# Teo Wai Cheong *v* Crédit Industriel et Commercial and another appeal
# [2013] SGCA 33

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| **Case Number** | : Civil Appeals Nos 59 and 94 of 2012 |
| **Decision Date** | : 17 May 2013 |
| **Tribunal/Court** | : Court of Appeal |
| **Coram** | : Sundaresh Menon CJ; Chao Hick Tin JA; V K Rajah JA |
| **Counsel Name(s)** | : Chelva Rajah SC and Tham Lijing (Tan Rajah & Cheah), Sean Lim Thian Siong and Gong Chin Nam (Hin Tat Augustine & Partners) for the appellant; Manoj Sandrasegara, Smitha Menon, Aw Wen Ni, Mohamed Nawaz, Daniel Chan, Jonathan Tang and Edmund Koh (WongPartnership LLP) for the respondent. |
| **Parties** | : Teo Wai Cheong — Crédit Industriel et Commercial |

*Banking*

*Evidence – Admissibility of Evidence*

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 3 SLR 1149.]

17 May 2013 Judgment reserved.

**Sundaresh Menon CJ (delivering the judgment of the court):**

**Introduction**

1 This litigation, between the appellant Teo Wai Cheong ("Teo") and the respondent Crédit Industriel et Commercial ("the Bank") has had a long and tortuous history. This is the third time that the matter has reached the Court of Appeal. As will become evident, the need for much of this arduous journey stemmed from the Bank's abject failure to make proper discovery. The first time the matter came before us, in Civil Appeal No 113 of 2009, we dealt with an interlocutory application, brought by Teo, for further discovery. On that occasion, we allowed Teo's appeal and ordered the Bank to make further discovery. The trial of the matter followed and it lasted 16 days ("the First Trial"). The Judicial Commissioner who heard the trial ("the First Trial Judge") found in favour of the Bank and his judgment is reported at *Crédit Industriel et Commercial v Teo Wai Cheong* [2010] 3 SLR 1149. Dissatisfied, Teo appealed against the First Trial Judge's judgment in Civil Appeal No 99 of 2010. We reserved judgment on that occasion and subsequently, in the course of reviewing the record, we noted that further documents which seemed relevant had not been disclosed. We accordingly exercised our power under s 37(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and directed the Bank to produce these documents, which the Bank duly did ("the newly disclosed evidence"). On perusing the newly disclosed evidence, it became evident that we could not conclude that the findings of the First Trial Judge would have been unaffected had he had the same opportunity to consider the newly disclosed evidence. We accordingly set aside that judgment and ordered a new trial. Our unreported judgment may be found at *Teo Wai Cheong v Crédit Industriel et Commercial* [2011] SGCA 13 ("the CA 99/2010 Judgment"). The retrial lasted some 23 days ("the Retrial"), at the end of which, a High Court Judge ("the Retrial Judge") found in favour of the Bank; his judgment is reported at *Crédit Industriel et Commercial v Teo Wai Cheong* [2012] 3 SLR 287 ("the Retrial Judgment"). There are now two appeals before us arising from the Retrial.

**The Background**

***The facts***

2 The Bank is a French bank registered as a foreign company in Singapore. It carries on a private banking business in Singapore. Teo is a former private banking client of the Bank. A relationship manager known as Ng Su Ming ("Ng") managed Teo's account. Ng had been Teo's relationship manager, even before Teo opened his account with the Bank, when she had worked at Citibank Singapore ("Citibank"). The relationship had started in 2004 and when Ng left Citibank for the Bank in 2006, she persuaded Teo to transfer his business and to open a private banking account with the Bank.

3 Initially, Teo dealt in foreign exchange options, equity notes and shares. In June 2007, Teo was introduced by Ng to what was, at that time, a new financial product known as "equity accumulators". The parties do not dispute the essential features of an accumulator.

4 With an accumulator, an investor agrees to accumulate a certain specified quantity of shares of a specified counter from a counterparty over an agreed period ("the agreed period"). This undertaking is fixed at a price which reflects a discount to the market price at which that counter is trading at the beginning of the agreed period. This market price is called the "Initial Price" and the discounted price is known as the "Forward Price" or the "Strike Price". The investor's obligation, which is to acquire an agreed number of shares on each trading day for the duration of the agreed period, may be prematurely terminated by agreement. However, if the market price of the shares rises above a certain specified price, known as the "Knock-Out Price", the accumulator is automatically terminated. This serves to cap the loss of the counterparty. As long as the market price is above the Strike Price but below the Knock-Out Price, the investor is obliged to purchase the specified quantity of shares at the Strike Price. In doing so, the investor will be accumulating shares at a discount to the prevailing market price. Once the Knock-Out Price is struck, the transaction ends. On the other hand, where the market price falls below the Strike Price, the investor is obliged to purchase *double* the previously agreed quantity of shares ("the Doubling Effect") at the Strike Price. In such circumstances, the investor is incurring losses because the Strike Price is no longer at a discount to the market price, and for good measure, the losses are doubled as a result of the Doubling Effect. This might explain why, as was noted by the First Trial Judge, these instruments were colloquially called "I'll kill you later" by finance industry professionals. Another term which bears explaining is the "Maximum Obligation". Assuming the accumulator does not get knocked-out, the investor's Maximum Obligation under the accumulator in dollar terms is the cost of purchasing double the specified quantity of shares at the Strike Price for each day of the entire period of the transaction. The Maximum Obligation is derived on the basis of the market price being below the Strike Price for the entire period of the transaction, on which premise, the Doubling Effect would have been triggered.

5 It is common ground between the parties that the usual course of conduct and communications between Ng and Teo with respect to the placement and updating of the status of Teo's orders for a particular accumulator was by way of telephone conversations and Short Message Services ("SMSes"). This typically involved the following:

(a) Prior to obtaining Teo's instructions for a particular accumulator, Ng would call the Private Banking Advisory department of the Bank ("PBA") to obtain the required pricing information on the accumulator, including the market price at the time of the query, the indicative Strike Price, and the indicative Knock-Out Price.

(b) Ng would then convey this information to Teo, and might also include the recommendations of research analysts relevant to the particular share counter.

(c) According to the Bank, Ng would obtain from Teo specific instructions on the range of the indicative Initial Price, the range of the indicative Strike Price, the range of the indicative Knock-Out Price and the range of the Maximum Obligation that he was agreeable to (although Teo denies this particular step).

(d) Upon receiving Teo's instructions, Ng would contact PBA to place the order with the Bank's counterparties.

(e) Sometimes, Ng would combine the orders of several clients and place a single consolidated order with PBA. In such instances, upon PBA fulfilling the whole or part of the consolidated order, Ng would allocate to each client his/her proportionate entitlement.

(f) After PBA had successfully placed the order with the Bank's counterparties, Ng would be informed.

(g) A Customer Service Officer under Ng's charge would then key the orders allocated to each client into the Bank's system.

(h) As a standard practice, the Bank would send confirmation notes and term sheets detailing the terms of the accumulators entered into by Ng and PBA on Teo's behalf to his residential address. On each occasion that shares were subsequently acquired pursuant to an accumulator, confirmation notes evidencing this would also be sent to him. It would typically take around two and a half weeks from the date of the transaction for these notes to be processed and received by Teo and the Bank's other customers.

6 Between 20 July 2007 and 3 October 2007, twenty equity accumulators were purchased and booked under Teo's account with the Bank. These transactions and the terms of these accumulators are listed in the table below:

Table of Accumulators

| **No** | **Trade date** | **Share counter** | **Initial price (S$)** | **Strike price (S$)** | **Knock-out price (S$)** | **Maximum obligation (S$)** | **Knock-out date** |
|---|---|---|---|---|---|---|---|
| 1 | 20.07.07 | Noble Group Ltd ("Noble") | 1.85 | 1.6558 | 1.8870 | 1,496,181 | 23.07.07 |
| 2 | 25.07.07 | Noble | 1.93 | 1.7688 | 1.9686 | 1,069,770 | 24.09.07 |
| 3 | 01.08.07 | Keppel Corp Ltd ("Keppel") | 13.10 | 11.9734 | 13.3620 | 663,805 | 03.08.07 |
| 4 | 13.08.07 | Keppel | 12.40 | 11.3832 | 12.6480 | 691,188 | 27.08.07 |
| 5 | 15.08.07 | Keppel | 12.10 | 11.0352 | 12.3420 | 670,057 | 23.08.07 |
| 6 | 10.09.07 | Keppel | 13.00 | 11.7650 | 13.2600 | 1,071,556 | 12.09.07 |

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|---|---|---|---|---|---|---|---|
| 7 | 13.09.07 | DBS Group Holdings Ltd ("DBS") | 19.60 | 17.7380 | 19.9920 | 1,795,086 | 19.09.07 |
| 8 | 13.09.07 | DBS | 19.90 | 18.0095 | 20.2980 | 1,822,561 | 20.09.07 |
| 9 | 18.09.07 | DBS | 19.10 | 17.4383 | 19.6730 | 2,179,788 | 19.09.07 |
| 10 | 25.09.07 | Neptune Orient Ltd ("NOL") | 5.15 | 4.5320 | 5.3045 | 917,277 | 01.10.07 |
| 11 | 25.09.07 | Cosco Corp Ltd ("Cosco") (1st) | 5.35 | 4.6920 | 5.5105 | 2,374,152 | 26.09.07 |
| 12 | 27.09.07 | China Energy ("CE") (1st) | 1.41 | 1.2803 | 1.4523 | 97,1748 | 28.09.07 |
| 13 | 01.10.07 | Cosco (2nd) | 6.90 | 6.0720 | 7.1070 | 1,530,144 | 02.10.07 |
| 14 | 01.10.07 | CE (2nd) | 1.6701 | 1.5198 | 1.7202 | 1,148,969 | 02.10.07 |
| 15 | 02.10.07 | CE (3rd) (established at 9:36am) | 1.7950 | 1.6335 | 1.8489 | 823,284 | N.A. |
| 16 | 02.10.07 | CE (4th) (established at 9:22am) | 1.7946 | 1.6017 | 1.8305 | 1,614,514 | N.A. |
| 17 | 02.10.07 | CE (5th) (established at 9:14am) | 1.8109 | 1.6162 | 1.8471 | 1,629,130 | N.A. |
| 18 | 02.10.07 | CE (6th) (established in two tranches at 11:39am and 11:56am) | 1.74 | 1.5834 | 1.7922 | 1,979,250 | N.A. |
| 19 | 03.10.07 | CE (7th) | 1.68 | 1.5238 | 1.7304 | 4,571,400 | N.A. |
| 20 | 03.10.07 | Sembcorp Marine | 5.30 | 4.7753 | 5.459 | 3,128,777 | 18.10.07 |

7 The dispute between the parties was in respect of the accumulators set out in the entries numbered 15 to 19 of the Table of Accumulators, *viz*, the Third, Fourth, Fifth, Sixth and Seventh China Energy ("CE") Accumulators (collectively, "the Disputed Accumulators"). These accumulators were established on 2 and 3 October 2007.

***The Bank's claim against Teo and his defence and counterclaims***

8 The Bank in these proceedings claimed against Teo a sum of S$2,782,803.66, being the amounts outstanding for CE shares delivered pursuant to the Disputed Accumulators. In addition, the Bank claimed against Teo a sum of S$3,625,393.11, being the cost it incurred in closing out the

Disputed Accumulators with its counterparties. In the alternative, the Bank claimed against Teo the amount of S$6,408,196.77 (which is the sum of the aforesaid amounts of S$2,782,803.66 and S$3,625,393.11), being what it says was a loan it extended to Teo when he failed to make payments of the demanded sums. The Bank also claimed interest on the loan amounting to S$51,323.06.

9 Teo's defence to the Bank's claim was a simple one: he did not order the Disputed Accumulators; they were therefore not authorised and accordingly, he was not liable for them. This litigation at its heart therefore turned on a single factual issue: whether Teo had given Ng the necessary instructions and so authorised entering into the Disputed Accumulators. The Bank did have an alternative argument: that by reason of Teo's silence and conduct, he was estopped from denying that he had authorised Ng to enter into the Disputed Accumulator transactions.

10 We mention in passing that this was not a case involving any allegation by Teo of the Bank "mis-selling" him these financial products. Although in his Defence and Counterclaim, Teo counterclaimed against the Bank that it had breached its statutory duty under s 27 of the Financial Advisers Act (Cap 110, 2007 Rev Ed) ("FAA") in recommending the accumulators without "reasonable basis", this was never pursued by Teo at first instance either at the First Trial or the Retrial, or before us. Moreover, no mention was made of it in the Appellant's Case filed for the appeal.

11 Finally, Teo counterclaimed against the Bank for an account of the monies set off and assets realised and liquidated by the Bank for the purpose of effecting payment said to be due under the Disputed Accumulators.

***Nature of the evidence at the trials***

12 The evidence at the First Trial and at the Retrial focussed mainly on three areas:

(a) First, there was the background to the establishment of the Disputed Accumulators and the nature of Teo's relationship and working arrangements with the Bank and with Ng. In essence, this was to understand the process by which the undisputed accumulators (the entries numbered 1 to 14 of the Table of Accumulators at [6] above) were ordinarily processed by Ng and the Bank for Teo.

(b) Second, the evidence dealt with what had happened on 2 and 3 October 2007 when the Disputed Accumulators were actually entered into. Particular attention was placed on the phone calls between Teo and Ng, during which, according to the Bank, Teo had authorised establishing the Disputed Accumulators. Much of the evidential difficulties faced in this case stemmed from the fact that Ng had a practice of using her personal handphone when making such calls. Had she instead used the landline provided for her use by the Bank, in accordance with the Bank's internal Compliance Manual, these conversations would have been recorded and the evidential difficulties could largely have been avoided.

(c) Last, evidence was led as to Teo's behaviour after 3 October 2007. The Bank argued that this was consistent with his having authorised the Disputed Accumulators. Teo, unsurprisingly, contended otherwise.

**The drawbacks in the evidence in both the First Trial and the Retrial**

13 There were significant drawbacks in the evidence in both the instances that this case was tried. It cannot seriously be disputed that the First Trial was conducted with the Bank not having properly fulfilled its discovery obligations. In Civil Appeal No 99 of 2010, we noted that certain

transcripts of telephone conversations and other documents in the possession of the Bank had not been disclosed, and those which were, had material portions redacted. [note: 1] Counsel for the Bank had informed us that the redactions had not been objected to by Teo's counsel, and moreover had been accepted by the First Trial Judge as validly redacted on the ground that these were necessary to avoid any contravention of s 47 of the Banking Act (Cap 19, 2008 Rev Ed) ("the Banking Act").

14 However, it was the Bank's case that Ng had a practice of consolidating the orders of different clients (see [5(e)] above), and the Bank had to rely on such consolidation having actually occurred to overcome the fact that the orders allegedly placed on Teo's instructions did not correspond in time or in terms with the sequence in which Ng had placed orders with PBA. For this reason, we held in Civil Appeal No 99 of 2010 that the evidence relating to the orders placed by the other clients was relevant and liable to be discovered. [note: 2] This evidence was also considered relevant because it appeared that one or some of Ng's other clients had also disputed that they had authorised Ng to purchase CE accumulators which had been placed as part of a consolidated order. We further concluded that the Bank's belief that these documents were privileged from disclosure by reason of s 47(1) of the Banking Act was erroneous because the disclosure of records where the clients were only referred to anonymously as "Client A", "Client B" and/or "Client C" would not give rise to a prohibited disclosure of "customer information" under the Act. [note: 3] The Bank was thus directed to disclose these further materials.

***The evidence not disclosed at the First Trial***

15 The new evidence was disclosed in due course. Some of this turned out to be highly relevant. As it transpired, the new evidence also revealed that there had been a quite separate breach by the Bank of its discovery obligations, as other material documents were produced which were potentially prejudicial to it and had not previously been disclosed. The following gives a flavour of some of the more important documents disclosed, amongst material that covered more than 2,700 pages, following our direction in Civil Appeal No 99 of 2010:

(a) First, documents that we had specifically contemplated, namely, transcripts and documents relating to the phone calls between Ng and the other clients, were disclosed. These dealt with the way in which orders were processed on 2 and 3 October 2007 and the instructions and discussions Ng had with these clients in relation to the Disputed Accumulators;

(b) Second, transcripts of taped phone conversations between Ng and other employees of the Bank in relation to the events of 2 and 3 October 2007 were disclosed. Some transcripts of such phone conversations that had occurred on 2 and 3 October 2007 had been disclosed at the First Trial; but the Bank only now disclosed further transcripts of conversations which took place after 3 October 2007;

(c) Third, a *draft* email dated 19 November 2007, which Ng wrote but never sent to Teo was disclosed. Although the contents of this email were perhaps ambiguous, it might have contradicted Ng's evidence and should have been available to be put to her during cross-examination;

(d) Fourth, internal correspondence between Ng and the Bank's credit department was disclosed. In brief, these documents showed that after 3 October 2007, the Bank's credit department had sent Ng daily reminders and requests for her to get Teo to top up his account, which had become under-margined as a result of the accumulators entered into on 2 and 3 October 2007. Her conduct in the wake of this pressure was inexplicable and undoubtedly invited

many questions;

(e) In addition, a "Watchlist and Provisions Report as at 30 November 2007", an internal bank document describing the status of their position *vis-à-vis* Teo, was disclosed.

16 It was unsatisfactory, to say the least, that these disclosures had not been made by the time of the First Trial. We do recognise the candour of those responsible for making these further disclosures which went beyond the precise scope of the orders we had made in Civil Appeal No 99 of 2010. However, it must be said even so, that this did not displace the unfortunate consequences of the earlier breaches. Moreover, it also did not significantly obviate the evidentiary difficulties occasioned by the fact that Ng had persisted in not using the landline provided by the Bank in transacting with Teo. We will comment separately on some of these documents in due course as well as on the bearing they have on the issues in these appeals.

***Ng's non-attendance at the Retrial***

17 As already noted (above at [1]), in light of the newly disclosed evidence, we ordered a retrial of the matter. [note: 4] Unfortunately, this was not the end of the evidentiary difficulties that have plagued this litigation. Because the sole issue in this case turns on whether Teo had authorised Ng to enter into the Disputed Accumulators in the course of their phone calls on 2 and 3 October 2007 and these phone calls were not recorded, Ng was a crucial witness. Furthermore, much of the newly disclosed evidence involved Ng, who alone was in a position to speak to many of these documents and attest to their effect. Most unfortunately, when the Retrial was set down for hearing, the Bank was unable to produce Ng to testify. The Bank accordingly applied pursuant to s 33 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") to admit in the Retrial, Ng's affidavits of evidence in chief as well as the oral evidence she gave at the First Trial. The Retrial Judge acceded to this application and on the basis of Ng's evidence given at the First Trial, found in favour of the Bank.

**The issues in this appeal**

18 Following the decision of the Retrial Judge to admit the evidence and so to find in favour of the Bank, Teo brought two appeals before us:

(a) Civil Appeal No 94 of 2012 is his appeal against the Retrial Judge's decision pursuant to s 33 of the EA to admit all the evidence given by Ng at the First Trial.

(b) Civil Appeal No 59 of 2012 is his substantive appeal, against the Retrial Judge's finding that Teo had authorised the Disputed Accumulators and accordingly giving judgment in favour of the Bank. This would also entail consideration of the Retrial Judge's dismissal of Teo's counterclaim.

**Civil Appeal No 94 of 2010**

***The application pursuant to s 33 of the EA***

19 When the Bank found it could not locate Ng, it applied on the first day of the Retrial for leave to admit Ng's affidavits of evidence in chief and her oral evidence from the First Trial pursuant to s 33 of the EA. Section 33 of the EA provides as follows:

**Relevancy of certain evidence for proving in subsequent proceeding the truth of facts therein stated**

33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable subject to the following provisions:

(*a*) the proceeding was between the same parties or their representatives in interest;

(*b*) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(*c*) the questions in issue were substantially the same in the first as in the second proceeding.

*Explanation*—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

20 According to the Bank, Ng had left Singapore to reside in Dubai and despite its efforts, it could not locate her. In support of its application, Jean-Luc Anglada ("Anglada"), the Bank's regional manager, affirmed an affidavit detailing the Bank's attempts to locate and contact her ("the s 33 Affidavit"). [note: 5] These efforts included the following:

(a) attempting to contact her at her Dubai and Singapore phone numbers and through her e-mail address;

(b) visiting her parents' residence in Singapore where she had previously resided and speaking to her father;

(c) issuing a subpoena for Ng to testify and attempting (unsuccessfully) to serve it on her at her Singapore address;

(d) visiting the restaurant in Dubai where Ng was last known to be working but finding that she no longer worked there;

(e) sending a letter by courier to her last known address in Dubai and having it returned undelivered;

(f) doing the same to her parent's residence with the same result;

(g) visiting her parents' residence once more but to no avail;

(h) placing an advertisement in the Straits Times and an English language newspaper in Dubai; and

(i) seeking advice from legal counsel in Dubai who advised that there was no procedure under Dubai law to compel her to testify even assuming she could be found.

21 There are two requirements under s 33 which the Bank had to show were fulfilled. The first was that the witness "[could] not be found". The second was that the provisos to s 33 were satisfied, though in this regard, it was only proviso (*b*), *ie*, that "the adverse party in the first proceeding had the right and opportunity to cross-examine" the deponent, that was in issue between the parties.

22 The Retrial Judge concluded that both requirements had been met and admitted Ng's affidavits of evidence in chief and oral evidence from the First Trial into evidence. The Retrial Judge was of the view that contrary to Teo's submission, the first of the two requirements mentioned above did not impose on the Bank an obligation to expend its "best efforts" to locate Ng; rather, the threshold was one of "due diligence". [note: 6] The Retrial Judge considered that the Bank's search had been undertaken with due diligence, and that there was nothing to show that its search had not been carried out *bona fide*. As to the second requirement, the Retrial Judge held, contrary to Teo's submission, that he had had a sufficient "right and opportunity to cross-examine" Ng during the First Trial, notwithstanding that Ng had not been cross-examined on the newly disclosed evidence which was not then available. [note: 7] The Retrial Judge thought that to completely exclude Ng's evidence would be unacceptable, and that the better approach was to admit the evidence but accord it the appropriate weight having regard to whether it was consistent with the newly disclosed evidence.

***The underlying policy of s 33 of the EA***

23 Section 33 of the EA provides that in the prescribed circumstances, evidence given by a witness in a judicial proceeding or before any person authorised by law to take such evidence is relevant for the purposes of proving in a subsequent judicial proceeding the truth of the facts it states. In our judgment, s 33 represents an exceptional jurisdiction and so its requirements must be strictly satisfied before it may be invoked. In *Chainchal Singh v Emperor* AIR 1946 PC 1, Lord Goddard noted the same saying (at [4]):

> Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. *It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a better opinion as to his reliability than is possible from reading a statement or deposition*. It is necessary that provision should be made for *exceptional cases* where it is impossible for the witness to be before the Court, and *it is only by a statutory provision that this can be achieved*. *But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved.* [emphasis added]

24 Section 33, in common with the EA as a whole, has its origins in the English common law (see Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan and Co Ltd, 12th Ed, 1936) at pp 52–53). This section traces its origins to the 19th century case of *Wright v Doe d Tatham* (1834) 1 Ad & El 3, amongst others. Various theories have been advanced to rationalise the reception of such evidence, including a suggestion that the rule is *sui generis*. In our view, the rule operates within an overall framework that is designed to ensure that, as far as possible, the best evidence is placed before the court while permitting narrow exceptions where necessary and to the extent that there are sufficient safeguards to assure the reliability of the evidence. It will usually be the case that the best evidence will require the presence and oral testimony of the witness concerned. Where for some reason this is not possible, such as in the circumstances prescribed in s 33, then hearsay evidence may be resorted to. Under s 33, the hearsay evidence concerned is of a specific sort, namely that which had been given at a previous "judicial proceeding" or "before any person authorised by law to take it". As with all exceptions to the rule against hearsay evidence, this is subject to certain preconditions. These preconditions in s 33 are found in the requirement that the witness be practically unavailable and in the three provisos to the section.

25 How do these provisos ensure the reliability of such hearsay evidence? This can be answered

by reference to the rationale underlying them. It is a truism that cross-examination plays a fundamental role in the common law's adversarial process for getting to the truth. The jurist John Henry Wigmore went so far as to declare that "it is beyond any doubt the greatest legal engine ever invented for the discovery of the truth" (see John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1905) ("*Wigmore on Evidence*") at para 1367). The three provisos to s 33 preserve to the greatest extent possible, the security ordinarily afforded by the law through the process of cross-examination to a party against whom hearsay evidence is sought to be adduced. Garrow B in *The Attorney General v Davison* (1825) M'Cel & Y 160 at 169 explained the rationale for this as such:

> In order to affect any party by oral or written testimony, an opportunity should be allowed to him of checking or correcting it by cross-examination. The purpose of a cross-examination is to explain something not yet understood: to elicit something which was not the intent of the examination in chief.

26 Accordingly, where the three provisos are satisfied, the statement may be admitted even though it is hearsay in the strict sense. As further amplified in V Kesava Rao, *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (Butterworths Wadhwa, 18th Ed, 2009) at p 2133:

> In Anglo-Saxon jurisprudence, all depositions of witnesses must satisfy the following tests, namely: (a) they must be taken under oath or solemn affirmation; and (b) when deposing the witness must be brought face to face to the party against whom he is deposing in open court, so that he may be cross-examined by the latter. This security is termed by Bentham as confrontation. This was established long ago, 'the other side ought [not] to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method of discovering the truth.' The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination and obtaining immediate answers. There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness's deportment while testifying, and a certain subjective moral effect is produced upon the witness.
>
> When, therefore, a statement has already been subjected to cross-examination and is, hence admitted as in this case [under s 33 of the EA], it comes in because the rule is satisfied and not because an exception to the rule is allowed.

27 The provisos are cumulative in the sense that they must all be met. Proviso (*b*) is there to ensure that the machinery of cross-examination was effectively available to test the deposition. Proviso (*a*) requires that the *party* against whom the deposition is sought to be used in the present proceedings was the same opposing party in the previous proceedings and proviso (*c*) ensures that the *issues* in the previous and the present proceedings are substantially the same. These latter two provisos are necessary because, as explained in *Wigmore on Evidence* (at para 1386):

> Unless the issues were then the same as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods. Unless furthermore, the parties were the same in motive and interest, there is a similar inadequacy of opportunity, for the present opponent cannot be fairly required to abide by the possible omissions, negligence, or collusion, of a different party, whose proper utilization of the opportunity he has no means of ascertaining.

28 In the light shed by these authorities, we consider the applicability of s 33 in this case.

***The "cannot be found" requirement***

29 To succeed in its application, the Bank must first satisfy the court that the witness "cannot be found". Before the Retrial Judge, the parties took contrasting positions as to what sort of search this requirement entails. The Bank submitted that what this called for was the exercise of "due diligence" in trying to locate the witness. On the other hand, Teo submitted that the Bank ought to have expended its "best efforts" and that the efforts of the Bank (see [20] above) were insufficient. On appeal before us, Teo seemingly accepted the "due diligence" standard though he nonetheless maintained that the Bank had not in fact done enough to satisfy this standard. Teo submitted that an entity such as the Bank ought, among other things, to have engaged private investigators in Singapore and in Dubai, which they did not do. [note: 8]

30 On this, we are broadly in agreement with the Retrial Judge. It would be unfair to say that the efforts undertaken by the Bank were not reasonably sufficient or did not constitute the application of due diligence. It would undoubtedly have been sensible of the Bank to engage private investigators who would have detailed the measures they took to locate Ng. But this particular failure does not obviate the need for us to view in the round the efforts the Bank did apply. This was not a case where Teo could make good any suggestion that the Bank's efforts were not *bona fide*; and, there was nothing to suggest that the Bank was trying to avoid locating Ng. We therefore agree with the Retrial Judge that this requirement was satisfied on the facts.

31 However, for the guidance of future applicants, we must emphasise that although the "due diligence" standard was satisfied in this case, the evidence that was filed by the Bank to demonstrate that it had exercised due diligence could have been better in several respects. In particular, the s 33 Affidavit would have benefitted from the inclusion of more details as to the specific steps and efforts that had been undertaken by the Bank. For example, the s 33 Affidavit referred to different individuals within the Bank who were trying to locate Ng, but did not always identify who these individuals were. Nor was it specified just what instructions had been given to each of them. Such details would have been helpful to the court in coming to a conclusion as to whether the applicant had in fact exerted reasonable diligence. To give one specific example, Anglada deposed in the s 33 Affidavit that a representative of the Bank "visited Café Paparotti, a restaurant in Dubai where Ms Ng was last known to be working at... [h]owever, [the Bank's] representative was told that Ms Ng no longer works at the said restaurant". [note: 9] Nothing in the s 33 Affidavit reveals who this representative was or who the representative had spoken to at the restaurant. If the representative had spoken to the manager of the establishment, this would have gone further towards showing reasonable diligence than if he had spoken to a dishwasher and stopped the enquiry there. Nor was it specified whether the representative had asked whoever was spoken to whether he or she knew of Ng's present whereabouts. Although we do not hold these gaps in the s 33 Affidavit against the Bank, these examples illustrate the level of particularity that should be provided to the court to enable it to assess whether due diligence had been applied in the search for the missing witness.

32 Furthermore, where an application under s 33 is envisaged as a possibility, it would ordinarily be sensible to apprise the opposite party of the measures that have been or are being taken to locate the witness and to invite any comments or suggestions from that party. It may be noted that the interests would generally be convergent in such circumstances.

***The "right and opportunity to cross-examine" proviso***

*The rationale and the relevant principles*

33 The principal issue in respect of this requirement in the present case is whether Teo could be said to have had the "right and opportunity to cross-examine" Ng at the First Trial notwithstanding the fact that the newly disclosed evidence was not available at that time. Counsel for the Bank submitted that because Ng had been cross-examined by Teo's counsel for 6 days during the First Trial, this in itself, without regard to the availability of the newly disclosed materials, meant that the requirement was amply satisfied.

34 We do not agree. The "right and opportunity to cross-examine" must refer to more than just the process of cross-examination having been available at the earlier proceedings. Even if there had been a physical opportunity to cross-examine the witness, if for some reason that opportunity was in fact materially impaired, then it cannot be said to have in fact existed for the purpose of satisfying this proviso to s 33. The right and opportunity to cross-examine must have been an effective one because it serves the crucial function of affording the party against whom hearsay evidence is sought to be used the security he would otherwise have had but for the fact that the witness cannot now be found (see above at [25]). Such security must be real and not illusory. This is also borne out by the other provisos which taken together establish that the previous opportunity to cross examine the witness must in essence have been on a similar substantive footing as would have been the case if the witness had in fact been present in the later proceedings.

35 To the extent that the previous right and opportunity to cross-examine the witness was materially impaired in some way, it will then be relevant to consider why this was so. Where this was due to the cross-examiner's own conduct of the examination, it will not be a legitimate objection to the admissibility of that evidence (see *Wigmore on Evidence* at para 1390). However, the position would be quite different at the other end of the spectrum where the previous cross-examination was materially impaired by the act or omission of the very party who is seeking in the later proceedings to admit the earlier evidence. Although it does not appear that the application of s 33 to this precise scenario has been judicially considered, the authorities suggest a general principle that can guide us. An examination of three examples in the sundry list of circumstances under which the previous cross-examination has been taken to have failed provided in *Wigmore on Evidence* will bear this out. *Wigmore on Evidence* (at paras 1390–1392) states as follows:

> §1390. **Failure of Cross-examination through the Witness' Death or Illness**... (1) Where the witness' *death* or *lasting illness* would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him – as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out.
>
> ...
>
> §1391. **Failure of Cross-examination through the Witness' Refusal to Answer or the Fault of the Party offering him.** (2) Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination, the opportunity of thus probing and testing his statement has substantially failed, and his direct testimony should be struck out.
>
> ...
>
> §1392. **Non-Responsive Answers; General or "Sweeping" Interrogatories.** (3) Where a deposition is taken on *written interrogatories* filed before-hand, and the witness in an answer to a *direct* interrogatory departs from the subject of the question, the cross-examiner may be virtually deprived of cross-examination, because by not anticipating this answer he will not have

framed his cross-interrogatories to probe the witness on the subject. This objection is obviously applicable to written interrogatories only; but to that extent it has a just foundation...

(4)`A direct interrogatory may be so *general* or "*sweeping*" as to enable the witness, while responsively answering, to range over a variety of topics whose tenor the cross-examiner cannot by possibility have anticipated. In this way, for the same reason just noted, he may be substantially deprived of his right...

36 In our judgment, these are particular manifestations of the general principle that where the earlier cross-examination can be shown to have been materially impaired and this was caused or even materially contributed to by the act or omission of the witness himself or of the party seeking to invoke s 33, it cannot then be said that the requirement prescribed in that section, of there having been the "right and opportunity to cross-examine", has nonetheless been fulfilled. This follows from the fact, as we have noted, that s 33 represents an exceptional jurisdiction, and in invoking it, the court is bound to consider whether justice is being done as between *both* parties to the litigation.

37 The foregoing principle will apply with even greater force where the party seeking to invoke s 33 has committed an act or omission in relation to an obligation that is directly relevant to maximising the opportunity to cross-examine. It is this aggravated application of the rule that arises in this case.

*The Bank's breach of its discovery obligations*

38 When the Bank failed to disclose the newly disclosed evidence at the First Trial, it was in breach of its discovery obligations. At the hearing of the present appeals, we asked counsel for the Bank to explain the reason for this breach. We were told that the Bank was not aware of, or rather had overlooked, the existence of *some* of the documents; while *others* were not disclosed on the basis of legal advice. After the hearing, we invited the Bank to clarify this further. We also invited the Bank to consider waiving privilege and disclosing any legal advice it might have received on the issue of discovery and disclosure of the relevant documents. [note: 10]

39 In its reply to the court, [note: 11] the Bank through its solicitors stated as follows:

(a) In respect of documents relating to Client A, who before the commencement of the First Trial had suggested to Teo that Ng had also entered into unauthorised trades for him, these were not disclosed pursuant to legal advice rendered by its solicitors who took the view that this was in the nature of similar fact evidence and hence irrelevant. In any event the Bank was not in a position to disclose them without Client A's consent; [note: 12]

(b) In respect of documents relating to the orders of Clients A, B and C whose orders were consolidated with Teo's orders, the Bank on its own, took the view that because the fact of consolidation had not been challenged in the pleadings, these documents were not relevant. The Bank did not seek or receive legal advice on these documents; [note: 13]

(c) In respect of the documents showing that after 3 October 2007, the Bank's internal credit department sent daily reminders to Ng pressing her to get her clients to regularise their under-margined positions, the Bank took the view, without advice, that these were generated as part of its standard operating procedure and hence irrelevant; [note: 14]

(d) In respect of the transcripts and related documents of the subsequent conversations

between Ng and other Bank employees in relation to the events of 2 and 3 October 2007, the Bank said that it (presumably referring to those having conduct of the litigation) did not know these existed until a further review was undertaken following our directions in Civil Appeal No 99 of 2010. [note: 15]

40 From these clarifications, it was evident that the Bank's breaches of its discovery obligations arose from positive steps and decisions it had taken and in the main these were misconceived. In respect of at least two categories of documents (see [39(b)] and [39(c)] above), the Bank had decided not to disclose these on its own initiative. Although counsel for the Bank described this as "inadvertence", to put it at its lowest, a litigant, especially one with the sort of institutional support that might be expected of the Bank, runs a risky and dangerous course when it chooses not to implement even elementary steps to ensure that it has complied with its discovery obligations. As for documents evidencing the conversations that took place between Ng and the other employees of the Bank, its excuse is that it did not know these documents existed at the time of the First Trial. We find this difficult to accept. First, we note that some transcripts of conversations that took place on 2 and 3 October 2007 had been disclosed. It is unclear to us, in this light, how or why the later transcripts were missed. Second, these documents surfaced upon a "review" done following our orders in Civil Appeal No 99 of 2010. This suggests that had the Bank done the same review before the First Trial, these documents would have surfaced. No explanation was forthcoming as to why this had not been done. Finally, although there is no suggestion that its breaches of its discovery obligations was the result of its receiving incorrect advice from its solicitors, we would point out that even if that were so, the Bank would have remained responsible for this *vis-à-vis* its counterparty to the litigation (see *Vernon v Bosley (No 2)* [1997] 3 WLR 683 at 698F–G).

41 Discovery is a fundamental rule in our system of litigation. In the plain language of Sir John Donaldson MR in *Davies v Eli Lilly & Co and Others* [1987] 1 WLR 428 ("*Eli Lilly*") at 431, litigation is conducted "cards face up on the table". There are several reasons for this cardinal principle of litigation. The broad rationale of any system of discovery is said to be the just and efficient disposal of litigation (see Paul Matthews & Hodge M Malek QC, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012) ("*Disclosure*") at para 1.02; and see also the comments of Donaldson MR in *Naylor v Preston Area Health Authority* [1987] 1 WLR 958 ("*Naylor*") at 967E). The just and efficient disposal of litigation can only be achieved by ensuring that parties disclose the relevant evidence before any hearing of the matter, thus allowing counsel and the parties to evaluate the strength of their respective cases, clarify the issues between them, reduce surprises at the trial and encourage settlement (see *Disclosure* at para 1.02). Such a philosophy recognises that although our system remains an adversarial one, it is not one that condones a litigant winning on "tactical considerations" alone (see *Naylor* at 967B).

42 Donaldson MR in *Eli Lilly* (at 431) additionally explains that the principle that litigation is to be conducted with "cards face up on the table" helps ensure that "real justice between opposing parties" is done. Unless the court has before it *all* the relevant information, such an object cannot be achieved. In our view, this principle is equally designed to ensure that a party has an effective and unimpaired opportunity to conduct its cross-examination. Without the relevant evidence disclosed before the hearing of a matter, a litigant cannot be said to be in a position to adequately prepare his cross-examination and so to effectively test a witness's testimony.

43 The responsibility for ensuring proper discovery falls not only on the litigant but on his lawyers as well. In *Myers v Elman* [1940] AC 282 ("*Myers v Elman*") at 322, Lord Wright explained that a client cannot ordinarily be expected to realise the entire scope of his discovery obligations without the aid and advice of his solicitor. As officers of the court, solicitors owe a special duty to the court to properly explain to their clients what these obligations are. They also owe a duty of involvement in

and supervision of the disclosure process. We recognise that solicitors might, as a result, find themselves in an unenviable position *vis-à-vis* their clients. As Lord Atkin observed in *Myers v Elman* (at 304):

> It is a subject which undoubtedly often presents difficulties to a solicitor, who in quite ordinary disputes finds it difficult to convince his client that business documents, as well as documents which the client considers private and confidential, must be disclosed.

44 Nevertheless, because this duty is owed to the court and exists for the purpose of ensuring the proper administration of justice, it remains incumbent on solicitors, in good conscience, to act in diligent compliance with it (see *Public Trustee and another v By Products Traders Pte Ltd and others* [2005] 3 SLR(R) 449 at [26]–[36]). Should the solicitor find that he is unable to obtain his client's cooperation in this respect, he must cease to act for that client (see *Myers v Elman* at 293–294, 317).

45 What then are the practical applications of this duty of the solicitor? Lord Atkin explained it thus in *Myers v Elman* (at 304):

> He is at an early stage of the proceedings engaged in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously *he must explain to his client what is the meaning of relevance*: and equally obviously *he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter;* but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. [emphasis added]

46 As noted above, when we asked the Bank to clarify the reasons for its non-disclosure of important documents at the First Trial, we invited it to consider waiving privilege and disclosing the legal advice it received on the question of discovery and disclosure of the relevant documents. This included the initial letter that was sent to the Bank setting out its discovery obligations. We were told that the Bank was advised "generally" on its discovery obligations, and two emails sent by the Bank's solicitors to its in-house counsel and Head of Legal and Compliance were produced. [note: 16] In these emails, the solicitors stated, similarly on both occasions: [note: 17]

> Pursuant to Order 24 of the Rules of Court of Singapore, either party to a Suit in Singapore (i.e., the Plaintiffs or the Defendant) is obliged to disclose all documents on which either party relies on or will rely on and which are in the party's possession, custody or power and this would include:
>
> (i) Documents which adversely affect his own case;
>
> (ii) Documents which adversely affect another party's case; or
>
> (iii) Documents which support another party's case.

47 We would have serious concerns if this was the *full* extent of the legal advice rendered by the solicitors to the Bank on the question of discovery, since in effect, it entailed little more than a perfunctory reference to O 24 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) without more. Merely informing the client of the terms of O 24 does *not* discharge a solicitor's duty to the court in connection with discovery. In *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 60, Salmon J held that a solicitor is duty bound, as an officer of the court, to carefully go through the documents disclosed by

the client in order to ensure that, as far as possible, no relevant documents have been omitted. We accept that this may have to be tempered in appropriate cases, particularly where the volume of electronic or other documents might necessitate some degree of considered, informed and adequately supervised delegation. But there was nothing to suggest that this was such a case. Moreover, we would have expected that in advising the Bank, its solicitors, as professional advisors having expert knowledge of the relevant legal and factual issues likely to arise in such litigation, would at the very least have identified classes or types of documents that the Bank should search for and produce. Further, the solicitors would also have been expected to examine what the Bank in fact produced and consider, in this light, what classes of documents seemed to be missing.

48 The Bank in the present case is a large corporate entity with many employees and working parts. How does a solicitor's duty in respect of his client's disclosure operate where the client is a corporate being? In *Koh Teck Hee (trading as Mui Teck Heng Garments & Trading Co) v Leow Swee Lim (trading as Meyoung Trading)* [1991] 2 SLR(R) 328 (at [21]), K S Rajah JC adopted the opinion of Megarry J in *Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaires) Ltd and Others* [1968] 1 WLR 693 (at 694) that the solicitor's duty extends to ensuring that knowledge and appreciation of the scope of the discovery obligations are passed on to any in the corporation who might be affected by it. We respectfully agree. As to how and what it means in practical terms to discharge such a duty, the advice of the learned authors in *Disclosure* (at para 18.08) is instructive:

> Where the client is a business organisation, a visit to its premises will be useful also to gain an insight to the way the business is administered, how and when documents are generated, and the personalities of the people involved. All of this knowledge will assist the solicitor, both in locating documents which may be subject to the disclosure obligation, and in dealing with any queries on, or criticisms of, the client's disclosure once given. This will save time and costs later. ... In some cases it may be a good idea to circulate all relevant employees giving general information about the disclosure process, and enquiring whether any relevant files or documents are or have been held by them.

49 As we have stated (at [47] above), we do not think that the two emails disclosed could have been the full extent of the advice on discovery rendered to the Bank by its solicitors. On the other hand, we simply do not know whether the solicitors here had taken all the steps they ought to have. Of the newly disclosed documents, the documents in the second, third and last classes of documents (as identified in the solicitors' letter, see [39] above) appear to us to be the sort that would likely have emerged had the solicitors taken the appropriate steps we have set out above. Further, we would be surprised and concerned if the commercial staff of the Bank felt able to form their own view as to the relevance and discoverability of the orders of Clients A, B and C without obtaining any legal advice on the matter, including from the Bank's in-house legal team. Even, a simple investigation into the daily operations of the Bank should have revealed that the Bank's credit department generated daily margin chasers and their relevance should have been readily apparent to the in-house lawyers and the solicitors. These observations as to what would or could have been done in respect of the disclosures in this case are, in the final analysis, somewhat hypothetical and speculative. Because the issue is not before us, we say no more about the solicitors' conduct of the discovery in this case, but we take this opportunity to remind all solicitors of the special duty they owe us in this aspect of administering justice.

*The "right and opportunity to cross-examine" was materially impaired by the non-disclosure of the newly disclosed evidence*

50 Teo's "right and opportunity to cross-examine" Ng at the First Trial was materially impaired by the Bank's non-disclosure of the newly disclosed evidence. Much of the newly disclosed evidence was

potentially prejudicial to the Bank's case that the Disputed Accumulators were authorised.

51 For instance, in respect of the daily chasers sent by the Bank's credit department to Ng pressing her to get Teo to top up his account, which was under-margined as a result of the Disputed Accumulators, it was telling that Ng did not respond for several days despite the mounting pressure. Significantly, Ng also did nothing to convey this reminder to Teo. This omission is inexplicable if the transactions were authorised. Moreover, some correspondence or other documents that evidenced conversations between Ng and her colleagues in relation to the events of 2 and 3 October 2007 revealed that she was lying to them and this was simply inconsistent with the transactions in question being fully authorised, as was the Bank's case.

52 The newly disclosed evidence would undoubtedly have been used by Teo's counsel in his cross-examination of Ng at the First Trial had it been available then. Had Ng not been able to satisfactorily explain these documents, it would have gravely undermined Ng's testimony and the Bank's case that the Disputed Accumulators were fully authorised.

53 Counsel for the Bank submitted that the Bank too was prejudiced by Ng's unavailability to testify at the Retrial as she might well have had a good explanation for the evidence, which at first blush might appear prejudicial to the Bank's case. This might well be so, but it was the Bank's own breach of its discovery obligations that led to this. Moreover, the policy behind s 33 of the EA is to ensure reliability of the evidence where the best evidence, in this case Ng actually testifying at the Retrial, is not available. It was not just in these circumstances to proceed, as counsel for the Bank submitted, by admitting Ng's testimony and then balancing the potential prejudice to Teo by giving that testimony the appropriately discounted weight.

54 In the circumstances, we hold that the cross-examination of Ng at the First Trial was materially impaired and this was brought about by the Bank's breach of its discovery obligations. Accordingly, we hold that proviso (*b*) to s 33 was not satisfied in this case.

***Our decision in Civil Appeal No 94 of 2012***

55 We therefore hold that insofar as Ng's evidence in her affidavits of evidence in chief and oral testimony at the First Trial relates to facts which are disputed between the parties, they are not admissible under s 33 of the EA and are thus to be excluded. Specifically, the evidence is excluded for the purpose of proving what happened on and after 2 and 3 October 2007. As Teo did not dispute that the evidence may be admitted to prove background facts, *viz*, the events before 2 and 3 October 2007, we allow it to stand to this extent.

56 We accordingly allow the appeal in Civil Appeal No 94 of 2012.

**Civil Appeal No 59 of 2012**

***The Bank's case***

57 Counsel for the Bank submitted that the Bank's case could stand even if Ng's affidavits of evidence in chief and oral testimony at the First Trial were not admitted pursuant to s 33 of the EA in relation to the contested facts and specifically, the events of 2 and 3 October 2007 and thereafter. Counsel for the Bank listed the following facts in support of his argument:

(a) Teo was a sophisticated investor who had been a private banking client of Ng for a number of years;

(b) On the basis of the 14 undisputed accumulators and the fact that he had received terms sheets for them, Teo was well versed in accumulators and knew how they worked;

(c) The evidence showed that Teo's risk appetite was growing from July to September and at one stage, his total exposure under the accumulators was some $5.7m. So, to enter into the Disputed Accumulators with such a large exposure was not out of character;

(d) The market was rising at the material time. If the market had continued to rise, Teo could have expected to see a quick knock-out of the accumulators which would have allowed him to make a quick profit;

(e) There was a prevailing "China fever" or an "S-Chip fever" in Singapore. CE and Cosco shares were doing very well during this period, and this was evidenced by the various analyst reports and articles produced by the Bank at the trials;

(f) On the morning of 2 October 2007, Ng sent an SMS to Teo stating "Ok, last night [US] very good. Rally shld continue. Can I do somemore? Looking at china energy, cosco, ferrochina. [*sic*]". Teo called Ng 6 seconds after receiving the SMS and they *must* have talked about S-chip shares and the establishment of more such accumulators. Teo under cross-examination conceded that he spoke to Ng, although he denied agreeing to the establishment of the Disputed Accumulators;

(g) The chronology of events on 2 and 3 October 2007, was consistent with Ng taking orders from clients and *then* placing them through PBA;

(h) Term sheets detailing the Disputed Accumulators were sent to Teo, suggesting that there was full transparency on the Bank's part;

(i) Teo did not unequivocally object to the transactions when he found out about them. When he met the management of the Bank, he expressed concern only with the *extent* of the exposure, and did not allege that the transactions were wholly unauthorised; and

(j) Teo inquired about the unwinding costs of the Disputed Accumulators, suggesting that he knew he had made a bad bet and was thinking of cutting his losses.

58 As the plaintiff, the Bank bore the burden of proof. In its Statement of Claim, [note: 18] the Bank claimed against Teo the full amounts due under the Disputed Accumulators on the basis of their specific terms. Its case was that the Disputed Accumulators were *fully* authorised. The Bank consequently bore the burden of showing that this was in fact so. In order to do so, the Bank had to prove that Ng spoke to and obtained Teo's authorisation on 2 and 3 October 2007 to transact the Disputed Accumulators on the terms on which they were in fact done. This, after all, was its pleaded case.

59 Given our ruling that the Bank cannot rely on Ng's evidence to prove what transpired on and after 2 and 3 October 2007, the Bank faced a considerable hurdle, and this was not mitigated by the array of facts that counsel for the Bank presented. Many of these facts showed the occasion and even possibly the motivation for Teo to enter into the transactions. But without more, this would not suffice to discharge the Bank's burden of proving that in fact the establishment of all the Disputed Accumulators were authorised – not merely that Teo was familiar with them and might well have contemplated entering into them.

***The hurdles faced by the Bank in proving its case***

*Ng's inaction in the face of intense pressure from the Bank's credit department*

60 It is not disputed between the parties that after 3 October 2007, there was a complete absence of communications between Ng and Teo until 11 October 2007. The newly disclosed evidence showed that from 4 October 2007 onwards, the Bank's credit department sent emails to Ng several times daily. These came from different persons pressing her to get Teo to pay monies into his under-margined account to regularise it. The pressure on Ng from the Bank's credit department was substantial and it mounted as the days went by but without any action by her to regularise the position. On 8 and 9 October 2007, emails were sent to Ng informing her that her ability to trade was suspended and would remain so until the position was regularised. [note: 19] Despite this, Ng did not contact Teo until 11 October 2007.

61 These emails also showed that Ng was being taken to task by others within the Bank for having entered into the transactions in Teo's account contrary to the terms on which she had been authorised by the Bank. In an email on 8 October 2007 from Tay Lian See ("Tay"), head of the Bank's credit department, Ng was reminded that the clients' accounts had to be fully funded to the extent of the Maximum Obligation *before* the accumulators were established. [note: 20] Ng had breached the Bank's internal policy and the terms of her own authority when she booked the Disputed Accumulators in Teo's account without Teo already having sufficiently funded his account to the tune of the Maximum Obligation. That this had been so even on previous occasions does not detract from the intense pressure Ng came under on this occasion, as she was asked repeatedly to ensure that Teo urgently paid the required monies into his account. Inexplicably, she did nothing of the sort.

*Ng's persistent failure to tape her calls with her clients*

62 As much as the difficulties in this case were caused in the first instance by Ng's failure to use her recorded telephone line provided by the Bank when taking orders from Teo and her other clients, even when it had become apparent that a dispute between the Bank and Teo was a real possibility, and even after she had been specifically directed to use the recorded telephone line, Ng persisted in using her personal handphone when speaking to Teo. On or around 12 November 2007, Tay specifically instructed Ng to use the Bank's recorded telephone line when speaking to Teo. The Bank at this time was under the impression that Teo was vacillating on his liability to the Bank, and Tay wanted any conversations to be recorded. [note: 21] Ng claimed that she spoke to Teo after this on 14 November 2007, but despite instructions to the contrary, she apparently did so on her personal handphone. She claimed that this was because she had already left the office at 9pm. [note: 22] Similarly, her subsequent telephone conversations with Teo between 15 November and 19 November 2007 were all unrecorded.

63 Teo submitted that such conduct on Ng's part cast doubts on the Bank's claim that Teo had fully authorised Ng to enter into the Disputed Accumulators on his behalf. [note: 23]

*Ng was lying to the Bank's credit department*

64 Some emails in the newly disclosed evidence revealed that Ng had lied to her colleagues from the credit department on several occasions.

65 On 8 October 2007, Ng's assistant Paul Neo ("Neo") sent an email on Ng's instructions to Chee

Eng Sim ("Chee") of the Bank's credit department requesting approval for a loan on Teo's behalf (as well as that of other clients) to settle the under-margined position in his account. [note: 24] The loan requested on Teo's behalf was for S$118,057.57. In this email, Neo stated that "[a]s spoken with [Ng], clients will fund in money this week". This was a remarkable contention because, as noted above, Ng did not have any contact with Teo during this period until 11 October 2007 at the earliest. Teo submitted that Ng was making up this story to mislead Chee. [note: 25]

66 Another document in the newly disclosed evidence was a transcript of a telephone conversation between Ng and Neo on 12 November 2007. [note: 26] In this conversation, Ng instructed Neo to draft an email to Ng's superior Paul Kwek ("Kwek") requesting approval for Teo to draw down on a loan to pay for the shares acquired under the Disputed Accumulators, and also to inform Kwek that Teo would be selling some of his shares over the following days to raise funds for this purpose. Neo duly sent an email to Kwek at 4.05pm conveying this. [note: 27] However, Ng's telephone records showed that she only attempted to call Teo at 6.45pm on that day and was not able to reach him. In fact, the last time she had spoken to Teo was an entire week earlier on 5 November 2007. Ng had not gotten any such instructions from Teo and was concocting falsehoods to mislead the Bank's credit department. [note: 28] Moreover, by this time, Ng knew that Teo was disputing these transactions.

67 More disturbing was the tone of the conversation between Ng and Neo. First, when Neo informed Ng on the following day that the amount in Teo's Singapore dollar deposit account was insufficient to meet payments falling due in respect of the acquisitions to be made under the Disputed Accumulators, Ng replied: [note: 29]

> Tomorrow's most likely I would sell [shares] off for him. So don't take loan, never mind, tomorrow we just sell.

The tone of the exchange was that Ng would deal with Teo's account on her own, without even seeking Teo's authorisation. Later in the conversation, Ng told Neo: [note: 30]

> No, no, no, no, you don't put that. You say that er... yah, client will sell some shares tomorrow er, you say his Neptune Orient NOL maybe, then tomorrow he then change his mind lah. (Laughs)

In essence, Ng was laying out a plan of the story they would tell of Teo's purported intentions, and of how they could cover this lie up with another, namely that Teo had subsequently changed his mind. There is a seriously disturbing tone in these exchanges that does not sit well with the trust that customers are invited to place in their bankers.

68 Lastly as we have observed (above at [62]), Ng claimed to have called and spoken to Teo on her personal handphone on 14 November 2007. However, her telephone records do not show such a phone call having been made. Notably, when the Bank later prepared for this litigation a document entitled "Chronology of emails and phone calls relating to margin calls for the 5 Disputed Energy Accumulators", [note: 31] the alleged phone call on 14 November 2007 was not listed. It may be that she was lying on this occasion also. [note: 32]

69 In our view, Ng's lies to her own back office made no sense if the Disputed Accumulators were in fact fully and properly authorised. Moreover, Teo's assertions gain strength from the fact that he made and then maintained them well before he had access to some of this incriminating evidence, which only emerged from the Bank at a very late stage.

***The evidence in support of the Bank's case***

70 We consider the evidence in support of the Bank's case.

*Phone calls were made on 2 and 3 October 2007 and accumulators were booked*

71 The Bank relied primarily on the fact that there *were* a number of calls between Ng and Teo on 2 and 3 October 2007. But this does not tell us what was said. It was the Bank's case that during these phone conversations, Ng and Teo generally discussed S-Chip shares and specifically, the possibility of entering into further CE accumulators. We might agree that this was in all probability likely to have been discussed. We might also agree with the Bank and the Retrial Judge [note: 33] that in respect of the phone calls on 2 October 2007, given that Teo had called Ng just seconds after he received an SMS from her asking if he wanted to enter into more S-Chip accumulators after a good rally the night before, it is more likely than not that they did discuss S-Chip shares and the prospect of entering into further CE accumulators. In respect of the phone calls on 3 October 2007, we might similarly agree, since she had spoken to PBA just prior to calling Teo and had told them that she would take her clients' orders for CE accumulators before getting back to them, that when she did speak to Teo, it was to discuss the prospect of entering into more CE accumulators. [note: 34] However, this was just not sufficient. As we have pointed out (see above at [58]), the Bank as the plaintiff bore the burden of proving its pleaded case, and its pleaded case was that Teo had *authorised* Ng to transact the *exact volume* of CE accumulators on the *terms* on which the Disputed Accumulators were transacted. Ng's testimony at the First Trial, had it stood up to proper cross-examination, could have been relevant to prove this but, as we have ruled, that is not admissible.

72 We acknowledge that Ng did book the Disputed Accumulators into Teo's account. The Bank submitted that the chronology of events on 2 and 3 October 2007 was consistent with Ng taking orders from her clients and then placing them with PBA in accordance with such instructions. [note: 35] We do not disagree with the Retrial Judge's methodical analysis of the order of the various phone calls on 2 and 3 October 2007 and the conclusion that the sequence of events was *not inconsistent* with Ng obtaining Teo's instructions before booking the Disputed Accumulators in his account (see the Retrial Judgment at [46] and [63]). [note: 36] However, the Retrial Judge reached his ultimate conclusions on the basis of admitting and accepting Ng's earlier evidence. The position is dramatically different on our view of this evidence.

73 Moreover, Ng's subsequent conduct immediately after 2 and 3 October 2007 (see [60]–[61] above) does not sit well with the conclusions suggested by the Bank.

*Teo's slowness is denouncing the Disputed Accumulators*

74 In favour of the Bank's case, it is noteworthy that Teo had been less than forthright in denouncing the Disputed Accumulators when he first learnt about them. The Bank submitted that Teo's seeming ambivalence suggested that the transactions were not unauthorised. One would expect a victim of an unauthorised trade that gave rise to such large exposures to react much more definitively to disclaim it as soon as he became aware of its existence. [note: 37] According to Teo, on 16 October 2007 he learnt for the first time from Ng that she had entered into the Disputed Accumulators and the Sembcorp Accumulator (entry number 20 of the Table of Accumulators, see [6] above), which according to her left him facing a Maximum Obligation of some $9m. He said that he was at a cake shop in Bukit Timah when she called to tell him this and he "blew up" on learning this. He allegedly told her that these were not authorised and certainly not to such a large extent. During

their next phone call on 18 October 2007, Ng informed him that the Sembcorp Accumulator had been knocked-out and he agreed to accept that transaction since it caused him no loss. He said that she then asked for time to resolve the Disputed Accumulators with her superiors and he agreed. The Bank submitted that if the Disputed Accumulators were in fact unauthorised, he would have immediately complained directly to the Bank's management, rather than trust Ng, the very person who had gotten him into the predicament, to resolve the matter. [note: 38] After their conversation on 18 October 2007, there was no further contact between them for nearly 3 weeks.

75 In our view, all this was to be seen in the light of a long and seemingly successful relationship that Teo had until then enjoyed with Ng. Ng had been his relationship manager from 2004 when she had been with Citibank. When she left Citibank for the Bank in 2006, she successfully persuaded him to transfer his business and open a private banking account with the latter. Given this long relationship, it was entirely plausible that he would have first thought that she would be an ally in trying to resolve the situation by accepting the responsibility and working it out with her superiors. We do not disagree with the Retrial Judge that Teo *could* have gone directly to Ng's superiors immediately. [note: 39] But this must be tempered with an understanding of the reality of their relationship. Teo's friend, one David Lim ("Lim"), a remisier with DMG Partners Securities, gave evidence that sometime in November 2007, when Teo told him that Ng had carried out some unauthorised trades on his account, he advised Teo to speak to Ng's superior. [note: 40] Teo said that he arranged to meet Ng's superior, Kwek, after being so advised by Lim. Lim's evidence was not seriously challenged by the Bank.

76 Second, as we have noted, Ng was lying to her colleagues about various matters during this period (see above at [64]–[69]). In our judgment, given this evidence of her lack of candour, it might have been just as likely that she was lying to Teo, as he contended was the case, with assurances that she would resolve the issue with her superiors.

77 Third, we note that in relation to his evidence as to the phone calls of 16 and 18 October 2007, Teo was broadly consistent in his account of these events from the affidavit he first filed in response to the Bank's application for summary judgment in January 2009, [note: 41] through each of his subsequent testimonies including his affidavit of evidence in chief affirmed in September 2009, [note: 42] his testimony under cross-examination at the First Trial in November 2009, [note: 43] and his testimony under cross-examination at the Retrial in January 2012. [note: 44] Teo, unlike Ng, was present at both the First Trial and the Retrial, and faced cross-examination on this issue by counsel for the Bank twice. His testimony, in essence that he had agreed to give Ng time to resolve the issue with her supervisors, did not waver and remained broadly consistent.

*Teo's receipt of confirmation notes, term sheets and monthly statements of accounts*

78 Counsel for the Bank made much of the fact that Teo had received from the Bank letters containing confirmation notes and term sheets detailing the terms of the Disputed Accumulators as well a monthly statement of his account for the month of October. The Bank contended that despite these documents expressly requiring the client to inform the bank immediately of any transaction stated therein that was not in accordance with his instructions or of any error, Teo had failed to do so. [note: 45] The Bank argued that Teo's evidence, that although he received and opened some of these documents he never read them, was "convenient" and could not be believed.

79 In our view, this misses the fact that the evidence from the Bank's Head of Internal Audit, Cecilia Goh, showed that such documents took at least two and a half weeks from the time they were

generated to when the client received them. [note: 46] By the time Teo received them, on his version of events, he had already raised an objection with Ng on 16 October 2007 (see [74]) above). These documents therefore do not add anything to the Bank's case.

*Teo's payment of $160,000 to the Bank*

80 On 7 November 2007, Teo issued the Bank a cheque for $160,000. This was used to pay for some CE shares that had been delivered under the Disputed Accumulators. The Bank argued that Teo's payment, made without any qualifications or reservations, evidenced his having authorised the Disputed Accumulators. [note: 47] The Bank pointed out that all of Teo's previous accumulators had been knocked out, and, as he should have been aware, he had a positive balance of assets worth at least $500,000 in his account. It was submitted that Teo must have known that he had more than sufficient assets to satisfy any liabilities that might have arisen under any other authorised or undisputed transactions. As against this, Teo's case was that Ng asked him to make this payment and he did so believing that it was required in connection with some undisputed accumulators. [note: 48] Teo maintained that he did not monitor the details of his transactions and acted primarily on the basis of his discussions with Ng. This is unsurprising in all the circumstances of this case and when dealing with a banker who was required to record such conversations. Teo, of course, was not aware that Ng usually did not record their conversations. In the circumstances, it was not implausible that he made this payment without being specifically aware that it was for the Disputed Accumulators. [note: 49] In the absence of any admissible evidence to the contrary from Ng, there was no basis for rejecting Teo's version.

***The picture that emerges from the evidence***

81 In reviewing the totality of the evidence, it cannot be denied that there *were* difficulties with Teo's case, which was that the Disputed Accumulators were *completely* unauthorised. Having regard to the telephone conversations that undoubtedly took place between Ng and Teo during this period, and the orders that Ng was placing with PBA it would be implausible that they *never* discussed entering into these accumulators.

82 It is likely in our view, having regard to the objective facts that stand, quite apart from Ng's evidence, that Teo and Ng did discuss the establishment of *some* of the Disputed Accumulators. In this regard, the Bank relied on various meetings Teo had with the Bank's management team on 20 and 28 November 2007 and 5 December 2007, during which, it was said, Teo only complained about the *level and size* of his exposure under the Disputed Accumulators. [note: 50] This was the evidence of the Bank's employees who were present at the meetings and it was reflected in the contemporaneous notes of these meetings as well as in subsequent correspondence with Teo. But it was never the Bank's case that only *some* of the Disputed Accumulators were authorised and the objective facts, even taking at face value the evidence of what transpired at these meetings, simply do not suffice to establish on a balance of probabilities that *all* the Disputed Accumulators had been fully authorised on the terms in which they had been entered into.

83 Teo maintained that he had at various times indicated to Ng the limits within which he was prepared to enter into accumulators, and that these were far lower than the level of the exposure he faced under the Disputed Accumulators. He was adamant that his appetite for risk was never to this extent. This might have played on Teo's mind in his subsequent dealings with the Bank. But it was ultimately irrelevant to this case because the Bank was not claiming anything other than the full extent of the liability for the Disputed Accumulators. In the final analysis, this was what the Bank had to prove and there was nothing to show that Teo ever accepted that he had authorised the

establishment of all the Disputed Accumulators.

84 The Bank as the plaintiff bore the burden of proving that Ng had been authorised by Teo to establish *each* of the five Disputed Accumulators on their *exact terms*. In all the circumstances, and especially given:

(a) that the Bank cannot rely on Ng's evidence;

(b) Ng's unexplained inaction from 3 October to 11 October 2007; and

(c) Ng's deliberate attempts to lie and mislead even her own colleagues in the Bank;

we find that the Bank has failed to discharge its burden of proving that Teo had specifically authorised the establishment of the Disputed Accumulators.

***The Bank's estoppel argument***

85 The Bank's further and alternative argument was that Teo was estopped from claiming that the Disputed Accumulators were unauthorised because by his conduct he had represented that they were authorised. In our judgment, this was little more than an attempt to make up by numbers, what the Bank's case (without Ng's evidence) lacked in substance and we can dispose of it shortly. A concise statement of the law of estoppel by representation may be found in our decision in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273 ("*Pertamina Energy*") at [72]:

> In *Greenwood*, the House of Lords held that in order for estoppel to succeed, three conditions must prevail: (a) *a representation or conduct amounting to representation intended to induce a course of action on the part of the person to whom the representation was made*; (b) *an act or omission resulting from the representation by the person to whom the representation was made*; and (c) *detriment to such person as a consequence of the act or omission*. It was also declared that silence can indeed amount to a representation if there is an existing duty to disclose knowledge. In essence, where the customer has actual knowledge of any forgery or unauthorised issuance of payment instructions and fails to inform the bank accordingly, the customer is prevented from raising the forgery. [emphasis added]

86 The Bank argued that Teo represented that the Disputed Accumulators were authorised by: [note: 51]

(a) keeping silent and inactive for more than a month after he received the confirmation notes and term sheets for the Disputed Accumulators and the monthly statement of accounts for October 2007 showing the Disputed Accumulators;

(b) making payment of the sum of $160,000 on 7 November 2007 to the Bank without qualification and reservation, such sum being payment for shares acquired under the Disputed Accumulators; and

(c) instructing Ng on 16 November 2007 to sell 180,000 CE shares, 120,000 of which were acquired pursuant to the Disputed Accumulators.

It claimed that as a result of relying on such representation, it suffered detriment in continuing to purchase CE shares under the Disputed Accumulators from its counterparties, and in having to pay higher unwinding costs to its counterparties than it would have if it had unwound the transactions on

16 October 2007 (when Teo first learnt of them).

87 Teo, in response, argued that no such representation had been made because he had objected to the Disputed Accumulators when Ng spoke to him on 16 and 18 October 2007, and, in any event, when he met Kwek on 20 November 2007. [note: 52] He further argued that the Bank had failed to plead the steps it would have taken on learning that the Disputed Accumulators were unauthorised, and that it had also failed to lead any evidence to show what it could and would have done to minimise its loss from the Disputed Accumulators (as required of it; see *Pertamina Energy* at [85]). [note: 53] Lastly, Teo submitted that the evidence actually showed that even after the Bank knew that Teo was alleging that the Disputed Accumulators were unauthorised, it took the opposite view and maintained that they were authorised. [note: 54]

88 In our judgment, the Bank's claim fails, first because there was no evidence of any representation by Teo to the bank. On the basis of Teo's evidence, he had disclaimed the Disputed Accumulators in his conversations with Ng on 16 and 18 October 2007. Moreover, on the evidence before us, it was Ng who was misrepresenting the position to her colleagues in the Bank. Secondly, the Bank has not shown that it had suffered detriment by reason of any such representation. Teo's position that the Disputed Accumulators were unauthorised was made known to the Bank, at the latest, by the time of Teo's emails to Kwek on 21 November 2007, 23 November 2007 or 11 December 2007. [note: 55] Yet, the Bank, presumably relying on Ng's version of events, did not take immediate steps to unwind the Disputed Accumulators. Instead, the Bank continued to acquire CE shares under the Disputed Accumulators from its counterparties and only unwound these transactions in April 2008, some 4 months later. [note: 56] In the circumstances, it cannot be said that the Bank had *relied* on any representation from Teo, nor that it had suffered any detriment as a result. Instead, it had mistakenly concluded that it would be able to prove that the Disputed Accumulators were authorised and so did not unwind them earlier. For these reasons, the Bank's estoppel claim also fails.

***Teo's counterclaim for wrongful liquidation of assets and monies set off***

89 Given that the Bank fails on its claim against Teo for the Disputed Accumulators, it must follow that Teo's counterclaim for wrongful liquidation of his assets which were held by the Bank and wrongful set off of monies in his accounts by way of payment for the Disputed Accumulators must succeed. These assets and monies were Teo's to begin with. As the Bank was not able to prove that the Disputed Accumulators were authorised, it had no right to appropriate these assets and monies in order to effect payment for them.

90 Finally, we turn to the separate head of counterclaim brought by Teo for breach of statutory duty under s 27 of the FAA, to which we have already referred (see [10] above). Given Teo's experience with accumulators aside from the Disputed Accumulators, there is no basis for such a counterclaim, and it was therefore unsurprising that it was never pursued by Teo.

***Our decision in Civil Appeal No 59 of 2012***

91 The appeal in Civil Appeal No 59 of 2012 is therefore allowed and the Bank's claims against Teo are dismissed.

92 Teo's counterclaim against the Bank for wrongful liquidation of his assets and for wrongful set off of any cash balances in his account is allowed. We accordingly order an account to be taken of such assets and monies. The Bank is to pay such sum found to be due to Teo with interest from the date of such wrongful liquidation and/or set off to the date of payment at the rate of 3% per annum.

If the account and the extent of any repayment due to Teo cannot be agreed between the parties, the matter is to be remitted to the Retrial Judge for determination. The parties are to write to the Registry within one month to request a Pre-Trial Conference to be fixed for the matter to be set down to be heard before the Retrial Judge if this is necessary.

**Costs**

93 In *Myers v Elman*, the solicitor was ordered by the court to personally pay the costs of the proceedings on the ground of his dereliction of duty in relation to his client's discovery. There, the solicitor left the supervision of the discovery process to his clerk. As a result his clients made and filed affidavits of documents which, in the context of that litigation, the solicitor, had he been apprised of the facts, would have *known* were inadequate and false. There is no occasion for us to make such an order in this case for two reasons. First, the extent to which the solicitors, if at all, had failed in their duty to the court in relation to the discovery in this case was not clear (see above at [49]). Second, and more importantly, the Bank in this case was not lacking in resources or sophistication. It had an in-house legal team that was also working on this matter and we would have expected the Bank's in-house legal team to make reasonable inquiries and to initiate elementary steps to understand exactly what the Bank's discovery obligations were, had they entertained any doubts on this. Unfortunately, that was apparently not done.

94 We order costs here and below to Teo. These are to be taxed if not agreed. There will be the usual consequential orders.

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[note: 1] CA 99/2010 Judgment at [20].

[note: 2] CA 99/2010 Judgment at [21]–[22].

[note: 3] CA 99/2010 Judgment at [23].

[note: 4] CA 99/2010 Judgment at [30].

[note: 5] Record of Appeal (Volume II) (Part B) at pp 13–19; Appellant's Core Bundle (Volume II) (Part A) at p 75–79 (20th Affidavit of Jean-Luc Anglada affirmed on 14 October 2011).

[note: 6] Retrial Judgement at [37].

[note: 7] Retrial Judgement at [39].

[note: 8] Appellant's Case at paras 56–58.

[note: 9] Record of Appeal (Volume II) (Part B) at pp 13–19; Appellant's Core Bundle (Volume II) (Part A) at 75–79 at para 19 (20th Affidavit of Jean-Luc Anglada affirmed on 14 October 2011).

[note: 10] Letter from Supreme Court Registry to WongPartnership LLP dated 20 March 2013.

[note: 11] Letter from WongPartnership LLP to Supreme Court Registry dated 3 April 2013.

[note: 12] Letter from WongPartnership LLP to Supreme Court Registry dated 3 April 2013 at paras 3–

20.

[note: 13] Letter from WongPartnership LLP to Supreme Court Registry dated 3 April 2013 at paras 31–40.

[note: 14] Letter from WongPartnership LLP to Supreme Court Registry dated 3 April 2013 at paras 50–53.

[note: 15] Letter from WongPartnership LLP to Supreme Court Registry dated 3 April 2013 at paras 43–45.

[note: 16] Letter from WongPartnership LLP to Supreme Court Registry dated 3 April 2013 at para 59.

[note: 17] Letter from WongPartnership LLP to Supreme Court Registry dated 3 April 2013 at Tab 15.

[note: 18] Record of Appeal (Volume II) (Part A) at p 112–153 (Statement of Claim (Amendment No 3)).

[note: 19] Record of Appeal (Volume V) (Part R) at p 18; Appellant's Core Bundle (Volume II) (Part C) at p 123.

[note: 20] Record of Appeal (Volume V) (Part R) at p 6.

[note: 21] Record of Appeal (Volume III) (Part W) at pp 227–228.

[note: 22] Record of Appeal (Volume V) (Part R) at pp 107–110.

[note: 23] Appellant's Case at para 701.

[note: 24] Record of Appeal (Volume V) (Part R) at pp 6–8.

[note: 25] Appellant's Case at paras 663–665.

[note: 26] Record of Appeal (Volume IV) (Part Y) at p 35–45.

[note: 27] Record of Appeal (Volume V) (Part R) at p 95–97.

[note: 28] Appellant's Case at para 687.

[note: 29] Record of Appeal (Volume IV) (Part Y) at p 39.

[note: 30] Record of Appeal (Volume IV) (Part Y) at p 40.

[note: 31] Record of Appeal (Volume IV) (Part Y) at pp 105–111.

[note: 32] Appellant's Case at para 700.

[note: 33] Retrial Judgment at [50].

[note: 34] Retrial Judgment at [65].

[note: 35] Respondent's Case at paras 245–248, 264–268.

[note: 36] Retrial Judgment at [46] and [63].

[note: 37] Respondent's Case at paras 307–314.

[note: 38] Respondent's Case at para 313(a).

[note: 39] Retrial Judgment at [74].

[note: 40] Record of Appeal (Volume III) (Part L) at pp 288–230 (Affidavit of Evidence in Chief of David Lim Kiam Seng sworn on 11 September 2009).

[note: 41] Record of Appeal (Volume III) (Part C) at pp 35–37 (Affidavit of Teo Wai Cheong affirmed on 29 January 2009).

[note: 42] Record of Appeal (Volume III) (Part L) at pp 27–30 (Affidavit of Evidence in Chief of Teo Wai Cheong affirmed on 15 September 2009).

[note: 43] Record of Appeal (Volume IV) (Part O) at pp 177–188 (Teo Wai Cheong's evidence under cross-examination).

[note: 44] Record of Appeal (Volume III) (Part Z) at pp 245–265, 292–300 (Teo Wai Cheong's evidence under cross-examination).

[note: 45] Respondent's Case at paras 79–84.

[note: 46] Record of Appeal (Volume III) (Part W) at p 16 (Cecilia Goh's evidence under cross-examination).

[note: 47] Respondent's Case at para 322–337.

[note: 48] Record of Appeal (Volume III) (Part L) at p 30–31 (Teo Wai Cheong's Affidavit of Evidence in Chief affirmed on 15 September 2009).

[note: 49] Record of Appeal (Volume III) (Part Z) at p 292–300 and Record of Appeal (Volume III) (Part AA) at p 1–3 (Teo Wai Cheong's evidence under cross-examination).

[note: 50] Respondent's Case at p 142–157.

[note: 51] Respondent's Case at para 505.

[note: 52] Appellant's Case at paras 825, 827 and 834.

[note: 53] Appellant's Case at paras 845–848.

[note: 54] Appellant's Case at para 851.

[note: 55] Appellant's Case at para 860.

[note: 56] Record of Appeal (Volume II) (Part A) at p 144–145 (Statement of Claim (Amendment No 3) at paras 49–50).