BANK DOCUMENTATION

THE STANDARD TERMS GOVERNING CURRENT ACCOUNTS IN SINGAPORE: THE CUSTOMER'S DUTY OF CARE, THE UNAUTHORISED DEBIT AND THE ALLOCATION OF RISK

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Summary

The modern banking environment no longer resembles the circumstances pertaining when the major banking law precedents were set. The *Macmillan* and *Greenwood* duties do not adequately protect banks from the unauthorized debit. *Macmillan* is hampered by the requirement that the negligence must be "in the transaction itself" while *Greenwood*, with its requirement of actual knowledge of forgery, allows customers to abdicate all responsibility for the conduct of their accounts. Different remedies for the allocation of loss have been proposed, such as the extension of the principles of contributory negligence and a statutory allocation of loss. Banks, for their part, contract in their standard terms and conditions for more protection than is otherwise available to them.

A key provision is the verification and conclusive evidence clause. This is a stricter, contractual version of the *Greenwood* duty. It should not, however, be seen as a simplistic risk–shifting device. Unlike many other provisions in the standard terms, if properly observed, it need not alter the common law incidence of risk and it is a powerful tool for loss avoidance. It does have the potential to operate unfairly, and its availability where the bank has been negligent is particularly controversial. On the other hand, a verification duty without the backing of a conclusive evidence clause is toothless. The clause should be reformed, not rejected. It has a valuable role to play in modern banking.

The *Macmillan* duty should be replaced by a general duty of care, to avoid fraud and forgery losses. The Singapore High Court recognized this need in *Khoo Tian Hock v OCBC* but it has yet to receive Court of Appeal endorsement and obiter dicta from the highest court suggest this will not be forthcoming. Some banks express such a broader duty in their terms.

Singapore bank terms contain a myriad of other customer duties, exclusions of liability, indemnities and deeming provisions. Some of these are necessary to facilitate the effective operation of the verification and conclusive evidence clause. Generally these provisions reflect legitimate concerns but they have the potential to operate unfairly against the customer. Some terms give the bank unwarranted immunity from the risks of their business. In exchange for a broader customer duty of care and a verification and conclusive evidence clause, banks should relinquish many of these unfair terms.

Electronic banking challenges the ability of the traditional rules to allocate risk fairly. At the same time, the trend in Singapore is to transfer all the risk for use of electronic facilities to the customer. This imbalance needs to be corrected.

The common law and the Unfair Contract Terms Act are important tools to control banking contractual excesses. Because the Act is aimed at exclusions for negligence, it will not help a customer where the bank's strict duty to pay only on a valid mandate is relaxed.

Singapore banks should take the initiative to reform their standard terms to reflect a more equitable allocation of risk. Should they fail to do so, legislative change or enhanced soft law controls may be necessary.

Law Reports and Journal Abbreviations

AC – The Law Reports: House of Lords and Privy Council Cases
ACWS – All Canadian Weekly Summaries
All ER – The All England Law Reports
All ER (Comm) – The All England Law Reports Commercial Cases
Ala L Rev – Alabama Law Review
Alta LR – Alberta Law Reports
App Cas – The Law Reports: Appeal Cases
ALJ – The Australian Law Journal
ATPR – Australian Trade Practices Reports
BFLR – Banking & Finance Law Review
BLR – Business Law Review
Can Bus LJ – Canadian Business Law Journal
Ch – The Law Reports: Chancery Division
Com Cas – The Times Reports of Commercial Cases
CLC – CCH Commercial Law Cases
CLR – The Commonwealth Law Reports
CPD – The Law Reports: Common Pleas Division
DLR – Dominion Law Reports
EGLR – Estates Gazette Law Reports
ER – The English Reports
Harv L Rev – Harvard Law Review
JBL – The Journal of Business Law
KB – The Law Reports: King's Bench Division
LMCLQ – Lloyd's Maritime & Commercial Law Quarterly
LQR – The Law Quarterly Review
Lloyd's Rep – Lloyd's Law Reports
Macq – Macqueen's Reports
Man R – Manitoba Law Reports
MLJ – Malayan Law Journal
MLR – The Modern Law Review
NE – North Eastern Reporter
NY – New York Court of Appeals Reports
NYS – New York Supplement
OJLS – Oxford Journal of Legal Studies
OR – Ontario Reports
QB – The Law Reports: Queen's Bench Division (from 1891)
QBD – The Law Reports: Queen's Bench Division (to 1890)
SAcLJ – Singapore Academy of Law Journal
Sing JLS – Singapore Journal of Legal Studies
SLR – Singapore Law Reports
St John's LR – St John's Law Review
The Times – *The Times* Newspaper Report
TLR – The Times Law Reports
TLJ – Torts Law Journal

Tr. LR – Trading Law & Trading Law Reports
US – United States Reports
WLR – The Weekly Law Reports
WWR – Western Weekly Reports

Chapter 1: Introduction

1.1 Overview of the Banking Relationship

The banking relationship is contractual. In *Foley v Hill*,[1] the House of Lords, with reference to earlier cases and having regard to the rights of a bank in regard to the monies deposited with it, held that a bank–customer relationship is a debtor–creditor relationship.[2] This was endorsed and further clarified in *Joachimson v Swiss Bank Corporation*.[3] All three judgments in *Joachimson* recognized that the bank–customer relationship is not an ordinary debtor–creditor relationship.[4] A customer (the creditor) must make a demand to the bank (the debtor) before seeking repayment of the debt. More recently, in *Libyan Arab Foreign Bank v Bankers Trust Co*,[5] Staughton J said, "The obligation of a bank is not, I think, a debt pure and simple, such that a customer can sue for it without warning."[6] Certain acts or services by a bank may place it in the position of an agent or even a trustee.[7] Thus, in *Woods v Martins Bank*[8] the court held that a fiduciary relationship existed between Woods and the bank in circumstances where the bank agreed to act as Woods' financial adviser.[9] In

[1] (1848) 9 ER 1002.
[2] See view of R S T Chorley "Liberal Trends in Present–Day Commercial Law" (1939) 3 MLR 272 at 292 et seq. Lord Chorley says that that the banking relationship was initially viewed as one of bailment but the inability to explain the bank's rights to the use of the money led to the formulation of the debtor–creditor relationship, which he describes as "a thoroughly inadequate basis".
[3] [1921] 3 KB 110.
[4] [1921] 3 KB 110. Per Bankes LJ at 119, Warrington LJ at 126, Atkin LJ at 128.
[5] [1988] 1 Lloyd's Rep 259.
[6] *Ibid,* at 272.
[7] In *Foley v Hill* (1848) 9 ER 1002, Lord Brougham's judgment, at 1008, recognizes the possibility of a bank undertaking a service which places him in the position of a trustee or an agent. Lord Brougham's examples of where a fiduciary relationship might arise are where a bank accepts a deposit of exchequer bills and undertakes to receive the interest due on them or sell them on behalf of the customer.
[8] [1959] 1 QB 55.
[9] *Ibid,* at 72.

the payment of cheques drawn on the customer's account,[10] a bank is the agent of its customer. So, too, in the collection of cheques. In *Barclays Bank plc v Quincecare Ltd*,[11] it was articulated as follows by Steyn J: "Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent".[12] A bank may also be a bailee, for example, where it accepts items for keeping in safe custody. This potential for a multi–faceted nature, has led to the view that the bank–customer relationship is a "sui generis" combination of well–recognised categories of contractual relationships.[13]

There was a time when the contract between a bank and its customer consisted only of implied terms. In 1921 in *Joachimson v Swiss Bank Corporation*,[14] Bankes LJ said, "In the ordinary case of banker and customer their relations depend either entirely or mainly upon an implied contract."[15] Long–established bank practice, however, is to contract on standard terms and conditions, a practice legitimized at least a century ago. Thus, in 1909, in *Kepitigalla Rubber Estates, Limited v National Bank of India, Limited,*[16] Bray J said: "If the bank desire that their customers should make these promises they must expressly stipulate that they shall."[17] In 1931, *Calico Printers' Association Ltd v Barclays Bank Ltd*[18] upheld

[10] Per Lord Atkinson in *Westminster Bank Ltd v Hilton* (1926–1927) 43 TLR 124 at 126: "It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that quoad the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent."
[11] [1992] 4 All ER 363.
[12] *Ibid,* at 375.
[13] E P Ellinger, Eva Lomnicka and Richard Hooley *Modern Banking Law* (4th ed, Oxford University Press, 2006), at 125.
[14] [1921] 3 KB 110.
[15] *Ibid,* 117.
[16] [1909] 2 K.B. 1010.
[17] *Ibid,* at 1025.

an express exclusion of liability favouring the bank. In the United States, Uniform Commercial Code ("UCC") section 1–102 recognises the right of a bank and its customer to expressly contract for their rights and duties, subject to the requirement of reasonableness. In a recent decision of the Singapore Court of Appeal, the legitimacy of this practice was reinforced.[19]

The object in this thesis is to examine the express terms of banks in Singapore, focussing on the allocation of risk in the event of an unauthorised debit.

1.2 Thesis Structure

Chapter 2 sets out the contractual principles relevant to standard terms including the common law relating to the incorporation and interpretation of standard terms and legislative curbs on freedom of contract. These principles are relevant background to the analysis of the express terms in the banking contract. The customer's common law duties are dissected in chapter 3, with particular reference to their development and historical context. This is important to assess the legitimacy and effectiveness of the common law duties today. The discussion includes a consideration of the principles of estoppel and the law relating to implied terms. The next five chapters (4–8) focus on the verification and conclusive evidence clause. This clause appears in the terms and conditions used by all five major banks operating in Singapore that were selected for this study: United Overseas Bank, DBS Bank, Oversea–Chinese Banking Corporation, The Hongkong and Shanghai Banking Corporation and Standard Chartered Bank. The clause is central to bank protection

[18] (1931) 36 Com Cas 71; affirmed (1931) 36 Com Cas 197.
[19] *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273 at 293.

from fraud and forgery and, it will be argued, a justified incursion into the customer's rights and duties. It accordingly merits the detailed attention it receives here. Chapter 4 commences with an in–depth analysis of the operation of the clause. Chapter 5 weighs up the merits of a verification clause without the support of a conclusive evidence provision and concludes that it is an inadequate protection for the bank. In chapter 6, the use of a verification and conclusive evidence clause in the United States of America and Canada is discussed. The effect of Singapore's Unfair Contract Terms Act on the verification and conclusive evidence clause is considered in chapter 7, followed in chapter 8 by recommendations for reform of the clause. Chapter 9 contains a discussion of mutuality in the bank contract. In chapter 10, sixteen other clauses in bank terms and conditions are analysed; these are either necessary for the effective operation of the verification and conclusive evidence clause or impact the risk and liability for the unauthorised debit in some other way. The terms regulating electronic banking are discussed in chapter 11. The final chapter, 12, looks at the cumulative effect of the terms on risk and liability allocation in the contract and concludes with recommendations.

1.3 Overview of the Singapore Legal System

Singapore has been an independent state since 1965. The Singapore Supreme Court consists of the High Court and the Court of Appeal. The Court of Appeal is the highest court in the country since the abolition of rights of appeal to the Privy Council. This was achieved in stages,[20] culminating in the removal of all remaining rights of appeal in April

[20] See, for example, the discussion by Dr Myint Soe *Principles of Singapore Law* (4th ed, The Institute of Banking & Finance, Singapore, 2001), at 74–76.

1994.[21] The Second Charter of Justice, 1826[22] is regarded as making English law applicable in the Straits Settlements, which included Singapore,[23] subject to changes to suit local conditions and to prevent harsh operation.[24] Today Singapore has the Application of English Law Act, 1993,[25] in terms of which English common law continues to be authoritative in Singapore subject to appropriate modification for local circumstances. English legislation is no longer generally applicable in Singapore but certain statutes were adopted by the Application of English Law Act and various Singapore statutes are re–enactments, to a greater or lesser degree, of English legislation.[26] English law has been central to the development of Singapore law and is still relevant; frequent reference will be made to it.

1.4 Overview of the Customer's Duty of Care

In England, the customer's duty of care under the general law is limited. The House of Lords decision in 1918, in *London Joint Stock Bank v Macmillan & Arthur*,[27] is the leading authority.[28] It held that a customer has a duty to its bank to exercise reasonable care in writing cheques. This is subject to the qualification, articulated in *Paget's Law of Banking*,

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[21] Judicial Committee (Repeal) Act, 1994 (Cap 143).
[22] Second Charter of Justice, dated 27 November 1826.
[23] Singapore was part of the Colony of the Straits Settlements from 1867 to 1946, see Dr Myint Soe *Principles of Singapore Law* (4th ed, 2001), at 4.
[24] G W Bartholomew "The Singapore Legal System" in *Singapore: Society in Transition, Riaz Hassan* (ed) (Singapore, Oxford University Press, 1976) 84 at 88–90; David Hay (Gen Ed) *Halsbury's Laws of Singapore*, Vol 1 "Administrative and Constitutional Law," (Butterworths Asia, 1999), para 10.006; Dr Myint Soe *Principles of Singapore Law* (4th ed, 2001), at 2.
[25] Cap 7A.
[26] An example in the banking context is the Bills of Exchange Act, Cap 23.
[27] [1918] AC 777.
[28] *Macmillan*'s predecessor is *Young v Grote* (1827) 130 ER 764, which is discussed in chapter 3 below.

that the bank must not be negligent in failing to detect the alteration.[29] *Paget's* view was approved by the Singapore High Court in *Bintai Kindenko Pte Ltd v Sanwa Bank Ltd.*[30]

Another major development came in 1933 in *Greenwood v Martins Bank Limited.*[31] The House of Lords held that a customer is under a duty to inform the bank of any forgery of cheques drawn on his account as soon as he becomes aware of it, failing which the customer is estopped from disputing the bank's right to debit his account. Some 30 years later, in *Brown v Westminster Bank Ltd*[32] the Queen's Bench Division (Commercial Court) held that the customer was estopped from denying the authenticity of her signature, which she had represented, upon enquiry by the bank, to be genuine. All the elements of an estoppel, as identified by Lord Tomlin in *Greenwood's* case,[33] were satisfied: a representation by the customer, conduct by the bank as a result of the representation (payment of the cheques) and detriment to the bank in consequence. These elements were endorsed in a decision of the Singapore High Court in *Banque Nationale de Paris v Hew Keong Chan Gary & Ors*.[34]

In 1985, Hong Kong banks, operating in circumstances very different from those pertaining in *Macmillan* and *Greenwood*, sought recognition from the courts of a broader implied duty on the customer. The Privy Council, applying English law,[35] was asked to review the extent of the customer's duties in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and*

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[29] Mark Hapgood QC (Gen ed), *Paget's Law of Banking* (13th ed, Lexis Nexis Butterworths, 2007) para 19.7, at 489.
[30] [1994] 3 SLR 459 at 468.
[31] [1933] AC 51.
[32] [1964] 2 Lloyd's Rep 187.
[33] [1933] AC 51.
[34] [2001]1 SLR 300 at 341.
[35] [1986] 1 AC 80 at 108.

Others.[36] It rejected the arguments that the extent of a customer's implied duties to its bank should be any wider than those defined in *Macmillan* and *Greenwood* above.[37] In Singapore, on the other hand, fifteen years after *Tai Hing Cotton Mill*, a bank's argument for a wider common law duty of care on the customer found favour with the High Court in *Khoo Tian Hock & Anor v Oversea–Chinese Banking Corporation Limited (Khoo Siong Hui, Third Party)*.[38] The court reviewed authorities in Singapore, the United Kingdom, Australia, New Zealand and Canada and made a deliberate decision not to follow *Tai Hing Cotton Mill.* It held that a customer had an implied duty to the bank not to facilitate fraud. Its reasoning is summarised in the words: "To draw a distinction between the drawing of cheques on the one hand and other steps or omissions on the other hand is to create an artificial and unrealistic distinction. After all, fraud is not facilitated by the careless drawing of cheques alone."[39]

1.5 Overview of the Bank's Duty of Care

In both England and Singapore, the bank's duty of care to its customer is stated as a matter of principle; whether it applies in any given situation will depend on the particular circumstances. *Joachimson v Swiss Bank Corporation,*[40] the usual starting point for a discussion of the implied terms in the bank–customer contract, said nothing about a duty of care on the bank toward its customer. Still, cases before and after *Joachimson* recognised a

[36] [1986] 1 AC 80.
[37] Discussed further in chapter 3 below.
[38] [2000] 4 SLR 673.
[39] [2000] 4 SLR 673 at 707.
[40] [1921] 3 KB 110.

bank's duty of care to its customer.[41] In 1959, in *Woods v Martins Bank*,[42] the court decided that financial advice given by a bank to a customer, within the scope of the bank's business, had to be given with reasonable care and skill. While *Paget's* 9th edition said that the facts of the case were special and the decision may be "unsafe for general application,"[43] a series of decisions confirmed the duty. In *Selangor United Rubber Estates Ltd v Cradock (No 3)*,[44] the Chancery Division had to consider a paying bank's liability to its customer in negligence. The court acknowledged that *Joachimson*'s case did not mention a duty of care owed by the bank to the customer but rejected an inference that no such duty exists,[45] ruling that "a bank has a duty under its contract with its customer to exercise 'reasonable care and skill' in carrying out its part with regard to operations within its contract with its customer."[46] Four years later, the same court, in a case with remarkably similar facts, said that a bank is required to "exercise reasonable care and skill in transacting the customer's banking business".[47]

Selangor has been criticised on the facts[48] but the principle was confirmed by the English Court of Appeal in *Lipkin Gorman v Karpnale Ltd and Another*:[49] "That a bank has a duty of care to its customer when carrying out its mandate is beyond doubt," per Parker LJ[50]

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[41] For example, *Curtice v London City and Midland Bank Ltd* [1908] 1 KB 293; *Hilton v Westminster Bank Ltd* (1925–1926) 42 TLR 423 (CA); *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 from 1594.
[42] [1959] 1 QB 55.
[43] Maurice Megrah and F R Ryder, *Paget's Law of Banking,* (9th ed, London, Butterworths, 1982) at 131.
[44] [1968] 1 WLR 1555.
[45] *Ibid,* at 1595. In *Tournier v National Provincial and Union Bank of England* [1924] KB 461, Atkin LJ said that *Joachimson's* case did not contain an exhaustive list of the implied terms in a bank–customer contract.
[46] [1968] 1 WLR 1555 at 1608.
[47] *Karak Rubber Co v Burden* [1972] 1 WLR 602 at 629.
[48] See e.g., Ellinger, Lomnicka, Hooley *Modern Banking Law*, 153.
[49] [1989] 1 WLR 1340.
[50] *Ibid,* at 1376.

with Nicholls LJ concurring.[51] This duty was held, for example, to extend to a funds transfer instruction in *Royal Products Ltd v Midland Bank Ltd*, by Webster J in the Queen's Bench Division, on the basis that it was an ordinary banking operation.[52]

Although the seminal cases[53] were decided relatively recently, they confirmed a view long propounded by commentators including Heber Hart, who wrote in 1904: "Within the scope of his business, the banker is bound to exercise the degree of skill, care and diligence, usual in the ordinary conduct of banking business, and reasonably necessary for the proper performance of the duties undertaken by him."[54]

The Singapore Court of Appeal in *Yogambikai Nagarajah v Indian Overseas Bank*[55] endorsed the principle established in *Selangor*[56] and *Lipkin Gorman*[57]. In *Khoo Tian Hock v OCBC*,[58] the High Court stated the duty as follows: "To summarise, a bank must act with reasonable care. Whether a bank has behaved reasonably and discharged its duty of care must be viewed in all the circumstances."[59] The circumstances of each case are critical to whether the duty is owed, in the first place, and whether it has been breached, in the second. *Suriya & Douglas (a firm) v Midland Bank plc*[60] is illustrative. The Court of

[51] *Ibid,* at 1387.
[52] [1981] 2 Lloyd's Rep 194 at 198.
[53] *Selangor, Karak* and *Lipkin Gorman*, above. These three cases also raised issues of constructive trust but the issue of a breach of care was dealt with separately.
[54] Heber Hart *The Law of Banking* (London, Stevens and Sons Limited, 1904), at 579.
[55] [1997] 1 SLR 258.
[56] With reservation on the application of the law to the facts in that case, see [1997] 1 SLR 258 at 275.
[57] [1997] 1 SLR 258.
[58] [2000] 4 SLR 673.
[59] *Ibid,* at 691.
[60] *The Times*, March 29, 1999.

Appeal (England) considered that the bank's duty did not extend to advising a customer of new account types that would be advantageous to the customer.

1.6 Interaction of the Two Duties

The duties of care owed by the bank to the customer and vice versa are not two parts of one whole: some losses cannot be attributed to a breach of duty by either party, yet they will usually have to be borne by one of them. These losses can arise in a myriad of ways: losses may be caused by external political or economic factors that affect the availability of certain currencies or their exchange rates, or by the insolvency of a correspondent or by the bank failing to implement a countermand instruction. Losses may be facilitated by either or both bank and customer being in breach of their duties of care. One of the biggest concerns of banks is payment from an account without a mandate as a result of the dishonest scheme of a third party.

Banks, conscious of the potential for losses for which they may be liable under the common law, seek protection. They do so in different ways. One of the most significant is through their terms and conditions.[61] These terms are in standard, pre–printed form and will be referred to here as the 'T&C'. The legitimacy of using express terms to create rights and duties not imposed by the common law is founded on the principle of freedom of contract. In the banking context, it was recognized, for example, in 1891 in *The Governor and Company of the Bank of England v Vagliano Brothers*,[62] in 1909 in *Kepitigalla Rubber*

[61] Other ways include the adoption of business and security practices, and insurance.
[62] [1891] AC 107 at 125 per the Earl of Selborne, banks "are entitled to judge for themselves what risks they will run".

Estates, Limited v National Bank of India, Limited[63] and endorsed in *Tai Hing Cotton Mill*.[64] Freedom of contract is subject to legislative and common law controls,[65] most notably the Unfair Contract Terms Act,[66] which will be discussed below.[67] Through the T&C, banks attempt to shift some, maybe most, of the risk to the customer. The focus here is on these contractual terms in Singapore in the context of the unauthorised debit, how they are used and how they modify the common law; whether their use is legitimate, whether they reflect a reasonable apportionment of rights and duties between bank and customer; whether re–alignment may be appropriate; and how that may be achieved.

1.7 The Express Terms

This research is based on an analysis of the general T&C of five major retail banks operating in Singapore: United Overseas Bank ("UOB"), DBS Bank ("DBS"), Oversea–Chinese Banking Corporation ("OCBC"), The Hongkong and Shanghai Banking Corporation ("HSBC") and Standard Chartered Bank ("Standard Chartered"). The first three banks are based in Singapore and are prominent operators in the Singapore market; the latter two are headquartered in London but have a strong presence in Asia, including Singapore. Their T&C are accessible via the Internet and hardcopies are available from bank branches on request. Since the commencement of this research at the end of 2003, the above banks have made amendments to their T&C. References in this thesis are to the current editions of the T&C as of 15 February 2008.

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[63] [1909] 2 K.B. 1010. At 1025 Bray J said: "If the bank desire that their customers should make these promises they must expressly stipulate that they shall."
[64] [1986] 1 AC 80 at 110.
[65] Such as contracts infringing public policy. There are also soft law controls, such as the Banking Codes which are discussed below.
[66] Cap 23.
[67] See chapter 7 below.

The focus in this research is on the contractual terms for current accounts and primarily on the T&C for individual customers, although some reference will be made to business T&C. Given the diversity in banking products and services, including specialist savings schemes, fixed deposits, loans, share and margin trading facilities and foreign currency accounts, the one–size–fits–all T&C is no longer possible or appropriate. Bank documentation has accordingly mushroomed and specialist accounts and services are governed by their own T&C designed to deal with their own peculiarities and requirements. This study is therefore confined to the T&C for the core bank account, the current or cheque account. The T&C for this basic account are commonly incorporated into the T&C for the more specialised banking services. They commonly form the backbone of bank documentation.[68] Some banks have separate T&C for personal and business customers.[69] The T&C examined here are as follows:

- UOB's "Terms and Conditions Governing Accounts and Services", undated[70]
- OCBC's "Terms and Conditions Governing Deposit Accounts", undated[71]
- DBS's "Terms and Conditions Governing Accounts", October 2006[72]
- HSBC's "Terms and conditions governing personal deposit accounts", 23 January 2007[73]
- Standard Chartered's "Standard Terms and Conditions,"[74] undated.

[68] For example, DBS T&C for electronic services, Part A 29, Part B 11; HSBC's T&C for Internet banking (online@hsbc), clause 2.b.
[69] For example, DBS and UOB appear to use the same current account T&C whether the account is personal or business while OCBC uses separate current account T&C for the two types of customer.
[70] Reference Feb 195800116D.
[71] Reference OCBC T&C–PE/0405.
[72] Reference 06–09–235.
[73] Reference SGH MKT WEL 052/1.
[74] Reference CB–0098–1206.

The five Singapore banks all have additional T&C regulating some or all of their electronic services which will be introduced in chapter 11; these will be referenced in the footnotes as "E–terms".

Reference will also be made to terms and conditions used by the following banks in England for comparative purposes: Barclays Plc ("Barclays"), National Westminster Bank Plc ("NatWest") and HSBC Bank Plc ("HSBC"). These T&C are:

- Barclays's "Retail Customer Agreement,"[75] 2007
- Natwest's "Personal and Private Banking Terms and Conditions,"[76] 2007
- HSBC's "Personal Banking Terms and Conditions,"[77] 1 October 2007
- HSBC's "Business Banking Terms and Conditions,"[78] 2007

A survey of the T&C reveals that the contractual obligations and liabilities of both parties are crafted in four main ways. The T&C:

1. impose express duties on the customer;
2. enhance the bank's rights against the customer;
3. exclude and limit bank liability; and
4. indemnify the bank.

These terms are supported by deeming provisions regarding, for example, the evidential value of bank records and receipt of bank communications. The ambit of the exclusions of

[75] http://www.barclays.co.uk/importantinfo/cust_agree.html
[76] http://www.natwest.com/content/microsites/private/pdf/Private_Bank_Account_Terms_Conditions.pdf
[77] http://www.hsbc.co.uk/1/2/legal;jsessionid=0000KrrhHHiclzES9ukbBYt0Phs:11j56r6g2
[78] http://www.hsbc.co.uk/1/2/legal;jsessionid=0000KrrhHHiclzES9ukbBYt0Phs:11j56r6g2

liability, indemnities and customer duties is wide, extending into most facets of the ordinary bank–customer relationship. Some provisions are specifically targeted, such as an exclusion of liability for losses from observing or failing to observe a countermand instruction[79] or the shifting of liability for losses caused by the insolvency or fault of a correspondent.[80] Others are very widely drawn, rendering some of the more specific provisions superfluous, such as a customer indemnity to the bank for all costs, losses, damages, expenses and claims, howsoever suffered[81] or the exclusion of liability arising from the bank's exercise of its rights under the T&C.[82] Relevant express provisions will be considered in more detail.

[79] For example, OCBC 8.2.
[80] For example, Std Ch 11.5.
[81] For example, UOB 21.1.
[82] For example DBS 21.1(e).

Chapter 2: The Contractual Background

Before embarking on an analysis of the T&C, it is worth remembering the environment in which they are created and operate. It is this environment that provides the tools for the analysis that will be applied later on. The banking relationship is contractual.[83] The T&C are not, however, negotiated between the bank and the customer. It is unlikely that any, other than possibly the biggest of customers, would have any prospect of altering the bargain which the bank presents to them in the form of the pre–printed T&C. In the words of the Canadian Supreme Court judge, Laskin J (dissenting), in *Arrow Transfer Co Ltd v Royal Bank of* Canada,[84] "it is more a contract of adhesion than a bargained arrangement."[85]

In practice, it is unusual for a prospective customer to read the terms that will govern his contract with the bank. If he does, it is unlikely that he will comprehend the full impact of the provisions. They are pre–printed, often in small type, and are relatively lengthy.

Standard terms have advantages, saving time and costs. They also pose problems: the party producing the terms is familiar with them and has probably had them prepared by experts while the other party is unfamiliar with them, may not have had an opportunity to read them and is not expected to read them.[86] Abusive use of standard terms has provoked the courts and legislature to find ways to protect ignorant consumers from harsh provisions. In

[83] Established in *Foley v Hill* (1848) 9 ER 1002 to be that of debtor–creditor.
[84] (1972) 27 DLR (3d) 81.
[85] *Ibid,* at 97.
[86] E Allan Farnsworth *United States Contract Law* (Transnational Juris Publications, Inc. Ardsley–on–Hudson, New York, 1991) at 91.

Macaulay v Schroeder Publishing[87] Lord Diplock, in the House of Lords, divided standard form contracts into two kinds. The first, he said, are "of very ancient origin"[88] and have become settled through years of negotiation between the respective interests involved. Bills of lading and charterparties are examples. The second are more recent. They are "the result of the concentration of particular kinds of business in relatively few hands."[89] They have not been negotiated by the parties or approved by an organization representing the weaker party. The terms of the contract are dictated by one party, who is able to adopt a "take it or leave it" stance either because of his own superior bargaining power or because of the collective power exercised together with others providing similar goods or services.[90]

In *Interfoto Picture Library v Stiletto Visual Programmes*[91] Dillon LJ said, "printed conditions have tended to become more and more complicated and more and more one–sided in favour of the party who is imposing them".[92] Later cases echo the same view. In *AEG (UK) Ltd v Logic Resource Ltd*[93] Hobhouse LJ (dissenting) commented: "As is almost inevitable in printed standard terms, they are not related to the particular circumstances of the case and, furthermore, they stipulate for a greater protection of the seller than is reasonable".[94] These dicta reveal the judicial distaste for standard terms; they create a tension between freedom of contract on the one hand and abuse of a dominant contractual position on the other. Over the years, standard terms have been challenged, using a variety of contractual tools. An overview of these tools, in the banking context, follows.

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[87] [1974] 1 WLR 1308.
[88] *Ibid,* at 1316.
[89] *Ibid.*
[90] *Ibid.*
[91] [1989] QB 433.
[92] *Ibid,* at 438.
[93] [1996] CLC 265.
[94] *Ibid,* at 277.

2.1 Incorporation

A customer wishing to open an account in Singapore will be asked to sign an Application or Request for an Account which states that it will be governed by the bank's standard T&C. Banks may, as a matter of practice, ask the customer to sign a copy of the T&C, which should then be kept on file. Today the customer will normally be given a copy of the T&C, which is strongly recommended.[95] The Singapore *Code of Consumer Banking Practice*, published by the Association of Banks in Singapore,[96] requires that the T&C be made "readily available" to the customer.[97] Where the customer does not sign the T&C, but only the application form stating that the contract will be governed by the T&C, they are incorporated by reference, a recognized method of importing terms into a contract. In *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd*, [98] the Singapore High Court decided that terms may effectively be incorporated by reference where the contract that incorporates those terms by reference is signed, even if the terms are not given to and are not read by the other contracting party.[99] The position may be different where the terms to be incorporated are not made available despite the request of the other party.[100] In both cases, i.e. actual signature of the T&C or signature only of the application form incorporating the T&C by reference, the customer will in all likelihood not have read the T&C or even the signed application form. What is significant though, in both cases, is

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[95] See dictum of Hobhouse LJ (dissenting on the issue of incorporation) in *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 277.
[96] See further discussion of the *Code* in chapter 2.3 below.
[97] *Code of Consumer Banking Practice* (Sep 2002) cl 8.a.i. In the United Kingdom, banks undertake in *The Banking Code* (March 2005) s. 6.1, to provide a customer with the relevant T&C when a product or service is applied for.
[98] [2003] 1 SLR 712.
[99] *Ibid,* at 725.
[100] *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427 at 433; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 275.

that there is a signed contract and the customer is bound by it.[101] In the words of Hobhouse LJ,[102] there is a "fictional element of consent which has nevertheless to be accepted by contract law in the interests of having a coherent objective scheme."[103]

Singapore law distinguishes between a signed agreement[104] and the so–called "ticket cases," in which it is sought to impose contractual terms without the other party agreeing orally or by signature: "When a document containing contractual terms is signed, then, in the absence of fraud, or …, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."[105] In Singapore in 1959, in *Serangoon Garden Estate Ltd v Marian Chye*[106] Chua J stated: "I think it is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, then to use the words of Denning J in the case of *Curtis v Chemical Cleaning and Dyeing Co* 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.' ".[107] Sir Guenter Treitel[108] adds one proviso to this proposition: The document which was signed must be one which could reasonably be expected to be

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[101] As was held in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828 at 838; *Stephan Machinery Singapore (Pte) Ltd v Overseas–Chinese Banking Corporation Ltd* [2000] 2 SLR 191at 193; *Elis Tjoa v United Overseas Bank* [2003] 1 SLR 747 at 765.

[102] Hobhouse LJ dissented on the issue of incorporation.

[103] *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 278. Later, at 278: "it is a necessary incident of a law of contract that in various commercial and other situations parties must objectively be taken to have agreed to clauses even though they have not actually applied to those clauses, and indeed may never have taken steps to inform themselves of their content."

[104] An interesting critical analysis of the weight attached to a signature to a document in English law is contained in the Canadian decision of *Tilden Rent–A–Car Co v Clendenning* (1978) 83 DLR (3d) 400 (Ont CA).

[105] Per Scrutton LJ in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at 403, affirming *Parker v South Eastern Ry Co* CA (1877) 2 CPD 416.

[106] (1959) 25 MLJ 113.

[107] *Ibid,* at 114. A more recent reiteration of this position can be found in *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1999] 1 SLR 214 at 224.

[108] G H Treitel *The Law of Contract* (11th edn, Sweet & Maxwell, London, 2003), at 217.

contractual in nature.[109] This qualification is made in the light of *Grogan v Robin Meredith Plant Hire and Another.*[110] The Court of Appeal (England) held that time sheets which contained words purporting to incorporate standard terms of business, and which were signed by the other party as signifying number of hours worked, did not vary the existing contract between the parties so as to incorporate the standard terms. The time sheets recorded performance of a contractual obligation; they did not purport to be a contract or to have contractual force. This development is recognized in *Chitty on Contracts*, evident from a comparison of the three most recent editions. In the 27th edition, it says: "The other party may have signed the document, in which case he is bound by its terms."[111] *Parker v South Eastern Ry Co*[112] is cited in support. In the 28th and 29th editions, it says: "If a party signs a contractual document, he will normally be bound by its terms"[113] and reference is made to *Grogan.*[114]

A potential avenue of escape from signed contractual terms lies in onerous or unusual terms. The source of this doctrine is said[115] to lie in a statement by Bramwell LJ in *Parker v South Eastern Ry Co.*[116] The doctrine, which has come before the Court of Appeal (England) a remarkable number of times, was first developed in the context of unsigned

[109] *Ibid*.
[110] *The Times*, February 20, 1996.
[111] AG Guest (Gen Ed) *Chitty on Contracts* (27th ed, 2 vols, Sweet & Maxwell, London, 1994) vol 1 para 12–007.
[112] (1877) 2 CPD 416.
[113] HG Beale (Gen Ed) *Chitty on Contracts* (28th ed, 2 vols, Sweet & Maxwell, London, 1999) vol 1 para 12–008; HG Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 12–008.
[114] *The Times*, February 20, 1996.
[115] See for example, Robert Bradgate "Unreasonable Standard Terms" (1997) 60 MLR 582 at 589.
[116] (1877) 2 CPD 416 at 428: "I think that there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read".

contracts. In *Thornton v Shoe Lane Parking Ltd*[117] Megaw LJ said: "where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition *of that particular nature* was fairly brought to the notice of the other party."[118] Lord Denning MR, in the same case, said of the term: "it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way."[119] The Court of Appeal (England) in *Interfoto Picture Library v Stiletto Visual Programmes*[120] took the concept further. In *Thornton*'s case, the term was considered unusual for the contract type in which it was inserted, while in *Interfoto*, the term was not unusual in itself[121] but, being extortionate, the term was unusual in degree. It was held that onerous or unusual terms must be highlighted to the other party. Dillon LJ said that this was "a logical development of the common law into modern conditions".[122] Bingham LJ went so far as to say that it represented the concept of fair dealing in English contract law.[123]

This development made its way into the realm of written contracts. The Court of Appeal (England) in *AEG (UK) Ltd v Logic Resource Ltd*[124] endorsed the following statement in *Chitty on Contracts*: "Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or

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[117] [1971] 2 QB 163.
[118] *Ibid,* at 172.
[119] *Ibid,* at 170. Lord Denning went on to say: "In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it – or something equally startling." This is a reference to a similar statement made in an earlier judgment of his, *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 at 466.
[120] [1989] QB 433.
[121] In *Interfoto* the court referred to evidence of similar terms from ten other operators in the same market, see [1989] QB 433 at 436.
[122] [1989] QB 433 at 438.
[123] *Ibid,* at 439, 443. See also Bradgate "Unreasonable Standard Terms" at 588.
[124] [1996] CLC 265 at 273. Here the written contract was constituted by an exchange of correspondence being an order, an acknowledgement of order and a confirmation of order.

unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention".[125] The requirement was subsequently applied in *Ocean Chemical v Exnor*,[126] by Evans LJ. In *AEG* all members of the Court of Appeal agreed that a sub–clause must be considered in the context of the clause as a whole and not in isolation. [127] The majority[128] found that the clause was "extremely onerous and unusual"[129] and as it had not been brought to the attention of the other party, it was not incorporated into the contract. Hobhouse LJ (dissenting) supported the proposition that onerous or unusual terms must be brought to the attention of the other party[130] but differed by saying that: "it is necessary to consider the type of clause, and only if it is a type of clause which it is not to be expected will be found in the printed conditions referred to then to go on to question its incorporation."[131] He considered that only in "the most exceptional circumstances"[132] is a party able to complain that a clause, of a type one would expect to find in printed terms, is not incorporated by standard words of incorporation.[133] Hobhouse LJ found that the clause in question dealt with a topic one would expect in contracts in the industry concerned and therefore was not to be scrutinised for being onerous or unusual.

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[125] Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004) vol 1 para 12–015.
[126] [2000] 1 Lloyd's Rep 446 at 454.
[127] [1996] CLC 265.
[128] Judgment was delivered by Hirst LJ.
[129] [1996] CLC 265 at 273.
[130] Note his support for the statement of Dillon LJ in *Interfoto Picture Library v Stiletto Visual Programmes* [1989] QB 433 at 439.
[131] [1996] CLC 265 at 277.
[132] *Ibid*.
[133] *Ibid*.

In *Ocean Chemical v Exnor*,[134] a written contract for the supply of bunkers to a ship included a clause shortening the limitation period to six months. Evans LJ suggested that even in the case of a signed document, having regard to the nature and effect of the term, there may be a duty to bring it to the attention of the other contracting party in order to effect its incorporation into the contract: "in some extreme circumstances, even a signature might not be enough."[135]

Tilden Rent–A–Car Co v Clendenning[136] is a decision of the Ontario Court of Appeal, Canada. The majority held that the hirer of a motor vehicle was not bound by "stringent and onerous provisions"[137] contained in the fine print of the standard form agreement, which denied the hirer insurance cover for damage to the vehicle, despite his signature to the agreement. It was held that such terms could not be relied on if they had not been drawn to the attention of the other party.

In Singapore, however, the "onerous or unusual" line of argument was rejected in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association.*[138] The plaintiffs sought to exclude a term from a bank contract on the ground that it was onerous and unreasonable and the defendant had not taken adequate steps to draw it to their attention. The High Court said "the plaintiffs signed the general agreement. Having signed it, they must be taken to have read and understood the terms thereof."[139] Absent evidence that the agreement was not freely entered into, the court was not prepared to entertain the

[134] [2000] 1 Lloyd's Rep 446.
[135] *Ibid,* at 454.
[136] (1978), 83 DLR (3d) 400 (Ont CA).
[137] *Ibid,* at 408.
[138] [1992] 2 SLR 828.
[139] *Ibid,* at 838.

argument that the term was not incorporated in the contract. In *Ri Jong Son v Development Bank of Singapore*[140] the bank relied on an exclusion of liability in their T&C. It was contended by the customer that the significance of the T&C should have been brought to his attention. The Singapore High Court held that in the circumstances of the customer not speaking English, and the bank officer not speaking Korean (the customer's language), it was "unduly onerous"[141] to require the bank officer to bring the terms and conditions or the particular exclusion clause to the customer's attention.

In *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd*, Judith Prakash J said, "the line of authorities that decides that onerous and unusual conditions cannot be incorporated unless the attention of the party sought to be bound has been specifically drawn to them does not apply to a case … where there is a signed contract with an explicit incorporating clause."[142] This, notwithstanding that the incorporated terms were not given to the other party and were not read. The court went further, endorsing a statement of Hobhouse LJ[143] in *AEG (UK) Ltd v Logic Resource Limited*[144] that it was no longer necessary to introduce stricter criteria for the incorporation of contract terms by reference as the reasonableness of a contract term can be assessed in terms of the Unfair Contract Terms Act.[145] From the viewpoint of a contracting party wanting to escape a clause in a contract, however, the exclusion of the clause through the rules for incorporation is far preferable to the protection offered by the Unfair Contract Terms Act, which, if it

[140] [1998] 3 SLR 64.
[141] [1998] 3 SLR 64, at 72.
[142] [2003] 1 SLR 712 at 725.
[143] Dissenting on the issue of incorporation.
[144] [1996] CLC 265 at 277.
[145] *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712 at 726.

applies at all, operates in most cases on the more nebulous concept of reasonableness,[146] making the outcome less certain.

As a legal doctrine, onerous or unusual terms is a weak option on current authority. In the bank customer's favour, the Singapore *Code of Consumer Banking Practice*[147] says that banks should be transparent about their T&C, use legible print, plain English[148] and not include "harsh, oppressive or excessively one–sided terms" in their agreements.[149]

The law relating to unconscionable terms provides limited scope to avoid standard banking T&C. Historically, English law only protected against specific limited categories of exploitation. According to Andrew Burrows,[150] exploitation of mental weakness has enjoyed greater protection in English law than exploitation of a difficult predicament,[151] for which he says there is little authority in English law.[152] More recently, there were indications of a willingness to develop the limited categories into broader principles or at least update them to modern situations.[153] The Queen's Bench decision of *Lloyds Bank v Bundy*[154] was one of these decisions. Lord Denning (dissenting) indicated his support for an "inequality of bargaining power" principle in English law. However, in *National*

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[146] See, for example, the comment of Andrew Phang in "Interpretation, Severance and Policy and the Unfair Contract Terms Act" [1992] LMCLQ 467 at 470: "for the most part the ascertainment of the reasonableness of a given exception clause is an exercise fraught with difficulties (particularly of a factual nature)".
[147] See further discussion of the *Code* in chapter 2.3 below.
[148] See the "Guidance for Code Subscribers" 1 Sep 2004, cl 3b, available at http://www.abs.org.sg/documents/Guidance%20for%20CCBP%20Subscribers.pdf.
[149] *Ibid,* cl 3a.
[150] Andrew Burrows *The Law of Restitution*, (2nd ed, Great Britain, Butterworths Lexis Nexis, 2002).
[151] Excepting extortionate salvage agreements, see Burrows, *Restitution* at 268.
[152] Burrows, *Restitution*, at 268.
[153] For example, *Cresswell v Potter* [1978] 1 WLR 255; *Backhouse v Backhouse* [1978] WLR 243.
[154] [1975] QB 326.

Westminster Bank v Morgan,[155] Lord Scarman said: "And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power."[156] He considered that this was a matter for the legislature and, with reference to a number of statutes, commented that it was a task they had already undertaken.[157] Nevertheless, in *Credit Lyonnais Bank Nederland NV v Burch*,[158] dicta by the Court of Appeal (England) supported the setting aside of a legal charge as an unconscionable bargain. An additional factor limiting this line of attack lies in the orthodox view that the doctrine may only be invoked in cases of procedural unfairness as opposed to substantive unfairness. Burrows acknowledges that "the judicial desire to push forward the frontiers of legal protection on the grounds of exploitation has receded"[159].

In Singapore, "the more conservative English approach has found favour",[160] yet there are "signs of a more liberal approach"[161] in *Fong Whye Koon v Chan Ah Thong.*[162] Andrew Phang, while favouring a broader application of the doctrine, recognises that clear judicial support for it is currently lacking.[163] In *Halsbury's Laws of Singapore*, he writes: "unconscionability as a broader independent doctrine in itself has yet to be conclusively

[155] [1985] AC 686.
[156] *Ibid,* at 708.
[157] *Ibid*.
[158] [1997] 1 All ER 144.
[159] Burrows, *Restitution*, at 271 –272.
[160] Hans Tjio 'Undue Influence, Unconcscionability and Good Faith' 8 SAcLJ (1996) 429 at 441.
[161] *Ibid*.
[162] [1996] 2 SLR 706.
[163] Andrew Phang (Gen Ed) *Basic Principles of Singapore Business Law*, (Singapore, Thomson, 2004) at para 13.49.

adopted by the Singapore courts".[164] The doctrine has, however, been applied in Singapore to give relief from forfeiture[165] and to restrain calls on performance bonds.[166]

There are other possible bases for excluding the T&C or one or more of the clauses from the banking contract. Misrepresentation[167] (fraudulent, negligent or innocent), duress and undue influence[168] are well–established categories. Fraud, duress or undue influence by a bank employee inducing a customer to open an account on given terms is uncommon.[169] So too, the likelihood of unconscionability in the context of bank T&C for the opening of a current account is small. In contrast, it has found application in the context of security for advances.

Negligent or innocent misrepresentation leading to the conclusion of the banking contract, on the other hand, poses a realistic danger for banks. It threatens the basis from which they derive their authority to transact banking business on behalf of the customer. The integrity of the contracting process is dependant upon bank officers following, without exception, an established procedure in the opening of the account. Bank staff performing this task are unlikely to be familiar with the detailed contents of the T&C or with general contract law,

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[164] Andrew Phang and Teo Keang Sood (Gen Ed) *Halsbury's Laws of Singapore*, Vol 7 " Contract", (Lexis Nexus Singapore, 2005 Reissue), para 80.250.
[165] *Pacific Rim Investments Pte Ltd v Lam Seng Tiong* [1995] 3 SLR 1.
[166] See Phang and Teo (Gen Ed) *Halsbury's Laws of Singapore*, vol 7, para 80.250.
[167] See *Serangoon Garden Estate Ltd v Marian Chye* (1959) 25 MLJ 113.
[168] Illustrated by *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828. This is a well established ground for which there is a lot of authority.
[169] If established, duress and undue influence have the effect of rendering the contract voidable at the instance of the victim. A contract induced by fraudulent misrepresentation can be rescinded and damages can be claimed.

although the Guidelines to the Singapore Banking Code do say that staff should be familiar with the T&C, their main features and be able to discuss them with customers.[170]

It is conceivable that the bank officer may on occasion deviate from the laid–out procedure for opening an account, or a small percentage of prospective customers may ask questions about the T&C that the bank officer is ill–equipped to answer and in the process of doing so, misrepresent the effect or meaning of the clause. It is at this stage that the risk of misrepresentation (most likely innocent or negligent) arises, as happened in *Curtis v Chemical Cleaning & Dyeing Co Ltd*.[171] In *AEG*, Hobhouse LJ (dissenting on incorporation) said, "selective and misleading quotes may detract from the incorporation which they are seeking to achieve."[172] It is conceivable for a customer to express concern about a particular provision in the contract, in response to which he receives an assurance from the bank officer that while it is in the contract, the bank would never exercise its rights in the manner envisaged. Even more worrying for the bank is the scenario, based on personal experience, of the prospective customer asking for a copy of the T&C and being given, for example, a leaflet setting out only applicable interest rates, the official thereby representing that there are no other terms. The customer may even be told that there are no other terms. In the case of the average customer who does not know better, this could amount to a misrepresentation.

[170] See 'Guidance for Code Subscribers', cl 8.a.i.
[171] [1951] 1 KB 805; Canadian authority that an incorrect explanation of a contractual term can amount to misrepresentation is *Tilden Rent–a–Car Co v Clendenning* (1978) 83 DLR 3d 400.
[172] *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 277.

Two Canadian cases serve as a warning to banks on their contracting procedures: In *Armstrong Baum Plumbing & Heating v Toronto Dominion Bank*,[173] the customer had three accounts with the bank. The verification clauses applying to two of the accounts were similar, that applying to the third, the most recently opened, was more onerous. It included an exclusion for forgeries by employees of customers. It stated that it applied to all accounts operated by the customer, i.e. to the other two accounts as well. Subsequently, in circumstances of employee fraud, the bank disputed its liability to reimburse the customer on the basis that the customer had not complied with the new clause. The customer disputed the application of the term to his agreement with the bank. The Ontario Court of Appeal[174] confirmed the trial court decision in favour of the customer on the basis that the bank officer attending the customer at the time of signature of the new T&C had misrepresented it as similar to the old T&C, whereas in fact they were significantly different. *Rancan Fertilizer Systems Inc v Lavergne et al* [175] also concerned an amended verification agreement in the context of losses from forgeries perpetrated by an employee. The change was introduced by the bank, without informing the customer, when the customer requested the addition of two signatories to the account. The Manitoba Court of Appeal confirmed the trial court decision that the bank had misrepresented the T&C to the customer by not informing him of a fundamental change in the terms of the agreement.

Adequate training of staff with appropriate procedures on how to deal with questions is obviously an essential yet easily neglected area. If an imperfection in the contracting process is discovered before a dispute arises, the bank may seek to rely on its contractual

[173] (1994) 15 BLR (2d) 84; on appeal (1997) 32 BLR (2d) 230.
[174] (1997) 32 BLR (2d) 230.
[175] (1999) 134 Man R (2d) 73.

right to amend the terms of the contract[176] or its common law right to terminate the contract by giving reasonable notice to the customer.[177] It is more likely, however, that the frailties in the contracting process will become known only when a dispute arises. Effective incorporation of the T&C into the contract is the first hurdle which must be passed and should receive proper attention from bank management.

2.2 Interpretation

Assuming that a clause has been validly incorporated into a contract, the next issue is to identify what it means. The golden rule for the interpretation of contracts is to ascertain the objective intention of the parties.[178] The test, according to Lord Nicholls of Birkenhead, is "what would a reasonable person *in the position of the parties* understand was the meaning the words were intended to convey?"[179] With this object in mind, rules of construction have been developed and include maxims such as giving words their ordinary meaning,[180] adherence to established judicial interpretation,[181] avoidance of absurd or inconsistent interpretation,[182] deference to established customary meaning[183] and construction of the document as a whole[184]. According to *Chitty on Contracts*,[185] the modern, English, approach to construction is common sense interpretation with rules of construction serving

[176] All the T&C examined contain variation clauses. They are discussed in more detail below in chapter 10.15.
[177] *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127, per Atkin LJ.
[178] See e.g. Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004) vol 1 para 12–042 and *Law Society of Singapore v Lau See-Jin Jeffrey* [1999] 2 SLR 215 at 221.
[179] Lord Nicholls of Birkenhead, "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577 at 579.
[180] See e.g. Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004) vol 1, para 12–051.
[181] *Ibid,* para 12–053.
[182] *Ibid,* para 12–055.
[183] *Ibid,* para 12–058.
[184] *Ibid,* para 12–063.
[185] Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004).

as guidelines rather than rigid rules.[186] The contra proferentem rule, stating that a clause is interpreted against the party who included it in the contract, is applicable where there is ambiguity and all other construction aides fail.[187] In the context of a bank's standard T&C, the rule requires ambiguous terms to be strictly interpreted and to be construed against the bank who has inserted them.[188]

Exemption clauses are "construed strictly"[189] or in the words of Evans LJ in *Ocean Chemical*[190] there is "a more stringent approach"[191] to such clauses. This, says *Chitty*, means that they must be clear, unambiguous and must apply exactly to the situation which has transpired.[192] In *Bintai Kindenko Pte Ltd v Sanwa Bank Ltd & Anor*[193] the Singapore High Court held that to exclude liability for negligence, the clause had to be clear and unambiguous.[194] Limitations of liability, as opposed to exclusions of liability, are treated more leniently. The Singapore High Court in *The Neptune Agate*[195] endorsed the statement to this effect in *Ailsa Craig Fishing v Malvern Fishing*,[196] reiterated in *George Mitchell (Chesterhall) v Finney Lock Seeds.*[197] Limitations of liability must nevertheless be unambiguous and will be construed contra proferentem.

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[186] *Ibid,* para 12–045.
[187] *Ibid,* at para 12–083.
[188] An example of the application of this doctrine in the banking context is *Bank of Scotland v Ladjadji* [2000] 2 All ER (Comm) 583. See also *Patel v Standard Chartered Bank* [2001] Lloyd's Rep Bank 229.
[189] Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004) vol 1at para 14–005.
[190] [2000] 1 Lloyd's Rep 446.
[191] *Ibid,* at 452.
[192] Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004) vol 1 at para 14–006.
[193] [1994] 3 SLR 459.
[194] *Ibid,* at 469.
[195] *Zenith Taiwan Corp v Owners of and Other Persons Interested in the ships or Vessels 'Neptune Agate' et al, The Neptune Agate et al* [1994] 3 SLR 786 at 798.
[196] *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co* [1983] 1 WLR 964 at 970.
[197] *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 814. *Ailsa Craig* has been endorsed in Singapore in *Rapiscan AsiaPte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 at

Drafting of bank T&C is a delicate task. They must cater for all possible situations, including the unforeseen. At the same time, the T&C must be precise, concise, unambiguous and clear. A sound knowledge of the law, a good command of the language, a creative mind and lateral thought are all prerequisites.

2.3 Validity and Enforcement

Aside from the rules relating to the incorporation of terms into a contract and their meaning, there are other common law and legislative controls on the legality, validity and enforceability of contracts and contractual terms. Examples of common law rules are those concerning contracts contrary to public policy, contracts in restraint of trade and penalty clauses. The most relevant statutory rules in Singapore in the context of a bank's standard terms are contained in the Unfair Contract Terms Act,[198] which will be referred to hereafter as the "UCTA". It has been described as "one of the most important statutes which have been enacted in recent times."[199]

In England and Singapore the UCTA imposes controls on exemption and restriction of liability clauses in consumer and commercial contracts. It is not concerned generally with the fairness of the contract or its provisions. Recourse to the Act is not excluded because a party knowingly and willingly entered into a contract with an exclusion or restriction of

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343 and *Emjay Enterprises Pte Ltd v Skylift Consolidator(Pte) Ltd (Direct Services (HK) Ltd, third party)* [2006] 2 SLR 268 at 273.

[198] Chapter 396.

[199] *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1999] 1 SLR 214 at 225.

liability.[200] The Act renders certain exclusions or restrictions invalid,[201] while others are made subject to the requirement of reasonableness. For example, section 2(2) requires a clause restricting loss or damage, other than from death or personal injury, to be reasonable. Section 3 applies to contracts in which one party deals as a consumer or contracts on the other's standard terms. Its effect is that clauses excluding or restricting liability of the other party for a breach of contract and clauses permitting the other party to render performance substantially different from what was reasonably expected, or no performance at all, must be reasonable. In the banking context, section 4 requires an indemnity given by a non–business customer for a liability incurred by his bank for negligence or breach of contract to be reasonable. Section 12 clarifies that a customer who does not open the account in the course of business, deals as a consumer. Section 13 extends the ambit of Part 1 of the Act (primarily sections 3–7) to exclusions of or restrictions on the rules of evidence or procedure, or any right or remedy in respect of the liability, and the imposition of restrictive or onerous conditions on the liability or its enforcement. Although not stated in section 13, a contractual term which does any of these things must pass the test of reasonableness.[202]

The Consumer Protection (Fair Trading) Act, (Chapter 52A) in Singapore aims to protect consumers against certain unfair trade practices. As articulated by consumer advocates,[203] the problem with the "buyer beware" stance of the law is that businesses do not fully

[200] *Ibid,* at 228; *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712 at 727.
[201] For example, section 2(1) disallows exclusion or restriction of liability for negligence causing death or personal injury.
[202] See *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 606, 608.
[203] Stephen Loke, Chia Ho Beng, Joyce Goh *A Consumer's Guide to Fair Trading* (Times Editions, Singapore, 2004).

inform consumers about their business or product.[204] The Act does not, however, apply to any transaction or activity regulated by specified written laws, including the Banking Act.[205] Banking business is regulated by the Banking Act; according to section 4, banking business "means the business of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, the making of advances to customers, and includes such other business as the Authority may prescribe for the purposes of this Act".[206] As a result, the activities of banks are not subject to the provisions of this consumer protection legislation. The reason for this exclusion was apparently to avoid confusion and cost increases.[207] It is not apparent why these concerns arise particularly in the financial services sector so as to justify their exclusion from the legislation. Another argument justifying the exclusion of banks from the Act is their regulation by the Monetary Authority of Singapore and the application of the *Code of Consumer Banking Practice* (discussed below).

On 13 November 2005, the *Straits Times* newspaper in Singapore reported that the Consumer Protection (Fair Trading) Act would be extended to apply to the financial services sector including insurance companies and banks, but this amendment is not yet reflected in the Act. In the event that this Act does come to apply to the banking contract, it would enable a consumer to take action against a supplier for an unfair practice.[208] An unfair practice occurs, inter alia, when the conduct of the supplier of goods or services may reasonably deceive or mislead a consumer or take advantage of him where he is not able to

[204] *Ibid,* at 4.
[205] Cap 19.
[206] Banking Act, section 2.
[207] Loke, Chia, Goh *A Consumer's Guide to Fair Trading* at 8.
[208] Consumer Protection (Fair Trading) Act, Second Schedule, section 6.

understand the transaction.[209] The Second Schedule of the Act lists specific unfair practices including taking advantage of a consumer by use of terms that are unconscionable (which includes harsh and one–sided terms),[210] and concealing from or misleading a consumer on an important matter by using small print.[211] The reasonableness of the conduct of the supplier is relevant to determine whether there has been an unfair practice.[212] There is a prescribed limit, currently $20,000, for the value of a claim under this Act.[213] The consumer may abandon any amount in excess of the limit in order to bring his claim within the statute. The provisions of the Act cannot be contracted out of[214] and a contra proferentem interpretation of ambiguous provisions, against the supplier, is applied.[215] It is clear that there is scope for application of these provisions to the banking contract in the event that the Act becomes applicable to banks.

In September 2002, the Association of Banks in Singapore ("ABS") published the first *Code of Consumer Banking Practice* outlining the minimum standards a customer can expect from its bank.[216] It is premised on four principles: "fairness", "transparency", "accountability" and "reliability" and invites customers to use the code as a benchmark by which to measure the conduct of their banks. The code falls into the category of so–called "soft law" as it does not have legislative force and is based on voluntary subscription by ABS members. The code reflects generally accepted contractual procedures to ensure

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[209] *Ibid,* section 4.
[210] *Ibid,* section 11.
[211] *Ibid,* section 20.
[212] *Ibid,* section 5.
[213] *Ibid,* section 6.
[214] *Ibid,* section 13.
[215] *Ibid,* section 18.
[216] Accessible via the ABS website at http://www.abs.org.sg/consumerbankingpractice.htm. An annotated version with guidance comments is available at http://www.abs.org.sg/documents/Guidance%20for%20CCBP%20Subscribers.pdf.

fairness and fair dealing in the banking industry. It sets out a dispute resolution process which can be escalated to a mediation panel convened under the auspices of the ABS to decide the matter.

In England, *The Banking Code* for personal customers was first effective in 1992; it has been revised over the years[217] and a similar code for small business customers[218] has been developed. The codes set standards for good banking practice;[219] they are drafted as an agreement between bank and customer. Subscription to the codes by banks is widespread and this will generally be stated in the T&C. Copies of the codes are available from bank branches. This leads to the view that the codes' "provisions may well be treated as implied terms in the banking contract".[220] It is doubted, however, whether provisions in the codes contrary to the customer's interests and not reflected in the T&C, are binding on a customer.

[217] The current edition is dated 1 March 2005. A new edition is scheduled to be released on 3 March 2008.
[218] Businesses with a turnover of up to 1 million pounds a year.
[219] Available on the website of the British Bankers' Association at http://www.bba.org.uk
[220] E P Ellinger, Eva Lomnicka and Richard Hooley *Modern Banking Law* (4th ed, Oxford University Press, 2006), at 63.

Chapter 3: The Customer's Contractual Duties to the Bank in Singapore

This chapter focuses on the customer's implied duties, in particular those in *Macmillan*, *Greenwood* and *Khoo Tian Hock*. It starts with a list of the customer's express duties[221] in the T&C of the Singapore banks that are analysed here, to show the contrast with the implied duties.[222] Then there is a discussion of the historical development of the principles of causation and negligence in English law as they have shaped the customer's duty recognised in *London Joint Stock Bank v Macmillan and Arthur*.[223] This puts *Macmillan* and its predecessor, *Young v Grote* (1827)[224] in context. "Negligence in the transaction itself" emerges from *Macmillan* as the test to determine the extent of customer's duty. The concept is traced through 19th century cases to explore its meaning and rationale. This leads to a discussion of the evolution of causation in English law, culminating with a conclusion on the role of "negligence in the transaction itself" today. The focus then shifts to the general principles governing implied terms as they relate to the *Macmillan*, *Greenwood* and *Khoo Tian Hock* duties. An analysis of the law of estoppel as applied to the customer's duty in *Greenwood v Martins Bank Limited*[225] concludes the chapter.

3.1 The Express Duties

Under the common law, the customer has a duty to exercise care in drawing cheques[226] and to notify the bank on becoming aware of forgery.[227] In Singapore, there may be a broader

[221] The express duties are analysed in detail in chapters 4, 10 and 11.
[222] Mentioned in the Overview in chapter 1 and discussed in detail in this chapter.
[223] [1918] AC 777.
[224] (1827) 130 ER 764.
[225] [1933] AC 51.
[226] *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777.

duty not to facilitate fraud in general.[228] The T&C of the five Singapore banks analysed here set out more detailed customer duties, including to

1. notify the bank of a change in particulars;[229]
2. notify the bank of non–receipt of a bank statement;[230]
3. notify the bank of non–receipt of a cheque book;[231]
4. prevent the loss or theft of a cheque, cheque book or ATM card;[232]
5. comply with the T&C on the cheque book cover;[233]
6. notify the bank if a cheque, cheque book or ATM card is lost, stolen or mislaid;[234]
7. draw cheques and keep a cheque book in a way that does not facilitate fraud, forgery or alterations;[235]
8. operate an account in a manner that does not facilitate fraud, forgery or alterations;[236]
9. safeguard passwords and codes;[237]
10. monitor the account at all times and report unauthorised debits;[238]
11. examine statements and other advices and report omissions, wrong or unauthorised entries;[239]
12. sign and return confirmation slips if requested to do so.[240]

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[227] *Greenwood v Martins Bank Limited* [1933] AC 51.
[228] *Khoo Tian Hock & Anor v Oversea–Chinese Banking Corporation Limited (Khoo Siong Hui, Third Party)* [2000] 4 SLR 673.
[229] UOB 23.1, E–terms 13(f); OCBC 31.1, E–terms 4.3.1; DBS 26.3, E–terms Part A 26, Part B 66; HSBC Part A 18.1, E–terms 5.a.; Std Ch 15.9, E–terms 14.4.
[230] UOB 13.3(d); DBS 10.1.
[231] UOB 14(a)(iii); OCBC 7.2 (exclusion of liability); DBS 11.2(a); HSBC Part B 1.6 (exclusion of liability); Std Ch 4.8, 11.1.12 (exclusion of liability and indemnity).
[232] UOB 14(a)(i)–(ii); OCBC 7.7, 26.2(e), 27.9, E–terms 2.2; DBS 11.3 (a), E–terms Part A 2; HSBC Part A 15; Std Ch 4.3.
[233] DBS 11.2(c);
[234] UOB 14(a)(i); OCBC 7.7, 26.2(e), 27.9; DBS 11.2(b), 11.3 (b); HSBC Part A 15; Std Ch 4.3, 35(e).
[235] UOB 14(a)(iv); OCBC 7.3, 7.7; DBS 11.2(c); HSBC Part A 15, Part B 1.2, 1.5; Std Ch 4.3.
[236] UOB 14(a)(iv); DBS 11.2(c); Std Ch 11.1.7 (exclusion of liability).
[237] UOB 15.1 E–terms 2.1(a), 2.1(e); OCBC E–terms 1.2, 2.2, 3.2, 3A.3; DBS E–terms Part A 2; Part B 15; HSBC Part A 15, E–terms 3.g, 10.b, 10.c; Std Ch 34.1, 35(d), (f), E–terms 3.3.
[238] UOB 14(c); DBS 11.1(a).
[239] UOB 13.4; OCBC 9; DBS 11.1(c); HSBC Part A 3.1; Std Ch 5.1.1.

A consideration of these provisions reveals that they are all directed, to some or other extent, at the problem of the unauthorised debit or payment without a mandate. This is one of the biggest concerns for banks. The bank wishes to debit the customer's account with a payment while the customer denies the bank's entitlement to do so. Under the common law, unless the bank can point to a breach by the customer of his duties to the bank, the bank must, even where innocent of negligence, bear the loss itself or recoup it elsewhere. Old authority for this proposition includes *Hall v Fuller* [241] and *Young v Grote.*[242] It can be explained in terms of the doctrine of mandate: non–observance of the mandate does not entitle the bank (the agent) to reimbursement from its principal (the customer).[243] In *Hall v Fuller*,[244] which appears to be based on the mandate rationale, Abbot CJ said: "Bankers can only charge their customers with sums of money paid pursuant to order."[245] It can also be explained as a consequence of the debtor–creditor nature of the bank–customer relationship,[246] which was settled some 22 years after *Hall v Fuller* in *Foley v Hill*.[247] Money deposited with the bank belongs to the bank and represents a debt that must be repaid to the customer according to the terms of their agreement, commonly on demand.[248] If a debtor (the bank), makes a payment to the wrong person, it obviously does not reduce the debt owed to the creditor (the customer).

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[240] UOB 13.3(c); DBS 11.1(b).
[241] (1826) 108 ER 279.
[242] (1827) 130 ER 764.
[243] In *Kepitigalla Rubber Estates Limited v National Bank of India, Limited* [1909] 2 KB 1010 at 1022, Bray J rationalizes the customer's duty in terms of the doctrine of mandate.
[244] (1826) 108 ER 279.
[245] *Ibid,* at 282. Per Bayley J at 282: "This was not a genuine order".
[246] Established in *Foley v Hill* (1848) 9 ER 1002.
[247] (1848) 9 ER 1002.
[248] *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.

It is interesting to compare in more detail the above list of express contractual duties with the common law duties of the customer. The common law duties, or elements of them, are evident among the express duties listed above.

The customer's duty to its bank to exercise reasonable care in writing cheques, confirmed in 1918 by *Macmillan*,[249] is reflected in the following express duties:

- to draw cheques in a way that does not facilitate fraud, forgery or alterations; and
- to comply with the T&C printed on the cheque book cover.

The instructions printed on the cheque book cover are concerned primarily with the *Macmillan* duty, giving instructions on how to write a cheque so as to prevent fraudulent alteration.

The *Greenwood* duty[250] is to notify the bank as soon as the customer becomes aware of a forgery on his account. This enables the bank to endeavor to protect itself from further loss.[251] This common law duty is reflected in these express duties:

- to monitor an account at all times and immediately report unauthorised debits; and
- to examine statements, passbooks and other advices and report omissions and wrong or unauthorised entries.

The duty to examine bank statements and report errors and omissions is part of a controversial clause, now common in Singapore and, for example, Canada. The operation and merits of the verification and conclusive evidence clause, as it is known in Singapore,

[249] [1918] AC 777.
[250] [1933] AC 51.
[251] See the expression of this in *Price Meats v Barclays Bank plc* [2000] 2 All ER (Comm) 346.

will be discussed in detail later.[252] There is a striking similarity between the clause and the *Greenwood* duty, which it is submitted can be seen as its common law ancestor:

- Both the *Greenwood* duty and the verification duty require that in certain circumstances the customer notify the bank about activity on his bank account.
- In certain circumstances, both duties will preclude the customer from disputing an unauthorised debit.
- The two duties share an underlying rationale that the bank is entitled to protection from third party dishonesty.

The *Khoo Tian Hock* duty[253] recognised that the customer in Singapore has a general duty to prevent fraud. As such, it will depend on the particular circumstances whether the duty arises and whether it has been breached. In this case, the customer (a husband and wife with a joint current account) claimed against the bank for monies paid out on cheques, which the court found had been forged by the customer's son, who had a previous history of such conduct. On the face of it, the bank had no mandate to make the payments and the customer was therefore entitled to have the debit entries reversed. The bank claimed, however, that the customer was estopped from relying on the forgeries, alternatively, was in negligent breach of duty to the bank. The court held that a customer has an implied duty to the bank not to facilitate fraud; the customer had breached this duty and therefore could not raise the forgeries against the bank.

[252] In chapter 4 below.
[253] [2000] 4 SLR 673.

Based on the facts in *Khoo Tian Hock*, we know that this general duty propounded by the court encompassed a duty to safeguard a cheque book against misuse by a known fraudster. Interestingly, both Parke B in *Bank of Ireland v Evans' Charities*[254] (1855) and Lord Macnaghten in *Scholfield v The Earl of Londesborough*,[255] (1896) rejected the careless keeping of a cheque book as justifying the placement of liability on the customer in the event of ensuing loss.[256] Parke B's reason appears to be remoteness. In *Khoo Tian Hock* there was one important additional factor: the fraudster in *Khoo Tian Hock* was known by the customer to have committed a fraudulent act about a month before the incident that led to the dispute and was known to have had access to the cheque book. The banking environment had also changed dramatically in more than a century since the earlier cases.

Elements of the *Khoo Tian Hock* duty are evident in numerous provisions of the T&C, including the duty to:

- keep a cheque book in a secure place; and
- operate an account in a manner that does not facilitate fraud or forgery;

Because the *Khoo Tian Hock* duty is articulated as a general principle, it may extend to other aspects of operating a bank account, including the duty to verify bank statements, the duty to notify the bank of the theft of cards, a cheque book or access codes and the duty (primarily of corporate customers) to supervise employees and implement appropriate systems. In fact, all of the express duties listed above can arguably form part of a general

[254] (1855) 10 ER 950.
[255] [1896] AC 514.
[256] (1855) 10 ER 950 at 959; [1896] AC 514 at 531.

duty, as set out in *Khoo Tian Hock,* not to facilitate fraud. It would subsume the *Macmillan* and *Greenwood* duties. It could apply to a factual scenario which is as yet unforeseen.

The question arises whether the *Khoo Tian Hock* duty, set out in a decision of the Singapore High Court, will endure in the domestic banking landscape. The Court of Appeal has not yet had occasion to endorse the development. There is, however, an indication from the Court of Appeal that the decision is not supported. V K Rajah J, in *Pertamina Energy Trading Limited v Credit Suisse*,[257] said, obiter, that *Khoo Tian Hock* had "obscured" the legal position in Singapore and that a revision of the law in *Macmillan* and *Tai Hing Cotton Mill* was "unnecessary and perhaps undesirable".[258]

The reasoning of the court in *Khoo Tian Hock* is attractively logical and compliments the practices of modern banking: fraud is not facilitated only by the careless drawing of cheques, and drawing a distinction between the execution of cheques, on the one hand, and other steps or omissions, on the other hand, appears arbitrary. Lord Finlay LC in *Macmillan* said, "it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery."[259] Some 78 years later, Woo Bih Li JC in *Khoo Tian Hock* considered it obvious that in conducting his banking affairs, the customer is bound to take usual and reasonable precautions to prevent fraud. The two judgments agree in principle: the customer has certain responsibilities in the conduct of his bank account. It is the extent of the duty which is in issue. The customer's implied duties will be analysed

[257] [2006] 4 SLR 273.
[258] *Ibid,* at 292–293.
[259] [1918] AC 777 at 789.

and their adequacy in the modern banking environment debated after setting out the background on causation and negligence.

3.2 Historical Development of Causation and Negligence

Khoo Tian Hock challenges the limited ambit of the *Macmillan* duty. This calls for a discussion of *Macmillan*'s ancestry, starting with the decision in Y*oung v Grote* (1827).[260] First, however, it will be helpful to have regard to the development of the concepts of "causation" and "negligence" in English law.

Percy Winfield, writing in 1926, said that Anglo–Saxon law (449–1066), on the whole "gropes its way along with no more than a sub–conscious grasp of the differences between 'intent,' 'negligence,' and 'unavoidable harm'".[261] According to Sir William Holdsworth, under Anglo–Saxon law the guiding principle was that an act causing damage must, to keep the peace, be compensated;[262] remoteness of damage and fault were disregarded.[263] The focus of the law was to compensate the victim or his family in order to suppress feud and revenge; this dictated an emphasis on the feelings of the victim(s) at the expense of evaluating the fault of the perpetrator.[264] Thus, Holdsworth said, there was "a time when the common law had no doctrine of negligence".[265]

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[260] (1827) 130 ER 764.
[261] P H Winfield, "The Myth of Absolute Liability" (1926) 42 LQR 37 at 40.
[262] Sir William Holdsworth, *A History of English Law* vol II (4th ed, 16 vols, London, Methuen & Co Ltd Sweet and Maxwell, 1936, reprinted 1966), 51.
[263] *Ibid,* 52.
[264] *Ibid,* 50–53.
[265] Sir William Holdsworth *A History of English Law*, vol III (5th ed, 16 vols, London, Methuen & Co Ltd Sweet and Maxwell, 1942, reprinted 1966), 378.

This came to be tempered during the mediaeval period (1066–1485), when liability depended on bringing a claim within one of a number of recognised actions, but still irrespective of fault.[266] The only requirement was that the act must have caused the damage.[267] Provided the wrong complained of fell within one of the forms of action, liability was strict[268] although there was some recognition of justification for certain types of harm.[269] For example, certain acts of self–defence or exercise of property rights that caused damage may have been excused.[270] A development in the mediaeval period was that a man would only be liable if his conduct was the proximate cause of the harm.[271] Holdsworth wrote that the "conception of negligence is latent in such a limitation" and "although this latent consequence has not been discovered",[272] it familiarized "the courts with the idea that in a large number of cases liability was grounded upon negligence."[273] The requirement of proximity eventually led to the reception of the doctrine of negligence[274] but in the meantime causation remained the prime determining factor.[275] The governing principle was that a man acted at his peril and conscious modification of this position was a long way off.

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[266] *Ibid*, 375
[267] *Ibid*.
[268] *Ibid*.
[269] *Ibid,* 377.
[270] *Ibid*.
[271] *Ibid,* 379. See also Thomas Atkins Street *Foundations of Legal Liability – A Presentation of the Theory and Development of the Common Law* (3 vols, Northport, Long Island, N.Y., Edward Thompson Company, 1906), vol I, 190.
[272] Holdsworth *History of English Law*, vol III, 379–380.
[273] Sir William Holdsworth *A History of English Law*, vol VIII (2nd ed, 16 vols, London, Methuen & Co Ltd Sweet and Maxwell, 1937, reprinted 1966), 451.
[274] Holdsworth, *History of English Law*, vol III, 379, vol VIII, 451.
[275] See also the discussion by J H Baker *An Introduction to English Legal History* (3rd ed, London, Butterworths, 1990), Ch 22, particularly at 455.

Winfield views Holdsworth's account as an "inaccurate" generalisation,[276] a criticism which implicitly acknowledges that there is some merit in Holdsworth's view.[277] Winfield's point is that "in many instances a mediaeval man did not act at his peril",[278] and "there was a rough appreciation of the distinction between intention, inadvertence, and inevitable accident."[279] He concedes, however, that "in theory there was a tendency to hold a man liable for some (but not all) purely accidental harm".[280]

The period following 1485 saw some development of torts of wrongful intent and torts of negligence.[281] Factors contributing to the development of the common law were the growth of English commerce and industry and the addition of mercantile jurisdiction to the common law, which had previously been exercised by the Court of Admiralty; this involved the application of rules until now not used in the common law courts.[282]

Thomas Street, in 1906, wrote that the "law of negligence historically starts from the idea of failure in performance of a determinate provable legal duty."[283] He cites cases from the 14th to 18th centuries evidencing recognition of liability for negligence. This occurred first where the parties were in a "contractual, quasi–contractual, or proprietary" relationship[284] giving rise to a positive duty to act. It might arise by virtue of ownership of property,[285]

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[276] Winfield, "The Myth of Absolute Liability," 50.
[277] *Ibid* at 42.
[278] *Ibid* at 46.
[279] *Ibid* at 42.
[280] *Ibid*.
[281] Holdsworth, *History of English Law*, vol VIII, 447 et seq.
[282] Holdsworth, *History of English Law*, vol III, 387.
[283] Street, *Foundations of Legal Liability* vol I, 182.
[284] Holdsworth, *History of English Law*, vol VIII, 451.
[285] See Street's examples, *Foundations of Legal Liability* vol I, 183–4.

public office such as the position of sheriff created by statute,[286] public calling such as that of smith, innkeeper or carrier,[287] or the relationship of bailment.[288]

The next development was recognition of a duty not to cause harm in the pursuit of one's own affairs. Street says this step marked the "beginning of the conception of negligence in its ordinary sense."[289] He cites cases from the 14th and 15th centuries that would fall into this category. Implied duties to exercise care in one's conduct first arose where there was a relationship of contract, limited initially to those engaged in a common calling, e.g. a ferryman or surgeon.[290]

Winfield acknowledges that from the mid–16th to the end of the 17th centuries there was little development in the general theory of negligence.[291]Around the end of the 17th century[292] to the beginning of the 18th century,[293] negligence came to be regarded as a basis of liability;[294] but until the early 19th century, trespass remained the remedy for damage caused even if it was negligent and not intentional.[295] The next development was an action in negligence as an alternative to trespass,[296] followed by the development of the objective

[286] *Ibid,* 184.
[287] *Ibid,* 184–5. Also Winfield, "History of Negligence in the Law of Torts" at 185–186.
[288] Note that according to Holdsworth, *History of English Law* vol VIII, 452–3, certain bailees were still subject to the old rule rendering them liable irrespective of negligence, e.g., the innkeeper and the common carrier but other bailees escaped this rule.
[289] Street, *Foundations of Legal Liability*, vol I, 186. See also Baker, *Introduction to English Legal History*, 460.
[290] Street, *Foundations of Legal Liability*, vol I, 188. See also Winfield, "History of Negligence in the Law of Torts" at 187.
[291] Winfield, "History of Negligence in the Law of Torts" at 192.
[292] Street, *Foundations of Legal Liability*, vol I, 189.
[293] Holdsworth, *History of English Law*, vol VIII, 452.
[294] Street, *Foundations of Legal Liability*, vol I, 189; Holdsworth, *History of English Law*, vol VIII, 452.

[295] Street, *Foundations of Legal Liability*, vol I, 190.
[296] Street, *Foundations of Legal Liability* vol I, 190.

standard of the reasonable man and the idea that negligence was linked to a duty not to cause harm.[297]

David Kretzmer[298] notes that the "conventional wisdom of tort scholars" was that "until the nineteenth century liability in tort was based on 'cause' rather than 'fault'."[299] Kretzmer argues that this conventional view is inaccurate in placing too much emphasis on causation and ignoring the role of fault which is evident in pre–nineteenth century English law.[300] The merits of that debate are outside the focus of this paper but Kretzmer's point is not so much to deny the importance of causation pre–nineteenth century but to give recognition to a role played by fault during that time. He concedes "that a shift in the basis of liability did take place in the course of the nineteenth century",[301] that shift being away from causation towards notions of fault.

In the 19th century, according to Winfield, "the development of the conception of negligence as an independent tort is comparatively rapid" and "we are not far out if we select the period from about 1825 onwards as the most fruitful."[302] This is significant. *Macmillan*'s ancestor, *Young v Grote* (1827),[303] to be discussed next, was decided at the start of that period. The yardstick of the reasonable man by which to judge negligence was

[297] Holdsworth, *History of English Law*, vol VIII, 450.
[298] David Kretzmer, "Transformation of Tort Liability in the Nineteenth Century: The Visible Hand" (1984) 4 OJLS 46.
[299] *Ibid* at 46.
[300] *Ibid* at, for example, 76, 87. The same view was advanced earlier by Percy H Winfield, "The History of Negligence in the Law of Torts" (1926) 42 LQR 184, see for example the summing up at 191.
[301] Kretzmer, "Tort Liability in the Nineteenth Century" 48.
[302] P H Winfield, "History of Negligence in the Law of Torts" at 195.
[303] (1827) 130 ER 764.

only expressly recognized in 1837 by Tindall CJ in *Vaughan v Menlove*,[304] 10 years after *Young v Grote*. Tindall CJ in the Court of Common Pleas said: "The care taken by a prudent man has always been the rule laid down".[305] This suggests that the concept was familiar but that it had not before been articulated.[306]

3.3 *Young v Grote*

In contemplation of a period of absence from home, Mr Young signed cheques in blank and authorised his wife to complete them as necessary. Such a need duly arose and Mrs Young directed a clerk in the employ of her husband to fill out one of the cheques. This he did in a manner that facilitated alteration. The clerk subsequently increased the amount of the cheque and appropriated the proceeds. The bank paid the cheque for the increased amount and Mr Young disputed its right to debit his account accordingly. The Court of Common Pleas decided unanimously in favour of the bank.

Thomas Bevan,[307] writing in 1907, points out that the judgments in *Young v Grote*,[308] were delivered orally at the conclusion of the case and were "likely to be very inexactly expressed".[309] Bearing that in mind, the following dicta from the case should be mentioned.[310] Best CJ, citing the French jurist Pothier in support, decided that it was the fault of Mr Young that the bank paid more than they ought. He identified the customer's fault as lying in his choice of the person with whom he entrusted the signed blank cheques:

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[304] (1837) 132 ER 490.
[305] *Ibid,* at 493.
[306] See Sir Frederick Pollock *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (7th ed, London, Stevens and Sons Limited, 1904), 430.
[307] Thomas Bevan "*Young v Grote*" [1907] 23 LQR 390.
[308] (1827) 130 ER 764.
[309] [1907] 23 LQR 390, at 405.
[310] Using the report in 4 Bing 253 now appearing in (1827) 130 ER 764.

"If Young, instead of leaving the check with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up".[311] Park J agreed that Mr Young was negligent: "He leaves blank checks in the hands of his wife, who was ignorant of business".[312] The cheque as issued by his wife became his genuine order.[313] Burrough J said the "blame is all on one side";[314] it consisted in leaving a blank cheque with the customer's wife, who then wrote it up inadequately. Gaselee J found on the basis of the "great negligence on the part of Young", but he didn't identify what it consisted in.[315]

Prior to *Young v Grote*, *Lickbarrow v Mason*[316] (1787) stated the following principle: "whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it."[317] This dictum and that of Best CJ in *Young v Grote* – "if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again"[318] – have common ground with the proposition espoused by Pothier that the giver of a mandate, who with fault misleads the receiver of the mandate, must bear the loss occasioned by it.[319] *Lickbarrow v Mason* was subsequently criticised for stating the principle too widely.[320] Yet, in *Meyer & Co Limited v The Sze Hai Tong Banking and Insurance Company Limited*,[321] (1913) the Privy Council (composed,

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[311] *Ibid,* at 767.
[312] *Ibid*.
[313] *Ibid*.
[314] *Ibid*.
[315] *Ibid*.
[316] (1787) 100 ER 35.
[317] *Ibid*, at 39.
[318] *Ibid*, at 766.
[319] This translation of Pothier's doctrine is taken from the judgment of Lord Macnaghten in *Scholfield v The Earl of Londesborough* [1896] AC 514 at 545–6.
[320] For example in *Arnold v Cheque Bank* (1876) 1 CPD 578 at 587; *Bank of England v Vagliano Bros* [1891] AC 107 at 170 –171 by Lord Field (dissenting); *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 by Lord Parmoor at 836.
[321] [1913] AC 847.

inter alia, of Viscount Haldane and Lord Shaw of Dunfermline, who were present five years later in the House of Lords decision in *Macmillan*[322]), decided against a customer, whose employee had fraudulently misappropriated cheques, on the basis that "as between two innocent persons, one of whom must suffer by the fraud of a third person, he should suffer who by his conduct has enabled such third person to occasion the loss."[323] The decision in *Khoo Tian Hock* is compatible with the old statements of the law in Y*oung v Grote* and *Lickbarrow v Mason*.

In *Scholfield v The Earl of Londesborough*,[324] Lord Macnaghten considered Pothier's doctrine "not unreasonable" but said that it was not applicable to the facts there pertaining.[325] Lord Halsbury, in the same case, criticised Best CJ for deciding *Young v Grote* on the authority of Pothier, which rule he rejected as not forming part of English law.[326] Lord Halsbury preferred to invoke the principles of estoppel where the customer's neglect justifies a departure from the general rule. In *Macmillan*, Lord Finlay LC and Lord Shaw defended Best CJ's decision in *Young v Grote* and supported the application of Pothier's principle to English law.[327] Lord Finlay (in *Macmillan*) considered estoppel to be an expression of Pothier's principle.[328] He says: "In whichever of these ways it may be put,[329] the ground is really one and the same – as the negligence of the customer caused the

[322] *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777.
[323] [1913] AC 847 at 852.
[324] [1896] AC 514.
[325] *Ibid*, at 546.
[326] *Ibid*, at 532
[327] [1918] AC 777 at 793–794 (per Lord Finlay) and at 828 (per Lord Shaw).
[328] *Ibid,* at 792–794.
[329] Lord Finlay is referring here to the explanations of estoppel and avoidance of circuity of action. See [1918] AC 777 at 793–4.

loss, he must bear it."[330] Both Pothier's rule and negligent estoppel are predicated on a duty on the part of the customer. Benjamin Geva writes that despite the "reinstatement of the authority of Pothier", it has "ceased to play an explicit role in subsequent case law" and, today, *Macmillan* is rationalised as fundamental to the bank–customer relationship rather than in terms of the doctrine of mandate.[331]

The exact basis for the decision in *Young v Grote*[332] was contentious among the judges who subsequently considered it.[333] There were two main views: presumed authority and negligence.

The first view, that by signing an incomplete cheque, authority is given to fill it up in whatever way the blank permits, is a principle of the law merchant.[334] This was the view favoured in *Robarts v Tucker*[335] (1851), in *Swan v North British Australasian Company* (1863) by Blackburn J[336] and in *Barker and Another v Sterne*[337] (1854) by Pollock CB who, obiter, preferred to base the rationale of *Young v Grote* on a presumed authority for the bill of exchange to be completed rather than on the negligence of the drawer.[338] A later comment on *Young v Grote* describes Pollock CB's view as "clearly wrong"[339] on the basis

[330] [1918] AC 777 at 794. Lord Finlay is supported in this view by Lord Shaw of Dunfermline, at 828.
[331] B Geva "Allocation of forged cheque Losses – Comparative aspects, policies and a model for reform." [1998] 114 LQR 250 at 263.
[332] (1827) 130 ER 764.
[333] In the opinion of Lord Halsbury LC in *Scholfield v Earl of Londesborough* [1896] AC 514 at 522, there is confusion among the judges in *Young v Grote* and within their individual judgements as to the basis for their decision.
[334] Per Williams J in *Ex parte Swan* (1859) 141 ER 871 at 889.
[335] (1851) 117 ER 994 at 1002.
[336] (1863) 159 ER 73 at 76.
[337] (1854) 156 ER 293 at 294 - 5.
[338] See also Bray J in *Kepitigalla Rubber Estates Limited v National Bank of India, Limited* [1909] 2 KB 1010 at 1022.
[339] Editorial, "Careless Spaces on Negotiable Instruments 31 Harv L Rev " (1917–1918) 779 at 780.

that the alteration was made without any authority at all.[340] Thomas Bevan argued that *Young v Grote* can be seen as the operation of an estoppel because the customer is estopped from denying that the cheque as paid by the bank was his order. It is not, however, a negligent estoppel.[341]

The second view is that *Young v Grote* is based on the negligence of the drawer, pertaining to the completion of the cheque in such a manner as to facilitate a subsequent fraud. Interestingly, little is said in the subsequent cases about Mr Young's negligence in leaving the cheque with a woman ignorant of business.[342]

Overall, the weight of authority is in favour of the negligence rationale, but the effect of such negligence is contentious. There are two possibilities: it gives rise to an estoppel against the customer or it gives the bank a separate cause of action and therefore, to avoid circuity of action, it can be raised as a defence. In *The Governor and Company of the Bank of Ireland v The Trustees of Evans' Charities in Ireland*[343] (1855), Lord Cranworth said *Young v Grote* was decided on the basis of estoppel arising from the negligence of the drawer. *The Guardians of Halifax Union v Wheelright*[344] (1875) said *Young v Grote* was decided on the basis of negligence and suggests that it gives rise to an estoppel: A man cannot complain of his own wrong against another who was misled by it.[345] In *Arnold v The Cheque Bank*[346] (1876) Lord Coleridge CJ expresses the view that *Young v Grote* was

[340] *Ibid*.
[341] Thomas Bevan "*Young v Grote*" [1907] 23 LQR 390 at 392.
[342] (1827) 130 ER 764 at 767.
[343] (1855) 10 ER 950 at 960.
[344] (1875) LR 10 Ex 183.
[345] *Ibid,* at 192.
[346] (1876) 1 CPD 578.

decided on the basis of Pothier's rule where the drawer of the cheque was at fault in the manner of drawing the cheque and that subsequent cases explained that for the negligence to estop, it must be negligence in the transaction itself.[347]

In *Swan v North British Australasian Company* (1863),[348] Cockburn CJ is emphatic that *Young v Grote* was not decided on the basis of estoppel but possibly to prevent circuity of action because the customer would have a claim against the bank for the unauthorised payment and the bank would have a claim against the customer for negligence.[349] In *Macmillan*, Lord Finlay LC, supported by Lord Shaw, is clear that the sole basis for the decision in *Young v Grote* is the customer's duty of care breached by his negligence.[350] Viscount Haldane does not regard *Young v Grote* as "instructive"[351] and Lord Parmoor doesn't give his opinion on the basis for the decision but considers the case law subsequent to *Young v Grote* to have clarified the duty of the customer to his bank.[352] He does, however, indicate his support for the view that a customer who signs an incomplete mandate must be taken to have given authority to his agent to fill it up, which he is precluded from denying.[353]

Lord Finlay LC in *Macmillan* said that *Young v Grote*[354] was decided on the sole ground that "Young was a customer of the bank owing to the bank the duty of drawing his cheque

[347] *Ibid,* at 587.
[348] (1863) 159 ER 73.
[349] *Ibid,* at 79.
[350] [1918] AC 777 at 792–793 and 828.
[351] *Ibid,* at 822.
[352] [1918] AC 777 at 836.
[353] *Ibid,* at 832.
[354] (1827) 130 ER 764.

with reasonable care".[355] *Young v Grote*,[356] however, contains no statement of a particular duty of care on the part of the customer and no delineation of the kind of negligence that will justify a decision against the customer. The discussion above on the historical development of the concept of negligence suggests that this was not possible at the time.[357] Percy Winfield's statement that negligence "as a technical term began to clarify in the early nineteenth century"[358] can explain the vague articulation of Mr Young's negligence in *Young v Grote*. Negligence was at that time a nascent concept poised to undergo substantial development. This raises the question whether the court in *Young v Grote*[359] used the term "negligence" as a technical term signifying the existence of a duty of care or in a more general sense.

Negligence can be used in two different senses. The House of Lords in *Gallie v Lee* articulates the distinction:[360] in a broader or general sense negligence can refer to carelessness, failure to take sensible precautions, lack of prudence or common sense. In the narrow or technical sense it refers to breach of a duty of care such as would found an action in tort (or contract, where applicable). Having regard to this dual nature and considering the immaturity of the law of negligence and the concept of a duty of care at the time of *Young v Grote*, conclusions about a duty of care from the dicta in *Young v Grote* must be cautiously made. Was Mr Young's negligence a breach of a duty owed by him as a customer to his bank or was it carelessness justifying an application of the principle that

[355] [1918] AC 777 at 793.
[356] (1827) 130 ER 764.
[357] See chapter 3.2 above.
[358] P H Winfield, "History of Negligence in the Law of Torts" at 184.
[359] (1827) 130 ER 764.
[360] *Saunders (Executrix of the Will of Rose Maud Gallie, deceased) v Anglia Building Society* [1971] AC 1004 at 1020, 1023, 1026, 1036. See also *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 919

"no man may take advantage of his own wrong"?[361] There is no discussion or elaboration of a "duty of care" in *Young v Grote*; and use of the words "fault", "want of proper caution" and "blame" in the dicta of the case suggest carelessness or lack of prudence rather than a technical duty of care.

There are two ways in which Mr Young could be viewed today as negligent. They are not mutually exclusive. The first is in the manner of drawing the cheque. Young's wife, his agent in the matter, drew the cheque in a manner that facilitated alteration. Young was liable for his agent's negligence. Young himself signed the cheques in blank. This, by today's standards, is likely to be negligence in the drawing of the cheque, which would be considered under *Macmillan* and *Tai Hing Cotton Mill* as a breach of the customer's duty. But, interestingly, no fuss is made of this aspect of Mr Young's imprudence by the court in *Young v Grote*. Best CJ even appears to entertain the possibility that the demands of commerce might require such a practice, as argued by Mr Young's counsel. Rather it is the second aspect of Mr Young's conduct that is highlighted, particularly by Best CJ: Mr Young's choice of his wife, a woman not experienced in the ways of business, as the custodian of the signed cheques with authority to fill them up as necessary.

If this is what Mr Young's negligence consisted in, then it did not pertain to the drawing of the cheque. The judgements in *Young v Grote* all condemn Mr Young's lack of caution or negligence, but there is little expression that it pertained to the drawing of the cheques. The facts are capable of supporting such a conclusion but the court did not clearly rest its

[361] Words of Lord Hodson in *Saunders (Executrix of the Will of Rose Maud Gallie, deceased) v Anglia Building Society* [1971] AC 1004 at 1019.

decision on that basis. One must agree with Cockburn CJ in *Swan*[362] that *Young v Grote* was decided on the basis of Mr Young's negligence,[363] but the effect and nature of that negligence is not explicit. Cockburn CJ does not specify what the negligence consisted in.

3.4 The *Macmillan* Duty

In *London Joint Stock Bank v Macmillan*,[364] a dishonest clerk in the employ of Messrs Macmillan & Arthur presented Mr Arthur with a cheque for signature. The cheque had been filled up by the clerk with blank spaces facilitating alteration of the amount payable, which happened after Mr Arthur had signed it. The London Joint Stock Bank disputed its liability to reimburse the firm. The House of Lords held in their favour on the ground that the customer has a duty not to be negligent in the completion of a cheque.

A preliminary question is whether the *Macmillan* duty is limited to the drawing of cheques or whether it extends to the giving of any mandate to the bank. In *Macmillan*, Lords Finlay and Shaw and Viscount Haldane confine their discussion to the drawing of cheques. Lord Parmoor, however, recognises that the duty applies to a mandate: "it is the duty of a customer to use due caution in the preparation and issue of a mandate to his banker."[365] The language of Lord Scarman in *Tai Hing Cotton Mill* is confined to the drawing of cheques. Common sense dictates that the duty extends to the giving of a mandate to the bank, in whatever form it might take. The scenario of a customer sending a standing payment instruction to the bank by signing the appropriate form in blank and leaving it to be

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[362] (1863) 159 ER 73.
[363] *Ibid,* at 79. In Cockburn CJ's view this was to avoid circuity of action, not because it gave rise to an estoppel.
[364] [1918] AC 777.
[365] *Ibid*, at 834.

completed and delivered to the bank by another who dishonestly inserts his own account details and possibly a different amount, is so similar to the signing of cheques in blank as to require the same outcome.[366] The restrictive language of the Law Lords other than Lord Parmoor can be explained on the basis of the facts pertaining in those two cases. There is no suggestion that they intended that the duty should be confined to the drawing of cheques as opposed to mandates generally. To the contrary, reasoning based on the significance of the mandate, as in the judgments of Viscount Haldane[367] and Lord Shaw,[368] suggests otherwise. *Kepitigalla Rubber Estates Limited v National Bank of India Limited*[369] supports this view: "It seems to me to be clearly the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given."[370]

3.5 Negligence in the Transaction Itself

Macmillan emphatically limits the customer's liability for negligence to "negligence in the transaction itself".[371] There is no mention in Y*oung v Grote* of "negligence in the transaction itself". Lord Parmoor in *Macmillan* acknowledged that "the principles involved in the duty which a customer owes to his banker have been further defined and made more exact in a number of subsequent decisions."[372] A House of Lords reference in 1854 to Y*oung v Grote* makes no mention of a requirement that the negligence be in the transaction itself: "where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document

[366] As happened in *Young v Grote* (1827) 130 ER 764.
[367] [1918] AC 777 at 815.
[368] *Ibid*, at 824.
[369] [1909] 2 KB 1010.
[370] *Ibid,* at 1022.
[371] [1918] AC 777. The judgment of Lord Finlay LC goes into this discussion in detail, see from 786, and 800, per Viscount Haldane at 815, per Lord Shaw of Dunfermline at 826 and per Lord Parmoor at 834.
[372] *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 836.

which he has induced them to act on as genuine."[373] Lord Finlay in *Macmillan* said that the requirement of "negligence in the transaction itself" is recognised in preceding cases.[374] This is correct, as the following cases show.

In *The Governor and Company of the Bank of Ireland v The Trustees of Evans' Charities in Ireland*[375] (1855), stock held by the Trustees of Evans' Charities registered in the bank was fraudulently transferred to a third party by the secretary of the Trustees, who used the seal of the charity to forge the transfer papers which bore genuine signatures. The fraud was facilitated by the forger having custody of the corporation's seal, an arrangement that was arguably negligent. The House of Lords, rejecting the argument of the Bank of Ireland, said the negligence must be in or immediately connected with the transfer of the stock.[376]

In *Swan v North British Australasian Company (Limited)* (1863),[377] the owner of shares executed transfer forms in blank for his intended sale of certain shares. He gave them to his broker who, contrary to instructions, used them to sell other shares and appropriated the proceeds. Blackburn J said that "the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake; and it must be the neglect of some duty that is owing to the person led into that belief".[378] Blackburn J's statement in *Swan* subsequently received endorsement in authoritative bank–customer cases, for instance from

[373] *Orr & Barber v Union Bank of Scotland* (1854) 1 Macq 513 at 523. See also *The British Linen Co v The Caledonian Insurance Co* (1861) 4 Macq 107 at 114.
[374] [1918] AC 777 at 796–800.
[375] (1855) 10 ER 950.
[376] *Ibid*., at 959 in the judgment of Parke B.
[377] (1863) 159 ER 73.
[378] *Ibid,* at 76.

Lord Coleridge CJ in *Arnold and Others v The Cheque Bank* (1876),[379] from Lord Field (dissenting on other grounds) in *Bank of England v Vagliano Bros* (1891) [380]and from Lord Parmoor in *Macmillan*.[381]

This decision in *Swan* was the last in a trilogy of cases in which Mr Swan sought a remedy for the losses he had suffered at the hands of his broker. The history of his campaign is convoluted and bears explanation. In 1859, Mr Swan brought an ex parte application in the Court of Common Pleas to have the share register of the company amended to reflect his name as the owner of the shares that had been fraudulently sold by his broker. The decision is reported as *Ex parte Swan*.[382] The matter was argued twice; it was initially directed that the then registered holders of the shares should have an opportunity to be heard; when the matter was argued again, the court was equally divided and the motion failed. Erle CJ and Keating J considered that Mr Swan's negligence precluded him from obtaining relief, while Willes and Williams JJ considered that ownership of the shares had not been changed by the forged transfers. In 1862, Mr Swan brought an action in the Court of Exchequer against the company in which he had owned the shares to have his name restored to the share register. This decision is reported as *Swan v North British Australasian Company (Limited)*.[383] The court was again equally divided (Martin B and Channell B in favour, Wilde B and Pollock CB against) and in 1863 the matter was taken to a Court of error on a special case stated for the opinion of the Court of Exchequer.[384] In the Court of error, six of the seven Judges found in favour of Mr Swan, Keating J dissented on the basis of Mr

[379] (1876) 1 CPD 578 at 587–8.
[380] [1891] AC 107 at 171.
[381] [1918] AC 777 at 836.
[382] (1859) 141 ER 871.
[383] Reported in (1862) 158 ER 611.
[384] *Swan v North British Australasian Company (Limited)* (1863) 159 ER 73.

Swan's negligence. Despite the strong support for Mr Swan's position in the Court of error, this history shows how marginal the merits in favour of Mr Swan were.

Bank of England v Vagliano Bros (1891)[385] involved false bills of exchange forged by the customer's employee and accepted by the customer as drawee. The case was decided primarily on an application of the Bills of Exchange Act 1882,[386] but six of the eight Law Lords who decided the case also considered the bank's liability on the basis of the conduct of the parties. Lords Halsbury[387] and Field,[388] (the latter dissenting on the outcome), clearly reiterate the requirement of negligence in the transaction itself. Lord Bramwell (also dissenting on the outcome), puts it in causation terms: "the conduct of the bank's customer to enable the bank to charge the customer must be conduct directly causing the payment."[389] This is interesting and will be raised again later.

Lewes Sanitary Steam Laundry Company (Limited) v Barclay, Bevan & Co (Limited)[390] (1906) considered *Evans' Charities* to have established the requirement that "negligence to make an estoppel must be in, or immediately connected with, the transaction itself"[391] and cited reinforcing extracts from *Vagliano,* specifically the judgements of Lord Bramwell (emphasising the requirement of a causal connection) and Lord Halsbury (that carelessness or neglect unconnected with the act itself cannot be relied on by the banker to justify his

[385] [1891] AC 107.
[386] Lords Herschell and Morris confined themselves to the issue on the Bills of Exchange Act, see [1891] AC 107 at 156 and 161–163.
[387] [1891] AC 107 at 115.
[388] *Ibid,* at 171.
[389] *Ibid,* at 136.
[390] (1906) 11 Com Cas 255.
[391] *Ibid,* at 267.

default).[392] In *Lewes*, the negligence lay in the lack of checks and controls in a company employing the son of the chairman who knew his son had a history of forgery. The other directors were not aware of this and the court was unwilling to impute the chairman's knowledge to the whole board. The court's finding was that the lack of checks and controls was not negligence in the transaction itself and the employment of the son with his history of dishonesty (known only to his father, the chairman) did not excuse the bank.

Kepitigalla Rubber Estates v National Bank of India[393] (1909) involved forged cheques. Bray J (in the King's Bench Division) considered himself bound by the authority of *Evans*, *Swan* and *Lewes* that for the customer's negligence to serve as a defence to the bank, it must be "in or immediately connected with the transaction itself and must have been the proximate cause of the loss."[394]

These are the seminal authorities referred to in *Macmillan*, particularly by Lord Finlay, for ruling that the customer must have been negligent in the transaction itself to excuse the bank from liability for an unauthorised debit. There are two unanswered, related questions: what does "negligence in the transaction itself" mean, and what is the rationale for this requirement?

[392] *Ibid*.
[393] *Kepitigalla Rubber Estates Limited v National Bank of India Limited* [1909] 2 KB 1010.
[394] *Ibid,* at 1025.

3.5.1 Meaning of "Negligence in the Transaction Itself"

The Singapore High Court in *Khoo Tian Hock* posed the crucial question: "what is meant by negligence 'in the transaction itself'".[395] It answered: "In my view it is merely a reference to the principle of causation and was not intended to limit the duty of care owed by a customer to his bank."[396] This is the nub of the court's position in *Khoo Tian Hock*.[397] It is a plausible proposition and merits investigation.

Parke B in *Evans' Charities* (1855) treated the stated requirement of "negligence in or immediately connected with the transfer itself" as a requirement of causation. He said: "If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer."[398] The point is not lost in *Khoo Tian Hock*.[399] Parke B appeared to regard the conduct of the careless–yet–innocent witnesses in *Evans' Charities*, who attested to having seen the seal properly affixed to the powers of attorney, as a novus actus interveniens, breaking the chain of causation between the conduct of the Trustees and the loss from the fraudulent sale of the stock. Either way, the ratio for Parke B's decision is rooted in causation.[400]

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[395] [2000] 4 SLR 673 at 709.
[396] *Ibid.*
[397] There are other examples of this reasoning in *Khoo Tian Hock* [2000] 4 SLR 673. For example, with reference to a passage cited from Lord Bramwell's judgment (*Bank of England v Vagliano Bros* [1891] AC 107 at 136), Woo Bih Li JC says at 706: "[it] was on causation and not the extent of the duty of care owed by a customer of a bank."
[398] (1855) 10 ER 950 at 959.
[399] [2000] 4 SLR 673 at 702.
[400] See comments by Hunter J in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's Rep 555 at 570.

This accords with the interpretation given by Wilde B in the 1862 Court of Exchequer judgment in *Swan*,[401] who says, "the sole question raised [in *Evans Charities*] was whether the negligence in the particular case was established and the consequences sufficiently proximate."[402] Subsequently, in the Court of error (*Swan*, 1863), Mellor J's dicta reveal that, in his view, "negligence in the transaction itself" is the requirement of causation in the sense that it is the immediate cause of the loss.[403] Lord Cranworth in *The British Linen Co v The Caledonian Insurance Co*[404] says of *Young v Grote*, "there might be negligence in the circumstances that were the immediate cause of the payment by the bank". The requirement of immediate cause is stressed but no mention is made of "negligence in the transaction itself".

In *Staple v Bank of England*[405] (1887), the Court of Appeal (England) gives rare attention to the meaning of the phrase. Lord Esher MR refers to *Evans' Charities* and points out that Parke B drew a distinction there between negligence (on the part of the other party or customer) which excuses the bank from liability for acting without authority and "negligence generally."[406] In the words of Lord Esher MR, the former is "negligence in or immediately connected with the transfer itself"[407] which is "a very strong expression"[408] and must be construed as meaning that "the negligence must be proximately connected with the transfer itself."[409] Bowen and Fry LJJ concurred. Bowen LJ says, "it must be shewn not

[401] (1862) 158 ER 611.
[402] *Ibid,*at 625.
[403] *Swan v North British Australasian Company* (1863) 159 ER 73 at 74.
[404] (1861) 4 Macq 107 at 114.
[405] *Staple v Bank of England* (1887) 21 QBD 160.
[406] *Ibid.*, at 172.
[407] *Ibid.*
[408] *Ibid.*
[409] *Ibid.*

merely that the plaintiff corporation were careless, but that the carelessness of the corporation directly and proximately led to the loss of the property which the banker was called upon to make good."[410] He does not think that there can be any doubt that this is the meaning of the phrase.[411]

Further support for the view that the phrase refers to causation is to be found in the statements of Lord Halsbury and Lord Bramwell in *Vagliano*:[412] Lord Halsbury says, "the carelessness of the customer, or neglect of the customer to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default."[413] Lord Bramwell (dissenting on the outcome) put it like this: "I think that the result of the authorities, …, is, that the conduct of the bank's customer to enable the bank to charge the customer must be conduct directly causing the payment."[414] Kennedy J in *Lewes*[415] said the bank "must show that the customer caused him to pay the money upon the forged cheque"[416] and he cited Lord Halsbury's dicta above.

This discussion demonstrates that there is strong support in the seminal cases for the causation interpretation of "negligence in the transaction itself". So too, in *Macmillan* there are dicta supporting the view that "negligence in the transaction itself" is a requirement of causation: Lord Finlay LC stated the customer's duty and then said: "Whether what happened in this case can be considered a natural and direct consequence of the customer's

[410] *Ibid,* at 174.
[411] *Ibid,* at 175.
[412] *Bank of England v Vagliano Bros* [1891] AC 107 at 115–116 and 136.
[413] *Ibid,* at 115.
[414] *Ibid,* at 136.
[415] *Lewes Sanitary Steam Laundry Company (Limited) v Barclay, Bevan & Co (Limited)* (1906) 11 Com Cas 255.
[416] *Ibid,* at 267.

negligence in drawing the cheque is in controversy."[417] There is further support for the causation interpretation later in his judgement.[418] Viscount Haldane sought to justify the view that a negligently drawn cheque is more immediately connected to the loss resulting from fraudulent alteration than other carelessness in the conduct of the account, such as leaving a cheque book or passbook in the wrong hands.[419] The difference, according to Viscount Haldane, is that the "loss has resulted immediately"[420] from the negligence in *Macmillan* whereas, he would say, losses from a failure to supervise employees[421] are not "brought into existence as the immediate and natural outcome"[422] of the customer's negligence. Viscount Haldane said an imprudent man who enables his clerk to forge a cheque by leaving the cheque book in the hands of the clerk, "is not liable, for this reason, that the direct and real cause of the loss is the intervention of an act of wickedness on the part of the clerk,"[423] These dicta from Viscount Haldane align "negligence in the transaction itself" with the requirement of causation. It suggests that the negligence must be in the transaction itself because that establishes an adequate causal connection. The irony is that the loss in *Macmillan*, for which the customer was held liable, was indeed caused by the intervention of an act of wickedness on the part of a clerk.

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[417] [1918] AC 777 at 789.
[418] *Ibid,* at 799–800: "the decision of *Young v Grote*, while establishing that it applies only to cases in which the negligence is in the transaction itself and has no application to cases where the fraud has been merely facilitated by negligence in the custody of the seal of a corporation or of transfers in blank."
[419] [1918] AC 777 at 815–816. Other forms of such carelessness could include a lack of supervision of employees and knowingly employing a fraudster as an accounting clerk.
[420] *Ibid,* at 815.
[421] Such as the facts in *Tai Hing Cotton Mill v Liu Chong Hing Bank & Others*.
[422] [1918] AC 777 at 815.
[423] *Ibid,* at 815–816.

The clear link between "negligence in the transaction itself" and causation evident in the older cases is consistent with what David Kretzmer[424] called the "conventional wisdom of tort scholars", that "until the nineteenth century liability in tort was based on 'cause' rather than 'fault'."[425]

The extent of judicial emphasis on "negligence in the transaction itself"[426] as a requirement of causation may seem surprising given that a causal link between a breach and a loss is today a fundamental requirement to be liable for breach of a duty of care, whether in contract or tort. The historical importance of causation in English law reflects a deeply rooted legacy of the importance of causation. The comments of Hunter J in *Tai Hing Cotton Mill* in the Hong Kong Court of Appeal are apposite.[427] In his view, *Evans' Charities* demonstrated the "reluctance of the Courts to hold anyone civilly responsible for the criminal act of another" and "it marked the confines of what the law then recognized as proximate cause, with which phrase [negligence in the transaction itself] was to become synonymous."[428] On Hunter J's analysis,[429] "negligence in the transaction itself", became synonymous with a restricted view of proximate cause that governed and confined the duty for years to come.[430]

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[424] David Kretzmer, "Transformation of Tort Liability in the Nineteenth Century: The Visible Hand" (1984) 4 OJLS 46.
[425] *Ibid* at 46. This is a view which he criticised, as mentioned in chapter 3.2 above.
[426] E.g., by Kennedy J in *Lewes*, the Court of Appeal in *Staple* and the House of Lords in *Evans*' *Charities* and *Vagliano*.
[427] [1984] 1 Lloyd's Rep 555.
[428] *Ibid*, at 570.
[429] In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* in the Hong Kong Court of Appeal [1984] 1 Lloyd's Rep 555 at 570.
[430] *Ibid,* at 570.

3.5.2 Evolution of Causation

In *Swan*[431] in the Court of error, there was no mention in the assenting judgements of Byles J and Cockburn CJ (who broadly concur), of "negligence in the transaction itself". They agreed that there was no negligence by Swan but even if there had been, the requirement of causation was not met. Byles J considered that the acts of Swan's dishonest broker were new causes intervening. Cockburn CJ identified the dishonest conduct of the broker as the proximate cause of the loss. Mellor J adopted a similar view on causation. The reasoning of Byles and Mellor JJ and Cockburn CJ in *Swan* reflects the narrow interpretation of causation that was prevalent at that time. In *Holmes v Mather*,[432] Bramwell B, in an action for injury from a runaway horse, said, "you must look at the immediate act which did the mischief" for if you look at the last act but one "you might as well argue that if the driver had not started on that morning,…, this mischief would not have happened." This view of causation has its origins in the strict liability under the mediaeval forms of actions.[433]

The same reasoning is evident in other old cases: in *Evans' Charities* Parke B said: "The transfer [of the stock] was not the necessary or ordinary or likely result of that negligence."[434] This may be true, but what is important is that the fraud was a possible result of the negligence. The possibility of the transfer of the shares without the knowledge of the owner is the reason why, it is submitted, the execution and delivery to another of transfers in blank is negligent.

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[431] *Swan v North British Australasian Company* (1863) 159 ER 73.
[432] (1875) LR 10 Ex 261 at 268.
[433] See Holdsworth, *History of English Law*, vol VIII, 446.
[434] (1855) 10 ER 950 at 959.

If the causation reasoning used in *Swan* in the Court of error in 1863 (by Byles and Mellor JJ and Cockburn CJ) is applied to *Young v Grote*, it was the intervention of the criminal act of the clerk that caused the loss, not the signature of cheques left blank or the poor choice of Mrs Young as custodian of the blank cheques. On this basis, *Young v Grote*, should have been decided in favour of the customer.

The thief's conduct is always going to be the immediate cause of the loss. To deny the causal link between the negligence of Mr Swan and the unauthorised share transfer, or of Mr Young and the unauthorised debit, is to deny any scope for shifting the loss from the bank in circumstances where there was dishonesty by a third party. Neither negligence in the drawing of a cheque nor other neglect (such as in the custody of a cheque book or supervision of an employee) necessarily results in loss to the customer. Both require the intervention, whether planned or opportunistic, of a fraudster. In *Macmillan*, the signature of the incomplete cheque was negligent because of the possibility of the intervention of a criminal, even though it was not "the necessary or ordinary or likely result of that negligence".[435]

The historical emphasis on causation and relative disregard of fault appears to have led to the narrowing of causation in order to limit what would otherwise be an untenably wide scope of liability. In 1904, Sir Frederick Pollock wrote: "Liability must be founded on an act which is the 'immediate cause' of harm or of injury to a right."[436] He elaborates on immediate, proximate or natural and probable cause. It is what the reasonable man in a

[435] *Ibid*.
[436] Pollock *Law of Torts*, 29.

similar situation to the defendant would "be expected to foresee as likely to follow upon such conduct".[437] By the time of *Macmillan*, a shift in the principles of causation is evident, for if the reasoning in *Evans*' *Charities*, *Swan* and *Staple* had applied, it would have resulted in a finding in favour of the customer. To the contrary, Lord Finlay (in *Macmillan*) said: "The fact that a crime was necessary to bring about the loss does not prevent its being the natural consequence of the carelessness."[438]

More than half a century earlier, Keating J in *Swan* in the Court of error, 1863[439] was a dissenting voice taking the same approach as that of Lord Finlay in *Macmillan*. He adopted, it is submitted with respect, the correct approach on causation, pointing out that forgery was no more the "necessary or ordinary result" of the cheques having been signed in blank in *Young v Grote* than of the transfers having been signed in blank by Swan.[440] Keating J considered that Mr Swan was estopped from recovering his loss because of his negligence.

Earlier, in *Ex parte Swan*[441] (1859), when Mr Swan sought to have his name restored to the company's register of shareholders, the judges were divided. Erle CJ applied the principles of estoppel to hold against Mr Swan. He was guilty of negligence ("of an extreme trust"[442] in his broker) and of misconduct for intending that transfers which were not properly executed or attested should be used as valid deeds, and this negligence and misconduct was proximate to the crime of the broker. In contrast, there was no want of care on the part of the company in registering the sale of the shares. Keating J, concurring with Erle CJ, cited

[437] *Ibid,* 31.
[438] [1918] AC 777 at 794. See further at 811.
[439] (1863) 159 ER 73.
[440] *Ibid,* at 75.
[441] (1859) 141 ER 871.
[442] *Ibid,* at 886.

Lickbarrow v Mason[443] with approval. In his opinion, Mr Swan's conduct "mainly contributed to the loss which has occurred."[444] On the other hand, Williams J was hesitant to recognise the application of estoppel or a rule of the law merchant outside of the field of negotiable instruments and in any event did not consider Mr Swan to have been negligent.[445] Willes J in his brief judgement was unwilling to apply *Young v Grote* to deeds for the transfer of property.

Wilde B (dissenting), in the first Court of Exchequer decision in *Swan* (1862), held that Mr Swan's careless conduct was the proximate cause of the forgery and that he was estopped from asserting the invalidity of the transfers.[446] Blackburn J's answer, in the Court of error (1863), to the dissenting judgments of Keating J, in the same court, and of Erle CJ and Keating J, in the Court of Common Pleas, (1859)[447] and of Wilde B, in the first Court of Exchequer, (1862)[448] was to emphasise that for a man's negligence to estop him from asserting a particular fact, it must be "neglect of some duty cast upon the person who is guilty of it."[449] This requirement was clearly not met, in Blackburn J's view.

Other early judgments disagreed with the narrow application of the principles of causation in assessing the link between the plaintiff's conduct and his loss. They were also more willing to recognise breach of a duty of care on the part of the plaintiff. In the court a quo in

[443] (1787) 100 ER 35.
[444] (1859) 141 ER 871 at 888. He refers to *Evans Charities* and the requirement of negligence immediately connected with the transaction itself but to stress another point.
[445] *Ibid,* at 890.
[446] (1862) 158 ER 611 at 626.
[447] (1859) 141 ER 871.
[448] (1862) 158 ER 611.
[449] (1863) 159 ER 73 at 75–6 quoting Parke B in *Freeman v Cooke* (1858) 154 ER 652.

Staple[450] (1887), Day J said he could not distinguish the case before him from *Young v Grote*.[451] Wills J said he could not follow the reasoning of the House of Lords, in distinguishing *Evans' Charities*, which like *Staple* involved carelessness in entrusting the custody of a seal used to effect transfer of stock, from *Young v Grote*.[452] Day and Wills JJ considered themselves bound by the decision of the House of Lords in *Evans' Charities*,[453] but Day J in particular made it clear that he would otherwise have decided the case in favour of the bank. He considered the conduct of the plaintiff to be "a case of the very greatest negligence",[454] which was "the direct cause of the loss."[455] By comparison, the negligence in *Young v Grote* was "trifling".[456] The House of Lords, finding in favour of the Charities in *Evans' Charities*, held that the negligence was too remote to affect the transfer. In *Staple*, on the other hand, Wills J considered that the negligence of the customer in the custody of the seal was more obvious than the negligent conduct of the customer in *Young v Grote*: "the mode of keeping the seal was eminently calculated to facilitate, if not to invite, the commission of forgery."[457] His reasoning was that the physical act of affixing a seal "is a much easier operation than that of imitating handwriting and filling in the cheque."[458] The Court of Appeal confirmed the decision against the bank in *Staple*.[459]

Turning to recent cases, in *Tai Hing Cotton Mill* a dishonest employee of the customer forged cheques over a period of nearly five years. This was largely facilitated by a lack of

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[450] (1888) 21 QBD 160.
[451] *Ibid,* at 163.
[452] *Ibid,* at 168.
[453] (1855) 10 ER 950.
[454] (1887) 21 QBD 160 at 163.
[455] *Ibid*.
[456] *Ibid*.
[457] *Ibid,* at 169.
[458] *Ibid*.
[459] *Ibid*, from 170 et seq.

supervision and absence of checks and balances in the running of the business. *Tai Hing Cotton Mill* and *Khoo Tian Hock* are similar in that the customers had no intention to give the bank a mandate to pay and played no part in drawing the cheques. It is submitted, nevertheless, that the negligence in *Macmillan*, where the partner signed a cheque drawn with blank spaces, is no more closely connected to the loss than the customers' neglect in *Tai Hing Cotton Mill* or *Khoo Tian Hock*.

What the ruling in *Khoo Tian Hock* underscores is that drawing a distinction between negligence in the execution of the mandate and extraneous negligence, as the determining factor to establish causation, is spurious and unhelpful. It is a smokescreen resulting in unfounded distinctions between different varieties of customer negligence. In *Macmillan*, Viscount Haldane drew a distinction between negligence in drawing a cheque and negligence in the conduct of an account, for example, entrusting a cheque book to a clerk. He ruled that the former would be the proximate cause of any loss resulting from criminal intervention but not the latter. The distinction is artificial. Take the modern–day equivalents: assume a customer negligently leaves his ATM card lying around with the PIN written on the card, or remains logged on to his bank account at an Internet café after departing from the premises. These acts, it is submitted, are as directly connected to any subsequent loss caused by a criminal act as was the negligence of Mr Arthur in *Macmillan.* While criminal intervention is not an inevitable consequence of customer carelessness, it is a possible outcome, and it is necessary that the law discourage carelessness posing the risk of such loss.

This point was argued in *Scholfield*,[460] in a dispute involving a bill of exchange: to say that the proximate cause of the loss is not the form of the instrument but the criminal intervention of the thief amounts to a denial of the existence of a duty of care.[461]

3.5.3 Meaning of "Negligence in the Transaction Itself" Reconsidered

The interpretation of "negligence in the transaction itself" as a requirement of causation is undermined by dicta stating the requirement of proximity in addition to the requirement of "negligence in the transaction itself," suggesting that they are distinct requirements. This development seems to have its genesis in the Court of error decision in *Swan*,[462] in the judgment of Blackburn J. He reiterates that "the neglect must be in the transaction itself",[463] but continues by saying, "and be the proximate cause of leading the party into that mistake."[464] This statement by Blackburn J is endorsed in *Arnold v Cheque Bank*[465] (1876) and in *Kepitigalla*[466] (1909), where Bray J considered himself bound by the authority of *Evans*' *Charities*, *Swan* and *Lewes*, holding that for the customer's negligence to serve as a defence to the bank, it must be "in or immediately connected with the transaction itself and must have been the proximate cause of the loss."[467] Lord Parmoor in *Macmillan*[468] endorses the principle, saying it is "not sufficient to show negligence in or immediately connected

[460] *Scholfield v The Earl of Londesborough* [1896] AC 514.
[461] *Ibid,* at 516.
[462] *Swan v North British Australasian Company* (1863) 159 ER 73.
[463] (1863) 159 ER 73 at 76.
[464] *Ibid,* at 76.
[465] (1876), 1 CPD 578 at 587–8.
[466] [1909] 2 KB 1010.
[467] *Ibid,* at 1025. In fact, only Blackburn J's judgement in *Swan* states "negligence in the transaction itself" as a separate requirement from causation. This formulation is not used in *Evans*' *Charities* and *Lewes*.
[468] [1918] AC 777 at 835.

with the actual transaction unless it can further be shown that the act of the banker in making the payment … followed in natural sequence from the negligent act."[469]

It was not the absence of proximate cause that Blackburn J based his decision on. He did not succumb to the narrow application of causation used by the other judges in *Swan* to affirm the decision in favour of Mr Swan. More than anything else, his judgment focused on the form of negligence necessary for an estoppel. He said that it must be neglect of a duty owed to the other person or to the general public and not a lack of prudence or neglect of a duty owed to specific third persons. And then he said, "and these distinctions make in the present case all the difference."[470] In conclusion, and somewhat confusingly, he found the case to be governed by *Evans*' *Charities*, which treats "negligence in the transaction itself" as a requirement of causation. In summary, while the judgement of Blackburn J suggests that "negligence in the transaction itself" is more than a requirement of causation, his position is not clear.

If "negligence in the transaction itself" is no longer synonymous with causation, it could be a reference to the nature or extent of the customer's duty. It may be another way of saying that the customer's duty is limited to care in the physical drawing of his mandate. In the words of Lord Shaw of Dunfermline in *Macmillan*: "The duty is so to fill up his cheque as that when it leaves his hands a signed document it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant

[469] *Ibid*.
[470] (1863) 159 ER 73 at 76.

it to cover shall be prevented."[471] On this view, the customer must have been negligent in the manner of drawing the mandate (the extent of the duty, denoted by the phrase "negligence in the transaction itself") AND that negligence must have resulted in the bank paying without a mandate (causation). The court in *Khoo Tian Hock* rejects this interpretation[472] and the weight of the old authorities do not support it. On the other hand, Blackburn J's judgement in *Swan*, referred to by Lord Field in *Vagliano*,[473] is consistent with "negligence in the transaction itself" being a reference to the ambit of the duty; in *Macmillan*,[474] Lord Finlay's use of the phrase appears first to be a reference to the ambit of the duty,[475] and later to the requirement of causation.[476]

The concept of a duty of care belongs to the law of tort. It is the yardstick by which actionable and non–actionable negligence are distinguished. There are well–established categories of duty of care in which the existence of the duty would not be in dispute. There are other areas in which the plaintiff would need to persuade the court to recognise it. The principles by which such determinations are made have long been grappled with.[477] The customer's duty to exercise care in the drawing of cheques arises not in tort but in contract. It is an implied term of the bank–customer contract and today it finds expression in the T&C. This is one of the advantages of suing in contract; it relieves the bank of establishing the existence of the duty. To say that the customer has a duty of care in the drawing of cheques is the same as saying that the customer must not be negligent in the drawing of

[471] *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 826.
[472] [2000] 4 SLR 674 at 709.
[473] *The Governor and Company of The Bank of England v Vagliano Brothers* [1891] AC 107 at 170–171.
[474] *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777.
[475] *Ibid,* at 795. He says that it refers to the "manner in which the cheque is drawn".
[476] *Ibid,* at 800. He distinguishes negligence in the transaction itself from negligence which merely facilitates a fraud.
[477] For a discussion of the principles, see *Yuen Kun Yeu v Attorney-General of HK* [1988] 1 AC 175 (PC).

cheques. All the judgements in *Macmillan* give clear recognition to the duty.[478] If therefore, "negligence in the transaction itself" is a limitation of the ambit of the customer's duty, then it serves the purpose of controlling the floodgates.

There is a surprising dearth of information in more recent cases as to the meaning of "negligence in the transaction itself". One of the few that raises the issue is the Canadian case of *Canadian Pacific Hotels Ltd v Bank of Montreal et al*.[479] An employee of the customer forged 23 cheques on the customer's account over a period of 15 months. The customer received daily statements from the bank, which contained a request for verification and notification but there was no verification agreement between the parties. The trial court[480] found that the customer had been negligent in various ways relevant to the fraud while the bank had not been negligent; it recognised an implied duty on sophisticated customers to verify bank statements. The Ontario Court of Appeal upheld the decision by a majority.[481] On further appeal, the Supreme Court of Canada allowed the customer's appeal. In the words of Le Dain J in the Supreme Court of Canada: "One explanation of the requirement that the negligence be in the transaction and be the proximate cause of the loss is that it must result in a representation concerning the instrument that causes prejudice or detriment."[482] Le Dain J's articulation of the requirement is reminiscent of Blackburn J in *Swan*. His explanation suggests that the negligence operates as an estoppel and "negligence in the transaction itself" means the customer's duty of care is limited in nature. He does not address why that should be so.

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[478] [1918] AC 777, at 789 (per Lord Finlay LC), 814 (per Viscount Haldane), 824 (per Lord Shaw), 830 (per Lord Parmoor).
[479] (1987) 40 DLR (4th) 385.
[480] Reported at (1981) 122 DLR (3d) 519.
[481] Reported at (1983) 139 DLR (3d) 575.
[482] (1987) 40 DLR (4th) 385 at 410.

It is clear that by the time of *Macmillan* "negligence in the transaction itself" was no longer a straightforward requirement of causation; it had taken on the role of qualifying the duty of care but without shedding early links to causation. This, it is suggested, is linked to the development and refinement of the concept of a duty of care and the consequent liberation of causation from its narrow confines. In *Scholfield*[483] (1896), there is reference to the concept of a customer's duty of care although *Scholfield* was not a bank–customer case. *Lewes Sanitary Steam Laundry* (1906)[484] contains one of the earliest statements articulating the customer's duty. It is true that as far back as *Young v Grote*, the customer's negligence was held to qualify the bank's obligation to pay in accordance with the mandate, but there was no statement of a particular duty on the part of the customer. In *Lewes*, Kennedy J says: "Negligence, to constitute an estoppel, implies the existence of some duty which the party against whom the estoppel is alleged owes to the other party. I think that the relation of bankers and customers does involve a duty on the part of the customer."[485] He goes on to discuss the circumstances in which the duty might arise, the nature of the duty[486] and he emphasises the requirement of a causal connection and that the negligence must be in or immediately connected with the transaction itself.[487] In *Kepitigalla*, Bray J had to rule on the bank's liability for payment on forged cheques. He considered, both on authority and as a matter of principle, it to be "the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given."[488] He cited *Young v Grote*, *Scholfield* and *Vagliano Brothers* and rejected the bank's argument for a broader duty on the part of the customer to take care in the course of their business to prevent

[483] [1896] AC 514.
[484] (1906) 11 Com Cas 255.
[485] *Ibid,* at 266.
[486] *Ibid*, "I assume that there is a duty to be careful not to facilitate any fraud".
[487] *Ibid,* at 267.
[488] [1909] 2 KB 1010 at 1022.

forgeries by their employees, on the basis of failing to meet the requirements for an implied term.[489] The concept of "negligence in the transaction itself," with the endorsement by the House of Lords in *Macmillan* (1918),[490] moved away from embodying the requirement of causation and embraced the duty of care to control the floodgates, at least in the bank and customer context. "Negligence in the transaction itself," still echoing its conservative causation roots, started to embrace the concept of a customer's duty of care.

The cases following *Young v Grote* reflect a concern for opening the floodgates of customer liability for negligence. Parke B's concern in *Evans' Charities* is clear: "If such negligence could disentitle the plaintiffs, to what extent is it to go?"[491] This concern is reiterated in *Arnold v The Cheque Bank.*[492] As a result, *Young v Grote* was viewed and adopted with caution, even suspicion.[493] Aspects of the judgment[494] were glossed over. In *Colonial Bank of Australasia Ltd v Marshall*,[495] the Privy Council marginalized the case by holding that it was qualified by *Scholfield*.[496] In 1904, Heber Hart supported *Young v Grote*, considering the law on this issue to be determined by the question whether the customer's negligence caused the bank to be misled.[497] He does not articulate the law in duty of care terms but the key factor of negligence is present.

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[489] *Ibid,* at 1025.
[490] [1918] AC 777. Lord Finlay at 795 first states the principle, again at 800; Viscount Haldane at 815; Lord Parmoor at 834.
[491] *The Governor and Company of the Bank of Ireland v The Trustees of Evans' Charities in Ireland* (1855) 10 ER 950 at 959.
[492] (1876) 1 CPD 578 at 589.
[493] See Geva, for example, who acknowledges the scepticism about the case, in "Reflections on the Need to Revise the Bills of Exchange Act – Some Doctrinal Aspects" (1981–82) 6 Can Bus LJ 269 at 319.
[494] E.g. the condemnation of Mr Young's choice of his wife to complete the cheques.
[495] [1906] AC 559.
[496] *Scholfield v Earl of Londesborough* [1896] AC 514.
[497] Heber Hart *The Law of Banking* (London, Stevens and Sons, Limited, 1904), at 282.

Macmillan, when it came before the House of Lords in 1918, was at a crossroads. There was a line of authority going back to *Young* v *Grote*, supported by the dictum in *Lickbarrow* v *Mason* and the writings of Pothier and academic opinion excusing the bank for paying without a mandate in limited circumstances but there was also Privy Council authority[498] that *Young* v *Grote* no longer represented the law. Both courts who heard *Macmillan* prior to the House of Lords agreed with the latter argument and found in favour of the customer.[499] The House of Lords' decision would bring finality to the debate, and the individual law lords were conscious of the significance of their decision.[500] In *Khoo Tian Hock*, the court concluded from its analysis that while *Macmillan* acknowledged a duty to draw cheques with reasonable care, at the same time it did not limit the duty to the drawing of cheques. This is true; but it was not necessary for the House of Lords in *Macmillan* to go further than the drawing of cheques for, crucially, on its facts, *Macmillan* involved negligence in the drawing of a cheque.[501]

Judicial development of the law is by and large accomplished in small steps. In these circumstances, the House of Lords in *Macmillan* was unlikely to take the matter any further than the facts demanded. Adherence to "negligence in the transaction itself" in *Macmillan* served a few purposes: on the facts it produced a just result, it observed the long line of authority preceding it and it avoided controversy by not infringing too far on the fundamental principle of banking law that the bank may only reimburse itself if it has observed the customer's mandate. If the facts of *Macmillan* had been those of *Tai Hing*

[498] *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559.
[499] [1918] AC 777 at 787.
[500] *Ibid,* at 786 per Lord Finlay LC: "My Lords, this is a case raising an important question of commercial law as to the relations between banker and customer."
[501] The judgment of Lord Shaw is apposite, [1918] AC 777 at 828.

Cotton Mill one wonders whether the House of Lords could have justified their loyalty to the old line or would their instinct to do justice have established a new principle?

3.5.4 Rationale of "Negligence in the Transaction Itself"

The discussion above is concerned primarily with the meaning of "negligence in the transaction itself". It is apparent that it serves to limit the ambit of the customer's liability but is the limitation of the duty to the framing of a mandate arbitrary or rational? One possible rationale appears in the judgements of Lord Finlay LC, Viscount Haldane and Lord Shaw in *Macmillan*.[502] It is this: special care is required in the framing of a mandate to the bank because of the significance of a mandate. The bank is obliged to punctually execute a valid mandate, and this entitles the bank to receive mandates in a clear and unambiguous form. There is a statement of this in *Kepitigalla*.[503] The customer therefore has a duty of care in the framing of his mandate. But the object of this duty is not primarily to protect a bank that delays honouring an ambiguous or unclear mandate. It is to prevent unfair exposure of the bank to forgery facilitated by the customer.

The duty of care in framing mandates serves to prevent the inequity of the bank bearing a loss occasioned by the customer through conduct beyond the control of the bank. This rationale is evident in the cases. For instance, Lord Macnaghten in *Vagliano Bros* explains his reason for finding against the customer who accepted false bills of exchange: "the loss would fall, not on the acceptor whose negligence had led to it, but on the banker, who could have no means of detecting the forgery and must have been thrown off his guard by the

[502] [1918] AC 777, at 789 (per Lord Finlay), 814 (per Viscount Haldane) and at 824 (per Lord Shaw).
[503] [1909] 2 KB 1010.

carelessness of his employer."[504] Lord Field (dissenting) in the same case acknowledged the hardship on the bank but he did not consider that the law allowed him to make a finding in the bank's favour because the "negligence in the transaction itself" requirement was not met.[505] Lord Field's application of this requirement (in the sense that it refers to a limited duty) is technically correct because the bills in question had been forged, they had not been negligently drawn. Lord Bramwell's dissenting judgement had hints of the same sentiment.[506] Those in the majority, who considered this aspect, acknowledged and expressed allegiance to the requirement of "negligence in the transaction itself" but if it referred to a limited ambit of the duty, they did not allow it to interfere with the outcome which justice, in their view, demanded. Lord Halsbury's judgment is a good example.[507] *Vagliano* highlights the fallacy of the distinction between forged signatures and altered amounts.

The bank's obligation of prompt execution of the mandate is not sufficient to explain limiting the duty of care in framing mandates. Bearing in mind the purpose of the duty, restricting it to the giving of a mandate is difficult to fathom. Customers are the custodians of their cheque books, their ATM cards with PIN details, Internet and telephone banking codes. Many customers delegate the operation of their accounts to another person chosen by them. In all these instances, a lack of care has the potential to result in loss, as occurred in *Khoo Tian Hock* and *Tai Hing Cotton Mill*. These acts involved in the operation of a

[504] [1891] AC 107 at 161.
[505] *Ibid,* at 169–171.
[506] *Ibid,* at 136–7.
[507] *Ibid,* at 115.

bank account do not, however, attract a duty of care because they do not constitute a mandate to the bank.

La Forest J in the Supreme Court of Canada in *Canadian Pacific Hotels Ltd v Bank of Montreal*[508] proffers two reasons for the narrow duties of care on a bank customer: certainty and loss distribution. Loss distribution, while it has its merits, should not, it is submitted, be a determining factor for the incidence of liability between bank and customer. Certainty is important but it can be achieved adequately without a limited duty of care.

One difference between a carelessly executed cheque, subsequently altered, and most if not all other forms of carelessness by the customer in the operation of a bank account, which may explain their different treatment in law, is that the former contains an authentic signature which ordinarily would constitute a mandate binding on the bank, while the latter does not. Provided the fraudulent alterations to the cheque do not arouse suspicion, the signature will pass any verification undertaken by the bank and the cheque will be paid. Other forms of carelessness or neglect by the customer in the operation of a bank account may involve a forged signature. But is this difference significant, justifying different treatment in law?

The argument might be that, as the *Macmillan* scenario involves an authentic signature, the bank is denied the means of detecting the fraud. But forged signatures can be so skilfully performed so as to be undetectable by any ordinary examination, in some cases even sophisticated examination. Furthermore, with modern banking facilities the customer's

[508] (1987) 40 DLR (4th) 385 at 433–434.

mandate may take the form of a user ID and a PIN number. Where this information falls into criminal hands, any ensuing fraud may be undetectable and no bank can be aware that a valid mandate does not exist. The fact that in one scenario the form of the mandate is genuine and in the other there is none, does not seem to be a material difference on which a legal distinction should be based. Cons J in *Tai Hing Cotton Mill* in the Hong Kong Court of Appeal[509] said, "it is the fact of payment, not the intrinsic invalidity of the cheque, which causes the loss."

The judgement of Lord Halsbury in *Scholfield v The Earl of Londesborough*[510] suggests another reason why the negligence should be in the transaction itself: the law does not generally deprive a man of his property "where his own carelessness has given opportunity for the commission of a crime."[511] Lord Halsbury recognises though that there should be some limitation to this principle by saying that a customer should not be able to raise his neglect against the bank that is misled by it.[512] Notably, this qualification does not encompass the requirement of "negligence in the transaction itself" and there is no reason why it should not apply to the facts of *Tai Hing Cotton Mill* or *Khoo Tian Hock*.

In *Macmillan*, while their Lordships agreed that the negligence of the customer was the basis for their decision, they were divided as to the effect of the negligence. Lord Parmoor considered that the customer's negligence operated as an estoppel.[513] Viscount Haldane agreed that it could act as an estoppel alternatively, he said, it served to avoid circuity of

[509] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's Rep 555 at 562–3.
[510] [1896] AC 514.
[511] *Ibid,* at 521. See the reiteration of this by Lord Wilberforce (dissenting on the issue of negligence) in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 902.
[512] [1896] AC 514 at 523–4.
[513] [1918] AC 777 at 835.

action.[514] Lord Finlay[515] recognised the estoppel and circuity of action rationales, but said, either way, the basis was the customer's negligence;[516] Lord Shaw concurred, apparently rejecting estoppel as a ground for the decision.[517] *Spencer Bower* on *Estoppel by Representation* regards the *Macmillan* duty as an estoppel by negligence.[518]

The emphasis of the law merchant and the modern interpretation of "negligence in the transaction itself" both focus on the drawing of the mandate. The underlying rationale of the law merchant's principle of presumed authority is that there should be confidence in negotiable instruments as forms of payment. It is submitted that the basis in negligence is preferable to presumed authority for two reasons. First, the fact that the cheque in *Macmillan* was a negotiable instrument is irrelevant to the issues arising in that case. The cheque in that case served as an instruction to the bank, a demand for (partial) repayment of the bank's debt to the customer. It was not furnished to a third party and it was not negotiated. In those circumstances, the reasoning of the law merchant and the interests of international commerce are not compelling. The second reason is an ideological one, namely the negligence rationale is capable of supporting a broad duty, one which extends to all facets of the banking relationship and not focussing only on the form of the mandate.

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[514] *Ibid,* at 818.
[515] *Ibid,* at 794.
[516] Lord Shaw leaves open the possibility that even in the absence of negligence, where undetectable fraudulent alterations are made before presentation of the cheque to the bank for payment, the resulting loss would fall on the customer.
[517] [1918] AC 777 at 827.
[518] Piers Feltham, Daniel Hockberg, Tom Leech *Spencer Bower: The Law Relating to Estoppel by Representation* (4th ed, Lexis Nexis, UK, 2004), 55.

3.5.5 Conclusion

The court in *Khoo Tian Hock* rejected the requirement of "negligence in the transaction itself." It noted that Best CJ in *Young v Grote*[519] considered that Young was negligent in choosing his wife as his agent. From this it concluded that the customer's duty in *Young v Grote* was not confined to the careless drawing of cheques.[520] In *Vagliano*, Lord Halsbury found satisfaction of the requirement of "negligence in the transaction itself" in the causal connection between the customer's fault and the bank's error.[521] The instances of the customer's fault that Lord Halsbury itemised included the customer's duty to know the state of his account with the apparent drawer of the false bills and the state of his account with the bank. Neither of these examples pertain to the drawing of the bills. On this basis, *Khoo Tian Hock* concluded that Lord Halsbury's dicta broadened the principle to negligence other than the manner of drawing the cheque. *Khoo Tian Hock*[522] cited Kennedy J's words in *Lewes* to the effect that a customer has a duty not to facilitate fraud[523] and maintained that it is unclear in *Kepitigalla*[524] whether Bray J was dealing with the customer's duty of care or with causation when he said that for the customer's negligence to serve as a defence to the bank, it must be "in or immediately connected with the transaction itself and must have been the proximate cause of the loss."[525] The court in *Khoo Tian Hock* considered itself unfettered by this dictum because of its ambiguity.[526] *Khoo Tian Hock* acknowledged that *Macmillan* supports the requirement of "negligence in the

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[519] (1827) 130 ER 764.
[520] [2000] 4 SLR 673 at 701.
[521] *Bank of England v Vagliano Bros* [1891] AC 107 at 115–116; *Khoo Tian Hock v OCBC* [2000] 4 SLR 673 at 703.
[522] [2000] 4 SLR 675 at 704.
[523] (1906) 11 Com Cas 255 at 266–267.
[524] [1909] 2 KB 1010.
[525] *Ibid*, at 1025.
[526] *Khoo Tian Hock & Anor v Oversea–Chinese Banking Corporation Limited (Khoo Siong Hui, Third Party)* [2000] 4 SLR 673 at 706.

transaction itself" but maintained that the judgements do not confine the customer's duty to care in the manner of drawing cheques.[527]

The position taken by the court in *Khoo Tian Hock* is consistent with the passages cited from *Vagliano*,[528] *Lewes*,[529] *Kepitigalla*[530] and *Macmillan*.[531] There are passages in these older cases, however, which detract from the conclusion in *Khoo Tian Hock*.[532] Nevertheless, the position taken in *Khoo Tian Hock* has merit. Some of the cases appear, on the one hand, to use "negligence in the transaction itself" to restrict the customer's liability to negligence in the drawing of the cheque, but they make statements, on the other hand, which are inconsistent with that notion; Lord Halsbury in *Vagliano* is a good example.[533]

It is submitted that the necessary and sufficient condition for customer liability for loss from an unauthorised debit is that the negligence should have an adequate causal connection with the loss to warrant legal sanction. The importance of the causal connection was recognised by Lord Bramwell (dissenting) in *Bank of England v Vagliano Bros*:[534] "conduct of the bank's customer to enable the bank to charge the customer must be conduct directly causing the payment"; and by Lord Halsbury in the same case: "But how can it be said in this case that the default is unconnected with the act? The very thing which the

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[527] *Ibid*, at 708 and 710.
[528] *Ibid*, at 703–704.
[529] *Ibid*, at 703–705.
[530] *Ibid*, at 705–706.
[531] *Ibid*, at 708–710.
[532] Such as the qualification by Kennedy J in *Lewes* (1906) 11 Com Cas 255 at 266–267: "It must be shown, if the defence is to succeed, that the conduct of the plaintiff company, in or immediately connected with the forging or uttering of the cheques, misled the defendant bank into making the payments upon those cheques."
[533] *Bank of England v Vagliano Bros* [1891] AC 107 at 115–116.
[534] [1891] AC 107 at 135–6.

banker does is induced by the fault of the customer."[535] Kennedy J in *Lewes* said: "He must show that the customer caused him to pay the money upon the forged cheque."[536] Also Lord Parmoor in *Macmillan*: the bank's payment must follow "in natural sequence from the negligent act."[537] This is the position taken in *Khoo Tian Hock*, where the court holds that, "the balance between the interests of the bank and the customer and the interests of justice would best be served if there is a wider duty of care but leaving the questions of negligence and causation to be determined according to the particular facts of each case."[538]

"Negligence in the transaction itself" is, for historical reasons, a murky, ill–defined concept that no longer serves a useful purpose. In the modern context of standard T&C, the extent of the customer's duty can be expressly defined without reference to old terminology and limitations; and the requirement of a causal connection between a breach and a loss, even if not expressed in the T&C, is so fundamental as to be required by general principles of the law. If the emphasis is on an adequate causal connection (as the old cases indicate), the customer's duty need not be confined to the framing of mandates. Giving pre–eminence to causation is not compatible with recognising a limited duty of care in the drawing of mandates because, as many of the cases show, a limited duty of care dictates that conduct not pertaining to the drawing of a mandate but which has facilitated loss from the dishonesty of a third party, must be disregarded. In other words, a limited duty of care detracts from giving pre-eminence to causation.

[535] *Ibid,* at 115–116.
[536] (1906) 11 Com Cas 255 at 266–7.
[537] [1918] AC 777 at 835.
[538] [2000] 4 SLR 673 at 708.

Even a wide duty of care as proposed by *Khoo Tian Hock* leaves intact the basic rule that a bank can only reimburse itself for authorised payments. The court in *Khoo Tian Hock* said that the wider duty of care which it proposes can be tempered by "not being too quick to find that the customer has been negligent or that the negligent conduct has caused the loss."[539] Caution is required, however, in adopting this approach for the reason summed up in the maxim that "hard cases make bad law." Courts could find themselves distorting legal precedent and principles pertaining to negligence or causation where the law favours the bank but the equities favour the customer. The areas of causation and negligence, while unavoidably involving an exercise of judgement, should be determined as far as possible by the application of well–defined legal principles to the established facts and should be unfettered by a need to make correcting adjustments. Determination of the wrongfulness (duty of care) of the customer's conduct is the element most appropriately used by the courts to determine issues of public policy. If banking in the 21st century requires, in the interests of justice and of society, a broader duty of care, there is no need to interfere with the application of the other elements of negligence and causation.

Thus the *Khoo Tian Hock* view that the customer today owes the bank a wider duty of care is supported in principle. A general duty to exercise care in the conduct of a bank account to prevent loss, flexible enough to deal with all factual situations in any age, will serve the needs and mores of society better than a rule limited to one factual situation, such as the customer's duty to exercise care in the framing of mandates.

[539] *Ibid*, at 707.

The question whether negligence is a satisfactory basis on which to determine the incidence of loss between two parties innocent of wrongdoing is discussed in the context of the verification and conclusive evidence clause below.[540]

3.6 Implied Terms

The law recognises that the parties to a contract may leave some terms unexpressed; once recognised, implied terms are as effective as express terms.[541] Implied terms may arise in fact or by law.[542] The *Macmillan*, *Greenwood* and *Khoo Tian Hock* duties are terms implied into the bank–customer contract. In *Macmillan* this is not stated explicitly in the individual judgments, save in the decision of Lord Parmoor: "The relationship implies, however, a special duty on the customer to use due caution in the preparation and issue of a mandate to his banker …"[543] Bankes LJ, in *Joachimson v Swiss Bank Corporation*,[544] confirms this: "The recent decision of the House of Lords in *London Joint Stock Bank v Macmillan*, approving *Young v Grote*, affords one striking instance of an obligation implied in the relation of banker and customer…"[545] There is scant indication, however, whether the term is implied in fact or by law. In *Young v Grote* there is no statement that the customer's neglect is a breach of a duty, let alone that it arises by an implied term of the contract. In *Tai Hing Cotton Mill*, prior to the advice of the Privy Council, in the Hong Kong Court of

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[540] In chapter 4 below.

[541] It is beyond the scope of this work to discuss the position where a term implied by law and an express term conflict but see *Johnstone v Bloomsbury Health Authority* [1991] 2 WLR 1362 and Andrew Phang "Implied Terms in English Law – Some Recent Developments" (1993) JBL 242 at 252 et seq.

[542] This terminology is used by G H Treitel *The Law of Contract* (11th edn, Sweet & Maxwell, London, 2003) at 201 et seq which was adopted in *National Bank of Greece SA v Pinios Shipping co No 1 and Another* [1990] 1 AC 637 at 644. See also the terminology of Lord Denning MR in *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 WLR 1095 e.g. at 1099: "A term implied by law is said to rest on the *presumed* intention of both parties: whereas a term implied in fact rests on their actual intention."

[543] *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 830.

[544] [1921] 3 KB 110.

[545] *Ibid,* at 119.

Appeal, Hunter J assumes that *Young v Grote* was the application of an implied duty of care, the basis of implication not being stated but he says "it seems implicitly to have been an implication of law."[546] The duty (to speak) in *Greenwood* was admitted by the customer; its nature was not analysed in the House of Lords.[547] In *Khoo Tian Hock*, the implied nature of the term is stated explicitly. The court was clear that it was applying the business efficacy test; it concluded that the duty not to facilitate fraud can be said to be in the minds of customers when they open a bank account.[548] This is consistent with the term implied being implied in fact. Yet, V K Rajah J commenting recently in the Court of Appeal on *Khoo Tian Hock*, suggests that the implication is by law.[549] In another Singapore High Court decision, [550] the business efficacy test was used to reject the application of the *Greenwood* duty to a private banking contract for share and foreign exchange trading transactions, an indication that the *Greenwood* duty is an implication of fact.

The theory is that terms implied in fact should reflect the intention, albeit unexpressed, of the parties. Terms implied by law are, in this important respect, different. They reflect what the law considers to be the necessary "incidents"[551] for particular contract types, based on policy considerations;[552] they do not necessarily accord with the intention of the parties.[553]

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[546] [1984] 1 Lloyd's Rep 555 at 570.
[547] *Greenwood v Martins Bank Limited* [1933] AC 51 at 58.
[548] [2000] 4 SLR 675 at 707.
[549] *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273 at 292.
[550] *Banque Nationale de Paris v Hew Keong Chan Gary & Ors* [2001]1 SLR 300 at 340.
[551] See, for example, the dictum of Stephenson LJ in *Mears v Safecar Security Ltd* [1983] QB 54 at 78; Lord Bridge in *Scally v Southern Health and Social Services Board* [1991] 3 WLR 778 at 787; also Treitel, *Contract*, 208.
[552] Elisabeth Peden identifies a number of policy considerations which the courts appear to use in determining whether to imply a term in law, see "Policy Considerations Behind Implications of Terms in Law", (2001) 117 LQR 459.
[553] See for example the discussion by Treitel *Contract*, 201 et seq; Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (15th ed, Oxford University Press, 2007), at 183; HG Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 13–003.

Terms implied by law are an "implicit requirement from the nature of the contract."[554] A criterion of reasonableness for implied contractual terms, whether in fact or by law, has been rejected by the House of Lords.[555] Andrew Phang, however, has argued that the criterion of necessity for terms implied by law is in effect a criterion of reasonableness.[556]

A third basis for implying a term, custom and usage has played an important role in the development of banking law; this is also rooted in the presumed intention of the parties.[557]

In England and Singapore[558] two tests have been used by the courts to ascertain whether a term should be implied in fact: the business efficacy test[559] and the officious bystander test.[560] The business efficacy test is premised on a term being so necessary to give the contract business efficacy that the parties must have intended it. The officious bystander test puts an imaginary person at the negotiating table who mentions a term for inclusion in the contract which is so obvious that the parties unanimously chorus "of course!" It is so obvious that they have not bothered to express it.

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[554] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818 at 895.
[555] See *Liverpool City Council v Irwin* [1977] AC 239 at 257, 262, 265 and *Scally v Southern Health and Social Services Board* [1991] 3 WLR 778 at 788. Reasonableness was supported by Lord Denning in the Court of Appeal in *Liverpool City Council v Irwin* [1976] 1 QB 319 at 329–330.
[556] Andrew Phang "Implied Terms in English Law – Some Recent Developments" (1993) JBL 242 at 246.
[557] See discussion by Le Dain J in *Canada Pacific Hotels Ltd v Bank of Montreal* et al (1988) 40 DLR (4th) 385 at 422.
[558] See, for example, discussion by Alexander Loke "The Malaysian Capital Controls of 1998 and Ringgit Denominated Deposits in Singapore" in (1999) 15 JCL 10 at 24.
[559] This test was first articulated by Bowen LJ in *The Moorcock* (1889) 14 PD 64.
[560] First articulated by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 605 although it is often attributed to MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206, who coined the phrase "officious bystander" at 227.

It has not been authoritatively decided whether the tests are alternative or cumulative. Treitel[561] and *Chitty on Contracts* agree that satisfaction of either test is generally sufficient to justify implication of a term.[562] Andrew Phang argues that "both tests should be utilized in a complementary and cumulative fashion"[563] because the business efficacy test, with its focus on the business expectations of the parties, is the better theoretical guide but it lacks practical guidance on how to ascertain the mutual intention of the parties. The officious bystander test, on the other hand, is the better practical guide to ascertaining the intentions of the parties but it lacks a theoretical focus.[564] The two tests do not state the same principle but the latter can be used to arrive at the former.[565] Phang, while supporting the cumulative use of both tests, indicates his preference for the business efficacy test because of its focus on a central interest of contract law, namely business efficacy.

Phang's criticism of the officious bystander test, that it lacks a theoretical focus, is perhaps harsh. The object of a term implied in fact is to give effect to the unexpressed intention of the parties. The officious bystander test addresses this goal very directly. This is lacking in the business efficacy test, which is concerned primarily with the business functionality of the contract, the reasoning being that business functionality will be co–extensive with the parties' mutual intention. But this is not necessarily so. Where a contract lacks a crucial

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[561] The general discussion of this topic in Andrew Phang and Teo Keang Sood (Gen Ed) *Halsbury's Laws of Singapore*, Vol 7 " Contract", (Lexis Nexus Singapore, 2005 Reissue), para 80.95 draws from Treitel, *Contract*. At para 80.095 *Halsbury's* says "Local case law appears to follow general English principles as laid out above."

[562] Treitel, *Contract*, at 203. He says that only if the "evidence negatives" the officious bystander test is it inappropriate to imply a term on the business efficacy test. Also Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004) vol 1 para 13–004.

[563] "Implied Terms Revisited" [1990] JBL 394 at 396. The Singapore High Court in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 at 935 et seq stated that the tests are complementary.

[564] "Implied Terms Revisited" [1990] JBL 394 at 395 - 396.

[565] *Ibid.*

provision and the contracting parties wish to imply the missing term but they disagree on its content, if both versions would give efficacy or functionality to the contract, the business efficacy test will not assist in determining what it was they had in mind at the time of contracting. A court is more likely to be assisted by the officious bystander test in these circumstances. Like reasonableness, business efficacy seems to be a necessary but not a sufficient condition[566] for an implication of fact.

A term implied in fact must be reasonable but this is subsumed in the requirement that it accords with the parties' intention as an unreasonable term is unlikely to have been intended by the parties. The business efficacy test does emphasise the important element of necessity as opposed to reasonableness.

Unfortunately, the language of necessity is used in the case law in both the context of terms implied in fact and terms implied by law. Treitel[567] and Phang[568] maintain that cases using the language of necessity for terms implied by law do so in a different sense from necessity for terms implied in fact. In the case of terms implied in fact, necessity refers to what is necessary to give effect to the intention of the parties. For terms implied by law, it is necessity in a broader sense, based on wider, policy considerations.[569] Stephenson LJ in *Mears v Safecar Security Ltd*[570] explained that it is not sufficient for terms implied by law

[566] *Ibid,* at 395–396.
[567] Treitel *Contract*, at 208.
[568] Andrew Phang "Implied Terms in English Law – Some Recent Developments" (1993) JBL 242 at 246.
[569] *Ibid.* Andrew Phang in "Implied Terms Revisited" [1990] JBL 394 at 400, while questioning the validity of the distinction between terms implied in fact and terms implied by law other than by legislation, recognises the scope for such an argument.
[570] [1983] QB 54.

to be reasonable; they must be necessary.[571] In the words of V K Rajah J in *Pertamina Energy Trading Limited v Credit Suisse*,[572] "a court should be slow to intervene and imply a term in a contract as a matter of law. It should do so only if the term to be implied is, in all the circumstances, fair, reasonable and sound in policy." Unless the court is specifically directing its mind to the distinction between implications of fact and those of law, care should be taken in attaching too much significance to their words in order to conclude that it is one or the other.[573]

Bearing this in mind, in *Tai Hing Cotton Mill*,[574] Lord Scarman considered an implied customer duty wider than that upheld by *Macmillan*. Applying the test of necessity, he rejected the implied term contended in that case, and justified the implied term recognised in *Macmillan*.[575] It is not explicit in Lord Scarman's judgement which of the two senses of necessity he had in mind. However, in the course of his argument justifying *Macmillan* and rejecting the bank's argument for a wider customer duty, he cites as support a dictum of Bray J in *Kepitigalla*,[576] apparently referring to terms implied in fact.[577] In rejecting the term contended by one of the parties, Bray J said: "It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the mind of the customer, or indeed, of the bank, when the relationship of banker and customer was created."[578] The words "necessary to make the contract effective" indicate that he was using

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[571] *Ibid,* at 78.
[572] [2006] 4 SLR 273 at 292.
[573] The judgment of Le Dain J in *Canadian Pacific Hotels Ltd v Bank of Montreal* (1987) 40 DLR (4th) 385 is one judgement where the distinction is kept clearly in mind.
[574] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 104–5.
[575] *Ibid*.
[576] [1909] 2 KB 1010.
[577] *Ibid,* at 1025–1026.
[578] *Ibid*.

the business efficacy test, a test for terms implied in fact. The reference to the parties' intention is a clear indication that it is a term implied in fact because terms implied by law are not determined by the parties' intention. From this one can argue that Lord Scarman is dealing with the terms in *Tai Hing Cotton Mill* and in *Macmillan* on the basis that they are implied in fact.

Negating this argument is Lord Scarman's reference to the test propounded by Lord Wilberforce in *Liverpool City Council v Irwin*[579] for a term implied by law[580] and his endorsement of the approach of Cons J in *Tai Hing Cotton Mill* in the Hong Kong Court of Appeal.[581] Cons J uses the test of necessity for terms implied by law. He concludes that "in the world in which we live today, it *is* a necessary condition of the relation of banker and customer that the customer should take reasonable care to see that in the operation of the account the bank is not injured."[582] The meaning of necessity is important.[583] Cons J acknowledges that he is applying "necessity" in a "practical"[584] sense, taking his cue from Lord Salmon in *Liverpool City Council v Irwin*,[585] who describes the contract as otherwise "futile, inefficacious and absurd". It seems "necessity" is not to be taken to mean a "*conditio sine qua non*",[586] for the term implied as a legal incident in *Liverpool City Council v Irwin*[587] can hardly pass that test.[588] Stephen A Smith expresses the view that it

[579] [1977] AC 239.
[580] [1990] 1 AC 637 at 646.
[581] [1984] 1 Lloyd's Rep 555 at 559–560.
[582] *Ibid,* at 560.
[583] A point also made by Emil L Hayek in "*Canadian Pacific Hotels Ltd v Bank of Montreal*" (1988) 14 Can Bus LJ 361 at 370.
[584] [1984] 1 Lloyd's Rep 555 at 560.
[585] [1977] AC 239 at 263.
[586] This is Hayek's apposite label in "*Canadian Pacific Hotels Ltd v Bank of Montreal*" (1988) 14 Can Bus LJ 361 at 370.
[587] [1977] AC 239.

means "reasonably necessary".[589] So too, the *Macmillan* duty can hardly be regarded as a *conditio sine qua non* of the banking relationship, but in the wider sense it may pass the test for a term implied by law. In *National Bank of Greece SA v Pinios Shipping Co No 1 and Another*,[590] Lloyd LJ in the Court of Appeal[591] clearly considers that Lord Scarman (in *Tai Hing Cotton Mill*) is dealing with a term implied by law. Perhaps Lord Scarman's reference to *Kepitigalla* is not made with the distinction between terms implied in fact and by law at the forefront of his mind.

An implied term that is specific to the circumstances of an individual bespoke contract is unlikely to be implied by law. Terms implied by law apply to contracts by type.[592] The fact that the *Macmillan* term applies to bank–customer contracts in general may suggest that it is implied by law.[593] But this is not conclusive. Terms implied in fact may be so obvious that they would normally apply to all contracts of that nature. The implied term in *Joachimson's* case (payment on demand) is an example. Of the three judges, Atkin LJ is clearest on the issue. He refers to the intention of the parties, which points directly to a term implied in fact. He asks, "did the parties in fact intend to make the demand a term of the contract?"[594] Bankes LJ expressly uses Lord Esher's test in *Hamlyn* v *Wood*,[595] that a term will not be implied in a contract unless "an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." This is the language of a

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[588] See a similar view expressed by Stephen A Smith *Atiyah's Introduction to the Law of Contract* (6th ed, Oxford, Clarendon Press, 2005) at 161.
[589] *Ibid*.
[590] [1990] 1 AC 637 at 646.
[591] This aspect of the decision was not taken on appeal to the House of Lords.
[592] Such as insurance, charterparties, employment.
[593] This may be the view of Lloyd LJ in the Court of Appeal in *National Bank of Greece SA v Pinios Shipping co No 1 and Another* [1990] 1 AC 637 at 645 although it is not clear.
[594] [1921] 3 KB 110 at 129.
[595] [1891] 2 QB 488 at 491.

term implied in fact. Bankes LJ adds that it is impossible to imagine the bank–customer relationship without a stipulation that repayment must be preceded by a demand. This statement of universal application would be consistent with an implication by law but it doesn't preclude an implication of fact. Warrington LJ does not directly discuss the issue in terms of implied terms. On balance therefore, despite the term applying generally in the banking contract, the indicators are that this was a term implied in fact.

Terms implied by law were distinguished from those implied in fact only relatively recently, in *Lister v Romford Ice and Cold Storage Co Ltd*[596] (1957) and *Liverpool City Council v Irwin*[597] (1977). On this basis, one may be tempted to argue that terms implied in the banking contract at the time of *Macmillan* in 1918 were implied in fact, the only acknowledged basis for implication at that time. The counter–argument is that terms implied by law existed albeit they weren't expressly acknowledged at that time.

It is not possible to conclude with confidence that the implied term in *Macmillan* is one of fact or of law.[598] Lord Wilberforce's statement that terms implied in fact and terms implied by law are parts of a "continuous spectrum"[599] is apposite. At the extremes of the spectrum the distinction is clear but there is a middle ground where the concepts merge and the distinctions blur. If the criterion of necessity, for terms implied by law, is used in a practical

[596] [1957] AC 555.
[597] [1977] AC 239 although, see for example Andrew Phang's argument that an analysis of the five detailed judgments in this case reveals only ambiguous recognition of the category of terms implied by law in "Implied Terms Revisited" [1990] JBL 394 at 403.
[598] Counsel in the Hong Kong Court of Appeal in *Tai Hing Cotton Mill v Liu Chong Hing Bank and Others* [1984] 1 Lloyd's Rep 555 at 559 argued that it was an implication by law.
[599] *Liverpool City Council v Irwin* [1977] AC 239 at 254.

as opposed to a strict sense,[600] the overlap between necessity based on presumed intention and necessity based on legal incidents is all the greater. The correlation between contracts that would otherwise be "futile, inefficacious and absurd"[601] (for terms implied by law) and terms being so necessary to give the contract business efficacy that the parties must have intended it (for terms implied in fact) is plain.

What of the nature of the bank's implied duty of care? Ungoed–Thomas J in *Selangor*[602] does not refer to the bank's duty of care as an implied term but he does make it clear that it arises out of the contractual relationship.[603] In *Karak Rubber*,[604] Brightman J says[605] that "the implied duty of care formulated in the *Selangor* case" passes the officious bystander test first propounded in *Reigate*,[606] based on the intention of the parties, indicating that Brightman J viewed the bank's duty of care as an implied term in fact. Still, Hunter J in *Tai Hing Cotton Mill* in the Hong Kong Court of Appeal expresses the view that the bank's duty in *Selangor* was implied by law, based on proximity, because there is no reference in the judgement to the presumed intentions of the parties.[607] Referring to Brightman J's contrary dicta, Hunter J says: "This seems to put the matter on both grounds."[608] It is not obvious what Hunter J means by this latter statement but it seems that he may be saying

[600] As per Cons J in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's Rep 555 at 560 following Lord Salmon in *Liverpool City Council v Irwin* [1977] AC 239 at 263 who describes the contract as otherwise "futile, inefficacious and absurd".
[601] Per Lord Salmon in *Liverpool City Council v Irwin* [1977] AC 239 at 263.
[602] [1968] 1 WLR 1555.
[603] *Ibid,* from 1594.
[604] [1972] WLR 602.
[605] *Ibid* at 629.
[606] *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 605.
[607] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's Rep 555 at 575.
[608] *Ibid.*

that the term can pass the tests for both terms implied by law and in fact. This would put it somewhere in the middle of Lord Wilberforce's implied term spectrum.[609]

Joachimson's implied term also falls in the middle ground. Overtly it appears to be implied in fact but it would also pass the test for terms implied by law. The "nature of the contract itself implicitly requires"[610] that there should only be a repayment obligation on demand, for otherwise the bank would immediately on receiving a deposit from a customer have to make repayment, defeating the object of the deposit.

Unless a court is expressly directing itself to the distinction between a term implied in fact or one by law, it is difficult to draw firm conclusions from dicta about implied terms. It is not possible to conclude categorically in relation to the *Macmillan* and *Greenwood* duties whether they are required by law or whether they are based on the mutual intention of the parties. Andrew Phang says that the distinction between the two categories of implied terms, is attractive in theory but may not in practice be useful.[611] It is submitted that the tests for the two varieties of implied terms do help courts to decide disputes about implied terms. An example is *Canadian Pacific Hotels Ltd v Bank of Montreal*,[612] a seminal banking case on issues directly relevant to this study. Le Dain J in the Canadian Supreme Court considered the scope for recognising broader implied customer duties on the bases of both presumed intention (implication in fact) and the legal incidents of the banking contract (implication by law). He used the tests of business efficacy and the officious bystander for

[609] The Court of Appeal in *Lipkin Gorman* [1989] 1 WLR 1340 did not shed any light on this debate.
[610] Lord Wilberforce's words in *Liverpool City Council v Irwin* [1977] AC 239 at 254.
[611] Andrew Phang "Implied Terms Revisited" [1990] JBL 394 at 395 and "Implied Terms in English Law – Some Recent Developments" [1993] JBL 242 at 243.
[612] (1988) 40 DLR (4th) 385.

implications of fact and of necessity for implications of law.[613] A second use for the distinction is that terms implied by law apply to future contracts of the same type, whereas terms implied in fact are, at most, presumed to apply to future contracts, the presumption being rebuttable on the basis of inconsistency with the parties' intention.

To a large extent, the significance of implied terms in the bank–customer contract has diminished with the use of extensive express standard terms to regulate the relationship. Unforeseen circumstances will, however, always arise and the law of implied terms will always be relevant.

3.7 Estoppel

The law of estoppel is relevant to both the duties recognised in *Macmillan* and *Greenwood v Martins Bank Limited*.[614] In the latter case, Mrs Greenwood forged cheques on her husband's account with the bank. Mr Greenwood became aware of those forgeries but did not notify the bank of them immediately. By the time the bank was notified, Mrs Greenwood had committed suicide. Before a more detailed discussion of the *Greenwood* duty, a discussion of the relevant principles of estoppel would be appropriate.

Estoppel comes in a variety of forms: for example, estoppel by representation, proprietary estoppel, promissory or equitable estoppel, estoppel by convention, estoppel by acquiescence and estoppel by deed. In *Johnson v Gore–Wood & Co (a firm)*,[615] Lord Goff

[613] *Ibid*, 422 et seq.
[614] [1933] AC 51.
[615] [2002] 2 AC 1.

of Chieveley rejected the view, propounded earlier by Lord Denning MR,[616] that all estoppels can be "accommodated within a single formula"[617] echoing Millett LJ's view in *First National Bank plc v Thompson*[618] that there was no overarching principle of estoppel. Lord Goff considered, however, that unconscionability was the link between the various estoppels.[619] *Spencer Bower* identifies unfairness as the common principle. [620] Estoppel by representation is most relevant to this study.

Historically, common law estoppel took three forms: estoppel by record, estoppel by deed and estoppel *in pais*.[621] Millet LJ in *First National Bank v Thompson*[622] said estoppel by representation of fact is an extension of the old, restricted estoppel *in pais*.[623] Parke B considered the requirements for an estoppel *in pais* in *Freeman and Another v Cooke*[624] (1848). He approved an earlier statement in *Pickard v Sears*,[625] which laid down the elements as: "where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position", the former is estopped from denying that state of things against the latter.[626] Elaborating, Parke B said, "conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth"[627] may often have the effect of precluding him from contesting its truth. In *First National Bank v*

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[616] In *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84.
[617] [2002] 2 AC 1 at 41.
[618] *First National Bank plc v Thompson* [1996] Ch 231.
[619] [2002] 2 AC 1 at 41.
[620] Feltham, Hockberg, Leech *Spencer Bower: Estoppel by Representation*, 23.
[621] See statement in *First National Bank plc v Thompson* [1996] Ch 231 at 236.
[622] [1996] Ch 231 at 236.
[623] *Ibid.*
[624] (1848) 154 ER 652.
[625] (1837) 112 ER 179.
[626] (1848) 154 ER 652 at 656.
[627] *Ibid.*

Thompson,[628] Millet J said estoppel by representation of fact requires "a clear and unequivocal representation, inducement and materiality".[629]

Estoppel by representation is sometimes referred to as estoppel by negligence or estoppel by conduct. For example, in Canada, Le Dain J in *Canadian Pacific Hotels v Bank of Montreal*[630] said one species of estoppel by representation is estoppel by negligence, also known as estoppel by conduct. In the Court of Appeal (England) in *Greenwood*, Greer LJ said: "Estoppel by negligence is representation of fact by conduct".[631] *Spencer Bower* says that estoppel by negligence is not a discreet category of estoppel but refers to the way in which the representation is made; it can thus manifest as an estoppel by representation of fact, promissory estoppel or proprietary estoppel.[632] This is supported by the dictum of Lord Salmon (dissenting) in *Moorgate Mercantile Co Ltd v Twitchings*,[633] who said that estoppel by negligence is a form of estoppel by conduct.[634] Estoppel by negligence is thus widely seen as a species of estoppel by representation, which may also be called estoppel by conduct, a modern form of estoppel *in pais*.

There is, however, an important distinction between negligent estoppel and other estoppel by representation evident in the dictum from *Pickard v Sears*[635] cited above. The conduct or representation in an estoppel by representation is made deliberately to induce a certain

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[628] [1996] Ch 231 at 236.
[629] Per Millet J in *First National Bank plc v Thompson* [1996] Ch 231 at 236.
[630] (1987) 40 DLR (4th) 385 at 394.
[631] *Greenwood v Martins Bank Limited* [1932] 1 KB 371 at 388.
[632] Feltham, Hockberg, Leech *Spencer Bower: Estoppel by Representation*, 8 - 9, 23, 59.
[633] [1977] AC 890.
[634] *Ibid* at 912.
[635] (1837) 112 ER 179. See also the judgment of Lord Edmund–Davies in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 919.

belief. The conduct or representation in a negligent estoppel is not intentional but careless, and will only be penalised if there is a duty not to have acted in that manner.

The elements of the estoppel in *Greenwood* were succinctly summarised as a representation, reliance and detriment.[636] This was endorsed by the Singapore Court of Appeal in *Pertamina*.[637] Where the representation takes the form of silence there must have been a duty to speak as there is generally no such duty. It may arise outside of a contractual relationship in which case it may be imposed by business usage or practice.[638] There is high authority that the duty to speak is not akin to a duty of care founding an action in tort. In *Fung Kai Sun v Chan Fui Hing*,[639] the Privy Council considered the defence of estoppel by silence against an owner of property who discovered that his property had been fraudulently mortgaged. Although the property owner was not a customer of the putative mortgagee (lender), the Privy Council considered that he had a duty to inform the mortgagee upon becoming aware of the fraud. Lord Reid said it was well established that silence can give rise to an estoppel without there having been a duty such as would support an action for damages or breach of which would amount to a tort.[640] From this it must follow that the duty to speak is a lesser duty and will arise more readily than a duty of care.

This can be contrasted with estoppel by negligence. There is ample authority going back to the 19th century that negligence will not give rise to a cause of action nor an estoppel unless

[636] [1933] AC 51 at 57.
[637] [2006] 4 SLR 273 at 300 et seq; also *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR 57 at 63.
[638] See Le Dain J in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1987) 40 DLR (4th) 385 at 412.
[639] [1951] AC 489.
[640] *Ibid,* at 501.

there is a duty of care.[641] In *Evans' Charities*,[642] Parke B said that negligently entrusting the seal of the corporation to the secretary was not that "species of negligence"[643] which would warrant a finding against the Trustees. Lord Cranworth, in the same case, said that the negligence in question must amount to an estoppel.[644] In the Court of error decision in *Swan*,[645] Keating J (dissenting) states that a person may be estopped where he is guilty of "culpable negligence";[646] Blackburn J stresses that there must be breach of a duty owed to give rise to an estoppel;[647] Byles J says "mere negligence" is not sufficient to found an estoppel;[648] and Cockburn CJ says that "negligence alone" is not a sufficient ground for estoppel.[649] Lord Coleridge CJ in *Arnold*[650] seems to agree.[651] In *Lewes*,[652] Kennedy J says: "Negligence, to constitute an estoppel, implies the existence of some duty which the party against whom the estoppel is alleged owes to the other party."[653] The judgments of Lord Edmund–Davies[654] and Lord Salmon[655] (dissenting) in *Moorgate* are supportive. There are similar statements by commentators: Pollock[656] in 1904, Geva,[657] Christopher Allen[658] and *Spencer Bower*. [659]

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[641] See, for example, Lord Wright's discussion in Mercantile Bank of India Ltd v Central Bank of India Ltd [1938] AC 287 at 298–299. Also Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others [1986] 1 AC 80 at 111; Canadian Pacific Hotels Ltd v Bank of Montreal et al (1987) 40 DLR (4th) 385 at 421.
[642] (1855) 10 ER 950.
[643] *Ibid,* at 959.
[644] *Ibid*., at 960.
[645] (1863) 159 ER 73.
[646] *Ibid,* at 75.
[647] *Ibid,* at 75–76.
[648] *Ibid,* at 77.
[649] *Ibid,* at 79.
[650] *Arnold v The Cheque Bank* (1876) 1 CPD 578.
[651] *Ibid,* at 589.
[652] (1906) 11 Com Cas 255.
[653] *Ibid,* at 266.
[654] [1977] AC 890 at 919.
[655] *Ibid* at 912.
[656] Sir Frederick Pollock *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (7th ed, London, Stevens and Sons, Limited, 1904), 429.
[657] "Reflections on the Need to Revise the Bills of Exchange Act" (1981–82) 6 Can Bus LJ 269 at 319: "It is fundamental that estoppel by negligence presupposes the existence of a duty of care."

In negligent estoppel, the negligence leads to a misrepresentation relied upon to the detriment of the other party, fulfilling the essential elements of the estoppel. Applying this analysis to *Macmillan*, the negligent completion of the cheque gave rise to the representation that the increased amount of the cheque was the mandate given by the customer; this was relied on by the bank to its detriment. In *Greenwood*, the bank–customer relationship gave rise to a duty to speak where the customer had actual knowledge of forgery on his account. This was breached, giving rise to the representation that the bank had observed its customer's mandate in paying the cheques forged by his wife; the bank relied on this to its detriment by not taking timeous action against the wife. In *Macmillan*, the representation was caused by negligence. In *Greenwood* there was no negligence; the representation was deliberate. Adrian Keane cites *Greenwood* as an example of estoppel by representation of fact.[660]

The similarity between negligent estoppel and the rationale in *Lickbarrow v Mason* is apparent: "whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it."[661] *Spencer Bower* labels this the "facilitation" theory, and criticises the dictum for being too wide because of its harsh operation against the careless or imprudent.[662] Judicial criticism of the maxim for the

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[658] Christopher Allen *Practical Guide to Evidence* (2nd ed, London, Cavendish Publishing Limited, 2001) at 390.
[659] Feltham, Hockberg, Leech *Spencer Bower: Estoppel by Representation*, 59, para III.5.1.
[660] Adrian Keane *The Modern Law of Evidence* (5th ed, Butterworths, London, 2000), 613–614. The discussion is omitted in the 6th edition.
[661] (1787) 100 ER 35 at 39.
[662] Feltham, Hockberg, Leech *Spencer Bower: Estoppel by Representation*, 72 - 73, para III.5.23 - 5.24.

same reason has already been mentioned.[663] A key difference between negligent estoppel and the rationale in *Lickbarrow v Mason* lies in the requirement of a duty of care for negligent estoppel to arise. This narrows the ambit of the facilitation theory.

In *Macmillan*, their Lordships did not agree on whether the customer's negligence in that case served to avoid circuity of action or operated as an estoppel.[664] The obvious question is whether it makes any difference? Lord Finlay in *Macmillan* seems to say not, either way, the basis for the decision is the customer's negligence [665]. Yet, in *Swan*, Wilde B in the Court of Exchequer [666] wished to stress the distinction between an action based on negligence and the doctrine of estoppel. An action for negligence is based on the breach of an obligation to another. The doctrine of estoppel is based on the injustice of allowing someone to cause his own misfortune and leave others to face the consequences. Both require the consequences to be proximate and not too remote but, says Wilde B, the similarity ends there; the two principles have different sources and go in different directions.[667] These comments are valid in the context of estoppel in general. The majority of estoppels do not involve a determination of the issue of negligence. Negligent estoppel (as a species of estoppel by conduct or representation) is different. *Spencer Bower* submits that the duty of care giving rise to an action in tort is of the same nature as the duty giving rise to a negligent estoppel, albeit that the point has not been decided.[668] This is supported

[663] For example in *Arnold v Cheque Bank* (1876) 1 CPD 578 at 587; *Bank of England v Vagliano Bros* [1891] AC 107 at 170 –171 by Lord Field (dissenting); *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 by Lord Parmoor at p836; see the discussion of these cases in chapter 3.5 above.
[664] See the discussion in chapter 3.3 above.
[665] [1918] AC 777 at 794.
[666] (1862) 158 ER 611 at 625 -6.
[667] *Ibid*.
[668] *Ibid,* 62, para III.5.6.

by Lord Fraser of Tullybelton in *Moorgate*.[669] It is clear that there is a considerable overlap between negligent estoppel and a duty of care giving rise to an action in tort. *Spencer Bower* says that it is arguable that estoppel by negligence "has now been supplanted by the tort of negligence and the doctrine of agency by ostensible authority."[670]

3.8 The *Greenwood* Duty

A necessary precursor to the analysis of the verification and conclusive evidence clause which is to follow is the *Greenwood* duty or estoppel: a customer who checks his bank statements and detects an error but who does not notify the bank, is estopped from subsequently asserting the error if he is aware that forgery was involved.[671] *Spencer Bower* says that this is not an estoppel unique to the bank–customer relationship: "It is a perfectly ordinary example of the estoppel which arises from failure to discharge a duty to speak in circumstances in which such a duty has arisen."[672] In *Greenwood*, the *Macmillan* duty did not avail the bank as the cheques were not drawn by the customer but forged by his wife. There was no "negligence in the transaction itself." A decision in favour of the bank had to be based on different principles. The House of Lords held, based on an admission by the customer, that the customer has a duty to notify the bank immediately he becomes aware of forgeries on his account. His failure to do so resulted in his being estopped from pleading the forgeries.

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[669] [1977] AC 890 at 924.
[670] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, at 8–9.
[671] In accordance with *Greenwood v Martins Bank Limited* [1933] AC 51. The bank must have suffered detriment, as to which, see the discussion below.
[672] Feltham**,** Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, at 248.

Although the duty of notification is associated with *Greenwood*, and carries its name, it was not a groundbreaking development in 1933. In 1904, for example, Heber Hart's *Law of Banking* recognised the estoppel,[673] based on the authority of *M'Kenzie v British Linen*[674] (1881). *M'Kenzie* concerned forged signatures on two bills. The House of Lords stated, with reference to *Freeman v Cooke*,[675] (1848) that a person who knew that a bank was relying on his forged signature, would be estopped from asserting the forgery if the bank altered its position to its detriment.

While in *Macmillan*, the House of Lords was divided on whether the customer's negligence gave rise to an estoppel or gave the bank a defence to avoid circuity of action,[676] in *Greenwood* the Law Lords expressly held that it was an estoppel. The elements of this estoppel will now be analysed in detail.

3.8.1 Knowledge

In the *Greenwood* context, the representation by silence presupposes knowledge of the forgery. This is particularly pertinent to the discussion in the next chapter of the verification and conclusive evidence clause, which seeks to ensure that the requirement of knowledge is met by imposing a duty to examine the bank statements. Knowledge, we know from the case law, is not an absolute concept, it comes in degrees. In *Baden v Societe Generale*,[677] Gibson J famously set out his five degrees of knowledge in the context of a constructive

[673] Hart, *The Law of Banking*, 275.
[674] (1881) 6 App Cas 82.
[675] (1848) 154 ER 652.
[676] See discussion in chapter 3.5.4 above.
[677] *Baden, Delvaux and Lecuit v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509.

trust issue. *Roper v Taylor's Central Garages (Exeter) Ltd*[678] was another case to identify degrees of knowledge, with particular significance for the *Greenwood* duty. *Roper* involved a contravention of a road traffic statute. The matter was decided on a narrow point of no relevance to this debate but Devlin J in the King's Bench Division went on to discuss the meaning of knowledge (in the context of mens rea) in a breach of a statutory provision. He identified three degrees of knowledge:

1. "Actual knowledge";
2. Shutting one's eyes "to an obvious means of knowledge", which he described as a person deliberately refraining "from making inquiries the results of which he might not care to have"[679]; and
3. "Constructive knowledge", or the neglect of obtaining knowledge which the reasonable person would obtain. "It does not mean actual knowledge at all; it means that the defendant had in effect the means of knowledge."[680]

The distinction between the second and third forms of knowledge is that shutting ones eyes is deliberately not knowing while constructive knowledge is neglecting to know.[681] Essentially, the difference is that in the former there is an element of dolus while in the latter fault takes the lesser form of culpa. In the context of *Roper*, i.e. for the purposes of the criminal law, Devlin J considered that shutting one's eyes to knowledge amounted to actual knowledge, while constructive knowledge was not knowledge at all.[682] Gibson J's more detailed analysis of knowledge in *Baden v Societe Generale*[683] includes two

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[678] [1951] 2 TLR 284 at 288–289.
[679] *Ibid,* at 288. Devlin J was here quoting Lord Hewart CJ in *Evans v Dell* (1937) 53 TLR 310.
[680] [1951] 2 TLR 284 at 288 –9.
[681] *Ibid,* at 289.
[682] *Ibid.*
[683] *Baden, Delvaux and Lecuit v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509.

additional categories between shutting one's eyes and constructive knowledge. Ross Cranston argues that excessive categorization can be misleading by over–emphasizing the degree of knowledge and neglecting the purpose of the knowledge.[684]

In *Price Meats Ltd v Barclays Bank Plc*,[685] the issue was liability for the loss from forged cheques. The matter came before the Commercial Court in the Chancery Division as an appeal from a failed application to strike out a defence.[686] It was argued by the bank, in support of its defence, that the customer had constructive knowledge of the forgeries, thus bringing the *Greenwood* duty into play. The knowledge, on which the bank based this argument, took two unrelated forms: a warning by the bank to the customer to investigate the size of its overdraft and the customer's discovery that its clerk (the one said to have committed the forgeries) had misappropriated petty cash monies. The court adopted Devlin J's analysis in *Roper* of the degrees of knowledge and decided that the customer did not have constructive knowledge of the forgeries and therefore that the particulars did not support a conclusion that the customer had reasonable grounds to suspect forgery. What is significant is that the court doubted that constructive knowledge was sufficient to invoke the *Greenwood* estoppel. Its analysis of the authorities[687] was that "reason to know" i.e. constructive knowledge, was not sufficient to give rise to the duty to inform the bank. Reference was made to *Roper* to emphasise that constructive knowledge was not actual knowledge.[688]

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[684] Ross Cranston "Understanding Banking Law" (1988) LMCLQ 360 at 370.
[685] [2000] 2 All ER (Comm) 346.
[686] On the grounds that it failed to disclose a reasonable ground of defence.
[687] *McKenzie v British Linen Co* (1881) 6 App Cas 82; *Ogilvie v West Australian Mortgage* and *Agency Corp Ltd* [1896] AC 257; *Morison v London County and Westminster Bank Limited* [1914] 3 KB 356.
[688] [2000] 2 All ER (Comm) 346 at 351.

One of the authorities referred to in *Price Meats* was *Morison v London County and Westminster Bank Limited*.[689] Morison's bank account was debited over a period of almost five years with cheques fraudulently drawn by his employee. The employee had authority to sign cheques on behalf of Morison and there was therefore no forgery[690] and no "negligence in the transaction itself". Morison sued the collecting bank, not his own, for conversion, alternatively money had and received. This was not therefore a case concerning the bank–customer relationship. Section 82 of the Bills of Exchange Act[691] availed the bank in relation to some of the cheques; in relation to others it did not.[692] It was argued, concerning these and some earlier cheques, that Morison had ratified his employee's actions. The Court of Appeal agreed.[693] A precondition of ratification is knowledge of that which is said to be ratified.[694] Knowledge of the wrongdoing was imputed to Morison[695] after he ordered his accountants to investigate his accounts.[696] In circumstances where the customer had some knowledge and chose to know no more, Phillimore LJ doubted whether the maxim, that the "means of knowledge are not the same as knowledge",[697] would apply but he refrained from deciding the point.

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[689] [1914] 3 KB 356.
[690] Counsel for the customer did argue that there was forgery but this was rejected by all the judges. The signature was genuine but amounted to a misuse of authority.
[691] Protection for a bank collecting cheques in good faith and without negligence.
[692] Some of the cheques were not crossed and in the case of the early cheques the court did not consider the bank met the 'without negligence' requirement.
[693] [1914] 3 KB 356, per Lord Reading CJ at 370–373; per Buckley LJ at 377; per Phillimore LJ at 385.
[694] *Ibid,* per Phillimore LJ at 384. Also stated in *Price Meats Ltd v Barclays Bank Plc* [2000] 2 All ER (Comm) 346 at 348.
[695] [1914] 3 KB 356. This is most evident in the judgments of Lord Reading CJ at 370–373 and Phillimore LJ at 385 but see Buckley LJ at 377.
[696] It appears from the report that the accountants were negligent and may not have had actual knowledge of the fraud.
[697] [1914] 3 KB 356 at 385.

In *Patel v Standard Chartered Bank*[698] it was argued for the bank that the *Greenwood* duty extended to fraud which the reasonable customer ought to have enquired about.[699] Toulson J rejected the submission. He affirmed that wilful blindness was tantamount to knowledge but said "it is an unacceptable leap to equate means of knowledge with actual knowledge."[700] To hold otherwise, he said, would be to enlarge the scope of the duty of care contrary to the ruling in *Tai Hing Cotton Mill.*

At this stage, therefore, the point would seem to be settled: constructive knowledge is not knowledge for the purposes of the *Greenwood* duty. This was the view of Le Dain J in the Supreme Court of Canada in 1988.[701] Recently, the Singapore Court of Appeal in *Pertamina Energy Trading Limited v Credit Suisse*[702] said that the *Greenwood* duty would arise where the customer had "actual knowledge" of any forgery or unauthorised payment instructions.[703]

Thus, a customer who knows that there is an error in his account, has no reason to suspect forgery, and neglects to raise the matter with the bank (as a reasonable customer would do) would not have the necessary knowledge for the *Greenwood* estoppel to arise, while a customer who deliberately avoids knowing the facts behind an error in his bank statement because he does not want to confront the truth, would be estopped under *Greenwood*. On this basis, a customer who examines his bank statements, but negligently or innocently does

[698] [2001] Lloyd's Rep Bank 229.
[699] *Ibid,* at 237.
[700] *Ibid,* at 238.
[701] In *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1987) 40 DLR (4th) 385 at 410. His survey of existing English and Canadian cases showed that they "were all cases in which there was actual knowledge of the forgery or alteration."
[702] [2006] 4 SLR 273 at 292.
[703] *Ibid,* at 300.

not detect the error, is not estopped under *Greenwood* from subsequently disputing an incorrect entry in his bank statement. Such a customer would lack the necessary knowledge for the duty of notification to arise. Nor would a customer who simply does not check his bank statements at all be estopped under *Greenwood* because there is no duty, under *Macmillan* or *Greenwood*, to check bank statements.[704] This is one of the innovations of the verification and conclusive evidence clause. It imputes to the customer knowledge of the contents of his bank statements by imposing on him a duty to examine them.

3.8.2 Reliance and Detriment

In order for any estoppel to operate, the party pleading it must have relied on the representation and suffered prejudice or detriment;[705] there must be a causal link between the representation relied on and the detriment.[706] Reliance will be present "if the promise had a material influence or effect on the conduct of the estoppel raiser."[707]

Gillett v Holt[708] concerned proprietary estoppel. The Court of Appeal (England) said detriment "is not a narrow or technical concept."[709] It need not consist in monetary expenditure or quantifiable financial detriment, so long as it is substantial.[710] *Spencer Bower* says that any prejudice "which the law recognizes as sounding in damages" will satisfy the requirement of detriment, and even unfairness which would be remedied by

[704] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 105–107.
[705] See *M'Kenzie v British Linen* (1881) 6 App Cas 82 on detriment.
[706] See statement in *Gillett v Holt* [2001] Ch 210 at 232 in the context of proprietary estoppel.
[707] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, at para XIV.2.33.
[708] [2001] Ch 210.
[709] *Ibid,* at 232.
[710] *Ibid.*

equity may suffice.[711] Detriment can take different forms.[712] In the bank–customer context it may be loss of the opportunity to take steps to prevent subsequent losses[713] (e.g., where the fraud is repeated), loss of the right of action against the wrongdoer (as in *Greenwood*) or loss of access to assets to recompense the crime (where the assets are disposed of or removed in the time after the representation is made, as discussed in *Fung Kai Sun v Chan Fui Hing and Others*[714]). In *Ogilvie v West Australian Mortgage and Agency Corporation Limited*[715] (1896), the Privy Council considered that the requirement of prejudice was met if the forger absconded out of the jurisdiction of the court. *Spencer Bower* refers to authorities to the effect that proof of a loss of a chance to protect oneself can establish detriment without establishing that the chance would have been successful.[716]

Previous editions of *Paget* took the view that it was immaterial that legal proceedings against the wrongdoer would not be productive of the stolen monies.[717] This view is supported by *Ogilvie*,[718] where Lord Watson rejected an argument that an estoppel was limited to the amount which the bank could have recovered from the forger. This was "contrary to all authority and practice",[719] he said. In *Fung Kai Sun*[720] (1951), however, Lord Reid in the Privy Council, said "this is the true test: the chance of recovering must

[711] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, 116.
[712] See examples listed in Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, 118 et seq.
[713] See Mark Hapgood (Gen Ed) *Paget's Law of Banking* (13th ed, Lexis Nexis Butterworths, 2007) para 19.8 at page 491.
[714] [1951] AC 489.
[715] [1896] AC 257.
[716] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation* 4th edition, 120.
[717] Hapgood *Paget's Law of Banking*, para 19.8, at page 492.
[718] [1896] AC 257.
[719] *Ibid,* at 270.
[720] [1951] AC 489.

have been materially prejudiced by the delay".[721] On the facts in that case it was necessary to show that a lender suffered detriment by the delay in notification of a fraudulent mortgage. The action failed on this point. The evidence suggested that the lender would not have taken any action had he been told of the forgery earlier and therefore the court was not prepared to assume otherwise. *Fung Kai Sun*'s case is not mentioned in the last two editions of *Paget*,[722] which does, however, qualify its previous view by saying that today the tendency is against recovery of an amount greater than the detriment suffered.[723]

Fung Kai Sun was relied on in the Singapore High Court decision of *Kodrat Suradji v Banque Nationale de Paris*[724] on the issue of detriment.[725] In *Pertamina Energy Trading Limited v Credit Suisse*,[726] in the Singapore Court of Appeal, V K Rajah J relied on *Fung Kai Sun*, in holding that it was necessary for the aggrieved party to plead and identify the steps it would have taken, prove a real chance of protecting or improving its situation and that it would have taken that chance.[727] On the facts, the estoppel claim in Pertamina was dismissed because there was inadequate evidence that the chance of recovering monies had been materially prejudiced by the customer's silence.

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[721] *Ibid,* at 506. The case is cited with approval in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273 at 306.
[722] Mark Hapgood (Gen Ed) *Paget's Law of Banking*: (12th ed, Butterworths Lexis Nexis, 2003); (13th ed, Lexis Nexis Butterworths, 2007)
[723] Hapgood *Paget's Law of Banking* para 19.8 at page 492.
[724] [1992] 2 SLR 676.
[725] *Ibid,* at 687.
[726] [2006] 4 SLR 273.
[727] *Ibid*, at 306.

3.8.3 Forgery or Fraud?

In *Greenwood*, the duty to disclose knowledge of forgery was admitted by the customer.[728] The court did not consider whether the duty extended to knowledge of fraud. The two concepts are related but are not identical. In both England and Singapore forgery is now dealt with by legislation.[729] Its essence is the falsification of a document coupled with the necessary intent. The Singapore Penal Code[730] defines forgery as the making of a false document with a mens rea that may take various forms including intent to cause damage or injury, intent to cause a person to part with property or enter into a contract, or intent to commit fraud.[731] Fraud is not defined in the Penal Code. Section 25 states that a thing is done "fraudulently" if it is done with the intention to defraud. This "leaves the interpretation of the word 'defraud' to the courts".[732] The essence of fraud is conduct causing detriment or prejudice (which need not be economic)[733] coupled with intent. Forgery is narrower in the sense that the actus reus of the offence is the making of a false document. Fraud commonly involves deceit although it seems that this is not an essential element of the offence.[734]

Returning to *Greenwood*, there is no logical reason why a customer should notify his bank of forgery on his account but not of fraud; and there is no reason why a customer's silence

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[728] Rightly, in the view of the court: *Greenwood v Martins Bank Limited* [1933] AC 51 at 58.
[729] UK: Forgery and Counterfeiting Act, 1981; Singapore: Penal Code, Cap 224.
[730] Cap 224.
[731] Section 463.
[732] Molly Cheang *Criminal Law of Malaysia & Singapore: Principles of Liability* (Kuala Lumpur, Professional (Law) Books Publishers, 1990), 52.
[733] *Ibid.*
[734] J C Smith *Smith & Hogan Criminal Law* (10th ed, Bath, Butterworths Lexis Nexis, 2002), 310.

about fraud (as distinct from forgery) should not found an estoppel.[735] In *Tai Hing Cotton Mill*, Lord Scarman was emphatic that the customer's duties under the common law are confined to those upheld by *Macmillan* and *Greenwood.*[736] Whether or not his intention was thereby to limit the customer's duty of notification to forgery, as distinct from fraud, is not the issue here. The point is that a contractual clause that extends the duty of notification to fraud is reasonable. It is inconceivable that in 1933 the House of Lords decision would have been any different had the unauthorised transactions of Mrs Greenwood been procured by fraud not involving forgery, albeit difficult to see how this could have been achieved at that time. Today, in the age of electronic banking, whether the *Greenwood* duty extends to fraud is crucial.

T&C that enhance the *Greenwood* duty so as to encompass fraud in addition to forgery would be uncontroversial. From there it is only a small step to justify a clause imposing a duty of notification if errors or omissions are detected in a bank statement, regardless of how they arose. This, it is submitted, is a reasonable departure from the common law.

[735] There is support for this in the literature, see for example: E P Ellinger, Eva Lomnicka and Richard Hooley *Modern Banking Law* (4th ed, Oxford University Press, 2006), 226–227; The Jack Report (Banking Services: Law and Practice Report by the Review Committee, Feb. 1989), at 42.
[736] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 108.

3.8.4 The Role of Negligence

An outstanding issue is the role of negligence in the *Greenwood* duty. It is clear from the discussion above[737] that negligence has no relevance in determining the customer's knowledge of a forgery. The requirement is actual knowledge or "Nelsonian knowledge".[738] What about the duty to speak on a customer having the necessary knowledge; is it a duty of care or an absolute duty? This is not an aspect of the *Greenwood* duty that has received much attention. In 1904, Hart discussed the *Greenwood* estoppel under the sub–heading, "Customer's Subsequent Negligence," in *The Law of Banking*, suggesting that the failure to notify the bank must be negligent. He does not expressly say so.[739] *Greenwood* is not helpful on this point as there the customer's failure to speak was deliberate;[740] *a fortiori* the duty arose. It is not difficult to imagine circumstances in which a customer is thwarted in his attempts to notify the bank of a forgery by events beyond his control (intervening accident, communication failure) or a customer who endeavours to notify the bank but because of negligence fails to do so (e.g. a notice incorrectly addressed, inadequate postage on an envelope containing the notice, an electronic message not delivered because of failure to click "send" or an inaccurate email address). Negligence in fulfilling the obligation to notify would not be excusable. The position where the customer's failure to notify the bank of a forgery is without negligence is unclear, but it will be submitted that a non–negligent failure should not be penalised.

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[737] In chapter 3.8.1.
[738] A phrase dating to an incident in which Lord Nelson was said to have put his blind eye to a telescope, thereby avoiding knowledge of the enemy's surrender, i.e. shutting one's eyes to an obvious means of knowledge.
[739] Hart *The Law of Banking*, 275, 282.
[740] [1933] AC 51at 58.

Another aspect of negligence in the context of the *Greenwood* duty is the effect of negligence by the bank. In *Greenwood*, it was found that the bank had been negligent in not detecting that the signatures on the cheques had been forged.[741] Lord Tomlin in the House of Lords expressly pointed out that this made no difference to the operation of the estoppel.[742] He said: "For the purposes of the estoppel, which is a procedural matter, the cause of the ignorance is an irrelevant consideration."[743] The estoppel arose because of a breach of the duty to disabuse the bank of its ignorance concerning the forgeries. In the Court of Appeal, this aspect received more attention. Scrutton LJ explained that the bank's loss lay in the lost opportunity to sue the forger[744] and the bank's negligence was not a proximate cause of its loss of the right of action.[745] Romer LJ agreed. In conclusion, negligence on the part of the bank had no bearing on the operation of the estoppel against the customer. This issue is important under the verification and conclusive evidence clause and will be discussed in the next chapter.

If one compares the *Macmillan* and *Greenwood* duties, the dichotomy between the restricted *Macmillan* duty, which arises only in the case of customer negligence in the execution of a cheque, and the general *Greenwood* duty to speak on becoming aware of forgeries, is striking. A general duty to prevent fraud, along the lines of *Khoo Tian Hock*, is doctrinally more consistent. If, at the time of *Macmillan*, a duty on the customer extending to the entire banking relationship had been recognized, it would not have been necessary for the *Greenwood* duty to be implied. The customer's duty to notify the bank of forgeries

[741] *Greenwood v Martins Bank Limited* [1933] AC 51 at 56.
[742] *Ibid,* at 59.
[743] *Ibid.*
[744] *Greenwood v Martins Bank Limited* [1932] 1 KB 371 at 383.
[745] *Ibid,* at 384.

on becoming aware of them would be caught by the broader principle that a customer must exercise care to prevent fraud in the operation of his bank account.

Chapter 4: The Verification and Conclusive Evidence Clause

The main shield used by banks in Singapore against unauthorised debits is the "verification and conclusive evidence" clause. It imposes a duty on the customer to examine his bank statements and notify the bank of any errors within a specified period of time, failing which the statement is taken as conclusive evidence of its contents and the customer is precluded from disputing any entries thereafter. The implication is that errors notified to the bank within the stipulated period will be rectified subject, it must be assumed, to the bank verifying the facts including that the debit did not result from a breach by the customer of his duties. The verification and conclusive evidence clause appears in all of the Singapore T&C examined.[746] It is controversial for a number of reasons: it enlarges the scope of the customer's duties by imposing an obligation to examine his bank statements that does not exist under the common law;[747] it applies to errors of which the customer is not aware and, perhaps the foremost reason, is the drastic consequence of precluding a customer from objecting to a debit on his account procured by fraud. This could happen while, for example, the customer is absent from home and unable to read his statement within the stipulated time,[748] a scenario prompting Poh Chu Chai to describe the clause as "very draconian".[749]

It should be pointed out that there are numerous other clauses in the T&C that can affect the incidence of loss between bank and customer. These other clauses will be discussed later.

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[746] UOB 13.4; OCBC 9; DBS 11.1(c); HSBC Part A 3.1; Std Ch 5.1.1.
[747] A position confirmed in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 105–107.
[748] The example given by Poh Chu Chai *Law of Banker and Customer* (5th ed, Lexis Nexis, 2004), 918.
[749] *Ibid*.

For the present, the verification and conclusive evidence clause will be considered in isolation without regard to its interaction with other clauses. Bookkeeping or paper errors are not the concern of the verification and conclusive evidence clause. They are easily rectified. It is fraud or forgery that is the problem as the resulting loss must often fall on innocent shoulders.

The effect of the verification and conclusive evidence clause extends beyond errors or omissions that have actually been detected. From the bank's perspective, this is one of its innovations, addressing the biggest weakness in the *Greenwood* duty, the requirement of knowledge. For more than a century, banks have sought, with scant success, judicial recognition for the proposition that the customer has an implied duty to examine his bank statements; an argument rejected, for example, by the Privy Council in *Tai Hing Cotton Mill*.

4.1 An "Account Stated"?

Edwin Mujih has argued that *Tai Hing Cotton Mill* could have been decided differently, based on the "settled account" defence, also known as an "account stated", citing authority predating *Macmillan* and *Greenwood*.[750] Ellinger, Lomnicka, Hooley[751] explain the significance of an account stated: The "customer and the bank would lose the right to query the correctness of given items once the bank statement or the pass–book became an account stated."[752]

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[750] Edwin C Mujih "Could '*Tai Hing'* Have Been Decided Differently?" (1998) Tr. LR, 129.
[751] E P Ellinger, Eva Lomnicka and Richard Hooley *Modern Banking Law* (4th ed, Oxford University Press, 2006).
[752] *Ibid,* at 225.

Mujih's argument is relevant to the debate on the acceptability of the verification and conclusive evidence clause, for if he is correct, it would imply common law support for the customer's obligation to examine bank statements.[753] *Devaynes v Noble*: *Clayton's* case (1816),[754] is Mujih's main authority. Here the court adopted a Master's report on the facts and held that a customer's silence after receipt of his bank statement was acquiescence in its accuracy. A dictum by Sir J Cross in *Ex parte Thomas Randleson*[755] (1833) is in support[756] although no reference was made to *Clayton's* case. However, *Chatterton v London and County Bank*[757] (1891) diverged from this view and in *Kepitigalla*[758] (1909) Bray J was dismissive: "I know of no authority in this country for this proposition."[759] It would lead to absurd results, he said.[760] Bray J endorsed the following statement by Bowen LJ in the Court of Appeal in *Vagliano Brothers*: "But there was no evidence to shew what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass–book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the bank or negligence on his part."[761] While Bray J said this dictum was not doubted in the subsequent House of Lords decision, on further appeal in *Vagliano Brothers*, [762] he seems to have overlooked this statement by Lord

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[753] See Mark Hapgood *Paget's Law of Banking* (11th ed, Butterworths, London, Edinburgh & Dublin, 1996), 162–163; Mujih "Could '*Tai Hing'* Have Been Decided Differently? (1998) Tr. LR, 129.
[754] 35 ER 767 at 778.
[755] (1832–1833) Deacon & Chitty Reports 534.
[756] *Ibid,* at 541: "The only inference, therefore, that can be drawn of any entry in the pass–book is, that the customer, by keeping the book, admits the statement in it to be correct."
[757] The Times, 21 January 1891.
[758] *Kepitigalla Rubber Estates Limited v Bank of India Limited* [1909] 2 KB 1010 at 1026.
[759] *Ibid,* at 1027.
[760] *Ibid,* at 1029.
[761] (1889) 23 QBD 243 at 263.
[762] [1909] 2 KB 1010 at 1028.

Halsbury: "Was not the customer bound to know the contents of his own passbook?"[763] Lord Halsbury's dictum suggests that the customer may be bound by the contents of his passbook. Nevertheless, the weight of authority is against the "settled account" defence in the bank–customer context in the absence of an agreement to the contrary.

Recent editions of *Paget*[764] deal with the matter more cursorily than the 9th edition, but they are to the same effect: bank statements do not constitute an "account stated" unless there is agreement to that effect.[765] The reasoning in the latest edition is based on the absence of a common law obligation on the customer to check his bank statements.[766] Ellinger, Lomnicka and Hooley in the 4th edition of *Modern Banking Law*, agreed that passbooks and bank statements are not regarded in English law as constituting an "account stated".[767] This was supported by Ellinger, writing in the Canadian Business Law Journal: "The attempt to resort to the doctrine of account stated in the context of periodic statements respecting bank accounts is highly artificial."[768] Older editions of *Paget*[769] and *Modern Banking Law*,[770] however, supported the logic of a bank statement constituting an "account stated", a position recently endorsed by Singapore's Court of Appeal in *Pertamina Energy Trading Limited v Credit Suisse*.[771]

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[763] *The Governor and Company of The Bank of England v Vagliano Brothers* [1891] AC 107 at 116.
[764] 10th edition (1989), 11th edition (1996), 12th edition (2003) and 13th edition (2007).
[765] Mark Hapgood (ed) *Paget's Law of Banking*, (12th ed) para 11.7, (13th ed) para 11.7; Maurice Megrah and F R Ryder *Paget's Law of Banking,* (9th ed, London, Butterworths, 1982), 105, 108.
[766] Hapgood (ed) *Paget's Law of Banking* (13th ed) para 11.7.
[767] E P Ellinger, Eva Lomnicka and Richard Hooley *Modern Banking Law* (4th ed, Oxford University Press, 2006), 225.
[768] E P Ellinger in "Reflections on Recent Developments Concerning the Relationship of Banker and Customer" (1988) 14 Can Bus LJ 129 at 135.
[769] Maurice Megrah and F R Ryder, *Paget's Law of Banking*, (9th ed, London, Butterworths, 1982), 104.
[770] E P Ellinger and Eva Lomnicka *Modern Banking Law*, (2nd ed, Oxford University Press, 1995), 172.
[771] [2006] 4 SLR 273 at 296. See also the view of Cons J in the Hong Kong Court of Appeal in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's Rep 555 at 560.

The 9th edition of *Paget*, after explaining that statements of account are the modern successor to the passbook,[772] said: "The proper function of the passbook should have been to constitute a conclusive record of the transactions between banker and customer, but it never acquired that status; it has never been regarded unquestionably as an account stated and the modern replacement of the passbook would seem to be no different."[773] The latter part of this statement was effectively endorsed four years later in *Tai Hing Cotton Mill*, when the Privy Council emphatically rejected an implied duty on the customer to examine his bank statements and report errors to the bank.[774] The absence of an obligation on the customer to examine his bank statements is fatal to the "account stated" argument.[775]

In contrast, Ross Cranston[776] supports the current position on a customer's duty to examine his bank statements, saying that the purpose of bank statements is to inform the customer and not to benefit the bank.[777] Roy Goode agrees, as the purpose of bank statements is to give the customer "a record of the movements on his account."[778] The point is obviously debatable. The banks in *Tai Hing Cotton Mill* did not rely on *Clayton's* case[779] and the "settled account" argument before the Hong Kong Court of Appeal or the Privy Council, presumably because the law on this issue was then settled. Ellinger in 1988 expressed the

[772] See discussion by Ellinger, Lomnicka *Modern Banking Law*, 225.
[773] Maurice Megrah and F R Ryder, *Paget's Law of Banking,* (9th ed, London, Butterworths, 1982), 104.
[774] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd,* [1986] AC 80 (PC) at 101, 104 and 107.
[775] See Mark Hapgood (ed) *Paget's Law of Banking* (11th ed, Butterworths, London, Edinburgh & Dublin, 1996), 162–163.
[776] Ross Cranston *Principles of Banking Law* (2nd ed, Oxford University Press, 2002).
[777] *Ibid,* at 164.
[778] R M Goode "Comments on Peter Ellinger's Paper" (1988) 14 Can Bus LJ 179 at 180.
[779] *Devaynes v Noble*: *Clayton's case* (1816) 35 ER 767 at 778.

view that it is "unlikely that the argument concerning the account stated will be raised in future cases",[780] but the position in Singapore is less certain in light of *Pertamina*.

Given the uncertainty, banks seeking to render customers' statements "accounts stated" must use the T&C and the duty to examine the bank statements must be an essential ingredient. An alternative provision could be that the customer is deemed to be familiar with the contents of his bank statements a set number of days after receipt or dispatch. This would deem the customer to have the necessary knowledge for the *Greenwood* estoppel to arise. It is submitted that an express verification obligation on the customer is preferable in that it explicitly tells the customer what action is required.

4.2 Public Policy

Turning now to the conclusive effect of the verification clause, a preliminary issue is its validity on public policy grounds. This does not seem to have arisen in any reported case concerning a current account but it has in the context of bank guarantees. In *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA*,[781] notice to a guarantor (bank) of default of payment by a customer was conclusive as to the amount of the bank's liability to the holder of the guarantee. This meant that no evidence could be lead to dispute the amount of the indebtedness under the guarantee although separate proceedings could be instituted to correct any error. The Court of Appeal (England) rejected the argument that the clause was contrary to public policy for ousting the jurisdiction of the court. The court

[780] E P Ellinger "Reflections on Recent Developments Concerning the Relationship of Banker and Customer" (1988) 14 Can Bus LJ 129 at 135.
[781] [1973] 2 Lloyd's Rep 437.

referred to the Australian decision of *Dobbs v National Bank of Australasia Ltd*,[782] which drew a distinction between a clause denying access to the courts and a clause setting out the method to ascertain rights or facts.[783] The Singapore High Court, in *Bangkok Bank Ltd v Cheng Lip Kwong*,[784] cited *Bache v Banque Vernes* with approval, accepting that absent fraud or patent error, a certificate of indebtedness issued under a conclusive evidence clause was effective as such.[785] In *Bangkok Bank*, the contract provided that the amount owing under a guarantee would be determined by a conclusive evidence certificate. Yong Pung How J (as he then was), upholding the clause, explained that it was "the dictates of commerce"[786] that led to the use of the conclusive evidence certificate and the practice was supported by the regulation of banks coupled with their complete honesty and reliability.[787] This was followed in the Singapore High Court in *Oversea–Chinese Banking Corporation Ltd v The Timekeeper Singapore Pte Ltd & Ors.*[788] In the same court, Judith Prakash J, in *Bok Chee Seng Construction Pte Ltd v Development Bank of Singapore Ltd*,[789] stated obiter that conclusive evidence clauses should be interpreted strictly, according to their terms because they oust the jurisdiction of the courts, but, it seems, that they do not infringe public policy.[790]

Lord Denning MR said in *Bache v Banque Vernes* that the use of the conclusive evidence clause was "only acceptable because the bankers or brokers who insert them are known to

[782] [1935] 53 CLR 643.
[783] Ibid, at 657.
[784] [1989] SLR 1154.
[785] *Ibid,* at 1159.
[786] *Ibid,* at 1159.
[787] *Ibid*.
[788] [1997] 2 SLR 526.
[789] [2002] 2 SLR 61.
[790] *Ibid*, at 66 –7.

be honest and reliable men of business who are most unlikely to make a mistake."[791] V K Rajah J, in the Singapore High Court in *Standard Chartered Bank v Neocorp International Ltd*,[792] rejected Lord Denning's "sole rationale",[793] noting that the clauses are used and accepted in many other commercial endeavours such as construction agreements, and preferring to base recognition of such clauses on the principle that parties must honour the terms of their contracts. V K Rajah J said that there is a rebuttable presumption against giving one party the right to conclusively determine issues pertaining to a claim and that a conclusive evidence clause should not be used to make a false claim.[794]

The conclusive evidence clause in bank T&C is used by banks to identify their mistakes and can be used to avoid liability for payments without a mandate. It therefore operates differently from the conclusive evidence clauses considered in *Bache*, *Dobbs* and the Singapore cases discussed above. It is submitted that this difference is not material to the issue of validity on public policy grounds and it is unlikely that these clauses in bank T&C would now be regarded as offending public policy.[795] They have been enforced in a number of cases, in Singapore and other jurisdictions, to be discussed below.

[791] [1973] 2 Lloyd's Rep 437 at 440.
[792] [2005] 2 SLR 345.
[793] *Ibid,* at 353.
[794] *Ibid,* at 354–5.
[795] See *Paget's Law of Banking* 2003 at 172.

4.3 Operation of the Clause

Opponents of the verification and conclusive evidence clause argue that the business of banking is the business of the banks.[796] Their point is that "customers are entitled to rely on banks performing their own functions to the highest professional standards."[797] In particular, they say that banks must accept that they are liable to pay out only on an authentic mandate from the customer. As Geva puts it, the bank is primarily responsible for detecting forgeries and unauthorised payment orders.[798] Poh Chu Chai is a staunch critic of the clause. He argues that the verification and conclusive evidence clause allows banks to shift their responsibility to verify the customer's mandate.[799] This is a serious allegation because payment on a valid mandate is fundamental to the banking relationship.

Assuming that the customer is diligent about checking his statements and reporting any errors, the verification and conclusive evidence clause has no impact on the risk for unauthorised debits. Once notified of an error, the bank ordinarily becomes liable to make correcting entries in the customer's account. In these circumstances, the clause does not alleviate the bank of the responsibility to pay only on an authentic mandate. The verification and conclusive evidence clause may seem to operate harshly against a dilatory customer[800] in the event of a one–off fraud.[801] Had the customer complied with his contractual duty to verify the account entries and notify the bank of the error, the bank

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[796] See, for example, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 106.
[797] Banking Services: Law and Practice Report by the Review Committee, (HMSO, London, Feb. 1989, Cm 622), at 43.
[798] Benjamin Geva "Allocation of Forged Cheque Losses – Comparitive Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 288.
[799] Poh Chu Chai *Banker and Customer* (5th ed, Lexis Nexis, 2004), 921. See also 912, 915.
[800] The customer who does not check his statements regularly or at all.
[801] This is one of Geva's criticisms of the clause: Benjamin Geva "Reflections on the Need to Revise the Bills of Exchange Act – Some Doctrinal Aspects" (1981–2) 6 Can Bus LJ 269 at 323.

would ordinarily have to bear the loss. The conclusive evidence clause, however, enables the bank to assert the conclusiveness of the bank statement after the stipulated period of time and saddle the customer with the loss. Failure by the dilatory customer to notify the bank of a one–off unauthorised debit is not the cause of the loss. The detection occurs after the fraud and notification cannot prevent the loss from occurring.

The benefit of having a chance to recover the money from the fraudster is, however, significant and should not be overlooked. The bank's chances of recovery from a thief, albeit remote, would generally be enhanced by acting promptly. We have seen that in *Greenwood* the bank's loss of its right of action against the customer's wife was sufficient to constitute the necessary detriment for the estoppel to arise.[802] In that case the bank actually lost its right of action through the death of the wife. In *Ogilvie v West Australian Mortgage and Agency Corporation Limited*[803] (1896), the Privy Council found detriment in the forger absconding out of the jurisdiction of the court, underscoring the importance of prompt notification to the bank.

The one–off fraud is not the primary target of a verification and conclusive evidence clause. It is directed particularly at the ongoing fraudulent scheme of which there can be few better examples than *Tai Hing Cotton Mill*. There, losses amounting to about HK$5.5 million accumulated over a period of five to six years from about 300 forged cheques in circumstances where little supervision was exerted over the dishonest employee who

[802] *Greenwood v Martins Bank Limited* [1933] AC 51 at 58.
[803] [1896] AC 257.

occasioned the loss and no significant verification of bank transactions was undertaken.[804] The majority of the loss could have been avoided if it had been detected and reported to the bank at an early stage. The Privy Council's advice to deny the banks relief prompted the Jack Report to recommend that the law be reformed to give banks a limited defence of contributory negligence in appropriate cases.[805] *Khoo Tian Hock* is a less spectacular but equally supportive example. In any fraudulent scheme, if the first or early withdrawals are detected and reported by the customer, the scheme can be arrested in its tracks. The recommendation of the Jack Report in this regard has not been implemented in England and finds no expression in Singapore.

To summarise, the above analysis of the operation of a verification and conclusive evidence clause reveals that:

1. It does not penalise a customer who is the innocent victim of a fraud but who detects the error in his bank statement and notifies the bank punctually.
2. It penalises a dilatory customer where the fraud is perpetrated repeatedly over a period of time. Of course the equities in such a case are ambiguous. *Tai Hing Cotton Mill* is an example.
3. It penalises the dilatory customer in the case of a one–off fraud despite the absence of a causal connection between the customer's dilatoriness and the bank's loss. The customer's neglect does, however, deprive the bank of acting to recover the loss.

[804] The finding of the trial judge which was accepted on appeal to the Privy Council. See [1986] 1 AC 80 at 99.
[805] Banking Services: Law and Practice Report by the Review Committee (Feb, 1989), at 43.

Poh Chu Chai's criticism that a verification and conclusive evidence clause enables a bank to shift its responsibility to examine the customer's mandate is correct in specific situations, but only in an ex post facto sense. The verification and conclusive evidence clause does not relieve banks from the responsibility of paying only on valid mandates, though they may rely on the clause to escape the consequences of breaching that duty in limited situations. This is not a radical departure from the common law: in *Greenwood*, the customer's failure to comply with his duty to report known forgery relieved the bank of responsibility for negligently paying without a mandate. In other words, while the verification and conclusive evidence clause may enable banks to escape the common law consequences of paying without a mandate, it does not exonerate banks from their responsibility to verify the customer's mandate. This responsibility remains intact.

As a matter of practice, banks do not examine mandates, for example cheques, that they receive for transactions below a certain amount[806] because the time and cost involved is not warranted by the potential loss. While insulating the bank, insertion of a verification and conclusive evidence clause does not altogether remove the risks entailed by this practice. Opponents of the clause would argue that if banks choose to conduct their business in a riskier way to maximize profits, they should also bear the consequent losses.[807] They should not be able to increase their profits and pass the attendant risk on to the hapless customer. Benjamin Geva does not support exonerating banks in these circumstances:

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[806] See e.g. David Hay (Gen Ed) *Halsbury's Laws of Singapore* "Finance and Banking" vol 12 (Lexis Nexis Singapore, 2002) para 140.658 fn 4; J R S Revell *Banking and Electronic Fund Transfers* 1983, at 18, 82; R M Goode (editor) *Electronic Banking – The Legal Implications* 1985 "Introduction", page X; Johanna Vroegop "The Legal Implications of Cheque Truncation" (1990) LMCLQ 244 at 250; see further discussion below, chapter 10.12.

[807] The view of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 106.

"Technological enhancements should not be used as an excuse to neglect basic responsibilities."[808]

The point remains, however, that the clause does not penalise the customer who fulfils his duty to verify and notify the bank. Rather it is the bank that will lose as their prospects of recovery from the thief are precarious. Banks do not know in advance which of their customers fulfil the verification duty and which do not. They do not therefore choose with which customers to be more careful and with which they can throw caution to the wind. Even if they did, it cannot be suggested that banks examine cheques to discern whether they have been written by a diligent or a dilatory customer and on that basis either adopt a careful or a careless examination of the cheque for compliance with the mandate. In choosing to automatically process cheques up to a certain amount, there is a risk that a customer will query a transaction and that the bank will be in breach. This, it will be argued, is one of the advantages of the verification and conclusive evidence clause; it respects the basic tenet of the relationship, that the bank may only reimburse itself to the extent of the customer's authority, provided the customer has verified and notified and not breached its duties of care.

4.4 Benjamin Geva's Standards

Geva has put forward a proposal for the allocation of loss between bank and customer arising from a forged cheque.[809] His goals are "loss reduction" and "loss distribution".[810] In

[808] Benjamin Geva "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 289.

[809] *Ibid*. See also Geva "Reflections on the Need to Revise the Bills of Exchange Act – Some Doctrinal Aspects" (1981–82) 6 Can Bus LJ 269 from 313. In the context of Electronic Funds Transfers he expresses

doing so, he strives to meet the following standards that would be widely accepted as desirable in governing the bank–customer relationship:

1. The bank is primarily responsible for detecting forged and unauthorised mandates.[811] This comes from the common law: the bank must act in accordance with its mandate and may not reimburse itself if it fails to do so, irrespective of fault. Erosion of this principle is controversial, it undermines one of the fundamental bases on which the banking contract is founded.
2. From point 1 it flows that banks should be encouraged to invest in mechanisms to detect forgery.[812]
3. Linked to points 1 and 2, the bank is the "superior prepayment detector."[813] The problem of allocating losses from forgery and alteration only arises if the bank pays a forged or altered instrument. The primary goal is to prevent the loss from arising at all.
4. "The bank is the better risk bearer or insurer."[814] The bank can distribute the losses, for example through bank charges or insurance.[815] The customer, on the other hand, is a poor risk bearer; he cannot distribute the losses and may be crippled by them.[816]

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many of the same sentiments, see Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207, which is discussed in more detail in chapter 10, "Electronic Banking".

[810] "Reflections on the Need to Revise the Bills of Exchange Act – Some Doctrinal Aspects" (1981–82) 6 Can Bus LJ 269 from 313.

[811] Geva "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 288. See also Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 228.

[812] *Ibid,* at 285. See also Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 229.

[813] *Ibid,* at 288.

[814] *Ibid* at 285.

[815] *Ibid*.

[816] *Ibid,* at 285. See also Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 231, 237.

5. The rules for allocation of liability between bank and customer for forgery and unauthorised alterations should be certain, fair, and reduce risk.[817] Risk reduction refers to linking liability to fault so as to "encourage diligence and the maintenance of sound practices to detect and eliminate forgery losses."[818]
6. Allocation on the basis of negligence is unattractive as the determination of fault[819] and apportionment of fault for contributory negligence could involve expensive litigation.[820]

It is interesting to evaluate the verification and conclusive evidence clause against Geva's standards:

1. The clause does not change the bank's primary responsibility. A customer who notifies the bank of an unauthorised transaction will be reimbursed, subject no doubt to an investigation into the veracity of the customer's allegation and ascertaining that the customer has not breached his duties of care.
2. The point about forgery detection mechanisms is an important one. Edward Rubin says: "Banks design the system, and banks can avoid losses by restructuring it, by training their employees or by developing new technologies."[821] He appears to suggest that a bank's failure to invest in the research and development of new technologies is not, but should be, regarded as "fault" when evaluating liability for an

[817] *Ibid,* at 286.
[818] *Ibid,* at 285.
[819] *Ibid.,*at 287. Geva refers to the customer's fault; later, at 289 he writes that the bank's fault is relatively easier to determine.
[820] *Ibid,* at 287. Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 229, 237.
[821] "Efficiency, Equity, and the Proposed Revision of Articles 3 and 4" E Rubin 42 Ala L Rev (1991) 551 at 568.

unauthorised debit.[822] Customers, on the other hand, cannot change the system or be expected to invest in it.[823] Rubin has a valid point in principle but failure to invest sufficiently in research and development cannot approach fault without evidence that investment in research would have yielded effective technology. Rubin's criticism must be confined to known advancements that banks have failed to embrace. If no such advancements exist, the point should not be over–emphasized. A second point is that there is no logic in any suggestion that the verification and conclusive evidence clause discourages investment in technological advancements. As the bank's primary responsibility remains unchanged under the verification and conclusive evidence clause, they are vulnerable to fraud and forgery and have every incentive to enhance their detection mechanisms.

3. The bank is the superior prepayment detector. Geva may be referring to the fact that the bank is the entity that has the last opportunity to avoid ensuing loss by declining payment; and it has the means to invest in up–to–date technology to aide that task. As stated above, banks can only be criticised if they fail to deploy known forgery detection methods. On the other hand, the customer, through verification and notification, is the superior post–payment detector. Although the verification and conclusive evidence clause focuses not on prevention but on cure, it is very effective at this level. It should not, and it does not, detract from the desirability of prepayment detection, which links up with the points 1 and 2 above.

4. It is agreed that the bank is the better risk bearer. However, and this point seems to be overlooked in much of the criticism of the verification and conclusive evidence

[822] *Ibid,* at 569.
[823] *Ibid*.

clause, the clause does not automatically alter the risk between bank and customer for unauthorised debits. If the customer fulfils his duty of verification and notification, the risk remains with the bank. And the verification and notification duty is not ordinarily an onerous, difficult or expensive duty to fulfil. The second point is that while the bank may be the better risk bearer, it does not follow that it should bear the loss. While the "means test"[824] has historically been a factor in deciding policy issues relating to liability, it has its limitations;[825] arguments for liability based on who is best able to bear it or insure against it, have been described by P S Atiyah as "going out of fashion today".[826] Taken to its logical extreme, it could lead to the downfall of a bank. Passing on the loss, whether to insurance companies or back to bank customers in the form of bank charges, is hardly a satisfactory answer. Keith Perrett[827] notes that distributing the loss through bank charges means that all customers subsidize careless, and in some cases reckless, customers, who, in turn, have no incentive to change their habits.[828] Loss reduction, it is submitted, is superior to loss distribution and the verification and conclusive evidence clause is particularly suited to reduce losses from unauthorised debits.

5. The merits of certainty and fairness in the law generally, and in this particular scenario, are undeniable. Risk reduction is equally desirable. Encouraging diligence and sound practices for detection and elimination of forgery losses, insofar as it pertains to banks, has already been covered in points 1 and 2. Insofar as it applies to

[824] Term used by E P Ellinger in "Reflections on Recent Developments Concerning the Relationship of Banker and Customer" (1988) 14 Can Bus LJ 129 at 132.
[825] See statement to this effect by Elisabeth Peden, "Policy Considerations Behind Implications of Terms in Law" (2001) 117 LQR 459 at 471.
[826] P S Atiyah *An Introduction to the Law of Contract* (1995, Oxford, Clarendon Press, 5th ed), 206.
[827] Keith W Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245.
[828] *Ibid,* at 271.

customers, the verification and conclusive evidence clause is well targeted to meet this goal. It is an excellent tool to detect fraud, albeit after–the–fact, and while it cannot eliminate losses, it can reduce them by stemming fraud before it is repeated. The clause fares well on a measure of certainty: the bank is liable, irrespective of fault, provided that the customer fulfilled his duty to verify and notify and is not in breach of his duties. The issue of fairness is more problematic. There is no doubt that in some cases the clause operates fairly, such as in the case of a diligent customer who reports errors to his bank promptly. So too, in a *Tai Hing Cotton Mill* scenario for example, many would consider it fair for a properly drafted clause to penalize the dilatory customer. In that case, four of the nine judges[829] considered it appropriate for the customer to be sanctioned for apathy and five,[830] while unwilling to sanction the customer, conceded that the customer's conduct was irresponsible. Nevertheless, the scope for harsh application of the clause has been acknowledged above. This will be discussed further below.

6. Geva criticizes the allocation of losses from forgery on the basis of customer fault.[831] The argument that follows was advanced by Edward Rubin in 1991 in the context of proposed revisions to the United States' Uniform Commercial Code.[832] The allocation of loss in the payment system on the basis of fault undermines the efficiency of the system in a number of ways. It can lead to customers taking

[829] See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd,* [1986] AC 80 (PC) at 100. The court a quo found in favour of two of the three banks. The Hong Kong Court of Appeal found in favour of the banks, [1984] 1 Lloyd's Rep 555.
[830] In the Privy Council.
[831] B Geva "Allocation of Forged Cheque Losses – Comparitive Aspects, Policies and a model for Reform" (1998) 114 LQR 250 at 285, fn194.
[832] E Rubin "Efficiency, Equity, and the Proposed Revision of Articles 3 and 4" (1991) 42 Ala LR 551 from 561.

> disproportionate loss avoidance measures;[833] it causes heavy losses to be suffered by a single customer;[834] allocating the loss through litigation is expensive.[835] Efficiency of the payment system can be better achieved by spreading the bulk of the loss and allocating the balance to the party in the best position to have avoided it to encourage loss avoidance.[836] This means assigning the bulk of liability to the bank with some liability to the customer sufficient to incentivise him to take precautions; the bank can spread the losses and take loss avoidance measures.[837] Rubin adds: "Beyond a certain point, liability simply punishes the consumer without achieving any increased level of loss reduction."[838]

In reply to Rubin's comments, the "fault" that forms the basis for loss allocation in the context of the verification and conclusive evidence clause is the failure to notify the bank of errors in the bank statement. It is not apparent what disproportionate loss avoidance measures Rubin sees customers taking; the required loss avoidance measure is verification and notification, this is not disproportionate either in relation to the benefit to be obtained or having regard to the measure itself. There is, unavoidably, the need for fact finding once the customer notifies the bank of an error in his statement. The drawback of expensive litigation is not inevitable but it is an unfortunate possibility. Once the facts are established, however, the allocation of loss under the clause is straightforward. Fault–based liability, despite its drawbacks, is fundamental to our legal system, criminal and civil. A glance at

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[833] *Ibid,* at 564.
[834] *Ibid*.
[835] *Ibid,* at 565.
[836] *Ibid,* at 564–566.
[837] *Ibid,* at 564.
[838] *Ibid,* at 568.

the contents pages of numerous tort and criminal law textbooks supports this view.[839] *Winfield & Jolowicz on Tort* states: "In most cases liability is based upon fault: sometimes an intention to injure is required but more often negligence is sufficient."[840] In the context of the criminal law, *Criminal Law* by Chan, Hor and Ramraj says: "One of the core assumptions of the criminal law is that criminal liability should reflect culpability or degree of fault of the accused".[841] It is the accepted basis for determining the incidence of liability. Rubin's criticism that failure to verify and notify can lead to heavy losses for the customer because there is no spreading of the loss is valid.

4.5 Bank Negligence

The issue of negligence in the context of the verification and conclusive evidence clause arises in different senses. First, how does negligence by the bank in the payment process interact with a customer's failure to fulfil his verification and notification duty? The second point was raised in the discussion above of the *Greenwood* duty:[842] is the customer excused for failing to verify or notify if his failure is not negligent? In other words, is his obligation to verify and notify absolute or is it a duty of care? Third, can a customer who verifies or notifies negligently, nevertheless escape liability on the basis that he fulfilled his contractual duty. These questions all raise issues regarding the interpretation of the

[839] For example, John G Fleming *The Law of Torts* (9th ed, LBC Information Services, 1998); R F V Heuston and R A Buckley *Salmond & Heuston on the Law of Torts* (21st ed, London, Sweet & Maxwell Ltd, 1996); Anthony M Dugdale (Gen ed) *Clerk & Lindsell on Torts* (19th ed, London, Sweet & Maxwell, 2006); W V H Rogers *Winfield & Jolowicz on Tort* (16th ed, London, Sweet & Maxwell, 2002); Chan Wing Cheong, Michael Hor Yew Meng, Victor V Ramraj *Fundamental Principles of Criminal Law* (Singapore, Lexis Nexis, 2005); J C Smith *Smith & Hogan Criminal Law* (10th ed, Butterworths Lexis Nexis, 2002).
[840] Rogers *Winfield & Jolowicz on Tort* para 3.1 (2).
[841] Chan, Hor Ramraj *Criminal Law* 139.
[842] See chapter 3.8.4.

contract, as the verification and notification duty is contractually imposed. The first and second questions are relevant to fairness and the third will be considered later.

4.5.1 The Verification and Conclusive Evidence Clause and Bank Negligence

Whether the verification and conclusive evidence clause protects or should protect the bank in the event of its own negligence is a thorny issue. The T&C may be explicit on this point. In Singapore, HSBC,[843] expressly uses the verification clause to protect itself against fraud, forgery or negligence. The other Singapore T&C studied here do not mention negligence but are in broad terms capable of interpretation to cover bank negligence. The operation of the clause where the bank has been negligent may seem unfair given the bank's strict common law duty to pay only on an authentic mandate. This criticism highlights one of Geva's principles listed above: that the bank is the superior prepayment detector and it should not be able to shirk this responsibility lightly. Some would go so far as to maintain that a bank is prevented from contracting out of its own negligence on grounds of public policy.[844] The Singapore and United Kingdom legislatures did not, however, share this view when they enacted the Unfair Contract Terms Act, which does not render void an exclusion of liability for negligence other than negligence causing death or personal injury, and specifically envisages that such a provision could be reasonable. One aspect of this debate is whether in terms of the UCTA it is reasonable for the verification clause to excuse the bank of negligent breach of its duty to pay on a valid mandate.[845]

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[843] HSBC Part A 3.1.

[844] Discussed by Bradley Crawford *Crawford and Falconbridge Banking and Bills of Exchange: a treatise on the law of banks, banking, bills of exchange and the payment system in Canada* (8th ed, Toronto, Canada Law Book Inc, 1986), 748–749 and 774.

[845] The application of the UCTA to the verification and conclusive evidence clause is discussed in chapter 7 below.

In *Elis Tjoa v United Overseas Bank* the Singapore High Court said, without much discussion, that the verification and conclusive evidence clause in question was "reasonable irrespective of whether UOB was negligent or not."[846] In *Pertamina*, the court upheld a verification and conclusive evidence clause. The court described the conduct of the bank, through its officer, as bordering "precariously on negligence".[847] No such finding was made, however, and the question of its interaction with a verification and conclusive evidence clause was not considered; the court did indicate that a case might have been made for contributory negligence.[848]

The effectiveness of a verification clause where the bank has been negligent is an issue which has arisen relatively frequently in Canada. Keith Perrett[849] writes that it is "surprising that, after almost a century of consideration, Canadian courts still consider it an open question whether these clauses are enforceable where the financial institution has been negligent in the administration of the customer's account."[850] This is evident in the series of cases since the seminal decision in *Arrow Transfer v Royal Bank of Canada*[851] in 1972 with the two camps lining up behind the views in that case of the majority ("the 'plain meaning' approach")[852] and Laskin J (the "contracts of adhesion" approach).[853] A consideration of the Canadian cases is instructive in highlighting the issue in a variety of circumstances. *Arrow Transfer* did not involve negligence by the bank but it is apparent that Laskin J

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[846] *Elis Tjoa v United Overseas Bank* [2003] 1 SLR 747 at 769.
[847] *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273 at 306.
[848] *Ibid*.
[849] Keith Perrett, "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245.
[850] *Ibid,* at 246.
[851] (1972) 27 DLR (3d) 81.
[852] Keith Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245 at 247.
[853] *Ibid,* at 247. See also *Arrow Transfer v Royal Bank of Canada* (1972) 27 DLR (3d) 81 at 97.

(dissenting) took the view, in the context of a broader customer duty of care, that the bank should not be able to point to the customer's breach where it was guilty of negligence.[854] *Arrow Transfer* is discussed in more detail below.[855] In the United States, the Uniform Commercial Code section 4–406 bars a customer who has failed to verify from claiming against the bank unless the bank was negligent in which case it allows for an apportionment of loss.

The Canadian Cases

Le Cercle Universitaire d'Ottawa v National Bank of Canada[856] (1987), came before the Ontario High Court of Justice. The bookkeeper of the customer fraudulently deposited cheques, payable to the customer, into the bookkeeper's own account with the same bank. The customer sued the bank for negligence. The bank admitted that it was negligent in not detecting the payee discrepancy but raised in its defence the customer's failure to notify it of the omissions in their monthly statements, as required by their contract. It was held that the clause protected the bank. It was clear, unambiguous and brought home the customer's obligation. Steele J said it was hard to see what the clause applied to if not "all aspects of negligence by the bank."[857] The customer's argument based on *Tai Hing Cotton Mill* and the minority reasoning in *Arrow Transfer*, failed.

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[854] *Arrow Transfer v Royal Bank of Canada* (1972) 27 DLR (3d) 81 at 101.
[855] In chapter 6.2.
[856] (1987) 43 DLR (4th) 147.
[857] *Ibid,* at 150. In *Arrow Transfer v Royal Bank of Canada* (1972) 27 DLR (3d) 81at 98, Laskin J used the same test to conclude that forgery was not covered by that verification clause. Steele J's conclusion on this point was criticized by Lambert JA in *Cavell Developments Ltd v The Royal Bank of Canada* (1991) 78 DLR (4th) 512 (BCCA) at 519.

Royal Bank of Canada v Larry Creighton Pro Corp[858] (1989) in the Alberta Court of Appeal is a refreshing contrast from the familiar scenario of the dishonest employee cheating his employer (and potentially his employer's bank). The dispute was over the rate of interest charged by the bank on certain loans. The court found that a lower rate than that claimed by the bank applied. The bank argued that the verification and conclusive evidence clause precluded the customer from complaining of the rate charged after the lapse of 30 days. Stratton JA agreed with Laskin J in *Arrow Transfer* that verification clauses should be strictly construed. He went on to find that the verification clause expressly applied to the current account, but while the interest charges on the loans were debited to the current account, the clause did not have the effect of acknowledging that the correct interest rate had been applied to the loans.

Kelly Funeral Homes Ltd v Canadian Imperial Bank of Commerce[859] (1990) was also a decision of the Ontario High Court of Justice. The manager of the customer stole by negotiating cheques drawn by him on the customer's account. He was an authorized signatory of the customer's cheques and there was therefore no forgery of the drawer's signature. In relation to one group of cheques, however, the bank had been given instructions for the cheques to be signed by two signatories, which instruction the bank had not observed. The bank was therefore in breach of its mandate in paying these cheques. The account agreement contained a verification and conclusive evidence clause. It was held that the clause availed the bank. Walsh J's cursory reasoning on this issue was that the customer could have discovered the bank's failure by examining cancelled cheques as required by the

[858] [1989] 3 WWR 561 (Alta CA)
[859] (1990), 72 DLR (4th) 276.

verification clause. A persuasive factor was the inequity of leaving the bank to bear the loss of a fraud committed by the customer's employee over a long period of time in an environment of inadequate accounting procedures.[860] Walsh J went on to make a strong statement in support of the verification and conclusive evidence clause: "given the volume of transactions which pass through a bank daily and present–day computerized cheque–processing systems which do not read signatures, it is not economically feasible to expect a bank to scrutinize every transaction that passes through a customer's account. It surely makes sense, therefore, to shift the burden of monitoring its cheques to the customer who generally has far better opportunities of uncovering irregularities on the part of its employees. Any potential losses to the customer can be offset somewhat by the use of surety bonds and proper accounting procedures."[861]

In *Cavell Developments Ltd v The Royal Bank of Canada*[862] (1991), the bank negligently honoured a company cheque signed by only one signing officer. The British Columbia Court of Appeal held that an account verification clause did not excuse the bank from its own negligence. The decision was based on a strict interpretation of the agreement and, in particular, an application of the rule that exclusion clauses capable of covering damage arising other than by negligence are interpreted as being restricted to such damage only, and not extending to negligence.[863] In other words, clear words are required to exclude liability for negligence. In *Cavell*, the agreement was capable of applying to non–careless breaches of the bank mandate and did not have to include negligence to be meaningful.

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[860] *Ibid,* at 284.
[861] *Ibid,* at 284–5.
[862] (1991) 78 DLR (4th) 512 (BCCA).
[863] Lord Greene MR's dicta in *Alderslade v Hendon Laundry Ltd* [1945] 1 All ER 244 at 245 was cited and followed.

Lambert JA distinguished *Kelly Funeral Homes* on the basis that the bank in the latter was not found to be negligent.[864]

Don Bodkin Leasing Ltd v The Toronto–Dominion Bank[865] (1993) was decided by the Ontario Court (General Division). The customer's accounting officer defrauded it by forging cheques and by diverting the proceeds of cheques intended for the issue of bank drafts. The court found that the forgeries were plausible and the bank was not negligent in failing to detect them.[866] The forged cheques escaped detection because, although an officer of the company scanned the bank statements and examined the paid cheques, the modus operandi of the dishonest employee was to collect the statements and remove the forged cheques before the verification process was undertaken. What the customer did not do was match the cancelled cheques to the debit entries in the statement and hence the forgeries went undetected.

The court found that the verification and conclusive evidence clause imposed a duty on the customer to examine the bank statements and cancelled cheques "in a sufficient and effectual manner",[867] that it had not done so, and that the clause protected the bank from liability for the forgeries despite the assumption that the bank was not authorized to hand over the statements and cancelled cheques to the dishonest employee. Ewaschuk J said: "it is far easier for the customer to detect the forgery by examining the cancelled cheques, or

[864] *Cavell Developments Ltd v The Royal Bank of Canda* (1991) 78 DLR (4th) 512 (BCCA) at 520.
[865] (1993) 14 OR (3d) 571 (Gen Div).
[866] Although this was not relevant to its common law duties. See (1993) 14 OR (3d) 571 at 579.
[867] (1993), 14 OR (3d) 571 at 582.

even when, as here, the cheque is 'lifted' by a rogue employee, to detect its absence".[868] In relation to the diversion of funds to another account, the court found that the bank was negligent in accepting oral instructions from the fraudulent employee. The issue therefore arose whether the verification and conclusive evidence clause applied where the bank had been negligent. The clause did not specify that it covered bank negligence but it did say that the bank would be "released from all claims".[869] It was held that the wording was wide enough to release the bank from a claim in negligence.

In *Alberta Ltd v Patel*[870] (1993), the Alberta Court of Appeal found the bank was negligent for transferring monies held in a term deposit on the authority of a single signing officer contrary to the customer's resolution. The court, using the same reasoning as Lambert JA in *Cavell Developments*, held that the verification agreement did not avail the bank.[871]

This survey of relatively recent Canadian cases shows how divided the courts are on the question whether the verification and conclusive evidence clause protects banks from their own negligence. The cases reflect divergent policy positions. Those opposed to the inroads made by the verification and conclusive evidence clause on the rights of customers, adopt a strict contractual approach to interpretation. They restrict protection of banks against their own negligence by demanding precise and explicit drafting. Those persuaded that the equities favour the banks are content with a less exacting standard of drafting. This view is

[868] *Ibid,* at 583.
[869] *Ibid,* at 580.
[870] [1993] 8 WWR 199 (Alta CA).
[871] *Ibid,* at 205.

supported by *Carleton Roman Catholic Separate School Board v Ruddick and Others*[872] (1994). The school board raised funds by issuing debentures. Its employee had a previous conviction for fraud but this was not known to the board at the time of employment. The employee cashed matured debentures over a period of years at three Canadian banks. Her modus operandi was to delete pertinent parts of the debentures in a way which the court found left them noticeably altered; this meant that the banks were negligent when paying them. The verification of the bank statements was the duty of the rogue employee and was therefore ineffective. In this respect the board was negligent. One of the issues for decision was whether a verification and notification clause availed the bank in respect of the debentures that it had cashed. Bell J commented that the cases of *Kelly Funeral Homes*, *Don Bodkin*, *Cavell Developments* and *Le Cercle* were not "entirely reconcilable". He decided the matter on a point of interpretation, namely a "release from all claims" would excuse bank negligence but a "conclusively settled" clause would not.

Implied Terms, the Verification and Conclusive Evidence Clause and Bank Negligence

Another question is whether there is any scope for an implied term that the verification and conclusive evidence clause is not applicable where the bank has been negligent. This is obviously not feasible where the T&C expressly cover negligence. It is trite that terms should not be implied lightly; therefore any argument in favour of an implied term must overcome the law's resistance to supplementing a contract in this way.

Andrew Phang expresses the view that the grounds for implying a term in fact are narrow, being confined to the intention of the parties, while those for implying terms by law, not

[872] (1994) 45 ACWS (3[d]) 309.

having to accord with the intention of the parties, are wider.[873] Although the grounds for terms implied by law may be based on wider policy considerations, it is submitted that it is harder to succeed in proving a term implied by law than in fact. The circumstances warranting a court's intervention on the grounds of an implied term applying to all contracts of the same type, based on policy considerations, must be limited. The judiciary are particularly cautious about recognising terms implied by law and, it is submitted, prefer to find terms implied by the more concrete criterion of the parties' mutual intention.

In the context of the verification and conclusive evidence clause, the test of necessity for a term implied by law is unlikely to be satisfied. This discussion will therefore be confined to terms implied in fact. Discussion of a term implied in fact in the context of the verification and conclusive evidence clause is problematic from the outset. While the bank, through its lawyers and draftsmen, can be assumed to have directed its mind to the contract and to have an intention regarding the many issues it covers, most customers cannot. They may be unaware that there is a verification and conclusive evidence clause in their contract at all; even less can they be considered to have contemplated, at the time of contracting, how the clause will operate in various factual scenarios. According to Treitel, "the test of implication under the officious bystander test is subjective: what would the parties have agreed? – not what would reasonable persons in their position have agreed?"[874] He identifies two situations in which terms will not be implied in fact: if one party is ignorant of the issue or the "facts on which the implication is to be based";[875] or if the parties have

[873] See Andrew Phang, "Implied Terms Revisited" [1990] JBL 394 at 394. Also *Scally v Southern Health and Social Services Board* [1991] 3 WLR 778 at 787.
[874] Treitel *Contract,* 204.
[875] Ibid.

opposite interests such that they would not have agreed to the same provisions in the term.[876]

The mere fact that the parties have opposite interests in the matter should not, however, be fatal. In many situations one party will, perhaps grudgingly, know and accept that a particular term is necessary for the viability of the transaction or the willingness of the other party to enter into it. Knowing these realities, the first party will accept the inclusion of the term in the contract. Such a term can be said to have accorded with both parties' intentions.

Further, while in many cases the customer is ignorant of the specific provisions of the T&C including the verification clause, and would therefore not have any unexpressed intention on the matter, that need not necessarily be the end of the enquiry on the existence of an implied term. The ignorant customer who has not read the T&C and is oblivious as to their contents, can sincerely maintain that he agreed to the standard T&C in the belief that the bank intended to contract fairly and reasonably and that the T&C would be fair and reasonable in their ambit and their application. It would be untenable and embarrassing for banks to argue otherwise. The United Kingdom Banking Code says: "We promise that we will act fairly and reasonably in all our dealings with you …";[877] Standard Chartered's T&C for Internet banking in Singapore says: "We believe the terms of this agreement are fair."[878]

[876] Ibid.
[877] Section 2.
[878] Std Ch Internet T&C, cl 13.2.

There is no general principle of fairness or reasonableness in English and Singaporean contract law but this does not mean that a party cannot allege that in his specific agreement it was intended that the contract terms would be fair and reasonable in their application. Support for an implied term of this nature can be found in *Paragon Finance plc v Staunton and Nash*.[879] The Court of Appeal (England) held that a mortgage agreement contained an implied term that a contractual discretion given to a lender to vary the interest rate would not be exercised "dishonestly", "capriciously", "arbitrarily", "for an improper purpose" or unreasonably in the sense that no reasonable lender would act in that way.[880] This implication was on the basis of the expectation of the parties, a term implied in fact.[881] *Chitty on Contracts*[882] has elevated this to a term that will be implied in all contracts of loan that give the lender a discretion to vary the interest rates.

Persuading a court to acknowledge a mutual intention to contract fairly and reasonably would be only the first hurdle for the customer to overcome. The second limb of the customer's argument would have to be that it is unreasonable for the bank to escape liability for a negligent breach of its primary duty to honour its mandate by relying on a verification clause. It is on this second limb that the outcome is unpredictable. A similar debate arises under the Unfair Contract Terms Act. The outcome involves policy considerations.

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[879] [2002] 2 All ER 248.
[880] *Ibid*., at 262, 263.
[881] *Ibid.*
[882] HG Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 26–156 fn 858.

For the more informed customer, who is aware of the verification term, the argument can be more direct and need not raise the issue of reasonableness. It would be that the customer intended that his express duty of verification and notification would not be used to excuse negligent breach of the bank's fundamental duty to observe the customer's mandate. Depending on the circumstances, the bank may not be willing to maintain otherwise. This position of the customer could, it is submitted, pass either the business efficacy test or the officious bystander test. In conclusion, an argument for an implied term against the application of the verification clause where the bank has been negligent is not as far–fetched as it may initially seem and could succeed in favourable factual circumstances. Banks intending that the verification and conclusive evidence clause should protect them against their own negligence should consider expressly indicating as much.

Breach of the Macmillan Duty and Bank Negligence

The ability of a bank to escape the consequences of its own negligence by pointing to a breach of duty by the customer has been considered in the context of the *Macmillan* duty. *Paget* expresses the view that "*Macmillan* … offers no relief" to the bank where the alterations are evident or discoverable by the exercise of due diligence or the appearance of the cheque raises suspicions.[883] In other words, the bank cannot raise a breach of the *Macmillan* duty to avoid liability for payment of an unauthorised alteration which was apparent or should have raised suspicions. In the old case of *Scholey v Ramsbottom and Others*[884] (1810), a cheque torn into four pieces by the customer was visibly pasted together

[883] Mark Hapgood QC (Gen ed) *Paget's Law of Banking* (13th ed, Lexis Nexis Butterworths, 2007) para 19.7, at page 489. This position is based on *Scholey v Ramsbottom* 170 ER 1227 to the effect that if a bank pays a cheque which is in a condition that should put them on enquiry, they cannot reimburse themselves.
[884] (1810) 170 ER 1227.

and presented for payment and paid. Lord Ellenborough considered that the bank was not justified in paying the cheque and was therefore not entitled to be reimbursed. *Paget's* view was followed, obiter, in Singapore in *Bintai Kindenko Pte Ltd v Sanwa Bank Ltd & Anor.*[885] A cheque drawn by the customer was fraudulently altered. The High Court found that the customer was not in breach of its *Macmillan* duty but even if it was, the alterations were evident and therefore the bank could not be relieved of its duty (to pay only on a valid mandate). This outcome recognises the bank's primary responsibility to pay on a valid mandate, as well as its status as superior prepayment detector.

If the same reasoning were applied in the context of the verification and conclusive evidence clause, a bank that has been negligent in not detecting or querying an instrument raising suspicion or having apparent, discoverable alterations will not be able to rely on the customer's failure to verify his bank statements to escape the consequences of its negligence or omissions. The qualification would uphold the bank's primary responsibility to pay on a valid mandate; give recognition to its status as superior prepayment detector and better risk bearer (assuming acceptance of Geva's principles); and encourage investment in fraud and forgery detection methods. The qualification retains the requirement to determine fault but, as already pointed out, fault–based liability is not in itself objectionable and in any event, as Geva says, the bank's fault is relatively easier to determine than the customer's.[886]

[885] [1994] 3 SLR 459 at 468–9.
[886] "Allocation of Forged Cheque Losses – Comparitive Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 289. See also page 287.

The discussion so far has considered the prospects of a customer persuading a court that there is an implied term in fact that the bank cannot invoke the verification and conclusive evidence clause where the bank has been negligent in making payment; and authority stating that a breach of the *Macmillan* duty, followed by bank negligence, will not avail the bank.

An Argument that the Clause Should Operate in Cases of Bank Negligence

There is an argument from the bank's perspective, however, that the verification clause is a valuable aid to banks in detecting their own negligence and denying application of the clause in instances of bank negligence would defeat that purpose.[887] For the banks it may be said that they recognise that they may be negligent in a certain number of cases and this is one of the reasons why they impose a verification duty on their customers, so that they may deal with negligent and non–negligent errors alike. If the aim of the clause is to combat fraud and forgery through bank accounts, is it not irrelevant that there was negligence by the bank? The customer is afterall the superior post–payment detector. Timeous notification by the customer and action by the bank may lead to recovery of the stolen monies. The bank suffers detriment if not notified of the error, even if it was culpable in making it in the first place.

It has already been said that the verification clause is a more severe contractual expression of the common–law *Greenwood* duty. In *Greenwood*, the bank negligently failed to detect

[887] A similar view was expressed in *Don Bodkin Leasing Ltd v The Toronto–Dominion Bank* (1993) 14 OR (3d) 571 (Gen Div) at 583.

that the signatures on the cheques had been forged.[888] The House of Lords expressly pointed out that this made no difference to the operation of the estoppel, preventing Mr Greenwood from raising the forgeries and the bank's breach of its mandate. The bank's negligence had no bearing on the detriment suffered by the bank, which lay in the loss of its right of action against Mrs Greenwood due to Mr Greenwood's silence about the forgeries until after her death.[889]

It is interesting to consider whether the bank would have been able to resist Mr Greenwood's claim for reimbursement if Mrs Greenwood had not died? Assume, for example, that Mrs Greenwood committed further forgeries and the bank continued to make payments negligently after Mr Greenwood became aware of his wife's actions. Would the estoppel have operated against Mr Greenwood in this scenario, in which the detriment suffered by the bank would have been caused by its own negligence? This hypothetical scenario would, it is submitted, have posed a dilemma for the Law Lords. On the one hand, the bank's negligence led to the unauthorised debit; on the other, the customer has intentionally stood by and allowed the bank to operate under the misapprehension that the payments are in good order. It is submitted that in this situation, the decision of the House of Lords would have been unchanged because of Mr Greenwood's intentional silence, because it constitutes bad faith vis–à–vis the bank.

Another issue to consider is proximity to the loss. Where a bank pays a cheque that has been altered, if the bank is negligent in failing to detect the alterations, it is the bank's

[888] See discussion in chapter 3.8.4 above.
[889] See discussion of the decision of the Court of Appeal above.

negligence that is the more proximate cause (in time) of the loss. Where a customer is unaware of a previous forged cheque being drawn on his account, the customer's innocent silence facilitates but does not cause a subsequent fraudulent withdrawal. This changes if the customer knows about the first forgery and remains silent deliberately. His silence condones the bank's breaches to date and, it is submitted, what was facilitation where the silence was innocent, becomes a cause of the subsequent forgeries where the silence is deliberate. The leap from facilitation to cause is possible because the customer who maintains a deliberate silence about a forgery knows, or is reckless about the likelihood, that further forgeries may result.

On this analysis the bona or male fides of the customer is crucial. Where the customer is mala fides, and the bank only negligent, the equities favour the bank. Equities is used here in the sense of what justice demands, i.e. what is fair, just, moral and ethical.[890] Many customers do not actually read their bank statements and their knowledge of unauthorised transactions can, at best, be deemed. A failure by the ignorant customer to notify the bank of an unauthorised debit is considered innocent by opponents of the verification and conclusive evidence clause, particularly where the bank has been negligent. But how innocent is a customer, fully appraised of the risks and what is contractually asked of him, who habitually fails to undertake the verification exercise? The ubiquitous cases of unsupervised, dishonest customer employees underscores the case for the banks.

[890] As opposed to the branch of law known as Equity. See Jill E Martin *Hanbury & Martin Modern Equity* (17th ed, London, Sweet & Maxwell, 2005), 3.

In summary, opposing arguments for the bank and for the customer on this issue, both have merit. The solution, it is submitted lies in an apportionment of loss.[891]

4.5.2 A Strict Duty or a Duty of Care?

The second question which was raised about negligence and the verification and conclusive evidence clause is whether the customer's duty to verify and notify is absolute or a duty of care.

Failure to perform a contractual obligation constitutes a breach of contract in the absence of lawful excuse.[892] Generally, contractual obligations are strict and there can be no lawful excuse even in the absence of fault.[893] The bank's obligation to pay only on a valid mandate is such an example. Events beyond the control of a customer may prevent him from performing his duty of verification. For example, assume a customer who lives alone falls ill and is in a coma in hospital for months. As a result, no verification of bank statements occurs. If a fraudster siphons money out of the customer's account during that time, the bank would be in breach for making payments without a mandate. However, the contract contains a verification clause. If the customer's verification duty is strict, the bank would be able to raise the breach regardless of the reason. Laskin J in *Arrow Transfer* favoured a

[891] Discussed in chapter 8 below.
[892] G H Treitel *The Law of Contract* (11th edn, Sweet & Maxwell, London, 2003), 835.
[893] *Ibid,* 838 citing *Raineri v Miles* [1981] AC 1050 at 1086 where Lord Edmund–Davies said: "in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best." See also Stephen A Smith *Atiyah's Introduction to the Law of Contract* (6th ed, Oxford, Clarendon Press, 2005), 167 et seq.

duty to examine statements with reasonable care[894] and Geva has proposed that a customer should have a duty of care to examine bank statements, to detect and report forgeries.[895]

The verification duties set out in the Singapore T&C covered by this study are not expressly stated to be duties of care. Generally speaking, contractual duties are absolute and failure to perform cannot be excused by the absence of negligence. To contend otherwise, on the basis of the rules of interpretation, would be difficult. The other option, once again, would be to turn to implied terms. The arguments are similar as before. There are two apparent obstacles to implying that the customer's verification and notification duty is a duty of care rather than an absolute duty. The first, again, is the ignorant customer who cannot be said to have an unexpressed intention on the matter. But as before, he can sincerely argue that he agreed to the standard T&C in the belief that the bank intended to contract fairly and reasonably and that the T&C would be applied in a fair and reasonable way by the bank. If it would be unfair or unreasonable for the duty to be an absolute one, the customer's lack of specific knowledge need not be an obstacle. The second problem concerns the intention of the bank. At first sight it seems obvious that the bank would intend that the customer's duty be absolute. But this is less certain when probed a little deeper. No bank in Singapore would maintain that it was its intention for the verification and conclusive evidence clause to operate unfairly or unreasonably to penalize a customer. Rather, it is in circumstances such as *Tai Hing Cotton Mill*, where the customer is guilty of gross neglect, that the clause is intended to operate. On this there is therefore a meeting of

[894] *Arrow Tranfer Co Ltd v Royal Bank of Canada et al* (1972) 27 DLR (3d) 81 at 101.
[895] "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 290.

the minds between bank and customer and, using either the business efficacy test or the officious bystander test, there is potential for an implied term.

The next question is about the specifics of any implied term that the verification and conclusive evidence clause is not absolute, i.e. imposes a duty of care. Such an implied term would have to be cast generally, for example, that the bank will not use the verification and conclusive evidence clause where it would be unreasonable or unfair to do so. Next, in the example above, the customer would have to aver that it would be unreasonable or unfair to apply the verification clause. The facts of each case would be vital to the outcome on the merits. For the customer who was aware of the verification term, and believed and intended the verification duty to be qualified by the requirement of reasonableness, the argument is more direct. Bank would probably take issue with what constitutes reasonableness.

A problem with the verification and notification duty as a duty of care is the scope it gives for spurious arguments by customers aimed at excusing them for their failure to fulfil the duty. Geva says: "I do not believe that in this context, there is a real danger of wasteful and extensive litigation on the breach of the duty of care."[896] The positions of Laskin J and Geva, that the customer's duty to examine bank statements should be a duty of care, is supported but subject to the following clarifications:

- Failure to verify or notify will be excused only where it is as a result of events beyond the control of the customer, such as serious, overwhelming illness or

[896] "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 290.

accident. The customer will be expected to make alternative arrangements wherever possible.

- Absence from the mailing address, not falling into the first category above, will not excuse a failure to verify; verification via electronic banking is usually an alternative and the customer bears the risk if his destination precludes this facility.
- Failure to detect an erroneous debit which is detectable from the statement will not be excused.

4.5.3 Negligent Verification or Notification by the Customer:

This issue is linked to the one above. If the customer has a duty of care to examine bank statements, he will be liable for negligent verification or non-notification. On the other hand, if the duty is strict, the customer will be liable for any failure to notify an error, whether innocent or negligent.

Chapter 5: A 'Stand–Alone' Verification Clause

Given the criticism against the conclusive evidence portion of the verification and conclusive evidence clause, this chapter will examine whether a verification clause is viable without the support of the conclusive evidence portion. This will be referred to as a "stand–alone" verification clause. The effect of other clauses appearing in Singapore T&C such as broad exclusions of liability and/or indemnity clauses will be ignored in this chapter and discussed below.[897]

It is significant that banks in England are reluctant to use the conclusive evidence clause and some even shy away from imposing a duty on customers to verify their bank statements. HSBC[898] (in the United Kingdom) does not impose any verification duty in their T&C for personal customers while their personal Internet T&C contain a verification clause;[899] Barclays Bank imposes a verification duty on personal customers,[900] while National Westminster Bank[901] uses non–obligatory wording. None of these provisions include a conclusive evidence clause. For business customers HSBC imposes a verification duty without a conclusive evidence provision.[902]

The reason for this very different approach may be self–imposed restraint on the part of the banks and their subscription to the United Kingdom Banking Codes, which urge but do not

[897] In chapter 10.
[898] See HSBC (UK) Personal T&C, Section 2, 2.2 "Statements".
[899] HSBC UK Personal E–terms 2.5: "You agree to check carefully …"
[900] Barclays Retail Customer Agreement, cl 6.1: "You must check your statement carefully and tell us as soon as possible…".
[901] NatWest General Conditions, Section A, cl 9.1.2: "You should read these statements and tell us as soon as possible …".
[902] HSBC (UK), Business T&C, Section 1, cl 10.1.

insist on verification: "We recommend that you check your statement or passbook regularly."[903] From a risk management viewpoint, it would undoubtedly be useful for these United Kingdom banks to deploy the conclusive evidence clause. Their decision not to do so is perhaps attributable to a desire to be seen as fair, socially–conscientious participants in the financial markets.[904]

Verification clauses drafted in non–mandatory terms, as a recommendation or request, fall short of imposing an enforceable verification duty on the customer. This has been the shortcoming of verification and conclusive evidence clauses before.[905] The failure to specify a time period in which the verification must be undertaken and errors reported also detracts from the enforceability of the term. The remainder of this discussion concerns a stand–alone verification clause drafted in mandatory terms.

In Singapore, HSBC uses a stand–alone verification clause in its terms for Internet banking.[906] It has no conclusive evidence provision, although the general T&C governing accounts, including a full verification and conclusive evidence clause, are stated to supplement the terms for Internet banking.[907] This may not be sufficient, however, to incorporate the conclusive evidence clause from the general T&C. The reason is one of interpretation. It is stated that in the event of conflict the Internet terms prevail.[908] This means that the stand–alone verification clause in the Internet terms may prevail over the

[903] UK Banking Codes, March 2005, section 12.3.
[904] See Law Commission Report No 219 "Contributory Negligence as a Defence in Contract" (London, HMSO, 1993), 25 – "fear of losing business in a competitive market."
[905] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 is an example.
[906] HSBC E–terms 3.l. See also Std Ch E–terms 3.4 but this must be read in conjunction with 4.4. Electronic banking T&C are discussed in chapter 11 below.
[907] HSBC E–terms 2.b.
[908] HSBC E–terms 2.c.

verification and conclusive evidence clause in the general T&C. In this particular case it is submitted that the absence of a conclusive evidence provision may be deliberate as it is not compatible with another of the terms, discussed in detail later.[909]

5.1 The Operation of a Standalone Verification Clause

Postulate payment of a forged cheque debited to an account governed by T&C containing a stand–alone verification clause. The bank will be in breach of contract for paying without a mandate. It may, in addition, have been negligent. If the customer verifies but fails to notify the bank of the error, he will probably be in breach of his *Greenwood* duty and will be estopped from denying the bank's mandate to pay. If the customer fails to verify, he will not have the necessary knowledge for the *Greenwood* estoppel to arise. If the customer fails to verify a bank statement when there is an express duty to do so, there would be a breach of contract but not negligence as, *Khoo Tian Hock* aside, there is no duty to examine bank statements.

The question to be addressed now is how the bank can raise the customer's breach of a contractual duty to verify, imposed by a stand–alone verification clause, in an action by the customer seeking correction of his account by the bank; and how would the two breaches of contract square up to each other.

[909] HSBC E–terms 10. This is discussed in chapter 11.2.

5.2 Cross–Breaches

Treitel[910] distinguishes between three types of performance under a contract:

1. Performance which is a condition precedent to the other party's performance. In such a case, the party whose performance is conditional upon the other party performing first can raise the failure of that party to perform first, as a defence to a claim brought against him.
2. Performance which is to be simultaneous. The example used is a contract for the sale of goods where payment and delivery are to be performed simultaneously. The inability of one party to perform would be a defence to a claim for breach against the other party.
3. Performance of independent promises. In such a case, "each party can enforce the other's promise although he has not performed his own."[911]

It is clear that a bank's promise to pay only on a valid mandate and a customer's promise to verify his bank statements and notify the bank of errors are not intended to be performed simultaneously, nor is the one a condition precedent to the other. They are independent promises and therefore can be enforced irrespective of the other party's performance.

Bearing this in mind, a bank which is sued for breach of the obligation to pay on a valid mandate, as in the scenario set out above, can respond in a number of ways:

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[910] Treitel, *Contract*, 761 et seq and 835. See similar discussion in H G Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 12–028 et seq. See also Stephen A Smith *Atiyah's Introduction to the Law of Contract* (6th ed, Oxford, Clarendon Press, 2005), 192, 195

[911] Treitel, *Contract*, 763.

1. It can deny that its breach of mandate was the cause of the customer's loss,[912] asserting rather that it was the customer's breach of the verification clause that occasioned the loss suffered by the customer. Such a plea could only apply to the second and subsequent debits in a scheme of unauthorised transactions.

2. The bank could counterclaim against the customer for the breach of the verification clause, either on the ground that notification would have enabled recovery of the stolen monies, or, where a second unauthorised debit occurred, the bank could allege that the customer's breach led to the second unauthorised debit and thereby caused the bank loss. The bank's loss is the cost of reimbursing the customer. In defence to the counterclaim, the customer could deny the causal connection between his breach and the bank's loss, contending that the loss flows from the bank's breach. Support for the bank's counterclaim option is found in *Macmillan*,[913] which recognizes that the customer's duty (not to be negligent in writing cheques) can be explained as a measure to avoid circuity of action. The defence and counterclaim options are analysed in greater detail in section 5.5 below.

3. The bank could plead a right of set–off based on the customer's breach of the verification clause. Support for this option can be found in the advice of the Privy Council in *Tai Hing Cotton Mill*[914] and in the House of Lords judgment of Lord

[912] The importance of the causal connection can be seen, for example, in *Sykes and Others v Midland Bank Executor and Trustee Co Ltd and Others* [1971] 1 QB 113, which highlighted the need for the damage to flow from the negligence. In this case, the wrong lies in the breach of contract, not negligence.
[913] *London Joint Stock Bank Limited v Macmillan and Arthur* [1918] AC 777 at 793 (per Lord Finlay LC), 818 (per Viscount Haldane).
[914] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 110.

Edmund–Davies in *Moorgate Mercantile v Twitchings.*[915] Adapting Lord Edmund–Davies's words to the current scenario, the customer's action against the bank for the unauthorised debit "constitutes an attack upon" (i.e. ignores and undermines) the bank's right to be notified of the unauthorised debit. This enables the bank to set off its damages against and in extinction of any successful claim by the customer. This is discussed in section 5.7 below.

4. The bank could plead that the customer is estopped from alleging the bank's breach of mandate because of the customer's breach of the verification duty, as discussed in greater detail in section 5.8 below.

5.3 The Pleading and Quantification of the Claims

The accepted manner of pleading a claim against the bank for an unauthorised debit consists of an allegation that the payment was unauthorised and a claim for repayment.[916] In the summary of his claim, the customer seeks a declaration that the bank was not entitled to make the debit, followed by a plea for the amount of the unauthorised payment.[917] As the debit is a breach of contract by the bank (payment without a mandate) the customer can, alternatively, plead his claim as one for damages in the amount of the unauthorised debit from the bank.[918] In some circumstances the customer may base his claim on the bank's refusal to make a payment to a third party for lack of funds which arises because of an

[915] [1977] AC 890 at 916.
[916] See Lord Brennan & William Blair (Gen eds), *Bullen & Leake & Jacob's Precedents of Pleadings* (15th ed, London, Sweet & Maxwell, 2004), precedent 5–C6 at 114.
[917] From the reports, this appears to be how the following claims were put: *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 787, 812; *Greenwood v Martins Bank Limited* [1933] AC 51 at 55; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 96.
[918] Support for this can be found in the judgment of Viscount Haldane in *London Joint Stock Bank v Macmillan* [1918] AC 777 at 813.

earlier unauthorised debit made to the account by the bank. In such a case, the customer will have made a demand, possibly in the form of a cheque or a standing payment instruction, and his claim is based on the bank's refusal to honour the demand.

The customer's basic claim will be for the amount of the unauthorised debit. This would be the ordinary damages flowing from the breach. The customer might wish to make an additional claim for interest foregone, as a second head of damage. It is not uncommon today for a current account to attract a small interest rate, possibly subject to the proviso that a specified minimum balance is maintained in the account for the relevant interest period. Alternatively, certain bank charges may be avoided if a minimum balance is maintained. The applicable rate is generally low and therefore interest is unlikely to be a big issue.

While interest on a debt cannot ordinarily be claimed as general damages, as the entitlement in the banking context to interest is contractual, there is no obstacle to claiming interest, lost through the fault of the bank, as damages.[919] In any event, a claim by a customer for recrediting an unauthorised debit to an account or for damages for breach of a mandate is not a claim for failure to pay a debt. Although the money standing to the credit of the customer in his bank account represents a debt due from the bank to the customer, it

[919] *President of India v La Pintada Compania Navegacion SA* [1985] AC 104 is House of Lords authority confirming that interest cannot be claimed as general damages in a claim for failure to make payment of a debt where no interest is provided for, although it may be claimed as special damages, e.g., where failure to repay a debt forces the plaintiff to obtain a loan and incur interest, see *Wadsworth v Lydell* [1981] 1 WLR 598 and *TKM (Singapore) Pte Ltd v Export Credit Insurance Corporation of Singapore Ltd* [1993] 1 SLR 1041 at 1075 et seq. Interest may be awarded on a judgment debt in Singapore in terms of section 12 Civil Law Act, Cap 43; see also the Singapore Rules of Court, O42 r12 and *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 2 SLR 517 at 567. In England section 17 Judgments Act, 1838 awards interest on judgment debts, see also the Civil Procedure Rules, Part 40.8.1.

is repayable only after a demand by the customer. Where the customer has not made a demand, a claim based on a wrongful debit to the account is not a claim for failure or late payment of a debt, rather it is a liquidated claim for repayment or for damage to the customer's asset arising from breach of contract.

A customer may consider that he is also entitled to consequential damages. The unavailability of the wrongfully debited funds may, for example, lead to the failure to make a payment to a third party with consequent losses. The law governing consequential contractual damages was stated in *Hadley v Baxendale*[920] with subsequent application in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*[921] and endorsement in *The Heron II*[922]. The last case affirms that the measure of contractual damages is to put the aggrieved party into the position he would have been in had the contract been performed[923] and this entitles him to the damages which the other party should reasonably have contemplated would flow from his breach. More recently, Sir Thomas Bingham MR in *Banque Bruxelles Lambert v Eagle Star Insurance* said on the recoverability of damages that the question was "whether, at the date of the contract or tort, damage of the kind for which the plaintiff claims compensation was a reasonably foreseeable consequence of the breach of contract or tortious conduct of which the plaintiff complains. If the kind of damage was reasonably foreseeable it is immaterial that the extent of the damage was not."[924] As a general rule,

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[920] (1854) 156 ER 145.

[921] [1949] 2 KB 528. There has been debate, beyond the scope of this study, whether *Victoria Laundry* altered the rule in *Hadley v Baxendale.* In *The Heron II*, the majority of the House of Lords did not think so, and they found it a helpful analysis of the older case. See *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 399 (per Lord Morris of Borth–y–gest), 410 (per Lord Hodson), 417 (per Lord Pearce), 424 (per Lord Upjohn).

[922] *Koufos v C Czarnikow Ltd* [1969] 1 AC 350.

[923] *Ibid,* see 414 (per Lord Pearce) and 420 (per Lord Upjohn).

[924] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 405; quoted with approval in *Brown v KMR Services Ltd* [1995] 2 Lloyd's Rep 513 at 557. In the same case, at 542, Stuart–Smith LJ

consequential loss is too remote to be recoverable unless, at the time of contracting, that loss was within the reasonable contemplation of the parties as a not unlikely consequence of the breach of contract.[925]

Treatment of consequential losses in the T&C varies. HSBC excludes liability for such losses in a term dealing specifically with that head of damage.[926] DBS excludes liability for "any loss".[927] OCBC covers consequential losses in a wide indemnity for losses, including losses resulting from reliance on an instruction purportedly from the customer.[928] Standard Chartered's indemnity clause, while not expressly excluding consequential losses, provides that the bank shall have "no liability whatsoever" in connection with, for example, instructions purportedly from the customer.[929] From an interpretation standpoint, it is submitted that there is no reason why words such as "any loss" or "no liability whatsoever" should not extend to consequential losses. "Consequential loss" is a technical term understood by lawyers whereas a customer reading his T&C is more likely to understand "any loss" or "no liability whatsoever" as conveying that liability will be nil. There should be no magic in use of the word "consequential". The commonsense approach of the Singapore Court of Appeal to interpretation in *Pertamina Energy Trading Limited v Credit Suisse*[930] supports this view. The T&C for electronic banking, discussed below, also deal

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endorsed *Chitty on Contracts* (27th ed) vol 1 para 26–023: "A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach".

[925] Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2004) vol 1 para 26–047, referred to with approval in *Korea Jonmyong Trading Company v Sea–Shore Transportation Pte Ltd and another* [2003] 1 SLR 702 at 707.

[926] HSBC 20.1.

[927] DBS 21.1 excludes liability for "any loss" in a variety of situations including where the forgery could not be detected or was facilitated in certain ways.

[928] OCBC 27.

[929] Std Ch 11.3.

[930] [2006] 4 SLR 273 at 295.

with consequential losses.[931] It is submitted that, as a general rule, the exclusion of consequential losses is reasonable under the Unfair Contract Terms Act. The exclusion of consequential losses is evident also in bank T&C in the United Kingdom.[932]

A bank, responding to a customer's claims arising from an unauthorised debit, would want to meet each of the customer's claims with a commensurate claim. The bank's argument would be that the customer's failure to verify his statement and report the unauthorised transaction caused the bank loss in the same amount. The quantum of the bank's claim would mirror the customer's claim; so, too, for consequential damages and interest foregone. The bank's liability to the customer for consequential losses and/or interest would translate into damages suffered by the bank attributable to the customer's breach. Unless the bank can adequately demonstrate that swift notification would have enabled it to recover the monies lost from the unauthorised debit, the causal element would only potentially be satisfied in the case of the second or subsequent unauthorised transaction, which the bank would have had the opportunity to halt if the first or a previous unauthorised transaction had been detected and reported to the bank.

5.4 Apportionment of Damages

Before discussing how the cross–breaches may be reckoned with by the principles of causation, it is appropriate to consider the scope under the law for an apportionment of damages. Under the common law, contributory negligence by a plaintiff was fatal to his claim in tort. The injustice that ensued prompted the United Kingdom legislature to

[931] See discussion in chapter 11 below.
[932] E.g., Barclays 9.3; HSBC (UK) Personal T&C 9.3.1; HSBC (UK) Business T&C 10.4.3.

intervene. The Law Reform (Contributory Negligence) Act, 1945 was primarily aimed at the apportionment of damages in tort cases,[933] although many held the view at one time that it was capable of applying where the duty arises only in contract. The key provision of Singapore's Contributory Negligence and Personal Injuries Act is in similar terms to the British statute. The application of the legislation to damages claimed under contract was considered by the Court of Appeal (England) in *Forsikringsaktieselskapet Vesta v Butcher and Others*.[934] It endorsed the court a quo's classification of contractual duties into three categories:

1. Absolute duties; i.e., breach of the duty is not determined by negligence.
2. Duties of care not mirrored in the common law (tort) in the absence of the contract.
3. Duties of care that mirror duties in tort.

The court ruled that the Act applies to any claim in contract where the contractual duty falls under category 3, i.e., the duty is mirrored in tort. One of the reasons given was that a plaintiff who is guilty of contributory negligence should not be able to escape apportionment of damages by pleading the case in contract.[935] The Singapore Court of Appeal supported this position in *Fong Maun Yee & Anor v Yoong Weng Ho Robert*.[936] It said, "where a defendant's liability in contract is concurrent with an identical duty in tort,

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[933] In *Forsikringsaktieselskapet Vesta v Butcher and Others* [1988] 3 WLR 565 at 589 Sir Roger Ormrod in the Court of Appeal went so far to say: "the Act is concerned only with tortuous liability…". This is because contributory negligence was, at one time, a complete defence to a claim in tort whereas it had no such impact on a claim in contract. This could lead to a plaintiff recovering more than, in fairness, he deserves, or less, by the courts endeavoring to compensate for the gap in the law by making an unfounded decision of novus actus interveniens or failure to mitigate. See the expression of this view in Law Commission Report No 219 "Contributory Negligence as a Defence in Contract" at 13, 16.

[934] [1988] 3 WLR 565. The case proceeded to the House of Lords, reported at [1989] 2 WLR 290, but on a different issue.

[935] *Ibid*, at 578 per O'Connor LJ.

[936] *Fong Maun Yee & Anor v Yoong Weng Ho Robert (practicing under the name and style of Yoong & Co)* [1997] 2 SLR 297; also *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another* [2006] 3 SLR 769 at 811 et seq, 818.

the defence of contributory negligence is available to the defendant."[937] The inference is that apportionment of damages is not available in contractual claims involving duties that fall under categories 1 and 2.

The British Law Commission in its Report on Contributory Negligence in 1993[938] considered that *Vesta* settled the debate on the possibility of the legislation applying more widely to contractual claims.[939] It recommended, however, that apportionment of damages should be available where there was contributory negligence by the plaintiff and the defendant was in breach of a contractual duty to exercise reasonable skill or care,[940] i.e. cases falling into category 2, but not where the defendant was liable for the breach of a strict contractual duty,[941] i.e. cases falling into category 1. This has not yet been implemented.

Applying this to the cross–breaches that may arise between a bank and a customer, it is clear that apportionment of damages will not be possible under the Act as the law now stands: the bank's duty to pay on a valid mandate is not determined by negligence, i.e. it falls under category 1, and the customer's verification duty does not exist but for the contract, i.e., it falls under category 2.

[937] *Ibid*, at 316–7.
[938] Law Commission Report No 219 "Contributory Negligence as a Defence in Contract".
[939] *Ibid,* at 3.
[940] *Ibid,* at 33.
[941] *Ibid,* at 28.

5.5 The Bank's Defence and Counterclaim

Both the bank's defence to the customer's claim and the customer's defence to the bank's counterclaim set out above,[942] raise the issue of causation, namely whether their respective breaches are causally linked to the loss which has resulted.[943] "The claimant may recover damages for a loss only where the breach of contract was the 'effective' or 'dominant' cause of that loss".[944] The burden of proof of causation ordinarily lies on the claimant, on a balance of probabilities.[945]

In *Galoo Ltd v Bright Grahame Murray*[946] Glidewell LJ said of causation: "There is no doubt that this is one of the most difficult areas of the law."[947] On the other hand, Lord Hoffmann has said: "There is nothing special or mysterious about the law of causation."[948] A point made by John Fleming, in the context of causation in the field of tort, is worth bearing in mind: "causation is not an objective notion, as was once pretended, but one varying with the reason or policy for which causal ascription is being sought."[949] The task of determining causation is commonly divided into an identification first of factual causation, then legal causation.[950]

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[942] In chapter 5.2.
[943] HG Beale (Gen Ed), *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 26–029: "there must be a causal connection between the defendant's breach of contract and the claimant's loss".
[944] *Ibid*.
[945] John G Fleming *The Law of Torts* (9th ed, Sydney, LBC Information, 1998) at 227.
[946] *Galoo Ltd (in liquidation) and Others v Bright Grahame Murray (a firm) and Another* [1994] 1 WLR 1360.
[947] *Ibid,* at 1369.
[948] Leonard Hoffmann "Causation" (2005) 121 LQR 592 at 603.
[949] Fleming, *The Law of Torts*, at 227. The case of *Chester v Afshar* [2005] 1 AC 134 is a good example of the impact of policy considerations on causation reasoning.
[950] See for example, Fleming, *The Law of* Torts, at 218**;** Andrew Burrows *Remedies for Torts and Breach of Contract* (3rd ed, Oxford University Press, 2004) at 45. Lord Hoffmann criticizes this approach as an over–complication, see "Causation" (2005) 121 LQR 592 at 598 but it is also used in Singapore, see for example *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at 802.

The "causa sine qua non"[951] or "but for" test aims to establish factual causation.[952] It has its limitations, however, for instance in the case of "alternative sufficient causes".[953] In *Chester v Afshar*,[954] Lord Bingham of Cornhill acknowledged the limitations of the test but added, "in the ordinary run of cases, satisfying the 'but for' test is a necessary if not a sufficient condition of establishing causation."[955]

Factual causation is a necessary but not a sufficient condition for legal liability. The quest is to identify the cause recognized by the law as resulting in the loss. This has been described as a, "normative question of whether a particular consequence of breach should be judged to be within the scope of liability for the breach."[956] The cause in question must be the dominant, effective or proximate cause:[957] "one has to ask oneself what was the effective and predominant cause".[958] This "is not necessarily the one which operates last."[959] It involves "a process of selection from among the co–operating causes to find what is the proximate cause in the particular case."[960] Heber Hart wrote in 1904 that, where

[951] See Hobhouse LJ criticising this expression in *County Ltd and another v Girozentrale Securities* [1996] 3 All ER 834 at 857.
[952] See Burrows *Remedies for Torts and Breach of Contract*, at 45 et seq.
[953] See John G Fleming *The Law of Torts* 1998 at 222. The limitations of the test were acknowledged in Singapore in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at 803, 810.
[954] [2005] 1 AC 134.
[955] *Ibid*, at 141.
[956] Jane Stapleton "Occam's Razor Reveals An Orthodox Basis for *Chester v Afshar*" (2006) 122 LQR 426 at 426.
[957] Proximate cause was used in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 at 212.
[958] *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 698. See also *County Ltd and another v Girozentrale Securities* [1996] 3 All ER 834 at 849 per Beldam LJ, ("effective cause") and at 857 per Hobhouse LJ, ("effective cause").
[959] *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 698 per Viscount Simon LC. See also Lord Wright at 706 that proximate means "not latest in time, but predominant in efficiency"; and Lord Porter at 715: "the proximate cause is not necessarily the nearest in point of time."
[960] *Ibid,* at 706.

both bank and customer have been negligent, the determining question is "whose negligence was the proximate cause of the loss?"[961]

A commonsense approach to causation has been supported by the courts. For instance, in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport*,[962] Lord Wright said: "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards."[963] And Hobhouse LJ said in *County Ltd v Girozentrale Securities*, "legal causation is a matter of fact and common sense."[964] The breach does not have to be the sole cause of the loss to entail liability for damages[965] but a distinction is drawn between conduct that "occasions" damage and that which causes it.[966] For example, in *Galoo* the Court of Appeal held that negligent auditing of a company's accounts gave the opportunity but was not the cause of the company's subsequent trading losses.

Foreseeability of the damage has been identified as a relevant factor for determining causation[967] but in *Quinn v Burch Bros (Builders) Ltd*[968] Salmon J demonstrated that while foreseeability of possible damage may be a guide, it was not the criterion for determining

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[961] Heber Hart *The Law of Banking* (London, Stevens and Sons, Limited, 1904), at 282.
[962] [1942] AC 691.
[963] *Ibid,* at 706. See also *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at 802.
[964] [1996] 3 All ER 834 at 858; see also *Galoo Ltd (in liquidation) and Others v Bright Grahame Murray (a firm) and Another* [1994] 1 WLR 1360. See however, the dicta of Lord Hope of Craighead in Chester v Afshar [2005] 1 AC 134 at 161: "An appeal to common sense when determining issues of causation is valuable in the right context. But out of its proper context, and without more, it may pull in two or more directions."
[965] G H Treitel *The Law of Contract* (11th edn, Sweet & Maxwell, London, 2003), 975.
[966] *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370. Endorsed, for example, in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360.
[967] *Roe v Ministry of Health, Woolley v Ministry of Health* [1954] 2 QB 66 at 84–5; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 420; *County Ltd and another v Girozentrale Securities* [1996] 3 All ER 834 at 858.
[968] [1966] 2 QB 370.

causation.[969] Although not in so many words, his Lordship went on to apply a commonsense approach.[970] The relevance of foreseeability to the question of remoteness of damage, on the other hand, is well established.

Applying the above principles to the current dilemma, the question is whether the bank, which has made an unauthorised payment from the customer's account in breach of its mandate, can maintain that it has suffered loss from the customer's failure to verify his bank statements and notify the bank of the unauthorised transaction; alternatively allege that the customer has caused his own loss? Conversely, can a customer who has failed to verify his bank statements and notify the bank of errors, point to the bank's breach, ignoring the customer's own, as the cause of the loss?

Of course, the primary cause of the loss is the dishonesty of the third party procuring the unauthorised transaction from the bank. Still, in every case, the bank and possibly the customer or both will have contributed to the causal chain; it does not matter that their conduct was not the only or main cause of the resulting loss; it is sufficient if it was an effective cause.[971]

In *BRDC v Hextall Erskine*,[972] in the Chancery Division, Carnwath J considered a question of causation in the context of a solicitor's negligence. He observed that generally a solicitor advising a client on legal action to recover damages from a third party is unlikely to be the

[969] *Ibid,* at 394.
[970] *Ibid,* at 394.
[971] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 406.
[972] *British Racing Drivers' Club Ltd and another v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667.

direct cause of the damage. Where the solicitor is negligent in rendering legal services to that client the question is whether the damage is "within the reasonable scope of the dangers against which it was the solicitor's duty to provide protection".[973]

In the current bank and customer scenario, the causal connection between the bank's breach and the customer's loss is clear; the unauthorised debit, the bank's breach, is an effective cause of the loss by reducing the customer's bank balance. If the bank can demonstrate that it could have recovered the money had it been notified, there will be a causal connection between the customer's breach and the bank's loss for which it can counterclaim and plead set–off. There is also a link between the customer's breach of the duty to verify and notify and any further breach by the bank of its duty to pay with a mandate, leading to further loss; but whether this is an effective cause of any subsequent debits is open to doubt.

The customer's breach of the verification duty does not on its own cause any loss; it is the bank's breach which is the conditio sine qua non of the loss. The customer's failure to verify and notify the bank of an unauthorised debit deprives the bank of the "red light" that would alert it to dishonest activity on the account. The customer's breach fails to alter the bank's conduct regarding any subsequent unauthorised debit. This suggests that, where a subsequent debit has been made, the customer's breach of his verification duty is not a cause of the bank's subsequent breach but merely "occasions" the bank's breach, as in the *Quinn* and *Galoo* cases. The failure to verify may be analogous to the negligent auditing of a company's accounts as in *Galoo*, where the auditing failed to reveal the insolvency of the company and the need for insolvency procedures to be instituted, but it did not cause the

[973] *Ibid,* at 681.

business practices responsible for the losses. If this analysis is correct, the customer's breach of the verification duty is not a factual cause of any second and subsequent debits, and is therefore not an effective cause of the loss.

The bank would argue otherwise. Its argument would have to be premised on it taking appropriate action after notification of the unauthorised transaction, to halt any further debits. The next question is whether the bank must prove that it would have taken steps to halt the fraudulent scheme, what those steps would have been and that they would have been effective. Where the breach complained of consists of an omission (in this case the customer's omission to verify his bank statement and notify errors to the bank), the question of causation depends on the answer to the hypothetical question: what would the bank have done had the duty been fulfilled?[974] The bank would be required to persuade the court, on a balance of probabilities, that it would have taken steps to avert the risk of further unauthorised transactions.[975] Ordinarily, where subsequent action would definitely benefit the party complaining of the breach (the bank), a court would be likely to accept that the preventive measures would have been implemented.[976] A bank should have no problem in persuading a court that it would have taken steps to halt a fraudulent scheme had it been notified of an earlier unauthorised debit. Of course, it is open to the customer to dispute the effectiveness of any measures which the bank could have taken. For present purposes, it is reasonable to conclude that this issue of hypothetical action by the bank to halt further debits is likely to be resolved in its favour. Assuming the bank persuades the court that it

[974] Adapted from the judgment of Stuart–Smith LJ In *Allied Maples Group Ltd v Simmons & Simmons (A Firm)* [1995] 1 WLR 1602 at 1610.
[975] *Allied Maples Group Ltd v Simmons $ Simmons (A Firm)* [1995] 1 WLR 1602 at 1610 and 1622; *Brown v KMR Services Ltd* [1995] 2 Lloyd's Rep 513 at 539.
[976] *Allied Maples Group Ltd v Simmons $ Simmons (A Firm)* [1995] 1 WLR 1602 at 1610.

would have taken effective steps to halt further debits, it is nevertheless submitted that the customer's breach does no more than "occasion" the bank's breach; and the bank's breach constitutes the legal cause of the loss.

Assuming, contrary to the view taken above, that the bank can persuade a court that the customer's breach of the verification/notification duty was an effective cause of the second and subsequent debits, it will not be able to deny the essential contribution made by its own breach (the unauthorised debit). The question is how, if at all, the two breaches can be taken into account to allocate loss between them, bearing in mind that the apportionment of loss legislation is not applicable.

The case of *Tenant Radiant Heat Ltd v Warrington Development Corporation*[977] posed a conundrum of "cross" causes in a landlord and tenant context. The tenant of premises sued the landlord for damage to the tenant's property caused by the collapse of the roof of the premises. The landlord counterclaimed for the cost of repairing the roof on the basis of the tenant's undertaking to maintain the premises. The Court of Appeal (England) found that the tenant's undertaking extended to the roof and that the tenant was in breach of that contractual obligation. It also upheld the landlord's liability in tort to the tenant for failing to keep the roof in good repair. The issue was the "interplay"[978] of these two liabilities.

[977] [1988] 1 EGLR 41.
[978] *Ibid,* at 43.

The court confirmed that an apportionment of damages was not possible under the contributory negligence legislation, discussed above.[979] Croom–Johnson LJ said: "Breach of a strict duty under a contract has never given rise to the defence of contributory negligence."[980] Dillon LJ stated the issue before the court: to what extent was the tenant's damage (to goods) caused by the landlord, notwithstanding the tenant's breach of contract; and to what extent was the landlord's damage (to the building) caused by the tenant's breach, notwithstanding the landlord's tort.[981] Dillon LJ concluded: "The effect is that on each question, apportionment is permissible."[982] This, he acknowledged, achieved the same effect as the Act,[983] but he was adamant that the result was not derived through the Act because the Act was not applicable. Regrettably, he did not elaborate on the basis on which he considered an apportionment to be within the court's competence, although a clue lies in his identification of the issue as "a problem of causation of damage."[984]

Confirmation of this can be found in the concurring judgment of Croom–Johnson LJ who said that "simply as a matter of causation"[985] an apportionment was possible. "Where one is dealing with two contemporaneous causes, each springing from the breach of a legal duty but operating in unequal proportions, the solution should be to assess the recoverable damages for both on the basis of causation."[986] In other words, the court apportioned the

[979] The Law Reform (Contributory Negligence) Act 1945.
[980] *Tenant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41 at 44.
[981] *Ibid,* at 44.
[982] *Ibid*.
[983] The Law Reform (Contributory Negligence) Act 1945.
[984] *Tenant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41 at 44.
[985] *Ibid*.
[986] *Ibid*.

"causative potency"[987] of the parties' respective breaches in relation to the damages suffered, not the parties' relative degrees of fault.[988]

There is support in Canada for an apportionment in contract where separate breaches contribute to a loss. In *Canadian Western Natural Gas Co v Pathfinder Surveys Ltd*,[989] in the Alberta Court of Appeal, Prowse JA expressed his support for the application, under the common law, of the principles of contributory negligence to a claim in contract on the basis of the principle that "where a man is part author of his own injury, he cannot call on the other party to compensate him in full."[990] In *Cosyns v Smith et al*,[991] the Ontario Court of Appeal, obiter, supported the application of apportionment in contract as well as tort where the "negligence of the plaintiff has concurred with that of the defendant to produce the misfortune for which damages are claimed."[992]

Dugdale & Stanton[993] apparently support the *Tenant Radiant Heat* decision but the weight of authority is against it. *Chitty on Contracts* describes it as "unusual"[994]. Andrew Burrows[995] says it is "controversial as a decision on causation (as opposed to contributory negligence)."[996] From this it is understood that Burrows agrees with the court's ruling that the contributory negligence legislation was not applicable but is doubtful about the

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[987] The phrase was coined by Denning LJ in *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291at 326.
[988] *Ibid*, at 326. Denning LJ said that, in applying The Law Reform (Contributory Negligence) Act 1945, the courts consider both the causal potency and the comparative blameworthiness of the two parties.
[989] (1980) 12 Alta LR (2d) 135.
[990] *Ibid,* at 158. This is a reference to a dictum by Viscount Simon in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611.
[991] (1983) 146 DLR (3d) 622.
[992] Glanville Williams *Joint Torts and Contributory Negligence* (London, Stevens, 1951), 214 –5.
[993] A M Dugdale & K M Stanton, *Professional Negligence* (2nd ed, London, Butterworths, 1989), at 517.
[994] HG Beale (Gen Ed), *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 26–036 and 26–043.
[995] Burrows, *Remedies for Torts and Breach of Contract*.
[996] *Ibid,* 77.

apportionment of causation. Most significant is the decision of the Court of Appeal (England) in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd*,[997] which expressed reservations about the decision. The court said that for it to apply the principle enunciated in *Tenant Radiant Heat* it would have required the issue to be argued fully by counsel.[998] The Law Commission Report on Contributory Negligence[999] expressed the view that *Tenant Radiant Heat* will be restrictively interpreted and limited to its facts.

The bank cannot deny that its breach caused the first unauthorised debit, which it is liable to reimburse. It may be able to prove that the customer's breach caused it loss by denying it the opportunity to recover the monies which it is liable to reimburse. Where there have been subsequent unauthorised debits, it is doubted whether the customer's breach will constitute a legal cause of those losses. In the event that they are, the ability of the court to take the customer's contribution into account, along with the bank's undeniable contribution, is subject to the acceptance of *Tenant Radiant Heat* as authority for such a course of action.

The bank may allege that the customer's failure to verify was a novus actus interveniens: a new cause occurring after the initial cause which breaks the causal chain between the initial cause and the result. It is submitted here that the doctrine of novus actus interveniens does not find application. Where the intervening conduct is that of the claimant, it is normally

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[997] [1990] 1 QB 818.
[998] *Ibid,* at 904. The *Tenant* decision was mentioned but not analysed in *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another* [2006] 3 SLR 769 at 816.
[999] Law Commission Report No 219 "Contributory Negligence as a Defence in Contract", at para 3.13.

more appropriate to deal with the issue with reference to the duty to mitigate damages and the law relating to contributory negligence.[1000] Clerk & Lindsell on Torts say that where the "conduct of the claimant is so wholly unreasonable and/or of such overwhelming impact that the conduct eclipses the defendant's wrongdoing",[1001] it may constitute a novus actus. It is submitted that the customer's failure to verify, which in itself does not cause any loss, is insufficient to constitute a novus actus interveniens.

Remoteness of damage[1002] and the duty of the plaintiff to mitigate against his loss[1003] are also relevant concepts. While they may achieve the same result, they are distinct and apply in different circumstances. In the present scenario, the ordinary damages (the amount of the unauthorised debit) do not raise the issue of remoteness. They flow directly from the bank's breach. The principle of mitigation is that a claimant cannot recover loss or damage to the extent that it is caused or increased by his own failure to limit the loss. The requirement for the plaintiff is to act reasonably, but the standard is not high given that the defendant is in the wrong.[1004] Mitigation and novus actus interveniens deal with the same issue although mitigation is usually more appropriate where there is an omission.[1005] The customer's verification duty should not be seen as a duty to mitigate his loss in the event of a breach by the bank of his mandate. The duty to mitigate only arises once there is knowledge of the

[1000] Anthony M Dugdale (Gen ed) *Clerk & Lindsell on Torts* (19th ed, London, Sweet & Maxwell, 2006), para 2–96; HG Beale (Gen Ed) Chitty on Contracts (29th ed, 2 vols., Sweet & Maxwell, London, 2004) vol 1, para 26–034.
[1001] Dugdale *Clerk & Lindsell on Torts*, para 2–96.
[1002] See Treitel, *Contract*, 976.
[1003] See discussion by Andrew Burrows in "Contributory Negligence in Contract: Ammunition for the Law Commission" [1993] 109 LQR 175 at 176.
[1004] *British Racing Drivers' Club v Hextall Erskin & Co* [1996] 3 All ER 667 at 684, see also Beale (Gen Ed) Chitty on Contracts, vol 1, para 26–095.
[1005] See discussion by Andrew Burrows in "Contributory Negligence in Contract: Ammunition for the Law Commission" [1993] 109 LQR 175 at 176.

breach.[1006] In this case the verification exercise is the means of obtaining that knowledge; the customer who has failed to verify will not know of the bank's breach.

5.6 Assessment of the Standalone Verification Clause

The viability of a stand–alone verification clause must be measured having regard to its effectiveness in protecting the bank against ongoing fraudulent schemes. It has been shown that the verification and conclusive evidence clause is effective in such a situation. The above analysis of causation is in the context of a bank arguing, as a defence or a counterclaim, that the customer's breach of the verification duty caused the loss and not the bank's breach of mandate. The above analysis suggests that the protection of the stand–alone verification duty is illusory; because courts are unlikely to resolve the causation dilemmas[1007] in favour of banks, the clause is inadequate for the purpose for which it is designed. The stand–alone clause may be fairer than a verification and conclusive evidence clause to the customer, whose failure to verify did not contribute to the loss in the case of the one–off forgery, but it does not solve the problem of the customer whose failure to verify is without fault, such as the solitary customer who, without blame, is incapacitated to the extent of being unable to check his bank statements. The stand–alone verification clause does not on its own distinguish between the wilful dilatory customer and the involuntary dilatory customer. This depends on another issue: whether the customer's verification duty is strict or a duty of care, as discussed above. In summary, the analysis thus far suggests

[1006] See *Eley v Bedford* [1972] 1 QB 155 at 158; *Youell v Bland Welch & Co Ltd (The "Superhulls Cover" case)(No 2)* [1990] 2 Lloyd's Rep 431 at 462; *Schering Agrochemicals Ltd v Resibel NVSA* 26 November 1992 (unreported, CA). HG Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 26–096 refers to the claimant's knowledge of the breach or the time when he ought to have known of the breach.

[1007] Relating to the distinction between occasioning versus causing the loss and the prospects of obtaining an apportionment in circumstances where the Act does not apply.

that the stand–alone verification clause has little to recommend it. It probably does not protect the bank because of causation problems and even if it did, it does not treat the dilatory but non–negligent customer any better than the verification and conclusive evidence clause does.

5.7 Set–Off

Set–off takes a variety of forms.[1008] Contractual set–off is not subject to the restrictions, such as those concerning future, contingent, collateral and several liabilities, which are attendant on the other forms of set–off. This makes it an attractive tool for banks and banks in Singapore give themselves wide express powers of set–off.[1009] Whether the set–off provision in the T&C avails the bank in the situation of cross breaches of contract will depend on the terms of the clause. The matter would come to a head in much the same manner as the claim and counterclaim discussed in the preceding paragraphs: the bank will debit the customer's account with the unauthorised transaction, the customer will object (after the time stipulated in the stand–alone verification clause) that the bank had no mandate and therefore no right to debit its account; the bank's response is that the customer breached the verification clause and this has occasioned damages to the bank, which it is entitled to set off against the customer's claim.[1010] If successful, the bank's set–off of its damages neutralizes the customer's claim to reimbursement and/or damages, leaving the customer with the loss.

[1008] Insolvent set–off, legal set–off, equitable set–off and contractual set–off. Sheelagh McCracken *The Banker's Remedy of Set–Off* (2nd ed, London, Butterworths, 1998) at 62 argues that there is "an evolution, albeit gradual, of a single concept of set–off, squarely based on notions of justice and fairness."

[1009] UOB 20; OCBC 25; DBS 15; HSBC 21; Std Ch 12.

[1010] The bank will not have sustained damages from a breach of a verification clause until the second in a scheme of unauthorised withdrawals is made from the account unless it can show that swift notification of the first unauthorised debit would have enabled it to recover some or all of the monies lost.

Set–off is a subject in itself and it is not proposed to discuss this aspect in further detail. Suffice to say that the bank's "debt," giving substance to the set–off in this scenario, is subject to the causation problems discussed above. The issue therefore is not so much the availability of the set–off but the legitimacy of the underlying claim on which it is based.

A similar conclusion as that reached on the protection offered by a standalone verification clause in the context of a defence and counterclaim, applies therefore to the bank's right of set–off.

5.8 Estoppel

Geva refers to the verification and conclusive evidence clause as an "estoppel by contract."[1011] The description is apt in that the clause contains all the terms necessary to block any dispute the customer may have with the accuracy of his statement. The bank does not need to fall back on the general law and the doctrine of estoppel to be effective. The question is whether breach of a standalone verification clause can give rise to an estoppel against the customer, and what the nature of that estoppel is?

It is apparent that the customer's contractual promise to verify his bank statements cannot in itself give rise to an estoppel by representation (as in the case of the *Macmillan* and *Greenwood* duties) for an estoppel by representation requires a representation of an existing

[1011] Benjamin Geva "Reflections on the Need to Revise the Bills of Exchange Act – Some Doctrinal Aspects" (1981–2) 6 Can Bus LJ 269 at 323.

fact.[1012] An undertaking to verify bank statements is not a representation of an existing fact but rather, a promise to do something in the future. According to *Spencer Bower*, any statement which is intended to be a promise, or cannot reasonably be understood as being anything else, is not a representation of fact and cannot operate to found an estoppel other than a promissory or a proprietary estoppel.[1013] Proprietary estoppel can be dismissed from this discussion as the promise or representation on which it is based concerns the acquisition of rights in property.[1014] This leaves promissory estoppel for consideration. Promissory estoppel is an equitable estoppel[1015] which was articulated in the judgement of Denning J in *Central London Property Trust Ltd v High Trees House Ltd*.[1016]

Spencer Bower comments that where a promise is made in a binding contract, it is not necessary to invoke the doctrine of promissory estoppel, presumably because enforcement is facilitated by the contract, but the two are "closely analogous in many respects".[1017] Estoppel may be the bank's only solution, given that enforcement of the stand–alone verification promise based on the principles of contract is doubtful because of the difficulty in proving that the loss was caused by the customer.

[1012] See e.g. L F Everest *Everest and Strode's Law of Estoppel*, (3rd ed, London, Stevens and Sons Limited, 1923), at 279; K R Handley *Estoppel by Conduct and Election* (London, Thomson Sweet & Maxwell, 2006), para 1–006. See also *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134.

[1013] Piers Feltham, Daniel Hockberg, Tom Leech *Spencer Bower: The Law Relating to Estoppel by Representation* (4th ed, Lexis Nexis, UK, 2004), para II.4.1.

[1014] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, para I.2.6; Handley *Estoppel by Conduct and Election*, para 1–029; Elizabeth Cooke *The Modern Law of Estoppel* (Oxford University Press, 2000), 42.

[1015] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, para XIV.1.1; K R Handley (London, Thomson Sweet & Maxwell, 2006) *Estoppel by Conduct and Election*, para 1–029.

[1016] [1947] KB 130.

[1017] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, para XIV.2.2 at page 450.

The first issue which arises is whether there is any reason why a contractual promise cannot give rise to an estoppel? On the principle that the greater includes the lesser, it is surely competent for the contracting promisee to fall back on the "weaker" doctrine of promissory estoppel to enforce his contractual rights, provided all the elements of a promissory estoppel are met. Lord Scarman's dicta in *Tai Hing Cotton Mill*[1018] suggest that the existence of a contractual right is not an obstacle to recourse to estoppel. He had no difficulty with the fact that the duty in question (to examine the statements) was a contractual duty although he does say that in such a case the estoppel is "academic" as the bank can rely on the defence of set–off or counterclaim.[1019] The 9th edition of *Paget* expressed the view that, "Estoppel may yet be available to limit the customer's freedom from responsibility in connection with his supervision of his banking account by reference to his banker's statements."[1020]

Assuming that there is no policy precluding the enforcement of contractual promises by applying the doctrine of promissory estoppel, the next question is whether a verification promise meets the elements of a promissory estoppel, a specialist topic in itself. The discussion which follows will be in broad terms only.

The elements of a promissory estoppel are a clear and unequivocal promise,[1021] which is intended to be binding,[1022] reliance[1023] and possibly detriment.[1024] There may be a further

[1018] [1986] 1 AC 80 at 110.
[1019] *Ibid*.
[1020] Maurice Megrah and F R Ryder *Paget's Law of Banking,* (9th ed, London, Butterworths, 1982), 113.
[1021] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 755, 761, 762, 771. See also discussion in Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, para XIV.2.2.
[1022] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, para XIV.2.22.

requirement, namely an existing legal relationship.[1025] *Spencer Bower* explains that doubt has been cast on this requirement in a number of cases;[1026] in the present context the requirement is met and it need not be discussed further. To meet the requirement of a clear and unequivocal promise, it is assumed for present purposes that the stand–alone verification clause is drafted in clear, unequivocal and mandatory terms. Translating the dicta in *Peyman v Lanjani*[1027] and *Motor Oil Hellas*[1028] into a banking context, the customer in making the promise to verify his bank statements does not have to be aware of the legal rights created by his promise in order for the estoppel to arise.[1029] The customer must have intended the promise to be binding and intended that the bank would rely on it.[1030] The customer agreeing to a stand–alone verification clause in a standard–term agreement may not know of the contents of the agreement. He does, however, know that he is entering into a legal relationship governed by terms with which he has not familiarised himself. A legal fiction operates to the effect that he is aware of the terms, and he is bound by them. This should be sufficient to satisfy this element.

Reliance and detriment are the remaining elements. Reliance will be present "if the promise had a material influence or effect on the conduct of the estoppel raiser."[1031] The bank may seek to prove this by pointing to its failure to take recovery steps or, where there has been a series of unauthorised debits, the bank may argue that the customer's failure to keep his

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[1023] *Ibid,* at para XIV.2.31.
[1024] *Ibid,* at para XIV.2.37.
[1025] *Ibid,* at para XIV.2.23.
[1026] *Ibid,* at para XIV.2.23–2.25. See also Cooke *The Modern Law of Estoppel*, 39.
[1027] [1985] Ch 457 at 495.
[1028] *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India ('the Kanchenjunga')* [1990] 1 Lloyd's Rep 391 at 399.
[1029] See also Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, at para XIV.2.18.
[1030] See *Ibid,* at para XIV.2.22.
[1031] *Ibid,* at para XIV.2.33.

promise facilitated the second and subsequent debits. The element of reliance is contentious. The customer may dispute that recovery would have been possible, or he may deny that his promise materially influenced the bank in making the subsequent debits; rather it was the bank's routine procedure that led to the debit. Had there not been a verification duty in the contract, the bank would nevertheless have made the debit, the customer may argue. The merits of the bank's claim to have lost an opportunity to recover the loss as a consequence of the customer's failure to verify and notify is dependant on the facts. This argument is developed in the discussion about estoppel by representation further down.

The need to demonstrate detriment is debateable. *Spencer Bower* submits that detriment in a wide sense must be present[1032] but there is authority that it is not a requirement.[1033] In the scenario of unauthorised debits, detriment is likely to be met and is accordingly not contentious.

There are two further factors relevant to the doctrine of promissory estoppel: the purpose of the doctrine of promissory estoppel is to prevent the insistence on legal rights where it would be "unconscionable or inequitable".[1034] It is often said that promissory estoppel is a shield and not a sword.[1035] Generally this means that the bank can seek to rely on

[1032] *Ibid,* at para XIV.2.45; see also Cooke *The Modern Law of Estoppel*, 68, 100.
[1033] The '*Post Chaser*' [1981] 2 Lloyd's Rep 695.
[1034] See dictum by Lord Goff in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India ('the Kanchenjunga')* [1990] 1 Lloyd's Rep 391 at 399; in Singapore, see *QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Pte Ltd* [2005] 1 SLR 711 at 719. Also Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, e.g., para XIV.2.23, XIV.2.37; Cooke *The Modern Law of Estoppel*, 37, 65.
[1035] See, for e.g., Stephen A Smith *Atiyah's Introduction to the Law of Contract* (6th ed, Oxford, Clarendon Press, 2005), 124.

promissory estoppel as a defence but not as a counterclaim. This purpose of the doctrine of promissory estoppel does not fit comfortably with a bank insisting on its right to verification under the contract, especially when it is in breach of the obligation, perhaps through negligence, to pay only on a valid mandate. Promissory estoppel is designed to avoid inequity.[1036] That, coupled with equitable maxims such as "he who comes into equity must come with clean hands,"[1037] is problematic for a bank which is in breach.

For these reasons, the availability of a promissory estoppel to enforce a stand–alone verification clause is uncertain, rendering it unsuitable for the purpose of protecting a bank against unauthorised debits.

Another possibility is to shift the focus away from the customer's promise to his silence and examine whether this amounts to a representation of fact that the bank statement is in order, i.e. constitutes an estoppel by representation. This issue was raised in *Tai Hing Cotton Mill* but rejected by the Privy Council.[1038] The reason is summed up in the following words of Lord Scarman: "Once it is held that [the statements] were not conclusive, silence, i.e. in this case failure to object, cannot be interpreted as a representation that the statements were correct for the simple reason that the company was not precluded by the terms of business from asserting that they were incorrect."[1039] Lord Scarman seemed to be saying that the contract did not prevent the customer from disputing

[1036] Feltham, Hockberg, Leech *Spencer Bower*: *Estoppel by Representation*, para XIV.3.13; Cooke *The Modern Law of Estoppel*, 37.
[1037] See articulation by John McGhee Q.C. (Gen Ed) *Snell's Equity* (31st ed, London, Thompson Sweet & Maxwell, 2005), 98.
[1038] [1986] 1 AC 80 at 110.
[1039] *Ibid,* at 111.

the accuracy of the statements and therefore his silence could not be interpreted as an assertion that they were accurate.

It is respectfully submitted that the conclusive effect of the statements is not the key issue. If the clauses in question had achieved the conclusive effect which was obviously desired, there would have been no need to rely on an estoppel. Crucial to the estoppel is whether an unequivocal duty to verify, which is missing at common law, is created by the contract.

A representation based on silence requires a duty to speak, which at common law arises with the knowledge of forgery. Where the customer has not verified his bank statement and does not have actual knowledge of an error, the question is whether the duty to verify is sufficient to found the estoppel, i.e., to bridge the knowledge gap? It is submitted that it is. This is reminiscent of the discussion above on whether bank statements give rise to an account–stated.[1040]

The elements of reliance and detriment also need to be met. As before, the requirement of reliance can be debated. The merits of this argument are the same as those discussed under promissory estoppel. The bank relies on the customer to fulfil his promise to verify and notify. The customer's silence is taken as a representation that the statement is correct and the bank is therefore not alerted to the danger of further unauthorised debits and the need to take action to take preventive measures. The argument has merit.

[1040] In chapter 4.1 above.

On the facts of *Tai Hing Cotton Mill*, the decision, with respect, was correct because the verification duty was not as strongly worded as is desirable. The T&C of Liu Chong Hing Bank said that customers are "desired" to check their statements, Tokyo Bank's T&C said the statement "will be confirmed" and Chekiang Bank's T&C implied a need to verify but did not express it at all. In the court below,[1041] the customer was found to be in breach of its duty to "take reasonable care to protect the interests of the bank,"[1042] per Cons J, and "to ensure the proper working of the account,"[1043] per Hunter J. The breach of this duty gave rise to negligent estoppel.[1044]

It is submitted that estoppel by representation of fact is the strongest argument which can be made to enforce a stand–alone verification clause. There is no doubt that from an effectiveness perspective, the verification and conclusive evidence clause is superior. If the stand–alone verification clause is enforceable, it is not materially different to the verification and conclusive evidence clause; to the contrary, the latter is preferable as it informs the customer of the disadvantage of not verifying while the former leaves him to deduce the consequences for himself.

[1041] The Hong Kong Court of Appeal, reported at [1984] 1 Lloyd's Rep 555.
[1042] *Ibid,* at 563.
[1043] *Ibid,* at 580.
[1044] *Ibid,* at 567 (per Cons J) and 581 (per Hunter J).

Chapter 6: A Comparative View

It is instructive to view the common law approach to a customer's duties in countries that share, or at some point did share, a common legal history with Singapore.

6.1 The United States

The United States and England share a common legal background. Lawrence M Friedman[1045] writes that "the United States was first settled by English–speaking people in the early seventeenth century."[1046] As a result of British colonisation, the "content and method of the [English] common law were absorbed into American social culture and have never been displaced".[1047] Today, a verification duty is imposed in the United States by the Uniform Commercial Code, section 4–406.[1048] Prior to the codification of the duty there was case law to the same effect. *Frank v Chemical National Bank of New York*[1049] (1881) and *Leather Manufacturers' Bank v Morgan and Others*[1050] (1886) were early cases to assert a depositor's duty to examine his account passbook and notify the bank of errors. In *Leather Manufacturers' Bank v Morgan*, reference is made to *Clayton's case*[1051] (1816) in support of the duty,[1052] which if breached would result in an estoppel by negligence against

[1045] *American Law: An Introduction* (2nd ed, W W Norton & Company, United States of America, 1998).
[1046] *Ibid,* at 52.
[1047] Graham Hughes, "Common Law Systems" in Alan B Morrison (ed), *Fundamentals of American Law*, (Oxford University Press, 1996), pp. 9–25 at p. 12. Per Lawrence M Friedman *A History of American Law* (Simon and Schuster, New York, 1973), at 15: "The basic substratum of American law, …, is English."; in *Monarch Steamship Co Ltd v Karlshamns Olje–Fabriker (A/B)* [1949] AC 196 Lord Wright said at 231: "The origin and foundation of the law in both countries [United States and Britain] are the same."
[1048] The article does not specify a period of time in which the customer must act, it says 'promptly'. See also limitations imposed by 1–102 and 4–103 on contracting out of obligations of good faith, diligence, reasonableness and care.
[1049] 84 NY 209.
[1050] 117 US 96, a decision of the New York Circuit Court.
[1051] *Devaynes v Noble*: *Clayton's Case* (1816) 35 ER 767 at 778.
[1052] 117 US 96 at 106.

the customer. One condition was that the bank must not have been negligent in paying the cheques. In England, *Clayton's case*[1053] was subsequently marginalized in *Chatterton v London and County Bank*[1054] (1890). In *Thomson v New York Trust Co*[1055] (1944), the majority of the New York Court of Appeals endorsed the following statement:[1056] "A depositor of a bank is under a duty to examine such statements of account, and to give notice of errors therein."[1057] The same court in *Maryland Casualty Co v Central Trust Co*[1058] explained the basis of the rule: it promoted justice as either the depositor or the bank could suffer loss from a third party's wrong and prompt action from the depositor enables the bank to pursue the forger and take steps for its own protection and the general banking community.[1059]

In *Shipman v Bank of the State of New York*,[1060] (1891) the court said: "Payments made upon forged indorsements are at the peril of the bank, unless it can claim protection upon some principle of estoppel or some negligence chargeable to the depositor."[1061] In *Stella Flour & Feed Corporation v National City Bank*[1062] (1954), the Appellate Division of the Supreme Court of New York, per Bergan J, said "negligence chargeable to the depositor" comprises:

[1053] *Devaynes v Noble*: *Clayton's Case* (1816) 35 ER 767 at 778.
[1054] The Times, Jan 21 1891.
[1055] 56 NE2d 32 at 36.
[1056] *Ibid*, at 36.
[1057] Made in *Potts & Co v Lafayette National Bank* 199 NE 50, at 52.
[1058] 79 NE2d 253.
[1059] *Ibid,* at 257.
[1060] (1891) 27 NE 371.
[1061] *Ibid*, at 372.
[1062] (1954) 136 NYS2d 139 affd 127 NE2d 864.

1. a delay in examining returned vouchers or accounts and in notifying the bank of wrongful debits, materially undermining the bank's ability to recover the loss;[1063] and
2. conditions "created or allowed by the depositor which greatly facilitate the deception imposed on the bank".[1064]

This would excuse the bank unless it was also negligent so as to set-off the negligence of the depositor.

From this it is apparent that, at least 30 years prior to *Macmillan's* case in England, United States' courts were taking a stricter view of the customer's obligations in regard to his bank account. This reflects an ideological difference between the two jurisdictions.

Today the Official Text of the Uniform Commercial Code provides as follows:
Section 1–302 recognises the right of a bank and its customer to expressly contract for their rights and duties, subject to obligations of "good faith, diligence, reasonableness and care" prescribed by the Act. The standards by which those obligations are measured may be agreed between the parties, provided they are not clearly unreasonable.
Section 3–103 defines "ordinary care" where it is required of a person engaged in business, as the "observance of reasonable commercial standards". Further, "reasonable commercial standards" do not require a bank to examine the item it is paying or collecting, provided this is its procedure and is not an unreasonable departure from banking practice.
Section 3–406 estops a person who negligently facilitates the alteration or forgery of a mandate, from raising the defect against, inter alia, a bank which pays it honestly and in

[1063] 136 NYS2d 139 at 143.
[1064] *Ibid.*

accordance with its reasonable practice. This provision was said in the Comment to the 1962 Official Text of the Uniform Commercial Code[1065] to adopt the doctrine of *Young v Grote*.[1066].

Article 4 concerns bank deposits and collections.

Section 4–103 allows banks and depositors to determine their obligations to each other, i.e. to vary the provisions of article 4, except that a bank may not disclaim its duty of good faith or ordinary care. The parties may, however, determine the applicable standards provided they are not "manifestly unreasonable". This reflects the provisions of section 1–102. The 1962 Official Text of the Uniform Commercial Code[1067] says: "Under this article banks come under the general obligations of the use of good faith and the exercise of ordinary care."

Section 4–202 specifies when ordinary care is required from a collecting bank, e.g., in presenting an item, settling for an item and making protest.

Section 4–406 imposes a verification duty on the customer. The article does not specify a period of time in which the customer must act; it says "promptly".

[1065] Uniform Commercial Code, 1962 Official Text with Comments (The American Law Institute and National Conference of Commissioners on Uniform State Laws, 1962) Comment 1, 294.
[1066] (1827) 130 ER 764.
[1067] Uniform Commercial Code, 1962 Official Text with Comments, Comment 4, 367.

6.2 Canada

In Canada, like England, there is "judicial reluctance to impose upon a depositor a duty to examine bank statements and to report any discrepancies within a reasonable period."[1068] The response of banks has been to achieve the same result contractually. Verification and conclusive evidence clauses have been used in Canada in some form for more than 100 years,[1069] with one of the earliest cases on validity dating back to 1916.[1070] There has since followed a long line of litigation on this point. Some of the more recent Canadian cases, that involve negligence by the bank, are discussed above.[1071]

The seminal case is the decision of the Supreme Court of Canada in *Arrow Transfer Co Ltd v Royal Bank of Canada*[1072] (1972). The facts are all too familiar. A senior employee of the customer forged cheques on the company's bank account over a period of five years. The customer alleged that the bank had paid without a mandate; the bank in turn sought to rely on a verification and conclusive evidence clause. The majority of the court upheld the verification and conclusive evidence clause. The majority and the dissenting judge (Laskin J) disagreed on interpretation, on how explicit the clause had to be to cover forgery. Laskin J adopted a strict approach: if a clause, not expressly covering forgery, would have subject matter without forgery, a strict interpretation of the clause means that forgery is not covered.[1073] Laskin J considered that a contra proferentem interpretation was justified:[1074]

[1068] See statement of Laskin J (dissenting) in *Arrow Transfer Co Ltd v Royal Bank of Canada* 27 DLR (3d) 81at 99. This reluctance is not shared by Laskin J; see at 101.
[1069] Keith W Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245 at 246.
[1070] *Columbia Gramophone Co v Union Bank of Canada* (1916) 34 DLR 743.
[1071] In chapter 4.5.1.
[1072] (1972) 27 DLR (3d) 81.
[1073] *Arrow Transfer Co Ltd v Royal Bank of Canada* (1972) 27 DLR (3d) 81at 98.
[1074] *Ibid.*

"the principal question is … what is the scope of protection which [the bank] has achieved under a document which is more a contract of adhesion than a bargained arrangement."[1075]

While favouring a narrow construction of the verification agreement, Laskin J struck out in the other direction as regards a customer's duties to its bank: "I do not think it is too late to fasten upon bank customers in this country a duty to examine bank statements with reasonable care and to report account discrepancies within a reasonable time."[1076] In support of this view, Laskin J referred to the Uniform Commercial Code and its provision for such a duty. Laskin J's finding against the customer, however, went beyond a breach of a duty to examine bank statements. The customer's neglect of proper accounting procedures, coupled with knowingly employing a person with a history of dishonesty, "precluded" the customer from claiming against the bank in respect of any of the 72 forged cheques.[1077] Nicholas Rafferty[1078] submits that while *Arrow Transfer* concerned forgery, the reasoning should apply to fraud that the customer could have prevented.[1079]

Geva[1080] criticises the majority for applying an expansive construction of the clause rather than instituting change in the common law. In his view, they used the verification agreement to circumvent the consequences of their refusal to recognise a broader duty of

[1075] *Ibid,* at 97.
[1076] *Ibid,* at 101.
[1077] *Ibid,* at 102 - 103.
[1078] Nicholas Rafferty "Account Verification Agreements: When Can a Bank Protect Itself Against Its Own Negligence?" (1993) 8 BFLR 403.
[1079] *Ibid,* at 407.
[1080] Benjamin Geva "Reflections on the Need to Revise the Bills of Exchange Act – Some Doctrinal Aspects" (1981–2) 6 Can Bus LJ 269.

care to examine bank statements and notify errors.[1081] He considers that negligence is a sounder basis for liability than estoppel.[1082]

In Laskin J's dissenting view in *Arrow Transfer*, the duty of the customer to verify bank statements was clearly a duty of care;[1083] the customer's responsibility, however, for the employment of a dishonest person and its failure to supervise him was not discussed with reference to a duty of care. It is submitted that Laskin J's words point to a decision rooted in negligent estoppel, particularly the use of the word "precluded". If so, it is implicit that Laskin J recognised a duty of care going beyond the duty to examine bank statements.

In *Canadian Pacific Hotels Ltd v Bank of Montreal*,[1084] the Supreme Court of Canada acknowledged the uncertainty on this aspect of Laskin J's ruling in *Arrow Transfer*. Le Dain J said it "appears to have been the basis of a broader duty of care".[1085] Nicholas Rafferty agrees; it was a "broader duty on a customer to carry on its business with reasonable care".[1086] In *Canadian Pacific Hotels*, an employee of the customer forged 23 cheques on the customer's account over a period of 15 months. The customer received daily statements from the bank but there was no verification agreement between the parties. The trial court[1087] (Montgomery J) found in favour of the bank on the basis, inter alia, of an implied duty arising from commercial custom to verify bank statements.[1088] An interim

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[1081] *Ibid,* at 323.
[1082] *Ibid*, at 324.
[1083] *Arrow Transfer Co Ltd v Royal Bank of Canada* (1972) 27 DLR (3d) 81at 101.
[1084] *Canadian Pacific Hotels Ltd v Bank of Montreal* (1987) 40 DLR (4th) 385.
[1085] *Ibid*, at 418, see further at 419.
[1086] "Account Verification Agreements: When Can a Bank Protect Itself Against Its Own Negligence?" (1993) 8 BFLR 403 at 406.
[1087] Decision reported at *Canadian Pacific Hotels Ltd v Bank of Montreal* (1981) 122 DLR (3d) 519.
[1088] *Ibid*, at 533.

appeal court upheld the decision by a majority.[1089] On further appeal, the Supreme Court of Canada overturned the decision.[1090] Le Dain J's detailed judgment in the Supreme Court delved back to cases like *Evans' Charities*.[1091] In conclusion he doubted the basis for the commercial custom found by Montgomery J and dismissed the implication of the broader duties favoured by Montgomery J. In short, absent a verification agreement there was no duty on the customer to examine his bank statement and notify the bank of discrepancies.

Hayek[1092] criticizes Le Dain J's decision for not taking account of the "present–day banking milieu".[1093] He points to the "depersonification of banking" and its implications: increased number of customers including large corporate customers, greater volume of transactions and electronic processing. He goes on: "On policy grounds, there does not seem to be any valid reason for allocating a loss to the bank rather than to a large corporate customer …"[1094] These same policy considerations, it is submitted, justify the use of the verification and conclusive evidence clause.

Laskin J's minority judgement in *Arrow Transfer* was an important precedent for the trial judge in *Canadian Pacific Hotels*.[1095] Montgomery J's decision quotes extensively from Laskin J[1096]. In an argument based on the needs of the modern banking environment and the incongruity of the existing, limited customer duties, Montgomery J recognised two

[1089] A decision of the Ontario Court of Appeal, reported at (1983) 139 DLR (3d) 575.
[1090] Reported at (1988) 40 DLR (4th) 385.
[1091] Discussed in chapter 3.5 above.
[1092] "Canadian Pacific Hotels Ltd v Bank of Montreal" (1988) 14 Can Bus LJ 361 at 369.
[1093] *Ibid,* at 369.
[1094] *Ibid.*
[1095] In the Ontario High Court.
[1096] See *Canadian Pacific Hotels Ltd v Bank of Montreal* (1981) 122 DLR (3d) 519 at 530.

implied duties on the sophisticated customer:[1097] the institution of acceptable internal controls and the duty to examine bank statements with reasonable care and to report errors within a reasonable time.[1098] His legal basis for the implication was "commercial custom"; the guiding principle employed by Montgomery J is that where "two suffer for the fraud of a third, the one who most enabled that third party to create the fraud should bear the loss."[1099] This is reminiscent of *Lickbarrow v Mason*,[1100] which puts the point almost identically,[1101] and *Meyer & Co Limited v The Sze Hai Tong Banking and Insurance Company Limited* .[1102]

Laskin J's dissenting view in *Arrow Transfer*, stands in contrast to the position in *Macmillan*, where the negligence must be in the transaction itself, meaning today that the negligence must be in the drawing of the mandate. Lord Finlay LC in *Macmillan*, specifically said: "It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character."[1103] In *Arrow Transfer*, the facts were stronger than the scenario painted by Lord Finlay as the customer in *Arrow Transfer*, had actual knowledge of a history of dishonesty on the part of the employee, yet he was employed in an accounting position with access to the customer's cheque book and was inadequately supervised. One cannot but doubt whether Lord Finlay in *Macmillan* would have maintained this position on the more extreme facts of *Arrow Transfer.* The facts illustrate the risk to banks from their

[1097] See (1981) 122 DLR (3d) 519 (HC) at 532, 533.
[1098] *Canadian Pacific Hotels Ltd v Bank of Montreal* (1981) 122 DLR (3d) 519 (HC) at 533–534.
[1099] *Ibid*, at 533.
[1100] (1787) 100 ER 35.
[1101] *Ibid,* at 39: "whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it."
[1102] [1913] AC 847 at 852.
[1103] *London Joint Stock Bank Limited v Macmillan and Arthur* [1918] AC 777 at 795.

customer's imprudence. Nevertheless, on the authority as it presently stands in England, the customer does not owe a duty to his bank at common law to exercise care in the employment of staff. In Singapore, based on *Khoo Tian Hock*, the general duty not to facilitate fraud would, it is submitted, be wide enough to penalize the customer for employing a person in the circumstances of *Arrow Transfer*.

Keith Perrett writes that the reaction of Canadian banks to the "strict interpretation" cases was to bolster their T&C on account verification.[1104] Perrett's extracts of particular exclusion clauses in use in Canadian bank's T&C in 1999 reveals a use of the following provisions:

1. A widespread exclusion of liability for losses attributable to forged or unauthorised signatures. This may be qualified if the loss was caused by the bank's fault, and if the customer can prove, inter alia, that the loss was not made by a current or previous employee or agent and that the loss was unavoidable despite the customer having taken all feasible steps to avoid it including implementation of measures to supervise and monitor employees and agents.
2. An obligation to implement supervisory and monitoring controls, inter alia of staff. In some cases, specific procedures are detailed. Obviously, if adopting such an approach, care should be taken to ensure that these specific measures are not interpreted as exhaustive, failing which the bank could find itself the victim of its own explicit drafting, especially in an environment of strict interpretation of terms.

[1104] Keith Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245 at 257.

Having regard to the clauses cited by Perrett,[1105] Canadian banks have, on the whole, continued to shy away from express exclusions for bank negligence. Their T&C make it plain that they do not wish to be liable for losses attributable to forged or unauthorised signatures made by employees or agents, past or present, that could have been detected by the implementation of proper procedures and checks and balances; nor losses contributed to or facilitated by the customer's own lack of diligence in relation to his account, even if the bank was also negligent.

[1105] *Ibid,* at 257–263.

Chapter 7: The UCTA and the Verification and Conclusive Evidence Clause

The validity of a verification and conclusive evidence clause was recognised in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association*[1106] by the Singapore High Court. The customer signed the T&C of the bank on opening the account. It included a verification and conclusive evidence clause. The clause was challenged after 15 forged cheques were debited to the account. It was held that the clause imposed an obligation on the customer to verify statements within the stipulated period, failing which they were conclusively correct. Although the court considered the issue to be governed by the Bills of Exchange Act[1107] to the exclusion of the Unfair Contract Terms Act (UCTA),[1108] it nevertheless expressed the view that the clause was reasonable within the terms of the UCTA. Central to the court's reasoning was the fact that the bank returned paid cheques to the customer together with periodic statements, which facilitated verification.

The practice of returning paid cheques to customers is no longer standard, leaving scope after *Consmat* for the argument that a verification clause is unreasonable,[1109] but subsequent decisions in Singapore have upheld the validity of verification and conclusive evidence clauses.[1110] Recent Court of Appeal recognition came in *Pertamina Energy Trading Limited v Credit Suisse*.[1111] The customer, a company, opened a deposit account

[1106] [1992] 2 SLR 828.
[1107] Cap 23.
[1108] Cap 396.
[1109] A point made by Poh Chu Chai *Law of Banker and Customer* (5th ed, Lexis Nexis, 2004), 922.
[1110] See *Elis Tjoa v UOB* [2003] 1 SLR 747; *Stephan Machinery Singapore Pte Ltd v Overseas–Chinese Banking Corporation Ltd* [2000] 2 SLR 191.
[1111] [2006] 4 SLR 273 at 299.

with the bank. A credit facility, secured by a charge over the deposit account, was later granted to the company. The charge was defective and a nullity. One of the authorised signatories to the account had the bank statements sent to his personal address. Thereafter, he fraudulently procured a drawdown of US$8 million under the facility. The bank set off the amount against the deposit account. At common law, the bank had paid without a mandate but the court upheld the verification and conclusive evidence clause. V K Rajah J, confining his decision to verification and conclusive evidence clauses used by commercial entities, said, "conclusive evidence clauses if and when properly and reasonably defined are enforceable".[1112] V K Rajah J refrained from expressing his opinion on the reasonableness of conclusive evidence clauses in the context of individual and non–corporate customers, this being unnecessary on the facts.[1113]

7.1 Application of the UCTA

Before the issue of reasonableness under the UCTA arises, it is necessary to bring the clause within the terms of the Act. UCTA does not apply to all contracts,[1114] nor does it apply to all clauses within a contract. It is targeted at clauses that have any of a number of specified effects, primarily of excluding or limiting liability. The verification and conclusive evidence clause may be caught by different sections of the Act.

S 2(2) requires a clause that excludes or restricts liability for negligence to be reasonable. A verification and conclusive evidence clause does not overtly exclude liability for

[1112] *Ibid*, at 296.
[1113] *Ibid*.
[1114] See for example, the First Schedule to the Act which excludes sections 2–4 from certain types of contract, such as insurance contracts.

negligence. However, the effect of the clause is to exclude the bank's liability for negligence by putting errors, including negligent errors, in bank statements beyond dispute after expiry of the stipulated time period.

An analogous situation arose in *Phillips Products Ltd v Hyland and another*[1115] in the context of a contract for plant hire that included the services of a driver or operator. A clause of the contract made the hirer of machinery responsible for the acts or omissions of the driver, but there was no specific exclusion for negligence by the driver. The plant owner argued that while the clause in question did affect its liability for negligence, it did not exclude or limit liability for negligence per se and therefore did not come within the ambit of the section. Slade LJ in the Court of Appeal (England) rejected the argument. He said: "In applying s 2(2), it is not relevant to consider whether the form of a condition is such that it can aptly be given the label of an 'exclusion' or 'restriction' clause."[1116] "To decide whether a person 'excludes' liability by reference to a contract term, you look at the effect of the term. You look at its substance."[1117] The court also said, but without elaboration, that the term there in question was caught by section 13(1) of the Act.[1118] A later Court of Appeal (England) decision, *Thompson v T Lohan (Plant Hire) Ltd*,[1119] supported (and distinguished) the *Phillips* decision.

[1115] [1987] 1 WLR 659.
[1116] [1987] 1 WLR 659 at 666.
[1117] *Ibid.*
[1118] *Ibid.*
[1119] *Thompson v T Lohan (Plant Hire) Ltd and Another (JW Hurdiss Ltd, third party)* [1987] 1 WLR 649 at 656 where the court found that a clause which passed liability from a wrongdoer to a third party, but which did not affect liability to the victim of the wrongdoing, was not affected by section 2(1) of the UCTA.

Sir Nicholas Browne–Wilkinson VC, in *Tudor Grange Holdings Ltd and Others v Citibank NA and Another*[1120] had to consider the application of the UCTA to settlement agreements. In this context he said: "The Act of 1977 is normally regarded as being aimed at exemption clauses in the strict sense, that is to say, clauses in a contract which aim to cut down prospective liability arising in the course of the performance of the contract in which the exemption clause is contained."[1121] Cons J, in *Tai Hing Cotton Mill* in the Hong Kong Court of Appeal, considered when a clause could be termed an exclusion clause. Although his comments were not made in the context of the UCTA, they are pertinent: "The clause, if effective, will relieve the bank of what would otherwise be its liability and that, to my mind, is conclusive of its nature."[1122] There is no doubt that the effect of a verification and conclusive evidence clause is to exclude, among other things, negligence and therefore section 2(2) of the UCTA applies.

S 3(2)(a) requires a clause that excludes liability for a breach of contract to be reasonable. Once again, a verification and conclusive evidence clause does not expressly exclude liability for breach of contract but in effect it does just this. The breach of contract lies in the bank's payment without a mandate.[1123] Recognition of the application of this section to the clause can be found in *Pertamina Energy Trading Limited v Credit Suisse*.[1124]

S 3(2)(b)(i) requires a clause allowing performance in a manner substantially different from what was reasonably expected, to be reasonable. This will apply if the customer can

[1120] [1992] Ch 53.
[1121] *Ibid,* at 65.
[1122] [1984] 1 Lloyd's Rep 555 at 566.
[1123] This is the basis on which Poh Chu Chai in *Law of Banker and Customer* argues that the UCTA applies to the clause, at 923.
[1124] [2006] 4 SLR 273 at 295.

persuade the court that the verification and conclusive evidence clause entitled the bank to render performance substantially different from what the customer reasonably expected. The argument could run along the lines that the customer expected the bank to act only on an authentic mandate and to be liable to reimburse it in the event of breach but the effect of the verification and conclusive evidence clause is to excuse the bank of the consequences of failing to observe its mandate. In *Paragon Finance plc v Staunton and Nash*,[1125] the Court of Appeal ruled that a discretion to vary interest rates was not "performance" within the meaning of the Act.[1126] It is submitted that the duty to observe the mandate will qualify as "performance" as it is used in the Act.

S 3(2)(b)(ii) applies to contractual provisions that entitle the rendering of no performance at all, and is unlikely to be applicable in the present context.

S 13 is also relevant. The Court of Appeal (England) in *Stewart Gill Ltd v Horatio Myer & Co Ltd*[1127] gave the section a broad interpretation, saying that it extended the scope of the Act by increasing the types of exclusions falling within the ambit of the Act.[1128] A verification and conclusive evidence clause excludes a right or remedy in respect of negligence; this brings it within the terms of section 13(1)(b), alternatively it excludes or

[1125] [2002] 2 All ER 248.
[1126] *Ibid* at 270–271.
[1127] [1992] QB 600.
[1128] *Ibid* at 605. In doing so, it rejected a narrow interpretation that the section only applied to an exclusion which indirectly achieved what was caught by other sections of Part I of the Act. Andrew Phang "Interpretation, Severance and Policy and the Unfair Contract Terms Act" [1992] LMCLQ 467 at 468 points out that the narrow interpretation of the clause "is not without merit" but concludes that the broad interpretation may better serve the overall policy of the Act[1128] which is "at best, neutral and, if at all, tends to render such clauses unenforceable."

restricts the rules of evidence by making the bank statement conclusive, making section 13(1)(c) applicable.

It is worth considering whether a standalone verification clause is caught by any of the provisions of the UCTA. The clause merely requires the customer to examine his periodic statements and to report any errors to the bank. No adverse consequences for failing to do so are stipulated. There is no exclusion of liability for negligence, hence section 2 is apparently not applicable. There is no exclusion of liability for the bank's breach of contract or a claim to be entitled to render substantially different or no performance at all, hence section 3 is apparently not applicable. Section 4 is not applicable as there is no indemnity by the customer to the bank. Nor are there any of the exclusions stipulated in section 13 (rules of evidence, onerous conditions or prejudice on the enforcement of a liability). On the face of it therefore, the UCTA does not apply.

However, where the T&C contain a general exclusion of liability and/or indemnity for breach of contract, the general exclusion of liability will apply because failure to verify the bank statement constitutes a breach of the stand–alone verification clause. The UCTA will apply to that clause; ss 2(2), 3(2)(a), 3(2)(b)(i) are all potentially relevant. The other possible basis for the application of the UCTA to a stand–alone verification clause is on the basis of *Phillips Products v Hyland*,[1129] that the substance of the clause is determinative. This is premised on the enforceability of the clause on its own terms.[1130]

[1129] [1987] 1 WLR 659.
[1130] See the discussion of this issue in chapter 5 above where it is argued that the stand–alone verification clause is inferior without some stipulated sanction.

7.2 Reasonableness

The discussion above shows that UCTA, sections 2(2), 3(2)(a), 3(2)(b)(i) and 13 are all capable of applying to a verification and conclusive evidence clause. Bringing a clause within the terms of the Act is only the first hurdle for the customer resorting to the UCTA for relief. The second stage is the adjudication of the issue of reasonableness. The burden of proof lies with the bank, the entity averring that the term is reasonable;[1131] the bank "has to make a positive case and prove whatever is necessary by way of factual background and other commercial considerations that [it] says suffice to establish the reasonableness of the clause."[1132] In *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd*[1133] the court suggested that the more unreasonable a term appears to be, the greater the burden of proof which has to be discharged. *Kenwell* is authority for the proposition that the ubiquity of verification and conclusive evidence clauses in Singapore does not mean that they are reasonable.[1134]

Poh Chu Chai argues that verification and conclusive evidence clauses are unreasonable.[1135] An impediment to this position lies in the acceptability which these clauses have acquired in Singapore case law, particularly since the decision in *Pertamina Energy Trading v Credit Suisse*.[1136] The Court of Appeal endorsed the view that "in principle conclusive evidence clauses employed in a banker and corporate customer relationship afford a

[1131] Unfair Contract Terms Act, section 11(5).
[1132] Per Hobhouse LJ (dissenting on the issue of incorporation) in *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 278.
[1133] [1999] 1 SLR 214 at 228.
[1134] *Ibid*.
[1135] Poh Chu Chai *Law of Banker and Customer*, 917, 922.
[1136] [2006] 4 SLR 273.

practical and reasonable device for pragmatic management of risk allocation."[1137] This dictum appears to concede however, that the clause has the potential to operate unreasonably. *Phillips Products Ltd v Hyland and another*[1138] stresses that the question is not whether the clause in question is reasonable per se but whether it is reasonable in the particular circumstances in which it arises. Given an apt factual matrix, it is submitted that a credible attack can still be made on verification and conclusive evidence clauses in Singapore despite the in–principle approval which the clause has received. It is important that, despite their legitimate interests in using the conclusive evidence clause, banks should feel constrained by the UCTA not to abuse their dominant contractual position in protecting their interests.

As verification and conclusive evidence clauses are wide enough to protect the bank regardless of how the incorrect entry arose, the argument that they are unreasonable is supported by *Stewart Gill Ltd v Horatio Myer & Co Ltd*, where a clause which could extend to a defence based on fraud was considered "plainly unreasonable".[1139]

S 11(1) of the UCTA requires the term to be 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." Although the Guidelines in the Second Schedule are stated to be applicable to a determination of

[1137] *Ibid,* at 295.
[1138] [1987] 1 WLR 659 at 668.
[1139] [1992] QB 600 at 608.

reasonableness under s6 and s7, they "are usually regarded as being of general application to the question of reasonableness."[1140]

The majority of the Guidelines offered in the Second Schedule to the Act for determining reasonableness seem to favour the customer.

Guideline (a) calls for a consideration of the parties' relative bargaining positions. In general, the customer has no bargaining position vis–à–vis the bank. Hobhouse LJ, in *AEG (UK) Ltd v Logic Resource Ltd*,[1141] considered that this factor militated strongly in favour of the non–proffering party.[1142] He stated that guidelines (a) and (c) are concerned with the reality of consent from the non–proffering party against a contractual background which tolerates objective (as opposed to subjective) consent to give rise to a binding contract.[1143]

Guideline (b) has regard to the availability of a similar contract with other persons without the offending term and whether the customer received inducements to agree to the term. Because verification and conclusive evidence clauses are ubiquitous in bank T&C in Singapore, the customer cannot easily avoid the term by taking his banking business elsewhere. However, in *Elis Tjoa v United Overseas Bank*, the Singapore High Court did not consider that this rendered the clause unreasonable.[1144] The prevalence of fraud and forgery was considered an adequate justification for the clause.[1145]

[1140] *Ibid*. See also *Singer Co (UK) Ltd and Another v Tees and Hartleypool Port Authority* [1988] 2 Lloyd's Rep 164 at 169.
[1141] [1996] CLC 265.
[1142] *Ibid* at 279; see also Hirst LJ at 274.
[1143] *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 279.
[1144] [2003] 1 SLR 747 at 769.
[1145] *Ibid.*

Guideline (c) raises the question of the customer's knowledge of the term. The majority of customers would be unaware of the term and of its implications and banks do not routinely draw customer's attention to the clause when opening the account. As mentioned in the discussion above on Guideline (a), Hobhouse LJ (dissenting on the issue of incorporation) in *AEG (UK) Ltd v Logic Resource Ltd*,[1146] explained that this factor is relevant notwithstanding that the term passes the test for incorporation[1147] because under the UCTA, particularly paragraphs (a) and (c) of the Second Schedule, the reality of consent of the non–proffering party is accorded some weight: "It is necessary in order to assess reasonableness to consider to what extent the party has actually consented to the clause."[1148] Robert Bradgate points out that guideline (c) is not purely subjective; it contains an objective "ought reasonably to have known" element.[1149] He suggests that while it takes an objective view of the profferee's awareness of the term, it is subjective in that it does so from the profferee's point of view and not that of the profferor.[1150]

Guideline (d) requires consideration of the ease of compliance with the term as assessed at the time of contracting. This is the only factor that arguably favours the bank in that compliance with the term, i.e. verification and notification of errors, is in most cases practicable;[1151] the absence of paid cheques with the bank statement (at least in the context of a corporate customer) was dismissed by V K Rajah J in *Pertamina Energy Trading v*

[1146] [1996] CLC 265 at 278.
[1147] *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 279. See also comment by Hirst LJ at 273 –4.
[1148] *Ibid,* at 279.
[1149] Robert Bradgate "Unreasonable Standard Terms" (1997) 60 MLR 582 at 591. See *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] 2 Lloyd's Rep 356 at 361 for an application of the objective element.
[1150] *Ibid,* at 592.
[1151] The position where the bank holds statements for the customer is discussed below in chapter 10.1.

Credit Suisse as swaying the issue of reasonableness.[1152] It may seem that the verification and conclusive evidence clause is more reasonable for business accounts where the customer has staff who manage the accounts and can undertake the verification exercise as part of their duties while for private customers, who do not have the same resources, it may be unreasonable. On the other hand, in most cases a private customer's banking affairs are significantly smaller in volume, compensating for the fact that verification must be undertaken by himself.

Guideline (e) is not significant in the bank–customer context.[1153]

The Guidelines are not the only considerations for evaluating the issue of reasonableness. The court must take into account all the relevant factors of the case before it.[1154] In *The Zinnia*,[1155] Staughton J suggested that terms can be unreasonable, first, for being in such fine print that they can hardly be read and secondly for "convoluted and prolix"[1156] language such that they are difficult to understand.[1157] A verification and conclusive evidence clause relieves the bank of the consequences of breach, including negligent breach, of a duty that is fundamental to the banking relationship, namely, to pay in accordance with the mandate. This alteration to such a basic duty is, it is submitted, a relevant factor in determining whether the express term is reasonable.

[1152] [2006] 4 SLR 273 at 296.
[1153] It relates to the manufacture of goods.
[1154] *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1999] 1 SLR 214 at 228.
[1155] *Stag Line Ltd v Tyne Ship Repair Group Ltd and Others* [1984] 2 Lloyd's Rep 211.
[1156] *Ibid,* at 222.
[1157] *Ibid*.

Lord Griffiths in *Smith and Eric S Bush v Harris and Another and Wyre Forest District Council*[1158] identified further relevant considerations. First, the difficulty of performing the task for which liability is sought to be excluded. The greater the difficulty, the higher the risk of failure, supporting the justification of an exclusion of liability. In the banking context, the task being undertaken is to pay in accordance with the mandate. The bank may argue that a meticulous examination of all mandates is not feasible in modern banking operations and cannot reasonably be expected by customers. Bank practice, already referred to, of not examining mandates below a certain threshold can be viewed as falling on either side of the reasonableness divide, depending on whether the practice is accepted as being commercially necessary to enable banks to deliver the service to larger volumes of customers, quicker and cheaper, or whether one views it as a practice to maximize bank profits. Banks can point to the difficulty posed by sophisticated forgeries even after a meticulous examination. The existence of forgery detection technology is relevant to this argument. The failure of a bank to embrace affordable scientific and technological advances would be damaging to its argument and its reputation.[1159] On the other hand, the exclusion of liability, through a verification and notification clause, for what transpires to be a patent or obvious forgery or fraud, is unacceptable.

Another consideration identified by Lord Griffiths is the "practical consequences of the decision on reasonableness", particularly the ability of the respective parties to bear the loss

[1158] [1990] 1 AC 831 at 858.

[1159] Where banks do embrace new technology to help them in determining the authenticity of a mandate it will be necessary to include in the T&C an exclusion of liability for declining to honour a mandate on the basis of an application of such technology.

and the ability of one party to distribute the loss.[1160] It is accepted that the bank is able to distribute the loss and is better able to bear the loss. While this may be a factor for consideration, it must be treated with caution as discussed in chapter 4.4 above.

Lord Griffiths considered that the reasonableness of the exclusion of liability may be judged differently depending on the size of the amount involved. He held that an exclusion of liability in the context of a valuer's report of a modest house was unreasonable, but expressed the view that it may be reasonable if applied to a much bigger property investment.[1161] In the banking context, this factor may work the other way around. An exclusion of liability for small payments may be acceptable having regard to the volume of transactions banks must process each day, the majority of which will fall into the small category. At the other extreme, it may be reasonable to expect banks to exercise individual caution before making large payments.

There is no exhaustive list of the factors that may affect the reasonableness of an exclusion or limitation. All relevant factors must be taken into account. The determination of reasonableness is a question to be determined by the court,[1162] to be made with regard to the term as a whole at the time of contracting[1163] and without regard to the use which may

[1160] [1990] 1 AC 831 at 858–859.
[1161] [1990] 1 AC 831 at 859.
[1162] Per Stuart–Smith LJ in *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 608.
[1163] *Ibid,* at 608–9. Stuart–Smith LJ bases this view on the wording of the Act and on the inability of the other party to assess reasonableness for himself or to know the extent of the term if the proffering party can rely on only portion of the term.

subsequently be made of the term.[1164] It is no defence therefore to say "we would never apply the term in that way."[1165]

The court in *Stewart Gill Ltd v Horatio Myer & Co Ltd*[1166] rejected the use of the blue pencil test to change an unreasonable clause into a reasonable one. It was inconsistent with the policy and purpose of the Act for the court to sever the offensive parts of a clause, leaving the remainder intact, Stuart–Smith LJ said.[1167] This position is supported by Andrew Phang,[1168] while Lee Beng Tat argues that *Stewart*'s case should be restricted to "contract terms which are not clearly severable",[1169] and that severance should be allowed where "a clause is clearly intended to exclude or limit liability under several distinct and independent circumstances".[1170]

Based on the authority as it stands, banks are best advised to break up exclusions and limitations into smaller constituent parts. Most of the T&C examined have severance clauses aimed at overcoming the knock–on effect of a finding of unlawfulness or unenforceability of any provision.[1171] The severance clause provides that the remainder of the contract will not be affected by one of the clauses being declared a nullity.

[1164] [1992] QB 600 at 607, 608.
[1165] In *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 Hobhouse LJ (dissenting on the issue of incorporation) said that the clause in question must be viewed against the breach of contract, but this is "clearly wrong", flying, as it does, in the face of the words of the statute, namely circumstances pertaining "when the contract was made", per Bradgate "Unreasonable Standard Terms" at 585.
[1166] [1992] QB 600.
[1167] *Ibid,* at 609.
[1168] "Interpretation, Severance and Policy and the Unfair Contract Terms Act" [1992] LMCLQ 467 at 470.
[1169] "Where an Exclusion Clause is Unreasonable Only in Part" Lee Beng Tat [1992] SJLS 557 at 565.
[1170] *Ibid,* at 563.
[1171] UOB 30; OCBC 34; HSBC Part A 24; Std Ch 25. Electronic terms: UOB 13(a); OCBC 4.6; DBS Part A 32, Part B 64; HSBC 16.d; Std Ch 13.1.

7.3 Reasonableness of the Verification and Conclusive Evidence Clause

Banks can point to the changes in the business of banking since 1933, when *Greenwood* recognised a customer's duty to report forgeries, to justify the verification and conclusive evidence clause. Banks are bigger, there are fewer of them, they operate in larger geographical areas than before. The availability of bank accounts to the masses[1172] means that banking has become impersonal. The bank's duty to know his customer's signature was developed in a far smaller, more intimate environment.[1173] Customers are no longer known at their branch by sight, even less are their signatures recognized on sight. This is the reality of modern banking, it is an unavoidable consequence of banking for the masses. Customers, with the strong encouragement of their banks, do not confine their banking business to their branch during banking hours;[1174] they have access to 24–hour banking facilities such as ATM machines and internet banking. Computerisation has facilitated new and quicker ways of doing the business of banking. This has reduced the importance of the branch and led to the centralisation and specialisation of bank activities. There is recognition of this in the judgment of Staughton L in *Libyan Arab Foreign Bank v Bankers Trust Co*:[1175] "In the age of the computer it may not be strictly accurate to speak of the branch where the account is kept."[1176] The bank's mandate, in the sense of the means of

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[1172] The Jack Report (Banking Services: Law and Practice Report by the Review Committee, Feb. 1989), at 9 referred to the "vast increase in the banked population". It put the figure at 30% of the adult population in 1959, and 87% in 1984. It considered this figure had risen possibly to 89% by 1989. The website of the British Bankers Association in 2008 states that banks provide banking services to 95% of the British population: see http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=469&a=7447.

[1173] Per John F Dolan "Impersonating the Drawer: A Comment on Geva's 'Consumer Liability in Unauthorised Electronic Funds Transfers'" (2003) 38 Can Bus LJ 282 at 283: "It was a commercial reality in the 18th century, a time when the number of literates was small and merchant numbers even smaller, that traders knew each other's signature if not each other's face".

[1174] As decided in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110. Although the common law has not changed on this issue, bank T&C have given effect to the change; see e.g., UOB 2.7, 3.8; OCBC 6.4; DBS 3.3; HSBC 5.1.

[1175] [1988] 1 Lloyd's Rep 259.

[1176] *Ibid,* at 270.

verification used by banks,[1177] is no longer confined to signature. The customer's signature now takes more varied forms, such as a username and PIN for internet banking, or production of a card and a PIN for an ATM machine. It is to be expected that customer signatures are not recognized on sight. These views are widely shared.[1178] In the words of Keith Perrett,[1179] "given the realities of modern–day, high–volume, computer– and technology–based cheques–clearing systems, there is little that financial institutions can do to detect and prevent forgeries through the scrutiny of signatures."[1180]

The customer, on the other hand, has an array of practices and procedures to ensure good governance of his bank account. Perrett divides the measures into three:[1181] "corporate controls[1182], document controls[1183] and computerised cheques reconciliation procedures"[1184]. At the heart of the issue lies a question of policy. The arguments in favour of the clause, in principle, are not difficult to make. They are much the same as the argument in favour of a change in the common law duties, made for example by Emil Hayek, who points to the following:[1185] the "depersonification of banking", a product of

[1177] See the analysis of the banking mandate by Ross Cranston *Principles of Banking Law* (2nd ed, Oxford University Press, 2002), 140.
[1178] Emil Hayek **"**Canadian Pacific Hotels Ltd v Bank of Montreal" (1988) 14 Can Bus LJ 361 at 369; M H Ogilvie "Bank Accounts and Obligations" (1985–1986) 11 Can Bus LJ 220 at 226; Keith Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 246.
[1179] "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 246.
[1180] *Ibid,* at 270. See also "Bank Accounts and Obligations" M H Ogilvie (1985–1986) 11 Can Bus LJ 220 at 226.
[1181] "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 246 at 270.
[1182] This includes checking employment references, separation of duties pertaining to payments and reconciliation, and audits.
[1183] Security features which make counterfeiting and alteration of cheques more difficult.
[1184] Enables immediate verification that a cheque presented for payment is in its original state.
[1185] "Canadian Pacific Hotels Ltd v Bank of Montreal" (1988) 14 Can Bus LJ 361 at 369.

greater customer numbers, large corporate customers, volume of transactions and electronic processing.

The verification and conclusive evidence clause aims to accomplish greater information sharing between bank and customer than the common law requires. It should not be seen as detracting from the bank's duties but rather as increasing the customer's duties so as to complement the bank's duty, as a result of which far fewer fraudulent transactions will succeed. The justification for imposing this additional duty on the customer lies in the climate in which we live. Fraud, forgery and dishonesty perpetrated through the banking system are a worldwide problem costing billions of dollars each year.[1186] The greater good of society requires that it be combated. Banks cannot, and there is no reason why they should, engage in that battle on their own. To be effective, a multi–pronged attack is needed and customer diligence is a very effective way in which to limit these losses. There are some forgeries and alterations that even with the exercise of due diligence by the bank, cannot easily and confidently be identified. The bank faced with a skilled forgery has no basis on which to refuse payment.[1187] They are under a duty to comply promptly[1188] with a valid payment instruction[1189] and they face liability for damages if they fail to do so.[1190]

[1186] Tony Wojciechowski and Geoff Newiss, using data obtained from the British Home Office, put the value in the United Kingdom in 2001 of payment fraud at 75 million pounds, and plastic card fraud at 114 million pounds. Forged cheques made up a significant component of the payment fraud statistic. See Claire Flood–Page and Joanna Taylor (eds) "Crime in England and Wales 2001/2002: Supplementary Volume" (RDS Publication, 2003), at 78–9 at http://www.homeoffice.gov.uk/rds/pdfs2/hosb103.pdf.

[1187] Electronic mandates are an example.

[1188] See Lord Shaw of Dunfermline in *London Joint Stock Bank Limited v Macmillan and Arthur* [1918] AC 777 at 824; *Bank of Baroda v Punjab National Bank* [1944] AC 176 at 184, per Lord Wright: "Other things being equal, in particular if the customer has sufficient funds or credit available with the bank, the bank is bound either to pay the cheque or dishonour it at once."

[1189] *Westminster Bank v* Hilton (1926–1927) 43 TLR 124 at 129 (HL), per Lord Shaw: "When a banker is in possession of sufficient funds to meet such a cheque from a customer, the duty of the bank is to honour that cheque by payment, and failure in this duty may involve the bank in serious liability to its customer." *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 119, per Bankes LJ: "The banker contracts to

On the other hand, a customer who verifies his bank statements should have no difficulty detecting an unauthorised payment. It is easier for the customer to detect forgeries or alterations than it is for the bank because the transaction shows up in the periodic statement irrespective of the level of skill with which the fraud or forgery was accomplished. Fraud through the banking system should be seen as a collective problem for which a collective response is required. This underscores the benefits of a principle of mutuality. The verification and conclusive evidence clause promotes bank and customer cooperation in the fight against fraud. The problem is much bigger than the issue of apportionment of liability between bank and customer; it is about reducing the occurence of dishonesty for the greater prosperity of society.

"Law and lawyers operate not in a vacuum but within a commercial, social and economic context."[1191] The law exists to facilitate commerce, and must, so far as possible, accommodate, rather than inhibit, the commercial dictates of the industry concerned. The fast processing of large numbers of cheques and the availability of automated banking facilities are the ways in which banks are able to meet the needs of their customers. Customers cannot on the one hand demand the benefits of 24–hour banking facilities, rapid clearance of cheques and relatively low charges, while on the other hand insist on a meticulous, manual examination of all instruments and bespoke execution of transactions. Banks can deliver the greater volume and speed which is expected but in return they require some vigilance from the customer in relation to his own affairs.

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act as [the customer's] mandatory and is bound to honour his cheques without any delay to the extent of the balance standing to his credit."

[1190] See e.g., *Marzettie v William* (1830) 109 ER 842; *Rolin v Steward* (1854) 139 ER 245.

[1191] "Understanding Banking Law" Ross Cranston 1988 LMCLQ 360 at 377.

Geva comments that unauthorised withdrawals arise mostly from the dishonesty of an employee of the customer.[1192] The Singapore High Court made the same point in *Elis Tjoa v United Overseas Bank.*[1193] The cases discussed in this study bear this out. If that be so, the argument in favour of the verification and conclusive evidence clause is even stronger. The bank is a hostage to fortune: it has no say in the selection of the customer's employees, or in their supervision or in the establishment of checks and balances within the business. Yet, in the absence of a verification and notification duty, it is the bank which stands to lose when dishonest transactions are made by employees under the nose of the customer – a *Tai Hing Cotton Mill* scenario.

The threat posed by careless customers also spills over to the collecting bank, as illustrated by the Canadian case of *Westboro Flooring & Décor Inc v Bank of Nova Scotia* ,[1194] described by Rafferty & Hamilton as "a clearer and more egregious illustration of a collecting bank's bearing the risk of a drawer's negligence".[1195] The collecting bank which has unwittingly opened a bank account for an employee with fraudulent intentions has no contractual means to protect itself against the careless employer, but it would benefit from a broader duty of care and a verification and notification clause.

[1192] Benjamin Geva "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 287.

[1193] [2003] 1 SLR 747 at 769, "the wrongful act is often facilitated by the misplaced trust or negligence of the customer himself."

[1194] (2004) 241 DLR (4th) 257.

[1195] Nicholas Rafferty & Jonette Watson Hamilton "Is the Collecting Bank now the Insurer of a Cheque's Drawer against Losses Caused by the Fraud of the Drawer's Own Employee?" (2005) 20 BFLR 427 at 428.

In *Macmillan*, Lord Shaw of Dunfermline expressed the view that the bank's lack of "control over or participation in"[1196] the period before presentation of a cheque justified the imposition of liability on the customer where he had facilitated forgery through negligent drawing of the cheque. The customer's negligence in employing and/or supervising employees is equally beyond the control or participation of the bank and this surely entitles them to introduce measures to safeguard themselves against losses which are facilitated by the customer's acts or practices. Every business, including banks, runs the risk of losses from internal dishonesty. Why should banks run the risk of such losses for their customers as well as for themselves? As recognized by the Hong Kong Court of Appeal in *Tai Hing Cotton Mill*[1197], the present state of the law forces banks to act as insurers for their customers' misfortunes and follies. Dishonest employees can, and do, occasion loss to their employers in other ways unconnected with the bank account; theft of cash, trading stock or equipment and supplies are examples. There is no question of bank liability for such losses, but where the dishonesty is perpetrated through the bank account, customers can lay the losses so occasioned at the feet of banks. One might counter that banks can insure against these losses. Insurance, however, only spreads the risk; it does not combat the problem, and the cost of the insurance is inevitably passed on to customers. It is not a satisfactory solution.

The arguments against the verification and conclusive evidence clause reflects an adherence to banking practices and circumstances which no longer pertain. Ellinger expresses the view that the verification and conclusive evidence clause does not impose on

[1196] *London Joint Stock Bank Limited v Macmillan and Arthur* [1918] AC 777 at 825.
[1197] [1984] 1 Lloyd's Rep 555 at 560, 569, 576. See also M H Ogilvie "Bank Accounts and Obligations" (1985–1986) 11 Can Bus LJ 220 at 225.

the customer an unreasonable burden.[1198] Roy Goode has countered, saying that banks make fulfilment of the duty "as difficult as possible" by not identifying the payee of debits in the statement and by not returning cancelled cheques.[1199] The point is relevant, but how arduous a task is it to cross–check a bank statement with counterfoils and other records for verification? The Singapore Court of Appeal, in *Pertamina Energy Trading Limited v Credit Suisse*,[1200] took the view that, for commercial customers, the absence of cancelled cheques did not have an adverse effect on the reasonableness of the clause.

It is submitted that the position of the personal customer is the same. In the case of the average individual, he is unlikely to have such a high level of activity on his account that he is not able to identify quite quickly (or if necessary with some cross–referencing) the legitimacy of debit entries. Commercial customers, who are likely to have a higher volume of activity on their account, employ people to perform this task. The nature of the task, even without cancelled cheques and payee identification, is commensurate with what the vast majority of customers in their different predicaments can manage. V K Rajah J in *Pertamina* makes the point that some accounts where the verification and conclusive evidence clause is used, do not involve the use of cheques at all.[1201] The more often the customer examines his statements, the smaller the burden of verifying their accuracy; there will be fewer transactions to verify and they will probably be fresh in his memory. This is possible through electronic banking facilities which offer around the clock access to account information.

[1198] E P Ellinger in "Reflections on Recent Developments Concerning the Relationship of Banker and Customer" (1988) 14 Can Bus LJ 129 at 142.
[1199] R M Goode "Comments on Peter Ellinger's Paper" (1988) 14 Can Bus LJ 179 at 181.
[1200] [2006] 4 SLR 273 at 296.
[1201] *Ibid,* at 296–297.

It is true that where the verification and conclusive evidence clause is invoked it departs from the bank's fundamental duty to pay only on a valid mandate. It is also true that, as commonly drafted, the clause can operate harshly in certain circumstances, such as where the defect in the mandate was patent. Indiscriminate application of the clause could shake the confidence of the public in banks as the custodians of their money. For this reason it is proper for the clause to be neutralized in appropriate circumstances and for the courts to be robust in their application of the UCTA to this end. The statement in *Elis Tjoa v United Overseas Bank* that the verification and conclusive evidence clause was "reasonable irrespective of whether UOB was negligent or not"[1202] is, with respect, not sustainable as a general proposition. An exclusion purporting to cover a patent forgery is surely unreasonable and contrary to public policy. The court did qualify its statement, saying that it may be unreasonable or against public policy to allow reliance on a verification and conclusive evidence clause where a debit is made without any instruction at all, as opposed to a forged or fraudulent one. It should be remembered that the reasonableness of the verification and conclusive evidence clause is to be judged at the time of contracting and therefore on the potential it has to apply to a wide variety of situations. All verification and conclusive evidence clauses in Singapore, as drafted, are wide enough to protect the bank where no payment instruction of any kind was given to them. On this basis, they could all be thrown out as unreasonable.

While the verification and conclusive evidence clause may be reasonable in many contexts, its potential to apply unreasonably in other contexts is relevant under the Act. Giving it a

[1202] *Elis Tjoa v United Overseas Bank* [2003] 1 SLR 747 at 769.

blanket stamp of approval, without regard to its potential to apply unreasonably, is contrary to the terms of the UCTA. The Act should be applied with confidence by the courts to throw out broadly drafted clauses that can potentially be used abusively by the banks. Banks should feel some pressure to define the exclusion more specifically. In terms of the UCTA, it is not sufficient for banks to say that they would never use the clause in an abusive way. The reasonableness of the clause under the Act must be judged according to its capacity, not its intended or subsequent application. Suggestions for the reform of the clause are made below.[1203]

7.4 Reasonableness of a Standalone Verification Clause

A verification recommendation or request is clearly reasonable, albeit legally ineffective. A verification duty without any penalty is unlikely to come within the purview of the UCTA, given that it does not have any of the effects stipulated mainly in sections 2 and 3 of the UCTA as discussed above.[1204] A standalone verification duty which is enforceable with recourse to a general exclusion of bank liability for breach of contract, does come within the purview of the UCTA and the arguments for or against its reasonableness are akin to those discussed above for the verification and conclusive evidence clause, subject to one comment. For the customer who chooses to read the T&C or whose attention is drawn to the verification and conclusive evidence clause, the penalty for non–compliance is clearly stipulated. The customer who reads a standalone verification clause, on the other hand, which is enforceable with reference to a general exclusion of liability for breach of contract stipulated elsewhere in the T&C, will most likely not be aware of the consequences of non–

[1203] In chapter 8.
[1204] As discussed in chapter 7.1 above.

compliance. This detracts from the reasonableness of the term, particularly under Guideline (c) of the Second Schedule of the UCTA, which takes into account the customer's knowledge of the term.

7.5 Other Aspects of Reasonableness

Leaving aside the reasonableness of a verification and conclusive evidence clause in principle, another aspect which can affect the reasonableness of the clause is the time period in which the customer must act before the statement becomes conclusive of its contents. Three of the five Singapore banks covered in this study require notification within 14 days of the date of the statement;[1205] the DBS gives 14 days from receipt of the statement;[1206] HSBC, in striking contrast, gives 90 days from the date of the statement.[1207] Poh Chu Chai uses the example of the customer who is away on holiday to support his argument that these clauses are unreasonable because of the short time period given by banks.[1208]

In *Pertamina Energy Trading Limited v Credit Suisse*,[1209] the Singapore Court of Appeal considered that a period of 14 days was reasonable and did not impose too harsh a burden on the customer.[1210] A factor for the court was that the customer was a commercial entity. The court presumably had in mind that the customer employed staff to whom the task could be delegated. It is submitted that for a commercial customer a period of 14 days, while not generous, may not be unduly harsh. For individuals, however, it is submitted that a period

[1205] UOB 13.4; OCBC 9; Std Ch 5.1.1.
[1206] DBS 11.1(c).
[1207] HSBC Part A 3.1.
[1208] Poh Chu Chai *Law of Banker and Customer*, 918.
[1209] [2006] 4 SLR 273 at 292.
[1210] *Ibid,* at 299.

of 14 days is too short.[1211] As argued by Poh Chu Chai, it is not unusual for people to be away from home or the office for two weeks, or to be indisposed for any variety of reasons for that period of time. Of course, the shorter the time period, the more effective the clause is in protecting banks and, assuming diligent customers, the more efficient such clauses would be in fighting fraud and making recoveries. But efficiency is not the only consideration. In *Elis Tjoa v United Overseas Bank*,[1212] the court suggested that the bank may consider extending the verification and notification period to 21 days from 14 days to give customers a reasonable opportunity to fulfil the duty.[1213] In Canada, a period of thirty days appears to be standard.[1214]

Customers, particularly personal customers, have more than bank statements on their minds. They should be given a reasonable length of time in which to verify the statements. Ignoring prolonged absences from home or work, for which alternative arrangements should be made between bank and customer, it is submitted that a period of 30 days is reasonable. For active bank accounts, statements are commonly sent out on a monthly basis. It is reasonable for a customer to have the whole of the period before his next statement arrives to reconcile and verify it. It is submitted, on the other hand, that it is unwarranted to compromise the efficiency of the clause by going beyond 45 days. By that time the customer is in possession of two statements which he must verify. Human nature

[1211] While different legal treatment of personal and commercial customers is not supported (see the discussion below in chapter 12), it is submitted that different time limits for examination of bank statements is not different legal treatment but a difference in degree, according to what is appropriate, having regard to some of the practical distinctions between a personal and a business customer.
[1212] [2003] 1 SLR 747.
[1213] *Ibid,* at 768.
[1214] See examples of specific clauses cited by Keith Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245 at 246; the Royal Bank provision for 45 days is an exception.

being what it is, it is thought that the greater the accumulation of unverified statements, the smaller the likelihood that they will be verified in the short term or at all.

From an evidential point of view, it is undesirable to have time running from a point which cannot be ascertained objectively, such as the date of posting or the date of receipt of the bank statement. On the other hand, particularly where the time allowed for verification is short, it is unsatisfactory to have time running from a day when the customer is not in possession of the statement, for example, the statement date. There may be a delay, for whatever reason, in the statement reaching the customer. The UOB, OCBC and Standard Chartered clauses effectively give the customer less than 14 days in which to verify the statement because time runs from the date of the statement which is before the customer is in receipt of it. This supports the argument in the paragraph above that a period of 14 days is too short. Another provision in the T&C attempts to address the problem posed by non–receipt of statements.[1215]

7.6 Drafting, Interpretation and Contracting Aspects

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others[1216] conceded the legitimacy of bank recourse to the verification and conclusive evidence clause in principle, but its hostile attitude to the clause is displayed in the strict interpretation given to the various permutations of the clause used there. The customer's internal controls in *Tai Hing* were considered inadequate, and undoubtedly facilitated the loss that ensued. Yet, the Privy Council found that the express clauses did not constitute "conclusive evidence clauses":

[1215] In chapter 10.1 below.
[1216] [1986] 1 AC 80.

they did not "bring home to the customer" the importance of inspecting statements or the conclusive effect if it failed to do so.[1217] Hunter J in the Hong Kong Court of Appeal[1218] took the same view. The shortcoming of the clauses lay in their drafting. The same weakness was identified in Canada by Laskin J (dissenting) in *Arrow Transfer Co Ltd v Royal Bank of Canada*.[1219] Laskin J found it appropriate to construe the clause contra proferentem the bank; the failure to state explicitly that the protection afforded was for forgery of the drawer's signature, which would normally lie at the risk of the bank, was fatal.[1220]

The Privy Council in *Tai Hing Cotton Mill* and Laskin J (dissenting) in *Arrow Transfer* revealed their hostility to the verification clauses by the restrictive interpretations they gave to them. On the other hand, Cons J in the Hong Kong Court of Appeal, while agreeing that the verification agreements, as exclusion clauses, should be clear, unambiguous and construed contra proferentem, he considered such construction should be as an ordinary person "looking for no subtle distinctions, seeking no refined shades of meaning".[1221] On this basis he considered the clauses to be effective against the customer. The position of the Singapore Court of Appeal in *Pertamina Energy Trading Limited v Credit Suisse*[1222] aligns with the view of Cons J. V K Rajah J said "if a clause is worded widely enough to the effect that 'all' discrepancies … will be deemed conclusive unless reported within a reasonable time, it is not open to a customer to argue that a fraud or forgery does not fall

[1217] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 109–110. Similar words were used by Laskin J (dissenting) in *Arrow Transfer Co Ltd v Royal Bank of Canada* (1972) 27 DLR (3d) 81 at 98.
[1218] [1984] 1 Lloyd's Rep 555 at 581.
[1219] (1972) 27 DLR (3d) 81.
[1220] *Ibid,* at 98.
[1221] [1984] 1 Lloyd's Rep 555 at 567.
[1222] [2006] 4 SLR 273.

within the scope of such a clause."[1223] While a less restrictive interpretation is indicated by this decision, careful attention to the drafting of the clause is important. At the same time, it is clear from *Pertamina* that the Singapore courts are less likely to apply restrictive interpretation, as has been the case in Canada.[1224]

The Privy Council in *Tai Hing* did not examine the clauses in detail and highlight their shortcomings. Reference to the clauses, as they are reproduced in the Privy Council judgment,[1225] reveals the following weaknesses: The customer's obligation to verify the statement is, in one case, not expressly stipulated at all;[1226] in another, the verification is "desired," suggesting best practice but not compulsory action;[1227] even "will be confirmed" does not adequately set out the obligation to verify and notify.[1228] The language used, stating that the bank statement "may be deemed to be correct"[1229] or "the bank may take the said statement as approved" indicates that such an outcome is discretionary. The words "deemed to be correct" and "shall be deemed to have been confirmed"[1230] and

[1223] *Ibid*., at 295.
[1224] The Canadian cases are discussed in chapter 4.5.1 above.
[1225] [1986] 1 AC 80 at 109.
[1226] In the case of Chekiang First Bank Ltd, the clause said: "A monthly statement for each account will be sent by the bank to the depositor by post or messenger and the balance shown therein may be deemed to be correct by the bank if the depositor does not notify the bank in writing of any error therein within 10 days after the sending of such statement …"
[1227] In the case of Liu Chong Hing Bank Ltd, the clause said: "A statement of the customer's account will be rendered once a month. Customers are desired: (1) to examine all entries in the statement of account and to report at once to the bank any error found therein, (2) to return the confirmation slip duly signed. In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed".
[1228] In the case of Bank of Tokyo Ltd: "The bank's statement of my/our current account will be confirmed by me/us without delay. In case of absence of such confirmation within a fortnight, the bank may take the said statement as approved by me/us."
[1229] See the clause used by Chekiang First Bank Ltd, above.
[1230] See the clause used by Liu Chong Hing Bank Ltd, above.

"approved"[1231] do not convey the irrebuttable status which the banks wished the statements to acquire.

In the opinion of the Privy Council, in all three clauses, "the burden of the objection and of the sanction imposed" was not "brought home to the customer." [1232] Geva observes that the clause used by Liu Chong Hing Bank Ltd[1233] would have passed the test laid down by the majority in *Arrow Transfer* but not the dissenting judgment of Laskin J.[1234] The court in *Tai Hing* noted that paid cheques were not returned to the customer with the bank statements in any of the cases but it did not indicate that this was significant to the outcome of the matter. In the case of Chekiang First Bank Ltd, the customer had, for about twenty years, returned confirmation slips to the bank, signed by two authorized signatories.[1235] Cons J in the intermediate court of appeal found that the wording of the confirmation slips[1236] constituted a representation that the balance stated in the statement was correct and in the learned Judge's view, the customer could not "now, go behind them".[1237] The Privy Council did not address this view.

[1231] See the clause used by Bank of Tokyo Ltd, above.
[1232] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 110.
[1233] Liu Chong Hing Bank Ltd's terms stated: "A statement of the customer's account will be rendered once a month. Customers are desired: (1) to examine all entries in the statement of account and to report at once to the bank any error found therein, (2) to return the confirmation slip duly signed In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed"
[1234] Geva "Allocation of Forged Cheque Losses – Comparitive Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 272.
[1235] [1986] 1 AC 80 at 109.
[1236] See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's rep 555 at 567: "I/We acknowledge receipt of your monthly statement of my/our current account with you showing the following balance which has been examined and found correct …".
[1237] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's rep 555 at 567–8.

In *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association*[1238] the Singapore High Court considered the verification clause[1239] to be wider than the three clauses in *Tai Hing Cotton Mill* and therefore not vulnerable to the same adverse interpretation.[1240] There are, undeniably, significant differences between the clause in *Consmat* and the clauses used by the Hong Kong banks in *Tai Hing Cotton Mill*: the Bank of America clause is drafted in mandatory terms, the customer's obligation to verify and notify is spelt out and the conclusive consequence is strongly and clearly worded. There is no doubt that, from an interpretation viewpoint, the *Consmat* clause is superior to the *Tai Hing Cotton Mill* clauses.

Turning now to the clauses used by the five local banks, whose terms are analysed here:[1241]

[1238] [1992] 2 SLR 828 at 835.

[1239] "I/We hereby undertake to verify the correctness of each statement of account and accompanying cheques or vouchers received from you and to inform you within seven (7) days from the receipt thereof of any discrepancies, omissions or debits wrongly made to or inaccuracies or incorrect entries in the account as so stated and that at the end of the said period of seven (7) days the account as kept by you shall be conclusive evidence without any further proof that … the account is and entries therein are correct, and except as provided above you shall be free from all claims in respect of the account."

[1240] A view with which Poh Chu Chai *Banker and Customer* disagrees, at 922.

[1241] **UOB's clause 13.3 states:**
"The customer is under a duty:– (a) to check all entries in the statement of account … (b) to report promptly to the bank any irregularities … errors …"
Clause 13.4 states: "If the Bank does not receive from the customer a written objection within fourteen (14) days … (a) the Customer shall be deemed conclusively:– (i) to have accepted, and shall be bound by … the transaction(s)/entries and the balance set out in the statement … (b) the statement … shall …be deemed conclusive evidence … (c) the Customer shall have no claim against the Bank howsoever arising…"
OCBC's clause 9 states:
"The Customer agrees to verify the correctness of all details….and to notify the Bank within 14 days… . Upon expiry … the Statement of Account shall be conclusive against the customer…"
DBS's clause 11.1(c) states:
"You shall: examine all … entries in the Statement of Account … and report any … debits or credits wrongly made or made without authority. You must object to such debit or credit entries … within 14 days … . If you do not do so: (i) such entries made in the statement of account … shall be deemed correct and conclusive without further proof … (ii) you will be bound by the Statement of Account …; and (iii) we will be free from all claims …"
HSBC's clause 3.1 states:
"The Accountholder agrees to examine each statement of account and notify the bank …. of … errors … from whatever cause (including … forgery, fraud, lack of authority or negligence of any person), failing

They are all in mandatory terms, they specify clearly the action required of the customer and the consequences of failure are explicit. The clauses that are broken down into sub–paragraphs are preferable in that this aides clarity and could avoid problems in the event of any striking out in terms of the UCTA. The clauses which reinforce the conclusive effect by indicating that the statement will be binding and no claims will be competent against the bank are better at bringing home the effect to the customer. HSBC's is the only clause which explicitly covers fraud, forgery and negligence. From a restrictive interpretation perspective, it is superior to the others. On the other hand, this may make it more vulnerable to a finding of unreasonableness under the UCTA.[1242] All the clauses are capable of applying to a debit made in the absence of any instruction at all – which was highlighted by the court in *Elis Tjoa v United Overseas Bank*[1243] as potentially unreasonable.

Along with *Burnett v Westminster Bank Ltd*,[1244] *Canadian Pacific Hotels v Bank of Montreal*[1245] highlights the importance of incorporating the verification and conclusive evidence clause in the T&C as opposed to in the statement.[1246] A direction to verify, a fortiori a request to do so, in the statement itself, is inadequate to ensure the contractual

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which such statement of account shall be conclusive evidence as to the balance(s) shown…"
Standard Chartered's clause 5.1.1 states:
"Customer must verify the correctness of each entry in each such statement … and notify the bank promptly, …. of any irregularities, ….errors… . Omission to do so indicates approval of the contents thereof, and that the Account as kept by the Bank is conclusive evidence … and the Bank shall be free from all claims in respect thereof."

[1242] In *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 608 a clause which could extend to a defence based on fraud was considered "plainly unreasonable".

[1243] [2003] 1 SLR 747 at 769.

[1244] [1966] 1 QB 742. See further discussion in chapter 10.18 below.

[1245] (1988) 40 DLR (4th) 385.

[1246] A point also made eg by Ellinger in (1988) 14 Can Bus LJ 129 at 143.

obligation that the bank seeks to achieve. Bradley Crawford[1247] argues that *Burnett* is authority for the proposition that reasonable efforts to bring a clause to the customer's attention or acknowledgement from a customer that he was aware of the condition (which is unlikely to be forthcoming once litigation is underway) coupled with the continued use of the account, amounts to acquiescence in the new terms. Whatever the merits of that argument, banks must be advised to be conservative and incorporate the clause in their T&C.

Should banks, at the time of opening a bank account, draw customers' attention to the verification and conclusive evidence clause? The suggestion from the Court of Appeal (England) that there may be a duty to bring certain terms, having regard to their nature and effect, to the attention of a contracting party has been mentioned.[1248] This development has not been endorsed in Singapore.[1249] Drawing a customer's attention to the term may be unnecessary in order to incorporate it into the contract, but it can only benefit the bank to do so. While the law operates on the basis that the customer is familiar with the T&C, we know that he is not. Drawing the customer's attention to the term informs him of something he may not otherwise know. There is a growing emphasis on the need for banks to assume an educational responsibility toward their customers.[1250] Telling the customer what is expected of him under the contract weakens arguments that the clause is unreasonable.

[1247] "Comments on Peter Ellinger's Paper" (1988) 14 Can Bus LJ 171 at 173.

[1248] In chapter 2.1 above. See *Ocean Chemical v Exnor* [2000] 1 Lloyd's Rep 446 at 454.

[1249] *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828 at 838.

[1250] The Jack Report (Banking Services: Law and Practice Report by the Review Committee, February 1989), for example, at 45 recommended that banks be required to give customers "a fair and balanced view" of their terms "and of the rights and obligations that exist on each side." The Singapore Banking Code reflects similar sentiments: see Cl 3.b., "transparency" relating to products and services; Cl 5, "Information Your Bank Will Provide"; Cl 8, on information relating to terms and conditions.

Having drawn the customer's attention to the clause, it is as well for it to be marked in the customer's copy and initialed in the bank's copy, or both, to show that it was brought to his attention.

From a practical perspective, if bank staff are trained to spend 5 minutes highlighting the clause to new customers, explaining the importance of verifying the statement, and the consequences of not doing so, the percentage of customers who regularly undertake the verification will surely increase. This should be the primary objective of a verification clause. It should not be aimed primarily at relieving banks of their responsibilities or at protecting them in an environment of rampant fraud but of harnessing customer–power to combat it. The education process need not stop at the account–opening stage. Singapore banks print messages to customers in bank statements on matters ranging from interest rates to spending incentives. A prominent "WHEN LAST DID YOU CHECK YOUR BANK STATEMENT?" in big red letters on the envelope containing the statement, with a reminder inside of the obligation and the adverse consequences of failure, would go a long way in keeping the issue prominent in the customer's consciousness.

Chapter 8: Reform of the Verification and Conclusive Evidence Clause

The verification and conclusive evidence clause has much to recommend it. It embodies the principle of mutuality, it harnesses the superior post–payment fraud detection position of the customer, it gives the customer an incentive to be diligent about his banking affairs and above all, if implemented by customers, it is beneficial to both parties to the contract and society in general by reducing loss through dishonesty. It is also a contractual reality in Singapore. The main areas of concern about the clause are the causal connection between customer breach and the loss, customer breach without culpa, and bank negligence.

The first issue can be remedied by excluding application of the clause to the first unauthorised transaction, which would not be prevented through punctual verification and notification. There is a counter–argument, however, that the clause should apply even to the first unauthorised debit because failure to verify denies the bank the opportunity of taking timeous action against the wrongdoer. The discussion on estoppel revealed that the loss of a right of action or removal of assets from the jurisdiction can constitute detriment.[1251] It is submitted, on balance, that the customer can reasonably be penalised for his neglect to verify and notify and there is no need for special treatment even in the case of a single or first unauthorised transaction.

[1251] See chapter 3.8.2 above.

The second concern, of failure to verify and notify without fault, can be dealt with by making the verification duty a duty of care.[1252] As discussed above,[1253] the potential for spurious excuses from the customer must be addressed. Customers should not be able to evade their duty unless it is attributable to events beyond their control, such as serious illness or accident. Customers absent from home nowadays have the option of verifying accounts electronically in most parts of the world and therefore need not be excused from this duty. The customer should bear the risk if his choice of destination precludes this facility. Bearing in mind that a verification period of at least 30 days is advocated, customers will not be affected by ordinary holiday absences. Special arrangements can always be made with the bank if warranted. Failure to detect an erroneous debit which is detectable from the statement should not be excused.

The problem of bank negligence is more difficult. The arguments and counter–arguments have been aired.[1254] There is a strong case for the operation of the verification and conclusive evidence clause even in the event of bank negligence on the grounds that the clause is a valuable aide to banks in detecting their own errors. Still, it is inequitable for the customer alone to be penalised in this situation. This, it is submitted, is an appropriate situation in which to apportion loss under the Contributory Negligence and Personal Injuries Act.[1255] This can only be achieved by a provision in the T&C or by legislation, as the Act would not otherwise be applicable.[1256]

[1252] This is supported by Geva, see "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 283, 287–8. Geva dismisses, in this context, the drawback of litigation to resolve the matter.
[1253] In chapter 4.5.2 above.
[1254] In chapter 4.5.1 above.
[1255] Cap 54.
[1256] See discussion in chapter 5.4.

At its simplest, it could be provided that the terms of the Act[1257] shall apply in the event of loss arising from bank negligence and customer breach of the verification clause.[1258] The Act does not, however, provide a formula for the swift resolution of the matter. Section 3, which sets out the principle of the Act, clearly envisages the involvement of a court of law in making an apportionment. Edward Rubin makes a valid, damning criticism of the structure of the legal system particularly as it applies in the bank–customer context: the bank is able to debit a customer's account, leaving the customer to sue the bank if he disagrees with the debit; because most customers cannot afford the costs of litigation, they are left helpless in the face of a debit they do not agree with; and where they do resort to litigation, the cost of doing so is disproportionate to the benefit; this constitutes an economic inefficiency in the fault–based system.[1259] Geva has expressed a similar view.[1260]

Any apportionment of liability is inherently unscientific because it involves the attribution of a numerical value to human conduct that is judged to be a departure from the norm. Bearing this in mind, and given the expense and uncertainty of litigation to obtain a court–ordered apportionment of loss, it is submitted that the T&C or statute should apportion the loss in accordance with a pre–determined ratio.[1261] There are many possible permutations; the benefits of simplicity must be balanced against the greater accuracy that can be achieved through complexity. It is submitted that a just outcome can be achieved by

[1257] Contributory Negligence and Personal Injuries Act, Cap 54.
[1258] The suitability of these principles was also suggested by the UNCITRAL Legal Guide on Electronic Funds Transfers (United Nations, New York, 1987), 53 para 26.
[1259] E Rubin "Efficiency, Equity, and the Proposed Revision of Articles 3 and 4" (1991) 42 Ala LR 551 at 569–570, 576 - 577.
[1260] See e.g., Geva "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" (1998) 114 LQR 250 at 288.
[1261] The UNCITRAL Legal Guide on Electronic Funds Transfers (United Nations, New York, 1987), 53 para 26, acknowledges that recourse to the courts to determine an apportionment is not usually warranted having regard to the amount in dispute.

distinguishing between fault by the customer in the form only of failing to verify/notify and the more serious situation of the customer facilitating the loss by a breach of a duty of care and failing to verify/notify. Singapore T&C reflect the view that where the customer has contributed to the loss, banks consider customers should be liable for it, irrespective of the bank's contribution.[1262] A more balanced outcome is called for.

The following is a suggested formula for apportionment of loss where the bank has been negligent and the customer is in breach of his duties:

1. Where the customer is in breach only of the verification duty, the customer will be liable for 20% of the direct loss. The allocation of the majority of the loss to the bank reflects the bank's greater culpability for the loss, but at the same time recognizes the customer's failure in combating the loss.
2. Where the customer has facilitated the loss by a breach of its duty of care in addition to failing to verify bank statements, the customer will be liable for 50% of the direct loss.

The exact ratio of apportionment can be debated and adjusted if necessary. It is less appropriate for large losses to be dealt with on the basis of a pre–determined formula. Accumulated losses exceeding, it is suggested, $50,000 should be resolved by recourse to the courts if the parties are unable to agree on an apportionment. The court would be entitled to apportion the loss in accordance with the guiding principle in the Act, namely to reach a "just and equitable" outcome.[1263]

[1262] Specific examples of such provisions will be discussed in chapter 10 below.
[1263] Contributory Negligence and Personal Injuries Act, section 3.

Given that banks are unlikely to concede their own negligence, this system will only be workable if the customer is given the right of recourse to a less costly tribunal established by the government or the banking industry. The dispute resolution process envisaged by the Singapore Banking Code may be suitable. In addition, the customer should have the right of appeal to a court of law if he takes the view that the formula operates harshly against him.

The Singapore Banking Code requires subscribing banks to create a process, which, at its highest level, establishes a panel of mediators to hear the dispute. Under the Code, certain claims are excluded, including those in excess of $50,000 and those of business customers. Although the stratification of customers is not favoured in this study, it should at least be extended to sole proprietors, small partnerships and small companies. This could be delineated by reference to the paid–up share capital or turnover of the enterprise.

Under this scheme, the bank would not have the right to appeal rulings by the tribunal for claims under the threshold, in order to prevent banks from abusing their superior resources to bully customers into submission. The formula route deals with a major criticism of an apportionment system, namely the cost to the customer of obtaining relief. Although the formula may be criticised for being inherently inaccurate, the proposal gives the customer the alternative of seeking bespoke apportionment from the courts. Apportionment involves placing a value on something not inherently capable of quantification. Where the amount in dispute is relatively small, the apportionment formula provides a quick and inexpensive solution to the problem and leaves the customer better off than he would be under the T&C as they currently stand in Singapore.

The verification and conclusive evidence clause is not the panacea of all banking ills. There are cases of forgery that will not be identifiable from the ordinary bank statement. This could happen in different ways; one obvious example is the alteration of the payee in a payment instruction but without changing the amount of the payment. Suffice to say that if the transaction is not identifiable as an error, based on the information provided by the bank in the statement, the verification and conclusive evidence clause should not apply. Banks choosing to give customers more information than is standard in statements, such as identifying the recipient of the payment or providing an image of the cheque paid,[1264] will therefore derive greater benefit from the verification and conclusive evidence clause.

Apportionment of loss is not supported other than in instances of bank's negligence. Customers should be properly informed of the verification and notification duty at the time of opening their bank accounts. They should be reminded regularly of their obligations and, it is submitted, they should face the consequences of default.

The qualification of the verification and conclusive evidence clause by taking account of situations in which customers should reasonably be excused for their failure and of bank negligence, would put it in better standing vis–à–vis the UCTA. At the same time, it would reflect the policy adopted in the judgments of the Singapore courts and subscribed to in this thesis, that customers should accept greater responsibility for their accounts. Harsh operation of the verification and conclusive evidence clause would be ameliorated.

[1264] A practice adopted by Citibank Singapore Ltd.

How is such reform of the clause to be achieved? Banks, mindful of their upstanding reputation in society and apprehending the risk that a standard verification and conclusive evidence clause can unreasonably relieve the bank of negligence or penalize a non–negligent customer, should ideally introduce these changes to their T&C voluntarily. Failing that, legislative intervention may be necessary. Banks that are reluctant to voluntarily introduce these reforms may consider the following:

1. There is a risk that the courts may strike out the verification and conclusive evidence clause on the grounds that it is unreasonable in terms of the UCTA. This would be embarrassing and leave the banks exposed vis–à–vis all the other customers who contracted under the same T&C. It would be far preferable for banks to temper the T&C themselves.
2. Legislative intervention to alter the verification and conclusive evidence clause may be more extensive than the changes suggested above, removing the bank's control over the issue. As a matter of principle, banks would prefer not to have the legislature regulating this aspect of their business. The verification and conclusive evidence clause could only be the beginning; there are many other issues raised by bank T&C which could also be targeted. Banks are already a heavily regulated sector, adding a significant compliance burden. It is preferable, from the banks' point of view, to exercise self–restraint and refrain from rampant self–protection in the T&C than to have public intervention into yet another aspect of their business.
3. Singapore banks may not feel under any pressure to soften the impact of their T&C (in general) and the verification and conclusive evidence clause (in particular) in the present climate. The UCTA has yet to bite in these circumstances and statutory change on this topic is probably not high on the legislature's current agenda. Yet,

banks should not be complacent. As argued, there remains scope for the UCTA in this situation and the announcement (see Straits Times 13.11.05) that the Consumer Protection (Fair Trading) Act[1265] would extend to banks, although yet to be implemented, may signify the start of a new trend.

[1265] Chapter 52A.

Chapter 9: Mutuality of Duties

The arguments above,[1266] in favour of the reasonableness of the verification clause, reflect support for the merits of mutuality in the bank–customer relationship, aptly summarised in a Canadian court, per Montgomery J, "so that both the bank and its customer are jointly engaged in prevention and minimisation of losses occurring through forgeries"[1267].

The application of a principle of mutuality of obligations was dealt a blow by the Privy Council in *Tai Hing Cotton Mill* and by the Supreme Court of Canada in *Canadian Pacific Hotels*, where arguments for the extension of the customer's duty based on modern banking realities were rejected. In both these cases, the intermediate appeal courts[1268] were convinced of the merits of mutuality and ruled accordingly: in *Canadian Pacific Hotels*, the Ontario Court of Appeal[1269] by a majority endorsed the trial court decision of Montgomery J to the effect that the sophisticated customer had a duty to institute internal controls to prevent loss to its bank; in *Tai Hing Cotton Mill*,[1270] it was argued that a broader duty of care on a customer was reciprocal to the general duty of care imposed on banks in the *Selangor Rubber*, *Karak Rubber* and *Lipkin Gorman* trilogy. Cons J in the Hong Kong Court of Appeal inclined to the view that customers should reciprocate, not with a duty to exercise skill, but with a duty to exercise care "of the interests of the bank".[1271]

[1266] Chapter 7.3 above.
[1267] *Canadian Pacific Hotels Ltd v Bank of Montreal* (1981) 122 DLR (3d) 519 (HC) at 533.
[1268] The Hong Kong Court of Appeal (Fuad, Cons and Hunter JJ) and the Ontario Court of Appeal (Jessup and Houlden JJA, Lacourciere JA dissenting).
[1269] (1983) 139 DLR (3d) 575.
[1270] [1984] 1 Lloyd's Rep 555 at 559.
[1271] *Ibid,* at 560.

The principle of mutuality is strongly supported as a desirable goal in the allocation of duties and risk in the bank–customer relationship. It harnesses the commendable ideal of two parties in a contractual relationship, each making their contribution to its success.[1272] The three seminal cases of the 20th century concerning the bank customer's duty upheld the ideal in principle, even if restrictively in application. Thus in *Macmillan*, Viscount Haldane spoke of reciprocal, correlative and complementary obligations;[1273] and Lord Shaw of "reciprocal obligations".[1274] In *Joachimson*, Atkin LJ said the banking contract involves "obligations on both sides"[1275] and in *Greenwood*, in the Court of Appeal, Scrutton LJ spoke of "mutual" duties[1276] and "corresponding" duties[1277] in the bank–customer relationship. Adherence to the narrow customer's duties comes, however, at the expense of mutuality.

A reciprocal obligation to the bank's duty of care would be a duty to exercise care in the conduct and operation of the bank account. The bank's duty of care came to be fully articulated relatively recently. By that time the concept of a duty of care was well developed and the courts were well equipped to articulate the bank's duty as a flexible principle capable of applying to any variety of situations as necessary and, importantly, capable of moving with developments in banking so that what might not form part of the bank's duty of care today may well do so tomorrow.

[1272] See similar view and argument by M H Ogilvie "Bank Accounts and Obligations" (1986) 11 Can Bus LJ 220.
[1273] *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 814.
[1274] *Ibid,* at 824.
[1275] [1921] 3 KB 110 at 127.
[1276] *Greenwood v Martins Bank, Limited* [1932] 1 KB 371 at 380.
[1277] *Ibid,* at 381.

Adherence to the narrow traditional duties undermines mutuality; it sets the bank and customer on a collision course. In the words of M H Ogilvie,[1278] it "leads to an undesirable confrontation of banker and customer in a context in which their respective interests are complementary and interconnected."[1279] The need for a principle of mutual responsibility in banking is particularly evident in the area of self–service electronic banking facilities. This is recognised by the regulatory authority, the Monetary Authority of Singapore (MAS),[1280] and reinforced by the Singapore Banking Code, which says "the security of the system also depends on you".[1281]

[1278] "Bank Accounts and Obligations" M H Ogilvie (1985–1986) 11 Can Bus LJ 220.
[1279] *Ibid,* at 226.
[1280] MAS "Internet Banking Technology Risk Management Guidelines", June 2003 cl 9 particularly cl 9.01 and cl 9.05.
[1281] Code of Consumer Banking Practice, 2002, cl 18.

Chapter 10: Other Express Duties of the Customer

It is submitted that the verification and conclusive evidence clause is the most important of the customer's express duties for combating the unauthorised debit. For the verification clause to operate effectively, it is necessary to ensure that the statements are received by the customer. To achieve this, banks impose additional duties on the customer, such as the duty to notify a change in the customer's mailing address and the duty to notify non–receipt of bank statements. There are numerous other provisions in bank T&C that are concerned with responsibility for unauthorised debits, such as exclusions of liability where the bank is not at fault, or where the customer facilitated the loss. Electronic banking is a growing trend that gives rise to particular problems that are less acute in traditional banking. Provisions for loss allocation in this area need to be examined. Finally, there are terms that do not directly concern the unauthorised debit but which have an impact on the allocation of risk, such as variation and limitation clauses. These various provisions will be discussed in this chapter and the next. References in this chapter are to the provisions of the five banks operating in Singapore that have been the subject of this study, unless stated otherwise.

A general comment from a drafting perspective about the use of "negligence" in the T&C is appropriate. The T&C may exclude liability where the customer has been negligent. One should question what "negligence" means here. The dual meaning of negligence has been discussed.[1282] In the strict, narrow sense, the customer will not be negligent unless he is under a duty of care. A restrictive interpretation of the T&C will ascribe this narrow

[1282] In chapter 3.3 above.

meaning to "negligence". This means that an exclusion of liability "where the customer has been negligent" goes no further than the common law already provides, namely the customer is liable for a breach of his established duties.[1283] If the bank is seeking protection beyond the *Macmillan* and *Greenwood* duties, more akin to *Khoo Tian Hock*, a reference to "negligence" may be effective only if a broader duty of care has been stipulated in the contract.

10.1 Communications, Instructions and Mandate[1284]

The verification and conclusive evidence clause is a safety check designed to ensure that the bank is observing the customer's mandate primarily as regards payments. The mandate to pay is an instruction that must be communicated to the bank, along with a variety of other instructions such as countermands, changes in particulars and account closures. All of these must be implemented by the bank subject to their T&C. Banks also need to communicate with their customers, informing them of changes in interest rates, new practices, new products, branch closures and mergers etc. It is not surprising therefore that bank T&C contain extensive provisions on communications and instructions. They reflect a concern about authenticity and clarity of instructions on the one hand, and delay or non–receipt of communications on the other. Provisions cover the following issues:

1. The means of giving instructions: written, oral; mail, fax;[1285]
2. Flawed and ambiguous instructions;[1286]

[1283] The *Macmillan* and *Greenwood* duties. The *Khoo Tian Hock* duty is much more extensive, but there is the question over how established it is in Singapore law, as discussed in chapter 3.1 above.

[1284] UOB 4, 22, 23, E–terms 2.2, 2.7, 13(e)–(f); OCBC 2, 6.5, 8, 31, E–terms 1.3, 2.3, 3.3, 3.8, 4.3; DBS 5.14, 5.15, 5.16, 26, 27 E–terms Part A 26, Part B 20–31, 66–68; HSBC A 4, 11, 18, E–terms 4, 12, 16a.; Std Ch 14, 15, E–terms 4.1–4.3, 4.7–4.9, 14, 15.

[1285] UOB 4.3, 22, E–terms 2.7 (b), 13(e); OCBC 2.1, 6.5, E–terms OCBC 3.8, 4.3.1; DBS 27.1–27.3, E–terms Part B 26(b); HSBC A 11; Std Ch 15.1, 15.2, E–terms 14.1.

3. The bank's right to act or refuse to act on instructions;[1287]
4. The delivery of bank communications to the customer, non receipt and deemed receipt;[1288]
5. The use of signature stamps and seals;[1289] and
6. Countermand.[1290]

The law recognizes the right of the bank, as an agent, to receive clear, unambiguous instructions. An agent will not be penalised for giving a reasonable construction to ambiguous instructions.[1291] However, where the ambiguity is patent, it is not reasonable for the bank to act without taking further instructions. In *Patel v Standard Chartered Bank*,[1292] Toulson J held that the doctrine that an agent who acts on ambiguous instructions is not in default if he can show that he adopted a reasonable construction, may apply to the bank–customer relationship, but that it was not applicable where the instruction was contained in a pre–printed form prepared by the bank and any irregularity in its completion was apparent.[1293] A similar requirement applies to authenticity; the bank must be reasonable in acting or declining to act on a particular instruction.[1294] Obviously, oral instructions pose evidential problems and therefore have greater potential for dispute. Banks should carefully

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[1286] UOB 4.2, E–terms 2.2 (a); OCBC 2.7, 27.4, E–terms 1.3, 2.3, 3.3; DBS 27.2, E–terms Part B 21, 26(c)(1)–(2); HSBC A 16.c.ii ; Std Ch 15.1, E–terms 4.3.
[1287] UOB 3.4, 4.1, E–terms 2.2(c); 2.2(e); OCBC 2.6, 6.5; DBS 27.2, DBS Part A 12, Part B 26(c); HSBC A 18.2, E–terms 4.d–e; Std Ch 4.9, 15.1–15.2, E–terms 4.8.1.
[1288] UOB 23, E–terms 13 (e)–(f); OCBC 31.2, E–terms 4.3.2; DBS 26.1, 26.2, E–terms Part A 26, Part B 24; HSBC A 18.3, E–terms 16.a.; Std Ch 14.1, 14.3, E–terms 14.4.
[1289] UOB 4.6; DBS 5.16; HSBC A 23.8, Std Ch 15.4.
[1290] UOB 4.8, E–terms 2.2(d); OCBC 2.2, 8, E–terms 1.3, 2.3, 3.3; DBS 5.14, 5. 15, E–terms Part B 23; HSBC Part A 4, E–terms 4c, 12b; Std Ch 4.4, E–terms 4.7.
[1291] *George Ireland and Others v Joseph Gibbons Livingstone* (1872) LR 5 HL 395 at 416; *Curtice v London City and Midland Bank Limited* [1908] 1 KB 293 at 299; *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 at 153.
[1292] [2001] Lloyd's Rep Bank 229.
[1293] *Ibid,* at 234.
[1294] Per Fletcher Moulton LJ in *Curtice v London City and Midland Bank Limited* [1908] 1 KB 293 at 299

consider their willingness to accept oral instructions and contract accordingly in the T&C. In Singapore, the T&C reflect that while banks prefer written instructions and may reserve their right to receive instructions in writing, oral instructions are generally accepted, subject to disclaimers. To avoid disputes over the content of oral instructions, the T&C may provide that the bank may record telephone communications[1295] and that the customer is bound by such a recording.[1296]

The right of a customer to countermand payment instructions is established in the case law[1297] and recognized by statute.[1298] A countermand instruction revokes the authority of the bank such that it may not reimburse itself if it proceeds to make the payment.[1299] On the other hand, a bank is under a duty to comply promptly with a valid payment instruction and faces liability for damages if it fails to do so.[1300] Between these two rules, there is no scope for error on the part of the bank and it is both reasonable and prudent for banks to define the terms on which they will accept countermand instructions.

Stop payments are probably most commonly associated with cheques, and many of the cases concern cheques. Nevertheless, other forms of payment (such as electronic funds

[1295] E.g., DBS 27.4, Std Ch E–terms 15.
[1296] E.g., DBS 27.4.
[1297] The old cases include: *Williams v Everett and Others* (1811) 104 ER 725; *Wienholt v Spitta* (1813) 170 ER 1416; *Gaunt v Taylor* (1843) 67 ER 170; *Morrell v Wootten* (1852) 51 ER 753. They recognise that an instruction from a customer to his bank to pay a third person can be countermanded before it is carried out.
[1298] Singapore: Bills of Exchange Act (Chapter 23) section 75; England: Bills of Exchange Act 1882, section 75.
[1299] See statement of these principles by Goff J in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and Another* [1980] 1 QB 677 at 699. Other examples of an absence of a mandate are where the bank has received notice of its customer's death and where the customer's signature is forged. For House of Lords authority, see *Westminster Bank Ltd v Hilton* (1926–1927) 43 TLR 124.
[1300] See, e.g., *Marzettie v William* (1830) 109 ER 842; *Rolin v Steward* (1854) 139 ER 245.

transfers, standing payment orders) are, in principle, capable of being stopped.[1301] Section 75 of the Bills of Exchange Act,[1302] which recognizes the right to countermand a bill, does not prescribe any rules for countermand but various principles can be distilled from the case law.

Countermand must be made at the branch of the bank where the account is kept.[1303] This is the corollary of the requirement that demand for payment must be made at the branch where the account is kept.[1304] Today this is out of keeping with the expectations of customers and the practice of banks, which provide their customers with facilities, such as the ATM, to obtain repayment the world over.[1305] Some banks make it clear that the acceptance of countermand instructions is in the discretion of the bank.[1306] Some banks indicate that they will accept oral or electronic countermand instructions.[1307] Where the T&C do not address the issue, the general law will prevail and oral countermand is possible.

[1301] One significant difference however, is that a stopped cheque gives a cause of action to the payee against the drawer, while other payment instructions can be revoked without any recourse for the payee. See *The Brimnes* [1975] 1 QB 929. All the members of the Court of Appeal agreed that a payment instruction by telex could not be equated with payment in cash or by cheque because of this difference, per Edmund Davies LJ at 949, Megaw LJ at 965 and Cairns LJ at 969.
[1302] England and Wales: 1882; Singapore: Cap 23.
[1303] *Burnett v Westminster Bank Ltd* [1966] 1 QB 742. *London Provincial and South–Western Bank (Limited) v Frank Buszard* (1918–1919) 35 TLR 142 is to the same effect; it was held that notice of countermand to one branch of a bank is not effective against other branches of the same bank. Here a branch of the bank, without notice of the countermand, advanced money on a cheque which had been countermanded at the branch where the account was kept. The bank, as a holder in due course of the cheque, obtained judgment against the drawer of the cheque.
[1304] See, for example, *Burnett v Westminster Bank Ltd* [1966] 1 QB 742 at 760.
[1305] See e.g., UOB 3.8; DBS 3.3.
[1306] E.g., OCBC 8.1.
[1307] DBS 5.14; Std Ch 4.4.

The authenticity of countermand instructions, as with any instructions to a bank, whether oral or written, must be capable of verification.[1308] An unauthenticated countermand might be ground for a bank to postpone payment without risk of liability and investigate the authenticity of the countermand.[1309] The instruction to countermand must be unambiguous and contain sufficient information for the bank to be able to identify the payment which is to be countermanded.[1310] The furnishing of incorrect details at the time of countermanding will ordinarily excuse the bank in the event of payment being made, although the customer may have a case if the bank should reasonably have been able to identify the payment that the customer intended to be stopped.

The T&C of Singapore banks studied here have varying provisions: a range of specified details[1311] or full details may be required;[1312] or only the cheque number.[1313] Exclusions of liability and indemnities for any losses arising from the countermand being executed or not being executed are predictably present. The exclusions or indemnities may be specific to countermand[1314] or be contained in wide, general indemnities that will be discussed below. A particularly thorny issue is the time at which a payment instruction can no longer be countermanded. Countermand is obviously no longer possible once payment is complete

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[1308] In *Curtice v London City and Midland Bank Limited* [1908] 1 KB 293 the issue was whether a cheque was effectively countermanded by telegram. Cozens–Hardy MR in the Court of Appeal said at 299: "I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque." In *Chua Neoh Kow v Malayan Banking BHD* [1986] 2 MLJ 396 at 399 Shankar J said of oral countermand, "provided the bank is in no doubt that the verbal instructions have originated from the customer and the notice is unambiguous and unequivocally refers to the particular cheque, then the banker must stop payment."

[1309] *Curtice v London City and Midland Bank Limited* [1908] 1 KB 293. See judgments of Cozens–Hardy MR at 299; Fletcher Moulton LJ at 300; Farwell LJ at 301.

[1310] *Curtice v London City and Midland Bank Limited* [1908] 1 KB 293 at 299; *Westminster Bank Limited v Hilton* (1926–27) 43 TLR 124.

[1311] HSBC Part A 4.1.

[1312] OCBC 8.1; Std Ch 4.4.

[1313] DBS 5.14.

[1314] E.g., OCBC 8.2.

but the point of no return may be reached prior to completion. Identifying this moment in a particular payment method is tricky; isolating a general principle for all payment methods may be impossible. While countermand is primarily an issue between the bank and its customer, third parties may be involved, namely the intended recipient of the payment, possibly his bank and, depending on the payment method, clearing agents. Banking practice and clearing house rules may come into play; this raises the issue of the extent to which customers are bound by them.

For these reasons, banks should define in the T&C, or where appropriate in other documentation, the point at which countermand instructions will not be entertained. A similar recommendation was made by Roy Goode in 1985.[1315] In Singapore, OCBC stipulates that once received, instructions cannot be cancelled unless the bank agrees;[1316] HSBC will accept a countermand instruction if the cheque has not been presented.[1317] Electronic instructions are widely stated to be irrevocable. It is appropriate for electronic instructions to be irrevocable because of the speed with which the transaction is executed. Banks may be willing to undertake countermand on a "best endeavours" basis.[1318] It is also appropriate for bank forms, e.g., for fund transfers, to specify countermand terms.

Certain accounts, e.g., joint, corporate, partnership and trust accounts require special provisions. Banks are concerned about who is authorized to operate the account and issues such as conflicting instructions, disputes between the joint account holders, effective

[1315] R M Goode "Electronic Funds Transfer As An Immediate Payment System" in R M Goode (ed) *Electronic Banking – The Legal Implications* (London, The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985), 15 at 27.
[1316] OCBC 2.2.
[1317] HSBC 4.1.
[1318] E.g., DBS E–terms Part B 23.

communication with the account holders, change in the communication address or mandate and incapacity of one of the account holders. As a result, all T&C contain particular provisions dealing with the complexities arising from such accounts.[1319]

Overall, the T&C reinforce the bank's common law right to clear, unambiguous and authentic instructions. In the problem areas of ambiguity, inconsistency, accuracy and authenticity, the banks contract for protection by excluding liability or taking indemnities. Some provisions are wide enough to alleviate the bank of their common law duties to exercise care and to observe their mandate, provided they acted in good faith; these provisions are capable of excluding liability for patently flawed instructions or limiting the duty to verify signatures.[1320] The UCTA, particularly sections 2(b) and 3.2 would apply; the issue is whether such provisions are reasonable.

Automation and mass processing of bank procedures means that individual examination of each instruction and mandate received by the bank is compromised. To what extent should this excuse the bank from their common law obligations? The automation of bank processes has become a necessity of modern banking not only for banks but also for customers. For the customer it offers reduced costs in the form of bank charges (reflecting savings on the number and size of branches and staff numbers), greater efficiency in the execution of instructions and convenience. The argument against the reasonableness of such provisions should not, therefore, be based on an assumption that such procedures benefit only the bank. If it is accepted that the automation of bank processes is necessary in

[1319] UOB 9–11; OCBC 12–15; DBS 12–14; HSBC 7; Std Ch 8–10.
[1320] E.g., UOB 4.2; OCBC 27.4; DBS 27.2; Std Ch 15.2.

the modern banking environment, the logical extension is that the individual examination of the mandate is no longer feasible in all circumstances. Who should bear the risk of losses arising from the new, accepted methods?

It is clear that a bank should not be able to use exclusionary provisions in the T&C to escape liability where they have actual or so–called Nelsonian knowledge of a defect in a mandate or instruction that they nevertheless proceed to execute. To allow this would be to legitimise mala fides, which is contrary to public policy. The qualification that the bank acted in good faith is important to avoid application where there was mala fides but a bank can act negligently and still act in good faith. If the customer is also in breach, the resulting loss may fall to be apportioned in terms of the recommendation above;[1321] if the customer is not in breach of his duties, it is submitted that an exclusion or indemnity which excuses bank negligence is not reasonable. Where neither party is negligent, it is submitted that bank's should bear the risk of payment without a mandate, not because they introduced a system which does not involve examining every mandate but because the default rule (based on the absence of a mandate) allocating liability to the bank should prevail. The risk to the bank is reduced by the broader customer's duty of care that is advocated here.

All the T&C contain provisions designed to ensure efficient delivery of bank communications to the customer.[1322] The most common provision is that posting to the

[1321] See chapter 8 above.
[1322] UOB 13.3(d), 23.2, 23.3, 23.4, 23.5, 23.8, E–terms 13 (e)–(f); OCBC 31.2, 31.3,E–terms 4.3.2; DBS 10.1, 26.1, 26.2, E–terms Part A 26, Part B 24; HSBC Part A 18.3, E–terms 16.a.; Std Ch 14.1–14.3, E–terms 14.4.

customer's latest address on record with the bank is effective delivery.[1323] This is commonly coupled with a provision for deemed receipt. In contrast, communications from the customer to the bank may be stated to be effective only on actual receipt.[1324] The most important, and probably most frequent, of the bank communications to be effected by the deemed receipt provisions, is the bank statement. For the verification and conclusive evidence clause to be effective, the bank must ensure that it provides the customer with his bank statements. This is illustrated by the case of *Ri Jong Son v Development Bank of Singapore Ltd*[1325] where the court held that the bank's failure to prove that the statements were posted meant that the provision for deemed receipt did not avail them. Banks may boost their position by imposing on the customer the obligation to notify them in the event that the statements are not received at the usual time.[1326]

The UCTA will apply to exclusions of liability for non–receipt or delay in receipt of communications. Some of the provisions, such as deemed receipt of communications, may not appear to be an obvious target for the UCTA. The deemed receipt clauses may, however, be caught in the UCTA web by being part of an overall clause that excludes or limits liability, or gives an indemnity. This is because the clause is looked at as a whole.[1327] Even on their own, deemed receipt clauses have the potential to limit the bank's liability, for example where a bank is seeking to enforce a verification and conclusive evidence clause it has the effect of removing the customer's defence of non–receipt of bank

[1323] UOB 23.2, E–terms 13(e); OCBC 31.2, E–terms 4.3.2; DBS 26.1, E–terms Part A 26, Part B 24;; HSBC A 18.3, E–terms 16.a; Std Ch 14.1, E–terms 14.4.
[1324] E.g., DBS E–terms Part B 67; HSBC E–terms 16.a.; Std Ch 14.2.
[1325] [1998] 3 SLR 62 at 72–74.
[1326] E.g. UOB 13.3(d); DBS 10.1.
[1327] *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 278, per Hobhouse LJ (dissenting on the issue of incorporation).

statements. The interpretation given to section 13 in *Stewart Gill v Horatio Myer*,[1328] and the examples given by Richard Lawson[1329] of what would be caught by the section, suggest that the UCTA should apply. Lawson's examples include clauses that impose a requirement to notify a claim within a particular time, reverse the burden of proof, and restrict the remedies available to a party aggrieved by a breach.[1330]

In general, it is submitted that the deemed receipt provisions are reasonable in the environment of impersonal banking for the masses and a reliable postal system. Some T&C provide, however, that a communication will be deemed to be received even where it is returned undelivered.[1331] When a communication is returned undelivered, banks cannot assume that the customer is in breach of the duty to keep the address updated. The communication may have been delivered to the wrong address. Because of the importance of the verification and conclusive evidence clause to the armour against dishonesty, and because of the impracticality of expecting the bank to confirm receipt of bank statements by customers and the problems associated with proof of delivery,[1332] it is submitted that it is reasonable for customers to be saddled with the responsibility of ensuring that they receive the means of verification i.e., the bank statement.

The practice of a bank holding mail for customers raises the question of what it means for the verification and conclusive evidence clause. This may be a continuing arrangement requested by offshore customers from the outset of the banking relationship, or it may be

[1328] [1992] QB 600. See the discussion in chapter 7 above.
[1329] Richard Lawson *Exclusion Clauses and Unfair Contract Terms* (8th ed, London, Sweet & Maxwell, 2005).
[1330] *Ibid,* at para 7.02.
[1331] E.g., DBS 26.1, Std Ch 14.1.
[1332] The incidence of the onus of proof is an important issue; it is discussed in detail in chapter 11.

appropriate in the event of a planned long absence from the mailing address. It is trite that the verification and conclusive evidence clause is dependant for its operation on receipt of bank statements by the customer. *Pertamina Energy Trading Limited v Credit Suisse*[1333] illustrates the danger of retained mail arrangements. The customer's account was subject to a verification and conclusive evidence clause. Initially, the bank was instructed to retain the bank statements; later an authorized signatory directed all mail to be sent to his address. One unauthorised transaction took place, [1334] in which the authorized signatory was complicit, for the substantial sum of US$8 million. The statements were not verified until six months later. The Court of Appeal held that the customer had to bear the consequences of the diversion of the correspondence to the authorised signatory's address.[1335]

While the issue did not arise in *Pertamina*, by availing the customer of the hold–mail service, it may be argued that the bank is waiving its right to verification and notification by the customer. If this is not the desired position, the bank should insert an exclusion of liability clause for any losses that result from the customer not receiving statements and other communications at his request. It is recommended that banks consider their position in hold–mail cases and make an informed choice in their T&C. UOB's T&C provide that dispatch/receipt of communications is deemed to have taken place where the bank is instructed to hold mail for collection.[1336] Being effectively an exclusion clause, this would be subject to the provisions of the UCTA, but it is submitted that such an exclusion would generally be reasonable. Similar issues may arise where a customer requests statements at

[1333] [2006] 4 SLR 273 at 292.
[1334] The customer had a credit facility 'secured' by an invalid charge on a deposit account. The unauthorized transaction was a drawdown on the credit facility.
[1335] [2006] 4 SLR 273 at 299.
[1336] UOB 23.6.

longer intervals such as six months or a year for accounts that are rarely used. It may be sensible practice for the bank to send statements at shorter intervals whenever there has been activity on the account other than routine entries such as interest or bank charges.

10.2 Duty to Notify the Bank of a Change of Particulars, Including Signature[1337]

This duty extends to changes in contact details (address and contact numbers, nowadays it may include email addresses), name (most applicable to woman getting married and taking their husband's name), partners/directors, constitution/rules of companies, partnerships, clubs etc, occupation and identity documents. The identity and names of customers or partners/directors of customers, and the constitution/rules of incorporated and unincorporated customers are relevant when the bank determines whether it has a binding mandate to act. The customer's contact details are vital to the prevention of fraud and forgery losses and to the effectiveness of the verification and conclusive evidence clause, premised, as it is, on the receipt of bank statements. Telephone and fax details may not be as important to the verification and conclusive evidence clause, but they are essential to the bank's fulfilment of its role as pre–payment detector of fraud or forgery.[1338]

The T&C may give the bank time in which to process any notified change in signature or other details.[1339] The bank can have no way of knowing the customer's details without being informed by the customer. In *Industrial & Commercial Bank v Li Soon Development*

[1337] UOB 23.1, E–terms 13(f); OCBC 31.1, E–terms 4.3.1; DBS 26.3; HSBC 18.1; Std Ch 14.1, 15.9.
[1338] The bank may wish to verify a mandate by telephoning the customer and the customer's mobile number may be used by the bank in electronic banking to provide a one–time PIN number.
[1339] DBS 26.4, 26.5; Std 15.9.

Pte Ltd,[1340] the Singapore High Court said, per Chao Hick Tin J: "I do not think it is the duty of a banker to keep track of the address of a customer. The duty rests with the customer to notify the banker of any change."[1341]

There is no obvious basis for the UCTA to apply to this term, but if it did, it should pass the test of reasonableness. Banks must obviously verify the authenticity of notifications to change details, particularly those supporting the verification and conclusive evidence clause, and those affecting the bank's mandate. The provisions of this clause are important and necessary for the safe operation of the account, yet the consequences of breach are not generally stipulated. This, one must assume is deliberate. Banks are content to rely on the general exclusions of liability or indemnity for breaches of contract[1342] stipulated elsewhere in the contract.

10.3 Duty or Liability Arising From Non–Receipt of Cheque Book[1343]

The bank's concern about non–receipt of cheque books is obvious: a cheque book in the wrong hands can lead to payments without a mandate. Banks seek to protect themselves from this risk in various ways, one of which is the verification and conclusive evidence clause; it is an effective way in which to identify when a cheque book has fallen into the wrong hands. Other protections include: excluding bank liability for cheque books not received, putting the risk of loss from failed delivery of a new cheque book on the customer; indemnifying the bank for lost or stolen cheque books; imposing a duty on the

[1340] [1994] 1 SLR 471.
[1341] *Ibid*, at 483.
[1342] UOB 21.1(c), 25.1; OCBC 27.6; DBS 16.2; HSBC Part A: 19.1; Std Ch 11.1.3.
[1343] UOB 14(a)(iii); OCBC 7.2, 27.9; DBS 11.2(a); HSBC Part B 1.6; Std Ch 4.8, 11.1.12.

customer to notify non–receipt of a requested cheque book, and to check that the cheque book is received intact and notify the bank if not. Additional security measures may also be undertaken, such as shrink–wrapping the cheque book to prevent tampering before it reaches the customer. The T&C also give the bank the right to choose the method of delivery of the cheque book, commonly by post.[1344]

Some banks automatically send a new cheque book to the customer when their computer system notifies them that the customer is approaching the end of his cheque book. In such a case, there is no "request" by the customer and, on a strict interpretation of the term, the duty to notify non–receipt of a requested cheque book will not arise. This is appropriate as a customer who has not requested a cheque book will not ordinarily have the receipt (or non–receipt) of the cheque book on his mind. He will have no yardstick by which to measure an unusual delay in receipt of the cheque book. T&C should take account of this practice and not make the duty dependant on a request from the customer. This problem could be remedied by mailing a separate letter informing the customer of an automatic dispatch of a cheque book, coupled with a direction to notify in the event of non–receipt.

The UCTA is applicable to the extent that this clause excuses the bank of breach of contract or negligence. In dispatching cheque books to customers, it is reasonable that banks must act with care; they cannot, by passing the risk of delivery to the customer, ignore realities of which they are aware. Thus, if it is known that the postal system is unreliable, or that there is a high incidence of cheque books being stolen in the course of posting, banks should not be able to turn a blind eye to the risk and rely on their T&C to protect them

[1344] OCBC 7.2; DBS 5.11; HSBC Part B 1.6; Std Ch 4.8, 11.1.12.

when losses ensue. The clause would be improved by inserting the requirement that the bank act reasonably in choosing the method of delivery. The duty to notify tampering with the cheque book is reasonable and would probably be required under the general *Khoo Tian Hock* duty. It is submitted that the duty to notify non–receipt of a requested cheque book would be reasonable if the customer is notified by separate communication that a cheque book has been posted.

Loss or non–delivery of a cheque book may cause the customer loss other than by falling into the wrong hands, i.e. by depriving him of a means of payment leading to late or non–payment of debts or liabilities and loss of opportunities. Banks obviously do not wish to be liable for this very open–ended category of losses and the passing of this risk to the customer is surely justifiable, as the customer can take steps to mitigate or avoid losses and inconveniences from not having a cheque book.

10.4 Customer's Duty to Prevent Loss or Theft of Cheques, Cheque Books and ATM Cards, and Notify the Bank of Such Loss.[1345]

Having received the cheque book (or ATM card) it is equally important to keep it in a safe place. These duties fall under the *Khoo Tian Hock* duty to prevent fraud. In that case the customer was penalised for not storing the cheque book in a way that would deny access to their son, who had defrauded before. The court took the view that, to limit losses, customers need to exercise care in all facets of their banking affairs, not only in the drawing

[1345] UOB 14(a)(i)–(ii); OCBC 7.7, 26.2(e), 27.9; DBS 11.2(b), 11.3 (a); HSBC Part A 15; Std Ch 4.3, 35(e).

of cheques and notification of known forgeries on their accounts. Fraud is not perpetrated through the careless drawing of cheques alone.[1346]

The position advocated here is that to confine customers' duties to the drawing of cheques can only lead to greater losses and the financial detriment of society as a whole. It is reasonable for banks to require care from customers in the handling of cheques, cards and access codes. Given that the duty set out in *Khoo Tian Hock* has been questioned by the Court of Appeal in Singapore, it would be advisable for banks to make this duty an explicit term of the contract. HSBC drafts the duty to take care of cheque books, etc., as a duty of care.[1347] It is submitted that this is reasonable under the UCTA and represents a more balanced allocation of risk than an absolute duty.

10.5 Duty Not to Draw Cheques or Keep a Cheque Book in a Way that Facilitates Fraud or Forgery;[1348] Duty Not to Operate an Account in a Way that Facilitates Fraud or Forgery[1349]

These duties encompass the *Macmillan* and *Khoo Tian Hock* duties existing at common law.[1350] In some cases the customer's liability is drafted not as a duty but as an exclusion of bank liability.[1351] Given that these duties exist at common law,[1352] express terms imposing similar duties should pass the test of reasonableness under the UCTA. A key difference, however, is that the express duties may be absolute and not duties of care. It is submitted

[1346] Per Woo Bih Li J in *Khoo Tian Hock v OCBC* [2000] 4 SLR 673 at 707.
[1347] HSBC Part A 15.
[1348] OCBC 7.3, 7.7; HSBC Part A 15, Part B 1.2, 1.5; Std Ch 4.3.
[1349] UOB 14(a)(iv); DBS 11.2(c); Std Ch 11.1.7, 11.3 (indemnity and exclusion of liability).
[1350] See discussion in chapter 3 above on *Khoo Tian Hock v OCBC* [2000] 4 SLR 673 and subsequent comments in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR 273.
[1351] E.g., HSBC Part B 1.2; Std Ch 11.1.4, 11.1.7.
[1352] Subject to the doubts over the *Khoo Tian Hock* duty.

that the bank is adequately protected by a duty of care in these circumstances. A breach of certain other express duties in the T&C, for example, breach of the duty to notify a change in particulars or the duty to notify non–receipt of a new cheque book[1353] may constitute fault or facilitation by the customer for the purposes of the duty not to facilitate fraud or forgery.

10.6 Duty to Comply With T&C Contained in the Cheque Book[1354]

These instructions explain and illustrate to the customer the proper writing of a cheque and overlap with the duty to draw cheques in a manner which does not facilitate fraud. Basically they traverse the requirements comprised in the *Macmillan* duty, and extending towards the *Khoo Tian Hock* duty, for example, to keep the cheque book locked in a safe place. They may reiterate the requirement to notify non–receipt of a cheque book, an irregularity upon receipt of the cheque book, and loss of the cheque book or cheques.

Contractual terms written in a cheque book cover raise the question of incorporation into the contract. As the cheque book is provided to the customer after the opening of the account, to the extent that it contains terms that are not reflected in the T&C, they will not be incorporated in the contract.[1355] The bank may argue that continued operation of the account with knowledge of the terms constitutes acquiescence, but this requires proof that the customer was aware of the terms contained in the cheque book. Banks seeking to make

[1353] As discussed in chapter 10.3 above.
[1354] DBS 11.2(c);
[1355] As happened in *Burnett v Westminster Bank Ltd* [1966]1 QB 742. See the discussion in chapter 10.15 below. It has been argued by Bradley Crawford "Comments on Peter Ellinger's Paper" (1988) 14 Can Bus LJ 171 at 173 that acquiescence can be based on reasonable efforts to bring the provisions to the customer's attention.

the provisions in the cheque book part of the contract should ensure that they are incorporated explicitly[1356] or by reference[1357] in the T&C.

Duplication of the T&C in the cheque book is superfluous but worthwhile nevertheless to educate customers. The Association of Banks in Singapore in their Guidelines to the Banking Code recommend the use of the cheque book cover to convey guidelines to customers on how and how not to draw cheques.[1358]

10.7 The Customer's Duty to Monitor the Account at All Times and Report Unauthorised Debits[1359]

This term resembles the verification clause without the conclusive aspect. Bearing in mind that the T&C include a verification and conclusive evidence clause, exactly what the bank envisages here bears examination. Customers with active accounts are sent statements once a month, or more frequently, which they are required to verify and notify in the event of error in accordance with the verification and conclusive evidence clause. An additional duty to monitor the account "at all times" assumes that the customer has access to account information at all times. This monitoring clause may be aimed at other information received by the customer in connection with his account between statements, for example through ATM's and Internet banking.

[1356] OCBC 7.3–7.4; HSBC Part B 1.1–1.3; Std Ch 4.3.
[1357] UOB 14(a)(iv); DBS 29.
[1358] Guidance for Code Subscribers, 1 Sep 2004, cl 18.b.
[1359] UOB 14(c); DBS 11.1(a).

The duty to monitor "at all times" cannot be interpreted as requiring customers to avail themselves of ATM and Internet banking facilities. It does not expressly do so and use of such facilities is clearly not obligatory. The banks that impose this duty may be seeking to extend the effect of the verification and notification duty to any information a customer acquires in between periodic statements. The *Greenwood* duty largely achieves the same end. The rationale behind the clause is clearly to require diligence in regard to the account, but it seems to impose an active duty, as opposed to a passive one, without specifying the source of the information.

The UCTA will apply to this clause if it excludes or limits liability or indemnifies the bank. To the extent that the clause is a reiteration of the *Greenwood* duty, it would be reasonable. To the extent that it requires something more, it may be vulnerable to attack for being void for vagueness.

10.8 The Duty to Sign and Return Confirmation Slips[1360]

Confirmation slips may be enclosed with bank statements for return to the bank confirming receipt of the statement and agreement with its contents. The use of confirmation slips is not currently common practice in Singapore. The effectiveness of confirmation slips to bind a customer to the entries in a statement of account, in the absence of a duty to verify the account, is unclear.[1361] Use in conjunction with a verification and conclusive evidence clause is superfluous although, if properly worded, it could, in principle, constitute an

[1360] UOB 13.3(c); DBS 11.1(b).

[1361] See Geva " Allocation of Forged cheque Losses – Comparitive Aspects, Policies and a Model for Reform" [1998] 114 LQR 250; *Kepitigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010 at 1028; *Arrow Tranfer Co Ltd v Royal Bank of Canada et al* 27 DLR (3d) 81 at 87, 96.

estoppel. The signed confirmation slips used by one of the banks (Chekiang First Bank Ltd) in *Tai Hing Cotton Mill* did not ultimately avail the bank because the effect was not brought home to the customer, although Cons J, in the Hong Kong Court of Appeal[1362] took a different view.[1363]

Requiring signature and return of confirmation slips may have an impact on customer behaviour by procuring verification from those customers who comply with the request to sign and return the slips but on the whole it is submitted that the effort of enforcing compliance with the duty would outweigh any benefits. Voluntary compliance is likely to be low. Banks would then face the dilemma of whether to chase up outstanding confirmation slips each month or to ignore the non–compliance. The latter is an unattractive option and must be avoided; the former is impractical and, in any event, is unlikely to produce full compliance.

10.9 Exclusion of Liability for Paying on Forged or Altered Cheques[1364]

An exclusion of liability for losses from paying on forged or altered cheques has a variety of permutaions in the T&C including: where a customer was negligent or facilitated the defect,[1365] where erasable ink or equipment, cheque writers or franking machines were used,[1366] where the defect cannot easily be detected or the mandate appears to be the

[1362] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1984] 1 Lloyd's Rep 555 at 567. The slip read as follows: "I/We acknowledge receipt of your monthly statement of my/our current account with you showing the following balance which has been examined and found correct …".
[1363] See the discussion in chapter 7.6 above.
[1364] UOB 3.3, 3.10; OCBC 26.2(g), 26.3; DBS 21(b); HSBC Part B 1.5; Std Ch 11.1.4, 11.1.7.
[1365] UOB 3.10; OCBC 26.2(g), 26.3; DBS 21(b); HSBC Part B 1.5; Std Ch 11.1.7.
[1366] UOB 3.10; OCBC 26.3; DBS 21(b); HSBC Part B 1.1;

Customer's[1367] and third party fraud.[1368] As these provisions exclude bank liability for breach of contract, the UCTA is applicable. The test is reasonableness.[1369]

The exclusion where the customer is negligent or facilitates the defect is subsumed by the *Khoo Tian Hock* duty not to operate the account in a manner facilitating forgery. The clause does not exclude the possibility that the bank was also negligent, in which event it penalises the customer for his fault while disregarding the bank's fault. Consistent with the submission above,[1370] where both parties have been negligent, there should be an apportionment of loss.

In relation to the exclusion where erasable ink, cheque writers or franking machines are used, in *Macmillan*, Lord Shaw alluded to the problem of cheques tampered with prior to presentation for payment.[1371] The scenario he was addressing was one of a customer having exercised due care in the drawing of the cheque but subsequent tampering is executed with such skill that the bank is not negligent in failing to detect it. In this context, he mentions deletions "accomplished by chemical aid".[1372] Lord Shaw's expressly obiter view was that the customer would be liable for the ensuing loss. His reasoning is based on the point of time at which the bank's duty to observe the customer's mandate arises. This he identifies as the moment at which the customer presents the cheque. Until then, responsibility for the cheque is the customer's, and the fate of the cheque is completely beyond the bank's control. Lord Shaw's view is, it seems, expressed in the context of a bearer cheque payable

[1367] UOB 3.3, 3.10; OCBC 10.3, 26.2(f), 38.6; DBS 21(b); HSBC Part B 1.5; Std Ch 4.5, 11.1.4, 11.1.6.
[1368] HSBC Part B 1.5; Std Ch 11.1.4.
[1369] As discussed in chapter 7.2 above.
[1370] In chapter 8.
[1371] *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 824–6.
[1372] *Ibid,* at 826.

to drawer. In the case of a cheque payable to a third party, the argument based on the customer's responsibility for the fate of the cheque until presentation is weaker, although obviously the bank's responsibility until presentation remains nil. It has no knowledge of the cheque until presentation, whether it is a bearer, order or non–transferable cheque.

Lord Shaw did not reconcile his view of this aspect with the *Macmillan* duty which only arose where there was "negligence in the transaction itself". The absence of blame on the part of the bank, on its own, cannot be decisive as it raises the perennial problem of allocation of loss between two innocent parties but here it is coupled with, and this is significant, the duty of the bank to observe promptly an apparently legitimate mandate. It is submitted that the exclusion of liability where erasable ink, cheque writers or franking machines have been used may be reasonable, having regard to the reasons expressed by Lord Shaw in *Macmillan* and because of the ease with which a fraud can be perpetrated through their use. It is a way of discouraging use of such equipment, when there are other, more acceptable ways of executing the mandate.

The exclusions covering defects that cannot be easily detected or authorisations that appear to be the customer's also suggest the absence of fault on the part of the bank. One question is what depth of detection must be undertaken before it can be said that the defect was not easily detectable? The common law does not answer this question because the duty to observe the mandate is strict. The bank's answer will be based on what is feasible in the circumstances, for example, in the case of written mandates, a focused but brief comparison using the naked eye with the specimen signature on record. Some banks specify the extent of detection that will be deployed. OCBC provides that the bank may, but is not bound to,

verify signatures other than by comparing it with specimen signatures held by the bank; further, that bank opinion on the issue is conclusive and a cheque may be dishonoured on the basis of this examination.[1373] Provisions defining the extent of signature verification are anomalous with the modern practice to do so only for high–value cheques.[1374] The threshold amount for verification is kept confidential by banks because of the obvious opportunity it offers to fraudsters. It is kept constantly under review and fluctuates during the year according to various factors. Signature verification provisions can be criticized for misleading customers into thinking that verification is undertaken.

It is submitted that where the customer is not in breach of his duty of care, it is unreasonable for banks to exclude loss on the ground that the defect cannot be easily detected or the mandate appears to be that of the customer: the customer is already under a verification and notification duty to aide in the detection of forgeries; the risk of clever forgeries is inherent in the business of banking and should be borne by the bank. Some of the provisions excuse the bank for paying on a signature "purporting" to be that of the customer.[1375] This can apply unreasonably, for example, where a forgery of a customer's name makes no attempt to resemble the customer's signature, yet it purports to be that of the customer. It is clearly unreasonable for a bank to be excused in such cases.

[1373] OCBC 2.5.

[1374] The practice is acknowledged in the literature. See e.g. David Hay (Gen Ed) *Halsbury's Laws of Singapore* "Finance and Banking" vol 12 (Lexis Nexis Singapore, 2002) para 140.658 fn. 4; J R S Revell *Banking and Electronic Fund Transfers* 1983, 18, 82; R M Goode "Introduction" in R M Goode (ed) *Electronic Banking – The Legal Implications* (London, The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985), pX; Johanna Vroegop "The Legal Implications of Cheque Truncation" (1990) LMCLQ 244 at 250; See further discussion below in chapter 10.15.

[1375] See e.g., OCBC 10.3; Std Ch 11.1.4.

The broad exclusion of liability for third party fraud overlaps with the other exclusions discussed here, and similar considerations apply. It is submitted that it is unreasonable.

The interaction of these exclusions (defect which cannot be easily detected/authorisation which appears to be the customer's, customer facilitation, third party fraud**,** erasable ink, cheque writing equipment) with the verification and conclusive evidence clause bears consideration. They are all targeted at unauthorised debits. Whereas the verification and conclusive evidence clause, in principle, preserves the customer's right to a reversal of incorrect entries, the current exclusions give the customer no opportunity to demand rectification. Thus a customer, who in fulfilment of his verification duty notifies the bank of an unauthorised debit, could be met with the response that the error was not easily detectable or arose from the use of erasable ink and therefore the bank is not liable for the loss. The bank appears to be contracting out of the verification and conclusive evidence clause in the specific circumstances covered by these exclusions, predominantly situations in which they are not at fault or at least where the customer is at fault. This suggests that the verification and conclusive evidence clause is intended to apply in circumstances where bank is at fault.[1376]

10.10 Exclusion of Liability for Loss Arising without Bank Fault[1377]

A general exclusion where the bank is not at fault is common. This is in addition to the exclusions discussed immediately above, which generally involve an absence of, or reduced

[1376] The right of the bank to use the verification and conclusive evidence clause where it has been negligent is defended in chapter 4.5.1 above.
[1377] UOB 25.1; OCBC 26.1; 26.3; DBS 21.1(a); Std Ch 11.8.

blame on the part of the bank. Through the no–fault exclusion the bank is contracting out of its strict duty to pay only on a valid mandate.

This provision was considered in *Ri Jong Son v Development Bank of Singapore*.[1378] The action was brought against the bank by one of two joint account holders on the basis that his signature had been forged by the other account holder. The Singapore High Court held that ordinarily a debit without a mandate would have resulted in the bank's liability to the plaintiff but that the above clause excused the bank of liability where it was without fault; further, the plaintiff had not proved that the bank's signature verification procedure had been negligent. On the application of the UCTA, it was held that because the exclusion clause did not exclude liability for negligence it was not subject to the requirement of reasonableness in section 2(2) of the UCTA. The court indicated, in any event, that it considered a provision confining liability to where the bank was at fault, to be reasonable. It held that the clause was not unclear or ambiguous.

The court's ruling that section 2(2) of the UCTA did not apply is, with respect, correct. This illustrates a limitation in the UCTA's effective operation in the banking context. A major concern about contractual fairness is the exclusion of liability for negligence. In this instance, the bank purports to concede liability for negligence and therefore UCTA alarm bells do not ring; yet the limitation of bank liability to negligence represents a significant departure from the much wider strict liability at common law for paying without a mandate. The court's interpretation of fault to include "negligence" in this context is supported. The wider the interpretation given to fault, the smaller the ambit of the exclusion.

[1378] [1998] 3 SLR 64.

The *Ri Jong Son* decision can be criticised for not considering the application of section 3(2) of the UCTA, namely the possibility that the bank was in breach of contract (paying without a mandate), or was claiming to be entitled to render performance substantially different from that which was reasonably expected of him (to pay only on a mandate); and therefore that the clause was subject to the requirement of reasonableness.[1379]

The court's dicta that the clause was reasonable in the event that the UCTA did apply, reflects a value judgment for which both support and criticism can be garnered from a spectrum of commentators. The exclusion of liability for loss where the bank is not at fault means that where loss must be allocated between an innocent bank and an innocent customer, it falls on the customer, while at common law it would fall on the bank. Bearing in mind that the duty to pay on a valid mandate is fundamental to the business of banking, it is submitted that the loss should fall on the bank unless the customer has breached his duty of care, which it is submitted, should be a general duty of care along the lines of the *Khoo Tian Hock* duty. The bank has the protection of the verification and conclusive evidence clause in such a situation and this, it is submitted, is sufficient to reduce the risk which they face.

10.11 General Exclusions of Liability[1380]

All the T&C contain wide exclusions of liability. Some of the exclusions are in addition to those discussed above. Examples are an exclusion of liability for acting or failing to act, an

[1379] See Poh Chu Chai *Banker and Customer* at 900.
[1380] OCBC 26.1; DBS 21.1(e); HSBC 20.4; Std Ch 11.5.

exclusion for losses arising from the bank's exercise of its rights under the T&C and an exclusion for loss howsoever caused. In some cases the exclusion is stated not to extend to gross negligence or wilful default. It is submitted that such broad exclusions are not necessary or appropriate where the customer has a general duty of care and a verification and notification duty, and that they are not reasonable under the UCTA. Where specific situations justify the use of an exclusion clause, it should be specifically targeted. The T&C of the United Kingdom banks that have been considered do not contain similar exclusions although an exclusion for losses from events beyond the control of the bank is used.[1381]

10.12 Cheque Truncation Provisions[1382]

In July 2003 Singapore introduced cheque truncation into its cheque clearing system.[1383] Under this system, abbreviated as CTS, the cheque is replaced by a scanned image thereby avoiding the need for physical transport and sorting. The image is made where the cheque is deposited and sent electronically to the relevant parties, i.e. the clearing house and the drawee bank. Under this system the paying bank does not get the opportunity to examine the paper cheque unless it requests to do so.[1384] While the new system offers benefits of efficiency and reduced costs in the long term, one concern is that the inability of the paying bank to scrutinize the original cheque reduces its ability to detect forgeries and alterations. This concern is addressed in the T&C by an exclusion of liability for payment of a cheque

[1381] E.g., Barclays 9.2; NatWest 8.2; HSBC UK Personal T&C Section 1,cl 7.7.
[1382] OCBC 38; DBS 6; HSBC Part A 23; Std Ch 3, 4. UOB's CTS provisions are set out in a separate "Additional Terms and Conditions Governing Accounts and Services".
[1383] This summary of the cheque truncation system is based on David Hay (Gen Ed) *Halsbury's Laws of Singapore* "Finance and Banking" vol 12 (Lexis Nexis Singapore, 2002) from para 140.652 and the website of the Monetary Authority of Singapore at www.mas.gov.sg.
[1384] Section 89(2) Bills of Exchange Act.

where the alteration or forgery is not apparent from the CTS image presented to a bank[1385] or a more general exclusion for any loss whatsoever, arising from the CTS.[1386]

The reality, as discussed above,[1387] is that individual examination by banks of cheques below a certain amount, is no longer undertaken. This is a strategic decision by banks worldwide based on the relative costs of scrutinizing large volumes of cheques versus the losses from paying on forgeries.[1388]

Exclusions falling under this head overlap with some of the exclusions already discussed, such as where the defect cannot be easily detected and losses not attributable to the bank's fault. The UCTA applies; both sections 2 and 3 are relevant. It is submitted that to the extent that loss must be allocated to one of two innocent parties, it should be borne by the bank, for the reasons submitted in respect of the exclusion for losses where the bank is not at fault.

There are other predictable exclusions in the T&C for failure or delay of the CTS system or the systems and networks employed by it, [1389] exclusions relating to the loss of the items or

[1385] OCBC 38.6; Std Ch 4.5, 11.1.6.
[1386] DBS 6.6; HSBC Part A 23.3.
[1387] See chapter 10.10 above.
[1388] See e.g. David Hay (Gen Ed) *Halsbury's Laws of Singapore* "Finance and Banking" vol 12 (Lexis Nexis Singapore, 2002) para 140.658 fn 4; J R S Revell *Banking and Electronic Fund Transfers* 1983, at pages 18, 82; R M Goode "Introduction" in R M Goode (editor) *Electronic Banking – The Legal Implications* (London, The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985), pX; Johanna Vroegop "The Legal Implications of Cheque Truncation" (1990) LMCLQ 244 at 250.
[1389] Eg OCBC 38.7; Std Ch 11.3.1/2/3.

images of the cheque[1390] and provisions dealing with the changes in the bank's responsibilities as a result of the new system, which are beyond the scope of this study.

10.13 Indemnities[1391]

All the T&C contain indemnity clauses. Whether in the general T&C or in separate electronic terms, the structure is generally the same: a broad, general indemnity for all losses, liabilities, claims, etc., which the bank may incur in connection with the operation and performance of the contract with specific instances of application being particularized for areas of obvious or high concern. Some of these indemnities have been discussed in the course of particular exclusions. Section 4 of the UCTA applies to unreasonable indemnity clauses where the customer deals as a consumer. Richard Lawson writes, "in so far as an indemnity term seeks to provide cover for an act of negligence, it is difficult to see that any such could ever pass the reasonableness test."[1392] The all–encompassing clauses prevalent in Singapore, which indemnify the bank for claims of whatsoever nature and howsoever arising, are obviously vulnerable under the UCTA. It is submitted that the all–encompassing indemnities are unreasonable and inconsistent with the proposals put forward here for a more balanced allocation of risk between bank and customer.

10.14 Conclusiveness of Bank Records[1393]

Bank statements are not the only documents that acquire conclusive effect under the T&C. Most of the terms considered have broad provisions deeming bank records in general or of

[1390] OCBC 38.8; HSBC 23.6.
[1391] UOB 21, E–terms 10; OCBC 27, E–terms 4.2; DBS 16, E–terms Part A 23, Part B 54; HSBC Part A 19, E–terms 16.c; Std Ch 11, E–terms 8.4.
[1392] *Exclusion Clauses and Unfair Contract Terms* (8th ed, 2005) at para 9.09.
[1393] UOB 22.3, 34.9, E–terms 13(i); OCBC E–terms 2.9, 3.9; DBS 30, E–terms Part A 24, Part B 53; HSBC Part A 2.5, 13.7, 14.5, E–terms 8.b.; Std Ch 3.2, 35(l).

particular transactions, such as cash deposits, ATM, debit card, Internet and CTS transactions, to be conclusive and binding against the customer. Some provide for their admissibility in evidence[1394] and that the accuracy and authenticity of computer data will not be disputed on this basis.[1395] The concerns addressed by these provisions include the absence of any other, or better, proof of transactions, the problem of falsification by the customer of his records, and efficiency.

The UCTA clearly applies: the provisions restrict the rules of evidence, (section 13) and may excuse the bank's negligence (section 2(2)) or breach of contract (section 3(2)(a)) and possibly entitle the bank to render performance substantially different from what is reasonably expected (section 3(2)(b)(i)). The provisions on conclusiveness of bank records add to the immunity which the T&C give to the banks and their reasonableness should be carefully scrutinized by the courts.

DBS excludes calculation or obvious errors in records of electronic transactions other than Internet banking from the conclusive presumption.[1396] There is no apparent reason why this exclusion should not apply also to Internet banking. In the United Kingdom, HSBC's Personal Internet Banking Terms and Conditions contract for the evidential value of their records unless they are proved wrong.[1397] In Singapore, HSBC's Internet T&C provide for the bank's records to prevail in the event of conflict between the bank's records and information held by the customer, unless the contrary can be proved. Although the burden

[1394] HSBC Part A 17.1. Electronic terms: DBS Part B 53
[1395] DBS 30. Electronic terms: DBS Part B 53
[1396] DBS E–terms, Part A 24, Part B 53.
[1397] HSBC (UK) Personal T&C E–terms 7.

of proof may detract from these provisions,[1398] they are commended for acknowledging the customer's legitimate interests. It is submitted that banks can reasonably be expected to concede the correctness of their records in the face of evidence to the contrary and in the case of obvious or calculation error.

A presumption in favour of bank records for ATM deposits is necessary. The customer keys in the amount he is depositing but the bank has no means at that stage of verifying that cash or cheques to that value have indeed been received by them. It is essential therefore that banks verify the amount deposited. It is reasonable for these deposit records to have deemed validity subject to clear evidence from the customer to the contrary. Provisions for the conclusivity of electronic transactions are consistent with the general approach of the T&C in this area, as discussed above.

10.15 Variation Clauses[1399]

As a general contractual principle, contracts cannot be unilaterally amended. This is illustrated by *Burnett v Westminster Bank*.[1400] As a result of computerisation, the bank introduced a term into the contract that the account details in pre–printed cheques could not be altered by the customer. The new term was printed on the cover of the cheque book. Mocatta J held that notice of this change in terms had not adequately been given to the customer and was accordingly not effective.

[1398] See the discussion of the effect of the burden of proof in chapter 11.2 below.
[1399] UOB 28.1–2, E–terms 13(b); OCBC 32, E–terms 4.4; DBS 28, E–terms Part A 31, Part B 61; HSBC Part A 22.1–2, E–terms 13(f); Std Ch 22, E–terms 12.
[1400] [1966] 1 QB 742.

Banks therefore contract for the right to vary the T&C, with provision for notice to be given to the customer. The right to vary the T&C is very important to the bank and is invoked relatively often. The T&C all provide that a customer, by continuing to operate the account after notice of the proposed changes, is deemed to have consented to them.[1401] Such a provision essentially articulates the general law which would in any event apply. In *Burnett*, where there was no express agreement for the particular changes in the terms but the customer had continued to use his cheque book, the argument of deemed consent failed on the facts as the court found that inadequate notice of the change had been given to the customer; the customer's conduct could not therefore be taken as acquiescence.

The steps taken to bring the variations to the customer's attention are important and should be dealt with in the T&C. This is done by all the banks under consideration.[1402] Where there are separate electronic terms, the incorporation of the general terms (which contain the notification procedure) into the electronic terms should be sufficient. Although the customer is not ordinarily involved in the process of varying the terms, by continuing to operate his account after notice of proposed changes, he signifies his consent to the variations. If he does not consent he may decline to continue the relationship and close the account. As such, variations to the T&C, although not achieved by negotiation, are arguably achieved by consent, manifested by the customer's subsequent acquiescence, although he cannot insist on any other terms.

[1401] UOB 28.2; OCBC 32.2, E–terms 4.4.2; DBS 28.3, E–terms Part A 31, Part B 61; HSBC Part A 22.2; Std Ch 22.1, E–terms 12.2.
[1402] UOB 28.1, E–terms 13(e); OCBC 32.3, E–terms 4.4.4; DBS 28.2, E–terms DBS Part B 61; HSBC Part A 22.2, E–terms 13(f); Std Ch 22.1, E–terms 12.1.

Variation clauses are commonplace and have gained general acceptance in contract law but they are potentially problematic. Cranston says they may be void for vagueness[1403] although Chitty[1404] and Treitel[1405] agree that they are legitimate. Cranston refers to the Australian case of *Kabwand Pty Ltd & Ors v National Bank of Australia Ltd*,[1406] which concerned a provision entitling the bank, in its sole discretion, to vary the interest rate of a loan in conformity with general movements in the bank's interest rates. On appeal, the Full Court of the Federal Court of Australia held that the clause was not void for uncertainty. A significant factor for the court was the stipulation that variations would conform with general movements, thereby applying an objective market standard. The court did not express a view on an unfettered right to vary interest rates.

In *Lombard Tricity Finance Ltd v Paton*,[1407] the English Court of Appeal, considering an agreement governed by the Consumer Credit Act 1974, held that in general it was unusual for an agreement to provide for unilateral variation by one party in his discretion and to the detriment of the other, and clear words would be required to achieve this.[1408]

In *Paragon Finance plc v Staunton and Nash*,[1409] the same court implied a term into a mortgage agreement that a contractual discretion given to the mortgagee to vary the interest rate would not be exercised "dishonestly", "capriciously", "arbitrarily", "for an improper

[1403] Ross Cranston *Principles of Banking Law* (2nd ed, Oxford University Press, 2002), 146.
[1404] HG Beale (Gen Ed) *Chitty on Contracts* (29th ed, 2 vols, Sweet & Maxwell, London, 2004) vol 1 para 22–039.
[1405] G H Treitel *The Law of Contract* (11th edn, Sweet & Maxwell, London, 2003), 58: "a term, by which interest rates are expressed to be variable on notification by the creditor, is perfectly valid".
[1406] (1989) ATPR 40–950.
[1407] [1989] 1 All ER 918.
[1408] [1989] 1 All ER 918 at 923.
[1409] [2002] 2 All ER 248.

purpose" or unreasonably in the limited sense that no reasonable lender would act in that way.[1410] This implication was made on the basis of the expectations of the parties, an implication of fact. The variation clause itself is probably not subject to adjudication under the UCTA but a variation facilitated by such a clause may be challenged if it has any of the effects targeted by the UCTA.

10.16 Limitation Period

Clauses altering limitation periods do not directly affect the allocation of risk between bank and customer for unauthorised debits, but they affect the customer's ability to enforce his rights. Unresolved grievances can ultimately only be brought to a head by recourse to the courts.[1411] In Singapore, a customer would ordinarily have a period of six years from the date of the cause of action arising to bring a claim against his bank.[1412] In the case of contractual claims, the cause of action arises when the breach occurs. Some T&C contract out of this period and replace it with a shorter period, such as one year.[1413]

Based on Judith Prakash J's comments in *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd*,[1414] this is a "substantial restriction" of the customer's rights. Section 3 of the UCTA applies. The onus of proving reasonableness is on the bank. In *Press Automation*, Prakash J accepted that a time bar was in accordance with the local

[1410] *Ibid.*
[1411] The dispute resolution procedures outlined in the Singapore Banking Code do not apply in all areas of dispute, there is for example a monetary limit on the size of claims and even if available, the customer may prefer to have his complaint dealt with in a court of law.
[1412] Section 6, Limitation Act, Cap 163.
[1413] UOB 25.2; Std Ch 11.9.
[1414] [2003] 1 SLR 712 at 730.

and international practice of freight forwarders.[1415] This was not determinative of the matter, however, as the reasonableness of the provision in the contract in question had to be decided. Two specific arguments in support of reasonableness were made: first, that the time bar was necessary to allow for a right of recourse against the third party carrier in the event of a claim by the client, and second, to enable the carrier to obtain reasonable insurance rates. Prakash J found, however, that neither circumstance was proved and the clause was not, therefore, reasonable. She did not indicate whether, if proved, those two circumstances would have justified the clause. This decision suggests that the time bar in bank contracts may be unreasonable.[1416]

It is submitted that the verification and conclusive evidence clause, which ousts the general law on limitation, is justified and reasonable for the reasons submitted earlier.[1417]

[1415] *Ibid*.
[1416] Each case depends on its own facts, see *Press Automation Technology Pte Ltd v Translink Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712 at 727.
[1417] Chapter 7.2–7.3 above.

Chapter 11: Electronic Banking

Electronic banking involves the use of technology, particularly computer technology, in the delivery of banking services.[1418] It is evident from bank websites that customers are encouraged to make use of this new means of operating their bank accounts. The Electronic Transactions Act,[1419] although excluded from application in some areas of banking,[1420] demonstrates the legislature's support for the trend toward automation. Electronic banking facilities in Singapore include ATM machines, Internet banking, debit cards, EFTPOS[1421] and telephone banking. A common denominator is the use of codes to gain access to the facility.

The typical clauses in bank T&C that have been discussed above[1422] apply also to electronic banking but electronic banking poses particular challenges not raised by traditional banking methods. It is therefore warranted to consider the subject separately. Electronic banking has become a specialist subject and to a large extent it cannot be addressed without a reference to the evolving technology which underpins it. It is beyond the scope of this study to attempt a comprehensive analysis of the issues. The focus here will be on the allocation of risk for electronic banking as manifested in the T&C, particularly in the context of ATM and Internet banking.

[1418] See David Hay (Gen Ed) *Halsbury's Laws of Singapore* "Finance and Banking" vol 12 (Lexis Nexis Singapore, 2002) para 140.617.
[1419] Cap 88.
[1420] Most notably, cheques. See section 4(1)(b).
[1421] Electronic funds transfer at point of sale.
[1422] In chapters 4 and 10 above.

The treatment of electronic banking in the T&C varies. UOB,[1423] HSBC[1424] and Standard Chartered[1425] deal with ATM cards in the general T&C and have separate T&C for Internet banking. OCBC and DBS have separate T&C for all their electronic services. The following additional electronic T&C will be referred to:[1426]

- UOB's "Terms and Conditions of UOB Personal Internet Banking Access" 11/2006[1427]
- OCBC's "Terms and Conditions Governing Electronic Banking Services – Personal", November 2006[1428]
- DBS's "Terms and Conditions Governing Electronic Services", July 2007[1429]
- HSBC's "Terms and Conditions for online@hsbc Personal Internet Banking", 2007[1430]
- Standard Chartered's "Electronic Banking Terms and Conditions", 6 November 2006.

Reference will be made to the following electronic banking T&C in England:

- HSBC's "Personal Internet Banking Terms and Conditions",[1431] undated
- HSBC's "Business Internet Banking Terms and Conditions",[1432] 2007
- Halifax's "Fraud Guarantee"[1433] and "Online Service Conditions"

[1423] UOB 3.3, 14, 15, 33, 34.
[1424] HSBC Part A 13, 14.
[1425] Std Ch 35.
[1426] They can be accessed from the relevant bank's website.
[1427] http://www.uobgroup.com/pdf/pubtnc.pdf
[1428] http://www.ocbc.com/personal–banking/tools%20and%20info/Toi_Poc_Trc_BnkEleSer.shtm
[1429] http://www.dbs.com/sg/personal/ibanking/additionalinfo/terms/
[1430] https://www.hsbc.com.sg/1/2/!ut/p/_s.7_0_A/7_0_OM/.cmd/act/.c/6_3_43O/.ce/7_1_95Q/.p/5_1_4VE
[1431] http://www.hsbc.co.uk/1/2/legal;jsessionid=0000KrrhHHiclzES9ukbBYt0Phs:11j56r6g2
[1432] http://www.hsbc.co.uk/1/2/legal;jsessionid=0000KrrhHHiclzES9ukbBYt0Phs:11j56r6g2
[1433] http://www.halifax.co.uk/SecurityandPrivacy/onlinefraudguarantee.asp

- Barclays Bank's Online Banking Guarantee[1434]

Provisions governing risk allocation for electronic banking reflect concern about two main, overlapping issues: authenticity and verification of mandate on the one hand, and system integrity, failure and faults on the other.

11.1 Authenticity and Verification of the Mandate

Concerns about authenticity and verification of mandate give rise to rules aimed at regulating the customer's conduct. For example, terms include the duty to safeguard the means of access to the electronic facility, whether it be an ATM card, password, username, PIN or other code.[1435] In all e–banking, the customer's contact with the bank is impersonal. The traditional form of mandate and the traditional forms of verification of mandate are accordingly not available. In their place come different combinations of a plastic card, PIN number, username and password. More recently, at the instigation of the Monetary Authority of Singapore,[1436] Singapore has seen the introduction of an additional tier of security for Internet banking, the so–called two– or second–factor authentication (2FA). This is a one–time password generated by a hardware device furnished to the customer by the bank or notified to the customer via his mobile phone.

The problem with all the electronic forms of mandate is that they are remote from the customer and can be used by anybody getting access to them. Whereas, in theory at least, a

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1434 www.personal.barclays.co.uk/BRC1/jsp/brccontrol?task=homefreegroup&value=13491&target=_self&site=pfs

1435 UOB 15.1 E–terms 2.1(a), 2.1(e); OCBC E–terms 1.2, 2.2, 3.2, 3A.3; DBS E–terms Part A 2; Part B 15; HSBC Part A 15, E–terms 3.g, 10.b, 10.c; Std Ch 34.1, 35(d), E–terms 3.3.

1436 MAS circular no. SRD TR 02/2005.

forged signature is detectable because of execution by a different hand, a fraudulent use of somebody else's card, PIN, password, etc., so long as they match, is not objectively detectable. Even the recently introduced 2FA cannot prevent all forms of unauthorised use. Anybody possessed of the customer's username and PIN for Internet banking with access to the customer's hardware device or mobile phone (most likely a member of the customer's household or an employee) will be able to access the Internet banking facility. Because of this, Geva writes that this form of authentication is more akin to a seal than a signature.[1437] His point is valid but it must be noted that this is the form of the mandate for electronic banking purposes. Concern among banks about the potential for loss in these situations is warranted and they justifiably impose an obligation on the customer to safeguard the means of access. Specific examples of safeguards are to memorise the codes and certainly not to record them recklessly, not to divulge them to anybody and to log out when leaving the computer used for Internet access. These are commonly referred to as the customer's security duties in the T&C.[1438]

These duties are analogous to the *Macmillan* duty. A customer who carelessly keeps his ATM card and PIN together in circumstances where others can get access to them is analogous to a customer who signs the cheques in his cheque book in blank.[1439] The latter is in breach of the *Macmillan* duty. Such provisions are not only reasonable; they are necessary and are in compliance with the Monetary Authority of Singapore's

[1437] Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 229.
[1438] See e.g. HSBC E–terms 3, Std Ch E–terms 3.3, 3.5–3.7.
[1439] Martin Karmel "Procedure and Evidence: The Maintenance of Transaction Records: Proving the State of Account in EFT Transactions" in R M Goode (ed) *Electronic Banking – The Legal Implications* (London, The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985) 45 at 52.

requirements.[1440] The potential for loss is great and many of the safeguards lie within the control of the customer. There are safeguards which fall within the ambit of the bank's duty of care; they include daily and monthly withdrawal limits, encryption, denial of access when the incorrect code is used, usually after the third attempt, procedures designed to avoid interception of access codes/devices that are mailed, privacy at ATM machines to avoid detection of PIN's by criminals, customer profiling, and monitoring of the integrity of ATM machines, but these measures cannot replace the necessity for the customer's care in safeguarding the means of access.

A problem with unauthorised access is the difficulty of proving whether the use of the card, PIN, password, username, 2FA, etc., was by the customer or authorized by him. Online fraudulent withdrawals will generally take the form of transfers from the target bank account to an account chosen by the fraudster; cash withdrawals are obviously not possible through online or telephone banking. The recipient account will have had to be linked to the target account; the fraudster might take steps to avoid the detection of his scheme, such as changing the account address so as to divert bank statements. So long as the sum in question remains within the banking system, it can be traced and potentially retrieved with the necessary legal procedures, but once withdrawn, the chances of recovery deteriorate.

Martin Karmel, in 1985, commented that the PIN system might not be the best and that signature or voice recognition systems might be better.[1441] Two years earlier, J R S Revell

[1440] See, e.g., MAS Internet Banking Technology Risk Management Guidelines June 2003, cl 9.0.3.
[1441] Martin Karmel "Procedure and Evidence: The Maintenance of Transaction Records: Proving the State of Account in EFT Transactions", 45 at 52.

wrote, "PINs are most unsatisfactory security devices".[1442] Today, more than twenty years later, the PIN system continues to be a major basis for authentication in electronic banking. Karmel points out, in the context of ATM banking, that where the customer has negligently facilitated the unauthorised use of his card, for instance by writing his PIN number on the card, the bank would in theory be able to allege a breach of the *Macmillan* duty; in practice, the bank would, in most cases, have a problem proving the necessary facts. It is for this reason that wide exclusions of liability for electronic banking transactions are prevalent.

All the T&C analysed in this study reflect a concern about authority and authenticity of the mandate. It is not uncommon for the T&C to make the customer liable for any losses arising from access to e–facilities using the correct codes.[1443] Some provisions deem all transactions using the electronic facility to be with the customer's authority;[1444] a variant is that the customer contracts to bear any loss occasioned by use of the facility;[1445] or the customer is made responsible for all instructions given electronically;[1446] another version is that all withdrawals by electronic channels bind the customer and discharge the bank of liability;[1447] and the customer is precluded from making a claim/disputing the transaction.[1448] The bank may take an indemnity for carrying out instructions that are

[1442] J R S Revell *Banking and Electronic Fund Transfers* (Paris, OECD, 1983), 86. See a similar statement in the Jack Report (Banking Services: Law and Practice Report by the Review Committee Feb, 1989), at para 10.06, page 83.
[1443] UOB 3.3, 15.1, 15.3, E–terms 2.1(a), 2.1(c), 2.2(a), 7(b)(i), 7(b)x; OCBC E–terms 1.3, 1.7, 2.3, 2.7, 3.3, 3.6; DBS E–terms Part A–11; Part B 20, 21; HSBC Part A 13.5, 13.6, 13.7, E–terms 4.b.; Std Ch 34.2, 35(f), E–terms 4.1, 8.2.1.
[1444] E.g., OCBC E–terms 1.3, 2.3, 3.3; DBS E–terms Part B 20; HSBC Part A 13.5;
[1445] E.g., HSBC Part A 13.6.
[1446] UOB 15.1, E–terms 2.1(c); OCBC E–terms 1.7, 2.7, 3.6; DBS E–terms Part A 11; Part B 20; Std Ch 34.2.
[1447] UOB 3.3; OCBC E–terms 1.3, 2.3, 3.3; DBS E–terms Part B 21.
[1448] UOB E–terms 2.1(a), 2.1(c); DBS E–terms Part A 11.

unauthorised or imperfect.[1449] These terms are supported by provisions that bank records of transactions are conclusive against the customer.[1450] The exclusions of liability discussed here do not hinge on proving a breach of the customer's duties of care because of evidential difficulties. In summary the customer may have to bear the loss in circumstances where he has not facilitated an unauthorised withdrawal.

In Geva's view, liability for the customer on the basis that the bank has adhered to its security procedure is unfair because of the difficulty the customer will have to prove that he did not give the instruction.[1451] The evidential problems in electronic banking reinforce the arguments in chapter 7.3 above in favour of a verification and notification duty. The benefits of loss detection, particularly to facilitate mitigation and prevention of further losses, cannot be underestimated.

HSBC (Singapore) and Standard Chartered (Singapore) make significant concessions. In HSBC's terms for personal Internet banking, clause 10, titled "Your Liability for Unauthorised Transactions", states that the customer will not be liable for "direct loss" unless: he has been fraudulent or grossly negligent[1452] or if he has allowed a third party to use any of his access codes[1453] or contributed to the loss, e.g., by failing to observe the security measures required of customers.[1454] The customer's potential liability for unauthorised transactions is also clearly drawn to his attention in the T&C at the beginning

[1449] UOB 21.1(a), E–terms 10(a)(ii); OCBC E–terms 4.2; DBS E–terms Part B 54; HSBC E–terms 16.c.; Std Ch 11.1.4.
[1450] UOB 13(i); OCBC E–terms 2.9, 3.9; DBS E–terms Part A–24, Part B 53; HSBC 13.7; Std Ch 35l.
[1451] Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 237.
[1452] HSBC E–terms 10a.
[1453] HSBC E–terms 10b.
[1454] HSBC E–terms 10c.

of the document. It is submitted that the words "direct loss" are used to exclude consequential losses. The bank's liability for consequential losses is specifically excluded elsewhere.[1455] Clause 10 also states that the customer will not be liable for losses caused by the fraud or negligence of bank staff, system fault, a crime which should have been prevented by the bank's risk control measures and other loss not contributed to by the customer.[1456] Standard Chartered makes similar concessions.[1457]

In the United Kingdom, HSBC's Personal Internet Banking Terms and Conditions provide that the bank may act on all "apparently valid instructions"[1458] but if the customer did not facilitate the loss (fraudulently or negligently[1459]) the amount in question, along with interest and charges will be reimbursed.[1460] A breach of the specified security duties,[1461] such as safeguarding of access codes, ATM cards, etc., will be negligence facilitating the transaction. The terms for business customers are less generous. HSBC's Business Internet Banking Terms and Conditions in the United Kingdom exclude bank liability except in instances of gross negligence or wilful misconduct by the bank;[1462] the bank's liability is subject to limits per transaction and per year. Consequential losses are excluded.[1463] The contrast between this treatment of personal and business customers reflects a widespread view that more onerous terms for business customers are justified.

[1455] HSBC E–terms 9aii.
[1456] HSBC E–terms 10e.
[1457] Std Ch E–terms 4.4 and 4.5 state that the customer will not be liable for misuse of the password where the customer proves that he adhered to his security duties or where, inter alia, the bank has breached its commitment to provide a secure system, as stated in cl 8.1.
[1458] HSBC UK Personal E–terms 3.1.
[1459] "acted without reasonable care".
[1460] HSBC UK E–terms 4.1–4.2.
[1461] HSBC UK Personal E–terms 2.
[1462] HSBC UK Business E–terms 14.1.
[1463] HSBC UK Business E–terms 14.1.

Halifax Plc provides that the customer is responsible for online transactions using the correct access codes unless fraudulent.[1464] In addition, the bank tenders an "Online Fraud Guarantee" on its website as follows: "If a customer of our online service is a victim of online fraud, we guarantee that they won't lose any money from their account, and will always be reimbursed in full."[1465] There is no qualification that the customer must not have facilitated the withdrawal.

Barclays Bank also tenders an "Online Banking Guarantee" for customers who "innocently suffer Internet fraud".[1466] The qualifications are similar to those used by HSBC in Singapore, in Clause 10, including reasonable care and compliance with standard security practices.

Halifax and Barclays may tender their online fraud guarantees to encourage use of online banking and confidence in the services. References to the "unlikely event" of fraud in both guarantees suggest that they are the outcome of cost–benefit analyses and assessments of the risk of fraudulent withdrawals.[1467] There is an obvious benefit to banks from increased use of electronic services. A large–scale shift of customer banking activity to the Internet, coupled with use of the ATM network for cash withdrawals, will reduce bank overheads such as staff and high street premises.

[1464] Clause 4b, c, d Online Service Conditions.
[1465] http://www.halifax.co.uk/SecurityandPrivacy/onlinefraudguarantee.asp
[1466] http://www.personal.barclays.co.uk/BRC1/jsp/brccontrol?task=homefreegroup&value=13491&target=_self&site=pfs
[1467] http://www.halifax.co.uk/SecurityandPrivacy/onlinefraudguarantee.asp

The question arises why UK banks can offer electronic banking to customers on more generous terms than the majority of the Singapore banks studied here. One would expect the risk to be no greater in Singapore than in the United Kingdom. Chris Reed suggests an answer: when electronic banking was first introduced in the United Kingdom, "banks adopted a conservative risk management approach to this new technology."[1468] It was not unusual, he goes on, to find terms placing all liability for transactions using the correct codes, on the customer.[1469] The similarity with the current trend in Singapore is striking. In Reed's view some of the terms may have fallen foul of the UCTA but they were never challenged.[1470] It then became clear, "that such a conservative approach to the allocation of risks … could not continue, because the early contracts were far too one–sided."[1471] Pressure for change came in the form of a European Commission Recommendation in 1988, followed by the Jack Report in 1989[1472] and a government White Paper in 1990,[1473] which suggested a solution in the form of a Code of Practice. The United Kingdom Banking Code[1474] followed. This states that unless the bank can prove fraud or a failure to act with reasonable care, the customer will have no, or limited, liability for losses from an account.[1475]

[1468] Chris Reed, Ian Walden and Laura Edgar (Editors) Cross–Border Electronic Banking: Challenges and Opportunities (2nd ed, LLP London, 2000), 156.
[1469] *Ibid*, 156.
[1470] *Ibid*.
[1471] *Ibid*.
[1472] Banking Services: Law and Practice Report by the Review Committee, CM 622 (HMSO, London, 1989), chapters 9–10.
[1473] Banking Services: Law and Practice Cm 1026 (HMSO, London, 1990).
[1474] Discussed in chapter 2.3 above.
[1475] The Banking Code, March 2005, cl 12.11–12.12.

11.2 The Burden of Proof

In some, perhaps most, online frauds it is not possible to objectively conclude that a withdrawal was fraudulent. The main source of such information would be the subjective assertion of the customer that a withdrawal was not made by him. Banks are vulnerable to false allegations of fraud by customers. Karmel's article discusses apparently inexplicable ATM withdrawals from places remote from the cardholder who swears he was at all times in possession of his card.[1476] The majority of these cases, he says, are probably the unauthorised activity of somebody linked to the customer; nevertheless, the possibility of system error or unrelated third party tampering cannot be excluded.

The incidence of the burden of proof where a customer alleges an unauthorised debit is particularly significant in the context of electronic banking because of the dearth of evidence. Benjamin Geva says that the bank must prove that it was entitled to debit the customer's account.[1477] This means, in the context of an ATM withdrawal, proof that it verified the PIN and that the card used was genuine; in addition, the bank must prove the adequacy of the security procedure and the absence of negligence by the bank.[1478]

The Evidence Act[1479] applies to judicial proceedings in Singapore. Section 104 states: "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at

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[1476] Martin Karmel "Procedure and Evidence: The Maintenance of Transaction Records: Proving the State of Account in EFT Transactions" in R M Goode (editor) *Electronic Banking – The Legal Implications* (London, The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985) 45 at 50–51.

[1477] "Consumer Liability in Unauthorized Electronic Funds Transfers" Benjamin Geva (2003) 38 Can Bus LJ 207 at 232 et seq. Chris Reed expresses a similar view, see Joseph J Norton, Chris Reed and Ian Walden (Eds) Cross–Border Electronic Banking: Challenges and Opportunities (1st ed, London, LLP, 1995), 85.

[1478] Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" 232.

[1479] Cap 97.

all were given on either side." Section 105 puts the burden of proof of particular facts on the person who wishes the court to believe their existence. Section 108 puts the burden of proving facts especially within the knowledge of one party, on that party.

Jeffrey Pinsler, in his book on the law of evidence in Singapore, writes: "In civil cases the incidence of the burden of proof is primarily determined by the pleadings which reflect and formulate the … issues".[1480] The facts which are not admitted, and therefore remain in issue, must be proved by the plaintiff.[1481] The burden of proof must be distinguished from the burden to adduce evidence, which may oscillate between the parties according to the effect of the evidence that has been led.[1482] Pinsler points out that the drafting of the pleadings can affect the incidence of the burden of proof.[1483] In a simple bank–customer dispute, the customer may plead the existence of the contract with the bank and the term of the agreement that debits will be made from the account only with a valid mandate. The bank would admit this. The customer may plead, furthermore, that the debit was made without a mandate. This, the customer may have to prove, unless the bank pleads that it paid with a mandate, in which case it is conceivable that the burden of proof may be the bank's. Furthermore, if the bank pleads a breach by the customer of his duties, the bank may be required to prove that.

[1480] Jeffrey Pinsler *Evidence, Advocacy and the Litigation Process* (2nd edition, LexisNexis Singapore, 2003), 250.
[1481] *Ibid*.
[1482] *Ibid*.
[1483] *Ibid*, at 251.

In *Yogambikai Nagarajah v Indian Overseas Bank*,[1484] the Singapore Court of Appeal held that the burden of proving forgery was on the party alleging it, and that the required standard of proof is a higher degree of probability than the ordinary civil standard, albeit not as high as the criminal standard,[1485] following *Hornal v Neuberger Products*.[1486] It appears that the customer in *Tai Hing Cotton Mill* was put to the proof of the alleged fraud.[1487] An allegation of fraud in the context of an unauthorised debit will invariably emanate from the customer; from this it seems that the customer will bear the burden of proof. Indeed, in *Khoo Tian Hock*, the court applied the authority of *Yogambikai* to require the customer to prove the forgeries.[1488] In *Ri Jong Son v Development Bank of Singapore Ltd*,[1489] a joint account holder claimed that his signature had been forged by the other account holder and he sought a declaration that the debit was without authority. The bank denied these allegations. It is apparent that the customer bore the onus of proof.[1490]

This analysis of the position in Singapore suggests that the onus of proof will mostly be on the plaintiff customer. Assuming, however, that the burden is on the bank, it would have to prove on a balance of probabilities that the debit was authorized. In the context of electronic banking, compliance with the mandate will not be difficult for the bank to demonstrate, although the bank may in addition be required to prove that its security

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[1484] [1997] 1 SLR 258.
[1485] *Ibid*, at 269 et seq. Note, however, in *Tong Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR 263 at 274 - 275 the Singapore Court of Appeal stated that the burden of proof in civil cases is a balance of probabilities even in cases of fraud but the more serious the allegations, the more the assertor will have to do to establish them.
[1486] [1957] 1 QB 247.
[1487] See the judgment of Cons J in the Hong Kong Court of Appeal [1984] 1 Lloyd's Rep 555 at 568 et seq.
[1488] *Khoo Tian Hock & Anor v Oversea–Chinese Banking Corporation Limited (Khoo Siong Hui, Third Party)* [2000] 4 SLR 676 at 681.
[1489] [1998] 3 SLR 64
[1490] *Ibid*, at 71. This was on a higher standard as is "needed to support a claim of forgery."

procedures are sound and in ATM transactions that the card which was used was the customer's authentic card.[1491] Geva concedes that it is "debatable how far the financial institution ought to go in making its case."[1492] Although he does not elaborate, it seems that he is acknowledging that at a certain point, the bank will have adduced sufficient evidence to cast an evidential burden on the customer to refute evidence that the bank acted in accordance with a mandate. In many cases the customer may only have his own evidence denying that the mandate emanated from him, unless he has knowledge of where the lapse occurred, in which case it may point to a breach of his duties to safeguard the means of access to the account.

In these disputes, the customer cannot escape the need to prove his claim to a certain extent, either in the form of the burden of proof, perhaps requiring a higher standard than a balance of probabilities, or an evidential burden. The assessment of the customer's credibility will be key to the acceptance of his evidence.

The requirements of proof may detract from the value of the concessions made by HSBC and Standard Chartered.[1493] Nevertheless, they represent a more customer–friendly position than a provision deeming all transactions using the correct codes to be authorized. They recognize that there are circumstances in which the customer could be the blameless victim of fraud, and give the customer a chance to prove that.

[1491] It seems that this may not be difficult in the case of online (as opposed to offline) transactions, see Joseph J Norton, Chris Reed and Ian Walden (Eds) Cross–Border Electronic Banking: Challenges and Opportunities (1st ed, London, LLP, 1995), p83.

[1492] Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" 232.

[1493] Std Ch E–terms 4.4 makes it clear that the customer, to escape liability for unauthorized instructions emanating from a third person, must prove to the satisfaction of the bank that, inter alia they adhered to the security procedures stipulated.

HSBC's T&C governing ATM cards in Singapore contrast with their online banking T&C. The former, like the other Singapore banks studied here, reflect anxiety about unauthorised transactions using the ATM card. All transactions effected using the card are deemed to be authorised by the customer;[1494] all losses arising in connection with the use of the card are to be borne by the customer;[1495] the bank may debit the account with any withdrawals and transfers made with the card, irrespective of the customer's authority and knowledge of the transactions.[1496] It is not obvious why HSBC's approach to ATM banking should differ so much from that for Internet banking. Could it be that the bank has empirical evidence to the effect that unauthorised debits are more prevalent through the ATM than on the Internet? Perhaps Internet banking fraud requires a greater level of expertise; the inability to extract cash directly through the Internet is another possibility; the greater number of security tiers, username, password, 2FA for Internet banking compared with only a password (once possession of the ATM card has been obtained) for ATM banking is another consideration.

11.3 Risk Allocation Alternatives

Absent fraud or negligence ("without reasonable care") by the customer, all the United Kingdom T&C consulted here state that the customer is not liable, or his liability is limited to 50 pounds, for unauthorised card transactions.[1497] This is consistent with The Banking

[1494] HSBC Terms and conditions governing personal deposit accounts, 1 December 2006, Part A, cl 13.5.
[1495] *Ibid,* cl 13.6.
[1496] *Ibid,* cl 13.7.
[1497] See e.g. Barclays 3.3–3.5; NatWest General Conditions, section A, cl 13.10; HSBC (UK) Personal T&C, Section 2, cl 9.3; Halifax 10, 14–17.

Code to which these banks subscribe.[1498] Customers are, of course, required to comply with their security duties.

Geva has made the following loss allocation proposal: [1499]

1. The customer is liable for fraudulent withdrawals in which he is complicit and authorized withdrawals. His definition of "authorized" would include cases where the customer caused or contributed to the loss through fault. The burden of proof is on the bank.
2. The customer is liable on a no–fault basis for unauthorised debits up to a minimum amount, provided the bank can prove its compliance with verification procedures. This will promote diligence by the customer and take account of the usual inability to prove where the security breach arose.
3. The balance of the loss is to be borne by the bank.
4. A verification and notification duty is imposed on the customer. Failure to comply can lead to customer liability.

The verification duty is the main difference between Geva's proposal and the prevailing position in the United Kingdom.

Geva acknowledges that while banks may prima facie be justified in passing the risk for properly authenticated but unauthorised transfers to the customer, he says there are a number of factors which detract from that conclusion: the large losses which the customer

[1498] UK Banking Code, March 2005, section 12.12.
[1499] Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 239 et seq and 278.

may have to bear, the virtues of loss distribution, negligence by either bank or customer and the bank's responsibility for facilitating an insecure system.[1500] Some of these considerations have been discussed in the context of the verification and conclusive evidence clause and the need for a broader duty of care.[1501] The points concerning bank negligence and facilitating a risky system need to be considered. In Geva's view they are related: in the context of electronic banking where authentication is impersonal, bank negligence is likely to consist in failure to implement adequately secure systems and procedures.[1502] This is the second major concern reflected in the T&C.

11.4 System Integrity, Failure and Faults

The bank's duty of care to the customer[1503] extends to the provision of electronic banking services. The duty requires, inter alia, that banks offering electronic services set up a safe system. Whether the bank has discharged this aspect of its duty will be judged with reference to a wide range of factors including the technological capabilities of the time, identified vulnerabilities, customer education and information on electronic banking and cost. The bank's responsibility in this area is reinforced by the Monetary Authority of Singapore[1504] and the Singapore Banking Code, which states: "Your bank will ensure that its banking systems are reliable and secure."[1505]

[1500] Benjamin Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 229.
[1501] See chapter 4.4 above.
[1502] *Ibid,* at 231.
[1503] See discussion in chapter 1.5 above.
[1504] Monetary Authority of Singapore statements, circulars and notices on Internet banking are numerous. See, for example, MAS Policy Statement on Internet Banking, 9 July 2000; MAS "Internet Banking Technology Risk Management Guidelines", June 2003.
[1505] Code of Consumer Banking Practice, Sep 2002, cl 3.d.iii, 18.

In the United Kingdom, Halifax tells the customer: "We do all we can to protect you online"[1506] and "we are committed to looking after your money".[1507] The security measures employed are detailed on the website.[1508] In Singapore, OCBC for example, on its website, takes a more guarded position: it explains that there are risks inherent in the system, theft of access codes and fraudulent transactions are mentioned as examples of such risks. This is followed by a warning that while OCBC takes security measures to safeguard against these risks, it is "unable to guarantee the complete security of your transactions against any attacks from malicious programs."[1509] DBS Internet banking T&C contain an acknowledgement by the customer of the "internet–related risks" which are listed as: inadequate technical knowledge, failure to take safety measures, monitoring by third parties, third party access, viruses, and other similar threats.[1510] It is regrettable that these risks are buried in the body of the T&C rather than being highlighted at the beginning of the document. Bank websites are ideal platforms for giving customers the necessary information on electronic banking. It is desirable that customers are informed of the risks associated with the service.

Customer education is an important aspect of electronic banking security and of the bank's duty. The bank's responsibility for customer education is recognized by the Monetary Authority of Singapore[1511] and Singapore banks are clearly conscious of their responsibility for educating customers. For example, in the context of Internet banking, their websites

[1506] http://www.halifax.co.uk/SecurityandPrivacy/onlinefraudguarantee.asp
[1507] http://www.halifax.co.uk/aboutonline/home.asp
[1508] http://www.halifax.co.uk/securityandprivacy/technology.asp
[1509] "Benefits and Risks of Internet Banking" at https://www.ocbc.com/internet–banking/
[1510] DBS E–terms Part B 36.
[1511] See, for example, Monetary Authority of Singapore Annual Report 2003/2004, Box 9; "Internet Banking Technology Risk Management Guidelines", June 2003.

give instruction on proper logging out procedures, cache clearing, changing passwords regularly, alerts on phishing; ATM cards are accompanied by instructions not to store the card and the PIN in the same place, to memorise the PIN rather than write it down and customers are warned to be on the lookout for ATM machines that have been tampered with.

Last year[1512] OCBC had an alert on its website for ATM skimming devices. This, it explained, is an unauthorised physical device placed over part of the ATM machine; it is used to obtain information from cards inserted into the ATM machine which facilitates counterfeit card production, sale of personal information and credit card fraud. If used in conjunction with a camera device, PIN details may be gleaned, enabling unauthorised withdrawals. While the website attempts to educate customers on how to identify these devices and warns them not to use affected machines, this information would not come to the attention of all ATM users and even among those who see it, some may not recognize the device. Despite the customer's innocence in such circumstances, provisions deeming access to be authorized because the correct codes were used, would saddle the customer with liability.

This highlights circumstances in which such provisions operate harshly against the customer. The bank is responsible for the maintenance and integrity of the systems it makes available to customers. Other than being vigilant about patent system tampering or malfunction, there is nothing the customer can do to prevent such problems. Banks are in a better position to identify system faults and tampering than the customer. In the United

[1512] March 2007.

Kingdom, Halifax informs customers that they monitor and analyse online transactions 24 hours a day.[1513] The same can be expected in Singapore. Unlike banks with a wide ATM network in larger countries like the United Kingdom, Canada and Australia, banks in Singapore operate in a very limited geographical area. Frequent physical inspection, installation of security cameras and monitoring of transaction and other data, are, it is submitted, duties that customers can reasonably expect banks in Singapore to undertake.

With proper monitoring by banks, overt criminal activity such as skimming devices should not succeed, and it is reasonable to expect banks to bear losses arising from such third party tampering unconnected with the customer. Where banks do discover evidence of third party tampering, it is submitted that their duty of care to customers requires them to take steps to alert all, or at least potentially affected customers and to ascertain whether unauthorised transactions have been made. New cards and access codes may have to be issued. The Monetary Authority of Singapore requires "an open policy of disclosure of security incidents" to customers.[1514]

Electronic banking T&C reflect concern among banks about liability arising from faults and failures in the hardware and software of their systems; they shift this risk to customers. There are provisions indemnifying the bank against losses arising from system faults, waiving the customer's right to claim against the bank in the event of system fault, excluding liability for loss from failure or non–availability of the service or equipment.[1515]

[1513] http://www.halifax.co.uk/securityandprivacy/technology.asp
[1514] MAS circular no. FSG 61/2001.
[1515] UOB 23.8, 25.1(b), E–terms 2.5(b), 7(b)(v), 7(b)(vi), 7(b)(xiv), 7(b)(xv), 7(b)(xvi), 8(d); OCBC 26.2(c), E–terms 2.8, 4.2; DBS E–terms Part A 20(c), 20(e), Part B 43, 47; Std Ch 14.3, 34.2, 35(x), E–terms 8.2.3.

HSBC, on the other hand, says that the customer will not be liable for faults in their systems unless they were obvious or the customer had notice of them,[1516] while Standard Chartered excludes liability for system or equipment breakdown or failure except where they should have prevented them.[1517] In some cases, the more general exclusions of liability or indemnity are broad enough to cover the risk in question. For online banking, Halifax in the United Kingdom has a more succinct but similar exclusion for any loss suffered where a communication between bank and customer is distorted, fails to reach its destination or is sent in error.[1518] Significantly, it is subject to the fraud guarantee.

Claims arising from equipment or system failure may be analysed from different perspectives. For example, one may seek to identify whether the bank was at fault. In the context of the T&C and the risk burden, it is submitted that the significant distinction lies not primarily in the determination of fault but in the nature of the loss. The most common complaint regarding equipment or system failure will be about the non–availability of the service; in most cases this will amount only to inconvenience to customers. At the other end of the scale, the non–availability of an electronic facility could give rise to a claim for large consequential losses owing, e.g., to the late payment of monies to a third party. The reasons for the failure may be attributable to the bank's fault such as failure to maintain or update equipment or failure to have suitable back–up for known risks. On the other hand, the problem may be beyond the control of the bank, e.g., a power failure. Contractual doctrines such as force majeure and frustration may apply and provide the bank with protection in certain circumstances.

[1516] HSBC 10.e.ii.
[1517] Std Ch 8.2.3. This concession should, however, be read in conjunction with cl 8.3.
[1518] Halifax Online Service Conditions cl 4.d. and 4.e.

It is submitted that it is reasonable for the bank to exclude liability for consequential losses arising from the unavailability of the service, whether attributable to the bank's fault or not except in instances of gross negligence or wilfulness on the part of the bank. In general, the law has reservations about liability for consequential losses and it is not unreasonable for banks to contract that customers bear the risk of system or equipment failure giving rise to such losses.[1519] Of course, an alternative means of performance should be given so far as possible in the event of system or equipment failure, such as withdrawals from the bank counter when an ATM machine is out of order.

In a small number of cases, presumably rare, claims may be for actual losses from the account because of system or equipment failure. This could arise from a programming deficiency or a mechanical fault. Martin Karmel[1520] refers to alleged occurrences of ATM machines spewing out notes without being prompted to do so. The difference between this and the scenario discussed in the paragraph above is that here system failure results in an unauthorised debit to the customer's account. Again, such losses may or may not be attributable to the fault of the bank. It is submitted that losses from a customer's account caused by system or equipment failure, not facilitated by the customer, should in accordance with basic banking principles, be borne by the bank, irrespective of fault. The hardware and software for electronic banking services are in the custody of the bank. The

[1519] UOB 25.1 ("any loss") but qualified by "through no fault of the bank", E–terms 7(e);OCBC 26 (any loss or other consequences"), E–terms 4.2 (indemnity for any losses "whatsoever and howsoever caused"); DBS 6.6, 21.1 ("any loss"), E–terms Part A 22, Part B 47; HSBC 9.a.ii; Std Ch 11.3.1, 34.2, 35(w), E–terms 8.2, but see also 8.3.

[1520] "Procedure and Evidence: The Maintenance of Transaction Records: Proving the State of Account in EFT Transactions" in R M Goode (editor) *Electronic Banking – The Legal Implications* (London, The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985), 45 at 51.

customer has no control over the systems employed, their maintenance and repair. It is harsh for a customer to be liable for a loss over which he has no influence.

The reality, however, is that, where there has been system malfunction, it will not always be possible to identify genuine customer loss from a hoax. In the banks' defence, the risk of unauthorised debits caused by system error or failure pales in comparison with the risk of unauthorised debits facilitated by the customer.[1521] Nevertheless, we have seen that HSBC and Standard Chartered in Singapore have seen fit to contract on a more balanced basis.[1522] Consequential losses may result from the unauthorised debit, for example because of an inability to pay a third party. It is submitted that the exclusion of consequential losses which is ubiquitous in Singapore T&C should not apply in the event of the bank's gross negligence or wilful default.

DBS excludes liability for any loss suffered in connection with the use of Internet banking "howsoever caused" and notwithstanding that the bank could have anticipated or had been notified of the possibility of the loss.[1523] It is submitted that such a clause is unreasonable under the UCTA. In connection with the use of other electronic services, such as telephone and ATM services, DBS excludes liability for loss unless attributable to the bank's negligence or wilful default.[1524]

[1521] See eg UNCITRAL Legal Guide on Electronic Fund Transfers 1987: "The errors which occur as a result of hardware or software failure are a minute proportion of the total number of transactions."
[1522] See discussion above on HSBC's terms for online banking.
[1523] DBS E–terms Part B 47.
[1524] DBS E–terms Part A 20.

11.5 Conclusion

The problem of proof in electronic banking prompts some banks to use sweeping provisions placing all the risk on the customer. Banks are vulnerable to unscrupulous customers alleging fraudulent or erroneous withdrawals from their account. The United Kingdom experience, however, does not seem to have led to an opening of the fraud floodgates. The 2FA used in Singapore will help to reduce the scope for fraud.[1525]

It is submitted that the apportionment of risk in electronic banking should not differ markedly from that for banking in general, and the following usual provisions should apply:

1. The bank is liable unless there are grounds to hold the customer liable for a loss.
2. The customer is under a general duty of care in the conduct of his bank account. This will include the requirement that he comply with the security procedures for electronic banking. Breach may excuse the bank from liability.
3. The customer is under a duty to verify and notify the accuracy of his bank statement, failing which it becomes conclusively binding on him.
4. Losses are to be apportioned where the bank has been negligent and the customer is in breach of his duty of care and/or his verification duty, in accordance with the proposal set out above.[1526]

[1525] The notification of the second tier password by mobile phone may facilitate better verification of the truthfulness of a dishonest claim of fraud by a customer by having reference to the telephone records kept by the mobile telephone provider.
[1526] In chapter 8 above.

It is submitted that the following additional terms, unique to electronic banking are appropriate:

1. The burden of proving a prima facie valid mandate, appropriate security procedures[1527] and the proper functioning of the system should be on the bank. The customer will carry an evidential burden to rebut this evidence. The outcome may depend on the customer's credibility. Relevant details include, in an ATM transaction, whether the card is still in his possession, how and when he considers it went missing, what steps he took thereafter, the terminal from where the unauthorised transaction was made, the time of the transaction; in the case of an internet transaction, the terminal which was used and the time of the transaction, information relating to the 2FA tier of security, how it was stored, how it was breached, and telephone records if the 2FA is notified by telephone, information relating to people who may have obtained access such as family members, etc. If the bank alleges circumstances which excuse it from paying on a valid mandate, i.e. a breach of the general duty of care or the security duties, the burden of proof is on the bank. Section 108 of the Evidence Act will apply where particular information is within one party's knowledge; and an argument akin to the res ipsa loquiter presumption may be made in some circumstances.
2. The bank's exposure in electronic transactions can be tempered by the imposition of reasonable daily, monthly and transaction limits. These may vary from individual customers to business customers. The customer may increase these limits but, it is submitted that it is reasonable to provide that any loss which would not have occurred

[1527] It is thought that this would be met by the bank demonstrating that its technology is in line with that used by other banks in Singapore and elsewhere. Apart from the technological safeguards, this would include monitoring of ATM facilities, withdrawal limits and customer profiling.

but for the customer's increase of these limits will be borne by the customer except in the case of gross negligence or wilfulness by the bank.[1528]

3. The bank will fully investigate a complaint of fraud or erroneous debiting to the customer's account[1529] within a stipulated time period. The findings will be shared with the customer along with any relevant bank records, e.g., relating to the proper functioning and suitability of its equipment and systems. The customer will cooperate fully with the bank giving it access to any information that will aid in the investigation.[1530] Failure to do so will be relevant in determining whether the bank has discharged its burden.[1531] Banks should set up a procedure whereby the customer is required to complete a form with all relevant details to initiate the investigation.
4. The customer will not be liable for debits made after notification of a breach in the security of the access card/token/PIN.
5. Consequential losses are excluded unless attributable to the bank's gross negligence or wilfulness. Some T&C make the customer liable for consequential losses suffered by the bank because of the customer's breach.[1532] This, it is submitted, is one–sided and unreasonable.

It is clear that the UCTA applies to the various exclusions of liability and indemnities for electronic banking. The issue is one of reasonableness. Singapore courts have been cautious in the past about declaring bank terms unreasonable but, based on the discussion above, a

[1528] See similar provisions in UOB E–terms 2.4(c).
[1529] A requirement suggested by Geva in "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 279.
[1530] *Ibid*.
[1531] *Ibid*.
[1532] See, e.g., UOB E–terms 2.8 for any breach of the agreement by the customer; OCBC 27 indemnity for any loss from the bank's "execution, performance or enforcement" of the T&C.

strong argument can be made that some of the terms are unreasonable and banks should consider a revision. Court decisions will reflect the prevailing mores. The relatively harsher terms imposed by Singapore banks in comparison with the United Kingdom suggests that banks do not currently feel the need to pander to consumer interests.

Chapter 11: Conclusion and Recommendations

The Singapore T&C weave a tight mesh of protection around the bank. The various provisions intertwine, overlapping in many places, plugging particular exposure in others. Their impact cannot be assessed in isolation. It is necessary to determine the net effect, the overall allocation of risk and incidence of liability.

It has been shown that in Singapore the T&C for a current account may contain most or all of the following provisions:

- a duty on the customer to prevent fraud and forgery;[1533]
- a verification and conclusive evidence clause;[1534]
- deemed validity of electronic transactions;[1535]
- an exclusion for loss arising without bank fault;[1536]
- an exclusion for loss from forged or altered cheques where the defect cannot be detected,[1537] or where the signature appears to match the mandate;[1538]
- an exclusion of bank liability where the customer has facilitated the loss;[1539]
- a general exclusion, for example, for loss howsoever arising;[1540]
- conclusiveness of bank records;[1541]

[1533] UOB 14(a)(iv); DBS for cheque books and passbooks: 11.2, 11.3; Std Ch 11.1.7, 11.3 (indemnity and exclusion of liability).
[1534] UOB 13.3, 13.4; OCBC 9; DBS 11.1(c); HSBC Part A 3; Std Ch 5.1.1.
[1535] UOB 15.1, E–terms 2.1(c); OCBC E–terms 1.7, 2.7, 3.6; DBS E–terms Part A 11, Part B 20, 21; HSBC 13.5, 13.6, 14.5, 14.6; Std Ch 34.2, 35(w).
[1536] UOB 25.1; OCBC 26.3; DBS 21.1(a); Std Ch 11.8.
[1537] UOB 3.10; OCBC 26.2(f), 38.6; HSBC Part B 1.5; Std Ch 4.5, 11.1.6.
[1538] UOB 3.3; OCBC 10.3, 26.2(f); Std Ch 4.5, 11.1.4.
[1539] UOB 3.10; OCBC 26.2(g), 26.3; DBS 21.1(b); HSBC Part B 1.5; Std Ch 11.1.7.
[1540] OCBC 26.1; DBS 21.1(e); HSBC 20.4; Std Ch 11.5.

- general exclusions of liability;[1542]
- broad indemnities for claims against the bank;[1543]
- variation clauses;[1544] and
- a shortened limitation period.[1545]

Let us consider a hypothetical set of bank T&C imposing only a verification and conclusive evidence clause and a general duty of care on the customer not to facilitate fraud and forgery on his account (a *Khoo Tian Hock* duty). The bank will also have an implied duty to exercise care in the conduct of the account and to observe its mandate. Assuming no further contractual inroads, if there is no breach by the customer of his contractual duties, the incidence of loss between the innocent bank and the innocent customer as a result of the dishonesty of a third party, is on the bank. Although the duties posited are more extensive than under the common law, the default allocation of risk to the bank remains intact.

The picture changes, however, when the usual provisions listed above are added to the contract. Exclusions of liability for electronic transactions carve off large areas of bank exposure irrespective of fault, with a commensurate increase in customer exposure. The bank's potential liability is now confined mainly to cheque and counter transactions, and fund transfers not made by electronic banking. Further narrowing of the bank's exposure comes from the exclusion where the bank is not at fault. This reverses the risk where both

[1541] UOB 22.3, 34.9, E–terms 13(i); OCBC E–terms 2.9, 3.9; DBS 30, E–terms Part A 24, Part B 53; HSBC Part A 2.5, 13.7, 14.5, E–terms 8.b.; Std Ch 3.2, 35(l).
[1542] OCBC 26.1; DBS 21.1(e); HSBC 20.4; Std Ch 11.5.
[1543] UOB 21, E–terms 10; OCBC 27, E–terms 4.2; DBS 16, E–terms Part A 23, Part B 54; HSBC Part A 19, E–terms 16.c; Std Ch 11, E–terms 8.4.
[1544] UOB 28.1–2, E–terms 13(b); OCBC 32, E–terms 4.4; DBS 28, E–terms Part A 31, Part B 61; HSBC Part A 22.1–2, E–terms 13(f); Std Ch 22, E–terms 12.
[1545] UOB 25.2; Std Ch 11.9.

parties are innocent. Bearing in mind that payments, whether to the customer himself or to third parties on his direction, make up the majority of the bank's activity on behalf of the customer, the replacement of the strict duty to observe the mandate with a duty of care is a significant inroad. The exclusion for payment of forged or altered cheques where the defect cannot be detected or the signature appears to match the mandate, removes a chunk of bank risk in the context of cheques. The ambit of bank liability is now limited to patent forgeries in cheque and counter transactions and non–electronic fund transfers. This is further constricted by the exclusion that operates where the customer has facilitated the loss. Non–receipt of bank statements or cheque books is covered. If loss arises from an unforeseen situation not already covered, the general exclusion of liability is likely to protect the bank. Added to that is the conclusiveness of bank records, the wide indemnities, the bank's ability to vary the contract when a vulnerability is detected and the shortening, in some cases, of the time limit in which to bring the claim.

The risk for unauthorised withdrawals from a bank account lies squarely with the customer. It is only in very limited circumstances that the customer can look to the bank to bear the loss from an unauthorised debit. The result is that the bank is almost untouchable.

It has been argued here that the bank is not adequately protected in the modern banking environment by the *Macmillan* and *Greenwood* duties, and that the restriction of the *Macmillan* duty to "negligence in the transaction itself" is unsound and unwarranted. On the other hand, it is submitted, based on the analysis of various provisions in the T&C and having regard to their cumulative effect, that they are excessive in protecting the bank

against the risk of the unauthorised debit. The question is how best to rebalance the needs of bank and customer today, taking account of modern banking reality.

- Geva has proposed a statutory scheme to allocate losses from forged cheques and electronic funds transfers.[1546]
- The Jack Report recommended that the bank should be able to raise a defence of contributory negligence where the customer has been so negligent as to render it inequitable for the bank to bear all the loss.[1547]
- The Singapore High Court has recognised a general duty of care owed by the customer to the bank.[1548]

Geva's proposal for allocating loss from forged cheque losses[1549] is, in summary, as follows:[1550]

- The default rule is that forgery losses fall on the bank. This is consistent with the bank being the better risk bearer and the superior pre–payment detector. Passing on resulting costs to the customer is acceptable.
- The customer will be liable if he has breached the *Macmillan* duty provided the bank has not been negligent AND the customer has not notified the bank of loss or theft of its cheque forms.

[1546] Benjamin Geva "Allocation of Forged cheque Losses – Comparitive Aspects, Policies and a Model for Reform" [1998] 114 LQR 250 at 288 et seq. See also his scheme for allocation of losses from unauthorized electronic Funds transfers – Geva "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can Bus LJ 207 at 237 et seq.

[1547] Banking Services: Law and Practice Report by the Review Committee (HMSO, London, Cm 622, Feb, 1989), 43, Recommendation 6(1).

[1548] *Khoo Tian Hock & Anor v Oversea–Chinese Banking Corporation Limited (Khoo Siong Hui, Third Party)* [2000] 4 SLR 673.

[1549] Which adheres to the principles he identifies, discussed in chapter 4.4 above.

[1550] Benjamin Geva "Allocation of Forged cheque Losses – Comparative Aspects, Policies and a Model for Reform" [1998] 114 LQR 250 at 288 et seq.

- Customers should bear a small deductible in respect of each forgery loss to encourage diligence from the customer.
- All customers have a duty of care to examine bank statements and report errors within a stipulated time.
- Accounts suffering repeated forgery losses face sanction, for instance by withdrawal of payment facilities or higher charges.
- Sophisticated business customers have a duty of care to prevent forgeries, preferably by adhering to stipulated procedures.

Geva's proposals for unauthorised electronic transfers are similar.[1551] His scheme for forged cheque losses is rejected here at an ideological level for not adequately valuing loss prevention and the mutuality of the banking relationship. It is primarily about loss allocation.[1552] While it sets a goal of loss prevention, this is seen as disproportionately the domain of banks. It has been argued here, and there is wide support from academic and judicial quarters, that the most effective and more affordable loss prevention opportunities lie with the customer, particularly through verification and notification. Geva's proposal for unauthorised electronic funds transfers recognises the essential role of the verification duty for combating losses. Once its vital role is accepted, and coupled with a general duty of care, it is submitted that there is no need for loss allocation in the form of a minimum deductible against the customer. Geva addresses two particular problem areas: forged cheques and unauthorised electronic transfers. Geva's system is unnecessarily complicated for the average customer: for example, the definition of "authorised payments", deductibles

[1551] See discussion in Ch10.11 "Electronic Banking" above.
[1552] In "Reflections on the Need to Revise the Bills of Exchange Act – Some Doctrinal Aspects" (1981–2) 6 Can Bus LJ 269 at 324, Geva recognises the importance of loss reduction.

and verification duties of care may be compounded by separate rules according to the method of payment.

Geva supports different treatment for personal and business customers, an issue raised in *Canadian Pacific Hotels*. The additional duties recognised by Montgomery J in the trial court were limited to sophisticated customers, by which it seems he meant commercial customers.[1553] One reason for this limitation may be the "commercial custom"[1554] on which he based the implied terms. On appeal, Le Dain J in the Canadian Supreme Court rejected the differentiation between ordinary and sophisticated customers, holding that there was no basis in law for the distinction and that it would lead to "great uncertainty."[1555] On this aspect, he was in agreement with Cons J in the Hong Kong Court of Appeal in *Tai Hing Cotton Mill*.

Emil J Hayek's[1556] critique of the *Canadian Pacific Hotels* decision supported the distinction. The two classes of customer are "substantially different" in his view and the courts are able to deal with the grey areas. There was a suggestion in the Singapore Court of Appeal decision of *Pertamina Energy Trading Limited v Credit Suisse*[1557] that the distinction is supported. V K Rajah J there referred to the reasonableness of a conclusive evidence clause under the UCTA and took account of the fact that the customer was a commercial entity. It is submitted that this should not, absent a clearer intention, be taken

[1553] Montgomery J recognised two additional duties on the customer: the institution of acceptable internal controls and the duty to examine bank statements with reasonable care and to report errors within a reasonable time, see (1981) 122 DLR (3d) 519 (HC) at 532–534.
[1554] *Canadian Pacific Hotels Ltd v Bank of Montreal* (1981) 122 DLR (3d) 519 (HC) at 532.
[1555] *Canadian Pacific Hotels Ltd v Bank of Montreal* (1987) 40 DLR (4th) 385 at 429.
[1556] "Canadian Pacific Hotels Ltd v Bank of Montreal" (1988) 14 Can Bus LJ 361 at 369.
[1557] [2006] 4 SLR 273 at 296.

as support for the view that the individual and the business customer are fundamentally different. It is support for the view that under the UCTA, the differences between personal and business customers are relevant to the determination of the issue of reasonableness.

Hayek's proposition is disputed. From a banking perspective, the differences between, for example, an individual customer and a large corporate customer are not so fundamental as to justify a different legal regime; rather, they are differences in detail and differences in degree that should be taken into account in the same way that the circumstances of every case are to be taken into account. If, for the sake of argument, it were accepted that the two classes of customer are substantially different, the problem arises whether there are indeed only two classes of customer. Is there one category embracing the ordinary individual customer who manages his own bank account and the high–net–worth individual with a myriad of accounts assisted in the management of his affairs by an accountant? Does a small partnership account belong with the individuals or with the commercial, sophisticated customers? And does the small business account get categorised with the multinational?

From a doctrinal and policy viewpoint, it submitted that the law and duties imposed on customers should be the same for all, regardless of their legal personality, size or degree of sophistication. The differences between customers will naturally be expressed when their duties are translated into practice. Generally, the banking affairs of the individual customer are simpler and less numerous than the corporate customer; therefore the impact of more onerous duties on the former is going to be reduced in terms of what is required of him. The verification of bank statements is practically a much simpler task for the ordinary

individual than it is for the business customer; and the institution of internal controls has a very different meaning for the individual than it does for the business customer.

The biggest risk of bank account losses lies with business customers and their dishonest employees. Canadian banks commonly exclude liability for losses caused by the acts of business customers' employees along with detailed provisions for the introduction of checks and balances.[1558] But the high–net–worth individual customer may also employ assistants who pose as much of a risk to the bank. So too, an individual customer may facilitate access to his bank account by a spouse, parent or child. Where a third party is able to access a customer's banking facilities, the duty of supervision and the duty to institute checks should apply irrespective of whether he is a business or a personal customer and irrespective of the customer's attributes. It is submitted that the duty of vigilance is subsumed by a general duty to prevent fraud and forgery (the *Khoo Tian Hock* duty). This duty should be articulated in the T&C.

The fact that banks may use different T&C for personal and business customers does not detract from this argument. The position taken here is that personal and business customers are not in legal terms different, and that they should not be treated differently by the law. Practically, it is recognized that there are differences: the form of the mandate, the level of activity on the account, the demand for credit, and international payment facilities are all areas in which businesses are likely to differ from individuals. These practical issues justify different T&C, but not a different legal regime.

[1558] Keith W Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245 at 257 et seq.

Apportionment of loss, as recommended in the Jack Report, is supported in principle. We have seen that it is embraced in the United States in the UCC.[1559] It is submitted here that apportionment would be particularly apposite to resolve the dilemmas arising where the bank and customer have been negligent or the customer has breached the verification duty. This potential for complementary use of the verification clause and the principles of contributory negligence is recognized also by Rafferty.[1560] Ultimately, however, apportionment of loss is just another scheme for loss allocation. It does nothing to change banking habits and avoid the losses in the first place. It cannot compete with the benefits of diligent verification of bank statements to alert the parties to fraud and arrest a scheme in its tracks. Contributory negligence is also an ex post facto label of conduct; it is a concept remote from customers. It does not inform them what they should do to avoid losses. As proposed in the Jack Report, it is a solution which is likely to be arrived at only after litigation. It is a useful tool when loss–prevention methods have failed but as a solution to the unauthorised debit, it has its limitations.

Numerous exclusions of liability, indemnities and deeming provisions mean that standard T&C for bank accounts are extensive and dense. In the unlikely event that a customer takes the time to read the T&C, he will be challenged to understand their full impact. The cumulative effect is that banks are exposed to limited pockets of potential liability to customers for losses. Some of the exclusions make a mockery of the principle underlying the verification clause, that the customer who fulfils his verification and notification duties will not be liable for unauthorised debits. The British banks studied here do not deploy the

[1559] Above, see chapter 6.
[1560] "Account Verification Agreements: When Can a Bank Protect Itself Against Its Own Negligence?" (1993) 8 BFLR 403 at 420.

extensive exclusions of liability and indemnities that are standard in the T&C of Singapore banks. In this age of consumer rights and protection, the T&C in Singapore should be simplified and reflect a better balance of risk and responsibility. At the same time, the customer should accept his role and responsibility in loss prevention.

The answer, it is submitted, lies in a general duty of care coupled with a reformed verification and conclusive evidence clause. This will provide banks with greater protection than they get under the common law while at the same time upholding their duties to, and recognizing the legitimate interests of, the customer. Nowhere is the need for a general duty of care on the customer better illustrated than in the field of electronic banking.

Deciding a bank–customer dispute by determining whether there has been a breach of a duty of care, or negligence, is criticized by Geva and J F Dolan [1561] for necessitating "fact finding,"[1562] meaning the outcome is uncertain and the process, inevitably through litigation, is expensive. To a large extent this criticism has been dealt with elsewhere[1563] but the point to be made here is that Geva's proposals in relation to electronic fund transfers do not avoid the need for fact–finding and evaluation either. Geva proposes holding the customer liable for authorised withdrawals, and fraudulent withdrawals in which the customer is complicit. As his definition of "authorised" takes account of customer fault

[1561] See, for example, Geva in "Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform" [1998] 114 LQR 250 at 287 and J F Dolan "Impersonating the Drawer: A Comment on Geva's 'Consumer Liability in Unauthorised Electronic Funds Transfers'" (2003) 38 Can Bus LJ 282 at 291.

[1562] The term used by Dolan "Impersonating the Drawer: A Comment on Geva's 'Consumer Liability in Unauthorised Electronic Funds Transfers'" (2003) 38 Can Bus LJ 282 at 291.

[1563] See chapter 4.4 above.

causing or contributing to the loss, this will necessitate fact finding. This is acknowledged by Dolan,[1564] although he maintains that Geva's scheme avoids the worst of the problems.

A general duty of care surely includes a duty to verify bank statements. There are, nevertheless, a number of reasons why an express verification and conclusive evidence clause should be stipulated in the T&C in addition to a general duty of care. As mentioned before,[1565] the general duty of care has yet to be recognized by the Singapore Court of Appeal. Even assuming that the broader duty does receive Court of Appeal endorsement, the verification duty should nevertheless remain in the T&C. As a major component of a general duty of care, it is important to emphasize the verification duty to customers. A general duty of care on the part of the customer is, of necessity, devoid of specificity. The customer does not know in exact terms, in every scenario, what he is required to do. The express verification and conclusive evidence clause gives the customer certainty. He can understand what is required of him: he must carefully examine his bank statements and notify the bank of any errors within the time period stipulated. This is not an onerous task. The duty is straightforward and easy to understand. From a practical viewpoint, verification is so central to what banks wish to achieve that they should spell it out in their T&C. A further reason for specific inclusion of a verification clause is that the conclusive effect of the clause, which gives the clause teeth, would not form part of a general duty of care.

[1564] J F Dolan "Impersonating the Drawer: A Comment on Geva's 'Consumer Liability in Unauthorised Electronic Funds Transfers'" (2003) 38 Can Bus LJ 282 at 291.
[1565] See chapter 3.1 above.

Edward Rubin[1566] makes the point that shifting the risk of losses from third party dishonesty to the customer will not change his behaviour as it is invariably the result of carelessness and not a costs-benefit analysis.[1567] While negligence leading to an unauthorised debit can be a consequence of human nature, the failure to verify bank statements should not be dismissed as inadvertence. It is a habit which needs to be cultivated, a necessary requirement consequent on having a bank account. Failure to adhere to it goes beyond oversight.

This leads to the question of how the verification duty, as advocated here, should interact with the broader duty of care, also advocated here. Compliance with the verification duty by a customer who has breached his duty of care, for example by signing cheques in blank or inadequate supervision of an employee, will not free him from liability but will assist him in mitigating the loss with the bank's assistance. It is submitted that the bank's duty of care requires it to take all reasonable measures to limit losses once notified by the customer of an unauthorised debit.

Hunter J in *Tai Hing Cotton Mill* in the Hong Kong Court of Appeal[1568] said that the Canadian experience has shown that bank recourse to protection in their T&C is less attractive in practice than it is in theory. The problems that have arisen with the verification clause in Canada are restrictive interpretation to avoid the consequences of conclusiveness, and the controversy over whether the clause avails the bank where it has been negligent.

[1566] "Efficiency, Equity, and the Proposed Revision of Articles 3 and 4" E Rubin (1991) 42 Ala LR 551.
[1567] *Ibid,* at 568.
[1568] [1984] 1 Lloyd's Rep 555 at 579.

The first area is a drafting issue. *Pertamina Energy Trading Limited v Credit Suisse*[1569] indicates that this may be less of a problem in Singapore than it has been in Canada. Bank T&C should be prepared by experts in the field. There is sufficient precedent for the draftsman to avoid the pitfalls. The second area, namely negligence by the bank, involves a policy decision. It has been submitted above that it is in this context that a rule for contributory negligence would be apposite.[1570] The statement of Keith Perrett is supported: "Rationales based on loss avoidance, fairness and consistency with international banking procedures all argue in favour of such a duty", [1571] namely to verify bank statements.

It has been acknowledged that an unbridled verification and conclusive evidence clause can operate harshly in some circumstances. It has also been argued that a verification clause without the support of a conclusive evidence clause is inefficient. A revision of the T&C along the following lines is proposed:

1. The customer is under a duty to exercise care in the conduct of his bank account.
2. The customer is under a duty to examine all bank statements received from the bank to verify their accuracy. If there are any entries with which the customer does not agree or entries missing from the statement, the customer is under a duty to notify the bank in writing within 30 days of the date of the statement. After the lapse of 30 days from the statement date, the statement shall be deemed to be correct and conclusive against the customer and the bank will be free from all and any claims arising from the bank statement. Note: this is a standard verification and conclusive evidence

[1569] [2006] 4 SLR 273 at 295.
[1570] See chapter 8 above.
[1571] Keith W Perrett "Account Verification Clauses: Should Bank Customers be Forced to Mind Their Own Business?" (1999) 14 BFLR 245 at 273.

clause which clearly informs the customer what his duty is and the consequences of failure. The time period for verification is longer than is common in Singapore. This may be qualified by the concession discussed earlier excusing the customer where breach of this duty is occasioned by circumstances beyond his control.

3. Where the bank has been negligent, the customer is in breach of the contract, the total losses do not exceed $50,000, and

    3.1 the customer is in breach only of the verification duty, the customer will be liable for 20% of the direct loss suffered; or

    3.2 the customer has facilitated the loss by a breach of a duty of care in addition to failing to verify bank statements and/or notify errors, the customer will be liable for 50% of the direct loss suffered.

4. Where the bank disputes its own negligence, the customer may apply to a tribunal established for this purpose to determine the issue.

5. The customer will have the right of appeal to a court of law if he takes the view that the formula operates harshly against him. The court will apportion the losses to achieve a just and equitable result in accordance with the principle set out in section 3 of the Contributory Negligence and Apportionment of Liability Act. The bank will not have the right to appeal rulings by the tribunal.

6. In the case of accumulated losses from unauthorised debits totalling more than $50,000 arising from bank negligence and breach of a duty by the customer, section 3 of the Contributory Negligence and Apportionment of Liability Act shall apply to achieve a just and equitable result. Failing an agreement between the parties on an apportionment ratio, recourse shall be had to the courts.

7. Where a loss arises from bank negligence and breach of a duty by the customer, and the customer has complied with the verification and conclusive evidence clause, an apportionment will be made in accordance with paragraph 3.2 to paragraph 6 above.

It is submitted that the following additional provisions in the T&C are warranted:

1. The bank will act in good faith and no term should be construed to exclude bank liability for gross negligence or wilfulness.[1572]
2. Consequential losses are excluded unless attributable to the bank's gross negligence or wilfulness.

It is further proposed that in return for a broad duty of care and a modified verification and conclusive evidence clause, banks should relinquish the following clauses in the T&C:

1. The general exclusions of liability including the exclusions for losses arising in the absence of bank fault, losses from altered/forged cheques where the defect cannot be detected, or where the signature appears to match the mandate. The customer's fault, and not the bank's, should be the determining factor. The default rule should remain that the bank bears the loss.
2. The blanket validity of electronic transactions. Rather, the T&C for electronic banking should provide that:
    2.1 The bank will fully investigate a complaint of fraud or erroneous debiting to the customer's account upon the filing by the customer of such a complaint. The results of the investigation will be shared with the customer along with all relevant bank records. The customer's full cooperation with the investigation is

[1572] OCBC 26.2(a), for example, excludes liability for loss or damage where it has omitted "to act in good faith on the Customer's instructions." This, it is submitted is unreasonable.

required; failure to cooperate can be taken into account in determining whether a valid mandate existed.

2.2 The customer will not be liable for debits made after notification of a breach in the security of the access card/token/PIN.

2.3 The bank will bear the burden of proving the existence of a valid mandate, or circumstances which excuse it for complying with a flawed instruction, appropriate security procedures and the proper functioning of the system.

2.4 Any loss which would not have occurred but for the customer's increase of the bank–imposed transaction limits will borne by the customer except in the case of gross negligence or wilfulness by the bank.

3. Conclusiveness of bank records. At most, bank records should prevail unless there is evidence to the contrary.

4. Indemnities for all claims whatsoever and howsoever arising. Specific indemnities may be justified but they should be addressed to particular concerns.

5. The shortening of the limitation period. A shortening of the limitation period to one year, it is submitted, is draconian. If a shorter period is justified, it is submitted that at least three years should be given to customers to commence action.

These provisions, operating in areas where the customer has little or no control, make the biggest inroads on the customer's rights. If the customer has a general duty of care not to facilitate fraud, including a specific verification duty, it is submitted that there is no justification for the broad exclusions of liability and indemnities. Where the equities are balanced, i.e. both parties are without fault in causing the loss, the time–honoured allocation of risk to the bank is appropriate. It is at this point that the rationale of the better

risk bearer applies. The bank's exposure is still limited: some losses will have been facilitated by the customer; the vast majority of losses will be detectable debits in the bank statement.

Banks should accept their duty to educate customers regarding the T&C, in particular the duty of care, the verification and conclusive evidence clause, the security duties in electronic banking and other clauses relevant to the allocation of risk. The duty to educate should be seen as ongoing. Banks should accept their responsibility to embrace proven loss detection and limitation practices[1573] and commercially feasible technological advancements. The duty may extend to investment in research and development in such technology; the extent of the duty requires an examination of the process of invention of new technology which is beyond the scope of this work.

A particular issue is whether customers with Internet banking[1574] should be subject to the verification and notification duty every time they log on to their bank account. The practical importance of this issue lies in the possibility that a fraudster may make withdrawals from an account at short intervals such as every week or even every day. By the time the printed statement arrives in the mail, many such debits might have been made. Undoubtedly a customer, who detects an error in his bank account while using Internet banking, should be obliged to notify the bank. This is in keeping with the principle of the *Greenwood* duty, as discussed earlier. But it would be difficult for banks to prove that a customer actually detected the unauthorised debit. Bank records will, however, show a

[1573] Such as profiling customer spending and daily and transaction upper limits.
[1574] The discussion applies with modifications to other forms of automated banking.

customer's log–on history. Imposing a duty to verify and notify every time the customer logs on would be simpler. But to require verification every time a customer logs on would amount to different treatment of Internet customers from traditional customers and may even deter some customers from signing up for Internet banking facilities. Well–informed customers with up–to–the–minute information on their accounts is a desirable state of affairs. Frequent access to the latest information on a bank account is ideal for combating the underlying fraud problem.

Banks should encourage, not deter through harsh provisions, the use of facilities that afford customers easy, regular access to account information. Customers who log on to bank accounts via the Internet are likely to peruse the information available there, at least the most recent transactions, and detect unfamiliar debits out of self–interest. *Greenwood* imposes a duty on those customers to notify any forgeries that they detect. It is therefore unnecessary to impose a stricter contractual obligation to verify and notify every time a customer logs on. This is a position which should be reviewed as trends in the use of Internet banking and other facilities change.

It is preferable for banks to embrace the suggested modifications above in a spirit of self–regulation. After all, the modifications aim to produce a contract that will operate fairly for both parties, an ideal surely shared by the banks. The modifications could be incorporated in the T&C by banks, which should not wait for reforms to be introduced by statute. A third alternative is soft law, in the form of an enhanced banking code of conduct, requiring intervention by the Association of Banks in Singapore.

Some observations about the UCTA in the banking context are appropriate. Clauses in the T&C requiring the bank not to be negligent and not to act in bad faith escape the net of section 2 of the UCTA because the bank's duty to observe the mandate is strict, as illustrated by *Ri Jong Son*. Secondly, in terms of section 11(1) of the UCTA, reasonableness must be judged at the time the contract was made and not at the time of the breach or dispute. The drafters of this legislation no doubt had good reasons for this. It is apparent that various clauses in the T&C may operate unreasonably, in which case banks are likely to say that they would never robotically apply the T&C according to their full potential. It may be that in most cases the banks would accept liability for unauthorised debits rather than relying on clauses excusing them on grounds such as an absence of fault, or that the signatures appeared to match, and so on. But UCTA measures reasonableness at the time of contracting, not of breach. A better result may be achieved if the reasonableness of a clause is judged according to its actual use in specific circumstances rather than its potential use, encouraging the courts to apply the UCTA more rigorously to bank T&C. Rulings will be confined to the facts at the time of reliance on the term and will be only indicative of future rulings, easing concern about setting precedents with unpredictable consequences.

In conclusion, the express terms of the contract between bank and customer are more extensive than those implied by law. It is clear that banks use the contract to achieve a level of protection not accorded at common law. It is important to recognise that the modern banking environment is vastly different, more sophisticated and more extensive than before. This requires recognition that many of the express provisions are necessary and justifiable. At the same time, the potential for abuse by banks of their greater bargaining

power is manifest in standard T&C. This signifies a need for rigorous application of the common law and statutory controls available in Singapore law to maintain a balance in the apportionment of risk and liability between bank and customer for the unauthorised debit.

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