Ong and Co Pte Ltd v Lua Soo Theng
[2005] SGHC 6

Case Number : Suit 98/2003

Decision Date : 14 January 2005

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Andrew Ong Hock Sing and Tan Chuan Bing Kendall (Rajah and Tann) for plaintiff; Peter Yap (Peter Yap), Daniel John and Marc Wang (John Tan and Chan) for defendant

Parties : Ong and Co Pte Ltd — Lua Soo Theng

Contract – Contractual terms – Express terms – Indemnity clause in appointment letter of dealer's representative – Whether indemnity clause extended to margin losses of client.

Contract – Contractual terms – Whether memorandum of settlement amounted to compromise agreement – Whether action precluded by memorandum of settlement – Whether clauses in memorandum were condition precedents or mere statements of intention.

14 January 2005 *Judgment reserved.*

MPH Rubin J:

Introduction

1 In this action, the plaintiff, a stock-broking company and a member of the Stock Exchange of Singapore, claimed against the defendant, who was formerly its dealer's representative from 12 February 1997 to 31 May 2001, a sum of $8,754,630.84 (made up of (a) an alleged outstanding balance under a particular margin account amounting to $8,695,717.51 and (b) interest on the said sum for the period 1 March 2001 to 31 March 2001 amounting to $58,913.33) on account of margin account losses sustained by one of the defendant's clients. The defendant disputed the plaintiff's claim. He averred that he should not be held responsible for the said losses as he was not party to any margin account agreement and that in so far as he had not committed any breach of the memorandum of settlement dated 11 April 2001 reached between the parties, there was no justification for the plaintiff's present claim. Further, he, in turn, counterclaimed against the plaintiff for the refund of a sum of $236,540.69 being the excess amount taken from him by the plaintiff and interest on the said sum amounting to $16,800.

2 In fact, there were four main documents around which the dispute between the parties, by and large, revolved. They were:

(a) The letter of appointment dated 3 February 1997, duly accepted by the defendant, under which the defendant commenced his employment with the plaintiff on 12 February 1997;

(b) A margin account agreement dated 28 January 1997 (signed between one of the plaintiff's house dealers by the name Ms Chan Li Hyan ("Li Hyan") and a Malaysian company known as Texchem Investments Limited ("Texchem"));

(c) A banker's guarantee (issued by the Oversea-Chinese Banking Corporation Limited ("OCBC") dated 10 March 1998, provided by the defendant to the plaintiff); and

(d) A memorandum of settlement dated 11 April 2001 signed by the plaintiff and the defendant.

Pleadings

3 The plaintiff averred in the Statement of Claim that the defendant was employed by the plaintiff as a Director, Institutional Sales (Dealer Grade) with effect from 12 February 1997. The letter of appointment, in so far as is material, contained the following terms and conditions:

SECURITIES

7. The Company in its absolute discretion shall be entitled to require you to provide collateral or security in such form and substance satisfactory to the Company to secure your obligations hereunder and you shall do so within thirty (30) days of the Company's written request (or such further time as may be granted by the Company).

RIGHTS OF THE COMPANY

8. Notwithstanding any other provisions in this Agreement, the Company shall be entitled:-

(a) in its discretion, to require you to take such measures as the Company shall deem fit in any particular transaction;

(b) to suspend you and/or your transactions or dealings for such time as the Company shall in its absolute discretion deem fit;

(c) to check on and investigate transactions dealt by or through you;

(d) to call upon you, at any time, to show that you have the financial means to make good any damage loss or expense incurred or likely to be incurred by the Company in connection with transactions dealt by or through you in the name of the Company without taking into account the security required under Clause 7 of this Agreement; and

(e) in its discretion, to vary the terms and conditions of your employment including but not limited to your salary/bonus and/or such other benefits to which you may be entitled during your employment with the Company.

LIABILITY IN RESPECT OF CLIENT'S TRANSACTIONS

10. You shall be answerable and responsible to the Company and will keep the Company fully indemnified and harmless against any and all losses or damage the Company may sustain as a consequence of or in connection with or howsoever arising from any and all transactions dealt by or through you (hereinafter called "the Losses" which expression shall not include losses arising from or in connection with transactions by Institutional Clients as defined and excluded hereinafter) except where such transactions are pursuant to instructions of and for such clients as are designated by the Company as Institutional Clients, ie, banks financial institutions stockbroking companies and firms public listed companies and its subsidiary companies government related companies Statutory Boards Venture Capital Funds Licenced Investment Advisors and insurance companies so long as such Institutional Clients trade within the trading limits approved by the Company in writing and notified to you from time to time. If any Institutional Client trades over the trading limit approved by the Company, you shall be

answerable and responsible to the Company and will keep the Company fully indemnified and harmless for all Losses incurred under such the transactions which were entered into in excess of the trading limit.

11. Subject to the exception set out in and without prejudice to the indemnity contained in Clause 10 above, all sums due and payable to the Company in respect of transactions dealt by or through you (hereinafter called "the Contract Sum") shall be settled by you (should the client fail to do so) within the stipulated time period prescribed by the Exchange or by the Company, whichever is earlier ("the due date").

12. The Company shall be entitled in its absolute discretion to require and you hereby agree that any and all Losses/Contract Sum including contra losses be settled by cash payment or by set-off against any sums due and payable by the Company to the same client (for whose account the Losses/Contract Sum was incurred) or against any sum or sums payable by the Company to you, without prejudice to the rights of the Company to buy in or sell out in accordance with the Rules and Bye-Laws of the Stock Exchange of Singapore and any other rights powers or remedies of the Company.

13. Notwithstanding the above, you shall on demand pay to the Company:-

(a) the Losses/Contract Sum including contra losses or any part thereof; and

(b) interest thereon at the Company's prevailing rate

from the due date to the date of full payment.

14. You shall pay any and all costs and expenses whatsoever incurred by the Company on a full indemnity basis including (but not limited to) the cost of the Company's solicitors in pursuing or advising on any claim against you and/or against any client for whose account or Losses you are liable to indemnify the Company and the cost of the solicitors of any client if the Company has to pay or pays such costs.

15. Any payment made by you under Clause 13 and/or 14 shall be refunded to you (without interest) if there is a surplus in any recovery effort that may be pursued by the Company at its discretion after the deduction of the Losses, any costs or expenses whatsoever incurred by the Company including (but not limited to) the cost of the Company's own solicitors incurred in connection with the recovery of payment ("Net Surplus"). The Company shall refund the Net Surplus to you within 10 working days of receipt by the Company of the recovery moneys from the debtor.

TERMINATION

17(a) ...

(b) Notwithstanding the termination of your appointment for any reason whatsoever, you shall remain fully liable to the Company for all Losses and outstanding sums due and payable hereunder, and any collateral or security provided by you to the Company shall continue to be valid binding and enforceable for all purposes until all outstanding sums due and payable hereunder shall be fully recovered by the Company.

(c) …

4 According to the plaintiff, there was and still is an amount of $8,695,717.51 (RM18,587,965.75) owing to the plaintiff by Texchem, a non-institutional client, arising from the margin account transactions dealt by or through the defendant. The plaintiff maintained that by virtue of the terms of the letter of appointment, the defendant was liable to pay the plaintiff the said sum. Further or in the alternative, the plaintiff relied on the terms of the margin account agreement signed by Li Hyan (on behalf of the plaintiff) and Texchem, sometime on or about 28 January 1997 ("margin account agreement"). The plaintiff averred[1] that Li Hyan signed the margin account agreement and acted as the dealer's representative to service Texchem's margin account purely for the transitional period between 28 January 1997 and 12 February 1997 before the defendant commenced his employment with the plaintiff. The plaintiff took over as the dealer's representative and started servicing Texchem's account with the plaintiff upon the terms of the margin account agreement with effect from 12 February 1997. In this connection, the plaintiff underscored cll 3.10, 3.12, 3.13 and 3.14 of the margin account agreement and they read as follows:

> 3.10 Without prejudice to any other right or remedy which the Company may have (howsoever arising), if any Event of Default shall occur, the Company is authorised, in its absolute discretion, to take one or more of the following actions:
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> (i) satisfy any obligation or liability the Client may have to the Company out of any money property securities equities and/or interest held by the Company under any account whether in the margin deposited pursuant to this Agreement, the Memorandum of Charge in favour of the Company, the Client's trust account held by the Company or otherwise;
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> (ii) to liquidate the margin account including cash marginable securities and/or securities issued by the Government or its agents or other instruments comprised in the margin and/or the securities bought and carried in the Client's margin account and without prejudice to the generality of (i) above, to apply or allocate the proceeds thereof in such proportion and manner as the Company deems fit to pay/settle all outstanding liabilities or monies due from the Client to the Company whether under the Client's margin or other accounts including the debit balance due thereunder, accrued interest thereon and any costs and expenses incurred by the Company in enforcing or attempting to enforce the Client's and/or Dealer's Representative obligations hereunder or under any other agreement or obligation of the Client and the Company including the Company's legal cost and expenses on an indemnity basis;
>
> (iii) in addition to any lien right of set-off or other right which the Company may have, the Company shall be entitled at any time without notice to the Client or the Dealer's Representative to combine or consolidate all or any of the accounts of the Client whether alone or jointly with any other person and set-off or transfer any sum standing to the credit of any one or more such accounts in or towards satisfaction of any moneys obligations and liabilities of the Client to the Company arising under the margin or other accounts and be actual contingent primary collateral several or joint; and
>
> (iv) terminate the margin account forthwith and the whole of the moneys outstanding and unpaid together with all interest thereon under the margin facilities and all moneys owing and liabilities accruing to the Company under this Agreement shall immediately become due and payable without demand or notice which is hereby expressly waived.
>
> 3.12 In addition to any other right the Company may have hereunder or otherwise against the Client and/or the Dealer's Representative, the Dealer's Representative shall indemnify the Company against all costs, expenses, losses and liabilities contingent or otherwise arising or related to the margin account granted hereunder and shall pay forthwith on the Company's

demand without condition or protest for the same or any one or some or all of the same. For the avoidance of doubt, the Dealer's Representative indemnity obligation to the Company is to be regarded as an independent and distinct obligation owing to the Company and is no way to be affected by the Company's action or omission vis-a-vis the Client whether the same leads to a discharge release or varying of the liability of or the granting of any time indulgence or concession to the Client.

3.13 No act or omission or forbearance by the Company whether in favour of the Client and/or the Dealer's Representative and/or any other person shall prejudice the rights of the Company hereunder and without prejudice to the generality of the foregoing and in greater particularity the same shall not constitute a waiver of the Company's rights unless the waiver is specified in writing by a director of the Company.

3.14 A written certificate or statement by any of the Company's authorised officers on the debit balance or on any monies due or payable by the Client to the Company and/or the amount for which the Dealer's Representative is to indemnify the Company under clause 3.12 above shall be conclusive evidence of the matter or fact stated therein.

5 The plaintiff averred that due to Texchem's breach of the margin account agreement, it terminated Texchem's margin account facility on or about 9 April 2001. According to the plaintiff, the defendant stood to benefit and did benefit from the transactions in Texchem's margin account. The plaintiff asserted that the defendant had, in fact, demanded and had indeed been paid various fees pertaining to the said margin account serviced by him including but not limited to commission, facility and rollover fees as well as commitment fees. The plaintiff maintained that the defendant was and is liable to indemnify the plaintiff under the terms of the margin account agreement as well as under the terms of the letter of appointment for the outstanding balance under Texchem's margin account.

6 The Defence and Counterclaim (re-re-amended) filed by the defendant had undergone several changes from 27 February 2003 to 5 February 2004. In essence, the defendant's position was that while he agreed that he took over servicing the Texchem account from Li Hyan with effect from 12 February 1997, he was never told and neither was he aware that he was to indemnify the plaintiff for any losses incurred by Texchem on the margin trading account. He averred that the plaintiff did not require the defendant to, and the defendant did not, sign the margin account agreement.

7 The defendant placed reliance on the memorandum of settlement and contended that the action by the plaintiff was misconceived since it was not based on the terms contained therein. The said memorandum requires reproduction and reads as follows:

Date: 11 April 2001

To: David Lua
Fr: Goh Boon Huat

Cc: Ong Seng Gee

Re: Meeting held on 4 April 2001 between Ong Seng Gee, Charles Tan, Goh Boon Huat and David Lua

We set down below the terms of the settlement as agreed in the above meeting and in the follow-up meeting on 11 April 2001 between Goh Boon Huat, Petrine Yap and David Lua.

1 You shall provide a new irrevocable and unconditional on demand bank guarantee for the sum of $150,000 by 10 April 2001 to secure the losses arising under your stock account and your clients' trading accounts. The Company will reimburse the bank charges incurred in issuing the bank guarantee. The Company acknowledges that the BG has been given to the Company on 10 April 2001.

2 You shall convert the existing $200,000 bank guarantee earmarked for Texchem to the usual irrevocable and unconditional on demand guarantee used by the Company for dealers when collateralizing against clients' contra losses or in such form as the Company shall approve. This revised guarantee is to secure the losses arising under your stock account and your clients' trading accounts which shall be handed to the Company within 7 days from today or such later date as the parties may agree. The Company will also bear the bank charges associated with the conversion.

3 The Company shall restore your salary to that paid in January 2001 and shall pay your February and March salaries in arrears. Your April 2001 salary will be paid in the normal course of payroll processing.

4 OSG acknowledged DL's contention that Texchem's margin position is the Company's responsibility and not DL's. On a without prejudice basis, OSG will use his best endeavours to assist in persuading the Credit Committee/Company to agree with DL's position on the matter. DL will assist in the recovery of the losses arising from Texchem's Margin Account to the best of his ability and the Company will reimburse DL for any reasonable expenses incurred.

5 Settlement of contra losses – Payment by 31 July 2001

DL will procure the payment of all outstanding contra losses (as per Statement of Account attached herewith as at 3 April 2001, but excluding losses under Ngu Tieng Ung account) by 31 July 2001. Upon such payment by the stipulated date, the Company shall waive all interest charges relating to those outstanding accounts charged to DL's P/L.

6 Ngu Tieng Ung's Contra Losses – Payment commencing November 2001.

The principal amount of the outstanding contra losses on Ngu Tieng Ung's account is approximately S$247,000. This account is currently under legal action. The Company will continue to pursue recovery in consultation with DL. The Company will waive interest if it facilitates any potential settlement with the client which only recovers the principal. The Company will not seek recovery of interest from DL. Unless the principal has been paid by the client, DL will settle the principal amount in monthly instalments of S$10,000 commencing November 2001. However, future legal costs shall be borne equally between DL and the Company only if the principal sum has been fully paid to the Company.

7 Stock Account Losses as at 3 April 2001 (excluding Panpacmedia losses) – Payment commencing 30 April 2001

DL agreed to make five equal monthly instalment payments commencing 30 April 2001 for the Stock Account losses (excluding Panpacmedia losses incurred) less any surpluses from the P/L and without interest charge thereon.

8 Panpacmedia Stock Losses – Payment by 30 September 2001

Conditional upon due performance of items 1, 2 and 7 above, DL shall pay only 35% of the Panpacmedia's stock account losses (S$118,099.00) excluding any interest expense arising from this stock account position taken to facilitate the placement of Pancpacmedia shares.

9 Discounts on Commissions Charged to Clients – approx S$27,000

As part of this settlement set out above, the Company shall pay the discounts on commissions charged to DL's clients amounting to approx S$27,000 such amount on a cost-sharing basis of 35:65 / DL : the Company.

10 In the event you breach or fail to perform any of the above terms or obligations, all outstanding amounts shall fall due immediately and without further notice or indulgence, the Company shall take such action it deems fit including commencement of legal action against you to recover all losses, interest, costs and expenses on a full indemnity basis.

11 The Company shall consult with DL on legal actions to be taken against the client, Ngu Tieng Ung. Whether any legal action is to be taken against clients remains at the sole direction of the Company. It will be the Company's prerogative on how it wants to pursue recovery of losses arising from Texchem's margin position.

(signed)

Goh Boon Huat, General Manager
11 April 2001

I, David Lua Soo Theng, hereby agree to and confirm the above terms of settlement.

(signed)

David Lua 12/4/01

8 With regard to the memorandum of settlement, the defendant's averments, as appear in his Defence and Counterclaim, read:

16. Further or in the alternative the Defendant says that by way of the Plaintiffs' memorandum dated 11 April 2001 ("Memorandum of Settlement"), the Plaintiffs entered into a compromise settlement with the Defendant of all issues then outstanding between him and the Plaintiffs.

…

17. … In consideration of the Plaintiffs' promises under the Memorandum of Settlement, the Defendant:-

a) procured a fresh bankers' guarantee for S$200,000 in favour of the Plaintiffs to secure the Defendant's agreed owings under the Memorandum of Settlement in substitution for the Defendant's existing bankers guarantee for S$200,000 in connection with Texchem;

b) procured another bankers' guarantee for $150,000 in favour of the Plaintiffs to further secure the Defendant's agreed owings under the Memorandum of Settlement;

b) agreed to assist the Plaintiffs in the recovery against Texchem and/or Chan Teik Huat of the losses arising from Texchem's Margin Account;

c) undertook liability for various stock account losses which the Defendant had previously denied liability for; and

d) agreed to make instalment payments on Ngu Tieng Ung's account at the rate of $10,000 per month with effect November 2001.

18. The Plaintiffs agreed, in the compromise under the Memorandum of Settlement as evidenced in particular by paragraph 10 and paragraphs 4 and 11 thereof, that before the Plaintiffs proceeded with any claim against the Defendant for any liability with regard to the irrecoverable losses arising from Texchem's margin account ("the Texchem Margin losses"), :-

i) the Defendant would have to be in breach of any of the terms or his obligations under the Memorandum of Settlement; and further

ii) the Plaintiffs would comply with the following conditions precedent namely that :-

(a) the Plaintiffs' Executive Director (and son of the then Executive Chairman, Mr Ong Tjin Ann) Ong Seng Gee would use his best endeavours to persuade the Credit Committee and/or the Plaintiffs to agree that the Defendant was not liable to indemnify the Plaintiffs for the Texchem Margin losses; and

(b) the Plaintiffs would recover the Texchem Margin losses from Texchem and/or its guarantor, Chan Teik Huat, and the sale and/or disposal of Texchem's then pledged shares (details of which are found in paragraph 15 of the *Statement of Claim*).

19. The Defendant contends that the pledged shares were then worth at least S$3 million.

19A. The Defendant contends that this action of the Plaintiffs is misconceived in that it is not based on the terms of the Memorandum of Settlement.

20. Further the Defendant contends that the Plaintiffs failed to fulfil or perform the conditions precedent in the Memorandum of Settlement stated in paragraph 18 above before proceeding with the claim against him. The Plaintiffs' claim is therefore misconceived by reason of the Plaintiffs' non-performance or non-fulfillment of the said conditions precedent.

Particulars

(a) The said Ong Seng Gee failed to use his best endeavours to persuade the Credit Committee or the Plaintiffs to agree that the Defendant was not liable to indemnify the Plaintiffs for the Texchem Margin losses; and

(b) The Plaintiffs failed to take any or any adequate, legal action or enforcement against Texchem and/or Chan Teik Huat to recover the Texchem Margin losses; and/or

(c) The Plaintiffs failed to sell and/or dispose Texchem's then pledged shares. (As at the date of the Plaintiffs' letter of demand dated 3rd January 2003 against the Defendant for the sum of $8,404,630.84, the Plaintiffs were still in possession of Texchem's pledged shares

which were, by that time, of a substantially diminished value compared to their value in April 2001 when the Memorandum of Settlement was entered into.)

21. Further and in the alternative, the Defendant contends that the Plaintiffs are estopped from seeking to claim the Texchem Margin losses from him until the Plaintiffs first comply with the matters set out in paragraph 18 above.

Particulars

(a) The Defendant had relied on the Plaintiffs' representations made to the Defendant with the intention that the Defendant should act on such representations, as evidenced by the Memorandum of Settlement; and

(b) The Defendant, in reliance on the said representations, did the matters and/or undertook the liabilities as envisaged in the Memorandum of Settlement, particulars of which are stated in paragraph 17 above.

22. Further and in the alternative to the matters set out in paragraphs 20 and 21 above, the Defendant contends that it is unconscionable for the Plaintiffs to have commenced legal action against the Defendant for the Texchem Margin losses since:-

(a) The Plaintiffs' Mr Ong Seng Gee did not use his best endeavours to persuade the Plaintiffs' Credit Committee to agree that the Defendant was not liable for the Texchem margin losses;

(b) They held on to the Texchem pledged shares without selling them or disposing of them to reduce the Texchem Margin losses; and

(c) They failed to use reasonable diligence in claiming the Texchem Margin losses from Texchem and/or Chan Teik Huat.

Accordingly, the Defendant says the Plaintiffs are estopped from claiming the Texchem Margin losses from him.

22A. (i) Further or in the alternative, the Defendant had a reasonable expectation that if he performed, or substantially performed his obligations under the Memorandum of Settlement, the Plaintiff would not sue him for the Texchem Margin losses.

(ii) The Defendant contends that as he had performed or substantially performed his obligations under the Memorandum of Settlement, the Plaintiffs are in law and/or in equity precluded and/or estopped from suing him and/or it is unconscionable for them to do so.

9 The central theme of the defendant's counterclaim was again the memorandum of settlement. In sum, he maintained that whilst he had performed or substantially performed his part of the bargain, the plaintiff did not do so and as a result he suffered damage. Although no definite figures were stated in his counterclaim, the court was told that his counterclaim was for a sum of $237,000 (rounded up) and $16,800 interest.

10 The Reply and Rejoinder filed by the respective parties require no mention at this stage.

Evidence

11 There were altogether four witnesses who testified for the plaintiff. They were:

(a) Ong Seng Gee ("OSG"), an executive director of the plaintiff;

(b) Ms Tay Ai Khim ("Tay"), manager in the margin financing department of Kim Eng Securities Pte Ltd ("Kim Eng") (the plaintiff merged with Kim Eng and became a wholly owned subsidiary of the Kim Eng Group from 7 November 2001);

(c) Ms Teo Seow Lee ("Teo"), a credit officer of the plaintiff; and

(d) Ms Wu Wen Shan ("Wu"), the general manager of the plaintiff.

For the defence, there was only one witness. It was the defendant, Mr Lua Soo Theng himself. Their respective testimonies can be summarised as follows.

The plaintiff's evidence

OSG

12 OSG was the principal witness for the plaintiff. His evidence was that he is currently an executive director of the plaintiff. His late father, Mr Ong Tjin An, was the executive chairman and chief executive officer of the plaintiff. His uncle, Ong Ka Tuan, was also an executive director of the plaintiff. He first joined the plaintiff as a corporate executive in August 1995, rose through the corporate ladder fairly swiftly over the years, and in March 2001 became the managing director of the plaintiff. He said that the plaintiff was, at all material times, a wholly-owned subsidiary of Ong Asia Limited ("OAL"). OAL was acquired and became a wholly-owned subsidiary of Kim Eng Holdings Ltd on 6 November 2001. After the acquisition, he remained at the plaintiff as an executive director to the present time.

13 OSG claimed that the plaintiff's organisation was subject to the control of an executive committee ("the Exco"). It comprises the chairman, the managing director, one executive director and senior managers. At all material times in 1996/1997, the plaintiff had two general managers, Wu and one Mr Goh Boon Huat ("Goh"), who were also the members of the Exco. OSG said he was fully familiar with the circumstances and development relating to the defendant's employment with the plaintiff.

14 OSG said that sometime at the end of 1996, the plaintiff was interested in recruiting the services of Ms Evelyn Lee ("Evelyn"), a very successful dealer's representative at another leading Singapore stockbroking firm, Vickers Ballas Securities Pte Ltd ("Vickers"). She is the wife of the defendant. The plaintiff also came to know at about that time that the defendant was a successful financial consultant with strong financial ties and would also be suitable to be recruited as a dealer's representative. However, Evelyn's recruitment had to be put on hold because she was not in a position to get a release from Vickers on account of some unpaid losses for the accounts of those clients she had been servicing. The discussion between the parties then turned to the recruitment of the defendant, with the intention that Evelyn's recruitment might be reviewed at a later date.

15 According to OSG, during discussions, the defendant indicated that he had various contacts, who would open an account to trade with him as their dealer's representative. The defendant also said that he had a high net worth client known as Dick Chan Teik Huat ("Chan") who wished to obtain a margin line to carry out margin financing. The defendant also indicated that since Chan would like to

trade as soon as possible, the plaintiff should facilitate the opening of Chan's margin account without waiting for the defendant to complete the formalities to join the plaintiff officially. The plaintiff acted on the request and a margin account was consequently opened on 28 January 1997 in the name of Chan's corporate vehicle, Texchem, a British Virgin Islands company. Along with the Texchem margin account, various other accounts for the contacts of the defendant were also opened, all of them prior to the defendant joining the plaintiff. The understanding between the plaintiff and the defendant was that the accounts thus opened at the behest of the defendant, would be serviced by him immediately upon his joining the plaintiff.

16 OSG said that upon the opening of Texchem's margin account, the plaintiff arranged for Li Hyan, one of its house dealers, to temporarily service the account of Texchem. This was only a stopgap measure and the clear understanding was that Li Hyan was simply to act as a caretaker in the interim period to facilitate any trade which the defendant's clients wished to make before the defendant commenced his employment with the plaintiff. In fact, Li Hyan carried out only a single trade in Texchem's margin account on 4 February 1997. All the subsequent trades, on the Texchem account, were transacted by the defendant after he had joined the plaintiff on 12 February 1997 and the brokerage reports of the defendant would bear testimony to this fact.

17 OSG invited the court's attention to the terms contained in the letter of appointment of the defendant, particularly to cll 7 to 17 therein ([2] *supra*), dealing with securities, rights of the plaintiff and the defendant's liability in respect of his client's transactions. OSG also made reference to a memorandum from the plaintiff's then dealing liaison manager, Chao Kok Chin ("Chao"), to the plaintiff's credit department on 12 February 1997, instructing the latter to transfer the accounts from Li Hyan to the defendant.

18 OSG explained that the plaintiff did not arrange for the defendant to sign Texchem's margin account to replace Li Hyan's signature, as it would have necessitated Texchem to pass perhaps another resolution to re-sign the fresh agreement. He also felt that it could also have been due to an oversight. Nonetheless, according to OSG, the signatures of the dealer's representatives to the margin account agreements were essentially an additional confirmation of the indemnity, already provided for in their letters of appointments and as such, the fact that the plaintiff did not cause the defendant to sign a fresh margin agreement in relation to Texchem's margin account did not mean that the defendant was not bound by the indemnity which he had already provided under his letter of appointment. OSG mentioned that, in any event, cl 3.12 of Texchem's margin account agreement made it clear that the indemnity provided was in addition to any other rights the plaintiff might have against the client and/or a dealer's representative.

19 According to OSG, the defendant was fully aware of his obligation that in taking over Texchem's margin account from Li Hyan, he would be liable for any deficits in Texchem's margin account. In fact, all commissions carried out in Texchem's account were attributable and paid to the defendant, including the commissions for the single trade keyed in by Li Hyan prior to 12 February 1997, which also was as a stand-in for the defendant. OSG added that the defendant's conduct at all times was that he was entitled to all fees and commissions arising from Texchem's account. In this connection, OSG referred to the correspondence between members of Team 80 (a team of leaders led by the defendant) and the plaintiff, evidencing the fact that the defendant had given instructions and obtained his share of commissions, facility fees, rollover fees and other fees and other payments arising from Texchem's margin account at all material times. Further, according to OSG, under cl 10 of the defendant's letter of appointment, the defendant was obliged to indemnify the plaintiff for all losses and damage arising from all the transactions dealt by or through him. OSG added that since Texchem was a non-institutional client (as admitted by the defendant in "further and better particulars" provided by the defendant on 22 April 2003), the exclusions for losses in relation to trades

for institutional clients were not available to the defendant for margin account losses.

20 OSG said that in margin trades, the client was allowed to purchase anything between 2.5 to 3.5 times the value of whatever collateral pledged with the plaintiff and the risk factor was high if the market conditions became adverse. OSG said that the defendant had consistently acknowledged his obligation and had assumed liability for any deficit in Texchem's margin account. This was evidenced by the fact that he had consistently, during the tenure of his employment with the plaintiff, provided banker's guarantees to further underpin the liabilities in Texchem's margin account. In this regard, OSG relied on a few banker's guarantees provided by the defendant to the plaintiff and the phraseology found in them. OSG added that a subsequent change of wording, to expand the original ambit from margin account losses to a general banker's guarantee at the time of the departure of the defendant from the plaintiff's employment, did not alter the defendant's already accrued obligations and liabilities under his letter of appointment in any manner.

21 As regards the memorandum of settlement dated 11 April 2001, on which the defendant placed substantial reliance in this action, the evidence of OSG, as appears in paras 72 to 80 of his affidavit of evidence-in-chief, bears reproduction and the paragraphs read as follows:

> 72. As is standard when any Dealer's Representative leaves the Plaintiffs' organisation, the management will meet with the Dealer's Representative to discuss the outstanding losses in the Dealer's Representative's clients' accounts, as well as all other associated matters.
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> 73. I met with the Defendant sometime in March 2001 together with our ex-General Manager, Goh, our ex-Credit Manager, Charles Tan and our trainee Credit Manager, Quek Chin Hung. During this meeting, I informed the Defendant that he would have to make payment or provide collateral for all his clients' losses. When the subject of Texchem's Margin Account was raised, the Defendant indicated that Texchem's margin positions should be the Company's responsibility and not his.
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> 74. I did not agree with the Defendant's position that Texchem's margin positions should be the Company's responsibility and not his. The Defendant did not provide any basis for this contention, and the only basis for his request is simply that he would honour his obligations towards the losses in all his other clients' accounts, but he wanted the Company to release him from liability for Texchem's Margin Account as the sum involved was too substantial for him.
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> 75. Furthermore, the Defendant's request to waive his liability for Texchem's margin position, which was for a very substantial sum, was not a matter within my authority. Although there are no fixed guidelines issued by the Company specifying the amount of losses which the Directors may waive, the Company has implemented clear guidelines as to the trading limits which the Managing Director and the Executive Chairman may authorise. In the case of a Dealer, the global retail limit (ie the maximum limit for all his retail clients) which the Managing Director may authorise for any particular Dealer is a sum not exceeding S$5million, while the Executive Chairman may approve a limit up to S$6million. For any amounts above S$6million, this will require the Credit Committee's approval. A copy of the Board meeting minutes of the Plaintiffs dated 1 March 2001 evidencing such restrictions in the approval for trading limits is now produced and shown to me and marked "OSG-17".
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> 76. My response to the Defendant was that I did not have authority to waive such extensive losses, and any such decision to release him for the extensive losses would require the Credit Committee of the Company to make such a decision. I therefore told the Defendant that the only thing I could agree to was that I would use my best endeavours to communicate his

sentiments to the Credit Committee, but I gave absolutely no assurance that the Credit Committee would agree to waive his liability.

77. After some discussion, we finally agreed that we would document his contention to me that Texchem's margin positions should be the Company's responsibility and further that I would use my best endeavours to communicate his sentiments to the Credit Committee, and the issue of whether his liability should be waived would be put to the Credit Committee for a decision.

78. As detailed above, I had wanted the banker's guarantees provided by the Defendant to be extended to cover losses pertaining to all accounts serviced by the Defendant, instead of only securing Texchem's margin positions. The margin deficits in Texchem's account were of a very significant amount and we had anticipated that recovery action would probably have to be taken against Texchem as well as the guarantor, Chan, although this will take time and it was certainly not a pre-condition to our looking to the Defendant under his indemnity that we should first attempt or obtain recovery from Texchem and its guarantor. From the Plaintiffs' point of view, however, the immediate pressing issue then was his repayment of all the other losses and it was important to ensure that we also receive collateral to secure the losses of his other clients such that, if the Defendant defaulted in his various promises to make instalment payments, we could call on the banker's guarantee for non-payment in respect of such losses immediately.

79. Since the Defendant refused to put up any further banker's guarantees, the Plaintiffs' next best alternative was to ensure that the banker's guarantees he had previously provided be changed to be generally worded to cover all liabilities under his letter of appointment. At no time did we release the Defendant from liability for Texchem's margin positions.

80. In the discussions that ensued, the Defendant agreed to change the terms of his banker's guarantee to a generally worded banker's guarantee so that it would cover all amounts arising under his Letter of Appointment, which would necessarily include both the deficits under Texchem's Margin Account, as well as the losses of his other clients, including those that had already crystallised and identified in the Memorandum of Settlement.

22 Dealing with the defendant's allegations that he provided banker's guarantees only for the purposes of helping the plaintiff to facilitate the plaintiff's intended initial public offer ("IPO") listing, OSG remarked that the allegation was unmeritorious since the defendant had since 10 March 1998 provided banker's guarantees to secure the losses in Texchem's margin account. He added that in February 1998, Mr Ong Ka Tuan approached the defendant to furnish a banker's guarantee on account of the deteriorating margin position in Texchem's account and at that point in time, OAL had absolutely no intention of going public because of the very adverse economic conditions surrounding Asia. In any event, at that time, the plaintiff had no track record of strong earnings in the previous years, which was then a requirement for IPO listing. As it happened, OAL proceeded to engage underwriters and placement agents in August 1999 and the application for listing was made only in November 1999.

23 OSG, in his evidence, also dealt with the stock account losses agreed to be paid by the defendant by instalments as reflected in cl 7 of the memorandum of settlement. This was in reference to the losses that had crystallised as at 3 April 1997. OSG said that the memorandum of settlement, however, was not intended to cover stock account losses occasioned by the defendant after 3 April 1997. OSG also emphasised that the said memorandum did not provide that it was in full and final settlement of each parties' respective claims against each other. He added that the defendant's conduct in refusing to pay stock account losses, which crystallised subsequent to 11 April 2001, was, therefore, without basis. He further said that the defendant's allegations, that in subsequently

seeking to claim such losses from him the plaintiff had breached the memorandum of settlement, were also without any merit.

24 OSG's account, as regards the defendant's conduct subsequent to his resignation from the plaintiff's employment on 12 May 2001, was as follows.

25 After the defendant's departure from the plaintiff, he initially made payments to the plaintiff in accordance with his obligations under the memorandum of settlement. However, the defendant subsequently started to make various unilateral and unauthorised deductions from the agreed payment schedule, alleging that he was entitled to certain payments, which the plaintiff disputed. By January 2003, in addition to having made unilateral and unauthorised deductions, the defendant failed to make further payments under the memorandum of settlement.

26 However, the banker's guarantees were not sufficient to cover the outstanding amounts due from the defendant to the plaintiff under the terms of the memorandum of settlement, apart from Texchem's margin account losses. These payments were also strictly irrelevant to the plaintiff's claim against the defendant for the losses in Texchem's margin account, contrary to the position taken by the defendant in these proceedings.

27 OSG said that the issue of the defendant's liability for Texchem's margin account was tabled by him when the plaintiff's credit committee met on 22 October 2001. According to OSG, he briefed the credit committee on the defendant's contentions that he should not be held responsible for the losses in Texchem's margin account, and recommended to the committee that it should consider waiving his liability even if the plaintiff were to hold the view that he was liable. Having briefed the committee, he did not participate in the vote that was taken at that meeting. The decision by the committee at that meeting was to put the matter on hold and see whether the defendant would perform all his obligations under the terms of the memorandum settlement. There was a further meeting held by the credit committee on 11 December 2001. However, the issue of the defendant's liability for Texchem's losses was not discussed at that meeting. When the committee met again on 6 November 2002, it was apprised of the status of litigation with Texchem in Singapore, and its guarantor in Malaysia, as well as the difficulties which the plaintiff was experiencing with the various positions taken by the defendant in making unauthorised deductions and his refusal to honour his commitments under the memorandum of settlement. In the event, the committee decided not to waive the defendant's liability for losses in Texchem's margin account and to commence action against the defendant for the losses.

28 OSG was recalled to answer an allegation by the defendant that a memorandum of charge executed by Texchem, which appeared at p 14 of the core bundle of documents, suggested that the collateral shares were charged to Texchem's margin account prior to 12 February 1997. OSG's evidence, in this regard, was that there were no shares charged to Texchem's margin account when the memorandum of charge was signed on 28 January 1997 as could be seen from the fact that the schedule to the said memorandum of charge was a blank sheet of paper.

Tay

29 The plaintiff's second witness was Tay. Her evidence, by and large, was in relation to the nature of a margin account and its comparison with a cash account and in so far as is material, it was to the following effect.

30 Tay testified that notwithstanding the fact that a margin account entailed the provision of collateral by the customer and despite the buffer made available by the customer's equity in the

account, the operation of a margin account still presented a greater risk to a stockbroking company as compared to a cash account. This was because of the "gearing" or multiplying effect of margin financing which allowed a client to essentially make net share purchases of up to 2.5 to 3.5 times the value of his pledged collateral.

31 During cross-examination, Tay testified that before the merger between Kim Eng and the plaintiff, Kim Eng only required its margin account agreements to be signed between the client and Kim Eng, and its trading representatives did not sign the margin account agreement. However, the trading representatives would still be liable for an indemnity for the margin account losses of their clients by virtue of the indemnity clause contained in Kim Eng's standard letters of appointment which are signed by its trading representatives. The letter of appointment issued by Kim Eng similarly did not specifically refer to margin accounts but simply referred to coverage of all trading accounts.

32 To a question put to her during cross-examination, Tay confirmed that all stockbroking firms would look to their trading representatives to indemnify them for losses for all accounts including margin accounts, the only exception being trades carried out for institutional clients.

Teo

33 Teo's evidence was that she had been a credit officer of the plaintiff at all material times. She narrated to the court, in her affidavit of evidence-in-chief, the recovery action taken by the plaintiff against one Ngu Tieng Ung, one of the defendant's clients. However, the issue relating to Ngu Tieng Ung's liability was no longer a live issue by the time the hearing commenced in this action. Her other evidence centred on steps taken by the plaintiff against Texchem, in Singapore and elsewhere. In this regard, her evidence was as follows.

34 Teo averred that the plaintiff had commenced an action against Texchem in the Singapore High Court and had obtained judgment against Texchem on 10 March 2003. However, as Texchem was a British Virgin Islands company with no known assets within or outside Singapore, the plaintiff was unable to execute the judgment.

35 Teo also gave evidence that the plaintiff had commenced legal proceedings against Chan in Malaysia and had applied for summary judgment but the action was still pending against Chan in the Kuala Lumpur High Court.

36 During cross-examination, Teo confirmed that the defendant did call her some time in December 2002 to request a return of one of his two banker's guarantees. Teo told the court that she informed the defendant that he would have to speak to OSG on his request but that OSG was on leave at that point in time.

37 Teo was recalled as a witness during the trial after the defendant raised an allegation during the cross-examination of Wu, that the Metroplex Bhd shares deposited as collateral in Texchem's account were deposited before the defendant's commencement of employment on 12 February 1997. When Teo was recalled to the stand, she provided copies of the plaintiff's margin valuation report which were admitted and exhibited.[2]

38 From the documents thus admitted in evidence, Teo said that the collateral for four million Metroplex Bhd shares, which was the first deposit of collateral by Texchem, was furnished to the plaintiff on 17 February 1997. Teo further testified that, based on the margin valuation report,[3] the second deposit of 11.1 million Metroplex Bhd shares as collateral by Texchem was on 20 February 1997.

39 Teo's evidence on this issue resulted in the defendant and his solicitors conceding that the deposit of collateral by Texchem of four million Metroplex Bhd shares was indeed on 17 February 1997, and the further deposit of collateral by Texchem of 11.1 million Metroplex Bhd shares was on 20 February 1997, and not before 12 February 1997 (which was the date the defendant commenced employment with the plaintiff) as alleged by the defendant.

Wu

40 Wu said that at the material time, she was one of the two general managers of the plaintiff. She said that she was predominantly overseeing the operations, human resource and information technology departments of the plaintiff whereas the other general manager, Goh, was in charge of the plaintiff's finance and credit departments. Wu's evidence could be summarised as follows.

41 Wu averred that she was a member of the Exco at all material times and was present at the Exco meetings when the recruitment of the defendant and his wife Evelyn was discussed. Wu's evidence was that the plaintiff had initially intended to recruit the defendant first and subsequently to recruit Evelyn with a view to the defendant and Evelyn working as a team as dealers. However, it subsequently transpired that the plaintiff was able to recruit the defendant but not Evelyn whose intended departure from Vickers, where she was employed, was hampered by unexpected trading losses.

42 Wu also testified that in her capacity as head of the plaintiff's human resource department, she was aware that a standard letter of appointment would be used for all its dealers, regardless of whether that particular dealer serviced cash accounts, margin accounts or both. In all cases, the standard format or wording of a letter of appointment would be used irrespective of whether the dealer concerned services margin or cash accounts, or both.

43 Wu claimed that she had attended the meetings of the plaintiff's credit committee and averred that the minutes of the two credit committee meetings held on 22 October 2001 and 11 December 2001 represented an accurate and faithful record of the proceedings during those two meetings.

44 In her evidence, Wu also testified as to the value of the collateral which was pledged by Texchem when the margin account was first opened with the plaintiff. She further deposed to the value of securities (which were previously furnished by Texchem as collateral) as at November 2003.

45 Wu further deposed that the defendant was, at all material times, both the dealer servicing the margin account and the relationship manager in relation to Texchem's account. She said that prior to his departure from the plaintiff's employment, the defendant was very much in control of the plaintiff's efforts in procuring Texchem or Chan to provide the requisite collateral.

46 She claimed that the defendant was also involved at each stage of the decision-making process to effect the force-selling of Texchem's collateral.

47 In her affidavit of evidence-in-chief, Wu further explained the reasons which contributed to the devaluation of Texchem's collateral and other factors which inhibited the plaintiff from force-selling Texchem's collateral and/or which affected the share price and the ability to realise a good value for the collateral. According to her, this included the ASEAN currency crisis in 1997 which erased almost 66% off the share price of Metroplex Bhd shares for the year of 1997 alone. She added that the prices of Metroplex Bhd shares and other collateral put up by Texchem or Chan were also affected and devalued by the Central Limited Orders Book (CLOB) issue which existed from early

September 1998 to mid-2001.

The defendant's evidence

48 The defendant's evidence, as appeared from his affidavit of evidence-in-chief, was to the following effect.

49 He is also known as David Lua and is presently a director of ACPS Investments Pte Ltd, a company engaged in making investments in businesses.

50 Before joining the plaintiff, he was working as a management consultant. Prior to that, he was holding senior finance and management positions in several listed companies.

51 He was employed as Director, Institutional Sales (Dealer's Representative) by the plaintiff with effect from 12 February 1997. He ceased employment with the plaintiff about four years later, with effect from 31 May 2001.

52 In his letter of appointment, paras 10 to 15 set out his liability to indemnify the plaintiff for losses incurred arising from "client's transactions" dealt by or through him. He was also liable to indemnify the plaintiff for all sums due and payable to the plaintiff where the client failed to pay the "contract sum" within the "due date". Losses arising from transactions by "institutional clients" in respect of trades not exceeding the trading limit approved by the plaintiff were expressly excluded from the indemnity.

53 According to him, his liability to indemnify the plaintiff did not include or extend to losses incurred from stock account trading and margin accounts.

54 He averred that he was not liable for Texchem's margin account and his reasons in brief were:

(a) He did not sign the margin account agreement between the plaintiff and Texchem which agreement contained the indemnity provisions for margin account losses. In Texchem's case, the margin account agreement had been signed by another dealer's representative before he commenced employment with the plaintiff. He did not sign it, neither did he undertake any liability for Texchem's margin account losses, whether expressly or impliedly.

(b) The indemnity under the letter of appointment was not intended to cover margin accounts. Margin account transactions were by nature different from stock and shares trading transactions. Margin accounts involved the granting by the plaintiff for share purchases, and the use by the client of "margin facilities" to finance the purchase of stocks and shares. The client was required to provide collateral as security for the use of the facilities which collateral included the giving of marginable securities. Furthermore, losses could arise, as in the present case, as a result of the diminishing value of the securities which was not a loss resulting from the trading of shares. He would not have held himself liable to indemnify any losses on the margin account in Texchem because of the exposure, which was in the tens of millions.

55 He added that before he left the employ of the plaintiff, he entered into an agreement with the plaintiff to settle their differences. The terms of the agreement were contained in the memorandum of settlement dated 11 April 2002 and a clarification thereto dated 23 May 2001. Under the memorandum of settlement, he was obliged to make payment of slightly over $700,000.00 to the plaintiff over a period of about one and a half years. To secure the payment, he was required to

provide two banker's guarantees for $150,000.00 and $200,000.00 respectively. In turn, the plaintiff undertook certain obligations towards him.

56 He alleged that the plaintiff breached the memorandum of settlement by wrongfully claiming to add further obligations on him and by wrongfully calling up on the said banker's guarantees.

57 He narrated the events leading up to his employment with the plaintiff as follows. In 1996, the plaintiff approached his wife, Evelyn, to join the plaintiff. However, she declined and stayed with her employer, Vickers, where she was a dealer's representative. Evelyn then introduced him to the plaintiff in October 1996. He then met with the management of the plaintiff to explore his interest in the stockbroking business and the possibility of his joining the plaintiff.

58 He confirmed that Chan and his private investment vehicle, Texchem, were clients of Evelyn at Vickers when he decided to join the plaintiff. Evelyn introduced Chan and various other parties as potential clients for the plaintiff. Consequently, he commenced work with the plaintiff on 12 February 1997. It was the first time he started work as a dealer's representative in the stockbroking business.

59 On 12 February 1997, Li Hyan was instructed by an internal memorandum to transfer over to him the servicing of the several clients' accounts which had been introduced to the plaintiff by Evelyn. Texchem was one of those mentioned.

60 According to the defendant, the plaintiff had given Texchem a $20m credit line to trade in shares under a margin account. However, he was not aware that Texchem had signed a margin account agreement; neither was he aware that Li Hyan had also co-signed it. However, neither Li Hyan nor anyone else in the plaintiff had at any time given him a copy of the margin account agreement. At no time was he told that when he took over the servicing of the Texchem account, he would have to sign the margin account agreement or he was to indemnify the plaintiff if Texchem defaulted.

61 Dealing with Texchem's transactions, the defendant claimed that in February 1997, Texchem activated the use of the $20m margin facility. To start with, Chan arranged for the transfer to the plaintiff of 15.1 million Metroplex Bhd shares. They were then valued at $29,294,000.00.

62 Then the plaintiff took over from other stockbrokers and financial institutions, two blocks of 6.5 million (totalling 13 million) Metroplex Bhd shares owned either by Chan or Texchem. For these, the plaintiff paid out to the other stockbrokers and financial institutions $24,033,937.50 drawn down from the margin facility.

63 Based on the plaintiff's margin monthly statement dated 28 February 1997, the total value of Texchem's collateral shares was about $53.7m. Specifically, they comprised:

(a) 15.1 million Metroplex Bhd shares (*ie*, shares transferred to them as collateral from Chan) valued at $29,294,000.00; and

(b) 12.6 million Metroplex Bhd shares (*ie*, 13 million shares purchased less 400,000 shares sold on 27 February 1997) valued at $24,444,000.00.

64 Further, the net amount of loan to Texchem outstanding at the relevant time was $23,617,791.00.

65 The defendant added that Texchem was charged a commitment fee of $300,000.00 for the

$20m facility in February 1997. The sum was debited to the margin account. The plaintiff shared this commitment fee with him in a 65:35 proportion. Likewise, in May 1997, when an additional $10m facility was granted to Texchem, an amount of $150,000.00 was also debited to the margin account and shared between the plaintiff and the defendant. In addition, Texchem was charged yearly facility rollover fees of 1% on the credit line which was shared with the defendant in the same manner. Interest charges payable by Texchem were also debited to the margin account. Total interest charges for the period of February 1997 to March 2001 (the account was closed by the plaintiff on 9 April 2001) was $4,553,174.77. These interest charges were not shared by the plaintiff with the defendant.

66 The defendant said that by late 1997, the value of Metroplex Bhd shares started to fall drastically due to the Asian economic crisis. Texchem was requested to bring in fresh securities or, alternatively, pare down the financing. Texchem requested indulgence and submitted various schedules of payment, some of which were not honoured, or not fully honoured.

67 According to the defendant, the plaintiff's margin accounts were operated under the strict rules of the Singapore Exchange, then known as the Stock Exchange of Singapore ("SES"). Under SES rules, collateral value had to be maintained at 140% or more of the financing granted. Where it fell below 140% (but not below 130%), the client would be asked to top up by way of cash or additional suitable shares ("marginable shares"), failing which the plaintiff would force-sell a part of the collateral shares held to bring the account into compliance. When the collateral value fell to 130% or less, the plaintiff was at liberty to force-sell without further reference to the client. The plaintiff monitored margin accounts daily. When the 140% floor level was reached, further share purchases for the clients were prevented. This was what happened in Texchem's case. When the 140% floor level was reached, the plaintiff's credit department would instruct the defendant to force-sell, which he did. Unfortunately, Metroplex Bhd shares never recovered. Ultimately, neither Texchem nor Chan made good on the outstanding margin account.

68 As to his issuing banker's guarantees in respect of Texchem losses, his averments and explanations were as follows.

69 Sometime in February 1998, Mr Ong Ka Tuan approached the defendant to assist the plaintiff by providing a banker's guarantee. He explained that the plaintiff was asking dealer's representatives to help out so as to reduce the provisions for the 1997 year-end accounts. He highlighted to the defendant that Texchem's margin account was deficient and the provisions that would be required would adversely affect the plaintiff's year-end results which in turn would adversely affect the plaintiff's future plans for an IPO on the SES.

70 Ong Ka Tuan requested that the defendant help out by providing a short-term banker's guarantee for $500,000.00. The defendant was not agreeable and replied that he was not liable for Texchem's margin account. Ong Ka Tuan assured the defendant that the plaintiff would not call on the guarantee and offered to pay the defendant for the bank charges and fees for issuing the banker's guarantee. The defendant did not agree to his request then and told him that he would think about it.

71 A few days later, Ong Tjin An, Chairman of the plaintiff, called the defendant to his room. He was a highly respected person and was looked upon as a man of his word. He also had a good relationship with the dealer's representatives. He told the defendant of the deficiency in Texchem's margin account and requested assistance from the defendant by providing a banker's guarantee for $500,000.00 so as to reduce the level of provisions required for year-end purposes and for the future plans for an IPO. The defendant again pointed out that he was not liable for Texchem's margin

account. Ong Tjin An assured the defendant that the banker's guarantee would not be called upon.

72 Despite his view that he was not liable, the defendant was generally happy in the plaintiff company and felt that he might be able to stay on with it for a longer term and benefit from its listing on the SES. He was therefore prepared to help. When he told Ong Tjin An that he did not have the resources to raise a bank guarantee for $500,000.00, the latter suggested that the defendant could use his house as collateral and the plaintiff would in turn pay for the bank guarantee fee and charges the defendant incurred with my bankers. In the end, the defendant agreed to help because of Ong Tjin An's assurances.

73 The banker's guarantee dated 10 March 1998 was therefore given with a short-term validity period of six months. It was subsequently renewed in September 1998 for a reduced amount of $300,000.00 for another six months. In December 1998, an additional banker's guarantee of $150,000.00 was given to the plaintiff for a period of six months. This was subsequently renewed on 6 June 1999 and expired on 4 December 1999. No further renewal of this $150,000.00 guarantee was given. In January 2000, after the expiry of the $300,000.00 banker's guarantee (which expired in December 1999), the defendant provided a fresh banker's guarantee of $200,000.00 at the request of the plaintiff.

74 The plaintiff issued a prospectus for its IPO on 20 March 2000. When the $200,000.00 banker's guarantee expired in July 2000, the defendant was asked to renew it to cover the outstanding substantial contra losses of his other clients. As it was true that several of his other clients had contra losses with the plaintiff, the guarantee was given for one year. Other than that, no changes were made to the wording of the guarantee.

75 The defendant claimed that it was not true for the plaintiff to say that his giving of the banker's guarantee covering the Texchem losses was an admission by him of his liability for Texchem's margin account position, whether by way of implied liability under the margin account agreement which he never signed, or under the terms of the indemnity in his letter of appointment.

76 As regards his departure from the plaintiff and the circumstances surrounding the signing of the memorandum of settlement, the defendant's averments are as follows.

77 In early 2001, he decided to quit the stockbroking industry. At that point, several of his clients had outstanding contra losses, totalling about $0.5m. He then initiated discussion with the management on the settlement of those liabilities prior to his departure.

78 A meeting was called on 4 April 2001. Present at the meeting were the newly appointed executive director, OSG; the general manager, Goh; and the credit manager, Charles Tan.

79 As a result of the discussions and compromise reached, the plaintiff prepared a memorandum of settlement dated 11 April 2001 which he countersigned in confirmation.

80 According to him, this settlement agreement was intended to cover all issues between the plaintiff and him, including the disagreement on the Texchem margin account, where both parties preserved their respective positions.

81 After stating that the Texchem account was still outstanding and the amount due and payable by Texchem and Chan was about $8.8m, the defendant averred that although he was not liable for the outstanding account, he wanted to have this matter resolved before his departure from the plaintiff.

82 He therefore specifically raised the matter for discussion and documentation. All outstanding issues between the plaintiff and him were discussed and negotiated.

83 OSG, who represented the plaintiff in this discussion, was a former dealer's representative himself. The defendant told him that he was not liable for Texchem's margin position as he had not agreed to indemnify the plaintiff for this margin account. Furthermore, there was still outstanding collateral held by the plaintiff which could be dealt with to improve Texchem's margin account position. He agreed, however, to assist the plaintiff in its actions against Texchem and Chan for any losses.

84 OSG clearly appreciated the force of the defendant's argument that he was not liable for Texchem's margin position. OSG said that the plaintiff would recover the Texchem margin losses from Texchem and/or its guarantor, Chan, and the plaintiff would sell or dispose of the collateral pledged to the plaintiff (which was then still valued at $3,030,272.54). On the issue of the defendant's denial of liability, OSG said that he would use his best endeavours to assist him in persuading the credit committee to agree with the defendant's position on the matter.

85 Because of the said representations made to him, and not otherwise, the defendant in turn agreed to undertake the following:

(a) to give a fresh banker's guarantee for $200,000.00 in favour of the plaintiff as security for his agreement to pay the agreed amounts in the compromise in substitution for the then $200,000.00 guarantee which was expiring on 20 July 2001;

(b) to give another banker's guarantee for $150,000.00 in favour of the plaintiff as additional security; and

(c) to make instalment payments on Ngu Tieng Ung's account of $10,000.00 per month commencing from November 2001.

86 The defendant further averred that he assumed liability only for the stock account losses as at 3 April 2001 covered under paras 7 and 8 of the memorandum of settlement which amounted in total to $192,775.00. This agreement to assume liability obviously prejudiced him because he had hitherto denied that he was liable for all stock account losses.

87 In pursuance of his obligations and having regard to the undertakings under the memorandum of settlement, the defendant claimed that he did the following:

(a) procured (renewed) a fresh banker's guarantee for $200,000.00 in favour of the plaintiff;

(b) procured another banker's guarantee for $150,000.00 in favour of the plaintiff;

(c) made payments of contra losses;

(d) undertook liability for the stock account losses as specified in the memorandum of settlement;

(e) commenced payment of the monthly instalment payments towards Ngu Tieng Ung's account of $10,000.00 per month from November 2001.

88 As to the circumstances leading to the subsequent dispute between the plaintiff and the

defendant regarding the performance of the terms of the memorandum of settlement, the defendant's explanations were best stated in his own words in paras 59 to 72 of his affidavit of evidence-in-chief. They read as follows:

The MBF Stock Account losses

59. I was not liable for stock account trading losses. However, as part of the compromise agreement, I agreed to pay only those stock account losses as set out in clauses 7 and 8 of the MOS [memorandum of settlement], ie as at 3rd April 2001. …

60. By a letter dated 7 June 2001, the Plaintiffs unilaterally and wrongfully sought to add additional stock account losses in respect of MBF Capital Sdn Bhd to my account as well. Subsequently, and more particularly, by a letter dated 19th June 2001, the Plaintiffs clearly acted in breach of the MOS. …

Ngu Tieng Ung's contra losses

61. A client, Ngu Tieng Ung ("Ngu"), had incurred a contra loss back in 1997 and had refused to make payment despite efforts made to recover the loss. The Plaintiffs had obtained Judgment against him in Singapore and attempts were made to enforce the Judgment in Malaysia. The amounts to be recovered under the Judgment were M$514,537.88 (ie approximately S$247,000) plus interest and costs.

62. At the time of the negotiations in early April 2001, the Company also stated that they would continue to pursue recovery against Ngu. Other terms were also agreed in respect of this account.

63. I had genuinely expected that the Company would, after the MOS, proceed diligently with their claims against Ngu and that the Company's claim against Ngu would be settled with 6 months. Hence it was agreed that "if Ngu did not pay the Principal Amount by end October 2001, the monthly instalment of $10,000 would commence in November 2001". …

64. However, after the settlement agreement, the Plaintiffs made no serious attempts to recover from Ngu. Instead they contented themselves with their right under the MOS to look to me for payment from November 2001 onwards. This was highly prejudicial to me and the Company was not acting in compliance with the terms of the MOS.

65. On my part, I paid 13 monthly payments of $10,000 a month starting from November 2001 up till November 2002.

66. As at end-November 2002, I only owed approximately $117,000 to the Plaintiffs. However, they were holding on to both guarantees for $150,000 and $200,000 respectively. Since the Plaintiffs were already in breach of the MOS and had already given notice of their intention to call on the banker's guarantees of $350,000.00, I was deeply concerned that the Company would enforce the banker's guarantees unlawfully.

67. I therefore decided that I would not make further payments unless the Plaintiffs would show their good faith by returning to me for cancellation at least one of the two banker's guarantees they were then still holding. The amount then outstanding was adequately covered by any one of the guarantees. This was conveyed to the Plaintiffs' Ms Teo Siew Li and also referred to in my solicitor's letter to the Plaintiffs dated 10th January 2003. …

Further breaches by the plaintiffs

68. By a letter dated 3rd January 2003, in breach of their obligations, the Company (through their solicitors) demanded payment of the sum of $8,404,630.84 (with interests and costs). Up to that date, nothing had been conveyed to me about Mr Ong Seng Gee's "best endeavours". I obtained a copy of the minutes of the Credit Committee meetings of 22nd October 2001 and 8th November 2002 after the discovery of documents on or about 2nd June 2003 in these proceedings. An examination of these minutes reaffirms my assertion that Mr Ong Seng Gee had failed to comply with the obligations under the MOS.

69. In addition, the Company had also failed to take any or any adequate legal action or enforcement against Texchem and/or Chan Teik Huat to recover the Texchem margin account losses and/or that the Company had failed to sell and/or dispose of Texchem's collaterals. The value of these collaterals was $3,030,272.54 as at 31st March 2001.

The wrongful call on the banker's guarantees

70. On 17th February 2003, the Company (through their solicitors' letter dated 17th February 2003) alleged that I had breached the MOS and that the Company would proceed to enforce their rights under Clause 10. In that letter, the Company claimed that I owed them an outstanding sum of $20,415.90 after taking into account of all my earlier payments and my banker's guarantees of $350,000.00. The Plaintiffs then went ahead to carry out their threats. …

71. On or around 8th March 2003, the Company also unlawfully called on the banker's guarantees. Not only had the Company acted in bad faith, the Company was not entitled to do so having regard to the fact that the Company had already acted in breach of the MOS as elaborated earlier.

Refusal to assign Ngu's Debt

72. The net effect of the Plaintiffs calling up on the banker's guarantees was that all the outstandings on Ngu's contra loss position with the Plaintiffs was fully satisfied. However, to add insult to injury, when my solicitors requested the Plaintiffs to recognise that I had been accordingly subrogated to Ngu's debt, and requested an assignment of the debt, the Plaintiffs repeatedly raised baseless arguments to deny my request.

Joint addendum on parties' claim and counterclaim

89 Before I proceed to evaluate the evidence adduced and the arguments presented and state my conclusions, an agreed joint addendum submitted by the parties' counsel, concerning the parties' claim and counterclaim, requires reproduction. It reads as follows:

1. <u>Parties' Agreement Reached On 13 October 2004 On Certain Issues</u>

Both the Plaintiffs and the Defendant have agreed to the following:-

(i) That the collateral value for which the Defendant should be given credit should Judgment be entered on the Plaintiffs' claim is the agreed sum of S$2,187,524.00 (being the average figure between S$3,247,113.00 and S$1,127,935.00 which figures are derived from

AB pg 2088, a copy of which is enclosed herein for the Court's convenience).

(ii) Should the Court grant Judgment to the Plaintiffs, parties agree that the principal sum to be awarded is a sum of S$6,567,106.84 (being S$8,754,630.84 as claimed under paragraph 18 (i) of the Plaintiffs' Statement of Claim (BOP pg 15) less S$2,187,524.00), but subject to paragraph (iii) below.

(iii) Should the Court grant Judgment to the Plaintiffs, parties further agree that from the sum of S$6,567,106.84, there should be a further deduction of S$236,540.69 to take into account the Defendant's alleged counterclaim but with no order as to costs on the counterclaim.

(iv) Should the Court grant Judgment to the Plaintiffs, parties further agree that the Plaintiffs will be entitled to continuing interest on the sum of S$6,330,566.15 (S$6,567,106.84 – S$236,540.69) at the rate of 8% per annum from 1 April 2001 until payment.

2. Following from the above, should the Court grant Judgment to the Plaintiffs, both parties agree that there should be the following award:-

(i) Judgment for the Plaintiffs in the sum of S$6,330,566.15 (being S$6,567,106.84 – S$236,540.69).

(ii) Continuing interest on the sum of S$6,330,566.15, at the rate of 8% per annum from 1 April 2001 until payment.

(iii) There is no agreement between parties on the question of costs in the event that the Court grants Judgment to the Plaintiffs. The Plaintiffs are claiming costs on a full indemnity basis pursuant to Clause 14 of the Letter of Appointment (reproduced in the Plaintiffs' Statement of Claim at BOP pg 7) which is a contractual clause allegedly entitling the Plaintiffs to claim costs on a full indemnity basis.

3. Conversely, should the Court grant Judgment to the Defendant and dismiss the Plaintiffs' claim, parties agree to the following:-

(i) There be no order on the Defendant's counterclaim and no order on costs of the counterclaim.

(ii) There is no agreement between the parties on the issue of the Defendant's costs on the Plaintiffs' claim.

The plaintiff's arguments

90 The plaintiff's claim, as pleaded and as presented during the trial is, in the main, based on the indemnity provisions contained in the defendant's letter of appointment. The relevant provisions relied on by the plaintiff are cll 10 to 17 therein.

91 In so far as is material, the plaintiff's counsel underscored the following provisions:

(a) Clause 10:

You shall be answerable and responsible to the Company and will keep the Company fully

indemnified and harmless against any and all losses or damage the Company may sustain as a consequence of or in connection with or howsoever arising from any and all transactions dealt by or through you (hereinafter called "the Losses"…) ...

(b) Clause 13:

Notwithstanding the above, you shall on demand pay to the Company:

(a) the Losses/Contract Sum including contra losses or any part thereof; and

(b) interest thereon at the Company's prevailing rate

from the due date to the date of full payment.

(c) Clause 17(b):

Notwithstanding the termination of your appointment for any reason whatsoever, you shall remain fully liable to the Company for all Losses and outstanding sums due and payable hereunder, and any collateral or security provided by you to the Company shall continue to be valid binding and enforceable for all purposes until all outstanding sums due and payable hereunder shall be fully recovered by the Company.

92 Further or in the alternative, the plaintiff's claim is based on the terms of the margin account agreement. The contention advanced on behalf of the plaintiff, in this respect, was that although the said margin account agreement was not signed by the defendant, he was still bound by its terms owing to the following:

(a) Neither Li Hyan nor the plaintiff had any relationship with Texchem and/or Chan before Texchem opened the margin account with the plaintiff.

(b) Li Hyan was merely the house dealer who was appointed by the plaintiff to manage all the defendant's clients' accounts for the transitional period before the defendant joined the plaintiff's employment, because these clients had all opened accounts with the plaintiff before the defendant's commencement of employment.

(c) All the defendant's clients' accounts, including Texchem's margin account, were immediately transferred to the defendant when he commenced employment on 12 February 1997.

(d) Li Hyan carried out only a single trade in Texchem's margin account on 4 February 1997 and all subsequent trades were carried out by the defendant in Texchem's margin account.

(e) All the commissions for the trades carried out in Texchem's margin account, including the commission for the single trade keyed in by Li Hyan on 4 February 1997 (which accounted for a substantial commission of $21,949.88 for the dealer) were all attributed and paid to the defendant.

(f) The defendant had earned commitment fees on the full $20m margin credit line given to Texchem initially, notwithstanding that Li Hyan had carried out the first trade on 4 February 1997 in the purchase of 6.5 million Metroplex Bhd shares with a value of about $12m and which therefore used up the credit line for that amount.

(g) A proportion of 35% of the sum of $450,000.00, which was the commitment fee for the year 1997 charged on Texchem's margin account for the full margin limit of $30m, was attributed to the defendant.

(h) For the year 1997 alone, the total amount of fees and brokerage earned from Texchem's margin account was approximately $910,000.00 and the defendant would have earned 35% of that sum.

(i) The defendant had signed five other similar margin account agreements for other margin account clients he serviced.

(j) The defendant had sought the benefit of the trades under Texchem's margin account for his share of the commissions, facility fees, rollover fees and commitment fees.

(k) The defendant had provided numerous bankers' guarantees to secure the losses under Texchem's margin account as particularised under para 4 of the defendant's Amended Rejoinder and Reply to Defence to Counterclaim.

93 The plaintiff's counsel further invited my attention to the various bankers' guarantees provided by the defendant to underpin the Texchem account. These guarantees were, admittedly, provided by the defendant, first in March 1998 and subsequently renewed at various intervals right up to August 2000.The plaintiff's counsel also, in this connection, urged the court to give no credence to the defendant's claim that these guarantees were requested by the plaintiff for the purpose of window-dressing the accounts of the plaintiff in relation to the plaintiff's prospective IPO.

The defendant's arguments

94 The contention by the defendant's counsel is anchored primarily to the memorandum of settlement. The arguments advanced on behalf of the defendant in response to the plaintiff's claim are encapsulated in the defendant's executive summary[4] in the following terms:

(a) The memorandum of settlement was a compromise agreement binding on the parties. The plaintiff failed to comply with the terms of the memorandum and the plaintiff was precluded from suing the defendant. Further and alternatively, even if the plaintiff was not precluded, the plaintiff had not complied with or satisfied the pre-conditions that the plaintiff was required to satisfy before it could sue.

(b) The terms of the indemnity under cl 10 of the letter of appointment did not extend to margin losses, and the plaintiff was not liable for Texchem margin losses as he never signed the margin account agreement or any of the documents pertaining to the additional facility.

(c) From the plaintiff's conduct, it could clearly be inferred that the plaintiff relied on the guarantor Chan as security against any losses of Texchem because of Chan's financial standing rather than on the defendant, as the defendant was always seen as being incapable of indemnifying the plaintiff for such huge amounts of $20m or $30m.

(d) The defendant did not dispute that a banker's guarantee for $500,000 drafted by Petrine Yap was issued in favour of the plaintiff on 10 March 1998. However, the defendant said that the words did not carry the significance alleged by the plaintiff (admission of liability, which was denied) because the banker's guarantee was issued following certain representations made by Ong Tjin An, namely,

(i) that the banker's guarantee was for the plaintiff's 1997 year-end accounts and for future IPO purposes; and

(ii) that the banker's guarantee would not be called on.

(e) In any event, the post-memorandum of settlement guarantees omitted those words and were clearly not intended to secure any indemnity (if at all there was any such indemnity) for the Texchem margin losses. Even if, which was denied, the wordings in the pre-memorandum of settlement banker's guarantees did carry the significance as alleged by the plaintiff, the facts and circumstances of the subsequent memorandum of settlement and the omissions of these words in the post-memorandum banker's guarantees must necessarily mean that the plaintiff had acknowledged the position of the defendant (*ie* the defendant's denial of liability for Texchem margin losses under his letter of appointment).

(f) The parties entered into the memorandum of settlement which regulated the parties' rights upon the defendant's departure from the plaintiff. The plaintiff's position was fundamentally different in that the plaintiff formulated its claim against the defendant based on the letter of appointment and the margin account agreement without regard to the terms of the memorandum of settlement and founded its claims exclusively on the letter of appointment and margin account agreement. The plaintiff's disregard of the terms of the memorandum of settlement was fatal to its claim.

95 In contending that the defendant should not be held liable under the margin account agreement, the points highlighted by counsel for the defendant[5] were these:

(a) The defendant never signed the margin account agreement.

(b) The plaintiff had opportunity to have the margin account agreement re-signed when the facility was increased to $30m but it did not.

(c) The defendant did not know that there was any liability to indemnify for margin losses.

(d) The defendant was not told that he was taking over Li Hyan's liability to indemnify.

(e) The plaintiff never intended that the defendant should indemnify it for the Texchem facility; it always looked to Chan.

(f) The defendant never made it a condition of his employment that Texchem be given margin financing facilities.

96 As regards the counterclaim of the defendant, his contention, in sum, was that he had overpaid the plaintiff of about $236,540.69 and consequently he should be refunded the said sum together with interest of a sum of $16,800.

Conclusion

97 Absent the excess and frills, in my view, the primary issue in this case is whether the defendant can be held personally liable for the Texchem losses, despite the fact that he had not appended his signature to the margin account agreement. The figures themselves are not in dispute, having regard to the parties' agreed position in the joint addendum submitted to the court by counsel for the litigants.

98 In this context, I must say at the outset that the Texchem account was introduced to the plaintiff by the defendant and/or his wife and that Li Hyan, a house dealer of the plaintiff, was a mere stand-in until the defendant came on board the plaintiff. The fact that there was only one transaction carried out by Li Hyan in relation to Texchem and that it was also at the instance of the defendant cannot be disputed. Moreover, the fact that the defendant even collected the commission in relation to the only transaction carried out by Li Hyan further fortified the view that Li Hyan was no more than a proxy for the defendant. In the circumstances, the suggestion by the defendant's counsel in his closing submission that the defendant was not told that he was taking over Li Hyan's liability is pure cant, considering the fact that he had exclusively operated the Texchem account either by him or through his team members and had obtained commission, commitment and rollover fees in relation to the said account from its inception.

99 The fact, however, is that the plaintiff, either through oversight or otherwise, did not require the defendant to subscribe to the margin account agreement. In the premises, in my opinion, the plaintiff's argument that the defendant is still bound by the terms of the margin account agreement is a little stretched. Nevertheless, the terms of the letter of appointment, duly signed by the defendant, particularly cll 10, 11, 12, 13, 15 and 17, make it clear that he is answerable and responsible for all losses and damage from any and all transactions dealt by or through him, save in certain circumstances. The exceptions provided do not, admittedly, include the Texchem account.

100 It is indeed a settled principle that where the words in a contract are unambiguous, it is not for the courts to sidestep their true purport. In *Associated Asian Securities Pte Ltd v Lee Kam Wah* [1993] 1 SLR 585, the Singapore Court of Appeal had to deal with a somewhat similar fact situation. In that case, the appellants were stockbrokers with whom the respondent was a remisier. In a suit by the respondent for a sum of money which was not disputed, the appellants counterclaimed, with interest thereon, the sum of $143,707.94 as losses suffered by purchasing replacement shares for transactions in which a client of the respondent's had delivered forged share certificates. The terms and conditions governing the respondent's relationship with the appellants were contained in a contract dated 14 September 1981 and included the following:

(a) that the respondent shall be responsible for all liabilities arising from contracts written by him;

(b) that the respondent shall indemnify the appellants for any losses and damages that may arise on all contracts written by him; and

(c) that the respondent agree to the above terms and conditions and thereby indemnify the appellants for any losses or damages arising from any contracts written or any transactions entered into by him.

The appellants contended that these clauses amounted to an indemnity by the respondent and, in the alternative, that the respondent had impliedly warranted the genuineness of the documents submitted. The respondent argued against this construction of the clauses and also said that in any event the appellants were debarred from relying on the clauses by reason of their own negligence in accepting the forged share certificates from the client without first ensuring their authenticity. The trial judge, Karthigesu J (as he then was), dismissed the counterclaim (see [1991] SLR 850).

101 The Court of Appeal, in allowing the appeal, held that the indemnity given by the respondent to the appellants was wide enough to encompass the genuineness of the share certificates submitted by his client and that the plain wording of the clauses in the contract favoured the appellants. In delivering the grounds of judgment, Yong Pung How CJ commented at 587, [7]–[10]:

> The respondent's defence was that on a proper construction of the terms and conditions, he was not liable to the appellants for any loss or damage suffered by them and in the alternative that the appellants had themselves been negligent in accepting the forged share certificates from the client without first ensuring the authenticity of the share certificates, and were thus debarred from relying on the indemnity clauses.
>
> The trial judge decided in favour of the respondent. He said that he was unable to construe the indemnity clauses in the appellants' favour and in the circumstances of the case he also could not construe the terms and conditions to include an implied warranty given by the respondent to the appellants as to the genuineness of the share certificates sold by the client. He thought that the language of the indemnity clauses was too open-ended and sought to place some limitation on it. He held that the clauses applied to all losses and damage incurred in the course of bona fide and genuine transactions. As to transactions that were not bona fide and genuine, the indemnity clauses applied if the remisier had been negligent or had himself been party to the fraudulent intention.
>
> His decision thus far was not disputed. Beyond this, however, the learned judge would not go. The appellants contended that he ought to have gone further and construed the indemnity clauses to extend even to losses and damage incurred as the result of fraud by third parties in which the remisier had no part.
>
> Normally, when contractual terms are clear and unambiguous they are taken at face value unless there is some compelling reason why they should not be. The fact that a term may put what appears to be a disproportionate or unfair burden upon one party is not regarded as a sufficient reason to interfere with its interpretation if it is in itself clear, because parties who contracted on equal terms must be left free to apportion risks as they see fit. For this reason the plain wording of the indemnity clauses in this case favoured the appellants.

102 I agree with the submission by the plaintiff's counsel that cl 10 of the letter of appointment is couched in the widest terms possible and it is not subject to any express or implied terms or any proviso whatsoever, save for a specific proviso that it does not apply to transactions for clients which are designated by the plaintiff as institutional clients. In this respect, the defendant himself had admitted during the trial that Texchem was not an institutional client.

103 In the case at hand, the contention by the defendant was that cl 10 of the letter of appointment did not concern margin account clients. In my view, this submission lacks merit and attempts to give an unjustified spin to the clear words of the said clause. In my view, the words of the said clause are so unequivocal they do not permit any interlineations or suggested permutation. As observed by Lord Denman CJ in *Aspdin v Austin* (1844) 5 QB 671 at 684; 114 ER 1402 at 1407:

> Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.

Lest it is suggested that I have overlooked it, I must hasten to add that I did in this regard bear in mind that the plaintiff did have the practice of requiring its dealer's representative to co-sign the margin account agreements. In my view, the margin account agreements are primarily intended to bind the client who intends to operate a margin account and the co-signing by the dealer's representative is an additional underpinning. It does not imply in any manner or form that the clear obligations undertaken by the defendant under his letter of appointment do not cover margin losses.

104 Similarly, in *Ong & Co Pte Ltd v Lai Siew Ping Vivien* [2003] 1 SLR 1, Tan Lee Meng J construed the same cl 10 and held that the terms of the said indemnity clause were unambiguous and should be taken at face value.

105 A narrower indemnity clause was a subject of dispute before the Hong Kong High Court in *Phillip Securities (HK) Limited v Wong Wai Shing* [1999] 409 HKCU 1 ("*Phillip Securities*"). The facts of that case were these. The plaintiff was a stockbroker. The defendant was engaged by the plaintiff as a dealer's representative between 1992 and 1996. The defendant introduced two clients to the plaintiff, namely Ms Ng and Mr Leung, who opened accounts with the plaintiff. The accounts were margin trading accounts. Transactions were carried out on the accounts, upon instructions placed with the defendant by Ms Ng and Mr Leung. Trading losses were incurred on these two accounts and as a result the two clients owed the plaintiff a substantial sum of money.

106 Admittedly, sometime after the defendant was engaged by the plaintiff, he was made to sign an agreement, which contained a clause, which read:

> The Dealer's representative shall indemnify the Company and keep it indemnified against all damages, liabilities, actions, proceedings, judgments, costs (including legal costs on a solicitor-and-own client basis), claims, demands and any other losses of whatever nature that may be suffered or incurred by the Company in connection with or arising from securities transactions dealt by or through the Dealer's representative in the name of the Company (whether or not the same have been caused by or may relate to any fraud, deceit, negligence, misconduct, breach of contract or default on the part of the Dealer's representative or his/her agent or client.

107 Following losses incurred on the transactions dealt by or through the defendant, the plaintiff commenced proceedings against him. The defence that was run by the defendant was that of *non est factum*. The defence pleading contained the averment that the plaintiff had never explained to the defendant, whether prior to the signing of the agreement or at any time thereafter, the contents of the agreement or the reason for signing the same. The court, in the event, did not uphold the defendant's contention and entered judgment for the plaintiff on the ground that there was no dispute that the transactions of Mr Leung and Ms Ng were dealt by or through the defendant.

108 Returning to the facts of the case before me, it must be remarked presently that cl 10 of the letter of appointment is in fact couched in much wider terms than the indemnity clause in *Phillip Securities*, where the relevant indemnity clause related to losses or damages arising from "securities transactions".

109 In my view, the submission, that the indemnity provisions in the letter of appointment do not encompass margin account losses, is patently unsustainable. In this regard, for the sake of completeness, I should also add that I fully accept the submission of the plaintiff's counsel, which is enumerated under sub-paras (a) to (k) of [92] above.[6]

110 This brings me next to the defendant's contention based on the memorandum of settlement, which is the sheet anchor of the defendant's defence. The principal contention by the defendant, on this issue, is that the plaintiff is precluded from suing the defendant by the plaintiff's failure to satisfy "conditions precedent" under cll 4 and 11 of the memorandum of settlement. Clause 4 talks about:

(a) OSG's acknowledgment – of course, without any admission – of the contention of the defendant that Texchem's margin position was not his responsibility;

(b) OSG declaring, on a without prejudice basis, that he would use his best endeavours to

assist the defendant to persuade the credit committee to agree with the defendant's stated position; and

(c) the defendant stating his intention to assist in the recovery of the Texchem losses, to the best of his ability.

Clause 11, for its part, provides that the plaintiff shall consult with the defendant on legal action against Ngu Tieng Ung. It also provides that the plaintiff retains the sole discretion and prerogative as to whatever legal actions it may take in relation to the Texchem account or against any of the clients.

111 First and foremost, as pointed out by the plaintiff's counsel, the so-called condition precedent does not seem to feature in the defendant's affidavit of evidence-in-chief. Second, this position was also not taken up with OSG when he was testifying. Leaving that aside, from the evidence of OSG, I was satisfied that he did his level best to persuade the credit committee to see the point of view of the defendant but, as stated by OSG, it was the defendant's difficult and unco-operative attitude that put paid to those endeavours. Furthermore, a statement of intention or a voluntary gesture on the part of a good Samaritan – OSG was indeed, in my opinion, one such well-intentioned person – could not in law be elevated into a binding legal obligation. Clause 4 of the memorandum, if one were to look at it closely, does not support the contention that it can be equated with a condition precedent. Clause 11 again is no more than a statement of intention. At any rate, the evidence adduced by the plaintiff, particularly through Teo, amply demonstrated to the court that it did everything possible to recover its losses from Texchem, Chan and Ngu before it commenced the present action. In the circumstances, the allegation of breaches as raised by the defendant appear unmeritorious. It would further appear to me that the issue in relation to Ngu Tieng Ung has become a spent issue at the commencement of the hearing.

112 The defendant's counsel invited my attention to a passage in David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 2nd Ed, 1985) at p 57, which reads as follows:

> An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action. If the parties have agreed that their original dispute may be resurrected in certain events then, of course, the position may be different. But subject to that the position is as stated. Bowen LJ expressed the position thus: "As soon as you have ended a dispute by a compromise you have disposed of it."

113 I fully agree with the passage above. However, from whichever angle I look at it, the phraseology employed by the parties in the said memorandum of settlement does not convey the impression that the parties have resolved or compromised the Texchem issue. What the memorandum purports to say is that there will be an endeavour or attempt to resolve it and nothing more. There is therefore no basis for the defendant to rely on the memorandum, there being no unequivocal undertaking by the plaintiff to bear the losses arising from Texchem's margin account.

114 In my determination, in so far as the Texchem issue is concerned – which is the bone of contention at this trial – the defendant has not, on balance, established that the plaintiff is in breach of any condition, let alone any condition precedent of the said memorandum of settlement.

115 Dealing with the defendant's counterclaim, it would appear to me that he had caused it to be substantially deleted in his Re-Amended Defence and Counterclaim filed on 5 February 2004, save for

"damages from the [plaintiff] for breaches of the [memorandum of settlement] and for wrongfully calling upon the 2 banker's guarantees" and costs. As submitted by the plaintiff's counsel, the defendant, however, did not produce any evidence at the trial as to any damage which he had allegedly suffered. During cross-examination, the defendant said that he was seeking by his counterclaim a sum of $16,800 being interest charges on the banker's guarantees. As pointed out by the plaintiff's counsel, this point was never pleaded.

116 Before I conclude, I must deal with two contentions raised on behalf of the defendant by his counsel[7] concerning (a) some alleged hearsay nature of plaintiff's evidence; and (b) urging the court to draw adverse inference against it on account of the plaintiff's not calling some persons whose names featured in evidence. The defendant's submission, in this regard reads as follows:

> 2.1 The Plaintiffs' evidence on the following facts in issue were led by PW1 and are inadmissible hearsay. Even if it were admissible, it cannot be relied on for the truth of the statements (see *Subramaniam v PP* [1956] 1 WLR 965 and PW1's answers during cross-examination where he admitted and conceded that it was hearsay evidence):-
>
> > a) Purport of discussions between Defendant's wife, Evelyn Lee, Defendant and Plaintiffs before Defendant joined Plaintiffs (ie Plaintiffs' allegation that Defendant imposed conditions on his employment with Plaintiffs, such as, opening Texchem Margin Account before he joined)
> >
> > b) Reason why Evelyn Lee did not join Plaintiffs
> >
> > c) Reason(s) why Dick Chan/Texchem opened a margin trading account with Plaintiffs in 1997
> >
> > d) Reason(s) why Texchem Margin Account was opened before Defendant joined Plaintiffs
> >
> > e) Whether the Plaintiffs told Defendant during the discussions to join the Plaintiffs that a house dealer would service the Margin Account during the transitional period before the Defendant joined the Plaintiffs
> >
> > f) Whether the Plaintiffs told the Defendant during the discussions to join the Plaintiffs that the Defendant would be liable for losses in all the accounts to be serviced by the Defendant
>
> 2.2 An adverse inference must also be drawn from the fact that the Plaintiffs did not call as witnesses:-
>
> > a) *Members of the senior management* who had first hand knowledge of the pre-employment negotiations with Defendant;
> >
> > b) *Mr Ong Ka Tuan* ("OKT") (the Plaintiffs' then Executive Director who had first hand knowledge of the pre-employment negotiations with Defendant, and the giving of the banker's guarantee in March 1998);
> >
> > c) *Mr Goh Boon Huat* ("GBH") (the Plaintiffs' then General Manager who had first hand knowledge of the pre-employment negotiations with Defendant);

d) *Mr Chao Kok Chin* ("CKC") (the Plaintiffs' then Dealing Manager who had first hand knowledge of the pre-employment negotiations with Defendant, and who also was involved in the opening of the Texchem margin account);

e) *Ms Chan Li Hyan* ("CLH") (the Plaintiffs' house dealer); and

f) *Ms Petrine Yap* (the Plaintiffs' then legal counsel).

Plaintiffs did not even give any explanation why they were not called.

2.3 In light of the above, it is submitted that the only admissible and reliable evidence before the court is the Defendant's evidence on the matters in dispute.

117 The reply to the foregoing submission can be found at paras 5.18. to 5.21[8] of the plaintiff's closing submission, which read:

5.18 In the Defendant's Closing Submissions, he invited the Court to draw an adverse inference arising from the Plaintiffs' alleged failure to call various witnesses to give evidence on certain facts.

5.19 The submission fails to appreciate the fundamental principle set out above that "he who asserts must prove". It is not for the Plaintiffs to call witnesses whose evidence is not crucial to their case and to call them only for the purpose of rebutting bare allegations put forward by the Defendant. In particular, it is the Defendant's allegation that OKT had allegedly requested that the Defendant provide his banker's guarantees for an alleged ulterior purpose, and it is hence entirely for the Defendant to prove that allegation by serving a subpoena on OKT, which he had clearly chosen not to. Any adverse inference should in fact be drawn against the Defendant.

5.20 For completeness, the Plaintiffs would also address the Defendant's contention in his Closing Submissions on the calling of witnesses as follows:-

(a) **Members of the Plaintiffs' senior management** – There can be no doubt that OSG is a representative of, and was at all material times a member of the senior management of the Plaintiffs. The evidence given in Court, which is not disputed, is that OTA has passed away and the Plaintiffs did not call OKT purely because he was in ill health and had indicated to the Plaintiffs that he would prefer not to be called as a witness because of his medical condition, and the Plaintiffs were merely respecting his wishes. In any event, the dispute in question does not turn on the negotiations preceding the Defendant's employment (which the Defendant alleges necessitated the calling of these witnesses) when a subsequent contract in writing has been signed, ie the LOA.

(b) **Mr Ong Ka Tuan** – As explained above, the Plaintiffs' reason for not calling OKT was on valid medical grounds. What is telling is that the Defendant has chosen not to subpoena OKT when it was the Defendant himself who has raised an allegation about OKT's and OTA's assurances to him in persuading the Court not to accept the contents of the bankers' guarantees at face value.

(c) & (d) **Mr Goh Boon Huat and Mr Chao Kok Chin** – These persons are no longer in the employment of the Plaintiffs. The same submission regarding the negotiations preceding the Defendant's employment as set out above would apply.

(e) **Ms Chan Li Hyan –** There is absolutely no dispute concerning Li Hyan which requires her to be called as a witness. Both parties are in agreement that it was Li Hyan who signed the Margin Account Agreement and who had carried out the first trade on 4 February 1997.

(f) **Ms Petrine Yap** – There is nothing concerning Ms Petrine Yap's evidence relied upon or which needs to be relied upon by the Plaintiffs in substantiating their claim. The Defendant, on the other hand, made various bare allegations of certain alleged assurances given by Ms Petrine Yap to him, although he agreed with the Court under cross-examination that such allegations were neither pleaded nor referred to in his AEIC at all. Any adverse inference he invites the Court to draw should be against himself since the Defendant chose not to call Ms Petrine Yap as a witness to substantiate such alleged assurances.

5.21 Not only did the Defendant chose [*sic*] not to call the abovementioned witnesses to substantiate his bare allegations, the Plaintiffs [*sic*] contentions of hearsay against the Plaintiffs in his Closing Submissions is also flawed as he did not file any notice of objection on the grounds of hearsay or otherwise to the Plaintiffs' affidavits of evidence-in-chief.

118 In my determination, the plaintiff's decision not to call a few of its staff members named by the defendant did not in any way add or subtract the quality of the evidence adduced on behalf of the plaintiff. First of all, the plaintiff's case is based on written documents. Secondly, if these persons were vital to the case of the defendant, he could well have called them himself to prove or disprove his claims. In this, I accept the submission by the plaintiff's counsel as valid and hold that the submission, that I should draw adverse inferences against the plaintiff for not calling a few of its staff members, is lacking in substance. I must add that I have not given any weight to any hearsay evidence in determining the issues before me. Another stark feature in the defendant's submission is that although his wife seems to feature prominently in the inception of the Texchem account, he also for some reason shied away from calling her. It was obvious that he was endeavouring to apply one standard for himself and another for the plaintiff.

Decision

119 Having reviewed all the relevant evidence and extensive arguments presented, I am satisfied that the plaintiff has proved its claim against the defendant on a balance of probabilities. In my view, the contention by the defendant that he was not responsible for the margin account losses incurred in the Texchem account lacked credence and credibility. He has failed to establish, on balance, that the plaintiff was in breach of its obligations under the memorandum of settlement. In the premises, his counterclaim also fails and is hereby dismissed. In the premises, there will be judgment in favour of the plaintiff on the terms set out in para 2 of the joint addendum in the following terms:

(a) judgment for the plaintiff in the sum of $6,330,566.15 (being $6,567,106.84 minus $236,540.69);

(b) continuing interest on the sum of $6,330,566.15 at the rate of 8% per annum from April 2001 until payment; and

(c) costs on a standard basis.

120 I believe that a postscript is warranted at this stage. The plaintiff, in the course of the trial, at the urging of the court, was somewhat magnanimous in offering to settle the claim at a much-reduced amount. For some reasons, the defendant did not accept the offer. Nevertheless, I commend

to the plaintiff to consider the revival of the said offer, provided, of course, that goodwill is manifested from the other side.

Plaintiff's claim allowed. Defendant's counterclaim dismissed.

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[1]Para 9 of the Statement of Claim

[2]As AB-2079 to AB-2088

[3]Exhibited at AB-2081 and AB-2082

[4]Pages 3 and 4

[5]See page 14 of his executive summary

[6]Para 32 at pages 10 and 11 of the plaintiff's executive summary

[7]Pages 11 to 13 of his closing submission

[8]Pages 108 to 109