

DP02

Law On Banking And Finance

11 MAY 1999

1. Time allowed : Three (3) hours
2. Total number of questions : Five (5) questions on 2 pages
3. Number of questions to be answered : Four (4) questions
4. Answers should be supported by reference to cases and/or statutes.
5. Begin each answer to a new question on a fresh page.
6. Answer **all** questions in **English**.

ANSWER FOUR (4) QUESTIONS ONLY

1. (a) The Banking and Financial Institutions Act 1989 (BAFIA) *inter alia* imposes a duty of secrecy on bank employees not to disclose information relating to the affairs or accounts of their customers.

Discuss the scope of the duty of secrecy by explaining the extent of the duty, including the permitted disclosures, under the BAFIA. [15]

- (b) Mr Tan maintains a savings account with Bank Besar Bhd. His wife, Mrs Tina Tan, goes to Bank Besar Bhd at least once a week to deposit money into Mr Tan's savings account.

Is Mrs Tina Tan a customer of Bank Besar Bhd? Give reasons for your answer. [5]

- (c) Mr Wong maintains a current account (without credit facilities) with Bank Kuat Bhd.

Mr Wong had on two occasions given stop payment instructions to Bank Kuat Bhd when there was insufficient balance in the account to meet the cheque amounts. Bank Kuat Bhd wants to close Mr. Wong's account immediately as his account was not conducted satisfactorily and he sometimes creates various commotion and disturbances in the banking hall. Mr Wong has also been very rude to the bank's staff and has even spat at a teller for refusing to go out on a date with him.

Advise Bank Kuat Bhd whether it has the legal right to close Mr Wong's account immediately. [5]
(Total:25 marks)

2. (a) Datuk Goh maintains a personal current account with an overdraft limit of RM2million with Bank Bagus Bhd. This overdraft facility is secured by a third party charge over a piece of land owned by Datuk Goh's wife, Datin Valerie Goh.

Recently, Datuk Goh was very busy setting up fast-food outlets in China. In view of his frequent trips abroad, Datuk Goh wants his son, Frankie Goh Eng Joi, to operate his current account on his behalf. Datuk Goh wants to know whether he could do so by executing a power of attorney or a letter of mandate or otherwise.

Assuming you are an officer of Bank Bagus Bhd, advise Datuk Goh on the advantages, disadvantages and the procedures (including documentation) and the law involved in respect of creation of each of the aforesaid modes of authorisation by Datuk Goh. [10]

- (b) Bank Sentosa Bhd overlooked an oral stop payment instruction given by its current account customer, Encik Taib bin Rahman and consequently paid RM35,000 on an "Account Payee" crossed cheque, which was made payable to Datuk Kaya bin Raya.

The collecting bank, Bank Tenang Bhd, credited the proceeds of the cheque into Datuk Kaya bin Raya's savings account. Datuk Kaya bin Raya withdrew the amount and spent the money during his recent holiday in Australia with his family.

Discuss Bank Sentosa Bhd's

- (i) rights against Datuk Kaya bin Raya; and [5]

- (ii) liabilities towards Encik Taib bin Rahman. [5]

- (c) Is a partnership a separate legal entity (i.e. having a personality of its own)? Explain your answer. [5]
(Total:25 marks)

3. (a) Mesti Maju Sdn Bhd is a successful company which maintains a current account (without credit facilities) with Bank Aman Bhd. The average credit balance of Mesti Maju Sdn Bhd's account is RM1million.

Unknown to Mesti Maju Sdn Bhd's directors, the company's accounts officer, Swee Ting, has been forging the directors' signatures on 800 cheques for amounts ranging from RM5,000 to RM9,000 per cheque. This has been going on for the past three years. The auditors of the company have also failed to detect the fraud as Swee Ting has been very careful in disguising the fraud to look like genuine transactions by the company. The fraud was only discovered after Swee Ting resigned and absconded.

Mesti Maju Sdn Bhd now claims against Bank Aman Bhd for RM5million, being the total amount of the cheques.

Advise Bank Aman Bhd as to their liabilities (if any) and whether Mesti Maju Sdn Bhd should bear the loss of the RM5million instead, as they owe some duties to their banker. [15]

- (b) In relation to the law on negotiable instruments, state and define the various characteristics of a banker's draft. [10]
(Total:25 marks)

4. (a) Compare and contrast between a bill of exchange and a cheque. [10]

- (b) In January 1998, XYZ Sdn Bhd was granted a hire-purchase facility of RM500,000 by Fast Finance Bhd in relation to the hire-purchase of a sophisticated printing machine. This extremely heavy machine is affixed and sealed to the floor and ground of XYZ Sdn Bhd's factory, welded and secured by nuts and bolts.

Unknown to Fast Finance Bhd, in July 1998, XYZ Sdn Bhd charged its previously unencumbered land (on which the said factory was built) to Bank Sama Bhd.

In January 1999, the loan granted by Bank Sama Bhd became non-performing and Bank Sama Bhd is contemplating taking legal action including foreclosure of the land. However, land prices in that vicinity deteriorated drastically since October 1998 due to the fact that the city-dumping site for waste disposal was recently located near the factory.

The forced sale value of the land including the value of the printing machine may just be enough to repay the company's debt owing to Bank Sama Bhd. Therefore, Bank Sama Bhd claims that the land, factory and the printing machine are charged to them as security, and plans to sell the land together with the machine. On the other hand, Fast Finance Bhd is objecting to this claim on the ground that they are the owners of the printing machine.

Advise Fast Finance Bhd. [10]

- (c) Is a private caveat a form of security? Give reasons for your answer. [5]
(Total:25 marks)

5. (a) What legal consequences will ensue if an instrument of dealing over land in Peninsular Malaysia is not stamped? [5]

- (b) Describe the nature of **all** of the following and discuss whether they are forms of security for loans and advances:

(i) guarantees [5]

(ii) negative pledges [5]

(iii) letters of comfort [5]

- (c) Mr Wong Boh Lui maintains a savings account with Duit Finance Bhd, with a credit balance of RM6,000. Today, Duit Finance Bhd received a circular from the Official Assignee's office informing them that Mr Wong Boh Lui is a bankrupt.

Advise Duit Finance Bhd on what it should do. [5]

(Total:25 marks)

OUTLINE ANSWERS

Question 1

- (a) **Almost all candidates knew the duty of banking secrecy.**
- (b) **A well-answered question.**
- (c) **A well-answered question.**

- (a) Section 97(1) of the Banking and Financial Institutions Act 1989 (BAFIA) imposes the duty of banking secrecy. This duty is binding upon directors and officers (the word “officer” is defined in Section 2, BAFIA to include all employees including the Chief Executive Officer) of licensed institutions and external bureaus and agents (such as lawyers, valuers, accountants and auditors) appointed by licensed institutions to undertake any part of their business.

The duration of the duty is during their tenure of office or their employment “or thereafter” which indicates that the duty is owed even after retirement or resignation, i.e. forever. Moreover, the duty is not only on secrecy of customers’ accounts but it covers all affairs of the customer and the information covered are those in “any record, book, register, correspondence or other documents whatsoever, or material” and the acts prohibited include “give, produce, divulge, reveal, publish or otherwise disclose ... or make a record ...”

However, according to Section 97(2), banking secrecy does not apply to information or documents which are already lawfully available to the public. It also does not apply to general information (i.e. summary or collection of information) which is set out in a manner not enabling information relating to a particular licensed institution or a particular customer to be ascertained from it.

The permitted disclosures under BAFIA are:

- (i) Disclosure for facilitating performance of functions by Bank Negara Malaysia (BNM), i.e. disclosures to BNM, and its officers, Advisory Panel or its professionals such as lawyers, accountants and valuers who are authorised in writing by BNM – Section 98.
- (ii) Written permission to disclose is given by the customer or his personal representative – Section 99 (1)(a).
- (iii) Where the customer is bankrupt or if the customer is a corporation, the customer is being or has been wound-up in Malaysia or in any country or territory or place outside Malaysia – Section 99 (1)(b).
- (iv) Where information is required for *bona fide* commercial transactions to assess creditworthiness of the customer and the information required is general in nature and not detailed – s. 99 (1)(c).
- (v) For the purposes of any criminal proceedings or in respect of any civil proceedings between a licensed institution and its customer or his guarantor relating to the customer’s transaction with the institution or between the licensed institution and two or more parties making adverse claims in customer’s deposits where the licensed institution is seeking relief by way of interpleader – s. 99 (1)(d).
- (vi) Where the licensed institution has been served a garnishee order attaching monies in the customer’s account – s. 99 (1)(e).
- (vii) Disclosure to an external bureau established, or to an agent appointed, by the licensed institution with the prior written consent of BNM – s. 99(1)(f).
- (viii) Where such disclosure is required or authorised under any other BAFIA provision – s. 99(1)(g).

- (ix) Disclosure authorised under Federal law to the police on the accounts and affairs of the suspect of the offence under such law (such as the Kidnapping Act and the Dangerous Drugs Act) – s. 99 (1)(h).
- (x) Where disclosure is authorised in writing by BNM – s. 99 (1)(i).
- (xi) Disclosure under Banker’s Books (Evidence) Act 1949 pursuant to a court order under that Act – s. 100.

A case on point is *Attorney General of Hong Kong v Zauyah Wan Chik & Ors. and another appeal*.

- (b) No, Mrs Tina Tan is not Bank Besar Bhd’s customer. Mr Tan himself is the customer. The word “depositor” is defined in Section 2 of the Banking and Financial Institutions Act 1989 as “a person entitled to repayment of a deposit, whether made by him or any other person”. Thus, the person entitled to repayment of the savings account deposit is Mr Tan, the account holder and it does not matter whether the deposits were actually made by Mrs Tina Tan. The customer is the (i.e. Mr Tan) is the one who has contracted with and opened the account with the bank and Mrs Tan had only acted as the agent of Mr Tan when she deposited the monies into Mr Tan’s savings account.

The chief criterion of who a customer is, is whether there exists an account with a bank and duration is not of the essence – *Great Western Railway Co v London and County Banking Co Ltd* and *Commissioners of Taxation v English, Scottish and Australian Bank Ltd*.

Thus, it does not matter whether Mr Tan goes to the bank or not nor does it make any difference that Mrs Tina Tan goes to the bank at least once a week to deposit money into Mr Tan’s account.

- (c) Bank Kuat Bhd is advised not to close the account immediately. The bank must give the customer reasonable notice – *Joachimson v Swiss Bank Corporation*.

The period of notice must be long enough to enable the customer, having regard to all the surrounding circumstances, to make alternative arrangements – *Prosperity Ltd. v Lloyds Bank Ltd*. Written notice to close the customer’s account must be given by the Bank – *Ng Cheng Kiat v Overseas Union Bank*. In practice, the closure of account and the notice period for closure are usually governed by the terms and conditions of the customers’ contracts with their respective banks. The period of notice is usually 14 days or 30 days, in practice, depending on the circumstances of the case.

Question 2

- (a) **Many candidates had a poor understanding on powers of attorney and letters of mandate.**
- (b) **A poorly answered question.**
- (c) **Answers were of an average level. Some candidates (presumably those who did not study thoroughly) were confused that partnerships were companies.**

- (a) If Datuk Goh wants to let his son Frankie operate his current account on his behalf, this would mean that Datuk Goh wants to appoint Frankie as his agent. Agency may be described as the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal’s legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. Statutory law on agency is found in Part X (Sections 135 to 191) of the Contracts Act 1950.

As far as the creation of agency in regards operation of bank accounts, banks normally require that the respective bank’s standardised letter of mandate be used. In such document, Datuk Goh would authorise Frankie to be the mandate-holder. This is the creation of agency by way of express appointment by the principal, i.e. Datuk Goh, in writing.

Another method is by way of a Power of Attorney, i.e. Datuk Goh can appoint Frankie as his Attorney under a Deed of Power of Attorney. In West Malaysia, the Power of Attorney Act requires that all

Powers of Attorney must be executed and authenticated and attested in the manner as prescribed by provisions contained in the Powers of Attorney Act; and to be valid, the same must also be registered with the High Court. Therefore, a search on the Power of Attorney is necessary to verify whether the Power of Attorney has been registered; and if registered, whether the same has been revoked or withdrawn.

Bank Bagus Bhd must ensure that Frankie's authority and power to operate the account are clearly laid down in the deed of power of attorney. Powers of Attorney are construed strictly by the courts according to well-recognised rules. The powers of attorney are interpreted as giving only such authority as they confer expressly or by necessary implication – *Bank Bumiputra Malaysia Bhd v Henry Ginai Anak Langgie and Magnum Finance Bhd v Ling Sing Ping*.

The bank also needs to ensure that the Power of Attorney contains sufficient provisions or terms to enable Frankie to overdraw the account including the power to utilise the existing credit facilities and to overdraw on the account. Otherwise, it will not be safe for the bank to allow him to do so.

If a Power of Attorney is obtained, a general Power of Attorney with very wide powers would be preferred (rather than a limited power of attorney) so that the bank gets better protection.

I would advise Datuk Goh to sign a letter of mandate as there is less cost and formalities involved. Moreover, as far as the bank is concerned, there is less administrative cost and legal risks as the letter of mandate is in the bank's standardised format whereas each Power of Attorney may be worded differently. Further, for revocation of the letter of mandate, Datuk Goh has to do so by a letter of revocation addressed to the bank whereas for revocation of Power of Attorney, Datuk Goh may register such revocation with the High Court without the bank's knowledge.

- (b) (i) For Bank Sentosa Bhd's rights against Datuk Kaya for the recovery of the money paid under mistake, Section 73 of the Contracts Act 1950 applies. It reads, "A person to whom money has been paid, or anything delivered, by mistake must repay or return it." Bank Sentosa Bhd's overlooking the stop payment instruction was a mistake which led it to make the payment. The bank's negligence is irrelevant – *Kelly v Solari* and *Commercial Bank of Australia Ltd v Younis*. Thus, Bank Sentosa Bhd is advised that it has the right to recover the amount of the cheque which had been paid under mistake to Datuk Kaya. A case on point is *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim*.
- (ii) The Court may hold Bank Sentosa Bhd liable towards Encik Taib bin Rahman because the bank had paid on a countermanded cheque. The bank's terms and conditions governing the operations of current accounts usually provide that stop payment instructions should be in writing even though the countermand instruction was oral, it is valid and effective in law – *Chua Neoh Kow v Malayan Banking Bhd*. As the countermand was validly made before the payment the bank's payment to Datuk Kaya through the collecting banker, Bank Tenang Bhd, was without mandate. Therefore Bank Sentosa Bhd has to credit back the amount of the cheque into Encik Taib's account.

Bank Sentosa Bhd may also claim alternatively under common law for 'money had and received' (*Moses v Macferlan*) as a person should be prevented from retaining money derived from another which is against conscience that he should keep – *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*. Thus, unless Datuk Kaya can prove that he had altered his position in a manner rendering it inequitable that he should repay the money and that he acted in good faith, he must repay the money to Bank Sentosa Bhd as he would be unjustly enriched at the bank's expense if the bank could not recover from him. The Bank will be estopped from recovering by virtue of Section 115 of the Evidence Act.

- (c) A partnership (firm) is not a separate legal entity. In *Wong Yoon Yar v Lin Yin Thai & Ors*, it was held that a partnership has no legal entity nor personality of its own. This is notwithstanding that a partnership is registered with the Registry of Businesses. A partnership is merely a convenient name or label for a number of persons carrying on business in a partnership. The legal entity is still the partners themselves.

A partnership is defined as the relation which subsists between persons carrying on business in common with a view of profit – Section 3 (1) Partnership Act 1961. The firm is unlike a company which is a separate legal entity – *Salomon v Salomon*.

Question 3

- (a) **This question was poorly answered. Only a few candidates gave correct answers. Most candidates erroneously thought that where the drawer’s signature (on a cheque) is forged and the bank paid on such cheques, the bank is not liable if they acted in good faith.**
- (b) **Candidates’ understanding of the concept and principles examined were of an average level.**

- (a) A similar case on point is *United Asian Bank Ltd v Tai Soon Heng Construction Sdn Bhd*. Bank Aman Bhd would be held liable for the million RM5 loss on forged cheques if Mesti Maju Sdn Bhd. can establish the charge of forgery on a balance of probabilities. A banker who pays out on a forged cheque is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged cheque is a nullity and a banker has no authority, actual or implied, from his customer to act on it. Section 24 of the Bills of Exchange Act 1949 states to the effect that a forged cheque is wholly inoperative.

The said Section 24 protects a banker by the doctrine of estoppel. Thus, Mesti Maju Sdn Bhd would have to bear the loss of RM5 million themselves if they had represented to the bank that the forged signatures were effective and that the cheques were accordingly good for payment – *Brown v Westminster Bank Ltd* and *Tina Motors Pty Ltd v Australia & New Zealand Banking Group Ltd*. However, in this case, it is submitted that Mesti Maju had not done so and therefore is not estopped from claiming that the cheques were forged.

The Bank may be protected if it satisfies the conditions in Section 73A, Bills of Exchange Act 1949 if they can prove that Mesti Maju Sdn Bhd “knowingly or negligently contributes to the forgery”. If this cannot be proven then the said Section 24 applies; making the forged cheques wholly inoperative and the Bank having no mandate to debit the drawer’s account.

Mesti Maju Sdn Bhd is not under a duty to exercise reasonable care in the general course of carrying on business to prevent forgery on the part of their employee, Ms Swee Ting. Mesti Maju Sdn. Bhd, as customer, owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery – *London Joint Stock Bank Ltd v Macmillan*. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it – *Greenwood v Martins Bank Ltd*.

In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* (which was followed in *United Asian Bank Ltd v Tai Soon Heng Construction Sdn Bhd*), it was held, *inter alia*, that in the absence of a contract to the contrary, there was no duty imposed on the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank. Thus, the fact that Ms Swee Ting has been forging the cheques for more than three years, the Bank may still be held liable on the cheques.

- (b) A banker’s draft is an order to pay a specified sum of money, addressed by a banker to himself. A banker’s draft may be drawn by one bank upon another or it may be issued by a branch addressed to its head office or to another branch of the same bank. As regards the latter type, the issuing branch *vis-à-vis* its head office or another branch of the same bank is part of one single legal entity. This means that they are, in law, one and the same person – the drawer and the drawee are the same person (ie. the bank). Therefore, the holder of a banker’s draft may either treat it as a bill of exchange or a promissory note – Section 5(2) Bills of Exchange Act 1949.

Banker’s drafts are usually crossed “Account Payee Only” making them not transferable and therefore, not negotiable – Section 81A, Bills of Exchange Act 1949.

A request to issue a banker’s draft is usually made by a customer who has to pay money to someone who is not prepared to accept his cheque. This is because the drawer of a banker’s draft is a banker.

The draft would state the amount of the draft, the name of the payee (and sometimes the identity card number or passport number if the payee is an individual) and the place of payment. Requests for bank drafts are usually accompanied by application forms filled up by applicants or their agents.

Banker's drafts are actually instruments analogous to cheques since they are not, strictly-speaking, cheques as they are not orders to pay "addressed by one person to another" (Section 3, Bills of Exchange Act) as the banker's draft is an order pay addressed by the banker to itself.

Question 4

(a) **A well-answered question.**

(b) & (c) **Candidates' understanding of the concepts and principles examined were of an average level.**

- (a) (i) A cheque is defined in Section 73 of the Bills of Exchange Act 1949 as "a bill of exchange drawn on a banker payable on demand". Cheques are bills of exchange but bills of exchange are not cheques as they are not always drawn on a banker and payable on demand.
- (ii) Another difference is that cheques may be crossed by general crossings and special crossings but bills of exchange are not so crossed.
- (iii) Cheques are like bills of exchange as they are both "unconditional orders to pay, in writing, addressed by one person to another". However, for cheques the order to pay must be addressed to a banker as they must be "drawn on a banker", i.e. the drawee must be a banker whereas in bills of exchange, the drawee may be a person who is not a banker.
- (iv) Cheques are only payable on demand; whereas, bills of exchange may be payable "on demand or at a fixed or determinable future time." – Section 3, Bills of Exchange Act 1950. This is one of the major differences between cheques and bills of exchange.
- (v) Bills of exchange and cheques are similar in that both must be for "a sum certain in money and are made to the order of a specified person or to bearer."
- (vi) Another difference between a bill of exchange and a cheque is that, unlike a bill of exchange, cheques do not need to be accepted as they are payable on demand.

To summarise, cheques are similar to bills of exchange as they are a type of bills of exchange and are negotiable instruments but bills of exchange are not cheques as they are not always "drawn on a banker payable on demand".

Other differences and similarities:

- (i) Drawees of cheques do not accept any liability towards the payees, thereof (but are only liable towards the drawers). This is not the case for bills of exchange except for bank drafts, cashier's orders or promissory notes.
- (ii) Bills of exchange must be presented for payment when due, otherwise the drawers and indorsers will be discharged – s. 45 (1) Bills of Exchange Act 1949. On the other hand, cheques can be presented for payment within six months from the date of issue.
- (iii) Section 60, 80, 82 and 85 of the Bills of Exchange Act provides statutory protection for payment and collection of cheques but not bills of exchange.
- (b) The sophisticated printing machine which is extremely heavy and affixed and sealed to the factory floor, welded and secured by nuts and bolts comprise the land which is charged to Bank Sama Bhd. This is because, it is likely that the court may decide that the machine forms part of the land held under the charge by acquiring the character of a fixture. Land comprises fixtures by virtue of the definition of 'land' in Section 5 of the National Land Code 1965 which includes 'all things attached

to the earth or permanently fastened to anything attached to the earth, whether on or below the surface'. Cases on point are *Holland v Hodgson*, *Reynolds v Ashby & Son* and *The Shell Company of the Federation of Malaya Ltd v Commissioner of the Federal Capital of Kuala Lumpur* where Courts would apply the degree of annexature and the purpose of annexation tests to determine if the machine is a fixture or a chattel.

Thus, even though by virtue of the hire-purchase agreement, Fast Finance Bhd are the legal owners of the machine, yet, as the machine being a fixture forms part of the land held under the charge, the chargee bank (Bank Sama Bhd) has a prior claim against Fast Finance Bhd to the machine. As Fast Finance Bhd, being unaware of the existence of the charge, did not obtain a waiver from the chargee consenting to exclude the machine in the event of foreclosure of the charged land, Fast Finance Bhd would fail in their claim on the machine and can only sue the hirer for any breach of the hire-purchase agreement only.

- (c) A private caveat is not a form of security. Entry of a private caveat is provided under Section 323 of the National Land Code 1965. A private caveat does not confer upon the caveator any power of sale in event of default in repayment of credit facilities.

A private caveat is only a form of restraint on dealings. Its purpose is to prevent any other person from subsequently acquiring a registered title or interest adverse to the interest or rights claimed by a caveator which otherwise would be defeated. In short, it operates to prohibit subsequent dealings. Cases on private caveats include *Malayan United Finance Bhd v Tay Lay Soon* and *Chor Phaik Har v Farlim Properties Sdn Bhd*.

Question 5

(a) & (b) Candidates' understanding of the concepts and principles examined were of an average level.

(b) A well-answered question.

- (a) All instruments of dealing presented for registration which attracts stamp duty must be duly stamped so as to be fit for registration [Section 294]. The Land Registries and Land Offices would reject any instruments of dealings presented for registration if they are not properly stamped. The Stamp Act 1949 lays down the stamp duties applicable to various types of documents.

Failure to stamp does not, invalidate the document. However, an unstamped or improperly stamped document cannot be used in connection with legal proceedings, even if it is only tendered for purposes of evidence but is not otherwise bad. In these cases, where a party must produce an original document in Court in order to win his case, he must make sure that it is properly stamped or he will fail. A party may often get over this difficulty by paying the penalty provided for by the Stamp Act which is four times the deficient amount of stamp duty payable. Stamping out of time, i.e. after one month from the date of its execution, also incurs such penalty.

- (b) (i) A guarantee, is basically a promise by one person (the 'surety' or 'guarantor') to answer for the default of another (the 'principal debtor') to a third person (the 'creditor'). Section 79 of the Contracts Act 1950 defines a contract of guarantee' as "a contract to perform the promise, or discharge the liability, of a third person in case of his default". Basically, the guarantor promises the creditor. "If the principal debtor does not pay you, I will."

Guarantees are strictly speaking not a type or form of security for loans and advances. If the principal debtor defaults and the creditor wants to enforce the guarantee, the creditor has to sue the guarantors based on the letter of guarantee, just like any other unsecured debt.

- (ii) A negative pledge is actually a covenant not to do something; in relation to securities – usually, not to incur additional indebtedness and not to further encumber the company's assets.

In practice, negative pledges are normally given by companies and borrowers or security-parties. They are enforceable as contracts. Depending on the wording of the negative pledge document or clause, if there is a breach, the creditor can sue for such breach. However, they do not represent a type or form of security for loans and advances as negative pledges are just contractual terms only.

- (iii) Letters of comfort are often used in the context of parent and subsidiary relationships. Parent companies are sometimes not willing to guarantee its subsidiary's debts or obligations due to considerations such as balance sheet implications, restrictions in the Memorandum and Articles of Association or even company policy. On the other hand, the creditor may be unwilling to lend to the subsidiary if there is no commitment from the parent company. Contents of a letter of comfort may include awareness of the subsidiary's obligations, a declaration of shareholding and a declaration of policy or undertaking relating to the subsidiary meeting its obligations.

Letters of comfort are normally worded in such a way as to create only a moral obligation on the part of the parent company. Usually, it is never a legally enforceable undertaking coming close to a guarantee (e.g. in *Kleinwort Benson v Malaysia Mining*) and therefore, they are not a type or form of security for loans and advances. However, it is vital to examine the wording of the letter of comfort carefully because misconspecific terms may have been included therein which may well make the unsuspecting party bound by its terms.

- (c) Duit Finance Bhd has to freeze Mr Wong's savings account after ascertaining that the name and IC Number are correct.

This is because once a customer is adjudged a bankrupt, the Official Assignee shall be (by virtue of the receiving order) constituted a receiver of the property of the debtor, – Section 8, Bankruptcy Act 1967. By virtue of Section 24 (4) of the Bankruptcy Act, the adjudication order vests the properties of the bankrupt in the Official Assignee. Moreover, the doctrine of relation back of the Official Assignee's title under Section 47 (1) of the Bankruptcy Act.

During the bankruptcy of the customer, the Official Assignee may instruct Duit Finance Bhd to close the account and remit to them the credit balance. Section 55 (5) of the Bankruptcy Act obliges bankers and agents to pay or deliver to the Official Assignee money and securities in their possession, which belong to the customers.