Intrading Ltd *v* Australia and New Zealand Banking Group Ltd
[2013] SGHC 219

Case Number : Suit No 573 of 2011/R

Decision Date : 24 October 2013

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : John Wang and Chong Li Lian (RHTLaw Taylor Wessing LLP) for the plaintiff; Chou Sean Yu, Edwin Cheng and Lim Shiqi (WongPartnership LLP) for the defendant.

Parties : Intrading Ltd — Australia and New Zealand Banking Group Ltd

Contract – Contractual Terms – Express Terms

Contract – Contractual Terms – Implied Terms

Contract – Breach

24 October 2013

Woo Bih Li J:

Introduction

1 The plaintiff, Intrading Ltd, commenced Suit No 573 of 2011/R ("S 573/2011") against the defendant bank, Australia and New Zealand Banking Group Ltd, claiming damages for alleged breaches of a loan facility extended to the plaintiff by the defendant. S 573/2011 was bifurcated. The proceedings before me concerned the issue of liability only. After considering the evidence and submissions, I dismissed the plaintiff's claim with costs. The plaintiff has filed an appeal against my decision. I set out my reasons below.

The Background to the Dispute

Dramatis Personae

2 In these proceedings the plaintiff's sole witness was Jayes Baskar Damodar ("Jayes"). Jayes was a manager of the plaintiff. The loan facility granted to the plaintiff was essentially operated by Jayes at all material times.

3 The following four witnesses testified on behalf of the defendant:

(a) Malcolm George Crispe ("Crispe"). At the material time, Crispe was an Associate Director of the defendant and managed the defendant's banking relationship with the plaintiff.

(b) Lilijana Sarangdhar ("Lily"). At the material time, Lily was a Lending Support Officer who assisted Crispe in managing the defendant's banking relationship with the plaintiff.

(c) Loh Jing Ying ("Loh"). At the material time, Loh was a Client Service Executive who

assisted Crispe in managing the defendant's banking relationship with the plaintiff.

(d) Michael Neil Byers ("Byers"). At the material time, Byers was the Head of the Risk and Compliance department of the defendant.

The loan facility

4 By way of a facility letter dated 28 May 2008 ("the Facility Letter"), [note: 1] the defendant offered the plaintiff a Multi-Currency Residential Property Loan Facility ("the Facility"). The amount of the Facility was AUD2,032,500. Its purpose was to finance the purchase of five residential properties ("the Properties") in Perth, Western Australia.

5 The Facility Letter was accepted in writing by the plaintiff on 30 May 2008. The loan amount was drawn down in Australian dollars on 16 July 2008.

6 Three features of the Facility bear specific mention in these proceedings. First, under cl 12 of the Facility Letter, security for the loan was granted *inter alia* in the form of a mortgage over the Properties. As the plaintiff was a new customer of the defendant, it was also required to place a term deposit of AUD500,000 ("the First Deposit") with the defendant, over which a charge was extended in favour of the defendant.

7 Second, under cl 5 of the Facility Letter, the plaintiff was given the option of converting the loan amount into one of five approved currencies, namely, Australian Dollars ("AUD"), United States Dollars ("USD"), Singapore Dollars ("SGD"), Euros ("EUR") or Japanese Yen ("JPY") (hereinafter referred to as "the Currency Switch Option"). In this regard, the loan amount was converted into foreign currencies from time to time as follows:

(a) On 30 July 2008, AUD1,032,500 of the loan amount was converted, at the rate of 0.94968, to USD980,554.60.

(b) On 30 July 2008, AUD1,000,000 of the loan amount was converted, at the rate of 102.176, to JPY102,176,00.

(c) On 30 September 2008, USD980,554.60 of the loan amount was converted, at the rate of 104.4160, to JPY102,384,545.

(d) On 5 November 2008, JPY100,000,000 of the loan amount was converted, at the rate of 68.864, to AUD1,452,137.55.

(e) On 16 December 2008, JPY104,560,545 of the loan amount was converted, at the rate of 60.271 to AUD1,734,840.06.

8 Third, under cl 4 of the Facility Letter, the initial "loan to security ratio" ("the LVR") of the Facility was set at 75%. The LVR was calculated by dividing the value of the loan outstanding by the value of the security (in this case being the purchase price or value of the Properties). [note: 2] It was common ground between the parties that the First Deposit was not part of the security component for the purposes of calculating the LVR. [note: 3]

9 The LVR was susceptible to change over time. [note: 4] This could have been caused by fluctuations in the value of the Properties or by movements in foreign exchange rates where the loan

amount was converted to a currency other than the currency in which the loan amount was drawn down.

10 In the event that the LVR exceeded 75%, various clauses of the Facility Letter would come into effect. The first was cl 14, under which the defendant could require the plaintiff to reduce the LVR by reducing the loan amount outstanding or by furnishing additional security to the defendant.

11 If the loan amount was converted to a currency other than the currency in which the loan amount was drawn down (*ie*, AUD), cl 16 of the Facility Letter also applied. Like cl 14, cl 16 allowed the defendant to require the plaintiff to reduce the LVR to 75% by reducing the loan amount outstanding or by providing additional security. Clause 16 however gave the defendant the right to convert the loan amount back into any currency of its choice in one of two situations so as to eliminate its exposure to foreign currency risks. The first was where the bank had made a demand for additional deposits or security to reduce the LVR to 75% and had failed to receive the same within three days of the demand. The second was where the LVR exceeded 85%.

The Parties' Cases

12 In these proceedings, the plaintiff grounded its claim against the defendant on two broad bases. For ease of reference, I shall refer to them as the "LVR issue" and the "currency conversion issue" respectively.

The LVR issue

The plaintiff's case

The alleged terms of the Facility Letter

13 The plaintiff said that it was an express or an implied term of the Facility Letter that if the loan amount (or part thereof) was converted to a currency other than AUD, and if at any time the LVR exceeded 75%, the defendant was under a duty to inform the plaintiff of this fact on the day the LVR exceeded 75% or shortly thereafter. [note: 5]

14 The plaintiff's third allegation was that both the plaintiff and the defendant had acted on an assumed state of facts that in the event that the loan amount was converted to a currency other than AUD, and if at any time the LVR exceeded 75%, the defendant was under a duty to inform the plaintiff of this fact on the day the LVR exceeded 75% or shortly thereafter. [note: 6]

15 In this regard, the plaintiff said that sometime between 1 and 21 August 2008, the defendant's Crispe and/or Loh informed Jayes during a telephone conversation(s) that the LVR had exceeded 75%. In the said conversation(s), the defendant requested that the plaintiff provide a pledged cash deposit to reduce the LVR to 75%. A deposit of AUD50,000 was made on 22 August 2008 for this purpose ("the Second Deposit"). In the circumstances, the plaintiff said that the defendant was estopped by convention from denying the duty.

The defendant's alleged breaches

16 After the loan was drawn down in AUD, it was converted by the plaintiff to a currency or currencies other than AUD. The plaintiff says that the defendant should have informed it on or around 22 August 2008 that the LVR had exceeded 75%. [note: 7] By failing to do so, the defendant had breached its duty (however the duty was imposed). Rather, it was only on 15 September 2008, by

way of an email sent by Loh to Jayes, that the defendant informed the plaintiff that the LVR had reached 86.95%. [note: 8] The plaintiff was provided with two options to reduce the LVR. The first was to provide additional security of an amount not less than AUD444,457.36. The second was to reduce the outstanding loan amount by AUD333,343.02. Accordingly, on 22 September 2008, the plaintiff deposited a further sum of AUD500,000 with the defendant ("the Third Deposit"). [note: 9]

17 The plaintiff also said that the defendant should have again informed the plaintiff on or around 8 October 2008 that the LVR had exceeded 75%. [note: 10] In failing to do so on that day or shortly thereafter, the defendant had breached its duty. Rather, it was only on 16 December 2008, by way of an email sent by Crispe to Jayes, that the defendant informed the plaintiff that the LVR had exceeded 75%. [note: 11]

18 Furthermore, the plaintiff said that the defendant's failure to inform it that the LVR had exceeded 75% was due in whole or in part to the defendant having erroneously taken into account the First Deposit in calculating the LVR from time to time. [note: 12]

19 It is also the plaintiff's case that had the defendant informed it on or about 22 August 2008 or on or about 8 October 2008 that the LVR had exceeded 75%, it would have closed out its position, which was at that time in a currency other than AUD, and converted the loan amount back to AUD. [note: 13]

The defendant's case

20 The defendant did not dispute that on most days between 22 August 2008 and 16 December 2008, the LVR had exceeded 75%. [note: 14] However, the defendant denied that it was a term of the Facility, whether expressed or implied, that it was under a duty to inform the plaintiff, if the LVR exceeded 75%, on the day the LVR exceeded 75% or shortly thereafter. [note: 15]

21 The defendant also denied having acted on the assumption that if at any time the LVR exceeded 75%, the defendant was under a duty to inform the plaintiff of this fact on the day the LVR exceeded 75% or shortly thereafter. [note: 16] In particular, the defendant denied informing the plaintiff in early August 2008 that the LVR had exceeded 75%. Nor had it requested that the plaintiff provide a cash deposit of AUD50,000 (see [15] above) to be pledged to reduce the LVR. Rather, the Second Deposit was made for the purpose of meeting present and future interest payments under the Facility.

22 In any event, the defendant said that it did inform the plaintiff that the LVR had exceeded 75% on the following occasions: [note: 17]

(a) by way of a written notice dated 1 September 2008 (which the plaintiff disputes receiving); [note: 18]

(b) by way of an email dated 15 September 2008, sent by Loh to Jayes; [note: 19]

(c) by way of an email dated 20 October 2008, sent by Crispe to Jayes (which the plaintiff disputes receiving); [note: 20]

(d) by way of an email dated 11 November 2008, sent by Crispe to Jayes (which the plaintiff

disputes receiving); [note: 21]

(e) by way of a written notice dated 15 December 2008 (which the plaintiff disputes receiving); [note: 22] and

(f) by way of an email dated 16 December 2008, sent by Crispe to Jayes. [note: 23]

23 The defendant did not dispute that on 23 October 2008, the sum of AUD540,000, being the total of the First Deposit and the Second Deposit (less AUD10,000 to meet current interest payments), was erroneously used by the defendant as partial security for the loan to reduce the LVR. [note: 24] As a result, the LVR was reduced to approximately 80% on 24 October 2008, down from approximately 90% had this step not been done. However, the defendant said that the plaintiff had no basis to complain as this reduced the LVR to below a close-out level. According to the defendant, the plaintiff would have suffered no prejudice as the defendant did not exercise its rights under the Facility to convert the loan amount back to AUD.

24 Finally, even if the defendant had breached its duty, the defendant said that causation was not made out in this case. [note: 25] In this regard, the defendant said that the plaintiff would not have converted the loan amount back to AUD even if it had been informed by the defendant that the LVR had exceeded 75%.

25 I should add that in its opening statement and affidavits of evidence in chief filed in these proceedings, the defendant raised the issue of whether the plaintiff had taken reasonable steps to mitigate its loss. As the proceedings before me concerned the question of liability only and not quantum, I directed that no evidence on mitigation be given at this trial.

The currency conversion issue

The plaintiff's case

The alleged terms of the Facility Letter

26 The plaintiff said that it was an express or an implied term of the Facility Letter that the defendant was under a duty to act on the plaintiff's instructions in respect of currency conversions under the Facility. [note: 26]

The defendant's alleged breaches

27 The plaintiff alleged that on 5 November 2008, during a telephone conversation between Jayes and Lily, the defendant informed the plaintiff that orders for currency conversions could be executed up to 6pm (Singapore time) on a business day. [note: 27]

28 On 10 November 2008, the plaintiff left a signed fax instruction with the defendant to convert the loan amount then denominated in JPY to AUD at the spot level of 68.50. [note: 28] The defendant acknowledged receipt of and accepted the instruction. The plaintiff further alleged that during a telephone conversation on the same day, Crispe informed Jayes that the defendant would execute the plaintiff's instruction to effect the currency conversion when the plaintiff's desired rate was reached. [note: 29] Accordingly, the plaintiff said that the defendant was under a duty to execute the plaintiff's instruction if and when the rate of 68.50 was reached.

29 The plaintiff alleged that the rate of 68.50 was reached on 10 November 2008 at or about 5.30pm. As it transpired, the defendant failed to execute the currency conversion. In failing to do so, the defendant had breached the express or implied term of the Facility Letter that the plaintiff was relying on. [note: 30] The loan amount in JPY was eventually converted to AUD on 16 December 2008 at the lower rate of 60.271. [note: 31]

The defendant's case

30 The defendant denied that on 10 November 2008, it was under a duty to execute a currency conversion at the plaintiff's desired rate. [note: 32] The defendant's position in this regard was threefold.

31 First, the defendant said that currency conversions under the Facility were subject to the parameters and requirements which were communicated by the defendant to the plaintiff between 14 July 2008 and 10 November 2008. These parameters and requirements did not oblige the defendant to execute the currency conversion at the plaintiff's desired rate even if that rate was reached in the currency markets.

32 Second, the defendant pleaded that the defendant was not in a position to monitor, and therefore did not monitor, whether the plaintiff's desired rate was reached on 10 November 2008. I add however, that at trial the defendant appeared to accept that it did agree to monitor the rate on a best endeavours basis on 10 November 2008.

33 Third, the defendant relied on the terms of its General Indemnity (Value Message by Telephone, Telex and/or Facsimile, Payment Instructions by Fascimile and Other Communication by Fascimile) to contend that it was not under a duty to act on the plaintiff's signed fax instruction on 10 November 2008.

Issues before this court

34 The following issues were before me:

(a) whether it was an express or an implied term of the Facility Letter that if the loan amount (or part thereof) was converted to a currency other than AUD, and if at any time the LVR exceeded 75%, the defendant was under a duty to inform the plaintiff of this fact on the day the LVR exceeded 75% or shortly thereafter. Alternatively, whether the defendant was estopped from denying that it was under a duty to so inform the plaintiff;

(b) if so, whether the defendant breached the duty;

(c) whether it was an express or an implied term of the Facility Letter that the defendant was under a duty to act on the plaintiff's instructions in respect of currency conversions under the Facility and, if so, whether the defendant had breached this term; and

(d) whether the defendant's breaches of duty had caused the plaintiff's loss.

Was the defendant under a duty to inform the plaintiff if the LVR had exceeded 75%?

Was it an express term of the Facility Letter?

35 As mentioned above, the plaintiff's first contention was that it was an express term of the

Facility Letter that if the loan amount (or part thereof) was denominated in a currency other than AUD, and if at any time the LVR exceeded 75%, the defendant was under a duty to inform the plaintiff of this fact on the day the LVR exceeded 75% or shortly thereafter. [note: 33]

36 In this regard, the plaintiff relied on cl 16 of the Facility Letter which provides:

> **16 CLAWBACK CONDITION**
>
> Subject to the provisions in clause 14, in the event the outstanding loan amount is denominated in a different currency to the currency of the Security, the following clawback conditions will apply.
>
> (a) For the purposes of this clause, the loan to security ratio is the ratio of the outstanding amount(s) and/or contingent liabilities of the Facility after the notional conversion(s)* (at the prevailing rate(s) as determined solely by the Bank which may include the Bank's own prevailing rate(s) into the currency that the Property is denominated in, expressed as a proportion of the value of the assets held and charged as Property by the bank.
>
> ...
>
> (b) If at any time ... the loan to security ratio should exceed 75%, then the Bank may demand that the Borrower deposit an amount in a currency acceptable to the Bank equal to the access over a 75% loan to security ratio in a deposit account with the Bank in the name of the Borrower but charged to the Bank and/or provide to the Bank such additional securities, in form and substance satisfactory to the Bank and in such value as the Bank may require, at the option of the Bank.
>
> (c) If such deposits and/or securities as provided for in the CLAWBACK condition- Clause 16(b) above are not received within 3 days of such demand, or should the loan to security ratio exceeds 85% at any time, then the Bank may at its absolute discretion immediately convert the relevant amount in CLAWBACK condition- Clause 16(a) into any currency (at the Bank's then prevailing rate of exchange) that the Bank deems fit to fully eliminate its foreign exchange risks. All costs associated with such conversion will be for the Borrower's account. The Bank shall also not be held responsible in any way if it chooses not to convert at any level but instead continues to demand for additional securities or if it chooses to convert when the loan to security ratio is higher than 85%. Following any conversion, the loan to security ratio will still have to be re-instated to 75%. [note: 34]

For completeness, I also set out cl 14 of the Facility Letter which provides:

> **14 GENERAL CONDITIONS**
>
> The bank reserves the right to require the borrower to reduce the amount owing or contingently liable under the Facility in the event that the loan/security ratio exceeds 75%. For the purpose of calculating this ratio in this sub-clause, security is the total value of the Property held and pledged to the Bank assessed in the Bank's sole discretion. The Bank may in its absolute discretion, in addition, require the Borrower to provide such further security in such form and substance shall be satisfactory to the Bank. [note: 35]

37 In my view, a plain reading of cll 14 and 16 did not support the plaintiff's contentions.

Therefore, it was unsurprising that in the course of trial, counsel for the plaintiff intimated to me that the thrust of the plaintiff's case was based on an implied term instead. [note: 36] However, counsel continued to advocate the existence of an express term in his closing submissions. It was clear to me that there was no such express term.

Was it an implied term of the Facility Letter?

38 The plaintiff next relied on an implied term to the same effect as the alleged express term.

The law on implied terms

39 Turning to the law on implied terms, there were traditionally two situations in which a term would be implied in fact into a contract at common law. The first was where the term was necessary to give business efficacy to the contract. The "business efficacy" test, as it came to be known, was stated by Bowen LJ in *The Moorcock* (1889) 14 PD 64 at 68 in the following terms:

> Now, an implied warrant, or, as it is called, a covenant in law, as distinguished from a express contract or express warranty, really is in all cases founded on the presumed intention of the parties, an upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

40 The second was where the term to be implied represented the obvious but unexpressed intention of the parties. This "officious bystander" test was famously stated by MacKinnon LJ in *Shirlaw v Southern Foundaries (1926) Limited* [1939] 2 KB 206 at 227 as:

> If I may quote from an essay which I wrote some years ago, I then said: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!"
>
> At least, it is true, I think, that if a term were never implied by a Judge unless it could pass that test, he could not be held to be wrong.

41 In *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [32] ("*Forefront*"), Andrew Phang Boon Leong J held that both the business efficacy and the officious bystander tests were firmly established in the case law in Singapore. Interestingly, Phang J observed (*Forefront* at [36]) that both tests were complementary. The officious bystander test was said to be the practical mode by which the business efficacy test was implemented. In this regard, Phang J approved Scutton LJ's observation in *Reigate v Union Manufacturing Company (Ramsbottom), Limited*

and Elton Copdyeing Company, Limited [1918] 1 KB 592 at 605 where his Lordship held:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if the time the contract was being negotiated someone had said to the parties, "What will happen in such a case," they would have *both* replied, "*Of course, so and so will happen; we did not trouble to say that; it is too clear*." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.
>
> [emphasis in original]

The relationship between the tests was further clarified by the Court of Appeal in *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 ("*Foo Jong Peng*"). There, the Court said (at [28]):

> The relationship between the two test is complementary, rather than alternative or cumulative; the officious bystander test is the *practical mode* by which the business efficacy test is implemented.
>
> [emphasis in original in italics; emphasis added in underline]

4 2 *Forefront* was cited with approval by the Court of Appeal in *Ng Giap Hon v Westcombe Securities* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*") at [36]–[37] and *Foo Jong Peng* at [27].

43 Further, it has been said that the term to be implied must be reasonable and equitable: *Young & Marten v McManus Childs Ltd* [1969] 1 AC 454 at 465. I should however caution that mere reasonableness, or convenience for that matter, is insufficient to justify a term being implied into a contract; it must always be shown that the term is *necessary*: *Chitty on Contracts* Vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty*") at para [13-010]. Moreover, as Phang J noted in *Forefront* (at [39]), the criterion of necessity is equally applicable to both the business efficacy and officious bystander tests.

44 In this regard, it is apposite to note the following observations of the Court of Appeal in *Foo Jong Peng* at [34]–[35]:

> On a related (and no less important) note, the search under the rubric of implied terms is a search for the presumed intention of the contracting parties. In other words, *the court ought not to – and, indeed, cannot – simply substitute its view to that intention*. Put simply, the intention may be presumed but the court cannot be presumptuous. We accept that a sceptic might well argue that such a search by the Court is a fiction. However, even if we accept that argument, not all *legal* fictions are necessarily fictitious in the pejorative sense that the turn of phrase is utilised by a layperson. Indeed, we would go further: We are of the view that there is no legal fiction involved inasmuch as the court concerned does indeed sift through the objective evidence before it in order to ascertain what the presumed intention of the contracting parties is. In doing this, the court is constantly cognisant of the cardinal (and guiding) principle that it will not re-write the contract for the contracting parties. It is true that the very nature of an *implied* term necessitates some investigation of sorts on the part of the court. *However, it bears reiterating that the court does not substitute its own view of what the contracting parties should have intended had the gap in the contract been brought to their attention at the time they entered into the contract*.

> Indeed, there are legal boundaries which the court will not transgress. One of these is an obvious one: Where there already is an express term covering the situation at hand, the court will not imply a term which contradicts a particular express term...Another relates to a principle already emphasised above, viz, the criterion of necessity. The very nature of this criterion means that the court will imply terms in fact sparingly.
>
> [emphasis in original]

45 Where loan facilities are concerned, the learned authors of *Ellinger's Modern Banking Law* (Oxford University Press, 5th Ed, 2011) say:

> Under English Law, the loan facility's terms are paramount. The courts will construe those terms to give effect to the parties' intention, *but only rarely will the courts imply additional duties into loan contracts*, such as a duty to increase the facility or give adequate notice of its refusal to do so.
>
> [emphasis added]

46 In my view, the foregoing amounts to this. When implying a term into a contract, the function of the court is not to make a contract for the parties. In this regard, freedom of contract remains a central tenet of the law. The presumption is against adding terms to a contract and a court will only imply a term rarely: see *Forefront* at [29]; see also *Ng Giap Hon* at [74]. This is especially so in commercial arrangements where the parties have reduced their rights and obligations to a formal document However, the court will be prepared to imply a term into a contract where it may be presumed, from the express terms of the contract and the circumstances under which it was entered into, that the parties *must* have intended the term in question. (See *Chitty* at para [13-008]).

Application of the law to the facts

47 Based on the principles I have set out above, the plaintiff bore the burden of proving that the alleged implied term was both necessary and reasonable. The plaintiff contended that the implied term flowed from the express terms of the Facility Letter, *viz*, cll 4, 14 and 16.

48 Clauses 14 and 16 have been set out above at [36]. Clause 4 states:

> **4 LOAN TO SECURITY MAINTENANCE/UNDERTAKING**
>
> The initial amount of the Facility is subject to the maximum of 75% of the valuation amount of the Property ("Property" is defined in Clause 12 – "SECURITY" below) or the purchase price whichever is the lower (if the property is a new purchase). The Facility amount is also subject to the Bank receiving a satisfactory valuation of the Property and that the size of the Property must be more than 50 square metres and the amount of the Facility may be amended from time to time at the Bank's sole discretion.

49 The plaintiff submitted that the rationale for implying such a term was to enable the plaintiff to decide whether to – (a) provide additional security or reduce the loan amount outstanding so as to maintain the LVR at 75%; or (b) convert the loan amount taken in another currency back to AUD so as to close out its position and eliminate its foreign exchange risk.

50 In my view, the plaintiff's contention was untenable. Clause 4 did not assist it. It was also clear from cll 14 and 16 of the Facility Letter that any right accruing from the LVR exceeding 75% was to

be exercised by the defendant in its sole discretion. Clause 16 also made it clear that the defendant was not to be held responsible if it chose not to convert at any particular level. Fundamentally, cll 4, 14 and 16 of the Facility Letter existed to protect the defendant against diminutions in the value of the Properties or adverse movements in foreign exchange rates where the loan amount was converted to a currency other than the currency it was denominated. They were not for the benefit of the plaintiff.

51 In this regard, counsel for the defendant referred me to *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61. [note: 37] In that case, Tay Yong Kwang J interpreted a provision in a loan facility (also granted by the defendant in these proceedings) worded in identical terms to cl 16 of the Facility Letter. Tay J accepted the bank's contention that "clause 16 [was] there *to eliminate ANZ's foreign exchange risk* resulting primarily from a depreciation of the currency of the security against the different currency or currencies of the outstanding loan" [emphasis added]. I was of the same view.

52 At trial, the plaintiff purported to demonstrate that its own commercial interests depended on the LVR. [note: 38] In particular, the plaintiff sought to show that its interests would be adversely affected the later it was informed that the LVR had exceeded 75%. This was so because the plaintiff would have been required to provide more security to reduce the LVR to 75% should the defendant subsequently choose to make a call. [note: 39] The plaintiff further said that it was imperative that the defendant inform the plaintiff in a timely manner if the LVR exceeded 75% so that the defendant could make a timely decision on its exposure to foreign exchange risks.

53 I accepted that there was some co-relation between the LVR and the plaintiff's own commercial interest. Indeed, Crispe admitted this in cross-examination. However, that was not all.

54 First, as Crispe explained in cross-examination, [note: 40] the plaintiff's decision as to whether to deposit additional security or to convert the loan back to AUD also depended on what other exposures the defendant had. Each customer of the defendant had its own way of managing their foreign exchange risks.

55 Second, and more pertinently, it did not follow that it would be *necessary* to imply a term imposing a duty on the defendant to inform the plaintiff if the LVR exceeded 75%. In this regard, the defendant contended that Jayes was capable of monitoring, and was in fact monitoring the foreign exchange rates to assess the plaintiff's foreign exchange risks. [note: 41] Furthermore, Crispe said during cross-examination that it would have been remiss of the plaintiff not to be monitoring its own position. [note: 42]

56 Jayes's evidence on this point was evasive. He initially claimed that he did not track the foreign exchange rates. [note: 43] Eventually, he conceded that he tracked the rates from time to time [note: 44] but insisted that he was not monitoring the rates in the context of the LVR. [note: 45] In my judgment, this is immaterial. The foreign exchange rates would already have indicated whether it was likely that the LVR would be breached. If the plaintiff was really interested to know whether the LVR was in fact breached and if it could not make its own calculations to determine this, it could and would have contacted the defendant to find out.

57 By Jayes's own admission, the plaintiff never did so during the duration of the Facility. [note: 46] This was so even after Jayes allegedly first came to understand what the LVR meant sometime in August 2008. I add that I did not accept Jayes's allegation that he did not know what the LVR meant

until then. Jayes was a businessman. He was also the plaintiff's manager. The plaintiff did not suggest that Jayes was unaware of the terms in the Facility Letter. Jayes would have come across the reference in the Facility Letter to the LVR. If he did not understand it, he would have asked what it meant. He did not.

58 Counsel for the plaintiff also contended that given the factual matrix under which the Facility was entered into, there was an irresistible inference that the parties must have intended the implied term. The plaintiff's contention in this regard rested on two planks. [note: 47] First, the plaintiff said that the defendant had the capacity and the resources to monitor the LVR. Second, the plaintiff said that the defendant was in fact monitoring the LVR on a daily basis from mid-September 2008 onwards.

59 It was not in dispute that the defendant had an internal computer system called "Venus" to monitor the LVR. Moreover, with the collapse of Lehman Brothers and the onset of the global financial crisis in mid-September 2008, the defendant implemented an internal policy ("the LVR Policy") with regard to the monitoring of the LVR of its customers. The LVR Policy was effective from 24 September 2008.

60 Under the LVR Policy, the LVR of all the defendant's customers were monitored on a daily basis. Where the LVR was at a marginal level, *ie*, 5% below the contracted LVR, the relevant relationship manager of the defendant was required to advise the customer of its current loan status and the possibility of the defendant making a margin call. Where the LVR was at a call level, *ie*, 5% above the contracted LVR, the customer was to be notified and given 14 days to either reduce the loan amount outstanding or provide additional security. Where the LVR was at a close-out level, *ie*, 10% above the contracted LVR, the customer would be notified and given 7 days to either reduce the loan amount outstanding or provide additional security, failing which the loan amount would be converted back into AUD or other such currencies as the case may be.

61 In my view, the plaintiff's reliance on the LVR Policy was misplaced. In this regard, it is trite law that implied terms are to be ascertained at the time the contract is entered into. The LVR Policy which was implemented after the Facility was entered into was irrelevant on this point. Furthermore, as counsel for the defendant correctly pointed out, [note: 48] the LVR Policy was an *internal policy* of the defendant. The LVR Policy was intended to protect the interests of the defendant. It did not give rise to a duty on the defendant's part *vis-a-vis* the plaintiff to inform the plaintiff if the LVR had exceeded 75%.

62 Furthermore, although the plaintiff repeatedly stressed that the defendant had the capacity and the resources to monitor the LVR, that was not the relevant point. The implied term would mean that the defendant was under a duty to notify the plaintiff whenever the LVR exceeded 75%. This appeared deceptively simply until one considered the practical dimensions of this allegation.

63 For example, how was the implied term to be put into effect by the defendant? If on day one, the LVR exceeded 75% and the defendant was under a duty to notify the plaintiff, was the defendant also obliged to notify the plaintiff if by day three the situation had been reversed and the LVR no longer exceeded 75%? It would seem strange that, if the defendant was under a duty to notify the plaintiff if the LVR had exceeded 75%, the defendant was not obliged to notify the plaintiff if the situation had later remedied itself. Then, if on day five, the LVR exceeded 75%, the defendant would again have to inform the plaintiff accordingly. In a volatile market spanning several weeks, the defendant would have to repeatedly inform the plaintiff each time the LVR exceeded 75%. It was convenient for the plaintiff to ignore difficulties which the defendant would face if there was such an implied term.

64 Moreover, the defendant's alleged duty would extend to every of its customers to whom a loan facility was granted on similar terms. While sending out notifications to its customers might seem simple enough, having to deal with customer queries thereafter at around the same time was another matter. I did not think that imposing such a duty on the defendant was reasonable, let alone necessary.

65 In the circumstances, I was of the view that there was no such implied term of the Facility Letter.

Was the defendant estopped by convention?

66 The plaintiff's third allegation with regard to the LVR issue was that both the plaintiff and the defendant had acted on the assumption that in the event the loan amount (or part thereof) was converted to a currency other than AUD, and if at any time the LVR exceeded 75%, the defendant was under a duty to inform the plaintiff of this fact on the day the LVR exceeded 75% or shortly thereafter ("the Assumed State of Facts"). [note: 49] Therefore, the plaintiff was saying that defendant was estopped by convention from denying the truth of the Assumed State of Facts.

The law on estoppel by convention

67 The law on estoppel by convention was explained by the Court of Appeal in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 ("*MAE Engineering*") at [43]–[44] in the following terms:

> The *locus classicus* on the doctrine of estoppel by convention is Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84. There, the conduct of the parties was held to give rise to an estoppel by convention which precluded them from relying on the true construction of the written document, as opposed to what they had erroneously supposed it to mean. Lord Denning MR said (at 122):
>
> > When the parties to a transaction proceed on the basis on an underlying assumption – either of fact or law – whether due to mistake or misrepresentation makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.
>
> Estoppel by convention is not found on any representation but on an agreed statement of facts the truth of which has been assumed by the parties to be the basis of the transaction (see also Spencer Bower's *The Law Relating to Estoppel by Representation* (4th Ed, 2004) at para VIII.2.1.

It bears emphasis that estoppel by convention is not confined to cases where the underlying assumption was shared by both parties. It can also arise where the assumption was made by one party and acquiesced to by the other: *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [31].

68 For an estoppel based on convention to arise, the following requirements must be satisfied: *Singapore Island Country Club v Hilborne* [1996] 3 SLR(R) 418 ("*Hilborne*") at [27]:

(a) there must be a course of dealing between the two parties in a contractual relationship;

(b) the course of dealing must be such that both parties must have proceeded on the basis of

an agreed interpretation of the contract; and

(c) it must be unjust to allow one party to go back on the agreed interpretation.

Application of the law to the facts

69 The plaintiff relied on the following to establish that the parties had acted on the Assumed State of Facts. [note: 50] The plaintiff said that the LVR hovered between 78-80% between mid and end August 2008. It was against this backdrop and sometime between 1 and 21 August 2008 that Crispe and/or Loh informed Jayes during telephone conversations that the LVR had exceeded 75%. [note: 51] In the said conversations, the defendant also requested that the plaintiff provide a pledged cash deposit of not less than AUD40,000 to reduce the LVR to below 75%. The Second Deposit of AUD50,000 was made on 22 August 2008 for this purpose with AUD40,000 to reduce the LVR and the remaining AUD10,000 to meet interest payments which had fallen due under the Facility. [note: 52]

70 The defendant raised several defences to this allegation of the plaintiff. First, the defendant denied having acted on the Assumed State of Facts. [note: 53] Both Crispe [note: 54] and Loh [note: 55] denied informing Jayes that the LVR had exceeded 75% between 1 August 2008 and 21 August 2008. The defendant's position was that the Second Deposit was not made for the purpose of reducing the LVR to below 75%. Rather, it was made to meet both current and future interest payments under the Facility.

71 Secondly, the defendant said that even if did inform the plaintiff sometime between 1 and 21 August 2008 that the LVR had exceeded 75%, this did not mean that the defendant was under a duty to do so then or again.

72 On the evidence I would have decided that the defendant did not, on the occasion(s) in question, notify the plaintiff that the LVR had exceeded 75%. However, I need not elaborate on the evidence because even if the defendant did so inform the plaintiff, that was still consistent with the defendant's position that it might, but was not obliged to, notify the plaintiff accordingly.

73 I add that although emails and correspondence were exchanged between the parties both before and after 10 November 2008, the plaintiff did not mention therein that the defendant was under the duty in question or that the plaintiff thought that the defendant was under such a duty. When this point was brought to Jayes' attention, he did not say that the omission to do so was because the plaintiff was unaware that the defendant had breached its duty. Instead he said that the duty was mentioned orally by the plaintiff. [note: 56] I did not believe him as he was not a credible witness for reasons which I will elaborate on later.

74 The first time that such a duty was alluded to in writing was in a letter dated 16 November 2009 from the plaintiff's previous solicitors Manjit Govind & Partners to the defendant. Even then, the allegation was worded differently. That letter alleged that under the Facility, the plaintiff was to be informed when the exchange loss arising from a currency switch "approaches" 75% of the LVR. Secondly, when the LVR exceeded 75%, the defendant was again under a duty to inform the plaintiff accordingly. That was no longer the tune the plaintiff was singing at the trial. The allegation at trial was simply that the defendant was under a duty to inform the plaintiff if the LVR was exceeded. Furthermore, there was no allegation in that letter that the parties had acted on the Assumed State of Facts.

75 There must have been something more concrete to establish that the parties had acted on the

Assumed State of Facts. On this, the plaintiff failed.

76 The defendant also contended that the plaintiff was precluded from using the doctrine of estoppel by convention as a sword. [note: 57] In particular, the plaintiff could not use the doctrine to create a right to be informed that the LVR had exceeded 75% where such a right did not otherwise exist. Given my conclusion about the Assumed State of Facts, it was not necessary for me to address this argument.

Conclusion on the LVR issue

77 In the circumstances, I found that the defendant was not under a duty (whether express, implied or arising by estoppel) to inform the plaintiff if the LVR exceeded 75%. Accordingly, the plaintiff's claim on the LVR issue failed.

Was the defendant under a duty to act on the plaintiff's instructions in respect of currency conversions under the Facility?

78 The plaintiff also contended that it was an express or an implied term of the Facility Letter that the defendant was under a duty to act on the plaintiff's instructions in respect of currency conversions under the Facility. [note: 58] By failing to act on the plaintiff's faxed instruction on 10 November 2008, the plaintiff said that the defendant had breached its duty.

79 In this regard, the plaintiff's case on the currency conversion issue was framed in very wide terms and unclear. The defendant submitted that based on the plaintiff's pleaded case, the issue before me was whether the defendant was under a duty to effect a currency conversion at the plaintiff's desired spot rate on 10 November 2008, if the rate was reached in the currency markets. [note: 59] I agreed.

Was it an express term of the Facility Letter?

80 The plaintiff contended that it was an express term of the Facility Letter that the defendant was to act on the plaintiff's instructions in respect of currency conversions under the Currency Switch Option. [note: 60] In this regard, the plaintiff relied on cl 5 of the Facility Letter which provides:

> **5 CURRENCY SWITCH OPTION**
>
> Subject to the Bank's availability of funding as determined at its absolute discretion, the above Facility may be converted into any one of the following currencies viz AUD, USD, SGD, EUR and JPY on interest payment dates provided that advance written notice is given to the Bank at least 7 business days prior to the required value date of the foreign exchange transaction. The spot foreign exchange rate will have to be booked with the Bank to enable the conversion to be effected on the agreed value date which should coincide with the interest payment date.
>
> If a conversion is to be carried out on a non interest payment date, the Borrower shall be liable for any additional costs, expenses and/or liabilities sustained or incurred by the Bank as a result of having to break the funding deposit required for the loan. All procedures as described above in this clause shall also apply. The necessary notice period as described above for conversion of the loan shall also apply. The Bank reserves the right to review frequency of currency conversions if, in the opinion of the Bank, the borrower is switching currency for speculative purposes. [note: 61]

81 Although cl 5 of the Facility Letter gave the plaintiff the option of converting the loan into different currencies, it did not expressly state how such currency conversions were to be effected. In particular, cl 5 did not provide for the placing of orders for foreign currency at whatever rate the plaintiff desired. To the contrary, the reference in cl 5 to the spot foreign exchange rate having to be "booked" with the Bank suggested that both the plaintiff and the defendant had to agree on the rate pertaining to currency conversions under the Facility. Therefore, it was not enough for the plaintiff to inform the defendant of a desired spot rate for a currency conversion and then wait to see if that rate was reached on the day in question. Furthermore, cl 5 required a notice period of at least seven business days.

Was it an implied term of the Facility Letter?

82 I reiterate the observations made above about an implied term. Was it both necessary and reasonable to imply a term that the defendant was under a duty to effect a currency conversion at the plaintiff's desired spot rate, if the rate was reached in the currency markets?

83 While it would be advantageous to the plaintiff to have such a term, that was not the test. There was no evidence that a currency conversion would only work if such a term was implied. Indeed, the evidence was the other way around. There was evidence that shortly before 10 November 2008, currency conversions were done only after the rate was confirmed between both the plaintiff and defendant. There was also evidence that as at 10 November 2008, the defendant was not able to key in a desired rate which would be automatically triggered once that rate was reached and the plaintiff knew this.

84 Accordingly, I was of the view that it was neither necessary or reasonable to imply the term which the plaintiff contended for and I concluded that there was no such implied term.

85 For completeness, I will elaborate on the evidence about past currency conversions and what the plaintiff was told and on events which occurred on 10 November 2008, as much was made by the plaintiff about the events that day.

Previous conversions under the Facility

86 The plaintiff relied on two previous currency conversions, both of which were executed on 30 July 2008, to try to establish that prior to 10 November 2008, the defendant had always acted on the plaintiff's instructions in respect of currency conversions under the Facility and executed a currency conversion at the plaintiff's desired rate. [note: 62]

87 In this regard, by way of an email dated 25 July 2008, Jayes had purported to leave an order with Crispe to convert the loan amount then taken in AUD to USD and JPY at the rates of 0.9500 and 102.00 respectively. [note: 63] On 30 July 2008, Crispe informed Jayes that the plaintiff's order to convert part of the loan amount to USD was executed at the rate of 0.94968. [note: 64] As the plaintiff had an outstanding order to convert part of the loan amount to JPY, Jayes sent Crispe a follow up email on the same day. [note: 65] In that email, Jayes left an order with Crispe to convert the balance of the loan amount in AUD to JPY at the rate of 102.40. Later that day, on 30 July 2008, Crispe informed Jayes that this order had been executed at the rate of 102.316. [note: 66]

88 In my view, the fact that the defendant had twice acted on the plaintiff's instructions and converted the loan amount at the plaintiff's desired rate was not conclusive of whether the defendant was under a duty to execute a currency conversion on 10 November 2008 on the basis of Jayes's

faxed instruction alone.

89 For a start, the difficulty with the plaintiff's contention was that the currency conversions executed on 30 July 2008 preceded the implementation of the LVR Policy sometime in September 2008. As I will explain below, under the LVR Policy, the defendant was unable to take advance orders for currency conversion. Instead, any order for a currency conversion under the Facility had to be booked at a confirmed rate over the telephone.

90 Furthermore, regard must be had to the other occasions on which currency conversions were executed by the defendant under the Facility, namely:

(a) A currency conversion on 30 September 2008 where the loan amount then denominated in USD was converted to JPY at the rate of 104.4160. This conversion was booked during a telephone conversation between Jayes and Lily. [note: 67]

(b) A currency conversion on 5 November 2008 where part of the loan amount in JPY was converted to AUD at the rate of 68.864. This conversion was booked during a telephone conversation between Jayes and Lily. [note: 68]

These currency conversions were executed after the LVR Policy was implemented. Pertinently, each of these currency conversions was booked during a telephone conversation between Jayes and Lily where Jayes had accepted a confirmed rate which had been quoted to him by Lily over the phone.

91 Finally, as I will explain below, the plaintiff's contention ignored the parameters and requirements pertaining to currency conversions under the Facility which had been communicated to it by the defendant prior to 10 November 2008. In its reply submissions, the plaintiff contended that these parameters and requirements were irrelevant to the question of whether the defendant was under a duty to act on the plaintiff's faxed instruction on 10 November 2008. [note: 69] If that was so, I did not see why the plaintiff should itself seek to rely on previous currency conversions under the Facility in support of its own contention.

The parameters and requirements pertaining to currency conversions under the Facility

92 Counsel for the defendant contended that the faxed instruction given by the plaintiff on 10 November 2008 was subject to the parameters and requirements which were communicated to the plaintiff by the defendant on several occasions prior to that date. I will refer to each of these occasions in turn.

93 On 22 September 2008, Jayes sent Lily an email purporting to leave an order to convert a portion of the loan amount then denominated in JPY to AUD at the rate of 89.00. [note: 70] On the same day, Lily informed Jayes that the defendant could not take advance orders for currency conversions. [note: 71] When Jayes queried the defendant's inability to take advance orders when it had previously done so, Lily informed Jayes that as the conversion was to be executed at a forward rate, it could not be executed without approval from credit. [note: 72] Approval was obtained later on the same day.

94 On 23 September 2008, Lily and Jayes spoke on the phone. [note: 73] Lily reiterated that the defendant could not accept advance orders for currency conversions. Rather, the plaintiff had to book a currency conversion at a confirmed rate with the defendant over the phone. Jayes followed up

on his conversation with Lily by sending an email to Crispe. [note: 74] Jayes again queried the plaintiff's inability to place advance orders for currency conversion when it was previously able to do so. Jayes also sought to place advance orders to convert the loan amount in JPY to AUD and the loan amount in USD to JPY.

95 On 29 September 2008, Jayes sent Crispe a further email regarding the advance orders he had purported to leave on 23 September 2008. [note: 75] Thereafter, Crispe spoke to Jayes on the phone. [note: 76] Crispe informed Jayes that the defendant did not have a system which allowed orders for currency conversion to be placed on an advance basis. In particular, the defendant did not have a system which allowed for orders for currency conversion to be left to be executed automatically when a particular trigger point was reached. Further, the defendant could only monitor the market for the plaintiff's desired rates on a best endeavours basis. This meant that if the defendant noticed that the plaintiff's desired rate was reached, it could arrange for a currency conversion to be executed if it already had a signed instruction from the plaintiff. Alternatively, the defendant could call the plaintiff to confirm its instruction and thereafter, arrange for the currency conversion to be executed. Crispe also informed Jayes that there was a chance that the defendant could miss his desired rate. Therefore, the plaintiff was also responsible for monitoring the rates.

96 In this regard, the defendant said that its inability to take advance orders for currency conversion flowed from the LVR Policy which it had implemented from 24 September 2008, with the onset of the global financial crisis. Against this, the plaintiff contended that the change in the defendant's policy was not communicated to the plaintiff. [note: 77] Indeed, the plaintiff said that Crispe had continued to give Jayes the impression that the plaintiff could continue to place advance orders for currency conversion.

97 In cross-examination, counsel for the plaintiff referred Crispe to a transcript of his telephone conversation with Jayes on 29 September 2008. [note: 78] In that conversation, Crispe had told Jayes that the advance order he had placed on 23 September 2008 was not executed because the trigger point was not reached. Crispe explained that the reason he gave Jayes at that time was "customer-centric". More pertinently, the transcript showed that Crispe went on to clearly explain the defendant's inability to take advance orders for currency conversion. The plaintiff however asserted that Crispe had not informed Jayes specifically of a change in policy. In my view, it was sufficient for Crispe to have communicated to Jayes the requirements pertaining to currency conversions under the Facility. Crispe did not need to explicitly say that there had been a change in policy.

98 Although Jayes said that he disbelieved what Crispe had told him on 29 September 2008, [note: 79] this did not detract from the fact that the requirements and parameters pertaining to currency conversions under the Facility were clearly communicated to him at that time. It was not for Jayes to believe or disbelieve this unilaterally. If Jayes truly did not accept these requirements and parameters, he should have informed the defendant. Instead, Jayes remained silent. He did not protest or ask questions about what he had been told. In any event, I did not accept Jayes' disbelief. In my view, he knew and accepted that the defendant might not be able to execute an advance order given by him.

99 At this juncture I add that in his AEIC, [note: 80] Jayes appeared to claim that Crispe had in fact informed him that the defendant could execute such advance orders for currency conversion. Jayes relied on the first part of a sentence in his email to Crispe on 29 September 2008 but the entire sentence reads:

ok I understand that you can leave any orders in the system, so we will have to monitor until it reaches to that lvls. [note: 81]

As can be seen, the second part of the sentence showed that Jayes had recognised that the plaintiff itself had to monitor the rates. This in turn supported the point that Crispe had informed Jayes that the defendant could not accept advance orders for currency conversion. If Crispe had in fact informed Jayes that the defendant had a system which allowed for orders for currency conversion to be left to be executed automatically at fixed trigger points, it would have been illogical for Jayes to say that the plaintiff itself had to monitor the foreign exchange rates. In the circumstances, I accepted the defendant's contention that the use of the word "can" in the sentence in that email was a typographical error on the part of the plaintiff and should have read "cannot".

100 On 4 November 2008 Jayes sent Crispe an email purporting to place an advance order to convert part of the loan amount in JPY to AUD. [note: 82] Crispe replied on 5 November 2008. [note: 83] In that reply, Crispe reiterated to Jayes that any instructions for currency conversion had to be given verbally over the telephone or by a signed instruction. Furthermore, Crispe informed Jayes that any conversion would have to be at a confirmed rate and that the defendant could only monitor the rates on a best endeavours basis.

101 Thereafter, on 5 November 2008, Lily called Jayes to seek instructions on the currency conversion. [note: 84] During this conversation, Lily informed Jayes that: (a) the defendant could not take advance orders for a currency conversion; (b) Lily was not able to monitor foreign exchange rates for the plaintiff; and (c) Lily had to contact a dealer to quote a rate to the plaintiff. Jayes said he would monitor the relevant rate and he would call Lily if the rate reached a certain level and Lily informed him that she was not always at her desk.

The events of 10 November 2008

102 On 10 November 2008, Jayes sent an email to Crispe and Lily, purporting to leave an order to convert the loan amount then denominated in JPY to AUD at the spot rate of 69.20. [note: 85] This was later revised to 68.50. [note: 86] Lily replied on the same day to inform Jayes that a currency conversion could only be booked while Jayes was on the phone with her to accept a confirmed rate. [note: 87] Jayes then informed Lily that he had already discussed the possibility of leaving an advance order with Crispe and that Lily should seek clarification from Crispe before contacting him. [note: 88]

103 In this regard, it was true that Jayes had spoken to Crispe on the phone in the morning of 10 November 2008. However, the substance of what was said was disputed. Jayes claimed that during this conversation, Crispe had informed him that the defendant would execute the plaintiff's order when the plaintiff's desired rate was reached. [note: 89] It was also Jayes's evidence that Crispe did not say that the defendant could only monitor the rates on a best endeavours basis.

104 Crispe denied telling Jayes this. [note: 90] Crispe's version of the telephone conversation was as follows. First, Crispe informed Jayes that the defendant did not have a system which allowed advance orders for currency conversion to be placed. Moreover, the defendant could only monitor the foreign exchange rate on a best endeavours basis. If the defendant noticed that the foreign exchange rate was at the plaintiff's desired level, the defendant could execute the conversion if it had a signed faxed instruction from the plaintiff. However, the defendant was not to be held responsible for missing the plaintiff's desired rate. Furthermore, Crispe said that Jayes had agreed that the plaintiff was itself responsible to monitor the foreign exchange rate.

105 Unfortunately, no recording or transcript of the telephone call between Jayes and Crispe on 10 November 2008 was produced at trial. The defendant explained that it was unable to retrieve the recording due to a glitch in its recording system. The defendant also disclosed a chain of internal email correspondence demonstrating its attempts to retrieve the said recording. The plaintiff did not suggest to any of the defendant's witnesses that the allegation about the glitch in the recording system was a lie. In the circumstances, I accepted the defendant's explanation for the absence of a recording or transcript. This was not a case where the defendant had a reasonable opportunity to adduce the evidence but had deliberately failed to do so.

106 Shortly after this telephone conversation, Crispe requested that Jayes fax the defendant a signed instruction on the intended currency conversion. [note: 91] The faxed instruction was sent by Jayes to Crispe at about 12.46pm that same day. [note: 92] Crispe acknowledged receipt of the fax in an email sent to Jayes at about 3.28pm. [note: 93] The plaintiff placed much reliance on Crispe's acknowledgement of receipt of the faxed instruction. The plaintiff alleged that this meant that the defendant was under a duty to execute the currency conversion when the plaintiff's desired exchange rate was reached.

107 The defendant's position was that the faxed instruction was only relevant in the event that the defendant had noticed the plaintiff's desired rate, while monitoring the rates on a best endeavours basis. I add however that I did not accept that on 10 November 2008, a currency conversion could only be booked while Jayes was on the phone with Lily to accept a confirmed rate. Lily's email to Jayes in this regard was superseded by the subsequent telephone call between Crispe and Jayes. I found that a currency conversion could be executed without oral confirmation if the plaintiff had earlier provided the defendant with a signed fax instruction on the rate he was seeking. This was done by Jayes. Indeed, counsel for the defendant accepted that the faxed instruction was received and no further oral confirmation was needed. However, he maintained that the transaction would be executed only if the defendant noticed, on a best endeavours basis, that the rate had been reached.

108 I accepted the defendant's position for the reasons stated below.

109 First, I preferred Crispe's version of what had transpired in his conversation with Jayes on 10 November 2008. To corroborate Crispe's evidence, the defendant adduced a diary note prepared by Crispe on 10 November 2008, documenting his telephone conversation with Jayes. [note: 94] At trial, the plaintiff did not challenge the authenticity and contemporaneity of Crispe's diary note. The plaintiff's claim in its closing submissions that Crispe's diary note was "self-serving" was belated. [note: 95] I also add that Crispe's other diary notes adduced in evidence accurately documented his calls with Jayes. Those diary notes were corroborated by recordings and transcripts of his telephone conversations with Jayes.

110 Furthermore, I did not find Jayes to be a credible witness. In his AEIC, Jayes was selective in presenting his evidence. Notably, he made no mention of the occasions on which he was informed of the requirements pertaining to currency conversions under the Facility. Material parts of Jayes's evidence were also misleading. Jayes appeared to suggest in his AEIC that the currency conversions on 30 September 2008 and 5 November 2008 were executed on the basis of Jayes's email instructions alone. [note: 96] As I mentioned earlier, those currency conversions were in fact executed while Jayes was on the phone with Lily to accept a confirmed rate.

111 Jayes's evidence on what had transpired in his telephone call with Crispe on 10 November 2008

was also inconsistent. At first, Jayes said that Crispe had informed him that the defendant would execute the currency conversion if it *noticed* that the plaintiff's desired rate was reached. [note: 97] When I sought clarification from Jayes on this, he shifted his position. He claimed that Crispe had informed him that if the plaintiff's desired rate was reached, the currency conversion would be triggered automatically. [note: 98] His earlier evidence, before he changed it, was damaging to the plaintiff's case.

112 I was also of the view that even if Crispe did not specifically inform Jayes on 10 November 2008 that the defendant would only monitor the rates on a best endeavours basis, there was evidence from transcripts of earlier telephone conversations that Jayes was informed about this on other prior occasions and/or he was aware that the defendant would not necessarily be able to execute an advance order for currency conversion at his desired rate.

113 For example, in a conversation on 15 September 2008, Crispe told Jayes:

> [Crispe]: So what we can do is what we did previously, which with the other transactions, which was just to monitor that on a best endeavours basis for you. Now what a best endeavours basis means is that I'm going to be having a look at it, if I see that I can do it, I'll do it and I'll give you a call and to confirm it. But it does mean that we have the potential to miss that.

114 Another example is a conversation Jayes had with Lily on 5 November 2008. I have referred to that conversation at [101] above and I set out a part thereof:

> Jayes: That's the spot, 68.96. Is – you think is it possible to leave a call level, that you can call me once the level –
>
> Lily: No. No, because I don't have the ability to monitor rates.
>
> Jayes: Okay.
>
> Lily: It's when I ask the dealer to give me a rate –
>
> Jayes: I know.
>
> Lily: -- that's when the rate gets quoted, yah.
>
> Jayes: Sure.
>
> Lily: Yah.
>
> Jayes: But just what I do is just confirm with [Crispe] about the margin –
>
> Lily: Mm-hm.
>
> Jayes: -- and I will leave a call level with my – I will monitor the rate today, and once it comes to certain call level, I'll just give you a ring straightaway.
>
> Lily: Yah.
>
> …
>
> Jayes: So that means it's okay. I got to reconfirm with [Crispe]. Okay, so let me monitor the rates, and you are in the office today, right?

Lily: Yah, but I mean obviously, I'm – I won't always be here.

Jayes: Understand.

…

Lily: Yah, please do not assume that we are going to be here for the next eight hours, because it's whenever you catch us –

Jayes: Yah.

Lily: -- then we can quote you a rate. Now I'm not always at my desk, because we are moving –

Jayes: I understand.

Lily: Yes, so you know –

Jayes: So –

Lily: -- or I might be on the phone with another customer, so –

Jayes: Sure. But is this the only way to contact you by telephone or there's a mobile number where I can leave messages on that?

Lily: No, we do not take calls on mobiles at all.

115 As can be seen, Crispe had said that the defendant would monitor the rates on a best endeavours basis whereas Lily said that she did not have the ability to monitor the rates. What she meant was that she herself could not monitor the specific rate and to get a specific rate she had to ask the defendant's dealer to quote the relevant rate.

116 Finally, I did not accept the plaintiff's contention that any parameters communicated by the defendant to the plaintiff before 10 November 2008 were irrelevant. On the contrary, the plaintiff's faxed instruction on 10 November 2008 must be read in the light of those parameters. Doing this, it was clear to me that when Crispe acknowledged receipt of the plaintiff's faxed instruction, this was not an acknowledgement that the defendant was under a duty to execute a currency conversion at the plaintiff's desired rate if the rate was reached. Rather, the defendant was only under a duty to monitor the foreign exchange rates on a best endeavours basis and execute the plaintiff's instruction if it noticed that the desired rate was reached. The faxed instruction was only relevant in the event that the defendant did notice that the plaintiff's de sired rate was reached. In that case, the defendant was to execute the currency conversion without seeking further confirmation from the plaintiff.

117 According to the plaintiff, the spot rate of 68.50 was reached on 10 November 2008 at about 5.30pm. Jayes tried to contact Lily but as he was unable to reach her, he left a message on her answering machine to inform her that this rate had been reached. At the same time, he also sent a short message service ("SMS") to Crispe, asking Crispe whether his order had been executed. However, he received no response from Lily or Crispe that day.

118 On 11 November 2008, Jayes exchanged SMSes with Crispe who informed him that the order had not been executed.

119 Jayes' evidence was that on 17 November 2008, he was informed by Byers that at about 5.30pm of 10 November 2008, Crispe was engaged in an outside meeting and Lily had left the office

15 minutes earlier. Subsequently, Crispe informed Jayes that Lily was in fact engaged with another client at that time. In cross-examination, Lily herself could not remember what she was doing at that time. She also could not say whether she received the voicemail message which Jayes said he had left for her at that time.

120 I come to another point which the defendant relied on. It was Crispe's position that the defendant could only execute orders for currency conversion between 9am and 4.30pm. Crispe appeared to be suggesting that, in any event, the defendant was under no duty to execute the plaintiff's instruction after 4.30pm. Jayes did not agree with Crispe's position about the 4.30pm cut-off time. Jayes alleged that Lily had previously informed him on 5 November 2008 that the defendant could execute orders up to 6pm. In taking this position, Jayes was suggesting that the defendant was under no duty to execute the plaintiff's instruction only after 6pm. However, this position itself suggested that, if I were to accept that the cut-off time was 4.30pm, and not 6pm, then the defendant was under no duty to execute the plaintiff's instruction after 4.30pm.

121 As regards Jayes' allegation that Lily had told him on 5 November 2008 that the defendant could execute orders for currency conversion up to 6pm, the transcripts of two telephone conversations he had had with her that day were produced at trial. They showed that no such statement was made by Lily. Yet Jayes insisted that such a statement was made in a conversation he had with her that day. [note: 99]

122 Furthermore, such a statement would be inconsistent with an email which Lily had earlier sent to Jayes on 14 July 2008 [note: 100] when she was discussing the original drawdown of the loan amount with him. In that email, she said that "the loan and any FX will need to be booked tomorrow for settlement on the 16.07.08. Our cut-off time is 4.00pm each day Singapore time." Jayes claimed that he did not see that email as it was sent to his Hotmail address which was not the email address he usually used. Yet the defendant was able to show that on another occasion he did reply to an email sent to his Hotmail address. [note: 101]

123 On the other hand, Lily accepted, at trial, that deals could be completed by 4 or 4.30pm, [note: 102] and even after 5pm on a very exceptional basis. She maintained that she did not tell Jayes that the defendant could execute orders up to 6pm. It seemed to me that what Lily was saying was that legally the defendant was not obliged to execute the plaintiff's instruction after 4pm or 4.30pm but the defendant was free to do so if the defendant noticed that the desired rate was reached after 4.30pm.

124 I did not believe that Jayes did not read Lily's email of 14 July 2008. I also did not believe Jayes' allegation that Lily had told him on 5 November 2008 that the defendant could execute orders up to 6pm. I was of the view that he had been informed and he knew that the defendant would ordinarily execute orders up to 4pm or 4.30pm.

125 I accepted that any duty of the defendant was therefore up to 4.30pm.

126 I add that even if Lily had told Jayes that the defendant could execute orders for currency conversion up to 6pm, this would still be subject to my finding that the defendant was only under a duty to monitor the exchange rates on a best endeavours basis. I have not elaborated on the monitoring process which Lily explained briefly [note: 103] because it was unnecessary for me to make any finding as to whether the defendant had failed to exercise best endeavours in monitoring the exchange rates. That was not the plaintiff's pleaded case.

Conclusion on the currency conversion issue

127 In the circumstances, the defendant was not under a duty to execute a currency conversion on 10 November 2008 at the plaintiff's desired rate once that rate was reached. Therefore, the plaintiff's claim with regard to the currency conversion fails.

Conclusion

128 For these reasons, the plaintiff's claim in S 573/2011 was dismissed with costs. I allowed the defendant's costs on an indemnity basis because a contractual provision allowed the defendant to claim costs on that basis. I fixed such costs at $150,000 plus reasonable disbursements to be agreed or fixed by the court.

[note: 1] Agreed Bundle Vol 1 ("AB") pp 1-8

[note: 2] Bundle of Affidavits of Evidence-in-Chief ("BAEIC") 3 Tab D, p 7 at [15]

[note: 3] Setting Down Bundle ("SDB") p 64 at [7]

[note: 4] BAEIC 3, Tab D p 3 at [6]

[note: 5] SDB p 62 at [4.4]

[note: 6] SDB p 64 at [6]

[note: 7] SDB p 65 at [10]; SDB 91 at [1]. BAEIC 1 p 10 at [29]

[note: 8] SDB p 65 at [10]; BAEIC 1 p 11 at [30]; 1 AB 104

[note: 9] SDB p 66 at [11]; BAEIC 1 p 12 at [33]

[note: 10] SDB p 66 at [14]; SBD 91 at [2]

[note: 11] SDB p 66 at [14]; BAEIC 1 p 16 at [40]; 1 AB 114

[note: 12] SDB p 66 at [14]; BAEIC 16 at [40]

[note: 13] SDB p 70 at [28]; Plaintiff's Closing Submissions ("PCS") 50 at [89]

[note: 14] Defendant's Opening Statement ("DOS") p 16 at [33]

[note: 15] SDB p 77 at [4(d)]; DOS pp 12-15 at [23]–[29]

[note: 16] SDB p 79 at [7]; DOS pp 15-16 at [30]–[32]

[note: 17] SDB p 80 at [10]; SBD p 82 at [16]; DOS p 16 at [34]

[note: 18] BAEIC 2 p 126

[note: 19] AB Vol 1 p 104

[note: 20] AB Vol 1 p 172

[note: 21] AB Vol 1 p 198

[note: 22] BAEIC 2 p 309

[note: 23] AB Vol 1 p 242

[note: 24] DOS 17; BAEIC 2 pp 17-18 at [38]–[39]

[note: 25] Defendant's Closing Submissions ("DCS") p 35 at [48]

[note: 26] SDB p 62 at [4.2]; Plaintiff's Opening Statement ("POS") p 2 at [3.3]

[note: 27] POS p 11 at [31]; BAEIC 1 p 23 at [57]

[note: 28] SDB p 69 at [22]; BAEIC 1 p 24 at [59]

[note: 29] BAEIC 1 p 24 at [59]; PCS p 65 at [108]

[note: 30] SDB p 69 at [23]; POS p 12 at [35]

[note: 31] SDB p 69 at [24]

[note: 32] SDB pp 83–86 at [24]–[27]; DOS pp 19- 21 at [38]–[42]

[note: 33] PCS p 13 at [40]

[note: 34] AB Vol 1 p 6

[note: 35] AB Vol 1 p 5

[note: 36] Notes of Evidence ("NE") 13/5/2013 p 5 lines 4-12

[note: 37] DOS p 13 at [25]

[note: 38] NE 16/5/2013 p 20 line 13-24

[note: 39] PCS p 17 at [44]

[note: 40] NE 15/5/2013 p 74 lines 11-19

[note: 41] DCS p 15 at [23]

[note: 42] NE 15/5/2013 p 74 line 22

[note: 43] NE 13/5/2013 p 61 line 4–19

[note: 44] NE 14/5/2013 p 35 line 31– p 36 line 2

[note: 45] NE 13/5/2013 p 62 line 2–9

[note: 46] NE 14/5/2013 p 133 line 21-24.

[note: 47] PCS p 19 at [44]

[note: 48] DCS p 29 at [39]

[note: 49] PCS p 26 at [55]

[note: 50] PCS p 27 at [56]

[note: 51] BAEIC 1 p 9 at [25]

[note: 52] BAEIC 1 p 9 at [26]

[note: 53] DCS p 20 at [31]

[note: 54] BAEIC 2 pp 10-11 at [22]–[23]

[note: 55] BAEIC 3 Tab 3 p 3 at [7]–[8]

[note: 56] NE 14/5/2013 p 131

[note: 57] DCS p 24 at [34]

[note: 58] PCS p 59 at [96]–[97]

[note: 59] DCS p 38 at [55]

[note: 60] POS p 1 at [3.2]

[note: 61] AB Vol 1 p 2

[note: 62] PCS p 61 at [102]

[note: 63] AB Vol 1 p 96

[note: 64] AB Vol 1 p 97

[note: 65] AB Vol 1 p 98

[note: 66] AB Vol 1p 98

[note: 67] BAEIC 3 Tab C p 6 at [13]

[note: 68] BAEIC 3 Tab C p 7 at [16]

[note: 69] Plaintiff's Reply Submissions p 4 at [10]

[note: 70] AB Vol 1 p 116

[note: 71] AB Vol 1 p 116

[note: 72] AB Vol 1 p 126

[note: 73] BAEIC 3 Tab C p 5 at [12]

[note: 74] AB Vol 1 p 125

[note: 75] AB Vol 1 p 153

[note: 76] AB Vol 3 p 537

[note: 77] PCS p 61 at [102]

[note: 78] NE 16/5/2013 p 26 line 12– p 27 line 10

[note: 79] NE 13/5/2013 p 110 line 1–11

[note: 80] BAEIC 1 p 12 at [34]

[note: 81] AB Vol 1 p 152

[note: 82] AB Vol 1 p 175

[note: 83] AB Vol 1 p 177

[note: 84] AB Vol 3, pp 551-561

[note: 85] AB Vol 1 p 186

[note: 86] AB Vol 1 p 188

[note: 87] AB Vol 1 p 187

[note: 88] AB Vol 1 p 191

[note: 89] BAEIC 1 p 24 at [59]

[note: 90] BAEIC 2 Tab B p20 at [44]

[note: 91] AB Vol 1 p 190

[note: 92] AB Vol 2 p 419

[note: 93] AB Vol 1 p 194

[note: 94] AB Vol 3 p 833

[note: 95] PCS 82 at [134]

[note: 96] BAEIC 1 p 14 at [35] – 15 at [36]

[note: 97] NE 14/5/2013 p 89 line 12–14

[note: 98] NE 14/5/2013 p 92 line 13– p 93 line 6

[note: 99] NE 14/5/2013 pp 76-78

[note: 100] AB Vol 1 p 74

[note: 101] see DCS at para 62(d)

[note: 102] see her handwritten note at AB Vol 2 p 419 and NE 16/5/2013 at p 81

[note: 103] NE 16/5/2013 pp 87-88