IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 278

Suit No 88 of 2014

Between

AMFRASER SECURITIES PTE LTD

… *Plaintiff*

And

GOH CHENGYU (WU CHENGYU)

… *Defendant*

JUDGMENT

[Financial and Securities Markets] — [Securities] — [Trading]

[Agency] — [Evidence of agency] — [Actual authority]

[Agency] — [Evidence of agency] — [Apparent authority]

[Contract] — [Contractual terms] — [Implied terms]

[Contract] — [Contractual terms] — [Rules of construction] — [*Contra proferentem* rule]

[Tort] — [Negligence] — [Duty of care]

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v
Goh Chengyu

[2016] SGHC 278

High Court — Suit No 88 of 2014
George Wei J
7–8, 11–14, 19 July 2016

27 December 2016 Judgment reserved.

George Wei J:

Introduction

1 The plaintiff, AmFraser Securities Pte Ltd ("the Plaintiff"), is a Singapore stock-broking firm. The defendant, Mr Goh Chengyu ("the Defendant") was the Plaintiff's former client. On 22 January 2014, the Plaintiff commenced Suit No 88 of 2014 ("the Suit") against the Defendant to recover outstanding losses from the Defendant's account which arose from four trades executed on the Defendant's account in early October 2013 ("the four disputed trades").

2 The four disputed trades were placed on 2 and 3 October 2013 in respect of three counters: Blumont Ltd ("Blumont"), Asiasons Capital Ltd ("Asiasons") and International Healthway Corporation Ltd ("IHC"). On 4 October 2013, there was a substantial, indeed catastrophic, fall in the share

values of Blumont and Asiasons, which were both penny stocks. Trading in Blumont and Asiasons was suspended on 4 October 2013. The suspension was lifted on 7 October 2013. The counters were sold by the Defendant between 8 and 10 October 2013, resulting in significant losses in the region of $1.9 million.

3 It is undisputed that the four disputed trades were placed in the Defendant's account by his trading representative, Mr Heng Gim Teoh ("Heng"). Heng was a remisier working for the Plaintiff. The crux of the Plaintiff's case is that Heng had an agreement or understanding with the Defendant, to the effect that the Defendant's cousin, Mr Adrian Goh ("Adrian") and later on, Adrian's friend, Mr Lincoln Lee ("Lincoln"), could provide instructions on trades to Heng on the Defendant's behalf. In particular, the Plaintiff claims that the four disputed trades were authorised transactions on the Defendant's account, since they were placed by Heng on the instructions of Lincoln.

4 By contrast, the Defendant's position is that the four disputed trades were unauthorised. They were not placed by the Defendant, but were done without his knowledge or approval. The Defendant denies the existence of any agreement or understanding with Heng over the authority of Adrian and/or Lincoln to issue instructions for trades to be executed on the Defendant's account. The Defendant also counterclaims for, *inter alia*, an indemnity against the trade losses arising from the four disputed trades.

5 The Suit was originally fixed for a four-day trial from 10 to 13 March 2015. These dates were vacated on the eve of the trial to enable the Plaintiff to subpoena two material witnesses, Adrian and Lincoln.

6 The trial eventually took place over seven days between 7 and 19 July 2016. The Plaintiff called six witnesses. The first witness for the Plaintiff was Heng, who was, as I had earlier mentioned, a remisier at the Plaintiff and the Defendant's trading representative.

7 The second witness for the Plaintiff was Mr Chen Moh Yong ("Chen"), an assistant manager in the Compliance Department of the Plaintiff. Originally, the Plaintiff had intended to call Mr Lee Wing How ("Lee"), who was the Plaintiff's Executive Director at the material time. Unfortunately, by the time the matter came on for trial, Lee had resigned from his position and joined another organisation in Malaysia. For this reason, the Plaintiff sought and was granted leave to call Chen to give evidence in place of Lee in respect of a meeting which took place on 10 October 2013 at the Plaintiff's offices. Details of the meeting will be discussed later. The short point that I make now is that this was one of the early meetings during which the Plaintiff was trying to elicit facts as to what had occurred in respect of the four disputed trades. Given these circumstances, leave was granted to call Chen. I shall touch on the absence of Lee later in the judgment.

8 The third witness for the Plaintiff was Mr Tan Seow Kiat ("Tan"), a credit manager of the Plaintiff.

9 The fourth witness was Ms Thilaga Valli d/o Ramasamy ("Ms Ramasamy"), a representative from StarHub Ltd. Her evidence related to certain telephone call logs obtained from Heng's mobile number. Her evidence was admitted into evidence without cross-examination.[1]

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[1] NE 11 July 2016 p 125 lines 11-23

10 In addition, as set out at [5] above, the Plaintiff subpoenaed two witnesses, Adrian and Lincoln. On 7 July 2016, the first day of the trial, the Plaintiff applied for leave to put questions to Adrian, which might be put in cross-examination by an adverse party, pursuant to s 156 of the Evidence Act (Cap 97, 1997 Rev Ed). After hearing the parties, I granted the Plaintiff leave to do so.

11 The Defendant called three witnesses. The first witness was the Defendant. The second witness was Mr Goh Yew Gee ("GYG"), who is the uncle of the Defendant and the father of Adrian. The third witness was Lucas Goh ("Lucas"), who is another cousin of the Defendant. Both GYG and Lucas were involved in the aftermath of the penny stock crash and in particular, in the 10 October 2013 meeting as mentioned at [7] above.

12 It is to be noted that the affidavits of evidence-in-chief ("AEICs") of Lucas and GYG were admitted into evidence without cross-examination.[2] This was done on the basis that the evidence of these two witnesses, as set out in their AEICs, was essentially the same as the evidence of the Defendant and that they would give the same or similar answers in cross-examination on the key points in issue.[3] The Plaintiff proceeded on the basis that the Plaintiff's case had been put to these witnesses (and denied) and that no adverse inference was to be drawn against the Plaintiff.[4]

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2 NE 14 July 2016 p 161 line 20 – p 162 line 8

3 NE 14 July 2016 p 157 lines 8-18

4 NE 14 July 2016 p 161 line 20 – p 162 line 8; NE 14 July 2016 p 157

The Relationship between the Key Witnesses

13 By way of background, I shall first set out the relationships between the key witnesses of this Suit. As I have earlier stated, Heng worked as a remisier with the Plaintiff. By 2013, he had some nine years or so of experience trading on the stock exchange. There is no dispute that when the Defendant opened up a trading account at the Plaintiff, Heng was appointed as the Defendant's trading representative.

14 Whilst there is a dispute over the circumstances in which Heng first met the Defendant in late December 2012 or early 2013, it is reasonably clear that prior to this meeting Heng was not acquainted with the Defendant.

15 Heng's position is that he was introduced to the Defendant by Adrian in late December 2012 or early 2013. Adrian at that time was around 24 to 25 years old and a corporate dealer with CIMB-GK Securities Pte Ltd ("CIMB").[5] The Defendant, it will be recalled, is Adrian's cousin and was a project manager at Wee Hur Development Pte Ltd ("WHD"). Without going into unnecessary details, WHD is part of the Wee Hur Group, whose parent company ("Wee Hur") is listed on the Singapore Stock Exchange. The Wee Hur Group in turn appears to have been founded by GYG (Adrian's father) and Mr Goh Yeo Hwa (the Defendant's father).

16 I pause to note that whilst the Defendant's full-time job was as a project manager (property development) at WHD, it appears that he had an interest in the stock market. Indeed, by his own evidence, he had three other trading accounts with CIMB, UOB Kay Hian Pte Ltd ("UOB Kay Hian")

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[5] Heng's AEIC dated 16 February 2015 at para 8

and DMG & Partners Securities Pte Ltd ("DMG").[6] This will be discussed further below where relevant.

17 Lincoln was, at the material time, a remisier at Kim Eng Securities Pte Ltd ("Kim Eng Securities").[7] Prior to joining Kim Eng Securities, he worked as a remisier with other firms such as GK Goh and Phillips Securities.[8] Lincoln clearly had considerable experience in the securities business. The evidence was that in 2013 he was handling some 120 to 150 accounts.[9]

18 Lincoln first met Adrian sometime in 2012. In 2012 and 2013, he was meeting Adrian fairly regularly, around twice a month for social occasions at clubs and discos.[10] It appears that Lincoln was also introduced to Heng at one of these occasions and was told that Heng was a remisier at the Plaintiff.[11] It was unclear how often Lincoln had met Heng at other social occasions. That said, on Lincoln's own evidence, he did meet Heng a few times with Adrian over lunch, where they chatted about trades, the market and counters.[12] The impression that Lincoln gave was that he did not know Heng well and that they did not meet much.

19 As for Adrian, the evidence was that Lucas, the Defendant and some other senior members of the Goh family held accounts at CIMB all of

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6 Defendant's AEIC dated 17 February 2015 at para 4

7 NE 13 July 2016 p 2 line 25 – p 3 line 7

8 NE 13 July 2016 p 3 lines 19-21

9 NE 13 July 2016 p 4 line 12

10 NE 13 July 2016 p 7 lines 8-9; p 8 lines 6 – p 9 line 14

11 NE 13 July 2016 p 16 line 18 – p 17 line 9

12 NE 13 July 2016 p 17 line 10 – p 18 line 24

which were handled by Adrian.[13] Indeed, I note in passing that according to Adrian, his own father GYG as well as the Defendant enjoyed high trading limits at CIMB.[14] Whilst his evidence was rather guarded, it appears that the Defendant as well as GYG likely traded in penny stock counters such as Blumont, Asiasons and LionGold Corporation Ltd ("LionGold") through CIMB. Adrian agreed that these counters were "hot" in 2013.[15]

The Key Issues

20 The central issue was whether the four disputed trades placed by Heng in the Defendant's account were in fact authorised trades. Determination of this central issue required an examination of, *inter alia*:

(a) Whether the Defendant knew or consented to Heng taking instructions from Adrian and/or Lincoln in respect of a large number of trades in the same or similar counters as the four disputed trades and which were placed in his account in the eight-month period *prior to* the four disputed trades,

(b) Whether the Defendant knew or consented to Heng taking instructions from Lincoln in relation to the four disputed trades on 2 and 3 October 2013, and

(c) The relevant legal principles under which the Defendant could be held liable for the losses arising therefrom.

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13 NE 12 July 2016 p 13 line 7 – p 15 line 21

14 NE 12 July 2016 p 16 lines 2-11; 18

15 NE 12 July 2016 p 17 line 25 – p 19 line 18

Road-map to the Judgment

21 Given the issues that arise for determination and the brief facts set out above, the judgment will deal with the evidence and issues in the following sequence and by reference to the following main headings:

(a) The Opening of the Defendant's Account with the Plaintiff

(b) Relevant Terms and Conditions Governing the Defendant's Account

(c) The Operation of the Defendant's Account between February 2013 and 1 October 2013

(d) The four disputed trades

(e) Overall Assessment of the Witnesses and Evidence

(f) The Relevant Legal Principles and Decision

The Opening of the Defendant's Account with the Plaintiff

22 The Plaintiff's case is that Adrian first approached Heng to open an account for the Defendant with a trading limit of $2 million sometime in December 2012.[16] At that time, Heng was not acquainted with the Defendant. Thereafter, on or about 18 January 2013, Heng was introduced to the Defendant by Adrian over a lunch meeting. Adrian was present at this lunch meeting. Heng was informed, in the Defendant's presence, that Adrian would operate and give instructions on the Defendant's account.[17] After the lunch, Heng's evidence is that they proceeded to the Defendant's

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16 Heng's AEIC at para 8; Set Down Bundle, Tab 2, p2: Statement of Claim (Amendment No 1) ("SOC(1)") at paras 3-4

17 Heng's AEIC at para 15

office to obtain a photocopy of the Defendant's identity card.[18] The account was opened on 24 January 2013, with the first trades taking place between 15 and 20 February 2013.[19]

23 The Defendant's evidence on how his account at the Plaintiff came to be opened is dramatically different. The Defendant claimed that sometime in 2012, a "friend" informed him that the former knew Heng and that Heng needed to increase his client portfolio. It was this friend who sought the Defendant's assistance to open up a trading account at the Plaintiff under Heng. The Defendant's evidence was that he "felt comfortable" with the suggestion as the recommendation was coming from his friend. Accordingly, a meeting was arranged between Heng and the Defendant in early January 2013 to discuss the details of the account. This meeting took place over lunch. According to the Defendant, the account-opening forms were signed on the spot, Heng "appeared to be attentive and helpful" and the Defendant accordingly trusted Heng to be honest in the operation of the account.[20] The Defendant denies that he told Heng that Adrian was also to be allowed to give instructions or that Adrian was permitted to operate the account.[21] Indeed, his evidence is that Adrian had nothing to do with the opening of an account at the Plaintiff.

24 After considering the evidence, including Adrian's evidence that he did not introduce Heng to the Defendant, I prefer the evidence of the Plaintiff (through Heng) on the account opening to that of the Defendant.

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18 Heng's AEIC at para 19

19 Heng's AEIC at paras 20 and 21

20 Defendant's AEIC at para 6

21 Defence and Counterclaim (Amendment No 1) at para 12

The Defendant's evidence as to how he relied on a recommendation of an unnamed friend to open an account at the Plaintiff, with Heng as the remisier-in-charge, is hard to believe. In cross-examination, the Defendant was unable to provide any details on the friend. He could no longer recall the friend's name or even whether the friend was male or female.[22]

25 Further, the Defendant had never met or done business with or through Heng before. It is unbelievable that, after just one brief meeting over lunch, he decided that he could and would trust Heng to be his remisier for a new account at the Plaintiff. It is to be borne in mind that according to the Defendant, it was *Heng* who needed to increase his client portfolio – not the Defendant who needed another trading account; he already had many such accounts (see [16] above).

26 Much was made by the Defendant of the fact that in the account opening form, there is a statement that it was a "friend" who introduced the client (*ie*, the Defendant).[23] The Defendant denied strenuously that the introducer was in fact Adrian.[24] The Defendant suggested that if it had been Adrian, he should and would have been described as a "relative". With respect, this is wholly misconceived. The section of the form relating to the introducer was for the *remisier*, and not the client, to fill in. It referred to the relationship between Heng and the person who introduced Heng to the client (the Defendant). Obviously, the word "friend" is wholly consistent with Heng's evidence that it was Adrian (*Heng's* friend) who introduced the Defendant to him.

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22 NE 13 July 2016 p 135 lines 12-19

23 1 AB 30

24 NE 13 July 2016 p 137 line 23- p 138 line 6

Relevant Terms and Conditions Governing the Defendant's Account

27 What follows is a brief reference to some of the key terms and conditions applying to the Defendant's account.[25] The terms and conditions will be amplified later in the judgment. The prevailing and relevant terms and conditions at the time when the Defendant's account was opened and the four disputed trades placed is the Terms and Conditions for Operation of Securities Trade Account dated 2 July 2012 ("the OSTA 2012"). Whilst some references were made to an OSTA dated 2 January 2014 ("the OSTA 2014") in the Plaintiff's pleadings and affidavits, it is clear and beyond dispute that the applicable terms can only be those found in the OSTA 2012, which pre-dates the four disputed trades. In this respect, Clause 18.3 of the OSTA 2012 and Clause 22.3 of the OSTA 2014 both state that upon each instance of the client giving an order or instruction with respect to any transaction through the Plaintiff, the applicable version of the OSTA is the "then prevailing version of the [OSTA]… *at the time immediately prior to the time of such order or instruction*" [emphasis added]. Thus, the OSTA 2014, which post-dates the four disputed trades, cannot have been relevant. For the purposes of this judgment, I shall refer only to the terms of the OSTA 2012.

28 Clause 3.1 of the OSTA 2012 provides that the client "or any of its Authorised Persons may request [the Plaintiff] orally or in writing to buy or sell … Securities or deal with monies in the Account(s) or perform any other Transaction relating to the Account(s)."[26]

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25 1 AB 42-78

26 1 AB 53

29 "Authorised Person" is defined in Clause 1 as meaning any person authorised "in writing" by the client to perform any transaction in the account.[27]

30 Clause 23.1 goes on to set out an important provision dealing with the relationship between the client, his trading representative and the Plaintiff. It provides as follows:

> The Client confirms that in the purchase and/or sale of any Securities under the Account(s) by any representative on the Client's and/or the Authorised Person's instructions or though without their instructions *but with their consent and/or authority (express, implied or otherwise) and/or knowledge*, such representative all be deemed to be the Client's agent whether or not such representative is deemed to be engaged or employed by the Client in law. The Client will, as between [the Plaintiff] and the Client be liable for all purchases and sales of Securities executed by the representative for the Account regardless of whether the representative would also be liable to [the Plaintiff] for the same and the Client shall be liable to [the Plaintiff] for all costs, expenses, damages, losses, fees, charges, rates or duties which may be incurred by [the Plaintiff] in respect of all such Securities transacted. In addition, the Client confirms that in the purchase and/or sale of any Securities under the Account(s) by any representative, such representative shall be deemed to be the Client's agent and [the Plaintiff] is entitled to assume that as between [the Plaintiff] and the Client (i) any order said by the representative to be intended to be executed for the Client is so intended, and (ii) every order executed by the representative for the Client is the order intended to be executed by the Client.
>
> [emphasis added]

31 In the present case, there is no dispute that Heng is the trading representative handling the Defendant's account. In this regard I also note that Clause 22.2(e) provides that the Client agrees to "communicate, give

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[27] 1 AB 51

instructions and/or place orders only with the representative assigned by [the Plaintiff] to the Client."

32 The OSTA 2012 also contains detailed provisions on other matters including those on the issuance of Contract Notes and Statements. For example, Clause 25.1 states that:

> [The Plaintiff] will provide the Client with a written contract note/statement of each Securities Transaction effected in relation to the Account(s). Such contract note and/or statement shall be conclusive and binding against the Client unless objection in writing addressed to the General Manager of [the Plaintiff] is received from the Client to [the Plaintiff within 7 calendar days from the date of such contract note/statement.

33 Similar provision is made in respect of the provision of monthly statements in Clause 25.2.

34 Provision is also made in Clause 11 for the setting up and maintenance of a Trust Account by the Plaintiff into which monies standing to the credit of the Client's account can be held. In this respect, I note the Trust Authorisation Statement signed by the Defendant on 18 January 2013, which authorises the Plaintiff to retain all amounts due to the Defendant including sale proceeds and contra gains in a specified trust authorisation trading account. The Plaintiff was also authorised to direct debit and credit the account and to use the money in the specified trust authorisation trading account to, *inter alia*, set-off against purchases, contra losses and trading losses.

The Operation of the Defendant's Account between February 2013 and 1 October 2013

35 It is useful to begin with a brief explanation of the process of trading at the Plaintiff. When a client, such as the Defendant, purchases a stock through the Plaintiff, the Plaintiff is obliged to settle payment in full for such purchase upfront with the relevant exchange. The Defendant would then be liable to pay the Plaintiff on the settlement date. The Plaintiff therefore takes the upfront risk of the subsequent non-payment by the Defendant. To mitigate the risk, the Plaintiff sets credit limits and requirements for collateral, and also assesses the credit-worthiness of its clients.[28]

36 There are three types of statements that are sent to the clients, all of which the Defendant confirmed that he received in 2013:[29]

(a) For each sale or purchase executed under the customer's account, a contract statement would be sent to his mailing address by the Central Depository Pte Ltd ("CDP") the next day.[30]

(b) For contra trades carried out under the customer's account (*ie*, where certain shares bought are sold off after a few days), the Plaintiff would send a contra statement by post showing the details of these contra trades as well as the net profit or loss arising therefrom the next day.[31]

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28 NE 11 July 2016 p 25 line 15 – p 26 line 15

29 NE 14 July 2016 p 1 line 16 – p 2 line 25

30 NE 11 July 2016 p 9 lines 19-24

31 NE 11 July 2016 p 10 line 21 – p 11 line 9

(c) Monthly statements for the customer's account would also be sent out by the Plaintiff at the end of each month by post.[32] Customers would usually receive them about two or three days after the posting.[33]

37 Trades in the Defendant's account commenced with a contra trade in Asiasons between 15 and 20 February 2013. In all, some 96 trades with a total transacted value of over $45 million were executed under the Defendant's account between February 2013 and early October 2013. These do not include the four disputed trades. Most of these trades were in penny stock counters including Asiasons, Blumont, LionGold and IHC.[34]

38 The volume of shares traded was substantial. For example, in the case of LionGold, the highest volume was 1.73 million shares in April 2013. In the case of Asiasons, the highest volume was 950,000 shares in March 2013. For Blumont, it was 400,000 shares in September 2013. In the case of IHC, it was 1.5 million shares in August 2013.[35]

39 Between 17 and 24 September 2013, some two million shares in LionGold were acquired at $932,263.85 and sold at $818,003.91 at a loss of $114,259.94.

40 Between 24 September 2013 and 1 October 2013, 356,000 shares in Blumont were bought at $781,537.83 and sold at $870,076.84, at a profit of

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32 NE 11 July 2016 p 10 lines 2-7

33 NE 11 July 2016 p 9 line 25 – p 10 line 7 and p 11 line 13

34 Tan's AEIC dated 16 February 2015 at para 9

35 Plaintiff's submissions at para 30

$88,539.01. The highest aggregate value of open positions up to 1 October 2013 was about $2.189 million.[36]

41 The 96 trades generated some 22 transfers and payments of profits and losses. Transfer of contra gains and proceeds of sale of shares were paid to the Defendant's bank account by electronic payment. For example, on 21 February 2013, $13,656.21 was transferred to the Defendant. On 30 April 2013, $130,487.01 was transferred to the Defendant. On 30 August 2013, $22,000 was transferred and on 9 September 2013, another $10,633.10 was transferred.[37]

42 Losses during this period were settled through cash payments without any issues being raised by the Defendant.[38] For example, on 13 May 2013, two payments for $9,044.62 and $586.61 were paid in cash for losses. On 26 September 2013, $15,000 was paid for losses. On 27 September 2013, two payments for $15,259.94 and $40,000 were made in cash for losses incurred.[39]

43 Whilst the 96 undisputed trades and the payment of profits and losses on these trades are not disputed, there is considerable disagreement over whether these 96 undisputed trades were made by Heng on the instructions of the Defendant, or instead were made by Heng pursuant to instructions by Adrian and/or Lincoln. To be clear, the position taken by the parties at the trial was as follows. The Plaintiff asserted that all of the

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36 Plaintiff's submissions at para 31; 1 AB 80, 90, 92

37 Plaintiff's submissions at para 33

38 Heng's AEIC at para 34

39 Plaintiff's submissions at para 33

undisputed trades were made pursuant to instructions given by Adrian and/or Lincoln. Initially, the instructions were from Adrian. Subsequently, from around July 2013, the instructions were provided by Lincoln.[40] The settlement of losses by cash payments was made by Adrian and/or Lincoln.

44 The Defendant, on the other hand, took the position that he *personally* gave the instructions for all the undisputed trades to Heng. The Defendant denied that he had ever told Heng that Adrian or Lincoln had his consent to operate the account. Indeed, his position at trial was that he was unaware that Adrian and Lincoln had given any instructions for trades on his account. The Defendant asserted that he personally settled the losses by cash payments to Heng.

45 Whilst these 96 trades are not directly in issue to the claim in respect of the four disputed trades made on 2 and 3 October 2013, they remain relevant in shedding light on what likely transpired in the case of the four disputed trades. I shall now deal with some of the main evidence surrounding the parties' cases on this issue.

Heng's evidence in the course of the proceedings

46 First, the Defendant made much of the fact that the position taken by Heng on how the orders were placed and instructions given for the undisputed trades changed considerably over the course of the present Suit. In brief, Heng initially took the position, in earlier proceedings by the Plaintiff for summary judgment under O 14 of the Rules of Court (Cap 322, 2014 Rev Ed), that *the Defendant* had given direct instructions to Heng for all the trades (including the four disputed trades) by telephone calls. This

[40] Heng's AEIC at paras 26-27

position was taken or evidenced, *inter alia*, by Heng in the following documents:

(a) Heng's statutory declaration dated 25 November 2013;

(b) Heng's first affidavit filed for the O 14 proceedings dated 22 April 2014; and

(c) Heng's second affidavit dated 27 May 2014 when he stated that he stood by the statutory declaration and his first affidavit.

47 Thereafter, Heng's position changed. In the Statement of Claim (Amendment No 1) ("SOC(1)") dated 8 October 2014, the Plaintiff pleaded in para 7 that the Defendant executed trades by way of oral instructions provided to Heng directly or indirectly *through Adrian and or "one Mr Lee Lim Kern, also known as Lincoln."* SOC(1) at para 8 goes on to aver that in or around May 2013, the Defendant "through [Adrian] instructed [Heng] to also take instructions from Lincoln." Thereafter, in his AEIC filed for the trial (dated 16 February 2015) at paras 21 to 30, Heng again asserts that the undisputed trades were executed by him on behalf of the Defendant upon instructions given to him on his mobile phone by Adrian and later on by Lincoln.

48 It is clear that the position that Heng was taking in his AEIC for the trial was very different from that which had been previously asserted. Whilst Heng did not expressly state in his AEIC that he had lied in the previous statutory declaration and interlocutory affidavits, during cross-examination, he more or less accepted that he had lied when he previously affirmed the statutory declaration and affidavits which stated that he had received instructions orally from the Defendant directly.[41] Indeed, Heng

asserted at trial that he in fact never met the Defendant again after the lunch meeting of 18 January 2013.

49 Heng's explanation as to why he had previously lied or provided a different story about the Defendant giving oral instructions directly for the trades was hard to follow. The reasons articulated included: that there was an agreement to protect Adrian, that the story was maintained as an inducement to the Defendant to pay a discounted sum to the Plaintiff, and that he lied simply to protect his own position.[42]

50 The Defendant submitted that the fact that Heng had lied and had asserted inconsistent positions in his statutory declaration and interlocutory affidavits heavily affects the overall reliability of his evidence at trial. In short, the Defendant's case is that Heng told the truth in his statutory declaration and interlocutory affidavits to the extent that he stated that oral instructions were provided by the Defendant to place the *undisputed trades*. However, the contents of the statutory declaration and interlocutory affidavits were false to the extent that Heng stated that he had also received oral instructions from the Defendant for the *four disputed trades*.

51 The Plaintiff, on the other hand, took the position that whilst Heng did change his position on how and/or who provided the instructions for the undisputed trades, Heng had been consistent in maintaining the baseline position that all the trades placed in the Defendant's account were in fact *authorised*. In other words, although Heng was untruthful in stating that the Defendant had placed the orders himself, the fact of the matter is that the

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41 NE 7 July 2016 p 49 lines 10-23; p 50 line 17- p 51 line 14

42 Defendant's submissions at paras 19 -25.

orders were placed by Adrian and Lincoln with the Defendant's knowledge or consent. Indeed, I note that when asked whether he had lied in the statutory declaration and interlocutory affidavits, Heng's response was that he had lied but that it was "not a hundred per cent lie". By this, what Heng appears to have meant was that the trades were still those of the Defendant.[43]

The Defendant's evidence about his trading and settlement of losses

52 The Defendant's evidence about his trading activity is also relevant in assessing how the Defendant's account was operated. Under cross-examination, the Defendant described himself as an active technical trader in 2013. By this, what he appears to have meant was that he made decisions to buy and sell by reference to a moving day average system.[44] The trades were made by himself and for his own account. As explained above, the Defendant's evidence was that he placed the orders for his trades *directly* with Heng for the 96 undisputed trades.

53 That being the case, it is surprising that the Defendant's answers to the fundamental question of whether the orders were placed in writing, orally or by some other means was materially inconsistent. In his reply to the Plaintiff's request for further and better particulars, the Defendant stated that the manner in which orders were placed was "*[m]ainly oral* to the best of the Defendant's recollection" [emphasis added].[45] He admitted during cross-examination that this must mean that there was also some other way in which he had communicated with Heng. However, he later stated that in fact, the placement of orders were "all oral".[46] When pressed, he said that

43 NE 7 July 2016 p 42 lines 9-17; p 49 lines 2-7; p 58 lines 10-14

44 NE 13 July 2016 p 89 line 5 – p 90 line 15

45 Set Down Bundle, Tab 5, p 2

some orders were placed, not through telephone calls, but at physical (face-to-face) meetings with Heng. However, he ultimately retracted that statement when he was unable to satisfactorily explain why he had not brought this up earlier.[47] In the end, his position was that the orders for the 96 undisputed trades were all placed over the telephone.

54 Further, the Defendant was decidedly vague on many points of detail about his trading accounts. First, the Defendant's evidence on how many trading accounts he had in 2013 was laboured. In particular, he was unsure about his account at DMG. He could not recall who his broker was at DMG,[48] and had trouble recalling whether he even traded under the DMG account, as the following exchange reveals:[49]

> Q. And for the DMG Securities account?
>
> A. I really cannot recall whether I traded in DMG Securities account, your Honour.
>
> …
>
> Q. Are you suggesting to the court that in 2013 your account with DMG Securities was dormant?
>
> A. If I never trade, which I can't recall, it should be dormant, but even if I had, it should have not much trading.

55 The Defendant also could not recall clearly when he opened his accounts at CIMB and UOB Kay Hian. For example, in the case of the account at CIMB, the Defendant said he had no recollection as to when the account was opened, even though counsel for the Plaintiff had given him a

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46 NE 14 July 2016 p 58 line 2 – p 59 line 21

47 NE 14 July 2016 p 68 line 11 – p 72 line 20

48 NE 13 July 2016 p 105 lines 6-9; 110 lines 22-24

49 NE 13 July 2016 p 104 lines 7-9; p 105 lines 11 - 15

wide range of suggestions, querying whether it was in the "[e]arly 2000s, mid-2000s, late 2000s, around 2010, around 2012, 2013."[50] Under further questioning, the Defendant agreed that it was after Adrian joined CIMB as a corporate dealer and that it was Adrian who "got [him] to open the CIMB account."[51]

56 Neither could he recall what the trading limits were: not even for his accounts at CIMB and UOB Kay Hian, which he claims were the accounts that he used most and in which he had weekly trades.[52] When asked why he opened so many accounts, his response was that it gave him access to more information from brokers and that he sometimes opened an account to help a friend.[53] The Defendant was reluctant to agree with the suggestion that he opened multiple accounts so that he could access a higher combined trading limit.[54]

57 The point made is that the vagueness of the Defendant's evidence on his trading activity across his four accounts in 2013 is consistent with the Plaintiff's position that it was Adrian who was the prime mover and who was in effective control of the placement of trades in the Defendant's account at the Plaintiff. The Plaintiff points out that the Defendant did not even appear to be sure of what profits he made in respect of the undisputed trades. In particular, on 1 October 2013, there was an undisputed trade in 356,000 Blumont shares which resulted in a contra profit of $88,539.01.[55]

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50 NE 13 July 2016 p 100 line 7

51 NE 13 July 2016 p 100 lines 21-24.

52 NE 13 July 2016 p 103 lines 7-20; p 104 lines 2-6

53 NE 13 July 2016 p 108 lines 17-21; p 109 lines 10-14

54 NE 13 July 2016 p 107 line 21 – p 109 line 14

This undisputed trade is particularly significant as it was placed the day before the four disputed trades, two of which were also for Blumont shares. Yet, the Defendant did not recall or even refer to this trade when he provided further and better particulars of his Defence and Counterclaim on 16 April 2014. In those particulars, the Defendant stated that the orders which he placed with Heng occurred prior to *27 September 2013*.[56] When asked to explain the discrepancy, the Defendant's response was that the failure to include the trade on 1 October 2013 was a "serious overlook" on his part.[57] This is rather surprising if the Defendant was in fact actively running his own account. The trade resulted in the second largest profit in the history of the undisputed trades.[58]

58 I move on to the Defendant's assertions about the way that he settled his losses on his trading account. The Defendant does not deny that losses incurred for the undisputed trades were settled in cash. The Defendant however asserts that he handed the cash amounts as high as $40,000 and $70,000 directly to Heng. The Defendant explains that the sums were not withdrawn from a bank account but were kept at home in his father's safe. The Defendant also stated that the $70,000 that he took belonged to his father.[59] The Defendant did not provide an explanation as to why the losses were paid in cash. Indeed he accepted that it would have been more convenient and less risky if he had paid by cheque or bank transfer.[60]

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55 1 AB 144

56 Set Down Bundle, Tab 5, p 2: Further and Better Particulars sought of the Defendant's Defence and Counterclaim

57 NE 14 July 2016 p 63 line 16 - p 64 line 18

58 Plaintiff's submissions at paras 80 - 81

59 NE 14 July 2016 p 107 lines 2- 10

60 NE 14 July 2016 p 107 line 24 - p 108 line 6

59 There is, however, no independent evidence to support the Defendant's claim that he paid for the losses in cash personally. Heng's evidence on the other hand was that the cash was handed to him by Adrian and Lincoln.[61] The problem, however, is that there is no independent evidence to back up Heng's version of the way that the losses were settled either, given that both Adrian and Lincoln have denied that they had anything to do with the orders and the cash payments for losses. Based solely on the bare assertions of the witnesses on how the losses were settled, there is insufficient evidence for me to make a definitive finding on this point. Nonetheless, on the whole of the evidence put forward by the Defendant, I am unable to accept that he was actively involved in the trading in his own account.

The Call Logs and Matching Table

60 I move on to the next crucial area of evidence in relation to the parties' cases, which relates to objective evidence in the form of call logs.

61 There was considerable cross-examination of Heng and the Defendant on how many mobile phone numbers each possessed at the material time. The Defendant's evidence as to when he called Heng, and on what number, to place the trades was rather vague. The Defendant was merely able to recall that Heng had two mobile numbers and that he had stored these numbers into his mobile phone. Whenever he called Heng, he would use the speed dial function.[62] It is noted that a substantial period of time has elapsed and it is not surprising that the Defendant was unable to

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61 Heng's AEIC at para 34

62 NE 14 July 2016 p 52 lines 1-10

recollect specific dates or occasions on which phone calls were made by him to Heng on trades and transactions. Nevertheless, given the large number of phone calls that must have been made (on his evidence), it is surprising that he has no recollection whatsoever as to Heng's phone number(s).

62 More importantly, no call logs from the mobile phone number that the Defendant admits to using at the time were produced by him, even though (if he were telling the truth) it would have been in his interest to produce them. The Defendant's evidence was essentially that although he knew he could have asked his service provider for the call logs, he did not see the need to take this step.[63] The apparent reason was that Heng had already taken the position in the statutory declaration and affidavits filed for the O 14 application that the Defendant had personally placed the orders by telephone calls, presumably obviating the need for the Defendant to obtain call logs to support his case.[64] Further, the Defendant adds that when he discovered the fact of the four disputed trades, he was so angry that he smashed his phone and threw it away as he did not want to have anything more to do with Heng.[65]

63 By contrast, the Plaintiff points out that the SOC(1) and Heng's AEICs for the trial made it clear that Adrian and Lincoln had placed the orders for the undisputed trades over the telephone. Heng also produced copies of his mobile phone call logs, and these records were subjected to considerable cross-examination. The key point is that the call records

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63 NE 14 July 2016 p 86 line 1-7; p 87 lines 8-20

64 NE 14 July 2016 p 84 lines 17-23; p 85 line 24 – p 86 line 19

65 NE 14 July 2016 p 53 line 4-12

produced do not reflect a single call from the Defendant to Heng in the period in question. The Defendant's response was that Heng had a number of phone numbers and that the Defendant's calls might have been to one or more of those other numbers, whose call logs Heng did not disclose. Heng, on the other hand, insisted that he only had the one mobile number, although he accepts that he did on occasion use another remisier's mobile when he was covering duties for that remisier.[66] However, he stated that when he did use those numbers, it was to correspond with that remisier's clients, and not with his own clients, such as the Defendant.[67]

64 I pause to note that all the telephone calls to Heng on the undisputed trades and transactions were made to Heng's mobile number(s) and not to his office landline. Searches by the Plaintiff on the records of Heng's landline drew a blank. In any event, if the orders had been placed by a call to the office land line, there would have been some record. In this respect I note that Clause 22.1 of the OSTA 2012 make clear that telephone conversations may be recorded by the Plaintiff and used as evidence in any dispute. The importance of communicating in a manner whereby there is some record of the communication must have been obvious to all parties. Indeed, Clause 22.3(c) (whilst not directly relevant) reminds the client of risks attendant to trades executed outside the Plaintiff's office. The witnesses never offered any explanation as to why orders were not placed by means of calls to Heng's land line.

65 Based on the call logs from his mobile phone, the dates and times of the orders, the dates and times of the transfer of monies to the Defendant's

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66 NE 7 July 2016 p 105 lines 14-21

67 NE 8 July 2016 p 112 lines 11-22

account and the date of payment of cash for losses, Heng compiled a "Matching Table" in which he attempted to demonstrate a high degree of correlation between the dates and times of the transactions on the Defendant's account, and the telephone communications received or made by Heng to Adrian and Lincoln.[68] I should add at this juncture that in assessing Heng's evidence on his call logs and the Matching Table which he produced, I have taken note that the Matching Table is Heng's own attempt to reconstruct the transactions in the Defendant's account with the goal of establishing some basis for the submission that all the transactions were placed from numbers belonging to either Adrian or Lincoln. Heng accepts that the Matching Table was compiled based on his sight of his call logs, and the Plaintiff's records of the transactions as well as his own memory as to who he was speaking to over the mobile phone in respect of the transaction.[69]

66 The information in the Matching Table was organised and presented under seven columns. For example, the first three entries in the Matching Table are as follows:

Calls From/To	Contact Number	Date of Call(s)	Trade Date	Contract Number	Counter	Settlement Date
Adrian Goh	[number redacted]	8 Feb 13	8 Feb 13	128544/001	Asiasons	15 Feb 13
Adrian Goh	[number redacted]	19 Feb 13	19 Feb 13	139611/502	Asiasons	20 Feb 13
Adrian	[number	1 Mar 13	1 Mar 13	156629/001	Asiasons	6 Mar 13

[68] Heng's AEIC at Exhibit HGT-4

[69] NE 7 July 2016 p 6 line 13 p 11 line 19

Goh	redacted]	1 Mar 13				

67 In the case of Adrian, Heng's evidence was that there were four numbers which belonged to or were used by Adrian. Of these, Adrian admitted that one of the numbers was indeed his.[70] There is no independent evidence to show that calls from the other numbers to and from Heng were indeed phone numbers belonging to Adrian.

68 In this context, it is noted that Heng's call logs show that between 17 January 2013 and 5 August 2013, there were 447 calls between Heng and Adrian's admitted number.[71] These calls generally corresponded to the timing of when the orders were placed.[72] In particular, the Plaintiff points out that between 17 January 2013 and 24 January 2013, which was around the time when the Defendant opened up his trading account with the Plaintiff, there were 28 calls exchanged between Heng and Adrian.[73] The last call attributed to Adrian (according to the Matching Table and call logs) took place on 5 August 2013. Thereafter, all the calls were from phone numbers said to belong to Lincoln, which I will come to in a moment.

69 Adrian's explanation for the calls and the fact that the timing matched the placement of the orders was that this was pure coincidence.[74]

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70 Plaintiff's submissions at para 85; NE 12 July 2016 p 23 line 25 – p 24 line 18

71 Plaintiff's submissions at para 145; Plaintiff's Exhibits (Volume 1) Tab 7, last page

72 NE 12 July 2016 pp 50- 61 and pp 120-121

73 Plaintiff's submissions at para 123

74 NE 12 July 2016 p 121 lines 16 – 20.

Adrian asserts that he did call Heng from time to time, but those calls were to chat about market intelligence and movements in counters.[75]

70 However, I note that whilst some of the calls lasted several minutes, the duration of many of the calls was very short, with quite a few lasting around 30 seconds or less. It seems rather improbable that so many calls of such short duration would be placed at all times of the day (often during working hours) to discuss market intelligence, as Adrian states. The Defendant offers the explanation that some of the phone calls might have been very brief simply because "remisiers are busy people who talk to many clients at the same time to receive orders and inquiries and execute trades at a hectic pace."[76] I have no doubt that remisiers are indeed very busy and especially so during trading hours. For that reason, the number of phone calls strongly suggests that many or at least some of the calls must have been more than just general chats on market intelligence.

71 With regards to Lincoln, Heng claims that there were three numbers which belonged to or were used by Lincoln. Of these, Lincoln agreed that one number was indeed his number.[77] However, it is not in dispute that Lincoln's admitted mobile number was a "blocked number".[78] In other words, a call from the blocked number would not show up in Heng's caller ID on his mobile phone, and would be captured in the call logs as a "blocked number" or a blank. In fact, the call logs do show that Heng received a number of calls from a blocked number at or around the time of a

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75 NE 12 July 2016 p 33 line 6 – p 34 line 16

76 Defendant's submissions at para 91

77 NE 13 July 2016 p 5 lines 13-16 and p 6 lines 3-14

78 NE 8 July 2016 at p.20, line 16 - p21 line 7

number of transactions. For example, on 15 August and 17 September 2013, he received a call from a blocked number which was proximate to the time when trades in IHC and LionGold were executed respectively.[79] When asked how he (Heng) was able to recall that it was Lincoln whom he was speaking to on those occasions, Heng's evidence is that to the best of his recollection, he recognised Lincoln's voice and knew he was speaking to Lincoln.[80] By way of example, the 58th entry in Heng's Matching Table is as follows:

Calls From/To	Contact Number	Date of Call(s)	Trade Date	Contract Number	Counter	Settlement Date
Lincoln	(Blocked Number)	17 Sep 13	17 Sep 13	370762/ 001	LionGold Warrant	20 Sep 13

72 However, Lincoln flatly denied that the calls from the blocked numbers were made by him. The Defendant's position was that there is very little basis for Heng to assume or believe that the blocked number calls revealed by the call logs were indeed from Lincoln. However, the court was not provided with Lincoln's call logs. When Lincoln was asked whether he tried to get access to his own call logs to demonstrate that he did not call Heng's number, his evidence was that by the time he tried to do so in May 2016, the service provider had informed him that there was insufficient time to prepare the call logs in time for the trial. It is true that the first day of the trial was two months later, on 7 July 2016. That said, the point remains that Lincoln was subpoenaed to give evidence in May *2015*. There was ample time to secure the call logs between May 2015 and the trial in July 2016,

79 Heng's AEIC at Exhibit HGT-4 p 105

80 NE 7 July 2016 p 52 lines 12-15

but his evidence was that he did not do so, without giving any reasons for his failure.[81]

73 In addition, what is interesting is that an examination of the outgoing calls from Heng's phone reveals a fair number of calls made by Heng to Lincoln's admitted phone number. This is the very "blocked number" that Lincoln's accepts belongs to him. In this regard, it should be noted that when a subscriber (such as Heng) who knows the blocked number makes an outgoing call to that blocked number, his own outgoing call log will reveal the blocked number. For example, the outgoing call records exhibited in Ms Ramasamy's AEIC (which was unchallenged) show calls being placed on 16 September 2013 at 8.55am and again at 4.10pm. Calls were also made to that number on the 17 September, 29 September, 5 October, 6 October, 8 October, 9 October and 10 October 2013. The durations of the calls were rather short ranging from one or two seconds to around five minutes.

74 Thus, whilst the call logs are equivocal at best as to whether Lincoln called Heng on orders during the relevant time frame, it is at least clear that Heng did place a fair number of calls to Lincoln's blocked number. What those calls were about is of course a matter of conjecture. However, it is important to note that some of the outgoing calls to Lincoln's blocked number were placed *before* the four disputed trades.

75 As a final note, I am conscious that neither Heng, Adrian nor Lincoln have been forthcoming on the number of mobile numbers each possessed. The evidence indeed has been decidedly murky with allegations

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[81] NE 13 July 2016 p 43 lines 8-15

and claims that some numbers were from pre-paid SIM cards, which made it difficult to trace the numbers to the person using them. Essentially, each witness took the position that he only had one mobile number. Each witness claimed that the others had multiple mobile phone numbers. Nothing ultimately turns on this, and I have based my findings on the numbers admitted by the parties.

76 Before I conclude this section, I note that aside from the service provider's call logs and Heng's Matching Table, the Plaintiff's counsel also made extensive reference to tables and charts produced by the Plaintiff's legal representatives. These include (i) a Summary of Calls to Heng's mobile;[82] (ii) a revised Master List of Transactions in the Defendant's account;[83] (iii) a Summary Table of Calls to and from Adrian and Lincoln against Withdrawal of Profits and Settlement of Losses;[84] (iv) a Summary Table of Calls to and from Adrian on days when emails were sent to and from Adrian and Heng;[85] and (v) a Summary Table of Calls to and from Adrian matched with the Transactions Reflected in the Excel spreadsheet (which I will come to in the next section).[86]

77 These charts or tables were not produced by Heng or the witnesses. Instead they were based on information extracted by the Plaintiff's counsel from the Plaintiff's monthly statements, contra statements, order logs, StarHub call logs and the AEICs of the Plaintiff's witnesses. Whilst I

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82 See Plaintiff's submissions at annex 2

83 See Plaintiff's submissions at annex 3

84 See Plaintiff's submissions at annex 4

85 See Plaintiff's submissions at annex 5

86 See Plaintiff's submissions at annex 6

appreciate the effort to organise and present the substantial volume of information, I make clear that the decision I have come to is based on the evidence of the actual witnesses placed before the court, including Heng's Matching Table, the calls logs and the evidence as to the order logs and contra statements.

The Excel spreadsheet

78 The next piece of evidence relates to the communications between Adrian and Heng in March 2013 on the working out of brokerage commissions. Shortly after the Defendant opened his account at the Plaintiff, Adrian, by way of an email dated 11 March 2013, provided Heng with an Excel spreadsheet template to work out trade account information, including price, quantity, brokerage charges, fees, GST calculations and ensuing profit and losses on trades.[87]

79 Heng's evidence was that Adrian had requested him to provide a breakdown of fees and brokerage charges in respect of each trade that was executed in the Defendant's account. Adrian wanted Heng to provide a consolidated overview of the fees and charges across the various trades executed in the Defendant's account from time to time. Heng explains that such a breakdown would not be reflected in the monthly statements of account sent to the Defendant.[88]

80 Adrian's position was rather different. He said that the Excel spreadsheet template was developed for use by traders and staff at CIMB.

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87 Heng's 2nd AEIC dated 14 April 2016 at Exhibit HGT-9, p 39; NE 12 July 2016 p 68 lines 12 - 23, p 70, line 14 – p 71 line 1

88 Heng 2nd AEIC at para 6(a)

Adrian had sent Heng the sample template solely to assist Heng work out his commissions at the Plaintiff.[89]

81 It is noteworthy, however, that Heng sent Adrian an email in response two days later, on 13 March 2013, setting out an Excel spreadsheet filled out according to the template that had been provided. The Excel spreadsheet set out a breakdown and calculation of eight trades that were executed in early March 2013, purportedly under the Defendant's account.[90] The problem however is that this Excel spreadsheet did not expressly refer to the Defendant's account by name. Further, the counters referred to in this spreadsheet were "WEE HUR" and "Swiss Co" as opposed to Blumont, Asiasons or LionGold.[91] Whilst his explanation that he was being "lazy"[92] in not changing the names of the counters on the spreadsheet may seem questionable at first sight, there is little doubt that the eight trades recorded in the Excel spreadsheet were indeed trades carried out in the Defendant's account in the Asiasons counter. This was demonstrated by Heng's comparison of the trades set out in the Excel spreadsheet against the order logs and the monthly statement of accounts.[93] The brokerage rate charged at the Plaintiff was 0.180%. The brokerage rate that Adrian wanted to be applied was 0.160%. After discussions it was agreed (according to Heng) that a commission rate of 0.170% would be used and that Heng would personally reimburse Adrian for the 0.01% differential.[94]

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89 NE 12 July 2016 p 87 line 11 – p 90 line 12

90 Heng's 2nd AEIC at Exhibit HGT-10, p 43; NE 12 July 2016 at p 73 lines 12 - 20, p 75 line 13 – p 77 line 14

91 Heng's 2nd AEIC at Exhibit HGT-10, p 44

92 NE 8 July 2016 p 96 line 13

93 Heng's 2nd AEIC at para 12; Plaintiff's submissions at para 141; Heng's AEIC at Exhibit HGT-2, p 67.

82 Looking at the evidence as a whole, I am satisfied that Adrian clearly demonstrated a keen interest in obtaining regular overviews of the trades conducted by Heng in respect of the Defendant's account. Whilst this is not conclusive evidence supporting Heng's case, it is undoubtedly consistent with the arrangement that the Plaintiff asserts had been made between Adrian, Heng and the Defendant.

Lincoln's role

83 I move on to the role of Lincoln in the trades. What is apparent from Heng's call logs is that after about 5 August 2013 there were no more phone calls from any of the numbers that Heng asserts belongs to or were used by Adrian. This includes the number that Adrian admits belongs to him.

84 The Plaintiff's case is that from August 2013 onwards, the running of the Defendant's account was taken over by Lincoln, with the knowledge and consent of the Defendant. By contrast, the Defendant denies that Lincoln ever gave instructions on his account for the undisputed trades. The Defendant submits that the Plaintiff, through Heng, was unable to link any trades to the telephone registered in Lincoln's name.[95]

85 The Plaintiff did not offer any reason as to why the handling of the Defendant's account was "passed" over to Lincoln. This is something which is obviously not within its knowledge. However the evidence established that by around the end of September or early October 2013, Adrian ceased work at CIMB.[96] Whilst the evidence could have been

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94 Heng 2nd AEIC at paras 7 and 15

95 Defendant's submissions at para 3

96 NE 12 July 2016 p 9 lines 15-18

clearer, it seems that Adrian was detained by the Singapore Prison Service on 2 October 2013 and was discharged on 14 October 2014.[97] This period was referred to as admission for "drug rehabilitation"; the reality is that Adrian was incarcerated.[98] It is reasonably clear that given Adrian's personal problems it would have been difficult for him to be an active trader in the period immediately prior to his admission for rehabilitation.

86 In the end, the real question is *whether* Lincoln did in fact issue instructions to Heng for trades on the Defendant's account in circumstances such that the Defendant must have known and consented to his giving instructions. It does not matter as much *why* Lincoln took such an active role in giving orders to Heng on the Defendant's account from around August 2013.

87 After considering the evidence as a whole, I am satisfied it was indeed Lincoln who had placed the trades on the Defendant's accounts from about August 2013.

88 First, it is clear that Lincoln was acquainted with Heng and Adrian. Although Lincoln, in testifying, was keen to give the impression that he was not that close to Adrian,[99] it is clear from his own evidence that he was on friendly terms with Adrian and that he met him socially around twice a month (see [18] above). Lincoln and Adrian knew that they were both

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97 See letter dated 18 July 2016 sent by Tan Kok Quan Partnership, the law firm acting for Adrian attaching a letter from the Singapore Prison Service dated 14 October 2014. The letter was sent to the Supreme Court Registry shortly after the close of the evidence. See also Defendant's submissions at para 19(d) that Adrian had been "incarcerated"

98 Defendant's submissions at para 128

99 NE 13 July 2016 p 6 line 18 – p 7 line 22

traders ion the stock market. Their conversations were usually on market activity and counters, including Blumont. In particular, Lincoln stated that Adrian mentioned that his family traded on "penny stocks." Lincoln was also introduced to Heng during a social occasion (see [18] above).

89 Second, I note Lincoln's position that he did not know the Defendant at all. To be clear, there is no evidence which suggests that Lincoln had met the Defendant on any occasion. But even if I were to accept that Lincoln truly did not know the Defendant, this would not affect the Plaintiff's case. What is important is that the Defendant obviously knew Adrian. Once it is accepted that it was Adrian who persuaded the Defendant to open the trading account with the Plaintiff as a front, so that Adrian could issue instructions and trade on that account (whether by himself or by those he instructs), it is not surprising that the Defendant would not know very much about the placement of individual orders. His interest would largely be in the commission or sums that he was paid for the use of his account.

90 However, one aspect of Heng's testimony that was especially troubling concerns Heng's reason as to why he did not call the Defendant to confirm directly that Lincoln could be permitted to provide instructions. Under cross-examination, Heng's explanation was primarily that he was assured by Adrian that the Defendant had been informed and had no problems with the arrangement. Heng asserted several times that Adrian told him not to contact the Defendant.[100] When asked for the reason, Heng's evidence was that it was because Adrian and Lincoln were both trading representatives attached to other trading houses. Strict rules applied where a remisier or trader wanted to operate accounts at different trading houses.[101]

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[100] NE 7 July 2016 p 20 lines 6 – 23; NE 8 July 2016 p 100 lines 1-17

91 However, this still does not explain why Adrian should have told Heng not to even contact the Defendant to confirm the position.[102] Even if it was not necessary to contact the Defendant for confirmation each and every time Adrian and Lincoln called to issue instructions, it is hard to understand why Heng should not confirm directly with the Defendant that Lincoln did have *general authority* to issue instructions to trade on his account. When pressed further, Heng's explanation was that he simply followed Adrian's instructions, because it was Adrian who had introduced him to the Defendant, who was a "rich customer" and from a well-to-do family. He said that Adrian facilitated the opening of the Defendant's account at the Plaintiff and was providing instructions right from the start. The Defendant knew of this arrangement and never protested even though he must have received numerous statements and order confirmations for trades placed by Adrian.[103] That being so, it appears that Heng assumed he could rely on Adrian's assurance that there was no problem with Lincoln placing orders.

92 Third, the evidence in relation to Lincoln's operation of two other trading accounts at the Plaintiff must be considered. It was established that sometime in July 2013, a new account (under Heng) was opened at the Plaintiff by a Mr Ang Kong Wah ("Ang"). Ang had been a customer at Kim Eng Securities since 2008, with Lincoln as the designated remisier. Sometime in September 2013, Lincoln's own sister, Ms Lee Lim Yin ("Ms Lee") also opened a trading account at the Plaintiff with Heng as the remisier in charge.[104] Ms Lee also had a trading account at Kim Eng

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101 NE 8 July 2016 p 118 lines 12 – 21

102 NE 8 July 2016 p 120 line 24 - p 121 line 3

103 NE 8 July 2016 p 120 line 3 - p 122 line 15

104 3PBD, Tab 13, p 1, para 2

Securities.[105] It appears that trades in both Ang and Ms Lee's accounts were mainly in penny stock counters such as Blumont, Asiasons and LionGold.[106]

93 Legal proceedings were subsequently commenced by the Plaintiff to recover large sums said to be due from Ang and Ms Lee. It appears that the sums said to be owed to the Plaintiff in those two suits arise from trading in similar penny stock counters and the catastrophic crash on 4 October 2013.

94 In the case of the suit against Ang, Ang brought a third party claim against Lincoln, claiming an indemnity or contribution from him. According to the Third Party Statement of Claim, Lincoln approached Ang and said that Lincoln and a trading representative of the Plaintiff represented certain high net-worth undisclosed principals of the Plaintiff, who were desirous of opening a new trading accounts with the Plaintiff, and needed someone to front these accounts on their behalf. In consideration of Ang agreeing to lend his name to front the trading accounts, he was to be given 20% of the profit made from the trades and he would be fully indemnified in respect of any loss.[107]

95 Lincoln confirmed under cross-examination that he had received payments of $827,255 from Ang out of profits of $976,465 earned from trades under Ang's account with the Plaintiff. These payments amounted to about 85% of the profits made under Ang's account with the Plaintiff. Evidently, there was some sort of arrangement between Lincoln and Ang to share the profit and losses arising from trades executed under Ang's

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105 NE 13 July 2013 p 39 lines 13-16

106 NE 13 July 2016 at p.28 lines 3-24; p 36 lines 23-25.

107 3PBD, Tab 7, paras 3-5

account.[108] The nature of the arrangement is however disputed. In particular, Lincoln denied that Ang was asked to open the trading account as a "front" for Lincoln. Instead, he stated that the payments, substantial though they are, were made solely as payment for his recommendations or advice to Ang on the market and the counters.[109] The Plaintiff submits that this explanation is not credible given the size of the payments.

96 In the case of the account opened by Ms Lee with the Plaintiff, there is no dispute that she had lost around $1 million on a contra trade in respect of Blumont in October 2013. Ms Lee's pleaded defence in the suit by the Plaintiff against her is that her account was opened for an undisclosed principal at the request of Lincoln, and that she never operated the account.[110] This discloses a similar *modus operandi* as in Ang's case.

97 Lincoln's evidence is that whilst he was aware that his sister had opened a trading account at the Plaintiff, he could not recall whether he had approached his sister or whether she had approached him on the matter.[111] Lincoln agreed that his sister was not a regular trader and that the only trade that was done was the trade on 2 October 2013 in the Blumont counter, resulting in the substantial loss.[112] However, he flatly denies having anything to do with the trades in her account at the Plaintiff. Lincoln's evidence is that his sister wanted to open an account at the Plaintiff because she was apparently concerned that she would have no broker to advise her

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108 NE 13 July 2013 p. 29 line 2 - p 30 line 3

109 NE 13 July 2013 p 31 line 7 – p 32 line 14

110 Ms Lee's Defence at 3PBD, Tab 14, paras 2 and 7

111 NE 13 July 2013 p 36 lines 7-11

112 NE 13 July 2013 p 36 line 12 – p 37 line 3

on the sale and purchase of shares if, for some reason, Lincoln could not be contacted or was "not around". If she opened another account at the Plaintiff, she would then still be able to buy and sell shares in Lincoln's absence.[113]

98 This explanation is hard to follow. Lincoln accepts that his sister is not a "regular trader". She already had an account at Kim Eng Securities in respect of which Lincoln was the remisier. Lincoln agreed that even if he could not be contacted, she would be able to speak to another remisier at Kim Eng Securities. In any case, it is noted that the 2 October 2013 trade on her account at the Plaintiff was rather substantial. There is nothing to suggest that this trade was placed by Ms Lee at the Plaintiff simply because Lincoln was "not around" to advise her on the trade.

99 The Plaintiff, on the other hand, asserts that it is much more likely that Lincoln asked his sister to open an account at the Plaintiff under Heng, and that this account was to be operated on the instructions of Lincoln.

100 I agree with the Plaintiff that the evidence in respect of Lincoln's involvement with Ang and Ms Lee's account is at least consistent with its assertion that Lincoln was similarly involved in the placement of orders in the *Defendant's* account around August 2013 as well. In short, the Defendant had also been acting as the front for Lincoln, just as the Defendant had been the front for Adrian prior to Lincoln taking over the management of the Defendant's account.[114]

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113 NE 13 July 2013 p39 lines 5-19

114 Plaintiff's submissions at para 155

101 Whilst I am not making any finding of fact on what transpired in respect of the operation of the accounts of Ang and Ms Lee, I do take note of the following points. It is clear from Lincoln's evidence that he was a seasoned and experienced trader. He had actively traded for clients in the penny stock counters at Kim Eng Securities, where he worked as a remisier. He was aware that these counters were "hot". In fact, he was well aware of the fact that some trading houses, including his own (Kim Eng Securities), had started to place trading limits on penny stocks such as LionGold and Blumont. On the evidence before me, Kim Eng Securities appears to have been one of the first trading houses to impose some restrictions. Yet, even though Kim Eng Securities was placing limits on the penny stock counters, on his own evidence, Lincoln was still advising Ang to trade in these stocks at the new account which Ang had opened at the Plaintiff, and receiving rather large sums for it. Indeed, I note that the Plaintiff only imposed restrictions *after* trading in the shares in the penny stock counters were suspended by the Singapore Stock Exchange Limited ("SGX") on 4 October 2013,[115] which presented an opportunity for traders to continue trading on penny stocks at the Plaintiff just *before* the crash, even though it might have been more difficult to do so at some other trading houses.

102 The Defendant's position is that any connection between the trading in these accounts and the Defendant's account is at best "tenuous."[116] Further, the allegations against Lincoln in respect of Ang and Ms Lee's accounts have not been tested at trial.[117] Neither of these two suits has resulted in a considered decision after trial. It is not in dispute that the suit

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115 NE 11 July 2016 p 78 line 24 – p 79 line 6

116 Defendant's submissions at para 70

117 Defendant's submissions at para 67

brought against Ang was settled with a payment of $100,000 by Ang. The Defendant underscores that the settlement was made without admission of liability. The Defendant also describes the settlement payment as a "paltry sum" as compared to the costs of defending the suit.[118] The status of the suit against Ms Lee was not clarified, but the Defendant stated that the case is still at the pleadings stage.[119] In addition, the Defendant quite fairly submits that the making of a finding of fact that Lincoln was the one who placed the orders for the disputed trades carries "potential legal implications, to say the least".

103 I am cognisant that the brief comments I make on the evidence placed before me in respect of the dealings in the accounts of Ang and Ms Lee are based solely on the evidence of Lincoln and Heng. In assessing the evidence on the trading accounts of Ang and Ms Lee opened with the Plaintiff, I am conscious of the fact that neither Ang nor Ms Lee testified in the hearing before me. Further, I note that no connection has been asserted between the Defendant's account and those of Ang and Ms Lee other than the claim that Lincoln was also connected with trades in those accounts.[120] I also note that if Heng's evidence at trial is accepted, the implications for Adrian and Lincoln may be serious given the undisputed evidence that a trader is not normally permitted to operate or give instructions on a trading account held outside his own trading house. However, having carefully considered the totality of the evidence, as highlighted above, my finding

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118 Defendant's submissions at para 67

119 Defendant's submissions at para 67

120 Ang's Third Party SOC at 3 PBD, Tab 7, p 2, paras 3-4 and Ms Lee's Defence at 3PBD, Tab 14, p 1, para 2

that Lincoln was involved in the operation of the Defendant's account is not affected.

The three meetings in October and November 2013

104 Before I turn to examine the evidence on the four disputed trades, it is convenient at this point to jump forward in time to examine three meetings which occurred in October and November 2013, *after* the penny stock crash on 4 October 2013. These meetings are important for the purpose of assessing whether Heng's testimony at trial regarding the general operation of the Defendant's account is to be believed. Of particular interest is the evidence as to what the parties allegedly said at the meetings as to how and who gave instructions to trade on the Defendant's account.

105 The first meeting took place on or about 9 October 2013. Whilst there is some dispute as to whether the meeting was on 7 or 9 October 2013, nothing turns on this. It is not disputed that the meeting took place at the offices of Wee Hur. It appears that the meeting was called by GYG and was for the purposes of discussing the losses incurred in respect of the Defendant's account. There is no dispute that Adrian was not present at the meeting. Indeed, it will be recalled that by this date, Adrian was already in detention for drug rehabilitation.

106 The meeting was instead attended by GYG, Lucas, Heng and the Defendant. Heng's evidence was that he explained right from the outset that Adrian was the person giving instructions for trades and that Adrian subsequently told him to also take instructions from Lincoln.[121]

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121 Heng's AEIC at paras 44 and 46

107 A range of other matters was also discussed at the first meeting. For example, GYG requested that Heng should "consider relieving the Defendant of his liability" by claiming that he (Heng) had executed the trades without authorisation.[122] It appeared that GYG told Heng that if he cooperated by admitting that the trade was unauthorised, GYG would "take care of" Heng by finding him an alternative job in Vietnam.[123] Whilst Heng stated that he did not see why he should agree to be the scapegoat,[124] he accepted that he apologised to the Defendant at the end of the meeting at the request of GYG. Heng also stated that GYG insisted that Adrian's name should not be raised in any further discussions or meetings on the matter.[125]

108 The second meeting took place on 10 October 2013. This meeting took place at the offices of the Plaintiff. The meeting was attended by Lee, Chen, Heng, GYG, Lucas and the Defendant. In brief, Heng's recollection of this meeting was that GYG was the main person speaking on behalf of the Defendant and that he informed Lee that the trades were not authorised by the Defendant. In response, Heng's evidence was that he asserted that the trades were authorised and that instructions were given to him on his mobile phone. Under cross-examination, Heng clarified that he had informed those present that someone *other than the Defendant* had called Heng on his mobile phone, and that the trade was therefore authorised.[126]

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122 Heng's AEIC at para 49

123 Heng's AEIC at para 50; NE 7 July 2016 p 111 lines 15-19

124 Heng's AEIC at para 52

125 Heng's AEIC at para 51; NE 7 July 2016 p 109 lines 16-24

126 Heng's AEIC at paras 54-57; NE 7 July 2016 p 134 lines 13-25.

109 Under cross-examination, Heng further explained that he could not mention Adrian's name (and presumably his role in trades on the Defendant's account) at the second meeting because of GYG's insistence at the first meeting that Heng should keep "quiet" about Adrian's involvement.[127] The meeting ended with Lee telling the Defendant and GYG to write in to the Plaintiff if they wished to raise objections to the October trades. Heng's recollection was that GYG stated that a legal letter would be sent to the Plaintiff.[128]

110 The third meeting took place about one month later, on 11 November 2013. According to Heng, the meeting was at the request of GYG and he was told that the purpose of the meeting was to discuss the job proposal made by GYG to Heng (in exchange for Heng admitting that the four disputed trades were unauthorised) at the first meeting (see [107] above). To this end, GYG, together with Lucas, picked Heng from the Plaintiff's office. According to Heng, GYG then informed Heng for the first time that they were in fact going to the offices of a law firm. At the law firm's office, Heng was asked to tell the attending lawyer (who was a non-executive director of Wee Hur)[129] what he had "admitted" previously. It seems that this must have caught the attending lawyer by surprise. The lawyer at that point requested Heng to step outside and to leave the meeting.[130]

111 The account of the meetings presented by the Defendant was different on some key points. The Defendant's recollection was that the first

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127 NE 7 July 2016 p 113 lines 20-25

128 Heng's AEIC at para 59

129 NE 8 July 2016 p 66 lines 5-13

130 Heng's AEIC at para 65

meeting took place on 7 October 2013 and that Heng admitted in the meeting that the disputed trades were made without the Defendant's instructions.[131] Further, the Defendant asserts that Heng informed at the meeting that a person called Lee Lim Kern (who is Lincoln) had approached him for access to client accounts on which he could place trades.[132] The Defendant's evidence is that Heng admitted that he agreed to this proposal and that Lincoln would be fully responsible for the losses on the Defendant's account.[133]

112 As for the second meeting, the Defendant's evidence was that Heng had admitted that the Defendant had not instructed him to make the disputed trades and that the trades were done for a person called "Lincoln."[134] According to the Defendant, the meeting was very short and ended when Lee cut in to state that this was a very serious matter and time was needed to investigate the facts.[135]

113 As for the third meeting, the Defendant asserts that he was not present.

114 As can be seen, the position of the Plaintiff and the Defendant on what Heng said at the meetings, especially on whether the trades were authorised by the Defendant and how or who placed the orders is very much in issue.

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131 Defendant's AEIC at para 13(b)

132 Defendant's AEIC at para 13(c)

133 Defendant's AEIC at paras 13(d) and 16

134 Defendant's AEIC at para 20

135 Defendant's AEIC at para 20

115 Some support for the Plaintiff's case, as set out in Heng's evidence, can be found in the evidence of Chen. Chen was present at the second meeting where he took a contemporaneous note of the meeting. Chen's evidence in court was that there was no mention of a "Lim Lin Ken" (which the Defendant said was how he previously thought Lincoln's name was spelt) during the meeting at all.[136] According to the contemporaneous note which Chen made, when GYG stated at the meeting that the Defendant did not give instructions to place the order, Heng's response was merely that he received the instructions from "someone" to place the order on the Defendant's account.[137]

116 On the other hand, support for the Defendant's version of what was stated by Heng at the meetings can be found in the evidence of Lucas and GYG. According to Lucas, at the second meeting, Heng admitted that the Defendant had not issued the instructions to make the disputed trades and that they had been made for a person called Lincoln.[138] The evidence of GYG as to what transpired at the meetings is also similar to the position taken by the Defendant. For the sake of completeness, I note that there is no mention at all by GYG or Lucas of any proposal made to Heng for him to take responsibility for the disputed trades in exchange for employment. In addition, neither Lucas nor GYG's AEIC makes any reference at all to any third meeting.

117 The Defendant also tendered evidence in the form of a handwritten note prepared by him and dated 10 October 2013. The note sets out what

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136 NE 11 July 2016 p 117 lines 2-13

137 Chen's AEIC filed on 29 June 2016 at Exhibit PC-2.

138 Lucas' AEIC at para 12

appears to be a summary of his recollection of what was said at the second meeting. It is noted that the contents of the Defendant's note differ from the evidence of Heng and the contemporaneous note of the meeting taken by Chen, in particular on whether Heng admitted that the trades were unauthorised and that it was "Lin Ken" or Lincoln who called to place the orders. The opening three paragraphs of the note are set out below:[139]

> I make it clear to [Heng[& [Lee] that the trades were not authorised by me. I had also never authorise any one to trade on my behalf and never exercise the trades myself. This is thus a fraud case which I am a victim. The losses from these trades should therefore be borne by [the Plaintiff].
>
>]Lee] is shocked to hear this and said this is a serious case.
>
> I therefore ask [Heng][,] "Heng are the trades authorised by me or did I call you to execute these trades?" [Heng] reply "No". I ask him again "[t]hen who traded these trades using my account?" [Heng] reply "Lin Ken."

118 According to the Defendant, the note was prepared shortly after the second meeting when the Defendant returned to his office at Wee Hur.[140]

119 The Plaintiff disputes and challenges the authenticity of the note.[141] The Plaintiff rightly submits that if the Defendant's note was accurate, it is surprising that there was no revelation of "Lin Ken" or Lincoln's name in legal letters sent by the Defendant's lawyers on 3 January 2014 and 4 February 2014, which touched on the second meeting.[142] There was also no mention or reference to the Defendant's note in any of the eight affidavits filed by the Defendant in the proceedings. Indeed, it was not even

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139 2DBD, Tab 25

140 NE 13 July 2016 at p 61 lines 21 – 24.

141 Plaintiff's submissions at para 159

142 1 AB 215-216 and 219-220; Plaintiff's submissions at para 160

mentioned in his AEIC filed for the trial (on 17 February 2015). Instead, the note was simply disclosed as Item 91 in the Defendant's 1st list of documents dated 2 May 2014.[143] Under cross-examination, the Defendant's explanation was that he did refer to the note when he drafted his affidavits and AEIC, but admitted that he did not mention the note in their body.[144] Under further questioning, the Defendant accepted that it would have been natural to refer to and exhibit the note in his affidavits and AEIC.[145]

120 I note also that unlike the record or note prepared by Chen, the Defendant's note was not taken (whether in whole or in part) *at the meeting itself*. In Chen's case, his evidence was that he attended to observe the meeting and to take contemporaneous notes at the meeting. For these reasons, I am unable to place much reliance on the Defendant's note, particularly on whether Heng stated that the person who placed the orders for the disputed trades was "Lin Ken" or Lincoln.

121 A number of points arise from the above summary of the evidence on the three meetings.

122 First, the evidence as to what happened at the third meeting (indeed whether it actually took place) is thin. There is no mention of the third meeting at all by Adrian, GYG and Lucas. The lawyer before whom Heng was allegedly asked to repeat his admissions was not asked to testify. I am therefore not able to draw any firm conclusions on this third meeting.

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143 NE 13 July 2016 p 63 lines 13-20

144 NE 13 July 2016 p 63 lines 21-24; p 64 lines 12-14

145 NE 13 July 2016 p 68 at lines 6-11

123 Second, insofar as the 96 undisputed trades are concerned (including the 1 October 2013 trade in Blumont), Heng's evidence is that at the first meeting, he informed GYG and others that right from the start, instructions on the Defendant's account were given by Adrian and then Lincoln. The Defendant's (together with GYG's) evidence was that at the first meeting, Heng admitted that the four disputed trades were placed on the instructions of Lincoln and that these were placed without the authorisation of the Defendant. The Defendant and GYG did not discuss the 96 undisputed trades or the previous operation of the Defendant's account at all in their evidence on the first meeting, which I find rather curious.

124 Third, it will be recalled that Heng's evidence was that he only mentioned Adrian and Lincoln at the first meeting. At the second meeting, all he said was that "someone" had placed the orders over telephone calls, and that he had the records. Heng's general point was that he never admitted that the trades were unauthorised. I pause here to note Heng's evidence under cross-examination that outside of the meetings, he did tell the credit officer of the Plaintiff, a certain Mr Lai, that it was Lincoln who actually gave the orders for the four disputed trades. Heng did not however tell Lee about Lincoln's involvement.[146] According to Heng, it was because Mr Lai was chasing him for information as to what happened on the Defendant's account in relation to the four disputed trades.[147] It was in this context that he divulged Lincoln's role to Mr Lai. Heng stated that he assumed that Mr Lai would pass the information to his superior. However, what Mr Lai in fact did with this information is not clear.[148] Mr Lai was not

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146 NE 7 July 2016 p 76 lines 4-16; p 77 lines 6-8; p 89 lines 4-10

147 NE 7 July 2016 p 82 lines 4-5; 20-21

148 NE 7 July 2016 p 82 line 22 - p 83 line 4

called to give evidence. At that time, his supervisor seems to have been an officer from AmBank Malaysia (then the owner of the Plaintiff).[149]

125 Looking at the evidence on the three meetings, I am satisfied that Heng did state at the first meeting with GYG, Lucas and the Defendant that Adrian had issued instructions on the Defendant's account right from the start, that is to say in February 2013 and that sometime later Adrian had instructed him that orders could also be given by Lincoln. I am also satisfied that the second meeting was in the terms recorded by Chen in the contemporaneous minute. In other words, at all times, Heng has maintained that the trades on the Defendant's account were authorised.

Conclusion on the operation of the Defendant's account

126 Based on the evidence as a whole, I am unable to accept the Defendant's assertion that he had personally provided oral instructions to Heng for the 96 undisputed trades. Instead, I am satisfied on the balance of probabilities that Adrian initially provided most of the instructions for transactions in the Defendant's account. Adrian ceased to issue instructions sometime at the end of July or early August 2013. Between August 2013 and 1 October 2013, the transactions were placed on Lincoln's instructions.

127 What follows next is a discussion of the placement of the four disputed orders and the events occurring thereafter.

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149 NE 7 July 2016 p 87 lines 12-23; NE 11 July 2016 p 74 lines 20-21

The Four Disputed Trades

128 The evidence is clear that in September all the way to 1 October 2013, trades continued to be executed under the Defendant's account in the LionGold and Blumont counters (see [37]–[40] above). These trades were undisputed by the Defendant. The trades went on even though the price of these counters had spiked in early September 2013. The spike even led SGX to issue queries regarding trading in the counters, for example: in relation to Asiasons on 18 September 2013, Blumont on 18 September 2013 and 1 October 2013, and LionGold on 26 September 2013 and 4 October 2013. Copies of the query letters were released via SGXNET.[150] Indeed, under cross-examination, the Defendant agreed that he was aware of the spike in the share prices and had consistently traded in these three counters from September to 1 October 2013.[151] He also agreed that he was aware of the queries raised by SGX on Asiasons, LionGold and Blumont in September 2013.

129 The four disputed trades took place over two days in early October 2013, and were as follows:

(a) The first disputed trade relates to 400,000 Blumont shares purchased on 2 October 2013 for $958.327.15.

(b) The second disputed trade relates to 250,000 Asiasons shares purchased on 2 October 2013 for $699,197.90.

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150 2DBD Tabs 18, 19, 21, 23 and 24.

151 NE 14 July 2016 p 36 line 15 - p 38 line 11

(c) The third disputed trade relates to two million IHC shares purchased on 2 October 2013 for $801,947.40.

(d) The fourth and final disputed trade was for 200,000 Blumont shares on 3 October 2013 for $421,022.39.

130 On 4 October 2013, the prices of Blumont, Asiasons and LionGold essentially collapsed. Trading in these three counters was suspended by the SGX on the morning of 4 October 2013. The Defendant sold these counters between 8 and 10 October 2013. The end result was that, as at 31 October 2013, the net loss owing on the Defendant's account stood at $1,865,074.96.[152] Further, as at 13 December 2013, interest of $23,879.64 was also due. In total, a sum of $1,888,954.60 was due from the Defendant to the Plaintiff.

131 As mentioned, the Plaintiff's case is that the four disputed trades were placed by Lincoln with the knowledge and consent of the Defendant.[153] The Plaintiff relies on the evidence of Heng together with the point that the four trades were similar to and generally consistent with the pattern of trading under the Defendant's account since account opening.[154] From the perspective of the Plaintiff, there was nothing to indicate that the four disputed trades were out of the ordinary. The consistency of the four disputed trades with the Defendant's general trading pattern was also the observation of Tan on the stand.[155] The only difference between the undisputed trades and the four disputed trades of 2 and 3 October 2013 is

152 Plaintiff's submissions at para 38

153 SOC(1) at para 16

154 Plaintiff's submissions at para 37

155 NE 11 July 2016 p 58 lines 1-15

that the latter resulted in substantial losses as a result of the catastrophic collapse on 4 October 2013.

132 The Defendant, of course, emphatically denies any knowledge of the placement of the orders for the four disputed trades and asserts that the trades were unauthorised. He says that although he had personally instructed Heng on the 96 undisputed trades, including the Blumont trade of 1 October 2013, just a day before the first disputed trade 2013 (see [44] above), he had nothing to do at all with the placement of the four disputed orders that resulted in the large loss. The Defendant's evidence was that he left for an overseas trip to Vietnam on 3 October 2013 and only returned on 5 October 2013.[156] The Defendant asserts that he was out of touch with Singapore during this overseas trip and was not even aware of the market turmoil on 4 October 2013 and the collapse in the three penny stock counters. According to the Defendant, he only found out what happened when he returned to Singapore on 5 October 2013.[157]

133 The Defendant accepts that he could have checked market movements in Singapore if he wanted to but asserts that he did not do so and that he could not be contacted by his father in Singapore.[158]

134 Upon returning home, the Defendant's father told him that a contract statement dated 2 October 2013 had been sent to the Defendant relating to the three trades placed on that date. Apparently, this contract statement

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156 Defendant's AEIC at para 9

157 NE 14 July 2016 p 111 lines 24-25; p 113 lines 4-6

158 NE 14 July 2016 p 117 lines 13-22

arrived by post on 4 October 2013. The letter was opened by the Defendant's father on that day.[159]

135 The Defendant states that he later received a contract statement for the fourth trade that was made on 3 October 2013. The Defendant asserts that he was upset and "horrified" when he was told of the unauthorised trades on his return on 5 October 2013. The Defendant adds that the four trades were far in excess of the amounts he normally traded under his account.[160] However, the Defendant conceded under cross-examination, albeit with some hesitation, that the four trades were in fact consistent with the pattern of trades in his account.[161]

136 The Defendant asserts that when his father opened the letter containing the contract statement of 2 October 2013, he discussed the matter immediately with the Defendant's uncle, GYG. The Defendant's case is that GYG essentially took charge of the matter and contacted Heng to discover what happened. GYG, in his AEIC, states that he called the Plaintiff on 4 October 2013 and was put through to Heng. GYG asserted that Heng admitted that the Defendant did not give him authorisation for the trades. Instead, according to GYG, Heng stated that the orders were placed by and for Lincoln, a trading representative at another company.[162]

137 There is no dispute that the first meeting on 7 or 9 October 2013 was the first time the Defendant had any contact with Heng since his return from

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159 NE 14 July 2016 p 113 lines 11-14; p 115 lines 2-6

160 Defendant's AEIC at para 10

161 NE 14 July 2016 p 40 line 20 -p 42 line 19.

162 GYG's AEIC at paras 4-5

Vietnam on 5 October 2013. It is also clear that the Defendant did not make any attempt to call Heng himself and to challenge Heng directly on the four trades. It will also be recalled that the Defendant's evidence was that he was so upset and angry on hearing the news on his return that he smashed his mobile phone and discarded it as he did not want to have anything more to do with Heng.[163] Instead, he appears to have been content to leave the matter largely in his uncle, GYG's hands to resolve. Indeed, even though it was the *Defendant* who had suffered losses on his trade account, it does not appear the Defendant's own father played an active role in attempts to resolve the matter. Rather, it was curiously GYG, *Adrian's* father, who took a lead role in attempting to resolve the dispute.

138 Looking at the evidence as a whole and the position taken by the Defendant on his relationship and dealings with Heng, I find that the Defendant's conduct and response to the four disputed trades was very surprising indeed. It must be recalled that according to the Defendant, he had placed some 96 orders directly with Heng over the preceding many months and had in fact spoken to Heng on numerous occasions. The Defendant claims that he even handed cash to Heng on several occasions to settle losses. Further, the last trade which the Defendant asserts was authorised was in Blumont shares on 1 October 2013, a trade which resulted in a profit. Yet, despite the alleged history of direct and very recent dealings with Heng, the Defendant did not try to contact Heng immediately on his return.

139 If the Defendant's evidence that the four disputed trades were completely unauthorised is true, it would be only natural for him to have

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163 NE 14 July 2016 p 53 line 4-12

confronted Heng directly and much more firmly on his return on 5 October 2013. Indeed, I note that the Defendant did not even think of lodging a complaint with the relevant authorities. Therefore, I am of the view that his failure to directly challenge Heng and his willingness to allow GYG to take the lead is consistent with the Plaintiff's case that the Defendant opened the account as a "front" for Adrian from day one.

140 I do not pretend for a moment that I have found the evidence in this case easy to evaluate. However, given my assessment of Lincoln's role in the previous section, and after considering the evidence and the circumstances as described above, I am satisfied that it was instead Lincoln who had placed the orders for the four disputed trades of 2 and 3 October 2013 as well. The key question that remains is whether the Defendant knew and consented to Lincoln's operation of his account.

141 Given my earlier findings, there are two main possible scenarios which could apply in this case:

(a) First, the Defendant was indeed informed by Adrian of Lincoln's involvement and was aware that Lincoln was issuing instructions on his account at the latest from early August 2013 if not much earlier.

(b) Second, the Defendant only consented to Adrian operating his account at the Plaintiff and did not know that the transactions under his account, as from around early August 2013, were in fact being placed by Lincoln. Under this second scenario, the Defendant must have assumed that Adrian was still in control and operating the account all the way until 1 October 2013. On this basis, Heng either went on a frolic of his own on 2 and 3 October 2013 or was trading

for Lincoln. Either way, this was not done with the Defendant's knowledge or consent.

142 There are, of course, a number of other possible scenarios. These include the Defendant's position that he directly placed all the orders from the date the account was opened all the way to 1 October 2013. Thereafter, when the Defendant was away in Vietnam, Heng embarked on a frolic of his own with Lincoln in placing the four disputed trades on the Defendant's account. However, I have already rejected this possibility (see [126] above), because, in my assessment, the balance of the evidence supports the assertion that the undisputed trades were *not* made pursuant to direct instructions from the Defendant.

143 In my view, the first scenario is more likely. As I explained above, the evidence shows that the Defendant must have known of and approved the undisputed trades, including in August and September 2013, all the way up to 1 October 2013. In addition, the Defendant would be aware that Adrian must have already been in serious trouble with the authorities in respect of drugs by September 2013 at the very latest,[164] and was incarcerated from 2 October 2013 (the day of the first three disputed trades). Yet, the Defendant had not raised any objections to the undisputed trades immediately prior to the penny stock crash (but after Adrian has been incarcerated). This is coupled with his inexplicable contentment with leaving matters in GYG's hands in the aftermath of the penny stock crash, when a reasonable person would have taken a more active role. In the circumstances, I am satisfied, on a balance of probabilities, that Lincoln very likely took over placement of orders in the Defendant's account much

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[164] NE 12 July 2016 p 11 lines 6-8

earlier than 2 and 3 October 2013 and that the Defendant must have known and consented (expressly or at least impliedly), at the latest around early August 2013, to Lincoln's operation of his trading account, by means of instructions to Heng. This arrangement continued up until and including the time of the four disputed trades.

Overall Assessment of the Witnesses and Evidence

144 Given the nature of the claim, the range of issues and the state of the documentary evidence it is not surprising that cross-examination of the key witnesses was lengthy. Whilst I have already set out my main findings and conclusion on the placement of the orders and transactions, it may be helpful if I set out some general observations on the witnesses and legal principles governing assessment of evidence and credibility.

Heng

145 The key witness for the Plaintiff was, of course, Heng. The change in Heng's position in respect of whether the Defendant had given direct instructions on the trades has been referred to above at some length. It will be recalled that Heng accepts that his statements in the statutory declaration and the affidavits filed for the O 14 application to the effect that the Defendant had directly instructed him on the trades were false. The true position which he now asserts and which the Plaintiff relies on is that whilst the Defendant did not place the orders himself, the trades were still *authorised* because they were placed by Adrian and/or Lincoln with the Defendant's consent and knowledge. On this basis, Heng clearly lied or at the very least he was being rather economical with the truth in his statutory declaration and previous affidavits. What was important in the trial before me is whether Heng's evidence at trial is to be believed *even though it*

means that he had previously lied. If his evidence is believed, it follows that Adrian, Lincoln and the Defendant are not telling the truth about the trades made under the Defendant's account.

146 The Plaintiff submits that whilst the telling of lies in the statutory declaration and previous AEICs is inexcusable, Heng's evidence at trial, is credible and to be preferred for a number of reasons, all of which I have dealt with earlier. These include:

(a) the evidence of Heng's call logs and the Matching Table setting out the date and timing of the placement of orders which were consistent with Adrian and Lincoln placing the orders in question;

(b) the absence of any independent evidence, such as call logs, to support the Defendant's assertion that he had personally placed the 96 undisputed orders by phone call;

(c) the consistency or similarity between the undisputed trades and the four disputed trades;

(d) the fact that Adrian provided Heng with an Excel spreadsheet template for calculating brokerage commission in respect of the Defendant's account;

(e) the fact that Adrian and Lincoln clearly knew each other and socialised on a regular basis;

(f) the fact that Lincoln clearly knew Heng;

(g) the fact that Lincoln was involved in at least two other accounts under Heng at the Plaintiff, namely those of Ang and Ms Lee; and

(h) the fact that these two accounts were also exposed to losses in the same counters.

147 Paradoxically, it is the Defendant who asserts that Heng's previous statements that the Defendant did place the orders directly with Heng were correct at least insofar as the *96 undisputed trades* were concerned. The Defendant's position must be that Heng only lied in his previous statements to the extent that he asserted that the Defendant had also directly instructed Heng on the *four disputed trades.*

148 The Defendant submits that Heng's evidence lacks any credibility for a broad range of reasons. These include:

(a) Heng's reliance on his own claim or admission that he lied in his previous statements;

(b) the vague or confusing manner in which Heng attempted to explain *why* he initially tried to conceal the asserted fact that all the orders were placed by Adrian and Lincoln;[165]

(c) Adrian and Lincoln's evidence which are consistent which each other, namely that they had nothing to do with the Defendant's account;

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165 Defendant's submissions at paras 19-27

(d) the various statements which the Defendant claims were made by Heng at the first and second meetings;

(e) the "unexplained" fact that even though no trades were made under the Defendant's account in June 2013, Heng's call logs appear to show numerous calls from numbers said to belong to Adrian and Lincoln that month;[166]

(f) various inconsistencies in Heng's evidence such as whether Adrian placed all the orders with Heng by phone call, whether he called Adrian or whether Adrian called him on the individual transactions;[167] and

(g) the unsatisfactory nature of Heng's evidence on the Excel spreadsheet which Adrian had provided to him.[168]

149 I have touched on many of these points in the course of my earlier analysis. For completeness, I will add a few remarks on three of these points.

150 In relation to point (b), it will be recalled that Heng proffered various reasons as to why he had lied in the earlier AEICs (see [49] above). Looking at Heng's evidence as a whole, it appears that his basic position is that his own breaches and wrongdoings were at the very least part of the reason why he tried at first to hide the fact that it was Adrian and Lincoln who were operating the Defendant's account (with the Defendant's

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166 Defendant submissions at para 81

167 Defendant submissions at para 83

168 Defendant submissions at paras 87 and 88

knowledge and consent). In short, it was only when it became apparent that the Defendant (whether on his own or with his family's support) would not stand good for the trading losses from the four disputed trades (thereby exposing or underscoring Heng's own position and liability to the Plaintiff) that the truth began to come out. Although I am in no way condoning his behaviour, this underlying reason for suppressing the truth initially is, at least, understandable and does not affect my assessment of his subsequent evidence at trial.

151 Point (e) arises out of Adrian's evidence that no trades were recorded against the Defendant's account in June 2013. The Defendant proffered the explanation that the lack of trading activity was because of the stock market adage "sell in May and go away", which apparently refers to a phenomenon where many traders sell their stocks in the month of May. This affects the sentiment of the market and results in a decrease in the volume of share transactions in later months, such as in June.[169]

152 The Defendant asserts that any calls between Heng, Adrian and Lincoln in the month of June 2013 could only be for the innocuous purpose of discussing market conditions. This would in turn support Adrian's evidence that traders would often call and discuss market intelligence as part of general market research. This is why, according to Adrian, there is evidence of many calls between Heng and Adrian by reference to the mobile number that Adrian admitted belonged to him.

153 I do not doubt that market traders do consult, discuss and share "market intelligence" on counters and trends. It may well be that some calls

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169 NE 14 July 2016 p 17 lines 10-15; p 22 lines 16-20

were indeed made for this purpose, for example in June 2013 (where no trades were made on the Defendant's account). Nevertheless, it is hard to accept that *all* the calls between Adrian and Heng and indeed Lincoln and Heng were solely for this purpose. The sheer number of calls and the brevity of many of the calls do not sit comfortably with that assertion. Neither could it be pure coincidence that a significant proportion of these numerous calls were proximate in time to trades in the Defendant's account in the other months.

154 Point (g) relates to the Excel spreadsheet which I have earlier discussed (see [78]–[82] above). I have stated that I accept that the Excel spreadsheet supports the Plaintiff's position that Adrian was very much interested in the trading activity under the Defendant's account.

155 The Defendant, in his submissions, points to the fact that the only Excel spreadsheet that was filled out and produced in evidence related to trades conducted in March 2013. Heng did not produce nor did he explain why he did not produce completed Excel spreadsheets for any other month. There is also no evidence that Heng sent any completed Excel spreadsheets to Lincoln. The Defendant submits that this is consistent with Adrian's explanation that the Excel template he provided to Heng was simply to help Heng in his work at the Plaintiff and for no other purpose.

156 Looking at the evidence as a whole (including the sheer number of calls between Heng and Adrian), I am unable to draw such a conclusion. Instead, I am of the view that Excel spreadsheet, whilst not determinative on its own, is more consistent with the Plaintiff's position. Heng was a relatively experienced remisier. He had about nine years of experience at the Plaintiff and with other firms such as Phillips Securities and DBS

Vickers Securities (Singapore) Pte Ltd.[170] It does not make any sense that Heng would need Adrian's assistance to work out his brokerage commission for trades at the Plaintiff.

157 In sum, although I am acutely aware that Heng's evidence at trial was an about-turn from his earlier affidavits and statutory declaration, I am guided by the statement of Yong Pung How CJ in *Public Prosecutor v Singh Kalpanath* [1995] 3 SLR(R) 158 ("*Singh Kalpanath*") at [55], where he stated that "it is trite law that if a witness had lied on one or two points, it does not necessarily follow that his whole evidence should be rejected." The court's duty is to "sieve the evidence and to ascertain what are the parts of the evidence … which could be accepted." As a whole, I am satisfied that Heng's evidence for the trial is more consistent with logic and common sense, and also with documentary evidence such as the call logs. There is at least some plausible reason as to why he took the different position that he initially did. Indeed, it appears that he has come clean with the truth at trial, given that he has no further "incentive" to keep up the lie. Accordingly, I am of the view that, on balance, Heng's evidence at trial is reliable and buttresses the Plaintiff's case.

The failure to call Lee

158 The Defendant also submits that an adverse inference should be drawn against the Plaintiff as the result of the failure of Lee to testify, in accordance with section 116 of the Evidence Act.[171] However, it is unclear what the adverse inference would comprise or relate to.

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170 NE 7 July 2016 p 14 lines 1 – 10

171 Defendant's submissions at paras 150-156

159 In any case, I stress that 1 have noted that Lee was originally scheduled to testify and that he had affirmed an AEIC. I have no reason to doubt that if the trial had taken place in accordance with the original dates in 2015, Lee would indeed have testified. The original trial dates were vacated only because of the decision by the Plaintiff to subpoena Adrian and Lincoln, after I had indicated that they would be relevant witnesses. There does not appear to be any reason to doubt the Plaintiff's assertion that Lee had moved to Kuala Lumpur and had started work with new employers by the time this trial finally came on in 2016.

160 Lee's evidence (as evidenced from his AEIC) was primarily on what transpired at the second meeting held at the Plaintiff's offices on 10 October 2013, and his discussions with Heng before and after the meeting. In this regard, evidence as to what occurred at the second meeting was adequately provided by Chen, who was also personally present at that meeting. Evidence of the general nature of the Plaintiff's business and procedures was also provided by Tan. It is true, as the Defendant argues, that Lee's testimony might have shed some light on the Plaintiff's investigations into the four disputed trades.[172] However, ultimately the only people who can shed light onto the real question of whether the four disputed trades were in fact *authorised* were Heng, the Defendant, Adrian and Lincoln, all of whom have testified. In the circumstances, I am of the view that Lee's absence did not greatly impact the Plaintiff's case.

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172 Defendant's submissions at para 151

The Defendant

161 As for the Defendant, I agree with the Plaintiff's submission that the Defendant's evidence on how and why the account was opened at the Plaintiff was wholly unsatisfactory. The Defendant was clearly distancing himself as far as possible from Adrian. Indeed, I am satisfied that the introduction of Heng to the Defendant was arranged by Adrian and not by some unnamed friend of the Defendant. Thus, it is clear that, contrary to the Defendant's assertions, Adrian had been involved with the Defendant's account *from the very beginning*. I am also of the view that it is more likely than not that Adrian and Lincoln were involved in instructing Heng on the trades executed on the Defendant's account. This is reinforced by the relatively muted reaction of the Defendant upon his return from Vietnam on 5 October 2013 (see [137] – [139] above).

Adrian

162 Adrian's evidence is that since his admission for drug rehabilitation, he has been trying hard to get his life back on track. Since leaving CIMB and entering rehabilitation on 2 October 2013, he had no further contact or dealings in respect of the accounts under him at CIMB. He asserts that he does not even know if his former clients (including his own family members) suffered losses as a result of the crash on 4 October 2013.[173]

163 However, Adrian's evidence as to his knowledge of the Defendant's account at the Plaintiff as well as the Defendant's accounts at CIMB, UOB Kay Hian and DMG – all of which were opened *before* his incarceration – was decidedly vague and guarded.[174] Whilst Adrian may not have known of

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[173] NE 12 July 2016 p 20 line 7 - p 21 line 24

the details of the Defendant's accounts at UOB Kay Hian and DMG, Adrian must have had clear knowledge of the Defendant's account at CIMB, which was opened at his request and where he was the remisier-in-charge.[175]

164 Overall, my assessment is that Adrian was keen to give the impression that aside from executing the orders at CIMB, he had little to do with any trading decisions made in respect of any of the Defendant's accounts. This seems rather improbable.

Lincoln

165 The Defendant asserts that Lincoln had come forward as a witness to assist the court and that this was also an important factor to be taken into account when evaluating the credibility of his evidence against that of Heng.[176]

166 However, Lincoln was called as a witness by means of a *subpoena* by the *Plaintiff*. Lincoln was not prepared to swear or affirm an AEIC. Indeed, given the Plaintiff's and Defendant's cases, it was clear to me that the evidence of Lincoln (and indeed Adrian) was relevant, especially to the Defendant's case. It is therefore surprising that the *Defendant* was not the one who called Lincoln as a witness. By this, I am not referring to burden of proof. The point is, given Adrian and Lincoln's positions, it is surprising that they were not called by the Defendant.

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174 NE 12 July 2016 p 22 line 3 – p 23 line 13

175 NE 13 July 2016 p 100 lines 21-24

176 Defendant's submissions at para 57

167 Further, the Defendant stresses that the Plaintiff did not apply to cross-examine Lincoln under section 156 of the Evidence Act, something which was done in the case of Adrian.[177] The Defendant submits that, as a matter of law, the Plaintiff cannot now turn around and argue that Lincoln's evidence is not to be believed as against the evidence of Heng.[178] To this end, the Defendant cites the following passage from Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 19.072 that:

> … It is important that a party who intends to submit in his closing address to the court that the whole or part of the testimony of a witness whom he has called should not be believed obtains leave to cross-examine and impeach him.

168 The case authority cited by the learned author is the decision of the High Court (on appeal) in *Singh Kalpanath*, which concerned charges of cheating against a lawyer. A Prosecution witness gave evidence at trial (that the complaint concerned negligent conduct) which was inconsistent with his earlier testimony (that there was cheating) before the Disciplinary Committee. It was clear that the witness was trying to qualify his evidence. The Prosecution did not, however, apply to cross-examine the witness or to impeach his credit under sections 156 and 157 of the Evidence Act.

169 In these circumstances, Yong CJ observed at [88] that "[i]t was evidently a mistake on the part of the Prosecution who sought only to rely on their submissions to repair the prosecution case." I note however that Yong CJ went on to state that, notwithstanding this observation, "it remained the duty of the trial judge to evaluate with care the evidence" of

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177 Defendant's submissions at para 65(a)

178 Defendant's submissions at para 70

the witness. The trial judge had to consider the circumstances of the case as a whole (including the testimony before the Disciplinary Committee). It was open to the trial judge to believe the evidence of a witness so far as the essentials are concerned without having to accept as true everything which the witness says.

170 On a review of the Prosecution witness' evidence, Yong CJ held (at [89]) that there was "a deliberate and subtle" change in the evidence of the witness, "for reasons best known only to him", before the Disciplinary Committee and at trial. For this reason, Yong CJ held that the evidence of the witness at trial had to be approached with "great caution." Nevertheless, Yong CJ held that the qualified evidence should not adversely affect the credibility of the *client/complainant* or the weight to be given to the client/complainant's evidence.

171 It is clear that *Singh Kalpanath* does not stand for the proposition that the trial judge must accept the testimony of a witness on all points in respect of which the witness was not cross-examined or impeached by the party calling the witness. The court must review all the evidence and reach a determination as to which parts of the evidence are to be preferred on the issues in question. Further, where a party calls several witnesses, it does not follow that if witness X gives evidence that is inconsistent with the evidence of witness Y, the court must prefer the evidence of witness X simply because the party calling him did not apply to cross-examine or impeach the credibility of that witness. This is the approach that I have taken in assessing the evidence of Heng and Lincoln. In my assessment, Heng's evidence is to be preferred over that of Lincoln.

172 Finally, I make clear that the demeanour of the witnesses did not play any significant part in my assessment of the evidence. In this respect, I note the observations of the Court of Appeal in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 on the danger of over-emphasis on the demeanour of witnesses. VK Rajah JA stated at [43]:

> Findings on demeanour often relate to the fluency (or hesitation) of a witness, his steady or shifting gaze, his body language and the like. *A great deal of caution should be exercised by the trial judge when placing reliance on these factors alone to find a witness untruthful.* In this regard, it is important to remember the context in which evidence is given in court – the witness is under intense scrutiny of the judge and is also under pressure to answer counsel's questions; even truthful witnesses may wilt and display discomfort in such circumstances.
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> [emphasis in original]

173 What were by far more important to my assessment of the facts were the witnesses' answers to questions on the key areas of dispute, as tested against the totality of the evidence before the Court.

The Relevant Legal Principles and Decision

174 I turn now to the applicable legal principles and my substantive decision in this Suit.

The Defendant's liability for the disputed trades

Liability under Clause 23.1 of the OSTA 2012

175 To recapitulate, the main claim by the Plaintiff is for the sum of $1,888,954.60, being the outstanding amounts owed by the Defendant under his trading account.

176 The Defendant's trading account was governed by the OSTA 2012. The relevant terms of the OSTA 2012 have been briefly referred to earlier: see [27]–[34] above.

177 For convenience, I set out Clause 3.1 of the OSTA 2012 in full:[179]

> The Client or any of its Authorised Persons may request [the Plaintiff] orally or in writing to buy or sell or otherwise deal with Securities or deal with monies in the Account(s) or perform any other Transactions relating to the Account(s).

178 It would be recalled that an "authorised person" is defined in Clause 1 of the OSTA 2012 as any person authorised *in writing* by the client to perform any transaction in the account. There is no dispute that the Defendant did not sign any authorisation in writing to any individual to operate his account. It follows that the Plaintiff's case that the four disputed transactions were authorised cannot, and indeed does not, rest on any claim that Adrian and Lincoln are "authorised persons" within the meaning of the OSTA 2012.[180]

179 It does not, however, necessarily follow that just because Adrian and Lincoln are not "authorised persons" under Clause 1 of the OSTA 2012, any transactions which they placed with Heng are unauthorised and not binding in law and fact on the Defendant. In this regard, Clause 23.1 of the OSTA 2012 states:[181]

> The Client confirms that in the purchase and/or sale of any Securities under the Account(s) by any representative on the Client's and/or the Authorised Person's instructions or ***though without their instructions but with their***

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179 1 AB 53

180 Plaintiff submissions at paras 191 – 193

181 1 AB 60

> ***consent and/or authority (express, implied or otherwise) and/or knowledge, such representative shall be deemed to be the Client's agent*** whether or not such representative is deemed to be engaged or employed by the Client in law. ***The Client will, as between [the Plaintiff] and the Client be liable for all purchases and sales of Securities executed by the representative for the Account*** regardless of whether the representative would also be liable to [the Plaintiff] for the same and ***the Client shall be liable to [the Plaintiff] for all costs, expenses, damages, losses, fees, charges, rates or duties which may be incurred by [the Plaintiff] in respect of all such Securities transacted.*** In addition, the Client confirms that in the purchase and/or sale of any Securities under the Account(s) by any representative, such representative shall be deemed to be the Client's agent and ***[the Plaintiff] is entitled to assume that as between [the Plaintiff] and the Client*** (i) any order said by the representative to be intended to be executed for the Client is so intended, and ***(ii) every order executed by the representative for the Client is the order intended to be executed by the Client.***
>
> [emphasis added in bold italics]

180 The Defendant submits that the *contra proferentem* rule applies to the interpretation of the clauses in the OSTA 2012, such that any doubt should be construed against the Plaintiff. According to the Defendant, this is because the Plaintiff is relying on the OSTA 2012 to exclude its basic obligation to the Defendant to safeguard and monitor the Defendant's trading account.[182]

181 There are two difficulties with this submission. First, it assumes that the basic contractual obligation of the broad nature contended for in fact exists, and second, it assumes that Clause 23.1 is to be regarded as a clause which operates to exclude liability.

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182 Defendant's submissions at paras 130 and 131

182 With regard to the first issue, the Defendant has not provided any authority to show that the Plaintiff is in fact under a duty to the Defendant to safeguard and monitor the latter's account. I fail to see why this onerous and open-ended obligation should be imposed on the Plaintiff. It would not be in the Plaintiff's commercial interest to undertake such an obligation, and indeed it would be practically difficult for it to fulfil such a duty. This is especially because much of the trading on the clients' accounts, such as the Defendant's, takes place through remisiers, who are not even employees of the Plaintiff, and over whom the Plaintiff has a low degree of control.

183 With respect to the second issue, I note that there is a fundamental distinction between terms which seek to exclude or limit liability that would otherwise arise, and terms which seek to define the scope of the parties' contractual bargain: see Andrew Phang Boon Leong (gen ed), *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 07.004. In this case, Clause 23.1 is not an exclusion clause because there is no initial duty on the Plaintiff that it is trying to exempt itself from in the first place.

184 In addition, the Defendant asserts that the *contra proferentem* rule applies because the OSTA 2012 comprises detailed terms drafted by the Plaintiff which the "consumer has no choice but to accept." The authority relied on is *Tay Eng Chuan v Ace Insurance Ltd* [2008] 4 SLR(R) 95 ("*Ace Insurance*"). In that case, the Court of Appeal (at [34]) adopted the following passage from Lord Mustill's judgment in *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69 (at 77), explaining the basis of the *contra proferentem* principle:

> [A] person who puts forward the wording of a proposed agreement may be assumed to have looked after his own

> interests, so that *if the words leave room for doubt about whether he is intended to have a particular benefit there is a reason to suppose that he is not.*
>
> [emphasis added]

185 As the Court of Appeal in *Ace Insurance* explained at [35] (in the context of insurance policies), the *contra proferentem* rule is particularly pertinent where the terms of the contract are "invariably drafted and/or vetted by experts for the benefit [of that person] so as to protect [that person's] interest."

186 However, as I have earlier highlighted, the Defendant held multiple accounts with various broking houses, and had many options when it came to trading in securities. It is not the case that he had "no choice but to accept whatever terms and conditions…are imposed" by the Plaintiff (see *Ace Insurance* at [35]).

187 In any event, a bare statement that the *contra proferentem* rule applies to the OSTA 2012 generally is unhelpful. The *specific* clause(s) in respect of which the rule is said to apply must be identified, and more importantly, an *ambiguity* must be shown in those clause(s) for the *contra proferentem* rule to apply.

188 *Ace Insurance* provides a good example of this. The case concerned the interpretation of a particular clause in an insurance policy. The appellant, an insurance policyholder, suffered a number of eye injuries in a domestic accident, resulting in, *inter alia,* a loss of sight. The respondent insurer, made some payments but refused a payout for the loss of sight. The insurance policy contained an "Arbitration Clause", which stated that any dispute was to be referred to arbitration within three months. Another clause

stated that if the policyholder did not fulfil the conditions in the policy, the insurer would not be liable to pay the policyholder. The policyholder did not refer the matter to arbitration within three months, but commenced a legal action instead. The High Court judge agreed with the insurer that the latter was therefore not liable to make payments because the policyholder breached the Arbitration Clause. The action was thus struck out. The policyholder appealed, arguing that he could still pursue the matter in court through a "Legal Action Clause." The Legal Action Clause allowed an action to be brought 60 days after submitting written proof of his claim to the insurer. The Legal Action Clause was, however, expressly stated to be "subject to" the Arbitration Clause.

189 The Court of Appeal found that the meaning of the qualifying words "subject to", and their effect on the Legal Action Clause, was unclear. The first meaning favoured the insurer (the right of action was lost altogether if there was a breach of the Arbitration Clause) whilst the second meaning favoured the policyholder (a breach of the Arbitration Clause only results in loss of the right to *arbitrate* without affecting the right of *legal action*). In these circumstances, given the ambiguity, the Court of Appeal held that the *contra proferentem* rule applied, and concluded in favour on the insured.

190 However, in the present case, the words used in Clause 23.1 are abundantly clear that a sale or purchase of any securities under a client's account may be placed by a representative (i) on the client's instructions; (ii) on the authorised person's instructions; or (iii) though without the instructions of the client or authorised person, by *other persons* who have the client's or authorised person's consent, authority (express, implied or otherwise) and/or knowledge. In such cases, the representative is *deemed,* by virtue of the *contract* (*ie,* the OSTA 2012) to be the client's agent.

191 Further, the natural meaning of Clause 23.1 is not affected by Clause 3.1. Clause 3.1, which is headed "Transactions", provides that the client and its authorised person "may request [the Plaintiff]" orally or in writing to *buy and sell securities*, *ie*, to carry out transactions on the client's account. Clause 3.1 does not deal with the issue of the client's *liability* when transactions take place on the instructions of "representatives" of the client, especially where these "representatives" are not the client's "authorised person". In such cases, Clause 23.1 is clear that the key question is whether the instructions for the sale or purchase were made with the consent, authority (express, implied or otherwise) or knowledge of the client.[183] If so, the client is nonetheless *liable* as against the Plaintiff for the transactions and the losses arising thereof. In my judgment, there is no ambiguity in this clause, upon which the *contra proferentem* rule can apply.

192 My conclusion on the interpretation of Clause 23.1 is bolstered by the case of *Fraser Securities Pte Ltd v Seet Ai Kiang and others* [2004] SGHC 9 ("*Seet Ai Kiang*"), on which the Plaintiff relies. In that case, the court dealt with a case of alleged unauthorised trading, in which there was a clause (Clause 21.1) which is *in pari materia* to Clause 23.1 of the OSTA 2012. Clause 21.1 in that case stated:

> The Client confirms that in the purchase and/or sale of any securities under the Account(s) by any dealer's representative on the Client's and/or the Authorised Person's instructions or ***though without their instructions but with their consent and/or authority (expressed, implied or otherwise) and/or knowledge, such dealer's representative shall be deemed to be the Client's agent*** whether or not such dealer's representative is deemed to be engaged or employed by the Client in law. ***The Client will, as between Fraser and the Client, be liable for all purchases and sales of securities***

183 Plaintiff's submissions at para 197

> ***executed by the dealer's representative for the Account*** regardless of whether the dealer's representative would also be liable to Fraser for the same and ***the Client shall be liable to Fraser for all costs, expenses, damages, losses, fees, charges, rates or duties which may be incurred by Fraser in respect of all such securities transacted***. In addition, the Client confirms that in the purchase and/or sale of any securities under the Account(s) by any dealer's representative who is a remisier, such dealer's representative shall be deemed to be the Client's agent and ***Fraser is entitled to assume that as between Fraser and the Client*** (i) any order said by the remisier to be intended to be executed for the Client is so intended; and ***(ii) every order executed by the remisier for the Client is the order intended to be executed by the Client.***
>
> [emphasis added in bold italics]

193 On an application for summary judgment, the High Court held at [33] that:

> It was further contemplated by the terms of cl 21.1 that trading instructions might be given in relation to the defendant's account by *parties other than the defendant*. In such a case, then, *as long as the purchases and sales were effected with the consent and/or authority, express, implied or otherwise, of the defendant*, the remisier would be deemed to be the defendant's agent in effecting such purchases and sales *even though the defendant herself had not given specific instructions for the same.*
>
> [emphasis added]

194 The High Court found that on the defendant's own version of the events, she was aware that trading activities in the accounts would be carried out by the remisier on the instructions of the third parties and she was well content that it should be so. According to the defendant's evidence, when she visited the plaintiff's office, the remisier was informed that she was merely a nominee and that all transactions would be carried out by certain named individuals.

195 I am, of course aware that the facts of *Seet Ai Kiang* are different in that the defendant's *own case* in *Seet Ai Kiang* was that she was present when the remisier was informed that certain named individuals would be providing the instructions. In the present case, the Defendant has denied that he was a mere nominee or that Heng was informed, in the Defendant's presence, that Adrian and/or Lincoln would be operating his trading account.

196 On my assessment of the evidence, however, I have preferred Heng's evidence on this issue to the Defendant's (see [24] above), and found that Heng was told at the time of account opening that Adrian would be providing instructions on trades in the Defendant's account. In my view, it is clear that the Defendant knew his account was essentially a front and that he was in substance a nominee, as in *Seet Ai Kiang*. I reiterate my findings that there is no doubt that numerous trades were placed between February and early August 2013 in respect of similar counters. The Defendant was well aware of these trades, but never queried Heng or the Plaintiff on any of these trades or transactions.

197 In the case of the transactions initiated by Lincoln, I note that there is no suggestion that the Defendant was present when Adrian informed Heng sometime in April or May 2013 that Lincoln could also provide instructions. I accept that Heng did not verify directly with the Defendant that Lincoln was permitted to place orders. That said, I also found that the Defendant was aware of the trades in August, September and up to 1 October 2013. I am of the view that the Defendant must be taken to have known or consented to Lincoln's authority to provide instructions to Heng. Therefore, pursuant to Clause 23.1 of the OSTA 2012, the Defendant is bound by the trades executed by Heng on the instructions of Lincoln. He is

liable in contract to the Plaintiff in respect of the four disputed trades, and the losses arising therefrom.

Liability under common law

198 Even in the absence of Clause 23.1 of the OSTA 2012, the Defendant would still be liable to the Plaintiff under the common law, because Heng can be said to have had the *actual or apparent authority* of the Defendant to execute the four disputed trades on the basis of instructions from Lincoln.

199 In *Banque Nationale de Paris v Tan Nancy and another* [2001] 3 SLR(R) 726 ("*BNP*"), which the Plaintiff relies on, two trading customers denied liability for trading losses on the grounds that they were not aware of the trades which had been conducted under their accounts by their trading representative, and the trades were therefore unauthorised. What is especially important about this decision is that the Court of Appeal found that even if the customers were not aware of the specific trades in question, they must have been aware that the representative had been conducting trades in their accounts over a two-year period. This was not the least because of the large number of contemporaneous documents detailing the transactions entered into by the trading representative in their accounts and which were received by them without query, objection or protest. Since the customers knowingly allowed, condoned and approved the transaction entered into by their trading representative, they had in fact given *actual authority* to their trading representative. While the authority was not express, it could be implied from the conduct and actions of the parties and the circumstances of the case (at [63]).

200 Regard must also be had to *DBS Vickers Securities (Singapore) Pte Ltd v Chin Pang Joo and another* [2009] SGHC 248 ("*DBS Vickers*"), another case the Plaintiff relies on. In *DBS Vickers*, there was clear evidence (tape recordings) of instructions given by a third party to the remisier to operate the customer's trading account over a one-month period between 8 May 2008 and 10 June 2008. Contract notes and statements were also sent to the customer's residential address, and received without any dispute by the customer. The first time the customer raised an objection was only on 16 June 2008, after a letter of demand was received from the plaintiff's solicitors. Under cross-examination, the customer confirmed that he had given the third party authority to trade on his account. In deciding for the plaintiff, the High Court held (at [27]) that there was implied authority arising from a prior arrangement whereby the third party was allowed to trade on the customer's behalf.

201 Unlike the *DBS Vickers* case, this court does not have the benefit of tape recordings establishing the identity of the individual who actually placed the orders. Instead, aside from the oral evidence of the witnesses, there is only the evidence of Heng's call logs and the Matching Table comparing the dates and times of phone calls and the trades and transactions. The Defendant also did not concede, at any point under cross-examination, that he had authorised Adrian or Lincoln to trade on his account. That said, I have found, for the reasons discussed earlier, that the orders were in all likelihood placed by Adrian and/or Lincoln and not by the Defendant. I am also satisfied that there was a prior arrangement to the effect that Adrian could operate the Defendant's account and that this arrangement was extended to include Lincoln with the knowledge and consent of the Defendant. For these reasons, I am of the view that there was

implied actual authority given to Adrian and Lincoln to trade on the Defendant's account through Heng, and this included actual authority for Lincoln to place the four disputed trades through Heng.

202 Even if actual authority was not made out, the Court of Appeal in *BNP* held (at [67]) that the customers had by their conduct and actions held out the trading representative as having the necessary authority, which was sufficient to raise a case of *apparent authority*. The Court of Appeal held that there were two requirements which had to be satisfied for apparent authority to be made out, namely (a) there was a representation made by the customers that the trading representative had authority to enter into the transactions on their behalf; and (b) BNP must have relied on this representation. The two requirements were held to be met in that case.

203 Likewise, in the present case, even if Adrian and/or Lincoln did not have implied actual authority to act on behalf of the Defendant, I find that in the alternative, they at the very least had the *apparent authority* to do so. Like the customers in *BNP*, the Defendant was obviously aware of the trades on his account and never protested to the Plaintiff or even queried Heng, despite the numerous statements received over the months. The Defendant was instead content to leave his account essentially in the hands of Adrian and later, Lincoln. Even though Heng did not subsequently verify with the Defendant the authority of Lincoln to issue instructions, I am satisfied that the Defendant must have been aware of what was happening and did not object to the trades *between August and October 2013* either (except the four disputed trades). By his conduct, the Defendant had represented that Lincoln had the authority to provide instructions to Heng for transactions on his behalf, and continued to allow him to do so for further transactions, including the four disputed trades. It is also clear that

the Plaintiff had relied on the representation, as indeed there was no reason for it to suspect that anything was out of the ordinary in relation to the Defendant's account.

204 It follows that, subject to certain defences which have been raised, the Plaintiff succeeds in its claim against the Defendant. I shall now examine the Defendant's defences and counterclaim.

The defence and counterclaims

205 At paragraph 3 of the Defence and Counterclaim (Amendment No 1), the Defendant pleads that there were three terms to be implied into the contractual relationship between the Plaintiff as a broking house and the Defendant as a customer, which are, in brief:

(a) the Plaintiff will not deal with securities under the Defendant's account unless with the Defendant's express authorisation, instruction and/or consent;

(b) the Plaintiff will comply with rules, directives, guidelines and regulations issued by SGX;

(c) the Plaintiff will not seek to rely on an unconscionable bargain.

206 In the counterclaim, the Defendant submits that the Plaintiff owes and has breached a number of duties in contract and tort. In particular, he submits that the Plaintiff has breached (a) the implied terms set out in the preceding paragraph, including an additional implied term that it will not increase the Defendant's trading account limit without his authorisation, instruction or knowledge, and (b) a common law duty of care.

207 The Defendant avers that he has suffered losses as a result of the breaches committed by the Plaintiff. He claims for a declaration that he is not liable to the Plaintiff for the sum of $1,888,954.60, an order that the Plaintiff indemnifies him for that loss, and further or alternatively, damages arising from the Plaintiff's breaches of its contractual and tortious duties.

Implied terms in contract

208 Based on the Defence and Counterclaim (Amendment No 1), the Defendant asserts that there are four terms or duties which should be implied into the contract between the Plaintiff and the Defendant, which I shall now go through in turn.

209 It will be convenient to dispose of one of the terms immediately, namely that:

> The Plaintiff and/or its agents and/or employees including [Heng] will not seek to rely on an unconscionable bargain or enforce any term in any contract of services which is against public policy.

The Defendant explains in its further and better particulars filed by the Defendant on 2 February 2015 ("the 2 February Particulars") that the alleged unreasonable or unconscionable bargain was that of the Plaintiff claiming against the Defendant for losses arising out of the unauthorised trades where the Defendant did *not* authorise, instruct or consent to the trades and had immediately informed the Plaintiff that these trades were unauthorised.[184]

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184 Set Down Bundle, Tab 7, p 3: Defence and Counterclaim (Amendment No 1) para 25(a)

210 The response to this submission is that I have found that the four disputed trades were in fact and law authorised or consented to by the Defendant. Even though they were not executed pursuant to the Defendant's express verbal or written instructions, it is clear that the Defendant knew and consented to his trading account being operated by Heng under the instructions of Adrian and subsequently Lincoln. It was therefore not unconscionable for the Plaintiff to have commenced the present Suit.

211 The second term that the Defendant asserts should be implied is:

> The Plaintiff and its agents and/or employees will not increase the Defendant's trading account limit(s) without the Defendant's authorization, instruction or knowledge.

212 This submission can also easily be dismissed. As I have earlier found, the Defendant's trading pattern during the relevant time frame, including the counters dealt with and the volume and risk of exposure as represented by the four disputed trades, was similar to his trading pattern over the preceding eight months (see [131] above).

213 The third term or duty relied on is as follows:[185]

> The Plaintiff and its agents [including Heng] and/or employees will not buy or sell or deal with securities under the Defendant's trading account unless with the Defendant's express authorisation, instruction and/or consent.

214 In the 2 February Particulars, the Defendant identified the basis for the alleged duty to be "implied in law".[186]

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185 Set Down Bundle, Tab 3, p 12: Defence and Counterclaim (Amendment No 1) para 25(a)

186 Set Down Bundle, Tab 7, p 2: Further and Better Particulars sought of the Defendant's Defence and Counterclaim

215 It is well established that terms are not readily implied in law. Once a term has been implied in law, the term will be implied in all future contracts of that particular type. This can be distinguished from a term that is implied in fact, in which case the term only applies to the particular contract and parties. It behoves the court to approach terms implied in law with much care and circumspection, because a term that is implied in law establishes a precedent for similar cases in the future for all contracts of that particular type: see *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [42]–[44]. Indeed, it has been said that the touchstone for implying a term in the contract is *necessity* and not merely reasonableness: see Hugh Beale gen ed, *Chitty on Contract* vol 1 (Sweet & Maxwell, 31st Ed, 2012) at para 13-010.

216 To succeed in its position that the term should be implied in law, the Defendant needs to either show that there is a statutory provision which states that the term is to be implied, or there is some relevant custom and usage that requires the term to be implied: see *The Law of Contract in Singapore* at paras 06.076-06.090. However, in the present case, no independent evidence was led on the existence of any statute, custom or usage in respect of this term that the Defendant is urging the court to imply.

217 Quite apart from the absence of proof, the Plaintiff rightly submits that the implication of such a term is inconsistent with the express terms of the OSTA 2012. The OSTA 2012 sets out in great detail the terms and conditions governing the contractual relationship between the Plaintiff and the Defendant. As discussed earlier, this includes Clause 23.1 under which the Defendant is held liable for trades even if they were executed by a *third party*, but with the consent and/or authority (express, *implied or otherwise)*

and/or knowledge of the Defendant. There is thus no need for the Defendant's *express* authorisation, instruction and/or consent.

218 The final term that should be implied, according to the Defendant, is as follows:[187]

> The Plaintiff and/or its agents [including Heng] and/or employees will act in accordance with the rules, directives, guidelines and regulations issued by the relevant regulatory authority and/or SGX.

219 In the 2 February Particulars, the Defendant identified the specific rules to be the SGX-ST Rules ("the Rules"), including Rules 4.6.4, 4.6.6, 4.6.7, 7.1.1, 12.17.6, 13.2.1, 13.6.1, 13.11.1 and 13.13.3.[188]

220 It is not necessary to set out the details of all the Rules. Some examples will suffice to provide the tenor of the Rules:

(a) Rule 4.6.4 entitled "Good Business Practice" states that "[a] Trading Member must adhere to the principles of good business practice in the conduct of its business."

(b) Rule 4.6.6 entitled "Supervision" states that "[a] Trading Member must supervise its Trading Representatives, employees and agents."

(c) Rule 12.17.6 entitled "Trading by Employees and Agents" states that "[a] Trading Member must have in place procedures to

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187 Set Down Bundle, Tab 3, p 10: Defence and Counterclaim (Amendment No 1) para 25(c)

188 Set Down Bundle, Tab 7, p 3: Further and Better Particulars sought of the Defendant's Defence and Counterclaim

monitor the trading activities of its Directors, Officers, Trading Representatives and employees."

(d) Rule 13.6.1 entitled "Unauthorised Trading" states that "[a] Trading Representative must not: (i) execute his personal trades in the account of a customer; and (ii) use a customer's account for third party trading without the customer's prior *written* authorisation." [emphasis added].

221 The Defendant submits that there is a recognised general duty on financial institutions to ensure that their trading representatives are diligently supervised. The Defendant also urges the Court to take account of the fact that Singapore courts are generally slow to allow financial institutions to shift the responsibility for any fraud by its own employee or remisier to its own customers.[189] For this proposition, the Defendant relies on *Kwek Hock Hee and another v Tat Lee Securities Pte Ltd and another* [1999] SGHC 143 ("*Tat Lee*").

222 The immediate difficulty which the Defendant faces is his reliance on the Rules as undergirding the term sought to be implied. Rule 1.1.1 expressly provides that the Rules operate as a binding contract *only* between the Singapore Stock Exchange and *each Trading Member,* such as the Plaintiff. Rule 1.1.2 then states that a person who is not a party to the Rules, such as the Defendant, "has *no rights* under the Contracts (Rights of Third Parties) Act (Cap 53B, [2002 Rev Ed]) *to enforce the Rules*…" [emphasis added].

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189 Defendant's submissions at para 143

223 It is clear that the Rules are essentially regulatory rules which govern the relationship between the SGX and its Trading Members such as the Plaintiff. The Defendant, as the customer of the Plaintiff, does not acquire any rights as a third party under the contract between SGX and the Plaintiff. This is so even if the Rule in question directly benefits the Defendant. Support for this view can be found in the decision of the High Court in *RHB-Cathay Securities Pte Ltd v Ibrahim Khan and other actions* [1999] 1 SLR(R) 857. The defendant clients' argument was that the plaintiff's lack of proper supervision in breach of the Stock Exchange of Singapore rules and bye-laws enabled the dealer to conduct unauthorised trades with impunity, and the plaintiff should be liable for its own employee's fraud. The High Court held at [63] that even if there were breaches of the Stock Exchange of Singapore rules, which exposed the plaintiff, the remisier or dealer's representative to a penalty imposed by the Stock Exchange of Singapore, the breaches would not render void or illegal contractual obligations validly entered into between the member company and *the clients* arising out of share trading transactions.

224 Similarly, the Defendant, by opening the account with the Plaintiff, entered into a contractual relationship with the Plaintiff. The terms of that contract are expressly set out in considerable detail in the OSTA 2012, which includes Clause 23.1. Clause 23.1 is a valid contractual provision as between the Plaintiff and the Defendant, and under which the Defendant is liable.

225 The *Tat Lee* case does not assist the Defendant either. In that case, the plaintiffs opened trading accounts with the 1st defendant (a firm of stockbrokers) and were serviced by the 2nd defendant (a remisier attached to the 1st defendant.) Shares were acquired by the 2nd defendant, pursuant

to instructions of the plaintiffs. Subsequently, it was discovered that the remisier had sold the shares without the knowledge and consent of the plaintiffs. The crux of the 1st defendant's case was based on a letter of authority signed by the plaintiffs. The letter of authority authorised the 1st defendant to release debit and credit notes, statement of accounts and scrips to the 2nd defendant (the remisier) for transactions executed on the plaintiffs' account. The plaintiffs also warranted not to hold the 1st defendant, its directors and/or officers responsible for any losses that may result from the share transactions.

226 The High Court summarised the 1st defendant's argument as follows:

> [Defence counsel] says that although the remisier is the company's agent, *the agency is for the limited purpose of dealing in securities in the name of the company; the remisier is not the company's agent for all purposes.* The Letter of Authority allows the company to release the scrips to the remisier. What the remisier does with the scrips after they are released is of no concern to the company. Once the scrips are released to the remisier, the company is not in a position to control what the remisier does with them. The Letter of Authority also relieves the company from its duty to supervise what the remisier does with them. This is because the remisier receives the scrips on behalf of the *plaintiffs* as the *plaintiffs'* agent…
>
> [emphasis added]

227 The High Court disagreed with this argument. Its view was that a member of the stock exchange (such as the 1st defendant), as principal, was vicariously liable to its client for the fraud of its remisiers. The question was whether there was anything in the letter of authority which altered this basic position so as relieve the company from liability for frauds committed by the remisier. It was in this context that the High Court held that any ambiguity was to be resolved in favour of the plaintiffs. In coming to this

decision, the High Court referred to the regulatory framework and the public interest in having a system whereby the public can trade in shares in safety and with confidence. Insofar as the 1st defendant asserted that the remisier was only the company's agent to buy and sell shares for the client, the High Court concluded that the point was "extremely narrow" and did not displace the duty of the 1st defendant to supervise and control the 2nd defendant's trading activities which were "a continuous responsibility of the company."

228 The immediate difficulty with the Defendant's reliance on *Tat Lee* is that *even if* financial institutions were responsible to their clients for the fraud of their remisiers, there is no fraud to begin with in this case. I have found that the Defendant was well aware of and consented to Adrian and Lincoln executing trades (through Heng) under his account. This includes the undisputed trades as well as the disputed trades.

229 Further, it can be seen that the High Court in *Tat Lee* referred to the regulatory rules in the context of contractual interpretation, *ie*, in interpreting the letter of authority signed by the plaintiffs in that case. The public interest highlighted by the High Court helped to underpin the view that a contractual provision should not be construed as exempting a party from liability for his own fraud unless the language expressly compels one to do so. The High Court in *Tat Lee* did not hold that the regulatory rules referred to were, *in and of themselves*, binding on the plaintiffs.

230 Against this, the Defendant has submitted that notwithstanding clause 1.1.2 of the Rules, the court may find that "if certain rules are meant for the protection of investors, such provisions form part of the duties owed by a broker to its customers as implied terms."[190]

231 The case relied on is the decision of the Supreme Court of Victoria in *Bell Group Ltd v Herald and Weekly Times Ltd* [1985] VR 613 ("*Bell Group*"). In that case, Kaye J held at 617 that:

> [t]he broker, in carrying out his principal's instructions, is obliged to do in conformity with the usages of the Stock Exchange, which includes its articles, rules and regulations [as] he is unable to make a binding contract on behalf of his client unless he complies with the provisions of those instruments. Thus, in the fulfilment of his client's instructions, the broker is required to conduct himself … in the manner prescribed by the articles, rules and regulations.

232 It must however be stressed that in *Bell Group*, the plaintiff accepted at 618 that the contract made between the plaintiff and its broker contained an implied term that it was subject to the articles, rules and regulations of the Stock Exchange. The dispute arose after a broker on the floor of the Melbourne Stock Exchange offered to sell a parcel of shares. The offer was purportedly accepted by three brokers, each acting for a different client. The question was which party, if any, accepted the offer. An article of the Stock Exchange provided that disputes between Members with reference to transactions in securities should be investigated and resolved by the committee of the Exchange whose decision was binding upon members. The plaintiff was the principal of one of the accepting brokers. The plaintiff argued that it was the successful bidder and sought to restrain the Exchange from conducting any inquiry as to who was the successful bidder. The plaintiff argued that as a principal, it was not bound by the usages of the Exchange which were only applicable to brokers.

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[190] Defendant's submissions at para 166

233 Kaye J noted that the principal was an outsider who was not qualified to enter the floor of the Exchange, and held that the broker, in carrying out the principal's instructions, was obliged to do so in conformity with the usages of the Stock Exchange which comprises the articles, rules and regulations (including the article requiring disputes between Members in relation to transactions in securities to be investigated and resolved by the committee of the Exchange and whose decision was binding upon members). The broker was unable to make a binding contract on behalf of his client unless he complied with the provisions. It followed that a contract binding both the broker's principal and the counter-party only arose when the prescribed procedures had been followed.

234 The facts and circumstances in *Bell Group* were different and far removed from the case before me. Whilst the Defendant contends that the contract made between the Plaintiff and the Defendant contained an implied term that it was subject to the articles, rules and regulations of the Stock Exchange, there is *no* concession made on this point by the Plaintiff.

235 The Defendant entered into contractual relationship with the Plaintiff by opening the account. The terms of that contract are expressly set out in considerable detail in the OSTA 2012.

236 The Plaintiff as a trading member of SGX is in a separate contractual relationship with SGX. The Rules clearly form part of that contract. Any breach of the Rules will doubtless expose the Plaintiff to sanctions by SGX. Nevertheless, as I have earlier explained, the Rules expressly provide that third parties do not acquire any rights under the Contracts (Rights of Third Parties) Act. The Defendant, as a third party customer, remains a stranger to the contract *between the Plaintiff and SGX*.

237 In the present case, as we have seen, Clause 23.1 of the OSTA 2012 expressly provides that transactions executed in accordance with instructions of a person other than the Client or an authorised person are binding if the instructions were provided with the consent or authority, express, *implied or otherwise and/or knowledge of the Client or authorised person*. Even if Clause 23.1 is inconsistent with Rule 13.6.1 of the Rules, this does not alter the fact that Clause 23.1 is a valid contractual provision as between the Plaintiff and the Defendant. Unlike Clause 2.2 of the OSTA 2014, the OSTA 2012 does not contain a term stating that in the event of inconsistency between the terms of the OSTA and the Rules, the Rules will prevail.

238 The Defendant goes further to argue that the Plaintiff and the Defendant had *expressly agreed* that the contract would be governed by the applicable rules and by-laws of SGX. In particular, the Defendant relies on Clause 5.1 of OSTA 2012 which states that:[191]

> … all Transactions by the Client on or for any Account must be made in accordance with and subject to all applicable statutes, laws and regulations governing the Transactions …

239 Reliance is also placed on Clause 2.2 of the OSTA 2012 which states:[192]

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191 ABOD vol 1 p 11

192 ABOD vol 1 p 11

> The Client's relationship with [the Plaintiff], the operation of the Accounts(s), the provision of all services and the implementation of all orders shall be subject at all times to applicable statutes, laws and regulations…

240 The Defendant's counsel submits that these clauses make it clear that the Plaintiff and the Defendant both intended for "the relevant terms of the Rules to form part of their contract and therefore… the court should find that such rules and regulations can be implied into the contract whether in law or in fact."[193]

241 With respect to the Defendant's counsel, I am unable to accept the submission.

242 First, the highlighted clauses which refer to the Rules serve to *safeguard the interests of the Plaintiff vis-à-vis* the Defendant, rather than impose a duty on the Plaintiff to ensure compliance with the Rules, which is the basis of the final term sought to be implied. In fact, Clause 2.2 of the OSTA 2012 goes on to state that "…the Client shall do all things required by [the Plaintiff] in order to procure or ensure compliance with applicable statutes, laws and regulations." Clause 2.2 therefore is concerned with ensuring that *the Defendant*, as client, does not prevent the Plaintiff from complying with the applicable laws and regulations. In a similar vein, Clause 5.1 also goes on to state that "[the Plaintiff] may do or cause to be done any act or thing in order to prevent or remedy a breach of all such applicable statu[t]es, laws and regulations governing the Transactions …" It is clear that Clause 5.1 properly construed also protects the Plaintiff's rights. The intention is to enable the Plaintiff to take steps to avoid or

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193 Defendant's submissions at para 172

remedy an infraction of applicable statutes, laws and regulations, including the Rules.

243 In reaching this decision I have noted that Clause 33 read with Clause 1 of OSTA 2012 provides that the agreement shall be governed, interpreted and construed in accordance with the Rules. This provision makes sense as there are indeed provisions such as Clause 5.1 which enable the Plaintiff to take steps to remedy or prevent a breach of applicable laws. It does not mean, however, that the Rules themselves take precedence and prevail over the clear express terms of the Agreement.

244 Second, I also note the Defendant's concession that not all the terms of the Rules would or should form part of the contract between the broking house and the client.[194] Instead, what is contended is that rules which are *for the protection of investors* should form part of the contract as this will help promote confidence in the securities industry. However, the ambiguity and resulting uncertainty in drawing a line between those Rules which are for the protection of the investor and those which are not cannot be underestimated. Indeed, the Defendant does not clarify the relevant Rules which the OSTA 2012 allegedly incorporates. In any event, it stands to reason that the purpose of the Rules is to regulate and protect the industry as a whole: traders as well as members of the public, rather than the individual investor.

245 The Defendant argues, in the alternative, that the Rules should be implied in fact into the contract. It is well-established that the tests for an implication of a contractual term in fact are the "officious bystander" and

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194 Defendant's submissions at para 170

"business efficacy" tests. Underlying each test is that of *necessity*, in that the courts will imply a term only rarely: see *The Law of Contract in Singapore* at para 06.058.

246 For this submission, the Defendant relies on the case of *OCBC Securities Pte Ltd v Yeo Siew Huan* [1998] 1 SLR(R) 481 ("*OCBC*"). In *OCBC*, the defendant client traded in shares through the plaintiff. A total of four accounts, serviced by two traders, were opened. The plaintiff's claim was that the defendant failed to pay for shares that she had instructed the plaintiff to acquire. The defence was that the plaintiff had itself breached various provisions of the by-laws and was not entitled to be paid or indemnified for the losses on her account.

247 The facts of the case are somewhat curious in that the defendant signed two sets of application forms in respect of these accounts. In the case of the earlier application form, no express terms and conditions were annexed to the form. The second application form, on the other hand, set out terms and conditions on the reverse side of the form.

248 Understandably, the High Court held at [9] that the fact that no terms and conditions were set out in the first application form did not preclude some of the terms set out in the second application form from being applicable by implication, having regard to the customs and practices of the trade. Indeed, the parties agreed in that case that the contract was governed by the applicable rules and by-laws of the Stock Exchange of Singapore. That being so, the High Court held that the duties and conditions imposed on the plaintiff by virtue of the by-laws constituted, in whole or in part, the basis for implying terms. These implied terms included the duties imposed under by-law VI Clause 2 of the Stock Exchange of Singapore

which required the plaintiff to act in the interest of the defendant and only on the instructions of the defendant, including oral instructions, unless the plaintiff had been given discretionary powers of investment.

249 It will be noted that the *OCBC* case was decided on its own facts which *necessitated* an implication of terms because it could not be the case that the first two application forms and the trades under these accounts were not bound by any terms and conditions whatsoever. In the present Suit, the contractual relationship between the Plaintiff and the Defendant is already comprehensively governed by the detailed terms and conditions set out in the OSTA 2012. There is no doubt or dispute that the Defendant had been provided with a copy of the OSTA 2012 and was aware of the terms and conditions therein. Further implications of terms is not necessary. I further note that the very definition of an implication of a term *in fact* is that it only applies to that particular contract and parties, such as those in *OCBC*. The same implied term would not apply as a matter of course to all contracts of that type, or to the different factual scenario in the present Suit.

250 Moreover, the customs and practices of the trade, including the by-laws, could be used as a basis to imply the terms in *OCBC* because the parties *agreed* that the contract is governed by the applicable rules and by-laws. In the present Suit, it is unclear even on the Defendant's own case, what the precise Rules that should be incorporated are.

Duty of care in tort

251 Finally, I deal with the Defendant's counterclaim that the Plaintiff owes him a duty of care *in tort* in like terms as the contractual duty owed. This is based on the framework under *Spandeck Engineering (S) Pte Ltd v*

Defence Science & Technology Agency [2007] 4 SLR(R) 100 ("*Spandeck*"), as applied in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante*").[195] The Defendant argues, *inter alia*, that the twin criteria of voluntary assumption of responsibility (by the Plaintiff) and reliance (by the Defendant) were met. The Plaintiff held itself out as possessing the special services, facilities and licence to allow the Defendant to buy and sell shares on the stock market. The Defendant placed implicit reliance on the Plaintiff to maintain the Defendant's trading account as authorised by the Defendant, and not to allow any unauthorised trades in his account.

252 With respect, this submission is misguided. *Go Dante* can be distinguished from the present case in at least two ways. First, one of the strands upon which the Court of Appeal in *Go Dante* found the tortious duty of care owed was that the implied *contractual* duty of skill and care owed under various account-opening documents created the necessary proximity required under *Spandeck* (at [34]). There was no such contractual duty in the present case for the requisite proximity to be made out. In fact, many of the terms outlined in the OSTA 2012 expressly distanced the Plaintiff from the Defendant and sought to protect the former.

253 Second, the Court of Appeal in *Go Dante* held (at [35]) that even in the absence of the contractual framework established by the account-opening documents, the respondent bank nonetheless assumed responsibility because it accepted the appellant as someone whose money and assets were under its control, and on whose behalf it could and was expected to expend considerable sums in order to acquire various investments. In offering private banking and wealth management facilities,

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195 Defendant's submissions at paras 192-200

it held itself out as possessing special skill or expertise. Further, the appellant placed implicit reliance on that expertise. In particular, the appellant relied on the judgment, skill or ability of an employee of the respondent to make careful inquiry and give information or advice to him (in the form of recommending suitable investments and advising him of the pros and cons of those investments).

254 It is immediately apparent that the Plaintiff in the present Suit, being a *broking house*, mainly provided the Defendant with the *facilities* for trading in securities (with the sending of statements which merely recorded the trades).

255 In relation to advice, Clause 24 of the OSTA 2012 entitled "Investment Advice and Disclaimers" contains clauses which, on an overall reading, show that the Plaintiff has clearly distanced itself from assuming any responsibility to the client for any advice given.

256 For instance, Clause 24.5 states that if the client requires the Plaintiff to provide execution related advice which are specific (*ie*, specifically tailored for the client's investment objective, financial situation or particular needs), the client must first provide the Plaintiff with full information about its specific investment objectives, financial situation or particular needs, failing which the client must assume *sole responsibility* for determining the suitability of any and all advice or recommendation that the client may receive.

257 Clause 24.11 goes on to state that except if given pursuant to a specific advisory agreement (and for the payment of an agreed and additional fee for such advice or recommendation), the client must and

should regard any advice or commendation given in response to the client's request or question in the nature of general advice, and agrees that such advice may not be suitable for the client's investment objectives, financial situation and particular needs. There is no evidence that there was any such specific advisory agreement between the Plaintiff and the Defendant. For this reason, the Plaintiff cannot be said to be holding itself out as having special expertise.

258 Further, Clause 24.18(b) of the OSTA 2012 states:

> The Client represents, warrants and undertakes on a continuing basis that:
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> …
>
> (b) any order of the Client, with the sole exception of orders placed consistently and in accordance with Paid Advice or Guided Advice (given where the Client has provided all relevant information to [the Plaintiff] to enable such advice to take into account the client's financial resources, ability and willingness to take relevant risks and financial objectives), placed or any other dealings in the Account(s) is *solely and exclusively based on its own judgment and after its own independent appraisal and investigation into the risks associated with such orders and its own independent determination of the order being specifically suitable for the Client based on the Client's own assessment of its financial resources, ability and willingness to take relevant risks and financial objectives …*
>
> [emphasis added]

259 In addition, there was no evidence that the Defendant ever relied on the Plaintiff's skill and expertise, or used it as anything more than a facility for trading in securities. Even on the Defendant's own case and evidence, he was the one who had made the decisions on the transactions (except the four disputed trades), as a technical trader with a keen interest in the stock market. It was not his position prior to the closing submissions that he had at any time sought for or relied on the judgment or advice of the Plaintiff (or

even Heng). An argument in that respect at such a late stage appears to be no more than an afterthought and I am unable to place much weight on it.

260 In any event, *even assuming* that a duty of care may be owed as a matter of general principle, it is far from clear what is the nature or scope of the duty of care that the Defendant relies on. Further, even if there is a sufficiently certain duty of care owed by the Plaintiff to the Defendant, there would have been no breach of this duty. On the facts of the present case as I have found them, it hardly makes sense for the Defendant to complain of lack of due care by the Plaintiff, given that the Defendant was well aware of and consented to Heng's acting on the instructions of Adrian and Lincoln. The trades in the four disputed counters were similar to the trades over the preceding eight months. There was no reason for the Plaintiff to have suspected anything was out of the ordinary or to have taken any additional step to discharge its duty (if any).

Conclusion

261 In conclusion, the Plaintiff succeeds on its claim. The Defendant's counterclaims are dismissed.

262 The Defendant is ordered to pay to the Plaintiff $1,888,954.60 together with interest thereon continuing at the rate of 7% per annum from 14 December 2013 until the date of this judgment.

263 The Plaintiff claims costs on a full indemnity basis.[196] Whilst the basis was not raised in the closing submissions, it appears that claim arises from Clause 13.1 of the OSTA 2012 which states:[197]

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196 SOC(1) and Plaintiff's submissions at para 224

> The Client hereby agrees to indemnify and hold harmless [the Plaintiff] in full and upon demand from and against all actions, claims, liabilities, losses, damages, costs and expenses (*including without limitation legal fees and costs on a full indemnity basis*) whatsoever arising directly or indirectly out of (a) any action taken (or omitted to be taken) in good faith by [the Plaintiff] pursuant to any instruction, notice or request by the Client and/or the Authorised person or pursuant to the Agreement, (b) claims of third parties which may be brought or asserted in respect of any Securities deposited with [the Plaintiff] or against [the Plaintiff] by reason of its holding or having received or held such Securities from the Client under or pursuant to the Agreement or (c) *the enforcement of any of the Client's obligations and liabilities under the Agreement and/or the recovery of any sums owed by the Client under or relating to the Agreement.*
>
> (emphasis added)

264 The general principles applying to claims for indemnity costs under contractual provisions are well known: see, for example, *United Overseas Bank Ltd v Sin Leong Ironbed & Furniture Manufacturing Co (Pte) Ltd and others* [1988] 1 SLR(R) 76 and *Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] 3 SLR 909 ("*Abani Trading*"). As noted in *Abani Trading* at [91], the courts have long recognised that banks have a legitimate commercial interest in relying on contractual indemnities so as to minimise potential exposure to legal costs in the event of litigation. The same must be also true for trading houses and the securities market.

265 I note that there is authority for the proposition that the court retains the right to disregard a contractual provision for indemnity in circumstances where the enforcement of the provision is unjust (see *Abani Trading* at [92]–[93]; Foo Chee Hock (gen ed), *Singapore Civil Procedure 2016* (Sweet & Maxwell Asia, 2016) at para 59/2/2).The court must of course

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[197] 1 AB 57

exercise this discretion judiciously. Indeed, as stated by this court in *Abani Trading* at [93], in the absence of manifest injustice, the court will tend towards upholding the contractual bargain entered into by both parties. In the present case I see no reason why the Plaintiff's claim to contractual indemnity costs should not be upheld. The contractual provision is clear. The Defendant, whilst a young man at the time, had been working for many years and had risen to a position of some authority in WHD. The Defendant had opened three previous trading accounts with other trading houses and was well aware that there were standard terms and conditions in the contracts. Further, I do not see any basis on which any assertion that the Plaintiff had acted in an unconscionable manner against the Defendant in respect of the matters relating to the Suit can be sustained.

266 The Defendant is to pay the Plaintiff's costs on a full indemnity basis. These costs are to be agreed or taxed.

George Wei
Judge

Danny Ong, Jansen Chow and Ong Kar Wei (Rajah & Tann LLP) for the plaintiff;
Philip Fong and Nicklaus Tan (Harry Elias Partnership LLP) for the defendant.
