IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 04

Suit No 435 of 2014

Between

Major Shipping & Trading Inc

… *Plaintiff*

And

Standard Chartered Bank
(Singapore) Limited

… *Defendant*

GROUNDS OF DECISION

[Banking] — [Accounts]

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Major Shipping & Trading Inc
v
Standard Chartered Bank (Singapore) Ltd

[2018] SGHC 04

High Court — Suit No 435 of 2014
Kannan Ramesh J
21–24, 28 February; 1–3, 7–10 March; 5–7, 12 April; 25 May; 3, 21, 24 July; 6 September 2017

4 January 2018

Kannan Ramesh J:

1 Between 17 and 24 June 2013, Standard Chartered Bank ("the Bank") executed four transfers of funds ("the Four Transactions") totalling US$1,838,720.51 from the plaintiff's account with the Bank ("the Account"). By this suit, the plaintiff sought to recover the monies transferred out of the Account. On 6 September 2017, I dismissed the plaintiff's claim with detailed oral grounds. The plaintiff has now appealed. These are the full grounds of my decision.

Facts

The parties

2 The plaintiff is a company incorporated in the British Virgin Islands and is in the business of trading and shipping cement clinker. Mr Molla Mohammad Majnu ("Mr Majnu") and Mr Mohammed Jahangir Alam ("Mr Alam") are the beneficial owners of the plaintiff.

3 The defendant is a Singapore-incorporated company. It is undisputed that the defendant has acquired the rights, obligations and liabilities of the Bank in relation to the plaintiff. I shall therefore also refer to the defendant as "the Bank", although they are different entities, as nothing turns on this distinction.

Background to the dispute

The opening of the Account

4 On 7 December 2011, representatives of the plaintiff met Ms Mindy Poh ("Ms Poh"), who was then with the Bank's Small and Medium-Sized Enterprise banking department, to open an account with the Bank. Ms Poh was the plaintiff's Relationship Manager ("RM") for the Account until June 2015. I shall refer to this meeting as "the Account Opening Meeting".

5 During the Account Opening Meeting, the plaintiff's representatives signed and received several documents relating to the Account ("the Account Opening Documents"), including the Standard Terms and a Letter of Indemnity ("the LOI"). The relevant provisions of these documents are as follows"

6 Clause 1.1 of the Standard Terms provides, *inter alia*, as follows:

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> **1.1 Definitions:**
>
> …
>
> **"Instruction"** means instructions in relation to any Account, Transaction or Service which:
>
> **…**
>
> (c) We *believe in good faith has been given by an Authorised Person* or are transmitted with such testing or authentication as We may specify.
>
> …
>
> [emphasis added]

7 Clause 3.1(a) of the Standard Terms states:

> 3.1 In providing the Services, We will:
>
> (a) *use reasonable care and skill*; …
>
> [emphasis added]

8 Clause 4.6 of the Standard Terms provides:

> 4.6 **Payment Instructions**: You authorise Us to act as the instructing financial institution to send Your payment Instructions. *You also authorise Us, any Bank Member or any third party who receives such Instructions to act on them* as if You had sent the Instructions directly to them.
>
> [emphasis added]

9 Clause 5.5 of the Standard Terms states:

> 5.5 **Verbal or Electronic Instructions and Communications**:
>
> (a) We can act on Your Instructions or communications received verbally or through any Channel *if We believe them to be genuine and complete. We may require Your confirmation prior to acting on such Instructions*.
>
> (b) You bear any risks in sending Your Instructions or communications verbally or through any Channel.
>
> [emphasis added]

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10 Clause 10.1 of the Standard Terms states:

> **10.1 Exclusion of liability & Monetary Limitation:**
>
> (a) We are not liable for any Loss that You suffer or incur as a result of, arising from or in relation to, any Service, Channel, System Materials or Transaction (and the provision or execution of any of the foregoing), any act or omission, breach of contract or duty or any tort on Our part. … We remain liable for Your direct loss to the extent it is caused by any *fraud, gross negligence or wilful misconduct on Our part* …
>
> [emphasis added]

11 The LOI provides as follows:

> I/we understand and acknowledge that the risks involved in sending my/our instructions to you via the telephone, facsimile, untested telexes, telegraph, cable or any other form of electronic communication and *hereby agree that all risks shall be fully borne by me/us and you will not be liable for any losses or damages arising provided you have acted in good faith.*
>
> In consideration of your agreeing to act on the above instructions or communication, I/we agree and undertake:-
>
> …
>
> (g) that *provided that the Bank officer concerned believed the instruction to be genuine at the time it was given*, you may (but shall not be obliged to) *act as aforesaid without inquiry as to the identity or authority of the person giving or purporting to give any instruction or the authenticity of* any telegraph or cable or telephone or untested telex or fax message or *any other form of electronic communication and may treat the same as fully authorised by and binding on me/us*, regardless of the circumstances prevailing at the time of the instruction or amount of the transaction *and notwithstanding any* error, misunderstanding, lack of clarity, *fraud, forgery or lack of authority in relation thereto, and without requiring further confirmation or authentication or separate independent verification in any form*;
>
> …
>
> [emphasis added]

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12 Under the Account Opening Documents:

(a) Mr Majnu and Mr Md Nazrul Kamal ("Mr Kamal") were named as the authorised persons of the Account ("the Authorised Persons"). They each provided Bangladesh landline telephone numbers as contact numbers ("the Bangladesh Contact Numbers"). Mr Majnu also provided his email address, "mm.majnu@yahoo.com" ("the Yahoo Account").

(b) Mr Kamal and Mr Md Irshad Ali ("Mr Ali") were the plaintiff's contact persons. Two Singapore telephone numbers belonging to Mr Ali ("the Singapore Contact Numbers") were provided to the Bank. Mr Ali is a business associate of the plaintiff. He owns a Singapore-incorporated company that assists in the plaintiff's shipping matters.

13 On 14 March 2012, Mr Alam became one of the Authorised Persons.

14 From the date on which the Account was opened until 6 June 2013, the plaintiff withdrew a total of US$4,413,521.53 from the Account. The plaintiff's withdrawals from the Account are shown in the following table:

S/N	Date of transaction	Amount (US$)	Beneficiary
1	2 May 2012	684,579.58	Interlink Maritime Ltd (Singapore)
2	28 June 2012	552,046.87 (551,271.82 + 775.05 charge)	Pacific World Shipping Pte Ltd (Singapore)
3	23 November 2012	603,720.00 (602,935.00 +	Pacific World Shipping Pte Ltd

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		785.00 charge)	(Singapore)
4	26 December 2012	614,880.00	Pacific World Shipping Pte Ltd (Singapore)
5	30 January 2013	688,415.08	Pacific World Shipping Pte Ltd (Singapore)
6	30 January 2013	813,750.00	Virgoz Oil and Fat Pte Ltd (Singapore)
7	1 February 2013	10,000.00	Mr Majnu
8	2 February 2013	15,000.00	Cash withdrawal over the counter
9	18 March 2013	400,000.00	Interlink Maritime Ltd (Singapore)
10	16 May 2013	13,376.00	Phuong Bac Shipping Joint Stock Company (Vietnam)
11	6 June 2013	10.00	Mr Majnu
12	6 June 2013	17,744.00	Long Son (Vietnam)

15 Five of these withdrawals (S/Ns 2–4, 9 and 10) were effected pursuant to instructions given by fax and/or email. The other withdrawals were effected by cheque (S/Ns 1, 5 and 7), in person (S/Ns 6 and 8) and through the Bank's online banking platform ("the S2B platform") (S/Ns 11 and 12). Mr Majnu gave instructions for the last two transactions through the S2B platform on 6 June 2013, after meeting a colleague of Ms Poh at the Bank who taught him how to use the S2B platform. The plaintiff had not used the S2B Platform before 6 June 2013.

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The Disputed Instructions

16 From 17 to 26 June 2013, the Bank received six Outward Telegraphic Transaction ("OTT") instructions in the form of Remittance Application Forms. I shall refer to these instructions individually as "the 1st Instruction", "the 2nd Instruction", *etc*. These instructions bore signatures consistent with Mr Majnu's specimen signature in the Bank's records. They were attached to emails sent to the Bank from the Yahoo Account, and were also faxed to the Bank.

17 Upon receiving these emails from the Yahoo Account, Mr Lee Sien Sing, also known as Desmond Lee ("Mr Desmond Lee"), and Ms Poh sent several emails in reply, between 17 and 28 June 2013, to the Yahoo Account. (Ms Poh was on leave between 17 and 21 June 2013. Mr Desmond Lee, who also worked as a RM for the Bank, attended to her customers in her absence and handled the 1st and 2nd Instructions.) It was undisputed that during this period, *ie*, between 17 and 28 June 2013, Mr Majnu used the Yahoo Account to send emails to various third parties. However, unsurprisingly he disavows any knowledge of any of these emails sent from the Yahoo Account to the Bank and the replies from Mr Lee and Ms Poh.

18 On 18 June 2013, Mr Majnu received two text messages ("the 18 June SMSes") on his mobile phone ("the Mobile Phone") containing Yahoo! verification codes. It was undisputed that the 18 June SMSes were sent to the Mobile Phone in relation to the Yahoo Account. The expert jointly appointed by the parties, RSM Technology Risk Group Pte Ltd ("RSM"), gave evidence on the 18 June SMSes. RSM was unable to definitively conclude why the 18 June SMSes were sent, but opined that they may have been sent because a user was accessing or attempting to access the Yahoo Account using a new

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device. Mr Majnu did not act on the 18 June SMSes, claiming unfamiliarity with such notifications as the reason for not doing so.

The 1st to 4th Instructions

19 Details of the 1st to 4th Instructions, which I shall refer to collectively as "the Four Instructions", are set out in the following table:

S/N	Date of issuance	Date of execution	Amount (US$)	Beneficiary
1	17 June 2013	18 June 2013	85,676.88 (85,500.00 + 176.88 charge)	VR Vast Links Inc (USA)
2	20 June 2013	20 June 2013	657,985.00 (657,200.00 + 785.00 charge)	Silver Bird Ltd (China)
3	24 June 2013	24 June 2013	623,485.00 (622,700.00 + 785.00 charge)	Silver Bird Ltd (China)
4	24 June 2013	24 June 2013	471,573.63 (470,900.00 + 673.63 charge)	Silver Bird Ltd (China)

20 Officers of the Bank attempted to call the plaintiff's representatives to confirm the Four Instructions. In respect of the 1st and 2nd Instructions, calls were made to the Singapore Contact Numbers. In respect of the 3rd and 4th Instructions, calls were made to the Bangladesh Contact Numbers. All of these calls were unanswered, except a call in respect of the 1st Instruction. This call was terminated shortly after Mr Ali, who answered the call, told the officer not to disturb him. The Bank therefore did not obtain confirmation of the Four Instructions from the plaintiff's representatives by telephone.

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21 The Four Instructions were referred to the RM in charge of the Account for a decision on whether they should be executed. As noted at [17] above, Ms Poh was on leave between 17 and 21 June 2013. Mr Desmond Lee, who attended to Ms Poh's customers in her absence, handled the 1st and 2nd Instructions. In respect of these instructions, Mr Desmond Lee was told that the officers of the Bank had not been able to verify the 1st and 2nd Instructions by telephone. Nonetheless, he gave approval for the 1st and 2nd Instructions to be executed. Ms Poh dealt with the 3rd and 4th Instructions. Similarly, she was told that the Bank had not confirmed these instructions by telephone; again, she nonetheless approved the execution of these instructions.

22 The Four Instructions were thus executed and the relevant amounts (see [19] above) were accordingly debited from the Account.

23 On 24 June 2013, after Ms Poh approved the execution of the 3rd and 4th Instructions, she sent an email to Mr Majnu requesting the latter to provide the Bank with his updated contact details. She explained that the Bank had attempted to contact Mr Majnu many times through the numbers originally provided but had not succeeded in doing so most of the time.

24 In reply, on the same day, an email from the Yahoo Account was sent to Ms Poh, purportedly from Mr Majnu ("the Health Problems email"). This stated that Mr Majnu was receiving medical treatment for health problems and was unable to receive phone calls. It also stated that Mr Majnu would update his contact details on 1 July 2013. Ms Poh responded to the Health Problems email later that day, acknowledging its contents.

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The 5th and 6th Instructions

25 On 26 June 2013, the 5th and 6th Instructions were sent to the Bank. Details of the 5th and 6th Instructions are set out in the following table:

S/N	Date of issuance	Date of execution	Amount (US$)	Beneficiary
5	26 June 2013	NA	1,440,800.00	Silver Bird Ltd (China)
6	26 June 2013	NA	1,225,500.00	Silver Bird Ltd (China)

26 The Bank did not execute the 5th and 6th Instructions. This was because there were insufficient funds in the Account to do so. On 27 June 2013, there was US$182,167.05 in the Account. Ms Poh sent an email to Mr Majnu to inform him of this. She also invited the plaintiff to fund the Account and to reissue the instruction(s), stating that the Bank would be cancelling the 5th and 6th Instructions.

Events after the Disputed Instructions

27 On 27 June 2013, Mr Majnu logged onto the S2B platform and sought to transfer a sum of US$503,386.00 to a third party ("the 7th Instruction"). Mr Majnu's unchallenged evidence was that the S2B platform indicated that the transaction was successful although there were in fact insufficient funds in the Account to process the transfer.

28 On 28 June 2013, Ms Poh sent an email to Mr Majnu stating that the 5th, 6th and 7th Instructions had been rejected because there were insufficient funds

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in the Account. Ms Poh further invited Mr Majnu to resubmit the instructions once there were sufficient funds in the Account.

29 The following events subsequently transpired:

(a) On 2 July 2013, Mr Majnu sent Ms Poh an email stating that he had discovered that the Four Transactions had occurred. According to Mr Majnu, the Four Transactions were executed "without [the plaintiff's] knowledge, advices and intimation".

(b) This email led to an exchange of emails between Ms Poh and Mr Majnu on the same day, during which Ms Poh forwarded copies of the Four Instructions to Mr Majnu and stated that she would also send copies to Mr Ali (whom Mr Majnu authorised to receive the copies, discuss the matter and take further action on the plaintiff's behalf). Ms Poh also forwarded the two emails that she had sent to Mr Majnu on 24 June 2013 relating to the plaintiff's contact details (see [23] and [24] above).

(c) Mr Majnu called Ms Poh later that evening. He stated that the Four Transactions were unauthorised and asked Ms Poh to recall the monies transferred out of the Account.

(d) Mr Majnu sent two further emails to Ms Poh on the evening of 2 July 2013. He stated that he had not sent any emails to Ms Poh from 7 June 2013 until the morning of 2 July 2013, and had not been ill or sick in June 2013. He reiterated that he had not sent the Four Instructions, and asserted that the Bank normally confirmed the

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plaintiff's requests with him by telephone but did not do so for the Four Instructions.

30 Mr Majnu also discussed the Four Transactions with Mr Alam on 2 July 2013. It was decided that Mr Alam would travel to Singapore on that night to meet with Ms Poh and take the necessary follow-up measures. Mr Majnu could not travel to Singapore immediately as he did not have the necessary visa at that time.

31 On 4 July 2013, Mr Alam and Mr Ali met Ms Poh and Mr Gareth Scully, the Bank's Director and Head of Sales and Relationship Management, to discuss the Four Transactions. On that date, Mr Majnu also sent an email to Ms Poh instructing the Bank not to execute any fund transfer requests in respect of the Account except those made through the S2B platform. Notably, this email did not indicate that the plaintiff had previously instructed the Bank not to remit monies from the Account except pursuant to requests made through the S2B platform. I return to this point at [84(a)(ii)] below.

32 On 30 July 2013, Mr Majnu made a police report concerning the Four Transactions.

The parties' cases

The statement of claim

33 The plaintiff's case was that the Bank had breached several duties owed to the plaintiff and thereby caused it to suffer loss of US$1,838,720.51, being the total sum transferred out of the Account pursuant to the Four Transactions. The Bank was accordingly liable to the plaintiff for this sum, interest and costs.

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34 The plaintiff's principal cause of action was founded on cl 4.6 of the Standard Terms (see [8] above). By this provision, the Bank was authorised to act on the plaintiff's "payment Instructions". Under cl 1.1 (see [6] above), the term "Instructions" referred to instructions that the Bank "believe[d] in good faith [to have] been given by an Authorised Person". The plaintiff argued that the Bank had not been authorised to act on the Four Instructions because:

(a) the Authorised Persons did not send the Four Instructions; and

(b) the Bank could not have believed in good faith that they had been sent by the Authorised Persons given the "highly suspicious circumstances surrounding [their] receipt".

35 The plaintiff also contended that the Bank had breached its duty to use reasonable care and skill under cl 3.1(a) of the Standard Terms (see [7] above), or similar express or implied duties in contract or at common law, and thereby caused the plaintiff to suffer loss. In this regard, the plaintiff averred as follows:

(a) The Bank effected the Four Transactions despite the highly suspicious circumstances surrounding them.

(b) The Bank failed to call the plaintiff's representatives to verify the Four Instructions before effecting them. The Bank also failed to call the plaintiff's representatives to inform them that it had executed the Four Instructions once it had done so.

(c) The Bank had been negligent or grossly negligent in the way it attempted to verify the Four Instructions before executing them.

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36 The plaintiff also claimed the Bank had breached duties to take steps or have the necessary facilities and/or system in place to prevent unauthorised fund transfers. For completeness, the plaintiff also pleaded that there was an agreed course of conduct, or an express or implied duty owed by the Bank, to verify fund transfer instructions with the plaintiff before acting on them. However, as the Bank noted, the plaintiff did not pursue this claim in submissions.

The defence

37 The Bank's defence was threefold. First, the Bank claimed that it did not breach any duty to the plaintiff for the following reasons:

(a) The Bank had the plaintiff's authority or mandate to execute the Four Instructions. In this regard:

(i) the Bank did not admit that Mr Majnu did not issue the Four Instructions; and

(ii) in any event, the Bank claimed that it was authorised to act on the Four Instructions because it executed them while believing in good faith that they were issued by Mr Majnu.

(b) The Bank did not breach its duty to use reasonable care and skill under cl 3.1(a) of the Standard Terms.

38 Secondly, the Bank averred that any loss suffered by the plaintiff was wholly caused or contributed to by the plaintiff's own negligence. Further and/or in the alternative, the plaintiff was estopped and precluded from claiming for any loss it suffered, and/or it was inequitable for the plaintiff to so claim.

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39 Thirdly, the Bank claimed that the exclusion clauses in cl 10.1 of the Standard Terms and the LOI excluded its liability for the plaintiff's loss.

The reply

40 In reply, the plaintiff claimed the Bank was not entitled to rely on the exclusion clauses in cl 10.1 of the Standard Terms and the LOI for three reasons:

(a) First, the exclusion clauses did not apply because no reasonable banker would have believed that the Four Instructions were genuine and/or that the Bank had acted in good faith. In particular, the Bank was required to verify the plaintiff's payment instructions by way of a telephone call before executing them. The Bank did not do this and accordingly failed to act in good faith.

(b) Clause 10.1 of the Standard Terms and the exclusion clause in the LOI breached the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the UCTA") and were therefore ineffective.

(c) The Bank did not explain the terms of the Account Opening Documents to the plaintiff.

41 The plaintiff also contended that the Bank waived or was estopped from relying on the Standard Terms and the LOI to assert that it was not required to call the plaintiff to verify its payment instructions before effecting the same.

42 Finally, the plaintiff denied any contributory negligence on its part.

The issues

43 The following issues fell to be determined:

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(a) Did the Bank breach its duties to the plaintiff ("the breach issue")? In particular:

(i) Did the Bank breach cl 4.6 of the Standard Terms? This required examination of two sub-issues:

(A) Did Mr Majnu issue the Four Instructions to the Bank ("the authorisation issue")?

(B) If not, did the Bank nonetheless act in good faith in executing the Four Instructions ("the execution issue")?

(ii) Did the Bank breach any other duty to the plaintiff ("the miscellaneous breaches issue")?

(b) Did the exclusion clauses in cl 10.1 of the Standard Terms and the LOI apply to exclude the Bank's liability for the plaintiff's loss ("the exclusion of liability issue")?

(c) Was there contributory negligence on the plaintiff's part ("the contributory negligence issue")?

44 Notably, the execution and exclusion of liability issues (see [43(a)(i)(B)] and [43(b)] above) raised an overlapping sub-issue, *viz*, the meaning of "good faith" for the purposes of the definition of "Instruction" in cl 1.1 of the Standard Terms and the exclusion clause in the LOI ("the definition issue"). In my view, the meaning of "good faith" would be the same for both of these provisions as both concerned the Bank's rights and liabilities in acting on payment instructions. I therefore considered the definition issue first before examining the other issues.

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The definition issue

The parties' submissions

45 The plaintiff submitted that the definition of "good faith" for the purposes of the Standard Terms and the LOI was "conditioned by its context". The context included (i) the other provisions of the Account Opening Documents, in particular cl 3.1(a) of the Standard Terms, (ii) the Bank's internal procedures, and (iii) relevant banking practices in Singapore. It was necessary for the Bank to act (a) with reasonable care and skill, (b) in accordance with "the spirit of its own internal policies and procedures", and (c) in accordance with relevant banking practices in Singapore, before it could be said that it acted in good faith.

46 In its written closing submissions, the Bank suggested two definitions of "good faith". For the purposes of cl 4.6, good faith simply required an honest belief by the Bank that the relevant instruction was given by an Authorised Person. For the purpose of the exclusion clause in the LOI, "good faith" required the Bank to have acted without fraud, wilful misconduct or gross negligence. Nonetheless, during oral closing submissions, Mr Benedict Teo ("Mr Teo"), counsel for the Bank, did not maintain this distinction between two definitions of good faith. He accepted a unitary definition: good faith required both honesty and a lack of gross negligence on the Bank's part. In this regard, Mr Teo conceded that the Bank would not have acted in good faith if it had been grossly negligent in acting on the Four Instructions.

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My decision

47 In *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 ("*Toshin*"), V K Rajah JA, delivering the judgment of the Court of Appeal, observed at [45] that "the concept of good faith is reducible to a core meaning". Rajah JA expounded on that core meaning as follows:

> 45 … At its core, the concept of good faith encompasses *the threshold subjective requirement of acting honestly*, as well as *the objective requirement of observing accepted commercial standards of fair dealing* in the performance of the identified obligations. …
>
> [original emphasis omitted; emphasis in italics added]

In sum, the concept of good faith encompasses both the subjective criterion of acting honestly and the objective criterion of "observing accepted commercial standards of fair dealing". In relation to the latter requirement, Rajah JA noted at [49] that what such standards of fair dealing require "will depend heavily on the commercial nature and purpose of the contract in question".

48 In this case, the parties did not dispute that the Bank had to act honestly to be said to have acted in good faith. What divided the parties was the issue of what the objective aspect of good faith required of the Bank. The Bank accepted that it would not have acted in good faith if there had been gross negligence on its part (see [46] above). Yet, the plaintiff argued that good faith required even more of the Bank. According to the plaintiff, the Bank would not have acted in good faith if it had acted without reasonable care (see [45] above). I did not accept the plaintiff's account of the meaning of good faith for the following reasons.

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49 First, on its plain and ordinary meaning, "good faith" does not connote reasonable care. Ordinarily, one who acts merely negligently may still act in good faith. The phrase "good faith" is often used to express a standard that is different from that of reasonable care. I therefore found it very difficult to accept that the parties intended that, for the purposes of the Standard Terms and the LOI, the Bank had to act with reasonable care in order to act in good faith. While the concept of good faith has an objective component, interpreting good faith to require reasonable care would appear to stretch that concept too far.

50 Secondly, the plaintiff submitted that the references to "good faith" in the Standard Terms and the LOI should be interpreted in the light of cl 3.1(a) of the former, as the meaning of "good faith" was "conditioned by its context" (see [45] above). Clause 3.1(a) required the Bank to "use reasonable care and skill" in providing its services (see [7] above). Accordingly, the Bank had to act with reasonable care and skill in order to be said to have acted in good faith. However, I considered that this was an argument without merit for the following two reasons:

(a) As explained at [49] above, it seemed obvious that "good faith" and "reasonable care and skill" refer to different standards. If the Bank failed to act with reasonable care or skill, it would not follow that it also acted without good faith. It would simply have acted without reasonable care or skill and thereby breached cl 3.1(a). There was no logical basis to say that mere negligence *per se* amounted to bad faith. In my judgment, therefore, it was incorrect to incorporate the standard of reasonable care and skill into the term "good faith", which stipulates a quite different standard.

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(b) Further, I noted that cl 3.1(a) is a general provision that does not specifically address the Bank's rights, duties and liabilities in acting on instructions – which is the context in which the phrase "good faith" has application in the Standard Terms and the LOI. By contrast, the Standard Terms and the LOI contain the following provisions:

(i) Clause (g) of the LOI provided that the Bank was entitled to act on electronic instructions "provided that the Bank officer concerned *believed the instruction to be genuine at the time it was given*" [emphasis added] (see [11] above).

(ii) Clause 5.5(a) of the Standard Terms entitled the Bank to act on "Instructions" if it "*believe[d] them to be genuine and complete*" [emphasis added] (see [9] above).

These provisions indicate that "good faith" in this context primarily connotes honesty and, for reasons that I will come to shortly, the absence of reckless or grossly negligent conduct. However, they do not go further in suggesting that the mere failure to exercise reasonable care or skill would suffice for the Bank to be said to have acted without good faith.

51 I therefore could not accept the plaintiff's argument that the Bank would not have acted in good faith if it had acted without reasonable care or skill. Nonetheless, I accepted on the authority of *Toshin* that there is an objective aspect of good faith. I was satisfied that it would not have been sufficient for the Bank to have honestly believed that the Four Instructions came from the plaintiff, to have held this belief in good faith or acted in good faith in executing the Four Instructions. In my judgment, the Bank would not have believed in good faith that the plaintiff issued the Four Instructions, or acted in good faith

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in executing them, if it was glaringly clear that a fraud was being perpetrated and yet the Bank failed to realise this. In other words, the Bank would not have believed in good faith that the plaintiff issued the Disputed Instructions if it was grossly negligent or reckless in holding that belief. I came to this view for two reasons:

(a) The plaintiff submitted that the meaning of "good faith" could be gleaned from and should be consistent with the parties' justified expectations and the spirit and purpose of the contracts between them. In my view, the interpretation of the objective component of good faith I arrived at was consistent with the parties' justified expectations and the spirit and purpose of the Account Opening Documents.

(b) This interpretation of good faith rendered the exclusion clause in the LOI, which also used the term "good faith", consistent with cl 10.1 of the Standard Terms. The exclusion clause in the LOI excluded the Bank's liability for acting on the plaintiff's electronic instructions provided the Bank had "acted in good faith" (see [11] above). Clause 10.1 excluded the Bank's liability for all loss except to the extent that such loss was caused by "fraud, *gross negligence* or wilful misconduct" on the Bank's part [emphasis added] (see [10] above). Interpreting good faith to require a lack of gross negligence on the Bank's part therefore rendered cl 10.1 of the Standard Terms consistent with the exclusion clause in the LOI.

52 I then considered the plaintiff's argument that the Bank was required to act in accordance with "the spirit of its own internal policies and procedures" and relevant banking practices in Singapore to be said to have acted in good

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faith (see [45] above). The gist of this argument was that the Bank would only have acted in good faith if it had obtained call-back confirmation of the plaintiff's payment instructions before acting on them. I could not accept this argument. It was contrary to the clear terms of cl 5.5(a) of the Standard Terms and cl (g) of the LOI:

(a) Clause 5.5(a) states that the Bank "*may* require [the plaintiff's] confirmation prior to acting on [its] Instructions" (see [9] above). The Bank therefore did not owe a duty to the plaintiff to perform call-back confirmation of its payment instructions. It was merely entitled, and not required, to do so under cl 5.5(a) of the Standard Terms.

(b) Similarly, cl (g) of the LOI provides that the Bank was entitled to act "*without inquiry as to the identity or authority* of the person giving or purporting to give any instruction *or the authenticity of … any other form of electronic communication* … notwithstanding any … *fraud*" [emphasis added] (see [11] above). Clause (g) further provides that the Bank was entitled to act "*without requiring further confirmation or authentication or separate independent verification in any form*" [emphasis added].

These provisions expressly provide that the Bank did not owe a duty to the plaintiff to obtain call-back confirmation of payment instructions issued or purportedly issued by the plaintiff's representatives, before acting on those instructions. To hold that the Bank nevertheless had such a duty, by virtue of the meaning of "good faith", would be to surreptitiously smuggle such a duty into the parties' contractual relationship, notwithstanding their express

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agreement that there would be no such duty. It was clear to me that this would not be a legitimate interpretation of the term "good faith".

53 In sum, I held that the concept of good faith in the Account Opening Documents incorporated the subjective requirement of acting honestly, and the objective element of a lack of gross negligence or recklessness by the Bank.

The authorisation issue

The parties' submissions

54 The plaintiff argued that Mr Majnu did not issue the Four Instructions. Rather, the plaintiff was the victim of an unknown fraudster who had issued the Four Instructions to the Bank. The plaintiff made the following submissions:

(a) First, Mr Majnu did not sign the Four Instructions. In this regard, the plaintiff relied on the evidence of the Bank's forensic document expert, Ms Lee Gek Kwee. Her evidence was as follows:

(i) the signatures on the 1st, 3rd, and 4th to 6th Instructions were "identical to and superimposable with each other …"; and

(ii) the signature on the 2nd Instruction was "identical to and superimposable with" Mr Majnu's signature in an earlier payment instruction sent to the Bank on 24 December 2012, which authenticity was undisputed. This earlier instruction appears to have been sent to the Bank by email.

The plaintiff argued that the evidence indicates that the signatures on the 1st to 6th Instructions were a "cut-and-paste" of digital images of Mr Majnu's signature. Mr Majnu did not have a practice of using a

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digital image of his signature to sign Remittance Application Forms. Therefore, the evidence showed that Mr Majnu did not sign the Four Instructions.

(b) Secondly, the plaintiff claimed Mr Majnu did not send the Four Instructions to the Bank for the following reasons:

(i) The emails enclosing the Four Instructions ("the Four Emails") were sent from originating internet protocol ("IP") addresses in South Africa. By contrast, other emails that Mr Majnu sent to the Bank (which authenticity were not in dispute) were all sent from IP addresses in Singapore and Bangladesh. Neither Mr Majnu nor Mr Alam were in South Africa between 17 and 26 June 2013. The evidence thus demonstrated that Mr Majnu did not email the Four Instructions to the Bank.

(ii) The Four Emails were signed off as "Sent from Yahoo! Mail on Android" ("the Default Signature"). This was the default signature for emails sent from the Yahoo! email application for Android mobile devices. Yet the emails were sent from the Yahoo Account via the internet browser Google Chrome; and the Default Signature would not have been automatically generated when an email was sent via Google Chrome. The evidence thus indicated that the author of the emails manually typed in the Default Signature to create the impression that they were sent from an Android mobile device.

(iii) The person who sent the Four Emails did not use the same *modus operandi*

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as Mr Majnu. The Four Emails were sent via eFax, an Internet fax services provider that Mr Majnu did not use; the attachments to the Four Emails were created using a software Mr Majnu did not use; and the Four Instructions were sent via email before being faxed to the Bank, contrary to the Mr Majnu's practice of faxing its instructions to the Bank before following up (sometimes) with an email.

(iv) There was evidence of unauthorised access to the Yahoo Account in the form of the 18 June SMSes.

(v) There were irregularities in the way in which one email was sent from the Yahoo Account to the Bank.

(c) Thirdly, the plaintiff argued that circumstantial evidence showed that Mr Majnu did not send the Disputed Instructions. In particular, the plaintiff relied on the fact that the 5th and 6th Instructions were sent to the Bank although there were insufficient funds in the Account to fulfil them; and the fact that Mr Majnu had issued the 7th Instruction on 27 June 2013, through the S2B Platform, notwithstanding that there were insufficient funds in the Account to do so. In my judgment, this evidence was crucial. I elaborate on this point at [60] below.

55 The Bank's case, in gist, was that the plaintiff had to adduce clear and convincing evidence of the fraud it alleged, and the plaintiff had failed to meet this evidentiary threshold. The Bank made the following submissions:

(a) The plaintiff's evidence of the alleged fraud was equivocal. The principal point advanced by the Bank here was that the evidence noted

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in [54(a)]–[54(b)] above was consistent with Mr Majnu having caused a third party to send the Four Instructions to the Bank.

(b) The plaintiff did not adequately explain two critical facts that undercut its case that the Four Instructions were not authorised:

(i) First, the person who sent the Four Emails had logged onto the Yahoo Account to send them. Yet Mr Majnu's evidence was that he had never shared the password to the Yahoo Account with anyone else. Hence, the only reasonable inference was that Mr Majnu had sent the Four Emails or caused them to be sent, having given someone his password.

(ii) Secondly, the signatures on the Four Instructions were consistent with Mr Majnu's specimen signature in the Bank's records. Mr Majnu said that only he and two of the plaintiff's employees had access to his signature.

(c) Mr Majnu's conduct, both during the period in which the 1st to 6th Instructions were sent to the Bank and after its discovery of the alleged fraud, indicated that the plaintiff had authorised the Four Instructions. In particular, Mr Majnu caused the hard disk of his work computer and the Mobile Phone to be "wiped" without backup, after he discovered the alleged fraud. The Bank submitted that the plaintiff did so to remove any evidence that it had in fact authorised the Four Instructions.

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My decision

56 It is trite that a party must raise cogent and compelling evidence to prove fraud. In this regard, the plaintiff accepted that it had to meet a higher evidential threshold to make out its case that the Four Instructions were unauthorised and used as the instruments of fraud. Nonetheless, it was undisputed that the legal standard of proof the plaintiff must meet remained that of the balance of probabilities. With these principles in mind, I turned to consider the evidence.

57 To begin with, I found four pieces of evidence relied on by the plaintiff material (see [54(a)] and [54(b)(i)]–[54(b)(iii)] above). First, the evidence on what appeared to be Mr Majnu's signatures on the 1st to 6th Instructions. Secondly, the originating IP addresses of the Four Emails. Thirdly, the inclusion of the Default Signature in the Four Emails. Fourthly, the difference between the *modus operandi* used by the person who sent the Four Emails and the Mr Majnu's *modus operandi* in sending payment instructions to the Bank.

58 The Bank sought to challenge or downplay the relevance of these pieces of evidence. I found some of the Bank's arguments (*eg*, that virtual private network and spoofing technology could have been used to mask the true originating IP addresses of the Four Emails) more plausible than others (*eg*, that Mr Majnu might have preconfigured the Yahoo Account such that the Default Signature would be appended to every email sent from that account by default). Yet, it was difficult to understand why Mr Majnu would have perpetrated a fraud on the Bank. Critically, when these four pieces of evidence were taken together and considered in totality, I found that they strongly suggested that the 1st to 6th Instructions were sent by a third party and not by Mr Majnu.

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59 The question which then fell to be answered was whether the third party issued the 1st to 6th Instructions without Mr Majnu's authorisation, or whether Mr Majnu had participated in a scam to defraud the Bank. During oral closing submissions, Mr Teo sought to maintain that it was not the Bank's positive case that Mr Majnu had caused the 1st to 6th Instructions to be issued and was now bringing a fraudulent claim against the Bank. However, no matter how Mr Teo sought to clothe the argument, that was in effect the thrust of his submissions.

60 Having considered the evidence and the parties' submissions, I found the plaintiff had proven, on the balance of probabilities, that it did not authorise the 1st to 6th Instructions or cause them to be sent to the Bank. In arriving at this conclusion, I placed weight on (a) the fact that the 5th and 6th Instructions were sent to the Bank, and (b) Mr Majnu's issuance of the 7th Instruction:

> (a) The 5th and 6th Instructions were sent to the Bank on 26 June 2013. However, the Bank did not execute them as there were insufficient funds in the Account to do so (see [25]–[26] above). The plaintiff argued that this showed that the person who had sent the 5th and 6th Instructions did not know how much money was in the Account. According to the plaintiff, this conclusion was also consistent with two emails sent to the Bank on 18 and 19 June 2013 in which Mr Desmond Lee was asked for the balance of the Account. I accepted the plaintiff's submissions in this regard. Proceeding on that premise, *ie*, the person who sent the 5th and 6th Instructions was unaware of the balance of the Account, it seemed very unlikely that Mr Majnu had participated in a scheme to defraud the Bank. The key point was that Mr Majnu would have known or at least been able to find out (without explicitly asking Mr Lee) the balance of the Account. It appeared that there were three avenues to find out the

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account balance: calling the customer service line, using the S2B platform, or visiting a branch of the Bank. In that light, I found it unlikely that Mr Majnu was party to the fraud. If he had taken part in the fraud, he would have known that there were insufficient funds in the Account to execute the 5th and 6th Instructions. Accordingly, the 5th and 6th Instructions would not have been sent to the Bank. The fact that they were sent to the Bank suggested Mr Majnu was not party to the fraud.

(b) On 27 June 2013, Mr Majnu issued the 7th Instruction through the S2B platform (see [27] above). As with the 5th and 6th Instructions, this was not processed as there were insufficient funds in the Account to do so. The fact that Mr Majnu issued the 7th Instruction indicated that he was not party to a scheme to defraud the Bank and therefore did not know that the Account had by then been depleted by the Four Transactions.

61 The Bank submitted that the issuance of the 5th to 7th Instructions may have been "a smokescreen" to disguise the scam in which Mr Majnu connived. This may be possible, but I did not accept that the plaintiff fell short of proving fraud in view of that mere possibility, for the following reasons:

(a) First, it was unnecessary for the plaintiff to exclude every logical possibility to prove that a fraudulent third party had issued the 1st to 6th Instructions. It was sufficient for the plaintiff to raise cogent evidence to establish fraud on a balance of probabilities. I was satisfied that the plaintiff had fulfilled this requirement.

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(b) Secondly, if the Bank were correct, the scam would have been a carefully planned and well-disguised scheme to defraud the Bank. Yet if so, it did not seem logical that a substantial sum of money, US$182,167.05, would have been left in the Account (see [26] above). Equally, it would have made sense for Mr Majnu to raise the alarm upon logging onto the S2B platform on 27 June 2013, whereupon (as the Bank submitted) he would have been able to discover that the Account had been depleted. The 7th Instruction would have been unnecessary. It would not have made sense for Mr Majnu to have waited to raise the alarm. That would have given rise to suspicion that he had been aware of the fraud and yet acquiesced in it by failing to inform the Bank of the fraud promptly. If a scam was indeed at play, the safest course of action would have been to raise the alarm at the earliest possible opportunity. But Mr Majnu only told the Bank that the Four Transactions were unauthorised on 2 July 2013 which suggested that he only became aware of the situation on or about that date. All this indicated that Mr Majnu was not a party to an elaborate scam to defraud the Bank.

(c) Thirdly, it did not seem to me that Mr Majnu had a clear motive to participate in a scam to defraud the Bank. There was no evidence, for example, that he was in need of money at the material time.

62 Finally, I accepted that questions may be raised over the plaintiff's case given that (a) Mr Majnu did not share the password to the Yahoo Account with anyone else, and (b) only three persons, including Mr Majnu, had access to his signature (see [55(b)] above). However, I also accepted the plaintiff's submission that an unknown third party may have obtained the password to the Yahoo Account without authorisation, *eg*, through a phishing attack. This would

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address point (a) above. The third party would then have been able to obtain Mr Majnu's specimen signature from his previous emails. In this regard, I noted that the signature on the 2nd Instruction was identical to an instruction that had been sent to the Bank by email (see [54(a)(ii)] above). This would address point (b) above.

63 In view of the points made at [60]–[61] above, I also decided to give the plaintiff the benefit of the doubt over the fact that Mr Majnu had caused the hard disk of his work computer and the Mobile Phone to be "wiped" after he discovered the alleged fraud (see [55(c)] above). Mr Majnu's evidence was that he had experienced difficulties with his work computer and the Mobile Phone, which had "crashed" and "frozen" on several occasions. He had therefore instructed an employee of the plaintiff's Information Technology department to repair the computer and the Mobile Phone. The employee reinstalled the hard disk of the computer and performed a factory reset of the Mobile Phone. I accepted Mr Majnu's evidence on this point, and therefore did not draw an adverse inference against the plaintiff in relation to the fact that Mr Majnu had caused the hard disk of his work computer and the Mobile Phone to be "wiped".

64 In sum, for the above reasons, I found on the balance of probabilities that Mr Majnu did not issue the Four Instructions to the Bank. This led to the question of whether the Bank had nonetheless believed in good faith that Mr Majnu issued the Four Instructions, and was thus authorised to execute them under cl 4.6 read with cl 1.1 of the Standard Terms.

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The execution issue

65 In view of my interpretation of good faith (see [53] above), I considered that the Bank would have believed in good faith that Mr Majnu issued the Four Instructions if it had held this belief honestly, and without recklessness or gross negligence on its part. The plaintiff did not claim that the Bank had actual notice of the fraud. Nor did it allege that the Bank was reckless. The key issue was therefore whether the Bank was grossly negligent in believing that Mr Majnu had issued the Four Instructions.

66 At the outset, I note that while there were references to gross negligence in the plaintiff's pleadings, I did not understand its core position at trial and in closing submissions to be that the Bank was grossly negligent. The plaintiff's case was put on the basis that the Bank was simply negligent. In conjunction with this position, the plaintiff argued that good faith should be interpreted as requiring reasonable care and skill, which argument I did not accept for the reasons given at [49]–[50] above. It seemed that this argument might have been advanced to avoid the difficulty that the exclusion clause in the LOI, which uses the terminology of good faith, would otherwise exclude liability for any breach of cl 3.1 of the Standard Terms. Thus, on one level, the plaintiff's case on cl 4.6 of the Standard Terms fell away given my interpretation of good faith and the fact that it did not advance its case on the basis of gross negligence.

67 Nonetheless, I proceeded to consider whether the Bank was negligent or grossly negligent in believing that Mr Majnu had issued the Four Instructions.

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The parties' submissions

68 The plaintiff submitted that there were highly suspicious circumstances surrounding the Four Instructions that should have put the Bank on notice that Mr Majnu did not send these instructions. The plaintiff relied on the opinion of its expert, Mr Aaron Lee Soon Yong ("Mr Aaron Lee"), that there was a "constellation of suspicious circumstances … collectively and cumulatively [giving] rise to enough suspicion" to warrant further investigations of the Four Instructions before they were executed. The "red flags" relied on by the plaintiff may be grouped into the following three categories:

(a) *Irregularities concerning the content of the Four Instructions*:

(i) The frequency and quantum of the Four Instructions were "extremely high" and unprecedented.

(ii) The instructions were to remit monies to beneficiaries and countries to which the plaintiff had not remitted monies before.

(iii) The plaintiff's name was misspelt as "Major Shipping & *Tagging*" [emphasis added].

(iv) The purposes of the Four Instructions were not stated on the Four Instructions.

(v) The date of the 3rd and 4th Instructions was erroneously stated as "24/6/*3013*" [emphasis added].

(b) *Irregularities concerning the manner in which the Four Instructions were sent to the Bank:*

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(i) The Four Instructions were sent to the Bank by email before being faxed thereto, contrary to the Mr Majnu's usual practice.

(ii) The Four Instructions were faxed via eFax, which the Mr Majnu had not used before.

(iii) The Four Instructions were sent by email and fax to the Bank notwithstanding that Mr Majnu had learnt to use the S2B Platform as a more efficient way of transferring funds on 6 June 2013 (see [15] above).

(c) Miscellaneous irregularities:

(i) Mr Desmond Lee was asked by email for the balance of the Account on 18 and 19 June 2013 (see [60(a)] above).

(ii) On 24 June 2013, Mr Majnu purportedly sent the Health Problems email to Ms Poh (see [24] above).

69 The plaintiff argued that despite these "red flags", the Bank failed to confirm, or use reasonable efforts to attempt to confirm, the Four Instructions with the plaintiff before acting on them. Accordingly, the Bank could not have believed in good faith that the Four Instructions had been given by an Authorised Person.

70 In reply, the Bank contended that the "red flags" relied on by the plaintiff did not constitute suspicious circumstances, either individually or cumulatively, that would have put a reasonable banker on notice that the plaintiff did not send the Four Instructions. The Bank relied on the evidence of its expert Mr Tan Boon Hoo ("Mr Tan") to this effect.

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My decision

71 I found that the "red flags" relied on by the plaintiff were not sufficient, either individually or cumulatively, to put a reasonable banker on notice that Mr Majnu did not issue the Four Instructions. I shall deal with the "red flags" by reference to the three categories set out at [68] above.

The content of the Four Instructions

The frequency and quantum of the Four Instructions

72 The plaintiff made the following submissions:

(a) The Four Instructions were of a frequency and quantum that departed from what the plaintiff had informed Ms Poh during the Account Opening Meeting (see [4] above). During that meeting, the plaintiff had told Ms Poh that its remittance instructions would be in the range of US$400,000 to US$600,000, with about one or two withdrawals from the Account each month. However, between 17 and 24 June 2013, a mere eight days, the Bank received four instructions from the plaintiff for a total of US$1,838,720.51 to be remitted from the Account. It is important to emphasise here that it was not the plaintiff's case that it had imposed firm restrictions on the frequency and quantum of withdrawals from the Account during the Account Opening Meeting. According to the plaintiff, as I understood it, the information it gave Ms Poh during the Account Opening Meeting was more in the nature of estimates.

(b) Furthermore, the frequency and quantum of the Four Instructions departed from the previous pattern of withdrawals from the Account.

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> Over seven months leading up to June 2013, the plaintiff only withdrew a total of US$2,445,726 by telegraphic transfer. By contrast, between 17 and 24 June 2013, the Bank received instructions to remit a total sum of US$1,838,720.51 from the Account. Further, the 2nd to 4th Instructions were for a total of US$1,750,800, which was an "astronomical" sum to be sent to a single entity, Silver Bird Ltd, within five days (see [19] above).

For these reasons, the plaintiff claimed that the frequency and quantum of the Four Instructions would have put a reasonable banker on notice of a possible fraud.

73 I did not find these arguments persuasive. First, I found that the factual basis of these submissions was weak for the following reasons:

> (a) The plaintiff did not establish on the balance of probabilities that it had told Ms Poh, during the Account Opening Meeting, that its remittance instructions would be in the range of US$400,000 to US$600,000; or that there would only be one or two withdrawals from the Account a month. Ms Poh's consistent evidence was that the plaintiff did not inform her of these matters during that meeting.
>
> (b) It was not plain that the Four Instructions were unprecedented at least in terms of quantum. While US$1,838,720.51 was withdrawn from the Account by the Four Transactions, a total of US$4,413,521.53 had been withdrawn from the Account between May 2012 and June 2013, a period of slightly more than one year (see [14] above). Furthermore, I also noted that more than US$1.5m had been withdrawn from the Account on one day, 30

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January 2013 (see S/Ns 5–6 in the table at [14] above). When Mr Teo put this to Mr Aaron Lee in cross-examination, the latter conceded that the mere fact that approximately US$1.75m was sent to Silver Bird Ltd in four days was not in itself suspicious.

74 Secondly, I did not accept the key premise of the plaintiff's arguments, *viz*, that a bank should enquire into a customer's payment instructions if the frequency and quantum of those instructions depart from (a) estimates provided during an account opening meeting, and/or (b) a pattern established by earlier transactions. Rather, I accepted Mr Tan's evidence that a bank is not generally required to make such enquiries. Mr Tan gave three reasons for this opinion:

(a) First, the monies in an account belong to the customer who is free to transfer them as the customer deems appropriate. Banks are thus generally not required to scrutinise the details of transactions.

(b) Secondly, banks receive many withdrawal instructions each day and it is therefore unreasonable to expect banks to make enquiries about instructions that depart from a pattern established by earlier instructions. In this regard, Mr Aaron Lee accepted that each RM at the Bank may have been responsible for managing hundreds of transactions a day.

(c) Thirdly, a customer's withdrawal patterns could change with time along with changing business needs.

I found Mr Tan's reasons for his opinion to be cogent and accordingly accepted his opinion. Mr Tan's opinion was also supported by the evidence of the plaintiff's own witnesses. Significantly, there were five authorised withdrawals from the Account in excess of US$600,000, including one for US$813,750.00

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(see S/Ns 1 and 3–6 in the table at [14] above). Mr Majnu accepted that the plaintiff did not expect the Bank not to execute these payments for the reason that they exceeded the upper end of the range allegedly given to the Bank. Mr Aaron Lee also agreed that it was not incumbent on the Bank to restrict withdrawals from the Account based on estimates given when the Account was opened.

75 Notably, Mr Tan qualified his opinion by adding that a customer could impose restrictions on withdrawals from a bank account if it wished to do so. As noted at [72(a)] above, it was undisputed that the plaintiff did not impose any such restrictions on withdrawals from the Account. For all these reasons, even if the frequency and quantum of the Four Instructions were unprecedented, I did not accept that this would have put the Bank on notice of a possible fraud.

The beneficiaries of the Four Instructions

76 The beneficiaries of the Four Instructions were entities to whom the plaintiff had not remitted monies before. Further, their bank accounts were in countries – the US and China – to which the plaintiff had not sent monies before. The plaintiff claimed that these aspects of the Four Instructions were "red flags" that should have raised the suspicions of the Bank's officers.

77 I did not accept this argument for the following reasons:

(a) First, the plaintiff had withdrawn monies from the Account in favour of five different parties (excluding Mr Majnu) before the Four Transactions were executed (see the table at [14] above). In my view, it was therefore not a "red flag" that two new entities were identified as the beneficiaries of the Four Instructions. I also did not

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consider that the fact that the beneficiaries' accounts were in the US and China would have attracted suspicion. As Mr Tan observed, given the international nature of the plaintiff's business, which seemed to have been explained to Ms Poh during the Account Opening Meeting, it would not have been surprising for the plaintiff to remit monies to these countries.

(b) Secondly, as noted at [74] above, Mr Tan's evidence was that a bank is generally not required to enquire into its customers' payment instructions. It is usually not required to scrutinise, *inter alia*, the payees of those instructions. As stated above, I accepted Mr Tan's evidence.

The unstated purpose of the Four Transactions

78 I found that the lack of a stated purpose for the Four Transactions on the Four Instructions was not a "red flag" for the following reasons:

(a) First, Mr Aaron Lee's opinion that this was a "red flag" was premised on the claim that "the purposes of previous successful TT instructions had been stated on the TT forms". However, this was not correct. Three of the plaintiff's authorised OTT instructions did not state the purpose of the relevant transactions (albeit two of these were not executed for separate reasons). One of these instructions, which was executed, was for the largest withdrawal from the Account.

(b) Secondly, Mr Aaron Lee accepted that it was not mandatory to state the purpose of a transaction in the Remittance Application Form. Furthermore, he agreed that banks do not have the resources to investigate the purposes of all the payment instructions from their

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customers. Yet, he maintained that the Bank should have enquired into the purposes of the Four Transactions. During cross-examination, he relied on a Notice issued by the Monetary Authority of Singapore ("MAS") in support of this view. However, this Notice concerned the prevention of money laundering and terrorist financing. It required banks to enquire into the purpose of "all complex or unusually large transactions or unusual patterns of transactions that have no apparent or visible economic or lawful purpose". I was satisfied that the Four Transactions did not fall into this category of transactions, and so did not attract the heightened scrutiny as required under the MAS Notice.

The misspellings and erroneous dates in the Four Instructions

79 I found that the misspellings of the plaintiff's name were not "red flags":

(a) First, Mr Majnu did not have a consistent manner of signing off his emails to the Bank. Notably, it was undisputed that he had misspelt the plaintiff's name as "Major Shipping & *Tagging*", the misspelling relied on by the plaintiff here, in two emails to Ms Poh in February 2013. Mr Tan opined that in this light, a reasonable banker would not have found the misspellings of the plaintiff's name suspicious. He also opined that it was not unusual for banks to receive emails where representatives of a (corporate) customer signed off referring to the name of a different company, *ie*, one that was not the customer. I accepted Mr Tan's evidence on these points.

(b) Secondly, I noted that the misspellings were found in the Four Emails which were all sent from the Yahoo Account. This was the email account provided to the Bank when the Account was opened (see

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> [12(a)] above). The plaintiff consistently used this email account to communicate with the Bank. Additionally, the Four Emails were also purportedly signed off by Mr Majnu. Viewing the misspellings in that light, I agreed with the Bank that they did not amount to "red flags".

80 I also found that the erroneous statement of the year in the date on the 3rd and 4th Instructions (see [68(a)(v)] above) was not a "red flag". Mr Tan's evidence was that it would have been reasonable for a banker to conclude that this was an obvious typographical error. I accepted Mr Tan's evidence.

The manner in which the Four Instructions were sent to the Bank

81 I found that the alleged irregularities in the way the Four Instructions were sent to the Bank did not amount to "red flags", for reasons to which I will now turn.

Emailing the Four Instructions before faxing them to the Bank

82 I found that the fact that the Four Instructions were sent to the Bank by email before being faxed thereto did not amount to a "red flag" for the following reasons:

> (a) First, Mr Aaron Lee did not state that this was a "red flag". There was thus no expert evidence in support of the plaintiff's position here.
>
> (b) Secondly, the plaintiff only pleaded this point in relation to the 1st Instruction, and not the 2nd to 4th Instructions.
>
> (c) Thirdly, in relation to the 1st Instruction, Mr Tan noted that even if the plaintiff had a practice of faxing payment instructions to the Bank

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before emailing them, there was nothing suspicious about there being no initial fax of the 1st Instruction. The plaintiff could, for instance, have forgotten to fax the instruction. I found Mr Tan's evidence cogent and accepted it.

The use of eFax

83 I found that the fact that the Four Instructions were faxed to the Bank using eFax did not amount to a "red flag", for two reasons:

(a) During cross-examination, Mr Aaron Lee did not say that the use of eFax was a "red flag" in itself. He said it was a "red flag" on the basis that there was allegedly a pre-advised fax number for the plaintiff in the Bank's records. But he later admitted that there was no such number. His evidence that the use of eFax was a "red flag" accordingly fell away.

(b) Mr Tan's evidence was that (a) banks do not impose restrictions on the devices used to fax instructions to them or the origin of those instructions, and (b) it is not uncommon for customers to fax instructions to banks using different fax devices. The source of a fax and the device used to fax the instruction are thus immaterial to banks. Mr Tan further noted that there were emails from the Yahoo Account, purportedly from Mr Majnu, which corresponded to each fax instruction. In the premises, the use of eFax would not have attracted suspicion. Again, I found Mr Tan's evidence on these points cogent and I accepted it accordingly.

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The fact that the S2B Platform was not used

84 I found that the fact that the plaintiff did not use the S2B Platform to send the Four Instructions to the Bank did not amount to a "red flag":

(a) First, I found that the plaintiff did not inform the Bank, before the Four Instructions were sent to the Bank, that it would *only* use the S2B Platform to issue instructions for the remittance of monies from the Account. I made this finding for the following reasons:

(i) First, I accepted Ms Poh's evidence that the parties did not agree, nor was she informed, that the plaintiff would only use the S2B platform to remit monies from 6 June 2013 onwards.

(ii) Secondly, Mr Majnu sent an email dated 4 July 2013 to the Bank instructing it not to remit monies from the Account unless it received instructions through the S2B platform (see [31] above). Critically, in this email, Mr Majnu did not indicate that he had previously given a similar instruction to the Bank. I found this omission telling. The email was sent after the plaintiff found out about the Four Transactions. If the plaintiff had previously instructed the Bank not to remit monies from the Account unless it received instructions through the S2B Platform, and the Bank had failed to comply with this instruction in executing the Four Transactions, Mr Majnu would have referred to that in his email. Separately, the plaintiff did not send any other emails indicating that the Bank had executed the Four Transactions in breach of an earlier instruction that the Bank was only to effect instructions given via the S2B Platform.

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(iii) Thirdly, I did not accept Mr Majnu's testimony that on 6 June 2013, he had told the employee of the Bank who taught him how to use the S2B Platform (see [15] above) that he would only remit funds from the Account using the S2B Platform from that point in time onwards. Mr Majnu conceded that this claim was not made in his affidavit of evidence-in-chief, nor was it found in the plaintiff's pleadings. I found that it was an afterthought.

(b) Secondly, given my finding at [84(a)] above, I found that the mere fact that the Four Instructions were issued to the Bank by fax and email, after the plaintiff had started using the S2B platform, did not amount to a "red flag". I made this finding for two reasons.

(i) First, taking the matter in the abstract, Mr Aaron Lee accepted that there was nothing "intrinsically suspicious or unusual" for a customer to give instructions by fax after using an online platform to issue instructions to a bank.

(ii) Secondly, on the facts of this case, two points indicated that a reasonable banker would not have found the plaintiff's use of fax and email to issue the Four Instructions suspicious. First, the plaintiff had frequently used fax and/or email to instruct the Bank to remit monies from the Account. For five out of the 12 withdrawals, the plaintiff had used fax and/or email to convey its instructions to the Bank (see [15] above). Secondly, the plaintiff had only used the S2B platform on one day, 6 June 2013, to effect two remittances. There was no settled practice of it using the S2B platform to remit monies from the Account.

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85 I then turned to the miscellaneous irregularities relied on by the plaintiff.

Miscellaneous irregularities

Email requests for the balance of the Account

86 Two emails were sent from the Yahoo Account to the Bank on 18 and 19 June 2013 respectively (see [60(a)] above). In these emails, Mr Desmond Lee was asked for the balance of the Account. The plaintiff argued that these emails were "red flags" because (a) Mr Majnu had never asked the officers of the Bank for the balance of the Account before, and (b) Mr Majnu would have been able to ascertain the balance of the Account by logging onto the S2B platform.

87 However, during cross-examination, Mr Aaron Lee accepted that it was not clearly more convenient for a customer to use the S2B platform, as opposed to sending an email to the relevant RM, to check the balance of an account, given that logging onto the S2B platform required the use of a security token. A customer might also find it difficult to log onto the S2B platform if he or she did not have access to a computer. I accepted that there were many innocuous explanations as to why a customer of the Bank might email a RM to request for the balance of an account. I therefore found that the two email requests for the balance of the Account were not "red flags".

The Health Problems email

88 I found that the Health Problems email (see [24] above), in which Ms Poh was informed that Mr Majnu was ill and unable to receive calls, was not a "red flag". On 6 June 2013, less than two weeks before the 1st Instruction was sent to the Bank, Mr Majnu sent

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an email to Ms Poh stating: "now I m in singapore for treatment purpose". I accepted Ms Poh's evidence that this email gave her the impression that Mr Majnu was receiving medical treatment. The Health Problems email would have been consistent with this.

89 The plaintiff claimed that the Health Problems email was suspicious as it stated that Mr Majnu was unable to receive calls; yet, Mr Majnu had ostensibly been sending faxes and emails to the Bank. Ms Poh's evidence, however, was that Mr Majnu did not inform her of the nature of his health problems and she had no reason to doubt what he conveyed to be his doctor's advice, *ie*, that he was unable to receive calls. Furthermore, Mr Tan opined that it was not uncommon for customers to arrange for fund transfers before they undergo medical treatment, especially if they may not be contactable after treatment. I accepted Ms Poh's and Mr Tan's evidence.

Conclusion

90 For the reasons given above, I found that the "red flags" relied on by the plaintiff were not sufficient, taken individually, to put a reasonable banker on notice that Mr Majnu did not issue the Four Instructions. I then turned to consider the plaintiff's submission that, when these "red flags" were considered in totality, a reasonable banker would have been put on notice that Mr Majnu did not issue the Four Instructions. I did not accept this submission. The plaintiff did not offer any theory or explanation of how factors that were not individually suspicious would collectively give rise to suspicion to put the Bank on notice of a possible fraud. Mr Aaron Lee's opinion on the collective and cumulative effect of the "red flags" was premised on the "red flags" being suspicious in and of themselves. I rejected that premise. In the circumstances, there was no cogent

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and credible evidence supporting the plaintiff's submission that the "red flags" collectively put the Bank on notice of a possible fraud.

91 I therefore found that the "red flags" relied on by the plaintiff were not sufficient, either individually or cumulatively, to put a reasonable banker on notice that Mr Majnu did not issue the Four Instructions. Accordingly, I found that the Bank had not been negligent in (a) failing to detect the alleged "red flags", and (b) executing the Four Transactions despite the alleged "red flags".

92 Given that a reasonable banker would not have been put on notice that Mr Majnu did not issue the Four Instructions, I also found that the Bank was not negligent in not obtaining call-back confirmation of the Four Instructions before executing them (see [69] above). Mr Tan's evidence was that to impose such a requirement generally, for all OTT instructions, regardless of whether a bank was put on notice of a possible fraud, would be unreasonable and impractical, given the volume of instructions received by the Bank and the delay and increased costs that would result from imposing such a requirement. I accepted Mr Tan's evidence.

93 Given this finding, *ie*, the Bank was not negligent in not obtaining call-back confirmation of the Four Instructions before executing them, I also found that the Bank was not negligent in the manner in which it sought to obtain call-back confirmation of the Four Instructions. If the Bank's duty of care did not extend to obtaining call-back confirmation of the Four Instructions, I did not see how it could extend to attempting to obtain such confirmation in certain ways.

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94 I therefore found that the Bank was not negligent, let alone grossly negligent, in believing that Mr Majnu had issued the Disputed Instructions. Hence, I found that the Bank believed in good faith that the instructions were sent by Mr Majnu. It then followed that the Bank acted within its authority under cl 4.6 of the Standard Terms in executing the Four Transactions, and I so found.

The miscellaneous breaches issue

95 In its closing submissions, apart from the cause of action based on cl 4.6 of the Standard Terms, the plaintiff relied on two other causes of action.

96 The plaintiff claimed the Bank breached cl 3.1(a) of the Standard Terms in executing the Four Transactions without obtaining call-back confirmation of the Four Instructions, notwithstanding the allegedly suspicious circumstances relating to the Four Instructions. For the reasons above, I found that the Bank was not negligent in virtue of these matters (see [91]–[94] above). I thus found that the Bank did not thereby breach cl 3.1(a) of the Standard Terms.

97 The plaintiff also argued that the Bank had breached implied terms to (a) act in accordance with its internal risk management procedures, (b) take steps and/or have the necessary facilities to prevent unauthorised fund transfers and/or, (c) comply with the relevant MAS regulations and guidelines.

98 I did not accept that there were any such implied terms. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), Sundaresh Menon CJ, delivering the judgment of the Court of Appeal, laid down the following three-stage test for the implication of terms at [101]:

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> (a) The first step is to ascertain how the gap in the contract arises. *Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.*
>
> (b) At the second step, *the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.*
>
> (c) Finally, the court considers the specific term to be implied. T*his must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract.* If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.
>
> [emphasis added]

99 In my judgment, the terms that the plaintiff contended were implied did not meet any of the three steps of the *Sembcorp Marine* test. First, the plaintiff argued that there was a gap in the contracts because they did not make any provision regarding the duties that the plaintiff contended for. In my view, the Account Opening Documents extensively set out the duties owed by the Bank to the plaintiff. There was no gap to be filled by an implied term. Secondly, I found that it was not necessary in the business or commercial sense to imply the duties that the plaintiff contended for. Finally, I found that none of the implied duties that the plaintiff contended for satisfied the officious bystander test.

100 It followed from my findings above that the plaintiff failed to prove that the Bank breached any duty owed to the plaintiff. The plaintiff's claim therefore fell to be dismissed on this basis alone. However, for completeness, I proceed to consider the exclusion of liability and the contributory negligence issues.

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The exclusion of liability issue

101 The plaintiff submitted that the Bank could neither rely on cl 10.1(a) of the Standard Terms nor the exclusion clause in the LOI to exclude its liability to the plaintiff. The plaintiff raised separate arguments for each exclusion clause and I shall therefore examine them in turn.

Clause 10.1(a) of the Standard Terms

102 The plaintiff submitted that the Bank could not rely on cl 10.1(a) of the Standard Terms to exclude its liability to the plaintiff for several reasons.

103 Two of the plaintiff's submissions fell away given my findings above. First, for the purpose of this clause, the plaintiff argued that the Bank could not rely on cl 10.1(a) because it was grossly negligent in effecting the Four Transactions. However, I found that the Bank was not grossly negligent (see [94] above) and therefore could not accept this argument. Secondly, the plaintiff submitted that cl 10.1(a) could not be read harmoniously with the exclusion clause in the LOI. However, I found that cl 10.1(a) and the exclusion clause in the LOI were mutually consistent (see [51(b)] above). I therefore could not accept this argument either.

104 The plaintiff also argued that the Bank could not rely on cl 10.1(a) as it was inconsistent with cl 3.1(a) of the Standard Terms, which required the Bank to exercise reasonable care and skill in providing its services. Therefore, cl 10.1(a) had to be "rejected as repugnant". In support of this argument, the plaintiff relied on the proposition stated in Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at para 9.08:

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> 9.08 If a clause in a contract is followed by a later clause *which destroys the effect of the first clause, the later clause is to be rejected as repugnant* and the earlier clause prevails. *If, however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together, and effect given to both.*
>
> [emphasis added]

105 In my judgment, cl 10.1(a) qualified rather than destroyed the effect of cl 3.1(a) of the Standard Terms. It did not exclude liability for all breaches of the duty of care that the Bank undertook under cl 3.1(a) of the Standard Terms. The Bank remained liable for the breaches that amounted to gross negligence. Thus, cl 10.1(a) fell squarely within the scope of the latter italicised proposition of the extract above. There was therefore no basis to reject it for inconsistency with cl 3.1(a).

106 Secondly, the plaintiff submitted that cl 10.1(a) was inconsistent with the main object of the contracts between the parties. I struggled to understand this submission. According to the plaintiff, the main object of the contracts between the parties was "for the [Bank] to provide banking services to the plaintiff". I could not accept that the mere exclusion of liability for negligence *simpliciter* in providing banking services was inconsistent with the very provision of those services.

107 Thirdly, the plaintiff argued that cl 10.1(a) contravened ss 2(2) and 3(2) of the UCTA on the basis that it unreasonably restricted the Bank's liability for negligent conduct, and was thus ineffective. Under s 11(1) of the UCTA, the test for reasonableness is whether the term was "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". In my judgment,

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cl 10.1(a) satisfied this test of reasonableness. The plaintiff is a commercial entity who entered into a contractual relationship with the Bank in the course of its business. The banking experts agreed that cl 10.1(a) was a clause which is "commonly found in the account opening documents and standard terms of Singapore banks". I saw nothing unreasonable in the Bank seeking to exclude liability for negligence given the volume of transactions it handles for various customers. In the circumstances, I found that cl 10.1(a) of the Standard Terms did not contravene the UCTA.

The exclusion clause in the LOI

108 In relation to the exclusion clause in the LOI, the plaintiff had pleaded that the exclusion clause in the LOI also contravened the UCTA. However, the plaintiff did not raise this point in closing submissions. Instead, it raised a single argument in relation to the exclusion clause in the LOI. It argued that the Bank could not rely on this clause because the Bank did not believe in good faith that Mr Majnu had issued the Four Instructions. The exclusion clause was thus not engaged on the present facts.

109 However, I found that the Bank did believe in good faith that Mr Majnu issued the Four Instructions (see [94] above). Accordingly, I did not accept the plaintiff's argument that the Bank was not entitled to rely on the exclusion clause in the LOI.

Conclusion

110 For the above reasons, I did not accept the plaintiff's arguments that the Bank could not rely on cl 10.1(a) of the Standard Terms or the exclusion clause in the LOI to exclude its liability to the plaintiff. In any event, as noted above, I

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found that the Bank was not liable to the plaintiff to begin with (see [100] above).

The contributory negligence issue

111 The Bank submitted that any loss suffered by the plaintiff was caused and/or contributed to by the plaintiff's own negligence. This was because the plaintiff knew or should have known that a third party was accessing the Yahoo Account and sending the Four Instructions to the Bank without authorisation. In this regard, the Bank made, *inter alia*, the following points:

(a) By 18 June 2013, Mr Majnu would have been aware that a third party was accessing the Yahoo Account without authorisation upon receiving the 18 June SMSes (see [18] above).

(b) Between 17 and 28 June 2013, Mr Majnu would have known that a third party was sending the Four Instructions to the Bank, upon seeing the emails in reply from Mr Desmond Lee and Ms Poh (see [17] above).

(c) On 27 June 2013, Mr Majnu would have seen the balance of the Account upon logging onto the S2B platform (see [27] above).

The evidence was that the Bank required about two to three days to process an OTT instruction. Thus, if the plaintiff had informed the Bank on 17 or 18 June 2013 of the alleged fraud, after it knew or should have come to know about it, the Bank would not have executed any or most of the Disputed Instructions. The plaintiff's loss was therefore due to its contributory negligence.

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112 Having carefully considered the evidence, I found that the Bank did not establish that the plaintiff was contributorily negligent for the following reasons:

(a) First, Mr Majnu's evidence was that he did not see the 18 June SMSes, the emails from Mr Desmond Lee and Ms Poh, or the balance of the Account on 27 June 2013 upon logging onto the S2B platform. There was no compelling objective evidence contradicting Mr Majnu's evidence. In this regard, RSM did not find evidence that the plaintiff's representatives had read or received Mr Desmond Lee's and Ms Poh's emails before 2 July 2013 (or that they had not done so). I therefore accepted Mr Majnu's evidence.

(b) Secondly, in relation to the 18 June SMSes, I noted that they simply read: "[number] is your Yahoo! verification code". The messages did not expressly state that there had been (attempted) unauthorised access to the Yahoo Account. Mr Majnu's evidence was that even if he had read the 18 June SMSes, he would not have appreciated their significance at the material time. I accepted Mr Majnu's evidence on this point.

(c) Thirdly, Mr Majnu's unchallenged evidence was that when he attempted to perform a transfer of funds using the S2B platform on 27 June 2013, the webpage indicated that the transaction was successful (see [27] above). I thus accepted that it was not evident to Mr Majnu, when he used the S2B platform on 27 June 2013, that the Account had been depleted of funds by then.

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Conclusion

113 For all these reasons, I dismissed the plaintiff's claim.

114 In relation to costs, having reviewed the parties' submissions on costs, I concluded that the Bank was entitled to costs on an indemnity basis for defending the action on the basis of cl 10.2(a) of the Standard Terms, by which the plaintiff undertook to "indemnify [the Bank] on demand against any Loss arising from or incurred in connection with … [the Bank] providing any Service to [the plaintiff]". I thus awarded costs of a total of S$384,375 to the Bank.

Kannan Ramesh
Judge

Kelly Yap, Chan Cong Yen Lionel and Jade Chia
(Oon & Bazul LLP) for the plaintiff;
Teo Chun-Wei Benedict and Lim Mei Yee Elaine
(Drew & Napier LLC) for the defendant.

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