IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 78

Suit No 314 of 2013

Between

First Asia Capital Investments Limited

… *Plaintiff*

And

(1) Société Générale Bank & Trust
(2) Karen Cheong Hui Er

… *Defendants*

JUDGMENT

[Contract] — [Collateral contracts]

[Contract] — [Misrepresentation]

[Contract] — [Undue influence] — [Presumed]

[Equity] — [Fiduciary relationships] — [When arising]

TABLE OF CONTENTS

First Asia Capital Investments Ltd
v
Société Générale Bank & Trust and another

[2017] SGHC 78

High Court — Suit No 314 of 2013
Steven Chong JA
15–18; 22–24 November 2016; 8 February 2017

12 April 2017 Judgment reserved.

Steven Chong JA:

Introduction

1 Following the Global Financial Crisis in 2008, many investors incurred substantial losses to their equity portfolios. One particular financial product, known as a share "accumulator", was the source of many investors' financial woes during that period, so much so that it earned itself the infamous epithet, the "I kill you later" contract.

2 Pursuant to a share accumulator transaction (henceforth referred to as a "share accumulator"), the issuer is obliged to sell shares of a company at a price known as the "strike price" to the investor over an agreed period of time. The strike price is lower than the market price at the beginning of the agreed period. As long as the market price remains above the strike price but below what is known as a "knock-out" price, the investor is obliged to purchase an

agreed quantity of shares at the strike price, thus "accumulating" shares in that company, but at a discount. If the market price rises above the knock-out price, the share accumulator is terminated. If it falls below the strike price, the investor is usually required to purchase in multiples of the agreed quantity of shares at set intervals. The knock-out price caps the issuer's loss, and thus the investor's gain, should the market price increase, but there is no corresponding limit to the investor's loss if the market price falls. The huge losses that can be caused by such unlimited downside risk probably explains why many investors have brought actions against their banks seeking to disclaim such share accumulators.

3 The usual complaint, in previous cases involving this financial product, is that the share accumulators were either plainly unauthorised or inadequately explained and misrepresented to the investor. The case before me concerns not one but 103 share accumulators which were transacted over a period of some 18 months from June 2006 to January 2008. The plaintiff investor, First Asia Capital Investments Limited ("FAC"), is a company incorporated in the British Virgin Islands ("BVI"). Its authorised signatories are Mr Lucas ("Lucas") and his wife, Ms Lenny Patricia Halim Liem ("Lenny"). FAC entered into share accumulators with the first defendant, Société Générale Bank & Trust ("SocGen"), through the second defendant, Ms Karen Cheong Hui Er ("Karen"), its relationship manager. All of these share accumulators were entered into with Lenny's written approval. What then is FAC's basis for disowning them? The answer to this basic question is not as straightforward as one would expect. This is because FAC's statement of claim ("SOC") underwent six amendments between the commencement of this suit and the trial, which, given that successive amendments bore different colour codes,

resulted in a kaleidoscopic seventh version. FAC's further attempt to amend its SOC *after the close of its case* was disallowed.

4 Although Lucas and Lenny were both authorised signatories of the account, FAC claims, *inter alia*, that there was an oral collateral agreement, between FAC, the bank, and the relationship manager, that no transaction could be validly entered into on FAC's behalf without the prior approval of Lucas since he was the "main" signatory and Lenny merely the "ancillary" signatory. However, no such distinction was made in the bank's contractual documents.

5 The main dispute turns on a key factual inquiry: was there any such oral collateral agreement? This will have to be assessed with reference to the objective evidence and the conduct of the parties. It will also entail some commonsensical inquiries. Why would a bank enter into a collateral warranty with its customer on terms which contradict its own contractual documents? Further, why would a customer rely on such a collateral agreement which it ought to have known conflicts with the bank's written terms, especially since there is a foolproof method at its disposal to achieve its intended safeguard, *ie*, removing the wife as an authorised signatory of the account? The answers to these questions must also take into account the fact that Lenny is legally trained[1] while Lucas is a very successful lawyer in Indonesia.[2]

6 The trial of this action took place over seven days in November 2016. The proceedings were bifurcated and the trial dealt only with the issue of liability. Four witnesses were called: Lucas, Lenny, SocGen's CEO, Mr Jean-

1 Transcript (17 November 2016) at p 82, lines 18–21

2 Transcript (15 November 2016) at p 25, lines 14–16

Francois, Michel, Marie Paquereau, and Karen. Given the bifurcation, FAC's and SocGen's expert witnesses on the calculation of the alleged losses were not, as originally planned, called to testify.

7 Having examined all the evidence before the court, it is clear to me that the claim has no merit or factual foundation. This action was brought by FAC in a misconceived attempt to shift responsibility for the consequences of its own investments to the bank.

Background

8 The present claim relates to FAC's two accounts with SocGen. These were Account Numbers 8882633 and 8888045.[3] I will refer to them collectively as the "FAC accounts". They were opened on 9 June 2005 and 4 January 2006 respectively.[4]

9 Karen was an employee of SocGen and was assigned to be FAC's relationship manager.[5] She was employed by SocGen from 5 November 2005 to 30 October 2010, after which she joined another bank.[6] Prior to FAC's opening of its accounts with SocGen, Lucas held seven accounts[7] with SocGen. Karen was also the relationship manager for those accounts.[8]

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3 Statement of Claim (Amendment No 6) at para 5; 1st Defendant's Defence (Amendment No 5) ("D1's Defence") at para 6

4 Affidavit of Evidence-in-Chief of Jean-Francois, Michel, Marie Paquereau's ("Paquereau's AEIC") at paras 11 and 15

5 Statement of Claim (Amendment No 6) at para 6; D1's Defence at para 5

6 Affidavit of Evidence-in-Chief of Karen Cheong Hui Er ("Karen's AEIC) at paras 3–4

7 Further and Better Particulars dated 13 October 2015 (Sum 4550 of 2015) at para 1 (Set Down Bundle, p 1461)

8 Statement of Claim (Amendment No 6) at para 6; D1's Defence at para 8

10 As mentioned, FAC opened its first account (*ie*, Account Number 8882633) with SocGen on 9 June 2005. On opening the account, FAC received SocGen's Corporate Account Booklet, which contained a number of contractual documents, the most significant of which for present purposes are: (a) the Corporate Account Application; (b) the General Terms and Conditions ("GTCs"); and (c) the Mandate for Limited Company Account ("Mandate").

11 The Corporate Account Application described the account as an "Investment Advisory Account" as opposed to a "Discretionary Investment Management Account". It stated FAC's mailing address in Singapore and provided for SocGen to receive instructions from the authorised signatories appointed in the Mandate by telephone or facsimile. It provided that the account would be operated and dealt with in accordance with the GTCs. It was signed by Lenny and Lucas as authorised signatories.[9]

12 The GTCs contained SocGen's standard terms and conditions and provided in cl 2.1 that SocGen was entitled to accept and execute instructions from any authorised signatory.[10] Clause 2.1 is in the following terms ("you" for this purpose referring to SocGen and "me" to FAC):

> You are entitled to accept and execute instructions in accordance with the mandate set out in the Account(s) Opening Application, the Mandate for Limited Company Account, letter of authority, power of attorney, limited power of attorney, or a board resolution, in respect of any transaction concerning my Account(s) given by me or by my Authorised Signatory(ies) either in person or by telephone (which need not have any call-back procedure), facsimile transmission or by electronic mail, the Internet (or by any other telecommunications or electronic mode of communication whatsoever)…

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9 Paquereau's AEIC at pp 86–88

10 Paquereau's AEIC at p 93

13 The Mandate stated that the board of directors of FAC had resolved to open an account with SocGen, and that the two authorised signatories for the FAC accounts were to be Lucas and Lenny. The director's resolution in question was passed on 8 June 2005 and signed by FAC's sole director, a company named Corporate Finance Overseas Limited.[11] According to the Mandate, authority "for signing the documents and for giving instructions to the Bank in connection with the Accounts" was exercisable "[s]ingly by any one" of the authorised signatories.[12]

14 On 11 November 2005, SocGen offered a US$20m credit facility to FAC, who accepted it on 24 November 2005.[13] This was subsequently superseded by a facility letter on 24 August 2006, which extended a number of credit facilities to FAC including one of US$30m for equity option trading.[14]

15 On 4 January 2006, FAC sent SocGen a letter of request to open a new account.[15] According to this letter, the authorised signatories for this second account (*ie*, Account Number 8888045) were to be the same as that for the first account. The new account was also to be operated in accordance with the GTCs governing the first account.

The plaintiff's case

16 FAC entered into a total of 103 share accumulators with SocGen in respect of shares in 27 companies – in other words, it entered into multiple

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11 Paquereau's AEIC at pp 70 and 73

12 Paquereau's AEIC at p 89

13 Paquereau's AEIC at p 111

14 Paquereau's AEIC at p 141

15 Paquereau's AEIC at p 135

share accumulators in respect of some companies. The trade dates of these share accumulators were from 7 June 2006 to 3 January 2008.[16] FAC entered into the 103 share accumulators using the second account it opened with SocGen, *ie*, Account Number 8888045; no share accumulators were entered into using Account Number 8882633.[17]

17 By March 2008, all but 18 of the 103 share accumulators had been knocked out.[18] On 26 March 2008, FAC sent a letter to SocGen instructing it to unwind the remaining 18 share accumulators.[19]

18 FAC alleges that its losses were suffered on all the share accumulators it entered into in respect of shares in 13 companies.[20] It is not clear why only these 13 companies were identified. The losses were computed by taking the difference in the purchase value (number of shares multiplied by the strike price) and the sale value of the share accumulators. The losses are said to amount to US$15,859,572.59.[21] I note however that in its SOC, FAC alternates between saying it has suffered loss and damage of "at *least* the sum of US$15,859,572.59"[22] and "*about* US$15,859,572.59" [emphases added].[23] Furthermore, one of its prayers for relief in its SOC is for damages to be assessed. In any event, since the trial dealt only with the issue of liability, the precise quantification of FAC's loss is not relevant for present purposes.

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16 1st Defendant's Closing Submissions at para 14

17 1st Defendant's Letter to Court dated 13 February 2017 at paras 4–5

18 1st Defendant's Letter to Court dated 13 February 2017 at para 5

19 Paquereau's AEIC at pp 2302–2303

20 Statement of Claim (Amendment No 6) at Annex 1A

21 Affidavit of Evidence-in-Chief of Lucas ("Lucas' AEIC") at p 13

22 Statement of Claim (Amendment No 6) at para 21

23 Statement of Claim (Amendment No 6) at paras 24, 38F, 43

19 FAC's claim against the defendants is based on a number of grounds.

20 First, FAC has averred that the share accumulators were in breach of an oral agreement collateral to their contract as set out in the contractual documents. Specifically, FAC has pleaded that:

(a) At all material times, Lucas was the "main signatory" of the FAC accounts whereas Lenny "functioned only as an ancillary person".[24]

(b) Either there was an agreement between the parties, or any or both of the defendants had made a representation or warranty to FAC, that when the defendants invested the monies in the FAC accounts, they would only do so with the prior approval of Lucas as the main authorised signatory.[25] FAC's use of the phrase a "warranty and/or representation and/or agreement" was confusing. It appeared to be pursuing both a cause of action in misrepresentation and one for breach of contract: there are references to FAC acting "in reliance" on the agreement/representation/warranty, but also to the "agreement" having been "breached".[26] However, its case, as developed at the trial and in its closing submissions, was that there was a collateral agreement between FAC and the defendants that the latter would not deal with the monies in the FAC accounts without Lucas' prior approval. I will henceforth approach this claim as one based on breach of a collateral agreement.

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24 Statement of Claim (Amendment No 6) at para 11A

25 Statement of Claim (Amendment No 6) at para 18

26 Statement of Claim (Amendment No 6) at para 20

(c) The collateral agreement was made orally and "on or about 2005".[27]

(d) The defendants breached the collateral agreement by entering into share accumulators without the approval or consent in writing from Lucas.[28]

21 Second, FAC has also pleaded a claim for misrepresentation. This appears to encompass claims both in contract (a misrepresentation inducing FAC through Lenny to enter into the share accumulators) and the tort of deceit.

(a) As for the contractual claim, FAC has pleaded that the defendants had obtained Lenny's signature to the share accumulators by informing her in June 2006 that Lucas had already authorised them. Subsequently, Karen continued to obtain Lenny's approval for share accumulators from September 2006 onwards, when Lenny was under the continuing impression that Lucas had authorised each of the subsequent share accumulators.[29] The defendants obtained Lenny's signature by only forwarding her the signature page of the relevant documents.[30]

(b) As regards the claim in tort, FAC has pleaded that the misrepresentation made by Karen – that Lucas had already authorised various share accumulators – was a fraudulent misrepresentation,[31] and

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27 Further and Better Particulars (22 August 2015) (Sum 1197) at para 7 (Set Down Bundle, p 1310)

28 Statement of Claim (Amendment No 6) at para 20(b)

29 Statement of Claim (Amendment No 6) at para 11C

30 Statement of Claim (Amendment No 6) at para 11D

that SocGen, as Karen's employer, is vicariously liable for her misrepresentation.[32]

22 FAC has also brought a claim for breach of fiduciary duty. It has pleaded that the defendants were under a fiduciary obligation to FAC and Lucas (though not to Lenny) which required them, amongst other things, to act in good faith and in their best interests, and to use the monies in the FAC accounts only for purposes authorised by Lucas.[33] In breach of their fiduciary obligations, the defendants executed the unauthorised share accumulators which included shares in SocGen itself. The defendants also procured Lenny's execution of the documents relating to share accumulators without fully informing her of the nature, effect and risk of such transactions.[34]

23 FAC has also pleaded that Lenny was under the undue influence of Karen when she executed the transaction documents for the share accumulators due to the "close family relationship" between them;[35] and that the undue influence of the defendants caused Lenny to enter into the share accumulators.[36]

24 Finally, FAC has framed a claim based on another alleged misrepresentation. It has pleaded that from time to time, Lucas had asked Karen whether the monies in the FAC accounts were "safe", and that Karen represented that they were.[37] This, FAC has claimed, was a misrepresentation

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31 Statement of Claim (Amendment No 6) at para 20C(1)

32 Statement of Claim (Amendment No 6) at para 21A

33 Statement of Claim (Amendment No 6) at para 28

34 Statement of Claim (Amendment No 6) at para 29(i)

35 Statement of Claim (Amendment No 6) at paras 26, 26A

36 Statement of Claim (Amendment No 6) at para 31A

because the monies in the FAC accounts, being assigned to and liable to be used for the highly-risky share accumulators, were not in fact safe.[38] It is not apparent when exactly such a misrepresentation was made – FAC only said that the misrepresentations were made on "several instances in the period from 2005 to 2007".[39]

Procedural history

Changes in the statement of claim

25 FAC's SOC has gone through several rounds of amendments. There are three key aspects of this case on which FAC has not taken an entirely clear or consistent position.

26 The first aspect is the number of unauthorised share accumulators.

(a) In its original SOC, FAC pleaded that neither Lucas nor Lenny authorised the defendants to use any monies, shares or assets for any investment purposes. This suggested that none of the share accumulators were authorised.[40]

(b) In Karen's request for further and better particulars in relation to SOC (Amendment No 3), FAC was asked to specify which share accumulators the defendants had transacted without the approval or consent from Lucas. FAC specified 22 share accumulators as being unauthorised.[41] In a response to SocGen's request for particulars, filed

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37 Statement of Claim (Amendment No 6) at para 20(B)(1)

38 Statement of Claim (Amendment No 6) at para 20B(2)

39 Further and Better Particulars dated 13 October 2015 (Sum 4550) at para 18 (Set Down Bundle, p 1332)

40 Statement of Claim dated 18 July 2013 at para 10

on the same day as its response to Karen's request, FAC specified the same 22 share accumulators as those which the defendants had procured the execution of by sending Lenny only the last page of the transaction documents.[42] It remains unclear why FAC was, at that time, appearing to challenge only 22 share accumulators, or why it was alleging different grounds of lack of authorisation in respect of these share accumulators.

(c) In any case, in its SOC (Amendment No 4) , FAC amended paragraph 20 to assert that the specific share accumulators entered into without the consent in writing from Lucas were the 22 transactions specified in the request for particulars and, "additionally", those specified in an Annex-1A to the SOC. That Annex-1A contains the transaction documents of the 103 share accumulators mentioned previously. The 22 share accumulators referred to earlier are in fact part of those 103 share accumulators. FAC has maintained this position in the most current iteration of the SOC.

27 The second aspect concerns how the collateral agreement was breached.

(a) In SOC (Amendment No 1), FAC pleaded that the defendants would only deal with or invest the monies in the account "with the prior written approval of the representatives as [FAC's] only authorised signatories to the Accounts", and that the defendants had

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41 1st Defendant's Closing Submissions at para 75; Further and Better Particulars dated 13 October 2015 (Sum 4550) at para 24(b) (Set Down Bundle p 1466)

42 Further and Better Particulars filed 13 October 2015 (Sum 4509), para 24(b) (Set Down Bundle, p 1341)

entered into share accumulators without the approval or consent *in writing* from "the representatives" – that is, Lucas *or* Lenny.[43]

(b) In SOC (Amendment No 2), FAC took a different position: that the defendants would only deal with or invest the monies "with the prior written approval of Mr Lucas as [FAC's] main authorized signatory"; and that the defendants had entered into the share accumulators without "the approval or consent in writing from Mr Lucas".[44] The previous averment that approval from Lenny would suffice was deleted.

(c) In SOC (Amendment No 3), the position was that the defendants would only deal with or invest the monies with the "prior approval of Mr Lucas"; and that the collateral agreement was breached because the defendants had invested in share accumulators "without the approval or consent from Mr Lucas".[45] It appears that there was no longer any requirement that Lucas' consent or approval had to be in writing.

(d) In SOC (Amendment No 4), FAC appeared to revert to the position that Lucas' consent or approval had to be in writing. It maintained in one paragraph that the defendants were only to deal with or invest the monies "with the prior approval of Mr Lucas", but pleaded separately that the defendants had invested in share accumulators "without the approval or consent *in writing* from Mr

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43 Statement of Claim (Amendment No 1) at paras 18 and 20

44 Statement of Claim (Amendment No 2) at paras 18 and 20

45 Statement of Claim (Amendment No 3) at paras 18 and 20

Lucas" (emphasis added).[46] This has remain unchanged in the subsequent amended SOCs.

28 The third aspect concerns the defendants' misrepresentation that Lucas had already authorised the transaction.

(a) FAC only pleaded for the first time in SOC (Amendment No 5), paragraph 11C – some two months before the trial – that: (i) the defendants obtained Lenny's signature by informing her in or about *June 2007* that Lucas had already authorised the share accumulators, and that all she had to do was sign on the relevant documents; and (ii) from about *September 2007* onwards, Karen, knowing that Lenny had the continuing impression that Lucas had authorised the share accumulators, continued to obtain Lenny's signature for the share accumulators without explaining the nature of the transactions to her.

(b) Following an amendment to the SOC – that is, Amendment No 6 – which FAC applied to make on the first day of trial, and which I allowed, FAC's case was that the relevant dates for the misrepresentation referred to in paragraph 11C were not June and September 2007 but *June and September 2006*.[47]

The striking-out application

29 I should also mention that on 11 April 2014, SocGen filed an application in Summons No 1834 of 2014 to strike out FAC's claim. One of its prayers was for FAC's SOC (which, at that time, was SOC (Amendment

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46 Statement of Claim (Amendment No 4) at paras 18 and 20

47 Statement of Claim (Amendment No 5) at para 11C

No 2)) to be struck out in its entirety. On 3 June 2014, the Assistant Registrar hearing the case struck out parts of the SOC.[48] Both FAC and SocGen appealed.

30 On 14 August 2014, I allowed FAC's appeal against the Assistant Registrar's decision and dismissed SocGen's appeal.[49] I did not think it right to strike out the SOC in its entirety for a number of reasons, the most significant of which was that FAC's counsel, Mr Peter Gabriel, persuaded me that there were two specific matters which should be properly ventilated at trial.

(a) First, in response to my question as to why Lucas' instructions to obtain his prior approval was not reduced in writing, Mr Gabriel informed me that Karen was aware that Lucas had no interest in share accumulators and, for that reason, she had specifically sought Lenny's authorisation *only* for the share accumulators while all other transactions were authorised by Lucas. The submission at that stage was that Karen had deliberately bypassed Lucas in respect of the risky share accumulators and instead sought Lenny's authorisation knowing full well that Lucas would not have approved them.

(b) Second, FAC had pleaded that "all and/or some of [Lenny's] signatures were obtained after the conclusion of the transactions";[50] and there were at least two share accumulators that seemed to have been executed even before the transaction document was sent to Lenny for her signature. It appeared to be possible, as FAC had pleaded, that Lenny's signatures were obtained through the process of only the

48 Order of Court 4927 (Set Down Bundle, p 1579)

49 See Minute Sheet (RA 210) at pp 5–6

50 Statement of Claim (Amendment No 2) at para 11E

signing page of each of the transaction documents being forwarded to Lenny.[51] The suggestion was that Lenny signed them without knowing or understanding the nature of the transaction documents.

31 It is important to note that at the time when this appeal was heard before me, discovery had not taken place. In particular, the transcripts of the telephone instructions between Lenny and Karen (which featured prominently at the trial) were not before the court. As will be seen, however, both these points were refuted at trial (I deal with each of them at [63] and [75]–[76] respectively). In fact, contrary to Mr Gabriel's submission, when the evidence unfolded (see [66] below), it became clear that Lenny had authorised numerous other transactions *beyond* the share accumulators. Perhaps that is why FAC did not actively pursue these points either at trial or in its closing submissions.

Issues

32 Based on the facts and pleadings set out above, and as agreed by the parties, there are seven issues to be addressed:

(a) Was there a collateral agreement that the defendants would not deal with the monies in the FAC accounts without the prior approval of Lucas as the main authorised signatory?

(b) If so, what was the legal effect of such a collateral agreement given the contractual terms governing the banker-customer relationship between FAC and SocGen? Did the defendants breach that agreement by entering into the share accumulators?

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[51] Statement of Claim (Amendment No 2) at para 11D

(c) Did Karen misrepresent to Lenny, prior to entering into each share accumulator transaction, that Lucas had already authorised the share accumulators? If so, is SocGen vicariously liable for Karen's misrepresentation?

(d) Is FAC permitted by its pleadings to advance the case that notwithstanding Lenny's written authorisation of the share accumulators, Lenny had in fact not provided prior oral authorisation either directly or through Lucas and Lenny's personal secretary, Erlina? This issue arose during the trial because FAC claimed that Lenny did not provide prior oral authorisation for some or all of the share accumulators. It also emerged that Karen might have taken instructions for some share accumulators through Erlina.

(e) Did the defendants owe fiduciary duties to FAC?

(f) Did the defendants exercise undue influence over Lenny?

(g) Did the defendants misrepresent that the monies in the FAC accounts were "safe"?

33 The collateral agreement and misrepresentation arguments are intertwined. A determination that there was never any such collateral agreement would effectively dispose of all the issues save for the allegations of undue influence and breach of fiduciary duties which are peripheral issues raised by FAC.

Analysis

Whether there was a collateral agreement

34 As will become apparent in the analysis below, the collateral agreement argument fails on multiple fronts: (a) the vagueness of FAC's pleadings; (b) the inadmissibility of evidence to prove the alleged collateral agreement; (c) FAC's abject failure to adduce any credible evidence of the agreement; and (d) the existence of the collateral agreement being at complete odds with the contemporaneous objective evidence.

The collateral agreement is vaguely pleaded

35 The collateral agreement is pleaded in extremely vague terms. It is important to bear in mind that, in the interests of commercial certainty, a finding of a collateral agreement alongside a main contract will not lightly be made; there must be clear proof that all legal requirements of a binding contract have been met, and that its terms are certain (see *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 ("*Dynasty Line*") at [18]–[19]).

36 That a collateral agreement is alleged to have been made orally does not mean it does not need to be pleaded with a degree of specificity. In particular, it must at least be reasonably certain when the collateral agreement was concluded. I observed in *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962, in the context of a striking-out application, that even for a contract which was made orally, there could only be one date on which the contract could be said to have been concluded, and that it was, in that case, "plainly unarguable to assert that an oral contract was concluded over a two-month period" (at [42]). FAC's pleading here is even less precise

than that. It has averred that the collateral agreement was formed "in 2005". It is plainly inadequate to simply allege that an oral agreement was made in a particular calendar year. Such a general pleading makes it both difficult for the opposing side to know the case it has to meet, and embarrassing for the court to determine based on the evidence whether such an agreement was ever formed.

37 It was also observed in *Dynasty Line* (at [25]) that a court would be "slow to replace the terms of a written contract with the inconsistent and *uncertain* terms of a collateral agreement" [emphasis added]. Those words of caution are particularly apposite here. As mentioned at [27] above, FAC has not taken a consistent stand on the terms of the collateral agreement. It first pleaded that the defendants were not to invest the FAC account monies without the prior approval of Lucas *and* Lenny, then amended this to say that only Lucas could grant prior approval. It also vacillated on whether such prior approval had to be in writing. There is some force in the defendants' submission that FAC appeared to be tailoring its case to meet points raised by them. For example, at the hearing of the striking-out application before the Assistant Registrar, the defendants pointed out that the requirement of Lucas' "prior written approval" in the SOC (the version current at that time was SOC (Amendment No 2)) was inconsistent with the GTCs.[52] Clause 2.1 of the GTCs permitted the defendants to take instructions from the authorised signatories "either in person or by telephone" as well (see [12] above). FAC then amended its SOC to remove the reference to approval or consent being "in writing". The inconsistent and frequent amendments to the SOC with regard to the collateral agreement are symptomatic of an inherently unreliable claim. If

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52 1st Defendant's Closing Submissions at para 69

there was such an alleged collateral agreement, it should be capable of a definitive claim. Yet, it kept evolving *throughout* the proceedings.

38 There appears, however, to be a much more fundamental objection to FAC's claim than its inexact pleadings: that evidence of the collateral agreement is inadmissible pursuant to s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) because its terms are inconsistent with the contractual documents between FAC and SocGen.

Evidence of the collateral agreement is inadmissible

39 Once the terms of a contract have been reduced in writing, evidence of an oral agreement which contradicts or is inconsistent with its terms will not be admissible. Section 94(*b*) of the Evidence Act provides:

> **Exclusion of evidence of oral agreement**
>
> **94**. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:
>
> …
>
> (*b*) the existence of any separate oral agreement, *as to any matter on which a document is silent and which is not inconsistent with its terms*, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
>
> [emphasis added]

40 The Court of Appeal has stated on a number of occasions, with reference to s 94(*b*), that evidence of a collateral agreement whose terms are inconsistent with the main contract is inadmissible (see *Latham Scott v Credit*

Suisse First Boston [2000] 2 SLR(R) 30 at [21], referring to its previous decision in *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR(R) 77 at [14]–[15]); see also *Dynasty Line* at [23]).

41 FAC cannot rely on s 94(*b*) to prove the oral collateral agreement. Section 94(*b*) provides that evidence as to a matter on which the contract is "silent and which is not inconsistent with its terms" may be proved. However, according to the collateral agreement pleaded by FAC, the defendants could act only on the instructions on Lucas. That is clearly inconsistent with cl 2.1 of the GTCs, which permitted SocGen to act on the instructions of either authorised signatory – that is, Lucas or Lenny.[53] Lucas agreed under cross-examination that the collateral agreement, in restricting Lenny's mandate as an authorised signatory, was inconsistent with the contractual documents.[54]

42 Further, even if the collateral agreement were not inconsistent, s 94(*b*) also provides that regard must be given to the formality of the contractual document in deciding whether to admit evidence of a collateral agreement. The GTCs contained a full description of the contracting parties' respective rights and obligations. It is highly unlikely that SocGen would agree to be bound by orally agreed terms which are not contained in and, more importantly, are contrary to the GTCs. This would be a further reason not to admit evidence of the collateral agreement in any event.

43 FAC submits that s 94 of the Evidence Act only applies if *both* written and oral agreement should come into existence at the same time whereas, the oral collateral agreement in this case was concluded before the written

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53 1st Defendant's Closing Submissions at para 117

54 Transcript (16 November 2016) at p 56, lines 11–16

contract.[55] I cannot agree. There is nothing in s 94 to suggest that only oral agreements which come into existence at the time of the written agreement (and which contain inconsistent terms) are precluded. In any event, there is clear authority against FAC's assertion. In *Dynasty Line*, the pleaded collateral agreement was allegedly entered into *before* the main contract; the Court of Appeal nonetheless found (at [22]–[23]) that it would have been inconsistent with the main contract itself, and that evidence of it would therefore have been inadmissible at trial by virtue of s 94(*b*) of the Evidence Act.

44 Hence, evidence of the collateral agreement is not admissible. In any event, as I will now explain, it is clear that based on the evidence, there was never any such collateral agreement.

Inference that collateral agreement existed cannot be drawn

45 It is common ground that there is no objective documentary evidence, either contemporaneous or otherwise, mentioning the collateral agreement. Nor was the collateral agreement referred to in any letter of demand prior to the filing of the SOC. FAC is essentially asking this court to draw an inference that the defendants *would have* entered into such a collateral agreement with FAC. This inference is supported, it claims, by two facts: first, that the monies in the FAC accounts and all the previous accounts he had held with SocGen were at all times Lucas' money, and second, that Lenny was only added as an authorised signatory to the FAC accounts on Karen's advice so that she could benefit from the right of survivorship.[56] This submission fails for a number of reasons.

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55 Plaintiff's Closing Submissions at para 66

56 Plaintiff's Closing Submissions at para 26

46 First, there is no logical connection between the ownership of monies in the FAC accounts and the question of who is authorised to give instructions to use those monies. Once the owner of the funds has agreed to put another person as an authorised signatory to the bank account, the legal consequences which flow from such a nomination have nothing to do with the alleged sole ownership of the funds. In any event, Lucas was not the beneficial owner of all the monies in the other seven accounts he had opened with SocGen, but only of the monies in six of them.[57]

47 Second, the right of survivorship does not appear to have any relevance here. FAC's submission is this: Lenny was named as a joint account holder of two of Lucas' *individual accounts* with SocGen for the right of survivorship to operate; therefore, it follows that Lenny must similarly have been named as an authorised signatory to FAC's *corporate account* for the right of survivorship to operate. However, it is not clear how the right of survivorship enters into the picture. Mr Gabriel accepted that the right of survivorship does not operate in respect of FAC's corporate account.[58] FAC has not explained how Lenny would benefit from the right of survivorship by being named as an authorised signatory to a corporate account.

48 Third, even if the two facts relied on by FAC somehow support the existence of a collateral agreement, it does not follow that the defendants would have entered into such a collateral agreement *orally* despite knowing that the terms of the banker-customer relationship were governed by the contractual documents which, significantly, contained contrary provisions. There is no compelling reason why they would enter into a collateral

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57 Transcript (16 November 2016) at p 5, lines 4–13

58 Transcript (15 November 2016) at p 11, lines 12–13

agreement inconsistent with the written terms of the contract. Clause 37 of the GTCs allowed SocGen to amend any of the terms of the agreement by sending a notice *in writing*.[59] There is therefore no reason why SocGen would resort to varying the terms orally. Lucas himself admitted that given the inconsistency between the collateral agreement, which effectively restricted Lenny's mandate as an authorised signatory, and the terms of the contractual documents, it would have been of the utmost importance for it to be reduced into writing.[60] The only reason he did not do so, he explained, was that he trusted Karen.[61] It is difficult to believe that Lucas would not have wanted the security of a written collateral agreement given that he is a commercial lawyer who would have, by his own admission, understood the importance of evidence.[62]

49 What makes the existence of the collateral agreement even more untenable is that there were simpler ways of achieving Lucas' purpose. If FAC and the defendants intended an agreement that the monies were not to be invested without Lucas' approval, they could have achieved this by (a) having Lucas listed as the sole authorised signatory; or (b) amending the terms of the written contract. Either of these ways would have been eminently preferable to an oral collateral agreement, which would be susceptible to ambiguity and thus to dispute.

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59 Paquereau's AEIC at p 99

60 Transcript (16 November 2016), at p 56, line 16; p 57, line 1

61 Transcript (16 November 2016) at p 59, line 15–18

62 Transcript (16 November 2016) at p 57, lines 14–16

50 Therefore, I reject FAC's submission that I should draw the inference that the collateral agreement must have existed based on the two facts it has alleged.

Objective contemporaneous evidence to the contrary

51 Going further, however, when the objective circumstances are examined, it is beyond doubt that there was no collateral agreement of the sort alleged by FAC.

(a) The collateral agreement is premised on Lenny being an "ancillary person". However, the evidence suggests that she actively made the decisions to enter into the share accumulators (and, indeed, other investment products as well).

(b) The collateral agreement is to the effect that that no transactions were to be entered into on the FAC accounts without Lucas' prior approval. Yet, leaving aside the share accumulators, Lucas was never asked for his approval for any other transactions entered into using the FAC accounts.

(c) If there were a collateral agreement that the monies in the FAC accounts could not be used for transactions without Lucas' instructions, the defendants would have breached that agreement by accepting the authorisation of Lenny for the share accumulators. Yet, FAC raised no complaint until February 2008 even though the first share accumulator was transacted in as early as June 2006.

52 I expand on these points in turn.

(1) Lenny was not an "ancillary person"

53 FAC's case on the collateral agreement is premised on Lenny being, as described in the SOC, an "ancillary person" (and Lucas, the "main" authorised signatory). Lenny claimed that she was named as an authorised signatory to the FAC accounts to sign off on documents when Lucas was not around and had given prior approval to do so,[63] and that she would not have understood what "accumulators" were or the risks associated with such financial products.[64] She said that she played a "passive" role as an authorised signatory and had no authority to enter or exit transactions.[65] Crucially, Lenny testified that Lucas had told her of her restricted mandate as an authorised signatory of the FAC accounts.[66] In other words, she knew of this alleged collateral agreement between Lucas and the defendants. There are two main assumptions underpinning FAC's case theory that Lenny was an "ancillary" person: first, Lenny did not understand share accumulators; second, she had no authority to enter or exit transactions.

54 The transcripts of Lenny's conversations with Karen during the period of the share accumulators present an entirely different picture: they show that Lenny was actively making investment decisions in respect of the share accumulators. In fact, Lenny even regarded the FAC accounts as her own. Her active participation in the share accumulators completely contradicts the alleged collateral agreement restricting her role to only signing documents when Lucas had given prior approval. Lenny made the decisions on the share

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63 Affidavit of Evidence-in-Chief of Lenny Patricia Halim Liem ("Lenny's AEIC") at para 9

64 Lenny's AEIC at para 15

65 Transcript (18 November 2016) at p 34, lines 11–16; p 35, lines 10–18

66 Transcript (18 November 2016) at p 40, line 23; p 41, line 4

accumulators because she was, as stated in the contractual documents, permitted to authorise transactions singly. I turn now to highlight the salient extracts of the transcripts which bear out this inevitable conclusion. I should mention that the full audio recordings of these were played at the trial, quite often at Lenny's insistence. The transcripts bear out two main points.

55 First, Lenny clearly understood the nature of share accumulators.

(a) In a conversation with Karen on 19 October 2007, Karen began by reminding Lenny that Lenny had asked her to "check [an] accumulator for Keppel".[67] Lenny had done so because she was interested in deciding whether or not whether she should purchase that share accumulator.[68]

(b) In a conversation on 19 September 2007, Karen asked whether Lenny wanted to sell the SocGen accumulator she had bought the previous day. Lenny told her to "wait" and confirmed that she did not want to take profit yet.[69]

(c) Lenny could even ask Karen about the four or five different accumulators over the course of one conversation: on 11 October 2007, she instructed Karen to take profit on four different accumulators (China Citic, Bank of China, Fraser & Neave, and Keppel) and to take profit on another accumulator (DBS) the next day.[70]

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67 Paquereau's AEIC at p 1230

68 Transcript (18 November 2016) at p 25, line 23; p 26, line 2

69 Karen Cheong's AEIC at p 921

70 Karen Cheong's AEIC at pp 1076–1096

56 Lenny was also aware of the risks of share accumulators. In a conversation on 7 December 2007:

(a) Lenny asked Karen whether she had queued for a particular share accumulator. Karen replied that she had not yet done so because the "price [had] gone up quite a lot" and the "risk [was] very high".[71]

(b) They moved on to discuss a different share accumulator (in a coal company named China Shenhua). Karen reminded Lenny she had bought two of these share accumulators. Lenny thought it was "too little".[72] Karen was concerned that it would be best not to buy "too much", reminding her that if the market price of the shares dropped, FAC would "need to buy double everyday".[73] She also advised Lenny not to have too many coal companies in her portfolio and that she had to "be careful" because the market price might be overvalued.[74]

The conversation illustrates that Lenny was advised about, and was aware of, the risks of entering into share accumulators.

57 The second point is that Lenny clearly exercised the authority to enter and exit transactions. The conversations referred to above already demonstrate that she exercised such authority. Going further, however, the transcripts show that she even regarded the monies in the FAC accounts as hers to use for investments. Lenny even told Karen *not* to accept Lucas' instructions. In a conversation on 24 October 2007, Karen told Lenny that she had suggested

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71 Paquereau's AEIC at p 2260

72 Paquereau's AEIC at p 2265

73 Paquereau's AEIC at p 2266

74 Paquereau's AEIC at p 2268

that Lucas "borrow [money] from First Asia". Lenny responded that the FAC account was her "territory".[75] In short, Lucas was asking for a transfer of funds and Lenny was instructing Karen to *refuse* his request. In another conversation on 24 October 2007, Karen suggested that she could transfer certain shares out of the FAC account to one of Lucas' accounts. Lenny told her, "You can't transfer it … Yeah, we, let's not give it to him. We, we, it's ours" – "ours" here meaning she and Karen, in the sense that Karen was to take instructions only from her and not Lucas in respect of the FAC accounts. When Karen said she would keep the funds in the FAC account, Lenny's response was, "Yeah, we hold onto our own, we are responsible for our own."[76] When, at trial, Lenny tried to explain this statement away, she ran into further difficulties. Lenny said that she was only trying to give the impression that the FAC account was her own money, when it was in fact Lucas'[77] – but giving the impression that it was her own money suggests that Lenny was not in fact an ancillary person who had no authority to transact on the FAC accounts. Certainly there would be no reason for Karen or SocGen to believe that Lenny, as a duly authorised signatory, was in fact not authorised to give instructions in respect of the FAC accounts.

58 I will highlight two further difficulties raised by Lenny's explanations at trial when she was confronted with the evidence of the transcripts. First, her constant refrain was that she and Karen were just "telling stories". What she meant was that she was merely giving "input" and not instructions to Karen as to whether to enter or exit the share accumulators; Karen still had to obtain Lucas' consent after getting her approval. However, not only was there no

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75 Karen Cheong's AEIC at pp 1179 and 1183

76 Karen Cheong's AEIC at pp 1206–1209

77 Transcript (17 November 2017), p 67, lines 10–22

record in the transcripts of her having asked Karen to obtain, additionally, Lucas' approval for any particular transaction, this would not have been a commercially sensible practice given that share prices are by their nature time-sensitive and therefore could have moved by the time Karen sought and obtained Lucas' confirmation.

59 Second, Lenny said it was Karen's "habit" to continue asking her for instructions and that she was surprised that Karen was calling her when she should have been calling Lucas in respect of the share accumulators. However, there was nothing in the conversations that indicated any tone of surprise on her part at being called or that she had directed Karen to seek Lucas' approval or even inquired whether Lucas had given his approval. Instead, the evidence is to the contrary. She not only readily discussed the share accumulators with Karen, but also told Karen that the FAC accounts were her "territory".

60 From the transcripts, (and I should add that the transcripts Lenny was asked about at trial are only a fraction of those admitted in evidence) my clear impression is that Lenny was an informed investor who was content to manage the share accumulators on her own. She clearly exercised her authority as an authorised signatory to enter into share accumulators. This effectively gives the lie to FAC's case that Lenny was merely an ancillary person which somehow supports the existence of a collateral agreement limiting her authority in respect of the FAC accounts.

(2) Lucas was not asked directly to authorise transactions on the FAC accounts

61 Share accumulators were not the only investments transacted using the FAC accounts. FAC also transacted in a wide range of other products such as

commodity options, equity-linked notes, and dual currency investments. FAC is, however, not claiming that any of these transactions was unauthorised.

62 If there was in fact a collateral agreement that the monies in the FAC accounts could not be used without Lucas' prior approval, and since FAC is not challenging the other transactions, it should follow that Lucas must have *directly* given his prior approval for these other transactions on the FAC accounts. An examination of the other transactions which were entered into using the FAC accounts reveals that this was not the case.

(a) It is clear that written authorisation was never obtained from Lucas even for these transactions. It is not in dispute that Lenny signed *all* the transaction documents for *all* investments of the FAC accounts. Mr Gabriel informed the court that he was not aware of any transaction document relating to the FAC accounts which bore Lucas' signature.[78]

(b) Nor did it appear to be the case that Karen sought Lucas' oral approval for these non–share accumulator transactions which were subsequently approved in writing by Lenny. Lucas claimed that Karen would call him and explain these transactions to him, and that he would approve them over the phone.[79] Yet he admitted that there were no transcripts or audio recordings of any of these conversations he purported to have had with Karen in which he had allegedly authorised the non-share accumulator transactions.[80]

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78 Transcript (23 November 2016) at p 36, lines 22–24

79 Transcript (15 November 2016) at p 34, lines 6–22

80 Transcript (15 November 2016), p 120, lines 4–14; Transcript (16 November 2016) at p 65, line 21; p 66, line 7

(c) In fact, it seems likely, given the absence of any evidence of Lucas having authorised *any* transaction, that most, if not all, the transactions on the FAC accounts were – as was the case with the share accumulators – authorised by Lenny first orally followed by her written confirmations. In truth, it is not Lucas' evidence that he had personally given his prior authorisation for Lenny to enter into these transactions. Rather, what he in fact meant was that he had *no objection* to Lenny's entering into these transactions using monies in the FAC accounts – he acknowledged this twice during his cross-examination.[81]

The collateral agreement mandated that Lucas' approval had to be given for any transaction on the FAC accounts, yet all of the above shows that his approval was never in fact sought, much less given, for *any* transaction, whether for share accumulators or other investment products. The irresistible and only feasible conclusion is that there was never any such collateral agreement. There was no restriction whatsoever on Lenny, as an authorised signatory, from entering into transactions using the monies in the FAC accounts.

63 I pause here to address the first of the two matters which Mr Gabriel had raised at the striking-out application (see [30(a)]). The argument that Karen sought only Lenny's authorisation for the share accumulators but obtained Lucas' authorisation for all other transactions is simply unsustainable given, as I have just found, that there was no evidence that Lucas had personally given authorisation for any transaction on the FAC accounts. Quite

[81] Transcript (15 November 2016) at p 116, line 23; p 117, line 1; Transcript (15 November 2016) at p 128, lines 3–8

the contrary: it was Lenny who appeared to have authorised all the transactions. The argument that Karen deliberately bypassed Lucas because she *knew* that Lucas would not have approved any share accumulator is plainly misconceived as Lucas admitted that there was no evidence of any conversation in which he had informed Karen not to enter into share accumulators.[82]

(3) FAC did not raise any complaint about the share accumulators till much later

64 There is one final point which effectively demolishes FAC's case on the collateral agreement. FAC received numerous confirmations of the share accumulators. Lucas would have had ample opportunities to object to the share accumulators on the ground that the defendants had breached the collateral agreement in not seeking his prior approval. Yet, the first time Lucas raised any objection was on 15 February 2008, when he claimed in a letter to SocGen that all the share accumulators "were entered into without [his] knowledge or consent".[83] According to Lucas, he only discovered at the end of 2007 that share accumulators had been entered into: he had tried to transfer funds from the FAC accounts but was told that the money was "blocked" because the credit facility had been fully drawn upon on account of the share accumulators; it was then that he learnt from Lenny that she had entered into such share accumulators.[84]

65 These allegations have no merit at all given that FAC had received, during the period of the share accumulators: (a) term sheets for all the share

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82 Transcript (15 November 2016), p 131, line 24; p 132, line 5

83 Paquereau's AEIC at p 2300

84 Transcript (15 November 2016) at p 62, lines 15–25; p 73, line 25; p 74, line 6

accumulators (save for two which were transacted solely by telephone instructions);[85] (b) confirmation sheets for individual share accumulators; and (c) monthly statements of accounts at its registered address.[86] The term sheets were faxed to FAC whereas the confirmation sheets and monthly statements were sent to its Singapore registered address. The confirmation sheets contained the following provision: "Unless we hear from you within 7 days from the above date, this transaction is deemed to be true and accurate". The monthly statements of accounts contained entries of the share accumulators. Each page of the monthly statements contained a similar provision: "Unless you notify us within 14 days after delivery of the statement, all the entries in this statement will be deemed to be complete, accurate, conclusive and binding on you". The importance of checking the monthly statements, in particular, must have been known to FAC when it first opened the corporate account: Clause 32.1 of the GTCs provided that FAC was to examine all statements of accounts and notify SocGen of any "unauthorised transaction(s)" within 14 days, failing which the transactions would be "binding and conclusive", no claim on the grounds of "lack of authority" being admissible thereafter.[87] Despite all this, Lucas testified that he never checked any of the monthly statements sent to FAC's registered address in Singapore.[88] I find Lucas' explanation incredible, to say the least. Given the volume of the confirmations and statements sent to FAC over a fairly long period of time, it is unbelievable that an educated and commercially astute person like Lucas would not have bothered to check any of these financial documents.

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85 D1's Closing Submissions at para 15

86 Paquereau's AEIC, JFP-22

87 Karen's AEIC at p 380

88 Transcript (16 November 2016) at p 76, lines 8–10

66 Even assuming that Lucas did not check any of the confirmations or monthly statements, it is hard to believe that Lucas was completely unaware of any of the share accumulators Lenny had entered into. As mentioned, Lenny entered into a variety of other investment products using the FAC accounts. Lucas has not claimed that he was unaware of these transactions. He admitted that he did talk to Lenny about some of the transactions on the FAC accounts.[89] In particular, he said he always knew what Lenny was doing with regard to, for example, currency transactions, only that he had never talked to Lenny in any way about share accumulators.[90] This explanation is self-serving and I reject it. There is no conceivable reason why Lucas would be aware of all the other transactions *except* those relating to share accumulators. It is difficult to believe that Lenny would not have mentioned the share accumulators to Lucas when profits were made. And on this point, I note that there are in evidence fax transmissions from Karen to FAC, all of which were sent in February 2007, informing it of the profit it had made from the sale of shares acquired through share accumulators.[91]

Conclusion: the collateral agreement did not exist

67 Ultimately, since the collateral agreement was alleged to have been made orally, whether or not it existed is necessarily a matter of inference. The facts relied on by FAC do not, as it has contended, *remotely* support the inference that the collateral agreement existed. The objective circumstances confirm that the collateral agreement did not and could not have existed. The inescapable conclusion is that there was simply no collateral agreement

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89 Transcript (15 November 2016) at p 30, lines 1–3

90 Transcript (15 November 2016) at p 133, lines 7–22

91 Karen's AEIC at p 2212–2214

between FAC and the defendants that the latter could only transact on the FAC accounts with Lucas' prior approval. The collateral agreement was conjured up by FAC to disclaim the share accumulators which it was obviously bound by.

Whether the defendants misrepresented to Lenny that Lucas had given prior approval for the share accumulators

68 As mentioned (at [28(a)] above), this claim in misrepresentation was introduced belatedly, just two months before the trial. It was not mentioned in any complaint to FAC or in any of the earlier versions of the SOC. In addition, FAC initially claimed that the misrepresentation was in June 2007, then changed its mind and said it was in June 2006. Therefore, this claim has to be viewed with a degree of scepticism. It must also be viewed with caution given that FAC is accusing Karen of having made such misrepresentations fraudulently.

69 In any case, FAC's claim on this misrepresentation is untenable. Mr Gabriel accepted in closing submissions that the existence of the collateral agreement is foundational to this misrepresentation. If there were no collateral agreement that the defendants could only act with Lucas' prior approval, there would be no reason for the defendants to misrepresent that Lucas had already given prior approval when asking Lenny to sign off on the share accumulators. Since I have found that no collateral agreement existed, it is therefore improbable that any such misrepresentation was made.

70 Given this finding, there is no need to consider whether SocGen is vicariously liable for Karen's purported misrepresentation.

Whether Lenny had not in fact provided prior oral authorisation of the share accumulators

71 FAC has not pleaded that the share accumulators are unauthorised because Lenny did not provide prior *oral* authorisation despite having signed the written term sheets. Its case has always been that Lenny authorised all the share accumulators in question, but that her authorisation should have no legal effect either because Lucas' prior approval had not been sought, or because her authorisation had been procured by misrepresentation. While FAC insists that it has pleaded it, the paragraphs in the SOC it has referred to do not mention anywhere that Lenny had not orally authorised any of the share accumulators. Curiously, FAC claimed that the following sentence in the SOC supports its case: "[FAC] avers that the Defendants had used such monies deposited in the Account as well as such shares and/or assets, for transactions unauthorised by [FAC]".[92] This sentence is *not* found in its latest version of the SOC, which is SOC (Amendment No 6). While it did appear in the *original* SOC (at paragraph 13), it was *deleted* in SOC (Amendment No 1). It is thus disingenuous for FAC to still rely on this.

72 In any event, any argument that Lenny had not provided prior oral authorisation is plainly unsustainable. Lucas accepted, in cross-examination, that Lenny had authorised all the share accumulators (although he maintained that his authorisation, which was required, was not obtained).[93]

73 Quite apart from its failure to plead this point, FAC is also precluded by the contractual documents from claiming that the share accumulators were unauthorised. As mentioned (at [64]), the confirmation sheets and monthly

92 Plaintiff's Closing Submissions at para 109

93 Transcript (15 November 2016) at p 27, lines 9–16

statements were sent to FAC, who raised no objection within the stipulated time for doing so.

74 For completeness, I note that FAC has alleged one particular accumulator (for SocGen shares) as having been entered into without prior oral authorisation from Lenny. The trade date of this accumulator was 16 October 2007.[94] On that day, Karen called, not Lenny, but Erlina, the personal assistant to Lucas and Lenny.[95] Karen asked Erlina whether she wanted to "do" the SocGen accumulator.[96] Erlina eventually said, "Okay, lah, do it, lah", to which Karen replied, "We see the market tomorrow".[97] Despite this reply, Karen did execute the accumulator that day, *ie*, 16 October 2007. It appears that Karen did obtain Lenny's authorisation. She called Lenny about half an hour after having called Erlina. At one point in the conversation, she mentioned to Lenny (quite abruptly, given that the conversation till then had been about a currency investment) that she would "do" the "SG first" (presumably this meant the SocGen accumulator).[98] It appears that Lenny gave her approval.

75 Whether or not Lenny did in fact orally authorise the transaction is of no legal consequence given, first, that it has not been pleaded that her oral authorisation was not given (Mr Gabriel agreed there was nothing in FAC's pleadings suggesting that Lenny signed the term sheets despite not having given prior oral instructions to enter into the share accumulators[99]), and

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94 Karen's AEIC at p 1105

95 Transcript (15 November 2016) at p 14, lines 18–19

96 Karen's AEIC at p 1124

97 Karen's AEIC at p 1125

98 Karen's AEIC at p 1136

secondly because Lenny did sign the term sheet for this accumulator.[100] In short, even if Karen had placed any order without Lenny having first given oral authorisation, FAC would still be bound since Lenny gave written confirmation by signing the term sheets. It is not in dispute that Lenny signed all the term sheets. I would add that this puts to rest the second of the two points which Mr Gabriel relied on to persuade me to allow the striking-out appeal (see [30(b)] above). Although some share accumulators may have been executed even before the term sheets were sent to Lenny for her signature, her signature on the term sheets confirms that they were in fact authorised.

76 It is convenient now to deal also with the point that only the signature page was faxed over by SocGen. Counsel for Karen, Mr Kenneth Koh, demonstrated at trial in Karen's re-examination that this could not have happened. The term sheets for each share accumulator would have had a time stamp at the top left of the signing page as well as an indication on the top right of the number of pages that had been faxed over.[101] During the trial, Mr Koh referred the court to four term sheets in which the number of pages indicated as having been faxed over corresponded with the total number of pages in the term sheet.[102] There is no reason to suppose that the same was not done for all the term sheets and FAC did not suggest otherwise in its closing submissions. Lenny's practice was, however, to fax back only the last page of the term sheet bearing her signature to SocGen. The document that Mr Gabriel relied on at the striking-out appeal to suggest that SocGen only faxed the term sheets to Lenny after the share accumulator had been entered into was the last

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99 Transcript (22 November 2016) at p 27, lines 21–25; p 28, lines 1–6

100 Karen's AEIC at p 1109

101 *eg* Karen's AEIC at p 825

102 Transcript (24 November 2016) at pp 33–39

page of a term sheet for a share accumulator (City Development Ltd). The trade date was 18 October 2006 but the term sheet was faxed to Lenny on 30 October 2006. However, the signature page has a marker at the top right hand corner which shows that six pages were faxed over.[103] In other words, SocGen did not fax only the signature page to Lenny. Hence, although the trade date preceded the date of the fax, it is clear that Lenny was aware of this and proceeded to sign the term sheet nonetheless.

Whether the defendants owed fiduciary duties to FAC

77 A bank does not ordinarily owe fiduciary duties to its customers given that the relationship between a bank and its customer is contractual. Bearing in mind the duty of single-minded loyalty owed by any fiduciary, the critical question in the context of a banker-customer relationship is whether the bank "has undertaken, expressly or impliedly, to act as a fiduciary *vis-à-vis* the principal, *ie*, to put the principal's interests ahead of its own" (*Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 1 SLR 1310 at [110]).

78 I reject FAC's submission that the defendants owed it fiduciary duties. There is, on the whole, no evidence that SocGen and Karen, as FAC's bank and relationship manager respectively, had agreed to place FAC's interests ahead of their own. This conclusion is buttressed by a number of specific points.

79 First, the FAC accounts were execution-only accounts. The defendants could not enter into any transactions using those accounts unless they had been instructed to do so by FAC.[104] That the defendants have no authority to deal

103 Paquereau's AEIC at p 4105

104 Transcript (23 November 2016) at p 66, lines 15–19

with the account monies on their own is a factor tending to show that there is no fiduciary obligation. In *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, the Court of Appeal noted, albeit in *obiter*, that relationships in which fiduciary obligations have been imposed tend to involve three general characteristics: (a) the fiduciary has scope for the exercise of some discretion or power; (b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (c) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power (at [41]). In *Nitine Jantilal v BNP Paribas Wealth Management* [2012] SGHC 28, Choo Han Teck J found that the fact that the bank could not deal with the customer's assets as it wished but had to act on the latter's instructions was a point against finding any fiduciary obligation (at [13]).

80 Second, the contractual documents clearly excluded the possibility of a fiduciary relationship arising between FAC and the defendants. Clause 9.1(c) of the GTCs expressly provided:

> Notwithstanding that I may have informed you of my investment objectives or given you any information, I shall be solely responsible for making my own independent investigation and appraisal of all investments which I intend to deal in and making my own judgement and independent decision before dealing in them.

Further, the confirmation sheets for each share accumulator state that SocGen would not assume any fiduciary responsibility or liability arising from the transactions.[105] Similar contractual terms were found to militate against the existence of a fiduciary duty in *Susilawati v American Express Bank Ltd*

105 Paquereau's AEIC at para 78

[2008] 1 SLR(R) 237 ("*Susilawati (HC)*") (at [67]), a finding which was not challenged on appeal.

81 FAC relies on the fact that Lenny would act on Karen's advice. Karen, FAC claims, would call Lenny to introduce or discuss certain accumulators with her; she would also recommend the purchase of certain accumulators and Lenny would sometimes trust her recommendations.[106] Such advice and recommendation could not conceivably give rise to any fiduciary duty. In fact, the defendants were contractually obliged to offer such advice. Clause 9.1(b) of the GTCs provided:

> You will advise and inform me of investment opportunities as and when you deem fit … I am free either to follow or disregard, in whole or in part, any advice, recommendation or information given by you to me. You will only act on instructions given by me and/or my Authorised Signatory(ies)…

As the above clause makes clear, FAC (and, for the purposes of this case, Lenny) retained the power of deciding whether or not to enter into any share accumulator that had been recommended.

Whether the defendants exercised undue influence over Lenny

82 Undue influence arises in the course of a relationship between two persons where one person has acquired over the other a measure of influence or ascendancy of which that person takes unfair advantage. It may either be proved directly or with the aid of a presumption; this is referred to as "actual" and "presumed" undue influence respectively. FAC did not plead whether it was relying on actual or presumed undue influence in this case, though it

106 Transcript (23 November 2016), p 49, line 12; p 50, line 11

clarified at an interlocutory hearing that it was relying on presumed undue influence.[107]

83 For undue influence to be presumed, two things must be shown: first, that the complainant reposed trust and confidence in the other party or the other party acquired ascendancy over the complainant; and second, that the transaction is not readily explicable by the relationship of the parties (*per* Lord Nicholls of Birkenhead in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 ("*Etridge*") at [21], applied in *Susilawati (HC)* at [28]). I would stress that the complainant must have reposed trust and confidence "in relation to the management of the complainant's financial affairs" (*Etridge* at [14]). If the complainant is able to establish these two points, undue influence is presumed and the burden falls on the wrongdoer to rebut the presumption.

84 In certain established categories, the relationship of trust and confidence is presumed, leaving only the question of whether there is a transaction which calls for an explanation. Those categories would include that of parent and child, doctor and patient, lawyer and client, and so on (*The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*Law of Contract*") at para 12.143); it has been said that "the relation of banker and customer will not normally meet this criterion", though exceptionally it may (*Etridge* at [10]). No argument was made that the relationship of trust and confidence should be presumed in this particular banker-customer relationship. The burden therefore falls on FAC to prove, as a first step, that Lenny placed trust and confidence in Karen in relation to the management of FAC's financial affairs.

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107 D1 Closing Submissions at para 212

85 In my view, FAC has not discharged its burden. It is important to bear in mind that not any kind of relationship where there is "trust and confidence" would suffice for the vitiating factor of undue influence to operate (*Susilawati (HC)* at [29]). Undue influence is generally concerned with those relationships where improper pressure is not overtly applied but exists by virtue of the nature of the parties' relationship (*Law of Contract* at para 12.096). There is no easy way to define the essence of such relationships, but they generally would involve "trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other" (*Etridge* at [11]). I do not think the relationship between Lenny and Karen was anywhere close to such a nature. It is not in doubt that Lenny and Lucas had a close relationship with Karen, who, as their relationship manager, even attended to their personal needs such as assisting them to obtain permanent residence in Singapore.[108] Neither is it in doubt that, in relation to the FAC accounts, Lenny (and Lucas) "placed their trust in [Karen]".[109] That does not, however, mean that Lenny reposed trust in Karen in relation to the management of her (or more accurately, FAC's) financial affairs, or, put another way, that Karen had acquired ascendancy over Lenny such that she was able to improperly pressure her into executing share accumulators. As mentioned earlier (at [55]–[57]), the transcripts of their conversations show that Lenny knew what share accumulators were and was actively involved in the decisions to purchase them; on occasion, she even disregarded Karen's recommendations. It is quite inconceivable that Lenny was pressured into executing these share accumulators by virtue of Karen's undue influence over her.

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108 Statement of Claim (Amendment No 6) at para 26

109 Plaintiff's Closing Submissions at para 167

Whether the defendants misrepresented that the monies in the FAC accounts were "safe"

86 As pleaded, the monies were not apparently safe because they were used for the share accumulators. There is no evidence, apart from Lucas' assertion, that Karen represented the monies as having been "safe". In any event, to say that money in an account is "safe" is far too vague a statement to be able to constitute an actionable misrepresentation; nor is it clear how there could be reliance on such a statement in the context of an investment advisory account in which there was obviously a possibility that monies would be used for (and thus potentially lost on) transactions.

87 According to Lucas, the monies in the FAC accounts had to be kept "safe" in two senses: (a) the monies in the accounts "were not to be invested or transacted in any way unless specific approval [had been] given by [him]"; and (b) the defendants were "not to invest in any risky products".[110]

88 The misrepresentation in the first sense was not pleaded. FAC only pleaded that Karen misrepresented the monies as being safe when they were in fact being used for highly-risky share accumulators (see [24] above). In any event, there would be no reason to make this misrepresentation unless there was some agreement that Karen was not to approach Lenny to sign off on any transaction. This misrepresentation is premised on FAC's case on the collateral agreement, on which I have found against FAC.

89 The misrepresentation in the second sense is flawed. It could not have been the case that the monies in the FAC accounts were not to be invested in any risky product. It is a fact that FAC invested in shares, foreign exchange,

110 Lucas' AEIC at para 20

gold, and even foreign exchange accumulators using the FAC accounts. Lucas accepted that these were risky products, though he claimed that the risks on these transactions were "calculated", whereas the risk on share accumulators was not so.[111] In other words, the definition of a "risky product" depended entirely on what Lucas perceived to be a calculated risk and therefore worth taking. This was, in my view, too convenient an explanation, contrived only for the purpose of excluding the share accumulators.

90 In my judgment, FAC's claim based on this alleged misrepresentation is also entirely without merit.

Time bar

91 Of the two defendants, only SocGen has pleaded a limitation defence. It averred that "any claim in relation to transactions that took place on or prior to 11 April 2007 [is] time barred by virtue of the Limitation Act [(Cap 163, 1996 Rev Ed)]".[112] In its closing submissions, it argued that FAC's claim in relation to transactions before 11 April 2007, whether based on contract, tort, breach of fiduciary duty or fraud, are barred by a limitation period of six years (FAC commenced its claim on 11 April 2013).[113]

92 As I have rejected all of FAC's arguments, it is unnecessary to deal with the limited time bar defence raised by SocGen.

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111 Transcript (15 November 2016) at p 39, lines 10–18

112 D1's Defence (Amendment No 5) at para 27

113 1st Defendant's Closing Submissions at paras 99–100

Conclusion

93 For the reasons given, I dismiss FAC's claim with costs. After the delivery of my decision, FAC's counsel accepted that SocGen and Karen are entitled to costs on an indemnity basis as is contractually provided for in cl 11 of the Mandate and cl 18.3 of the GTCs.

94 The trial was heard over seven days. The pleaded claim amount was in excess of US$15m. Notably, as the defendants brought to my attention, considerable time was spent to review and transcribe 338 audio recordings of the telephone conversations between Lenny and Karen. The request for bifurcation was only made on the eve of trial, and hence, much work had already been carried out by the parties in relation to the quantum of FAC's losses. In all the circumstances, I fix costs on an indemnity basis in the sums of $400,000 and $375,000 to SocGen and Karen respectively, with reasonable disbursements, to be taxed if not agreed.

Steven Chong
Judge of Appeal

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