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DREW & NAPIER LLC

# LEGAL UPDATE

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## CASE UPDATE

### THE EFFICACY OF "CONCLUSIVE EVIDENCE" CLAUSES

***RBS Coutts Bank Ltd v Shishir Tarachand Kothari* [2009] SGHC 273**

#### Executive summary

The Singapore High Court has affirmed that a certificate issued pursuant to a "conclusive evidence" clause is, in the absence of fraud or manifest error, determinative of the amount due. However, the existence of such a clause does *not* preclude the court from reviewing the legal basis of the demand itself.

**Hri Kumar, SC** and **Benedict Teo** of Drew & Napier LLC represented the successful plaintiff, RBS Coutts Bank Ltd.

#### Background

Shishir Tarachand Kothari (the "**Defendant**") opened an investment and forex trading account (the "**Account**") with RBS Coutts Bank Ltd (the "**Plaintiff**"), a private bank.

The Defendant was duly furnished with a set of account opening forms (the "**Application Form**") and the Plaintiff's General Terms and Conditions (the "**General Terms**"). The Account was governed by the General Terms as well as several other agreements (the "**Agreements**").

After the Account was opened, the Defendant engaged in various forex transactions, including currency accumulator contracts through which the Defendant acquired substantial US dollars.

Towards the end of 2007, due to the weakening of the US dollar, the Defendant was informed by the Plaintiff that he either had to inject more funds into the Account, or close out some of his forex positions. Despite this, the Defendant failed to take any action and the Account remained in deficit.

In exercise of its rights under the General Terms, the Plaintiff closed out the Defendant's forex positions and disposed of the Defendant's investments. In December 2008, the Plaintiff's officer signed and issued a conclusive certificate of indebtedness pursuant to Clause 58 of the General Terms, certifying US\$569,109 as the outstanding sum due and owing from the Defendant to the Plaintiff.

Clause 58 of the General Terms provides that:

*"A certificate signed by any authorised representative of*

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*RBS Coutts showing the amount of Obligations from time to time due from you to RBS Coutts shall be conclusive evidence as against you of the amount so owing."*

The Plaintiff commenced summary judgment proceedings against the Defendant for the outstanding sum and successfully obtained judgment. Dissatisfied with the outcome, the Defendant appealed to the High Court.

### The High Court's decision

The court dismissed the appeal on the grounds that there were no valid defences to the Plaintiff's claim.

#### *"Conclusive evidence" clauses*

The court re-affirmed that a certificate issued pursuant to a "conclusive evidence" clause is, in the absence of fraud or manifest error on the face of the certificate, conclusive evidence of both the liability of the debtor and the amount of the debt.

The rationale underlying the legal acceptance of a "conclusive evidence" clause stems from the assumption that *"money institutions, which are themselves closely regulated by law, are completely honest and reliable"*. However, the existence of such a clause does *not* preclude the court from reviewing the legal basis of a plaintiff's claim in respect of issuing such a certificate.

The court agreed with the views of Justice VK Rajah (as he then was) in the case of *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR(R) 345, where it was stated that the foundation for the legal acceptance of a "conclusive evidence" clause was contract. An agreement between parties should therefore be upheld in the absence of any relevant public policy considerations.

The court noted that in practice, there was a significant degree of variation in the manner in which "conclusive evidence" clauses were drafted. The precise effect of a "conclusive evidence" clause would therefore depend on its specific wording and formulation.

#### *The Defendant was bound by the General Terms and the Agreements*

One of the defences raised by the Defendant was that he ought not to be bound by the General Terms and the Agreements as he had not been given copies of the same.

The court dismissed this argument. It was not disputed that the Defendant had received a copy of the Application Form (which was signed and returned to the Plaintiffs) and that he signed the signature pages of the Agreements (the "**Enclosures**").

The court noted that the Defendant was an experienced businessman and had not raised any concerns in respect of the General Terms and the Agreements.

Further, both the Application Form and the Enclosures made express reference to the General Terms and/or the Agreements. The court placed emphasis on the fact that the Plaintiff had, in the Application Form and the Enclosures, specifically called the Defendant's attention to the fact that by signing those documents, he was agreeing to be bound by the General Terms and the Agreements.

To the court, it was clear that the Defendant knew that he was agreeing to the terms General Terms and Agreements. He was therefore bound by the same.

#### *The Defendant had full knowledge of the forex transactions*

The Defendant also argued that some of the forex transactions undertaken by the Plaintiff were unauthorised.

This argument, which the court termed as "yet another illusive crutch" which the Defendant attempted to rely on to refute the Plaintiff's claim, was also dismissed by the court. The Defendant was not in a position to argue that any of the forex transactions were unauthorised as he had received statements in respect of the Account (the "**Statements**") at periodic intervals. The Statements evidenced *all* the forex transactions undertaken in respect of the Account.

Clause 17 of General Terms provided, *inter alia*, that the Defendant would undertake to verify the correctness of the Statements and inform the Plaintiff of any discrepancy within 90 days from the date of receipt of the Statements. Upon expiry of the 90 day period, the Statement would be "conclusive evidence" of the entries and details contained therein.

The period of 90 days gave the Defendant more than adequate time to examine the transactions in detail. Further, the Defendant was notified by the Plaintiff, by way of email and/or written confirmations, of the particulars of each forex transaction after it had been carried out. The Defendant did not object to any of these particulars or transactions when notified of the same.

#### **Comment**

In the wake of the economic crisis in 2008 following the collapse of Lehman Brothers, many customers who have invested in various investment products have started to come forward with various complaints regarding both the nature and suitability of the products purchased, as well as questioning the authority of the Banks in proceeding with such investments.

This case is a timely reminder of the importance of contractual provisions allowing the Banks to conclusively prove the indebtedness of its customers, as well as the need for Banks to properly maintain (and issue) records of their customers' transactions as well as their customers' agreement or authority to proceed with their investment instructions. What assisted the

Plaintiff in this case was its records of telephone conversations with the Defendant, which evidenced his knowledge and instructions in relation to his investments.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the Litigation and Dispute Resolution lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our [website](#)), or:

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