Kea Meng Kwang and Another v Merrill Lynch Investment Managers (Asia Pacific) Ltd and Others
[2006] SGHC 161

Case Number : Suit 311/2005

Decision Date : 12 September 2006

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Herman Jeremiah and Koh Kia Jeng (Rodyk & Davidson) for the appellant; Hri Kumar and Kay Pang Ker-Wei (Drew & Napier LLC) for the respondent

Parties : Kea Meng Kwang; PT Siak Raya Timber — Merrill Lynch Investment Managers (Asia Pacific) Ltd; Kea Meng Cheng; Kea Kah Kim

Evidence – Witnesses – Examination – Where person to be examined out of jurisdiction – Whether court should assist plaintiff in obtaining such evidence – Applicable principles – Order 39 r 2(1), O 39 r 1(1), O 39 r 1(2) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

12 September 2006

Woo Bih Li J:

Background

1 The first plaintiff, Kea Meng Kwang ("Kwang"), and the second and third defendants, Kea Meng Cheng ("Cheng") and Kea Kah Kim ("Kim"), respectively, are brothers.

2 The second plaintiff, PT Siak Raya Timber ("PTSRT"), is a company incorporated in Indonesia.

3 By an agreement dated 27 June 1991, Kwang, Cheng and Kim appointed Warburg Asset Management Jersey Ltd, a company based in Jersey, Channel Islands, as the investment managers of their portfolio of investments. In that agreement they also appointed SG Warburg & Co (Jersey) Ltd, a bank based in Jersey, as their bank for custody and banking services. An account, No 0323644 ("the Account"), was opened with the bank in 1991 in the three names of Kwang, Cheng and Kim ("the Account Holders") and funds were deposited into the Account from 1991. At the relevant time, the mandate to operate the Account apparently required all three Account Holders' signatures. I say "apparently" because this point is not conceded by the first defendant whom I shall refer to at [5] below. The Account Holders were also directors of a family business, KH Kea Properties Pte Ltd ("Kea Properties"), a company incorporated in Singapore.

4 SG Warburg & Co (Jersey) Ltd was acquired by the Royal Bank of Scotland in 1997 and renamed RBSI Custody Bank Ltd ("RBSI"). Some time after 1991, the investment managers became known as Merrill Lynch Investment Managers (Channel Islands) Limited ("MLIM(CI)").

5 The first defendant, Merrill Lynch Investment Managers (Asia Pacific) Limited ("MLIM(AP)"), is a company incorporated in Singapore. Its previous names were Warburg Asset Management Singapore Pte Ltd and Mercury Asset Management Pte Ltd. MLIM(AP) and MLIM(CI) are part of the Merrill Lynch Investment Managers group of companies.

6 MLIM(AP) had no contractual relationship with the Account Holders. However, as it operated from Singapore, it served as the contact point for the Account Holders and relayed instructions from the Account Holders in Singapore to MLIM(CI). If instructions were to be given to RBSI, they would be

given in Singapore to MLIM(AP) who would relay the instructions to MLIM(CI) who would in turn relay the same to RBSI.

7 From 1991, the person who contacted MLIM(AP) for the Account Holders was Kim. He would contact MLIM(AP)'s Digby Armstrong (from 1991 to 1996) and Jeanette Tan *nee* Ho ("Jeanette") (from 1996 to 2001).

8 From 1992, the Account Holders were granted a guarantee facility by RBSI under which RBSI would issue guarantees to support credit facilities provided by a bank in Singapore, Internationale Nederlanden Merchant Bank (Singapore) Ltd ("ING Singapore"). The guarantee facility from RBSI was secured by funds in the Account.

9 Between 1992 and 1996, RBSI issued guarantees to support credit facilities provided by ING Singapore to Kea Properties.

10 In 1997 and 1998, RBSI issued guarantees to support credit facilities provided by ING Singapore to Kea Properties as well as for an account No 5028 ("Account 5028"). Account 5028 was held in the sole name of Kim. The purposes of the credit facilities, whether for Kea Properties or for Account 5028, had nothing to do with the investment portfolio managed by MLIM(CI).

11 Kwang did not dispute that he had signed to accept the guarantee facility letters from RBSI for the years 1997 and 1998. However he claimed that he had thought that the guarantee facility then extended only to guarantees provided to secure credit facilities for Kea Properties and not for Account 5028 as well.

12 In 1999, Kim again requested for a guarantee facility from RBSI to secure credit facilities for Kea Properties and for Account 5028. Due to urgency, RBSI issued its guarantees to ING Singapore although RBSI's facility letter and other related documents for its 1999 guarantees had been signed only by Cheng and Kim, but not Kwang. This was on Kim's representation to Jeanette that Kwang was not in Singapore and he would obtain Kwang's signature in due course. I should say, at this stage, that Kwang's position is that RBSI had relied on MLIM(AP)'s representation, conveyed through MLIM(CI), that Kwang's signature would be procured when RBSI issued its guarantees. Although the 1999 guarantees issued by RBSI are not in issue as such, I have mentioned Kwang's position because the same series of events occurred when RBSI issued its guarantees in 2000 again to secure credit facilities for Kea Properties and Account 5028. This time RBSI's guarantees were called upon and, apparently, it debited the Account to indemnify itself.

13 Consequently, Kwang commenced the present action. As against MLIM(AP), Kwang's action was in respect of the amount debited by RBSI to indemnify itself for the guarantee issued for Account 5028. He had accepted that RBSI could debit the Account for the other guarantee issued for Kea Properties. As regards RBSI's guarantee for Account 5028, Kwang based his claim on the following causes of action:

(a) MLIM(AP) procured or induced RBSI to be in breach of its mandate in respect of the Account;

(b) negligence of MLIM(AP);

(c) breach of MLIM(AP)'s fiduciary duty, owed to each of the Account Holders; and

(d) dishonest assistance by MLIM(AP) of the breach of fiduciary duty owed by MLIM(CI) to

each of the Account Holders.

14 I should add that Kwang has another claim in this action against MLIM(AP) in respect of various sums drawn from the Account and paid into Account 5028 or some other account of Kim with another bank or stockbroker. These sums total US$1,319,500 but do not relate to the issuance of the RBSI guarantee for Account 5028.

15 The claims by Kwang and PTSRT against Kim and/or Cheng are also not relevant for present purposes.

16 By Summons No 6493 of 2005 ("the Summons") dated 28 December 2005, Kwang applied under O 39 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for a letter of request to be issued to the proper judicial authority of Jersey for the examination of 13 persons in Jersey who were current or former employees of MLIM(CI) or RBSI. However Kwang had not ascertained whether any of these persons were willing to give evidence in Singapore or via video link. Subsequently, he was given the opportunity to do so and he limited his application thereafter to eight out of the 13 persons. In other words, his summons in respect of five of the persons was unnecessary and he had caused costs to be wasted in relation to the work done for arguments in respect of those five persons.

17 At the third hearing of the Summons on 20 April 2003, Kwang applied to amend the questions which he was seeking answers to. MLIM(AP)'s position was that the amendments were substantial but, notwithstanding the objection of its counsel, Kwang was allowed to amend. The fourth hearing was on 9 May 2006. After hearing submissions, an assistant registrar dismissed the Summons, as amended.

18 Being dissatisfied with that decision, Kwang filed an appeal to the judge in chambers, the appeal being Registrar's Appeal No 165 of 2006. His appeal was confined to three persons only and was in respect of certain areas of evidence which were apparently less extensive than what was sought below. After hearing submissions, I dismissed his appeal on 19 July 2006. He has since appealed to the Court of Appeal against my decision.

The schedule to the appeal

19 The schedule to Kwang's notice of appeal to the judge in chambers ("the Schedule") sets out the names of the persons to be examined and the corresponding areas of evidence on which they were to be examined. It states:

> **Schedule**
>
> All the paragraph numbers below correspond to that set out in the Amended Schedule 2 to the Amended Summons in Chambers Entered No. 6493 of 2005/G re-filed on 28 April 2006.
>
> 2 . **Ian Henderson**, then Senior Manager on the issue of the guarantee facility in 1998, 1999 and 2000:-
>
> Issuance of 1999 and 2000 guarantees
>
> (i) RBSI's requirement for 3 signatures;
>
> (ii) his reliance on Jeanette Tan's confirmation in 1999 that *inter alia* the 3rd brother would sign as soon as possible and documents bearing his original signatures will be sent to RBSI;

(iii) whether the 1999 and 2000 guarantees was [*sic*] issued after receipt of confirmation from MLIM(AP)'s Jeanette Tan;

(iv) whether RBSI exceptionally agreed to proceed on only two signatures to issue the 2000 guarantee only upon confirmation that the 3rd signature would be forthcoming.

Damage

(i) whether the sum of US$3.4 million was debited from the Account and paid to ING Barings South East Asia Limited?

4. **Ms Lorna Morris**, Credit Officer:-

Issuance of 1999 and 2000 guarantees

(ii) her email dated 25 October 2000 sent at 16.31 hours to Ms Andrea Le Maistre in respect of the 2000 guarantee where she stated RBSI's exceptional agreement to issue the 2000 guarantee on 2 signatures upon confirmation that the 3rd signature will be forthcoming;

(iii) her memo of 30 October 2000 where she states RBSI's mandate and where she enclosed a sample letter for confirmation of signatory requirements;

Damage

(i) whether the sum of US$3.4 million was debited from the Account and paid to ING Barings South East Asia Limited.

5. **Derek Ferguson**

(i) The role of MLIM(AP).

(ii) Construction of clause 35 of the terms and conditions of the Agreement, i.e. the context of the clause *re* the situations where MLIM(CI) would act as both market-maker and broker and principal and agent and how conflicts in interest can arise.

Order 39 rules 1 and 2

20 Order 39 rr 1(1) and 1(2) and O 39 r 2(1) of the Rules of Court state:

Power to order depositions to be taken (O. 39, r.1)

1.—(1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

(2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit.

Where person to be examined is out of jurisdiction (O. 39, r.2)

2.—(1) Where the person in relation to whom an order under Rule 1 is required is out of the

jurisdiction, an application may be made —

(*a*) for an order in Form 74 under that Rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; or

(*b*) if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order in Form 75 under that Rule appointing a special examiner to take the evidence of that person in that country.

21 As can be seen, O 39 r 2(1) read with O 39 rr 1(1) and 1(2) empowers the court to order the examination of a person even if the person to be examined is out of the jurisdiction where this process appears (to the court) necessary for the purposes of justice and the court may make an order on such terms as the court thinks fit.

The court's reasons and decision

22 It was a central plank of Kwang's causes of action against MLIM(AP) in respect of the RBSI facility under which RBSI issued its guarantee for Account 5028, that RBSI had indeed breached its mandate to the Account Holders by issuing the guarantee without the requisite three signatures. If RBSI was not in breach of the mandate, all the causes of action pleaded against MLIM(AP) in respect of that facility would fail.

23 On the other hand, even if Kwang managed to establish this breach of mandate, it did not follow that Kwang would necessarily succeed against MLIM(AP). He would still have to establish MLIM(AP)'s liability under one of the many causes of action he pleaded, and, as I shall elaborate, that would be an uphill task.

24 In other words, it would have been much simpler for Kwang to have sued RBSI than to sue MLIM(AP) as, in the former instance, he only needed to establish the breach of mandate, subject to whatever defences RBSI might have.

25 When I asked Kwang's counsel, Mr Jeremiah, why Kwang did not sue RBSI, he informed me that there was a provision in the relevant documents that such a suit would have to be filed in England under an exclusive jurisdiction clause. His written submission stated at paras 123–127 that:

123 Kwang took into account several factors in respect of litigation in England:

a. The costs of commencing an action in England;

b. Having to manage litigation in England from Singapore;

c. Whether too many fronts would be opened up by suing in England; and

d . The key witnesses are in Jersey and an application for a letter of request to be issued by the English Courts to the Royal Courts of Jersey would still have to be undertaken.

….

124 Midway through the application below, [MLIM(AP)] then disclose a Standard Variations to the Agreement on 10 March 2006 (see pages 202 to 204 of PBOD). This document varies the exclusive jurisdiction of the English Courts to that of the jurisdiction of the Royal Courts of

Jersey. It is not stated whether the Royal Courts of Jersey have or do not have exclusive jurisdiction.

125 By this time, parties had already gone through several weighty applications and the action was at a rather advanced stage.

126 Further, there is every possibility that, if proceedings are commenced against RBSI in Jersey, RBSI will bring MLIM(AP) in as a party and/or to claim an indemnity or contribution from them by reason that RBSI relied on the representations from MLIM(AP).

127 Hence, against all these factors, and the late disclosure of a document which varies the exclusive jurisdiction of the English Courts, [MLIM(AP)'s] arguments that proceedings should have been commenced in Jersey are without merit.

26 I found the above reasons for not commencing action against RBSI in England or in Jersey, when a variation in jurisdiction was discovered,[note: 1] to be wanting.

27 First, the costs of litigation in England, however high they may be perceived to be as compared with costs of litigation in Singapore, must be secondary to the chances of success in a claim against RSBI as opposed to a claim against MLIM(AP).

28 Secondly, in today's context, there is no particular difficulty in managing a litigation in England from Singapore such as to justify suing on a more difficult case than is otherwise available to Kwang.

29 Thirdly, as regards the question of opening too many fronts, the claim in respect of the guarantee for Account 5028 was in any event quite separate from the claim against MLIM(AP) in respect of the remittances amounting to US$1,319,500. It was also separate from the claims by the two plaintiffs against Cheng and/or Kim. Indeed, the claims against Cheng and/or Kim should not have been lumped together in one suit with the present two claims against MLIM(AP). The point about having too many fronts was therefore a weak one.

30 Fourthly, and perhaps most importantly, it was not correct that an application for a letter of request to be issued by the English courts to the court in Jersey would still have to be undertaken. If RBSI was the defendant in an English action commenced by Kwang, RBSI would have been obliged to give evidence in an English court and would be subject to rules such as rules relating to discovery, further and better particulars and interrogatories. Moreover, and more importantly, it would have been irrelevant to the action between Kwang and RBSI for breach of mandate whether RBSI had relied on any assurance from MLIM(AP). RBSI's purported reliance on such an assurance was the crux of the second to the fourth areas of evidence which Kwang was seeking from Ian Henderson ("Ian"), and the first area of evidence he was seeking from Lorna Morris ("Lorna") as set out in the Schedule. In other words, in an action by Kwang against RBSI, such evidence would no longer even have to be considered at all as between them, and there would have been no need for Kwang to seek such evidence from RBSI, whether in Jersey or in England.

31 Indeed, after it was discovered that Kwang could sue RBSI in Jersey, whatever remaining reservations he might still have had about suing RBSI should have disappeared.

32 As for the submission that parties in the action in Singapore had already gone through several weighty applications and that the action was at a rather advanced stage, the latter picture painted by this submission was not quite complete. By an order of 1 June 2006, an assistant registrar had

ordered that the action in Singapore be stayed pending the outcome of five issues in another action in Singapore, *ie*, Suit No 624 of 2005. Although the stay did not apply to the Summons or any appeal in respect of the Summons or the sending of a letter of request from Singapore to the court in Jersey, if Kwang was successful in any of his appeals in respect of the Summons, all other steps, including but not limited to the taking of evidence in Jersey, were stayed. In other words, even if Kwang had been successful in the appeal which I heard, all he could do was to obtain the letter of request to be sent to the court in Jersey, but he could not proceed further pending the outcome of the five issues in Suit No 624 of 2005. On the other hand, if he were to sue RSBI in Jersey, there was no prohibition to stop him from continuing with that action.

33 As regards the submission that RBSI might bring an action against MLIM(AP) for an indemnity or contribution, that was a matter between those two parties.

34 If Kwang were to bring an action against RBSI in Jersey, the evidence which his appeal was seeking would be unnecessary, as elaborated in [30] above. Furthermore, the evidence for his claim would only be received in Jersey. As he was insisting on his present course of action, some of the evidence would be received in Jersey and some in Singapore. Much more costs would be incurred as two sets of solicitors would be involved, one in Jersey and one in Singapore, and the solicitors in Singapore would have to fly to Jersey. The additional costs were contrary to Kwang's reason of wanting to save costs. There would also be the disadvantage of different tribunals hearing the persons examined in Jersey and the witnesses in Singapore.

35 Perhaps Kwang was concerned that if he did succeed against RBSI, he would have to withdraw the claim against MLIM(AP) in respect of RBSI's guarantee for Account 5028 and pay costs to MLIM(AP) for that claim. In my view, if that was his concern, it should not be a significant one compared with all the additional costs being incurred for which he would not necessarily recover and the higher threshold he had to overcome as against MLIM(AP).

36 Notwithstanding all the above observations which, in my view, made Kwang's appeal no long necessary or advantageous to him, I was mindful that, generally speaking, it was for Kwang, as plaintiff, to elect his course of action even though his election was contrary to logic. However, this was not a case where Kwang could obtain the evidence of Ian or Lorna voluntarily. He had to seek the assistance of the court and, in my view, the court was entitled to look at the big picture in deciding where justice lay and whether any terms should be imposed.

37 It is appropriate at this juncture to mention that in resisting Kwang's appeal, Mr Hri Kumar, counsel for MLIM(AP), had relied on *Singapore Court Practice 2005* (Jeffrey Pinsler gen ed) (LexisNexis, 2005) at para 39/2-3/2 which states:

> The application of a plaintiff who sues in Singapore knowing that he might have difficulties securing witnesses from another country may be looked upon less favourably if he could have brought proceedings in that other country. Conversely, the defendant who is reluctantly sued here might be in a better position to obtain a deposition from abroad. (See *Ross v Woodford* [1894] 1 Ch 38; *Emanuel v Soltykoff* (1892) 8 TLR 331; *Coch v Allcock & Co* (1888) 21 QBD 178.)

38 However, bearing in mind that Kwang was in Singapore (at least for some of the time) and MLIM(AP) was operating from Singapore, it was difficult to suggest that Kwang could have conveniently brought proceedings against MLIM(AP) in Jersey.

39 Nevertheless, the fact that Kwang could conveniently bring proceedings against another party, *ie*, RBSI, in Jersey was, in my view, still relevant especially when it would be relatively much

easier for him to establish his cause of action against RBSI than against MLIM(AP). It seemed to me that while the facts envisaged in the proposition stated above in *Singapore Court Practice 2005* ([37] *supra*) did not quite fit those before me, the logic behind the proposition was still applicable. Superficially, it seemed relatively easier for Kwang to conduct an action in Singapore. However, given that such an action would require the obtaining of evidence in Jersey with the attendant additional costs for him and for MLIM(AP), and given that he has a relatively easier cause of action available against RSBI, I had reservations as to whether the court should lend its assistance to such an unwise course of action when MLIM(AP), who would also be incurring additional costs as a result of a successful appeal by Kwang, was objecting.

40 Mr Kumar also resisted Kwang's appeal on the ground that it was oppressive, relying on *First American Corp v Sheikh Zayed Al-Nahyan* [1999] 1 WLR 1154 ("*First American*"). Mr Kumar submitted that it was oppressive because RBSI is a potential defendant. I noted that in that case, a US District Court had issued letters of request for oral examination of various persons in England. The plaintiffs then applied to the court in England for an order giving effect to the requests. That application was unsuccessful. The plaintiffs' appeal to the English Court of Appeal was dismissed. The Court of Appeal was of the view that the letters of request were oppressive because there was a possibility that the persons to be examined would be joined as defendants in a civil action. I had some doubt whether *First American* applied to the facts before me because it suggested that it was for RBSI, and not MLIM(AP), to take that objection.

41 In the absence of other authorities, I did not make my decision on the basis of oppressiveness but on other grounds which I shall come to.

42 The main areas of evidence which Kwang was seeking were really with a view to blaming MLIM(AP) for RBSI's breach of mandate, assuming that such a breach of mandate could be established. Kwang was hoping that, if his appeal was successful, Ian and/or Lorna would say that he and/or she had relied solely or primarily on MLIM(AP)'s assurances when they breached the mandate.

43 I should now elaborate further on the background that led to the issuance of the 1999 and then the 2000 facility for Account 5028. In this context, it is important to bear in mind that, in the past, Kim was the one liaising with MLIM(AP).

44 On 9 December 1999, Jeanette from MLIM(AP) sent a fax to Tina Barton ("Tina") of MLIM(CI) to say that Kim had signed the requisite guarantee facility letter but his two brothers (meaning Kwang and Cheng) were away and would be back only in early January 2000. Kim had said that he had requested the facility earlier when his brothers were in Singapore but it took RBSI more than two months to revert. Jeanette asked Tina to find out if RBSI was prepared to issue the guarantee based on Kim's sole signature and on the understanding that he would get the two brothers to sign when they returned to Singapore.

45 On 9 December 1999, Tina sent a note to Ian of RBSI stating:

> Please find attached the additional guarantee facility letter signed by Kea Kah Kim. I have been advised by Jeanette Tan that his two brothers are away until early January 2000 and that Kea has requested that the guarantee be issued to him pending their signatures – as happened for the other guarantee issued.
>
> Please let me know urgently whether this is acceptable or not. Kea is handing the original of the document to Jeanette Tan tomorrow and will get his brothers to sign it as soon as they return to Singapore.

46 Apparently, thereafter, Cheng signed on various documentation for the facility and, on 13 December 1999, Tina forwarded to Jeanette an e-mail from Ian to her (Tina) which stated:

> Tina – Please obtain Jeanette Tan's confirmation that she holds all four original documents signed by the two brothers (she should have Facility Letter; Security Interest Agreement; Specific Counter Indemnity; and letter addressed to MAM Forum House) and that she is forwarding to us. Also confirmation that the third brother will sign as soon as possible and documents bearing his original signatures will be sent to us. Please also confirm that MAM CI hold a fax indemnity for this client.
>
> Against these confirmations, we will exceptionally issue the guarantee against fax copies of the documents.

47 The relevant documents were sent by Jeanette to Tina by courier. Jeanette also said in an e-mail dated 14 December 1999, "I also confirm that I will get the third brother to sign … when he returns to Singapore early next year." However in that e-mail she also added, "Grateful if RBSI could issue the guarantee today as the client has again stressed urgency when he personally delivered the documents to me this morning."

48 RBSI did issue the guarantee for Account 5028, without Kwang's signature on the relevant documents but, as I have mentioned, Kwang's present suit is not about the 1999 RBSI guarantee but the one RBSI issued in 2000.

49 On 20 September 2000, Jeanette sent a fax to Tina stating that Kim had requested the renewal of the two guarantees, including the one for Account 5028, which were due to expire in November 2000 with a variation, *ie*, the guarantee facility for Kea Properties was to be reduced by US$400,000 (to US$2.6m) and the one for Account Number 5028 was to be increased by US$400,000 (to US$3.4m).

50 On 25 October 2000, Andrea Le Maistre of MLIM(CI) ("Andrea") sent a fax to Ian of RBSI to say that Jeanette had advised that due to the delay in receiving the renewal documentation, only two of the brothers had signed and the third (meaning Kwang) would sign upon his return. It also stated that the client had requested the facility to be in place by 3 November 2000.

51 On the same day, *ie*, 25 October 2000, Lorna of RBSI spoke to Andrea and followed up with an e-mail on that day itself to say, and I quote:

> We also note from your memo that only two of the brothers are available to sign the facility agreement and you have requested we accept this with the third remaining brother signing on his return. Unfortunately, this situation also arose at the last renewal, and to date, we have still not received the third [brother's] signature. We are therefore reluctant to accept the agreement on only two signatures, as our experience shows we cannot rely upon the third signature being provided. We will however exceptionally agree to proceed on only two signatures: please confirm by which date the third signature will be forthcoming to both the amendment documents and the documents from last year.

This e-mail of 25 October 2000 is specifically identified in the first area of evidence sought from Lorna.

52 On 27 October 2000, Jeanette sent a fax to Andrea stating that she had couriered the original facility letter signed by the two brothers and that, "I will let you have the third brother's (Kea

Meng Kwang) signature in due course." Jeanette also said in that fax that she would be grateful if Andrea could arrange to get RBSI to issue the guarantees before 3 November 2000. Jeanette further mentioned that Kim was agreeable to amend the mandate to permit two out of the three signatures to be binding.

53 As already indicated, RBSI then proceeded to issue the guarantees (on or about 30 October 2000) for which the guarantee for Account No 5028 is now in issue.

54 As for the change in mandate, a sample letter was sent by Lorna to Andrea which found its way to Jeanette. Jeanette sent it to Kim and she later received the letter, still undated, but apparently signed by all three Account Holders. I say "apparently" because Kwang is alleging that his signature thereon is a forgery. I should also mention that the letter which allowed RBSI to act on any two signatures of the Account Holders seemed to apply only to future, and not past, transactions. The letter was couriered by Jeanette to Andrea. In a fax dated 14 December 2000, Jeanette informed Andrea that she had reminded Kim to get the third signature for the previous documentation and would chase again.

55 Apparently there was subsequently a phone call between Andrea and Lorna on 9 January 2001. According to Andrea's handwritten note of that conversation, Lorna had said that the third signature for the previous documentation had not been received. However, as Lorna had the original documentation with two signatures and the subsequent letter (purportedly signed by all three) stating that two signatures would suffice, "Lorna advised do not chase further!"

56 In these circumstances, Mr Kumar submitted that even if Ian and/or Lorna were to say that RBSI had relied solely or primarily on MLIM(AP)'s assurances (about obtaining Kwang's signature) rather than that of Kim's, it was still open to MLIM(AP) to argue otherwise. I agreed.

57 In considering the overall justice of the case and what terms I should impose, if at all any, I also took into account the merits of the claim by Kwang. Without my having to go into a very detailed examination of the evidence, it was evident to me that Jeanette had not intended to give a separate assurance from MLIM(AP) about getting Kwang's signature. What she had done was merely to reiterate Kim's assurances to her. On the other side of the coin, it was unlikely that RBSI could have understood otherwise. Any reference by Ian to obtaining Jeanette's confirmation about obtaining Kwang's signature was simply because Jeanette was the contact person in MLIM(AP). RBSI was prepared to do a favour to the Account Holders in view of the past relationship and, no doubt, to cultivate that relationship further. Likewise, Jeanette was keen to help cultivate MLIM(CI)'s relationship with the Account Holders by forwarding Kim's request onward to MLIM(CI) who would in turn forward the request to RBSI. RBSI had taken the position that in doing that favour, they knew they were not acting strictly on the mandate they had been given and hence their initial emphasis about making an exception and their initial reminder to get Kwang's signature. They then eventually and specifically told MLIM(CI) to stop chasing for that signature as I have elaborated above. Even if Lorna should deny the existence or substance of the 9 January 2001 conversation between Andrea and her, as recorded by Andrea, the other evidence which I have set out was quite overwhelming. In my view, there was no suggestion from RBSI that it had relied on Jeanette as having given a separate assurance, for and on behalf of MLIM(AP), about procuring Kwang's signature.

58 I also noted that Kwang did not suggest that should Ian and Lorna say that they had relied solely or primarily on Kim's assurances, as passed on through Jeanette, and not Jeanette's assurances, Kwang would withdraw the claim against MLIM(AP) in respect of the guarantee for Account 5028. Was he then, in that situation, going to rely on the e-mail and faxes I have referred to, to suggest that they must have considered Jeanette's assurances to be separate from those of

Kim's? If so, that would demonstrate that such evidence carried more weight than what these two persons might now say.

59 Notwithstanding these considerations, I was, nevertheless, still minded to allow Kwang's appeal in respect of the second to the fourth areas of evidence sought from Ian and the first area of evidence sought from Lorna, but on terms since I was also concerned about the additional costs being incurred. MLIM(AP)'s solicitors had estimated additional costs to be around $285,000, which was not a small sum. Naturally, I did not simply accept such an estimate. I asked Mr Jeremiah whether Kwang would be prepared to first bear MLIM(AP)'s additional costs, for the time being, for the exercise in obtaining evidence from Jersey. If so, the respective solicitors were to see if they could agree on what constituted a reasonable sum, failing which I would determine what the reasonable sum should be. If the exercise was as fruitful as Kwang hoped and he managed to succeed on this claim in reliance on such evidence, he could ask the trial judge to order MLIM(AP) to repay what he had forked out for its additional costs, as well as his own. However, Kwang did not rise to the occasion. His solicitors subsequently wrote in to say that he was not agreeable to the idea. It was not suggested that he was financially unable to pay MLIM(AP)'s additional costs first.

60 In the circumstances, I was not minded to allow the appeal for these areas of evidence. The next area of evidence sought from Ian and Lorna was in respect of the requirement under the mandate for three signatures. This was the first area of evidence sought from Ian and the second area of evidence sought from Lorna, as set out in the Schedule. Mr Jeremiah's submission drew my attention to para 28 of the re-re-amended defence of MLIM(AP) in which MLIM(AP) denied paras 19 and 20 of the re-re-amended statement of claim. In essence, paras 19 and 20 were asserting that the mandate required RBSI to obtain all three signatures for any matter not expressly excepted in the mandate.

61 Given the stand taken in the written communication between MLIM(AP) and MLIM(CI) and RBSI which I have stated above, I was surprised to note that MLIM(AP) was disputing that the mandate required all three signatures for any matter not expressly excepted in the mandate.

62 Be that as it may, I was of the view that the interpretation of the mandate did not depend on oral evidence from Ian or Lorna. Even if Ian and/or Lorna were to admit that the mandate required all three signatures, this would not bind MLIM(AP). Whether MLIM(AP) is bound by its own admission or is estopped by its own conduct and written communication from asserting an interpretation different from that which MLIM(AP) itself had acted upon is a separate matter that does not require the evidence of Ian or Lorna. Accordingly, there was no need to obtain such evidence under O 39 of the Rules of Court in any event.

63 I would add that if, as it appeared, the interpretation of the mandate was really in issue, then the parties should have sought a decision on this preliminary point first. A decision unfavourable to Kwang on the point would render his claim futile and the need to obtain any further evidence from Jersey, or at all, academic. Should the decision be in favour of Kwang, then, again, the evidence of Ian and Lorna on the requirement for three signatures is, *a fortiori*, unnecessary.

64 I come now to the remaining area of evidence which Kwang was seeking from Ian and/or Lorna, *ie*, evidence that the sum in question was in fact debited from the Account.

65 As regards this aspect, I would have thought that as an account holder at the relevant time, Kwang would have been entitled and able to obtain a copy of the bank statement and other documents to establish the fact of and reason for the debit easily. Indeed, he should have obtained this statement and other documents before he even initiated action on this claim. If he was faced

with a pending expiry of a limitation period, he should have obtained the statement and other documents before taking any further step after filing the action. The debiting of the Account to reimburse RBSI for the guarantee in question is a basic fact that should be established at the outset and not after "parties had already gone through several weighty applications", as his counsel submitted. Furthermore, it was doubtful whether such a fact could be established simply by oral evidence of bank officers given several years later when documentary evidence of the same must be available.

66 Significantly, Kwang did not elaborate as to what steps he had taken to obtain the bank statement and other documents before the Summons was filed. Mr Kumar also indicated to me that upon production of appropriate documentary evidence to establish that the Account was debited to reimburse RBSI for the guarantee for Account 5028, MLIM(AP) would not be unduly difficult on the point.

67 Accordingly, I was also minded not to allow the appeal on this area of evidence in any event.

68 As for the evidence sought of Derek Ferguson ("Derek"), Mr Jeremiah submitted that Derek was the managing director of MLIM(CI) (under one of its previous names) in 1991 and 1992 and was also the managing director of RBSI in 1999. He submitted that Derek, as the former managing director of MLIM(CI) and RBSI, could have relevant evidence of the structure of the Warburg group then and the role MLIM(AP) had *vis-à-vis* MLIM(CI) and RBSI, as the role of MLIM(AP) or its predecessors was not expressly defined in the formal documentation. He said that this was relevant for the cause of action under negligence to establish a duty of care and although evidence was available from another person who would be giving evidence for MLIM(AP) on the areas of evidence sought from Derek, Kwang should not be constrained by MLIM(AP)'s choice of witnesses. Also Derek, having left, was more independent than any other witness still employed by MLIM(AP) or MLIM(CI).

69 I was of the view that while Kwang was not *prima facie* constrained by MLIM(AP)'s choice of witnesses, Kwang was nevertheless seeking the aid of the court, as I have already stated. If he could, on his own steam, get Derek's co-operation, that was his prerogative. I did not think it was a sufficient reason to say that because Derek is an ex-officer, his evidence would be preferable. If Mr Jeremiah's submission was valid, then, a plaintiff who has commenced action in Singapore, say, against a bank operating in Singapore, should *prima facie* receive the court's assistance under O 39 to obtain evidence out of jurisdiction from an ex-employee of the bank even though there is an employee available in Singapore to give the evidence sought. That would inflate the costs of litigation unnecessarily. Indeed, it is common knowledge that litigation can and does proceed on the basis that employees of the defendant will be giving evidence and it is for counsel for the plaintiff to use his skills to extract the evidence he wants. The court also takes into account the fact that such witnesses are not independent.

70 Secondly, there was no suggestion that Derek had some special knowledge of the structure within the Warburg group or the relationship between the corporate entities in question which was relevant and which others did not have. I did not think it was sufficient for Mr Jeremiah to submit that he did not know what Derek's evidence would be. That was a separate point from Kwang having to indicate the special knowledge Derek was believed to have.

71 If Mr Jeremiah's submission was valid, it would mean that the court should, generally speaking, make an order under O 39 for an ex-employee to give evidence in preference to an existing employee since the former's evidence is "independent" even though he no longer has ties with the defendant and there is no suggestion that he has some special evidence to offer.

72 Mr Jeremiah used the same reasons to justify seeking the court's assistance to obtain Derek's evidence for the causes of action under breach of fiduciary duty and under dishonest assistance. For the reasons I have given, I found such reasons to be unpersuasive. Indeed, I also saw no hint of any dishonest assistance by MLIM(AP) from the material before me.

73 Mr Jeremiah also submitted that Derek's evidence would be relevant in the construction of cl 35 of the "Terms and Conditions For Discretionary Fund Management" enclosed with the investment agreement which the Account Holders had signed with MLIM(CI)'s predecessor. MLIM(AP) was relying on this clause which states:

> The relationship between the Manager, the Customer and the Custodian is as described in this Agreement. Neither that relationship nor the services to be provided by the Manager nor any other matter shall give rise to any fiduciary or equitable duties which would prevent or hinder the Manager or any Associate in transactions with or for the Customer acting as both market-maker and broker, principal or agent, dealing with other Associates and other customers and generally effecting transactions as provided above.

74 On this point, paras 105–107 of Mr Jeremiah's submission stated:

> 105 The question is whether, the said clause excludes "any fiduciary or equitable duties from arising" *or* only that which "would prevent or hinder the Manager or any Associate in transactions with or for the Customer acting as both market-maker and broker, principal or agent, dealing with other Associates and other customers and generally effecting transactions as provided above."
>
> 106 The 2nd construction is the correct one. The clause is not a blanket exclusion of all fiduciary duties. The clause is to be understood in the context of the financial services and securities industry. The terms used support Kwang's interpretation.
>
> 107 The questions for Ferguson would be of the context of the clause in particular the situations where MLIM(CI) would act as both market-maker and broker and principal and agent and how conflicts in interest can arise.
>
> [emphasis in original]

75 I was of the view that the contention of construction as stated in Mr Jeremiah's paras 105 and 106 was a matter which he could and should submit on and it was not for Derek to say how the clause should be construed.

76 As for the contention in Mr Jeremiah's para 107, there was again no reason why Derek should be required to give evidence when someone else was available to do so.

77 Accordingly, even if Kwang had been willing to first bear the additional costs of obtaining evidence from Jersey, I would not have allowed his appeal in respect of Derek's evidence or of the evidence from Ian or Lorna on the requirement for three signatures or the debiting of the Account.

78 In the circumstances, I dismissed the entire appeal with costs.

[note: 1] See para 124 of Kwang's written submission.