Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) *v* Oversea-Chinese Banking Corp Ltd [2011] SGCA 3

Case Number	: Civil Appeal No 100 of 2010
Decision Date	: 21 January 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Michael Khoo SC and Josephine Low (Michael Khoo & Partners) and Andrew Ee Chong Nam (Andrew Ee & Co) for the appellant; Adrian Wong Soon Peng, Jansen Chow and Nelson Goh (Rajah & Tann LLP) for the respondent.
Parties	: Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) — Oversea-Chinese Banking Corp Ltd

Banking

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 4 SLR 47.]

21 January 2011

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This was an appeal by Hsu Ann Mei Amy ("Amy" or "the appellant") as the litigation representative of Mdm Hwang Cheng Tsu Hsu ("Mdm Hwang") against the decision of the High Court judge ("the Judge") in *Hwang Cheng Tsu Hsu (by her litigation representative Hsu Ann Mei Amy) v Oversea-Chinese Banking Corp Ltd* [2010] SGHC 160. The Judge had dismissed Mdm Hwang's action for damages against Oversea-Chinese Banking Corporation Limited ("the respondent").

2 The proceedings concerned the nature and extent of a bank's duty to carry out the mandate of a customer. Mdm Hwang was a long established customer of the respondent, and had been accorded the status and privileges of a private banking client. She had Singapore dollar deposits with the respondent in excess of $8 million. When Mdm Hwang, accompanied by Amy, instructed the respondent to open a new Joint Account in the joint names of Mdm Hwang and Amy ("the Joint Account") and to transfer all the deposits held in her accounts with the respondent to the Joint Account, the respondent was hesitant about carrying out her "instructions" as its officers were concerned that she might not have fully understood the legal consequences of her instructions. Subsequently, when Amy told the respondent that Mdm Hwang would be closing all her accounts with the respondent (because of the respondent's failure to open the Joint Account), the respondent became more anxious for Mdm Hwang's sake and took certain steps to satisfy itself that Amy's instruction reflected Mdm Hwang's real intention. The respondent's actions culminated in Mdm Hwang commencing these proceedings to claim damages against the respondent for breaching its duties as her banker by refusing to carry out the said instructions. The respondent denied liability on the ground that it had acted reasonably in trying to protect the interest of Mdm Hwang.

3 In our view, these proceedings could have been avoided or resolved earlier if the dispute between the parties had been properly identified at its early stages, or if it had been referred to

mediation. It seemed to us that Mdm Hwang was poorly advised and had been led to believe that the respondent had decided that she was mentally incompetent and unable to look after her affairs. Mdm Hwang's dismay and apparent unhappiness as to what was happening was, in our view, exacerbated by Amy's aggressive attitude towards the respondent in harbouring doubts about her own integrity. This miscomprehension resulted in Mdm Hwang's solicitor, Andrew Ee ("Ee"), seeking to prove that she had mental capacity and that the respondent was wrong not to act on her instructions. He had in his possession medical reports on Mdm Hwang which certified that although Mdm Hwang was suffering from incipient dementia and short-term memory loss, her cognitive ability was not impaired and her testamentary capacity was not affected by her medical condition. Inexplicably, these reports were not shown to the respondent until court proceedings had commenced. Mdm Hwang failed to obtain summary judgment against the respondent and a court-appointed psychiatrist was brought in to examine her mental capacity. The action proceeded to its desired end, and a total of five medical professionals (comprising two psychiatrists, two geriatric specialists and one clinical psychologist) were called to give evidence on Mdm Hwang's mental capacity, and all were cross-examined in turn by counsel for both parties.

4 This part of the proceedings (which occupied nearly five days of trial) was a complete waste of the court's time as the crucial issue in the case, as framed by the Judge after the medical evidence was given, was *not* whether Mdm Hwang had the mental capacity to manage her financial affairs or operate her bank accounts, but whether, given the respondent's knowledge of the circumstances surrounding Mdm Hwang's instructions, the respondent had acted reasonably in not carrying out these instructions. In the event, the Judge held that the respondent had acted reasonably and dismissed Mdm Hwang's claim.

5 At the conclusion of the hearing of the appeal, we affirmed the Judge's decision and dismissed Amy's appeal with costs to be paid by Mdm Hwang's estate. We now give our reasons for our decision.

The Facts

Background

6 Mdm Hwang adopted Amy, then two years old, as her daughter in 1967. Amy lived with Mdm Hwang until 2007, when Amy moved into her own home following her marriage. Mdm Hwang and Amy were close to each other and in the later years of Mdm Hwang's life, Amy looked after Mdm Hwang. In 1999, Mdm Hwang executed a will ("the 1999 Will") in the presence of Dr Teo Sek Khee ("Dr Teo"), a consultant and head of the geriatric unit at Raffles Hospital. The 1999 Will was later altered by a codicil executed in 2007. In March 2008, Amy requested that Dr Teo certify Mdm Hwang's testamentary capacity so that she could change the 1999 Will, but Dr Teo declined to do so as he was concerned that Mdm Hwang's constipation problem might have clouded her cognitive functions. Nevertheless, Mdm Hwang executed a new will on 24 March 2008 ("the 2008 Will"), which was later altered by two codicils executed by Mdm Hwang in May 2008 and August 2008. Under the 2008 Will and the two subsequent codicils, Amy was appointed the sole executrix and the sole beneficiary of Mdm Hwang's estate. Mdm Hwang died on 11 May 2010. Probate of the 2008 Will was granted to Amy on 18 October 2010, two days before the hearing of this appeal.

7 On 7 February 2008, Mdm Hwang suffered a fall and fractured her hip. She underwent hip replacement surgery. Amy informed Chen Ching Ling, Mdm Hwang's relationship manager in the respondent's private banking division at that time, that Mdm Hwang had difficulty issuing her own cheque to pay the hospital's bill. In mid-February 2008, Lim Sar Lee ("Sar Lee"), the respondent's regional marketing manager, visited Mdm Hwang in hospital and asked her to sign on a piece of paper.

The signature was consistent with the specimen signature kept by the respondent.

8 Prior to the events leading to the present dispute, Mdm Hwang had consulted four medical professionals on medical issues such as her memory disorders and her mental capacity. We have earlier mentioned (at [6] above) Dr Teo's decision in March 2008 not to certify Mdm Hwang's testamentary capacity. On 28 March 2008, Dr Lim Hsin Loh ("Dr Lim"), a consultant psychiatrist in private practice at Mount Elizabeth Medical Centre, examined Mdm Hwang and opined that she had deficits in short-term memory and orientation, and recommended that she be further examined by Dr Zena Kang ("Dr Kang"), a clinical psychologist. Dr Kang examined Mdm Hwang on 1 and 3 April 2008, conducting brief neuropsychological tests to assess Mdm Hwang's mental status and cognitive functions. These tests were not designed to diagnose dementia, and were only indicative of general levels of cognitive impairment. Dr Kang concluded that Mdm Hwang's deficits were mainly in her short-term memory, which adversely affected her ability to learn new information. After receiving Dr Kang's report, Dr Lim examined Mdm Hwang again on 12 May 2008 and opined that Mdm Hwang had testamentary capacity, although she was suffering from mild dementia. Between 8 April 2008 and 28 July 2009, Mdm Hwang was examined by Dr Sitoh Yih Yiow ("Dr Sitoh"), a specialist in geriatric medicine. He made general assessments which were not intended to reflect Mdm Hwang's mental competence, and found that Mdm Hwang faced both physical and mental difficulties. He opined that Mdm Hwang's dementia was of moderate severity.

The events of May 2008

9 On 13 May 2008, Amy accompanied Mdm Hwang to the respondent's premises to open the Joint Account. Kang Eu Jin ("Eu Jin"), a client services officer of the respondent, attended to Mdm Hwang and Amy. Eu Jin observed that Mdm Hwang appeared dazed and was "staring into blank space". Amy gave the instructions for the opening of the Joint Account. As Eu Jin became concerned that Mdm Hwang might not understand what opening of the Joint Account entailed (*ie*, that Amy would have access to the deposits in the Joint Account), he left the room and consulted Sar Lee on what to do. Following Sar Lee's directions, Eu Jin returned to the room and proceeded to fill in the account opening forms, although he informed Amy that the opening of the Joint Account would be subject to management approval. When Eu Jin tried to explain to Mdm Hwang the details about the opening of the Joint Account, Amy cut him off and said to Mdm Hwang "Qin Meng!" (which means "sign your name" in the Cantonese dialect) in a forceful tone. Eu Jin observed that Mdm Hwang appeared unsure about what she was supposed to do, but she signed the forms.

10 On 15 May 2008, Sar Lee and Chua Eng Leong ("Chua"), Mdm Hwang's new relationship manager, visited Mdm Hwang at her home to verify her instructions. When Mdm Hwang was asked about her earlier visit to the bank on 13 May 2008 to open the Joint Account, she could not recall the visit, and stated that she had no intention to open the Joint Account. She initially also said that she did not have a daughter, but later said she had a daughter who was overseas on vacation. Sar Lee and Chua reported the events of 13 May 2008 and 15 May 2008 to Olivier Denis ("Denis"), the respondent's head of private banking. Denis subsequently held internal meetings with Sar Lee, Chua, as well as the respondent's legal and operational risk management and compliance departments on how to deal with the situation.

11 On 20 May 2008, Amy called Chua about the Joint Account, and upon learning that it had not been opened, told Chua that she would bring Mdm Hwang to the respondent's premises on 22 May 2008 to close all of Mdm Hwang's accounts with the respondent. Chua informed Denis of what Amy had said and Denis decided that senior management would meet Mdm Hwang on 22 May 2008 to evaluate if Mdm Hwang understood what she was doing.

12 On 22 May 2008, the respondent's head of operational risk management and compliance, Siau Kee Liam ("Siau"), circulated amongst the respondent's officers a list of 12 questions to ask Mdm Hwang. A total of four bank officers, namely, Chua, Denis, Siau and Jo Goh (one of the respondent's compliance officers), met Mdm Hwang and Amy when they arrived. When Siau requested that any instructions to close Mdm Hwang's accounts should be given by Mdm Hwang personally, Amy became agitated and said to Mdm Hwang, in Cantonese, that the respondent was suspecting Amy of trying to cheat Mdm Hwang of her money. Thereafter, Amy told Mdm Hwang in a loud and commanding voice that unless Mdm Hwang transferred the money to Amy and closed all her accounts with the respondent, Mdm Hwang would lose all her money. All this while, Mdm Hwang remained silent. Amy later left the room at the request of the respondent's officers. The officers noted that Mdm Hwang became at ease after Amy left. Chua then began asking Mdm Hwang the questions from the list of prepared questions. Her responses to these questions were as follows:

(a) When asked whether she knew where she was, Mdm Hwang shook her head and responded that she did not know where she was.

(b) When asked whether she remembered Chua, Mdm Hwang was unable to respond, notwithstanding that Chua had just introduced himself to Mdm Hwang at her home only one week ago.

(c) When asked whether she knew why she was at the respondent's premises, Mdm Hwang shook her head and responded that she did not know why she was there.

(d) When asked whether she knew how much money she had deposited with the respondent, Mdm Hwang stated that she had quite a lot of money with the respondent, although she could not specify how much.

(e) When asked whether she wanted to close her bank accounts, Mdm Hwang responded that there was no need to do so because she had no problems with the respondent.

(f) When asked who the lady who accompanied her to the respondent's premises was, Mdm Hwang replied that the lady was her niece.

(g) When asked who "Amy Hsu" was, Mdm Hwang replied that "Amy Hsu" was her daughter.

(h) When asked again whether she wanted to close her accounts with the respondent, Mdm Hwang replied that she was happy with the respondent and that there was no need to close her accounts.

The officers were, by this time, convinced that there were issues with Mdm Hwang's mental capacity, and also doubted if the "instructions" were in fact emanating from Mdm Hwang. However, before the officers could complete their questioning, Amy entered into the room and demanded that the respondent's officers stop speaking to Mdm Hwang. She then left with Mdm Hwang after slamming the door and telling the officers that they would hear from her lawyers.

Events after the meeting of 22 May 2008

13 The respondent received a letter dated 28 May 2008 from Mdm Hwang's solicitor, Ee, demanding an apology and an explanation from the respondent for its failure to carry out Mdm Hwang's instructions to close her accounts. The letter did not refer to the refusal to open the Joint Account. The respondent replied on 6 June 2008 that it would need Mdm Hwang's written consent

before they could disclose customer information in relation to her accounts with the respondent to Ee. Ee replied on 10 June 2008, enclosing a letter dated 6 June 2008 ("the 6 June letter") which stated that Ee was authorised to write on Mdm Hwang's behalf. The respondent replied to Ee on 17 June 2008 informing him that the signature on the 6 June letter was different from Mdm Hwang's specimen signature kept on the respondent's records, and that the respondent would only entertain Ee's queries upon receipt of Mdm Hwang's written consent.

14 On 18 June 2008, the respondent received a letter dated 16 June 2008 ("the 16 June letter"), purportedly written by Mdm Hwang, appointing Amy as her agent with "power to authorise all [her] correspondence and instructions with immediate effect". However, the letter was signed by Amy rather than Mdm Hwang. The respondent replied on 19 June 2008 that it could not accept the 16 June letter as it was not signed by Mdm Hwang personally.

15 On 24 June 2008, Ee wrote again to the respondent and enclosed a letter dated 20 June 2008 (signed by Mdm Hwang before a notary public), confirming that the 6 June letter was indeed signed by Mdm Hwang. The respondent replied to Mdm Hwang on 9 July 2008 and emphasised that it was concerned to ensure that it acted only in accordance with her instructions, and proposed a face-to-face meeting with Mdm Hwang. Ee replied on 15 July 2008 rejecting the request for a face-to-face meeting. Ee enclosed a Power of Attorney purportedly executed on 29 May 2008 by Mdm Hwang, appointing Amy as her attorney with power to act on her behalf in certain matters specified therein (although it should be noted that the Power of Attorney did not specifically allow Amy to close any of Mdm Hwang's bank accounts). Subsequently, Ee wrote a letter dated 21 August 2008 to the respondent's solicitors stating that Mdm Hwang would, accompanied by Amy, be willing to meet the respondent. The respondent accepted the proposal and informed Ee via a letter dated 28 August 2008 that the respondent's officers and legal counsel would be attending the meeting with Mdm Hwang.

Commencement of legal proceedings

16 However, on 2 September 2008, before any meeting could take place, Ee served on the respondent's solicitors a writ of summons issued in the name of Mdm Hwang, claiming damages against the respondent for failing to carry out her instructions regarding the opening of the Joint Account and the closing of all her accounts. In view of the service of the writ, the respondent's solicitors informed Ee on 12 September 2008 that the respondent no longer considered the meeting necessary as the matter was before the court.

17 The respondent duly filed its defence on 24 September 2008, whereupon Mdm Hwang applied for summary judgment against the respondent. Affidavits of Mdm Hwang and Amy were produced at the summary judgment proceedings. The reports of Dr Lim and Dr Kang were served on the respondent on 3 October 2008 in support of the summary judgment application. It should also be noted that prior to the hearing of the application for summary judgment, a letter in Mdm Hwang's handwriting dated 19 October 2008 ("the 19 October letter") was sent to the respondent's solicitors. The same letter was produced in the summary judgment proceedings as part of Mdm Hwang's second affidavit. In that letter, Mdm Hwang stated that she was "fully aware and kept informed, as well as monitoring all the events and correspondences with regard to my closure of accounts at OCBC since May 2008." The letter further stated that the respondent's "prudency [*sic*] is getting overboard", and that the respondent was "trying to protect [Mdm Hwang] from some kind of 'harm' that in reality does not even exist". The letter concluded by asking "how much longer am I expected to endure from [*sic*] your delays and denials before my instructions are finally heard and carried out?" The appellant's counsel contended that the letter evinced that Mdm Hwang's mental faculties were not impaired and that she would have been mentally capable of instructing the respondent on what to do with the

deposits she had with the respondent.

18 The appellant's application for summary judgment was heard on 12 November 2008 before an Assistant Registrar who held that the medical reports of Dr Lim and Dr Kang were insufficient to justify giving summary judgment. The Assistant Registrar accordingly granted the respondent unconditional leave to defend the claim. Mdm Hwang appealed against the decision of the Assistant Registrar, but the appeal was dismissed by a High Court judge on 9 December 2008.

19 The respondent then applied for the appointment of a court expert to examine Mdm Hwang on her medical condition. The High Court appointed Dr Francis Ngui ("Dr Ngui"), Medical Director and Senior Consultant Psychiatrist of Adam Road Medical Centre, on 5 December 2008 as the court expert for this purpose. Dr Ngui examined Mdm Hwang on 15 January 2009, and in his report dated 19 October 2009 stated that although Mdm Hwang had shown significant defects in orientation and memory recall as at the 15 January 2009 session, she was mentally competent to manage her financial affairs prior to that date, although he conceded that she might have had episodes where she was less lucid. During these less lucid periods, Dr Ngui opined that Mdm Hwang could be temporarily deemed unfit to manage her financial affairs.

20 Pursuant to an Order of Court dated 26 March 2009, the respondent paid the balance sum of Mdm Hwang's deposits, which amounted to a sum of S$8,805,843.14, into court on 15 April 2009. Subsequently, Mdm Hwang's dementia became more advanced, and on 14 December 2009, Amy was appointed (on Amy's application) as Mdm Hwang's litigation representative in these proceedings.

21 When the trial began on 25 January 2010, Mdm Hwang did not testify. Hence, only Amy gave evidence on the events leading up to the filing of the claim against the respondent. The appellant's medical witnesses were Dr Sitoh, Dr Lim and Dr Kang. Dr Teo was called as a witness of fact by the court. Dr Ngui was called as a court-appointed expert witness. Judgment was reserved. Mdm Hwang died on 11 May 2010. On 25 May 2010, the Judge delivered judgment and dismissed Mdm Hwang's action on the ground that the respondent had acted reasonably as a banker in not carrying out Mdm Hwang's instructions to open the Joint Account and to close all her accounts. She ordered that the costs of the action be paid by Amy personally as litigation representative.

The issues on appeal

22 On appeal, counsel for the appellant raised a large number of issues which may be compressed into three main questions as follows:

(a) whether the Judge correctly framed the key issue;

(b) if so, whether the respondent's refusal to carry out Mdm Hwang's "instructions" was reasonable; and

(c) whether Amy should be liable for costs personally as Mdm Hwang's litigation representative, and this in spite of the fact that as litigation representative, Amy would ordinarily be entitled to an indemnity from Mdm Hwang's estate.

The law

23 It is trite law that a bank has a duty to comply with the customer's mandate. However, this duty is subject to the bank's duty to take reasonable care in all the circumstances: see *Yogambikai Nagarajah v Indian Overseas Bank and another appeal* [1996] 2 SLR(R) 774 ("*Yogambikai*"), citing

Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 2 Lloyd's Rep 289 and *Lipkin Gorman v Karpnale Ltd and another* [1989] 1 WLR 1340 ("*Lipkin Gorman*"). Accordingly, where a bank has good reason to believe or suspect that a customer's mandate may not be genuine or may not represent his or her true intention, the bank is entitled to refuse to comply with the mandate. Conversely, if a bank fails to comply with its client's instructions under circumstances where a reasonably prudent bank would *not* have been put on notice, then the bank may be acting in breach of its duty to comply with the client's instructions: see, *eg*, *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363 at 374–375, 376G–H ("*Quincecare*"), citing *Lipkin Gorman v Karpnale Ltd and another* [1987] 1 WLR 987 at 1006 *per* Alliott J at first instance.

24 Whether a bank would have been put on notice is necessarily a fact-specific inquiry. Accordingly, it is not possible to enumerate an exhaustive list of the situations in which a bank would be put on notice. It suffices to note that a bank may be put on notice if it has *reasonable grounds*, not necessarily amounting to proof, for believing, *inter alia*, that its client is being defrauded (see, *eg*, *Yogambikai* at [53]; *Quincecare* at 376G–H), is being subjected to improper pressure or influence of a third party, or is suffering from mental incapacity (see, *eg*, *Paget's Law of Banking* (Mark Hapgood QC gen ed) (LexisNexis, 13th Ed, 2007) at 478, para 18.17). A bank is put on notice "if a reasonable and honest banker [who] knew of the relevant facts … would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded" (*Yogambikai* at [58], citing *Lipkin Gorman* at 1378B).

25 A bank dealing with elderly and infirm customers may be put on notice of improper pressure or influence exerted over the customer by a third party. Such acts may not amount to criminal conduct or fraud *simpliciter*. As noted in the Australian Financial Ombudsman Services Bulletin's 2008 report titled "Financial Abuse of the Vulnerable Older Person" ("*FAVOP*") at page 4, conduct by a third party *vis-à-vis* an elderly customer may put a bank on notice if it involves, *inter alia*, a third party's "intimidation, deceit, coercion, emotional manipulation, physical neglect, psychological abuse, undue influence or empty promises".

Whether the Judge correctly framed the key issue

26 Apropos this point of appeal, Amy's counsel argued that the key issue was not whether the respondent acted reasonably in refusing to carry out Mdm Hwang's "instructions" as framed by the Judge, but rather, whether Mdm Hwang was mentally competent to instruct the respondent to close her accounts. After some questioning by us, in particular having regard to Mdm Hwang's pleaded case, counsel for the appellant conceded that the Judge had framed the key issue correctly, and on that basis, agreed to withdraw this ground of appeal as he found it difficult to argue, on the evidence, that the respondent had not acted reasonably in failing to carry out Mdm Hwang's instructions. However, he insisted that the respondent was, in any event, still in breach of its duties as a banker because it *continued* to refuse to close Mdm Hwang's accounts even after it had received the reports of Dr Lim, Dr Kang and Dr Ngui. This issue is addressed further at [36] below.

27 In our view, the Judge framed the key issue correctly. The Judge ultimately made no finding on the testimonies of the medical professionals regarding whether Mdm Hwang was mentally competent to operate her bank accounts, as there was no need to do so. Indeed, if the key issue had been clearly framed at the beginning of the trial, it would not have been necessary to question the medical professionals on their reports.

Whether the respondent's refusal to carry out Mdm Hwang's "instructions" was reasonable

28 To determine this issue, we asked two questions: (a) whether the respondent was put on

notice, *ie*, had reason to suspect that Mdm Hwang's "instructions" did not represent her true wishes; and (b) whether the steps taken by the respondent that culminated in its decision not to carry out those instructions were reasonable.

29 Before we consider these issues, we should mention the guidelines which have been followed by financial institutions in other jurisdictions when dealing with old and mentally infirm customers who could potentially be victims of financial abuse by relatives, friends, guardians or persons who are in a position to take advantage of them. In the court below, the Judge referred to the Australian *FAVOP* guidelines. We note that there are numerous other sources of extra-legal guidelines, for instance, Susan J Heakes' article titled "Fraud Against Elders: Is the Bank on the Hook?" (Canada), a 2003 publication of the American Bar Association's Commission on Law and Aging (written by Sandra L Hughes) titled "Can Bank Tellers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly" (United States) as well as the guidelines issued by the Ministry of Community Development, Youth and Sports on "Understanding Elder Abuse and Neglect – Detecting and Helping" (Singapore). These guidelines proffer indications of potential red flags of financial abuse against elderly and infirm customers. Some examples of such red flags, as gleaned from the various guidelines, are:

(a) where an elderly person is accompanied by a new acquaintance to make a large or unusual withdrawal of cash;

(b) where an elderly person is accompanied by a family member or other person who seems to coerce them into making transactions;

(c) where an elderly person is not allowed to speak for him or herself, or where the party accompanying the elderly person does all the talking;

(d) where an elderly person starts to appear fearful (particularly of the person accompanying him or her) or withdrawn;

(e) where the elderly person is physically absent when the instructions are given to the bank;

(f) where there are withdrawal slips presented by a third party, with the elderly person's signature on it but the rest of the slip is filled out in a different handwriting;

(g) where there are significant withdrawals or transfers suddenly made by or on behalf of an elderly person, especially where the elderly person obtains no apparent benefit from such transactions;

(h) where the elderly person does not appear to understand or be aware of recently completed transactions;

(i) where the elderly person signs documents without appearing to understand what the documents mean;

(j) where the elderly person gives implausible explanations about or appear confused about what he or she is doing with the money;

(k) where the elderly person engages in banking activity that is unusual, erratic or uncharacteristic; and

(l) where there is creation of joint accounts with another person or sudden inclusion of new

names on the elderly person's account.

The existence of one or more red flags may be sufficient to put a bank on notice of potential financial abuse of the elderly customer.

Whether the respondent was put on notice

30 In the present case, the respondent had no prior knowledge regarding Mdm Hwang's medical condition, or of the fact that she had been examined by medical professionals regarding her cognitive ability. The respondent's officers were clearly not competent to evaluate whether Mdm Hwang was mentally capable of managing her finances or whether she knew or understood the legal consequences of opening the Joint Account or closing all her accounts. Nonetheless, the officers could still be put on notice pursuant to the following red flags raised from their observations of the relevant circumstances:

(a) Throughout her long banking relationship with the respondent, Mdm Hwang had previously dealt directly with the bank, rather than through an intermediary. Amy was thus a complete stranger to the respondent when she brought Mdm Hwang to open the Joint Account, or to close all of Mdm Hwang's accounts and withdraw all of Mdm Hwang's deposits.

(b) At the 13 May 2008 meeting, Mdm Hwang looked dazed and did not speak to the respondent's officers. It was Amy who spoke for her. Mdm Hwang did not give any oral or written instructions to the respondent. Her instructions were given, or rather, deemed to have been given, by her signing the account opening forms. She had meekly and silently signed the account opening forms after Amy forcefully told her to do so (see [9] above).

(c) At the 15 May 2008 home visit, Mdm Hwang explicitly denied wanting to open a joint account, thus further supporting the respondent's suspicion that the instructions to open a joint account were issued by Amy rather than Mdm Hwang (see [10] above).

(d) With regard to the 22 May 2008 meeting at the respondent's premises, it was not Mdm Hwang who made the appointment with the respondent, but Amy. At the 22 May 2008 meeting itself, when Chua told Amy that the respondent's officers would like to speak with Mdm Hwang alone, Amy told Mdm Hwang that if she did not transfer the money to Amy and close all her accounts with the respondent, Mdm Hwang would lose all her money. After Amy had left the room, the respondent's officers observed that Mdm Hwang became more relaxed. Her answers to the questions the respondent's officers put to her convinced them that there were issues as to Mdm Hwang's mental capacity, and also that the instructions to close all her accounts may not have been issued on Mdm Hwang's own accord (see [12] above).

(e) Subsequently, the letters from Ee caused the respondent more concern, as every attempt by Ee to show that Amy was "authorised" by Mdm Hwang to deal with her accounts reinforced the respondent's suspicion that Amy was trying to take over the running of Mdm Hwang's bank accounts without the latter's authorisation (see [13]–[15] above).

31 In these circumstances, it was clear that the respondent was put on notice that the instructions conveyed by Amy might not have reflected Mdm Hwang's real intentions, or that Mdm Hwang might not have sufficient cognitive ability to understand the consequences of opening the Joint Account or of closing all her accounts. There was thus sufficient *prima facie* evidence for the respondent not to carry out Mdm Hwang's instructions until further inquiries could be made.

Whether the respondent acted reasonably after being put on notice

Whether the respondent acted reasonably after being put on notice

32 This brings us to the second question as to whether the respondent had acted reasonably in not carrying out Mdm Hwang's instructions after it had been put on notice. In this connection, we agreed with the Judge that the respondent had acted reasonably. The respondent had taken further steps to satisfy itself that Mdm Hwang was mentally capable of understanding the implications of opening the Joint Account with Amy as the joint account holder. The respondent's officers visited Mdm Hwang at her home on 15 May 2008 to verify her instructions regarding the opening of the Joint Account, and also insisted on speaking to Mdm Hwang alone at the 22 May 2008 meeting to ascertain whether Mdm Hwang's instructions to close her accounts should be complied with (although this exercise was unfortunately cut short by Amy). The respondent was further willing to meet Mdm Hwang and Amy face-to-face to resolve the impasse, although this attempt was also frustrated by Mdm Hwang's issuance of a writ against the respondent.

Mental competency and undue influence

33 For the reasons stated at [26]–[27] above, it is not necessary for us to make a finding on Mdm Hwang's mental competence at the material times. However, if such a finding had been in issue, we would have found, on a balance of probabilities, that she was sufficiently competent to manage her financial affairs, and therefore to give instructions to the respondent to open the Joint Account or to close all of her accounts. There were a number of such indicators. First, Dr Lim's examination of Mdm Hwang's mental capacity on 12 May 2008 (after considering Dr Kang's report) revealed that Mdm Hwang had testamentary capacity, although she was suffering from mild dementia. Second, although Dr Kang did not use purpose-built tests in testing Mdm Hwang for dementia, and instead only tested Mdm Hwang for general levels of cognitive impairment, she concluded that Mdm Hwang's deficits were mainly in her short-term memory, which adversely affected her ability to learn new information. By implication, this diagnosis meant that Mdm Hwang's mental capacity to make decisions concerning her own personal affairs was not affected. It bears noting that Mdm Hwang had also made the 2008 Will on 24 March 2008, the validity of which was not challenged after her death. Third, Dr Ngui, the court expert, also opined that prior to 15 January 2009, Mdm Hwang was mentally competent to manage her financial affairs, although she might have had episodes where she was less lucid. Nothing in Dr Ngui's report supported the view that Mdm Hwang was mentally incapable of instructing the respondent to open the Joint Account or to close all of her accounts. There was also no evidence to show that Mdm Hwang was not lucid at either the 13 May 2008 meeting or the 22 May 2008 meeting.

34 In this connection, it is necessary that we mention one other piece of evidence that was not addressed by the Judge, *viz*, the 19 October letter. The appellant claimed that the letter was in Mdm Hwang's handwriting, and had been sent to the respondent's solicitors. The respondent did not contest these claims. On appeal, counsel for the appellant contended that there had been a "concession" by Denis, upon his reading of the 19 October letter, that Mdm Hwang was mentally competent. This contention was misguided, since all Denis meant to say was that the author of the letter – *if* it was Mdm Hwang – was wholly unrecognisable from the elderly lady whom he had personally observed at the meeting. There was no "concession" of Mdm Hwang's mental capacity whatsoever.

35 In our view, the evidence showed that although Mdm Hwang was probably mentally competent in 2008, the instructions conveyed by Amy to the respondent and the signing of the account opening forms by Mdm Hwang may not have been voluntary acts. Judging from the red flags that we have set out earlier at [30], this appeared to be a classic case of undue influence. Unfortunately, counsel for the respondent did not plead this defence on behalf of his client. This defence would have succeeded on the evidence as the law does not require the respondent to *prove* undue influence, but rather,

only that it had *reasonable grounds* for believing that Mdm Hwang was under such influence when she gave instructions to the respondent.

36 Finally, we would like to deal with some arguments made by both counsel. Dealing first with those made by counsel for the appellant, it was argued that the respondent should not have contested the application for summary judgment in view of the reports of Dr Lim and Dr Kang, as well as the handwritten 19 October letter, and that in any event, the respondent should have closed all of Mdm Hwang's accounts after receiving Dr Ngui's report. We did not accept this argument because the respondent was entitled to defend Mdm Hwang's claim for damages on the basis of her pleaded case. Mdm Hwang could have applied to court for payment of the money which the respondent had already paid into court.

37 Counsel for the appellant also argued that Mdm Hwang's action was a continuing demand for the return of Mdm Hwang's money. We did not accept this argument. Mdm Hwang's claim was one for damages for breach of contract, rather than for detinue or for payment of any debt due from the respondent.

38 On the part of counsel for the respondent, he attempted to justify his extensive cross-examination of Mdm Hwang's medical witnesses on the ground that testamentary capacity was different in substance from the capacity to operate a bank account or to manage one's financial affairs. We do not agree that this distinction can form the basis of a proposition of law. We do not see why a person would require greater cognitive ability to manage his or her bank accounts (and *a fortiori* understand the legal consequences of opening a joint account or of closing bank accounts) than to understand the legal incidents of a complex will. Therefore, the cross-examination of Mdm Hwang's medical witnesses in order to show that their reports were not relevant to her mental capacity to manage her financial affairs was done on the wrong premise.

39 On the whole, this was an unfortunate case where unnecessary time and costs were wasted in examining and cross-examining no less than five medical professionals on issues that were not relevant to the key issue in the case. The case was unduly prolonged as a result of a complete misunderstanding by the parties of the nature of the dispute between them. In retrospect, it could be said that the dispute could have been settled amicably if both counsel for the appellant and counsel for the respondent had suggested that the Judge should speak to Mdm Hwang alone to find out what she had really wanted to do with her money. After all, she had already made the 2008 Will making Amy the sole beneficiary of her estate. If this had been made known to the Judge, it might not even have necessitated a reserved judgment and the subsequent appeal against that judgment to us.

Costs

40 The Judge ordered that Amy, as Mdm Hwang's litigation representative, was to pay the costs of the action personally. Although the Judge did not expressly make an order to the effect that Amy was entitled to an indemnity from Mdm Hwang's estate, we note that, as litigation representative, she would ordinarily be so entitled. In any event, we were of the view that the decision that the Judge relied on, *viz*, *Yonge v Toynbee* [1910] 1 KB 215 ("*Yonge*"), did not support an order making Amy, as litigation representative of Mdm Hwang's estate, personally liable for costs. *Yonge* decided that where legal proceedings are brought by an agent on behalf of a principal who subsequently becomes mentally incapacitated, that agent would be personally liable for costs if he fails to appoint a litigation representative for the incapacitated principal. This is not the case here.

41 We acknowledge that, in practical terms, the Judge's costs order made no difference to Amy as there was more than enough money in Mdm Hwang's estate to indemnify her. However, we agreed

with counsel for the appellant that the Judge erred in making such an order because the order reflected on the propriety of Amy's action in continuing the proceedings as Mdm Hwang's litigation representative. We did not agree with the submission of counsel for the respondent that the English case of *In re E (Mental Health Patient)* [1984] 1 WLR 320 justified the Judge's order, because Amy was appointed the litigation representative only *after* the action had been commenced. Even if the law were that a litigation representative has to bear the costs personally (and this is not the law), fairness dictates that such a costs order should only be imposed if Amy had been advised, when she was appointed as litigation representative, of the consequences should she lose the case. As this is not an area of the law which is well known to litigants as well as lawyers, it would be unfair, in principle, to impose an order for Amy to bear costs personally, even though such costs could be recovered from Mdm Hwang's estate. There could be situations where a plaintiff might not have sufficient funds to indemnify the litigation representative. We accordingly set aside the costs order.

Conclusion

42 It was for these reasons that we dismissed the substantive appeal and allowed the appeal on costs and ordered that the respondent's costs be paid by Mdm Hwang's estate on an indemnity basis (as contractually agreed). After we made the order of costs, counsel for the respondent informed us that the respondent would not be enforcing the order of costs against Mdm Hwang's estate to make the point that its actions were taken, not for its own benefit, but instead, to protect Mdm Hwang's deposits.