estoppel on a forged document since the company has not made a representation to anyone*.
>
> [Emphasis added]

91 From the passages quoted, the legal effect of forgery on representation appears to be that the forged document could be sidelined as a nullity for *all* purposes. *Halsbury's Laws of Singapore*, (Vol 6, 2006 Reissue at [70.099]) also adopts the view that a fabricated document is a nullity. No estoppel can be used to set up the forgery against the principal since the latter has not made a representation to the third party.

92 The cases cited by APBS draw a distinction between a document which is a complete fabrication and a document which contains the impression of a genuine seal and genuine signatures but the transaction to which the document relates has not been authorised or the seal has been fixed without authority. The courts there use the forgery concept in the first case in a narrow or strict sense, and the latter case in the wide or loose sense. Where there is forgery in the narrow or strict sense, the indoor management rule in *Royal British Bank v Turquand* 119 ER 474 ("*Turquand*") does not apply. The rule does not operate to assist an outsider relying on forgery because the rule applies only to irregularities that otherwise might affect a genuine transaction (see *Ruben*, *supra*). Where there is a forgery in the wide or loose sense, some courts have held that the indoor management rule cannot apply. However, other courts have expressed the view that the question is whether the seal and signatures were affixed or signed by persons held out by the company to have authority to do so. If so, the indoor management rule would apply together with the rules on apparent authority. But either rule would not apply or arise if the third party is put on notice by the nature of the transactions or knows of the agent's lack of authority; or is put on notice by the company's constitutional documents of the limited authority of the agent. Professor Tan Cheng Han in *Walter Woon on Company Law* at paras 3.41 and 3.47 commented:

There are, however, situations where a third party cannot rely on apparent authority or the presumption of regularity… First, if the contracting party knows or should know of the agent's lack of authority he cannot claim to have been misled and no estoppel will arise in his favour [and he also cannot invoke the "indoor management rule"]. Secondly, if an examination of the company's memorandum or articles of association would have made it plain that the agent's authority was limited, the contractor will be put on notice as to the agent's authority. Thirdly, the nature of the transaction may be such as to put the third party on inquiry as to the agent's authority. *If he does not make reasonable inquiries, no estoppel will arise in his favour*.

…

If there are suspicious circumstances about the transaction that would put the contracting party on inquiry, he cannot glibly assume that everything is in order and rely on the presumption of regularity. Sometimes, the circumstances are such that a reasonable man would be suspicious of the agent's authority; if this is so, the contracting party must make reasonable inquiries. *If such inquiries would have revealed the agent's lack of authority, the contracting party cannot rely on the indoor management rule to assist him*.

[Emphasis added]

93 In most situations, no estoppel on the facts can be used to set up the forgery against the principal. However, in an exceptional case, a company may be estopped from denying the counterfeit if the company on the facts represented the documents as genuine (as to which see per Brennan J in *Northside Development* at 184 -185 and per Dawson J at 199). On the by and large binding effect of a forgery, Brennan J wrote at 184 to 185:

It has been said that a forgery does not bind a company and that the indoor management rule does not avail a party who assumes the validity of a forgery: *Ruben v. Great Fingall Consolidated*. That observation has given rise to some confusion in the application of the rule, the term "forgery" being used in two senses. *In Ruben v. Great Fingall Consolidated*, Lord Loreburn L.C. was speaking of a forgery in the strict sense, that is, of an instrument bearing a false seal or signature. As the rule is founded on estoppel, it does not cover a forgery in that sense. *A company cannot give authority to fix a false seal and it is difficult to envisage a case in which there would be ostensible authority to write a false signature. It is possible that a company would be estopped from denying that a forgery in the strict sense is binding upon it, but such cases would be exceptional and would depend upon a representation that the company was bound by the forgery*. On the other hand, when the seal and the signatures are genuine the question is simply whether the company has given actual or ostensible authority to the persons who affixed the seal, attested the sealing or countersigned the instrument to do so. Sometimes an instrument bearing a genuine seal and genuine signatures but executed without the authority of a company has been described as a forgery: see, for example*, Kreditbank Cassel G.m.b.H. v. Schenkers (27) and Wake's Case (28)*. If such an instrument is a forgery, it is a forgery in a looser sense. *A forgery in the strict sense is binding on a company only if the company be estopped from denying both the falsity of the seal or signature and the authority of the persons affixing the false seal or writing the false signature to do so*. But an instrument bearing a genuine seal and genuine signatures, though it be described as a forgery, is binding on the company if the company be estopped from denying the authority of the persons affixing the genuine seal and writing the genuine signatures to do so. Such an instrument, being regular in form, is binding on the company if it be executed for the purposes of the company's business or otherwise for the company's benefit and the party relying on it is not put on inquiry as to the authority of the persons who executed it to do so. *If it transpires that the instrument was executed without the authority of the company, though it was apparently regular in form, executed by officers or agents acting within the scope of their ordinary authority to execute such instruments, and used for the purposes of the company's business or otherwise for its benefit, the loss will fall on the company unless the party dealing with the company was put on inquiry*. But if the party dealing with the company was put on inquiry and failed to make inquiry or, on inquiry, was not reasonably satisfied that the instrument was executed with the company's authority, the company will not be estopped from denying that it is bound by the instrument.

[Emphasis added]

94 And Dawson J added at 199:

In applying these principles in the case of forgery, it is necessary to distinguish between forgery which involves a counterfeit signature or seal and that which does not. *A counterfeit signature or seal purports to be that which it is not, not because of any lack of authority, but simply because it is false. There is no representation that the forger is authorized to act as an agent and there is no room for the application of the indoor management rule. The forgery is truly a nullity*. In *Ruben v Great Fingall Consolidated* there were counterfeit signatures and it was in that context that Lord Loreburn said that the indoor management rule did not apply because it "applies only to irregularities that otherwise might affect a genuine transaction". Of course, *if a company represents that a counterfeit signature or seal is genuine, it may be estopped from denying its authenticity*.

[Emphasis added]

95 Similarly, the commentary in *Gore Browne on Companies* (45th Ed, Updates 64, May 2007, Chapter 8 at para 28) states:

There is authority from the House of Lords for the proposition that forgery as such is a nullity and cannot bind the company. On the other hand, *if an organ or official of the company with the authority to bind the company held out the person who committed the forgery as having authority to execute the document in question, the company may be estopped from denying the validity of the forgery*…". [Emphasis added]

96 The commentary then turns to deal with the case of *Ruben* and it states:

Indeed, it is difficult to see why even forgery as in *Ruben's* case must be treated as being governed by a special rule. So far as actual authority is concerned, a forgery is clearly a nullity. However, whether or not it binds the company should depend on general *Turquand* principles. *It is clear that under general agency law forgeries are not treated differently from other fraudulent acts which may be binding on the principal if the agent acts within his ostensible authority*. In particular, the company secretary may have a wide authority to represent that minutes and other documents are valid.

[Emphasis added]

97 In *Ruben*, the secretary of the defendant company had forged the names of two directors on a share certificate and had affixed the company's seal without authority. The secretary issued the certificate, obtained a loan of £20,000 through a firm of stockbrokers using the shares as security, and then absconded. On discovery of the fraud the company refused to register the transfer into the name of the bankers from whom the brokers had obtained the loan. The brokers were obliged to repay the loan and then took action against the company, claiming that it was estopped from setting up the secretary's fraud. The House of Lords held that the brokers could not recover. Lord Loreburn LC said (at 443) that the doctrine that persons dealing with limited liability companies are not bound to inquire into their indoor management, and is not affected by irregularities of which they have no notice, applied only to irregularities which might otherwise affect a genuine transaction and did not apply to a forgery. Furthermore, the dishonest employee was not employed to warrant the genuineness of certificates for shares in the company which employed him. His fraud was not committed in the course of employment. Possession of the seal which facilitated the fraud was incidental (see *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 at 737) ("*Morris v Martin*").

98 The decision in the *Ruben* case was not disapproved in *Lloyd v Grace, Smith* to which Lord Loreburn and Lord Macnaghten were themselves part of the coram. Since that time, *Ruben* has, nevertheless, been represented as setting out the general position that a forgery is a nullity which cannot be validated, albeit there may be circumstances in which a party may be estopped from disputing the validity of a forged document. More to the point, Diplock LJ in *Morris v Martin* (at 737) explained that the dishonest company secretary in *Ruben* was not actually or ostensibly employed to warrant the genuineness of certificates for the shares. An application of the *Ruben* decision can be found in the Hong Kong case of *Hua Rong* which is relevant. In *Ruben* there was no ostensible authority vested in the secretary. In *Hua Rong*, the appellate court also found that no ostensible authority vested in the director. The facts are as follows.

99 Fan Veng Hong ("D2"), X and Y, were shareholders and directors of Mega Capital Enterprises Ltd, an investment company ("D1"). Unknown to X and Y, D2 approached P and applied for loans, purportedly on behalf of D1. P, acting through its solicitors, gave to D2 to adopt, a draft resolution of the board of directors of D1, authorising the loan application and directing D2 to affix the common seal and execute the mortgage deed on behalf of D1. D2 returned a copy of D1's resolution signed only by herself as chairman. P refused to accept this because the document was undated and the signatures of two other directors were required. The articles of association of D1, specifically stated that the common seal could only be affixed by a person under the authority of the directors, or a committee of directors, authorised to give permission for the use and in the presence of one director, or of the secretary, or such other person or persons as the directors or the committee of directors may appoint for that purpose. D2 later produced, and P accepted as valid, another copy of the resolution bearing the forged signatures of X and Y. The loans were approved and D2 executed the mortgage. Upon disbursement of the loan, D2 deposited the cheque into D1's account, but fraudulently withdrew the money, eight minutes later. D2 subsequently disappeared. The Judge found the loan agreement and the mortgage deed to be null and void *ab initio* and hence, unenforceable (see High Court decision reported in [2001] 2 HKLRD 1). P appealed, contending that D2 had apparent authority to enter into the loan. The appellate court held that D2 did not have apparent or ostensible authority to apply for the loan and execute the mortgage. P also could not rely on D2's substantial shareholding in D1 as indicating that she had the authority to enter into the transaction on D1's behalf. Under the articles, a single director had no power to borrow or request a loan on behalf of D1, without authorisation of the other directors. *P was aware of this*. Neither D2's substantial shareholding nor any of the other factors relied on by P (such as D2's possession of the seal of D1), amounted to a representation by D1 which was a vital element, if any argument of ostensible authority was to succeed.

100 The observations in *Hua Rong* are relevant in relation to the board resolution issue for HVB who despite knowing that it would require a valid resolution for the US$30m loan to go through, nonetheless, accepted an invalid resolution in that the wording of the resolution was inapt. The loan agreement was signed on 21 March 2003 and the resolution presented to HVB was made later on 24 March 2003. The wording of the resolution did not ratify the execution three days earlier. Besides, the text of the resolution referred to a facility letter of 21 March 2003 (not the formal loan agreement) and no such facility letter was in evidence. It was a material discrepancy that was accepted by HVB compliance department (see [160]-[170]). Similarly, for SEB, there is evidence that it chose to forego inquiries and accepted as sufficient the certified extracts of board resolutions (see [142]-[159]).

101 The banks cite *Lee Feng Steel (see supra* [87]) and *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1992] 1 SLR 296 ("*Blue Nile*"). In *Lee Feng Steel*, the employee was authorised to issue, sign and present the documents on behalf of the company (see [106(d)] below for facts of the case). In *Blue Nile*, the employee was authorised to issue bills of lading. In *Uxbridge* as in *Lloyd v Grace*

Smith, the clerk had full authority to conduct the business of a solicitor's office in the name and on behalf of his principal. It was not within his actual authority to commit fraud, but it was within his ostensible authority to perform acts of the kind that come within the business conducted by a solicitor. These cases are plainly distinguishable.

102 In summary, the fake mandates here concerned the concept of forgery in the strict sense. In the light of the commentaries above, the approach as explained is correct and the answer is that a principal may in appropriate circumstances be bound by the fraudulent acts of his agent where there *is* evidence of ostensible authority. In the *Ruben* case, it was *in the absence of any evidence that the company* ever *held out* the secretary as having authority on its behalf to warrant the genuineness of certificates for shares in the company which employed him other than the mere ministerial act of delivering share certificates, when duly made, to the owners of shares that the House of Lords held that the company was not estopped by the forged certificate from disputing the claim of the appellants, or denying responsibility for the wrongful action of their secretary. Likewise, it is clear on the evidence before me that the banks only dealt with one senior employee of APBS, and that was Chia. On the evidence, *no* authorised person in APBS held out Chia as having authority to enter into and execute the SEB Facilities and HVB Facility. As such APBS is *not* estopped from denying the forgery. Lord Loreburn's speech in the *Ruben* case (at 443) is apposite in that the banks' appeared to have shaped their argument on ostensible authority to follow the one canvassed in that case, and it also highlights the insurmountable evidential difficulties the banks face by running that argument:

> Another ground was pressed upon us, namely that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not, nor was he held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From the beginning to end the company itself and its officers, with the exception of the secretary, had nothing to do with the preparation or issue of the document.
>
> No precedent has been quoted in support of the plaintiffs' contention except the case of *Shaw v Philip Gold Mining Co* [(1884) 34 QB 103]. I agree with Stirling LJ in regarding that decision as one that may possibly be upheld upon the supposition that the secretary there was, in fact, held out as having authority to warrant the genuineness of a certificate. If that be not so, then in my opinion the decision cannot be sustained.

103 As I see it, the banks faced with evidential difficulties seek to rely on *First Energy* as a narrow exception to condition (2) of Diplock LJ's four conditions in *Freeman & Lockyer* to establishing ostensible authority (see [80] above). The banks also argue that condition (2) is nonetheless satisfied. There was holding out by APBS on apparent authority by reason of Chia's very position as Finance Manager, he was the person who would ordinarily have authority to warrant the genuineness of the documents including certified extracts of the board resolutions and to communicate board approvals to the banks. The points foreshadowed here are discussed in the next section.

Apparent authority to represent or warrant the certified extracts of the board resolutions as genuine or to communicate board approval of the transactions

104 The starting point is that the representation of the agent's apparent authority must be by the

principal, and this means by the person who has actual authority to manage or conduct that part of the business of the corporation to which the contract relates (see Lord Keith in *Armagas v Mundogas* at 778). The banks have not identified or named this person. The banks rely heavily on *First Energy* to support a narrow exception to the principle that the representation must be by the employer, arguing that commercial reality and the reasonable expectations of parties in commercial transactions was that an employee like Chia with his considerable powers as Finance Manager would be authorised ostensibly to communicate board approval or warrant the authenticity or genuineness of the certified extracts of the board resolutions. The banks also submit that there are circumstances in which a principal may be bound where his words or conduct caused a third party to act on a representation of authority made by the apparent agent. I will discuss *First Energy* later, but first the contentions of the banks.

(1) The banks' contentions

(A) MATTERS RELIED UPON BY SEB IN SUPPORT OF THE CASE ON OSTENSIBLE AUTHORITY

105 To preface the matters, the argument is that the circumstances here were such that APBS was bound as its conduct led SEB to act on a representation of authority made by the apparent agent, Chia. APBS appointed Chia as its Finance Manager to head its finance department. His business card described him as APBS's Finance Manager. Chia used his position of Finance Manager to deceive the banks and his subordinates in the finance department. SEB submits that Chia's initial approach to SEB, had it been a genuine approach, would have been within Chia's actual authority. Thereafter, every step which he took – including the delivery of the certified extracts of the board resolutions, accepting the facilities offered by SEB, giving instructions in respect of the SEB Facilities, operating and maintaining the SEB Facilities, using APBS's surplus funds to service the SEB Facilities – had they been taken within the course of a genuine transaction, would have been equally within the authority of Chia. Moreover, Chia was not a complete stranger to SEB. Before his employment at APBS, he was the Financial Controller at Swire Pacific Offshore Limited, who was a customer of SEB. The banking relationship with APBS was conducted in the same way as when Chia was with Swire Pacific Offshore Limited. Also, throughout the entire banking relationship, Chia was dealing openly with SEB, with bank officers from SEB visiting APBS's offices for meetings during office hours and SEB receiving faxes from the finance department's fax machine. There were no queries on SEB's bank statements sent to APBS's office address. APBS also received credit advices from OCBC in respect of moneys remitted from SEB to the OCBC Account. The credit facilities were never in default, and there were free flow of funds from the SEB S$ Account to OCBC Account and *vice versa*. Over the relevant period, surplus funds of S$45m were deposited with SEB. Similarly, over a period of time, S$45.3m were transferred from SEB S$ Account to the OCBC Account. The remitting bank was SEB and not Citibank where the fixed deposits were allegedly placed. Chia even instructed APBS's senior systems analyst to assist in the installation of the SEB Internet trading station in his office computer. He openly asked his colleagues to organise a number of visits to APBS's brewery for SEB. On one such tour of the brewery, SEB was introduced as "our friendly bankers". In addition, SEB relies on Chia's statements in his mitigation plea (see [38] above).

(B) MATTERS RELIED UPON BY HVB IN SUPPORT OF THE CASE ON OSTENSIBLE AUTHORITY

106 HVB submits that Chia's dealings with HVB on APBS's financial requirements, executing the requisite documents for operating the HVB Facility, submission of the certified extract of the board resolution, instructing HVB on the operation of the HVB Facility and representing to HVB that APBS had approved the HVB Facility and authorised Chia to execute the HVB loan agreement and the notice of drawdown, were all conduct that fell within a Finance Manager's authority. Besides, in or around end 1999, Brand Jan van den Berg, the Director (Group Technical) of APBL, a member of its senior

management, informed Zimmermann at a friend's dinner party that Chia was the appropriate person to discuss banking facilities with. APBS gave Chia a business card stating his position as Finance Manager of APBS, which Chia handed to Zimmermann at a meeting on 8 January 2003. There were communications with HVB using APBS's office email and paper with APBS's letterhead, or telephone calls made to Chia's office at APBS. Based on all those facts and circumstances, it was very plausible that Chia was the appropriate point of contact in APBS for the purpose of discussing credit and loan facilities. Any reasonable banker in HVB's shoes would have considered what Chia had done to be completely legitimate and normal. HVB cites the following authorities in support:

(a) The underlying basis of ostensible authority is that a third party can, in certain situations, assume that an agent has authority, regardless of whether the principal has in fact granted such authority.

(b) In *"The Raffaella"*, the English Court of Appeal held that an agent's particular office is part and parcel of the whole course of the principal's conduct. The following facts, namely, Chia (i) had a name card from APBS; (ii) was purportedly the most senior finance officer within APBS; (iii) was perceived by Zimmerman, Brand Jan van den Berg and Hwee Koon as being the appropriate person to discuss banking facilities with; and (iv) had meetings with Hwee Koon and Zimmerman, were pieces of a jig-zaw puzzle that formed a factual matrix similar to *The Rafaella vis-à-vis* the scope of Chia's authority.

(c) In *First Energy*, the English Court of Appeal held that commercial reality and the reasonable expectations of parties in commercial transactions are important factors in determining the apparent authority of an agent. Accordingly, if APBS is correct, then even if it were an F&N Group Treasury officer who had submitted the forged documents to HVB, APBS would only have been bound if HVB had demanded to attend the board meetings or query each signatory to a board resolution to ascertain its genuineness. That, HVB argues is an absurd prospect.

(d) In *Lee Feng Steel*, the High Court held that a principal will still be bound by the forgery, if its agent had real or ostensible authority to deliver documents. In that case, Ong had submitted forged applications for letters of credit to the defendant bank. Ong absconded with the proceeds of the fraud. The defendant was sued for breach of contract and negligence in failing to detect the forgeries. The claim was dismissed, and the court noted that in delivering the forged documents, Ong was acting within the scope of her authority. On the point of the person delivering documents, HVB submits that the fact that: (a) even F&N Group Treasury officers do not personally deliver documents to banks but would arrange to dispatch them; (b) the cover letters to the banks enclosing the requisite documents for the facilities were signed off by the F&N Group Treasury Manager or his deputy; and (c) the equivalent positions of the F&N Group Treasury Manager would have been the position of Finance Manager of APBS, demonstrate that it was reasonable for Chia to submit documents and concomitantly for HVB to believe that the documents submitted were genuine. It is convenient to now make the short point that HVB's submission on factors (a) to (c) above is irrelevant for it completely sidesteps the condition precedent stipulated in cl 2.1.1 of the HVB loan agreement which states that that the board resolution itself has to authorise the "appropriate persons to …deliver this Agreement on behalf of the Borrower…".

(2) Discussion and decisions on apparent authority to warrant the genuineness of documents and to communicate board approval of the transactions

107 Of concern here is condition (2) of Diplock LJ's four factors in *Freeman & Lockyer* (as set out in [80] above). I begin with the decision of *First Energy* before coming to the question whether the

representation of fact relied upon here to found ostensible authority fall within the narrow exception explained in the *First Energy* to the general rule that the representation must be that of the principal.

(A) DECISION OF FIRST ENERGY

108 *First Energy* is often cited as authority for the limited proposition that an agent who has no ostensible authority to conclude a particular transaction, may sometimes be clothed with ostensible authority to make representations relating to a contract which his principal is authorised to make. On the principle as to making a representation of fact, Steyn LJ at 204 said:

> It seems to me that the law recognises that in modern commerce an agent who has no apparent authority to conclude a particular transaction may sometimes be clothed with apparent authority to make representations of fact. The level at which such apparent authority could be found to exist may vary and generalisation will be unhelpful.

The plaintiff in the *First Energy* case knew that the agent had no authority himself to make an offer of credit on behalf of his principal, but the English Court of Appeal held that the agent had apparent authority to communicate the decisions made by his seniors (the only potential contracting party); that such "general apparent authority arose" from the position in which the defendant had placed the agent. On the facts, the outcome of the decision has been interpreted as a narrow exception to the general rule that the representation must be that of the principal.

109 Each case depends on its own facts, and the relevant inquiry, therefore, is whether the acts of the principal constitute a representation that the agent had a particular authority and were reasonably so understood by the third party (see Sir Browne-Wilkinson in *The Raffaella* at 41).

110 The facts in the *First Energy* can be briefly summarised. The plaintiff specialised in the replacement of old-fashioned heating systems by a new form of space heating. In order to make the new systems financially attractive, the plaintiff devised a scheme whereby it would install the heater and the owner would pay over a number of years. The plaintiff needed the credit facilities and approached the defendant, the Hungarian International Bank ("HIB"). Jamison was the senior manager of the Manchester office of HIB. Discussions took place and Jamison told the plaintiff that he had no authority to sanction a loan facility. Jamison was not held out as having any authority to sanction any particular size facility. Jamison had authority to sanction large credit transactions and authority to sign a facility letter in cases where the bank decided to grant a facility. HIB sent a facility letter to the plaintiff signed by its managing director and an assistant director. The letter set out in some detail the terms relating to the facility and the final paragraph provided that the letter did not constitute an offer but detailed the terms upon which the bank was prepared to consider making facilities available and invited the plaintiff to sign the terms if they were acceptable and to forward a cheque of £2,500. It was also stated that the signing by HIB of one of the copies would only "then create a binding contract between us." The plaintiff signed the facility letter and deposited a cheque £2,500 with HIB. The facility letter was not signed by HIB but the parties did business by way of hire purchase agreements for the installation of the heating. Later, the senior management of HIB decided that they were no longer interested in the plaintiff's business. The plaintiff then issued proceeding against HIB. The trial judge found that a letter written by Jamison on 2 August 1990 concerning the further hire purchase agreements was an offer which could be accepted. The August letter signed by Jamison offered a facility which the plaintiff accepted. No head office approval was sought before making that offer in question. The trial judge found that Jamison had no ostensible authority to enter into the transaction but nevertheless held that he had the authority to communicate an offer by somebody within the bank who did have authority and once that offer was accepted then the bank was bound. The issue on the appeal was whether the bank had held out Jamison as its agent for the

purpose of conveying the approval of the offer. The English Court of Appeal upheld the trial judge in his construction of the letter, *viz*. that it was an offer which was accepted. The appellate court held that there was a contract on the facts; HIB had put Jamison in a position where he had apparent authority to make a representation that he had been given authority to sanction the loan.

111 The contrasting case is *Armagas v Mundogas*. There, the plaintiffs, through their broker (J), negotiated to purchase a ship from the defendants. The plaintiffs planned to let the ship back to the defendants on a three-year charterparty so as to finance the sale. J stood to gain if the deal went through. The defendants' vice-president of transportation and chartering manager (M) was negotiating with J. He told J that the defendants would only enter into a one-year charterparty. J then offered M a bribe and M signed a three-year charterparty to the satisfaction of the plaintiffs. He also signed a one-year charterparty so as to mislead the defendants. The ship was duly let to the defendants, who returned it after one year. The plaintiffs thought the charterparty was for three years and therefore sued for breach of contract. They argued that M had either actual implied or apparent authority to sign the three-year charterparty. The House of Lords held that notwithstanding M's appointment, there was no usual or customary authority (to sign a three-year charterparty) incidental to that position. Neither was there was a representation by the defendants that he had such authority; the only representation was by M.

112 Professor Reynolds commented on *First Energy* in his article entitled "The Ultimate Apparent Authority" (1994) 110 LQR 21. He wrote at 23–25:

[*First Energy*] is difficult to reconcile with *The Ocean Frost* …

It is heavily based on the desirability of third parties in commercial situations being able to rely on letters such as that written. There must be many who do this: indeed, to question such assurances is rude and may also be risky. It is also known to be difficult to ascertain the limits of authority of bank officials. On the other hand, *to allow a person known to have no authority in effect to give himself authority by wrongly purporting to notify a decision of someone else that the act is authorised is virtually to abandon the idea that the doctrine of apparent authority rests on manifestation by the principal*. A number of American cases deal with agents who purport to go and telephone to obtain authority and then report that they have got it. The third party has usually failed. Perhaps the best is *Owners Loan Corporation v. Thornburgh* 106 P 2d 511 (S.C. Okl., 1940), where the court said:

> "Apparent authority loses all of its apparency when the third party knows that actual authority is lacking" (at p. 512).

and later

> "When an agent by express words represents to a third person that the principal has consented and has therefore given his authority to close the deal, he is saying no more than what he would imply or infer anyway by the mere offer to transact for his principal, unaccompanied by such words, for of course an offer or an agreement by one representing himself to be an agent includes his accompanying representation of authority. Else he would not hold himself out as agent" (at p. 514).

The reasoning that an agent has authority to sign letters indicating that a transaction is authorised is perhaps slightly different; but it has the same effect if generalised. The Restatement, Second, Agency allows effect to a representation by an agent that he has authority only in special circumstances: see section 170; and this approach appears to be supported by Lord Keith of Kinkel in *The Ocean Frost*: see p. 779. On orthodox reasoning a person in the position of the borrower (who had already had one loan authorised by two signatures) should have asked for a letter from higher up in the organisation.

Perhaps this case is to be regarded as exceptional on the facts. The person concerned, despite the absence of authority, seems to have held a position of considerable importance in a fairly small organisation apparently unknown to the court; and perhaps its reasoning can be based on the general corporate conduct of the defendant. *But there is little in the judgments to suggest that the court saw the case as a special one. If the reasoning is correct, some modification of the existing theoretical basis of apparent authority may in the end be needed*. That may be appropriate: some think the *Sun Life* case harsh, for the reasons given above. Lord Wilberforce suggested wider reasoning in agency contexts more than 20 years ago (*Branwhite v. Worcester Works Finance Ltd*. [1969] 1 A.C. 552 at p. 587). *But such a development would require the disavowal of The Ocean Frost (unless, as seems unlikely, the case is to be confined to deceit), which refuses to apply tort vicarious liability reasoning to an agency situation. And it would leave the basis of apparent authority reasoning open to new offers*.

[Emphasis added]

113 *First Energy* was subsequently described in *Bowstead* (at p 341 para 8-023) as "[involving] a

departure from the basic principles of apparent authority, for which no general justifying principle seems ready at hand".

114 Whilst *First Energy* has been criticised in writings, it has also been acknowledged elsewhere by English judges as a decision that gives effect to the parties' commercial expectations in circumstances where it can be inferred that the employee is held out as having the authority to communicate an offer or accept an offer.

1 1 5 *First Energy* was followed in *HSBC v Jurong Engineering* (see *supra* [86(e)]), but Tay Yong Kwang JC (as he then was) characterised *First Energy* as standing for a "narrow exception" based on express authorisation of the principal (at 68):

> There is, however, a narrow exception to the general rule stated above: *if the company has expressly authorised the agent to make representations on its behalf, then any representation made by that agent that he himself has authority to do an act is a good representation for the purposes of conferring apparent authority on the agent to do that act, even if he has been expressly prohibited to do it, and even if it is not something that agents in his position usually have power to do*. The leading authorities on this exception are the two English cases of *The Raffaella; Soplex Wholesale Supplies Ltd and PS Refson & Co Ltd v Egyptian International Foreign Trade Co* [1985] 2 Lloyd's Rep 36 and *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194.
>
> [Emphasis added]

116 If one adopts the narrower reading of the case (seemingly favoured in *HSBC v Jurong Engineering*), *First Energy* would be inapplicable to the present case because there was no express authorisation whatsoever by APBS that Chia could make the alleged representation of fact on its behalf. If one says that *First Energy* stands for the proposition that the representation as to authority made by the principal is completely not required so as to advance the public policy consideration of protecting third parties, this departs too radically from the conceptual basis of the doctrine of apparent authority, as the doctrine is premised fundamentally on such representation having been made.

117 On a separate note, the facts here are also distinguishable from those in *First Energy*. In *First Energy*, the issue on appeal was whether HIB had held out Jamison as its agent for the purpose of conveying the approval of the offer. The appellate court held that, albeit the manager lacked actual authority to make the loan and that no other person in the bank had held him out as having such authority, by reason of his very position as manager in the Manchester branch office (as distinct from Chia's position as departmental head who answers to the General Manager in the same office), he was a person who would ordinarily have authority to communicate the decision of more senior members of the bank at its London head office who were authorised to make and/or approve such a loan. The commercial reality and the reasonable expectation of the parties was that as the manager of the Manchester branch of the bank, Jamison was authorised ostensibly to communicate to the plaintiff the approval of head office. The plaintiff was accordingly held to be entitled to rely upon the offer which was received from Jamison. Steyn LJ narrowed down the issue of simple authority to the category of general ostensible authority of the agent "arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question" (per Lord Keith in *Armagas v Mundogas* at 777 (see *supra* [86(h)]).

(B) ASSESSMENT OF THE MATTERS THE BANKS RELY UPON TO SUPPORT A CASE OF OSTENSIBLE AUTHORITY

118 The argument is that the matters, whether separately or collectively, relied by SEB and HVB to justify the conclusion that Chia was clothed with apparent authority to warrant the genuineness of the documents, in particular, the certified extracts of the board resolutions or to communicate board approvals to the banks stemmed from his very position as Finance Manager. The alleged holding out was from APBS permitting Chia to inform third parties that he was APBS's finance manager, a position of considerable authority. The commercial expectation of the banks was that the finance manager with apparent authority to deal with banks on the financial requirements of APBS would ordinarily or necessarily have apparent authority to warrant the certified extracts of the board resolutions as genuine, or to communicate board approval of the transactions that Chia had been discussing with the banks. In the final analysis, for the reasons stated below, the arguments on Chia's ostensible authority are more fanciful than real.

119 It is important to distinguish between what Chia represented and what APBS represented by placing Chia in the position of Finance Manager. For instance, Chia met Amin on 28 December 1998 when he was not yet an employee of APBS. Of course, what he represented then and used by SEB in the application for facilities cannot bind APBS. Amin had accepted what Chia told him on 28 December 1998 that he was the finance manager of APBS and believed that it was APBS that had approached him. Chia joined APBS on 20 January 1999, and Amin was given his business card on 22 January 1999. More importantly, Amin knew Chia in his previous employment, and it would appear that he had erroneously assumed that Chia's role would be similar within APBS. This was a bad mistake as each company operates differently and the case here was one of familiarity giving way to the normal procedural checks were Chia a new contact. In any case, Amin admitted in cross-examination that because of his prior good relationship with Chia, he did not consider it necessary to verify what Chia had told him with any other party. Chia was also Amin's former classmate. In fact in the entire four and a half years, Amin did not verify with a third party anything that Chia said to him.[note: 15] I am also not persuaded that APBS had represented through Brand Jan van den Berg that Chia was the appropriate person to deal with if HVB wanted to start a banking relationship with APBS. I agree with Mr Singh that, at the material time, Zimmerman did not even know if Brand Jan Van Den Berg was an employee of APBS. The person who started the relationship with Chia was Hwee Koon who in turn relied on Chia's own representation as to his own authority. Hwee Koon had past dealings with Chia during her time at Sumitomo, and she concluded for herself, when she joined HVB, that Chia was the proper person to deal with for the purpose of banking facilities with HVB. As Lord Donaldson MR said in *United Bank of Kuwait v Hammoud* [1988] 1 WLR 1051 at 1066, "it is trite law that an agent cannot ordinarily confer ostensible authority on himself. He cannot pull himself up by his own shoe laces." So, if there is no representation by the principal, there can be no apparent authority conferred on the agent, even if the agent represents to the contrary.

120 The furthest that APBS did, in relation to representing that Chia had some sort of authority, was to appoint him Finance Manager. To reiterate, the issue here is whether Chia was held out by APBS as having apparent authority by reason of his very position he was the person who would ordinarily have authority to represent the authenticity of the certified extracts of the board resolutions and to communicate board approval. Christopher Leong testified that Chia was not part of senior management of APBS. Those who are considered senior management are named in the Annual Reports of which SEB and HVB had copies but did not appear to appreciate, or if they did, was not perturbed because they were talking with Chia on the premise that board approval would have to be obtained. In my judgment, Chia's appointment as Finance Manager in and of itself does not, assist the banks unless there is evidence that Chia was usually authorised to confirm the veracities of the board resolutions and the other related documents, and the banks could and did reasonably rely on his office for the inference as to Chia's apparent authority. Factually, APBS appointed Chia to the position of Finance Manager and gave him a business card describing him as the Finance Manager.

Beyond that, the relevant inquiry is as to the powers usually enjoyed by such a finance manager in general. Evidence of the usual authority of someone in the same position as Chia must be led by the banks; but the banks did not lead evidence on this. HVB argues that in the banking industry, the authority of a Finance Manager of an intended customer to deal with, make representations and submit documents to banks on matters of finance is not in fact limited, or known to be limited in a particular way. Evidence from the banking experts on how the banks perceived the authority of the finance manger of their corporate customer is unhelpful. Keer LJ in *The Raffaella* suggested that the inquiry should turn to what the employee concerned did rather rely on the style of his office. LJ Keer (at 45) said:

> An enquiry about the "usual" degree of authority associated with commonplace designations within the structure of companies may be relatively easy, such as that of managing director as in *Freeman & Lockyer*…But, in relation to designations, such as "manager", this may be virtually impossible … In such cases the emphasis must necessarily shift towards an investigation of what the person in question was authorised to do, in dealing with outsiders who relied on his apparent authority, instead of concentrating on the label given to his position in the company.

121 I have earlier said that evidence of what Chia was required to do, and in fact did, and whether his employer acquiesced in what he did would provide some evidence of Chia's authority (see [49] above). Since the banks led no evidence of this nature, what is before the court is the fact of Chia's appointment as Finance Manager and that of itself as stated is insufficient "representation" by APBS of Chia's apparent authority to make representation of fact such as warrant the genuineness of the certified extracts of the board resolutions, or to communicate board approval of the transaction. Furthermore, the banks' requirement for certified extract of a board resolution for each and every transaction has an important bearing on the ostensible authority of Chia to make the alleged representation (see [125] to [136] below).

122 It is not disputed that there were no dealings between the banks and anyone from APBS's senior management. The banks never met the General Manager or a director of APBS. The banks relied only on the name and reputation of APBS. The fact that Chia worked from APBS's office, met the bankers there during office hours, made use of his office telecommunication facilities including the installation of an SEB internet trading station in his office computer, simply gave him a "badge of respectability" which Chia as a fraudster enjoyed until exposed as such (per the observations of Stuart-Smith LJ in *Hornsby v Clark Kenneth Leventhal* [1998] PNLR 635 at 647) ("*Hornsby*"). In other words, the more a dishonest employee audaciously makes use of the trappings of his appointment, the more an unauthorised conduct is going to appear authorised. The essential inquiry is what is it that shows whether Chia was acting within or without what was authorised and required by his duties as employee?

123 All the transactions with the banks were purportedly pursuant to, and flowed from the powers ostensibly granted by the forged certified extracts of the board resolutions, and of little evidential value. Hence, it really comes down to first finding the holding out or representation by APBS that Chia as finance manager could, without question, produce a board resolution and confirm its genuineness to the banks. This holding out will have to be examined against the backdrop of an agent who has no apparent authority to enter into a particular transaction, and the inquiry is whether Chia can still be held out as having apparent authority to make a representation of fact argued for by the banks. Certainly, in the absence of evidence, Chia has plainly no apparent authority to do so. I make two additional points on the issue of ostensible authority. The first is evidence of the banks' standard requirement that certified extracts of board resolutions must be furnished. The banks accept that Chia did not have authority to bind the company without board approval, and as such Chia could not

enlarge apparent authority by his own representations. The second point is Chai's forgery of the mandate is inextricably linked to the banks' verification of the certified extracts of the board resolutions they received. If the banks did not make reasonable inquiries to verify the agent's authority, as they ought to, the rules of apparent authority would not apply in their favour (see [92] above *Walter Woon on Company Law*, paras 3.41 and 3.47). On the evidence, the banks willingly took the risk of forgery and Chia's lack of authority. Again, the banks cannot claim to be misled and no estoppel will arise in their favour.

124 It seems to me that this was not, as the banks would have it, a case of APBS holding out its Finance Manager, Chia, as having authority to warrant the false certified extracts of the board resolutions as genuine. It was rather a case of Chia, without the knowledge and permission of APBS, held himself as empowered by the false mandates. The banks were easy prey; for conveniently, the banks, at the same time, were very eager to start and develop a banking relationship with APBS. At Chia's oral requests, the banks willingly gave loans of millions of dollars without following their own manuals and normal banking procedures, and regardless of the multitude of discrepancies and irregularities that this court had seen in the documents and heard about in course of cross-examination of the witnesses of fact for the banks.[note: 16] Seeing the discrepancies and irregularities in the documents that were starring at the bank officers in the face, but were not raised or queried, the inference that could reasonably be drawn from all that is either (a) the banks were staffed by incompetent professionals who were slip-shod in the conduct of the bank's business, or (b) the banks deliberately chose to forgo making reasonable inquiries as they valued a banking relationship with APBS, and Chia was the contact person for the banks through Amin and Hwee Koon. On all counts, the latter reason is the more probable explanation, and I so hold. From the view point of the banks, the advantages outweighed the risks. The loans were considered relatively small; they were regarded as a "door-opener" to potential business opportunities for the banks in the future. At the same time, the bank saw the downside risk of default as low given the reputation and creditworthiness of the named corporate borrower with a reported huge cash reserve of over S$100m and strong cash flow. However, the downside risk was not only just about a potential default by non-payment of the loans. Matters that could vitiate the transaction are risk factors that have to be checked and confirmed. In forgoing obvious inquiries on the discrepancies in the documents that go to Chia's mandate, which would have revealed the fraud sooner than 2 September 2003, Chia was able to take and continue to take deliberate risks with the hope that his fraud would not be discovered too soon. The misfortune that materialised was the consequence of the risks the banks were prepared to take and did assume.

(C) CONDITION PRECEDENT FOR CERTIFIED EXTRACTS OF BOARD RESOLUTIONS AND APPARENT AUTHORITY

125 The alleged representation that APBS had held out Chia as having apparent authority to represent the authenticity of the board resolutions and documents must be examined against evidence of the banks' standard requirement for certified extracts of board resolutions for this standard requirement will undermine the rules of apparent authority. Besides the banks' standard requirement, the banks wanted, and they were provided, certified copies of the Memorandum and Articles of Association of APBS ("M&A"). The M&A is required to ascertain that the trading activities of the company are within the main object clause. It will also reveal whether the company has power to borrow, to guarantee and to charge its assets. The Articles of Association will show whether the directors have the necessary powers to borrow, guarantee and charge the assets of the company; show what constitutes a quorum at board meetings; and how the power to borrow is to be exercised. Generally, the power to give approval to an application for a loan and to execute the documents necessary to give effect to the transaction is the prerogative of the board of APBS.

126 The banks' overall evidence on the matter of the certified extract of a board resolution in general is that whatever their witnesses may have thought about Chia's authority (whether actual or ostensible), the banks first and foremost required the express authority of the board to open bank accounts; approve the transactions, and to give individuals delegated authority to sign the contracts. A board resolution is critical to concluding a transaction. Concomitantly, it has the intended effect of bringing the transaction to the attention of the highest echelon of management. Peter Vassiliou ("Vassiliou") was, at the material time, HVB's managing director and head of credit risk management. As head of credit risk management, he had overall responsibility for approving new transactions, and he was the ultimate approving authority for the US$30m facility. Vassiliou confirmed that HVB's requirement for a certified extract of the board resolution was to ensure that the board and senior management of APBS were aware of the transaction.[note: 17] SEB's evidence is to the same effect. Since Chia's mandate was forged, no authorised person in APBS held out Chia as having authority to execute the SEB Facilities and HVB Facility.

127 The banks' standard requirement for board resolution and its imposition by the banks as a condition precedent to grant of the facility or a precondition to drawdown of the funds, in my view, is evidentially a formidable obstacle in the way of the banks to satisfying the conditions in the judgment of Diplock LJ in *Freeman & Lockyer* to establish ostensible authority. The points made earlier in [62] - [75] in relation to implied actual authority apply equally with the same force on the doctrine of apparent authority. Evidentially, reliance on the apparent authority of Chia (condition (3) in the judgment of Diplock LJ) is difficult to satisfy in the light of the banks' standard requirement for board resolution.

128 The banks argue that notwithstanding the forgery, Chia, the Finance Manager, whom the banks were in discussions on the financial requirements of APBS, was clothed with apparent authority to communicate the board's approval of the transaction or put forward the condition precedent documents as genuine. The salient matters supporting the conclusion that the banks have *not* discharged the onus of proving that Chia was clothed with apparent authority to communicate the board's approval of the transaction or put forward the condition precedent documents as genuine are as follows. First, as mentioned earlier, the inference drawn from evidence of the condition precedent imposed by the banks, and the direct testimonies of the factual witnesses from SEB and HVB that a board resolution was vital is that the banks had not in any way taken Chia's authority for granted. Zimmermann confirmed that the finance manager has to be ultimately empowered through the board resolution. He also recognised that the board resolution may authorise two different individuals, not necessarily the finance manager to act on behalf of the company.[note: 18] Certainly, Chia could not enlarge the apparent authority of the Finance Manager by his own representations.

129 Second, the certification of the extract of the board resolution as a true copy must come from the officers contemplated in the terms of the banks' condition precedent (see [67] above). The question that arises is what was conveyed by putting forward the certified extracts of the board resolutions? If the directors gave the certification, they were ostensibly certifying that the board met and passed the resolution. The banks were not looking to Chia to communicate board approval of the transaction or to warrant the genuineness of the certified extracts of the board resolutions. This analysis of the evidence seriously undermines the banks' submissions that Chia was clothed with apparent authority to represent and warrant the validity of the board resolutions. In my judgment, the banks' impression that the certified extracts of the board resolutions were genuine and properly executed was founded purely on the banks' own narrow and limited verification of the certified extracts of the board resolutions, and invariably acceptance of the discrepancies in foregoing obvious inquiries (see [123]-[124] above). This point is elaborated below.

130 Third, whilst it is plausible for the banks to expect that Chia would be the first and last point of contact, this expectation of itself still does not surmount and satisfy condition (2) of Lord Diplock's four conditions in *Freeman & Lockyer* to establishing ostensible authority (see [80] above). It is clear from condition (2) that in order to create an estoppel between the corporation and contractor, the representation as to authority which creates the apparent authority must be made by some person who has actual authority from APBS to make such a representation. I do not see how Chia could be held out by the very reason of his position that he was the person having authority to communicate agreement to the transaction on the part of the principal (in this case board approval), and that the contents recorded in the document were true. The reasoning in *First Energy* does not assist the banks.

131 The justification of the decision in *First Energy* appears to be that the agent's general apparent authority stemmed from the position in which HIB placed Jamison as the manager of Manchester branch (per Steyn LJ at 203 and per Evans LJ at 205). Although Jamison lacked actual authority to make the loan and that no other person in the bank held him out as having such authority, by reason of his very position as the branch manager in Manchester, he was a person who would ordinarily have authority to communicate the decision of more senior members of the bank hundreds of miles away in the London head office who were authorised to make and/or approve such a loan. In the circumstances, the plaintiff was accordingly entitled to rely upon the offer received from Jamison. In this present case, there was never any board approval to begin with, and the mandate was forged. It must be remembered that *First Energy* was not a forgery case, and it is also distinguishable for this reason.

132 Furthermore, the application of the decision in *First Energy* is sidelined by the banks' condition precedent to the grant of the facilities or drawdown. Put another way, the banks' pre-condition has the effect of ruling out ostensible authority, and, hence, the argument of Chia's apparent authority to warrant the genuineness of the board resolution is not a viable proposition. My conclusion is supported and reinforced by the reasoning in *Sun Life Assurance Company of Canada v CX Reinsurance Company Limited* [2004] Lloyd's Rep 58. In that case, the appellants were CX Reinsurance formerly known as CNA Reinsurance Company Ltd ("CNA"). In the report, CX Reinsurance Company Ltd was referred to as CNA who wanted to stay proceedings brought by Sun Life Assurance Company of Canada ("Sun Life") to avoid a personal accident risks treaty. The issue for determination was whether the parties were bound by an arbitration clause or agreement. In the negotiations to clarify two points, one of which was the arbitration clause, CNA's representative was Mr N and Sun Life's representative was Ms O. The draft treaty wording was agreed between the representatives of the parties (Mr N and Ms O) but was never signed by Sun Life. A critical feature of the case is that the parties were negotiating to produce a formal signed agreement and Sun Life never signed. As a result, the agreement to arbitration was never formally executed. In those circumstances, the judge held that no binding arbitration agreement had been brought into existence through the medium of the draft Treaty and the stay application was dismissed. Of interest to the proceedings before me is the question of Ms O's authority. The inquiry there was whether Ms O was given actual authority to enter into a binding agreement with CNA on terms that she could negotiate with Mr N, or whether she was in some way held out as having authority to take that step to bind Sun Life, or whether she was held out as having authority to communicate a decision on the part of someone more senior in the administration of Sun Life of an agreement to those terms.

133 CNA argued that so far as Mr N was concerned, Ms O had ostensible or delegated authority to reach and/or communicate agreement as a result of Ms O's superior's indication to Mr N that he should discuss the draft Treaty with Ms O on the two outstanding points (cancellation date for the cancellation clause and the arbitration clause). Mr N said in evidence that he believed that Ms O was fully authorised to communicate the decision of Sun Life to him. His understanding was that by

indicating that the only points of discussion on the wording were those that she raised with him, he understood Ms O to be confirming to him that the wording had gone through the full review process and that the balance of the clauses were agreed by Sun Life. Ms O had passed the wording to her superior (Ms B) for review but the latter did not carry out the review before she left Sun Life. Ms B said in evidence that had she done the review, she would have queried further the Arbitration Clause.

134 The English Court of Appeal upheld the judge's finding that the parties negotiated throughout on the basis that a formal signed agreement was a pre-condition to the parties becoming bound by its terms. As such, Ms O clearly did not have authority to enter into a binding agreement. She was not held out as having authority to enter into a binding agreement, and was not held out as having authority to communicate agreement to it on the part of someone more senior. According, the pre-condition did not support the conclusion that Ms O was being held out as having authority to communicate Sun Life's decision on the two matters.

135 Significantly, the finding that a formal signed agreement was a pre-condition to the parties being bound by the terms was a crucial fact ruling out ostensible authority. Such a pre-condition defeats any apparent authority to communicate an offer from the principal capable of acceptance thereby bringing into existence a contract. Potter LJ at observed at [39] as follows:

> The judge's finding that both sides negotiated with the common understanding that formal signature of the Agreement was required before the parties became bound effectively outflanked the possible reliance by CNA upon the decision in *First Energy v Hungarian International Bank*.

136 Likewise, the banks' imposition of the condition precedent calling for a certified extract of a board resolution by an officer with first-hand knowledge of the resolutions (a pre-condition to the parties being bound by the terms of the transactions), put paid to the banks' assertion that Chia had apparent authority by reason of his very position was the person who could represent the authenticity of the certified extracts of the board resolutions, or to communicate the board's approval of the transactions to the banks. There being no representation needed to establish ostensible authority, the claim in contract fails.

(D) VERIFICATION OF THE CERTIFIED EXTRACTS OF BOARD RESOLUTIONS AND SIGNATURES

(I) OVERVIEW

137 Typically, a bank entering into a transaction with a corporate customer would expect to be given due authorisation (as in written specific authority) from the corporate customer. Again, ordinarily, banks do not lack money, resources and commercial power which they exercise by the imposition of strict, even onerous, documentation after making detailed inquiries about the borrower. An example of this is the banks' imposition of conditions precedent in the transaction documentation. Commonly in use in the contractual document are representations and warranties. In the case of a corporate borrower, the documents required by banks include the M&A, Certificate of Incorporation, and certified extract of a board resolution ("the condition precedent documents"). Thereafter, verification of the condition precedent documents follows and the scope and intensity of the verification is usually prescribed by the individual bank concerned. Operationally, the internal system and procedures of banks provide for verification of the condition precedent documents *prior* to drawdown or release of funds. In SEB, it was the responsibility of its Counterparty Risk Management department, CRM, to check and verify the condition precedent documents. In HVB, the checking and verification of the condition precedent documents was the responsibility of the department called

"Banking Support". What is verification of the condition precedent documents about? A convenient starting point is the bank's manual which basically reminds the bank officers to ensure that important documents creating a legal relationship between the bank and customer like the contract and certified extract of the board resolution are "properly executed" by the authorised persons (see Gerard Lee's testimony at [67] above). Verification of documents is simply a common sense principle to look after and safeguard the banks' own interests. It calls for the exercise of common sense and ordinary prudence of a reasonable person, rather than the skill of a signature expert as the banks in this case seem to espouse. This means that the bank has to check (i) the M&A to ensure that the board resolution has complied with, *inter alia*, the provisions on powers and duties of directors and proceedings of directors; and (ii) the identity, designation and signature of the signatories to the contract and certified extract of the board resolution. Such checks are obviously necessary as discrepancies and irregularities in the documentation, if serious enough, may undermine and vitiate the transaction to the detriment of the banks when it comes to enforcement. In the context of apparent authority, the evidential value of verification of the documents is in determining the question whether or not the banks were put on notice of the employee's lack of authority, and the reasonable inquiries that were required to be made. Where the banks willingly accept the risk of the employee's lack of authority, the banks cannot claim to be misled and no estoppel will arise in their favour.

138 Interestingly, the commercial power of the banks to inquire as to the authority of the persons executing the documents was noted by Lord James a century ago in the *Ruben* case (at 447), and if for their own reasons, business or otherwise, the banks decided to forgo or limit the exercise of this power, the adverse consequence of that decision must necessarily fall on the side of the banks. Lord James's speech in the *Ruben* case which remains relevant in modern day commerce is set out below, and the further point of contacting directors to countercheck the position as mentioned in the speech (at 447) is not just a theoretical possibility; it is a feasible and effective safeguard in the modern world:

> I cannot help observing that the decision now about to be given may cause those who receive certificates in commercial life to be anxious and to be shaken in their confidence in respect of the validity of those certificates. But in this case the transferee has a safeguard which a company has not. A company cannot protect itself against the frauds of its secretary, and if the company has to bear the burden of this loss, of course the loss place upon companies will be very great, and they must guard against it, but certainly theoretically – I do not know whether it is quite the case practically – the transferee has a safeguard, he can always apply to the two directors whose names appear on the certificate and inquire from them whether those signatures are valid and genuine signature or not. If the answer is that they are genuine, the certificate of course is valid; if the answer is, "No, I have not signed that certificate", then he is aware that it is invalid. I do not know whether in commercial life transferees will take the trouble to inquire of directors whose signatures appear on certificates whether those signature are genuine or not, but at any rate there is that power if they choose to exercise it.

139 This present case serves to highlight the need to verify the identity and signature of the corporate officers certifying as true the copy of the relevant minutes that recorded the resolution passed in order to safeguard the banks' own interests. An exercise of this nature is part and parcel of the inquiry as to Chia's apparent authority through verification of the authority of the persons executing the condition precedent documents on behalf of the corporate borrower. It shows the reasonable steps that can be taken to ensure proper execution of important documentation. In my judgment, a reasonable step to take to ensure the bona fides of the certification is to contact a third party like the company secretary to confirm the board resolution. It is also reasonable to contact the director to confirm that he certified as true the extract of the relevant minutes that recorded the

resolution passed. A verifying officer can verify the signature against the bank's record if the signature of the signatory is already on the bank's record on the account. Another way of verification is to check the subject signature against documents already filed with the Accounting & Corporate Regulatory Authority ("ACRA") such as the Directors' Report of APBS where the signatures of the directors appear. It is not disputed that the banks here were keen to start and develop a banking relationship with APBS. As such, simply meeting up with a director of APBS by paying him a courtesy visit would have been the most natural and obvious thing to do, but it was not an avenue that was pursued. In HVB's case, a formal loan agreement was signed. One simple and straightforward approach to verify Chia's authority would be to meet a director of APBS by attending at APBS's office to witness the execution by Chia of the HVB loan agreement. Inexplicably, Hwee Koon witnessed the signing of a US$30m loan agreement in Chia's car, which was extraordinary to say the least, and it did nothing to verify Chia's authority that was dependent on the certified extract of the board resolution.

140 Even if the banks thought that the certified extract of the board resolution was genuine, the contents of the document (*ie*, the resolution that was purportedly passed) must accurately cover the transaction and authority properly delegated. To illustrate this point with an example, I need only refer to the wording of resolution for the HVB Facility. The HVB loan agreement was signed on 21 March 2003, and the certified extract of the board resolution presented to HVB was passed later on 24 March 2003 and the wording there, in my view, did not ratify the execution three days earlier.

141 On the evidence, the banks accepted the condition precedent documents put forward as sufficient in the face of the discrepancies and irregularities highlighted by APBS (see [142] to [170] below). I repeat and adopt my earlier finding that the banks' impression – the certified extracts were genuine as they have been properly executed, and consequently the validity of Chia's authority to act on behalf on APBS – was founded purely on the banks' own narrow and limited verification and acceptance of the condition precedent documents having chosen to forego inquiry as to authority. On the evidence, the banks willingly accepted the certified extracts of the board resolutions and willingly took the risk of forgery and Chia's lack of authority. Consequently, (i) the rules of apparent authority would not apply as they could not be fulfilled, and (ii) the attendant risks or factors that could vitiate the transactions including the risk of forgery as was the case here fell on the banks. In the circumstances, it is easy to see that the banks could not have relied upon anything (and there was nothing at all) conveyed to them or held out generally by the APBS that Chia was authorised to warrant the genuineness of the certified extracts of the board resolutions. If anything, the false representation that the mandate was genuine was patently Chia's personal deceit perpetrated against the banks; and the banks' arguments sought to elevate Chia's act to a holding out by APBS by reason of his position in the company merely serve to obfuscate and create an issue out of the confusion.

(II) SEB'S VERIFICATION

142 I begin with Amin's testimony. He confirmed in cross-examination the following matters.[note: 19] Condition precedent documents that the bank received from its corporate borrowers are verified by its Counterparty Risk Management department ("CRM"). By "verify", Amin meant to say that Sharon Chow, (the CRM officer involved at the start of the relationship), was responsible for making sure that the documents were complete and were properly signed by the relevant persons.[note: 20] What SEB did in 1999 to verify whether someone signed on a document like a certified extract of a board resolution would be to compare the signature with other documents with his signature.[note: 21] After checking was completed, Amin as relationship manager would have to be informed before the facilities could be used.

143 Gerard Lee was head of SEB's CRM from November 1998 to March 2000. As head of CRM, he

had overall responsibility of managing counterparty risks through analysis, documentation, monitoring, administration, risk and portfolio management of clients and transactions as well as all day-to-day related transactions. From March 2000 to January 2001, he was posted to SEB's Hong Kong branch. He returned to the Singapore branch in February 2001 as Manager-Credits and reported to the Head of Credits and CRM until end June 2001. Thereafter, he took over as Head of Credits. In March 2002, he was Head of Credits and CRM. As Head of Credits, his responsibilities included ensuring compliance with SEB's credit policies and management of credit risks.

144 Gerard Lee confirmed that CRM has to verify the documents and this meant verifying the signatures on the documents.[note: 22] For the account opening in 1999, CRM would check that all documents required to be submitted were provided and the board resolution put forward was in accordance with the relevant provisions in the M&A. CRM would verify the subject signatures against documents made available by the customer or obtained from the Registry of Companies (now known as ACRA). Documents filed with ACRA would include the financial statements or returns of the customer. Gerard Lee said that CRM would ascertain that, at least, one of the signatures of the directors of the customer could be verified against the signatures in the available documents. This procedure was adopted for verification of board resolutions from the time the SEB Accounts were opened until around 2002. Gerard Lee said the procedure changed after the Association of Banks in Singapore in September 2001 issued its own set of guidelines on anti-money laundering. In 2002, SEB adopted a formalised procedure which required signatures of directors on board resolutions to be verified against those found in Form 45 filed by the customer with ACRA.[note: 23] On examining the evidence, it seems to me that the pre-2002 practice and the 2002 formalised procedure described by Gerard Lee are not as different as the bank wants the court to believe. Form 45 is a document filed with ACRA and it is publicly available. As such, it would qualify as a document that could be used in pre-2002 to verify the signature of the directors.

145 I now turn to the bank's manual on "Documentation files" (in use pre-2002) directs that the documentation file must contain a "Documentation checklist" summarising the principal documents received by the bank. More importantly, the documentation checklist is to be *signed* by the Relationship/Account Manager, and the literature states that "[b]y this act [of signing off] he/she is representing that the documentation package has been reviewed, all required documents have been obtained and are properly executed".[note: 24] First, the words "properly executed" appear, and to give real meaning to these words, CRM must check and verify the identity, designation and signature of the person certifying as true the copy of the extract of the board resolution in question. In his testimony, Amin explained that he depended on CRM to inform him that verification had been done. Second, the Documentation checklists for the OD Facility and FX Line were signed off by Amin, the Relationship Manager as required, but his signature at the bottom of the page was not dated. Others like Sharon Chow, Gerard Lee and banking support apparently signed the Documentation checklist on 3 February 1999 in respect of documents received on 3 February 1999. The unanswered question is whether those who signed off on 3 February 1999, (especially Sharon Chow) subsequently checked and verified the replacement certified extract of the board resolution passed on 3 February 1999 *after* it was received by the bank on February 1999. Furthermore, there are no initials or ticks under the column headed "DOC checked (CRM)" to indicate that the documents received by the banks had been checked and verified.

146 I next refer to SEB's CRM Procedural Manual, CRM 1.2 on Verification of Signatories/Signatures (28 February 2002 version) which states clearly the purpose of verification of signatures: it is to "ensure that legal documents from clients are signed by authorised personnel." CRM is to verify the signatures on the board resolution, and this is done by checking the subject signature against the relevant director's signature in Form 45.[note: 25] Documentation checklist (now called Security

Register and Documentation Checklist) for the MM Line was signed off as required, and the last entry was on 7 August 2002 in relation to the certified extract of the board resolution passed on 2 August 2002 for the MM Line increase to US$25m.[note: 26] That particular certified extract was ostensibly signed by Michael Fam and Koh Poh Tiong as directors of APBS. Even on Gerard Lee's description of the 2002 formalised procedure, the bank apparently accepted the certified extract at face value. In 2002, the officer concerned was Karen Chan, but she was not called as a witness for SEB. It is not disputed that at the material time, SEB had in its possession Form 45 for Koh Poh Tiong. Looking at Koh Poh Tiong's signature in Form 45 and comparing it with the ostensible signature of Koh Poh Tiong in the certified extract of the board resolution passed on 2 August 2002, I am able to easily tell that the two signatures are noticeably different, and the discrepancy would have put the bank on notice and to make further checks. The bank would have found out the true position easily enough, but it apparently accepted at face value the certified extract choosing to forgo verification of the signatures.

147 Again, the signature of Koh Poh Tiong in Form 45 and in APBS's Directors' Report (Exhibit EA-2 of Amin's written testimony) is noticeably different from the ostensible signature of Koh Poh Tiong in the certified extracts of the board resolutions passed on 3 February 1999 and on 11 November 1999 respectively.[note: 27] Amin confirmed that in January 1999, the bank had already in its file documents obtained from ACRA such as extracts of APBS's Directors' Reports, Form 45 for Koh Poh Tiong, and Form 49 for Ton Blum. The microfilm printouts (exhibit "EA-2") of the Directors' Reports dated 21 December 1993 and 16 December 1996 were of pages with Koh Poh Tiong's signature on them. One can deduce from the printouts that the bank wanted sample signatures of the directors, and they were meant to be used for verification of the signatures. Gerard Lee's evidence on how the certified extract of the board resolution of 11 November 1999 relating to extension of the OD Facility was verified is hearsay and inconclusive as can be seen from his answers in cross-examination:[note: 28]

Q: … How is [*sic*] the board resolution of 11 November 1999 verified?

A: It was verified against ACRA records, available customers' documents, and …

Q: Are you saying that a fresh ACRA search was done?

A: I do not recall, but it was …

Q: What is your practice? What was the procedure?

A: We verify against documents provided by customer, publicly available information, and from ACRA.

Q: Okay.

A: And/or from ACRA

Q: Are you saying, therefore that on 11 November you asked for fresh documents from the client and/or you looked for publicly available information and/or you did a fresh ACRA search?

A: Yes

Q: You did?

A: No, not me, sorry. The analyst

148 Even if it was not the practice of the bank to check the signature against Form 45 because it was not a formalised procedure at that time in 1999, the evidence is that the bank was supposed to verify the signature against information in the SEB file and documents that were publicly available, and one such document would be the Directors' Report containing the signatures of directors of APBS.[note: 29]

149 Verification of signatures of directors on the certified extracts against signatures found in Form 45 or Directors' Report is a matter of common sense, and is so obvious a step to take to check if the document was "properly executed" by directors of APBS. Amin testified that if the bank's manual is silent or not detailed enough on the steps to take the officers would just have to exercise judgment and common sense. Common sense would dictate that to verify the authenticity of the certified extract of the board resolution, the bank communicates with the company secretary to check if he was aware of the board resolution in question. Even if there is a concern that any inquiry would carry the potential to cause offence or embarrassment as SEB suggested, I do not accept it as a valid excuse in the bank's favour. Verification of signature is a matter of common sense to safeguard the banks' own interests, and in forgoing the chance to do so, the bank assumed the risks of fraud as was the case here. In the context of apparent authority, the bank cannot claim to have bee misled and no estoppel will arise on its favour. It is not unreasonable that a bank should suffer the consequences of its decision not to take precautions. Here, the same person with whom the bank has spoken to is returning documents authorising the very same person to sign the loan documentation and to operate the account singly, something that contradicted the rudiments of internal control and corporate governance, and according to Mr Hudson, these factors in combination increases the "call for suspicion", and hence reasonable inquiry ought to be made of the employee's authority. Taking these matters onboard together with the need to ensure that the documentation was properly executed, the bank, nonetheless, accepted at face value the certified extracts of the board resolutions passed on 3 February 1999 and on 11 November 1999. I have already dealt with Koh Poh Tiong's signature. [note: 30] The other discrepancy is the designation of Ton Blum which I will now deal with.

150 The five documents provided by Chia in early February 1999 were ostensibly signed by Ton Blum as a director of APBS. Amin said he handed them over to the CRM officer, Sharon Chow to check to ensure the documents were "correct in all respects" and "verified" which in turn meant "what they purport to represent is true".[note: 31] The purported certified extract of the board resolution passed on 25 January 1999 did not give board approval for the OD Facility. It gave authority to open accounts in any currencies for transactions relating to the deposits. Amin testified that Sharon Chow noted the discrepancy and alerted him. He spoke to Chia who provided a fresh certified extract of the board resolution passed on 3 February 1999, and the bank recorded receipt of this document on February 1999.

151 In relation to the account opening, Sharon Chow was the only person who could tell the court whether the signatures on the documents were verified and how they were verified but she was not called as a witness. There is no indication on the Documentation checklists, which she signed off on 3 February 1999, to tell us if the replacement certified extract of the board resolution passed on 3 February 1999 and received by the bank on February 1999 was checked and verified by Sharon Chow (see [145] above). Gerard Lee said he checked with Sharon Chow on her work maintaining that

she followed the practice for account opening at that time. Gerard Lee testified that SEB verified the documents to satisfy itself that the account opening and facilities were authorised and that the documents the bank received were "sufficient".[note: 32] He claimed that there was nothing to alert SEB of Chia's lack of authority to represent APBS in the opening of the accounts. I do not accept his testimony. There were two glaring discrepancies: Koh Poh Tiong's signature and Ton Blum designation as director of APBS.

152 Gerard Lee revealed that the bank purchased the microfilm of the documents filed with ACRA. Included in the bundles of documents marked as exhibit "EA-2", was a printout of Koh Poh Tiong's Consent to act as Director (Form 45). [note: 33] SEB was also in possession of a Form 49 showing Ton Blum as the General Manager of APBS with effect from 29 January 1996. Before the SEB Accounts were opened, SEB was aware that there was no Form 45 for Ton Blum; there was only a Form 49. Gerard Lee claimed that as Koh Poh Tiong had signed off as director next to Ton Blum's name on the certified extract of the board resolution, the bank accepted Ton Blum as director relying on Koh Poh Tiong's signature as confirmation of the designation of Ton Blum as director. From Gerard Lee's testimony, the bank simply relied on the signature appearing in the certified extract of the board resolution as Koh Poh Tiong's without verifying that it was actually Koh Poh Tiong's signature. Significantly, the documents as SEB noted in 1999 (and that is the only relevant time of any importance) contained discrepancies in two respects. First, Ton Blum was the General Manager of APBS, but he ostensibly signed off as director in the documents. In particular, the certified extract of the board resolution passed on 3 February 1999 identified him as a director. The other director was Koh Poh Tiong. Second, the certified extract was purportedly signed by Ton Blum and Koh Poh Tiong as directors of APBS.

153 Gerard Lee's explanation as outlined in [152] did not accord with the pre-2002 procedure he had described. It contradicted his oral testimony on how the bank normally verifies the director's signature on the certified extract of a board resolution:[note: 34]

> A: I would check the names against various sources, like publicly available information.
>
> Q: Yes?
>
> …
>
> A: Things like annual reports
>
> Q: Yes?
>
> A: Documents provided by the customers
>
> Q: And the signatures themselves?
>
> A: The same thing, ACRA, annual reports, publicly available information or documents provided by customers. It's the same process. The check there is to verify …
>
> Q: So you would check signatures against other signatures right, of the same person? That's your evidence?

In other words, if I were to sign as a director of APBS, and you wanted to know whether that's my signature, you would check the publicly available records or annual report to see how my signature looked like; right?

…

A: … yes, that is the verification of the signature.

154 Like Amin, Gerard Lee had resorted to *ex post facto* reasoning to justify what was done or not done. His testimony relying on Koh Poh Tiong's warranty for Ton Blum's directorship made no sense. The bank had no basis to assume that he was a director because Koh Poh Tiong's signature was next to Ton Blum who was described as a director. There was equally no basis to assume that Koh Poh Tiong and Ton Blum had signed. The bank could have found out the true position easily enough but nothing was done with a view to doing so. There may be good reason why there was no Form 45 for Ton Blum, but the bank did not take any step to find out the position at the material time. It could have made rudimentary inquiries to satisfy itself as to the position of Ton Blum in the company *before* opening the SEB Accounts and granting the OD Facility and the FX Line.

155 It is useful to set out Amin's testimony where he accepted that there was a discrepancy in the designation of Ton Blum, but the discrepancy was clarified by Koh Poh Tiong as Gerard Lee explained. The testimony demonstrates his and Gerard Lee's *ex post facto* reasoning which offends common sense and it must have been an afterthought made up by them, each saying the same thing to corroborate each other's lie. He said:[note: 35]

Q: … The facts were there; the evidence was in front of you and Ms Sharon Chow; the forgery was waiting to be discovered. You didn't care, Sharon Chow apparently didn't care, and all of this has happened.

A: No, I disagree, Mr Singh.

Q: You have displayed the most remarkable disregard for common sense, and indeed your own credibility, by your answers.

A: I object to that, Mr Singh. I---

Q: You can object to that a hard as you like, Mr Amin. The fact is, page 407 [Form 49 on Return giving Particulars and Register of Directors, Managers, Secretaries and Auditors and Change of Particulars], if anybody had read it, would have told that person that there is something wrong here. Do you agree?

A: Yes, that … there's a discrepancy here. Yes.

Q: Yes. And prudence would have required that there be an independent check, independent of the person who handed you documents which were discrepant?

A: The independent check was with the documents signed by the CEO of APBL.

Q: Mr Amin, what you are saying …with the greatest respect … is nonsense. Koh Poh Tiong is not verifying that Ton Blum is a director. Where does he so verify it?

A: I think in the application form he has signed it, and in the director's resolution he has signed beside Mr Ton Blum, also as director.

156 At 143 of the transcripts:

A: Because, I will be looking at other documents, and here we have Mr Koh declaring that the information are correct, so I must believe that, if he tells me that there has been an error, ACRA is not updated, I would take that as good.

Q: … So, if Chia Teck Leng tells you that ACRA was not updated, you would take it as valid and you wouldn't do your own search; correct?

A: I would take it as valid, because there were other signatures there. And that was Mr Koh's signature.

Q: Yes. Okay.

A: … Ton Blum … well, on the face of it, when he signed, he must be a director as well. And it's not just one document, it's a few documents that they signed together.

Q: It wouldn't have occurred to you that this might be a forgery, of even Koh Poh Tiong's signature, right?

A: No

157 As stated, Gerard Lee's testimony is the same as Amin's. It is not difficult to conclude that the absurd testimony was a poor excuse to cover up a discrepancy. The truth of the matter is that SEB wanted and valued a banking relationship with APBS (see [124] above). The OD Facility of S$500,000 for three months was to the bank insignificant, and it was meant to be a standby facility; the FX Line was considered "small" and approving Chia's request was looked upon as a "door opener". In his Visit Report dated 28 December 1998, Amin wrote about the prospect of the company's cash surplus of over S$100m being "placed on fixed deposits (in various currencies) with us". He recommended in his Visit Report that a relationship with APBS "could offer very promising possibilities across our business areas, if we are prepared to provide an unsecured SGD 0.5m short term O/D line for 3 months, in addition to the small FX lines."[note: 36]

158 Even if the bank had thought that the signatures of the directors were genuine, the contents of the certified extract of the board resolution had to be checked to ensure that it was in order; for instance, it properly covered the transaction in question. Notably, the OD Facility letter and the foreign exchange agreement were both dated 2 February 1999, and they were signed by Chia on the same date, one day *before* the board resolution was ostensibly passed on 3 February 1999. The wording of the certified extract of the board resolution did not ratify and would not have covered the OD Facility and FX Line. When questioned on this discrepancy, Amin was particularly evasive.[note: 37]

159 Amin was often evasive requiring questions to be repeated many times. He would not answer

questions directly, and it was the persistence of counsel in pressing for an answer to his question that Amin eventually answered after an unnecessary long time. My impression of his performance in the witness box is that he was not actually trying to assist the court with an honest account of events as he saw them at the time. It is obvious that he did not exercise independent thinking at all material times, and he was in difficulty when the questioning became inconvenient. This showed as he often resorted to *ex post facto* responses to justify what was done or not done. Gerard Lee was also guilty of *ex post facto* reasoning.

(III) HVB'S VERIFICATION

160 HVB's manual provides that the bank has to check and verify that the documents received from the customers have been properly executed. Paragraph 13.1.1.of HVB's Corporate Banking Credit Policy Asia, August 2002 states as follows:[note: 38]

> *Upon the receipt of the executed documents from the Customer by the CRM, both the RM/Product Specialist and the CRM have to check and verify that documents have been properly executed and all required documents have been obtained*. The Banking Support Department is responsible for verifying the signature on the documents if those signers have record with us. *If those signers do not have any record with us, the RM/Product Specialist is responsible to make the necessary arrangement to witness and verify these signatures*.
>
> [Emphasis added]

161 The certified extract of the board resolution was ostensibly signed by Koh Poh Tiong and Michael Fam. As can be seen from the text above, para 13.1.1 requires CRM and the Relationship Manager/Product Specialist to "check and verify that documents have been properly executed". In 2003, Cheah Soo Lee was the manager of the Singapore banking support department. Her department would check the M&A, Certificate of Incorporation, Certificate of Change of Name, copies of authorised signatories. If the documentation was incomplete, the department would not approve the drawdown. Cheah Soo Lee explained that HVB would conduct a Biznet company search on the directors of the company to check if the person who (on the face of it) signed the certified extract of the board resolution was, at the time, a director of APBS. Cheah Soo Lee was adamant that her department, Banking Support, was only required to check for physical completeness of the certified extract of the board resolution; there was no procedure within banking support to witness signatures.[note: 39]

162 Evidently, HVB did not adhere to its own manual to ensure that the certified extract of the board resolution was properly executed. APBS was a new customer, and there was no bank record of signatures. In that case, pursuant to para 13.1.1, the RM (*ie*, the relationship manager, Hwee Koon) was required to make arrangements to "witness" and "verify" the signatures of Michael Fam and Koh Poh Tiong on the executed documents. I accept Zimmermann's explanation that it may not be possible for bank officers to witness the directors' signatures if the company is a multinational corporation and the directors are located overseas. But APBS is a local company. In any case, even if a bank officer is unable to witness the director's signature, there are other ways of verifying a signature, such as contacting the company secretary or the director who signed the document to ask about the board resolution. Another way is to verify the director's signature against sample signatures from other sources like the Directors' Reports where the signatures of the directors who signed off the reports are easily found. Notably, HVB had in its possession the Directors' Reports for the financial years ended 30 September 2000, 2001 and 2002; they were provided by Chia at the meeting on 8 January 2003. [note: 40] It is clear on the evidence that HVB did not verify the signatures of the

persons who appeared to have certified the extract as a true copy of the relevant minutes of the board meeting that passed the resolution.

163 The purpose of verification of signatures is to ensure that the certified extract of the board resolution was properly executed. The certified extract of the board resolution is an important document for the bank; it is the borrower's authorisation of the transaction. If HVB only required banking support to check for physical completeness of the documents, the upshot of that evidence is that HVB simply chose to limit the inquiries available to look after and safeguard its own interest. That was the state of affairs as confirmed by the factual witnesses who testified on behalf of HVB. Zimmermann acknowledged that by not attesting to the director's signature or verifying the signature, the bank knowingly "lives" with the possible risk of forgery. [note: 41] Cheah Soo Lee also agreed with Mr Singh that without putting in place procedure to witness someone's signature, the bank for its commercial reasons knowingly takes the risks that it may make disbursements on the basis of forged signatures.[note: 42] Putting their evidence in the context of apparent authority, this means that the bank cannot claim to have been misled and no estoppel will arise in its favour.

164 As stated, verification of identity and signature is an exercise in common sense and ordinary prudence, and it is an exercise undertaken before the loan is allowed to be drawn down. Inasmuch as HVB did not verify the signatures, it simply accepted at face value that the documents were properly executed and allowed drawdown. Verification of a customer's signature against the bank's record on the account before cash withdrawals is common and routinely undertaken by bank tellers at a bank's counter. It is a check that is neither time consuming nor dependent on the skill of the bank officer to detect good forgeries. All that is required of the verifying officer is the exercise of common sense and ordinary prudence of a reasonable person in the position of the bank officer looking at the signature and comparing it against the bank's record or some other sample signature from public record. I repeat the point made at [149] about the risk of dealing with one person, and this same person with whom the bank has spoken to is returning documents authorising the very same person to sign the loan documentation and to operate the account singly, something that contradicted the rudiments of internal control and corporate governance, and according to Mr Hudson, these factors in combination increases the "call for suspicion", and hence reasonable inquiry ought to be made of the employee's authority.

165 Paul Rex, the banking expert who testified on behalf of HVB, agreed that one way to verify the authenticity of documents is to contact the company secretary or a director. He accepts that if the signatures were verified, Chia's fraud would have been detected. Despite that, he excuses HVB for not exercising common sense or ordinary prudence by contacting a third party like the company secretary to verify the authenticity or validity of the certified extract of the board resolution. His reason, which I find illogical and speculative, and is therefore rejected, is that a bank dealing with a public listed company or its major subsidiary would be entitled to assume the authenticity of a certified extract thereof and the signatures appearing there if it was submitted by an appropriate officer like Chia, and in the absence of any other features which would put the bank on notice to inquire further.[note: 43] In another paragraph, his concern that the bank by contacting the company secretary or one of the two ostensible signatories involved could be perceived as calling Chia's "own honesty or competence into question, with the potential of jeopardising severely any business relationship between HVB and APBS" and to use that reasoning to excuse HVB for its omission is, in my view, an absolute nonsense. The decision maker of the transaction as Mr Rex's accepted was the board of directors, not Chia. Chia as Mr Rex accepts was simply a point of contact.

166 Verifying the *bona fides* of documents is no different from taking steps to meet someone from senior management before the transaction is inked. Contacting senior management is not unheard of

and is known to the bank officers. Vassiliou confirmed this in cross-examination, and I did not think his evidence in re-examination changed the essence of his testimony set out here.[note: 44]

Q: Is there anything in the credit request which you wish had been done differently, or verified?

A: Well, with the knowledge that I now have …I mean, clearly, I would have to say "yes".

…

Q: With the knowledge that you now have.

A: Yes. I said I would change the fact that we…yeah, you should have contacted more than just the senior finance manager of the borrower, with the knowledge that we now have.

…

Q: Why is it that if you had contacted more than just the senior finance manager, things would have been different?

A: Things might have been different.

Q: Why?

A: Because someone other than Mr Chia in the organisation would have become aware of the potential borrowing.

…

Q: Why would speaking to someone else in senior management have possibly pre-empted the fraud? Why?

A: Because you would have raised the potential of a transaction that no one else in the organisation was aware of.

Q: Thank you. *Is this concept of speaking to someone else in senior management a concept which only hit you when Chia was arrested, is it a matter of common sense?*

A: *… I would like to clarify*.

Q: *This concept of speaking to someone else in senior management, did it occur to you only after Chia was arrested; or, you knew about it even beforehand? The concept*.

A: *Knew about it beforehand*.

Q: *Thank you. So as an experienced banker, you knew at that time, in 2002/2003, that if you are dealing with only one person, speaking to someone else in senior management might prevent a potential fraud?*

A: *Yes*.

Q: *Thank you. And I would assume that it is such common knowledge that this would also be known to Petritsch, Zimmermann, and Tan Hwee Koon?*

A: *I presume so, yes*.

Q: ... *Therefore, at the time the bank was dealing with Chia Teck Leng…and Chia Teck Leng only…the bank must have known that one way of reducing the risk of a potential fraud was to speak to someone other than Chia Teck Leng in senior management?*

A: Yes.

Q: … *And the bank chose not to speak to someone other than Chia Teck Leng right?*

A: *Right*.

[Emphasis added]

167 Tan Boon Hoo, the banking expert called by APBS, said at para 3.1.4- 3.1.6 of his report that checks may be done independently to verify the veracity of the board resolutions by checking with the company secretary, or by dealing with more than one individual. That view accords with common sense.

168 Objectively speaking, Terence Potter accepts that HVB could have taken steps to authenticate the documents which Chia had presented (and quite understandably there may be practical reason why it was not done).[note: 45] To him, a simple and commonsensical way to check would have been to speak to an independent third party like the company secretary to confirm the authenticity of the board resolutions. [note: 46]

A: Well, I can talk about common sense things that are relatively obvious.

…

Q: So tell us about the common sense things that you think are fairly obvious.

A: As I said earlier, … really all they can do is try to authenticate the forged documents.

Q: Pausing there, how do they do that?

A. Well, the only ways I can think of is to talk to the … as I said earlier, someone who is independent of the fellow who is handing you the documents, such as the company secretary who keeps board minutes, and confirm that they are real minutes, or it could be talking to other people, the fellow's superior in the organisation, I guess.

169 I should add that even if the bank thought that the certified extract of the board resolution was genuine, the board resolution must appropriately cover the US$30m facility, which in my view it did not. The board resolution was passed on 24 March 2003, after the loan agreement was signed on 21 March 2003. The wording of the board resolution was not apt to ratify the loan agreement. It was intended to authorise Chia to do something in the future. Neither did the board resolution indicate that the board was aware of the fixed interest rate for the loan at the time the resolution was passed which would have been an important matter for the board to know before approving the loan. In addition, the certified extract referred to a facility letter of 21 March 2003. There is no such document in evidence or for that matter in existence. The board resolution stated that acceptance of "the facilities offered by the Bank as contained in the facility letter" is in the best interests of the company. The board resolution also stated that the company "accepts the facility letter and enters into the obligation mentioned therein"; it authorised Chia to sign "the duplicate of the Facility Letter signifying the acceptance of the terns and condition of the facility letter." I do not accept the bank's evidence that the resolution was in order as the loan agreement which was signed on 21 March and the certified extract of the board resolution passed on 24 March were received by banking support on the same date, and they were received before disbursements of funds. In short, there was no valid approval of the board of APBS, and there was no valid delegated authority to Chia to act on behalf of APBS.

170 There were other irregularities. Chia verified his own specimen signature in the signature card that was meant for the "Chairman/Director/Secretary", and yet HVB accepted it. The Mandate for Accounts of a limited company was supposed to be signed by the company secretary and chairman of the meeting. Koh Poh Tiong was not the company secretary but it was ostensibly signed off by him as company secretary. Cheah Soo Lee said she knew that Koh Poh Tiong was not the company secretary; she saw that discrepancy but did not raise it as an issue with anyone in the bank.[note: 47] In any case, there was no verification of Koh Poh Tiong's signature. The discrepancies were accepted by the bank without inquiries as Cheah Soo Lee was satisfied that Chia's signature was verified by the other documents which is not the same thing as verifying the signatures of the directors who ostensibly signed the certified extract of the board resolution. In the circutmstances, HVB was content to live with the risk of forgery that could undermine and vitiate the transaction. Verification of the signatures would have revealed Chia's lack of authority, and in not making inquires, HVB cannot rely on apparent authority for assistance.

(3) Conclusion on ostensible authority to warrant the genuineness of the forged mandates

171 The banks have not established a holding out by APBS that Chia was clothed with authority to warrant the genuineness of the certified extracts of the board resolutions, or to communicate the board's approval of the transactions. Apparent authority fails on the basis of a lack of representation. Furthermore, evidence of the banks' standard requirement for board resolution which they imposed as a condition precedent of SEB Facilities and HVB Facility effectively undermines the bank's arguments on ostensible authority. The banks' impression that the certified extracts of the board resolutions were properly executed, and hence, in order, was founded entirely on the banks' limited verification of the certified extracts of the board resolutions. On the evidence, the banks willingly assumed the risk of fraud and hence Chia's lack of authority. As such, the banks cannot claim to be misled and no estoppel will arise in their favour.

Reliance

172 Having regard to the conclusions reached above - (a) that there was no representation to warrant the genuineness of the certified extracts or to represent that the board had approved the transactions; and (b) that condition (2) was not fulfilled - an assessment of condition (3) of Diplock LJ's four factors becomes academic. However, I propose to make a few comments on condition (3). First, for convenience condition (3) reads:

> That he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it.

173 Condition (3) requires the banks to act reasonably in so relying upon the representation; the banks will fail if they were put on inquiry and unreasonably failed to make the necessary inquiries about the employee's authority (see *The Raffaella* at [79] above; *Walter Woon on Company Law at* [92] above). As explained, there can be no reliance on Chia's apparent authority in the light of the banks' standard requirement for a certified extract of a board resolution. The limited verification of the condition precedent documents was clearly a failure to inquire into Chia's authority. On the evidence, the banks willingly assumed the risk of Chia acting fraudulently and hence Chia's lack of authority. As such, the banks cannot claim to be misled and no estoppel will arise in their favour.

174 In relation to the red flags raised by APBS, Mr Chong submits that they are red herrings, and hence irrelevant. [note: 48] APBS questioned the reasonableness of the explanations and reasons given by Chia to the banks for the loans, arguing that they did not make commercial sense. There were red flags or warning signs that ought to have prompted inquiry on the part of the banks as would have been made by a reasonable banker in the position of the banks at the relevant time and not as they now appear. The salient complaints highlighted by APBS were many. I begin with the complaint that SEB failed to comply with its own manuals and procedures. Specifically:

> (i) SEB's manuals stipulate that the credit memorandum, which forms the basis for the credit decision, should describe the "operational structure" of the customer's group, "if different from legal". But when pressed, Amin said that SEB had not addressed APBS's operational structure even though this was crucial to manage the risk that the counterparty may disavow the transaction if decision-making powers for treasury lay elsewhere.[note: 49]
>
> (ii) The manuals provide that SEB "must have confidence in the company's management and its ability to conduct the company's business in a professional way", and all Amin did in fulfilling this confidence is to be armed with the mere assurance in Chia being part of APBS management.[note: 50] The evidence is that Chia was not part of the senior management of APBS. He was not someone named as senior management in the Annual Reports of APBS.
>
> (iii) The manuals "exhorted [SEB] to analyse the purpose for which [OD] facilities were requested", but SEB did not comply with them, granting increases to the OD Facility to Chia on his request without question or evaluation.
>
> (iv) The manuals state that SEB should "review accounting principles and make sure that they are consistent with generally accepted accounting practice" ("GAAP"). A review of APBS's draft 1999 accounts did not disclose the overdraft from SEB required under GAAP. Chia's explanation was that the overdraft facility was aggregated under "Other Creditors". This departure from disclosure under GAAP should have put the bank on inquiry.

(v) The manuals state as "essential" a "thorough understanding of the purpose of the credit", but SEB simply acceded to the US$8m MM Line when Chia orally requested it.

(vi) The manuals stipulate that SEB has to "make sure that the borrower uses the loan for the stated purpose" but SEB did not monitor the use of the MM Line as Valerie Tan was not told by Amin to do so.

(vii) When the MM Line of US$25m was requested, Gerard Lee did not obtain the feasibility study even though the manuals provided that "Investment financing must be based on an investment analysis and repaid in accordance with the economic life of the investment. A straight line instalment schedule should be applied". Further, he did not probe, as required by the manuals, to understand the real purpose of the credit and the suitability of the credit to APBS's financial needs.

175 SEB's non-compliance with its internal manuals was a behaviour that was symptomatic of the bank's eagerness to establish a banking relationship with APBS and that eagerness was the larger problem that apparently permeated all levels in the bank. In that respect, it was unsurprising (as APBS points out) that SEB had also (in particular, the credit committee and the credit analysts) failed repeatedly to address or inquire about the glaringly obvious discrepancies in the documentation that accompanied the applications. For instance:

(i) In May 2000, SEB's credit committee reviewed APBS's account. It made nothing of the following falsehoods: (a) APBS had no borrowings for the last five years; (b) APBS had no debt of any kind as at 30 September 1999 when it had a debit balance of S$468,079 with SEB. The accounts Chia gave to SEB on 1 November 1999 did not record this liability; (c) SEB was dealing with APBS and not F&N; and (d) APBS's auditors had not corresponded with SEB to confirm the year-end balance as is the usual audit practice.

(ii) In November 2000, SEB's regional committee met and approved an increase in the MM Line from US$8m to US$10m, despite the following matters: (a) no new reason was given to support the increase; (b) Chia had not repaid the US$8 m; (c) APBS's audited accounts were analysed and it was noticed that the accounts did not reflect any debt owing to SEB; (d) in Chia's draft profit statement for 2000 that was given to SEB, the statement did not reflect any "interest expense" paid by APBS for 2000; and (e) APBS's audited accounts also did not reflect loans taken with the Japanese banks (which SEB knew about).

(iii) In April 2001, Andy Siew, performed SEB's annual review of APBS, and Chia had provided the doctored draft accounts. The red flags that should have been apparent to him were that: (a) the accounts did not comply with local accounting standards; (b) the doctored portions were visually obvious; (c) SEB could not have reasonably assumed that SEB's loan was under the classification "owings to financial institutions" since there was no breakdown for the classification "Other Creditors"; and (d) discrepancy in the dividend figure. Andy Siew was not called to give evidence in the trial. Neither was Carolyn Tay, the credit analyst who reviewed Chia's request for a MM Line of US$8m.

(iv) In May 2002, at Chia's request, Amin proposed that the MM Line be increased to US$15m. Chia also suggested exploring an additional US$ 20m medium term loan. After the application for a medium term loan was rejected, the following month, Chia through Amin proposed that the MM Line be US$25m; the additional US$10m was to be applied towards APBS opening a new bottling line. This request was approved by SEB in July 2002, despite the fact that: (a) the request was inconsistent with the original purpose for the MM Line and Chia's promise that it would be repaid

by APBS's cash deposits; (b) Amin had not obtained a feasibility study regarding the bottling line; (c) APBS could have financed the bottling line itself; (d) the urgency of the request was suspicious, as Chia had said weeks earlier that the new bottling line would not take place that year; (e) APBS would abandon a medium term loan for an increased MM Line which was a short term loan for a capital expenditure; (f) the doctored APBS accounts continued to show that APBS had no debt to SEB; and (g) Amin knew that Chia had not used the original MM Line for its stated purpose.

(v) In February 2003, Chia through Amin proposed an additional US$25m line to increase the MM Line to US$50m, and APBS's financial statements for the year ended 30 September 2002 were analysed, but SEB failed to notice the same discrepancies that have been re-emerging time and again. The proposal was not approved as the bank was not prepared to grant such a large loan on a clean basis to a non-Nordic customer.

176 Both Amin and Gerard Lee were aware that the treasury activities of APBS were under the control of F&N Group Treasury and as the treasury centre, it would be responsible for placing out funds as well as negotiating with banks for facilities for better interest rates and efficiencies.[note: 51] In addition, Mr Singh submits that the Visit Reports dated 28 December 1998 and 22 January 1999 and the credit application dated 28 January 1999 referred to all treasury activities being controlled by F&N.

177 From the matters highlighted above, and even though it would seem that it was not SEB's business as a matter of legal obligation to monitor APBS's purpose and use of the MM Line as stipulated in the relevant facility letter, the documentation submitted by Chia should have raised queries on account of the discrepancies discussed earlier (see [142] to [159] above). That fact combined with (i) the failure to comply with its internal manuals; and (ii) its failure to go beyond Chia as the final point of contact, SEB's officers were reasonably put on notice. All that one can say is that they did not bring any independent mind to bear upon the question of Chia's authority despite the numerous opportunities to do so. SEB cannot say that it is entitled to rely on APBS's representation - holding out of Chia as having authority to put forward forged documents as genuine - assuming that any such representation existed in the first place to excuse their conduct.

178 In relation to HVB, the red flag was the commercially illogical reason given for the US$30m loan. The loan was supposedly for a proposed new bottling plant. Chia had said that APBS needed to borrow in order to provide a "benchmark" interest rate to charge the joint venture partner in Indochina. "Benchmarking" as a reason for the loan was said to be implausible and it ought to have aroused the suspicions of a prudent banker. Mr Singh points out that APBS could always ask its existing panel of bankers for a favourable interest rate for such a loan and there was no need to enter into a loan just to do that. Also it did not make sense for APBS to actually borrow money from HVB and to incur interest just to obtain a benchmark.

179 Zimmermann in his written testimony stated that APBS was seeking a loan from HVB as Chia indicated that it was to benchmark the interest rate. Zimmermann did not mention that Weighted Average Cost of Capital ("WACC") was discussed at the meeting. In re-examination, Zimmermann changed his testimony by insisting that "the benchmark is the WACC".[note: 52] Mr Hudson confirmed in re-examination that he had not seen in any of HVB's papers or affidavits (including Mr Rex's report) any reference to WACC being used to justify the taking of the HVB loan.[note: 53] Valerie Tan who was present at the discussion did not make reference to "benching" or "WACC" in her affidavit of evidence-in-chief. The Credit Request dated 18 February 2003 which was signed by Zimmermaan and Tan Hwee Koon, mentioned "benchmarking" in the Comment Box. The comments there read:[note: 54]

> This is a new relationship and this transaction serves as the door opener to the Group. Asia Pacific Breweries (Singapore) Pte Ltd ("APBS") is financially strong and has practically no debt. For bench-marking purposes, APBS is entering into this medium term facility.
>
> DB5 for this transaction is positive. We will continue to promote treasury and securitization business to widen our product range after entering into this facility.

On this aspect of the evidence, I prefer the evidence of Valerie Tan over that of Zimmermann. The introduction of WACC in the witness stand was a blatant attempt to repair a perceived deficiency in his written testimony. By then, he realised that Chia's reason for benchmarking made no sense.

180 APBS also argues that HVB too did not comply with its internal manuals, and did not go beyond Chia as the final point of contact. HVB dealt with Chia alone. Nobody in HVB asked to meet senior management of APBS. It is evident from Zimmermann's testimony that HVB was aware of Chia's limited authority, and APBS argues that standard banking practice required HVB to meet senior management to review with senior management, including directors, its trading prospects and financing requirements. Mr Hudson opined, and I accept his evidence, that the responsibility of meeting senior management and other officers of a company before granting the facility was on the marketing department which would have been responsible for communicating with APBS and maintaining and developing the relationship. Mr Hudson, with 40 years of banking experience (and he helpfully elaborated on his relevant experience in re-examination[note: 55]), testified as follows:[note: 56]

> I have never heard of, or been involved in, a case where a bank extended a loan (directly, as distinct from participating in another bank's syndicate) to a corporate borrower for the purposes of that borrower's trading business, without first meeting senior management, including directors, of the borrower.

181 Mr Hudson's view is supported by HVB's manual which makes clear that HVB is to establish direct contact with the management team of the corporate borrower (as in senior management, and a finance manager like Chia was not part of senior management) and obtain information from them at first hand:[note: 57]

> It is of utmost importance that we maintain direct contact with the management team of the customer so that updated information like customer's business strategy and financial development can be obtained first hand.

182 Mr Hudson alluded to eliminating the possibility of fraud as another reason for meeting top management.[note: 58] Similarly, Mr Rex accepts that it is common for banks to contact senior management of the customer, and the reason for that is to mitigate the risk of not dealing with the correct person with authority. Mr Rex described Chia as the gatekeeper who was none other than the point of contact. In cross-examination, Mr Rex said:[note: 59]

> Q: … Is it your evidence that bankers do not ask to meet senior management?
>
> A: No.
>
> Q: They do? Why do bankers ask to meet senior management?

A: For a number of different reasons.

Q: One of those reasons is to mitigate a risk that you may not be dealing with someone who is authorised; right? Or rather you are dealing with someone who is not authorised.

A: That is one of those reasons, yes.

183 It seems to me that as HVB was looking to do business with APBS, it would welcome the opportunity to meet directors of the company. One such occasion would be at the time the loan agreement was signed. One would have expected the signing of the US$30m loan agreement to be in a formal setting of an office environment, and certainly not in Chia's car parked at the driveway of HVB's office building. I have also stated that a lending relationship would call for, at least, a courtesy visit to a director of the company. Moreover, it would not have been out of place to invite Chia's superior or a director of APBS to the lunch HVB organised in July 2003 for Chia to thank him for the US$30m facility. But HVB let slip the perfect opportunity to meet senior management. Mr Rex accepts in re-examination that once a first piece of business has been established, a meeting with the contact's superior is reasonable, and if that did not take place over time, "it will become increasingly suspicious.[note: 60] In this case, HVB did not ask to meet Chia's superior or a director. Equally, SEB did not ask to meet with Chia's superior or a director to introduce its officers in the Singapore branch in the four years of the alleged relationship.

184 HVB's manual also requires its officers to understand the group structure of the corporate borrower so as to understand the division of financial responsibility within the group. Hwee Koon was aware of the existence of F&N Group Treasury but did not tell Zimmermann about it. Zimmermann knew that APBS was a subsidiary of a large group of companies and that as with any group, it was conceivable that there could be some kind of group treasury. Despite that, Zimmermann did not check on where the responsibility for group treasury lay as he was content to deal with Chia alone because of APBS's creditworthiness and he simply trusted Chia who told him that he was handling APBS's borrowings and deposit placements.

185 Vassiliou agreed with Mr Singh that if HVB had met someone else other than just Chia, the fraud could have been detected.[note: 61] He admits that HVB knew at that time that one way of reducing the risk of potential fraud was to speak to someone in senior management other than Chia.[note: 62]

186 I agree with Tan Boon Hoo's commonsensical observations that it was unusual that a loan of US$30m did not to involve on the side of APBS in-house counsel or external lawyers to review the loan documentation. In this case, Hwee Koon sent as many as four emails on the proposed draft term loan agreement to Chia between 5 March 2003 and 24 March 2003.

187 Chia was the sole signatory of the US$30m facility. Mr Potter accepts that the appointment of more than one signatory is the most basic form of internal control in any case where an individual is in a position to instruct a bank on movement of funds. From an internal control and corporate governance point, the risks associated with sole signatory exist even for a facility with a single drawdown.

188 I make the following general comments on the conduct of the banks as highlighted above, and their effect on condition (3) of Diplock LJ's four factors. First, the banks wanted confirmation from the

APBS board in the form of certified extracts of board resolutions approving the transactions without which the transactions would not be concluded. The banks knew that board approval would be the most certain way to ensure that the transactions were authorised. At the outset of the discussions, Chia was told about the need for board approval (see [31] above). From this perspective, it did not matter what Chia might have told the banks since the banks were depending on board approval of the particular transaction. If that was commercially plausible and a reasonable stance for the banks to adopt, I think the criticism is best directed at the banks' token verification of the certified extract of the board resolutions they received. HVB's manual also deals with verification of the documents to ensure that they were properly executed.[note: 63] Meeting senior management was one of several ways to verify Chia's authority. I have already discussed this in [137] to [170].

189 Second, the banks' witnesses emphasised that there was no legal requirement upon the banks to investigate the commercial justification for the transactions from the viewpoint of APBS and the banks. It was said in evidence that it was not regarded as part of a bank's duties to investigate or to concern itself with the commercial benefit of the proposed transactions from the view of the potential borrower. Generally, that position seems to be legally accepted unless something irregular calls for inquiry. If the bank is put on inquiry in circumstances that the transaction may be irregular, it is imperative to seek an explanation before proceeding further. But I think the banks' eagerness to secure and develop a banking relationship with APBS, a cash rich company, was their undoing. I accept as plausible Mr Hudon's explanation on how the banks came to ignore the requirements of standard banking practice "when a bank sees a good credit" (see [190] below for his full oral testimony). [note: 64] In doing so, the bank took the risk of fraud. Objectively, there was no reasonable reliance to satisfy condition (3)

190 Third, the banks arguably had not acted reasonably and simply trusted Chia for no good reason, and did not ask the right questions. The facts in evidence, considered *collectively*, bear this out: Chia was the only contact person throughout all the transactions, which can only be considered irregular, as no attempt was made by Chia to introduce the key players, namely, the APBS directors, and neither was there any communication on the part of the banks with other senior APBS personnel throughout the relationship; and glaring irregularities in the documents that Chia had forged were accepted.

191 Fourth, in evaluating the banks' state of mind at the material time, it is important to keep in sight the banks' eagerness and desire to have a banking relationship with APBS. For the banks, the purpose for which the respective loans were needed was only material if it impacted on recoverability in the event of a default; but the banks did not think the risk was high because of the creditworthiness of the particular corporate borrower. The narrow thinking continued throughout the initial stages of the relationship and in the later stages as well. I accept as patently reasonable and credible, Mr Hudson's comments in answer to Mr Yeo's query for a plausible explanation as to how the five international banks were cheated by Chia came to ignore standard banking practice:[note: 65]

A: I can't [include Citibank in my explanation] because I have not studied the Citibank situation, and I do not know what happened there. So far as the other four banks are concerned, they all had in common, so far as I can see… and this is an explanation, this is not a statement of fact…but *it seems to me that they all had in common that they were very large international banks with a high level of overhead and a high degree of capital on which they had to earn a profit, looking for a profitable and creditworthy business in Singapore*. And they all fell foul of the problem that has occurred frequently in banking, that when a bank sees a good credit, it ignores some of the other requirements of good banking practice. *And all these four banks had in common that, in their desire for quick and reliable profitability, they ignored some of the basic precepts of good banking practice and of their own manuals. And that is my explanation of the intrinsically surprising fact that four big, good banks all fell foul of this same problem*. [Emphasis added]

Conclusion on authority and the claim in contract

192 For the reasons stated, I therefore conclude that Chia had no actual or ostensible authority to bind APBS. Accordingly, I dismiss the contactual claims in Suit 774 and 763. I shall now consider the other claims.

Vicarious liability

193 I now turn to the issue of vicarious liability for Chia's deceit. It is not disputed that Chia is personally liable to the banks for the tort of deceit. The banks contend that APBS is vicariously liable for Chia's deceit. It is said that the tort of deceit was in forging the certified extracts of the board resolutions, and the tort was committed in the course of Chia's employment. HVB argues both ostensible authority and vicarious liability in that the arguments are in many parts distinct. On the other hand, SEB concentrated mainly on vicarious liability in that ostensible authority was subsumed under the issue of vicarious liability.[note: 66] HVB accepts that the conclusion would be the same on whether the "close connection test" or agency principles applies. The different approach is because of differences in emphasis. The matters relied upon in support of ostensible authority and vicarious liability are, essentially the same.

194 The relevant leading authorities are *Lloyd v Grace Smith* and *Armagas v Mundogas*. If vicarious liability of the employer is to be established, the act of deceit – fraudulently representing the board resolutions as genuine - must be made in the course of Chia's employment (see also per Lord Woolf MR in *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2001] 1 AC 486 at 494). The question of whether an employee was acting in the course of his employment (and in the case of an agent, in the course of his authority) is to be decided according to the same test as whether the matters complained of were within the employee's express, implied or ostensible authority. The House of Lords in *Armagas v Mundogas* confirmed what had been stated in *Lloyd v Grace Smith* that there is no difference between the question whether the employee was acting in the course of his employment and the question whether he was acting within the scope of his actual or ostensible authority to make the statements in relation to the matters in hand (see also *Lloyd v Grace Smith* at 725). In short, on both issues, the same test applies.

195 In *Morris v Martin* (which is concerned with the vicarious liability of a master for a theft committed by his servant), the court there distinguished between the situation where the employer has given the employee the apparent authority to commit the tort and where the employment has

simply provided the opportunity to the servant to commit the tort. Diplock LJ at 737 observed:

> The mere fact that his employment by the defendant gave him the opportunity to steal … would not suffice.

196 Diplock LJ and Lord Denning MR (at 727) contrasted the apparent authority of a servant which can result in a liability on his employer (*Lloyd v Grace Smith*) and a servant taking the opportunity afforded by his service to steal or defraud another for his own benefit which does not make the master liable to the person who has been defrauded (*Ruben*).

197 For present purposes, the distinction highlighted in *Morris v Martin* **(**at 737) was adopted by the House of Lords in *Armagas v Mundogas*. The relevant criterion is ostensible authority to do the relevant act. The existence of authority to do other acts closely related to the fraudulent act does not suffice, and this aspect is not relevant on the facts here. It follows from *Armagas v Mundogas* that the vicarious liability claim adds nothing to the agency claim based on ostensible authority.

198 I have already held that Chia did not have authority to enter into a binding agreement and was not held out as having such authority; or as having apparent authority to communicate approval of the transaction on the part of someone more senior (*ie*, the board of APBS) or to warrant the genuineness of the extracts of the board resolutions. Therefore, the act of deceit which was the false representation was not practised in the course of Chia's employment. Accordingly, the case of the banks on vicarious liability fails for the same reasons as I have rejected the agency claim based on ostensible authority. Separately, I do not see how *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] 3WLR 1547 ("*SCB v PNSC*"), a decision cited by Mr Chong, which held that there is no common law defence of contributory negligence in an action for deceit, assists SEB on the facts. It is not APBS's defence to the challenge on vicarious liability that even if Chia, was acting in the course of employment in putting forward the false mandate as genuine, SEB was negligent in believing the representation. Its case is founded on there being no ostensible authority and APBS cites as illustration *Kooragang Investments Pty Ltd v Richardson and Wrench Ltd* [1982] AC 462 where the court held the employer not vicariously liable because the servant was not acting within his ostensible authority. Mr Yeo accepts, and rightly so, that in the context of ostensible authority, the question of the banks' reasonable reliance on the holding out or representation is still a relevant consideration.

199 There is, in the circumstances, no need for a decision whether the *Lister* test is applicable (see *Lister v Hesley Hall Ltd* [2002] 1 AC 215 ("*Lister*"). Be that as it may, suffice it to say that *Lister* adopts a looser test of connection between the acts in question and the employment in the context of the liability of the employer of a warden of a school for sexual abuse of the pupils by the warden. The oft repeated language of the "Salmond" formulation (see *Salmond, Law of Torts*, 1st Ed (1907), at 83) is whether an act done negligently or dishonestly, the wrongful act, comprised a wrongful and unauthorised mode of doing an act authorised by the employer. Lord Steyn said that "The [*Lister*] test is whether the [wrongdoer's] torts are so closely connected with his employment that it would be fair and just to hold the employers vicariously liable" (see at [28]). The *Lister* test was applied in the context of intentional torts; and again, in respect of torts performed for the tortfeasor's benefit (see *Bowstead*, para 8-178, at 458). A similar reasoning was used in relation to breach of trust and tort of knowing assistance in *Dubai Aluminium Co Ltd v Salaam* [2003] AC 366. There are two local cases that seemingly alluded to or applied the *Lister* test. The first case is *Ng Sing King v PSA International Pte Ltd (No 2)* [2005] 2 SLR 56 which was not a case on vicarious liability; it was a minority oppression action under s 216 of the Companies Act. APBS therefore points out that the reference to the close connection test was obiter. The other case is *Lim Kok Koon v Tan Cheng Yew* [2004] 3 SLR 111, a case under s 10 of the Partnership Act. Both these decisions are not helpful. On

the facts of this case, I have found that Chia's fraudulent representation for the reasons stated could not be attributable to APBS.

Estoppel pleaded by SEB

200 Estoppel was pleaded by SEB. Accepting Mr Singh's submissions on the vagueness of this plea, I need only add that I agree with the judge in *Hua Rong Finance* that it is difficult to conceive how a case on estoppel could succeed if the case on ostensible authority fails where reliance was on the forged copy of the alleged board resolution. In the light of my conclusion on the contract claim and tort claim, the case for estoppel fails.

The claim in tort by HVB: The negligence issue

The contentions

201 HVB (but not SEB) contends that APBS was negligent in broadly two ways: (a) failing to implement and maintain an adequate and reasonable system of internal controls in relation to APBS's finance department, its officers and its activities and transactions so as to prevent or detect fraud and any unauthorised transactions or activities; and (b) failing to do any or adequate background checks on Chia before employing him as Finance Manager. In the result, APBS failed to ensure that persons of integrity, honesty and good character were employed for the most senior finance position in APBS. Specifically, the failures HVB asserts include:[note: 67]

(i) The lack of supervision over Chia. For nearly five years, Chia was running APBS Finance like an autonomous unit.

(ii) The failure to perform the most elementary reconciliation of the purported Citibank deposits. Not a single written instruction was issued by APBS, nor was any fixed deposit advice received for any of the 22 purported deposits over three years. All the Citibank deposits were purportedly placed by cheque; none of the co-signatories asked or dared to ask about the propriety of the transactions. A total sum of S$53m was blindly signed away with no supporting documentation whatsoever. APBS's finance department was content to hope for the return of funds (which could be as long as up to eight months after the purported placement) when it would then carry out a "retrospective" verification using copies of forged Citibank schedules presented in a format which no one had ever encountered previously. By the time APBS was making the largest "investment" of S$30m purportedly with Citibank, even Chia did not bother to provide Teo Hun Teck of the finance department with any Citibank schedule given that the reconciliation process within APBS's finance department was almost non-existent.

(iii) The failure to properly record the purported Citibank deposits. The accounting records were left blank or incomplete for months but were signed off by the supervisors as if they were in order.

(iv) The failure to segregate key finance functions. Teo Hun Teck was solely responsible for the arrangements for the placement of fixed deposits, the recording, reconciliation and monitoring of the transactions.

(v) The failure to take appropriate action when the issues of non-compliance with protocol were reported in that Chia was placing deposits with Citibank without informing F&N Group Treasury. Chia's breaches were well-known within the finance department and his conduct was raised, at least, three times in 2000, 2001 and 2002, including to Quek Peck Leng, a director at

APBL level. In each instance, Chia's reporting superior officers in APBS (General Manager), APBL (Group Finance Director) and F&N (F&N Group Treasury) were not informed, allowing Chia to continue his activities.

(vi) The failure by F&N Group Treasury and F&N Internal Audit to detect the purported Citibank deposits for almost four years. This was inexplicable given that the Citibank transactions (and the clear absence of verification) were so clearly set out in the records of APBS and would have been apparent to anyone giving the records even the most cursory review.

(vii) The failure to carry out an independent check on Chia before employing him as APBS's most senior finance officer and a member of its senior management. The steps taken by APBS were clearly inadequate. For instance, his gambling debt of over S$1m was not followed up.

202 HVB refers to s 199(2A) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") and uses it as a basis for its claim in negligence outlined in general above. The section states:

(2A) Every public company and every subsidiary of a public company shall devise and maintain a system of internal accounting controls sufficient to provide a reasonable assurance that —

(a) assets are safeguarded against loss from unauthorised use or disposition; and

(b) transactions are properly authorised and that they are recorded as necessary to permit the preparation of true and fair profit and loss accounts and balance-sheets and to maintain accountability of assets.

203 The categories of liability arising out of breach of statutory duty in private law claims are identified in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 ("*X Minors*") at 730, to include *inter alia*:

(a) actions for breach of statutory duty *simpliciter;* and

(b) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it.

204 HVB is not suing for breach of statutory duty imposed by s 199(2A) of the Act, but submits that the statutory requirement imposes a common law duty of care in the tort of negligence which has been breached. The bank's argument is that by reason of s 199(2A), APBS as a subsidiary of ABPL, a public listed company, owes a common law duty of care to banks and financial institutions (not limited to the company's regular bankers) to implement, and maintain an adequate and reasonable system of internal control; it was reasonably foreseeable that, in the absence of proper corporate governance within APBS, Chia who was clothed with authority to manage substantial funds of the company and deals with banks and financial institutions, could (and the risk was obvious) take advantage of the weak internal controls for his personal benefit, thereby resulting in financial loss to the company and banks. Allied to this duty of care, is the duty to employ persons of good character to senior positions of responsibility. The short point is that APBS is negligent in failing to spot Chia's fraud on the company, and this failure had exposed HVB to the risk of contact with a dishonest employee than would otherwise have been the case. I shall consider below whether s 199(2A) of itself gives rise to a common law duty of care, or did anything pass between APBS and HVB which could count as giving rise to an assumption of responsibility by APBS to HVB to take care to avoid or prevent loss to HVB, and if so, it becomes necessary to consider the scope of duty for which APBS

assumed responsibility, and the scope of the loss which the causal connection links.

Section 199(2A) of the Companies Act

205 Section 199(2A) was introduced in 1989 as part of a series of amendments to the Act to detect and prevent company fraud after the Pan-Electric saga.

206 At the Second Reading of the corresponding Companies (Amendment) Bill on 7 April 1989 (Hansard, col 103), BG George Yeo ("BG Yeo") speaking for the Minister of Finance explained the rationale of the relevant amendments:

> The Bill also contains a number of amendments aimed at strengthening the statutory means to prevent and detect company fraud, particularly with respect to public companies. These are aimed at reducing the risk of another Pan-Electric type failure.
>
> …
>
> Clauses 20 [ultimately s 199(2A) of the Act], 21 and 22 attack the problem of the detection and prevention of company fraud in a three-fold manner.
>
> Clause 20 provides for the mandatory establishment of a system of internal accounting controls in public companies to ensure that their assets are safeguarded and transactions are properly authorised and recorded so as to permit the preparation of true and fair accounts. This is based on a recommendation from the Institute of Certified Public Accountants; formerly known as the Singapore Society of Accountants or SSA. As this is not a particularly onerous requirement, the proposal is to extend it to all public companies of which there are approximately 700 out of a total of 58,000 locally-incorporated companies.
>
> Clause 21 … obliges every Singapore-incorporated listed public company to have an audit committee …
>
> …
>
> Clause 22 places a responsibility on the auditor to report corporate fraud. …

207 Pausing there, it is noteworthy that the Act already recognised that the primary responsibility for safeguarding a company's assets and preventing errors and defalcations rests with a company's directors. Material irregularities, and *a fortiori* fraud, are normally brought to light by sound audit procedures, one of which is the practice of pointing out weakness in the internal controls. The proposed amendments go further, and as BG Yeo highlighted, the amendments seek to "attack the problem of the detection and prevention of company fraud in a three-fold manner".

208 At the Third Reading of the Bill on 30 November 1989, the Minister of Finance reiterated that the aim of the relevant amendments was to provide a more effective means to prevent and detect fraud in companies.[note: 68] Commenting on cl 22 (numbered as s 207(9A) of the Act) which imposes the duty of auditors to report fraud (see [206] above), the Minister referred to the class of persons the amendments sought to protect. The Minister said:

> … since the object of this amendment is primarily to *protect public shareholders and debenture holders against management frauds*, the mandatory requirement has been confined to public companies and their subsidiaries. [Emphasis added]

209 One gleans from the preceding italicised remarks that the aim of s 199(2A) is to protect a limited class made up of shareholders and debenture holders against management fraud and not banks in the position of HVB.

210 The relief for breach of s 199(2A) is spelled out under s 199(6) which provides for a fine or imprisonment. There is also provision for a default penalty. Whilst the presence of a criminal penalty is inconclusive as to whether the legislature intended to provide for a civil remedy, it is generally a factor militating against the finding of a civil remedy. The criminal penalty is primarily directed at those in management. The definition of "officer" in s 4(1) includes a person employed in an executive capacity. "Executive" is not defined and it ought to cover Chia whose responsibilities under the "Position Description" for the job of Finance Manager included that of "review[ing] operating systems and procedures", "ensur[ing] adequate controls, policies and compliance are maintained" and "ensuring compliance with local legislation and accounting practices". [note: 69]

211 Lord Wilberforce's test in *X Minors* (at 731) which has been accepted by the leading textbooks (see *Clerk & Lindsell* (Sweet & Maxwell, 19th Ed, 2006) ("*Clerk & Lindsell*") at para 9-06; *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 11th Ed, 2006) at para 11-06) involves the following matters:

> … in an ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. Such a cause of action can arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the *protection of a limited class* of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory duty was intended to be enforceable by those means and not by private right of action: see *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 and *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173. However, the mere existence of some other statutory duty remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. [Emphasis added]

212 Assuming, for the sake of argument, that there was a breach of statutory duty, applying the test in *X Minors*, on its construction, HVB does not fall within the limited class intended to be protected under s 199(2A) of the Act (see [208]-[209] above). Neither, on its construction, is there any indication that the legislature's intention is to arm those falling within the limited class with a civil remedy against the company for breach of statutory duty. Section 199(2A) is designed to safeguard the assets of the company and, hence, the provision is for the benefit of the company.

Common law negligence

213 Having reached the conclusion that in the present case there is no civil remedy for breach of statutory duty, is there a common law cause of action based on the existence of a common law duty of care? The common law duty is framed as follows. In its Statement of Claim (Amendment no 1), HVB alleged:

> 31. … The Plaintiffs will rely on (inter alia) the following matters:-
>
> (i) APBS appointed Chia as Finance Manager in the knowledge and with the intention that he would deal with banks and financial institutions on behalf of APBS;
>
> (ii) It was known or ought to have been known to APBS or ought reasonably to have been within its contemplation that, as APBS's Finance Manager:-
>
> (a) banks and financial institutions acting by their officers/representatives would deal with Chia in relation to the opening and operation of bank accounts in APBS's name, and/or the provision of loans and/or other banking facilities to APBS.
>
> (b) banks and financial institutions would rely on representations made by Chia in relation to such bank accounts and/or banking facilities to be opened and/or extended to APBS, including any representations that such bank accounts and/or banking facilities had been accepted or approved by APBS;
>
> (c) banks and financial institutions would rely on documents submitted by Chia in support of applications to open bank accounts and/or for banking facilities, as being genuine documents;
>
> (d) banks and financial institutions would act upon instructions given by Chia relating to the drawdown of funds from banking facilities extended to APBS;
>
> (e) Chia would be in a position to procure substantial banking facilities from banks and financial institutions in APBS's name on the premise that these banking facilities were for the benefit of APBS, if left unsupervised or inadequately supervised;
>
> (f) Chia would be in a position to commit fraud in respect of monies advanced, or intended to be advanced, to APBS, and to manipulate bank accounts in the name of APBS for his own purposes, if left unsupervised or inadequately supervised; and/or
>
> (g) any bank or financial institution which intended to provide loans or other banking facilities to APBS in reliance on Chia's acts and/or representations relating to such loans or banking facilities would incur substantial loss and damage if the loans/banking facilities were in fact unauthorised and APBS disclaimed liability for the same; and
>
> (iii) The Plaintiffs were directed to Chia as the appropriate person to discuss banking facilities with (as pleaded in paragraph 15) and accordingly the Plaintiffs did deal with Chia in relation to the HVB Facility.

32 Accordingly, APBS owed a duty of care to banks and financial institutions, including the Plaintiffs, who in APBS's reasonable contemplation, would deal with Chia as APBS's Finance

Manage:

(i) to ensure that persons employed in senior positions of responsibility for APBS's finance were individuals of integrity, honesty and good character;

(ii) to implement and/or maintain an adequate system(s) of internal control to enable APBS to monitor the transactions/activities by persons in its finance department and/or in its bank accounts and/or banking facilities, and/or to prevent or detect any unauthorised transaction/activity by/in the same;

(iii) to conduct regular reviews of such internal controls, including their effectiveness and compliance, to prevent or detect fraud and/or to prevent or detect any unauthorised transaction/activity by persons in its finance department, and/or in its bank accounts and/or banking facilities;

(iv) to lay down strict procedures and protocol for the opening and operation of bank accounts and/or the application for loans/banking facilities and to ensure that the same were observed and complied with; and/or

(v) to ensure adequate supervision over Chia while he was carrying out his responsibilities as APBS/s Finance Manager.

214 The pleadings then aver to the failures which are mentioned in [201] above. There is also the assertion that APBS failed to carry out an independent check on Chia before employing him as APBS's most senior finance officer and a member of its senior management.

Duty of care

215 This is a case concerning pure economic loss. The Court of Appeal in the leading case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 ("*Spandeck*") laid down a single test to be applied to determine the existence of a duty of care for all claims in negligence irrespective of the type of damages claimed and abandoning a long held legal distinction between physical damage or economic loss. In a nutshell, the *Spandeck* test involves a threshold finding of factual foreseeability, followed by proximity and then policy considerations. Generally, for a *prima facie* duty of care to arise in relation to negligent misstatement, it is necessary to show a special relationship between the parties so as to demonstrate physical, circumstantial and causal proximity. In the wider case of negligence, the existence of a duty of care requires an assumption of responsibility and reliance; and that it is fair, just and reasonable to impose a duty, there being no policy considerations to the contrary.

(1) Factual foreseeability and legal proximity

216 Mr Yeo argues that factual foreseeability is easily satisfied as there was a connection between the negligent conduct and the event causing loss. There is both physical and causal proximity because there was actual direct face-to-face contact with APBS management (via Chia). Chia was placed in a position where he managed substantial funds and dealt with banks. There is also causal proximity because there was closeness or directness of the causal connection or relationship between (1) Chia's fraud against APBS and the banks and the frauds were "integrated" and (2) the loss suffered by HVB. There was a failure to prevent or detect the 22 misappropriations, and if detected, it would have led to Chia being deterred from undertaking the frauds against APBS. Alternatively, actual discovery or detection by APBS would have led to the arrest or dismissal of Chia. Either

scenario, so the argument developed, would have prevented the facilities being entered into in March 2003 with HVB. HVB said that on the evidence adduced, there were signs of irregularities that served as warnings but nothing was done. APBS did not know of the misappropriations because it failed, *inter alia*, to supervise Chia; and proper supervision would have disclosed what was going on, and the fraudulent activities would have been stopped. Mr Yeo argues that it was reasonably foreseeable that in the absence of proper corporate governance within APBS, and given Chia's responsibilities, Chia could abuse his position and take advantage of weak internal controls to cheat the company and banks.

217 APBS submits that HVB's claim in negligence is fanciful as it is without any factual and legal foundation whatsoever. In response to HVB's claim on factual foreseeability and legal proximity, Mr Singh submits that the critical questions are whether APBS could have: [note: 70]

> (i) directed its mind to the consequence of employing Chia to perform operation finance functions, foreseen that Chia would forged board resolutions and obtained unauthorised facilities, and that HVB would have relied on the forged resolutions in granting the unauthorised facilities; or
>
> (ii) directed its mind to the adequacies or otherwise of its internal audit systems; foreseen that Chia would forged board resolutions and obtained unauthorised facilities, and that HVB would have relied on the forged resolutions in granting the unauthorised facilities.

218 The answer to both questions, APBS argues, is clearly no. APBS maintains that it could not reasonably be expected to foresee that at some time in the unknown future, some bank which it knew nothing about is likely to be injured by its choice of finance manager, and the alleged inadequacies of its internal finance and accounting systems. In short, HVB's allegation is that a duty of care is owed not only to the company's regular bankers, but to all banks and financial institutions at large. The absurdity of the claim, Mr Singh argues, is underscored by Zimmermann's testimony in cross-examination that the alleged duty HVB sought to impose on APBS began from the date of its incorporation, and is allegedly owed to every bank and financial institution which existed at the time of the company's incorporation, or some other time in the future. On the facts, APBS was not a customer of HVB and had never had any dealings with HVB. APBS could not have foreseen a failure in management controls in the way argued for by HVB.

219 The concept of proximity was explained in *Spandeck* at [81] and its existence depends on the following matters:

> In our view, Deane J's analysis in [*Sutherland Shire Council v Heyman (1985) 60 ALR 1*], that proximity includes physical, circumstantial as well as causal proximity, does provide substance to the concept since it includes the twin criteria of voluntary assumption of responsibility and reliance, where the facts support them, as essential factors in meeting the test of proximity. Where A voluntarily assumes responsibility for his acts or omissions towards B, and B relies on it, it is only fair and just that the law should hold A liable for negligence in causing economic loss or physical damage to B.

220 A feature of the single test for the imposition of this common law duty of care is whether the employer, APBS, had assumed a responsibility towards HVB for the duties alleged to arise so as to ensure that HVB does not suffer loss, and HVB relies on it. Therefore, the first question is whether the facts show a duty of care assumed by APBS to HVB. The facts relied on by HVB as showing a duty of care was assumed by APBS directly to HVB by reason of the matters pleaded in para 31 of the Statement of Claim (and reproduced at [213] above) rest on the actual or ostensible authority of Chia

which I have already rejected in this judgment. I concluded that Chia had not acted within the course of his employment; Chia did not have authority (actual or ostensible) to borrow and enter into a binding agreement on behalf of APBS, and was not held out as having authority to communicate approval of the transaction on the part of someone more senior (*ie*, the board of APBS), or to warrant the genuineness of the extract of the board resolution. In the circumstances, the very facts relied upon by HVB do not sustain a direct relationship between APBS and HVB capable of giving rise to a duty of care.

221 The case HVB seeks to advance is unsustainable for other reasons which I will now discuss. The essence of the argument, as I see it, is that APBS is said to be liable for damages because its failure to provide adequate and reasonable internal controls to detect Chia's misappropriation, or adequate supervision of Chia, or its inadequate pre-hiring checks on Chia had exposed HVB to the risk of contact with a dishonest employee than otherwise would have been the case. HVB's argument can be generally expressed as follows:

(i) If APBS had not acted in breach of the common law duty of care to maintain adequate and reasonable internal controls, or an adequate supervision of Chia, APBS would have detected Chia's misappropriations of 22 OCBC cheques.

(ii) In that case, his employment would have been terminated or he would have been arrested, and thus removed as the Finance Manager of APBS.

(iii) If he was removed, HVB would not have entered into the HVB Facilities.

(iv) The parting with the loan (*ie*, the drawdown) in the circumstances was a loss causing damage to HVB.

222 Having broken down HVB's argument in this manner, is there a duty of care owed to HVB? I do not think so. As stated, HVB has to first establish that there was an assumption of responsibility towards HVB in relation to APBS's system of internal control and supervision of Chia. Second, HVB's argument depends upon the nature of the causation necessary to establish liability for breach of duty. The fact that an alleged breach has initiated one train of events, rather than another, is not, or, at least, may not be sufficient in itself. HVB is saying that at the moment of parting with the loan (*ie*, drawdown) there is damage, and that this loss occurred as a result of relying on the negligent internal control including auditing and supervision by APBS of Chia and APBS did not stop Chia's fraudulent bilking of the company. This argument will be considered in detail later (see [229] & [243]-[246] below). Suffice it to say, the causal connection is missing in this argument.

223 I shall first discuss the criteria of assumption of responsibility. In the legal context of proximity, the existence of a "sufficient relationship of proximity" between the parties is the very basis of a duty of care. Here, HVB has to show that there was an assumption of responsibility towards HVB in relation to APBS's internal control and supervision of Chia. This is necessary as HVB is arguing that the breach exposed HVB to the risk of fraud, and if what happened subsequent to the breach was loss from a danger of that kind, the loss might be seen as a result of the breach. But again I do not think that this argument is open to HVB. To allow Chia to be in the company as its finance manager, does not, without more, establish a sufficient relationship of proximity or a casual relationship.

224 At this point, I must turn to the case of *Hornsby* to illustrate how an assumption of responsibility can arise. The English Court of Appeal in *Hornsby* rejected the contention that the defendants' "ought to have known" of Young's activities. Likewise, any argument that APBS "ought to have known" of Chia's misappropriations if it had adequate and reasonable internal controls, or had

supervised Chia and made proper reasonable inquiries is difficult to overcome. In *Hornsby*, 14 plaintiffs sued the firm of Clark Kenneth Levethal for (i) reimbursement of sums deposited with a fraudster named Nicholas Young on the footing that he had actual or ostensible authority to receive deposits on behalf of Clark Kenneth Levethal ("CKL") which he misappropriated; (ii) damages on the basis that CKL, as Young's employers, were vicariously liable for his fraud; and (iii) damages in negligence against all the defendants who were all firms of accountants. Young was employed as the International Executive Officers of CKL. He induced more than 100 investors to deposit money with him over a period of 12 years on the pretext that through his employment with CKL, he received his money in a number of different countries which enabled him to establish a fund for himself and a few close friends to invest in. The fund was said to be held in Standard Chartered Bank and would be structured in such a way that the returns were all received tax-free in the hands of the investors. The investments were said to be secured in the event of Young's death by insurance policies on his life and/or by specific bequests in his will in favour of investors. The rates of return ranged from 1.75% to 2.5% per month (21% to 30% per annum). Young was able to sustain the fraud for 12 years until he ran out of money in 1990 when the fraud was exposed. The 14 plaintiffs represented a reasonable spread of typical investors and it was hoped that the resolution of the 14 cases would point the way to a settlement of all the claims. It was alleged that the defendants owed a duty or undertook the task of so conducting their affairs and in particular supervising the activities of Young so that others did not suffer loss in consequence of those activities. Alternatively, the defendants owed the plaintiffs the duty to find out what Young was doing and put a stop to it. The trial judge rejected the plaintiffs' argument that CKL was under a duty of care. On appeal, the appellant's counsel argued that if CKL had known that Young was defrauding the plaintiffs by their investment in the International fund and using CKL's facilities to further the fraud, they should have stopped him. But the fact of the matter was that CKL *did not know* what Young was doing. Therefore, as Stuart-Smith LJ said, the appellants had to argue that they *ought to have known* or could have done so if they had made proper inquiries. Stuart-Smith LJ pointed out that the argument breaks down at the threshold of foreseeablity. He explained (at 651):

> The question of what is reasonably foreseeable is relevant both to the existence of the duty and to whether or not the duty of care is breached. *When one is considering the existence of the duty, this has to be considered in the light of the defendant's actual knowledge; this may extend to include those matters which a reasonable and honest man would know if he did not shut his eyes to the matter, sometimes called "Nelsonian knowledge"*. But *it is impermissible to attribute to him, at this stage, constructive knowledge in the sense of knowledge which he would have discovered if he had made enquiries*. He only becomes under a duty to make enquiries if he owes the plaintiff the duty of care postulated. The argument is, therefore, a circular one.
>
> [Emphasis added]

225 Stuart-Smith LJ noted that CKL had never assumed any responsibility to the plaintiffs for making any inquiry about the International Fund. If any of the plaintiffs had asked CKL about Young's activities and CKL had carried out an investigation and reported that the International Fund was sound and properly run, then there would have been an assumption of responsibility (at 653). Stuart-Smith LJ rejected the contention that the defendants' "ought to have known" of Young's activities and (at 653) said:

Mr Langstaff [for the appellants] relied upon the dictum of Salmon LJ in *Morris v Martin (C.W.) & Sons Ltd*; at page 741 he said:

> "The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make the master liable for his depredations: *Ruben v Great Fingall Consolidated* [1906] AC 439. It might be otherwise if the master knew or ought to have known that his servant was dishonest, because then the master could be liable in negligence for employing him."

Mr Langstaff submitted that "ought to have known" is sufficient for his purposes. This statement is obiter and it is in the context of the employer being a bailee of the plaintiff's goods; in such circumstances a duty to take care of the goods is imposed by law. A similar situation might arise where a window cleaning or decorating employer sent a man who he knew or ought to have known was dishonest into the house of a client. In such a case, there is a contractual relationship between the parties and it may well be an implied term that reasonable care would be taken not to employ dishonest employees. But absent any such relationship, whether it be contractual or, in Lord Delivn's phrase in *Hedley Byrne*, "equivalent to contract", I cannot accept the law will impose such a duty of care."

226 At this stage of inquiry as to the existence of the duty, APBS's actual knowledge is important. HVB is not saying that APBS actually knew of the misappropriations. In fact, HVB's pleaded case is that APBS *did not* know of Chia's misappropriations. Mr Potter testified that a reasonable system of internal control would have discovered the 22 misappropriations. His evidence is that if APBS had discovered the 22 misappropriations, it would not have been possible for the HVB facility to be granted. Therefore, HVB's case is that it *ought to have known* or *would have known* if it had reasonable internal controls or adequate supervision over Chia. This contention is rejected on grounds of circularity and foreseeablity. The approach adopted in the argument, as Stuart-Smith LJ explained is not good enough (see [224]-[225] above) when the consideration, at this stage of the inquiry, is on the existence of the duty. In addition, no case has been cited in which defendant employers have been found liable for financial loss caused in the way alleged by HVB.

227 One other important point to remember is that HVB belonged to an unlimited class. In *Robert Davis v Percy Radcliffe & Others* [1990] 1 WLR 821, the Privy Council held that the plaintiffs, who had deposited money with a bank that failed, had no claim in negligence against the person charged with the regulation of banks in the Isle of Man. In holding that the defendants owed no duty of care to the plaintiffs, Lord Goff identified as one of the considerations which militated against the existence of the duty the fact that it was said to be owed an unlimited class of persons, including not only those who had deposited money with the bank, but also those who were considering whether to do so (at 827). The reasoning by analogy is similar in this case. The alleged duty is owed not only to third party banks that have an existing banker-customer relationship with APBS but any banks out there that might come into contact with Chia. In my view, no duty should be imposed.

228 Furthermore, there is, objectively, no reasonable expectation on the part of APBS that Chia was so placed that others could rely on his putting forward forged documents as genuine or that the board had approved the transaction. I have already held that Chia had no actual (express or implied) or ostensible authority to enter into the HVB Facility. I also held that Chia was not held out by APBS as having apparent authority to represent that the forged documents were genuine or that the board of APBS had approved the HVB Facility. These findings are fatal to the existence of a duty on APBS. Objectively, the circumstances of the case critical to ascertaining the requirement of "proximity" between the parties are not fulfilled.

229 Factually, I have difficulty seeing the relevance of the 22 cheques and Chia's misappropriation of APBS's funds when considering the existence of a duty of care owed to HVB. The first cheque was issued on 24 November 1999 and the last one was on 10 October 2002. HVB discussed the HVB Facility with Chia in March 2003. By that time, Chia had stopped stealing from APBS. The last misappropriation took place on 10 October 2002, and no more interest was returned to the OCBC Account after 24 October 2002. In late 2002, Quek Peck Leng informally spoke to Chia about complying with protocol by keeping F&N Group Treasury informed of placement of fixed deposits. In the circumstances, in terms of timing and event, the fraud against APBS was not "integrated"; it was distinct from the fraud perpetrated against HVB in March 2003. Chia was no longer "drawing" from the OCBC Account to finance the various bank loans and gambling activities. In January 2003, Chia tried without success to increase the borrowings from SEB to US$50m. However, he continued to be reliant on the MM Line of US$25m, and there were rollovers of the drawings under the MM Line between 21 November 2002 and 24 March 2003 as well as in May 2003 (see [316] below). From a causative point of view, the failure of internal controls within APBS, for the sake of argument, would not have made a difference as HVB Facility came months later. HVB extended the HVB Facility in March 2003 because it, *inter alia*, accepted at face value the certified extract of the board resolution without verifying the directors' signatures. In March 2003, the bank's loss was still due to the forged mandate which HVB accepted at face value without verifying the directors' signatures. The relevance of this point is to the question of causation in relation to the negligence claim. Its force as a factor in any question of causation is compelling. The bank did not verify the signatures on the certified extract of board resolution and took the risk of accepting the directors' signatures at face value. If it had simply checked with the company secretary or the directors of APBS, it would have found out that the documents were forgeries and the authorisation was fictitious.

230 Arguing from a different perspective as to why no duty arises here, APBS referred to three authorities that support the proposition that customers of a bank do not owe a duty of care to prevent forgeries. *A fortiori*, no duty of care can be imposed on a non-customer like APBS. The authorities cited are *The Kepitigalla Rubber Estates Limited v The National Bank of India Limited* [1909] 2 KB 1010; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80 ("*Tai Hing*") and *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182. In particular, in *Tai Hing*, the accounts clerk manipulated the accounts and the bank customer's system of internal controls was inadequate to detect the fraud. The Privy Council held that the bank's customer did not owe a duty to the bank within the banking relationship to prevent forgery of his signature.

231 HVB distinguished these cases on the narrow premise that these cases involved parties who were already in an existing bank and customer relationship and they did not provide for the extent of duty sought to be imposed on the bank's customers. These cases, therefore, did not decide upon the issue of whether a duty of care at common law should arise in the absence of any contractual relationship.

232 A recent decision of the Court of Appeal in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273 ("*Pertamina*") considered a customer's common law duties and the appellate court had this to say (at [51]–[54]):

> 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 enunciated 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]

53 *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.

233 It is clear from the passages cited above that the Court of Appeal had – albeit in *obiter* – endorsed the view that a customer's duty of care ought not to be extended beyond the current boundaries. In fact, any common law duty will be subordinate to the contractual terms, and banks may and do rely on contract to modify or improve upon their common law position.

234 Seeing that the law is slow to impose a wider duty on customers beyond the current boundaries, APBS's argument that the law will not impose a greater duty on non-customer entities like APBS in the circumstances of this case involving fraud by an employee acting outside the course of his employment in a one-off transaction with HVB is certainly persuasive. More to the point, HVB belonged to an unlimited class, a fact which militated against the existence of a duty of care (see [227] above).

235 Finally, a comment on the issue of negligent hiring. APBS engaged a head hunter, advertised for the position, interviewed several potential candidates, and obtained positive references for Chia, before hiring him. HVB has not drawn the court's attention to any case, imposing a duty of care on a company to do more by embarking on an independent pre-employment screening or background checks to ensure proper hiring. I note the observations of Salmon LJ in *Morris v Martin* at 741:

> The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make the master liable for his depredations: Ruben v Great Fingall Consolidated [1906] AC 439. It might be otherwise if the master knew or ought to have known that his servant was dishonest, because then the master could be liable in negligence for employing him.

236 Taken from its context, the dictum is misleading. In fact, the dictum does not assist HVB. *Morris v Martin* is an example of the type of cases where an employer undertakes a responsibility to a third party and then entrusts the discharge of that responsibility to the dishonest agent. *Lloyd v Grace Smith* is an example of another type of cases where the wronged party is defrauded by an employee acting within the scope of his apparent authority. In this type of case, the wronged person acted in reliance on the alleged apparent authority of the employee. Where there is a contractual relationship, the law will resort to and imposes an implied term not to employ dishonest employee. The law would not be quick to impose a duty as argued by HVB. As Stuart-Smith LJ in *Hornsby* remarked (at 653):

> Mr Langstaff submitted that "ought to have known" is sufficient for his purposes. This statement is obiter and it is in the context of the employer being a bailee of the plaintiff's goods; in such circumstances a duty to take care of the goods is imposed by law. A similar situation might arise where a window cleaning or decorating employer sent a man who he knew or ought to have known was dishonest into the house of a client. *In such a case there is a contractual relationship between the parties and it may well be an implied term that reasonable care would be taken not to employ dishonest employees. But absent any such relationship, whether it be contractual or, in Lord Delvin's phrase in Hedley Byrne, "equivalent to contract", I cannot accept that the law will impose such a duty of care*.
>
> [Emphasis added]

237 In my judgment, there was no voluntary assumption of responsibility by APBS to ground a finding of sufficient proximity. In tort parlance, there was no relationship between APBS and HVB sufficient to create the degree of proximity by reference to physical proximity, circumstantial proximity or causal proximity. It is not shown that the HVB Facility was made in reliance of compliance with s 199(2A) or from the mere fact of the knowledge that loans might be made (and there is no evidence of knowledge) sufficient to create the degree of proximity. In order to establish a duty of care, it is necessary that the company knew that the intending lender would rely on Chia's representations for the purpose of deciding whether to make the loan which was not the case here, as I have found.

(2) Policy

238 The conclusion reached here is that no duty of care is owed by APBS to HVB. As no *prima facie* duty of care arises, there is no need to consider the second of the two-stage test, namely, policy considerations. However, I propose to briefly comment on some of the arguments canvassed.

239 In arguing allocation of risk and liability in support of the absence of policy consideration that negate the duty, HVB refers to the allocation of risk and liability in support of recognising a duty of care and cites cases on allocation such as *Welcome Investments Ltd*; *Panorama; Mercedes Benz (NSW) Pty Ltd v ANZ* and *National Mutual Royal Savings Bank Ltd* (unreported 1992 NSW Lexis 7008, first instance decision). I do not find these cases helpful. In relying on these cases, HVB has conflated the two distinct principles- the law of agency and the law of negligence, and it gives a misleading analysis and outcome. HVB's reliance on the decision of *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR 513 is misplaced. The case is distinguishable as it is on the duty of auditors and the detection of fraud in the course of the audit including the role of directors and non-executive directions in relation to overseeing the accounts of the company. The directors of the company could not put the blame squarely on the auditors for not detecting the fraud of the employee. The directors including non executive directors have duties to exercise due supervision and oversight over the management of the company and discharge of delegated functions.

240 Allocation of risk as a reason in favour of recovery for economic loss is not compelling here. Banks like HVB have the commercial power, money and resources to find out about the borrower, and to impose strict terms to safeguard the banks' interest. In this case, HVB imposed as a condition precedent to grant of the HVB Facility and drawdown, receipt of, *inter alia*, a certified extract of a board resolution. In addition, HVB has its own credit and risk teams to look after its own interests. Specifically, to safeguard its interest, HVB has banking support to carry out documentation checks. The officers check and verify counterparty documents to ensure that they are properly executed. I

found that the signatures on the certified extract of the board resolution were verifiable applying common sense. The fraud on HVB was not detected because HVB did not require its officers in banking support to verify signatures on counterparty documents. HVB chose to live with the risk that the persons who ostensibly signed the document did not actually sign off. The content of the extract of the board resolution was irregular as it did not cover the HVB Facility.

Breach of duty: Assumption

241 Having reached the conclusion that no duty of care arises, it is strictly not necessary to consider the breach alleged by HVB. However, I propose to comment on the allegation of breach of duty generally.

242 The breach (assumed here) was in failing to have in place as HVB alleges, a proper and reasonable system of internal controls as outlined in para 18(i) to (iv) Chapter 3 of HVB's Closing Submissions. Mr Yeo's point is that it was legitimate for HVB to expect that APBS would comply with its statutory duty, and that APBS would employ individuals of integrity, honesty and good character for the most senior finance position. In response, APBS argues that its internal controls did not cause HVB to extend the HVB Facility in APBS's name. Certainly, APBS's failures in internal controls and supervision of Chia did not prevent HVB from verifying signatures and hence Chia's authority.

243 If there was a duty of care and the breach by the defendant employer gave the opportunity to Chia to cheat HVB, the breach did not cause HVB's loss in the sense in which the word "cause" is used in law. The parting with the loan (*ie*, the drawdown) in the circumstances was a loss causing damage. However, the proximate cause of the loss was the fraud practised upon HVB by Chia, a risk that was willingly assumed by HVB when it accepted the certified board resolution without verifying the directors' signatures, and hence Chia's authority. The fraud consisted of the presentation of forged or fraudulent documents. The parting with the loan under the HVB Facility was pursuant to the fraud by Chia.

244 I have to agree with HVB that (i) the absence of supporting Citibank fixed deposit advice to confirm placement of the purported deposit; (ii) the deficient recording and reconciliation in the General ledger and fixed deposit reports were startling on hindsight but in the end, despite the sloppy paper work, the OCBC cheques were made out in favour of APBS, and on "maturity", money as in principal and interest flowed back to the OCBC Account. The evidence does not support the proposition that even if Teo Hun Teck as Chia's subordinate was under no duty to investigate, others were. In any case, if there was a duty to investigate, it would be owed to APBS. To elaborate, even if proper performance of his duty to his employer meant alerting his superior that he was not receiving fixed deposit advices from Chia which might have led to the discovery of what Chia was doing and its cessation, that omission cannot avail HVB. My impression of Teo Hun Teck, after listening to Teo in the witness box and seeing his countenance, is that he possessed a clerk-like mentality; not questioning what was being done. He once spoke to his immediate superior, Goh Chee Yee (Finance Executive) and Jimmy Tan about the fixed deposit advices not because he was suspicious that something was amiss, but it was more out of self-preservation in case he was blamed for not keeping his records up to date. They told him to follow up with Chia. Any concerns that Teo Hun Teck might have had as to the impropriety of the sloppy paper work was dispelled by the payments of principal and interest to APBS on ostensibly the maturity of the deposits.

245 There are circumstances in which a subordinate employee A is under is duty to report the activities of an immediate superior employee B to C, a person who is in a position of authority over both of them. Such a duty would arise where it is obvious to A that B is doing something which C ought to know about. I do not consider the situation in APBS to be such a case. Put at the highest,

what they knew was that Chia was not observing company protocol by keeping F&N Group Treasury informed of the deposits placed with Citibank which was the practice. The point at the end is whether there is a causal relationship, and one has to look more closely at the alleged breach and what flowed from it. The evidence is that no one suspected Chia of any fraud or dishonesty because the funds were accounted for. The concern was that Chia was placing fixed deposits without keeping F&N informed, and that was a technical breach of protocol. I agree with APBS that the absence of a whistle blowing policy is irrelevant.

246 Additionally, and at the risk of repetition, I make the point that there was no holding out by APBS that Chia was authorised to put forward forged documents as genuine. It was fully open to HVB to protect its own interest to verify the documents but it did not follow up on the discrepancies. Also HVB could have but did not take the common sense step of verifying the signatures on the certified extract of the board resolution. The content of the extract of the board resolution was inappropriate as it did not cover the HVB Facility. HVB cannot now say that it would not have parted with its money if it had known that the mandate was false for it had earlier assumed the risk of Chia acting fraudulently as regards his authority. It cannot now argue that the law of negligence ought to afford it greater protection.

Conclusion on the negligence claim

247 Having regard to the findings of fact and conclusions reached, it is necessary to deal with the issue of sub-participation and the quantum of loss. In summary, HVB's claim in negligence must fail. There is nothing to HVB's case that if APBS had a reasonable system of internal controls, adequate supervision of Chia and a proper recruitment process, the fraud would not have happened or would have been detected and Chia would not have had the opportunity to defraud HVB in March 2003.

Claim in restitution brought by SEB

Introduction

248 This claim in restitution arises following the dismissal of SEB's claims in contract and in tort under the principles of vicarious liability for Chia's tort of deceit.

249 SEB argues that between July 2001 and October 2002, a total amount of S$29,468,723.30 was unjustly received by APBS to its benefit. This amount of S$29,468,723.30 represents drawings under the MM Line and is part of the larger sum of S$45,347,671.23 paid out from the SEB S$ Account to APBS. SEB seeks recovery of the payment(s) at common law for money had and received. The second legal basis pleaded by SEB, in the alternative, is that a constructive trust arose in favour of the SEB in relation to the moneys transferred to the OCBC Account. APBS is, therefore, liable to account in equity as constructive trustee.

250 APBS denies that SEB has a valid claim in restitution, arguing that the elements of a restitutionary claim against APBS are not made out. APBS denies that the facts in evidence give rise to a trust, whether constructive or otherwise, in favour of SEB in respect of the sum of S$45,347,671.23 transferred from the SEB S$ Account to OCBC Accounts and/or such moneys in the OCBC Account in the sum of S$45,347,671.23. The short point is that SEB has to show, and it has not been shown because there is no evidence, that the pre-requisite of a fiduciary relationship exist. This evidential predicament puts an end to the alternative plea.

251 APBS has filed a counterclaim against SEB for the return of S$45m paid into the SEB S$ Account by Chia without the authority of APBS. According to APBS, this counterclaim will be pursued

if APBS is ordered to make restitution to SEB. If APBS was enriched to the extent of S$29,468,723.30 (hereinafter, for ease of description, rounded up to S$29.5m), then APBS says that in relation to its counterclaim, SEB was enriched to the extent of S$45m obtained at the expense of APBS. SEB denies receiving S$45m from APBS to the bank's benefit. APBS argues that the ministerial receipt defence raised by SEB does not apply. Furthermore, SEB's defence of change of position should be rejected because SEB did not change its position in good faith.

Sources and transfers of funds: Total Amount

252 At the outset, it is useful to look at the table prepared by APBS's expert witness, Mr Goh, a forensic accountant, for the sequence of fund transfers between the OCBC Account and SEB S$ Account.[note: 71] In reading this table one must keep in mind the findings that the SEB Facilities and HVB Facility are unenforceable against APBS. Not only was SEB fraudulently induced by Chia to lend money under the MM Line, from time to time Chia purloined funds belonging to APBS. Consequently, there were a number of payments into the SEB S$ Account from both drawdowns from the MM Line and the 18 OCBC cheque deposits. The movement of funds are tabulated below.

Table of Fund Transfers

Date	OCBC a/c no. 1 bank statement reference	SEB S$ a/c bank statement reference	OCBE a/c no. 1 to SEB S$ a/c	SEB S$ a/c to OCBC a/c no. 1	Running balance
			S$	S$	S$
13 Dec 00	CHQ 098620	08TC1312/7	3,000,000.00	-	3,000,000.00
13 Dec 00	CHQ 098621	08TC1312/7	2,000,000.00	-	5,000,000.00
23 Feb 01	CHQ 100461	08TC2302/1	3,000,000.00	-	8,000,000.00
23 Feb 01	CHQ 100460	08TC2302/1	2,000,000.00	-	10,000,000.00
16 Jul 01	Receipts-MAS	08TC1207/41	-	5,070,835.61	4,929,164.39
23 Jul 01	Receipts- MAS	08TC1907/10	-	5,046,356.16	(117,191.77)
13 Nov 01	CHQ 109098	08TC1211/62	3,000,000.00	-	2,882,808.23
13 Nov 01	CHQ 109097	08TC1211/62	2,000,000.00	-	4,882,808.23
20 Nov 01	CHQ109489	08TC1911/35	3,000,000.00	-	7,882,808.23

20 Nov 01	CHQ 109490	08TC1911/35	2,000,000.00	-	9,882,808.23
28 Nov 01	CHQ 109640	08TC2711/59	3,000,000.00	-	12,882,808.23
28 Nov 01	CHQ 109642	08TC2711/59	2,000,000.00	-	14,882,808.23
22 Jan 02	CHQ 111210	02TC/722	3,000,000.00	-	17,882,808.23
22 Jan 02	CHQ 111268	02TC/722	2,000,000.00	-	19,882,808.23
20 Feb 02	CHQ 112358	02TC/1639	3,000,000.00	-	22,882,808.23
20 Feb 02	CHQ 112359	02TC/1639	2,000,000.00	-	24,882,808.23
21 Feb 02	CHQ 112360	02TC/1692	3,000,000.00	-	27,882,808.23
21 Feb 02	CHQ 112361	02TC/1692	2,000,000.00	-	29,882,808.23
5 Jul 02	Receipts-MAS	02TC/6088	-	5,038,869.87	24,843,938.36
29 Jul 02	Receipts-MAS	02TC/6564	-	5,041,609.59	19,802,328.77
13 Aug 02	Receipts-MAS	02TC/6908	-	5,046,746.58	14,755,582.19
21 Aug 02	Receipts-MAS	02TC/7073	-	5,030,993.15	9,724,589.04
29 Aug 02	Receipts-MAS	02TC/7257	-	5,037,500.00	4,687,089.04
03 Sep 02	Receipts-MAS	02TC/7347	-	5,033,390.41	(346,301.37)
16 Oct 02	CHQ 119631	02TC/8252	2,000,000.00	-	1,653,698.63
16 Oct 02	CHQ 119630	02TC/8253	3,000,000.00	-	4,653,698.63
24 Oct 02	Receipts-MAS	02TC/8253	-	5,001,369.86	(347,671.23)
			45,000,000.00	45,347,671.23	

253 Mr Goh's evidence is that between 13 December 2000 and 24 October 2002 ("the relevant period"), there were movement of funds from OCBC Account to the SEB $S Account and *vice versa*. In particular, 18 OCBC cheques totalling S$45m were drawn from the OCBC Account and deposited into the SEB S$ Account, and S$45,347,671.23 moved from SEB S$ Account into the OCBC Account by telegraphic transfers. SEB's expert witness, Mr Kon's evidence is consistent with Mr Goh's evidence on the movement of the funds.

254 Mr Goh also testified on the source of S$45,347,671.23 as set out below which was paid from SEB S$ Account to OCBC Account. [note: 72]

Withdrawal from SEB S$ a/c	SEB loan	Mizuho loan	Sumitomo loan	SEB over draft	OCBC a/c No.1	Total
45,348,000	29,705,000	10,018,000	5,000,000	480,000	145,000	45,348,000

255 Mr Kon provides further details of the Mizuho loan. He gave evidence that for the transaction which took place on 23 July 2001, which is during the relevant period, S$89,630.36 can be traced to a deposit from an "APBS" account with Mizuho into the SEB US$ Account.[note: 73] This money was then converted into Singapore dollars and placed in the SEB S$ Account before being paid out to the OCBC Account. This analysis is consistent with Mr Goh's evidence that[note: 74]

> [the moneys that were transferred from SEB S$ Account to OCBC Account] originated mainly from the loan proceeds from SEB, Mizuho and Sumitomo. Most of these bank loans were initially paid into a SEB US$ Account No 709XXXXX ("SEB US$ account") and subsequently transferred to the SEB S$ account before they were paid into the OCBC Account No.1.

256 Neither of the experts addressed the source of the shortfall of S$347,671.23. APBS explains the S$45,347,671.23l as an indisputable fact that:[note: 75]

> [Chia] prepared and showed his subordinates various fictitious documents titled "Citibank Schedule of Fixed Deposits Committed" setting out *inter alia* the maturity date and interest rate of the deposits he said he was placing. When the fictitious "deposits" were due to mature, Chia would arrange to return money with interest into OCBC Account No. 1. The last misappropriation took place in October 2002.
>
> In total, Chia deposited a total of S$45 million of APBS's funds with SEB in the period 13 December 2000 to 16 October 2002. To continue the deception that these were fixed deposits, he ensured that these amounts were returned to APBS with interest, totalling S$45,347,671.23 in the period 16 July 2001 to 24 October 2002.

257 Therefore, this evidence suggests that S$347,671.23 did not stem from any particular source, but it was transferred to the OCBC Account to give the appearance of interest on deposit. However, from the table at [254], the S$347,671.23 could have come from loans from SEB, the Japanese banks or anyone of them or in combination. The experts did not address the origin of this S$347,671.23.

258 Mr Goh has provided a summary of the application of the S$45m from the 18 OCBC cheques deposited by Chia into the SEB S$ Account. Some of the figures in Mr Kon's table below are different, but the total amount of S$45m is the same. SEB's pleaded case based on Mr Kon's table is that the moneys were paid out of the SEB S$ Account on Chia's instructions as follows:

S/No	Purpose	Amount (S$)
1	Payments to third parties	23,449,271.32
2	To repay drawdowns DD1 and DD2 and interests due on 15 Dec 2000, 12 March 2001, 22 January 2002, 22 February 2002, 22 October 2002 and 21 November 2002 under the MM Line	10,521,672.08
3	To reduce the overdraft debt balance in the SEB S$ Account	5,957,099.93
4	Transfers to Sumitomo Mitsui Banking Corporation (formerly known as Sakura Bank)	3,049,196.11
5	Transfers to Mizuho Banking Group/Fuji Bank	1,867,585.14
6	Transfer to the OCBC Account	144,532.74
7	Exchange losses	6,079.12
8	To pay overdraft interest due and owing to SEB	4,120.75
9	To pay bank charges due and owing to SEB	442.81
	Total	45,000,000.00

According to Mr Goh, payments to third parties include Crown Ltd (S$11.09m); Jupiter Ltd (S$1.950m); Neo Beng Beng (S$5.225m); Chia (S$2.2m), and to a DBS account (S$2.314m).

Money had and received: personal claim in restitution at common law

259 The litigation here is between the victims of Chia's fraud. SEB submits that not all of the S$45m deposited into the SEB S$ Account was used to repay the MM Line that was drawn down and paid over to the OCBC Account. SEB, therefore, seeks to recover at common law as money had and received by APBS for the use of SEB the equivalent value of S$29.5m. SEB avers that the moneys were paid under a mistake of law as to the validity of contracts between SEB and APBS.

260 Generally, money paid under a mistake induced by fraud is repayable as that constitutes money had and received (see Goff & Jones, *The Law of Restitution*, 7th Ed (2007) ("*Goff & Jones*") at para 4-024). The remedy for such a claim is not damages, but an account and payment. The claim for restitution is founded upon the principle of unjust enrichment. Any claim for restitution consists of three subordinate principles which are inter-related:

(i) The defendant has been enriched by a benefit;

(ii) The benefit must have been gained at the expense of the plaintiff;

(iii) The benefit must be gained in circumstances where it would be unjust to allow the defendant to retain it.

261 All three elements of unjust enrichment have to be considered because mistake in payment by itself may not be sufficient to justify a restitutionary remedy, for the defendant may not have been enriched at all. Even if restitution arises on the facts, the restitutionary claim for an account will fail if the defence of change of position, for example, is available to the defendant.

Restitutionary Inquiry

(1) Common law rules of tracing

262 The claim in restitution is dependent on the plaintiff being able to establish through his title and tracing rules the sum paid to the defendant recipient. Therefore, to prove that APBS received SEB's money, common law rules of tracing are used; but common law rules of tracing do not allow tracing of money in or through a mixed fund (see *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321) ("*Banque Belge*"). Millet J in *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 at 285 succinctly said:

> Mixing [of the money] by the defendant himself must, therefore, be distinguished from mixing by a prior recipient. The former is irrelevant, but the latter will destroy the claim, for it will prevent proof that the money received by the defendant was the money paid by the plaintiff.

263 Tracing into or through a mixed fund is not defeated in equity, but equitable tracing rules do not apply here as the requirement of a fiduciary relationship to trace in equity does not exist on the evidence. In Millet J's example, the mixed fund account is the SEB S$ Account. Mr Goh and Mr Kon agree that loans from SEB, the Japanese banks and HVB were drawn down and paid into the SEB US$ Account, converted to S$ and then paid into the SEB S$ Account. Cheques drawn on the OCBC Account were also deposited into the SEB S$ Account.

264 APBS in its closing submissions did not regard title to sue as a live issue, and did not take issue that the telegraph transfers were from a mixed fund account (*ie*, the SEB S$ Account). APBS also does not deny that the $45.3m came from the MM Line save that the claim amount of $29.5m had been paid because of the rollovers of drawings made under the MM Line (see [304]-[318] below). The parties did not submit on title to sue at law, and I say no more as it is not for the court to concern itself with it.

(2) Has APBS been enriched despite Chia's lack of authority to borrow?

265 The bank's case is that money had and received by APBS was used for its benefit, and the present facts, gathered from SEB's arguments fall within the doctrine described in Article 93 of *Bowstead* at para 8-201 which states as follows:

> Where, by any wrongful act of an agent, or by an unauthorised act which is not ratified, the money of the third party [SEB] is obtained and applied for the benefit of the principal [APBS], the principal is liable in equity to restore such money to the extent that it has been so applied.

266 Mr Chong relies on *Bannatyne v D & C MacIver* [1906] 1 KB 103 ("*Bannatyne*") and *Reid v Rigby*

& Co [1894] 2 QB 40 ("*Reid v Rigby*") to illustrate that on the present facts, despite Chia's lack of authorisation, APBS clearly benefited from the receipt of the money by using the money to discharge *its* debts and dividends. The facts in *Bannatyne* were that the defendants had appointed an agent to carry on a branch of their business in London. The agent was entitled to draw on a London bank account for that purpose. He had, however, no authority to borrow money. He borrowed from the plaintiff (who believed he had the authority of the defendants) ostensibly on behalf of the firm, and paid money into the account. That money, or part of it, was then used to pay liabilities of the defendants. Further payments into the account by the defendant were then taken out by the agent and used for his own purposes. Further sums were also borrowed by the agent from the plaintiff and paid into the account. The Court of Appeal held that the plaintiff was entitled to recover from the defendants to the extent to which it could be shown that the plaintiff's money had in fact been used to pay the defendant's liabilities. In order to determine whether or not the unjust enrichment has taken place at the expense of the plaintiff, tracing in accordance with the rule in *Clayton's* case (1816) 1 Mer 572) should be applied. Romer LJ in *Bannatyne* made this clear (at 110-111):

> The principle to which I have referred clearly governs this case. The facts speak for themselves, and it cannot be said that this is a mere speculative application on behalf of the plaintiff in the hope that he may be able to [show] that some legal debts of the defendants have been paid off by means of money lent by the plaintiff. *The banker's account is in evidence before us, and it appears that the money first borrowed went to the credit of the firm's account at their bankers, which was kept by the agent of the branch establishment. It further appears that immediately after the money was paid in some legal debts of the firm were, in fact, paid off at a time when there was nothing in the bank to meet them except the money which had been borrowed of the plaintiff*.
>
> In these circumstances the proper course to be taken is that suggested by my Lord – to direct an inquiry to ascertain what debts and legal obligations of the firm were, in fact, paid off by means of the borrowed money. *The point that arose in Clayton's Case [I Mer 572], which was referred to in the course of the argument, will have to be borne in mind in ascertaining what debts were paid off; that is to say, what the plaintiff has to prove is actual payment of the debts, and not what I may call a payment by means of an adjustment of accounts*. It was suggested that the equitable principle which, in my opinion, governs this case, ought not to be applied if it turns out that, although the borrowed money was, in fact, applied in payment of debts of the firm, the account of the agent with his principals, if it were continued up to the time when this action was brought, would [show] that the agent was not a creditor of the firm. It appears to me that this consideration is not relevant. It might be relevant if the plaintiff were seeking to enforce a different equity, that is, the right to stand in the shoes of the agent as against his principal. That is not the equity which the plaintiff is seeking to enforce in this action.
>
> [Emphasis in the original]

267 In *Reid v Rigby*, the defendant's manager had no authority to borrow money on behalf of the defendant, or to overdraw the defendant's account. The manager, however, borrowed money from the plaintiff to replace money which he had wrongfully misappropriated from the defendant. He deposited the proceeds of the loan into the defendant's account and used the funds to pay the salaries of the defendant's employees. The court allowed the plaintiff's claim for money had and received as the defendant had benefited from the payment of salaries due to its employees.

268 Mr Chong relying on *Reversion Fund Co Ltd & Insurance v Maison Cosway Ltd* [1913] 1 KB 364 ("*Reversion Fund*") and *Rolled Steel Products v British Steel Corporation* [1986] Ch 246 ("*Rolled*

Steel") further contends that to the extent that APBS has used the moneys received from SEB to discharge *its* debts, it is irrelevant that SEB knew or ought to have known that Chia did not act with authority. APBS sought to factually distinguish all the four cases. Notably, *Reversion Fund* and *Rolled Steel* were discussed in the context of agency and the principal's adoption of the agent's act. The agent there used the unauthorised borrowed money to pay off the existing legal debts of the principal. *Bowstead* states at [para 8-202] that Article 93 applies, notwithstanding that the third party knew that the agent was not authorised to obtain or receive the money, because of a wider principle akin to the doctrine of subrogation whereby the third party is entitled to stand in the same position as the principal's creditor, and it has been suggested that the true basis of the principle is that a unauthorised loan is adopted or validated *pro tanto*. *Bowstead* reminds that the principle applies where a third party discharges the principal's legal liability with authority. The present facts here are distinguishable given that Chia used the borrowed money to extinguish his legal liability with APBS, instead of extinguishing APBS's debts.

269 In my judgment, the equitable doctrine underlying *Bannatyne* as an example of a more general restitutionary claim based on unjust enrichment is but one facet of the restitutionary inquiry, and is of limited assistance for it is distinguishable on the facts in several important respects. First, in *Bannatyne* the agent *was authorised* to pay off his *principal's debts*. (The manager in *Reid v Rigby* was similarly authorised as he was allowed to draw on the principal's bank account for the purpose of its business.) If the agent had no such authority, or his acts were not subsequently ratified, the lender could not recover as the principal had not adopted the benefit of the unauthorised borrowing so much so that the principal would not have benefited from the application of the invalid loan. The valid debts of the principal would only be discharged if he had authorised the application of the unauthorised loan for that purpose. Furthermore, as APBS rightly points out, Chia did not borrow for the purpose of paying APBS's debts. In the present case, it cannot be said that the telegraph transfers from SEB S$ Account to the OCBC Account were to pay off *APBS's debts* and dividends. Chia's clear intention (as is borne out by the evidence before the court) was to return to APBS what he took (ostensibly the fixed deposit placements). The telegraphic transfers were to discharge *Chia's liability* to APBS arising from his misappropriation of moneys from the OCBC Account. In short, Chia had a *prima facie* legal obligation to return an equivalent sum of the misappropriated moneys to the rightful owner, APBS, and the telegraphic transfers were for that purpose. Indisputably, APBS had a legal right against Chia for the recovery of a sum equivalent to the misappropriated moneys.

270 Another distinguishing feature in the *Bannatyne* case (as well as in *Reid v Rigby*) is the bank account there was a genuine one in that it belonged to the employer or principal unlike the SEB S$ Account which was not and never was APBS's. The proper analysis of the situation here is therefore as follows. It must be remembered that there was never a banker-customer relationship between SEB and APBS as a forged mandate was used to open the SEB Accounts in the name of APBS (see [33] above). In the absence of a legal relationship, the SEB Accounts (US$ and S$) were not APBS's. In practical reality, Chia was the *de facto* account holder of the SEB Accounts in the name of APBS; the use of APBS's name was a fraud on SEB as well as APBS. The SEB Accounts were under Chia's effective control and the bank accounts were always operated in accordance with his wishes and instructions. Chia caused to be paid into the SEB Accounts funds drawn down from SEB and the Japanese banks. He also deposited all 18 OCBC cheques into the SEB S$ Account. Chia made use of the mixed fund account (*ie*, SEB S$ Account) for his own purposes. He made payments to the OCBC Account and to others such as SEB, the Japanese banks, and Australian casinos, Crown Limited and Jupiter Ltd. There were also cheque payments to his personal bank account with DBS Bank and Neo Beng Beng.

271 Despite Chia's deception, the legal effect of crediting the SEB S$ Account was to create a new chose in action with SEB as the debtor of the SEB S$ Account that was in credit. By honouring the

payments to a third party (*ie*, APBS, SEB and Japanese banks) and debiting the SEB S$ Account, the bank acted as principal (*ie*, debtor) in repaying the chose in action and as agent of the *de facto* account holder in paying the third party.

272 I will now turn to discuss APBS's submissions that there was no enrichment since the payments discharged Chia's debt to APBS.[note: 76] Specifically, the only debt that was discharged was Chia's legal obligation to repay what he misappropriated from APBS (*ie*, S$45m) and APBS cannot be said to have been unjustly enriched by the payments. The *effec*t of the payments is the critical consideration as it determines whether APBS has been unjustly enriched. At this stage of the restitutionary inquiry, it is evident that Mr Chong's focus on the use of the money to pay *APBS's debts* and dividends is misplaced. Suffice it to say the evidence of payment of APBS's debts and dividends is a matter that is appropriate in discussions on the change of position defence.

273 APBS relies on *Aiken v Short* (1856) 1 H&N 210 ("*Aiken*") to support its argument that SEB should be denied recovery. In that case, the plaintiff bank paid off the defendant's debt owed by one Carter as agent for Carter. The defendant's debt was secured by an equitable mortgage on Carter's inheritance which was his interest in the estate of a deceased person. The bank as assignee of Carter's interest in the estate, which was subject to the equitable mortgage, paid off the defendant so as to make the property more saleable. As it turned out, Carter had no inheritance and the plaintiff on discovering this sued to recover the money paid to the defendant as money paid under a mistake of fact. The court held that the plaintiff could not recover. Bramwell B observed that the mistake was that the bank thought that if it paid the debt, it could sell the property for a better price. That was not an essential fact. The only facts that were fundamental to the payment were that first, the defendant's debt was unpaid, and second the bank had the debtor's authority to pay it on his behalf, and finally, the payment discharged the debt to the defendant. As to these facts there was no mistake. Pollock CB and Platt B based their judgments on the ground that the money which the defendant got from her debtor, Carter, was actually due to her, and there can be no obligation to refund it. The debtor was discharged as the plaintiff bank paid the money as Carter's agent.

274 In *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110 ("*Lloyd's Bank*"), the plaintiff bank had made a Clearing House Automatic Payment System transfer of £162,387, in the mistaken belief that there were sufficient cleared funds in its customer's bank account to fund the payment. Within a short time of payment, the error was realised and the paying bank notified the receiving bank of the mistake and requested repayment. The receiving bank refused the request. On the facts, the Court of Appeal held that the payment had been made with actual authority. Waller LJ explained that the reasoning in *Barclays Bank v Simms* [1980] QB 677 at 695 ("*Simms*") stemmed from the recognition that restitution would not be ordered where the payment made under a mistake had in fact discharged an existing debt (at 125). On the principles of restitution, Peter Gibson LJ said that there was no unjust enrichment because a payment made to discharge a debt does not result in the unjust enrichment of the payee (at 132). Waller LJ rejected the paying bank's claim for recovery on the ground that payment was made for good consideration for it discharged the debt. His Lordship opined that, unless an order for repayment reinstates the debt, which it did not, the payee will have changed its position in no longer having a remedy against the debtor (at 125-126).

275 Following the reasoning of the court in *Aiken* and Peter Gibson LJ in *Lloyd's Bank* (see [273] and [274] above), APBS has not been unjustly enriched in that the telegraphic transfers through SEB to the OCBC Account were designed to return the moneys taken from APBS. It is clear on the evidence drawn from an inference of the facts that Chia wanted to repay to APBS the principal of $45m on ostensibly the maturity dates of the fixed deposits as Chia did not want his misappropriations to be found out. Interest of S$347,671.23 was also paid to conceal the deception. Teo Hun Teck confirmed in his testimony that he understood the telegraph transfers to the OCBC Account to be principal and

interest from fixed deposits placed by Chia, and he recorded the receipts accordingly.

276 In *Aiken*, the debt was discharged as the plaintiff bank paid the money at Carter's request and as his agent. Likewise, the telegraphic transfers to APBS were made at the request of Chia, and the SEB $S Account was debited. It is *not* the bank's position, and this is an important point, that payments to APBS were unauthorised. It accepts that payments were at the request of Chia, and it does not and cannot take a contrary position because its claim for restitution in the sum of S$29.5m is the reduced amount or difference outstanding under the SEB Facilities after deducting the repayments made by Chia to SEB. It is common ground that SEB's restitutionary claim of S$29.5m is part of the S$45.3m that APBS received. SEB honoured the payments instructed by Chia and debited the SEB S$ Account to, *inter alia*, (a) repay itself in part the loans from the MM Line together with interest (*ie*, S$10.5m based on Mr Kon's figure) and (b) reduce the overdraft debt balance in the SEB S$ Account in the sum of S$5.95m (based on Mr Kon's figure). The bank has not impugned Chia's instructions by which SEB obtained repayments. The significance of SEB keeping those payments, and claiming the balance sum owing in the sum of $29.5m, is that it has to accept that the telegraphic transfers to the OCBC Account just like the loan repayments to SEB were authorised or requested by Chia and that the SEB S$ Account had been debited accordingly.

277 A point to note is that the absence of a contractual relationship between SEB and APBS is irrelevant (as explained by *Goff & Jones* in para 4-047 below), for the only facts fundamental to the payments were Chia's legal obligation to repay APBS the moneys he had purloined from the OCBC Account and at Chia's request, SEB paid APBS. This proposition is supported by *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177 ("*Porter v Latec*"), a decision of the High Court of Australia, and the commentary in *Goff & Jones* at para 4-047 (see [281] below).

278 In *Porter v Latec*, the appellant, Porter, lent £1,500 to one LH Gill on his fraudulent representation that he was one, HH Gill, the owner and mortgagor of a piece of land. At the impersonator's request, Porter utilised the loan to pay off a mortgage debt then existing in respect of the land and received from the mortgagee the duplicate bill of mortgage with an indorsed release thereon as well as the certificate of title for the land. LH Gill then executed what purported to be a bill of mortgage of the land to Porter by forging the signature of HH Gill. Porter later registered the mortgage. On default of the loan, Porter called upon HH Gill to pay. Thereafter, LH Gill applied to the respondent, Latec, a finance company, for a loan of £3000 which was granted; LH Gill again represented that he was HH Gill. He forged the signature of HH Gill on the application form and also to a bill of mortgage over the same piece of land which was offered as security for the loan. Latec paid £3000 to its solicitor to be paid out in accordance with the authority of HH Gill. LH Gill forged the signature of HH Gill and gave written authority to Latec's solicitors to pay Porter from the £3000, and the balance to him. The solicitors paid Porter in accordance with that written authority. After LH Gill's deception was discovered, Latec sued Porter for recovery of the moneys paid under a mistake of fact. The High Court of Australia, by a majority, denied Latec recovery because the money was paid on behalf of LH Gill in discharge of a debt actually owing to Porter by LH Gill under the name of HH Gill. Barwick CJ at 187 said:

> In my opinion, the proper view of the matter is that the payment...to [Porter] which was made by the solicitors …was a payment on behalf of Lionel Herbert Gill under the name of Herbert Henry Gill: it was paid in discharge and did discharge a debt actually owing to [Porter] by Lionel Herbert Gill under the name of Herbert Henry Gill and is not recoverable by the respondent.

279 Kitto and Windeyer JJ, dissenting, disagreed and held that the loan agreement was void for mistake, given that the written authorisation to pay Porter was a forgery. The absence of

authorisation went to the very foundation of the payment which Latec made to Porter. In the circumstances, Porter was liable to repay the amount he received from Latec. Kitto J opined that the fraud which LH Gill practised upon Porter was so fundamental to the transaction between them that no contract of loan ever came into existence between them (at 190). The documents were worthless to Latec for there was no valid mortgage, and Latec got nothing of value for its money (at 191). Latec's payment to Porter was not a payment authorised by LH Gill as a payment on his behalf. It was important that the loan was applied for on the security of land that belonged to a particular person (*ie*, HH Gill), and Kitto J opined that it was basic to the negotiations that they were conducted between that person and the proposed lender. The grant of the loan was implicitly, if not explicitly, on the condition precedent that the recipient was identical with the registered proprietor of the land. When Latec parted with its money on the faith of the authorisation letter it was not a payment made on behalf of the impersonator, LH Gill: it was an unauthorised payment on behalf of the real HH Gill (at 194).

280 On the other hand, Barwick CJ observed (at 183) that *after* the money had been physically disbursed or passed over to the impersonator, if sued by the lender, the impersonator could not escape liability for the money he took, and for performance of the terms of the loan by asserting that he did not agree to repay pursuant to the agreed terms. Put simply, the impersonator did actually take the money and must repay it. Payment to the lender would extinguish Porter's claim against LH Gill, and the payment by Latec to Porter was as agent for LH Gill (at 185).

281 *Goff & Jones* opined (at para 4-047) that an English court would on the same facts decide in the same way as the majority in *Porter v Latec* for the following reasons:

> The problem is the perennial one of which of two innocent parties should bear a loss caused by the fraudulent acts of a third party. The common law's refusal to apportion loss had led, here as elsewhere, to the development of technical learning. We are inclined to the view that, if the question should arise in England, P [payor] should be denied recovery on the ground that his payment was accepted by D [recipient] in discharge of a debt owing to him. It is irrelevant that the contract as between D and T [impersonator] may have been void, for money was owed by T to D; and P paid D, at T's request, to discharge T's obligation to D in that sum. Furthermore this situation has the merit that it produces a result consistent with *Aiken v Short*.

282 In the circumstances, the payments to APBS by way of telegraphic transfers were made at the request of Chia, and the effect of the payments was to discharge Chia's liability to APBS in respect of the sum of S$45m. The restitutionary reasoning is that APBS could not be said to have been unjustly enrichment at the expense of the SEB as the payments discharged the liability of Chia. The restitutionary claim for S$45m fails because APBS had not been enriched.

283 However, APBS has been enriched by the receipt of S$347,671.23, and I make two short points on this. The first is that the sum of S$347,671.23 was meant as Chia intended to be "interest". The second point is that Chia never placed the monies on fixed deposits to earn interest. APBS is not entitled to interest and Chia is under no legal obligation to pay any interest on a deposit to APBS.

(3) Unjust factor

284 I now come to the question of whether the payment of S$347,671.23 was under a mistake of law, and therefore recoverable. The analysis is the same, even if, for the sake of argument, APBS is enriched by the larger sum of S$45.3m.

285 I begin with the principles formulated by Robert Goff J in *Simms* at 695. The formulation refers to a mistake of fact, but it is equally applicable to a mistake of law. The principle is that a claim to recover money paid under a mistake of fact or law is *prima facie* recoverable, but it will fail if as Robert Goff J said in *Simms* case (at 695):

> [T]he money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt

286 The bank accepts that it bears the burden of showing that the payments were made under an operative mistake. Mr Chong's assertion is that the unjust factor is the payment of $29.5m in the mistaken belief that there was a valid bargain between APBS and SEB. At this stage of the restitutionary inquiry, Mr Chong relies on *Reversion Fund* and *Rolled Steel* to support his argument that even if SEB were reckless that would not bar SEB's restitutionary claim. His argument is misplaced. I should point out that these two cases are not restitutionary cases. The two authorities do not discuss mistake and voluntary assumption of risk. Contrary to Mr Chong's assertion, *Reversion Fund* and *Rolled Steel* are inapplicable when dealing with mistake as an unjust factor, and they do not bar a finding that voluntary assumption of risk precludes a mistake.

287 APBS takes issue with the plea of operative mistake contending that the payments were voluntary. Mr Chong objects to APBS's assertion which he says must be pleaded. In my view, APBS's plea in its defence is wide enough to make this positive defence which is based on the verification of documents point and the material facts have been pleaded.[note: 77] In my judgment, there is *no* operative mistake as SEB accepted the certified extracts of the board resolutions without verification of the documents as to identity and signature of the persons signing (see [137] to [159]). In other words, the bank accepted the certified extracts of the board resolutions without verification of the authority of Chia. I concluded on the evidence that the bank willingly took the risk of Chia acting fraudulently, and in doing so, and with the risk materialising, the bank must bear the consequences of Chia's deceit practised on SEB. In the words of Lord Hoffmann in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 "the real point is whether the person who made the payment took the risk that he might be wrong" (at [26]). *Goff & Jones* (at 4-031) suggests that one is reckless if one failed to make a full inquiry to allay his or her suspicions, or where there were no clear conclusions; but yet, nevertheless, transferred the benefit. On either test, for the reasons given, SEB took the risk of Chia's acting fraudulently as regards his authority and accordingly there is *no* operative mistake, and I so find.

288 Even if an operative mistake (as in mistake of fact or law) is shown, recovery is denied for the reason that the effect of SEB's payment to APBS discharged Chia's liability to the extent of S$45m. Mr Chong argues that APBS's contention that the payment of S$45m discharged Chia's liability raises the defence of good consideration which was not pleaded by APBS. Not only is APBS precluded from relying on the defence, there is also no evidence that the transfers were authorised or intended to discharge Chia's liability to APBS. I disagree with Mr Chong's submissions. Whilst APBS did not expressly aver to the defence of good consideration, the material facts constituting this defence have been pleaded; the bank is not prejudiced because all the relevant facts are before the court (see generally *Development Bank of Singapore Ltd v Bok Chee Seng Construction* Pte Ltd [2002] 3 SLR 547). Moreover, it is not the bank's complaint that it was taken by surprise by this defence. On the state of the pleadings, I start with APBS's general plea that the claim in restitution is not maintainable because all the elements of the claim are not made out by SEB. It is clear that APBS has pleaded the misappropriation of funds by Chia from the OCBC Account; how he deceived his co-signatories by misrepresenting the purpose of the OCBC cheques; the false "Citibank Schedule of

Fixed Deposits Committed" listed down the fixed deposits, their maturity dates and interests rates. APBS has further pleaded that there was no unjust enriched at the expense of SEB because the moneys taken by Chia were returned to the OCBC Account by SEB's transfer of funds. As such, it denied that the funds transferred by SEB to the OCBC Account were recoverable as the bank's money. In addition, SEB's pleaded case is that the telegraphic transfers were at Chia's request and instructions. The legal effect of the telegraphic transfers made at Chia's request - whether it discharged Chia's legal obligation, and hence there was no unjust enrichment as good consideration has been given - is a question of law that need not be expressly pleaded. The legal consequence of payment could be pleaded, but it does not mean that a failure to do so is fatal. I am reminded, and gratefully adopt here the apt observations of Lai Kew Chai J, in *Lea Tool & Moulding Industries Pte Ltd v CGU International Insurance plc* [2001] 1 SLR 413 at [16], "our procedural laws are ultimately handmaidens to help us achieve the ultimate and only objective of achieving justice as best as we can in every case [and should] not [be] permitted to rule us to such an extent that injustice is done".

289 Mr Chong's second point is that APBS did not adduce evidence to support the defence of good consideration. I disagree with the contention. The important facts to support the defence are actually not disputed; the relevant and unchallenged facts are already before the court. The bank accepts that Chia misappropriated moneys from APBS, and he deposited the OCBC cheques into the SEB S$ Account. It is not disputed, and it is SEB's evidence that the telegraphic transfers from the SEB S$ Account to the OCBC Account were on Chia's instructions, and the SEB S$ Account was debited accordingly. Jimmy Tan and Teo Hun Teck testified that they had co-signed the OCBC cheques on Chia's representation that he was placing the moneys drawn on the OCBC Account on fixed deposits with Citibank. Teo Hun Teck's evidence is that moneys that Chia ostensibly placed on fixed deposits with Citibank were returned to the OCBC Account with interest.

290 SEB's further submissions that restitution is denied only where the paying bank intended to, and did, in fact, discharge the indebtedness of a payee to a third party is misconceived. The consideration is not about the intention of the paying bank to discharge the customer's debt to a third party, a point that was raised in *Lloyd's Bank* but roundly rejected by Waller LJ (at 127). The critical consideration is the *effect* of the payment: does it discharge the debt or legal liability, and of relevance is the debtor's intention to repay APBS and the bank's honouring payment at the request or instructions of Chia. Waller LJ (at 127) explains:

> It must be remembered that the formulation in the *Simms* case [1980] QB 677 itself contemplates that "the money is paid to discharge and does discharge a debt owed…". The case further recognises that where the bank meets a cheque payable to A which in fact pays a debt that C owes to A, the bank is paying money to discharge that debt. If the debt is discharged that surely is the reason why the payee cannot be required to restore the money to the payer; and the interest of the payer cannot alter the fact that the debt has been discharged.

291 In respect of the sum of S$347,671.23 which was transferred to the OCBC Account to give the appearance of interest on deposit when in fact there was no such deposit, the ground of total failure of consideration is made out. APBS will be allowed to retain the money if it is able to successfully rely on the defence of change of position. I will deal with the defence of change of position later in this judgment (see [319] to [330]).

(4) Other Arguments

(A) QUANTFICATION OF ENRICHMENT: RUNNING ACCOUNT ARGUMENT

292 It is APBS's case that where the transactions are ineffective as between APBS and SEB, in determining the quantification of the recipient's enrichment, the court has to consider cross payments. There was no enrichment because cross payments were made to SEB. Nothing is due to SEB as SEB received S$45m from the OCBC Account and the payment from SEB to APBS totalling S$45m cancel each other out and operate as an effective set off to the other's claim. Furthermore, on 25 March 2003, the inflow of US$30m drawn down from the HVB Facility to the SEB Accounts would have cleared the MM Line leaving the SEB S$ Account in credit as at 2 September 2003.

293 In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR. *938* ("*Westdeutsche* (*CA*)*"*), the local authority entered into a 10-year interest rate swap transaction with a bank. The plaintiff bank as fixed rate payer paid the defendant council a lump sum of £2.5m. The defendant council made four payments to the plaintiff bank over a period of one and a half years, amounting to a total of £1.35m. The interest rate swap transaction by the local authorities was subsequently found to be *ultra vires*. The English Court of Appeal ordered the repayment of the balance of £2.5m amounting to £1.15m plus interest from the time of payment of the £2.5m under the law of restitution.

294 In the court below, Hobhouse J in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 ("*Westdeutsche (HC)")* held that where payments both ways have been made the correct view is to treat the later payment as, *pro tanto*, a repayment of the earlier sum paid by the other party and in so far as the recipient has made cross-payments to the payer, the recipient has ceased to be enriched. Dillon LJ on appeal affirmed Hobhouse J's approach by looking at the total payments made by each party and calculating the balance sum. Leggatt LJ further supports this position by holding that where there have been mutual payments, the recipient of the larger payment has only to repay the net excess over the payment he has himself made.

295 Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 WLR 802 ("*Westdeutsche (HL)")* at 839 also examined the flow of the funds and noted that "[t]here was an overall debit balance on the account on 16 November 1987."

296 Mr Chong submits that the cross-payment argument does not assist APBS because Hobhouse J's dicta in *Westdeutsche* (*HC)* allows a set off only where there is repayment of 'an earlier sum'; and since APBS transferred money to SEB before the drawings under the MM Line were due for repayment, there is "no earlier sum" to set off. Factually, the argument, accounting wise, is misconceived given that the overall balance is not affected by an obligation to repay "an earlier sum". In any case, Hobhouse J's dicta must be read in the light of the facts of that case. There is no evidence suggesting that Hobhouse J intended to limit the right to set off only where there is "an earlier sum" due and this is supported by Lord Goff's dicta in *Westdetusche (HL)* which deals solely with the overall balance, without any reference to "earlier sums".

297 Where benefits have been received under an *ultra vires* contract, and, hence, void, the obligation to account in the "swap" litigation line of cases is the defendant's enrichment arising from "the rolling balance between the payments on both sides" (see Peter Birks, *Unjust Enrichment*, 2nd Ed, Oxford University Press, 2005 at 226).

298 Again, the obligation to account where benefits have been received under contract which is, subsequently, set aside on agency principles and company law is explained by Lord Nicholls of Birkenhead in *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 ("*Criterion*") at 1848 as follows:

> If company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar principles of agency and company law. If, applying these principles, the agreement is found to be valid and is therefore not set aside, questions of "knowing receipt" by B do not arise. So far as B is concerned there can be no question of A's assets having been misapplied. B acquired the assets from A, the legal and beneficial owner of the assets, under a valid agreement made between him and A. If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the assets in question, A will have a personal claim against B for unjust enrichment, subject always to a defence of change of position. B's personal accountability will not be dependent upon proof of fault or "unconscionable" conduct on his part. B's accountability, in this regards, will be "strict".

299 In that case, the issue of the validity of the supplementary agreement that was entered into turned solely on whether the managing director of Criterion who signed the agreement on behalf of the company acted within the actual or apparent scope of his authority. That issue depended on the application of ordinary agency principles, having regard to the rule in *Turquand's case* (see *supra* [92]). The House of Lords held that if the managing director had no actual or apparent authority to conclude the supplementary agreement, then it could not be held enforceable against Criterion. The managing director might be liable to the respondent for breach of warranty of authority, but the supplementary agreement would not be Criterion's contract. The conscionability or unconscionability of the respondent's behaviour in seeking to hold Criterion to the supplementary agreement would in either case be irrelevant. In that case, Criterion entered into a partnership agreement with the respondent for the purpose of investing in real property. The agreement created a new company in which both parties held shares. By a separate agreement, Criterion granted the respondent a "put option" requiring Criterion to buy the respondent's interest in the new company upon the happening of certain events. The events were any change in the control of Criterion or either of the two signatory directors ceasing to be directors of the company. The purpose of the "put option" was to inflict adverse financial consequences on Criterion should it be subject to a hostile takeover, but it would also prevent or inhibit the dismissal of the two directors who signed the deal. Criterion sought a declaration by way of summary judgment that the "put option" was unenforceable because of a lack of actual or apparent authority on the part of two directors who signed the agreement.

300 In *Shalson v Russo* [2005] 2 WLR 1213, the loan contracts were induced by fraudulent misrepresentation, and upon recession for fraudulent misrepresentation, the party rescinding is put in the position he would have been in if no contract had been entered into in the first place. It involves a giving and taking back on both sides of the benefits gained before the contract was rescinded.

301 In my judgment, the straight application of the overall accounting approach does not sit well in a case like the present where the victims of Chia's fraud are suing each other in a personal claim for money had and received, and the restitutionary claim is subject to the change of position defence. The starting point is that there was never any legal relationship between SEB and APBS. It is not a case where both the parties acted upon a contract that was subsequently declared void. As such, the payments both ways were not from a transaction that was later declared ineffective. The false certified extracts of the board resolutions were nothing more than the "instrument of fraud" for Chia to obtain money by false pretences which he practised on SEB (per Carnwath LJ in *Halley v Law Society* [2003] EWCA Civ 97 at [47]). The situation between victims of fraud is very different, and

hence distinguishable from the "swap" litigation cases. SEB's restituionary claim and APBS's counterclaim could produce different results, especially, where the receipt of money in each case was under different conditions and circumstances. One difference, by way of example, comes from Mr Chong's argument (and I express no view on it here) that SEB received the OCBC cheque deposits as agent and relies on ministerial receipt as a defence (see [332] to [336] below). As Professor Birks in *Unjust Enrichment* succulently points out (at 226):

> One claimant may fortuitously encounter an obstacle or bar which the other escapes, with the consequence that for very slight reasons the parties to the one exchange may end up in very different situations.

302 That said some accounting would still be taken at the time the defence of change of position is considered. The defence would involve the recipient establishing that, in all the circumstances, it would be inequitable to require him to make restitution in full. The obvious cases occur where there has been a reduction in the assets of the recipient of the overpayment. In *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*") , the casino allowed Mr Cass, the solicitor in the plaintiff's firm of solicitors to gamble not knowing that he had stolen the money he used to play. The fact that it had changed position meant that it did not have to repay the total sum which Mr Cass had taken and used at the casino. On the other hand, Mr Cass had won some money and lost more. The net result was that, overall, the casino had net winnings from Mr Cass of just under £155,000. Although it would have been unjust to make the defendant repay all the money used by Mr Cass in the casino it was not unjust to make it repay the balance which it still held.

303 Even if cross-payments as a matter of principle are allowed in the present case in the same way as parties to an ineffective contract like in the "swap" litigation cases, APBS as the recipient of the larger payment has to repay the net excess over the payment SEB received. The net excess of S$347,671.23 is, however, still subject to the defence of change of position (see [319] to [330]).

(B) ROLLOVERS OF DRAWINGS UNDER THE MM LINE

304 The MM Line was first granted by SEB through a Money Market Facility Letter dated 26 June 2000 for an initial amount of US$8m. Thereafter, the MM Line was progressively increased to the maximum of US$25m at Chia's request. The first MM Line of US$8m was requested as a short term loan facility to finance the purchase of equipment in Cambodia and Vietnam. Later, Chia requested an increase of US$2m to US$10m to finance the company's joint venture project in Cambodia and Vietnam on the basis that APBS was using the cost of financing on the MM Line as the cost of finance for the projects. Later on, Chia requested the MM Line to be increased to US$15m. He also requested a US$20m medium term loan to finance a bottling plant in Singapore. The application for a medium term loan was rejected and Chia then requested that the MM Line be increased from US$10m to US$25m.

305 A review of Mr Kon's Appendix E of the Summary of MM loans over the period from 26 June 2000 to 19 May 2003 showed that a total of US$32m were drawn down with repayments amounting to US$7m resulting in a net drawdown amount of US$25m.[note: 78] In between the period, there were numerous "rollovers" of the drawn down amounts.

306 APBS argues that it was not unjustly enriched at the expense of SEB. It relies on Mr Goh's report, which applied the first-in-first-out rule in *Clayton's* case to the receipts and payments into and out of the SEB S$ Account, to show that there were further rollovers and drawdowns of the MM Line after 24 October 2002. Those facts, according to APBS, showed that SEB's claim of $29.5m was from later drawdowns, and the earlier drawdowns had been paid. The last two drawdowns of S$13m

and $S12m were on 24 March 2003 and 21 May 2003 respectively. SEB, however, rejects APBS's claim that $29.5m has been paid, and refers to the testimonies of Amin and Mr Kon to support its position that rollovers of amounts drawdown were merely extensions of the repayment date of the MM Line.

307 Mr Kon took time to describe the workings of the MM Line in his report. He detailed in his report an example of a rollover of a drawdown on the MM Line.[note: 79] He noted that APBS would issue a new Drawing Notice to SEB on the payment due date of the drawn down amount, instructing the latter to debit the principal together with interest payable to the SEB US$ Account. In the same Drawing Notice, APBS would give notice to SEB for a subsequent drawing of the same amount as the previous principal. He observed that there was no evidence of inflow or outflow of fresh funds, and that the observation was consistent with Amin's written testimony wherein he concluded that this was a rollover.[note: 80] Mr Kon confirms that the transaction he described in his report was indeed a rollover, by citing two sources - *Barron's Dictionary of Finance and Investment Terms* (J Downes & JE Goodman, 3rd Ed, 1991 at 382) and *Dictionary of Finance and Banking Terms* (Oxford University Press 3rd Ed 2005 at 359) – for the definition of a rollover which is when banks allow a borrower to delay making a principal repayment on a loan, or alternatively, as an extension period to maturity of a debt.[note: 81] Mr Kon then noted that the rollovers of amounts due under the MM Line were specifically allowed under cl 15 of the Money Market Facility Letter dated 26 June 2000 ("the MM Facility Letter").

308 I am unable to read cl 15 in the same way as Mr Kon, and his opinion on rollover based on the dictionary meaning cited is not consistent with the true construction of cl 15. The MM Facility Letter was dated 26 June 2000, and was amended in the subsequent letters dated 13 November 2000 and 24 July 2002. In order to utilise the MM Line, SEB requires under cl 8a an irrevocable Drawing Notice in the form prescribed in Appendix A, at least, three business days before the proposed date of drawing. Other clauses, namely clls 10 and 11, set out the interest payable and duration of the drawing respectively. By cl 16, any prepayment of the drawing is subject to SEB's consent and the borrower's indemnity in SEB's favour for any losses and cost as a result. As the MM Line is a revolving facility, re-borrowing is covered under cl 14, and it is permitted provided no Event of Default has occurred, and it may be redrawn up to the unused portion of the facility limit. Clause 15 stipulates the three conditions for a rollover of drawing under the MM Facility, as follows:

(a) Drawing is due to be repaid on the repayment date;

(b) The Borrower fails to make payment on such a date; and

(c) The Borrower does not inform the Lender.

Even when the above three conditions are satisfied, it is still at the lender's absolute discretion to allow a rollover of the *drawing together with the interest payable*, thereafter termed "Rolled Over Amount" for a further period as determined by the lender.

309 The aforementioned matters are the salient features of the MM Line that have to be adhered to. Drawings on the MM Line began immediately on acceptance of the MM Facility Letter. The first Drawing Notice in accordance with the MM Facility Letter requirements was made on 28 June 2000 for US$4m with a repayment date of 15 December 2000.[note: 82] The first instance of a rollover of drawing was made on 14 December 2000.

310 Amin explained that Chia had informed him some time before 15 December 2000 that the borrower would like to continue to draw on US$7m out of the outstanding US$8m that was due for

repayment on 15 December 2000. Amin then told Chia to instruct SEB to debit the SEB US$ Account with the maturing loan of US$8m, and at the same time, make a drawing of US$7m on the MM Line for value date on 15 December to set off against the net debit entry of US$7m in the SEB US$ Account. According to Amin, this would constitute a rollover of the US$7m for a further 28 days to a new repayment date of 12 January 2001.[note: 83]

311 I make the following observations. First, there is nothing in the MM Facility Letter that allows for a rollover as explained by Amin other than in the instance set out in cl 15. Clause 15 allows a rollover of the *drawing together with the interest payable*, that is to say the "Rolled Over Amount". Although Mr Kon referred to cl 15, his interpretation is incorrect. Indeed he cited it as supporting his view that the rollovers of the drawings were done in accordance with the MM Facility Letter. The dictionary meaning of "rollover" which Mr Kon relied upon is irrelevant in the light of cl 15. It seems to me that the rollovers carried out under Amin's instructions to Chia were outside of cl 15. If anything, the dictionary meaning of rollover is not limited to extension of the repayment date. It is capable of another dictionary meaning: "Renewing credit *i.e* "to roll-over debts by borrowing to pay them" (see Alan Gilpin, *Dictionary of Economics and Financial Markets*, 5th Ed, Butterworths, 1986). It seems to me that Amin's rollover instructions to Chia was not to extend the period of the loan or credit but to renew the loan or obligation as defined by Alan Gilpin.

312 Second, the prescribed Drawing Notice as set out in Appendix A of the MM Facility Letter does not allow for rollover. One can only deduce that the additional incongruous instructions in point (a) of the Drawing Notice dated 14 December 2000 for the transfer of the maturing drawing to the SEB US$ Account, was conveniently inserted into the prescribe Drawing Notice to give it an air of authority and legitimate veneer.

313 Third, the transfer of the maturing drawing of US$8m to the SEB US$ Account as directed in the Drawing Notice, can only mean that the SEB US$ Account will show an outstanding amount of US$8m. However, the SEB US$ Account does not have an overdraft facility let alone one for US$8m. All that can be said is that either SEB hurriedly approved an overdraft facility of US$8m for the SEB US$ Account, or the borrower is in default with respect to the Account No matter how momentarily it may be. The reality is that the latter case was the state of affairs and SEB chose to allow it. That state of affairs contradicted SEB's assertion that the MM Line was well maintained.

314 Finally, the intended purpose and desired effect of the "rollover "is clear. As the MM Line limit of US$8m has been exhausted, under cl 14 there can be no further drawing unless existing drawings have been repaid. By so transferring the US$8m to the SEB US$ Account, the MM Line is repaid and, therefore, immediate redrawing under cl 14 can be made. Throughout all this, it must be noted that it was Amin who suggested to Chia to issue the "rollover" instructions to SEB in the manner as shown in the Drawing Notice dated 14 December 2000 and subsequent similar Drawing Notices. The flouting of the terms of the MM Facility Letter can only be attributed to SEB's eagerness to accommodate Chia. Amin had viewed the latter as a valuable contact to have, and his dealings with Chia had been good and profitable for his forex department. If not for Amin's willing co-operation, the terms of the MM Facility Letter would have to be adhered to, with the consequence that there would have to be repayment of the drawings on the due dates before further drawings.

315 I now turn to Kon's findings on the two last drawings of US$13m and US$12m on 24 March 2003 and 21 May 2003 respectively.[note: 84] Mr Kon concluded that using the first-in-first-out basis the two drawings under the MM Line can be traced to earlier drawings that were unpaid as there was no fresh inflow of funds. Instead those earlier drawings were "rolled over" and therefore remain outstanding.

316 The US$13m drawing comprise of drawings made between 17 July 2000 and 24 October 2002 that had previously been "rolled over" individually and after being aggregated on 22 January 2003 was subsequently "rolled over" on 22 January 2003, 2 February 2003 and 24 March 2003. The US$12m comprise of drawings made between 15 March 2002 and 3 September 2002 and after being aggregated on 21 November 2002 was subsequently "rolled over" on 21 November 2002 and 21 May 2003.

317 The MM drawing limit of US$25m (increased from US$10m as revised by SEB's Facility Letter dated 24 July 2002) was fully utilised on 24 October 2002. The consequence of this is that under cl 14, drawings had to be repaid before further redrawing can be made. As was previously, this was skirted around by instructing SEB through the Drawing Notice to debit the SEB US$ Account with the maturing drawing. As the limit on the MM Line becomes unfrozen due to the repayment by the transferred amount that was stipulated in the Drawing Notice, an immediate drawing for the similar amount was demanded. I also noted that each rollover resulted in a new contract number, new contract date, new maturity date, and new rate of interest. As Amin explained during cross-examination, whenever a rollover was done, the principal loan amount owing would first be repaid, and this is shown as the credit entry in the bank statement. The debit entry in the bank statement meant that the principal loan amount has been redrawn pursuant to the Drawing Notice issued by Chia.

318 With the aforementioned observations in mind, I agree with Mr Goh that the two drawings of US$13m and US$12m respectively were fresh drawings and that the previous drawings that were ascribed to the two drawings had been repaid and replaced with new drawings at the respective dates. The drawdowns in March 2003 and May 2003 were not paid to or received by APBS. The effect of the rollover benefited Chia at SEB's expense. The restitutionary claim is therefore against Chia and not APBS.

Defence of change of position: APBS

319 I now deal with the defence of change of position in respect of the sum of S$347,671.23.

320 In relation to SEB's claim for restitution, APBS pleads the anticipatory change of position defence on the grounds that first, it believed the funds represented the matured fixed deposits. Second, APBS paid out S$45m in anticipation that it would be getting the same amount of money on maturity. It therefore spent the money it received from SEB. Third, APBS argues that it is impossible to return the parties to their original position because other banks are involved. SEB argues that restitution should be granted and the change of position defence does not apply to APBS on the basis that the requirement of causation, the "but for" test, has not been made out and restitution is not impossible.

321 Notably, the sum of S$347,671.23 was not specifically addressed in APBS's closing submissions. Only a sum of S$45m had been spent by APBS. Nothing was said about how this S$347,671.23 was spent, if it was indeed spent. SEB does not comment on this sum of S$347,671.23.

(1) Anticipatory reliance

322 Anticipatory change of position is recognised in both Singapore and England (see *Jones v Commerzbank AG* (2003) EWCA Civ 1663 ("*Commerzbank")* and *Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd* [2003] 2 SLR 103 ("*Parkway Properties*"). In order for the anticipatory change of position defence to apply, *Parkway Properties* requires that the payment out by the defendant be made in clear expectation of an imminent payment in by the plaintiff. In this present case, there is insufficient evidence before the court to demonstrate that APBS paid money to

SEB in "clear expectation of an imminent payment in" by SEB.

(2) Extraordinary change of position and requirement of causal link

323 It is APBS's pleaded case that the entire S$45m it received from SEB was used to pay dividends, excise duties, rebates and debts of APBS. The change of position defence is not sustainable because there is no extraordinary change of position as required by Lord Goff in *Lipkin Gorman*. Payment of APBS's debts in this case does not amount to a change of position (see *Scottish Equitable plc v. Gordon Derby* [2001] 3 All ER 818 ("*Scottish Equitable*"). In that case, Walker LJ at [35] held:

> In general it is not a detriment to pay off a debt which will have to be paid off sooner or later: *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230. He went on to suggest that payment of a debt may be an extraordinary change of position if the debt were a long-term loan on advantageous terms.

324 In relation to the excise duties and the rebates, there is no change of position because they are similar to a debt. However, declaration of dividends is discretionary; and as long as but for the receipt of the money from SEB, the company would not have declared a dividend, then the change of position defence can succeed. APBS has, however, not established on the evidence that 'but for' the receipt of the money, it would not have changed its position (see *Parkway Properties* and *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2001] 4 SLR 90 ("*MCST 473 v De Beers*").

325 I disagree with APBS's contention that there is no need to prove a causal link between the receipt of money and the change of position. APBS argues that all that is required is that the change of position is referable to the payment of money - APBS changed its position by spending the S$45m transferred to APBS, and the change of position would succeed to the extent of the dividend payments which are referable to the receipt of the money from SEB. SEB takes a contrary position, maintaining that APBS has failed to prove that "but for" the receipt of the money, it would not have changed its position.

326 In *Parkway Properties* which affirmed, *MCST 473 v De Beers*, only the first three elements in *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 ("*IDA v SingTel*") were distilled but not the fourth which required a causal link between the receipt of the overpayment and the payee's change of position. However, there is no conflict between *IDA v SingTel* and *Parkway Properties*. *MCST No 473 v De Beers* supports the requirement to show causation (at [101]). One of the reasons for the failure of the change of position defence was

> There was no evidence either that this sum was used for any other purpose or that such expenditure would not have been incurred had the sum not been paid.

327 Furthermore, the Court of Appeal in Parkway Properties dealt with causation under the third limb, when dealing with the issue of inequitability at [48]:

> It was clear to us that up to the time Parkway made full payment of the DP, Parkway were determined to proceed with the development of the cineplex even though the negotiations with UAST on the terms of the lease were still underway.

328 Under English law, Walker LJ in *Scottish Equitable* held that the "but for" test of causation must be satisfied for the change of position defence to apply. On the other hand, APBS relies on the Court of Appeal decision in *Commerzbank* to argue that all that needs to be shown is that the change of position is referable in some way to the payment of the money. Although *Commerzbank* (at [43]) did not expressly overrule Robert Walker LJ in *Scottish Equitable*, Mummery LJ held that it was neither necessary nor desirable to impose on the issue of causation questions generated in the cases on the recoverability of damages for tort.

329 In light of the Singapore authorities, the "but for" test of causation applies although the Singapore courts have not expressly laid down the exact test that would satisfy the causal link requirement. The "but for" test of causation would be in line with the test of causation for mistake. As stated, the "but for" causation has not been made out since APBS has not proven that "but for" the receipt of money from SEB, they would not have paid out dividends. In my judgment, there is no evidence that "but for" the receipt of S$347,671.23, a dividend would not be declared.

(3) Conclusion in relation to APBS's change of position

330 APBS's change of position defence fails in respect of the sum of S$347,671.23 because there is no extraordinary change of position and the "but for" test of causation is not made out on the facts. Accordingly, APBS has to return to the SEB, the sum of S$347,671.23 together with interest thereon at the rate of 5.33% from the date of the writ to date of payment.

APBS's Counterclaim in restitution against SEB

331 This counterclaim is for S$45m worth of OCBC cheques deposited into the SEB S$ Account. The pleaded cause of action is for money had and received; dishonest receipt and knowing assistance. APBS says that it will not pursue this counterclaim if SEB's restitutionary claim is dismissed. In the light of the conclusions reached in respect of SEB's claim in restitution, it is unnecessary to deal with APBS's counterclaim. However, I propose to comment on two of the arguments raised in respect of the counterclaim for money had and received.

SEB's ministerial receipt defence does not apply

332 The starting point of the claim for S$45m is that a person who receives stolen money is under a legal obligation to repay an equivalent sum back to the rightful owner. The obligation on the recipient is personal and it is not dependent on the stolen money being still in the recipient's hands. The restitutionary claim can be made against an innocent recipient (see *Barros Mattos Junior v MacDaniels Ltd* [2005] 1 WLR 247 at [15] – [16]).

333 SEB's submits that it has not been enriched by the receipt of funds deposited into the SEB S$ Account on the grounds that it received the money as agent and its reliance on the ministerial receipt defence is not without merit. SEB cites numerous cases such as *Portman Building Society v. Hamlyn Taylor* [1998] 4 All ER 202, *ANZ Banking Group Ltd v. Westpac Banking Corporation* (1988) 164 CLR 662 and *Gowers v. Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766 to support its argument that it is an agent entitled to the ministerial receipt defence. A closer analysis of those cases would show that the deposits or transfers to the bank were for the *specific purpose* of repaying other payees, and therefore the funds received by the bank were received by the bank as a mere intermediary. There is, however, no evidence that this was so in the present case.

334 SEB next relied on *Holland v Russell* (1861) 1 B&S 424, *Taylor v Metropolitan Railway Co* [1906] 2 KB 55 and *Continental Caoutchouc v Kleinwort, Sons and Co* (1904) 20 LT 403 ("*Continental*") for

the proposition that when an agent, *viz* the bank, had used moneys to repay the debt owing to him by the principal, or where the agent was entitled to retain the moneys, the bank does not get the benefit of the payment.

335 Of the cases cited, only one case, *Continental*, involved a bank and its customer. In *Continental*, the transfer into the bank did not originate from the customer. The bank acted as an agent of its customer in collecting payments from people who owed the customer money and then set off the sum collected against the sum owing by the customer to the bank. On the facts, the bank was acting as a mere conduit when it collected payments on behalf of its customer. In the present case, there is no evidence that SEB was collecting payments as a mere conduit. Normally, a bank receives money paid into a bank account as the bank's own funds subject to the bank assuming a personal liability in debt to the account holder to repay an equivalent sum on demand by the account holder (see Ellinger, *Modern Banking Law* (4th Ed, 2006) at p 268). The law looks at the relationship between the bank and its customer as essentially that of a debtor and creditor, and the bank is a debtor of the account that is in credit. The debt constitutes the chose in action, which is a species of property enforceable at common law. The chose in action is looked upon as the legal property belonging to the account holder at common law (per Lord Goff in *Lipkin Gorman* at 574).

336 APBS has a claim for money had and received against SEB as Chia deposited the OCBC cheques into the SEB S$ Account, and the OCBC cheques were honoured by OCBC. Despite Chia's deception, SEB is nonetheless the debtor of the SEB S$ account that is in credit as Lord Templeman in *Lipkin Gorman* explained at 563:

> If a thief deposits stolen money in a building society, the victim is entitled to recover the money from the building society without producing the pass book issued to the thief. As against the victim, the building society cannot pretend that the building society gave good consideration for the acceptance of the deposit. The building society has been unjustly enriched at the expense of the victim. Of course the building society has a defence if the building society innocently pays out the deposit before realises that the deposit was stolen money.

SEB's change of position defence

337 SEB's defence to the unjust enrichment claim by APBS is that it had changed its position by first, paying money out of the account in accordance with Chia's instructions, second, extending further credit to APBS, and third, repaying the earlier drawing under the MM Line and the overdraft facility.

338 SEB relies on *Bunge (Australia) v Ying Sing* (1928) 28 SR (NSW) 265 ("*Bunge*") to support argument that there was a valid change of position in allowing the principal further credit. The argument is that the receipt of moneys from the OCBC Account was a representation by APBS that the credit facilities to APBS were authorised, and on that basis, SEB continued to allow Chia to operate the credit facilities and to draw on the MM Line which was increased to US$25m. I make two points. First, the comments in *Bunge* were strictly obiter. The reason given by SEB that it continued to give credit to APBS is implausible in the light of the comments on rollovers in [304] to [318] above. Second, the argument must satisfy the test of causation. The "but for" causation is not made out on the present facts. I have held that SEB willingly assumed the risk on Chia's authority by not verifying the signatures on the certified extracts of the board resolutions. The bank was eager to start and develop a relationship and opening of the SEB Accounts, the OD Facility and FX Line were looked upon as a "door opener". Furthermore, in allowing Chia to draw on the MM Line, SEB did not at all adhere to its own terms in the MM Facility Letter. There was one $3m payment in January 2002 to settle the

first two drawdowns of the MM Line. Thereafter, bypassing the terms and conditions set out in the MM Facility Letter regarding the use of the MM Line and rollover as prescribed, Amin allowed Chia to continue to make rollovers and further drawdowns to the limit of the MM Line. This bypass was deliberate to accommodate Chia's request to continue using the MM Line. It was precisely Amin's accommodation to Chia that contributed to SEB's loss; rather than SEB's mistake as to the validity of its contract with APBS. There was, as I held earlier, no mistake as SEB took the risk on Chia's authority by not verifying the signatures on the certified extracts of the board resolutions.

339 SEB further contends that it changed its position by reason of having remitted the money to various people on Chia's instructions, and that such payments were made in good faith, and consequently, APBS's claim for money had and received must fail. In response, APBS argues that the defence is not available to SEB as the change of position was not in good faith, citing Lord Goff in *Lipkin Gorman* for the proposition that the defence is not open to one who has changed his position in bad faith. Arden and Phil LJJ opined that lack of good faith had to be related to the change of position, that is to say, it has to relate to the circumstance in which moneys were received, or in which they were discharged. Furthermore, there has to be a causal link between the receipt and the change of position before the defence of change of position can be established.

340 APBS argues that SEB did not act in good faith and relies on the following matters:[note: 85]

(a) OCBC cheques and the suspicious payments out of the unauthorised SEB S$ Account. It is plain that Amin's suspicions would have been aroused when he saw the OCBC cheques which had three signatories. In contrast, Chia was the sole signatory of the SEB Accounts.

(b) APBS's expert witness, Mr Tan testified that he would have been extremely surprised to see three signatures on the OCBC cheque whereas the SEB cheques only had one signature.

(c) The banking experts called by APBS testified that several payments were suspicious as a matter of banking practice, SEB's own manuals and MAS Notice 626 (Guidelines on Prevention of Money Laundering). Those payments were to Chia's own DBS Account No 6 (S$2.3314m), cash cheques (S$2.2m), Jupiter Ltd (S$1.95m), Neo Beng Beng (S$5.225m) and Crown Ltd (S$11.059m).

(d) SEB knew that the reasons Chia gave for the facilities were implausible and that he was not using the facilities for the purposes he said he would.

(e) SEB dealt solely with Chia despite knowing that Chia's authority was limited and the decision making powers lay elsewhere with F& N group Treasury.

(f) SEB knew that the account opening documents were completely amiss because Gerard Lee admitted under cross examination that SEB officers did check Ton Blum's signature against Form 45 to verify if he was a director but could not find a Form 45 for Ton Blum.

(g) Valerie Tan admitted that she was aware that cash cheques were risky and that she would be suspicious if a customer assumed such a risk.

341 In reply, SEB argues that it had no reason to be placed on inquiry about Chia's authority because:

(a) SEB dealt with 18 OCBC cheques amounting to S$45m over a period of 2 years, all of which cleared. Chia was one of three signatories of each of the 18 cheques.

(b) Each of the deposits was properly reflected in the bank statements sent regularly by SEB to APBS without any query or objection from APBS.

(c) There was a series of transfers of funds from the SEB S$ Account to APBS's account with OCBC. Each of these transfers was accompanied by credit advices issued by OCBC to APBS stating clearly the sending bank to be SEB.

342 The matters raised by SEB are not countervailing points for the reasons explained earlier in this judgment. As for APBS's arguments, they go to the question of whether the bank acted in a commercially acceptable manner. In *Abou-Rahmah v Abacha* [2007] 1 Lloyd's Rep 115 ("*Abou-Rahmah*"), the court applying the test of good faith held that because there was no particular suspicion about the two transactions which formed the subject matter of the case, the banks had acted in good faith. However, Rix LJ (dissenting) observed that the bank officer, Mr Faronbi, opened the bank account, and his knowledge or suspicions of money laundering were not directed to the transactions between themselves, but to the status of the client, Trusty International and its directors, Messsrs Ibrahim and Saminu (at [47]). He noted that the judge concentrated on transaction focused factors, and in doing so, failed to attach any proper significance to the judge's own finding that Mr Faronbi probably suspected, in a general way, that Messrs Ibrahim and Saminu might in the course of their business be assisting corrupt politicians to launder money. Rix LJ (at [50]) said:

> What the judge's finding amounted to was that Mr Faronbi had good reason for suspecting, … that Messrs Ibrahim and Saminu lent themselves to money laundering. Nevertheless, despite those suspicions, he went ahead and opened an account for their company, which he knew was involved in the bureau de change business and thus international transactions.

343 Rix LJ (at [52]) concluded:

> The bank's conduct there was not commercially acceptable conduct. It is not commercially acceptable for banks who suspect "in a general way" would-be customers of being involved in money laundering to open up accounts for them.

344 As it happened, the very first transaction in the new account was a fraudulent transaction. Rix LJ reasoned that without the opening of the account, the transfers could not have been effected as they were. The relevant causal connection between the change of position and the circumstances in which payment is effected exists because the loss would not have occurred, at any rate in the way in which it occurred, unless the bank had been willing to open an account for Messrs Ibrahim and Saminu's company (at [56]). The opening of the account was directly and causally related to the loss of the payments concerned (at 58). The bank therefore was held to have failed to make good its defence of change of position.

345 Applying the same reasoning as Rix LJ (which I find persuasive) to the situation where SEB took the risk on Chia's authority by not verifying the signatures on the certified extracts of the board resolutions, the payments at Chia's requests were closely linked to its decision not to verify Chia's authority before agreeing to open the SEB Accounts and grant the SEB Facilities so as to be prevented from relying on the change of position defence. The situation here is distinguishable from one where a bank pays money out of a bank account in accordance with instructions that turn out to be fraudulent, where the change of position defence applies to the bank as long as they act in good faith (see Abou-Rahmah). The good faith element was considered by Clarke LJ in Niru Battery Manufacturing Co v Milestone Trading Ltd [2004] 2 WLR 1415 who quoted with approval, at [164], the

following passages in Moore-Bick J's judgment at first instance reported in [2002] 2 All ER (Comm) 705 at [135]:

> In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself. The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made.

346 SEB's arguments that the payments were not queried by APBS subsequently would not alleviate the risk which SEB took when Chia first opened the SEB S$ Account. In my view, the opening of the SEB Accounts, and the payments were casually linked to the risk of fraud willingly assumed by SEB. There is certainly a relevant connection between the change of position from the actual payment of money to discharge the SEB loans, Japanese bank loans and gambling debts. In any case, in relation to transaction based inquiry, the way the bank account was conducted called for inquiry. In particular, there were payments from the SEB Accounts to a Melbourne casino, Crown Limited for "patron no. 00907659". In November 2001 alone, there were four payments to the casino totalling A$11.6m, a breakdown of which is as follows: (a) 12 November, A$1.5m; (b) 13 November, A$3m; (c) 20 November, A$3m; and (d) 27 November, A$4m. On 18 March 2002, there was another payment of A$2m to Crown Ltd. [note: 86] Amin's explanation that the bank was not put on notice because of the name "Crown" as it could be the name of the local logistics and transportation company that was located next to APBS in Tuas. He was simply guessing and seeking to dwell on *ex post facto* reasoning that was erroneous judging from the bank remittances to Australia. Payments to a casino in Australian dollars from what was perceived to be a corporate account on those limited facts were sufficient for the bank to make inquiries before effecting payment.

347 In addition to payments to casinos that were not picked up, Valerie Tan testified that had Amin given her instructions to monitor the cash cheques issued by Chia, she would have continued to do so, and she could check how much cash cheques were issued and where the cheques were being banked in. As far as she was concerned, it was Amin's responsibility to inform her department the purpose of the loans and what exactly he wanted monitored.[note: 87]

348 The bank's conduct in not verifying the documents, and its conduct of the accounts showed that it had failed to act in a commercially acceptable way. Had SEB acted in a commercially acceptable way, Chia's deception and dishonestly would have been stopped in its tracks much earlier.

Summary of Conclusions & Results

349 I now summarise the findings in this judgment.

(i) The SEB Facilities and HVB Facility were not executed by Chia with actual express authority from APBS. In addition, Chia, as Finance Manager of APBS did not have actual implied authority to commit the company on the SEB Facilities and HVB Facility. He also did not have actual implied authority or apparent authority to warrant the authenticity or genuineness of the certified extracts of the board resolutions or to communicate the approval of the board. Apparent authority fails on the basis of a lack of representation. Accordingly, the contractual claims in Suit 774 and Suit 763 are dismissed.

(ii) The question of whether an employee is acting in the course of his employment is to be

decided according to the same test as whether the matters complained of were within the employee's express, implied or ostensible authority. The banks' case on vicarious liability fails for the same reasons that I have rejected the agency claim based on actual (express or implied) or apparent authority. The claims in tort based on vicarious liability in Suit 774 and Suit 763 are dismissed.

(iii) SEB's case based on estoppel which rests upon the same facts as the case on ostensible authority fails for the same reason.

(iv) HVB's claim in negligence fails. The two-stage test for liability in negligence was not satisfied.

(v) SEB's claim in restitution fails as APBS was not unjustly enriched at the expense of SEB in the sum of S$45m. In respect of the S$347,671.23, which was transferred to the OCBC Account to give the appearance of interest on deposit when in fact there was no such deposit, the ground of total failure of consideration is made out. However, APBS does not have a valid change of position defence in respect of the sum of S$347,671.23. Accordingly, SEB is entitled to judgment in the sum of S$347,671.23 together with interest thereon at the rate of 5.33% per annum from the date of the writ to judgment.

(vi) SEB is to pay to APBS the costs of the action in Suit 774 to be taxed.

(vii) No order is made on APBS's counterclaim in Suit 774. However, APBS is to pay SEB the costs of the APBS's counterclaim to be taxed.

(viii) HVB is to pay APBS the costs of the action in Suit 763 to be taxed.

Appendix I

Summary of facts relating to Suit 774

1 At the material time, Eddie Amin ("Amin") was the Head of Sales in SEB's Trading and Capital markets Department. Amin and Chia were former classmates. Amin had business dealings with Chia from the time Chia was the Financial Controller of Swire Pacific Offshore Limited. Amin admitted that when he met Chia in December 1998, upper most in his mind was the prospect of a business relationship with APBS so that he could pursue a chance to make money for the bank.

2 Amin claimed that throughout the four and a half years of banking relationship, he dealt with Chia as the authorised representative of APBS. SEB did not suspect anything untoward as Chia being head of the finance department and/or finance manger of APBS would have the authority to, *inter alia*, procure loan facilities from banks; submit and/or execute loan facility documents and account opening documents with the approval of the Board.

3 It all started with Chia's telephone call to Amin in late December 2008. Chia informed Amin of his new job as the finance manager of APBS. Both of them met up for lunch on 28 December 1998. In that telephone conversation, Amin was told that Chia was keen for APBS to start a banking relationship with SEB. Over lunch, Chia explained that his business card was not ready, but he proceeded to give a brief background of his job scope. Their discussion centred on APBS's requirement for foreign exchange services as well as a clean overdraft line for about S$500,000 on standby for cash-flow mismatches. Chia suggested to Amin that SEB could consider starting a banking relationship

by offering APBS two facilities: (a) a small overdraft line of S$500,000, and (b) a foreign exchange dealing line. Chia also indicated interest in SEB's electronic cash management system (SEBSCREEN). Chia's requests were recorded in Amin's Visit Report dated 28 December 1998. Chia joined APBS on 20 January 1999.

4 Amin and Sharon Chow of Counterparty Risk Management Department ("CRM") called on Chia at APBS's office on 22 January 1999 to follow up on their discussions on 28 December 1998. At that visit, Chia gave Amin his business card which carried Chia's designation as Finance Manager. In paragraph 15 of his written statement, Amin stated that he had with him several documents and forms from the bank that would have to be completed by APBS. He handed to Chia the account opening form, signature card, sample board resolution, specimen letter of indemnity and consent for disclosure of information. Chia was informed that the directors would have to complete the documentation.

5 Before this 22 January 1999 meeting, Sharon Chow had obtained information and documents from publicly available sources on APBS, and they were kept in the bank's file on APBS. I noticed that from the Annual Report 1997 of APBL kept in the bank's file in the section under Directorate and other Corporate Information, "Senior Management" include the General Managers of the various subsidiaries of APBL. In the case of Singapore, the General Manager was identified as Antonius J M Blum. Significantly, Amin stated in his affidavit of evidence-in-chief that Sharon Chow also selected forms lodged with the Registry of Companies and Business and obtained extracts of her selection are in Exhibit marked "EA-2" which comprised printouts of microfilmed documents such as extracts of Statement of Directors of APBS dated 24 December 1992, Directors' Report dated 11 December 1993; Form 45 Consent of Koh Poh Tiong to Act as Director of APBS dated 20 September 1993; and Statement by Directors dated 16 December 1996. Notably, the signatures of Michael Fam and Koh Poh Tiong are found in Exhibit marked "EA-2". As early as January 1999, SEB was in possession of corporate information on APBL and APBS and of documents which bear the signatures of Michael Fam, Koh Poh Tiong and the other directors of APBS.

6 SEB's Credit Committee approved the credit application on 1 February 1999. By way of a Facility Letter and a Foreign Exchange Agreement both dated 2 February 1999, SEB offered foreign exchange trading facility with a settlement limit of US$5m, and a three-month overdraft facility for the sum of S$500,000 ("the OD Facility"). The OD Facility letter and Foreign Exchange Agreement were handed back to Amin on 3 February 1999. On the same date, Chia opened a Singapore Dollar bank account and a US$ bank account with SEB (collectively referred to as "the SEB Accounts"). The certified extract of the board resolution was provided later after Sharon Chow from the Counterparty Risk Management department ("CRM") alerted Amin that the certified extract of the board resolution passed on 25 January 1999 was inappropriate to authorise the opening of the accounts and to accept the facilities, and a fresh one was required to cover the specifics. The fresh certified extract of board resolution passed on 3 February 1999 was ostensibly signed by Ton Blum and Koh Poh Tiong.

7 The OD Facility was extended for a further three months from May 1999 to 3 August 1999 as Chia told SEB that there were some delays in the transfer of the treasury function from F&N to APBS. The OD Facility was extended a second time to 30 November 1999.

8 Between October and November 1999, Chia requested an increase of the OD Facility to S$3m and an increase of the settlement limit of the foreign exchange line to US$10m. According to Chia, the increase was to enable APBS to meet its short term working needs to cover short term mismatches in its cash inflows and outflows given that most of its cash reserves were tied up in fixed deposits with OCBC and Citibank. In the case of the foreign exchange line, the reason for the increase was to enable APBS to carry out bigger foreign exchange transactions. The request was approved by

the bank's Regional Credit Committee on 10 November 1999 and the increases were offered to APBS by way of an Amendment Letter dated 11 November 1999. In its Opening Statement, SEB said that approval was granted as APBS had operated the overdraft facility and the foreign exchange line satisfactorily. Amin stated in his written testimony that the credit application was approved because of the company's "strong market share position and its strong financial position including its low leverage as well as the strong solid standing of the major shareholders of its parent company, APBL (*ie*, Heineken NV and F&N)"). The Amendment Letter was signed by Chia and it was returned to Amin together with a certified extract of board resolution passed on 12 November 1999. The certified extract was ostensibly signed by Koh Poh Tiong and Ton Blum.

9 In May 2000, SEB provided APBS with an Internet Trading Station enabling the bank's customers to conduct foreign exchange transactions over the internet. The Trading Station software was installed in Chia's office computer with the assistance of APBS's personnel in the Management Information Systems ("MIS") department.

10 One and a half years into the banking relationship, Chia, on or about 27 June 2000, requested a money market facility in the sum of US$8m to enable APBS to finance the purchase of equipment in Cambodia and Vietnam. This money market facility (the MM Line") which is similar to a short term loan was subsequently increased to US$10m on or about 13 November 2000. The reason Chia gave for the increase was that the loan was needed to finance the joint venture project in Cambodia and Vietnam. APBS wanted to use the MM Line as a benchmark to charge the projects the cost of financing. The certified extracts of the board resolutions accepting the MM Line for the amount of US$8m and for the subsequent increase to US$10m were ostensibly signed by directors of APBS, Tan Yam Pin and Koh Poh Tiong.

11 In May 2002, Chia requested a further increase of the MM Line to US$15m, and for a medium term loan of US$20m. The additional US$5m was for working capital in relation to the factory expansion in Cambodia. The medium term loan of US$20m was to finance improvements to the bottling line in Singapore. SEB did not accede to this last request as it was not prepared to commit itself to a medium term loan to a non-Nordic customer. SEB was only prepared to increase the MM Line to US$15m. Without the medium term loan, Chia revised his request on the MM Line, and the bank agreed to increase the MM Line to US$25m. The certified extract of board resolution accepting the increase was ostensibly signed by Michael Fam and Koh Poh Tiong. Chia's last attempt in January 2003 for an increase in the MM Line was turned down by SEB as the bank was not prepared to grant such a large loan on a clean basis to a non-Nordic customer.

12 Throughout the banking relationship, SEB routinely sent bank statements and advices to APBS's address and later to a designated P O Box address with effect from 19 May 2003. However, Chia was the only person who opened the bank statements. Chia was promoted to the position of Senior Manger (Group Finance) of APBL on 14 July 2003. He told Amin that he would continue to be in charge of the Finance Department of APBS and there would be no need to meet the new finance manager of APBS. It is Amin's evidence that he did not see the need to meet the management of APBS beyond Chia. Based on his experience, Amin did a check on the credibility of Chia and he regarded it as sufficient to meet SEB's requirement that he perform a check on the credibility of the corporate management. Whilst Amin accepted that corporate management as envisaged by the bank's manual included other people apart from the financial manager, he had not verified the credibility of others in management.[note: 88]

13 From the time the MM Line was granted in June 2000 and up to the time of his last instruction in May 2003, it was Chia who gave written instructions to SEB to draw on the MM Line. On Chia's instructions, there were several transfers of funds between the SEB S$ Account and OCBC Account

and *vice versa*. As for cheque payments from the SEB S$ Account, the bank had complied with what appeared to be the mandate given by APBS. The MM Line and the Trading Station were well-utilised and the SEB S$ and US$ Accounts were well-maintained. For instance, Chia operated the SEB S$ Account in such a way that the overdraft limit was never exceeded and if withdrawals were made where the overdraft limit may be exceeded, funds would be deposited into the SEB S$ Account first so as not to exceed the overdraft limit. In relation to the MM Line, there were several drawings during the period from 28 June 2000 to 24 October 2002 up to the limit of US$25m. The drawing instructions issued after 24 October 2002 including but not limited to the two drawing instructions made on 24 March 2003 for US$13m and on 21 May 2003 for US$12m were in fact rollovers of the drawings made during the period from 28 June 2000 to 24 October 2002. As at 24 October 2002, a total sum of US$25m was drawn from the MM Line. At the time of Chia's arrest on 2 September 2003, the SEB S$ Account had a credit balance of S$538,591.83.

14 Between July 2001 and October 2002, the total sum of S$45,347,671.86 was remitted to the OCBC Account from the SEB S$ Account. Moreover, a substantial portion of remittances from the SEB S$ Account to the OCBC Account were from funds drawn from the MM Line. Conversely, between December 2000 and October 2002, there were payments made from the OCBC Account to SEB S$ Account in the total sum of S$45m. Thereafter the monies were withdrawn on the instructions of Chia.

15 As far as SEB was concerned, it had a healthy banking relationship with APBS. The only query that SEB had was in relation to cash cheques drawn on the SEB Accounts. It was explained by Chia to Amin that it was a convenient way to make payment to its dealers and outlets. Valerie Tan, a member of the team handling cash management services had on 5 July 2000 informed Amin of the cash cheques drawn on SEB Accounts. Valerie Tan discussed the issue of cash cheques with Chia who gave her verbal instructions concerning payment of cash cheques in a telephone conversation on or around 5 July 2000. After that conversation, she sent an internal email on his instructions that for cash cheques of S$300,000 and above she was to contact Chia to confirm issuance of the cash cheque. As it transpired, Chia circumvented his own instructions by issuing several cash cheques on the same day for sums less than S$300,000.

16 In March 2003, Amin had asked Chia to arrange for the General Manager or any other senior manger of APBS to meet the banks' Global Head of Merchant Banking who was visiting Singapore. He was told that Les Buckley was not in Singapore during the period of the visit. A similar request to meet the General Manager or any other senior management staff of APBS was made in September 2003 during the visit of the Head of Global Client Relationship Management. This was again not successful for one reason or another. At the last minute, Chia called to say he could not meet them as arranged. That was the last time Amin heard from Chia. As it transpired, it was the very same day Chia was taken away by the police for questioning on 2 September 2003.

Summary of facts relating to Suit 763

17 Tan Hwee Koon ("Hwee Koon") joined HVB on or around 1 December 2000. Before joining HVB, she was with Sakura Bank now known as Sumitomo Mitsui Banking Corporation ("Sumitomo Bank"). Hwee Koon joined HVB as Senior Officer of its International Desk. Matthias Zimmermann ("Zimmermann") was her immediate superior. She became the Relationship Manager, International Desk with effect from January 2002. As Relationship Manager, she assisted the Head of the department in his marketing efforts, preparing credit requests jointly with the credit risk manager and checking the completion of documentation.

18 After joining HVB, Hwee Koon contacted Chia as he was someone she had dealt with when she

was at Sumitomo Bank. On 13 March 2001, Hwee Koon and Robert Petritsch met Chia on 13 March 2001. Chia requested a working capital line as an entrance ticket to more business with the group in the future. The request was denied as it was seen as short term loan at low margin, and it did not fit into HVB's lending strategy. HVB preferred to provide financing for a specific purpose. Despite that decision, Hwee Koon continued to keep in touch with Chia.

19 In August 2002, Chia asked Hwee Koon whether HVB would be interested in offering a three-year term loan to APBS. It was to finance a new bottling plant. Hwee Koon with Zimmerman met Chia on 8 January 2003. On 3 March 2003, HVB approved a three-year amortising term loan for US$30m in APBS's name. The terms of the loan were negotiated between Chia and Hwee Koon in the course of January to March 2003. It was agreed that the loan would be an amortising term loan on a fixed rate basis to be repaid in six semi-annual instalments over three years.

20 On 5 March 2003, Hwee Koon provided Chia with a Checklist for Account Opening Documents which HVB required APBS to submit as part of the account opening documentation. Documents to be provided included a certified copy of the Board Resolution to authorise acceptance of the facility; certified true copy of the Memorandum and Article of Association; and certified true copy of the passport of each of the signatories in the signatory cards.

21 As Chia wanted to drawdown the loan on 25 March 2003, Hwee Koon explained that the rate had to be fixed two working days earlier on 21 March 2003. Hwee Koon stated that the "deal was closed" on 21 March 2003. It was the day the rate informed to Chia was accepted. Accordingly, the Agreement for an Amortising Term Loan was signed on 21 March 2003. Hwee Koon reminded Chia that the board resolution had to be provided before drawdown on 25 March 2003. A certified extract of the board resolution was received on 24 March 2003.[note: 89] The loan was drawn down on 25 March 2003, and the sum of US$30m was disbursed to the SEB US$ Account.

22 On 20 May 2003, Chia informed Hwee Koon of his promotion to APBL and that he would continue to be in charge of the HVB loan. On same day, Chia sent written instructions to change the mailing address to a PO Box address.

23 Hwee Koon and Zimmerman met Chia for the last time on 23 July 2003 over lunch arranged to thank him for giving HVB the opportunity to start a banking relationship with APBS. It was not until 2 September 2003 that HVB learned of Chia's lies. The HVB loan was not repaid when it fell due, and HVB commenced Suit 763.

[note: 1] HVB's Amended Statement of Claim para 14

[note: 2] Transcripts of Evidence dated 2 November 2007 p 38

[note: 3] Transcripts of Evidence dated 29 November 2007 pp 83-86.

[note: 4] Clause 2.1(a) of the Corporate Services Agreement

[note: 5] HVB's closing submissions at [33.iv.j]

[note: 6] HVB's closing submissions at [33.iv.f]

[note: 7]SEB's closing submissions at [70.(5)]

[note: 8]Christopher Leong's affidavit of evidence-in-chief, para 16

[note: 9]Transcripts of Evidence dated 2 November 2007 pp 40-44; dated 5 November 2007 pp7-9

[note: 10]Transcripts of Evidence dated 9 November 2007 pp 89-90

[note: 11]Transcripts of Evidence dated 19 October 2007 pp 95,96--97

[note: 12]Transcripts of Evidence dated 19 October 2007 p 98

[note: 13]Transcripts of Evidence dated 2 November 2007 pp 33- 38

[note: 14]Transcripts of Evidence dated 30 November 2007 pp 127-130

[note: 15]Transcripts of Evidence dated 2 October 2007 pp 16, 18 & 21

[note: 16]Examples in APBS's closing submissions paras 244(kk)-(zz); 252(h)-(p); 253(a)-(d); 258(c)-(n); 261-262; 425; 456-519

[note: 17]Transcripts of Evidence dated 13 November 2007 pp 17, 146

[note: 18]Transcripts of Evidence dated 2 November 2007 pp 37-38; 5 November 2007 pp 141-143

[note: 19]Transcripts of Evidence dated 1 October 2007 pp 105, 111-112, 115-116 & 128

[note: 20]Transcripts of Evidence dated 1 October 2007 p 116

[note: 21]Transcript of Evidence dated 1 October 2007 p 119

[note: 22]Transcripts of Evidence dated 26 October 2007 p 59

[note: 23]Gerard Lee's affidavit of evidence-in-chief paras 11, 12 and 13

[note: 24]Defendant's Core Bundle Bank's Manual Vol 1 p 22

[note: 25]Defendant's Core Bundle Bank's Manual Vol 1 pp 221 & 222

[note: 26]AB1 Vol 1A of 6 p 287

[note: 27]Amin's affidavit of evidence-in-chief, para 14, pp 218, 221-222, 228-229

[note: 28]Transcripts of Evidence dated 26 October 2007 pp 40-41

[note: 29]Transcripts of Evidence dated 5 October 2007 p 43

[note: 30]Transcripts of Evidence dated 23 November 2007 p 75

[note: 31]Transcripts of Evidence dated 3 October 2007 p 117

[note: 32]Transcripts of Evidence dated 19 October 2007 pp 95-98

[note: 33]Amin's affidavit of evidence-in-chief p 231

[note: 34]Transcripts of Evidence dated 26 October 2007 pp 49-50

[note: 35]Transcripts of Evidence dated 3 October 2007 pp 144-145

[note: 36]DCB Vol 1 Tab 1 pp 1-2

[note: 37]Transcripts of Evidence dated 3 October 2007 pp 172-176

[note: 38]DCB-Man (3) pp 997-998

[note: 39]Transcripts of Evidence dated 14 November 2007 p 47

[note: 40]Tan Hwee Koon's affidavit of evidence-in-chief para 25 pp 193-195, 214 -215, 236 & 237

[note: 41]Transcripts of Evidence dated 2 November 2007 pp 48-49

[note: 42]Transcripts of Evidence dated 14 November 2007 pp 47-48

[note: 43]Paul Rex's expert report exhibited in his affidavit evidence-in-chief paras 98-99

[note: 44]Transcripts of Evidence dated 13 November 2007, pp 67-68, 70, 74-75; 13 November 2007 pp 143-146

[note: 45]Transcripts of Evidence dated 19 November 2007 p 120

[note: 46]Transcripts of Evidence dated 19 November 2007 p 21

[note: 47]Transcripts of Evidence dated 14 November 2007 at p59

[note: 48]SEB's Closing Submissions at [168] – [333]

[note: 49]Transcripts of Evidence dated 1 October 2007 pp 157 to 159.

[note: 50]Transcripts of Evidence dated 2 October 2007 pp 32 to 33.

[note: 51]Transcripts of Evidence dated 2 October 2007 pp 3-8; 15 October 2007 pp 23-25; 23 October 2007 pp 90-91, 107-116

[note: 52] Transcripts of Evidence dated 7 November 2007 p 139

[note: 53] Transcripts of Evidence dated 23 November 2007 p 95-96

[note: 54] Tan Hwee Koon's affidavit of evidence-in-chief exhibit markedTHK-5" p 259

[note: 55] Transcripts of Evidence dated 23 November 2007 p 54

[note: 56] Hudson's affidavit of evidence-in-chief para 21

[note: 57] Corporate Banking Credit Policy, Asia dated August 2002, DCB-Manuel (3), p 988

[note: 58] Transcripts of Evidence dated 23 November 2007 p 61

[note: 59] Transcripts of Evidence dated 16 November 2007 pp 28-29

[note: 60] Transcripts of Evidence dated 16 November 2007 p 73

[note: 61] Transcripts of Evidence dated 13 November 2007 p 68

[note: 62] Transcripts of Evidence dated 13 November 2007 p 75

[note: 63] Corporate Banking Credit Policy Asia, August 2002, cl 13.1.1 (DCB-Man(3) p 997-998)

[note: 64] Transcripts of Evidence dated 21 November 2007 pp 163-164

[note: 65] Transcripts of Evidence dated 21 November 2007 pp 163-164

[note: 66] SEB Closing Submissions at [70]-[72]; [74]; [80]-[85] & [92]-[96]; & [97]- [167]

[note: 67] HVB's Closing Submissions, Chapter 3, Sections IV to XI, pp 33 to 104.

[note: 68] Hansard, col 895

[note: 69] AB11 pp 274-275

[note: 70] APBS's closing submissions para 699

[note: 71] Goh Thien Phong's affidavit of evidence-in-chief para 19

[note: 72] Mr Goh's affidavit of evidence-in-chief, p 64

[note: 73] Mr Kon's affidavit of evidence-in-chief, p 32

[note: 74] Mr Goh's affidavit of evidence-in-chief, p 14

[note: 75]APBS Closing Submissions paras 20 & 21

[note: 76]APBS's reply submissions para 301

[note: 77]See APBS's Defence (Amendment 2) para 45 (incorporating F&BP) read with para 51

[note: 78]Kon's affidavit of evidence-in-chief p139

[note: 79]Kon's affidavit of evidence-in –chief para 29

[note: 80]Amin's affidavit of evidence-in-chief, paras 78 and 79

[note: 81]Kon's affidavit of evidence-in-chief para 29

[note: 82]Amin's affidavit of evidence-in-chief, Vol 4 p1005

[note: 83]Amin's affidavit of evidence-in-chief, Vol 2 para 78.

[note: 84]Mr Kon's affidavit of evidence-in-chief, para 57 to 62

[note: 85]Paras 232, 234-235, 238,240-243 of APBS's reply submissions

[note: 86]1AB Vol 1B pp 475-477, 479 & 490

[note: 87]Transcripts of Evidence dated 18 October 2007 pp 42 - 70

[note: 88]Transcripts of Evidence dated 2 October 2007 pp 32- 34

[note: 89]Tan Hwee Koon's affidavit of evidence-in-chief paras 45, 46 and 49