Lam Chi Kin David *v* Deutsche Bank AG
[2012] SGHC 182

Case Number	: Suit No 834 of 2008/Z (Registrar's Appeals No 140 of 2012/M and No 142 of 2012/W)
Decision Date	: 04 September 2012
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Christopher Chong, Kelvin Teo and Jasmine Kok (MPillay) for the plaintiff; Ang Cheng Hock SC, Paul Ong and Zhuo Wen Zhao (Allen & Gledhill LLP) for the defendant.
Parties	: Lam Chi Kin David — Deutsche Bank AG

Civil procedure – damages – interest

Damages – assessment

Damages – computation – time

4 September 2012

Tay Yong Kwang J:

Introduction

1 Registrar's Appeal No 140 of 2012 was the plaintiff's appeal and Registrar's Appeal No 142 of 2012 was the defendant's cross-appeal against the assessment of damages conducted by an Assistant Registrar ("the AR"). I dismissed both the appeal and the cross-appeal on their substantive merits. The only variations I made to the AR's decision were that I amended the currency of the award from Singapore Dollars ("SGD") to United States Dollars ("USD") and I ordered the pre-judgment interest award to commence from 13 October 2008 instead of 11 November 2008. Both the plaintiff and the defendant have appealed to the Court of Appeal against my decision.

Background

2 The plaintiff, David Lam Chi Kin, was a private banking client of the defendant, Deutsche Bank AG. The plaintiff had a Foreign Exchange ("FX") GEM Account ("the account") with the defendant and he entered into FX contracts with the defendant under a "Carry Trade Investment Strategy", which involved him arbitraging on the interest rate differentials between different currencies.

3 In early October 2008, the FX rates moved against the plaintiff. The defendant faxed the plaintiff a letter on 7 October 2008 and another on 8 October 2008 informing him that the account was in "negative equity". On 10 October 2008, the defendant faxed the plaintiff a third letter informing him that the collateral shortfall was in excess of USD5.46 million and requiring him to take immediate steps to restore the shortfall in the collateral value by 5.00 pm on the same day.

4 On 10 October 2008, the defendant's relationship manager, one Cynthia Chin Mei Lin ("Cynthia Chin"), made three telephone calls to the plaintiff. The contents of each of the three telephone calls

were set out in an earlier Court of Appeal judgment in this case (see *Lam Chi Kin David v Deutsche Bank AG* [2011] 1 SLR 800 ("the Court of Appeal Judgment") at [11] and [12]):

> 11 The said letter was faxed to the [plaintiff] at about 11.15am (reflecting the [plaintiff]'s collateral position with the [defendant] at around that time). At 4.32pm, the [defendant]'s relationship manager, Ms Cynthia Chin Mei Lin ("Ms Chin") telephoned the [plaintiff]. During this conversation, Ms Chin told the [plaintiff] that the [defendant] would not close out his account immediately, but only that he should give a commitment to remit additional funds (to his account) to cover the negative equity by 13 October 2008. Ms Chin also estimated that the loss which the [defendant] would suffer if all of his FX contracts were closed out on that day would be about USD1m.
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> 12 At 5.06pm, Ms Chin telephoned the [plaintiff] and told him that she had no authority to "sit on this one million" negative equity position overnight, unless the [plaintiff] made a commitment to remit additional funds to his account by 13 October 2008. During this conversation, the [plaintiff] protested that the [defendant] had no right to ask for such a commitment as he had been promised a 48-hour grace period ("the Grace Period") for any margin call by the [defendant]. Ms Chin acknowledged that such a promise had been made, but replied that the [defendant] could close his account immediately if it did not want to do business with him. The [plaintiff] refused to give the commitment Ms Chin wanted because (as he later candidly admitted in his evidence) he knew that he would not be able to honour the commitment by 13 October 2008 (because even if he had funds in other banks, he would not be able to remit the funds as it needed two business days to do so: see [42] below). At 7.19pm, the [plaintiff] informed Ms Chin that he was unable to remit any money to cover the negative equity. He proposed to Ms Chin that his FX positions be closed out partially on that day, and the rest on 13 October 2008 (which was the next business day for trading in the foreign exchange market) to reduce his Total Exposure temporarily. At 7.53pm, Ms Chin telephoned the [plaintiff] to inform him that his proposal had been rejected and that the [defendant] would close out the various FX contracts in his account.

5 One of the issues before the Court of Appeal was whether the defendant had given a 48-hour grace period ("the Grace Period") to the plaintiff and if so, whether it was bound by it and therefore estopped from closing out the plaintiff's FX contracts until the expiry of the Grace Period. The Court of Appeal Judgment (at [39]) stated that:

> 39 … In our view, the [plaintiff]'s refusal in this respect would not affect his legal rights. If he was entitled to the Grace Period to respond to the 10 October 2008 letter, he was under no obligation to give the commitment that Ms Chin required. Furthermore, the [plaintiff] had also explained why he could not have fulfilled his commitment, even if he had the funds, as at least two business days' notice was required to transfer such funds. Indeed, in retrospect, the [defendant]'s insistence on a commitment by the [plaintiff] made little practical or commercial sense. The [plaintiff] could have easily given a commitment without having any intention of honouring it in the knowledge that he would not be able to do so since by 13 October 2008, as explained by him (see [42] below), he could only effect transfer of funds from another bank (assuming he had such funds) on two business days' notice. Thus, the commitment served no purpose whatever because the [defendant] would not have been better off even if the [plaintiff] had given the commitment. The [defendant] would not have gained anything from it. We do not see why the [plaintiff]'s candour and honesty in this regard should prejudice his right to insist on the Grace Period in order to provide additional collateral or to reduce his Total Exposure. In fact, as we have stated earlier, the [plaintiff] did the only thing that was feasible before the close of 10 October 2008 (*ie*, to reduce his Total Exposure by closing out partially his FX positions, but

not to crystallise his Total Exposure by closing out all his FX positions on that day). Indeed, for this reason, it is arguable that the [plaintiff] had complied with the terms of the 10 October 2008 letter, but the [defendant] was in breach of it by rejecting a partial closing out of his FX positions to reduce his Total Exposure. The [defendant], in requesting additional security by 5.00pm that day, was imposing a requirement that could not be fulfilled in practical terms, and it had to resort to the excuse of a commitment to crystallise the [plaintiff]'s Total Exposure instead of reducing it. As this point was not argued, we do not need to rule on it. Nevertheless, we do find the [defendant]'s conduct in this case rather surprising, given its own acknowledgement that it had given the Grace Period to the [plaintiff].

6 As a result, the Court of Appeal found (at [48]) and ordered (at [49]) that:

Summary of findings

48 To summarise our findings:

…

(c) in any event, promissory estoppel was applicable to the [defendant]'s promise of the Grace Period, and in consequence, ***the [defendant] was estopped from resiling on its promise to allow the [plaintiff] the Grace Period to respond to the 10 October 2008 letter*** ; and

(d) in *obiter*, the promise of the Grace Period constituted a binding undertaking by the [defendant] to give the [plaintiff] 48 hours to meet any margin call, which varied the terms of the Master Agreement and the Service Agreement accordingly.

Conclusion

49 For the above reasons, we allow the [plaintiff]'s appeal with costs here and below, with the usual consequential orders. ***The [plaintiff] is entitled to damages, if any, to be assessed by the Registrar on the basis that the [defendant] was only entitled to close out his FX positions on 13 October 2008 at the earliest.***

[emphasis added in bold italics]

The AR's decision

7 Based on the findings of the Court of Appeal, the AR who assessed the damages framed the pertinent issues as follows:

(a) When was the defendant entitled to close out the plaintiff's positions? ("Issue 1")

(b) What orders would the plaintiff have placed with the defendant? ("Issue 2")

(c) Would the defendant have placed those orders? ("Issue 3")

Issue 1

8 On this issue, the AR found that two questions arose:

(a) whether the Grace Period included non-business days; and

(b) if not, whether there was any other reason why the defendant could not close the plaintiff's positions on 13 October 2008.

9 After hearing the parties' arguments, the AR held that it was clear that the plaintiff had considered the relevant circumstances in coming to his initial conclusion that the Grace Period included both business and non-business days. The plaintiff had not put forth any convincing arguments to the contrary. The AR reasoned that there was nothing to prevent the defendant from exercising its contractual right to close the plaintiff out on 13 October 2008. Therefore, the AR held that the earliest time that the defendant was entitled to close out the plaintiff's positions is on 13 October 2008 at 12.00 noon.

Issue 2

10 Before the AR, the plaintiff argued that had he not been closed out prematurely, he would have placed (a) certain Spot Orders; and (b) certain Limit Orders with the defendant between 8.00 am and 8.59 am on 13 October 2008 and between 3.30 am and 4.00 am on 14 October 2008 respectively. The AR summarized the plaintiff's case at p 7 of his Grounds of Decision:

> The Plaintiff's case is that between 8 and 8.59 am on 13 October 2008, he would have placed spot orders to convert half his NZD deposits to USD and half of his JPY loans to USD ("the Spot Orders"). For the balance of his NZD deposits and JPY loans, the Plaintiff claimed that he would have placed limit orders to convert the NZD to USD at 50 points above the rate on which he converted the earlier half of his NZD deposits and to repay his JPY loans when the NZD hits this rate, which would have been hit between 3.30am and 4 am on 14 October 2008 ("the Limit Orders") (collectively the "Alleged Orders"). He asserted that he would have placed the Alleged Orders as he wanted to voluntarily close out his positions and had "serious concerns" that the Bank would close out his FX positions without giving him any time if his account was in negative equity. In addition, he no longer trusted the Bank as Cynthia Chin initially took 3 limit orders from him at 4.40pm on 10 October 2008 but subsequently refused to execute the three orders and also refused to grant him the grace period he was promised. He stated that he would have taken advantage of the market movement in his favour at the first available opportunity, which came between 8 and 8.59am on 13 October 2008.

11 On the issue of the Spot Orders, the AR held that the plaintiff's assertion of his strategy to close out part of his NZD deposits was not a new one, as the Court of Appeal had found in the Court of Appeal Judgment (at [37]) that the plaintiff was hopeful from his experience that the currency market would turn in his favour after the G7 meeting and as it turned out (albeit with the benefit of hindsight), the plaintiff was correct. The AR reasoned that since the plaintiff had already manifested his intention to close half his positions on 10 October 2008, it was on a balance of probabilities more likely than not that he would have placed the Spot Orders by converting half of his NZD deposits when he found out that the rates turned favourable between 8.00 and 8.59 am on 13 October 2008.

12 The AR did not decide on the Limit Orders because he had earlier decided that the earliest time that the defendant was entitled to close out the plaintiff's positions was 13 October 2008 at 12.00 noon, whereas the Limit Orders would only have been placed between 3.30 and 4.00 am on 14 October 2008. For completeness, the AR added that he would have found that the plaintiff did not prove on a balance of probabilities that he would have placed the Limit Orders with the defendant on 14 October 2008.

Issue 3

13 Having decided that the plaintiff would have placed the Spot Orders with the defendant, the AR awarded the plaintiff damages of SGD128,192.09, with pre-judgment interest on the above sum to commence from the date of the writ of summons filed on 11 November 2008.

My decision

14 It was clear that the assessment of damages in this case depended on the earliest time the defendant could have closed out the plaintiff, the hypothetical actions of both the plaintiff and the defendant and the actual market movements. I would frame the three issues before me in broadly the same terms as the AR:

(a) What was the earliest time that the defendant would have closed out the plaintiff? ("Issue 1")

(b) Hypothetically, and on a balance of probabilities, what would the plaintiff and the defendant have done at that time? ("Issue 2")

(c) Based on what the plaintiff and the defendant would have hypothetically done and the actual market movements, what damages and interest was the plaintiff entitled to? ("Issue 3")

Issue 1

15 Clauses 2.5 and 2.6 of the Master Agreement provided:

2.5 In relation to each Transaction, it is a condition precedent to the obligations of the Bank in relation to that Transaction becoming effective that the Counterparty enter into the Bank's Service Agreement or other agreement (together, 'the Service Agreement'), the Bank's Risk Disclosure Statement and any Credit Support Document as requested by the Bank from time to time in its absolute discretion. The Bank may in its absolute discretion waive such condition precedent for a particular Transaction or Transactions. ...

2.6 *The Bank shall at its absolute discretion prescribe the amount of margin or collateral that the Counterparty or any Credit Support Provider must provide to the Bank in order to secure the Counterparty's obligations to the Bank under the Transactions, and may from time to time amend or add to such margin or collateral requirements.* Such margin or collateral requirements may be notified by the Bank to the Counterparty in writing or verbally. *If the Bank shall for any reason deem that there is insufficient collateral held pursuant to the terms of the Credit Support Documents that is available to satisfy the Counterparty's present or future obligations under this Agreement or the Counterparty's present or future obligations under any other agreement or arrangement between the Counterparty and the Bank, the Counterparty* ***shall within one business day's notice*** *thereof deliver additional collateral of a type acceptable to the Bank in its sole discretion* (which collateral shall be delivered and secured pursuant to any existing Credit Support Document or other arrangement in a form satisfactory to the Bank in its sole discretion) *in an amount as may be required by the Bank.* The margin or collateral provided to the Bank as security for the Counterparty's obligations to the Bank under the Transactions is in addition to and without prejudice to any other collateral or margin which the Bank may now or hereafter hold from the Counterparty. ... *For the avoidance of doubt, if the Counterparty fails to deliver such additional collateral, such failure* ***shall constitute an Event of Default in respect of the Counterparty pursuant to Clause 5 below and the Bank may proceed to terminate some or all of the Transactions at its discretion pursuant to Clause 5 without further notice to the Counterparty*** *other than the notice of termination to be provided under Clause 5.4.*

[emphasis added in italics and in bold italics]

16 The interpretation of cl 2.6 was not in dispute before me. The Court of Appeal had already interpreted the scope of cl 2.6 in the Court of Appeal Judgment at [25] and [30]:

> 25 Under cl 2.6, *the [defendant] has the absolute discretion* to prescribe the amount of the margin and the collateral that the [plaintiff] must provide at any time and from time to time, and *if the* [*defendant*] *deems the collateral to be insufficient*, the [plaintiff] must deliver additional collateral "within one business day's notice". *The [plaintiff] is entitled to be given one business day's notice to meet such an obligation* — this is implicit or inherent in cl 2.6. *The expression "business day" is not defined in the Master Agreement, but in the Service Agreement, it is defined* (under the section "Bank statements") *as "a day other than Saturday or Sunday on which banks and/or foreign exchange markets are open for business in Singapore and/or such other financial centres as [the defendant] may choose".* Clause 2.6 also provides that a failure to provide additional security shall constitute an Event of Default under cl 5 of the Master Agreement, on the occurrence of which the [defendant] may terminate any one or more or all outstanding Transactions at its sole discretion on the date specified. An "Event of Default" in cl 5 refers to six events, including "any Event of Default (as defined in the Service Agreement)" as provided by cl 5.1(c). These cross-references reinforce the conclusion that the Master Agreement and the Service Agreement have to be read together with respect to each Transaction.
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> …
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> 30 For these reasons, we are of the view that cl 2.6 applied to the 10 October 2008 letter, and under that clause, the [plaintiff] was entitled to one business day's notice to restore the state of his account to the satisfaction of the [defendant], either by providing additional collateral or by reducing his Total Exposure. Accordingly, we find that the [defendant] was in breach of its obligations to the [plaintiff] in closing out all his FX positions on 10 October 2008.
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> [emphasis in original omitted; emphasis added]

17 The starting point is that although the defendant had an absolute discretion to prescribe the amount of additional margin or additional collateral that the plaintiff had to provide, it could not close out the plaintiff immediately even if the plaintiff was in negative equity. In the present case, the defendant had to give the plaintiff (i) one business day's notice; and (ii) a grace period of 48 hours, before it was entitled to entitled to close out the plaintiff's FX positions. The Court of Appeal found in the Court of Appeal Judgment (at [48]; see above at [6]) that the defendant was contractually obliged to comply with condition (i) and was obliged under the doctrine of promissory estoppel and/or variation to comply with condition (ii).

Condition (i)

18 It was not disputed that a letter was faxed by the defendant to the plaintiff at 11.15 am on 10 October 2008 ("the 10 October 2008 letter"), which was a Friday. The Court of Appeal held in the Court of Appeal Judgment (at [21]) that the 10 October 2008 letter was a margin call, thereby attracting the application of cl 2.6 and requiring the defendant to give the plaintiff one business day's notice before it was contractually entitled to close out the plaintiff's FX positions.

19 As clearly explained in the Court of Appeal Judgment (at [25]), "business day" did not include Saturdays or Sundays. 10 October 2008 was a Friday and 11 and 12 October 2008 were accordingly

not "business days". Therefore, if the defendant had not been in breach of cl 2.6, the earliest possible time that it would have been contractually entitled to close the plaintiff out under condition (i) was 11.15 am on 13 October 2008, being the Monday following the non-business days.

Condition (ii)

20 The interpretation of condition (ii) was less straightforward than that of condition (i). The Court of Appeal found in the Court of Appeal Judgment (at [38]) that the defendant was estopped from resiling on its promise to allow the plaintiff a Grace Period to respond to the 10 October 2008 letter. However, the issue whether the Grace Period should be construed to mean 48 hours or 2 business days remained an open one. In response to a letter dated 4 November 2011 from the plaintiff's solicitors seeking clarification from the Court of Appeal on whether it was inconsistent with the Court of Appeal Judgment for the plaintiff to take the position that the 48-hour Grace Period meant 2 business days, the Registry of the Supreme Court responded on 8 November 2011 that it was instructed to reply that the Court of Appeal did not decide the issue and that the plaintiff was entitled to raise it for the purpose of assessing damages. In further response to the defendant's solicitors' letter dated 9 November 2011, the Registry stated in its letter dated 14 November 2011 that "The Court of Appeal left open the issue as to whether the 48-hour grace period was intended by the parties to mean 48 hours or 2 business days".

21 In my view, it did not follow that because the requirement of one day's notice under condition (i) included only business days, the requirement of a Grace Period under condition (ii) should include only business days as well. If the Grace Period included only business days (*ie* Saturday and Sunday were excluded), the defendant was entitled to close the plaintiff out only after 11.15 am on 14 October 2008, a Tuesday. On the other hand, if the Grace Period included both business days and non-business days, then the Grace Period expired at 11.15 am on 12 October 2008, a Sunday.

22 The plaintiff argued that the Grace Period included business days only, relying on an observation by the Court of Appeal in the Court of Appeal Judgment (at [36]) that the 48-hour Grace Period could be "stretched to mean two business days" and was valuable because it gave the plaintiff more time to decide what to do. However, the AR found against the plaintiff and held that the Grace Period included both business and non-business days. The AR reasoned that the plaintiff, being a knowledgeable and sophisticated arbitrageur, had himself come to the conclusion earlier that the Grace Period included both business and non-business days, suggesting strongly that that was indeed the intended construction.

23 I agree with the above finding made by the AR. The Court of Appeal Judgment (at [36]) stated that the Grace Period was a valuable right because it gave the plaintiff more time to decide what to do; be it (i) to take his losses immediately or (ii) to average down his investment by buying more FX contracts or (iii) to maintain his FX positions until the next business day. As a matter of strict construction, I find that none of the above options available to the plaintiff required the Grace Period to exclude non-business days. In my opinion, the Grace Period in condition (ii) should not be construed to mean that the one business day's notice under cl 2.6 had been varied by agreement to read two business days' notice. If that was what the Court of Appeal had intended, the Court of Appeal would not have observed (at [36]) that the Grace Period was to allow the plaintiff to maintain his FX positions until "the next business day". Instead, the Court of Appeal would have observed that the Grace Period would allow the plaintiff to maintain his FX positions until "two business days later".

24 I find further support for construing the Grace Period to include both business and non-business days by examining the purpose of the Grace Period, which was to allow the plaintiff to have more time to consider his position in the light of market movements. If this were the case, so long as the

plaintiff was given the requisite 48 hours, he had the time to consider his position regardless of whether it was a business day or not. The only conceivable difference was that if the Grace Period had included both business and non-business days, the market might have been static during part of or even the entire 48-hour period when the plaintiff was considering his position. If the Grace Period covered business days only, then the 48-hour period would stop running when the market closed.

25 Assuming that the market closed on Friday in a condition that was adverse to the plaintiff, as was the case here, then even if the Grace Period included non-business days, the plaintiff would still have the entire weekend to consider what course of action to take before the market reopened on Monday. In such a case, the purpose of the Grace Period, which was to allow the plaintiff time to consider his position, would still be achieved. Discounting the non-business days and affording the plaintiff an additional grace period up until 11.15 am on 14 October 2008 was, in my view, overly indulgent and—as the defendant correctly pointed out—speculative. It was clearly not within the contemplation of the parties when the defendant promised the plaintiff the Grace Period. I therefore find, on a balance of probabilities, that the parties had intended the Grace Period to include both business and non-business days.

26 I would additionally observe that even the plaintiff himself had acknowledged that he had initially understood the Grace Period to include non-business days. It mattered little that the plaintiff later claimed to be mistaken in coming to such a view, since whether or not such an understanding was reached depended on an objective interpretation of the parties' intentions. I therefore agree with the AR that under condition (ii), the earliest time which the defendant was entitled to close out the plaintiff was 11.15 am on 12 October 2008. As indicated at [19] above, if the defendant had not been in breach of cl 2.6, the earliest possible time that it could have contractually closed the plaintiff out under condition (i) was 11.15 am on Monday, 13 October 2008, being the business day following the non-business days.

Conclusion

27 The combined effect of my findings on conditions (i) and (ii) (see above at [17]) is that the earliest time that the defendant was entitled to close out the plaintiff was at 11.15 am on Monday, 13 October 2008. As such, all of the plaintiff's alternative arguments and calculations founded on the basis that the earliest time the defendant was entitled to close out the plaintiff was at 11.15 am on Tuesday, 14 October 2008 would fail in the light of this finding.

28 However, in practical terms, it was impossible for the defendant to have closed out the plaintiff immediately at 11.15 am on 13 October 2008 since (i) some officer of the defendant had to make the decision to close out the plaintiff; (ii) other officers of the defendant had to be told of the decision and be briefed on the manner of execution; (iii) the plaintiff had to be contacted and be informed of the decision; and (iv) the defendant would still realistically need at least half an hour to execute the transactions. I find that although the defendant was eager to close out the plaintiff entirely at the earliest available opportunity, the AR was nevertheless justified in his decision that damages should be assessed on the basis that the bank would have closed out the plaintiff's FX account completely at 12.00 noon on 13 October 2008, after taking into account a reasonable amount of time to allow for communication between the parties. Therefore, the relevant rates that ought to be taken into account in computation of damages were the rates between 12.00 noon and 12.59 pm on 13 October 2008 and I accordingly affirm that AR's decision on this issue. In my opinion, such a finding was wholly in line with the Court of Appeal's ruling (at [49]) that damages had to be assessed on the basis that the defendant "was only entitled to close out [the plaintiff's] FX positions on 13 October 2008 at the earliest".

Issue 2

Issue 2

29 In the light of my finding above that the hypothetical time that the defendant would have closed out the plaintiff was between 12.00 noon and 12.59 pm on 13 October 2008, I shall next determine the extent of damages. For this issue, I shall adopt a two-stage approach. For the first stage, I would determine what the plaintiff and the defendant would, on a balance of probabilities, have done in the circumstances without the benefit of hindsight. I stress at the outset that the actual movements of the market—that is to say, hindsight—are irrelevant at the first stage. The actual figures had absolutely no impact on what the parties would have hypothetically done in the circumstances, because the parties should not, with the benefit of hindsight, be entitled to pick and choose the combination of transactions that were most favourable to them.

30 After determining what the parties would have hypothetically done, I would move on to the second stage to assess how much the plaintiff would have hypothetically lost based on what the parties would have hypothetically done (see below at [40]). It is only at this second stage that I would refer to the actual movements of the market in order to determine the hypothetical loss. The difference between the actual loss and the hypothetical loss would represent the measure of damages that the plaintiff was entitled to.

31 The defendant submitted that since their business hours were from 9.00 am to 6.00 pm from Monday to Friday, it was more likely than not that the plaintiff could only have placed the Spot Orders and Limit Orders only after 9.00 am on 13 October 2008 instead of between 8.00 am and 8.59 am. On the other hand, the plaintiff argued that, on a balance of probabilities, he could and would have placed the same Orders between 8.00 and 8.59 am on 13 October 2008. To persuade me that he could have placed the Orders before 9.00 am, the plaintiff referred me to the following evidence:

(a) a fax sent by the defendant to the plaintiff at 8.50 am on 13 October 2008 setting out the transactions that the defendant unilaterally entered into on 10 October 2008 to close out his account, showing that it was possible that some officers of the defendant would come to work before 9.00 am;

(b) the oral testimony from one of the defendant's officers stating that some officers would be contactable via their mobile phones to take instructions from their clients even if none of them had come to office before 9.00 am on 13 October 2008; and

(c) documentary evidence that the plaintiff had previously placed orders with the defendant before 9.00 am (for example, an order was placed by the plaintiff at 8.02 am on 23 September 2008) and the defendant had accepted those orders.

32 As the evidence that the plaintiff referred to was incontrovertible, I accepted the plaintiff's submissions. In addition, that weekend was a critical period for the defendant and it would not be inconceivable that its officers would be at work by 7.00 am on Monday, 13 October 2008 or that they would even have stayed overnight in the office on Sunday, 12 October 2008. Accordingly, I find that the plaintiff *could* have made the Spot Orders and the Limit Orders between 8.00 and 8.59 am on 13 October 2008. However, the more important question was whether or not, on a balance of probabilities, the plaintiff *would* have placed the orders. In this regard, the actual telephone conversations and the plaintiff's past investment strategy would be relevant.

33 The plaintiff submitted that on 10 October 2008, when his account was still in negative equity, he attempted to place 3 Limit Orders each in order to sell 10 million New Zealand Dollars ("NZD") for Japanese Yen ("JPY") at the rates of 59.90, 60.80 and 61.30 respectively. The plaintiff averred that he had communicated his intention to place the 3 Limit Orders to Cynthia Chin via telephone on 10

October 2008 but she allegedly refused to execute the 3 Limit Orders. The plaintiff submitted that his intention to place the 3 Limit Orders on 10 October 2008 showed that, on a balance of probabilities, it was probable that he would have placed the Limit Orders in issue before 12.00 noon on 13 October 2008, at the same time when he would have placed the Spot Orders.

34 On the other hand, the defendant argued that while the AR found some evidence that the plaintiff would have placed the Spot Orders before 12.00 noon on 13 October 2008, he found no evidence that the plaintiff would have placed the Limit Orders before that time. The defendant argued that plaintiff's submissions were made with the benefit of hindsight and were speculative in nature and that the plaintiff had not discharged his burden of proof. The defendant further submitted that the plaintiff's account was in a state of positive equity between 8.00 am and 8.59 am on 13 October 2008 as a result of the market moving in his favour. The defendant argued that, given this information, it was equally likely that the plaintiff would not have placed the Limit Orders and would instead have adopted a "wait-and-see" approach in hope that the market would move even more in his favour.

35 Further or in the alternative, the defendant submitted that even if the plaintiff had placed the Limit Orders in time, it was more probable than not that the Limit Orders would not have been executed, because the defendant would either:

(a) have refused to take the Limit Orders; or

(b) have taken the Limit Orders but would have proceeded to exercise its contractual right to close out the plaintiff at 12.00 noon on 13 October 2008.

36 I rejected both the plaintiff's and the defendant's arguments. I agree with the AR that the plaintiff would have tried to take advantage of the position when the market moved in his favour. The Court of Appeal Judgment (at [37]) stated that:

> 37 In the present case, the [plaintiff] wanted to partially close out his FX contracts (*ie*, NZD 20 million on 10 October 2008 and the balance of NZD 68 million on 13 October 2008) in order to reduce his Total Exposure as requested by the [defendant]. *He explained that, from his own experience in FX trading, the foreign exchange market was more likely than not to move in his favour because the next business day would be after the conclusion of the G7 meeting scheduled for that weekend.* It would seem that the [defendant] was fearful that the [plaintiff]'s FX positions would deteriorate further, thus increasing his exposure to the [defendant]. Hence, the [defendant] was determined to close out all his FX positions on 10 October 2008 after the 5pm deadline, which it did. *As it turned out, the* [*plaintiff*]*'s reading of the FX market after the G7 meeting was correct – the market did move in favour of the* [*plaintiff*] *on 13 October 2008 – in contrast to the apparent panic exhibited by the* [*defendant*]*.*
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> [emphasis added]

37 Based on the evidence before me, I find that, even without the hindsight that the market would have moved in the plaintiff's favour, it was more likely than not that the plaintiff would have, through the Spot Orders, partially closed out half of his NZD deposits with the defendant in order to reduce his total exposure. I did not accept the defendant's submissions that the plaintiff would more likely have adopted a "wait-and-see" attitude because when faced with the risk of getting closed out by the defendant at a substantial loss, I find it more probable that the plaintiff would have tried to reduce his total exposure rather than speculate further. I therefore rejected the defendant's submissions and affirmed the AR's finding (at p 8 of his Grounds of Decision; and see above at [11])

that the plaintiff would have made the Spot Orders.

38 As for the Limit Orders, I was not persuaded that the plaintiff would have made them before 12.00 noon on 13 October 2008. I agreed with the defendant that the plaintiff's arguments were made entirely with the benefit of hindsight. On a balance of probabilities, I find that it was more probable that the plaintiff would try to reduce his total exposure of his NZD to one that fell within acceptable limits rather than try to reduce the total exposure to zero by selling everything. I was not convinced that, on a balance of probabilities, the plaintiff would have placed the Limit Orders to convert all of his remaining NZD between 8.00 am and 8.59 am on 13 October 2008. Accordingly, I affirmed the AR's decision on this issue.

39 For completeness, I would add that I would reject both of the defendant's alternative arguments on this issue (see above at [35]). On 13 October 2008, the plaintiff was in positive equity. If the defendant was prepared to execute the plaintiff's Spot Orders, I saw no reason why the defendant would not have executed the plaintiff's Limit Orders if the plaintiff had placed them together with the Spot Orders. However, as I have found, it was more probable than not that the plaintiff would *not* have placed the Limit Orders with the defendant.

Issue 3

40 The issue of computation of damages was not in dispute. Neither side submitted that the AR had erred in his calculation using the foreign exchange rates on 13 October 2008 as agreed by the parties. Based on the AR's finding that the plaintiff would have closed out half his account between 8.00 am and 8.59 am on 13 October 2008 by placing the Spot Orders and that the defendant would have closed out the other half of the account at 12.00 noon on 13 October 2008 at whatever prevailing rate by exercising its contractual rights, I affirmed the AR's decision to award the plaintiff damages according to the agreed computation.

41 However, the amount of damages awarded to the plaintiff was mistakenly recorded as SGD 128,192.093 when it was clear that the parties intended the figures to be in USD. I therefore ordered that the currency of the damages in the AR's order be corrected from SGD to USD.

42 On the issue of judgment interest, the AR awarded interest from the date on which the writ of summons was issued which was 11 November 2008. The plaintiff submitted that interest should be awarded from the date on which the cause of action arose which in this case was 13 October 2008. The plaintiff relied on section 12(1) of the Civil Law Act, which provides:

> **Power of courts of record to award interest on debts and damages**
>
> **12.**—(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

43 The plaintiff submitted that the basis of awarding pre-judgment interest was to compensate the plaintiff for having been kept out of his money by the defendant and that he was deprived of the use of his money since 13 October 2008. The plaintiff cited *Lim Cheng Wah v Ng Yaw Kim* [1983-1984] SLR(R) 723, where L P Thean J (as he then was) held at [6] that:

> 6 In applying this section it is necessary to consider the basis on which interest should be

awarded. … [T]he basis on which the courts in England have acted in awarding interest under this subsection is that the defendant has kept the plaintiff out of the money which ought to have been paid to him and since the defendant has had the use of the money he ought to compensate the plaintiff accordingly. In *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 at 468, Lord Denning said:

> An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.

44 The defendant did not submit on the issue of interest. On the issue of pre-judgment interest, I agreed with the plaintiff's submissions that he had been kept out of his money since 13 October 2008. I therefore varied the AR's order such that interest began to run from that date instead of the date of filing the writ.

Orders made

45 In the light of the above reasons, I dismissed both Registrar's Appeal No 140 of 2012 and Registrar's Appeal No 142 of 2012. I amended the AR's order by changing the currency of the damages awarded from SGD to USD and varied the AR's award of interest by ordering the pre-judgment interest of 5.33% to commence from 13 October 2008 instead of 11 November 2008.

46 For both Registrar's Appeal No 140 of 2012 and Registrar's Appeal No 142 of 2012, since neither party had succeeded in the respective appeals, I made no order as to costs.