# Skandinaviska Enskilda Banken AB (Publ), Singapore Branch *v* Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal
# [2011] SGCA 22

**Case Number** : Civil Appeals Nos 121 and 122 of 2009

**Decision Date** : 19 May 2011

**Tribunal/Court** : Court of Appeal

**Coram** : Chan Sek Keong CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA

**Counsel Name(s)** : Sundaresh Menon SC, Rebecca Chew, Sim Kwan Kiat, Nigel Pereira, Paul Tan, Douglas Chi and Tan Liang Ying (Rajah & Tann LLP) for the appellant in Civil Appeal No 121 of 2009; Alvin Yeo SC, Monica Chong, Loo Ee Lin, Koh Swee Yen and Simran Toor (WongPartnership LLP) for the appellant in Civil Appeal No 122 of 2009; Davinder Singh SC, Hri Kumar SC, Yarni Loi, Jaikanth Shankar, Benedict Teo, Bhavish Advani, Alecia Quah and Delphia Lim (Drew & Napier LLC) for the first respondent in Civil Appeal No 121 of 2009 and the respondent in Civil Appeal No 122 of 2009; the second respondent in Civil Appeal No 121 of 2009 absent.

**Parties** : Skandinaviska Enskilda Banken AB (Publ), Singapore Branch — Asia Pacific Breweries (Singapore) Pte Ltd and another

*Agency*

*Banking*

*Restitution*

*Tort*

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2009] 4 SLR(R) 788.]

19 May 2011 Judgment reserved.

**Chan Sek Keong CJ (delivering the judgment of the court):**

**Introduction**

1 These two appeals stem from the elaborate fraud perpetrated over a period of more than four years by Chia Teck Leng ("Chia"), the second respondent in Civil Appeal No 121 of 2009 ("CA 121/2009"). They tell a cautionary tale of how two foreign banks, in their eagerness to secure a banking relationship with Asia Pacific Breweries (Singapore) Pte Ltd ("APBS"), a prominent local blue-chip company, failed to exercise due diligence and extended substantial credit facilities to APBS relying merely (and almost entirely) on representations made by Chia, APBS's finance manager at the material time. Those representations were subsequently found to be fraudulent.

2 The appellant in CA 121/2009 is Skandinaviska Enskilda Banken AB (Publ), Singapore Branch ("SEB"), while the appellant in Civil Appeal No 122 of 2009 ("CA 122/2009") is Bayerische Hypo-Und Vereinsbank Aktiengesellschaft ("HVB"). APBS is the first respondent in CA 121/2009 and the sole respondent in CA 122/2009. Chia did not play any active part in either the proceedings in the court below or the proceedings before this court, having been convicted of 14 charges of (*inter alia*)

cheating (with 32 other charges taken into consideration) and sentenced to 42 years' imprisonment (see *Public Prosecutor v Chia Teck Leng* [2004] SGHC 68 ("*PP v Chia Teck Leng*")).

3 APBS is the Singapore subsidiary of Asia Pacific Breweries Limited ("APBL"), the holding company of a group of companies engaged in the production and distribution of beer and other alcoholic beverages throughout the region ("the APBL group of companies"). APBL was set up as a joint venture between Heineken NV of the Netherlands ("Heineken") and Fraser and Neave Limited ("F&N"), a Singapore company. Both APBS and F&N are well-known blue-chip companies in the region, while Heineken is a Dutch global company that is familiar to all European banks.

4 Chia was an inveterate gambler and had been visiting casinos since 1994. APBS was not aware of Chia's gambling history when it employed him as its finance manager in January 1999. Using his position as APBS's finance manager, Chia devised and successfully implemented an ingenious scheme to cheat four foreign banks (including SEB and HVB, the appellants in the present appeals ("the Appellants")) of about S$117.1m (of which about S$34.8m has been recovered). In the present proceedings, SEB is seeking to recover from APBS a sum of either US$26,559,371.94 or S$29,468,723.30, while HVB is seeking to recover a sum of US$32,002,332.85. The position of the Appellants is that they lent these sums to APBS, which had authorised Chia to borrow the same. The position of APBS, in contrast, is that Chia had no authority whatsoever to borrow money on its behalf.

5 Chia's wily deception of the Appellants for more than four years was facilitated by a combination of APBS's failure of oversight over Chia's activities and the gullibility and/or trusting blindness of the Appellants' officers. The evidence at the trial showed that Chia was able to carry on his fraudulent activities for such a long time without being detected by his superiors because they left him to run APBS's Finance and Accounting Department ("APBS Finance") without any supervision. We should point out at this juncture that although there is, in our view, no doubt that the senior management of APBS was derelict in its corporate governance duties, that is not the focus of the present appeals. The question before us is instead who, as between the Appellants and APBS, should bear the losses occasioned by Chia's fraud. This involves an examination of four areas of law, namely, agency, vicarious liability, negligence and restitution.

6 The trial in the court below lasted for more than 47 days. It involved 11 witnesses of fact and seven expert witnesses who testified on banking practice and procedure, internal corporate and financial controls, pre-employment screening and computation of accounts. The trial judge ("the Judge") reserved judgment at the end of the trial, and eventually dismissed the claims of both the Appellants, except for a sum of S$347,671.23 in respect of SEB's restitutionary claim. Dissatisfied with that outcome, the Appellants have appealed against the whole of the Judge's decision. The Judge's factual and legal evaluation, findings and analysis are set out in a comprehensive 219-page judgment accompanied by a further ten-page appendix on the material facts (jointly reported in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 ("the HC Judgment")). We acknowledge the assistance which the Judge's carefully-reasoned judgment has given us in our examination of the legal issues raised in the present appeals.

## Background

### *Appointment of Chia as APBS's finance manager*

7 Chia is an accountant by training who worked in various finance-related positions for both international and local companies from 1983 to 1999 prior to joining APBS in January 1999. He moved from being a tax assistant to being a finance manager within the short span of a decade, and was

described by the judge at his criminal trial as a "financial wizard" (see *PP v Chia Teck Leng* at [33]). Unfortunately, he was also a compulsive gambler. By 1998, Chia had accumulated gambling debts exceeding S$1m. It was in those circumstances that Chia applied for the post of Finance Manager of APBS on 25 November 1998. After several rounds of interviews, Chia was offered the job on 23 December 1998 and was to officially start work on 20 January 1999. His new job gave him the opportunity to plan how to defraud various banks (all of which, it may be noted, were foreign banks) by relying on APBS's corporate standing and on his title of Finance Manager. The title "Finance Manager" is not an established title in the corporate sector, unlike corporate titles like "Finance Director", "Chief Financial Officer", "Managing Director", "Chief Executive Officer", "Chairman of the Board of Directors", "President" or "Director". In the present case, the Appellants were aware that Chia was not a director of APBS, but only a finance manager, a position which *prima facie* connotes that the office-holder carries out managerial, rather than executive, functions.

***Functions of Chia as APBS's finance manager***

8 As Finance Manager of APBS, Chia had two broad functions: operational and financial. Operationally, he reported directly to the general manager of APBS, a position held by Mr Ton Blum ("Mr Blum") until November 1999 and, thereafter, by Dr Les Buckley. Chia had two broad areas of operational responsibilities in APBS. First, he was Head of APBS Finance, which had a team of 22 employees engaged in the accounting, costing, budgeting, bookkeeping and cash management activities of APBS. In this regard, Chia, as Finance Manager, was expected to: (a) ensure that there were adequate controls within APBS Finance to comply with APBS's financial policies; and (b) manage APBS's relationships with financial institutions. Second, Chia was in charge of the Management Information Systems and Purchasing Department of APBS, which had 11 employees.

9 *Vis-à-vis* his financial functions, Chia reported to APBL's group finance director. Chia's duties and functions as Finance Manager were set out in two internal documents of APBS, namely: (a) a document entitled "Position Description" ("the Position Description"); and (b) a document entitled "Group Treasury Policy" ("the GTP"), which was first implemented in 1998 and subsequently updated in 2000. Under the GTP, responsibility for borrowing funds for and investing surplus funds of APBS was distributed among the following entities: (a) F&N's Group Treasury Department ("F&N Group Treasury"), which oversaw all treasury activities within the APBL group of companies; (b) APBL's Group Finance Department ("APBL Group Finance"); and (c) APBS Finance.

10 In relation to the investment of APBS's surplus funds, cl 6 of the GTP provided as follows: [note: 1]

> **6.0 <u>INVESTMENT OF SURPLUS FUNDS</u>**
>
> 6.1 [APBS's] Finance Manager shall be responsible for proper cash management. In general, no funds should be left idle. Any surplus funds should be used to reduce liabilities (of [the] same currency) first if the liabilities carry a higher interest cost than what the surplus funds can earn.
>
> 6.2 Surplus funds in excess of working capital requirements will be:
>
> a. Converted to foreign currency to match both the amount and [the] tenor of any foreign currency denominated loans and other net liabilities.
>
> b. Kept in the local currency in time deposits or other appropriate instruments for such duration no longer than 6 months until the funds are required, unless there is explicit

instruction f[ro]m the [APBS] Board to convert such funds to a hard currency in anticipation of a potential devaluation of the local currency.

6.3 Remaining surplus funds denominated in local currency are to be invested in the following:

a. Call and Term Deposits in banks and financial institutions as listed [i]n Appendix B.

b. Investment Grade Commercial Papers of minimum "A-Rating".

c. Treasury Bills and Bonds[.]

[underlining in original]

11 In relation to the borrowing of funds for APBS, cll 3.4 and 3.5 of the GTP provided as follows: [note: 2]

**3.0 <u>CREDIT FACILITIES</u>**

…

3.4 Procedures for sourcing [for] credit facilities

3.4.1 [APBS's] Finance Manager (with approval from the General Manager) will forward request[s] for new or increase in credit facilities to [F&N] Group Treasury (via [APBL] Group Finance) for review.

3.4.2 [F&N] Group Treasury will evaluate [APBS]'s proposal. If the proposal is justified, [F&N] Group Treasury will proceed to source and negotiate for facilities. In general, not less than three (3) quotes will be obtained. In locations where the financial system is less well developed, the minimum number of quotes may be reduced to two (2).

3.4.3 Loan Agreements and Letters of Offer with financial institutions should be cleared with [F&N] Group Treasury prior to their submission to [APBS] Board and APBL Board for acceptance.

3.4.4 [F&N] Group Treasury will submit its recommendation of the proposed facilities to [APBS] Board and APBL Board for approval.

3.5 [APBS's] Finance Manager will be responsible for ensuring that [APBS] meets all stipulated obligations and financial covenants under the borrowing facility.

It is pertinent to note that cl 3.4.1 of the GTP did not give APBS's finance manager any authority to source for credit facilities, but only conferred on him authority to forward (with the approval of APBS's general manager) any request for credit facilities to F&N Group Treasury (via APBL Group Finance) for review. If the request was found to be justified, F&N Group Treasury would then source for and negotiate the credit facilities sought by APBS (see cl 3.4.2 of the GTP). As can be seen, the raising of credit facilities by the APBL group of companies was subject to an elaborate process.

12 It should also be noted at the outset that when the Appellants' officers met Chia to discuss the credit facilities ostensibly sought by APBS, they only knew him as the finance manager of APBS. They

had no knowledge of the Position Description and the GTP as those were internal documents of APBS. Their knowledge of Chia's functions and responsibilities was based on what Chia told them. The Appellants were misled into granting credit facilities to APBS by the fraudulent representations of Chia as to (in essence) his authority as APBS's finance manager. Chia then misappropriated the proceeds of the credit facilities for his own purposes.

13 We shall now outline the facts concerning and the Judge's findings on the manner in which Chia defrauded the Appellants.

***Chia's dealings with SEB***

*How Chia obtained credit facilities from SEB*

(1) The overdraft facility and the foreign exchange facility

14 Before Chia was due to start work officially with APBS on 20 January 1999, he contacted Mr Eddie Amin ("Amin"), Head of Sales in SEB's Trading and Capital Markets Department, in late December 1998. Chia knew Amin from their university days and also professionally. Chia told Amin that he had just joined APBS as Finance Manager, and indicated that he was keen for APBS to start a banking relationship with SEB. During a lunch meeting on 28 December 1998, Chia briefly explained his work as Finance Manager, and indicated that APBS urgently required a three-month clean overdraft line of about S$500,000 to address its cash-flow mismatches as well as foreign exchange needs. Chia explained that although APBS's treasury functions were then carried out by F&N Group Treasury, he had plans to take back these functions for APBS; he would also place a large portion of APBS's surplus funds on fixed deposit with SEB. In other words, Chia in effect told Amin that when he (Chia) became APBS's finance manager, he would take back from F&N Group Treasury APBS's borrowing function, including (by implication) the authority to take out loans. Chia stated in his affidavit (which was admitted in evidence) that he made those false statements to discourage Amin from independently approaching F&N Group Treasury directly. Amin did not at this point ask for any supporting documents to verify what Chia told him.

15 After the lunch meeting between Amin and Chia on 28 December 1998, SEB's officers made some preliminary checks on the corporate structure of APBS based on public documents obtained from the Registry of Companies and Businesses ("the RCB"), such as APBL's annual report for 1997 and extracts of APBS's company forms. Those documents indicated that the general manager of APBS at that time was Mr Blum, and set out the signatures of APBS's directors, including those of Mr Michael Fam and Mr Koh Poh Tiong ("Mr Koh"). Chia and Amin (together with the latter's colleague, Ms Sharon Chow ("Ms Chow")) met again at Chia's office on 22 January 1999. By then, Chia had officially started work at APBS. To impress Amin and Ms Chow, Chia brought them to an in-house pub at the office premises of APBS called "The Tavern", where Tiger Beer, APBS's flagship beer, was served. At that meeting, Amin handed to Chia SEB's standard account opening documents to complete, and said that he would seek SEB's approval for a S$500,000 overdraft ("the OD Facility") and a US$5m foreign exchange facility ("the FX Facility") to be extended to APBS as requested by Chia. Those credit facilities were approved by SEB on 1 February 1999.

16 On 2 February 1999, Amin handed to Chia two letters of offer ("the Letters of Offer"), one relating to the OD Facility and the other, to the FX Facility. He briefly explained the terms of the Letters of Offer and told Chia that approval from APBS's board of directors ("the APBS Board") would be required. The next day, Chia returned to Amin SEB's account opening forms duly completed, together with the following documents bearing APBS's letterhead: (a) a letter of indemnity dated 25 January 1999; (b) a "Consent for Disclosure of Information" dated 25 January 1999; and (c) a

"Certified Extract of Director[s'] resolution passed on 25th January 1999" authorising SEB to open accounts in APBS's name "in any currencies for transactions relating to deposits" [note: 3] as well as authorising Chia to operate those accounts ("the 25 January 1999 APBS Board resolution"). Also handed over to Amin were the following APBS corporate documents stamped with the words "Certified True Copy" and initialled by Chia: (a) the memorandum and articles of association; (b) the "Certificate of Incorporation of Private Company"; (c) the "Certificate of Incorporation on Change of Name of Company"; and (d) Form 49 (the "Return giving Particulars in Register of Directors, Managers, Secretaries and Auditors and Changes of Particulars"). The speed with which Chia procured the APBS Board's approval of the OD Facility and the FX Facility did not arouse any suspicion in Amin. As it turned out, the signatures of the directors, *viz*, Mr Blum and Mr Koh, on (*inter alia*) the completed SEB account opening forms and the 25 January 1999 APBS Board resolution were forgeries.

17 In connection with the OD Facility and the FX Facility, Chia opened two accounts with SEB in APBS's name, *viz*, a S$ account ("the SEB S$ Account") and a US$ account ("the SEB US$ Account"). Both of those accounts ("the SEB Accounts"), although opened and maintained in APBS's name, were operated solely by Chia, who was also the sole signatory for both accounts. After SEB opened the SEB Accounts, Ms Chow discovered that the 25 January 1999 APBS Board resolution had approved only the opening of "accounts in any currencies for transactions *relating to deposits*" [note: 4] [emphasis added], and not the obtaining of credit facilities. On 3 February 1999, she asked Chia to obtain a fresh resolution of the APBS Board (referred to hereafter as an "APBS Board resolution" for convenience) affirming APBS's acceptance of the credit facilities set out in the Letters of Offer (*ie*, the OD Facility and the FX Facility). The next day (4 February 1999), Chia delivered to SEB a document entitled "Certified Extract of Board Resolution Passed On 3 February, 1999", which (*inter alia*) purportedly set out APBS's acceptance of the aforesaid credit facilities. As was the case with Amin, the speed with which Chia obtained the new APBS Board resolution purportedly passed on 3 February 1999 did not raise any suspicion in Ms Chow. That new APBS Board resolution was also forged.

18 Nine months later, on or about 3 November 1999, Chia requested Amin to increase the OD Facility and the FX Facility to S$3m and US$10m respectively. The increase in the OD Facility was purportedly to meet APBS's short-term working capital needs, while the increase in the FX Facility was to enable APBS to carry out larger foreign exchange transactions. Chia also wanted the increases approved by 11 November 1999. On the stated date, Amin met Chia in the latter's office and delivered to Chia SEB's letter offering APBS an increased overdraft line of S$3m as requested by Chia (SEB's letter did not mention Chia's request for an increase of the FX Facility to US$10m, [note: 5] but it appears from para 9 of SEB's second amended statement of claim filed on 18 March 2008 that that request was acceded to as well (see also [13] of the HC Judgment in this regard)). The next day (12 November 1999), Chia handed to Amin another forged APBS Board resolution headed "Certified Extract of Board Resolution Passed On 12 November 1999", which purported to approve the increase in the OD Facility.

(2) The money market facility

19 Approximately seven months years later, in June 2000, Chia asked SEB for a new short-term facility of US$8m to finance the acquisition of equipment for APBS's subsidiaries in Cambodia and Vietnam. Amin asked for supporting documents, such as a business plan projecting the anticipated cash flow. Chia managed to satisfy Amin's request with some information given orally. By way of a letter dated 26 June 2000 ("the MM Facility Letter"), SEB offered APBS a US$8m revolving money market facility ("the MM Facility"). Chia signed the MM Facility Letter (supposedly on APBS's behalf) and delivered to SEB a forged "Certified Extract of Board Resolution Passed On 27 June 2000" which

purported to approve the MM Facility.

20 Subsequently, the MM Facility was increased on two occasions at Chia's request. The first instance was on or about 6 November 2000, when the MM Facility was increased to US$10m. The reason provided by Chia for requiring the increase was the financing of a joint venture project in Cambodia and Vietnam. When Chia was asked why APBS, a cash-rich company, did not want to use its own cash reserves to finance the project, Chia fobbed SEB off with the explanation that APBS wished to use the interest rate for the MM Facility as a benchmark interest rate for borrowers that APBS would be lending money to. The second increase was in May 2002. Initially, Chia requested for the MM Facility to be increased to US$15m, representing that APBS needed the increase to cover working capital requirements for its factory in Cambodia. At the same time, Chia also asked for a medium-term loan of US$20m to finance improvements to be made to APBS's bottling line in Singapore. As before, Chia rebuffed Amin's request for written verification of those projects. SEB agreed to increase the MM Facility to US$15m on 19 June 2002, but did not approve the request for a US$20m medium-term loan. Chia then asked if SEB would consider increasing the MM Facility to US$25m instead, to which SEB readily agreed. On 24 July 2002, SEB delivered to Chia a letter offering to increase the MM Facility to US$25m, which offer was accepted by Chia (again purportedly on APBS's behalf) on 6 August 2002. Consistent with his *modus operandi* in relation to the OD Facility and the FX Facility, Chia provided SEB with forged APBS Board resolutions approving the MM Facility and the subsequent increases in that facility.

*Unusual features of SEB's dealings with Chia*

(1) Chia was SEB's sole point of contact

21 SEB's officers dealt with Chia alone during the entire duration of the banking relationship which they believed SEB had with APBS, *viz*, the period from early 1999 to September 2003. They never met or communicated with the company secretary, directors or any other officer of APBS senior to Chia. Although SEB's officers did ask to be introduced to APBS's senior management, they never asked themselves why Chia kept putting them off, insisting that he alone would deal with them and that certain communications between SEB and APBS should be directed to him alone.

(2) SEB's verification of the documents provided by Chia

22 As per the practice of every bank, SEB had its own due diligence procedures to follow before it could grant APBS the credit facilities requested by Chia (*ie*, the OD Facility, the FX Facility and the MM Facility (collectively, "the SEB Facilities")). At the trial, Mr Gerard Lee ("Lee"), Head of SEB's Credits and Credit Analysis and Administration Department ("Credits"), testified on SEB's internal procedures in this regard. Lee was an experienced officer, having been Head of SEB's Counterparty Risk Management Department ("CRM") from November 1998 to March 2000, Manager of Credits from February 2001 to the end of June 2001 and, thereafter, Head of Credits. His evidence was that SEB had complied with all its internal policies in extending the SEB Facilities to APBS. The Judge found that most of the checks described by Lee were designed primarily to address default risks, and not fraud risks. Further, Lee's evidence showed that there had merely been paper compliance, and not true compliance, with SEB's verification procedures. Lee himself had not carried out any verification. Ms Chow, his subordinate, had performed most of the due diligence checks in relation to the SEB Facilities, but not diligently. Furthermore, Ms Chow was not called to testify on what she had actually done. Similarly, Ms Karen Chan, the officer who had handled the verification checks preceding the grant of the MM Facility, was also not called to give evidence. In short, SEB adduced no credible evidence that any of its officers had complied with its own verification procedures or had checked the authenticity of any of the corporate documents handed over by Chia.

23 In this regard, we should also draw attention to the "Checklist for Opening of Accounts: Local Incorporated Non-Bank Companies" issued by SEB's CRM. That checklist stated that "[a]ll copies of documents (including translations) [were] to be certified true by Company Secretary, Director, Notary Public, Solicitor or Originals sighted by Officer of [SEB]". [note: 6] In the case of a new customer, SEB had no prescribed procedure for checking the authenticity of the signature of the customer's "Company Secretary, Director, Notary Public … [or] Solicitor", [note: 7] except by visually comparing the signature of the person concerned as shown on documents provided by the customer with the corresponding signature on documents filed in the RCB. SEB's officers did not ask for face-to-face verification because, in their view, that could be counter-productive since it could antagonise the person dealing with them.

(3) Interaction between SEB's officers and APBS's officers

24 SEB thought it had a normal banking relationship with APBS as it regularly sent credit advices, debit advices, monthly advices and bank statements to APBS. However, those communications were sent to the division headed by Chia, who merely instructed his staff to pass the communications to him. SEB also sent letters to APBS's official address until 19 May 2003, but was apparently not alarmed by Chia's instruction (which it complied with) that letters should thereafter be sent to a P O Box address. SEB's officers were invited by Chia to participate in APBS's social events, including a tour of APBS's brewery on 28 September 2000. During the tour, Chia introduced SEB's officers to one of his colleagues, Patrick Teo, as APBS's "friendly banker[s]". [note: 8] Chia and Patrick Teo also played host to SEB's Global Head of Merchant Banking, Ms Annika Bolin ("Ms Bolin"), when she came from Stockholm to visit Singapore. During that visit, Chia showed Ms Bolin around APBS's brewery and explained APBS's business strategy to her. SEB's officers also worked with APBS's IT personnel when SEB arranged for an Internet trading station to be set up on Chia's office computer.

25 As alluded to earlier (at [21] above), SEB wanted to deepen its relationship with APBS and requested Chia to arrange for meetings between its (SEB's) officers and the directors or senior management of APBS. All such requests were rebuffed by Chia with excuses. On one occasion, Chia told Amin that it was not necessary for him (Amin) to contact anyone else in APBS except himself (Chia). It never occurred to any of SEB's officers to question why Chia was so reluctant to introduce them to APBS's senior management. Thus, SEB's sole point of contact with APBS was Chia himself. SEB at no time thought this state of affairs unusual for an important corporate customer like APBS, despite the size of the SEB Facilities.

*Chia's "round-tripping" scheme*

26 Chia was able to defraud SEB (and also APBS) by employing a "round-tripping" scheme which he implemented using surplus funds of APBS that were deposited in a genuine account which APBS had with Oversea-Chinese Banking Corporation Limited ("OCBC"). When money borrowed from SEB was due to be repaid, Chia would transfer funds from APBS's account with OCBC ("the OCBC Account") to the SEB S$ Account. (In this regard, it should be noted that the money drawn by Chia from the SEB Facilities (including the FX Facility and the MM Facility, which were US$ facilities) was ultimately all paid into the SEB S$ Account specifically.) To cover up the deposits taken from the OCBC Account, Chia created a fictitious account with Citibank ("the fictitious Citibank Account"). Deposits taken out of the OCBC Account were recorded as having been deposited into the fictitious Citibank Account. Chia told his subordinate, one Mr Teo Hun Teck ("Teo"), that the reason for the ostensible transfer of funds was because Citibank offered a higher interest rate than OCBC. He instructed Teo not to inform F&N Group Treasury of the fictitious Citibank Account. Chia also created a fictitious document entitled "Schedule of Fixed Deposits Committed", supposedly from Citibank, to show that APBS had fixed

deposits with Citibank. Upon the "maturity" of the fictitious deposits with Citibank, Chia transferred a sum from the SEB S$ Account to the OCBC Account to give the appearance that Citibank was paying the appropriate interest. Although Chia never showed Teo any fixed deposit advices from Citibank, the latter did not think that anything was amiss. Teo also did not notice that the "interest" on the Citibank "deposits" was being paid into the OCBC Account from the SEB S$ Account, rather than from the fictitious Citibank Account. Eventually, Teo informed one Ms Goh Chee Yee ("Ms Goh"), a representative of F&N Group Treasury, about the fictitious Citibank Account and the fact that no fixed deposit advice had ever been received in respect of that account. Ms Goh, instead of checking with Chia, merely instructed Teo to obtain such advices from Chia.

27 In addition to the wily actions described above, Chia gave false and misleading information to his subordinates and intercepted all communications from SEB. Further, even though cheques drawn on the OCBC Account required two signatures, Chia had no trouble getting his subordinate co-signatories to countersign the cheques used to transfer funds from the OCBC Account to the SEB S$ Account. Altogether, from 13 December 2000 to 24 October 2002, Chia carried out 27 "round-tripping" transactions between the OCBC Account and the SEB S$ Account. Specifically, S$45m was transferred from the OCBC Account to the SEB S$ Account between 13 December 2000 and 16 October 2002 by way of 18 cheques drawn on the OCBC Account ("the OCBC Cheques"), whilst S$45,347,671.23 was transferred from the SEB S$ Account to the OCBC Account between 16 July 2001 and 24 October 2002 by way of telegraphic transfers (see the table at [130] below).

***Chia's dealings with HVB***

28 Unlike SEB, HVB granted, or attempted to grant, only one loan facility to APBS. Chia used the same *modus operandi* to obtain a loan facility from HVB. Sometime between late 2000 and early 2001, he contacted HVB's officer, Ms Tan Hwee Koon ("Ms Tan"), whom he had met earlier when she was working at Sakura Bank (now known as Sumitomo Mitsui Banking Corporation ("Sumitomo Bank")). Ms Tan had then just joined HVB as a senior officer of its International Desk. Chia must have sensed that Ms Tan, being a new officer, would be anxious to acquire a banking relationship for HVB with a blue-chip company like APBS. Chia and Ms Tan met on 13 March 2001 at The Tavern. At the meeting, Chia asked Ms Tan for a US$10m short-term revolving loan and a US$5m foreign exchange facility for APBS, indicating to her that the loans could be the start of a bigger business relationship between HVB and APBS. However, the meeting was unproductive as HVB declined Chia's requests because they did not fit in with its lending strategy.

29 Notwithstanding the abortive meeting between Chia and Ms Tan in March 2001, in August 2002, Ms Tan contacted Chia. By that time, Chia's gambling debts had mounted. Chia asked Ms Tan for a US$30m three-year term loan for APBS, ostensibly to finance its new bottling line. Ms Tan and HVB's Head of International Desk, Mr Matthias Zimmermann ("Zimmermann"), met Chia on 8 January 2003 at Raffles Hotel to discuss the proposal. At the meeting, Chia informed Zimmermann and Ms Tan that he was in charge of the finance operations of APBS, and that his job entailed handling all the credit facilities and banking relationships of APBS. Chia also mentioned that OCBC was the main banker for the APBL group of companies, but said that he did not like the services provided by OCBC and wanted to give HVB a business opportunity as he had known Ms Tan while she was working at Sumitomo Bank. In subsequent negotiations with Chia, Ms Tan asked for supporting documents to verify the purpose for which the loan was sought. While he provided some financial data to Ms Tan, Chia did not give her any documents. On her part, Ms Tan eventually dropped the issue.

30 HVB eventually offered APBS a US$30m three-year amortising term loan ("the HVB Facility") on certain terms and conditions. On 21 and 24 March 2003, Chia delivered to Ms Tan HVB's opening account forms, duly completed, and other documents purportedly setting out APBS's acceptance of

the HVB Facility, including a certified extract of the APBS Board resolution purportedly accepting the facility. Those documents were all forged. It was also later disclosed that the loan documentation for the HVB Facility was signed by Chia in his car on 21 March 2003 when he met Ms Tan at the car park of HVB's office building. In our view, this was a red flag that even the most bullish credit officer could not have missed.

31 Many of the features present in the manner in which Chia defrauded SEB were also present in the way he defrauded HVB. However, there were at least two differences. First, unlike SEB, HVB had a very short banking relationship with Chia. The HVB Facility was drawn down in one tranche on 25 March 2003, and Chia was arrested a few months later. Second, HVB's internal verification procedures were more stringent than those of SEB. HVB's "Corporate Banking Credit Policy, Asia" dated 27 August 2002 ("HVB's Credit Policy") stated at para 13.1.1: [note: 9]

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

Needless to say, para 13.1.1 of HVB's Credit Policy was ignored by HVB's officers, who simply accepted at face value whatever documents Chia gave them.

**The issues and the findings in the court below**

32 The material issues before the Judge may be summarised as follows:

(a) whether APBS held out Chia as having authority to represent to the Appellants that it had accepted the credit facilities offered by them (collectively referred to hereafter as "the Credit Facilities") and that the forged APBS Board resolutions which he (Chia) gave them in connection with those credit facilities were genuine ("the Agency Issue");

(b) whether APBS was vicariously liable for the fraud committed by Chia on the Appellants ("the Vicarious Liability Issue");

(c) whether APBS owed a duty of care to HVB to have in place reasonable internal controls to prevent and detect fraud, and, if so, whether APBS was in breach of this duty ("the Negligence Issue");

(d) whether APBS was liable to make restitution to SEB of the sum of S$29,468,723.30 ("the Restitution Issue"); and

(e) apropos APBS's restitutionary counterclaim against SEB, whether SEB was liable for knowing receipt and/or dishonest assistance with respect to the sum of S$45m transferred from the OCBC Account to the SEB S$ Account ("the Restitutionary Counterclaim Issue").

As can be seen from the aforesaid list, the issues common to both the Appellants *vis-à-vis* APBS were the Agency Issue and the Vicarious Liability Issue. The Negligence Issue was relevant only to HVB and APBS, whilst the Restitution Issue and the Restitutionary Counterclaim Issue were relevant only to SEB and APBS.

33 As mentioned at [6] above, the Judge ruled against the Appellants on all the pleaded heads of claim, except for SEB's claim in restitution, which she allowed in the amount of S$347,671.23. She made no order on APBS's counterclaim against SEB in the light of her decision on the Restitution Issue. Her rulings and reasoning on the various heads of claim are summarised in the headnote of the HC Judgment, as follows (see the HC Judgment at 789–791):

> *Actual authority*
>
> (1) Chia did not have express authority by virtue of the certified extracts of the various [APBS] [B]oard resolutions as they were false and were of no legal effect: at [33] [of the HC Judgment].
>
> (2) Chia did not have general authority as Finance Manager of APBS to commit APBS to the SEB Facilities and the HVB Facility without the sanction of the APBS [B]oard based on the construction of the "internal documents" (namely, the [Position Description] and the rules and guidelines in the [GTP] which together set out the duties of the Finance Manager): at [43] [of the HC Judgment].
>
> (3) The condition precedent calling for the certified extract of [an APBS] [B]oard resolution in and of itself carried the implication that the [Appellants] appreciated and knew that Chia had no actual authority to bind [APBS], and that the power to give approval to an application for a loan and to execute the documents necessary to give effect to the transaction was the domain of the [APBS Board]: at [31] [of the HC Judgment].
>
> (4) In the absence of any express authority to act for the particular purpose of the transaction in question (in this case to establish a banking relationship with the [Appellants] by opening the SEB Accounts, and by binding APBS in respect of the SEB Facilities and [the] HVB Facility), it followed that there was no implied actual authority which typically arose incidentally for the effective execution and performance of the express authority in the usual way: at [34] [of the HC Judgment].
>
> (5) Chia[,] in putting forward the forged documents as genuine[,] was not acting within his actual authority, whether express or implied: at [48] [of the HC Judgment].
>
> (6) At all material times, the [Appellants] decided to accept the various certified extracts of the [APBS] [B]oard resolutions on the strength of the certification, ostensibly signed by directors of [APBS,] that the matters stated in the extracts had been passed as recorded, and … *not* because Chia was putting forward forged documents as genuine. This was the verification of the documents point which ran counter to the argument of Chia's implied actual authority to warrant that the certified extracts of the [APBS] [B]oard resolutions were genuine or that the [APBS] [B]oard had approved the transactions: at [72] [of the HC Judgment].
>
> (7) Chia's fraud on [APBS] and the [Appellants] was necessarily determinative of the [Appellants]' authority debate. Chia's actual authority (express or implied), if any, was impliedly subject to a condition that it was to be exercised honestly and on behalf of the principal: at [46] [of the HC Judgment].
>
> *Ostensible authority*
>
> (8) A principal might in appropriate circumstances be bound by the fraudulent acts of his agent where there *was* evidence of ostensible authority: at [102] [of the HC Judgment].

(9) On the evidence, *no* authorised person in APBS held out Chia as having authority to enter into and execute the SEB Facilities and [the] HVB Facility. As such APBS was *not* estopped from denying the forgery: at [102] [of the HC Judgment].

(10) Since the [Appellants] led no evidence of what Chia was required to do, and in fact did, and whether [APBS] acquiesced in what he did[,] … what was before the court was the fact of Chia's appointment as Finance Manager and that of itself was insufficient "representation" by APBS of Chia's apparent authority to make representation[s] of fact such as [to] warrant the genuineness of the certified extracts of the [APBS] [B]oard resolutions, or to communicate [the APBS] [B]oard['s] approval of the transaction[s]: at [121] [of the HC Judgment].

(11) Evidentially, reliance on the apparent authority of Chia was difficult to satisfy in the light of the [Appellants]' standard requirement for [an APBS] [B]oard resolution: at [127] [of the HC Judgment].

(12) The [Appellants]' impression – that the certified extracts were genuine as they had been properly executed, and consequently [were evidence of] the validity of Chia's authority to act on behalf of APBS – was founded purely on the [Appellants]' own narrow and limited verification and acceptance of the condition precedent documents[,] [the Appellants] having chosen to forego inquiry as to [Chia's] authority: at [141] [of the HC Judgment].

(13) On the evidence, the [Appellants] willingly accepted the certified extracts of the [APBS] [B]oard resolutions and willingly took the risk of forgery and Chia's lack of authority. Consequently, (a) the rules of apparent authority would not apply as they could not be fulfilled, and (b) the attendant risks or factors that could vitiate the transactions including the risk of forgery fell on the [Appellants]: at [141] [of the HC Judgment].

(14) Verification of signature was a matter of common sense to safeguard the [Appellants]' own interests, and in forgoing the chance to do so, the [Appellants] assumed the risks of fraud as was the case here: at [149] [of the HC Judgment].

*Vicarious liability*

(15) The case of the [the Appellants] on vicarious liability failed for the same reasons that the agency claim based on ostensible authority failed: at [198] [of the HC Judgment].

…

*Negligen*ce

(17) In order to establish a duty of care, it was necessary that [APBS] knew that the intending lender [*ie*, HVB] would rely on Chia's representations for the purpose of deciding whether to make the loan: at [237] [of the HC Judgment].

(18) There was no voluntary assumption of responsibility by APBS and no relationship between APBS and HVB to ground a finding of [a] sufficient degree of proximity by reference to physical proximity, circumstantial proximity or causal proximity: at [237] [of the HC Judgment].

(19) If there was a duty of care and [if] the breach by APBS gave Chia the opportunity to cheat HVB, the breach did not cause HVB's loss. The proximate cause of the loss was the fraud practised upon HVB by Chia, a risk that was willingly assumed by HVB when it accepted the

certified [APBS] [B]oard resolution without verifying the directors' signatures, and hence Chia's authority: at [243] [of the HC Judgment].

*Restitution*

(20) SEB's restitutionary claim … failed because APBS could not be said to have been unjustly enriched at the expense of … SEB as the payments to APBS by way of telegraphic transfers [from the SEB S$ Account to the OCBC Account between 16 July 2001 and 24 October 2002] discharged Chia's liability to APBS in respect of the sum of S$45m: at [282] [of the HC Judgment].

(21) APBS had been enriched by the receipt of S$347,671.23 because APBS was not entitled to interest and Chia was under no legal obligation to pay any interest on a deposit to APBS: at [283] [of the HC Judgment].

(22) The two drawings of US$13m and US$12m [on the MM Facility on 24 March 2003 and 21 May 2003] respectively were fresh drawings and the previous drawings that were ascribed to the two drawings had been repaid and replaced with new drawings at the respective dates. Since the drawdowns in March 2003 and May 2003 were not paid to or received by APBS, the effect of the rollover benefited Chia at SEB's expense: at [318] [of the HC Judgment].

(23) APBS's change of position defence failed in respect of the sum of S$347,671.23 because there was no extraordinary change of position and the "but for" test of causation was not made out on the facts: at [330] [of the HC Judgment].

(24) It was unnecessary to deal with APBS's counterclaim in light of [the decision reached on] SEB's claim in restitution: at [331] [of the HC Judgment].

[emphasis in original]

**The issues to be dealt with in the present appeals**

34 The Judge's factual findings are largely not in dispute in the present appeals, which focus substantially on the legal consequences of those findings. The issues which we have to deal with are the same as those raised in the court below (as listed at [32] above). We shall address these issues in turn, beginning with the Agency Issue.

**The Agency Issue**

***The Appellants' arguments***

35 The Agency Issue, to recapitulate, is whether APBS held out Chia as having authority to represent to the Appellants that it had accepted the Credit Facilities and that the forged APBS Board resolutions which he gave them in connection with those credit facilities were genuine. As SEB adopted HVB's arguments before this court on this issue, we shall treat HVB's arguments in this regard as the Appellants' joint arguments.

36 According to the Appellants, the Judge misunderstood their case against APBS on the Agency Issue, and this affected her decision on the issue of ostensible authority. The Appellants submit that their case in the court below was not that Chia had actual and/or ostensible authority to obtain credit facilities from banks on APBS's behalf. Rather, their case was that Chia, as the most senior

finance officer in APBS, had authority, whether actual, usual or apparent (*ie*, ostensible), to make representations on behalf of APBS, including representations that APBS had accepted the Credit Facilities and that the forged APBS Board resolutions which he gave them were genuine. The Appellants argue that this proposition is on all fours with the decision of the English Court of Appeal ("the English CA") in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 ("*First Energy*"). They contend that what *First Energy* decided was that although the senior manager of the Manchester office of the defendant bank in that case had expressly told the plaintiff customer that he had no authority to sanction the credit facility sought by the plaintiff, he had, by virtue of his position as the senior manager, apparent authority to communicate to the plaintiff that the defendant's head office in London had given approval for that credit facility. In essence, the Appellants argue, the English CA held in *First Energy* that the law recognised that in modern commerce, an agent who had no apparent authority to conclude a particular transaction on his principal's behalf might sometimes nonetheless be clothed with apparent authority to make representations of fact about that transaction, including the representation that his principal had approved that transaction.

37 The Appellants have also made the following points in relation to *First Energy*:

(a) *First Energy* illustrates that a rigid requirement for a holding out in the form of an unequivocal and express representation by the principal directly to the third party is wholly inadequate and inapt when applied to the complexities of transacting with impersonal corporate structures which must deal through agents in today's commercial world.

(b) In reality, one would be hard-pressed to find an unequivocal and express representation by the principal directly to the third party, and it would often be the case that the representation is instead implied by the principal's conduct in clothing the agent with the trappings of authority by placing him in a certain position in the organisation.

(c) The Judge erred in law in failing to give sufficient weight to the decision in *First Energy* and in directing her mind singularly to the question of whether there had been an express representation from APBS to the Appellants as to Chia's authority. In so doing, the Judge failed to appreciate the relevance and importance of *First Energy*, where the emphasis of the court's legal analysis, instead of being placed (as per the traditional position) on the need for an unequivocal and express representation by the principal to the third party, shifted (rightly, in the Appellants' view) to the reasonable expectations of the third party as they would objectively appear in the context of commercial convenience and modern-day dealings.

(d) The position adopted by the English CA in *First Energy* is in line with the principle of fair risk allocation and recent developments in case law. *First Energy* has been applied in Singapore in a number of cases (*eg*, in *Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd and others* [2000] 1 SLR(R) 204 ("*Jurong Engineering*") and *Lee Feng Steel Pte Ltd v First Commercial Bank* [1996] 3 SLR(R) 64), and also recently in England in *Alan Lovett, Geoffrey Lambert Carton-Kelly v Carson Country Homes Ltd, Barclays Bank Plc, Registrar of Companies, Andrew Alexander Jewson, Edward Charles Carter* [2009] EWHC 1143. The principle laid down in *First Energy* has also been applied in the Australian case of *Pacific Carriers Limited v BNP Paribas* [2004] HCA 35, where the High Court of Australia acknowledged that a kind of representation often arising in business dealings was one which flowed from vesting an officer of a company with a certain title or status and equipping him with certain facilities. Such a representation, the court noted, might result in the principal permitting the agent to act in a certain manner without proper safeguards against misrepresentation.

***The decision in First Energy***

***The decision in First Energy***

38 As the Appellants' case on Chia's authority to make the fraudulent representations which were made is founded upon the authority of *First Energy*, we now examine this case in detail to see what the English CA actually decided and what the basis of its decision was. Before doing so, we should reiterate the established principle (which the Appellants do not dispute) that the law does not recognise the notion of what is commonly termed a "self-authorising" agent – *ie*, under the law of agency, an agent who has no authority, whether actual or ostensible, to perform a certain act cannot confer upon himself authority to do that act by representing that he has such authority. This principle is well illustrated by the House of Lords' decision in *Armagas Ltd v Mundogas SA* [1986] AC 717 ("*Armagas*").

39 In *Armagas*, the plaintiff ("AL") negotiated to purchase a ship from the defendant ("MSA"). AL planned to let the ship back to MSA on a three-year charterparty so as to finance the sale. The sale was brokered by an agent ("J"), who stood to gain if the deal went through. At all material times, J communicated with one Magelssen ("M"), who was MSA's vice-president (transportation) and chartering manager, regarding the sale. M told J that MSA would only enter into a one-year charterparty. J then offered M a bribe, and M signed a three-year charterparty to the satisfaction of AL. M also signed a one-year charterparty so as to mislead MSA. The ship was duly let to MSA, which returned it after one year. AL thought the charterparty was for three years and therefore sued MSA for breach of contract. AL argued that M had either implied actual authority or apparent authority to sign the three-year charterparty on MSA's behalf. The House of Lords held that notwithstanding M's appointment as MSA's agent in relation to the sale of the vessel, that position did not carry any usual or customary authority to sign a three-year charterparty; neither was there a representation by MSA that M had such authority. The only representation made was that made by M himself. In the circumstances, the House of Lords dismissed AL's claim against MSA.

40 In his judgment, Lord Keith of Kinkel, after expressing his agreement with Robert Goff LJ's observation in the English CA (*viz*, that it was most unlikely to be the law that a principal would be bound in a situation where its agent, who had no ostensible authority to enter into a particular transaction on its behalf, wrongly asserted after negotiations that he had gone back to the principal and had obtained actual authority to enter into that transaction (see *Armagas* at 731)), said (at 779 of *Armagas*):

> *It must be a most unusual and peculiar case where an agent who is known to have no general authority to enter into transactions of a certain type can by reason of circumstances created by the principal reasonably be believed to have specific authority to enter into a particular transaction of that type*. The facts of the present case fall far short of establishing such a situation. I conclude that the [English CA] rightly rejected [AL's] claim based on ostensible authority. [emphasis added]

41 Subsequently, the English CA found *First Energy* to be such an "unusual and peculiar case" (*per* Lord Keith in *Armagas* at 779). The plaintiff in *First Energy* ("FE") specialised in the replacement of old-fashioned heating systems with a more economical form of space heating. In order to make its product financially attractive to customers, FE allowed its customers to pay for the installation of the new system by instalments. FE sought financing from the defendant bank ("HIB"), which had its head office in London and which also had a branch office in Manchester. FE negotiated with the senior manager of HIB's Manchester office ("Mr J"), who had authority to sanction large credit transactions and sign facility letters. However, at an advanced stage of the negotiations, Mr J informed FE that he had no authority to sanction a credit facility of the amount asked for by FE.

42 Thereafter, HIB sent FE a facility letter, signed by its managing director and by an assistant

director ("Mr P"), offering a £2m credit facility for five years. However, this facility letter did not come into force. Since FE required financing for an initial project, the parties instead entered, successfully, into an *ad hoc* arrangement whereby HIB provided interim hire purchase ("HP") financing to FE for that initial project only. While discussions (which were known to Mr P) were ongoing between FE and Mr J to implement a more permanent financing agreement, FE secured three more projects. With respect to those three projects, Mr J wrote to FE on 2 August 1990 offering three more interim HP facilities as well as attaching the relevant agreements ("the 2 August HP Agreements") for FE's completion. FE subsequently returned the 2 August HP Agreements duly completed. In the meantime, HIB's senior management decided that HIB should not be financially involved in FE's ventures, including the three projects which were the subject matter of the 2 August HP Agreements. FE, which was left without financing by that decision, sued to enforce the 2 August HP Agreements. The trial judge ruled in FE's favour, whereupon HIB appealed.

43 The English CA dismissed HIB's appeal. It held, on the particular facts of the case, that:

(a) Mr J's position as the senior manager of HIB's Manchester office was such that Mr J was clothed with ostensible authority to communicate that HIB's head office had approved the 2 August HP Agreements;

(b) the fact that FE knew that Mr J's actual authority to offer credit facilities on HIB's behalf was limited did not necessarily mean that Mr J's authority to communicate decisions on HIB's behalf *vis-à-vis* credit facilities was also limited; and

(c) the trial judge was entitled to find as a matter of fact that Mr J possessed ostensible authority to communicate the approval by HIB's head office of the 2 August HP Agreements.

Accordingly, the English CA upheld the trial judge's decision that HIB was bound by the 2 August HP Agreements.

44 Each member of the English CA in *First Energy* delivered a separate judgment. Steyn LJ began his judgment by observing that a decision to the contrary effect (*viz*, that HIB was not bound by the 2 August HP Agreements) would "frustrate the reasonable expectations of the parties" (at 196) and would, moreover, "be based on an unreal premise as to the way in which commercial men transact[ed] business *of the particular kind involved in th[at] case*" [emphasis added] (at 196). He held (at 204) that "the law recognise[d] that in modern commerce[,] an agent who ha[d] no apparent authority to conclude a particular transaction [might] sometimes be clothed with apparent authority to make representations of fact [apropos that transaction]". He distinguished the decision in *Armagas* on the basis that it dealt with specific authority as opposed to general authority, and stated (at 203) that that decision did not foreclose the possibility of an agent having ostensible authority to communicate his principal's approval of a transaction even though he (*ie*, the agent) himself had no authority to enter into that transaction.

45 Evans LJ distinguished *Armagas* on the basis that the agent there (*ie*, M) had no authority either to enter into the relevant transaction or to communicate his principal's (*ie*, MSA's) approval of that transaction. In contrast, in *First Energy*, Mr J, *by virtue of his position* as the senior manager of HIB's Manchester office, had general authority to communicate decisions made by his superiors, and therefore had authority to communicate the specific representation that HIB's head office in London had sanctioned the 2 August HP Agreements. Evans LJ also expressed the view that such a decision would reflect the practical realities of the commercial world.

46 Nourse LJ agreed with the reasons given by both Steyn and Evans LJJ. He added that "[a]

question of ostensible authority [was] primarily one of fact" (at 207), and held that on the facts, the trial judge's conclusion in FE's favour was "the *only* one to which [the trial judge] could have come on the evidence before him" [emphasis added] (at 207). He further stated that HIB's proposition – *viz*, that "[FE's] knowledge of [Mr J's] inability to sanction any facility was just as much knowledge of [Mr J's] inability to communicate head office's approval of a facility" (at 207) – involved "a non sequitur which offend[ed] both commercial reality and common sense" (at 207).

47 In their judgments, all three members of the English CA in *First Energy* expressly stated that their rulings were entirely consistent with *Armagas*. Accordingly, *First Energy* is distinguishable from *Armagas* only on the facts. As far as we can see, the distinguishing features are as follows:

(a) *Armagas* involved a situation where it was not difficult for AL to check with MSA regarding M's authority. In contrast, in *First Energy*, given that Mr J was the senior manager of HIB's Manchester office, it would be impractical to expect each customer of HIB's Manchester office to check with HIB's head office in London regarding Mr J's authority.

(b) In *First Energy*, both the trial judge as well as the English CA effectively found as a fact that Mr J had ostensible authority to make the specific representation that HIB's head office in London had approved the credit facility sought by FE. In contrast, in *Armagas*, M was found not to have any authority, whether ostensible or otherwise, to enter into a three-year charterparty on MSA's behalf.

(c) *Armagas* concerned an agent who had limited authority, whereas *First Energy* concerned an agent who effectively had wide-ranging authority to perform a variety of tasks, including that of conveying his principal's approval of the transaction in question.

48 Steyn LJ's approach in *First Energy* was influenced in part by Kerr LJ's general observations on the nature of apparent authority in *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd, and P S Refson & Co Ltd (The "Raffaella")* [1985] 2 Lloyd's Rep 36 ("*The Raffaella*"). Kerr LJ's observations went further than those of Lord Keith at 779 of *Armagas* (reproduced at [40] above; see also *First Energy* at 203 for Steyn LJ's comments on Kerr LJ's observations in *The Raffaella*). However, what had an even greater influence on Steyn LJ's approach in *First Energy* was Browne-Wilkinson LJ's reasoning in *The Raffaella* (at 43), as follows:

> As at present advised, I am not satisfied that the principle to be derived from those cases [including *Armagas*] is as wide as [the second defendant's counsel] suggests [the submission of the second defendant's counsel was that a principal could not be held liable as a result of the agent holding himself out as having an authority which he did not in fact possess]: they were all cases or dicta dealing with the position where the agent had neither authority to enter into the transaction [in question] nor authority to make representations on behalf of the principal. It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the transaction cannot hold himself out as having authority to enter into the transaction so as to [a]ffect the principal's position. *But, suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied upon as part of the holding out of Y by the company? By parity of reasoning, if a company confers actual or apparent authority on A to make representations on the company's behalf but no actual authority on A to enter into the specific transaction, why should a representation made by A as to his authority not be capable of being relied on as one of the acts of holding out?* There is substantial authority that it can be: see *British Thomson-Houston Co. Ltd. v. Federated European Bank Ltd.*, [1932] 2 K.B. 176, especially

at p. 182 (where the only holding out was an erroneous representation by the agent that he was managing director); and the *Freeman & Lockyer* case [*ie*, *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd and Another* [1964] 2 QB 480] per Lord Justice Pearson at p. 499; *Hely-Hutchison v. Brayhead Ltd.*, [1968] 1 Q.B. 549 per Lord Denning, M.R. at p. 593A–D. *If, as I am inclined to think[,] an agent with authority to make representations can make a representation that he has authority to enter into a transaction, then the [trial] [j]udge was entitled to hold, as he did, that Mr. Booth, as the representative of Refson [the second defendant] in charge of the transaction, had implied or apparent authority to make the representation that only one signature was required and that this representation was a relevant consideration in deciding whether Refson had held out Mr. Booth as having authority to sign the undertaking [given to the plaintiff]*. [emphasis added]

49 In *The Raffaella*, the plaintiff ("EIFT") contracted to buy a cargo of cement from the first defendant ("Soplex"). Soplex intended to fulfil that contract by purchasing a vessel together with her cargo of cement. The second defendant ("Refson"), the trading bank which acted as Soplex's banker for the transaction, issued a guarantee in favour of EIFT promising to make irrevocable payment if the vessel did not arrive at the designated port by the stipulated date and/or if the cement supplied by Soplex did not meet the contractual standard. The guarantee was signed only by Mr Booth, Refson's documentary credits manager, who did not in fact have actual authority to sign the guarantee on Refson's behalf and who also concealed the giving of the guarantee from his superiors. EIFT subsequently made a claim under the guarantee. Refson denied liability, contending (*inter alia*) that Mr Booth had no authority to sign any guarantee which would be binding on it. This argument was rejected by the trial judge, who held Refson liable under the guarantee. On appeal, the English CA (consisting of Lawton, Kerr and Browne-Wilkinson LJJ) affirmed the trial judge's decision. It held that on the facts of that case:

(a) Mr Booth had apparent authority to sign the guarantee on behalf of Refson as the latter had held out Mr Booth as being a manager of the kind who dealt with its affairs generally and who could reasonably be expected to have general authority; and

(b) the evidence taken as a whole was sufficient to entitle the trial judge to find that Mr Booth had been held out by Refson as having apparent authority to sign the guarantee issued in favour of EIFT.

50 Kerr LJ also said that the issue before the court "raise[d] no question of principle[,] but merely the proper inference to be drawn from the evidence" (see *The Raffaella* at 43). He held that "Mr. Booth had Refson's actual authority to do everything on which [EIFT] rel[ied] as clothing him with the apparent authority to sign the [guarantee] without the addition of any other signature" (see *The Raffaella* at 43–44).

***Our ruling on the Agency Issue***

51 It is clear from the foregoing examination of *The Raffaella* and *First Energy* that in both cases, the court's decision was based on a specific finding of fact that the principal concerned had held out its agent as having authority to make, in relation to the transaction in question, representations of the class or kind of representations that the agent actually made, even though the agent knew he had no actual authority to enter into the transaction itself. In particular, it was made abundantly clear in *First Energy* that Mr J, as the senior manager of HIB's Manchester office, had overall responsibility of that office. In such circumstances, it made good commercial sense that a customer of HIB's Manchester office should be able to rely on what was conveyed to him by Mr J. In contrast, in the present case, Chia was merely the finance manager of APBS, a title which does not connote

the possession of any specific authority. The senior management of APBS, including the APBS Board, was also within easy reach of the Appellants. In the circumstances of the case, the Judge found as a fact that APBS had not held out to the Appellants, whether by its actions or by Chia's position as Finance Manager, that Chia had any authority to make on its behalf any representations of the class or kind of representations that Chia actually made. The Judge's finding is purely one of fact; therefore, unless the Appellants are able to show that this finding of fact is plainly wrong or is against the weight of the evidence, their appeals based on apparent authority must fail.

52 The Appellants rely on the following evidence as amounting to a holding out by APBS of Chia's authority to represent that APBS had accepted the Credit Facilities and that the forged APBS Board resolutions provided by Chia were genuine:

(a) Chia, apart from being the most senior finance officer in APBS, was a member of APBS's senior management as stated in the Position Description.

(b) Ms Tan had dealt with Chia previously in 2000, when she was at Sumitomo Bank, in relation to credit facilities sought on behalf of APBS. Thus, in her dealings with Chia after she joined HVB, she had every reason to believe that Chia was similarly authorised by APBS to request for credit facilities on its behalf.

(c) Chia had unlimited authority to operate and control the OCBC Account, except that he was a co-signatory.

(d) Chia had authority to open fixed deposit accounts in APBS's name for the purposes of investing APBS's temporary surplus funds, and also had a compliance function with respect to the covenants and obligations of APBS under credit facilities which it took out. Both of those areas of work would require Chia to communicate with banks.

(e) Chia frequently dealt with banks and acted as the point of communication between APBS and banks. In fact, Mr Brand Jan van den Berg, an APBL director, had told Zimmermann (HVB's Head of International Desk) on one occasion that Chia was the appropriate person in APBS to discuss banking facilities with.

(f) Chia had wide powers with regard to his subordinates as well as APBS's facilities and properties. He had met and entertained SEB's officers at APBS's premises, and had shown them around the premises. Further, he had allowed SEB's officers to set up SEB's Internet trading system on his own office computer with the assistance of APBS's IT personnel.

53 In the court below, the Judge, after considering all of the above factors, held that they were insufficient to show that APBS had held out Chia as having authority to make the false representations which he made to the Appellants. We are substantially in agreement with her ruling. Accordingly, as far as the facts are concerned, the Judge was entitled to find on the evidence that APBS *did not* hold out Chia as having the authority contended by the Appellants, *ie*, actual and/or ostensible authority to represent that APBS had accepted the Credit Facilities and that the forged APBS Board resolutions which he provided in connection with those credit facilities were genuine.

54 In view of our finding that APBS did not make the holding out submitted by the Appellants, the principle laid down in *First Energy – viz*, that an agent who has no authority, whether actual or apparent, to conclude a particular transaction on his principal's behalf may nevertheless have apparent authority to represent that his principal has approved the transaction – has no application in the present case. It is accordingly not necessary for us to decide whether that principle should be

accepted as good law in Singapore. However, given the importance of *First Energy* to the Appellants' arguments and given, also, that the principle laid down in that case is likely to surface again in our courts, we think it desirable that we state our views on the case.

***Our observations on First Energy***

55 As mentioned at sub-para (d) of [37] above, *First Energy* has been applied in Australia, and was recently followed in England. In addition, as the Judge observed (at [115] of the HC Judgment), *First Energy* has also been relied on in Singapore in *Jurong Engineering* by the High Court for the principle that (see *Jurong Engineering* at [68]):

> … [I]f the [principal] has *expressly* authorised the agent to make representations on its behalf, then any representation made by that agent that he himself has authority to do an act is a good representation for the purposes of conferring apparent authority on the agent to do that act, even if he has been expressly prohibited to do it, and even if it is not something that agents in his position usually have power to do. [emphasis added]

56 With respect to the above passage from *Jurong Engineering*, the Judge said (at [116] of the HC Judgment), without coming to any conclusion on the correctness of the principle set out therein:

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

57 There are four observations which we wish to make apropos *First Energy*. The first is that, as mentioned at [47] above, the English CA did not consider that its decision departed from established authority. If the English CA's view is correct, then *First Energy* would be considered good law here. It may, however, be that *First Energy* is *not* in fact consonant with established authority, but is instead a radical departure from the traditional conceptual basis of the doctrine of apparent authority as well as inconsistent with *Armagas* (as suggested by the Judge at [116] of the HC Judgment and by Prof F M B Reynolds in "The Ultimate Apparent Authority" (1994) 110 LQR 21). In this regard, we note that criticism of *First Energy* has been made in (*inter alia*) Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 19th Ed, 2010), which states (at para 8-023) that that case "involves a departure from the basic principles of apparent authority, for which no general justifying principle seems ready [at] hand", as well as Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2010), where the learned author opines that *First Energy* "was an example of a difficult case possibly making bad law" (at para 5.047) and that "courts should be slow to adopt the approach in *First Energy* … unless there are exceptional facts" (at para 5.043). If these criticisms of *First Energy* are justified, then that decision should not be followed by our courts. Therefore, if it becomes necessary in a future case for a Singapore court to decide whether or not *First Energy* is good law in this country, the court will have to first identify, in so far as is possible, what principle (if any) was established in *First Energy* that is not (according to the English CA) inconsistent with *Armagas*.

58 Our second observation is that, as mentioned at [48] above, in *First Energy*, Steyn LJ followed in the footsteps of Browne-Wilkinson LJ in *The Raffaella*. Referring to Browne-Wilkinson LJ's analysis of apparent authority at 43 of *The Raffaella* (reproduced earlier at [48] above), Steyn LJ said that that

passage "[threw] light on the approach [which the court] ought to adopt" (see *First Energy* at 204). He concluded (likewise at 204):

> In agreement with the [trial] [j]udge[,] I have come to the conclusion, on the particular facts of this case, that [Mr J's] position as senior manager in Manchester was such that he was clothed with ostensible authority to communicate that head office approval had been given for the facility set out in the [2 August HP Agreements]. Although his status was below that of a managing director or general manager, it was nevertheless considerable. And, in the circumstances of this case, the idea that [FE] should have checked with the managing director in London whether HIB had approved the transaction seems unreal. This factor is, of course, not decisive, but it is relevant to the ultimate decision.
>
> Having come to [the] conclusion, on the application of what I regard as orthodox principles of law, that the [trial] [j]udge was entitled and indeed right to find as a matter of fact that ostensible authority to communicate head office approval of the transaction had been established, I return to the place where I started. In my judgment a decision that [Mr J] did not have apparent authority to communicate head office approval would defeat the reasonable expectations of the parties. And it would fly in the face of the way in which[,] in practice[,] negotiations are conducted between trading banks and trading customers who seek commercial loans.

In other words, as we pointed out earlier (see sub-para (b) of [47] above), Steyn LJ (and, likewise, the other two members of the English CA in *First Energy*) specifically found that Mr J had ostensible authority to represent that HIB's head office in London had approved the 2 August HP Agreements. If the decision in *First Energy* is so understood, then it should pose no doctrinal difficulty.

59 Our third point is that in *First Energy*, the English CA treated Mr J's representation (*viz*, that HIB's head office in London had approved the 2 August HP Agreements) as merely another representation, like any other representation that an agent may be authorised to make. In our view, however, a representation by an agent that his principal has approved a transaction is not like other representations. A representation as to the principal's approval of a transaction goes to the heart of the agency relationship. While an agent may possess authority (whether actual or ostensible) to make general representations pertaining to a certain transaction (such as, for example, a representation about the condition of the goods involved in a sale transaction), this authority, in a situation where the agent *does not* also possess authority (whether actual or ostensible) to enter into the said transaction on the principal's behalf, *cannot* include authority to make the specific representation that the principal has approved that transaction. To argue that an agent has authority to represent that his principal has approved a transaction – which is, in effect, authority to bind the principal to the transaction – because he (the agent) has authority to make general representations about the transaction and, hence, also has authority to represent that his principal has approved the transaction is contrary to the established principle that there cannot be self-authorisation by an agent. Of course, if an agent has been conferred authority, whether actual or ostensible, to make the *specific* representation that his principal has approved a transaction (which authority Mr J was found to have in *First Energy*), he would also have been vested with at least ostensible authority to enter into the transaction on his principal's behalf. But, if the agent merely has authority to make *general* representations about the transaction and does not have any authority (whether actual or ostensible) to enter into the transaction on the principal's behalf, it is not possible for him to give himself such authority by falsely representing that his principal has approved the transaction, which representation carries with it the implication that the principal has given him (the agent) the requisite authority to bind the principal to the transaction.

60 Our fourth observation is that from an economic point of view, there is a significant difference between the commercial relationship of the parties in *First Energy* and that of the parties in the present case. In *First Energy*, FE needed financing to develop its business. Mr J, the senior manager of HIB's Manchester office (who, in Steyn LJ's view (at 197), had greater general authority than the general manager of HIB's commercial department in London), offered credit facilities to FE because he wanted HIB to invest in FE's business. Cutting off FE's credit facilities would probably have caused to FE more harm than the harm which validating those facilities might have caused to HIB; in fact, HIB might not necessarily have incurred any loss despite being held liable to honour the 2 August HP Agreements. The situation in the present case is the converse – APBS is bound to suffer serious losses (which have already materialised) if it is held liable for the fraudulent representations of Chia that (*inter alia*) APBS had accepted the Credit Facilities, which facilities APBS in fact never needed. We note, by way of further comparison, that in *The Raffaella*, Refson benefited from the transaction (*viz*, Soplex's purchase of the ship in question and her cargo of cement) as it acted as Soplex's banker for that transaction. This point is, of course, not decisive of the issue at hand, but, in our view, it is a relevant factor in determining whether the loss occasioned by an agent's fraud or unauthorised conduct should be borne by the principal or by the third party who deals with the agent, where both the principal and the third party are innocent parties.

61 For the foregoing reasons, it is our view that *First Energy* should be understood as a case that was decided on the basis of the wide-ranging authority that Mr J, as the senior manager of HIB's Manchester office, was found to have. Different kinds of agents have different authority in different settings. In the present case, it cannot be said that the Judge was wrong in declining to accord to Chia the same extent of authority as that accorded to Mr J in *First Energy*. There was little evidence, unlike in the case of *First Energy*, to demonstrate that Chia possessed ostensible authority to make representations that APBS had accepted the Credit Facilities. Chia was only a finance manager of one company in a large corporate group, a position that would carry with it less general authority than the position of a general manager (in this regard, it should be noted that APBL had a group general manager), a finance director or a managing director. Furthermore, Chia's authority as Finance Manager was not well known to the commercial world, and was certainly unknown to both the Appellants, which knew only what Chia had told their officers. Given these circumstances, there was no reason for any lending bank to assume, based on the appearance of things, that Chia had authority to represent that APBS had accepted credit facilities offered by the bank.

**The Vicarious Liability Issue**

62 We turn now to the Vicarious Liability Issue, where the question to be determined is whether APBS should be held vicariously liable for Chia's fraud on the Appellants. In our discussion of this issue, we shall, for convenience, use the terms "employer" and "employee" to also denote a principal and an agent respectively.

63 In analysing the Vicarious Liability Issue, the Judge considered the relevant leading authorities to be *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716 ("*Lloyd v Grace Smith*") and *Armagas*. She stated (at [194] of the HC Judgment):

> If vicarious liability of [APBS] is to be established, the act of deceit – fraudulently representing the [APBS] [B]oard resolutions as genuine – must be made in the course of Chia's employment … The question of whether an employee was acting in the course of his employment (and in the case of an agent, in the course of his authority) is to be decided according to the same test as [the test for determining] whether the matters complained of were within the employee's express, implied or ostensible authority. The House of Lords in *Armagas* … confirmed what had been stated in *Lloyd v Grace Smith*[,] [*viz*,] that there is no difference between the question whether the

> employee was acting in the course of his employment and the question whether he was acting within the scope of his actual or ostensible authority … In short, on both issues, the same test applies.

Applying the aforesaid principle, the Judge rejected the Appellants' case on vicarious liability because (see [198] of the HC Judgment):

> … Chia did not have authority to enter into a binding agreement and was not held out as having such authority; or as having apparent authority to communicate approval of the transaction on the part of someone more senior (*ie*, the [APBS Board]) or to warrant the genuineness of the extracts of the [APBS] [B]oard resolutions. Therefore, the act of deceit which was the false representation was not practised in the course of Chia's employment. Accordingly, the case of the [Appellants] on vicarious liability fails for the same reasons as [the reasons for which] I have rejected the agency claim based on ostensible authority.

***The Appellants' arguments***

64 Before this court, the Appellants' case on vicarious liability is that the Judge should not have relied on the principle laid down in *Lloyd v Grace Smith* (and reaffirmed in *Armagas*) as it has been superseded by what is commonly termed "the 'close connection' test" (also known as "the *Lister* test" because the test was first applied in England in the House of Lords case of *Lister and others v Hesley Hall Ltd* [2002] 1 AC 215 ("*Lister*")). The "close connection" test is currently the accepted test in English law for establishing vicarious liability. The Appellants argue that on the basis of the "close connection" test, APBS is vicariously liable to them for Chia's fraudulent acts as there was a close connection between those acts and Chia's employment as APBS's finance manager. APBS's counter-argument is that the "close connection" test should be confined to sexual abuse cases involving young and vulnerable victims, and that, in any case, APBS would not be vicariously liable for the fraudulent acts of Chia even if the "close connection" test were applied. It should be noted that in the court below, the Judge did not consider it necessary to rule on the applicability or otherwise of the "close connection" test. (Her view was that the House of Lords in *Lister* adopted the "close connection" test, which was "a looser test of connection between the [tortious] acts in question and the employment" (see the HC Judgment at [199]), because that case involved the sexual abuse of young and vulnerable victims in circumstances where victim compensation was a legitimate policy consideration and where the ability of the employer to pay compensation militated against shielding it from liability.)

***The origin and development of the "close connection" test***

65 It is not necessary for us to either examine or discuss in detail the origin of the "close connection" test. There is a great deal of judicial pronouncement and academic writing on it. It suffices to say that according to the House of Lords in *Lister* (at [36]–[37] *per* Lord Clyde and at [69]–[70] *per* Lord Millett), the "close connection" test is merely a reformulation of what we shall hereafter call "the Salmond test" (*ie*, the test first enunciated in John William Salmond, *The Law of Torts* (Stevens & Haynes, 1907)), which common law courts have applied for decades, and not a radical departure from it. This test, as currently restated in R F V Heuston & R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996) ("*Salmond and Heuston*") at p 443, rests on the principle that:

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of [the servant's] employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised

by the master.

66 The first limb of the Salmond test is uncontroversial. However, the second limb has always posed difficulties in terms of application. In particular, it is often difficult to determine whether the tortious act in question is an unauthorised mode of doing an act authorised by the employer, or an act outside the scope of the employee's employment altogether. As P S Atiyah commented in *Vicarious Liability in the Law of Torts* (Butterworths, 1967), the Salmond test is (at p 172):

> … an apparently simple test whose simplicity is largely deceptive. Indeed, to reconcile this test with the whole body of case law on this subject requires a good deal of verbal sleight of hand.

67 While the Salmond test may produce just results in cases of negligence, it has been recognised for a long time that it may not do so in cases of intentional torts. This is because it is often difficult to regard a deliberate attempt by an employee to commit a tort (and thereby contravene the terms of his employment) as an "unauthorised mode of doing some act authorised by the master" (see *Salmond and Heuston* at p 443), even though justice demands, under certain circumstances, that the employer should be made liable. Indeed, the Salmond test has been criticised as being artificial and inadequate in determining vicarious liability for intentional torts.

68 The difficulty with the Salmond test has been most strikingly brought home in cases involving sexual abuse of young and vulnerable victims by employees of social welfare homes. Such cases have recently increased in Canada and England. Up to 1999, the English courts applied the Salmond test in its traditional formulation (see, *eg*, *Trotman v North Yorkshire County Council* [1999] LGR 584 ("*Trotman*"), where the English CA, applying the traditional formulation, held that a school was not liable for the indecent assault committed by its deputy headmaster on a pupil who shared a room with him while they were on a school-sanctioned trip as what the deputy headmaster did was not an unauthorised mode of performing an authorised act, but an independent act outside the scope of his employment).

69 The English CA's approach in *Trotman* was rejected by the Canadian Supreme Court in *The Children's Foundation, the Superintendent of Family and Child Services in the Province of British Columbia and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Ministry of Social Services and Housing v Patrick Allan Bazley* [1999] 2 SCR 534 (referred to hereafter as "*Bazley v Curry*", as this case is more commonly known), where, on substantially similar facts, the court declined to follow *Trotman* and held the employer liable. The court (*per* McLachlin J) said (at [24]):

> … [T]he opinion's [*ie*, *Trotman*'s] reasoning depends on the level of generality with which the sexual act is described. Instead of describing the act in terms of the employee's duties of supervising and caring for vulnerable students during a study trip abroad, the [English CA] cast it in terms unrelated to those duties. Important legal decisions should not turn on such semantics.

The court propounded a new test – *viz*, the "close connection" test – as follows (at [41]):

> The fundamental question is *whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability*. Vicarious liability is generally appropriate where there is *a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom*, even if unrelated to the employer's desires. [underlining in original; emphasis added in italics]

Since then, the courts in Canada have applied the "close connection" test to all cases involving

religious bodies whose employees (*ie*, priests, deacons, *etc*) have sexually assaulted or abused young and vulnerable victims under their charge.

70 In *Roman Catholic Episcopal Corporation of St George's v John Doe (a pseudonym) and John Doe (a pseudonym)* [2004] 1 SCR 436 (referred to hereafter by its more commonly used case name, "*John Doe v Bennett*"), where an Episcopal corporation was held liable for the sexual misconduct of a parish priest *vis-à-vis* young boys under his charge, the Supreme Court of Canada (*per* McLachlin CJ) restated the rationale of vicarious liability as follows (at [20]):

> Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future.

The court applied a two-stage test to determine whether and when an employer would be held vicariously liable for the wrongdoing of an employee. This involved examining, first, "whether there [were] precedents which unambiguously determine[d] whether the case should attract vicarious liability" (at [20]), and, second, if there were no such precedents, "whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability" (at [20], citing, *inter alia*, *Bazley v Curry* at [15]).

71 In *Lister*, the House of Lords adopted the "close connection" test and applied it to facts similar to those in *Bazley v Curry*. In *Lister*, the residents of a boarding house, who had been put there because of their emotional and behavioural difficulties, were sexually abused by the warden of the boarding house. The House of Lords held that the owner of the boarding house was vicariously liable for the torts of the warden, and rejected the reasoning in *Trotman* that sexual abuse by an employee of young and vulnerable persons under his care was not a mode, whether authorised or not, of carrying out his duties.

72 Lord Steyn expressed the view (with which Lord Hutton agreed) that "[t]he question [was] whether the [employee]'s torts were so closely connected with his employment that it would be fair and just to hold the [employer] vicariously liable" (at [28] of *Lister*). In a similar vein, Lord Clyde stated (at [37]) that "[w]hat ha[d] essentially to be considered [was] the connection, if any, between the act in question and the employment"; in this regard, his Lordship cautioned that "the mere opportunity to commit the act" (at [45]) was not sufficient. Lord Millett enunciated the relevant test in terms of "[whether] the unauthorised acts of the employee [were] so connected with acts which the employer ha[d] authorised that they [might] properly be regarded as being within the scope of [the employee's] employment" (at [69]), and stressed that "[w]hat [was] critical [was] … the closeness of the connection between the employee's duties and his wrongdoing" (at [70]). Focusing on the connection between the duties of the employee and his wrongdoing, Lord Millett opined, would accord with the underlying rationale of the doctrine of vicarious liability (which his Lordship accepted was "a loss-distribution device" (at [65])).

73 Lord Hobhouse of Woodborough, on the other hand, appeared to take a different approach from that of the other four law lords. His Lordship described the sexual abuse cases (including *Trotman* and *Bazley v Curry*) as cases where "the employer ha[d] assumed a relationship to the plaintiff which impose[d] specific duties in tort upon the employer and the role of the employee (or servant) [was] that he [was] the person to whom the employer ha[d] entrusted the performance of those duties" (see *Lister* at [54]), and expressed the view that "the correct approach … [was] to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the

contractual duty of the servant towards his employer" (at [60]). However, it would seem that the approach taken by Lord Hobhouse was ultimately still predicated on the "close connection" test as, immediately before setting out the aforesaid "correct approach" at [60] of *Lister*, his Lordship stated (at [59]):

> If … the servant's employment merely gave the servant the opportunity to do what he did without more, there will be no vicarious liability[;] hence the use [in the] Salmond [test] and in the Scottish and some other authorities of the word "*connection*" to indicate something which is not a casual coincidence but [which] has the requisite relationship to the employment of the tortfeasor (servant) by his employer … [emphasis added]

74 Since *Lister*, the "close connection" test has been applied in England and other common law countries to a variety of situations. They include:

(a) *Dubai Aluminium Co Ltd v Salaam and others* [2003] 2 AC 366, where a law firm was held vicariously liable for the dishonest assistance of one of its partners in an elaborate commercial fraud;

(b) *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] 1 WLR 2158, where a nightclub owner was held vicariously liable for the injuries inflicted on a customer by an unlicensed doorman whom he had employed, even though the attack did not take place at the nightclub itself, but instead occurred about 100m away;

(c) *Clinton Bernard v The Attorney General of Jamaica* [2004] UKPC 47, where the Attorney-General of Jamaica was held vicariously liable for the consequences of an unlawful shooting by a police constable;

(d) *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224, where the House of Lords dismissed an appeal against the English CA's decision to allow a case involving an employee who was allegedly harassed by his employer's departmental manager to go to trial;

(e) *Kevin So v HSBC Bank plc and Lucy Yan Lu* [2009] EWCA Civ 296, where the English CA held a bank responsible for the negligent representations made by one of its employees;

(f) *Maga v Archbishop of Birmingham and another* [2010] 1 WLR 1441 ("*Maga*"), where vicarious liability was imposed on a Roman Catholic church for the sexual abuse committed by one of its priests, even though the plaintiff was not a Roman Catholic and had nothing to do with the church (except for a one-off occasion when he had helped to do some cleaning there), and even though the acts of abuse had not taken place within the church's premises;

(g) *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844 ("*Ming An*"), where the Court of Final Appeal of Hong Kong applied the "close connection" test to impose vicarious liability on an employer for the negligent driving of its employee;

(h) *State of New South Wales v Lepore and another* (2003) 212 CLR 511 ("*Lepore*"), where the High Court of Australia appeared to adopt the "close connection" test in deciding three appeals involving sexual abuse of students by teachers (it should, however, be noted that the general applicability of this decision has since been questioned by the Supreme Court of New South Wales in *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106); and

(i) *Ng Sing King and others v PSA International Pte Ltd and others* [2005] 2 SLR(R) 56, where

the Singapore High Court was of the view that there was no sufficiently close connection between the actions of a nominee director and his employment for vicarious liability to be imposed upon the party which had appointed him as its nominee director.

***Our views on the "close connection" test***

75 In our view, the "close connection" test is, as Bokhary PJ commented in *Ming An*, "an intellectually satisfying and practical criterion" (at [19]) for determining whether vicarious liability should be imposed on an employer for "all torts committed by an employee during an unauthorised course of conduct, whether intentional wrongdoing or mere inadvertence is involved" (at [25]). This is because the test "imposes vicarious liability when, but only when, it would be fair and just to do so" (at [19]) and, moreover, "provides a workable concept, namely[,] a sufficiently close connection, for determining in each case whether [imposing vicarious liability] would be fair and just" (at [19]). This test requires the court to "openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'" (*per* McLachlin J in *Bazley v Curry* at [41]). What the court has to do in each case is to examine all the relevant circumstances – *including policy considerations* – and determine whether it would be fair and just to impose vicarious liability on the employer. For instance, it is difficult to argue, on policy grounds, that victim compensation should not prevail in cases involving defenceless and vulnerable victims, such as young children who have been sexually abused by employees of welfare homes, however innocent the employer might be. But, the same policy consideration may not be valid in the case of an international bank which is the victim of a commercial fraud.

76 In *John Doe v Bennett* at [20] (reproduced at [70] above), McLachlin CJ highlighted two policy considerations underlying the doctrine of vicarious liability, namely: (a) effective compensation for the victim; and (b) deterrence of future harm by encouraging the employer to take steps to reduce the risk of similar harm in future.

7 7 *Vis-à-vis* the first of the aforesaid policy considerations, we are of the view that an innocent victim of an employee's tort should, under ordinary circumstances, be compensated. In this regard, the employer is usually the person best placed and most able to provide effective compensation to the victim. In our view, making the employer vicariously liable is not only a practical solution, but also fair and just. After all, a person who employs another to advance his own interests and thereby creates a risk of his employee committing a tort should bear responsibility for any adverse consequences resulting therefrom. This view is buttressed by the consideration that the employer may redistribute the cost of providing compensation for his employee's torts through mechanisms such as insurance.

78 We should at the same time point out, however, that the objective of victim compensation rests on the implicit premise that the victim of the tort is not at fault for the tort, or at least bears less fault for the tort than the party who is morally responsible for the tort ("the blameworthy party"). The main touchstone of legal liability at common law is usually, and justifiably, moral culpability. Where possible, the law endeavours to make the blameworthy party bear, to a commensurate extent, the financial consequences of his wrongdoing. Vicarious liability, in contrast, operates regardless of whether there is any fault on the part of the person who is ultimately made to provide compensation for the blameworthy party's wrongdoing ("the ultimate defendant"). More specifically, vicarious liability only comes into play when the law is unable, for practical reasons, to make the blameworthy party bear the financial costs of the tort. As a form of "strict" liability in the sense of liability imposed without necessarily requiring any fault on the ultimate defendant's part, vicarious liability is an anomaly in the common law. For this reason, vicarious liability can only be

justified if the victim of the tort is himself not at fault, or is less at fault than the blameworthy party and/or the ultimate defendant. It is only in a situation where the primary device for imposing liability – *ie*, fault – is incapable of providing the victim with effective compensation from the blameworthy party that resort to other factors to assign liability (and, thus, provide effective victim compensation) may be justified. In other words, a precondition for the imposition of vicarious liability is that the victim seeking compensation should either be without fault himself, or be less at fault than the blameworthy party and/or the ultimate defendant; otherwise, the policy of victim compensation as a justification for imposing vicarious liability loses much of its moral force.

79 Turning now to the second policy consideration highlighted by McLachlin CJ at [20] of *John Doe v Bennett*, *viz*, deterrence of future harm, this rests on the premise that penalising an employer for his employees' torts will provide him with an incentive to take steps to reduce the incidence of accidents and tortious behaviour by his employees. As McLachlin J astutely noted in *Bazley v Curry* (at [33]):

> Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.

80 In our view, the aforesaid policy consideration, which is aimed at promoting efficiency in business enterprises through deterrence, is a legitimate one. However, like victim compensation, it rests on the fundamental premise that the employer is best placed, relative to everybody else, to manage the risks of his business enterprise and prevent wrongdoing from occurring. In many cases, this premise may hold true. Employers are often well positioned to stem the occurrence of accidents as they have the ability to control their employees (see Fleming James Jr, "Vicarious Liability" (1953–1954) 28 Tul L Rev 161 at p 168). However, this is not always the case. In some situations, the person best placed, or at least better placed, to prevent the tort may well be the victim himself or a third party. This may occur, for example, where an independent contractor or some other third party independent of the employer supplies all the equipment required to perform a job which is part and parcel of the employer's business enterprise. In yet other cases, the type of tort that occurs is, realistically speaking, uncontrollable and, therefore, not amenable to deterrence. This is particularly relevant to torts committed in the course of excessively risky business enterprises, spur-of-the-moment torts and intentional torts. In such situations, it may well be possible to find that the employer has done all that is reasonable to deter the tort and yet has failed to prevent the commission of the tort. In such situations, deterrence as a justification for imposing vicarious liability loses much of its force.

81 In addition to the above points, it is also important to note that while victim compensation and deterrence are relevant and desirable policy considerations in deciding whether vicarious liability should be imposed, they cannot in themselves be determinative of every case. The courts are, after all, neither welfare agencies nor workplace safety regulators. The applicability of victim compensation and deterrence as valid policy considerations in a particular case does not inevitably lead to the conclusion that the employer should be held vicariously liable; *vice versa*, the inapplicability of these considerations does not mean that the employer may not be made vicariously liable. There may well be other potentially relevant policy considerations which may act as a counterweight to victim compensation and deterrence. As to what these other policy considerations are, it is impossible for us to anticipate or list them exhaustively. Each case must be decided on its facts. We can provide no guidance of greater specificity than to reiterate the sentiment expressed by Bokhary PJ in *Ming An* (at [19]) that in the final analysis, the ultimate goals of fairness and justice must be paramount:

> By "close connection" is meant a connection between the employee's unauthorised tortious act and his employment which is so close as to make it *fair and just* to hold his employer vicariously liable. … [V]icarious liability [is imposed] when, but only when, it would be *fair and just* to do so. [emphasis added]

82 We are aware that many people may be uncomfortable with the idea of judges making decisions based on policy considerations of what is fair and just in the circumstances. Lord Hobhouse, for one, was of the view that it was not appropriate to follow the policy-based approach taken by the Canadian Supreme Court in *Bazley v Curry*. His Lordship stated (at [60] of *Lister*):

> … I do not believe that it is appropriate to follow the lead given by the Supreme Court of Canada in *Bazley v Curry* … The judgments [given by the various members of the bench in *Bazley v Curry*] contain a useful and impressive discussion of the social and economic reasons for having a principle of vicarious liability as part of the law of tort which extends to embrace acts of child abuse. But an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be. In English law that clarity is provided by the application of the criterion to which I have referred derived from the English authorities [*ie*, the criterion of "comparison of the duties respectively owed by the servant to the plaintiff and to [the] employer" (see, likewise, [60] of *Lister*)].

83 In our view, Lord Hobhouse's concern is a valid one – but only up to a point. There is, of course, a difference between the policy reasons for a legal rule and the criteria for the application of that rule. The courts will apply a legal rule without reference to the policy reasons underlying it where the rule is clear and the facts fall within the rule. But, the problem here is that the English courts have thus far not been able to forge a legal rule of sufficient clarity for deciding, without having any regard to policy considerations, all vicarious liability cases. In our view, since the "close connection" test requires an employee's tort to be sufficiently closely connected with the employee's employment before vicarious liability can be imposed on the employer, policy considerations would and should have an important role in determining whether, in any particular case, it would be fair and just to hold the employer vicariously liable. In this connection, we should point out that the criterion which Lord Hobhouse referred to at [60] of *Lister* (reproduced in the preceding paragraph), when applied in the specific context of sexual abuse cases, would coincide with the policy consideration of victim compensation.

84 We should also add that the "close connection" test, which emphasises the degree of connection between risk and harm (see, *eg*, *Bazley v Curry* at [41]), is – conceptually – closely related to the test laid down by this court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") for determining whether a duty of care exists under the law of negligence. That test ("the *Spandeck* test") is a "two-stage test premised on proximity and policy considerations, … [and] preceded by a preliminary requirement of factual foreseeability" [emphasis in original omitted] (see *Spandeck* at [73]). If a claim based on vicarious liability fails the "close connection" test, it is *not likely* that that claim will pass the *Spandeck* test *vis-à-vis* a claim in negligence, and *vice versa*, as both tests take into account the criterion of foreseeability of harm occurring to the victim. This, of course, does not entail that a finding of liability in negligence can never be made where a claim in vicarious liability fails, and *vice versa*. The two doctrines are, after all, not exactly identical. Our point is simply that the doctrines of negligence and vicarious liability are closely related, and the courts should be slow to find liability under one doctrine when they are unable to find a corresponding liability under the other.

85 Over and above the points discussed above, it is important to bear in mind, when applying the "close connection" test, that this test is not a rigid definition of the circumstances which give rise to vicarious liability, but a guide to the principled application of the law to diverse factual situations. In the words of Bokhary PJ in *Ming An* at [25]:

> This is not to say that this criterion [of a close connection between the tort committed by the employee and his employment] is to be treated like a statutory formula. Its application is always to be undertaken in context. I dare say that the requisite connection will prove in practice to be more readily found in certain types of case[s] than in others. But the basic criterion having been applied, the disposal of each case will always turn ultimately on its own facts and the particular considerations which they raise. This is saying no more than what Lord Eldon LC famously intervened to observe in the course of the argument in *Gee v Pritchard* (1818) 2 Swans 402 at p.414; 36 ER 670 at p.674, namely[,] that doctrines ought to lay down "fixed principles" while "taking care that they are to be applied according to the circumstances of each case".

***Application of the "close connection" test in cases of fraud***

86 The present case concerns the fraud of Chia, who was the finance manager of APBS at the material time. In *Lister*, their Lordships made no distinction between intentional acts and inadvertent acts in applying the "close connection" test as they did not consider it necessary to put any particular type of case into a special category where a different rule of liability should apply. We agree with this approach. Given the reality that any employee may commit a tort intentionally in the course of his employment even where he is prohibited from doing the act constituting the tort, we see no justification for distinguishing cases of fraud from other intentional torts. Fraud is just another kind of intentional tort. It is different from, for instance, an intentional tort like assault only in so far as it usually gives rise to economic loss rather than physical harm to the victim. The test for whether vicarious liability should be imposed on the employer will still be whether the fraud of the employee is so closely connected with his employment that it is fair and just that the employer should be held vicariously liable for the employee's fraud.

***Relevant factors in applying the "close connection" test***

87 Under the "close connection" test, vicarious liability is imposed on an employer where, in the words of McLachlin J at [41] of *Bazley v Curry*, "there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires" [underlining in original]. Her Honour went on to outline some of the factors relevant in determining whether the requisite degree of connection exists in a particular case, as follows (see *Bazley v Curry* at [41]):

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) the extent of power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power.

88 In all the cases involving sexual abuse of young and vulnerable victims, such as *Bazley v Curry*, *Lister*, *John Doe v Bennett*, *Maga* and *Lepore*, most of the five criteria listed above were satisfied. Opportunity, time and circumstance were all present. Even in *Ming An*, which was not a sexual abuse case (that case concerned, instead, negligent driving by an employee), the court found the above criteria fulfilled. It may also be noted that in all those cases, the employee's tort was committed unilaterally on the victim, in the sense that the victim played no part in the commission of the tort. In contrast, the case of a commercial fraud perpetrated by an employee of a trading company against international banks *which could have prevented the fraud by taking basic precautions* presents quite a different situation, as we shall show below.

***Our ruling on the Vicarious Liability Issue***

89 Applying the "close connection" test to the facts of this case, and taking into account the policy considerations relevant to its application, we are of the view that APBS should *not* be held vicariously liable to the Appellants for the fraud committed by Chia. We have arrived at this conclusion for the following reasons.

90 First, although it can be superficially argued that there was a functional connection between Chia's employment as APBS's finance manager and Chia's fraudulent scheme, the connection was in fact illusory. This is because although the position of Finance Manager gave Chia substantial operational authority, it gave him very limited financial authority – in respect of the latter, Chia's authority was limited to placing APBS's surplus funds in fixed deposits, forwarding (with the approval of APBS's general manager) requests for credit facilities to F&N Group Treasury (via APBL Group Finance) for review and ensuring compliance by APBS with covenants and obligations under loans and other credit facilities taken out by APBS (see [10]–[11] above). Chia himself had no power to source for credit facilities for ABPS, much less to borrow money on its behalf. Chia's fraudulent acts lay in falsely representing to the Appellants that APBS had accepted the Credit Facilities and that the forged ABPS Board resolutions which he gave them were genuine. Those fraudulent acts were not connected with Chia's employment at all.

91 Second, it would not be reasonable for this court to hold that it was within APBS's contemplation that there was a risk that Chia might defraud a third party which he had no authority to deal with as Finance Manager. If Chia had defrauded either OCBC (the main banker of the APBL group of companies) or some other bank which APBS had existing dealings with, then the nexus between his fraud and his employment would have been closer. The same may be said if Chia had defrauded APBS itself. Indeed, as a cash-rich company, APBS should, if anything, have been more concerned about Chia defrauding it (however, APBS apparently believed (or at least acted in the belief), to its own cost, that Chia was an honest employee). It is important to remember, in the present case, that Chia had no authority to even source for credit facilities for APBS, let alone borrow money on its behalf. Further, no credit facilities could be accepted on APBS's behalf without a valid APBS Board resolution. In this regard, forging a board resolution to defraud is a serious offence. Given these circumstances, it would not be reasonable to hold that APBS should have expected that Chia would be so audacious as to commit, and commit successfully, a fraud on banks with which it had no prior dealings. Chia's fraud was, in our view, entirely unforeseeable as far as APBS was concerned.

92 Third, the policy consideration of victim compensation is not relevant in this case. The Appellants are banks with international branches and are financially in a much stronger position than APBS to bear the losses caused by Chia's fraud. Further, the Appellants are not vulnerable victims: they have all the means and resources, both administrative and legal, to protect themselves from fraudulent acts such as those committed by Chia. Indeed, the greater part of the fault for the successful commission of the fraud by Chia lies with the Appellants as they failed to adopt and/or

maintain adequate fraud prevention measures. Vicarious liability is a convenient loss-distribution device to compensate an innocent victim. However, in a case where the tort committed by the blameworthy party has caused loss to both the victim and the ultimate defendant (*ie*, where the ultimate defendant is also a victim of the same tort), the imposition of vicarious liability is not justified if the victim bears more fault for the tort than the ultimate defendant (see [78] above). In this connection, it bears reiteration that on the facts of this case, there is little doubt that much of the blame for the successful perpetration of Chia's fraud on the Appellants lay with the Appellants themselves rather than with APBS.

93 Fourth, *vis-à-vis* the policy consideration of deterrence, it works both ways in the present case. Whilst imposing vicarious liability on APBS may induce employers to take more stringent measures when appointing officers to senior positions and/or to be more vigilant in supervising their senior officers' activities, this consideration applies equally (if not with even greater force) to the Appellants against the backdrop of banks lending money to corporate borrowers without first carrying out proper checks and due diligence procedures and/or without first obtaining all the required documentation. Banks play a vital role in the economic life of a community as deposit-taking institutions and suppliers of investment capital for the economy. There is, therefore, a greater need for banks (as compared to trading companies such as APBS) to act responsibly and not take undue risks with their depositors' funds so that the public will have confidence in the banking system.

94 In the present case, Chia's fraud could have been prevented by the Appellants taking very elementary precautions, such as contacting any of APBS's directors before granting the Credit Facilities to verify that APBS had indeed accepted those credit facilities. Although (as noted at [5] above) APBS was careless in its lax supervision of Chia's activities, the Appellants were, in our view, certainly much more careless in readily lending money to (ostensibly) APBS at Chia's request without first complying with their own internal controls and due diligence measures. The Appellants practically allowed Chia to defraud them in their eagerness to do business with APBS. Imposing vicarious liability on APBS for Chia's fraud in the circumstances of this case may create an unacceptable moral hazard, in that banks may, as a result, be encouraged to take only minimal precautions against fraud when dealing with employees holding grand-sounding positions (but with very limited corporate powers), and to merely rely on such employees' employers to have adequate management structures in place for hiring honest and trustworthy staff as well as on the courts to shield them from losses should they be defrauded. Given the vital role of banks in our economy, there is every reason for the law to hold them to a higher standard of financial prudence and responsibility – especially in relation to fraud prevention – than the standard applicable to trading companies such as APBS.

95 Finally, if we apply the five factors proposed by McLachlin J in *Bazley v Curry* at [41] (reproduced at [87] above) for determining whether the "close connection" test is satisfied in any given case, it can be seen that except for the first factor (which we have found to be at most only tenuously present, if not entirely absent), none of the other four factors are present *vis-à-vis* Chia's fraud against the Appellants. Chia's fraud did not further APBS's aims, nor was it related to any friction, confrontation or intimacy inherent in APBS's enterprise. The extent of the power conferred on Chia was limited to banks that APBS had always dealt with (and, being a cash-rich company, APBS did not have to deal with many banks); Chia also had very limited authority where his functions as APBS's financial manager were concerned (see, *inter alia*, [10]–[11] above). Lastly, as we noted earlier (see [92] above), the Appellants were not vulnerable victims, but were instead in a position to dictate terms to prospective borrowers and thereby protect themselves against fraud, which is what every prudent bank would or should do when granting loans to new customers.

96 For all of the above reasons, we do not accept the Appellants' argument that it is fair and just to impose vicarious liability on APBS for Chia's fraud in the present case. Having regard to the

circumstances in which the fraud was perpetrated by Chia, we do not find it just and equitable to shift the burden of the losses suffered by the Appellants to APBS.

**The Negligence Issue**

97 We turn now to the Negligence Issue as set out at sub-para (c) of [32] above. As mentioned earlier, this issue is relevant only between HVB and APBS because negligence was raised as a cause of action by HVB alone (SEB made no claim under this head). HVB's arguments before us are substantially a reiteration of the arguments presented to but rejected by the Judge. The thrust of HVB's case is that APBS owes a common law duty of care to HVB because:

(a) APBS selected Chia specifically to be its finance manager and was in a better position than HVB to exercise control over his activities, but left him unsupervised during the period when he was defrauding the Appellants (among other banks).

(b) APBS had constructive knowledge, if not actual knowledge through deliberate blindness, that Chia was committing unauthorised acts in the course of his work.

(c) APBS assumed responsibility towards HVB as a result of its statutory duty under s 199(2A) of the Companies Act (Cap 50, 2006 Rev Ed), and as a result of its hiring and then failing to properly supervise Chia.

(d) HVB was not obliged, as a matter of banking practice, to take steps to check whether the forged APBS Board resolution which it received from Chia in connection with the HVB Facility was genuine. Its conduct in its dealings with Chia was entirely consistent with reasonable banking practice.

(e) Public policy would not weigh against finding that a duty of care exists in this case as APBS deals, not with an unlimited class of banks, but only with licensed banks in Singapore.

(f) The importance of holding negligent senior management to account and encouraging high standards of corporate governance weighs in favour of finding that APBS owes HVB a duty of care. Since APBS was in a far better position to exercise supervision over Chia and enforce its own internal controls, it would be unjust for the entire risk of Chia's fraud to fall upon an external party such as HVB, especially considering that this would also have the broader effect of undermining Singapore's reputation for good corporate governance and as a commercial and financial centre.

98 We do not propose to deal in detail with the above arguments as we agree with the Judge's reasons for rejecting them. We agree with the Judge, for the reasons which she gave, that no common law duty arises under s 199(2A) of the Companies Act. That provision was enacted to safeguard the assets of a company and, hence, was enacted for the company's benefit, and not for the benefit of any third party who might deal with the company's officers and employees.

99 In so far as a common law duty under the law of negligence is concerned, we likewise agree with the Judge, for the reasons which she gave, that in the circumstances of the present case, there was no relationship between APBS and HVB sufficient to create the requisite degree of proximity, whether physical, circumstantial or causal, needed to satisfy the *Spandeck* test. APBS did not assume any responsibility to HVB in relation to its (APBS's) internal controls and its supervision of Chia. Further, APBS could not have reasonably foreseen that as a consequence of alleged failures in its internal pre-employment procedures and internal controls, an unknown bank in the unknown future

would grant in its (APBS's) name an unauthorised credit facility based on a forged APBS Board resolution and false representations from a finance manager with such limited financial authority as Chia. In this regard, we reiterate that APBL, APBS's parent company, had set up an elaborate internal procedure under the GTP to control the obtaining of loans from banks by the APBL group of companies. Chia, as the finance manager of APBS, had no authority to source for funds, but only had authority "(with approval from the General Manager) [to] forward request[s] for new or increase in credit facilities to [F&N] Group Treasury (via [APBL] Group Finance) for review" [note: 10] (see cl 3.4.1 of the GTP (reproduced at [11] above)).

100 Indeed, the limitation on Chia's authority to deal with banks on APBS's behalf was so severe that even in the absence of any supervisory lapses on APBS's part, Chia would not have had the opportunity to defraud a bank like OCBC (with whom APBS had an existing relationship because of the OCBC Account), much less the opportunity to defraud banks with whom APBS had no prior relationship whatsoever. In our view, the imposition of a duty of care on APBS *vis-à-vis* HVB would mean that any company which employs an employee whose functions include contacting banks might, in the event of the employee defrauding any bank, potentially be liable for the employee's criminal acts if it has not exercised due care in employing the employee. We do not think there are any policy considerations that warrant imposing, in favour of banks, such a duty of care on companies which borrow money from them. By the nature of their business, banks are regular targets of fraudsters. The law should be slow to shield banks from the consequences of their own carelessness or incompetence (see, in this regard, [94] above).

101 In this connection, we also agree with the Judge that HVB belonged to an unlimited class of banks (see the decision of the Privy Council in *Robert William John Davis and Another v Percy Radcliffe and Others* [1990] 1 WLR 821 ("*Robert Davis*"), which the Judge cited at [227] of the HC Judgment in support of her finding on this point). HVB contends that this finding is not factually correct, and that the relevant class of banks to which a duty of care is owed would be limited to licensed banks in Singapore. In our view, this contention is misconceived. The issue here is whether the class of potential claimants is so unacceptably large as to militate against imposing a duty of care on companies which need to borrow money from banks for their businesses. In *Robert Davis*, the appellants sued the government body in charge of regulating banks in the Isle of Man when a bank with which they had deposited money was wound up. It was argued by the appellants that the class of companies which the government body allegedly owed a duty of care to was limited to those doing business in the Isle of Man. The Privy Council disagreed, holding that the alleged duty of care would be owed to an unlimited class of companies, and struck out the appellants' case. Similarly, we are of the view that any duty of care that APBS may owe based on HVB's arguments would be owed to an unlimited class of banks. This would militate against imposing the said duty of care.

102 Another relevant consideration which the Judge took into account is the established law on the duty of care that bank customers owe to banks (see *The Kepitigalla Rubber Estates, Limited v The National Bank of India, Limited* [1909] 2 KB 1010, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] AC 80 ("*Tai Hing Cotton Mill*") and *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182). In *Tai Hing Cotton Mill*, the accounts clerk of a bank's corporate customer forged the signatures of the customer's authorised signatories on about 300 cheques and presented those cheques for payment. The customer's system of internal controls was inadequate to detect the fraud, and the bank honoured the cheques. Nevertheless, the Privy Council held that the customer did not owe a duty to the bank to prevent forgery of its authorised signatories' signatures. As the Judge ruled, this must *a fortiori* be the case *vis-à-vis* the duty (if any) owed by a non-customer (such as APBS) to a bank (see [234] of the HC Judgment).

103 Furthermore, there is a crucial difference between cases like *Tai Hing Cotton Mill* and the

present case. *Tai Hing Cotton Mill* involved forged signatures on cheques. It is very difficult for banks to detect such forgeries by a visual examination of the signatures appearing on cheques that they are asked to honour. Yet, the courts hold banks liable for any failure to spot forgeries because, as Lord Scarman said in *Tai Hing Cotton Mill* (at 106):

> The business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer.

In comparison, in the present case, it was relatively easy for HVB to check whether Chia was authorised to represent that APBS had accepted the HVB Facility. All it had to do was to comply with its own due diligence procedures for verifying the signatures of the directors on the forged APBS Board resolution provided by Chia to show that APBS had (ostensibly) accepted the HVB Facility (especially given that APBS was a customer with whom HVB did not have a prior relationship). That HVB had the ability to prevent Chia's fraud by using reasonable means of verification provides even less reason for this court to impose a duty of care on APBS.

104 Finally, we agree with the Judge that even if APBS did owe HVB a duty of care and, further, breached this duty by its lax supervision of Chia, thereby giving Chia the opportunity to cheat HVB, such breach did not cause HVB's loss. The proximate cause of the loss was HVB's own negligence in believing the representations made by Chia apropos the HVB Facility and in readily accepting as genuine the forged APBS Board resolution which Chia provided in connection with that facility without verifying the directors' signatures on that resolution.

105 We earlier stated (at [84] above) that, conceptually, the "close connection" test under the law of vicarious liability is closely related to the *Spandeck* test under the law of negligence. In our view, given our ruling that APBS is not vicariously liable to the Appellants for Chia's fraud because the fraud was not so closely connected with Chia's employment as to make it fair and just to impose vicarious liability on APBS, the court should exercise caution in imposing liability on APBS under the law of negligence. This is because the "close connection" test requires the court to consider, amongst other factors, whether the tortious acts committed by the employee in the course of his employment were foreseeable, and foreseeability is likewise a key ingredient of liability in negligence (see [73] of *Spandeck*). We see no compelling reason why the doctrines of vicarious liability and negligence should arrive at different conclusions in the present case.

106 For the above reasons, we affirm the Judge's decision to reject HVB's claim based on negligence.

**The Restitution Issue and the Restitutionary Counterclaim Issue**

***Overview***

107 We turn now to SEB's restitutionary claim, which is being pursued as an alternative to the claims based on agency and vicarious liability, and APBS's restitutionary counterclaim (*ie*, the Restitution Issue and the Restitutionary Counterclaim Issue outlined at, respectively, sub-paras (d) and (e) of [32] above).

108 The factual context of SEB's restitutionary claim is as follows. As mentioned at [27] above, between December 2000 and October 2002, Chia withdrew S$45m from the OCBC Account and paid it

into the SEB S$ Account. During the same period, he also withdrew S$45,347,671.23 from the SEB S$ Account and paid it into the OCBC Account. (For convenience, we shall hereafter refer to the S$45m transferred from the OCBC Account to the SEB S$ Account as "the APBS S$45m", and the S$45,347,671.23 transferred from the SEB S$ Account to the OCBC Account as "the SEB S$45.3m".) A portion of the APBS S$45m was used to repay drawings under the MM Facility, which drawings formed part of the SEB S$45.3m paid into the OCBC Account, leaving a balance of S$29,468.723.30 ("the S$29.5m") unpaid under that facility. SEB asserts that it paid the S$29.5m (together with the rest of the SEB S$45.3m) into the OCBC Account under a mistake of law induced by Chia's fraud, and is seeking to recover the S$29.5m from APBS as money had and received.

109 APBS denies liability, and has also brought a restitutionary counterclaim against SEB for the whole of the APBS S$45m, which it asserts was unjustly received by SEB at its expense. As counsel for APBS has made it clear that this counterclaim will be pursued only if SEB succeeds in its restitutionary claim for the S$29.5m, we shall first consider the latter claim.

***The essential elements of a restitutionary claim***

110 The essential elements of a claim in restitution are well settled. As stated by the Judge at [260]–[261] of the HC Judgment, money paid under a mistake, whether of fact or of law, is generally repayable as money had and received (as just mentioned at [108] above, the present case concerns money paid under a mistake of law induced by fraud). The defendant must account for and repay the money if all of the following conditions are satisfied:

(a) the defendant has received a benefit (*ie*, he has been enriched);

(b) the enrichment is at the plaintiff's expense;

(c) it is unjust to allow the defendant to retain the enrichment; and

(d) there are no defences available to the defendant.

These four elements are well-recognised (see, *eg*, the House of Lords case of *Banque Financière de la Cité v Parc (Battersea) Ltd and Others* [1999] 1 AC 221 at 227 and the Singapore High Court case of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] 2 SLR(R) 136 at [70]).

***The arguments in the court below***

111 In the court below, SEB contended that APBS had been enriched by the S$29.5m as a result of the payment of the SEB S$45.3m (of which the S$29.5m formed a part) into the OCBC Account as it had used the money received to pay its debts and dividends. In support of this argument, SEB relied on the "adoption of benefit" principle, *ie*, the principle that (*per* Lord Selborne LC in *Blackburn Building Society v Cunliffe, Brooks, & Co* (1882) 22 Ch D 61 at 71):

> … [T]hose who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts.

SEB also cited, *inter alia*, *Bannatyne v D & C MacIver* [1906] 1 KB 103 ("*Bannatyne*") and *Reid v Rigby & Co* [1894] 2 QB 40 ("*Reid v Rigby*"). Both of those cases involved the factual scenario of an agent borrowing money, ostensibly on behalf of his principal, despite having no authority to do so. Part of

the money borrowed was used by the agent to discharge his principal's liabilities, and the balance was used for the agent's own purposes. In both cases, it was held that the lender could recover from the principal the sum advanced to the agent to the extent to which that sum had been used to discharge the principal's liabilities. The relevant legal principle was articulated by Romer LJ in *Bannatyne* (at 109) as follows:

> Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.

112 APBS sought to rebut SEB's submissions on the "adoption of benefit" principle by pointing out that unlike the factual situation in *Bannatyne* and *Reid v Rigby*, in the present case, Chia, who was the *de facto* borrower under the SEB Facilities (and also under the HVB Facility), did not use the S$29.5m (or, for that matter, any part of the SEB S$45.3m) to discharge *APBS's* liabilities; instead, his intention was to use the money to discharge *his own* liability to APBS in respect of the APBS S$45m which he had misappropriated from the OCBC Account. It was submitted that since the payment of the SEB S$45.3m (including the S$29.5m) into the OCBC Account (which was made on Chia's instructions) merely served to return to APBS money which it had a legal right to recover from Chia, APBS could not be said to have been unjustly enriched by that payment.

113 Additionally, APBS contended that it had not been enriched by the S$29.5m as that sum came from two fresh drawings made on the MM Facility on, respectively, 24 March 2003 for US$13m and 21 May 2003 for US$12m ("the Disputed Drawings"). According to APBS, it did not receive the Disputed Drawings as they were made after 24 October 2002, the last day on which money was transferred from the SEB S$ Account to the OCBC Account (see the table at [130] below). SEB's rebuttal to this argument was that the Disputed Drawings were not fresh drawings on the MM Facility, but "rollovers" of drawings made on the MM Facility prior to 24 October 2002 which had been paid into the OCBC Account as part of the SEB S$45.3m ("the Previous Drawings"); *ie*, according to SEB, the Disputed Drawings were, in essence, the Previous Drawings with their original maturity dates extended. SEB contended that since APBS had received the Previous Drawings and since those drawings had not been repaid, APBS had been enriched by the S$29.5m at its expense.

***The Judge's decision and the issues arising therefrom***

114 Although SEB's restitutionary claim was for only the S$29.5m, the Judge assessed the merits of the claim with reference to the SEB S$45.3m as a whole since that sum included the S$29.5m. She accepted APBS's argument that it (APBS) had not been enriched by the SEB S$45.3m (except to the extent of S$347,671.23). Accordingly, she dismissed SEB's restitutionary claim for the S$29.5m (save to the extent of S$347,671.23) as the S$29.5m was part of the SEB S$45.3m. The Judge gave the following reasons for her decision (see also [33] above):

> (a) APBS could not be said to have been enriched at SEB's expense (save to the extent of S$347,671.23) because S$45m out of the SEB S$45.3m went towards discharging *Chia's* liability to APBS, and not *APBS's* liabilities to other parties (see [269], [275] and [282] of the HC Judgment). This distinguished the present case from *Bannatyne* and *Reid v Rigby*, where the unauthorised loan procured by the agent was used in part to discharge the principal's liabilities, with the result that the principal was held to have adopted the benefit of a corresponding portion of the loan. (The Judge also pointed out (at [269]–[270] of the HC Judgment) two other factual

distinguishing features in *Bannatyne* and *Reid v Rigby*, namely: (i) the agent in those two cases was authorised to pay off the principal's debts; and (ii) the unauthorised loan was paid into a bank account that genuinely belonged to the principal, as opposed to a bank account which, although nominally in the principal's name, was in reality the agent's personal bank account (as was the position *vis-à-vis* the SEB Accounts).) In the circumstances, APBS could not be said to have adopted the benefit of S$45m out of the SEB S$45.3m. This in turn meant that APBS was enriched by only S$347,671.23 (see [283] of the HC Judgment).

(b) APBS's enrichment of S$347,671.23 was unjust because APBS had not provided any consideration for its receipt of that sum (see [291] of the HC Judgment). Mistake, however, was not an applicable unjust factor because SEB had not been labouring under any operative mistake when it paid the SEB S$45.3m (including the S$29.5m) into the OCBC Account (see [287] of the HC Judgment).

(c) APBS could not rely on the defence of change of position to defeat SEB's restitutionary claim. There was no anticipatory change of position by APBS as it did not pay the APBS S$45m to SEB (via the SEB S$ Account) in clear expectation of an imminent payment in by SEB (see [322] of the HC Judgment). The defence of extraordinary change of position was also not made out as APBS had not proved the requisite "but for" causal link between its receipt of the SEB S$45.3m and its alleged change of position (see [329] of the HC Judgment). APBS thus had to make restitution of S$347,671.23 to SEB (see [330] of the HC Judgment).

115 Two other aspects of the Judge's decision should be noted. First, in holding that the quantum of APBS's enrichment was limited to S$347,671.23, the Judge expressly stated that she was not applying the running account method of quantifying enrichment ("the running account method") as she considered that it "[did] not sit well" (see [301] of the HC Judgment) with the facts of this case. (The running account method would involve setting off the cross-payments between the SEB S$ Account and the OCBC Account, with the excess identified as the net extant enrichment in APBS's hands.) Second, without expressly deciding whether or not the S$29.5m came from the Disputed Drawings, the Judge held that, in any case, the Disputed Drawings were fresh drawings on the MM Facility which were never paid to APBS, and not "rollovers" of the Previous Drawings (see [316]–[318] of the HC Judgment).

116 Arising from the Judge's decision, the issues which SEB and APBS have raised in relation to the Restitution Issue are as follows:

(a) whether the payment of the SEB S$45.3m into the OCBC Account discharged Chia's liability to APBS in respect of the APBS S$45m misappropriated from that account ("the discharge of liability issue");

(b) whether APBS was enriched by the S$29.5m claimed by SEB in terms of having adopted the benefit of that sum ("the 'adoption of benefit' issue");

(c) whether the Judge was correct in ruling that the running account method was not the appropriate method for ascertaining the quantum of enrichment received by APBS from SEB ("the quantification of enrichment issue");

(d) whether the Disputed Drawings were fresh drawings made on the MM Facility after 24 October 2002, such that they did not form part of the SEB S$45.3m paid into the OCBC Account ("the Disputed Drawings issue");

(e) whether there is any unjust factor to support SEB's restitutionary claim ("the unjust factor issue"); and

(f) whether the Judge was right to reject APBS's defence of change of position ("the change of position issue").

We shall now address these issues in turn.

***The discharge of liability issue***

1 1 7 *Vis-à-vis* the issue of whether the payment of the SEB S$45.3m into the OCBC Account discharged Chia's liability to repay APBS the APBS S$45m misappropriated from that account, SEB's submission is that the said payment did not have that effect for the following reasons:

(a) There was no evidence that Chia instructed SEB to pay the SEB S$45.3m into the OCBC Account in order to discharge his liability to APBS in respect of the APBS S$45m. Instead, his only intention was to replenish the OCBC Account so that he could continue "round-tripping" money between that account and the SEB S$ Account.

(b) There was also no evidence that SEB agreed on behalf of Chia that the payment of the SEB S$45.3m into the OCBC Account would be for the purpose of discharging his liability to APBS.

(c) APBS itself never regarded the said payment as discharging Chia's liability to it, and therefore never accepted the SEB S$45.3m as repayment of Chia's debt.

(d) In any case, there was, in law, no liability owed by Chia to APBS to be discharged in the first place because while Chia's misappropriation of the APBS S$45m gave rise to criminal and tortious wrongs, those wrongs were entirely different from a recognised legal debt derived from a contractually-binding obligation between the parties.

118 The Judge rejected all of SEB's arguments and held that the payment of the SEB S$45.3m into the OCBC Account did discharge Chia's liability to APBS in respect of the APBS S$45m misappropriated from that account. We agree with the Judge's conclusion on this issue. There is no doubt that Chia was liable to repay APBS the APBS S$45m, irrespective of his criminal liability apropos his misappropriation of that sum. There is also no doubt that, as SEB submitted, Chia paid (or rather, procured SEB to pay) the SEB S$45.3m into the OCBC Account in order to replenish that account so that he could continue to draw on it for the purposes of his "round-tripping" scheme and thereby sustain his fraudulent activities. But, the very act of replenishing the OCBC Account meant that the existing shortfall therein, *ie*, the corresponding amount misappropriated by Chia, would have been repaid. Every payment into the OCBC Account for the purpose of replenishing it therefore *did* discharge Chia's liability to APBS in respect of the APBS S$45m by a corresponding amount.

119 With respect to SEB's argument that APBS did not regard the payment of the SEB S$45.3m as discharging Chia's liability to it and therefore never accepted the SEB S$45.3m as repayment of Chia's debt, our view is that this argument is based on a fiction. It is an entirely unrealistic argument as it bears no relevance to the facts of this case. It is not disputed that neither SEB nor APBS knew of Chia's "round-tripping" of money between the OCBC Account and the SEB S$ Account. Chia was able to do what he liked with these two accounts because he was in full control of both accounts, and thus could – and did – treat them as though they were his personal accounts. For this reason, in analysing the discharge of liability issue, what is important is Chia's intention in "round-tripping" money between these two accounts (which was to reduce the shortfall in the OCBC Account in order

to draw on it again), and not SEB's intention in paying the SEB S$45.3m into the OCBC Account as SEB was merely carrying out Chia's instructions. Similarly, given that both SEB and APBS were unaware at all material times of Chia's "round-tripping" scheme, APBS's argument based on Hobhouse J's "tender and acceptance" analysis in *TSB Bank of Scotland Plc v Welwyn Hatfield District Council* [1993] 2 Bank LR 267 at 271–273 (*viz*, that APBS had "accepted" Chia's "tender" of repayment of the APBS S$45m by retaining the SEB S$45.3m in the OCBC Account and dealing with it) is entirely unrealistic and irrelevant.

***The "adoption of benefit" issue***

120 We move on now to the "adoption of benefit" issue, in respect of which the question to be decided is whether APBS was enriched by the S$29.5m claimed by SEB in terms of having adopted the benefit of that sum. In this regard, SEB has reiterated before us its contention in the court below, namely, that APBS adopted the benefit of (and was thus enriched by) the payment of the SEB S$45.3m (including the S$29.5m) into the OCBC Account as it used the money to pay its debts and dividends (see [111] above). SEB submits that the "adoption of benefit" principle would still apply even if this court were to hold (contrary to SEB's argument) that the payment of the SEB S$45.3m into the OCBC Account discharged Chia's liability to APBS in respect of the APBS S$45m misappropriated from that account. In support of its argument, SEB, apart from citing the cases which it relied on in the court below, has also referred to (*inter alia*) *Re The Japanese Curtains and Patent Fabric Company (Limited), Ex parte Shoolbred* (1880) 28 WR 339 ("*Re Japanese Curtains*"), *Barrow v Bank of New South Wales* [1931] VLR 323 ("*Barrow*") and *Hazlewood et al v West Coast Securities Ltd* (1974) 49 DLR (3d) 46 ("*Hazlewood*"). The factual scenario in these three cases (in simplified form) was that an agent obtained money by fraudulent means and used part of the money for his principal's purposes. It was held in all three cases that the principal had to make restitution of that part of the fraudulently obtained money which it had either directly or indirectly benefited from.

121 In rebuttal to SEB's submissions, APBS has made three arguments, as follows:

(a) The "adoption of benefit" cases cited by SEB are all distinguishable from the instant case. In particular, all those cases involved money flowing in one direction only (*viz*, from the defrauded plaintiff to the defendant), whereas in the present case, there have been cross-payments between APBS and SEB, which are both victims of Chia's fraud. APBS and SEB are simultaneously defrauded parties as well as recipients of fraudulently obtained money.

(b) The true test applied by the courts in the "adoption of benefit" cases relied on by SEB is whether the defendant would be left worse off if it were ordered to make restitution of the alleged benefit received. Applying this test, it is clear that to order APBS to make restitution of the S$29.5m claimed by SEB would be to increase APBS's liabilities *vis-à-vis* SEB.

(c) As a matter of common sense, APBS cannot be said to have adopted the benefit of S$45m out of the SEB S$45.3m paid into the OCBC Account. The factual scenario in this case (as far as S$45m out of the SEB S$45.3m is concerned) is akin to that of a thief stealing S$100 from X, handing the S$100 to Y and then stealing S$100 from Y for the purpose of returning S$100 to X in order to cover his tracks: in such a situation, it cannot be said that X has been enriched by the S$100 stolen from Y and must make restitution of that sum to the latter.

122 We agree with APBS's argument at sub-para (c) of [121] above. As a matter of common sense, it is difficult to see how APBS can be said to have obtained any benefit from S$45m out of the SEB S$45.3m paid into the OCBC Account as the only effect of APBS's receipt of the sum of S$45m was to restore APBS to essentially the same position that it was in before Chia misappropriated the APBS

S$45m. The end result of Chia's "round-tripping" of money between the OCBC Account and the SEB S$ Account was that, leaving aside the sum of S$347,671.23, APBS was left neither better off nor worse off, whereas if APBS is now ordered to pay SEB the S$29.5m, APBS will end up worse off.

123 In our view, although *Bannatyne*, *Reid v Rigby*, *Re Japanese Curtains*, *Barrow* and *Hazlewood* appear to establish a plaintiff's right of recovery against a defendant who benefits (whether directly or indirectly) from money fraudulently obtained from the plaintiff by a fraudster, those decisions were, as counsel for APBS pointed out, all arrived at in a factual context wholly different from that before this court. In all those cases, the plaintiff, who had been defrauded into making payment by the fraudster, had not at any point itself been in receipt of money misappropriated from the defendant by the same fraudster. In our view, this critical feature distinguishes the present case from the aforesaid authorities.

124 Furthermore, where *Bannatyne* and *Reid v Rigby* are concerned, they are (as the Judge noted) distinguishable on the ground that the unauthorised loan obtained by the agent in those two cases was used to pay off the principal's debts, whereas in the present case, Chia used the SEB S$45.3m not to pay off APBS's debts, but to discharge his own liability to APBS. In any event, even if the SEB S$45.3m had been used to pay off APBS's debts, given that APBS never requested for the SEB S$45.3m to be paid into the OCBC Account, never authorised Chia to request for or procure such payment and was unaware at all material times of the said payment, the mere fact that APBS obtained a benefit from the payment (assuming the SEB S$45.3m was indeed used to pay off APBS's debts) is not in itself sufficient to give rise to an equity against APBS (see, in this regard, the majority decision in *In re Cleadon Trust, Limited* [1939] Ch 286 (especially at 322–326), which distinguished *Bannatyne* and *Reid v Rigby* on this ground; see also *English Private Law* (Andrew Burrows ed) (Oxford University Press, 2nd Ed, 2007) at paras 14.33 and 18.38).

125 Given our ruling that APBS cannot be said to have *adopted the benefit* of S$45m out of the SEB S$45.3m, it follows that APBS also cannot be said to have adopted the benefit of the S$29.5m claimed by SEB. This does not, however, mean that APBS has therefore not been *enriched* by the S$29.5m. The quantification of enrichment issue is relevant in this regard, and we now turn our attention to it.

***The quantification of enrichment issue***

126 In the court below, the Judge ruled that the running account method was inappropriate for determining the quantum of enrichment received by APBS from SEB as this was a case where "the victims of [a] fraud [were] suing each other in a personal claim for money had and received, and the restitutionary claim [was] subject to the change of position defence" (see [301] of the HC Judgment). In support of her view, the Judge cited the following passage from Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005) at p 226:

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

127 Before us, APBS has contended that the Judge wrongly rejected the running account method on the facts of this case. It points out that the Judge quoted only a portion of Prof Birks' discussion of the defence of change of position, and submits that the full passage at pp 225–226 of *Unjust Enrichment* in fact advocates the converse position. Specifically, APBS argues that it is Prof Birks' view that it is precisely in cases where the plaintiff and the defendant have potential restitutionary claims against each another for cross-payments made that the running account method should be

adopted to ascertain the net quantum of enrichment received by the defendant. In this regard, APBS submits that no distinction should be drawn between cases of void contracts due to ineffective transactions (such as the interest rate swap cases in England, where several local authorities made payments to banks pursuant to interest rate swap agreements which were subsequently held by the English courts to be outside the scope of the local authorities' powers and, thus, void *ab initio* (see, *eg*, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 ("*Westdeutsche Landesbank v Islington LBC*")) and cases involving fraud.

128 In support of the aforesaid arguments, APBS has cited the following passage from pp 225–226 of Prof Birks' *Unjust Enrichment*:

> Where a benefit has been received by the claimant from the defendant in exchange for the enrichment which he is seeking to recover from the defendant, that exchange-benefit can be seen as a disenrichment of the defendant …
>
> …
>
> … [W]here there has been an exchange[,] it must be true that, if one side recovers the value which he has transferred, the basis of his own receipt of the exchange-benefit must also have failed. In short, if the defendant is unjustly enriched at [the claimant's] expense, so also is the claimant enriched at the defendant's expense. I give you gold in exchange for money. The contract is invalid. The basis of my receipt of the money fails. You can claim restitution. But, necessarily, the basis of your receipt of the gold also fails.
>
> That bilateral unjust enrichment shows that both sides have claims … *Each party could be left to its own claim. But nowadays, as is illustrated in all the swaps cases* [*ie*, the interest rate swap cases]*, that is not allowed, and the effect is to reduce them* [*ie*, the two sides' claims] *to a single claim for the difference in value between the two performances. The defendant's enrichment in the swaps cases was the rolling balance between the payments on both sides*.
>
> The reason for tying the two claims together is explained by German jurists. They have shown that the two-claim approach can produce bizarre results. One claimant may fortuitously encounter an obstacle or bar which the other escapes, with the consequence that for very slight reasons[,] the parties to the one exchange may end up in very different situations. For example, if the law does not focus on the one enrichment which consists in [*sic*] the difference between the two performances, one party may be able to use the disenrichment defence and the other [may] not. In the common law[,] the old way of escaping from these problems was the very fierce rule that denied restitution altogether unless the parties could be put back into exactly their original position. Under that regime[,] 'counter-restitution impossible' was a peremptory and absolute defence. That blunt instrument has been given up. The same problems are now evaded by applying, in money, what German law calls the '*Saldo*' theory (*Saldo* being an old Italian banking word for a balance or difference, here borrowed to denote the balance or difference between the exchanged performances). In short[,] restitution is allowed subject to pecuniary counter-restitution, thus achieving *restitution of the difference*.
>
> [emphasis added]

129 We agree with APBS's submission that the Judge erred in rejecting the running account method for the reasons given by her. The Judge's concern was that where the victims of the same fraudster brought restitutionary cross-claims against each other, the outcome of each victim's claim might be different because one victim might be able to rely on the defence of change of position whereas the

other might not. This factor, the Judge considered, rendered the running account method inappropriate in the aforesaid scenario. With respect, we differ from the Judge on this point. In our view, for the reasons stated by Prof Birks at pp 225–226 of *Unjust Enrichment* (reproduced at [128] above), it is precisely where the victims of the same fraudster are suing each other in restitution (as in the present case) that the victims' claims should be tied together, which is the effect that applying the running account method would have. We also agree with APBS that the present case, although involving cross-payments between victims of the same fraudster, is no different from a case involving cross-payments under a contract which is subsequently found to be void *a b initio* (such as the interest rate swap case of *Westdeutsche Landesbank v Islington LBC*). As all the transactions effected by Chia *vis-à-vis* the SEB S$ Account and the OCBC Account were fraudulent, the cross-payments between SEB and APBS pursuant to those transactions were analogous to payments made under void contracts.

130 Applying the running account method, APBS was enriched by S$347,671.23, that being the net amount which APBS retained after all the cross-payments between the OCBC Account and the SEB S$ Account were set off against one another. This result can be immediately seen from the undisputed "Table of Fund Transfers" set out at [252] of the HC Judgment, which is reproduced in full below:

**Table of Fund Transfers**

| **Date** | **OCBC [Account] bank statement reference** | **SEB S$ [Account] bank statement reference** | **OCBC [Account] to SEB S$ [Account]** | **SEB S$ [Account] to OCBC [Account]** | **Running balance** |
|---|---|---|---|---|---|
| | | | S$ | S$ | S$ |
| 13 Dec 00 | CHQ 098620 | 08TC1312/7 | 3,000,000.00 | – | 3,000,000.00 |
| 13 Dec 00 | CHQ 098621 | 08TC1312/7 | 2,000,000.00 | – | 5,000,000.00 |
| 23 Feb 01 | CHQ 100461 | 08TC2302/1 | 3,000,000.00 | – | 8,000,000.00 |
| 23 Feb 01 | CHQ 100460 | 08TC2302/1 | 2,000,000.00 | – | 10,000,000.00 |
| 16 Jul 01 | Receipts-MAS | 08TC1207/41 | – | 5,070,835.61 | 4,929,164.39 |
| 23 Jul 01 | Receipts-MAS | 08TC1907/10 | – | 5,046,356.16 | (117,191.77) |
| 13 Nov 01 | CHQ 109098 | 08TC1211/62 | 3,000,000.00 | – | 2,882,808.23 |
| 13 Nov 01 | CHQ 109097 | 08TC1211/62 | 2,000,000.00 | – | 4,882,808.23 |
| 20 Nov 01 | CHQ 109489 | 08TC1911/35 | 3,000,000.00 | – | 7,882,808.23 |
| 20 Nov 01 | CHQ 109490 | 08TC1911/35 | 2,000,000.00 | – | 9,882,808.23 |
| 28 Nov 01 | CHQ 109640 | 08TC2711/59 | 3,000,000.00 | – | 12,882,808.23 |
| 28 Nov 01 | CHQ 109642 | 08TC2711/59 | 2,000,000.00 | – | 14,882,808.23 |
| 22 Jan 02 | CHQ 111210 | 02TC/722 | 3,000,000.00 | – | 17,882,808.23 |
| 22 Jan 02 | CHQ 111268 | 02TC/722 | 2,000,000.00 | – | 19,882,808.23 |

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

***The Disputed Drawings issue***

131 Turning now to the Disputed Drawings issue, as mentioned earlier (at [113] above), one of the arguments raised by APBS in contending that it was not enriched by the S$29.5m claimed by SEB was that that sum came from the Disputed Drawings, which, being fresh drawings made on the MM Facility after 24 October 2002 (the last day on which money was transferred from the SEB S$ Account to the OCBC Account), were not paid into the OCBC Account. On this point, the Judge held that the Disputed Drawings were "new drawings … [that] were not paid to or received by APBS[;] … [t]he restitutionary claim [was] therefore against Chia and not APBS" (see [318] of the HC Judgment).

132 We agree with the Judge, for the reasons which she gave, that the Disputed Drawings were fresh drawings on the MM Facility. The arrangement between SEB and Chia was that the Previous Drawings should be treated as having been repaid (as opposed to "rolled over") so that Chia could draw on the MM Facility again for whatever purposes he had in mind.

133 The above conclusion suffices to dispose of the Disputed Drawings issue. We do not think it is necessary for us to go on to determine whether the fact that the Previous Drawings were treated as having been repaid and that the Disputed Drawings were fresh drawings which were not paid into the OCBC Account would have constituted a sufficient defence to SEB's restitutionary claim for the S$29.5m. It is only necessary to say that since APBS did actually receive the S$29.5m as part of the SEB S$45.3m, this fact cannot be changed by the arrangement between SEB and Chia to treat the Previous Drawings as having been repaid. In other words, it is arguable that the S$29.5m would have been an extant enrichment in APBS's hands but for the fact that S$45m out of the SEB S$45.3m went towards discharging Chia's liability to APBS in respect of the APBS S$45m.

***The unjust factor issue***

134 We turn next to the unjust factor issue. Given our ruling that APBS has been enriched at SEB's expense by only S$347,671.23 (and not by the S$29.5m claimed), we need only consider whether there is any unjust factor to support SEB's restitutionary claim to the extent of S$347,671.23. In this regard, it is common ground that SEB bears the burden of proving that the circumstances surrounding APBS's enrichment render it unjust for APBS to retain the said sum.

135 In the court below, the Judge held that SEB could rely on the unjust factor of *total failure of consideration* as APBS had not provided any consideration for its receipt of S$347,671.23 out of the SEB S$45.3m paid into the OCBC Account, *but* SEB could not rely on the unjust factor of *mistake* because there was no operative mistake on its part when it made the said payment of the SEB S$45.3m. Our earlier ruling (at [118] above) that the payment of the SEB S$45.3m into the OCBC Account did discharge Chia's liability to APBS in respect of the APBS S$45m affirms the Judge's decision that APBS provided consideration for only S$45m out of the SEB S$45.3m; *ie*, the Judge was correct to hold that the unjust factor of total failure of consideration operated in respect of the remaining sum of S$347,671.23. We shall thus discuss only the Judge's rejection of mistake as an unjust factor.

136 In this connection, the Judge said (at [287] of the HC Judgment):

> In my judgment, there is *no* operative mistake as SEB accepted the certified extracts of the [APBS] [B]oard resolutions without verification of the documents as to [the] identity and [the] signature of the persons signing … In other words, [SEB] accepted the certified extracts of the [APBS] [B]oard resolutions without verification of the authority of Chia. I concluded on the evidence that [SEB] willingly took the risk of Chia acting fraudulently, and in doing so, and with the risk materialising, [SEB] must bear the consequences of Chia's deceit practised on SEB. In the words of Lord Hoffmann in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558[,] "the real point is whether the person who made the payment took the risk that he might be wrong" (at [26]). *Goff & Jones* [*viz*, Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 7th Ed, 2007)] (… at para 4-031) suggests that one is reckless if one failed to make a full inquiry to allay his or her suspicions, or where there were no clear conclusions; but yet, nevertheless, transferred the benefit. On either test, for the reasons given, SEB took the risk of Chia's acting fraudulently as regards his authority and accordingly there is *no* operative mistake, and I so find. [emphasis in original]

137 SEB submits that the Judge erred in reaching the above conclusion because, in the context of payments made under a mistake of fact or a mistake of law, leaving aside those extreme circumstances where the carelessness of the plaintiff is so gross that he must be considered to have assumed responsibility for his own mistake in making payment (see *Saunders & Co (a firm) v Hague* [2004] 2 NZLR 475 at [121] and Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 212), the plaintiff may be said to have voluntarily assumed the risk of making a mistaken payment only if either, as stated in *Kelly v Solari* (1841) 9 M & W 54; 152 ER 24:

> (a) the plaintiff, "although he might by investigation learn [of] the state of facts [or law] more accurately, … declines to do so, and chooses to pay the money notwithstanding" (at 58; 26); or
>
> (b) the payment is made "intentionally … without reference to the truth or falsehood of the fact [or legal premise upon which the payment is based], the plaintiff meaning to waive all inquiry into it" (at 59; 26).

138 We agree with SEB's submissions on this point. In our view, the evidence does not justify a finding that SEB's officers, in accepting as genuine the forged APBS Board resolutions provided by

Chia without first verifying his authority to submit documents on APBS's behalf, voluntarily assumed the risk that Chia might have forged those resolutions. SEB's officers were undoubtedly careless or imprudent in not going further to check whether Chia in fact had authority to submit documents on APBS's behalf, but they were lulled into a false sense of security by the position that Chia was holding (*viz*, that of Finance Manager), and proceeded on the basis that a finance manager must or should have the authority to do what Chia did. The false sense of security on the part of SEB's officers arose in the context of a bank granting credit facilities to a new customer which it considered to be reputable and creditworthy. The very laxity shown by SEB's officers in verifying the authenticity of the documents provided by Chia amply shows that far from contemplating or perceiving the danger of being defrauded by Chia (and, in turn, the risk of making mistaken payments on Chia's instructions), SEB's officers assumed that since Chia was APBS's finance manager, they were dealing with an authorised and trustworthy agent of APBS.

***The change of position issue***

139 Moving on now to the change of position issue, the question to be addressed is whether the Judge was right to reject APBS's defence of change of position.

140 In the court below, APBS pleaded, by way of defence to SEB's restitutionary claim, both *anticipatory* change of position and *extraordinary* change of position. Both defences were rejected by the Judge (see sub-para (c) of [114] above). With respect to the defence of *extraordinary* change of position, the Judge rejected it on the ground that APBS had failed to demonstrate that "but for" its receipt of the SEB S$45.3m, it would not have paid the dividends, excise duties, rebates and debts which it paid (APBS's case was that the whole of the SEB S$45.3m was spent on such payments). Although APBS has not tried to revive this defence before us, we should state, for completeness, that we agree with the Judge's rejection of it. This is because, as mentioned at [119] above, both APBS and SEB were unaware at all material times of Chia's "round-tripping" of money between the SEB S$ Account and the OCBC Account. It follows that APBS would not have known of the payment of the SEB S$45.3m into the OCBC Account, and therefore could not have consciously or deliberately changed its position following its receipt of that sum.

141 With regard to the defence of *anticipatory* change of position, the Judge rejected it on the ground that there was insufficient evidence to demonstrate that APBS had paid the APBS S$45m to SEB "in 'clear expectation of an *imminent* payment in' by SEB" [emphasis added] (see [322] of the HC Judgment, where reference was made to *Parkway Properties Pte Ltd and another v United Artists Singapore Theatres Pte Ltd and another* [2003] 2 SLR(R) 103 ("*Parkway Properties*") at [46]). The material part of [322] of the HC Judgment reads as follows:

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

142 Before us, APBS has argued that the Judge's finding on the defence of anticipatory change of position is wrong as there is evidence that "but for" the expectation that the APBS S$45m would be returned with interest, its officers would not have co-signed the OCBC Cheques by which Chia fraudulently withdrew the APBS S$45m from the OCBC Account, ostensibly for deposit with Citibank (see [26]–[27] above). In support of this argument, APBS has referred to the following passage at

[289] of the HC Judgment:

> … [SEB] accepts that Chia misappropriated moneys from APBS, and he deposited the OCBC [C]heques into the SEB S$ Account. It is not disputed, and it is SEB's evidence that the telegraphic transfers from the SEB S$ Account to the OCBC Account were on Chia's instructions, and the SEB S$ Account was debited accordingly. Jimmy Tan [a senior financial analyst in APBL Group Finance] and Teo Hun Teck [Chia's subordinate in APBS Finance (see [26] above)] testified that *they had co-signed the OCBC [C]heques on Chia's representation that he was placing the moneys drawn on the OCBC Account on fixed deposits with Citibank*. Teo Hun Teck's evidence is that *moneys that Chia ostensibly placed on fixed deposits with Citibank were returned to the OCBC Account with interest*. [emphasis added]

143 In our view, APBS's argument has no merit for two reasons. The first is that the above passage merely describes how Chia persuaded his co-signatories ("the Co-Signatories") to sign the OCBC Cheques; it says nothing about whether the Co-Signatories anticipated anything and, if so, what they anticipated when they signed those cheques. It appears from the evidence that the Co-Signatories signed the OCBC Cheques because they believed Chia's representation that the money withdrawn from the OCBC Account would be deposited with Citibank to earn higher interest than the interest offered by OCBC. The Co-Signatories were accustomed to signing cheques to withdraw money from the OCBC Account for deposit with other banks; therefore, they would have signed the OCBC Cheques as a matter of course, and would have taken it for granted that the money deposited with (ostensibly) Citibank would be returned with interest upon maturity. Given these circumstances, we find APBS's argument on the defence of anticipatory change of position quite unrealistic, just as we earlier found (at [119] above) APBS's "tender and acceptance" argument *vis-à-vis* the discharge of liability issue unrealistic and irrelevant on the facts of this case.

144 The second reason why we do not accept APBS's submissions on the defence of anticipatory change of position is that this defence will succeed only if the change of position relied on is a change for the worse, and not for the better; a detriment must result from the alleged change of position. In the present case, this essential requirement has not been satisfied as, on APBS's own account of the material events, the Co-Signatories, when signing the OCBC Cheques, believed that APBS would change its position for the better, in that the money deposited with (ostensibly) Citibank would be returned in due course with higher interest than if the money had been deposited with OCBC.

145 We conclude our discussion of the defence of anticipatory change of position with an observation on this court's statement in *Parkway Properties* that for this defence to succeed, there must be "payment out by the defendant … in clear expectation of an imminent payment in by the plaintiff" (at [46]). In our view, the requirement of *imminence* of the anticipated payment (or other benefit) from the plaintiff is not supported by any authority. The case in which the defence of anticipatory change of position was first accepted by the Privy Council, *viz*, *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 ("*Dextra Bank*"), did not mention such a requirement. In their leading joint judgment in that case, Lord Goff of Chieveley and Lord Bingham of Cornhill said with regard to this defence (at [38]):

> … [I]t is difficult to see what relevant distinction can be drawn between (1) a case in which the defendant expends on some extraordinary expenditure all or part of a sum of money which he has received from the plaintiff, and (2) one in which *the defendant incurs such expenditure in the expectation that he will receive the sum of money from the plaintiff, which he does in fact receive*. … *It is surely no abuse of language to say, in the second case as in the first, that the defendant has incurred the expenditure in reliance on the plaintiff's payment or, as is sometimes*

*said, on the faith of the payment. It is true that, in the second case, the defendant relied on the payment being made to him in the future (as well as relying on such payment, when made, being a valid payment); but, provided that his change of position was in good faith, it should provide, pro tanto at least, a good defence* because it would be inequitable to require the defendant to make restitution, or to make restitution in full. [emphasis added]

146 In *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 ("*Commerzbank AG*"), where the defence of anticipatory change of position was accepted as part of English law, the English CA rejected the element of imminence of the anticipated payment from the plaintiff as a requirement of the defence. In that case, counsel for the defendant suggested that this requirement was essential to the defence by submitting that the anticipatory change of position and the subsequent receipt of payment in *Dextra Bank* were transactions which were "so close together in point of time that they could really be treated as part and parcel of one transaction" (see *Commerzbank AG* at [63]). Munby J rejected this argument and stated (see, likewise, [63] of *Commerzbank AG*):

> The only point [made by the Privy Council in *Dextra Bank*] is that expressed by the learned editors of [Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 5th Ed, 1998)] at para 40-005:
>
> > "… *The burden of establishing the defence will become much greater if the evidence does not suggest a link with the anticipatory payment and the subsequent receipt of a payment, particularly if the receipts are received sometime after the anticipatory change of position*. ***But in each case it will be a question of fact for the court to determine*** ." Precisely so: there is no point of legal principle here; it is a question of fact.
>
> [emphasis added in italics and bold italics]

147 In our view, imminence of the anticipated payment from the plaintiff is not an essential element of the defence of anticipatory change of position. The critical element is, instead, the causal link between the change of position by the defendant and his reliance on the receipt of an anticipated payment (or other benefit) from the plaintiff. It is a question of fact in each case whether this causal link is present.

***Summary of our decision on the Restitution Issue***

148 To summarise our rulings on the various issues discussed in relation to the Restitution Issue, we hold as follows:

(a) The payment of the SEB S$45.3m into the OCBC Account did discharge Chia's liability to APBS in respect of the APBS S$45m misappropriated from that account (see [118] above). Therefore, APBS cannot be said to have been enriched at SEB's expense by S$45m out of the SEB S$45.3m.

(b) APBS also cannot be said to have adopted the benefit of the S$29.5m claimed by SEB (which formed part of the SEB S$45.3m) as the "adoption of benefit" principle is completely unrealistic in the circumstances of this case (see [122]–[124] above).

(c) Although APBS cannot be said to have adopted the benefit of the S$29.5m, it has, based on the running account method, nonetheless been enriched by the sum of S$347,671.23 at SEB's expense (see [130] above). In this regard, contrary to the Judge's view, the running account method is the appropriate method for quantifying APBS's enrichment in the present case (see

[129] above).

(d) As between SEB and Chia, the Previous Drawings were treated as repaid, and the Disputed Drawings were fresh drawings on the MM Facility that were never paid into the OCBC Account (see [132] above). However, it is not necessary for us to decide whether this fact would, in itself, provide APBS with a defence to SEB's restitutionary claim if APBS had indeed been enriched by the S$29.5m (see [133] above).

(e) APBS's enrichment by the sum of S$347,671.23 was unjust because APBS received this sum without providing any consideration (see [135] above), and because SEB paid this sum (and, likewise, the rest of the SEB S$45.3m) into the OCBC Account under an operative mistake (see [137]–[138] above).

(f) APBS has not succeeded in establishing the defence of change of position in terms of both extraordinary change of position and anticipatory change of position (see [140] and [143]–[144] above). *Vis-à-vis* the latter defence, imminence of the anticipated payment or other benefit from the plaintiff is not an essential element (see [145]–[147] above).

149 Since APBS has been unjustly enriched by the sum of S$347,671.23 at SEB's expense and cannot rely on the defence of change of position, it must make restitution of the said sum to SEB. SEB's restitutionary claim succeeds only to this extent (*cf* the S$29.5m claimed by SEB). In the circumstances, it is not necessary for us to deal with APBS's restitutionary counterclaim against SEB in respect of the APBS S$45m.

**Conclusion**

150 For the above reasons, both SEB's appeal (*viz*, CA 121/2009) and HVB's appeal (*viz*, CA 122/2009) are dismissed with costs and the usual consequential orders.

---

[note: 1] See the Appellant's Core Bundle dated 9 January 2010 filed by HVB for CA 122/2009 ("ACB (CA 122)") at vol 2, Pt 1, p 342.

[note: 2] *Id* at pp 338–340.

[note: 3] See the 1st Respondent's Core Bundle filed by APBS on 23 February 2010 for CA 121/2009 ("RCB (CA 121)") at vol 2, p 265.

[note: 4] *Ibid*.

[note: 5] See RCB (CA 121) at vol 2, pp 331–333.

[note: 6] See the Joint Record of Appeal filed on 23 December 2009 for CA 121/2009 and CA 122/2009 ("ROA") at vol 3, Pt 7, p 3229.

[note: 7] *Ibid*.

[note: 8] See ROA at vol 3, Pt 6, p 2983.

[note: 9] See p 84 of the Appellant's Supplementary Core Bundle of Documents dated 22 April 2010

filed by HVB for CA 122/2009.

[note: 10] See ACB (CA 122) at vol 2, Pt 1, p 339.

Copyright © Government of Singapore.