Bayerische Hypo- und Vereinsbank AG v C K Tang Ltd
[2004] SGHC 254

Case Number : Suit 732/2003

Decision Date : 18 November 2004

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Philip Jeyaretnam SC, Rodney Keong and Charmaine Cheong (Rodyk and Davidson) for plaintiff; Steven Chong SC and Sim Kwan Kiat (Rajah and Tann) for defendant

Parties : Bayerische Hypo- und Vereinsbank AG — C K Tang Ltd

Contract – Breach – Defendant engaged plaintiff as lead manager and underwriter in proposed securitisation transaction – Whether termination of transaction by defendant was a breach of contract

Contract – Contractual terms – Bifurcation of the phrase "due diligence" – Whether plaintiff completed its due diligence

Contract – Contractual terms – Rules of construction – Whether defendant entitled to terminate only within a reasonable time after plaintiff's completion of its due diligence or whether defendant could terminate at any time before completion of transaction

Contract – Implied contracts – Quantum meruit – Obligations of defendant upon termination clearly stated – Whether plaintiff entitled to reasonable remuneration for work done

Contract – Waiver – Whether defendant waived or elected not to exercise its right to terminate

18 November 2004 *Judgment reserved.*

MPH Rubin J:

Background facts and pleadings

1 The plaintiff, Bayerische Hypo- und Vereinsbank Aktiengesellschaft ("HVB") is reportedly the second largest bank incorporated in Germany. It carries on business as an offshore bank through a branch in Singapore. The defendant, C K Tang Limited ("CKT"), is a household name in Singapore. It is a public listed company incorporated in Singapore and owns the building at 310 and 320 Orchard Road ("the property"). It is in the business of department stores and wholesale trade.

2 The dispute at hand revolves around a contract ("the contract") entered into between the parties as constituted or evidenced by a letter of engagement ("the mandate letter") dated 24 January 2003 with an indicative term sheet attached ("the Indicative Term Sheet").[1] The said letter bears the signatures of one Mr Nicholas Hamilton ("Hamilton"), Head of Securitisation & Credit Engineering, Asia of HVB, currently holding the position of Managing Director, Asia Management Committee Asia of HVB, and Mr Foo Tiang Sooi ("Foo"), the Chief Operating Officer of CKT. Under the terms of the contract, CKT engaged HVB as the lead manager and underwriter ("the arranger") to a proposed $136.8m CKT Commercial Rental Receivables Backed Securitisation Transaction ("the transaction").

3 The transaction contemplated the issuance of notes which would be secured by commercial rental receivables arising from the property. The purpose of the transaction was to refinance the

entire corporate debt and existing debt obligations of CKT at a lower borrowing cost. CKT's corporate debt at that time consisted of:

(a) a transferable loan facility of $68m from the United Overseas Bank ("UOB") and $42m in principal amount of secured bonds; and

(b) a working capital line of $39m granted by a consortium of banks comprising the Oversea-Chinese Banking Corporation ("OCBC"), the Development Bank of Singapore ("DBS"), UOB, Bank of China and the Hongkong and Shanghai Banking Corporation ("HSBC").

In so far as is material, the mandate letter provides as follows:

January 24, 2003
C K Tang Limited
310 & 320 Orchard Road
Singapore 238864
Attention: Mr Foo Tiang Sooi

Dear Mr Foo,

Proposed SGD 136.8 Million C K Tang Commercial Rental Receivables Backed Securitisation Transaction

This letter (hereafter known as the "Letter Agreement") will confirm the engagement of Bayerische Hypo-und Vereinsbank AG ("HVB"), Singapore Branch by C K Tang Limited ("C K Tang") as C K Tang's exclusive Lead Manager and Underwriter ("Arranger" and "Underwriter") to the proposed S$136.8 million C K Tang Commercial Rental Receivables Backed Securitisation Transaction due 2008 ("Notes"). In connection with this engagement, HVB may retain the services of any of its subsidiaries to assist it in the performance of any of its obligations hereunder, in consultation with C K Tang. HVB will perform the following services as the Arranger for the said Transaction:

Structuring

(a) Assist C K Tang in evaluating and determining the optimal financing structure based on C K Tang's objectives, the analysis of the receivables data and forecasts related thereto.

(b) HVB will advise and assist C K Tang in negotiation with:

(i) the rating agency(ies);

(ii) legal counsel;

(iii) accountant and tax advisor;

(iv) the credit enhancement structure of the said Transaction;

(v) Trustees and related entities required for the establishment of the Special Purpose Companies for the said Transaction; and

(vi) Relevant authorities and regulatory agencies.

Underwriting

(c) HVB will act as the sole Underwriter for the Rated A, A2, A3 and B Notes (as stated in the attached Indicative Term Sheet dated January 24, 2003). The underwriting agreement for the Notes will be signed by C K Tang and HVB on or before February 28, 2003 or such time as may be mutually agreed before the closing of the Notes. The coupon level for the Notes will be determined based on the market clearing spread at the closing date, however we have set out indicative spreads for your information in the Indicative Term Sheet dated January 24, 2003. The estimated closing date of the said Transaction is March 10, 2003 or such other date as may be mutually agreed, subject to (among other things) satisfactory documentation, HVB's underwriting approval, and the absence of any material adverse change in the domestic and international financial markets or in the financial condition or operation of C K Tang, including, without limitation, material adverse changes in the regulatory and/or business environment.

Placement Agreement

(d) HVB will act as sole placement agent to place the junior unrated Notes on a best effort basis. The placement agreement for the junior unrated Notes will be signed by HVB and investors on or before February 24, 2003 or such time as may be mutually agreed before the closing of the Notes.

…

Fees

(f) Please refer to the attached Indicative Term Sheet dated January 24, 2003. All fees including structuring, underwriting and placement fees are payable upon settlement of the transaction, withholding from the total note proceeds by the Lead Underwriter.

Break-up Fee

(g) In the event C K Tang decides to terminate the transaction after HVB has completed the due diligence process, and provided that HVB has not indicated that the funding spreads to apply to each Class of Notes will be higher than 10 basis points above the respective estimated funding spreads as set out on the Indicative Term Sheet dated January 24, 2003, C K Tang will be required to pay HVB a break-up fee of S$165,000.

Operating Expenses

(h) All reasonable initial and ongoing costs and fees including legal, rating agency, trustee, administration, printing and out-of-pocket expenses will be subject to prior approval by C K Tang and for the account of C K Tang. HVB will assist in negotiations with all the related parties.

Out of Pocket Expenses

(i) All out-of-pocket expenses incurred by HVB in connection with the performance of its services hereunder will be subject to prior approval by C K Tang and reimbursed by C K Tang regardless of whether the transaction is completed and will be due and payable by C K Tang to HVB, or other relevant parties upon the presentation of the invoice (supported

by the necessary receipts or other evidentiary proof of the expenses) on a monthly basis. These out-of-pocket expenses will include, but will not be limited to, travel, accommodation, copying, faxing and couriers. All such expenses incurred by after the closing of the Transaction or termination of this agreement will not be reimbursed by C K Tang.

Structure of the Notes

(j) Please refer to the attached Indicative Term Sheet dated January 24, 2003.

…

INDICATIVE TERM SHEET

Proposed S$[136.8] million C K Tang Commercial Rental Receivables Backed Securitisation Transaction

Purchaser : Special purpose company ("SPC 1") to be incorporated as a public limited company in Singapore, wholly owned subsidiary of C K Tang.

Issuer : Special purpose company ("SPC 2") to be incorporated as a public limited company in Singapore.

Originator : C.K. Tang Limited

Seller : SPC1

Lead Manager & Underwriter : Bayerische Hypo-und Vereinsbank AG Singapore Branch ("Arranger")

Securities : Up to S$[136.8] million Commercial Rental Receivable Backed Debt Securities due 2008 ("Notes").

Issue Amount :

A	Notes 'AA/Aaa/AAA'	S$[62.4] Million Fixed Rate Notes
A2	Notes 'Aa2/AA'	S$[19.2] Million Fixed Rate Notes
A3	Notes 'A2/A'	S$[13.2] Million Fixed Rate Notes
B	Notes 'Baa2/BBB'	S$[17.2] Million Fixed Rate Notes
C	Notes 'Unrated'	S$[13.0] Million Fixed Rate Notes
D	Notes 'Unrated'	S$[11.8] Million Fixed Rate Notes

Related Property : No 320 Orchard Road

Purpose : The proceeds of the Note issuance will be used by the Issuer to fund the Loan by the issuer to SPC 1.

Issue Date : [March] 2003

Issue Price : 100%

Redemption Price : 100%

Expected Maturity : [5] years from Issue Date

Legal Final Maturity : [6.5] years from Issue Date

Expected Coupon : A Notes – SOR + [0.57]%
A2 Notes – SOR + [0.75]%
A3 Notes – SOR + [1.40]%
B Notes – SOR + [3.50]%
C Notes – SOR + [3.80]%
D Notes – SOR + [4.40]%

Step Up Coupon : If Notes extend beyond expected maturity, coupon for each tranche will be increased to 3 month SOR + [150] bps for the Notes

Interest Payment Date: Coupon is payable quarterly/semi-annually in arrears.

Principal Repayment : Bullet Payment at Maturity

Underwriting & Structuring Fees : Structuring Fee: S$550,000

Underwriting Fee:
A Notes – 0.40%
B Notes – 1.55%

Selling Commission:
C Notes – 1.75%
D Notes – 2.00%

Estimate Funding Spread:

(up to B Notes)	SOR + [1.15%]
(up to C Notes)	SOR + [1.42%]
(up to D Notes)	SOR + [1.68%]

Estimate All-in Costs:

(up to B Notes)	SOR + [1.71]%
(up to C Notes)	SOR + [1.92]%
(up to D Notes)	SOR + [2.14]%

Expected Net Proceeds: S$ [131.1] million

Net Proceeds is net of funds in:
1. SPC Management Expense Reserve

Account;

2. Note Interest Reserve;
3. Capital Expenditure Reserve Account; and
4. Upfront Expenses.

Form : The Notes will be issued in bearer form drawn without recourse to and without warranty by the Issuer.

Denomination : A temporary Global Note will be issued and be subsequently split into definitive Notes with denomination of S$250,000 each.

Status : The Notes will constitute direct, unconditional and secured obligations of the Issuer.

Distribution : The Notes will be placed via private placement to selected investors [pursuant to Section 274 and 275 of the Securities and Futures Act].

4 Whilst HVB was on course and pushing ahead with the transaction, CKT decided to terminate the appointment of HVB. The notice of the termination was contained in CKT's letter dated 8 May 2003. In so far as is material, the said letter reads:

> We have decided not to proceed with the Securitisation Transaction and wish to inform you of our decision to terminate your appointment.
>
> Notwithstanding the termination, we confirm that we will honour our obligations as outlined .in the letter of appointment.

5 HVB regarded the termination letter from CKT as a repudiatory breach. HVB's stand[2] was that it had, prior to 20 February 2003, completed its due diligence exercise ("due diligence") and the right to terminate the appointment of HVB by CKT under cl (g) of the mandate letter ("cl (g)") could only be exercised within a reasonable time after HVB's completion of its due diligence. Its further contention was that it was an express or alternatively implied term of the contract that CKT's right to terminate under cl (g), after due diligence, could only be exercised with payment, or alternatively, an offer of payment, of the break-up fee. In the main, HVB averred that CKT did not exercise its right under cl (g) within a reasonable time after HVB had completed its due diligence. CKT had, through its adviser and agent, one Primepartners Corporate Finance Pte Ltd ("PPCF"), further represented to HVB that it would not be exercising its right to terminate HVB's appointment, and CKT's right to terminate under the said clause had consequently lapsed.[3] In the event, by this action, HVB claimed against CKT damages for wrongful termination of contract in the sum of $1,725,672,[4] or alternatively, reasonable fees for work done (quantum meruit) for a sum of $688,350,[5] or alternatively, for the break-up fee of $165,000, in addition to or in lieu of damages or a reasonable fee for work done.[6] HVB also claimed a further sum of US$135,018 and $23,951.20 on account of out-of-pocket expenses.[7]

6 CKT's defence was that it had exercised its right to terminate the appointment of HVB as the arranger of the transaction, fully in accordance with the terms of the mandate letter.[8] Its other contentions, as appear from the Re-Amended Defence ("the Defence"), were that:

(a) under cl (g), HVB was not entitled to anything more than the break-up fee as stated in the said clause, provided that HVB had completed its due diligence and that it had not indicated that the funding spreads would be higher than ten basis points above those set out in the

Indicative Term Sheet;[9]

(b) HVB had not, contrary to its claim, completed its due diligence prior to 20 February 2003;[10]

(c) it was neither provided in the mandate letter nor could it be implied from any clauses therein that CKT's right to terminate the appointment of HVB could only be exercised within a reasonable time after HVB's completion of its due diligence;[11] and

(d) neither CKT nor PPCF had ever represented to HVB that CKT would not be exercising its right to terminate the appointment of HVB as the arranger of the transaction.

7 CKT averred that on or about 29 April 2003, it received an unsolicited bilateral term offer from OCBC, the terms of which were substantially more attractive than the terms obtainable under the mandate letter, and hence its decision to accept the new proposals and terminate HVB's engagement.[12] Paragraph 5 of the Defence, by and large, seems to capture the essence, if not all, of CKT's defence. It reads:

> 5. Paragraphs 8 and 9 of the Statement of Claim are denied. The Defendant had exercised its right to terminate the appointment of the Plaintiff as the Arranger and Underwriter of the Securitisation Transaction fully in accordance with the terms of the Mandate Letter. Under clause (g) of the Mandate Letter, the Defendant is entitled to terminate the appointment of the Defendant as the Arranger and Underwriter of the Securitisation Transaction at any time before the completion of the Securitisation Transaction, provided that the Defendant pays to the Plaintiff the break-up fee the sum of S$165,000 if the Plaintiff has completed its due diligence and if the Plaintiff has not indicated that the funding spreads will be higher than 10 basis points above those set out in the Indicative Term Sheet. It is not provided in any clause in the Mandate Letter that the Defendant's right to terminate the appointment of the Plaintiff can only be exercised within a reasonable time after the Plaintiff's completion of its due diligence. Further, there is no basis for the Plaintiff's allegation that there was an implied term in the Mandate Letter to this effect. The Defendant has always been prepared to pay the break-up fee to the Plaintiff as provided in clause (g) of the Mandate Letter. The Defendant informed the Plaintiff that the Defendant was prepared to do so in the Defendant's letters to the Plaintiff dated 8 May 2003 and 21 May 2003, as well as at a meeting between the representatives of the Plaintiff and the Defendant on 9 May 2003. Further, by an open letter dated 15 July 2003, the Defendant informed the Plaintiff that the Defendant has always been prepared to pay for reasonable out-of-pocket expenses and the costs of the other professionals, and that the Plaintiff has no legal basis for claiming anything more than the "break-up" fee. However, purely as a gesture of goodwill and without prejudice to the Defendant's rights, the Defendant indicated in its letter dated 15 July 2003 that it was prepared to pay the Plaintiff the sum of S$275,000 in full and final settlement of the matter. The plaintiff has failed to respond to the Defendant's letter within the deadline stipulated in the letter.

8 It should be mentioned at this stage that with regard to the out-of-pocket expenses claim by HVB for US$135,018 and $23,951.20, the dispute was only in relation to a sum of US$30,000. HVB demanded US$80,000 as being fees payable to Fitch Ratings ("Fitch"), whereas CKT contended that it should be only US$50,000.

Evidence

9 Three witnesses, Hamilton ([2] *supra*), Mr John Pang Yik Yu ("Pang"), HVB's Director,

Securitisation, and Mr Richard John Downer ("Downer"), a senior managing director, currently in the employ of Bear, Stearns International Limited, UK, testified on behalf of HVB. Four witnesses, Ms Angie Ng Chui Guat ("Angie Ng"), Vice President – Group Finance of CKT, Mr Gerald Ong Chong Keng ("Gerald Ong"), Managing Director of PPCF, Foo ([2] *supra*), and Ms Debbie Leong Sook Ching ("Debbie Leong"), Director, Corporate Finance of K&N Kenanga Berhad, Malaysia, gave evidence on behalf of CKT. Their testimonies are adequately summarised in the respective closing submissions of both counsel. In so far as is material, the relevant segments of their evidence are as follows.

The plaintiff's evidence

Hamilton

10 Hamilton's evidence was to the following effect.

11 He was the Managing Director, Asia Management Committee Asia of HVB and exercised general supervision over HVB's work on the transaction. HVB is widely regarded as having one of the top securitisation practices in Singapore and the region, as well as internationally.

12 He averred that there were two major reasons for CKT entering into the transaction. One was to lower its borrowing costs. The other was to replace an inflexible form of funding with a much more flexible form of financing, where the borrower would not be beholden to one financial institution in a loan.

13 Dealing with the terms of the mandate letter, he said that the only clause conferring the right of termination on CKT was cl (g), which in turn only entitled CKT to terminate upon completion of HVB's due diligence.

14 According to Hamilton, cl (g) contemplated that in the event HVB's due diligence revealed that the indicated spreads were achievable, and CKT still wished to terminate the transaction at that stage, CKT could cap its costs at just the break-up fee plus whatever expenses were incurred by HVB on the transaction up to that stage. In the event HVB's due diligence revealed that the indicated spreads were not achievable, then CKT could terminate at that point at no cost at all (apart from reimbursing HVB's expenses). This was a business risk that HVB was prepared to take.

15 He elaborated on the background to cl (g). Clause (g) was inserted at CKT's request because CKT wanted, in view of CKT's unfamiliarity and inexperience with securitisation, a chance to abort the transaction and proceed with alternative modes of financing if, after HVB's due diligence, the indicated spreads were not achievable within a reasonable range. CKT was concerned about not having to incur too much costs on the transaction pending HVB's conduct of its due diligence exercise to determine the feasibility of the transaction. He further explained that HVB agreed to incorporate a get-out clause because it sounded reasonable, in view of CKT's inexperience with securitisation.

16 He explained that the amount of the break-up fee was negotiated and eventually fixed at $165,000.00, which amount reflected the fact that it would essentially compensate HVB for about three weeks' work (*ie*, the period that HVB expected to take for its due diligence). HVB felt that $165,000 was slightly lower than what would be fair compensation, and that was why the original figure of $275,000 was proposed, but HVB did not spend too much time trying to negotiate on this because it was pretty confident that the transaction was going to be completed.

17 He also stated that if CKT had suggested that it wanted the right to terminate the transaction at the eleventh hour after HVB had put in months of work, and be paid for only three

weeks of work, he would have not have agreed to the break-up fee of $165,000.00.[13]

18 He understood that HVB had completed its due diligence by mid-February 2003 and no issues had cropped up that would adversely affect the indicated spreads. At CKT's request, Hamilton sent a letter dated 20 February 2003 to CKT[14] confirming that the transaction would proceed to closing (subject to the usual caveats).

19 By a letter dated 8 May 2003 (but sent to HVB on 9 May 2004), CKT terminated the transaction and HVB's engagement as the arranger.[15] This letter was accompanied by a letter from PPCF to HVB dated 9 May 2003.[16]

20 Following CKT's termination of the transaction, Hamilton and Pang met with CKT's Foo and Angie Ng and with PPCF's Gerald Ong on 9 May 2003. Hamilton told Foo that this was the first time in his experience that a transaction had progressed so far – in the present case practically to completion – and then been terminated. CKT made it clear at the meeting that its decision to terminate was final and Gerald Ong stated that the new proposal CKT had received from OCBC was too good to resist in terms of the cost savings as compared to the transaction, and that the "terms were so good compared to what CKT had originally asked for from OCBC". At the end of the meeting, Foo invited HVB to submit its claims for compensation and reimbursement. Gerald Ong even pressed Hamilton and Pang to state an amount then and there, but they did not do so. At no time during the meeting did CKT offer to pay the break-up fee of $165,000.

21 Unlike CKT, HVB's position with regard to termination had always been that the only clause conferring the right to termination to CKT was cl (g), which only entitled CKT to terminate after (*ie* upon or a reasonable time after) the completion of due diligence on or about mid-February 2003. By 8 May 2003, the transaction had moved far beyond that stage and CKT had lost its right to rely on cl (g).

22 Hamilton claimed that HVB had already paid the third party fees and expenses for DTZ Debenham Tie Leung (SEA) Pte Ltd ("DTZ") and Ernst & Young. HVB had not paid the fees and expenses for Fitch and for Standard & Poor's ("S&P") because the rating agencies had agreed, in light of their relationship with HVB, to wait until the outcome of this action before being paid by HVB. However, HVB owed the rating agencies the fees and expenses charged by them and certainly would be paying those fees and expenses.

23 He stated that HVB would pay Fitch's full fee of US$80,000 and not just the break fee of US$50,000. He stated that Fitch had indeed completed all its work in relation to assignment of a rating for the transaction, and this was Fitch's position as well.

Pang

24 Pang appeared to be the key witness for the plaintiff. His evidence requires reproduction somewhat at length.

25 Pang was HVB's principal director and team leader for the transaction, and was involved in the transaction from its inception to the termination. Hamilton exercised general supervision over HVB's work on the transaction.

26 His evidence as to how HVB structured the transaction was as follows. CKT's property, *ie* its flagship Tangs Department Store on 320 Orchard Road (the intended security backing the bond issuance) was to be sold to a wholly-owned subsidiary of CKT, namely, Tangs Properties, and leased

back by CKT. The sale of Tangs Department Store to Tangs Properties would be financed partly by a sub-shareholders' loan from CKT and loans from a special purpose vehicle ("SPV"). The SPV is an independent bankruptcy-remote entity held by a charitable trust set up to issue bonds to the capital market. The bonds issued by the SPV are to be backed by the loan to Tangs Properties, whereby Tangs Properties would pledge the Tangs Department Store to the SPV as security for the loan. Thus the bonds would ultimately be backed by the Tangs Department Store and the cash flows generated by the department store operations.

27 Discussions with respect to the transaction began in or about August/September 2002 between HVB and CKT and its advisers. CKT wanted to restructure its entire existing corporate debt, which was a loan with UOB and its consortium consisting of a term loan facility and working capital loan ("the UOB Loan"). The purpose of the transaction was to replace the UOB Loan because it was becoming too costly for CKT to service.

28 At no time prior to signing the mandate letter and entering into the contract did CKT or its advisers, Gerald Ong and Debbie Leong (then with the Bank of Tokyo-Mitsubishi), inform HVB that the UOB Loan had been converted to bonds. Pang's evidence was that he had asked Gerald Ong specifically about this and was informed that there were no bonds issued, and further that PPCF would take care of the redemption of the UOB Loan and HVB should concentrate on the transaction.

29 Under the mandate letter, CKT engaged HVB to provide professional services as the arranger of the transaction. HVB's remuneration for such services would have amounted to about $1.7m.

30 On cl (g), he said that the only provision in the contract allowing CKT to terminate the transaction and HVB's appointment as the arranger was cl (g).

31 Pang's understanding of cl (g) was similar to that of Hamilton in that CKT was only allowed to terminate upon HVB's completion of its due diligence or a reasonable time thereafter, which, in Pang's opinion, was one or two weeks after HVB had completed its due diligence.

32 Pang stated that he understood the words "while" and "after" to mean "upon". In this respect, when he did the first draft of the said clause,[17] it was not vetted by HVB's in-house counsel who was on vacation and not in the office. According to him, cl (g) did not confer upon CKT the right to terminate at any time after HVB had completed its due diligence.

33 According to Pang, cl (g) was inserted into the mandate letter specifically at the request of CKT made on or about 13 January 2003 in the discussions on the terms of the mandate letter. In an e-mail dated 13 January 2003 from PPCF's Debbie Leong to Pang, it was stated:

> Also in the event that after the due diligence process, the indicative spread is not obtainable and as a result, Tangs decide not to pursue with the Transaction, the structuring Fee, either wholly or part thereof, would not be payable.

Prior to CKT's request on or about 13 January 2003, there was no cl (g) or its equivalent.

34 He said that CKT's concern behind the request for the insertion of cl (g) was that it should have an escape route in the event that HVB's due diligence revealed that the estimated funding spreads would not be achievable. Clause (g) was thus inserted specifically to allow CKT to terminate the transaction after (*ie* when) HVB had completed its due diligence to ascertain whether the estimated funding spreads for the notes would be achievable. In the event the due diligence revealed that the estimated spreads would be missed by more than ten basis points, CKT would be entitled to

terminate, instead of proceeding with the transaction, without having to pay HVB anything. However, if the due diligence revealed that the indicative spreads would be achievable within ten basis points of the indicative spreads (*ie* that HVB had not been inaccurate in its indicative spreads), CKT would have to pay the plaintiff the break-up fee if it decided to terminate then.

35 Pang testified that there was a discussion between him and PPCF's Debbie Leong on the word "after" and what it really meant because, all along, the purpose of this clause was to make sure that CKT would not be entering into a transaction that might last, maybe, two to three or four months and incur too much costs, and in the end the transaction might not actually proceed into the capital market. Further, cl (g) was concerned only with HVB's due diligence, as distinct from the due diligence conducted by the transaction counsel and the rating agency.

36 He said that the break-up fee of $165,000.00 was intended to be an estimate of the likely fees that HVB would have incurred for its due diligence, which was expected to take about two to three weeks in the life of a transaction that was expected to take about eight weeks. It was also Pang's evidence that he had specifically told Debbie Leong, in one of the telephone discussions that he had with her, that the $165,000.00 was an estimate to cover two to three weeks of due diligence.

37 HVB commenced its due diligence to ascertain the achievable funding spreads immediately after the signing of the mandate letter on 24 January 2003 and completed its due diligence in or about mid-February 2003.

38 At the same time, pursuant to its duties as the arranger, HVB proceeded to liaise with Fitch and S&P, the rating agencies for the rated notes under the transaction. Fitch and S&P also had to conduct their own respective due diligence for this purpose. CKT appointed Knight Frank to conduct a valuation of CKT's property and produce a report thereon in support of the transaction process. M/s Allen & Overy Shook Lin & Bok ("AOSLB") were appointed as the transaction counsel on or about 5 February 2003. Dexia Trust Services Singapore Limited was appointed as the trustee for the noteholders under the transaction.

39 Pang asserted that the transaction process was very interactive as there were daily discussions between HVB and CKT or PPCF, where HVB updated PPCF or CKT on the progress of the transaction.

40 On 10 February 2003, HVB first learnt that, contrary to what CKT and its advisers had represented to HVB, the UOB Loan had apparently been converted to about $42m worth of bonds that had been sold to third parties ("the existing bonds"), and that these existing bonds had to be redeemed in connection with the repayment of the UOB Loan.

41 Pang's evidence was that he had asked PPCF's Gerald Ong whether there were any bonds outstanding. The reason why he had asked Gerald Ong this question specifically was that he was in the bond business and knew how difficult it was to identify bondholders in the market. Pang stated that he did not look for any references to bonds in the documents given to HVB for its due diligence because Gerald Ong had told him specifically (in response to his specific question) that there were no bonds outstanding.

42 On 18 February 2003, HVB learnt that the next earliest date for redemption of the existing bonds was 21 May 2003, which meant that the notice for redemption (which required three months' notice) would have to be given at the latest on 21 February 2003 (three days away).

43 Pang maintained that HVB was not responsible under the transaction for the redemption of

the existing bonds nor for the redemption of the UOB Loan, as this was not part of the transaction. This issue had not been discussed in the talks leading up to the mandate letter and there was no provision in the mandate letter for this.

44 Prior to 20 February 2003, in or about mid-February 2003, HVB completed its due diligence and concluded that the funding spreads would be realisable within ten basis points of the estimated spreads, as indicated on the Indicative Term Sheet.

45 It was Pang's evidence that in a securitisation transaction, there was no general requirement for the arranging bank to provide a formal notification of the completion of its due diligence to the client, as the nature of the transaction was an interactive one and the client would be updated on the progress of the transaction. Further, in this case, there was also no obligation on HVB to provide a formal notification of the completion of HVB's due diligence to ascertain whether the estimated spreads were achievable.

46 Nonetheless, CKT was aware that HVB had completed its due diligence for the purposes of ascertaining whether the estimated spreads would be achievable.

47 HVB wrote a letter on 20 February 2003 at the specific request of Gerald Ong for and on behalf of CKT, because CKT needed to assure HSBC Trustee that HVB's due diligence had been satisfactorily completed and that therefore CKT would be in a position to finance (via the transaction that would therefore proceed to completion) the early redemption of the existing bonds. This letter was therefore issued on 20 February 2003 prior to the meeting with HSBC Trustee on 20 February 2003.

48 Pang stated that CKT and PPCF knew that HVB's letter of 20 February 2003 was a clear notification of the completion of the plaintiff's due diligence and that the indicated spreads were achievable.

49 According to Pang, the due diligence by the rating agencies (Fitch and S&P) was completed on 10 February 2003 and 11 February 2003 respectively. Although there were outstanding issues relating to the valuation of, and the insurance coverage for, the property, these were, in Pang's view, not deal killers and were merely issues which had to be followed up with subsequent to the due diligence meetings held on 10 and 11 February 2003 as part of the rating agencies' process.

50 Pang explained that as rating reports would only be issued on the date of the settlement of the bonds, Fitch and S&P never issued their rating reports because of the termination.

51 Pang said that HVB took steps to obtain investors for the unrated bonds (the C and D notes) as early as right after the mandate letter was signed, by commencing discussions on a confidential basis with certain investors. Pang claimed that he had, in assessing the potential for unrated investors, spoken to about three different unrated investors in April or May 2003. He had given them all the details about the size, quality of the bond, and of the location and kind of property that was involved. Pang's evidence was that based on the interest in the market, HVB could indicate that the spread for the unrated notes could be achieved. Pang said in re-examination that immediately prior to 8 May 2003, HVB was confident of selling all its unrated bonds, and that was why HVB was claiming the loss of selling commission in full.

52 Pang said in cross-examination that prior to 20 February 2003, HVB did not at that point in time have to go to the market to sound out the interest level for the rated bonds because the rated bonds were underwritten by HVB. HVB's due diligence for the rated notes was to ensure that the

underlying property and whole financial structure would work and HVB could present this to the rating agency to achieve a certain rating for the rated notes. Pang further said that based on experience, this was achievable.

53 He claimed that HVB had also effectively obtained its internal credit committee's approval for its underwriting obligations under the mandate letter. HVB had intended to submit its internal credit request on 19 February 2003, after it completed its due diligence, but because of the issues relating to the redemption of the bonds, the internal credit request was only submitted on 15 April 2003. The credit committee gave its approval by circulation to its members from 8 to 13 May 2003 in ignorance of CKT's termination.

54 Pang explained the sequence of events following credit approval being given, conditional upon the rating agency issuing a report confirming the ratings in the Indicative Term Sheet. He said that after the arranger got a verbal approval from the rating agency, the deal would be launched with an information memorandum and the deal would be sold. After the arranger received money from the investor and delivered it to the originator, the arranger would then put its (the arranger's) money on the unsold rated bonds. The rating agency would then issue a rating letter, which the arranger would give to the internal credit committee to fulfil the committee's condition. Pang explained that this was why the rating report or letter from the rating agencies would only be produced to the internal credit committee after HVB had already underwritten the bonds and sold the bonds in the market.

55 As at 8 May 2003, in terms of rated securities, Pang gave evidence that HVB had in fact got a rating of $15m more than what was indicated in the Indicative Term Sheet.

56 In relation to the underwriting fee for the rated bonds, Pang's evidence was that regardless of whether the rated bonds were sold, HVB would still underwrite the bonds. Therefore, it would still earn its underwriting fee.

57 He said that immediately after HVB had issued its letter dated 20 February 2003, on 21 February 2003, the transaction came to a halt whilst CKT decided whether or not to proceed with the transaction.

58 On or about 24 February 2003, Pang learnt from Gerald Ong that CKT had conducted a board meeting on the issue of the redemption of the existing bonds, and to discuss whether to proceed with the transaction. On 25 February 2003, Pang requested Gerald Ong by e-mail at 9.22am[18] for an update on CKT's decision following its board meeting, and enquired whether the transaction was to proceed. On 26 February 2003, Pang informed his team by internal e-mail[19] of his belief that the transaction would be proceeding and informed the team to be prepared to start intensive work on the transaction again.

59 According to Pang, subsequent to HVB's letter dated 20 February 2003, CKT by itself and its adviser, PPCF, constantly impressed upon HVB the urgency in moving the transaction forward.

60 Pang referred to the minutes of CKT's board meeting held on 27 February 2003[20] which stated[21] that CKT's board of directors had decided unanimously to proceed with "HVB on condition that HVB was able to deliver the interest rate spreads as indicated in their Term Sheets".

61 CKT appointed a new transaction counsel, M/s Allen & Gledhill ("A&G"), on or about 3 or 4 March 2003 in place of AOSLB. CKT terminated AOSLB's appointment on or about 28 February 2003, as CKT took the position that AOSLB had failed to advise or properly advise CKT about the notice that was required to be given for redemption of the existing bonds.

62 At a meeting on 3 March 2003, PPCF informed HVB that CKT had given approval for the transaction to be completed as soon as possible, regardless of any issues in connection with the notice period for redemption of the existing bonds. HVB subsequently targeted 23 April 2003 as the completion date for the transaction. Pang conveyed this to the rating agencies on 4 March 2003, and HVB drew up a revised "Critical Path and Estimated Schedule". PPCF also drew up a tentative timetable for the redemption process, taking into account HVB's proposed deal launch and underwriting date of 16 April 2003.

63 On or about 12 March 2003, HVB, on behalf of CKT, engaged DTZ as independent valuer to produce a new valuation report on CKT's property as required by the rating agencies. This was because the rating agencies were dissatisfied with Knight Frank's valuation report prepared for the rating agencies' due diligence.

64 According to Pang, the DTZ report was "pretty much all done" on or about 14 April 2003.

65 HVB also appointed Ernst & Young as the transaction accountants on behalf of CKT.

66 On 7 March 2003, CKT's Angie Ng sent an e-mail to Pang stating that CKT had requested to pre-pay the UOB Loan to UOB and its banking consortium. As HVB was not aware that CKT was in talks with any other bank or financial institution to arrange for alternative financing, or that CKT was considering, or interested in seeking, any alternative means of financing other than the transaction, he regarded the request by CKT to pre-pay the UOB Loan under its previous obligations as a clear and unequivocal representation to HVB that CKT wanted to proceed with the transaction to completion. This was because, as far as HVB was aware, the pre-payment of the UOB Loan could only be made with the proceeds from the transaction.

67 Relying on CKT's representations, from about early March 2003 until the termination of the transaction on or about 8 May 2003, HVB worked and communicated extensively with CKT, PPCF, A&G and CKT's other transaction counterparts, on a continuing and almost-daily basis, for the expeditious progress and furtherance of the transaction.

68 On or about 2 April 2003, HVB learnt from A&G that Debbie Leong had orally requested A&G on or about 2 April 2003 to slow down the progress of the work for the transaction without informing the other parties involved in the transaction.

69 On 2 April 2003, Pang called Gerald Ong, who was Debbie Leong's superior at PPCF, to clarify the position. Gerald Ong agreed with Pang that Debbie Leong's request was inappropriate and assured Pang that Debbie Leong's request was due to a misunderstanding and requested Pang to ignore Debbie Leong's request.

70 He said that the transaction attracted stamp duty since it involved transfer of ownership of CKT's property to a special purpose company ("SPC"). To facilitate the waiver of stamp duty, HVB agreed to interpose itself into the transaction as a financial institution to provide a bridging loan so as to relieve CKT of the need to seek a ministerial waiver of stamp duty pursuant to s 74 of the Stamp Duties Act (Cap 312, 2000 Rev Ed) and facilitate instead a waiver pursuant to s 15 of the Stamp Duties Act.

71 The waiver of stamp duty was the responsibility of the transaction counsel and not of HVB, since AOSLB's engagement letter dated 5 February 2003[22] stated unequivocally that AOSLB's duties included "applying for an exemption from stamp duty in relation to the sale under Section 15 of the Stamp Duties Act". In contrast, HVB's obligations under the mandate letter did not include work in

connection with, or facilitating, the waiver of stamp duty. Notwithstanding this, HVB agreed out of goodwill to assist CKT to secure a waiver of stamp duty.

72 Pang claimed that by 8 May 2003, HVB had done the following:

(a) It had completed structuring of the transaction.

(b) It had obtained in-principle rating committee approval from the rating agencies of the Indicative Term Sheet capital structure for the notes.

(c) It had obtained the valuation report by DTZ.

(d) It had been involved in discussions on the insurance policy (which were in their advanced stage) and the policy would have been issued in time for the scheduled closing date of 30 June 2003. Further, it was not HVB's responsibility to procure the insurance policy for the transaction but that of Acclaim Insurance Brokers Pte Ltd, which was engaged by CKT.

(e) It had effectively obtained its internal credit committee's approval for its underwriting obligations under the mandate letter, including its role in providing a bridging loan to facilitate the waiver of stamp duty.

(f) It had conducted confidential and advanced discussions with possible "placees" for the majority of the bonds.

(g) It had also performed work in relation to the moneylender licence waiver requirement.

(h) It had supported and co-ordinated with A&G in relation to the transaction structure for the application for stamp duty waiver.

(i) It had also performed work in connection with the second and penultimate transaction documents with input from CKT's other transaction counterparts.

73 On 7 May 2003, Gerald Ong called Pang to meet him over coffee to discuss the transaction. Gerald Ong mentioned to Pang that CKT had apparently decided to terminate the transaction because of cost savings from an OCBC proposal. Gerald Ong told Pang that although he would try his best to convince CKT to continue with the transaction, it was unlikely that that would happen because CKT's chairman of the board had already approved the OCBC proposal and the board would be meeting that same afternoon to approve it. Pang expressed shock and asked Gerald Ong why HVB had not been consulted about this. Pang told Gerald Ong that HVB would, nonetheless, continue working on the transaction until receipt of official notification from CKT that it was terminating the transaction. At no time during this meeting did Gerald Ong mention anything about any alleged failure by HVB to achieve any milestones in the transaction. Pang requested a meeting with CKT and PPCF but CKT turned down Pang's request.

74 On or about 8 May 2003, CKT terminated the transaction and HVB's engagement as arranger by way of a letter from CKT dated 8 May 2003 and addressed to HVB, which was sent to HVB on 9 May 2003.

Downer

75 Downer's evidence was in relation to the following aspects:

(a) securitisation practice in general;

(b) the typical elements of due diligence by the arranger; and

(c) the typical elements of structuring and underwriting.

76 According to Downer, securitisation is a method of raising funds by which cash flows are converted into securities. The cash flows backing the bonds are typically originated by the company seeking finance (known as the originator) or a subsidiary or affiliate within its corporate group structure. The cash flows can be generated from different assets such as property, loans or sales receivables. Thus, investors who purchase bonds issued in a securitisation transaction will rely mainly on the cash flows as security, rather than the originator's credit and its existence. On the other hand, the bond investors would typically have no recourse to the originator in the event of default on the notes where such default is due to the poor or under-performance of the cash flows. Such examples of poor or under-performance would be due to certain credit events within the cash-flow pool. The main source of investors for securitisation would be from the capital market rather than the bank loan market. One advantage of financing through securitisation is that it typically involves less reliance on a single financier as would be the case in a bank loan. In addition, securitisation investors only have access to the securitised cash flows; a capital market investor who loses money in buying a bond backed by these cash flows would normally not be able to sue the originator for such losses. This is to be contrasted this with a bank loan, where the bank lender would ultimately be able to put the borrower into bankruptcy in the event of a loss or potential loss on a bank loan.

77 He said that as a general practice, when seeking to win the mandate for a securitisation engagement by a prospective client, the arranger would provide the client with a proposal indicating the estimated all-in cost likely to be achieved in the proposed note issue. The prospective arranger would arrive at the indicative all-in cost based on information on the client obtained from public news sources as well as unverified information provided by the client. Upon engagement as the arranger and/or underwriter, the arranger would then conduct a detailed due diligence on the client. This would include verification of information provided by the client. The purpose of this due diligence would be to establish (a) whether there are any material issues or obstacles that might prevent the execution of the transaction as originally proposed, and (b) whether the indicated all-in cost for the rated bonds would be achievable, and if not what the all-in cost would be, so that the feasibility of the proposed securitisation transaction can be determined, and adjustments made if necessary or helpful.

78 According to him, the due diligence conducted by the arranger is different from the due diligence undertaken by other participants, such as the legal advisers and the rating agencies. The arranger's due diligence will not include the legal advisers' check on the contracts in relation to the originator's cash flow or receivables; that task is performed by lawyers who report any adverse findings to the arranger. Nor does it include the rating agency's comparison of performance figures of the originator as compared to other originators within its peer group, or in the absence of a peer group member, other such suitable benchmarks as may be determined by the rating agencies. The arranger's due diligence is normally completed before the rating agency gives its indication of the rating. It is quite often the case that the arranger, using its skill and experience, can provide an accurate assessment of the likely transaction structure long before the rating agencies have even been contacted.

79 He mentioned that the fact that the underwriting commitment of an arranger remains unsigned prior to the launch date does not mean that the arranger has not completed its due diligence. It will normally be the case that an underwriting agreement is signed after the transaction has been priced or "launched" into the market. However, market practice across the globe for this

type of transaction dictates that a transaction is only launched once the transaction parties have agreed verbally to proceed to complete the transaction.

80 Downer explained that structuring of a securitisation transaction includes:

(a) evaluating and determining the optimal financing structure;

(b) analysing financial data and forecasts;

(c) formulating a cash-flow model for the transaction;

(d) negotiating with the rating agencies;

(e) liaising with transaction legal counsel on all aspects of the transaction;

(f) proposing credit enhancement structure and alternatives; and

(g) co-ordinating with other professionals such as security trustee, note trustee, corporate administrator, servicer, accountant, tax adviser and any other technical advisers in relation to the transaction.

81 Downer added that the structuring of a securitisation transaction is completed when the rating agencies indicate how much debt from the transaction can be rated at specific categories of rating within the transaction cash-flow structure, and when documentation is well progressed.

82 He said further that the underwriting obligations in a securitisation transaction include obligations:

(a) to subscribe for the bond issuance at the settlement as the primary subscriber for the whole issuance size;

(b) to sell the note issuance to capital market investors;

(c) to create market awareness for the placement of the notes;

(d) to obtain internal credit approval for the bond underwriting; and

(e) to determine final pricing prior to the settlement of the transaction.

83 Further, according to Downer, the principal work done in relation to underwriting is the identification of potential buyers of the notes and obtaining in-principle indications of interest from them. This process is known as a book-building process and can take anything from one to four weeks depending on transaction size, sophistication of underlying structure and market conditions. Once this has been done, the bulk of the underwriter's work is done.

84 In cross-examination, Downer stated that the job of the arranger is to look at the contemplated transaction and to ascertain whether the indicated cost of funds may be reasonably achievable. It will depend on the terms of the mandate whether the arranger is advised to look at the existing debt obligations of the originator.[23] During the due diligence phase, the arranger is entitled to make certain assumptions that the information given by the originator is correct, when assessing this information to form a view as to whether the transaction can reasonably be achieved.[24]

85 He added that at the due diligence phase, he would not expect the arranger to independently verify the information that has been received by them, for example, financial information.[25]

86 In re-examination, Downer said that the concept of due diligence had to be separated into segments of initial due diligence and ongoing due diligence. He explained that:

> (a) Initial due diligence is for planning purposes, to try and ascertain whether the transaction should go ahead.
>
> (b) After the initial decision to go ahead is made, there is then the process of ongoing due diligence to address the issues that are uncovered in the initial due diligence phase by the rating agency, or other issues that may be raised during the course of the transaction process by the lawyers, the rating agencies, the arranger or the originator of the transaction. The process of ongoing due diligence may, at some point, lead to the transaction not going ahead if an obstacle that was identified in the initial due diligence phase of the transaction was viewed then as something that could be resolved but subsequently is not able to be resolved. Ongoing due diligence would continue even beyond the closing of the transaction.[26]

87 Downer was also of the view that obtaining internal credit approval would be post-due diligence.[27]

The defendant's evidence

Angie Ng

88 Angie Ng's testimony was as follows.

89 On 24 January 2003, CKT engaged HVB to be the arranger for a securitisation transaction for the purpose of refinancing CKT's existing debt obligations comprising a transferable loan facility in the amount of $68m, and $42m in principal amount of secured bonds. The securitisation transaction involved the issuance of notes in the sum of $136.8m, which was to be backed by commercial rental receivables.

90 CKT decided to accept the securitisation proposal from HVB, and to appoint HVB as the arranger, as HVB's proposal was at that time commercially the most attractive to CKT.

91 The terms of the appointment of HVB as the arranger were set out in the letter of appointment (*ie*, the mandate letter) dated 24 January 2003.

92 The mandate letter was prepared by HVB. Sometime in early January 2003, HVB and CKT, together with CKT's advisers, PPCF, commenced discussions on the draft terms of the mandate letter. At CKT's request, HVB agreed to insert a break-up fee clause in the draft mandate letter. On 14 January 2003, HVB sent a revised draft mandate letter to her and to Debbie Leong of PPCF. This revised draft included a clause which provided for the payment of a break-up fee in the event that the transaction was terminated. Clause (g) of the draft mandate letter dated 14 January 2003 stated that:

> In the event C K Tang decides to terminate the transaction *while* HVB has completed the due diligence process, C K Tang will be required to pay HVB a break-up fee of S$275,000. [emphasis added]

93 On 16 January 2003, Debbie Leong, on CKT's behalf, provided her comments on the draft mandate letter by e-mail. Her comments on the clause relating to the payment of a break-up fee were as follows:

> Pg 2 of the mandate – break up fee – as discussed, please make references to the break-up fee being payable if Tangs decided to abort the exercise *after* due diligence, provided that the indicative spread in total is not in excess of [ ] basis point from the spread outlined in the attached indicative term sheet. In the event that Tangs decide to abort because the indicative spread exceeds [ ] basis point from that outlined in the indicative term sheet, no break-up fee would be applicable. [emphasis added]

94 Angie Ng also made reference to an e-mail dated 20 January 2003 from Lee Sze Sze of HVB where the latter had summarised her discussions with Debbie Leong with respect to the break-up fee as follows:

> Based on my conversation with Debbie, seems like CKT wants to amend the break-up fee clause such that, in the event that HVB cannot achieve an all-in-spread of a [*sic*] below a certain %, CKT can terminate the transaction without incurring any break-up fee. *Other than this, if CKT terminate after HVB has completed the due diligence, then the break-up fee would be applicable.* [emphasis added]

95 Angie Ng averred that CKT wanted to negotiate for a reduction in the break-up fee from the originally proposed sum of $275,000, which was around half the structuring fee payable upon completion of the transaction, to $165,000, which was about 10% of the aggregate of the structuring fee and selling commission that would be payable to HVB had the transaction been completed. On 21 January 2003, Debbie Leong, on CKT's behalf, followed up with additional comments on the draft mandate letter by way of an e-mail to HVB:

> Tangs has requested for the clause on the break-up fee to be amended so that if Tangs decide to terminate the transaction *after HVB has completed the due diligence process* and provided that the all in spread is not more than 10 basis points (on a gross basis – meaning the initial proceeds raised before taking into account expenses, reserves, etc) higher than the current indicative all in spread of 1.68% (up to D Notes), Tangs will be required to pay HVB a break-up fee of *S$165,000.* [emphasis added]

96 Thereafter, HVB agreed to incorporate CKT's comments into the mandate letter, and also agreed to CKT's proposed reduction of the break-up fee. On 21 January 2003, HVB sent a revised copy of the draft mandate letter with the clause on the payment of a break-up fee amended as proposed by CKT.

97 Angie Ng maintained that HVB and CKT did fully address their minds on the clause in the mandate letter that provided for the payment of the break-up fee. HVB had agreed to insert the break-up fee clause at CKT's request, and had also agreed to the amount of the break-up fee payable by CKT in the event that the transaction and HVB's appointment as the arranger were to be terminated.

98 Retracing the developments concerning the termination of the transaction, Angie Ng said as follows.

99 In an e-mail dated 28 April 2003, Gerald Ong, the managing director of PCF, asked Pang to provide an update of the progress of the transaction and whether there were any issues that could

delay or prevent the completion of the transaction by 30 June 2003. Pang replied by e-mail on 30 April 2003 that HVB expected to complete the transaction by 30 June 2003. Pang had stated in his e-mail that there were some minor issues to be resolved but there was no major issue that would delay the transaction.

100 On or about 29 April 2003, CKT received an unsolicited offer from OCBC for a bilateral term loan. The bilateral term loan was for the amount of $140m for a five-year duration. After reviewing the terms of this bilateral term loan offer, the board of directors of CKT considered the terms to be substantially more attractive than the transaction. This was because the bilateral term loan from OCBC allowed CKT greater flexibility in cash-flow management and was a cheaper alternative for refinancing CKT's existing debt obligations.

101 The board of directors of CKT, pursuant to its duty to act in the best interests of the company, decided on or about 2 May 2003 to accept the bilateral term loan offer from OCBC.

102 On 7 May 2003, Gerald Ong, on CKT's behalf, met with Pang and informed him of CKT's decision to terminate the transaction and HVB's appointment as the arranger. Subsequently, Foo also wrote to Hamilton on 8 May 2003 to inform HVB that:

> We have decided not to proceed with the Securitisation Transaction and wish to inform you of our decision to terminate your appointment.

103 In the same letter, Foo stated that notwithstanding the termination, CKT would honour its obligations as outlined in the mandate letter.

104 Angie Ng maintained that from the outset, and as stated in CKT's letter dated 8 May 2003, CKT had always taken the position that it was prepared to pay the break-up fee to HVB in accordance with cl (g), and to reimburse HVB for reasonable out-of-pocket and professional expenses in accordance with cll (h) and (i) of the mandate letter.

105 Angie Ng added that the only payment that HVB was entitled to upon the termination of the transaction and its appointment as the arranger was the break-up fee as agreed between the parties.

106 Angie Ng further said that CKT had also always taken the position that it was prepared, in accordance with the terms of the mandate letter, to pay for the reasonable out-of-pocket expenses and fees of the professionals engaged for the transaction. Under cll (h) and (i) of the mandate letter, CKT was only liable to pay for such expenses and fees for which it had granted its prior approval.

107 Angie Ng mentioned that for the purposes of the transaction, HVB had engaged S&P and Fitch as the rating agencies, Ernst & Young as tax accountants, and DTZ to provide an independent valuation of the property. CKT was prepared to pay for the fees charged by S&P and Ernst & Young. CKT was also prepared to pay the fee charged by DTZ, provided that its finalised valuation report would be furnished to CKT. To date, CKT had not received DTZ's finalised valuation report. On the other hand, CKT was not prepared to pay for the fee now charged by Fitch. This was because the fee now charged by Fitch, in the sum of US$80,000, was the full fee payable only upon completion of the transaction. The letter of appointment of Fitch provides that "should the transaction progress beyond the initial feedback stage but not close, break fees of US$50,000 will be payable". Given that the transaction had been terminated, the only fee that Fitch was entitled to was the break fee in the sum of US$50,000.

108 On the question of due diligence, Angie Ng disagreed that it had been completed prior to

20 February 2003. She claimed that CKT had never been notified by HVB that due diligence had been completed and that the letter from HVB to CKT dated 20 February 2003 did not in any way amount to a notification of due diligence.

109 According to Angie Ng, the background to HVB's letter to CKT dated 20 February 2003 was as follows. The main purpose of the transaction was to refinance CKT's debt obligations, comprising a transferable loan facility in the sum of $68m and secured bonds in the principal sum of $42m. The refinancing exercise would accordingly involve the redemption of such bonds. However, the legal counsel, AOSLB overlooked giving the required three months' advance notice of redemption to the bondholders.

110 As a result, A&G was appointed, in place of AOSLB, as legal counsel for the transaction. To assure CKT that, notwithstanding the complication that had arisen with respect to the redemption of the secured bonds, HVB remained confident in the transaction, Hamilton wrote the letter dated 20 February 2003 to CKT. After that letter and up till the letter of termination of the transaction dated 8 May 2003, CKT was never informed by HVB, in writing or otherwise, that the due diligence for the transaction had been completed.

111 She maintained that, in any event, for the purposes of cl (g), it was irrelevant whether or not due diligence had been completed. Even if it had been completed, cl (g) allowed CKT to terminate the transaction and the appointment of HVB as the arranger upon payment of the agreed break-up fee.

112 As regards CKT's instruction to HVB to obtain a new valuation from DTZ, she disagreed that such instruction amounted to a representation that CKT would not exercise its right under cl (g). On or about 28 February 2003, Fitch and S&P, the rating agencies, indicated that they did not find the previous valuation conducted by Knight Frank to be satisfactory. For the purpose of obtaining a valuation report satisfactory to the rating agencies, HVB appointed DTZ to be the alternative valuer for the transaction.

113 She regarded the appointment of an alternative valuer as being part of HVB's duties under the terms of the mandate letter, and this appointment could not be regarded as amounting to a representation, or as giving rise to any assumption, that CKT would not be exercising its right under cl (g).

114 On the subject of the waiver of stamp duty, Angie Ng said that it was not an additional task undertaken by HVB. All parties were aware at all material times that the waiver of stamp duty was a critical part of the transaction, without which the transaction would not have been commercially feasible. Based on the estimated value of the property of around $240m, stamp duty assessed at about 3% of the value would amount to approximately $7.2m.

115 She claimed that at various meetings between CKT, PPCF and HVB from around September 2002 to around April 2003, CKT and PPCF had emphasised to HVB that it was crucial to obtain a waiver of the stamp duty, for the transaction would not be commercially feasible to CKT without it. Thus, even though the mandate letter did not expressly state that HVB had to obtain a waiver of stamp duty, it was the common understanding of HVB, PPCF and CKT that waiver of stamp duty must be obtained. According to her, up till CKT's letter of termination sent to HVB on 8 May 2003, CKT was not informed by HVB as to whether the waiver of stamp duty had been obtained.

116 Dealing with the query contained in Gerald Ong's e-mail to HVB dated 28 April 2003 whether the transaction could be completed by 30 June 2003, she said that it was merely a request for an update of the progress of the transaction, and for confirmation on whether there were any

outstanding issues that needed to be resolved before the transaction could be completed, so that PPCF could update CKT accordingly. Such a request, in her view, could not be regarded as amounting to any representation, or as giving rise to any assumption, that CKT would not be exercising its right under cl (g).

117 On the topic of regular communication with A&G and a request for pre-payment of the UOB Loan, she did not see how any communications with A&G on the transaction, or CKT's communications with UOB on the pre-payment of its loan, could be regarded as a representation, or as giving rise to an assumption, that CKT would not be exercising its right under cl (g).

118 Angie Ng averred that under the terms of the mandate letter, CKT was not prohibited from discussing with any other bank or financial institution on the possibility of alternative arrangements for refinancing. As such, she could not see how any such discussions could be regarded as a representation or as giving rise to an assumption that CKT would not be exercising its right under cl (g).

119 She added that, even if the transaction had been completed, HVB might not be entitled to claim for fees in the sum of $1,725,672, which was the aggregate of the structuring fee, the underwriting fee for the A and B notes, and the selling commission for the C and D notes. According to her, there were two reasons for this. First, under the mandate letter, HVB had agreed to underwrite the A and B notes. However, HVB only agreed to place the C and D notes on a best effort basis. There was thus no guarantee that the C and D notes would be placed out. Accordingly, there was no guarantee that HVB would be entitled to the selling commission in the sum of $463,500 with respect to the C and D notes.

Foo

120 Foo's evidence was to the following effect.

121 He testified that Angie Ng was the key person from CKT involved in the transaction. She had, however, consistently kept him informed on the status and progress of the transaction. E-mails exchanged between CKT, HVB, PPCF and A&G relating to the transaction were also copied to him.

122 After associating himself with the testimony of Angie Ng, almost in its entirety, Foo mentioned that on or about 29 April 2003, CKT received an unsolicited offer from OCBC for a bilateral term loan. The bilateral term loan was for the amount of $140m and for a five-year duration. The terms of this bilateral term loan offer were substantially more attractive than the transaction. This was because the bilateral term loan from OCBC gave CKT greater flexibility in cash-flow management and was a cheaper refinancing alternative as compared with the transaction.

123 Consequently, on 30 April 2003, he informed Gerald Ong of the bilateral term loan offer from OCBC. On 2 May 2003, this bilateral term loan offer was discussed by the majority of the members of the board of CKT. After deliberation, there was consensus among the majority of the members of the board to accept the bilateral term loan offer from OCBC and to terminate the transaction.

124 Consequently, on 8 May 2003, Foo wrote a letter to Hamilton to notify him of CKT's decision to terminate the transaction. In his letter, he made it clear that notwithstanding the termination, CKT would honour its obligations as outlined in the mandate letter, which was to pay the break-up fee in accordance with cl (g).

125 According to Foo, CKT had always taken the position that it was prepared to pay the break-

up fee to HVB in accordance with cl (g) and to reimburse HVB for reasonable out-of-pocket and professional expenses in accordance with cll (h) and (i) of the mandate letter. Foo said that he did reiterate CKT's position at a meeting with Hamilton on 9 May 2003, as well as in subsequent correspondence to HVB.

Gerald Ong

126 Gerald Ong in his testimony associated himself with the averments contained in the affidavits of evidence-in-chief of Angie Ng and Debbie Leong.

127 He averred that PPCF was the principal adviser to CKT for the transaction. In that regard, he worked closely with Debbie Leong, then Associate Director of PPCF, in advising CKT on the transaction.

128 He said that before Debbie Leong and he joined PPCF in January 2003, both of them were with Tokyo Mitsubishi International (Singapore) Ltd ("TMIS"). On or around 16 August 2002, both met with Pang and Christine Tan of HVB at the office of HVB, to discuss a potential transaction involving CKT and the proposed structure of the transaction. In the course of their discussion, they asked Pang whether stamp duty would be payable on the proposed transaction. Based on the estimated value of the property, the issue of whether stamp duty was payable would have a significant impact on CKT's decision on whether to proceed with the proposed securitisation transaction. Pang told them in their discussion that no stamp duty would be payable on the ground that the proposed transaction would be regarded as secured lending and did not involve a true sale. Debbie Leong and he continued to advise CKT on the transaction after they left TMIS to join PPCF.

129 Gerald Ong mentioned that CKT decided to accept the proposal put forward by HVB after considering various refinancing options. Thereafter, HVB and CKT commenced discussions on the terms of the mandate letter and fully addressed their minds to the effect of cl (g), including the amount of the break-up fee payable in the event of CKT terminating the transaction and HVB's appointment as the arranger after HVB had completed the due diligence.

130 On the issue of waiver of stamp duty, he said that even before the signing of the mandate letter, Debbie Leong and he had discussed the matter with HVB. Pang represented to him that based on HVB's prior experience, it would succeed in obtaining a waiver of stamp duty even if it was payable. In various discussions between HVB, CKT, Debbie Leong and himself from around September 2002 to April 2003, both he and Debbie Leong had emphasised to HVB the importance of obtaining waiver of stamp duty.

131 It then transpired that A&G, the legal counsel for the transaction, was unable to obtain a waiver of stamp duty based on the original structure of the transaction. On 2 April 2003, Pang sent an e-mail to PPCF and CKT to say that, on the issue of waiver of stamp duty, HVB would contact the stamp duty office to expedite the process from a different angle, and that he would explore the feasibility for a "plan B" internally to tackle the issue. No details of this "plan B" were however provided to him (Gerald Ong). On or around 2 April 2003, Angie Ng requested Debbie Leong to instruct A&G to slow down the process of preparing legal documentation and not to incur additional legal costs too quickly. The main reasons for asking A&G to slow down were the difficulties with respect to obtaining a waiver of stamp duty and the fact that PPCF was then still in the process of identifying the beneficial owners of the existing secured bonds. Debbie Leong instructed A&G accordingly. When Pang complained to him that Debbie Leong had instructed A&G to slow down their work without informing the other parties, he explained to Pang the reasons, and that Debbie Leong had merely acted on CKT's instructions.

132 It was on or around 7 April 2003 that Pang brought up the idea of having a new structure for the transaction whereby HVB would, by providing a bridging loan to finance the purchase of the property by SPC 1 (as set out in the Indicative Term Sheet), interpose itself between SPC 1 and SPC 2 to facilitate the waiver of stamp duty. Pang then communicated this proposed new structure to CKT on or around 10 April 2003.

133 In A&G's e-mail dated 14 April 2003, A&G mentioned that it was still unable to discuss with the stamp duty office about the waiver of stamp duty, and that A&G was then also discussing with HVB on the need to proceed with an application to the Minister for Finance for ministerial remission for the original structure of the transaction.

134 On or around 23 April 2003, A&G applied to the stamp duty office for waiver of stamp duty based on the new proposed structure of the transaction whereby HVB would provide a bridging loan. Thereafter, and up till the letter of termination sent by CKT to HVB on 8 May 2003, Gerald Ong was not informed by HVB as to whether the application for waiver of stamp duty was successful.

135 On 28 April 2003, Gerald Ong sent an e-mail to HVB, Ernst & Young and A&G to say that the cut-off date for the completion of the redemption of the bonds was 30 June 2003 and that, in accordance with the notice to the bondholders, CKT was obliged to redeem the bonds in their entirety by 30 June 2003 without exception. He asked HVB, A&G and Ernst & Young to confirm if all the outstanding issues relating to the transaction could be resolved by 30 June 2003, and whether there was any issue likely to hinder the completion of the transaction by that date. On 30 April 2003, Pang replied that HVB expected to complete the transaction by 30 June 2003, save for some minor issues to be resolved.

136 He claimed that his e-mail of 28 April 2003 was merely a request for an update of the progress of the transaction and for confirmation of the outstanding issues which remained unresolved. He added that when he sent the e-mail on 28 April 2003 to all the parties, he had no knowledge of the bilateral term loan offer that CKT had received from OCBC. On 30 April 2003, Foo informed him of this bilateral term loan offer. Sometime in the morning of 7 May 2003, Foo informed him that CKT had on 2 May 2003 decided to accept the OCBC term loan offer and to terminate the transaction and HVB's appointment as the arranger. In the afternoon of 7 May 2003, he met Pang and informed him of CKT's decision to terminate the transaction and HVB's appointment as the arranger.

137 On 9 May 2003, he sent a letter to HVB setting out the following milestones which the transaction had yet to cross as at 8 May 2003:

(a) confirmation of the completion of due diligence conducted by HVB;

(b) execution of the underwriting agreement or any formal documentation in that regard; and

(c) formal receipts of any reports from rating agencies for the rated bonds pursuant to the transaction.

138 On the same day, Foo, Angie Ng and Gerald Ong met Hamilton and Pang at CKT's office. At the meeting, Foo and Gerald Ong explained to HVB that CKT's objective had always been to refinance the existing debt obligations in the most cost-effective way. Hamilton then remarked that the refinancing proposal was in fact very attractive which CKT would find difficult to reject. Foo stated that CKT would honour its obligations in accordance with the terms of the mandate letter with respect to the payment of the agreed break-up fee.

Debbie Leong

139 Debbie Leong's testimony, by and large, was same as that of Gerald Ong as to substance and material averments in relation to the negotiations prior to the signing of the mandate letter, the break-up fee, the need for waiver of stamp duty and the termination. However, as regards matters on the waiver of stamp duty and the termination of the transaction, the highlights of her evidence were as follows.

140 She was in full agreement with Angie Ng that it was the common understanding of all parties that waiver of stamp duty had to be obtained for the transaction.

141 A&G, in the event, advised by its e-mail dated 7 March 2003 that there might be difficulties in satisfying the conditions for obtaining a waiver of stamp duty as the stamp duty office had queried the structure of the transaction. On or around 31 March 2003, Debbie Leong sent an e-mail to all parties to suggest that a meeting be held among all parties to discuss the possibility that the current structure of the transaction might not satisfy the conditions for a waiver of stamp duty. By an e-mail to her on the same day, Pang asked her why a meeting was needed. In her reply e-mail, she explained that the purpose of the meeting was to discuss whether there was any alternative, including amending the structure of the transaction, so as to satisfy both the objectives of the transaction and the conditions for waiver of stamp duty. She added in her e-mail that, "As you know, we have been working on the basis that there is no stamp duty."

142 In his e-mail reply on the same day, Pang acknowledged that he knew that was the case, but requested that A&G provide an update on the status of the application for waiver of stamp duty before calling for a meeting.

143 On 1 April 2003, Debbie Leong received an e-mail from A&G stating that the stamp duty office had not yet responded to the application for waiver of stamp duty as the matter was still under consideration. Pang then sent an e-mail to her on 2 April 2003 to say that HVB would contact the stamp duty office to expedite the process from a different angle and that he would explore the feasibility for a "plan B" internally to tackle the issue. Pang did not, however, provide any details of the said "plan B".

144 Mainly because of the difficulties relating to obtaining a waiver of stamp duty, and also because PPCF was still in the process of identifying the beneficial owners of the existing secured bonds, on or around 2 April 2003, Angie Ng requested Debbie Leong to instruct A&G to slow down the process of preparing legal documentation and not to incur additional legal costs too quickly. Debbie Leong instructed A&G accordingly. Pang found out about her instructions to A&G before she had the opportunity to inform him. Pang then complained to Gerald Ong that Debbie Leong had instructed A&G to slow down its work without informing the other parties. She later understood from Gerald Ong that he had thereafter informed Pang that she had merely acted on CKT's instructions.

145 On or about 11 April 2003, she was informed by an e-mail from Pang that HVB was proposing a new structure for the transaction whereby HVB would by providing a bridging loan to finance the purchase of the property by SPC 1, by interposing itself between SPC 1 and SPC 2 to facilitate the waiver of stamp duty. Pang mentioned in his e-mail that the indication from the stamp duty office on this new proposed structure appeared to be positive. He also proposed that, simultaneously, an application be made to the Minister for Finance for ministerial remission for the original structure of the transaction.

146 On 14 April 2003, she sent an e-mail to A&G and HVB to summarise the outstanding matters

with regard to the transaction. At this time, the targeted date for the redemption of the bonds was 21 May 2003. She noted in her e-mail that there was no guarantee that the 21 May 2003 redemption date would be achievable in view of outstanding issues like the application for waiver of stamp duty. As such, PPCF proposed a "stop date" of end July 2003 to be stated as the redemption date in the notice to bondholders. In A&G's e-mail reply dated 14 April 2003, A&G mentioned that it was still unable to discuss the waiver of stamp duty with the stamp duty office, and that A&G was then also discussing with HVB on the need to proceed with an application to the Minister for Finance for ministerial remission for the original structure of the transaction. She learnt later that on or around 23 April 2003, A&G applied to the stamp duty office for waiver of stamp duty based on the new proposed structure of the transaction whereby HVB would provide a bridging loan. Thereafter and up till the letter of termination sent by CKT to HVB on 8 May 2003, she did not hear from HVB on whether the application for waiver of stamp duty was successful.

147 On 29 April 2003, Edwin Hsu of PPCF sent an e-mail to CKT and A&G to provide an update of the status of the valuation report to be issued by DTZ for the property for the purposes of the transaction. As stated in his e-mail, the valuation report to be issued by DTZ had not been finalised yet, pending a final round of comments from the rating agencies.

148 According to Debbie Leong, apart from the outstanding issue on the waiver of stamp duty, as at 8 May 2003, the transaction had yet to cross the milestones mentioned by Gerald Ong in his evidence.

Issues

149 The main issues identified by counsel for the defendant are:

(a) whether the termination of the transaction by CKT was a breach of contract;

(b) whether CKT had waived, elected not to, or is estopped from exercising its right to terminate; and

(c) what amount, if any, is payable to HVB by CKT for the termination of the transaction.

150 The issues framed by HVB's counsel are a little more elaborate. Although they traverse the same area as that of the defendant, the sub-issues raised relate to, amongst other things, the meaning of the word "after", the definition and dichotomy of the phrase "due diligence", the question of waiver, election and/or estoppel and whether HVB is entitled to reasonable fees apart from the break-up fee. It is not necessary to reproduce HVB's entire list. Suffice it to say that I propose to deal with the issues raised by both counsel on an all-inclusive basis.

Arguments and conclusion

151 As regards the issues whether the termination of the transaction by CKT was a breach of contract and whether CKT had a right to terminate the transaction apart from cl (g), HVB in para 8 of the Statement of Claim averred that "[it] was an express, or alternatively, implied, term of the contract that [CKT's] right to terminate under clause (g) could only be exercised within a reasonable time after [HVB's] completion of its due diligence process to the knowledge of [CKT]". HVB's alternative plea was that "it was an express or alternatively implied term of the Contract that [CKT's] right to terminate under clause (g) after [HVB's] completion of its due diligence process could only be exercised with payment alternatively offer of payment of the break-up Fee".

152 In his closing speech, counsel for HVB submitted[28] that the only clause and provision in the contract allowing CKT to terminate was cl (g), and the only other clause that referred to termination in any way was cl (i) of the mandate letter. CKT's response in this regard was that it was free to terminate the transaction at any time either before or after due diligence. Counsel for CKT argued that cl (g) was free from ambiguity and that it provided unequivocally that if CKT were to terminate the transaction after the completion of due diligence and if the funding spreads could be achieved, CKT would have to pay HVB the agreed break-up fee of $165,000. It was further submitted on behalf of CKT that since HVB now seemed to assert that the word "after" in cl (g) meant "upon" (or "during" or "when"), the burden rested on HVB to establish to the satisfaction of the court that the said clause should be rewritten in the manner it was now contending for.

153 Responding to an objection from HVB's counsel that it was not permissible to look at previous drafts of cl (g), CKT's counsel said that HVB's present contention had little merit and should be rejected since HVB had itself in the course of the proceedings made copious references to the negotiations relating to cl (g), as well as the drafts of cl (g), to support its case on the construction of cl (g). In this regard, reference was made to paras 29 to 44 of Pang's affidavit of evidence-in-chief.

154 CKT's counsel submitted that the exchange of correspondence pertaining to the genesis of the said clause was highly relevant, first of all, to disabuse HVB's present stand that the word "after" appearing in the said clause meant or should read as "upon", "during", or "when". Secondly, the reference to such correspondence was not intended to contradict, vary, add or subtract any of the terms of the mandate letter.[29]

155 As to the approach to be taken by courts in interpreting agreements in writing, this court had in *Transnational Recycling Industries Pte Ltd v Semac Pte Ltd* [2003] SGHC 130 at [93] and [94], attempted to extract some useful guidelines from textbooks and decided cases and they bear reiteration:

> As stated in *Chitty on Contracts* [vol 1] (28th edition – para 12-042), the object of all construction of the terms of a written agreement is to discover therefrom the intention of the parties. The authors of *Chitty on Contracts* further comment (para 12-043 *supra*) that the cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or a particular part of it is to be sought in the document itself. One must consider the meaning of the words used, not what one may guess to be the intention of the parties. However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. *In modern law, the court will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man*.
>
> The principles by which contractual documents are presently construed are summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 to 913; [1998] 1 All ER 98 at 114 to 115, (re-affirming what was said by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 to 1386; (1971) 1 All ER 237 at 240 to 242 and in *Reardon Smith Line Ltd v Hansen-Tangen*, *Hansen-Tangen v Sanko Steamship Co* [1976] 1 WLR 989; [1976] 3 All ER 570) as follows:
>
> > (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the

contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:

> if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

[emphasis in original]

156 Another useful passage which appears in *Chitty on Contracts* vol 1 (29th Ed, 2004) at para 12-119 purports to explain the nuances between the factual matrix and negotiations as well as subjective intent. The passage reads thus:

> On the other hand, although evidence of the facts about which the parties were negotiating is admissible to explain what meaning was intended, the court is not entitled to look at what the parties to the contract said or did whilst the matter was in negotiation nor are drafts or preliminary documents admissible in aid of its interpretation, except where it is sought to rectify the instrument or to show that the parties negotiated on an agreed basis that the words used bore a particular meaning. Evidence will also not be admitted to show what were the parties' subjective intentions with respect to the words used. "The general rule seems to be that all facts

are admissible which tend to show the sense which the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected."

157 The principles articulated by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, as well as the foregoing passage in *Chitty on Contracts*, were adopted by the Singapore Court of Appeal in *Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443 at [18] and [19].

158 My attention was also drawn to another decision by the Singapore Court of Appeal in *Chew Tong Shing v Hotel Royal Ltd* [1992] 2 SLR 787, where the court approved the principles enunciated by Kerr J in *The Karen Oltmann* [1976] 2 Lloyd's Rep 708 at 712 stating that:

If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention.

159 Kerr J's reasoning in *The Karen Oltmann* is extremely helpful and instructive. The said case arose out of a charterparty of a vessel called the *Karen Oltmann,* raising a short but extremely interesting point of construction and the old problem of whether, in cases of doubt, it is permissible to refer to the pre-contract exchange between the parties. The facts which gave rise to the dispute in that case were as follows.

160 The charter was negotiated between two firms of German shipbrokers and then drawn up in New York by brokers acting for an associated company of the charterers, the defendants. It provided for a certain daily rate of hire payable every 30 days in advance. The plaintiffs, the owners of the *Karen Oltmann*, claimed a declaration that the charterers prematurely gave notice of redelivery of the vessel and were in breach by redelivering her too early.

161 The charter was dated New York, November 5, 1969. Clause 7 of the charterparty provided:

… The Charterers to give the owners not less than ten days' notice at which port and on about which day the Vessel will be re-delivered. Should the Vessel be ordered on a voyage by which the Charter period will be exceeded the Charterers to have the use of the Vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow re-delivery about the time fixed for the termination of the charter, but for any time exceeding the termination date the charterers to pay the market rate if higher than the rate stipulated herein.

162 The important provisions are cll 1 and 26 which read as follows:

1. The Owners let and the Charterers hire the vessel for a period of 2 years, 14 days more or less in Charterers' option. (See Clause 26.)

26. Charterers to have the option to redeliver the vessel after 12 months' trading subject giving 3 months' notice.

163 In his judgment, Kerr J observed at 710:

The dispute turns on the meaning of the word "after". The owners submit that "after 12 months' trading" means "when the vessel has traded 12 months" or "on the expiry of 12 months' trading". The charterers submit that it means "at any time after the vessel has traded for 12 months". What happened was this. The vessel was delivered on Jan. 3, 1970, and the charter period then began to run. On July 30, 1971, when the vessel had traded for about 19 months without any relevant incident, the charterers gave three months' notice of their intention to redeliver the vessel. On this basis she would therefore have been kept in their service for about 22 months, or about two months short of the basic period of the charter. The owners protested and contended that the option of premature redelivery under cl. 26 was no longer open at that time. They said that the option of redelivery before the expiry of two years could only be exercised when the vessel had traded for 12 months, and that the necessary notice for this purpose would therefore have had to have been given about nine months from the date of delivery.

…

The answer to this question depends on the meaning which one gives to the word "after". As shown by the dictionary and as a matter of ordinary parlance, although "after" means "later in time", it can be, and is, used in two senses. The intended meaning depends on the context. For instance, if two people embark on a 10-mile walk and agree to have a rest after five miles, they mean that they will have a rest when they have walked five miles and not at any time between five and 10 miles. On the other hand, if they take part in a race under rules which say that competitors may take refreshment after five miles, then one would say that the intended meaning is that they can do so at any time after they have covered five miles. But one can also think of many illustrations in which either meaning might be equally defensible. For instance, if someone has a service agreement for 20 years which provides that he may retire on pension after 15 years, it would be very debatable whether he could only exercise this option after 15 years and not after, say, 18 years. … My first impression was that the intention of the parties in the present case was that, subject to having given three months' prior notice, the charterers were only to have the option of redelivering the vessel prematurely on the expiry of 12 months' trading and not at any time during the second year. However, as in all cases of first impression, it is difficult to justify the impression. When I search my mind about this, two reasons predominate. Both derive from having considered a large number of charter-parties. First, if the meaning for which the charterers contend had been intended, then I would have expected cl. 26 to include the words "at any time", which one frequently finds in charter-parties, before the words "after 12 months trading". Secondly, while an option to charterers to terminate a time charter on notice at a certain time within the basic period is by no means unusual, I do not recollect ever having seen one in which the charterers can terminate it on notice at any time, let alone after a certain point of time.

164 Proceeding further, Kerr J commented at 712:

The first question which arose at this point was whether this plea and the submissions founded on it entitled the Court to look at the exchange of telex messages. In my view they do. Take *Prenn v Simmonds*, [1971] WLR 1381, as an example. The issue in that case was whether the reference to "profits" in the contract meant the profits of the holding company only or the consolidated profits of the whole group. If in the course of the negotiations one party had made anything in the nature of a representation to the other to the effect that references to "profits" were to be taken in one of these senses and not in the other, and the other party had thereupon negotiated on this basis, then extrinsic evidence to establish this representation would in my view clearly be admissible. Similarly, if it had been contended that the parties had conducted their negotiations on an agreed basis that the word "profits" was used in one sense only, although in

the contract it was capable of having two senses, and that the contract had been executed on this basis, then I do not think that the Court would be precluded by authority from admitting extrinsic evidence to see whether or not this agreed basis could be established. Both these situations would be a long way from the attempts made in *Prenn v Simmonds* and *Arrale v Costain* [1976] 1 Lloyd's Rep 98, to adduce extrinsic evidence to try to persuade the Court that one interpretation of the contract was in all the circumstances to be preferred to the other.

I think that in such cases the principle can be stated as follows. If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own ddictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would ex hypothesi reflect the meaning which both parties intended.

165 After evaluating all the evidence, Kerr J held at 713:

The effect of these exchanges for present purposes is in my view perfectly clear. Both parties were throughout discussing the exercise of options "after" a number of months in the sense of "on the expiry of" and not "at any time after the expiry of". The charterers were the first to use this expression in this sense; the owners then made a counter-offer in the same sense, and this remained the sense throughout. …

It therefore follows that the action succeeds and that the owners are entitled to declarations that the charterers' notice of July 30, 1971, was not one which they were entitled to give under cl 26 of the charter-party and that they were in breach in redelivering the vessel on Oct 31, 1971.

166 Returning to the arguments before me, whilst I accept the submission by HVB's counsel that pre-contract correspondence should not be adverted to gather the subjective intent of the parties, it should be pointed out that inasmuch as HVB had itself introduced the pre-contract correspondence to show the "[h]istory and rationale for clause (g)"[30] in order to support its contention that the word "after" appearing in cl (g) meant "upon", "at the end of", or "when", it could not at this stage hope to prevent CKT from making reference to those documents to show the origin and evolution of cl (g).

167 Having referred to the exchange of correspondence, it was apparent that there was, in fact, no cl (g) in the previous draft mandate letters and the present cl (g) came to be inserted at the request of CKT to address its concern as to CKT's outlay and liability in the event of CKT aborting or terminating the transaction after due diligence by HVB. Evidently, the precursor of cl (g) was drafted by HVB and it was later fine-tuned to accommodate the concerns of CKT. Unfortunately, the professionals whose input went into the drafting, re-defining and eventual settling of cl (g) did not think it fit to employ the words "upon", "at the end of" or "when". In my view, the said clause, in the context of the concerns raised and addressed whilst it was being perfected, did not lend itself the construction contended for by HVB. Further, if the court were to lean towards the view expounded by HVB, it would be tantamount to importing HVB's subjective intent and not the parties' common intention.

168 In my view, the construction contended for by HVB's counsel that (a) the word "after" appearing in cl (g) in the phrase "after HVB has completed the due diligence process", could not mean

"any time after due diligence", and (b) that it should either mean "upon completion of due diligence" or "within a reasonable time after completion of due diligence", appeared to stretch logic and seemed to ill serve the specific issue raised in Debbie Leong's e-mail of 16 January 2003.[31] Further, HVB's arguments also appeared to ignore the fact that HVB had initially preferred to use the word "while" in the first draft of cl (g),[32] but this was specifically changed to "after" at the instance of CKT. Whilst I agree, as stated by Kerr J in *The Karen Oltmann*, that the word "after" could have more than one meaning, the context in which cl (g) came into being impelled me to conclude that the word "after" was employed by the parties in cl (g) to connote "at any time after completion of due process". In any event, Pang as well as Hamilton seemed to have conceded that the words "during", "upon", or "when" bear a different meaning from the word "after".

169 Next, on the issue of whether due diligence was indeed completed either as of 20 February 2003, as claimed by HVB, or as of 8 May 2003 when the termination notice was served by CKT on HVB, there appeared to be a great deal of controversy. At the trial, HVB's witness, Downer, characterised the whole process to contain two segments: initial due diligence and ongoing due diligence. Downer said[33] that initial due diligence was for planning purposes to try and ascertain whether the transaction should go ahead. The ongoing due diligence, on the other hand, was to address the issues that were uncovered in the initial due diligence phase, or other issues that might be raised during the course of the transaction process.

170 CKT's contention was that it had a right to terminate the transaction at any time, be it before or after due diligence. Of course, if the termination came about after due diligence, CKT would have to pay the break-up fee, provided certain other conditions were fulfilled. It was also pointed out by CKT's counsel that the phrase "initial due diligence" surfaced only at the trial.

171 In my evaluation, although the explanation as to the bifurcation of due diligence was late in its arrival, I am inclined to agree, having regard to the very nature of the securitisation scheme undertaken by the parties, that the phrase due diligence appearing in cl (g) was probably referrable to initial due diligence, although this point was not made clear at the outset by HVB to CKT. Having regard to the evidence, I am also inclined to agree that the initial due diligence was, by and large, completed by HVB as of 20 February 2003. However, this did not mean that the transaction was a "done deal" and it no doubt had to await further due diligence right up to the stage of completion.

172 On the issue of termination of the transaction by CKT and whether the said termination was a breach of contract, it was contended on behalf of HVB that the only provision in the contract allowing CKT to prematurely terminate the transaction, before its completion and settlement, was cl (g). In my analysis, cl (g) is no more than a delimiting provision as to the amount of damages or compensation payable to HVB by CKT in the event of termination. It is neither an opt-out nor a termination provision, and its inclusion clearly pre-supposes a possibility that CKT could terminate or abort the transaction at any stage, subject to the prescribed payment, provided certain conditions are satisfied. In the circumstances, the argument advanced on behalf of HVB is not well made.

173 The next issue is whether CKT had waived, elected not to, or is estopped from exercising its right to terminate the transaction. HVB's case on this issue can be summarised as follows:

(a) CKT instructed HVB to obtain a new valuation from DTZ;

(b) CKT requested HVB to facilitate the waiver of stamp duty;

(c) CKT sought confirmation from HVB that the transaction could be completed by 30 June 2003;

(d) CKT regularly communicated with A&G on the progress of the transaction;

(e) CKT informed HVB on 7 March 2003 that it had requested to pre-pay its loan with UOB; and

(f) CKT did not inform or indicate to HVB that it was in talks with any other banks or financial institutions to arrange for alternative financing.

174 Counsel for HVB argued[34] that even if CKT was entitled to terminate the transaction at any time after HVB had completed its initial due diligence, it had nevertheless lost its right. It was contended on behalf of HVB[35] that the intention behind cl (g) was that it would provide CKT with an opportunity, when HVB had completed its initial due diligence, to look again at the transaction to see whether it would proceed with the transaction, or terminate and proceed with an alternative refinancing proposal, or call off the entire refinancing exercise. In my opinion, this submission does not appear to have much validity for two reasons. Firstly, as stated earlier, cl (g) does not seem to contain any restriction or time-frame within which CKT could abort the transaction. Secondly, it would be entirely unreasonable to expect CKT to take a decision to go ahead or terminate the transaction merely on the strength of HVB's initial due diligence without CKT being advised of other pending due diligence aspects, such as redemption of bonds, waiver of stamp duty, rating agencies' due diligence and other potential deal breakers or unexpected hurdles which may surface during the ongoing due diligence. In fact, even as of 8 May 2003, the rating agencies had not issued their rating confirmation letter.

175 In my determination, the terms of the mandate letter provide an outlet for CKT at any time before the completion of the transaction and the only remedy HVB can have is under cl (g) for the agreed quantum and for out-of-pocket expenses. I agree in this regard with the submission of CKT's counsel that merely carrying out one's obligations pursuant to a contract or treating the contract as alive cannot amount to a representation that the contractual right will not be enforced. In this regard, CKT's counsel invited my attention to a New South Wales case, *Christiansen v Klepac* [2001] NSWSC 385 (unreported), where the evidence warranted the inference that, at least by mid-July 1998, the defendant in that case was aware that he had a right to rescind the contract. He, however, exercised his right to rescind in end-September 1998. The issue was whether the conduct of the defendant in that case from July to September gave rise to a waiver, election or estoppel. Young J held at [18] and [20]:

> The authorities are clear that the conduct that must be proved by a plaintiff to establish election (sometimes called waiver) "must be unequivocal in the true sense of the word". The conduct must be capable of one construction only, namely that X has chosen to forego its rights: Wilken and Villiers, Waiver Variation and Estoppel (John Wiley & Sons, Chichester, 1998) p 48. That succinctly states the law. …
>
> Miss Lane [counsel for the defendant] is correct in her submissions that the mere fact that a person does an act, which he or she does because the contract is on foot, does not necessarily amount to an election to keep the contract on foot. …

176 It might well be that the perception of Pang, from his communications and interaction with Gerald Ong, was that the transaction was going to go ahead. However, the conduct alluded to does not justify the conclusion that CKT had chosen to forego its right. In any event, cl (g) is unambiguous as to the obligations of CKT if it chose to terminate the transaction. In my view, the amount payable upon termination by CKT is clearly spelt out in cl (g). The amount finally offered and re-confirmed by CKT's counsel, which is $275,000 besides the out-of-pocket expenses is, in my view, not an

insignificant sum, considering the fact that this was the figure originally suggested by HVB before it finally inked the figure of $165,000 in cl (g).

177 In the premises, the claim by HVB for *quantum meruit* is a non-starter from the inception. It is a settled principle that there is no justification for a claim for reasonable remuneration in restitution, if the contract itself delimits the claimant's right to compensation. In this regard, it will suffice if I just referred to a decision by the High Court of Australia in *Pavey & Matthews Proprietary Limited v Paul* (1987) 162 CLR 221, where Deane J observed at 256:

> Indeed, if there was a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration. The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable.

178 I agree with the submission by CKT's counsel that the mandate letter should be given its natural meaning and that there is no room for re-writing or implying terms into the clause as is being suggested by HVB's counsel. HVB, which drafted cl (g), no doubt, with input from CKT, could have articulated the element of a time frame in cl (g) but did not do so. In this context, what the Singapore Court of Appeal observed in *Associated Asian Securities Pte Ltd v Lee Kam Wah* [1993] 1 SLR 585 at 587, [10] bears reproduction:

> Normally, when contractual terms are clear and unambiguous they are taken at face value unless there is some compelling reason why they should not be. The fact that a term may put what appears to be a disproportionate or unfair burden upon one party is not regarded as a sufficient reason to interfere with its interpretation if it is in itself clear, because parties who contracted on equal terms must be left free to apportion risks as they see fit.

179 This brings me to the issue of the out-of-pocket expenses claimed by HVB consequent upon termination. These are set out under para 15 of the Statement of Claim for a total sum of US$135,018.00 and $23,951.20 in relation to (a) Fitch's rating fee and travel expenses; (b) S&P's rating fee and travel expenses; (c) DTZ's valuation report fee; (d) Ernest & Young's fee for tax and accounting expenses; and (e) goods and service tax. The only item that is being disputed relates to Fitch. HVB claims that it has to pay US$80,000 for the work carried out by Fitch whereas CKT contends that it is prepared to pay only US$50,000. CKT's contention on this matter is that US$80,000 is payable only upon completion of the transaction. CKT argues that the letter of appointment of Fitch dated 12 February 2003 clearly states that a break fee in the sum of US$50,000 is payable to Fitch if the transaction is not completed. HVB's position is that Fitch had completed all its work in relation to the assignment of a rating for the transaction and as such it was obliged to pay the full fee to Fitch and this was the position taken by Fitch as well.

180 As regards the out-of-pocket expenses claim, my attention was drawn by counsel to the following documents:

(a) a letter dated 12 February 2003[36] from Fitch to Pang stating that if the transaction were to progress beyond the initial feedback stage but did not close, break fees of US$50,000 were to be payable;

(b) a fee schedule enclosed in Hamilton's letter dated 12 May 2003[37] containing the preliminary assessment of fees payable to Fitch as US$50,000;

(c) Fitch's letter dated 20 May 2003 to Pang[38] expressing its disappointment over the abandonment of the transaction and mentioning that it had substantially completed its work on the transaction; and

(d) Fitch's tax invoice dated 3 June 2003[39] addressed to HVB stating that a sum of US$80,000 is payable to it as "break fees for work on transaction completed but not issued" and travel expenses of US$2,525.

181 Having reviewed the documents and the claims by both parties, one thing that becomes clear is that the present claim by HVB in respect of Fitch is not contrived. The tax invoice sent by Fitch was not made out just to extract an extra US$30,000 to the benefit of HVB. Although Fitch's initial letter mentioned a figure of US$50,000 if the matter did not reach the "close" stage, its present claim for US$80,000 appeared to be not unreasonable based on the state of affairs that the transaction had almost reached its "close" stage. In this regard, I have no reason to doubt Fitch's claim that it had substantially completed its work. In the premises, the payment of US$80,000 to Fitch is justified and payable.

Decision

182 Having considered all the arguments and evaluated the evidence adduced at this trial, I am of the view that the termination of the transaction by CKT was entirely within the purview of the mandate letter, and that CKT had not committed any breach of the agreement between HVB and itself. CKT's acceptance of OCBC's offer sometime in May 2003 is found by me to be perfectly understandable given its flexibility, and it is not tainted by any unreasonable or unconscionable motive. Although HVB's sense of annoyance is understandable, that, by itself, does not give rise to any equitable relief other than what is currently being offered to HVB by CKT and the out-of-pocket expenses found due to HVB. In my opinion, the current offer of $275,000 by CKT is more than reasonable, bearing in mind that this was the figure floated by HVB in their pre-contract correspondence.

183 In the premises, judgment is entered for HVB in the sum of $275,000 and a further sum of US$135,018.00 and $23,951.20 on account of out-of-pocket expenses as claimed under para 15 of the Statement of Claim.

184 In respect of costs, I shall hear arguments as to whether the usual order that costs must follow the event should be made.

Order accordingly.

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[1]AB 115 to 124

[2]See paras 5 to 9 of the Statement of Claim

[3]Paras 8 and 10 of the Amended Statement of Claim ("Statement of Claim")

[4]Para 12 of the Statement of Claim

[5]Para 13 of the Statement of Claim

[6]Para 14 of the Statement of Claim

[7]Para 15 of the Statement of Claim

[8]Para 5 of the Re-Amended Defence ("Defence")

[9]Para 2 of the defence

[10]Para 4 of the defence

[11]Para 5 of the defence

[12]Paras 9 and 10 of the defence

[13]AB-116

[14]1AB 347

[15]3AB-1014

[16]3AB 1015

[17]At 1AB71

[18]1AB-351

[19]1AB-356

[20]4AB 1226 to 1231

[21]At para 2.4

[22]1AB144

[23]NE 31 March 2004 p 91 line 9 to 15

[24]NE 31 March 2004, p 91 line 24 to p 92 line 5

[25]NE 31 March 2004, p 92 lines 15 to 24

[26]NE 31 March 2004, p 100 line 11 to p 101 line 23

[27]NE 31 March 2004, p 98 lines 9 to 13

[28]Paras 42 to 45

[29]See paras 49 to 65 of CKT's closing submission

[30]See the heading preceding para 29 of Pang's AEIC

[31]AB-86

[32]AB-53, 65, 71 and 116

[33]See para 78 of HVB's closing submissions

[34]Paras 198 to 207 of HVB's submissions

[35]Para 200 of HVB's submissions

[36]AB 157

[37]AB-1022

[38]AB-1041

[39]AB-1061

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