IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 179

Suit No 369 of 2022

Between

(1) Foreland Singapore Pte. Ltd.
(2) Foreland Holdings Co., Ltd.

… *Plaintiffs*

And

IG Asia Pte. Ltd.

… *Defendant*

JUDGMENT

[Banking — Statement of account — Verification clauses — Whether verification clause binding on issuer]
[Contract — Contractual terms — Force majeure clause]
[Contract — Contractual terms — Rules of construction — Whether force majeure event rendered compliance "impossible or impracticable"]
[Contract — Contractual terms — Sections 3 and 11 Unfair Contract Terms Act 1977 (2020 Rev Ed) — Whether test of reasonableness applies to contractual terms]
[Contract — Remedies — Damages — Causation — Whether loss caused by breach]

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v
IG Asia Pte Ltd

[2024] SGHC 179

General Division of the High Court — Suit No 369 of 2022
Goh Yihan J
16–19, 23–26, 30–31 January, 1 February, 11 April 2024

11 July 2024 Judgment reserved.

Goh Yihan J:

1 This is the plaintiffs' claim against the defendant, for damages arising from the latter's allegedly wrongful reversal of the former's closing nickel trades made on 8 March 2022 (the "Foreland Closing Trades" or "FCTs"). In essence, the plaintiffs had issued instructions to the defendant to execute the FCTs. The defendant executed those instructions. The plaintiffs then issued further instructions to withdraw moneys in their associated accounts, including profits from the FCTs. The defendant did not do so on the basis that the London Market Exchange ("LME") had, in an extraordinary turn of events, suspended nickel trading and cancelled all nickel trades conducted on 8 March 2022 (the "Suspension and Reversal"). Instead, the defendant reversed the FCTs. The crux of the present case is whether the defendant was entitled to: (a) refuse to pay Foreland upon the execution of the FCTs; and (b) reverse the FCTs.

2 After carefully considering the parties' submissions that were tendered following a trial of 11 days, I dismiss the plaintiffs' claim. In my judgment, while the plaintiffs are wrong that the FCTs are insulated from the Suspension and Reversal, which I find constituted a "Force Majeure Event" under the Margin Trading Customer Agreement ("MTCA") read together with the Summary Order Execution Policy ("SOEP"), I find that the defendant was not entitled to reverse the FCTs based on a proper interpretation of the relevant terms in the MTCA. At the most, the defendant was only entitled to refuse to fulfil its payment obligations on the execution of the FCTs. However, the plaintiffs still ultimately fail in their claims because they did not suffer any loss from the defendant's wrongful reversal of the FCTs.

3 I now explain the detailed reasons for my decision in this judgment.

The parties

4 I begin with the parties in this action. The first plaintiff, Foreland Singapore Pte Ltd ("FSG"), is a company incorporated in Singapore. It carries on business as an investment, trading and holding company, as well as the provision of management consultancy services. The second plaintiff, Foreland Holdings Co Ltd ("FJP"), is a corporation incorporated in Japan and carries on business as an investment, trading and holding company. For convenience, I will refer to FSG and FJP, collectively, as "Foreland" in the singular.

5 The defendant, IG Asia Pte Ltd ("IGA"), is a company incorporated in Singapore. IGA is a member of the IG Group of companies ("IG Group"). IGA carries on the business of dealing in and providing financial and brokerage services, security dealings, as well as commodity contracts brokerage activities as a market maker, including foreign exchange trading, contracts for difference

("CFDs") trading, and indices trading. In this regard, it provides a platform (the "IG Platform") for its clients to trade in over-the-counter ("OTC") derivatives contracts.

6 In October 2018 and February 2021, respectively, FSG and FJP opened Corporate Margin Trading Accounts (the "Accounts") with IGA. FSG also successfully applied to be classified as an expert investor in December 2018. It is not disputed that, in the course of the operation of the Accounts, Foreland carried out trades and transactions of various commodities, including nickel, which the defendant executed on an OTC basis, that is, directly between FSG and IGA, as well as directly between FJP and IGA.

7 It is also common ground that the relationship between Foreland as clients and IGA is governed by, among other documents, the MTCA, which is a standard form document. The parties' relationship is also governed by the written statements in the SOEP.

Overview of CFD trading

8 At this juncture, it is useful to explain some basic concepts regarding CFD trading to assist the reader in understanding the reasoning in this judgment. For the avoidance of doubt, none of these constitute findings of fact or law.

9 CFDs are, broadly speaking, financial products that allow investors to speculate on the price movements of various financial markets, such as stocks, commodities, indices, and currencies, without the investor having to actually own the underlying asset. When purchasing a certain quantity of CFDs (*ie*, "opening a position"), an investor can either "go long" (*ie*, bet that the price of the underlying asset will increase), or "go short" (*ie*, bet that the price of the underlying asset will decrease).

10 One aspect of CFDs which appeals to some investors is that they can be "traded on margin". This means that the cost of the CFD is not equivalent to the full price of the underlying asset; rather, the CFD only costs a percentage of the price of the underlying asset(s), and yet allows the investor to reap the full risks and rewards of price movements in the underlying asset. The exact percentage in each transaction is called the "margin rate".

11 The results of trading CFDs can be broadly summarised as follows. If the investor predicted the price movement correctly, he could choose to "close" (*ie*, terminate) the position at that point in time. The result of such a "closing transaction" or "closing trade" is that he would reap a profit, with the magnitude of the profit being dependent on the degree of the price movement (*ie*, the difference between the price of the underlying asset at the time when the investor opened the position ("opening price" or "opening level") as compared to the price of the same when he closed the position ("closing price" or "closing level")). On the other hand, if the investor predicted the price movement wrongly, he might suffer serious losses, sometimes losing the entire investment sum (or more) – this is a feature of trading on margin. Where the price moves in the wrong direction, or when the market faces disruptions, the broker might raise the margin rate, which would effectively compel the investor to deposit more money with the broker, or risk getting his position closed forcibly (potentially at an unfavourable time).

The undisputed facts

12 With the above background in mind, I now turn to the substantive dispute. The parties' dispute centres on 41 out of a total of 51 nickel CFD transactions that Foreland opened. This comprised 19 nickel transactions opened by FSG, and 22 nickel transactions opened by FJP

(collectively, the "Transactions"). Foreland opened the Transactions between 18 February 2022 and 3 March 2022.[1]

13 Following an extraordinary surge in nickel prices on the LME in early March 2022, Foreland issued instructions via the IG Platform on 8 March 2022 to close all their open nickel positions – these closing trades are what I have referred to above as the "FCTs". IGA executed these instructions. Foreland's open nickel positions were therefore closed. The resulting profits were reflected in the Account Statements that were automatically generated for Foreland, dated 8 March 2022 and 9 March 2022.

14 On 8 March 2022 at around 8.15am (GMT) and later at around 12.00pm (GMT), the LME issued written notices for the suspension of all nickel trading on the LME Market (the "Suspension"), and the cancellation of all trades "executed on or after 00:00 UK time on 8 March 2022" (the "Reversal").

15 On 8 March 2022 and 9 March 2022, Foreland instructed IGA to effect the withdrawal of $6,636,840.10 and $11,874,152.84 from the FSG Account and the FJP Account, respectively, into their designated bank accounts.[2] However, IGA did not act on Foreland's instructions. Instead, IGA purported to rely on the Suspension and later reversed the FCTs by:

(a) opening new mirror trades for Foreland in the opposite direction (the "RFTs");

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1 1st & 2nd Plaintiffs' Closing Submissions dated 20 March 2024 ("PCS") at para 7.

2 PCS at para 12.

(b) raising the margin requirements for the said trades (*ie*, raising the margin rates, which would require an investor to deposit more money to maintain the same CFD position); and

(c) eventually forcibly closing the same.

16 Foreland later made various requests to withdraw as much money as possible from the Accounts on a without prejudice basis. However, instead of acting on Foreland's instructions, IGA eventually only released parts of the sums which were reflected in the Account Statements as being available. The key question in the present case is whether IGA's actions at each stage of the entire episode were justified.

The parties' general cases

17 Foreland's general case is that IGA was not justified in reversing the FCTs. According to Foreland, pursuant to Terms 4 and 9 of the MTCA, Foreland had issued instructions to execute the FCTs, which IGA admittedly accepted, executed, and confirmed in writing by way of the Account Statements. Upon these instructions, IGA was obliged, pursuant to Terms 7(13) and 7(14) of the MTCA, to pay the moneys to Foreland.

18 IGA's general case is that the Suspension and Reversal constituted an emergency or an exceptional market condition that amounts to a "Force Majeure Event" under Term 23(1) of the MTCA. This therefore entitled it to exercise the right under Term 23(2) of the MTCA to suspend or modify the application of all or any of the Terms of the MTCA, especially Terms 7(13), 7(14), and Term 4(7) read with Term 4(8)(k). This was on the basis that the Force Majeure Event made it impossible or impracticable for IGA to comply with these Terms. Alternatively, even if the Suspension and Reversal were not a Force Majeure

Event, IGA was entitled to reverse the FCTs by virtue of Term 10(4) of the MTCA, since it had acted in good faith and fairness. Further, IGA was not precluded from reversing the FCTs by virtue of, among other things, the method by which it had done so, as well as the Account Statements. Finally, IGA acted properly and in good faith in relation to Foreland's withdrawal requests and the closures of the RFTs.

19 In response to IGA's general case, Foreland argues that the Suspension and Reversal did not confer on IGA the right to reverse the FCTs. This is for the following reasons. First, since the parties had dealt with each other on an OTC basis, IGA assumed full responsibility for and bore all risks from the FCTs. IGA therefore cannot visit the consequences of the Suspension and Reversal on Foreland. Second, even if IGA could visit the consequences of the Suspension and Reversal on Foreland, and even if that event amounted to a Force Majeure Event under the MTCA, IGA could not rely on the MTCA to reverse the FCTs. Third, and in any event, the terms of the MTCA that conferred upon IGA the right to reverse the FCTs are unreasonable pursuant to the Unfair Contract Terms Act 1977 (2020 Rev Ed) ("UCTA"). Moreover, IGA was precluded from reversing the FCTs by virtue of the method IGA had used to effect them as well as the Account Statements. Alternatively, IGA was not entitled to reverse the FCTs by virtue of having acted in good faith and fairness. Finally, IGA did not act properly or in good faith in relation to Foreland's withdrawal requests and the closures of the RFTs.

The relevant issues

20 Shortly after the trial had ended, I invited the parties to tender their respective proposed list of issues. With these issues in mind, I then issued a

suggested list of four main issues for the parties' consideration, so that their closing submissions could be broadly aligned.

21 While this has resulted in the parties' closing submissions being somewhat aligned, this was not entirely so. In this regard, a well-structured set of submissions with a coherent internal flow and logic that addressed the key issues raised would have been helpful. Indeed, a possible indicator of a good set of submissions is a coherent table of contents with logically nested multi-level headings from which a reasonable reader can, without reading anything else, discern the general case being put forward (see also the High Court decision of *V V Technology Pte Ltd v Twitter, Inc* [2023] 5 SLR 513 at [5]). In this regard, and with respect, I found it slightly difficult to follow one set of closing submissions, which had 18 first-level headings for content that covered about 70 pages. While each party is well-entitled to advance its closing submissions in whatever manner it deems fit, it was not helpful for submissions to be structured with no apparent connection between arguments. Be that as it may, I gave my fullest consideration to both Foreland's and IGA's closing submissions under the circumstances.

22 Having regard to the parties' submissions, I will address the following issues in this judgment:

(a) whether IGA could visit the consequences of the Suspension and Reversal on Foreland despite the parties having dealt with each other on an OTC basis;

(b) if IGA could visit the said consequences on Foreland, whether IGA was entitled by the Suspension and Reversal to reverse the FCTs on the basis of it being a Force Majeure Event pursuant to Term 23(1) of the MTCA;

(c) if IGA was not so entitled, whether IGA was nonetheless entitled to reverse the FCTs on the basis of Term 10(4) of the MTCA;

(d) even if IGA was entitled to reverse the FCTs by virtue of either [(b)] or [(c)] above, whether it was nonetheless precluded from doing so on the basis of, among other things, the method by which it effected the reversals or the Account Statements;

(e) more broadly, whether IGA acted properly and/or in good faith in relation to the withdrawal requests and the forcible closures of the RFTs; and

(f) whether Foreland is entitled to any remedies in relation to IGA's conduct.

23 It is obvious that I will need to deal with sub-issues within these six main issues. To avoid confusion at this juncture, I will only outline those sub-issues at the appropriate points of this judgment. However, I will not address every issue that the parties have brought forward, especially if I do not think that the particular issue is germane to the dispute at hand.

Whether IGA could visit the consequences of the Suspension and Reversal on Foreland despite the parties having dealt with each other on an OTC basis

The parties' arguments

24 As a threshold point, Foreland argues that the consequences of the Suspension and Reversal cannot be visited on it because IGA had dealt with it as principal and market maker on an OTC basis, with IGA acting as the sole

execution venue for the execution of transactions instructed by Foreland.[3] By way of explanation, OTC trades refer to trades that are negotiated and agreed upon between market participants away from the supervision and central clearing of an exchange,[4] in contrast to exchange trading which takes place through public "open outcry" in a centralised location.[5] Foreland relies heavily on the opinion of Mr Tsvetan Nikolaev Beloreshki ("Mr Beloreshki"), who acted as its expert.

25 In response, IGA makes the following points:

(a) First, the FCTs were necessarily affected by the Suspension and Reversal.[6] In this regard, Foreland's argument that the consequences of the Suspension and Reversal cannot be visited on it because IGA had dealt with it as principal and market maker on an OTC basis is untenable. This is because the nickel CFDs that Foreland was trading on the IG Platform were predicated on and critically dependent on the functioning of the underlying market in two ways: pricing and an available market for hedges.[7]

(b) Second, the report from Foreland's expert, Mr Beloreshki, does not assist Foreland's case on the above issues because, broadly, (i) Mr Beloreshki is ill-qualified to speak to the issues he purports to in this dispute,[8] (ii) much of Mr Beloreshki's report

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3 PCS at para 23(a); see also PCS at paras 25–41.

4 Bundle of Experts' Affidavits of Evidence-in-Chief ("BEAEIC") at p 47, para 59.

5 BEAEIC at p 47, para 56.

6 Defendant's Closing Submissions dated 20 March 2024 ("DCS") at paras 6–15.

7 DCS at paras 7–15.

8 DCS at paras 38–39.

is polemic,[9] and (iii) Mr Beloreshki's conclusions in relation to the above issues are flawed and do not advance Foreland's case.[10] In contrast, the report from IGA's expert, Mr Richard Thaddeus Slovenski ("Mr Slovenski"), should be preferred.[11]

My decision: the consequences of the Suspension and Reversal can be visited on Foreland despite Foreland dealing with IGA as principal and market maker on an OTC basis

26 In my judgment, the consequences of the Suspension and Reversal can be visited on Foreland despite Foreland dealing with IGA on an OTC basis. I arrive at this conclusion for the following reasons.

The prices for nickel CFDs are derived from the LME nickel prices

27 First, the prices for the nickel CFDs are clearly dependent on nickel prices on the LME. After all, the prices for the nickel CFDs offered on the IG Platform are derived from the three-month forward nickel prices on the LME, albeit with a dealing spread added. This fact is stated clearly in several client-facing documents, including the MTCA:

(a) The Nickel Commodities CFD Product Details ("Product Details"), which is a client-facing document that is provided to clients and highlighted in Terms 1(3)(d) and 2(7) of the MTCA, states that the "Related Market" is the "3-month forward price of the underlying LME Price".[12] Thus, while Foreland attempts to

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9 DCS at paras 39.6 and 61–64.

10 DCS at paras 40–60.

11 DCS at paras 65–74.

12 Agreed Bundle of Documents Vol 2 ("2 ABOD") at p 98.

downplay the Product Details as a "solitary one-page" document that is "provided by way of information",[13] the fact is that the MTCA makes express reference to the Product Details. This makes sense as the MTCA is a general document and obviously cannot refer to the precise underlying market for a particular product. For completeness, Terms 1(3)(d) and 2(7) appear on the MTCA as follows:[14]

> **1. INTRODUCTION**
>
> …
>
> (3) You should read all of the provisions in this Agreement. Please pay special attention to those terms that are highlighted in bold because they contain important information about our relationship with you under this Agreement. In particular:
>
> …
>
> (d) Term 2(7) explains where you can find the Product Details;
>
> **2. THE SERVICES WE WILL PROVIDE AND DEALINGS BETWEEN YOU AND US**
>
> …
>
> (7) You acknowledge that the Product Details that apply at the time when you open or close a Transaction will be those displayed on our website(s), which may be updated from time to time.
>
> [emphasis in original omitted]

(b) Terms 4(2) and 4(3) make clear that the prices which IGA offers are derived from the underlying market with a spread applied.

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13 1st & 2nd Plaintiffs' Reply Submissions dated 11 April 2024 ("PRS") at para 49.

14 2 ABOD at p 151.

For completeness, Terms 4(2) and 4(3) appear on the MTCA as follows:[15]

> **4. PROVIDING A QUOTE AND ENTERING INTO TRANSACTIONS**
>
> …
>
> (2) Upon your request, in accordance with Terms 4(1) and 4(4), we will quote a higher and lower figure for each transaction (**"our bid and offer prices"**). These figures will be based on either the bid and offer prices in the Underlying Market (**"Commission Transaction"**) or our own bid and offer prices (**"Spread Transaction"**). Details may be found in the Product Details or may be obtained from one of our employees on request.
>
> (3) You acknowledge that both our Spread Charge (being our charge to you) and Market Spread (where there is an Underlying Market) can widen significantly in some circumstances, that they may not be the same size as in the Product Details and that there is no limit on how large they may be. You acknowledge that when you close a Transaction, the Spread may be larger or smaller than the Spread when the Transaction was opened. For Transactions transacted when the Underlying Market is closed or in respect of Transactions where there is no Underlying Market, the figures that we quote will reflect what we believe the market price in an Instrument is at that time. You acknowledge that such figures will be set by us at our reasonable discretion.
>
> [emphasis in original]

(c) IGA's website explains that the prices which IGA offers comprise the underlying market price with spreads "wrapped around" (the spread being the difference between the price at which the CFD is bought and sold on the platform and the market

15 2 ABOD at p 152.

> price, such that, with regard to CFD products, clients always buy slightly higher and sell slightly below the market price).[16]

28 In this regard, Foreland alludes to Term 12(4)(c) of the MTCA and argues that it expressly provides that Foreland is "not dealing on the Underlying Market".[17] For completeness, Term 12(4)(c) provides that "[b]y using our Orders, you expressly acknowledge and agree that: … (c) when you place and we accept an Order you are trading with us as principal and not dealing on the Underlying Market".[18] I disagree with Foreland's reliance on Term 12(4)(c). This is because IGA's case is not that Foreland is actually dealing on the LME, but that Foreland is trading on prices derived from the LME so that it appeared to be trading on the LME. There is thus no inconsistency between Term 12(4)(c) and IGA's case.

29 Another term that Foreland relies on is Term 4(3), which it raised for the first time in its Reply Submissions. Foreland argues that Term 4(3), by contemplating the possibility of IGA quoting figures even when the Underlying Market is closed or non-existent, proves that the prices of the nickel CFDs are not dependent on LME nickel prices.[19] I do not accept Foreland's submission. It is clear from the wording of Term 4(3) that the closure or non-existence of the Underlying Market are contemplated as exceptional events. Absent such exceptional circumstances, the prices that IGA offers are derived from the underlying market. In short, the exception proves the rule.

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16 Agreed Bundle of Documents Vol 4 ("4 ABOD") at pp 367–371.

17 PRS at para 67.

18 2 ABOD at p 156.

19 PRS at para 27.

30 In addition to the foregoing, Foreland's witnesses testified at trial that they were unaware that the nickel CFDs, which Foreland traded with IGA, were connected with the LME. For example, Mr Nobuaki Aoshima ("Mr Nobuaki"), who is a director at FJP, said that he did not know how the nickel CFD prices were derived. He even claimed that "IG has created these prices", and how these prices were derived was "not in any of [Foreland's] concerns".[20] Similarly, Mr Hasegawa Yozo ("Mr Hasegawa"), who is the director and the sole shareholder of FSG, also claimed that he did not know that the nickel CFD prices were derived from the LME.

31 Leaving aside the clear terms in the MTCA and other documents, it is commercially unrealistic to believe that Foreland would have traded with a platform which provided no visibility as to how they derived their prices. This is not believable because it would mean that Mr Nobuaki and Mr Hasegawa, who are both highly experienced traders, would choose to trade on a platform which provided no basis upon which they could make their investment decisions. Moreover, Mr Hasegawa eventually agreed during cross-examination that he understood IGA to have referenced LME nickel prices for the nickel CFDs.[21] In any event, even if Foreland did not actually know that the nickel CFD prices were derived from the LME, it ought reasonably to have known the same, by virtue of the various Terms in the MTCA and the documents I referred to above. There is therefore limited legal relevance even if Foreland's witnesses did not know that the nickel CFDs were connected with the LME.

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20 Certified Transcript 16 January 2024 at p 70 line 25 to p 72 line 11.

21 Certified Transcript 17 January 2024 at p 88 lines 13–18, p 91 lines 15–25.

32 Accordingly, the fact that Foreland dealt with IGA on an OTC basis does not mean that Foreland is insulated from events in relation to the LME, such as the Suspension and Reversal. Such an argument ignores the commercial reality of how prices for the nickel CFDs are derived from the LME nickel prices.

IGA's trading model is contingent on being able to hedge the nickel CFDs on the LME

33 Second, IGA's trading model is contingent upon being able to hedge the exposure from client trades on the underlying market (hedging referring generally to a strategy of offsetting investment risk from loss or failure by taking a countervailing action, with a perfect hedge being one that eliminates the possibility of future gain or loss).[22] To begin with, this trading model is clearly communicated to clients on its website.[23] IGA needs to engage in such hedging because it does not conduct proprietary trading in CFDs.[24] Indeed, IGA is only able to offer the nickel CFD as a product to its clients because it could hedge its market risk on the LME through its risk management process.

(1) IG Group's hedging model shows a clear connection between the FCTs and the LME

34 In this regard, IGA's evidence is that hedging is done through IG Markets Limited ("IGM"), which is the IG Group of companies' central risk management vehicle. According to Mr Adam James Blemings ("Mr Blemings"), who is the Head of Trading of the IG Group, IG Group's CFD business is contingent on the hedging of client trades on the underlying

22 BEAEIC at pp 422−423, para 18(d).

23 4 ABOD at pp 369 and 371.

24 Certified Transcript 23 January 2024 at p 162 lines 8−22; DCS at para 11, footnote 14.

market through IGM.[25] Thus, for any given CFD product, when a client trade is placed with an IG Group entity, that trade is automatically mirrored with IGM by way of that IG Group entity entering into a back-to-back transaction with IGM that is identical to the client's trade in position, transaction type, and price. The market risk of all the client trades with the IG Group are thus aggregated with IGM through these mirrored trades. When the market risk exceeds an internally prescribed limit, IGM places hedging transactions to hedge the total exposure faced by the IG Group arising from the client trades. IGM places these hedging transactions either automatically or manually, depending on the product.[26]

35 These hedging arrangements are necessary because of the IG Group's business model. The starting point is that the IG Group does not engage in proprietary trading of CFDs.[27] Therefore, it does not profit from its clients' trades *per se* (its profits come from the dealing spread, see [27(c)] above). Instead, its clients' positions mostly offset each other[28] (*ie*, its clients take opposite positions, or "bets", on the price movements of nickel). Inherent in this business model, however, is the possibility that a large majority of clients trade in one direction. In such a situation, IG Group needs to protect its exposure to risk by hedging in the underlying market.[29] Without such hedging, IG Group would be exposed to an unacceptable amount of risk, which would undermine its ability to offer its trading services to its clients. This explains why

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25 Affidavit of Evidence-in-Chief of Mr Adam James Blemings ("Blemings AEIC") at para 9.

26 Blemings AEIC at para 9.

27 Certified Transcript 23 January 2024 at p 162 line 8 to p 163 line 11.

28 4 ABOD at p 371.

29 4 ABOD at p 371.

the IG Group's CFD business is contingent upon the hedging of client trades on the underlying market.[30]

36 In relation to nickel CFDs, the underlying market on which the IG Group manually places hedging transactions for its client's nickel trades is the LME. This is because the prices for the nickel CFDs are based on the three-month forward price of nickel offered on the LME. The IG Group does not hedge nickel trades on any other exchange because pricing on other exchanges is not necessarily sufficiently correlated to the pricing of the nickel CFDs for the exposure to be appropriately covered.[31] IGM places the hedging transactions with Goldman Sachs & Co LLC ("GS"), which acts as IGM's hedging broker. IGM's clearing broker, Macquarie Bank Limited ("Macquarie"), matches the hedging transactions and clears them via the LME.[32] Drawing from Mr Slovenski's evidence, I summarise the trade flow from Foreland through to Macquarie in the table below:[33]

30 Blemings AEIC at para 9.

31 Blemings AEIC at para 10.

32 Blemings AEIC at para 11.

33 BEAEIC at p 431, para 48.

<table>
<tr><th>Counterparty</th><th>Platform</th><th>Contract Term</th><th>Notes</th></tr>
<tr><td>Foreland</td><td rowspan="2">Via IGA Platform</td><td>OTC Contract</td><td></td></tr>
<tr><td>IGA</td><td>OTC Contract</td><td rowspan="2">IGA has no market risk exposure due to hedging arrangement with IGM.</td></tr>
<tr><td>IGA</td><td rowspan="2">Automatic after trade on IGA Platform</td><td>OTC Contract</td></tr>
<tr><td>IGM</td><td>OTC Contract</td><td rowspan="2">IGM absorbs market risk from IGA and manages market risk between OTC Contract and LME.</td></tr>
<tr><td>IGM</td><td rowspan="2">Inter Office Market</td><td rowspan="2">Contingent Agreement to Trade (LME)</td></tr>
<tr><td>Goldman Sachs</td><td rowspan="2">Goldman transacts with IGM contingent on the transactions being accepted by Macquarie. From an LME perspective this is a “Contingent Agreement to Trade”.</td></tr>
<tr><td>Goldman Sachs</td><td rowspan="3">LME Clear</td><td></td></tr>
<tr><td>Macquarie</td><td>LME (upon Acceptance is considered “Executed”)</td><td></td></tr>
<tr><td>LME Clear</td><td>LME</td><td></td></tr>
</table>

37 In view of the above, it was not possible for Foreland to be insulated from the LME. While IGA was principal and market marker, this does not mean that the nickel CFDs were not offered to Foreland on a hedged basis or that their pricing could exist independently of market events. Indeed, this is quite clear from the documents that Foreland had access to. IGA's website titled "Does IGA aim to profit from client losses" states that IGA's business model is "based on providing individuals with the opportunity to trade the world's financial markets" and that IGA protects "[its] exposure to risk by hedging in the underlying market".[34] The SOEP also states that "[w]hilst [IGA] acts as principal in respect of your orders, [IGA] assess the execution venues available … and upon which [IGA] place significant reliance to obtain on a consistent basis the best possible result for the execution of your orders".[35] Further, the SOEP also states that IGA looks at the "price feed and hedging venues",[36] which is the underlying market, in determining its execution arrangements.

38 At this juncture, I find it convenient to address Foreland's argument that its lack of control over, as well as knowledge and visibility of, IG Group's trading and risk management models, means that Foreland must be insulated from events in relation to the LME.[37] I disagree with this argument. Put simply, what matters is the parties' allocation of risk between themselves, and not the extent of Foreland's knowledge about IGA's trading and risk management model. With regard to the former, the extracts reproduced above make it clear that the prices IGA charged for its nickel CFDs were offered on a hedged basis,

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34 4 ABOD at p 371.

35 4 ABOD at p 305.

36 4 ABOD at p 307.

37 PRS at para 56; PCS at paras 127, 173 and 179.

were linked to the LME, and that Foreland knew or should have known this. Second, and as I explained above (at [35]), the IG Group's business model hinges on it being able to manage its exposure arising from client trades, through hedging on the underlying market.[38] Thus, IGA does not take on the underlying market risks of its client's trades. Instead, these trades are done on prices linked to and reflective of the underlying market, and the risks arising therefrom are managed through hedges on the underlying market.

39 Thus, specifically in relation to the Suspension and Reversal, the matching of IGM's hedges by Macquarie was never completed because the Suspension made matching and clearing impossible. As a result, all client nickel trades carried out on 8 March 2022 with IG Group entities, which included the FCTs, became unhedged. Accordingly, the fact that Foreland dealt with IGA on an OTC basis does not mean that Foreland was insulated from all events in relation to the LME, such as the Suspension and Reversal. Instead, the risk of the Suspension and Reversal remained with IGA's clients, such as Foreland.

(2) Foreland's attempt to dispute the connection between the FCTs and the Suspension and Reversal is not convincing

40 Leaving aside the IG Group's hedging business model as described above, Foreland argues that there is no causal connection between the reversal of the FCTs and the Suspension and Reversal because: (a) IGA had fully hedged its exposure with IGM, and did not become unhedged;[39] (b) the unhedging of IGA's exposure was due to Macquarie not matching or clearing the hedges,

38 Blemings AEIC at para 9.

39 PCS at paras 126–144.

which was due to reasons other than the Suspension and Reversal;[40] and (c) IGM had consciously decided to hedge its exposure *only* on the LME, therefore bringing upon itself the consequences of the Suspension and Reversal.[41] I do not agree with these reasons that Foreland has advanced to support its argument that there is no causal connection between the reversal of the FCTs and the Suspension and Reversal.

41 First, Foreland's argument that IGA was entitled to reject IGM's reversal of the automatic back-to-back hedging transactions (between IGA and IGM)[42] ignores the realities of IGA's trading model. Although it is true that IGA's mirror trades transfer IGA's exposure to IGM, the transfer of that exposure is for the purpose of IGM hedging that exposure, aggregated with the risk arising from other IG Group entities, on the LME. Thus, IGM's hedges and the mirror trades are clearly part of a single process. Foreland is therefore incorrect to argue that IGM decided to "unhedge" IGA. Instead, the IG Group had taken the decision to reverse all client nickel trades on 8 March 2022 for all the relevant IG Group entities, and this was made necessary by the Suspension and Reversal.

42 Further, Foreland is also incorrect to argue that IGA never pleaded or explained how it became unhedged, and that IGA never mentioned the "reversal" of the mirror trades between IGA and IGM.[43] On the contrary, IGA's repeated references to its trading model explain clearly how it had become

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40 PCS at paras 145–171.

41 PCS at paras 145–171.

42 PCS at para 137.

43 PCS at paras 140−144.

unhedged. As for the "reversal" of the mirror trades, IGA explained that it had not stated as such because the mirror trades are not trades in the traditional sense and are thus not "reversed" in the usual manner. Rather, they are automatic records of the IG Group's client trades with IGM. As a result, their "reversal" is effected when FCTs and other client trades are reversed, such that mirror trades to those reversals are booked with IGM.[44]

43 Second, Foreland argues that Macquarie's decision not to match and clear the hedging trades placed by IGM was the proximate cause of IGM being unhedged.[45] The problem with this argument is that, as IGA rightly points out, the Suspension and Reversal is the most obvious cause of Macquarie's failure to match the hedging trades.[46] Therefore, Foreland has submitted that Macquarie's decision not to match or clear the hedges was due to reasons other than the Suspension and Reversal. However, I find that this submission is not supported by any evidence. Foreland relies on two planks to support this submission. One, although Macquarie received instructions from GS to match and clear IGM's hedging trades on the LME *before* the Suspension, Macquarie did not match IGM's hedging trades *before* the Suspension.[47] Two, Mr Beloreshki advanced a theory that Macquarie's non-matching was due to liquidity issues in the market.[48] Drawing on these two points, Foreland submits that Macquarie had decided of its own accord not to match IGM's hedging trades independently before it even knew of the Suspension.[49] However,

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44 Defendant's Reply Closing Submissions dated 11 April 2024 ("DRS") at p 27.

45 PCS at paras 160−161.

46 DCS at para 19.

47 PCS at paras 158−159.

48 Certified Transcript 31 January 2024 at p 48 line 24 to p 49 line 12.

49 PCS at paras 158–162.

Mr Beloreshki's theory that IGM's hedges were not cleared because of a lack of liquidity in the market was nowhere to be found in his report. Leaving that aside, Mr Beloreshki has not provided any clear evidence to substantiate this theory. Indeed, he did not correlate this theory to anything specific in Oliver Wyman, *Independent Review of Events in the Nickel Market in March 2022* (Final report: January 2023) or other data. He has thus failed to show that even if the Suspension and Reversal had not come into effect, Macquarie would not have been able to match IGM's trades due to the lack of liquidity. In so far as Foreland relies on the fact that Macquarie received instructions to match IGM's trades before the Suspension but did not act on them, this does not show that Macquarie did not match the trades for reasons other than the Suspension and Reversal.

44 Third, Foreland's argument, that IGM brought the consequences of the Suspension and Reversal upon itself because it decided only to hedge its exposure on the LME, overlooks several points. One, it ignores the truly extraordinary nature of the Suspension and Reversal. In fact, this was only the second time in the LME's history that nickel trading had been suspended. It is therefore not right to judge IGM's actions with the benefit of hindsight after such an extraordinary event had happened. Two, Foreland's argument also ignores the fact that the LME is the only market on which the IG Group could realistically hedge the nickel CFD without turning it into an entirely different product. In this regard, Mr Slovenski provided cogent reasons why hedging in other markets would not work:[50] for instance, liquidity in some markets is contingent on counterparty availability, and other markets had high barriers to entry including currency risk. In contrast, Mr Beloreshki made a bare assertion

50 BEAEIC at pp 437−441, paras 62, 65–76.

that IGM could have chosen to hedge its risks in a variety of alternative markets but without explaining why.[51] Also, Mr Blemings explained that while the IG Group had explored other markets such as the Shanghai Futures Exchange, it would not have been practical to hedge the nickel CFD, which derived its pricing from the LME, through other markets with different prices.[52]

45 Fourth, Foreland raised in its Reply Submissions, for the first time, the argument that Term 3(2)(b) of the MTCA shows that the hedging transactions IGA entered into in respect of any trades between IGA and Foreland are only for the purposes of managing *IGA's own risk* in relation to those trades. Based on that, it argues that any unilateral hedging transactions undertaken by IGA can only affect IGA's own risk, and not the risk which Foreland undertook under its trades with IGA.[53] However, this is a misreading of Term 3(2)(b), which appears in a section entitled "Conflicts of Interest" and which reads:[54]

> **3. CONFLICTS OF INTEREST**
>
> (2) We will take all appropriate steps to identify conflicts of interests between ourselves, our Associated Companies and Relevant Persons and our clients, or between one client and another, that arise in the course of providing our investment services. The following are examples of such material interests and conflicts of interests:
>
> …
>
> (b) we may execute hedging transactions prior to (i.e. in anticipation of) or following receipt from you of a request, or information concerning a contemplated request, to open or close a Transaction in order to manage our risk in relation to Transaction(s) you are entering into or contemplating, all of which may impact

51 BEAEIC at p 60, para 123.

52 Certified Transcript 24 January 2024 at p 62 line 19 to p 66 line18.

53 PRS at para 29.

54 2 ABOD at pp 151–152.

> on the price you pay or receive in relation to such Transaction(s) and any profits generated by such hedging may be retained by us or an Associated Company without reference to you;

Plainly, Term 3(2)(b), read in its proper context, refers to an example of a "material interests and conflict of interests" that may arise between IGA and a potential client (see Term 3(2)). This has nothing to do with the parties' overall allocation of risk in the transactions concerned.

46 Accordingly, the fact that Foreland dealt with IGA on an OTC basis does not mean that Foreland is insulated from events in relation to the LME, such as the Suspension and Reversal. Such an argument ignores the commercial reality of how the IG Group hedges client nickel trades on the LME. In sum, even if IGA had hedged directly on the LME without IGM's involvement, the analysis would still be the same.

Mr Beloreshki's expert opinion on the implications of IGA acting as principal and market maker on an OTC basis is not reliable

(1) Mr Beloreshki's opinion

47 Third, in so far as Foreland relies heavily on Mr Beloreshki's expert opinion to advance its argument on the present point, I do not think that his opinion, on the implications of IGA acting as principal and market maker on an OTC basis, is reliable. In this regard, Foreland summarised Mr Beloreshki's opinion to be as follows:[55]

(a) OTC trades are trades negotiated and agreed on between market participants away from the supervision and central clearing of an

55 PCS at paras 33(a)–33(e).

exchange. They are thus not subject to regulation by any self-regulating organisations. In particular, transactions executed in the OTC marketplace are not subject to the rules and regulations of any organised exchanges.

(b) IGA assumed full responsibility and bore all market risk. This included any gains or losses associated with the transactions that it entered into with Foreland.

(c) Among other market risks, market makers are exposed to: (i) price and volatility risk; (ii) liquidity risk; and (iii) execution and counterparty risk.

(d) Following the execution of the FCTs, IGA, who acted as principal, assumed the "nickel risks" that arose as a result of its decision to enter into the FCTs.

(e) From that point on, neither party bore responsibility with respect to the risks assumed and borne by its counterparty, and neither party had a claim on the profits realised, or a responsibility for losses incurred, by the counterparty.

(2) Mr Beloreshki does not possess the relevant expertise

48 To begin with, and with the greatest of respect to Mr Beloreshki, I do not think that he possesses the relevant expertise to opine on the issues put to him for this action. Although Mr Beloreshki claims to have had "vast marketplace experience as a trader",[56] this is not supported by his actual experience. Instead, Mr Beloreshki only spent two years with Banque Paribas

56 BEAEIC at p 9.

("BNP") from 1997 to 1999 and has been a consultant since 1999. While at BNP, Mr Beloreshki only acquired an entry-level broker licence, which did not allow him to deal with futures and commodities.[57] He also did not trade on the LME or any other commodity exchange.[58] All in all, Mr Beloreshki said that he is a "financial economist".[59] While Mr Beloreshki may be an excellent financial economist, such expertise is not the right kind required for this case.

49 Indeed, as IGA rightly points out,[60] Mr Beloreshki's expert opinion showed some unfamiliarity with the relevant issues in the present case.

50 First, Mr Beloreshki's explanation of IGM's hedging process was deficient. I raise the following examples:

(a) Mr Beloreshki stated that IGM executed its hedging transactions on an OTC basis.[61] This is not correct since, in the ordinary course, IGM's trades with GS are given up to Macquarie, with the final outcome of the hedges being that IGM ends up with nickel futures contracts on the LME.[62] As the hedges are on the LME, they, by definition, cannot be OTC. Mr Beloreshki's basis for his assertion that IGM's trades were OTC was that some of GS's trade confirmations had the word "OTC" written next to

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57 Certified Transcript 31 January 2024 at p 7 line 25 to p 8 line 2.

58 Certified Transcript 31 January 2024 at p 9 lines5–9, p 12 lines 9–18.

59 Certified Transcript 31 January 2024 at p 13 lines12–15.

60 DCS at paras 44−45.

61 BEAEIC at p 41, para 33(a).

62 Certified Transcript 19 January 2024 at p 161 line 21 to p 162 line 7; Certified Transcript 24 January 2024 at p 92 line 8−21; p 94 line 3 to p 96 line 5.

"Venue MIC".[63] However, he offered no explanation as to why this meant that IGM's trades were OTC, while also neglecting the GS trade confirmations that said "Pending" next to "Venue MIC".[64] In this regard, Mr Beloreshki claimed to have consulted other experts,[65] but this is nowhere stated in his report.

(b) Separately, Mr Beloreshki also said that GS as a non-LME member could not execute nickel futures on the LME,[66] even though Goldman Sachs International ("GSI") is an LME member.[67] Indeed, this ignores Mr Slovenski's report, which stated that IGM's hedges were done on exchange via GSI and Macquarie, both of whom are LME members.[68] Furthermore, as Mr Joseph James Ryan's ("Mr Ryan") Supplementary Affidavit of Evidence-in-Chief ("JJR SAEIC") clarified, while IGM would communicate with both GS and GSI when placing its hedges, IGM's hedging arrangement was with GSI, who executed the trades in all cases.[69] Yet despite having the benefit of Mr Slovenski's Report and JJR SAEIC, Mr Beloreshki

63 Certified Transcript 31 January 2024 at p 58 line 18 to p 59 line 14, referencing BEAEIC at pp 150−240 (Tab 6).

64 BEAEIC at pp 242−246 (Tab 6).

65 Certified Transcript 31 January 2024 at p 59 lines 3−14; p 69 line 16 to p 70 line 7.

66 BEAEIC at p 42, para 33(c).

67 Certified Transcript 31 January 2024 at p 72 line 24 to p 74 line 22.

68 BEAEIC at pp 430−431, para 48.

69 Supplementary Affidavit of Evidence-in-Chief of Mr Joseph James Ryan dated 24 November 2023 ("JJR SAEIC") at paras 8.1−8.3.

continued to insist that there could be a "potentially unknowable number of steps" between the FCTs and the LME.[70]

(c) Finally, Mr Beloreshki said that Macquarie cleared the trades through LME Select,[71] when this was actually done through LMEsmart.[72]

51 Above all, Mr Beloreshki's explanation of IGM's hedging process appears to have lifted an entire paragraph, without attribution and almost word-for-word, from the Detailed Grounds of Defence of the LME and LME Clear Limited in Claim Nos CO/1995/2022 and CO/2007/2022 in the High Court of Justice King's Bench Division Administrative Court (the "LME Defence"). While it may be understandable for a layperson to explain concepts by reference to other material, it is quite peculiar for an expert to do this by lifting an entire paragraph from another source and without any attribution. I illustrate this by first setting out para 33(e) of Mr Beloreshki's report[73] before reproducing para 30 of the LME Defence:[74]

> (e) Trades on LME Select involve two corresponding halves of an agreed trade being matched by the electronic platform. The trade is executed, and a cleared contract comes into being, when LME Clear confirms that it satisfies relevant criteria and pre-execution checks.[27]

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70 Certified Transcript 31 January 2024 at p 146 line 10 to p 148 line 18.

71 BEAEIC at p 42, para 33(d).

72 BEAEIC at pp 125, 262 and 264; see also https://www.lme.com/en/trading/systems/lmesmart: "LMEsmart is the system for the matching and registering of trades".

73 BEAEIC at p 42, para 33(e).

74 4 ABOD at p 254.

> 30. Trades on LMEselect involve two corresponding halves of an Agreed Trade being "*matched*" by the electronic platform. The Agreed Trade is Executed, and a Cleared Contract comes into being, when LME Clear confirms that it satisfies relevant Acceptance Criteria and Pre-Execution Checks.[43]

For completeness, footnote 27 to para 33(e) of Mr Beloreshki's report is not an attribution to any underlying source material. It simply reads "[i]n general, the process of trade execution on the LME takes place as quickly as it would be technologically practicable".

52 Second, Mr Beloreshki wrongly claimed that IGM was not subject to the LME Rules.[75] This is incorrect because the LME Rulebook requires contracts such as those between IGM and GSI, to provide that they are subject to the LME Rulebook. This is explicitly provided for in Regulation 2.6.4 of the Trading Rules, Part 3 of the LME Rulebook, which states:

> 2.6.4 Where any party to a Client Contract is not a Member, the back-to-back Client Contract shall come into effect pursuant to the terms of business between the Member and the Client. Any Member seeking to enter into Client Contracts with Clients that are not Members must ensure that its terms of business with such Clients contain provisions giving effect to this Regulation 2.6, and which provide that such Client Contracts shall incorporate and be subject to these Rules.

Accordingly, IGM's hedges would have been governed by the LME Rules, contrary to Mr Beloreshki's assertion to the contrary.

53 Third, Mr Beloreshki did not appear to have a clear understanding of what CFDs are. This is because he insisted that an "inventory" of CFDs can be

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75 BEAEIC at pp 27 and 55.

carried to fill client orders.[76] Indeed, when Mr Harish Kumar ("Mr Kumar"), who appeared for IGA, pointed out to Mr Beloreshki that there was no question of "inventory" with respect to CFDs, Mr Beloreshki insisted that "inventory" could refer to the trading positions that might be taken by a market maker.[77] That, with respect, makes little sense.

54 Taken collectively, I do not think that Mr Beloreshki possesses the relevant expertise to opine on the issues put to him for this action. I therefore do not prefer his opinion to that of IGA's expert, Mr Slovenski.

(3) Foreland's complaints against Mr Slovenski are unfounded

55 On Mr Slovenski, Foreland made detailed submissions that he was an "incompetent and biased expert witness".[78] These are very strong words to use on anyone, let alone an expert witness. Accordingly, I expected Foreland to produce clear evidence and good reasons to ground its serious allegations. Unfortunately, Foreland has failed to do so.

56 Before I explain why Foreland has failed to do so, I should say that Mr Slovenski was instructed by IGA to opine on just two of the seven issues that Mr Beloreshki had been asked to opine on, namely:

(a) the meaning, effect, and implication of IGA dealing with Foreland as principal and market maker, on an OTC basis; and

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76 Certified Transcript 31 January 2024 at p 85 line 25 to p 86 line 24.

77 Certified Transcript 31 January 2024 at p 87 lines 3−22.

78 PCS at para 222.

(b) whether IGA could have hedged its exposure by other means (*eg*, such as by trading on other exchanges).

While Mr Philip Ling ("Mr Ling"), who appeared as instructed counsel for Foreland, took the position that Mr Slovenski was looking to "avoid treading into five of the seven issues"[79] by merely opining on two issues, any assertion that Mr Slovenski had "avoided" the remaining issues is incorrect because Mr Slovenski had only been instructed to look into those two issues. Also, Foreland had formulated the seven issues on its own initiative, and IGA decided only to respond to two of those. IGA was well within its rights to do so.

57 I turn now to consider Foreland's complaints against Mr Slovenski. For the reasons that follow, I find them all to be unfounded.

(A) MR SLOVENSKI WAS NOT MISTAKEN AS TO THE ISSUE HE HAD TO ADDRESS

58 First, Foreland complains that Mr Slovenski had misstated the issue at para 9(a) of Mr Beloreshki's report that he had dealt with. Paragraph 9(a) is about "[t]he meaning, effect, and implication of the Defendant dealing with Plaintiffs as principal and market maker, on an OTC basis".[80] Instead of this, Foreland complains that Mr Slovenski repeatedly stated the issue to be "whether IGA was in fact acting and dealing with Foreland as principal and market maker".[81] However, the extracts that Foreland relies on from the Certified Transcript do not show that Mr Slovenski was so mistaken.[82]

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79 Certified Transcript 1 February 2024 at p 49 lines 5–10.

80 BEAEIC at p 28.

81 PCS at para 223.

82 Certified Transcript 1 February 2024 at p 60 lines 11–13, p 62 line 19, p 63 line 8, p 73 lines 16–18, p 79 lines 10–11.

59 While I have reviewed all of the extracts that Foreland relies on, it is not necessary for me to discuss every one of them. It suffices to raise a few examples to show how Foreland's argument, that Mr Slovenski had misstated the issue he had to address at para 9(a) of Mr Beloreshki's report, is, quite unfortunately, premised on reading a number of Mr Slovenski's responses out of their proper context. As a first example, Foreland raises these lines from Mr Slovenski's responses in the Certified Transcript:[83]

> IGA could do what they did or not, but I was asked to actually give an opinion around whether or not IGA was dealing with Foreland as a market maker and principal.

60 Admittedly, when read on its own, it does appear that Mr Slovenski had stated he had to give an opinion "around whether or not IGA was dealing with Foreland as a market maker and principal." However, when I examine what Mr Slovenski said immediately after these quoted lines, it becomes clear that he was not confused as to the issue he had to opine on:[84]

> The issue is that if I didn't make this assumption in (c), then I would have had to have said they aren't acting as market maker and a principal, okay? And for me, I looked at that and said, well, that's kind of odd so I'll just make this assumption but I was not making any sort of assumption of fact that IGA was able to do this.

61 Furthermore, it is instructive to examine the question to which Mr Slovenski was responding, and the words immediately preceding the quoted portion of Mr Slovenski's reply (see at [59] above):[85]

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83 Certified Transcript 1 February 2024 at p 60 lines 11–13.

84 Certified Transcript 1 February 2024 at p 60 lines 14–20.

85 Certified Transcript 1 February 2024 at p 60 lines 4–10.

> Q. The word "assumption" can't exist in a vacuum, right? You assume that this is in fact what happened, is that what you mean?
>
> A. I don't think that's correct. I made assumptions in order to be able to respond to the issues and in particular, if I look at (c), right, I don't have any sort of background or knowledge about whether or not …

It is clear from these lines that Mr Slovenski was responding to the cross-examination question by Mr Ling on whether Mr Slovenski was correct to have assumed that IGA was able to reverse the FCTs based on various Terms in the MTCA. I accept Mr Slovenski's point that it would be difficult for him to opine on "[t]he meaning, effect, and implication of the [d]efendant dealing with [p]laintiffs as principal and market maker, on an OTC basis", if he did not assume that IGA was acting as market maker and a principal. This may also be why Mr Slovenski had said he was giving an opinion "around" whether IGA was dealing with Foreland as a market maker and principal, and not "on" whether IGA was so dealing. Thus, Mr Slovenski was far from misstating the issue that he had to opine on.

62 As another example, Foreland raises two isolated instances in the Certified Transcript as further proof of its allegation that Mr Slovenski ostensibly misunderstood the issue he was to opine on:[86]

> Okay. So can I do them in my order? So 18(c) I think I've addressed already in the fact that I had to actually discuss the -- the IGA was working as principal market maker, that assumption was to enable me to say, yes, they were. Okay.
>
> …
>
> Well, I was asked to -- the first issue I was asked to address was around IGA operating as a -- I don't remember the exact

86 Certified Transcript 1 February 2024 at p 62 lines 19–23 and p 63 lines 4–8.

> wording, but around being a principal and market maker, okay? So it was the first issue I was supposed to address.

However, to be fair to Mr Slovenski, it is clear from the Certified Transcript that Mr Ling had not asked him directly to state the issue that he was supposed to opine on. Instead, in both instances, Mr Slovenski was replying to Mr Ling's questions about whether he ought to have made the assumptions that he did. In that context, it would not be fair to expect Mr Slovenski to have set out the issue with exactitude. Also, Mr Slovenski was quite candid in saying that he did not remember the exact wording of the issue but that it was "around" IGA being a market maker and principal.

63 I therefore do not think it is right for Foreland to extrapolate from these isolated instances in his evidence the logical leap that Mr Slovenski was somehow an "incompetent and biased" expert witness.

(B) MR SLOVENSKI WAS NOT BIASED JUST BECAUSE HE HAD MADE CERTAIN ASSUMPTIONS IN HIS REPORT

64 Second, Foreland argues that Mr Slovenski is biased because he had made certain assumptions which constitute the primary issues that the court needs to decide in this action. These assumptions are: (a) that "IGA was able to reverse the trades and reinstate [Foreland's] … positions based on the various clauses in the [MTCA]";[87] and (b) that IGA's allegation that it had become unhedged should have a bearing on the nickel trades placed by Foreland.[88] Accordingly, Foreland claims that for Mr Slovenski to have proceeded on these assumptions "renders any conclusion which he purports to arrive at in reliance

87 BEAEIC at p 422, para 18(c).

88 BEAEIC at p 423, para 19(b).

thereon not only circular, but in fact wholly meaningless" and that Mr Slovenski was "effectively arrogating to himself the duties and powers of the [c]ourt to determine these issues".[89]

65 I find Foreland's argument to be untenable. It is common for assumptions to be made in a report, including an expert report. In the present case, Mr Slovenski made the assumptions to enable him to sensibly respond to the issues that were referred to him. There is nothing inherently wrong with this. Indeed, Foreland itself assumes that the Suspension and Reversal amounted to a Force Majeure Event under Term 23(1) of the MTCA.[90] Foreland may rightly object to the correctness of the assumptions themselves, but the fact that Mr Slovenski had used assumptions does not mean that he was biased.

66 Fundamentally, Foreland has confused an assumption with a conclusion. Mr Slovenski was not arrogating any of the court's duties and powers to determine these issues because he was not making any conclusions on findings of fact that I am to reach (though, to be fair, Mr Slovenski (and anyone) is well-entitled to come to conclusions of their own without being accused of acting in place of the court). To take an example, if one were asked to describe his or her plan for the day on the assumption that it rained, that does not mean that that person is arrogating mother nature's power to make it rain. That person is also not being biased in favour of rainy days when setting out his or her plan on this assumption. With respect, Foreland's argument, that Mr Slovenski was biased because he had made certain assumptions, simply does not make any sense. It

89 PCS at para 224.

90 PCS at para 42.

is puzzling that Foreland devoted a good part of its time for the cross-examination of Mr Slovenski to explore this issue.

(C) MR SLOVENSKI'S CLARIFICATION OF HIS REPORT WAS NOT IMPROPER

67 Third, Foreland argues that Mr Slovenski wrongly sought to change his expert opinion via a clarification in a list of errata that was adduced at the start of his oral evidence. Indeed, Foreland's counsel were greatly agitated by this during the trial. The clarification in question is this:

> **Paragraph 53**
>
> I understand that there have been questions put to witnesses around exchanges providing liquidity and I believe that there is a misunderstanding of what is written in this paragraph. My paragraph 53 merely states that how the CFTC, CME and LME *define* market making include the element of compensation for accepting the risk of providing liquidity. It is not meant to imply that the exchanges themselves nor a regulatory body provide liquidity. The LME describes itself as providing "…a forum or "venue" within which buying and selling interests meet." It does not provide liquidity.
>
> However, the exchange can impact liquidity such as the LME's Suspension. At that point, most, if not all, market makers would have ceased to offer bids/offers in the OTC market as the Suspension would most likely mean that the LME was taking steps to bring the market back to order and that would impact prices from the point immediately prior to the Suspension.
>
> [emphasis in original]

68 In my view, Mr Slovenski was simply clarifying that LME was not a "liquidity provider". Rather, there is liquidity on the exchange and such liquidity could be impacted by the Suspension. Mr Ling had every right to cross-examine Mr Slovenski on this point if he felt it to be critical. He did not do so during his initial cross-examination of Mr Slovenski. While I did not think that Mr Slovenski's clarification was problematic, I allowed Mr Beloreshki to be recalled so that he could respond to Mr Slovenski's clarification. However,

Mr Beloreshki offered no meaningful response to Mr Slovenski's clarification and had to be stopped from giving unrelated evidence.[91]

69 In sum, I do not think that Mr Slovenski's clarification of his report was in any way improper, given that: (a) it was a short clarification; (b) Foreland was afforded multiple opportunities to respond during the trial; and (c) Foreland could and did respond to this clarification in its closing submissions by reference to various documents already in the evidence. Accordingly, I do not see how Mr Slovenski's clarification made him, as Foreland sought to put to him at trial, "an utterly incompetent, dishonest, biased and conniving witness".[92] Indeed, it is completely unnecessary to use such strong words against expert witnesses unless there is strong cause to do so. The Court of Appeal stated as much in similar circumstances in *Kiri Industries Ltd v Senda International Capital Ltd and another and other appeals and other matters* [2024] 2 SLR 1 at [42], where expert evidence was attacked with such phrases as "charade", "blatant untruth", "sleight of hand", and "conveniently and brazenly", the court described such terms as "distracting polemic" and "conclusionary epithets impugning the integrity of an expert witness" that ultimately proved to be "of little assistance to this court on the appeal". As Robert French IJ so aptly put it there: "[t]his court is concerned to hear each party's substantive arguments … not free character analyses of the opposing party's witnesses or generalised denunciations of the opponent's case".

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91 Certified Transcript 1 February 2024 at p 107 line 23 to p 111 line 7.

92 Certified Transcript 1 February 2024 at p 115 lines 24 to p 116 line 1.

(D) IT IS IRRELEVANT WHETHER MR SLOVENSKI IS "MORE OR LESS QUALIFIED" THAN MR KUMAR

70 While Foreland has not raised this in its Closing Submissions, it spent a considerable amount of time during Mr Slovenski's cross-examination asking Mr Slovenski to state whether he was "more or less qualified" than Mr Kumar to address the expert issues in Mr Beloreshki's report. When I intervened to ask about the relevance of these questions, it was explained to me that this had to do with Mr Slovenski's credibility and that Foreland would take it up in submissions.[93]

71 While Foreland eventually did not address this point in its Closing Submissions, I will observe that Foreland's line of questioning on this issue was decidedly puzzling. Although I gave Foreland some latitude in asking questions as to whether Mr Slovenski was "more or less qualified" than Mr Kumar, I agree with IGA that the relative competencies of Mr Slovenski and Mr Kumar are irrelevant to the dispute, nor do they affect Mr Slovenski's credibility, much less Mr Kumar's ability to test Mr Beloreshki's expert evidence during cross-examination. It is unclear to me why Foreland chose to devote yet another good part of its time for cross-examination of Mr Slovenski on this issue.

(4) In any event, Mr Slovenski's opinion is objectively preferable to Mr Beloreshki's

72 In sum, Foreland never seriously challenged the substance of Mr Slovenski's expert evidence at trial. Indeed, Foreland elected to limit its cross-examination of Mr Slovenski on the basis that its counsel was ill-qualified

93 Certified Transcript 1 February 2024 at p 51 lines 16–18.

to "wade into the arena of expert opinion".[94] I am puzzled by this approach because Foreland ought to have challenged the veracity of an opposing expert witness's opinion based on, for example, the reasoning or logic of the report. By Foreland's logic, the court, which needs expert opinion because it is not an expert on the issues concerned, would not be in a position to evaluate the expert opinion tendered before it. This cannot be the case. Instead, as I have said above, Foreland chose to focus its relatively short cross-examination of Mr Slovenski on peripheral issues such as: (a) whether Mr Slovenski was biased in making the assumptions that he did in preparing his report; (b) whether Mr Slovenski improperly made the clarification to his report; and (c) whether Mr Slovenski was more or less qualified than Mr Kumar. The end result is that Mr Slovenski's evidence on the two issues he was asked to opine on was never seriously challenged *substantively*. Since I do not regard Mr Beloreshki's expert evidence to be objectively reliable compared to Mr Slovenski's evidence, it follows that I prefer Mr Slovenski's evidence to Mr Beloreshki's.

73 I therefore accept Mr Slovenski's expert evidence that:

(a) In contrast to Mr Beloreshki's views, regardless of the risk limit parameters, a market maker will focus on ensuring that it retains as much of the margin generated from the bid/offer spread by closely managing the market risk, including but not limited to the following actions: offsetting the risk via hedges, adjusting the bid/offer spread, and limiting the warehousing of positions by tightening risk parameters.[95]

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94 Certified Transcript 1 February 2024 at p 90 lines 1–4.

95 BEAEIC at pp 428–429, para 41.

(b) Prior to 8 March 2022, it is true that IGA would have been able to hedge its exposure by various means. However, any of the options, other than the LME inter-office mechanism that was used via IGM, would have been sub-optimal. It is also unrealistic to expect that IGA should have had hedging alternatives outside of the LME inter-office market or to have spread its hedges amongst the various hedging options as a precaution against a possible disruption to the LME.[96]

(c) Following the LME announcement on 8 March 2022, IGA would also have been able to hedge its exposure. However, the gap in time from the point of the original closing trades and subsequent hedges to the time when IGA was made aware of the cancellation of the hedge transactions along with the time needed to set up alternative hedging mechanisms meant that, given the overall easing of the market, IGA would have had significant losses on those hedges relative to the prices achieved on the hedges prior to the Reversal.[97]

74 The result of accepting Mr Slovenski's evidence over that of Mr Beloreshki on these issues is that I accept the fact that, even though IGA traded with Foreland on an OTC basis, it still remains the case that IGA's trading model is contingent upon being able to hedge the exposure from client trades on the underlying market. Further, I also reiterate my conclusion that Foreland's attempt to dispute the connection between the FCTs and the Suspension and Reversal is not convincing for the following reasons: one, given

96 BEAEIC at p 424, para 23.

97 BEAEIC at p 424, para 23.

the IG Group's trading model, it was not realistic for IGA to reject IGM's reversal of the automatic back-to-back hedging transactions; two, it was the Suspension and Reversal, rather than Macquarie's failure to match and clear trades, that was the proximate cause of IGM becoming unhedged; three, IGM was justified in only hedging its exposure on the LME and hence cannot be said to have brought the consequences of the Suspension and Reversal upon itself due to its decision in this regard; and finally, the terms of the MTCA do not preclude IGA from passing the risks of the Suspension and Reversal onto its clients, inclusive of Foreland.

75 Accordingly, for all these reasons, I find that the consequences of the Suspension and Reversal can be visited on Foreland despite Foreland dealing with IGA on an OTC basis. Thus, I go on to consider if IGA is entitled by the Suspension and Reversal to reverse the FCTs on the basis of it being a Force Majeure Event.

Whether IGA was entitled by the Suspension and Reversal to reverse the FCTs on the basis of it being a Force Majeure Event pursuant to Term 23(1) of the MTCA

The parties' arguments

76 Foreland advances a few points in response to what they characterise as the "broad issue" of whether IGA was entitled by the Suspension and Reversal to reverse the FCTs, on the basis that the Suspension and Reversal was a Force Majeure Event:[98]

98 PCS at para 23.

(a) First, even if the Suspension and Reversal amounts to a Force Majeure Event under Term 23(1) of the MTCA,[99] IGA cannot rely on Term 23(2)(c) of the MTCA to modify the application of Term 4(7) because IGA has not shown that it was impossible or impracticable for it to carry out the FCTs.[100] Further, IGA cannot rely on Term 23(2)(c) of the MTCA to modify the application of Terms 7(13) and 7(14) of the MTCA because it has not shown that it was impossible or impracticable for it to comply with its payment obligations under these terms.[101]

(b) Second, even if IGA can rely on Term 23(2)(c) of the MTCA to modify the application of Term 4(7), this still does not advance IGA's case,[102] because:

(i) Term 4(7) is simply a permissive provision conferring certain rights upon IGA;[103]

(ii) Term 23(2)(c) can only be invoked to modify the manner in which an applicable term of the MTCA is to be applied but not to render applicable a term that is not applicable to begin with;[104] and

(iii) Term 23(2)(c) only entitles IGA to "suspend or modify" the application of Term 4(7) instead of, as IGA has done,

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99 PCS at para 42.

100 PCS at paras 49–56.

101 PCS at para 78.

102 PCS at para 60.

103 PCS at para 61.

104 PCS at para 62.

to cause Term 4(7) to have retrospective effect.[105] Further, even if Term 4(7) is applicable, it does not entitle IGA to open new transactions.[106]

(c) Third, even if IGA can rely on Term 23(2)(c) of the MTCA to modify the application of Terms 7(13) and 7(14), IGA was, in reality, completely extinguishing the application of these Terms, which is impermissible.[107]

77 In response, IGA makes the following points:

(a) First, the Suspension and Reversal amounted to an Force Majeure Event under Terms 23(1)(b) and 23(1)(c) of the MTCA, as well as the general definition in Term 23(1).[108]

(b) Second, as a result of the Suspension and Reversal, it was impossible or impracticable for IGA to comply with the MTCA in relation to the FCTs,[109] such that IGA could rely on Term 23(2)(c) to suspend and/or modify Terms 7(13) and 7(14),[110] as well as Term 4(7) read with Term 4(8)(k).[111]

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105 PCS at para 63.

106 PCS at paras 69–70.

107 PCS at para 84.

108 DCS at para 24.

109 DCS at para 25.

110 DCS at paras 27–28.

111 DCS at paras 29–30.

(c) Third, IGA is therefore empowered by the MTCA to suspend and/or modify the application of Terms 7(13), 7(14), and 4(7) read with Term 4(8)(k) to reverse the FCTs.[112]

78 I will address the parties' submissions in the course of explaining my decision on this issue.

My decision: IGA was not entitled by the Suspension and Reversal to reverse the FCTs even though it is a Force Majeure Event under Term 23(1) of the MTCA

79 For the reasons that I will now explain, I conclude that IGA was *not* entitled by the Suspension and Reversal to reverse the FCTs despite the Suspension and Reversal qualifying as a Force Majeure Event under Term 23(1) of the MTCA. More specifically, I find that, while IGA was entitled by Term 23(2) of the MTCA to suspend or modify its payment obligations that would normally arise under Terms 7(13) and 7(14), IGA was not entitled by Term 23(2) to modify Term 4(7) so as to allow it to reverse the FCTs. The ultimate result is that, subject to any other further ground upon which IGA can justify its reversal of the FCTs, IGA had wrongfully reversed the FCTs and must compensate Foreland for any proven loss.

80 To summarise at this juncture, I have reached this conclusion for the following reasons:

(a) First, the Suspension and Reversal amounted to a Force Majeure Event under Term 23(1) of the MTCA. IGA is therefore entitled to rely on Term 23(2)(c) to "suspend or modify the application

112 DCS at paras 75–79.

of all or any of the Terms of [the MTCA] *to the extent* that the Force Majeure Event makes it impossible or impracticable for [IGA] to *comply with the Term or Terms in question*" [emphasis added].[113]

(b) Second, the Suspension and Reversal made it impossible or impracticable for IGA to comply with its normal payment obligations imposed by Terms 7(13) and 7(14) of the MTCA. IGA is entitled to rely on Term 23(2) to suspend or modify the application of these terms. This therefore justified IGA's decision not to effect the withdrawal of $6,636,840.10 and $11,874,152.84 from the FSG Account and the FJP Account, respectively, into their designated bank accounts.

(c) Third, and however, the Suspension and Reversal *did not* cause IGA's compliance with Term 4(7) of the MTCA to be impossible or impracticable. This is because there is nothing for IGA to comply with in Term 4(7) in as much as that term does not impose any obligation on IGA to perform. The Suspension and Reversal did not, in the terms of Term 23(2)(c), make it impossible or impracticable for IGA to comply with Term 4(7), which, on IGA's argument, would be the "Term in question". IGA therefore cannot modify Term 4(7) and rely on the modified term to justify its reversal of the FCTs, which is what it has pleaded to have done.

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113 2 ABOD at p 162.

(d) Fourth, Foreland is incorrect to argue that, assuming that IGA was entitled to reverse the FCTs by relying on a modified version of Term 4(7), that such a term breached the reasonableness requirement under the UCTA. This is because, among other reasons, if the Suspension and Reversal was a Force Majeure Event, and IGA became entitled to rely on the various terms that it pleaded, IGA would not have breached the MTCA. Therefore, the reasonableness test under the UCTA would not have applied in the absence of a breach of contract.

81 The above means that unless IGA can show some other justification for reversing the FCTs, Foreland would succeed in its claim, subject to the assessment of damages. As I will explain below, IGA cannot rely on Term 10(4) of the MTCA to justify the reversal of the FCTs because IGA has pleaded that its reliance on Term 10(4) is predicated on the Suspension and Reversal *not* being a Force Majeure Event within the meaning of Term 23.[114] Since I have found that the Suspension and Reversal *is* a Force Majeure Event, Term 23 applies to govern the parties' affairs following the Suspension and Reversal. The problem for IGA is that Term 23(2) does not allow it to modify Term 4(7) so as to reverse the FCTs, and IGA cannot point to any other provision in the MTCA to justify the reversal. IGA has also not relied on the common law doctrine of frustration to plug any gap that the MTCA has not addressed in the event of a Force Majeure Event.

82 I now explain these various points in my reasoning behind my ultimate conclusion.

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114 Defence at para 23(c).

The Suspension and Reversal amounted to a "Force Majeure Event" under Term 23(1) of the MTCA

83 To begin with, having found that the consequences of the Suspension and Reversal can be visited on Foreland, I now explain why the Suspension and Reversal amounted to a "Force Majeure Event" under Term 23(1) of the MTCA, which provides as follows:[115]

> **23. FORCE MAJEURE EVENTS**
>
> (1) Subject to Applicable Regulations, we may, in our reasonable opinion, determine that an emergency or an exceptional market condition exists (a **"Force Majeure Event"**), in which case we will take reasonable steps to inform you. A Force Majeure Event will include, but is not limited to, the following:
>
> (a) any act, event or occurrence (including without limitation any strike, riot or civil commotion, act of terrorism, war, industrial action, acts and regulations of any governmental or supra national bodies or authorities) that, in our opinion, prevents us from maintaining an orderly market in one or more of the instruments in respect of which we ordinarily deal in Transactions;
>
> (b) the suspension or closure of any market or the abandonment or failure of any event on which we base, or to which we in any way relate, our quote, or the imposition of limits or special or unusual terms on the trading in any such market or on any such event;
>
> (c) the occurrence of an excessive movement in the level of any Transaction and/or the Underlying Market or our anticipation (acting reasonably) of the occurrence of such a movement;
>
> (d) any breakdown or failure of transmission, communication or computer facilities, interruption of power supply, or electronic or communications equipment failure; or
>
> (e) failure of any relevant supplier, intermediate broker, agent or principal of ours, custodian, sub-custodian,

115 2 ABOD at p 162.

> dealer, exchange, clearing house or regulatory or self-regulatory organisation, for any reason, to perform its obligations.
>
> [emphasis in original]

84 In this regard, Foreland had pleaded that the Suspension and Reversal was not a Force Majeure Event because: (a) it does not and cannot bind IGA or IGM; (b) it does not and cannot affect the parties' rights and obligations under the Account; and (c) it had no effect on the FCTs.[116] While Foreland appears to have dropped these points in its Closing Submissions and even assumed that the Suspension and Reversal amounted to a Force Majeure Event under Term 23(1) of the MTCA,[117] these three points can be easily dealt with. This is because they are premised on Foreland's other arguments that it is not dealing on the underlying market and that the FCTs are insulated from the Suspension and Reversal. Since I have already disagreed with these arguments, it follows that I also disagree with Foreland's pleaded points on why the Suspension and Reversal is not a Force Majeure Event.

85 I instead agree with IGA that the Suspension and Reversal is clearly a Force Majeure Event under Term 23(1) of the MTCA. In this regard, the Suspension and Reversal clearly comes within Term 23(1)(b) since it entailed the suspension and closure of the underlying market. The Suspension and Reversal also comes within Term 23(1)(c) since there was significant price volatility on 8 March 2022 leading to the Suspension and Reversal, with the Reversal then leading to the cancellation of all LME nickel trades on 8 March 2022. Thus, there was clearly an occurrence of "excessive movement" in the underlying market as spelt on in Term 23(1)(c).

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116 Reply at para 5(a).

117 PCS at para 42.

The Suspension and Reversal made it impossible or impracticable for IGA to comply with Terms 7(13) and 7(14) of the MTCA, therefore entitling it to suspend and/or modify those Terms

(1) The proper interpretation of Term 23(2)(c) of the MTCA

86 However, it is not enough that the Suspension and Reversal is a Force Majeure Event under Term 23(1) of the MTCA. This is because Term 23(1) does not itself entitle IGA to reverse the FCTs. Therefore, IGA is relying on Term 23(2)(c) to suspend and/or modify Terms 7(13) and 7(14), as well as 4(7) of the MTCA. Term 23(2)(c) provides as follows:[118]

> **23. FORCE MAJEURE EVENTS**
>
> …
>
> (2) If we determine that a Force Majeure Event exists, we may, at our absolute discretion, without notice and at any time, take one or more of the following steps:
>
> (a) increase your Margin requirements;
>
> (b) close all or any of your open Transactions at such Closing Level as we reasonably believe to be appropriate;
>
> (c) suspend or modify the application of all or any of the Terms of this Agreement to the extent that the Force Majeure Event makes it impossible or impracticable for us to comply with the Term or Terms in question; or
>
> (d) alter the Last Dealing Time for a particular Transaction.
>
> Where reasonably practicable, we will try and give you prior notice of the steps we intend to take, provided that the non-provision by us and/or non-receipt by you of such notice shall not invalidate such action.

118 2 ABOD at p 162.

Thus, in order for IGA to rely on Term 23(2)(c) to suspend and/or modify the relevant provisions, it needs to show that the Force Majeure Event "makes it impossible or impracticable" for it to *comply* with the *term in question*.

87 In this regard, while Foreland cites the Court of Appeal decisions of *Glahe International Expo AG v ACS Computer Pte Ltd and another appeal* [1999] 1 SLR(R) 945 at [44] and *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [80], it is strictly not necessary in the present case for it to rely on the broader common law principle that a party seeking to rely on frustration must show, regardless of what the contract provides, that the frustrating event made it impossible or impracticable for it to perform its obligations. Instead, the present case turns squarely on the interpretation of Term 23 of the MTCA and the powers that it confers on IGA in the event of a Force Majeure Event. In this regard, the Court of Appeal has explained in *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application* [2011] 2 SLR 106 at [49] (citing *RDC Concrete* at [54]) that:

> The most important principle with respect to *force majeure* clauses entails, simultaneously, a rather specific factual inquiry: the *precise construction* of the clause is paramount as it would define the *precise scope and ambit* of the clause itself. The court is, in accordance with the principle of freedom of contract, to give full effect to the intention of the parties in so far as such a clause is concerned.
>
> [emphasis in original]

88 The principles of contractual interpretation are well established under Singapore law. As the Court of Appeal stated in the seminal case of *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 ("*CIFG*") (at [19]):

> (a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
>
> (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).
>
> (c) The reason the court has regard to the relevant context is that it places the court in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context" (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).
>
> (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see, *eg*, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).

89 It is important that the interpretation must be one that the expressions used by the parties can reasonably bear, even if the court considers the parties' intention. This is crucial in the present case. The plain words of Term 23(2)(c), which IGA relies on, provides that IGA may take the step to "suspend or modify the application of all or any of the Terms of this Agreement to the extent that the Force Majeure Event makes it impossible or impracticable for [IGA] to *comply with the Term or Terms in question*" [emphasis added]. In my judgment, this connotes three important points:

(a) One, the Term (or Terms) that IGA seeks to suspend or modify pursuant to Term 23(2)(c) must be one which the Force Majeure Event has made it impossible or impracticable for IGA to *comply* with. Thus, the Term concerned must be one that IGA is able to, or needs to, *comply* with. This makes sense. After all, when a Force Majeure Event has occurred, IGA would want to minimise its duties in relation to its existing obligations that have been rendered impossible or impracticable to be *complied* with.

(b) Two, Term 23(2)(c) is also very precise to restricting the Term (or Terms) that IGA is empowered to suspend or modify to "the Term or Terms *in question*" [emphasis added]. Thus, Term 23(2)(c) does not give IGA a blanket power to suspend or modify all or any term in the MTCA. This is because the reference in Term 23(2)(c) to "all or any of the Terms" in the MTCA (the application of which can be suspended or modified), is limited to the "Term or Terms in question". In turn, the latter expression refers to the Term or Terms that have become impossible or impracticable for IGA to comply with due to the Force Majeure Event. Thus, IGA is only empowered by Term 23(2)(c) to suspend or modify the Term (or Terms) that has, due to the Force Majeure Event, become impossible or impracticable for IGA to comply with. IGA is not empowered otherwise to suspend or modify any other Term in the MTCA.

(c) Three, Term 23(2)(c) only allows IGA to suspend or modify the *application* of the Term or Terms concerned. This means that the Term or Terms must have *applied* to begin with, in the absence of the occurrence of the Force Majeure Event. Put differently, IGA cannot rely on Term 23(2)(c) to suspend or modify a term that never applied in the first place. This makes sense in the context of a Force Majeure event that has occurred. In such a case, IGA would want to limit or negate its obligations that have *already* occurred or vested in a term that already applies.

(2) The Suspension and Reversal has made it impossible or impracticable for IGA to comply with Terms 7(13) and 7(14) of the MTCA

90 With this interpretation of Term 23(2)(c) in mind, I am satisfied that the Suspension and Reversal has made it impossible or impracticable for IGA to comply with Terms 7(13) and 7(14) of the MTCA, although the effect of the Suspension and Reversal must be limited to profits following it; the Suspension and Reversal cannot affect profits that had already arisen before that (*ie*, 8 March 2022, 00:00 GMT). To begin with, Terms 7(13) and 7(14) of the MTCA provide as follows:[119]

> **7. CLOSING A TRANSACTION**
>
> …
>
> (13) Upon closing a Transaction, and subject to any applicable adjustments for interest and dividends in accordance with this Agreement:
>
> (a) you will pay us the difference between the Opening Level of the Transaction and Closing Level of the Transaction multiplied by the number of units of the Instrument that comprise the Transaction if the Transaction is:
>
> (i) a Sell and the Closing Level of the Transaction is higher than the Opening Level of the Transaction; or
>
> (ii) a Buy and the Closing Level of the Transaction is lower than the Opening Level of the Transaction; and
>
> (b) we will pay you the difference between the Opening Level of the Transaction and the Closing Level of the Transaction multiplied by the number of units of the Instrument that comprise the Transaction if the Transaction is:
>
> (i) a Sell and the Closing Level of the Transaction is lower than the Opening Level of the Transaction; or

119 2 ABOD at p 153.

> (ii) a Buy and the Closing Level of the Transaction is higher than the Opening Level of the Transaction.
>
> (14) Unless we agree otherwise, all sums payable by you pursuant to Term 7(13)(a) and Term 8(2) are due immediately on entering into the Transaction and must be paid in accordance with Term 16 upon the Closing Level of your Transaction being determined by us. Sums payable by us pursuant to Term 7(13)(b) will be settled in accordance with Term 16(5).

Since Term 7(14) refers to Term 16(5), I set that out as well:[120]

> **16. PAYMENT, CURRENCY CONVERSION AND SET-OFF (CONTINUED)**
>
> …
>
> REMITTING MONEY
>
> (5) We will be under no obligation to remit any money to you if that would reduce your account balance (taking into account running profits and losses) to less than the Margin payments required on your open Transactions. Subject thereto and to Term 16(6), 16(7), 16(8) and 16(9), money standing to the credit of your account will be remitted to you if requested by you. Where you do not make such a request, we will be under no obligation to, but may, at our absolute discretion, remit such monies to you. All bank charges howsoever arising will, unless otherwise agreed, be for your account. The manner in which we remit monies to you will be at our absolute discretion, having utmost regard to our duties under law regarding the prevention of fraud, countering terrorist financing, insolvency, money laundering and/or tax offences. We will normally remit money in the same method and to the same place from which it was received. However, in exceptional circumstances we may, at our absolute discretion, consider a suitable alternative.

91 It is not disputed that the general effect of Terms 7(13), 7(14), and 16(5) is to impose on IGA an obligation to pay, upon the closing of a transaction, the difference between the opening level of the transaction and the closing level of

120 2 ABOD at p 160.

the transaction, multiplied by the number of units in the relevant instrument (see [11] above for a brief explanation as to what this means). In short, applied to the present case, Terms 7(13) and 7(14) impose on IGA an obligation to pay Foreland the relevant sums upon the execution of the FCTs. IGA relies on Term 23(2)(c) to modify or suspend its payment obligations under Terms 7(13) and 7(14) because the FCTs could not be sustained.[121]

92 Foreland argues that IGA has not shown how it was impossible or impracticable for it to comply with its payment obligations under Terms 7(13) and 7(14) in accordance with Foreland's payment instructions.[122] In this regard, Foreland argues that IGA needs to show that the Suspension and Reversal caused IGA's compliance with its payment obligations to become impossible or impractical. Foreland then argues that IGA has failed to do this because IGA was at all times fully hedged and never became unhedged.[123]

93 While I agree with Foreland that the onus is on IGA to prove causation in this regard, I disagree with Foreland's arguments that IGA has failed to do so. For the reasons I have discussed above, this is because the Suspension and Reversal affected IGA's ability to provide the nickel CFD pricing to Foreland for the FCTs since those prices depended on the underlying LME market. Also, IGA's ability to execute the FCTs on 8 March 2022 was predicated on the IG Group's hedging model. Since the Suspension and Reversal retroactively annulled the substratum for the FCTs, it was no longer possible nor practicable for IGA to maintain the FCTs or the realised profits. It was therefore impossible

121 DCS at para 76.

122 PCS at para 78.

123 PCS at para 122.

or impracticable for IGA to comply with its payment obligations under Terms 7(13) and 7(14). IGA was thus entitled to rely on Term 23(2)(c) to modify the application of Terms 7(13) and 7(14) such that, notwithstanding the FCTs, Terms 7(13) and 7(14) did not come into effect. Therefore, IGA was ultimately justified in not complying with its payment obligations under these terms. However, as I mentioned above, the Suspension and Reversal can only operate to extinguish profits arising after 8 March 2022, 00:00 GMT.

94 I turn to address Foreland's alternative argument that the Suspension and Reversal did not make it impossible or impracticable for IGA to comply with Terms 7(13) and 7(14) because, while the Suspension and Reversal may have made it more expensive for IGA to comply with its payment obligations under these terms, IGA could well afford to do so.[124] In as much as Foreland made this argument, I disagree. This is because the question of "impossibility or impracticability" is not about IGA's *literal* wherewithal (or "means" for those who may find "wherewithal" a difficult word) to pay but whether it agreed to bear the risk of the Suspension and Reversal. Thus, even if it was not literally impossible for IGA to have paid Foreland, the question of impossibility or impracticability in relation to IGA's payment obligations under Terms 7(13) and 7(14) must be considered with regard to the commercial reality of how the nickel CFD product was structured, in that it depended on a functioning underlying market (*ie*, the LME) for pricing and for the hedges to go through. The Suspension and Reversal meant that there was no longer a functioning underlying market and thus no possibility of the nickel CFD trades (and any profits thereon) being maintained.

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124 Foreland's SUM 3512 submissions at paras 65–73.

95 Moreover, it is clear from how the parties have allocated the risk of a Force Majeure Event that it was impossible or impracticable for IGA to have complied with its payment obligations under Terms 7(13) and 7(14) of the MTCA. In this regard, Foreland argued that the risk concerned was a liquidity risk from the Reversal that caused a lack of counterparties to take the opposite sides of the trade, and that this was a risk to be borne by IGA alone. However, I prefer Mr Slovenski's view that the risk of the Suspension and Reversal happening was not a liquidity risk but rather a "systemic" risk.[125] This risk is not borne by IGA when it accepts its clients' trades because clients are made aware that their trades do not stand in isolation but are based on prices linked to and reflective of the underlying market. Indeed, the bargain between IGA and its clients is that IGA provides an avenue for its clients to trade as if they were trading on the underlying market.[126] In the circumstances, the risk of the occurrence of an exceptional underlying market event like the Suspension and Reversal remained with IGA's clients, including Foreland. Indeed, this is aptly reflected by the Force Majeure Clause in Term 23(2). This term empowers IGA to take certain action if the Force Majeure Event makes it impossible or impracticable for IGA to comply with the terms of the MTCA. The presence of the Force Majeure Clause shows that the risk exposure of an exceptional underlying market event lies squarely with the client. Thus, I accept that the risk mitigated by IGM's hedging is the risk of market movement,[127] and not the systemic risk that materialised in the Suspension and Reversal.

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125 Certified Transcript 1 February 2024 at p 98 line 24 to p 100 line 22.

126 DCS at para 34.

127 DCS at para 42.2.

96 Accordingly, I find that the Suspension and Reversal had made it impossible or impracticable for IGA to comply with its payment obligations under Terms 7(13) and 7(14) of the MTCA. IGA is therefore justified in relying on Term 23(2)(c) to suspend or modify its payment obligations. Crucially, however, IGA relies on a modified Term 4(7) to justify its subsequent reversal of the FCTs.[128] I therefore need to also consider if IGA is entitled to rely on Term 23(2)(c) to modify Term 4(7).

However, the Suspension and Reversal did not make it impossible or impracticable for IGA to comply with Term 4(7) of the MTCA, and IGA was therefore not entitled to suspend and/or modify that Term

(1) IGA's sole reliance on a modified Term 4(7) to justify its reversal of the FCTs

97 As a preliminary point, it appears that IGA has relied only on a modified Term 4(7) of the MTCA to justify its reversal of the FCTs. I therefore first refer to how IGA has pleaded its entitlement to reverse the FCTs in its Defence (Amendment No 3) (the "Defence"). At para 23 of the Defence, IGA pleaded as follows:

> …
>
> a. The Suspension and Reversal constituted an emergency or an exceptional market condition amounting to a "Force Majeure Event" under Term 23(1) of the MTCA, falling within the definitions stated under Term 23(1)(b) and/or Term 23(1)(c).
>
> i. In the circumstances, the Defendant was entitled to, and did, exercise its right under Term 23(2) of the MTCA to suspend or modify the application of all or any of the Terms of the MTCA on the basis that the Force Majeure Event(s) made it impossible or impracticable for the Defendant to comply with the Terms. In particular, the Defendant suspended and/or modified the application

128 DCS at para 76.

> of *inter alia* Terms 7(13) and 7(14) such that, notwithstanding the closure of the Foreland Transactions, Terms 7(13) and 7(14) did not come into effect. *Instead, the Foreland Closing Trades were reversed in accordance with the Reversal by the LME.*
>
> ii. *Further and/or in the alternative to* paragraph 23(a)(i) above, the Defendant exercised its right under Term 23(2) of the MTCA to modify the application of Term 4(7) read with Term 4(8)(k) such that where a Force Majeure Event occurred after the closing of transactions and had a retrospective effect to a point in time prior to the closing of such transactions, the Defendant would be entitled to, at its absolute discretion, open transactions to reverse the closure of affected transactions in accordance with the effect of the Force Majeure Event.
>
> …
>
> [emphasis added]

98 It may appear from para 23.a.i of the Defence that IGA relies only on Terms 7(13) and 7(14) of the MTCA to justify that the FCTs "were reversed in accordance with the Reversal by the LME". Indeed, given the use of the expression "[f]urther and/or in the alternative" at the beginning of para 23.a.ii, it might be thought that IGA's reliance on Term 4(7) to reverse the FCTs is *in addition* to its reliance on Terms 7(13) and 7(14) to justify the same. However, given that IGA's Closing Submissions state quite clearly that IGA's case is premised on solely relying on Term 4(7) as "modified to allow IGA to also reverse a transaction",[129] I find that IGA is relying only on a modified Term 4(7) (instead of Terms 7(13) and 7(14)) to justify its reversal of the FCTs. In any event, consistent with this finding, IGA has not explained how modified Terms 7(13) and 7(14) would allow it to reverse the FCTs.

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129 DCS at para 76.

(2) IGA is not entitled to modify Term 4(7) by relying on Term 23(2)(c)

99 I come then to Term 4(7) of the MTCA, which provides as follows:[130]

> **4. PROVIDING A QUOTE AND ENTERING INTO TRANSACTIONS**
>
> …
>
> (7) If we become aware that any of the factors set out in Term 4(8) are not satisfied at the time you offer to open or close a Transaction, we reserve the right to reject your offer. If we have, nevertheless, already opened or closed a Transaction prior to becoming aware that a factor set out in Term 4(8) has not been met we may, at our absolute discretion, treat such a Transaction as void from the outset, close it at our then prevailing price or allow it to remain open. You acknowledge that if we allow the Transaction to remain open this may result in you incurring losses. Notwithstanding the existence of a factor set out in Term 4(8), we may allow you to open or, as the case may be, close the Transaction in which case you will be bound by the opening or closing of such Transaction.

Since IGA relies on Term 4(8)(k), as Term 4(8) is referenced in Term 4(7), I set out Term 4(8)(k) as well:[131]

> (k) a Force Majeure event must not have occurred.

100 IGA explains in its Closing Submissions that Term 23(2)(c) modified Term 4(7) read with Term 4(8)(k), and that the latter two terms, read together in their unmodified forms, permitted IGA to treat a transaction as void from the outset, close it, or allow it to remain open if a Force Majeure Event had existed at the time the client offered to open or close the transaction concerned.[132] IGA argues that since the Suspension and Reversal had a retroactive effect, such that it affected transactions that had already been closed, none of these three options

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130 2 ABOD at p 152.

131 2 ABOD at p 152.

132 DCS at para 29.

in Term 4(7) would have made any sense. Therefore, IGA says that "it was impossible/impracticable for IGA to follow the strict wording of Term 4(7) when taking steps to reflect [the Suspension and Reversal]".[133]

101 It is telling that IGA did not explain in its Closing Submissions why it would be impossible or impracticable for IGA to *comply* with Term 4(7), being the expression used in Term 23(2)(c) and with Term 4(7) being the "Term … in question". It was only after I had asked the parties to address this issue in their Reply Submissions that IGA did so. In those submissions, IGA argues that "comply" also encompasses "the more general meaning of acting within the language of a provision".[134] IGA also argues that this broader construction conforms with the contextual background of the parties' intention to achieve trades reflective of the underlying market. This therefore justifies a greater remedial flexibility on IGA's part to, for instance, avail itself of a mechanism to consider a Force Majeure Event with retrospective effect and to accurately reflect the effects of the Suspension and Reversal.[135]

102 In my judgment, IGA cannot rely on Term 23(2)(c) to modify Term 4(7) because Term 4(7) simply does not come within the type of term that can be suspended or modified under Term 23(2)(c). This is because, as Foreland points out, Term 4(7) is a permissive provision that conferred certain rights on IGA under the circumstances specified therein.[136] There is thus nothing that IGA was obliged to comply with under Term 4(7), and which was rendered impossible

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133 DCS at para 30.

134 DRS at para 25.

135 DRS at para 25.

136 PCS at para 61.

or impracticable because of the Force Majeure Event, being the Suspension and Reversal.

103 It is true that the interpretation of Term 23(2)(c) must be undertaken contextually. However, I do not agree with IGA that this can permit a liberal interpretation of Term 23(2)(c) read with Term 4(7) that goes beyond the range of the permissible textual meanings. As the Court of Appeal explained in *CIFG* (at [19]), the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear. After all, the ultimately concluded meaning must still be consistent with the contractual language, which is the literal manifestation of the parties' intentions as informed by the contextual background. This is why I am unable to accept IGA's arguments to the effect that its interpretation should be preferred as a matter of commercial "context" or practicality. Such considerations of commerciality or practicality cannot overcome what the parties agreed upon and cannot be invoked as a substitute for the proper analysis and construction of contractual terms. Ultimately, what is a "commercially practical" outcome is one which the parties reasonably agreed to contract, bearing in mind the commercial context at the time, and not one which may be, on hindsight, the better outcome for the party concerned. As such, I agree with Foreland that IGA was not empowered by Term 23(2)(c) to modify Term 4(7). IGA's consequent reliance on Term 4(7) to reverse the FCTs is therefore wrong.

104 Further, I also agree with Foreland that IGA cannot use Term 23(2)(c) to suspend or modify Term 4(7) if the latter did not apply in the first place. This is because Term 23(2)(c) provides that IGA can only "suspend or modify the *application* of" the Term (or Terms) concerned. For the application of a term to be modified, that term, by implication, must have been applicable in the first place. In this regard, IGA argues that the meaning of "apply" does not import

the requirement that a clause must have come into effect before it can be modified. Rather, IGA argues that Term 23(2)(c) allows IGA to suspend or modify the way that it "uses" other Terms, which includes "all or any" of the Terms.[137] I disagree. In the context of Term 23(2)(c), the Term is clearly concerned with minimising IGA's existing obligations on the occurrence of a Force Majeure Event. Therefore, it is understandable why the Term is framed to refer to obligations that have already crystallised by specifically referring to the "application" of the Terms that the Force Majeure Event has made it impossible or impracticable for IGA to comply with. This wording only makes sense if it refers to a Term that, by virtue of it already being applicable, IGA is obliged to comply with. As a result, IGA cannot rely on Term 23(2)(c) to suspend or modify Term 4(7), since by IGA's own case, Term 4(7) cannot be sensibly applied in the circumstances. This is in contrast to Terms 7(13) and 7(14), which, in the absence of modification, would clearly apply to impose a payment obligation on IGA.

105 Finally, IGA argues that if Term 23(2)(c) applies, "there is no halfway house position on the payment obligations on the FCTs", in the sense that "[e]ither it remained (which would be illogical when the basis for the FCTs no longer existed), or it did not".[138] IGA therefore says that it takes us nowhere to contend that it "cannot relieve itself entirely from its payment obligation".[139] In its Reply Submissions, IGA argues that practical inconsistency would result in that, if IGA cannot modify Term 4(7) to reverse the FCTs, then the transactions would be reflected on IGA's books as successfully closed, contrary to the reality

137 DRS at paras 20 and 21.

138 DCS at para 78.

139 DCS at para 78.

that the basis for the FCTs had been voided and so no payment for the notional profits that would otherwise have accrued is due.[140] In essence, I understand IGA's argument to be that, since the substratum for the FCTs was retroactively annulled due to the Suspension and Reversal, IGA should be relieved of its payment obligations entirely, including being able to reverse the FCTs. I have some sympathy for this argument. However, what IGA is entitled to do on the occurrence of a Force Majeure Event is prescribed by the MTCA, which has to be interpreted to reflect both its wording and context. If IGA wanted a power to do what it did on the occurrence of a Force Majeure Event, it could have provided for this clearly in the MTCA. It did not do this. Further, IGA has pleaded and submitted that it is relying only on a modified Term 4(7) to reverse the FCTs. Given my conclusions above, I am compelled to find that IGA is not entitled to modify Term 4(7) by relying on Term 23(2)(c).

106 It follows that IGA has not advanced any proper basis under the MTCA to justify its reversal of the FCTs. While it is right for IGA to have refused to pay Foreland upon the execution of the FCTs, it is not correct for it to have *also* reversed the FCTs. Thus, IGA is liable to compensate Foreland for any losses suffered in connection with the reversal of the FCTs, subject to any other viable defences that I will consider below.

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140 DRS at para 28.

Whether IGA's ability to suspend and/or modify the Terms concerned satisfies the reasonableness requirement under the UCTA

The parties' arguments

107 In relation to the UCTA, Foreland's case is that the following terms in the MTCA do not satisfy the test of reasonableness under s 3 read with s 11 of the UCTA and are accordingly unenforceable:[141]

(a) Term 23(1): in so far as this term purports to confer on IGA the sole and absolute right to unilaterally and arbitrarily determine whether and when a "Force Majeure Event" (as defined/exemplified in Term 23(1)) exists.

(b) Term 23(2): in so far as this term purports to confer on IGA the right:

(i) in its absolute discretion, upon its unilateral subjective determination that a "Force Majeure Event" exists in the exercise of its sole and absolute discretion under Term 23(1) of the MTCA, to, without any notice and at any time, suspend or modify the application of all or any of the Terms of the MTCA;

(ii) to suspend or modify the application of Term 4(7) read with Term 4(8)(k) of the MTCA, such that these Terms apply and can be relied upon by IGA regardless of when the Force Majeure Event occurred.

141 1st and 2nd Plaintiffs' Opening Statement at paras 54–55.

(c) Term 4(7): in so far as this term confers on IGA the right, in its absolute discretion, to treat a transaction which has already been opened or closed as being void from the outset, and/or to open any transaction(s) to reverse any of the FCTs, on the basis that IGA was not aware of a "Force Majeure Event" as unilaterally determined by IGA in the exercise of its sole and absolute right to do so under Term 23(1) of the MTCA.

My decision: the UCTA does not apply

108 Foreland's argument in relation to the UCTA can be dealt with shortly. In my judgment, the UCTA does not even apply to the various terms in the MTCA that Foreland referred to. To begin with, the reasonableness test would only apply if IGA comes under ss 3(2)(*a*), 3(2)(*b*)(i), and/or 3(2)(*b*)(ii) of the UCTA, which provide as follows:

> **Liability arising in contract**
>
> **3.**—(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term —
>
> (*a*) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
>
> (*b*) claim to be entitled —
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
>
> except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

109 However, it is clear that ss 3(2)(*a*), 3(2)(*b*)(i), and/or 3(2)(*b*)(ii) of the UCTA do not apply in the present case. First – and to be fair, Foreland does not rely on this section – s 3(2)(*a*) applies only if there has been a breach of contract. If IGA can properly rely on Term 23(2), then there clearly would not have been a breach of contract.

110 Second, s 3(2)(*b*) applies only if IGA had sought to render, either a contractual performance substantially different from that which was reasonably expected of it, or no performance at all. However, if IGA can properly rely on Term 23(2) on the occurrence of a Force Majeure Event, then, depending on the interpretation of the clause, IGA would be empowered to do the very things specified in the clause. This may result in IGA rendering substantially different or no performance, but this would be in accordance with how the parties had agreed to allocate the risk of a force majeure event between them. The reasonableness test should generally not apply in such a situation to upset how the parties have allocated the risk between them. In any event, even if the reasonableness test applies, it would likely be satisfied on the facts because the parties are sophisticated parties who could protect their own commercial interests. Foreland had relationships with multiple brokers and was not constrained to enter into a contractual arrangement with IGA. It did so only because it was aware of the bargain it was entering into.

111 Accordingly, the UCTA does not even apply to the various terms in the MTCA that Foreland referred to. Thus, even if I had found that IGA could rely on a modified Term 4(7) to reverse the FCTs, I would not have found that IGA's power to do so was unreasonable under the UCTA.

Even if the Suspension and Reversal is not a Force Majeure Event, whether IGA has a different basis to reverse the FCTs by acting in good faith and fairness in accordance with Term 10(4) of the MTCA

The parties' arguments

112 I come now to IGA's alternative reliance on Term 10(4) of the MTCA. At para 23.b of the Defence, IGA pleaded as follows:

> Further and/or in the alternative, even if the circumstances constituted a situation that is not covered by the MTCA, the Defendant avers that, pursuant to Term 10(4) of the Agreement, it had acted in good faith and fairness in relation to the Foreland Transactions.

113 In turn, Term 10(4) provides as follows:[142]

> **10. DEALING PROCEDURES AND REPORTING**
>
> SITUATIONS NOT COVERED BY THIS AGREEMENT
>
> (4) In the event that a situation arises that is not covered by this Agreement or the Product Details, we will resolve the matter on the basis of good faith and fairness and, where appropriate, by taking such action as is consistent with market practice and/or paying due regard to the treatment we receive from any hedging broker with which we have hedged our exposure to you arising from the Transaction in question.

114 In this regard, IGA argues that, even if the Suspension and Reversal does not qualify as a Force Majeure Event, IGA acted in good faith and fairness, acting consistently with market practice, and paying due regard to the treatment received from its hedging brokers. Specifically, the reversal of the Closing Trades was consistent with the Reversal by the LME and the cancellation of IGM's hedging transactions. IGA was therefore fully in compliance with

142 2 ABOD at p 155.

Term 10(4) of the MTCA and entitled to reverse the FCTs in reliance of that term.[143]

115 In response, Foreland argues that Term 10(4) does not even apply in the present case.[144] And even if Term 10(4) were applicable, Foreland contends that IGA had not acted in good faith and fairness in relation to the opening of the new mirror nickel CFD positions. This is because, among other reasons, IGA admitted that the new nickel CFD positions were opened unilaterally, without Foreland's authorisation. Furthermore, IGA admitted that the decision to open the new nickel CFD positions was made by the IG Group Head Office, who is a stranger to the agreement between IGA and Foreland. Moreover, in effecting a complete "reversal" of the FCTs, instead of only partially reversing the FCTs to the extent of reducing IGM's exposure to the same level as its internal risk limit, IGA had effectively placed IGM in a better exposure position, to the detriment of Foreland.[145] More broadly, following the execution of the FCTs, IGA, who acted in a principal capacity, assumed the nickel risks that arose as a result of its decision to enter into the FCTs.[146]

My decision: Term 10(4) does not apply

116 In my judgment, Term 10(4) does not apply to the present facts because IGA's case is that Term 10(4) would only apply *if* the Suspension and Reversal does not qualify as a Force Majeure Event.[147] While IGA appears to have relied

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143 Defendant's Opening Statement dated 9 January 2024 at para 28.4.

144 PCS at para 207.

145 PCS at para 208.

146 PCS at para 209.

147 DCS at para 89.

on Term 10(4) more broadly in its Reply Submissions, I do not think it can do that based on its pleaded case.[148] Since I have found that the Suspension and Reversal is a Force Majeure Event, it follows that, by IGA's own case, its rights and entitlements following the event must be governed by Term 23 and not any other term of the MTCA. Put differently, IGA cannot rely on Term 10(4). I therefore agree with Foreland in this regard.

117 This is sufficient to dispose of the issue and it is not necessary for me to deal with Foreland's further arguments. However, I will make two points in passing.

118 First, in so far as Foreland repeats its argument that IGA assumed the nickel risks that arose as a result of its decision to enter into the FCTs, I disagree. I have already explained why this is a commercially unrealistic way of viewing the parties' agreement and is also inconsistent with the terms of the MTCA, which provide for IGA to take certain measures following the occurrence of a Force Majeure Event like the Suspension and Reversal. The problem for IGA is not so much that they assumed the risk of the Suspension and Reversal, but that the MTCA does not prescribe any power, even after the occurrence of a Force Majeure Event, to reverse the FCTs.

119 Second, while the point was not argued, I have my doubts that Term 10(4) can be interpreted as widely as IGA contends, *ie*, that it covers *any* "situation" that arises which is not covered by the MTCA, and that IGA has the right to resolve the matter in whatever way it deems fit so long as such resolution is done on the basis of good faith and fairness. At the very least, Term 10(4)

148 DRS at para 29.

falls under a section of the MTCA that reads "Dealing Procedures and Reporting". It seems to me that the word "situation" in Term 10(4) may have to be interpreted in a manner consistent with the subject matter that Term 10 purports to deal with. However, I say no more regarding this issue since it was not argued before me.

120 For present purposes, I conclude that Term 10(4) of the MTCA does not apply on the present facts. It follows that IGA cannot rely on Term 10(4) to justify the reversals of the FCTs.

Assuming that IGA had a basis to reverse the FCTs, whether it was precluded from doing so for other reasons

121 Since I have found that IGA cannot rely on any term in the MTCA to reverse the FCTs, it follows that I do not need to consider the follow-up issue of whether, even if IGA had a basis to reverse the FCTs, it was precluded by other reasons from reversing the same. In this regard, Foreland argued that IGA would still have been precluded from doing so for two reasons: (a) IGA was bound by the Account Statements, which are "final and conclusive and binding on both [Foreland] and [IGA]";[149] and (b) IGA had performed the reversal improperly in failing to reinstate the Accounts to the exact same positions that they were in on 7 March 2022, prior to the events of 8 March 2022.

122 However, since the parties have made extensive submissions on these two issues, I will deal with them on the assumption that IGA had a basis to reverse the FCTs. I do so only for completeness, and to be clear, the discussion

149 Statement of Claim at paras 17 and 22.

below does not change my ultimate conclusion that IGA had wrongfully reversed the FCTs.

Whether IGA was precluded by the Account Statements from reversing the FCTs

The parties' arguments

123 On the Account Statements, Foreland's case is that IGA had issued the Account Statements pursuant to Term 14(6) of the MTCA, in which all nickel CFD positions in the Accounts are stated as "CLOSE" and "now fully closed", and the amounts due to Foreland from such execution are also stated under the column "Amount Due to you or us". Foreland therefore says that pursuant to Term 14(7) of the MTCA, Foreland is deemed to have acknowledged and agreed with the contents of the Account Statement, including the closure of all the nickel CFD positions set out. By implication, IGA must equally be deemed to have acknowledged and agreed to those contents, which are final, conclusive, and binding on both Foreland and IGA. Thus, even if IGA could reverse the FCTs pursuant to the MTCA, this precluded it from doing so.[150]

124 In response, IGA argues that Term 14(7) only binds the client (*ie*, Foreland), and not IGA. This is clear from the plain wording of Term 14(7), which is a variant of the conclusive evidence clause found in standard terms of financial institutions. Thus, IGA was never bound by the Account Statements. Also, Term 14(7) only provides that Foreland is deemed to have "acknowledged and agreed with the content" of the Account Statements. This wording does not impose any legal obligation on IGA, nor does it allow Foreland to enforce the

150 PCS at paras 101 and 102.

Account Statements against IGA. Finally, even if IGA were bound at first, it did not remain bound subsequently as the Account Statements were superseded by later Statements (beginning from 14 March 2022) that reflected the reversal of the FCTs. Foreland therefore cannot insist on enforcing prior Account Statements while disregarding latter ones.

My decision: IGA would not have been precluded from reversing the FCTs by the Account Statements

125 In my judgment, if IGA had a basis to reverse the FCTs, it would not have been precluded from doing so by the Account Statements. To begin with, Term 14(7) provides as follows:[151]

> **14. COMMUNICATIONS**
>
> …
>
> (7) You will be deemed to have acknowledged and agreed with the content of any Statement and the details of each Transaction set out in any Statement that we make available to you unless you notify us to the contrary in writing within two business days of the date on which you are deemed to have received it in accordance with Term 14(10) below.

126 Term 14(7) is an example of a conclusive evidence clause. As the Court of Appeal observed in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273 ("*Pertamina*") (at [55]), such clauses "place the onus on the bank's customers to verify their bank statements and to notify the bank if there is any discrepancy within a certain period of time" and that "[if] the customer fails to do so, he is precluded from asserting that the statements do not represent the true state of his accounts with the bank", such that "he may not make a claim against the bank for his loss". In this regard, while Foreland relies

151 2 ABOD at p 157.

on the court's statement (at [63]) that "such conclusive evidence clauses are valid and binding on the parties", that statement only means that the contents of such clauses, being a term of the parties' contract, are binding on them. This is an obvious point. However, that does not necessarily imply what Foreland is arguing for, which is that statements issued *pursuant to* such binding conclusive evidence clauses are therefore binding on *both* parties. Whether this is the case will depend on the precise wording of the clause concerned. Indeed, in *Pertamina*, the Court of Appeal was considering a conclusive evidence clause that placed the onus on the customer (and not the bank) to check and then raise any objections to the bank statement within 14 days. If the customer failed to do so, then he or she would be deemed to have accepted the statement as true and accurate. The court did not find that the statement was binding on the bank.

127 In the present case, Term 14(7) is clearly only intended to bind the client (such as Foreland) and not IGA. Foreland is incorrect to assert that this argument is "not only shallow and devoid of logic and common sense, [but] it is [also] in fact hypocritical and reeking of double-standards and bad faith"[152] (which can really be summarised to read "wrong"). After all, IGA cannot be accused of hypocrisy in its interpretation of the term, if that interpretation reflects what the parties had agreed to in the MTCA. Ironically, the true hypocrisy would lie in a party, having agreed to the terms of the MTCA, arguing otherwise. However, it is not necessary for me to explore this further. The point is that the plain words of Term 14(7) provide that Foreland will be deemed to have acknowledged and agreed with the content of any Account Statement if it does not notify IGA to the contrary in writing within two business days. There is nothing in Term 14(7) which imposes the same obligation on IGA, or that

152 PCS at para 103.

deems IGA to have acknowledged or accepted the content of any Account Statement. This is consistent with the proposition that a bank statement allows the bank to assert its right against the customer, and not vice versa (see Poh Chu Chai, *Banking Law* (LexisNexis, 3rd Ed, 2018) ("*Banking Law*") at para 3.11).

128 Moreover, Foreland's argument that IGA is, in essence, irrevocably bound by the Account Statements on 8 and 9 March 2022, is commercially unsound. If accepted, this would mean that entities like IGA or banks would be bound by similar statements issued at a point of time and cannot cancel that by issuing further statements later in time. Indeed, in the banking context, so long as the certificate states a date and the amount due and owing as at that date, it is conclusive evidence of the amount due and owing *for the time being* at that date only (see *Banking Law* at para 3.11.4). In the present case, there is no reason why IGA should remain bound by the Account Statements issued on 8 and 9 March 2022 when they later issued statements beginning from 14 March 2022 that reflected the reversal of the FCTs. Indeed, such statements are a snapshot of the prevailing status of an account at a particular time. It does not make sense, as Foreland is really arguing, that the issuer is irrevocably bound by that statement.

Whether IGA reversed the FCTs improperly in failing to reinstate the Accounts to their exact same positions

The parties' arguments

129 Foreland argues that even if IGA were entitled to reverse the FCTs, it ought to have done so by putting Foreland back in exactly the same position as it was in before the open nickel CFD positions in the Accounts were closed by the execution of the FCTs, that is, at the same opening prices (between 24,104 to 27,364) when these positions were first opened between 21 February 2022

and 3 March 2022.[153] For convenience, I will term this as "Option 1". Instead of Option 1, IGA opened new nickel CFD positions, the prices of which Foreland says were arbitrarily adjusted (from the above original opening prices) to 47,083 as the "current price", while at the same time leaving the FCTs on the books of IGA. Foreland argues this is not, in fact, a reversal. I will term this as "Option 2". Thus, IGA acted wrongly when it eventually force-closed the new nickel CFD positions on 22 and 25 March 2022 and "bought" them back from Foreland at significantly lower prices (28,705 and 36,387.60) than the adjusted "current price" of 47,083. Foreland accuses IGA of contriving to "make a separate tidy profit for itself, all at the expense and to the ultimate prejudice/detriment of Foreland".[154]

130 In response, IGA argues that Foreland was placed in the same economic position it would have been if the remaining trades had not been closed on 8 March 2022.[155] IGA explains that it went with Option 2 instead of Option 1 because response speed was critical in light of the Suspension and Reversal. IGA's priority was then to ensure equity positions in client accounts were valued correctly as soon as possible given the urgency of the situation. Option 2 was quicker to implement than Option 1 as IGA did not need to take the additional step of making cash corrections.[156] There was thus nothing wrong with how IGA went about effecting the reversal. In contrast, Foreland is not running an honest case by insinuating that IGA improperly deprived it of further

153 PCS at para 215.

154 PCS at paras 215−219.

155 DCS at para 95.

156 DCS at para 96.

profits.[157] Ultimately, Foreland still profited from their trades despite the Suspension and Reversal; all that it "lost" was the additional profit from the trades of 8 March 2022.[158]

My decision: IGA would not have been precluded from reversing the FCTs by the method by which it effected the reversals

131 In my judgment, assuming that IGA had a basis to reverse the FCTs, it would not have been precluded from so reversing by the method by which it effected the reversals. There is nothing wrong with how IGA effected the reversals. I accept IGA's explanation that Option 1 and Option 2 would have resulted in the same economic outcome. Thus, Option 2 is still, in substance, a reversal. I can do no better than repeat the analysis in IGA's Closing Submissions, regarding the two options by which IGA could have reversed the FCTs:[159]

> Assuming the data points for the example are that the original opening price is 25,000 and the last closing price on 7 Mar is 47,000, the profit as at 7 Mar is 22,000 ([Joseph James Ryan] used 20,000 in his example for simplicity). Assuming the closing price on 8 Mar is 80,000, the profit as at 8 Mar is 55,000 ([Joseph James Ryan] used 60,000 in his example for simplicity).
>
> Under Option 1: The trade is re-opened at 25,000. Given that the last closing price on 7 Mar is 47,000, the re-opened trade is at a running profit of 22,000. The notional profit as at 8 Mar of 55,000 is removed from the cash in the account. The net effect of the cash correction less notional profit is the profit of 22,000.
>
> Under Option 2: The notional profit of 55,000 is left as cash in the account and the trade is re-opened at 80,000. Given that the last closing price on 7 Mar is 47,000, the re-opened trade is at a running loss of 33,000 ([Joseph James Ryan] used 30,000

157 DCS at para 97.

158 DCS at para 98.

159 DCS at para 95.2.

> to 40,000 in his example for simplicity). The net effect of the cash left in the account less loss is the profit of 22,000.

132 I also accept IGA's explanation as to why it went with Option 2. Therefore, Foreland is incorrect in asserting that IGA had somehow yielded a profit for itself. In the end, assuming that IGA was justified in reversing the FCTs, Foreland's economic position whether IGA adopted Option 1 or Option 2 would have been the same. Essentially, in both cases, all Foreland lost was the additional profit from the unsustainable trades of 8 March following the Suspension and Reversal.[160] As such, I cannot see how IGA would have been precluded from reversing the FCTs on the basis that it wrongly chose Option 2 in effecting the said reversals.

Whether IGA was entitled to refuse withdrawal requests and close the RFTs

133 I come now to the final issue raised by the parties. This concerns whether IGA was entitled to refuse Foreland's withdrawal requests and eventually close the RFTs. Since I have found that IGA had no basis to reverse the FCTs, it follows that this issue has become unnecessary. This is because if IGA cannot reverse the FCTs, then it would have no corresponding right to open new nickel CFD positions in the Accounts. The Accounts would also not have been subject to any margin calls, which IGA relied on to ultimately force-close the new nickel CFD positions. Thus, IGA would have had no basis to resist Foreland's further payment instructions.

134 However, since the parties have made submissions on this issue, I will (again) deal with it on the assumption that IGA was entitled to reverse the FCTs.

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160 DCS at para 98.

I only address this issue in the alternative and for completeness. It does not affect my ultimate conclusion that IGA was *not* entitled to reverse the FCTs.

The parties' arguments

135 Foreland argues that IGA was not entitled to refuse to comply with Foreland's further payment instructions issued on 11 and 14 March 2022 because the revised margin requirements applicable to the Accounts were only implemented on 15 March 2022. Accordingly, IGA was under a duty to comply fully with Foreland's payment instructions which were issued prior to such implementation, instead of only releasing part payments to Foreland.[161] While IGA has explained that the margin requirements had been under review before 15 March 2022, there is nothing in the MTCA that allowed IGA to refuse to comply with Foreland's payment instructions because the margin requirements were under review.[162] Also, Foreland argues that the IGA's eventual forced-closures of the new nickel CFD positions were wrongful because: (a) Mr Ryan, the actual person who gave the written notice to Foreland for such forced-closures, confirmed that he was never authorised to speak on behalf of IGA; and (b) the IG Group Head Office had done the forced-closures, but it had no contractual relationship with Foreland and hence no right to effect the closures.[163]

136 In response, IGA argues that it was entitled to raise the margin requirements on 8 and 15 March 2022, and did communicate these revisions to Foreland. Indeed, IGA revised the margin requirements for legitimate reasons

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161 PCS at para 97.

162 PCS at para 98.

163 PCS at para 100.

and not to avoid complying with Foreland's withdrawal requests.[164] In any case, IGA was entitled to act as it did because, among other reasons, Term 15(7) of the MTCA provides that IGA is "entitled, at any time" to increase the margin requirements. As for Foreland's withdrawal requests, IGA was entitled to refuse these requests because, assuming that IGA had proper basis to reverse the FCTs, neither Term 7(13) nor Term 16(5) of the MTCA entitles Foreland to immediate withdrawal. IGA was justified in taking some time to process the withdrawal requests. Moreover, Term 16(5) is clear that if the withdrawal would "reduce your account balance (taking into account running profits and losses) to less than the Margin payments required on your open Transactions", IGA would not be obliged to effect the withdrawal. Since Foreland's withdrawal amounts would have reduced its account balances to below the margin requirements for the RFTs, IGA was entitled to refuse the withdrawal requests. Finally, IGA did not need Foreland's authorisation to close the RFTs because of Term 15(3) read with Term 17(1)(a) of the MTCA.

My decision: IGA would have been entitled to refuse withdrawal requests and close the RFTs

137 In my judgment, assuming IGA was entitled to properly reverse the FCTs, it would also have been entitled to refuse Foreland's withdrawal requests and close the RFTs. Broadly, it is clear that both the refusal of withdrawal requests and closing of the RCTs were natural consequences of the circumstances that ensued after the reversal of the FCTs. IGA's actions were legitimately prompted by the Foreland's own conduct, assuming that there was a proper basis for reversal.

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164 DCS at para 106.

138 First, as to the withdrawal requests, I accept IGA's argument that it was entitled to revise the margin requirements. In this regard, Term 15(7) of the MTCA provides as follows:[165]

> **15. MARGIN (CONTINUED)**
>
> …
>
> (7) Subject to Applicable Regulations, we will be entitled, at any time, to increase or decrease the Margin required from you on open Transactions or to change the credit arrangements for your account. You agree that, regardless of the normal way in which you and we communicate, we will be entitled to notify you of a change to Margin levels or the credit arrangements for your account by any of the following means: telephone, post, email, text message, via one of our Electronic Trading Services or by posting notice of the change on our website. Any increase in Margin levels will be due and payable immediately on our demand, including our deemed demand in accordance with Term 15(6). Any change in the credit arrangements for your account will be effective at the time notified to you, which may include immediately. We will only increase Margin requirements or change the credit arrangements for your account where we reasonably consider it necessary, for example but without limitation, in response to or in anticipation of any of the following:
>
> …

139 It is clear that Term 15(7) of the MTCA entitles IGA to increase the margin requirements at any time. Indeed, IGA was not obliged to give reasons for the margin changes. IGA, through Edna Tan (referred to by IGA as "TZE"), also explained these margin increases with specific references to LME's actions and the volatility in the underlying market.[166] It is also clear from the evidence that the margin increases were not in response to Foreland's withdrawal requests on 11 March 2022. For example, the 9 March 2022 Risk Committee Meeting

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165 2 ABOD at p 159.

166 Affidavit of Evidence-in-Chief of Tan Zixian Edna at para 28 and p 166.

minutes show that the 8 March increase was to account for the Suspension and Reversal, and that "higher margin rates will be applied as nickel returns to trading".[167] Mr Blemings also explained that the IG Group decided on the 15 March increase because it considered various factors, such as the volatility of the nickel prices leading to the Suspension and Reversal and that there was uncertainty as to when the underlying market would reopen and at what prices. The margin increase was legitimately made to mitigate credit risk so that clients can withdraw any balance over and above margin requirements.

140 In light of IGA's legitimate margin increase, it is clear that Term 16(5) applied to govern the terms of any withdrawal request. For convenience, this term provides as follows:[168]

> **16. PAYMENT, CURRENCY CONVERSION AND SET-OFF (CONTINUED)**
>
> …
>
> REMITTING MONEY
>
> (5) We will be under no obligation to remit any money to you if that would reduce your account balance (taking into account running profits and losses) to less than the Margin payments required on your open Transactions. Subject thereto and to Term 16(6), 16(7), 16(8) and 16(9), money standing to the credit of your account will be remitted to you if requested by you. Where you do not make such a request, we will be under no obligation to, but may, at our absolute discretion, remit such monies to you. All bank charges howsoever arising will, unless otherwise agreed, be for your account. The manner in which we remit monies to you will be at our absolute discretion, having utmost regard to our duties under law regarding the prevention of fraud, countering terrorist financing, insolvency, money laundering and/or tax offences. We will normally remit money in the same method and to the same place from which it was

167 Agreed Bundle of Documents Vol 3 at pp 130–132.

168 2 ABOD at p 160.

> received. However, in exceptional circumstances we may, at our absolute discretion, consider a suitable alternative.

141 Thus, pursuant to Term 7(13) of the MTCA, IGA was not obliged to meet Foreland's withdrawal request made on 11 March 2022 immediately. On 15 March 2022, when the margin requirements were increased, IGA informed Foreland on the same day that the amounts available for withdrawal post-margin revision were GBP 2,008,120 (FSG) and GBP 1,991,488 (FJP). Thus, the withdrawal amounts Foreland requested on 11 March 2022 would have reduced the account balances to below the margin requirements for the RFTs. IGA was therefore entitled under Term 16(5) to refuse the withdrawal requests.

142 Consequently, assuming IGA was entitled to reverse the FCTs, it would thereby have been entitled to close the RFTs. By 16 March 2022, Foreland's account balances had fallen below the updated margin requirements. Between 16 and 22 March 2022, Foreland received multiple margin calls. Yet Foreland refused to top up their funds to meet the margin because they deemed the RFTs to be unauthorised. In the event, Foreland turned out to be right, as I have so held. However, if IGA were justified in reversing the FCTs, this would have constituted an Event of Default under Term 17(1)(a) of the MTCA. IGA would therefore have been entitled to close the RFTs "at any time and without prior notice" pursuant to Term 17(2)(a). IGA did just that on 22 March 2022 when it closed some RFTs to ensure that Foreland's positions were sufficiently collateralised. On 25 March 2022, IGA closed the remaining RFTs for the purposes of limiting the maximum amount involved in the dispute, as it was entitled to do under Term 26(2). Thus, IGA would have been acting well within its rights in relation to the closure of the RFTs. Finally, there was nothing wrong with Mr Ryan's notification to Foreland on the RFTs' closures because IGA

was never required under Term 26(2) to give prior notice of the closures to begin with.

143 However, needless to say, my analysis above does not affect my earlier conclusion that IGA was not entitled to reverse the FCTs to begin with.

The appropriate remedies

144 Since I have concluded that IGA wrongfully reversed the FCTs, I come now to the question of remedies. In this regard, Foreland prays for the sum of $9,653,223.79 to be paid to FSG, and the sum of $12,944,800.22 to be paid to FJP, or alternatively, among others, for damages to be assessed. While I have found that IGA was justified in refusing to pay Foreland when it executed the FCTs on 8 March 2022, I have also found that IGA ought not to have reversed the FCTs as it had no power under the MTCA to do so. The question is therefore whether Foreland has suffered any proven loss caused by IGA's wrongful reversal of the FCTs.

The parties' arguments

145 Ahead of their Reply Submissions, I invited the parties to address me on what it means in terms of remedies if I were to find that IGA was justified in not paying Foreland upon the execution of the FCTs but not to have been so justified in reversing the FCTs in reliance on Term 4(7).

146 IGA argues that it would not have any liability under Terms 7(13) and 7(14) of the MTCA to pay Foreland any notional profits for the FCTs. This is because such liability would have been discharged by virtue of Term 23.[169] As

169 DRS at para 30.

for the act of reversing the FCTs, IGA submits that it cannot give rise to any liability and remedies in contract or in tort.[170] First, as a matter of contract, IGA argues that its wrongful reversal of the FCTs is not in breach of any term, as it was justified in not paying Foreland on the execution of the FCTs. Foreland also suffered no loss from the reversal of the FCTs if IGA were held justified in suspending and/or modifying its payment obligations for the FCTs. On the contrary, Foreland turned a profit on their trades when the RFTs were closed.[171] Second, as a matter of tort, Foreland has not pleaded what tort was committed by IGA's reversal of the FCTs. In any case, if IGA were found not to be liable to pay Foreland notional profits for the FCTs, Foreland would not be entitled to damages under the tortious measure of damages because this measure would place Foreland in the position before the reversal took place, that is, where the last transactions on their Accounts were the FCTs on 8 March 2022.[172]

147 In turn, Foreland argues that IGA's pleaded case is that IGA was relying on Term 23(2)(c) "to modify its payment obligations under Terms 7(13) and 7(14), not to suspend such payment obligations for an indefinite period of time, but only <u>temporarily</u>, for the sole objective of 'buying time' in order to pave the way for and to allow IGA to reverse the FCTs, whereupon these payment obligations would be completely eradicated" [emphasis in original].[173] As such, if IGA were not entitled to reverse the FCTs in reliance on Term 4(7), it must follow that the pleaded basis on which IGA had relied upon Term 23(2) to modify the application of Terms 7(13) and 7(14), which is premised on IGA

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170 DRS at para 31.

171 DRS at para 32.

172 DRS at para 33.

173 PRS at para 13.

being entitled to reverse the FCTs, no longer subsists. Thus, IGA's payment obligations under Terms 7(13) and 7(14) would be fully reinstated. IGA would therefore be liable to pay Foreland the full amount of the profits which had accrued under the FCTs as confirmed in the Account Statements, as well as interest from the date on which IGA's payment obligations under Terms 7(13) and 7(14) are reinstated. It is noteworthy that Foreland does not refer to any other loss that it suffered.

My decision: Foreland has not shown that it suffered any proven loss caused by IGA's wrongful reversal of the FCTs

148 As framed by the parties, the issue at hand is whether IGA pleaded, and was entitled to rely on, Term 23(2) to extinguish (as opposed to merely suspend) its payment obligations upon the execution of the FCTs under Terms 7(13) and 7(14) of the MTCA. If IGA was entitled to do so, it follows that Foreland would have suffered no loss from IGA's subsequent reversal of the FCTs. This is because Foreland's entitlement to the "additional" notional profits from the FCTs (referring to the notional profits resulting from further price increases after the Suspension and Reversal) had been extinguished by IGA's reliance on Term 23(2) read with Terms 7(13) and 7(14), rather than being so extinguished by IGA's subsequent reversal of the FCTs.

149 In my judgment, what I have set out above is the correct analysis. Foreland has suffered no loss from IGA's wrongful reversal of the FCTs because its entitlement to any additional notional profits from the FCTs had been extinguished before the reversal.

150 First, as a preliminary matter, I find that IGA had pleaded this in its Defence. I refer to the paragraph in question, which reads:

> 23. Save that the Defendant reversed the Foreland Closing Trades, paragraph 25 of the SOC is denied. By reason of the matters pleaded at paragraphs 21(a) to (f) above, the Defendant was entitled to take the steps that it did pursuant to the provisions of the MTCA. The Defendant avers that:
>
> > a. The Suspension and Reversal constituted an emergency or an exceptional market condition amounting to a "Force Majeure Event" under Term 23(1) of the MTCA, falling within the definitions stated under Term 23(1)(b) and/or Term 23(1)(c).
> >
> > > i. In the circumstances, the Defendant was entitled to, and did, exercise its right under Term 23(2) of the MTCA to suspend or modify the application of all or any of the Terms of the MTCA on the basis that the Force Majeure Event(s) made it impossible or impracticable for the Defendant to comply with the Terms. In particular, the Defendant suspended and/or modified the application of *inter alia* Terms 7(13) and 7(14) such that, notwithstanding the closure of the Foreland Transactions, Terms 7(13) and 7(14) did not come into effect. Instead, the Foreland Closing Trades were reversed in accordance with the Reversal by the LME.
>
> …

151 In its Closing Submissions, Foreland emphasises the word "instead" in the last sentence of para 23.a.i to suggest that IGA only temporarily suspended its payment obligations under the FCTs and that IGA's "sole ultimate purpose" was to reverse the FCTs to eradicate its payment obligations entirely.[174] I disagree. In my view, it is important to emphasise the words appearing just before the word "instead", *viz*, "Terms 7(13) and 7(14) *did not come into effect*" [emphasis added]. There is no qualification to these words about Terms 7(13) and 7(14) being only temporarily suspended. Also, Foreland chose only to highlight that IGA "temporarily suspended" its payment obligations under Terms 7(13) and 7(14), while ignoring the plain fact that IGA also pleaded that

174 PCS at para 79.

it "modified" the application of those Terms. This is not right. Plainly, IGA pleaded that its payment obligations under Terms 7(13) and 7(14) were discharged. This is consistent with how Term 23(2)(c) of the MTCA is framed, which allows IGA to suspend or modify the application of Terms 7(13) and 7(14) because the Force Majeure Event (here, the Suspension and Reversal) makes it impossible or impracticable for IGA to comply with those Terms. Thus, I find that IGA has pleaded that it relied on Term 23(2)(c) to extinguish its payment obligations under Terms 7(13) and 7(14). While IGA pleaded that it "instead" reversed the FCTs, its case remains that its payment obligations were already extinguished prior to such reversal.

152 Second, and relatedly, Foreland itself adopts my reasoning above in relation to the words "did not come into effect" in its Closing Submissions:[175]

> Last but not least, in purporting to suspend and/or modify the application of Terms [*sic*] 7(13) and Term 7(14) "*such that, notwithstanding the closure of the Foreland Transactions, Terms 7(13) and 7(14) did not come into effect*", IGA was in truth and in fact completely extinguishing the application of these Terms. There is nothing in Term 23(2), even if applicable, which confers such a sweeping right or power on IGA.
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> [emphasis in original]

As is clear from its own submissions, Foreland recognises that the effect of IGA's reliance on Terms 7(13) and 7(14) is to completely extinguish the application of these Terms. This contradicts Foreland's argument that IGA was, on its pleaded case, only temporarily suspending the application of these Terms. Thus, even if it can be said that IGA had not pleaded this point clearly, Foreland was not surprised by any defective pleading because it had clearly contemplated

175 PCS at para 84.

that IGA was extinguishing its payment obligations under Terms 7(13) and 7(14).

153 Third, and more substantively, based on IGA's pleaded case, which I agree with, it is clear that Foreland suffered no loss from IGA's wrongful reversal of the FCTs. This is because Foreland's entitlement to the additional notional profits from the FCTs was extinguished upon IGA's reliance on Term 23(2)(c) of the MTCA to modify its payment obligations under Terms 7(13) and 7(14). While I have found that IGA had no contractual basis to reverse the FCTs later on, Foreland's entitlement to the notional profits had already been extinguished by that time. Instead, IGA's reversal of the FCTs was to reflect the reality that the notional profits that had apparently accrued were not due. In this regard, IGA submitted that if it were not entitled to reverse the FCTs, there would be a significant disconnect between factual reality and legal reality, in that the FCTs would be reflected as having been executed, yet Foreland would nevertheless not be entitled to the notional profits from the FCTs.[176] However, the effect of this disconnect is mitigated by my finding that Foreland's entitlement to the notional profits had already been extinguished prior to the wrongful reversal.

154 It follows from the above analysis that Foreland suffered no loss caused by IGA's wrongful reversal of the FCTs. Indeed, given that IGA was entitled to refuse payment of the additional notional profits to Foreland by relying on Term 23(2)(c) read with Terms 7(13) and 7(14) of the MTCA, it follows that Foreland ended up in the same financial position, regardless of whether IGA subsequently reversed the FCTs. Ultimately, considering the Suspension and

176 DRS at para 28.

Reversal, Foreland was put in the position prior to 8 March 2022 to reflect the underlying market. This is a commercially fair outcome given the unforeseeable nature of the Suspension and Reversal, which represented a Force Majeure Event.

155 However, while I do not grant the substantive reliefs sought by Foreland, I do find that IGA has acted in breach of contract by reversing the FCTs and closing the RFTs. This is because Term 4(7) did not empower IGA to do so and could not be modified by way of Term 23(2)(c). While Term 4(7) is an empowering provision rather than a provision imposing an obligation on IGA *per se*, that does not stop IGA's actions of opening new transactions to reverse the effects of the FCTs on Foreland's closing position from being a breach of the MTCA. In this regard, Term 4(7) gives a closed list of acts which IGA may do on the happening of *inter alia* a Force Majeure Event (per Term 4(8)(k)) before allowing a client like Foreland to close out their trading position. These include voiding transactions, treating them as open to (potentially) incur more losses, or closing it at a then-prevailing price, but that list of permitted acts does *not* include opening up new transactions on their account to reverse the economic effects of existing transactions thereon (as was done here). As such, IGA has acted in breach of the MTCA. This is significant as a breach of contract is an infringement of a contracting party's rights which is actionable *per se* even in the absence of proof of any loss being sustained in consequence.

156 Despite this, and for reasons that I have explained above, Foreland cannot show that it has suffered any loss caused by IGA's breach of the MTCA. Nonetheless, an innocent party in a breach of contract is entitled to nominal damages where he cannot prove that any loss was caused as a result of such breach (see, *eg*, the Court of Appeal decision of *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661

at [41] (*per* Yong Pung How CJ, dissenting) and [143]–[144] and the High Court decision of *Youprint Productions Pte Ltd v Mak Sook Ling* [2023] 3 SLR 1130 at [5]). This is so whether the innocent party fails to prove the causation of damage or the quantum thereof (see the Court of Appeal decision of *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd and another appeal* [2018] 2 SLR 199 ("*Biofuel*") at [44]). Accordingly, since I have found that IGA acted in breach of the MTCA to Foreland, I award nominal damages of $1,000 to each of the plaintiffs (see *Biofuel* at [45] and [47] and the Court of Appeal decision of *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 at [23] and [61]).

157 For completeness, I go on to consider the argument that the forced closure of the RFTs may have deprived Foreland of additional future profits. Such profits could have accrued, for instance, if the price of nickel rose following the forced closure of those transactions. In my view, Foreland should not be able to claim for such profits. This is because, on Foreland's case, the reversal of the FCTs was wrongful (*ie*, should not have happened). Therefore, in the counterfactual situation, which Foreland alleges *should* have happened, there would have been no reversal of the FCTs, and therefore no RFTs. If there were no RFTs, there would be no profits flowing therefrom. As such, it would clearly be inconsistent for Foreland to allege that the reversal, and therefore the RFTs, should not have occurred, while at the same time claiming for additional profits resulting from the RFTs.

Conclusion

158 For all the reasons above, I dismiss Foreland's substantive claim against IGA but award each of the plaintiffs $1,000 in nominal damages for the reasons set out above. In essence, the prices for the FCTs were based on prices derived

from those on the LME. When the unforeseeable Suspension and Reversal happened, the substratum of those trades in the underlying market were retroactively annulled. Indeed, albeit in a different context, Foreland itself acknowledges that the Suspension and Reversal was an event that IGA was "totally caught out by".[177] This is the whole point of the common law doctrine of frustration and a force majeure clause. Since the Suspension and Reversal amounted to a Force Majeure Event under the MTCA, IGA rightfully relied on Term 23(2)(c) read with Terms 7(13) and 7(14) of the MTCA to refuse to pay Foreland. While the MTCA does not, as IGA believed, entitle it to reverse the FCTs, Foreland suffered no loss from such reversal since it was no longer entitled to the notional profits under the FCTs by the time of the reversal. The result is that Foreland's claim is substantively dismissed.

159 In closing, while I am grateful to counsel for their submissions, I do wish to point out that the submissions contain at times unnecessarily critical or repetitive language. For example, in Foreland's Reply Submissions, it was submitted that some of IGA's submissions are "blatant lies".[178] These are serious accusations that ought not to be made without proper reason. Indeed, to suggest that submissions are "blatant lies" is quite different from saying that they are "misconceived" or "wrong".

160 Further, and with respect, the use of hyperbolic labels, such as calling the counterparty's argument "not only a non-starter, it smacks of double standards and indeed utter desperation",[179] or "not only shallow and devoid of

177 PRS at para 105.

178 PRS at paras 57, 58, 67, and 71.

179 PRS at para 75.

logic and common sense, but it is also in fact hypocritical and reeking of double-standards and bad faith",[180] adds absolutely nothing to a party's case. If anything, the use of such hyperbole may detract from the perceived credibility and reasonableness of an argument, even if a court will always give full consideration to the substance of an argument, however improperly it has been advanced. While I fully appreciate that counsel may, at times, be genuinely caught up in their enthusiasm in advancing their client's case, it remains that court submissions are not novels that require colourful language. Zealous advocacy is only a virtue in so far as it does not descend into discourteous personal attacks upon counsel (see r 7(2), Legal Profession (Professional Conduct) Rules 2015) or distract from the substance of an argument. Within an adversarial system, "[t]he clash of arguments that is supposed to result in the emergence of the light of truth must not degenerate so that more heat than light issues" (see the High Court decisions of *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)* [2005] 2 SLR(R) 509 at [64] and *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [40]). Accordingly, it is better to just be direct in submissions. Indeed, it is easier to simply say that the counterparty's argument is "wrong" or a "non-starter", avoid repetitive language, save a good number of words in word count, and use those saved words to strengthen one's own case in substance than in rhetoric.

180 PCS at para 103.

161 Unless they are able to agree, the parties are to make submissions on costs within 12 days of this decision, limited to ten pages each.

Goh Yihan
Judge of the High Court

Philip Ling Daw Hoang, Lim Haan Hui and Low Ziron (Wong Tan & Molly Lim LLC) (instructed) and Ong Mung Pang David (DOP Law Corporation) for the plaintiffs;
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