Lam Chi Kin David *v* Deutsche Bank AG
[2010] SGHC 50

Case Number	: Suit No 834 of 2008
Decision Date	: 10 February 2010
Tribunal/Court	: High Court
Coram	: Steven Chong JC
Counsel Name(s)	: Christopher Chong and Jasmine Kok (M Pillay) for the plaintiff; Ang Cheng Hock SC, Paul Ong and Goh Zhuo Neng (Allen & Gledhill LLP) for the defendant.
Parties	: Lam Chi Kin David — Deutsche Bank AG

Contract – Breach

Equity – Promissory Estoppel

10 February 2010 Judgment reserved.

Steven Chong JC:

Introduction

1 In his Opening Statement, the plaintiff interestingly characterised his claim as a case about "an investor, his fair-weather bank and the bank's broken promises". However, as the trial progressed, it became clear that the case by the investor was merely an attempt to transfer the losses which he had suffered as a result of market movements onto the bank. The plaintiff amended his case several times as to where the fault of the bank lay and was still undecided how to run the case until the trial began.

2 Essentially, the plaintiff alleged that the defendant made a wrong margin call on 10 October 2008 when it required him to clear the margin shortfall within the same day of the notice. The action was initially commenced with several pleaded causes of action. However, on the first day of the trial, the plaintiff obtained leave before me to amend his pleadings. At the same time, he abandoned all his pleaded causes of action except for the remaining claim for wrongful closure of his FX positions. It was the plaintiff's original pleaded case (prior to the amendment on the first day of trial) that by reason of his margin shortfall, the defendant was entitled to and ought to have closed his account three days earlier, on 7 October 2008. In spite of his amendment, the plaintiff confirmed both in his Affidavit of Evidence-in-Chief ("AEIC") as well as on the witness stand under cross-examination, that the defendant was indeed entitled to close his account on 7 October 2008. In these circumstances, can the plaintiff maintain a claim against the defendant for wrongfully closing his account on 10 October 2008 when it is his own evidence that the defendant's right to do so had accrued on 7 October 2008? Was this more than a "margin of error" by the plaintiff in bringing a claim against the defendant for allegedly making a wrong margin call?

Background facts

3 The plaintiff started his career as a lawyer. He was a sophisticated and successful investor and by 1994, he had retired from his law practice after having amassed a fortune in excess of United States Dollars ("USD") 70m from his investments. In the Account Opening form, the plaintiff described

himself as a "professional investor". He came across to the defendant as an "extremely savvy and knowledgeable client who knows precisely what he wants". He even gave the defendant instructions on specific times for communication purposes.

4 In November 2007, the plaintiff opened two separate accounts with the defendant, namely a Private Wealth Management Account ("Advisory Account") which held the plaintiff's deposits and loans in various foreign currencies and a Foreign Exchange ("FX") Gem Account which provided a platform for the plaintiff to trade in FX options. Chin Mei Lin ("Cynthia Chin") was the relationship manager of the defendant servicing the plaintiff from January 2008.

5 In the Advisory Account, the plaintiff was active in FX trades, particularly in "Carry Trade Investment Strategy". Under this strategy, an investor would typically borrow currencies which offer low interest rates and convert them into other currencies which offer higher deposit interest rates. In this way, the investor would make a profit from the difference in the interest rates. This strategy is of course subject to the inherent risks of currency fluctuations which could be to the benefit or detriment of the investor. Early in the relationship, the defendant had warned the plaintiff of the risks of over exposure to Carry Trades.

6 The plaintiff moved his deposits from accounts he held with the other banks to the Advisory Account. By 11 September 2008, the plaintiff had remitted a total of New Zealand Dollars ("NZD") 120,101,937.38 and USD 3,040,000 to his Advisory Account with the defendant. A total of Japanese Yen ("JPY") 4,168,423,696 and Swiss Francs ("CHF") 36,027,548.42 in loans were transferred from the plaintiff's accounts with Overseas Chinese Banking Corporation and BNP Paribas Private Bank respectively to the defendant. The plaintiff's deposits and loans in foreign currencies under the Advisory Account are collectively referred to herein as "FX positions".

7 The plaintiff's Advisory Account with the defendant was healthy until early October 2008 when the exchange rates started to move against him which resulted in a margin shortfall. The Advisory Account entered into an "account shortfall" of around USD 610,000 on 7 October 2008. This meant that the Collateral Value assigned to the plaintiff's deposits (which is less than the actual market value of the deposits) fell below the market value of the plaintiff's liabilities. The term "account shortfall" was used interchangeably with "margin shortfall" by the parties. "Collateral Value" is the value of the plaintiff's collateral as determined by the defendant. "Total Exposure" is the total sum of the plaintiff's liabilities under all the facilities extended to the plaintiff by the defendant. The margin shortfall deteriorated to around USD 2.3m on 8 October 2008 and later in the same day to around USD 4m. While there was a margin shortfall, the account was still in "positive equity" which meant that the mark to market value of the plaintiff's liabilities was less than the market value of his assets. On 10 October 2008, the margin shortfall deteriorated to around USD 5,460,370.02 which placed the Advisory Account into "negative equity". This meant that the mark to the market value of the plaintiff's liabilities exceeded the market value of his assets under the Advisory Account. The plaintiff was duly appraised of the margin shortfall at all material times.

8 The plaintiff informed the defendant that he was unable to/or unwilling to deliver additional collateral to clear the margin shortfall. On 10 October 2008, the defendant liquidated the plaintiff's FX positions by executing the following margin call transactions:

(a) NZD 42,251,287.42 sold at a rate of 58.34 for JPY 2,464,940,108

(b) NZD 40,690,522.37 sold at a rate of 58.34 for JPY 2,373,885,075

(c) NZD 5,079,561.11 sold at a rate of 58.65 for JPY 297,916,259

(d) USD 177,471.46 sold at a rate of 98.87 for JPY 17,546,603

(e) USD 1,135,239.43 sold at a rate of 98.80 for JPY 112,161,656

As the Advisory Account was in "negative equity", the proceeds from the above transactions were not sufficient to cover the plaintiff's liabilities. On 13 October 2008, the defendant wrote to the plaintiff claiming that a sum of USD 1,135,239.43 remained outstanding from the plaintiff after the execution of the margin call transactions and requested for payment of this sum. The plaintiff did not respond to this request for payment at all.

Amendments to the plaintiff's claims

9 On 11 November 2008, the plaintiff commenced the present action against the defendant to recover the losses he suffered following the margin call transactions:

(a) First, the plaintiff claimed that he had instructed Cynthia Chin on or about 23 September 2008 to proceed with a conversion of NZD 50m to USD at a then favourable rate of 0.6920. However, the defendant allegedly failed to proceed with the plaintiff's instructions. As a result, the plaintiff suffered an alleged shortfall of USD 5,460,370.02 between the Collateral Value provided to the defendant and the plaintiff's Total Exposure in his Advisory Account.

(b) Secondly, the plaintiff also alleged that the defendant had wrongfully closed out his FX positions in breach of the notice requirement under the defendant's terms and conditions as well as the grace period which was purportedly promised to him. He claimed that the margin call was only made on 10 October 2008 when the defendant required him to clear his margin shortfall within the same day even though he was entitled to one clear business day under the defendant's terms and conditions (cl 2.6 of the Master Agreement) and/or to a 48-hour grace period as promised. The plaintiff informed the defendant that he was unable and/or unwilling to remit additional collateral to clear the shortfall. Accordingly, the defendant closed out the plaintiff's FX positions at the close of 10 October 2008 which resulted in the loss of all his deposits with the defendant (estimated to be in excess of NZD 30m) and a further sum of USD 1,135,239.43 due and owing to the defendant which forms the subject matter of the defendant's counterclaim.

(c) Thirdly, the plaintiff alleged that the defendant, in breach of its duty of care, provided an inaccurate or unreliable computation of the margin shortfall in its letter dated 10 October 2008.

10 Subsequently, on 24 February 2009, the plaintiff amended his Statement of Claim. The plaintiff added details to his claim that Cynthia Chin had failed to respond to his instructions on 23 September 2008. According to the plaintiff, on 23 September 2008, he had sent an email to Cynthia Chin on a NZD transaction he wanted to carry out. He wanted to convert NZD to USD in light of the general downward trend of the NZD at that time. He issued an instruction to convert NZD 10m to USD if the rate of 0.6933 could be reached. Cynthia Chin failed to respond and the NZD/USD rate deteriorated throughout the day on 23 September 2008. The plaintiff claimed that in view of the defendant's

expertise and resources to monitor the currency market, the defendant had a duty to advise the plaintiff that it was impractical or imprudent to hold on to the NZD/USD dollar order at the rate of 0.6933.

11 The plaintiff also included an additional ground against the defendant. The plaintiff alleged that upon the margin shortfall on 7 October 2008, the defendant was entitled to and ought to have closed the plaintiff's Advisory Account so as to limit his liabilities to the defendant. Additionally, since the plaintiff was a customer with very substantial cash deposits with the defendant, the defendant had an implied duty to monitor and manage the plaintiff's Advisory Account properly and to act to mitigate the potential loss to the plaintiff. The plaintiff, however, deleted his claim based on cl 2.6 of the Master Agreement though the claim under the 48-hour grace period was retained.

12 Subsequently, the plaintiff decided to revive his claim based on cl 2.6 of the Master Agreement once again and on 1 December 2009 after having obtained leave before me , the plaintiff filed Statement of Claim (Amendment No 2). The plaintiff deleted his claim based on the defendant's failure to close the plaintiff's Advisory Account on 7 October 2008 to limit his liability to the defendant and relied on cl 2.6 of the Master Agreement to claim that the closure of the Advisory Account and the consequent margin call transactions were unauthorised.

13 On the first day of the trial, the plaintiff abandoned the following pleaded causes of action against the defendant:

(a) alleged failure to act on his instructions of 23 September 2008 to convert NZD 50m into USD;

(b) alleged breach of duty in providing inaccurate and unreliable computation of his margin shortfall on 10 October 2008; and

(c) alleged failure by the defendant to advise him not to maintain his order to sell NZD to USD at the exchange rate of 0.6933.

The trial therefore proceeded only on the plaintiff's sole remaining cause of action *i.e*. the margin call made by the plaintiff on 10 October 2008 was wrongful by reason of cl 2.6 of the Master Agreement and/or the 48-hour grace period.

When was the first margin call made by the defendant

14 This is a crucial issue for determination. The plaintiff's case that the defendant made a wrong margin call is entirely premised on proof that the only valid margin call made by the defendant was by way of a letter dated 10 October 2008 sent at about 11.15am. On this basis, the plaintiff submitted that the defendant was not entitled to close out his FX positions under the Advisory Account on 10 October 2008 because:

(a) he was entitled to 48 hours to "respond to a margin call" as promised by the defendant; and/or

(b) he was entitled to at least one business day notice to deliver the additional collateral as stipulated under cl 2.6 of the Master Agreement.

15 If the only valid margin call by the defendant occurred on 10 October 2008 (which was a Friday) as alleged by the plaintiff, then the earliest the defendant was entitled to close out the plaintiff's FX positions would be either first thing in the morning of 13 October 2008 (if the 48-hour grace period applies) or after 11.15am on 13 October 2008 (if cl 2.6 applies).

16 However, if the defendant had made an earlier valid margin call on either 7 or 8 October 2008, the plaintiff's submission would be rendered moot because even if either or both the 48-hour grace period or cl 2.6 had applied, the FX positions which were closed out at 8.00pm on 10 October 2008 would have been validly closed in any event.

17 It is the defendant's case that it made the following valid margin calls:

(a) by a fax dated 7 October 2008 wherein the defendant informed the plaintiff that his "Collateral Availability" under the Advisory Account had fallen into a "negative of USD 610,000";

(b) by a fax dated 8 October 2008 wherein the defendant informed the plaintiff that his margin shortfall had increased to USD 2,300,000; and

(c) by letter dated 10 October 2008 wherein the defendant required the plaintiff to restore the margin shortfall of USD 5,460,370.02 in the Collateral Value by 5.00pm Singapore time on the same day.

From the above, it is self-evident that the plaintiff's margin shortfall had deteriorated from USD 610,000 on 7 October 2008 to USD 5,460,370.02 on 10 October 2008.

18 The plaintiff claimed that the only valid margin call made by the defendant was by way of the letter dated 10 October 2008. The plaintiff submitted that the earlier communication did not amount to margin calls.

19 The term "margin call" is not specifically defined in any of the agreements between the parties. The plaintiff, however, relied on Cynthia Chin's AEIC that a margin call occurs when the plaintiff is informed of the extent of the shortfall and is asked to remedy it.

20 As for the fax dated 7 October 2008, the plaintiff advanced the following submissions:

(a) the fax was not an official communication from the defendant because it contained the following notation:

> "This is not an official bank's statement or advice and is not a substitute for our official statements or advice. This summary is prepared for you as a service to provide account information and is intended for discussion purposes only. It may not be complete, accurate or current and as such, as do not accept any liability for the information reflected therein. Please refer to our official statements and advices for an accurate and complete record of

your account".

(b) the fax did not specifically require the plaintiff to restore the margin shortfall; and

(c) in any event, by about 3.28pm on 7 October 2008 the exchange rates had improved and the margin shortfall had resolved itself.

21 As for the fax dated 8 October 2008, the plaintiff repeated the same submissions save that sub-para (c) did not apply on 8 October 2008.

Did the plaintiff regard the faxes from the defendant dated 7 and 8 October as "margin calls" which required him to take steps to clear the shortfall

22 It may well be that the faxes of 7 and 8 October contained the notation that they did not constitute "official bank's statement or advice…" and that they did not explicitly require the plaintiff to clear the margin shortfall. It remains necessary to examine the plaintiff's responses to the faxes.

23 Counsel for the defendant drew my attention to the evidence that the plaintiff was clearly aware that the above faxes constituted margin calls which required him to take steps to rectify the margin shortfall:

(a) First, the plaintiff admitted in his AEIC that by reason of the margin shortfall of USD 610,000, the defendant became entitled to close the account on 7 October 2008:

> 19. On 7th October 2008, I was informed by the Defendant that *my account had shortfall of USD 610,000*.
>
> 20. An account shortfall occurs when the value of my collateral, as determined by the Defendant, is deemed to be less than my total exposure in my currency trading account with the Defendant. The account shortfall occurred mainly as a result of the Defendant's failure to convert part or all of my deposits into USD. If the Defendant insisted, under the terms and/or powers it claimed to have based on the documents signed by me, that I should convert all my deposits into USD in September 2008 I would be obliged to do – just like the many options I traded.
>
> 21. Pursuant to the terms of Defendant's Service Agreement, the Defendant should be entitled to close my account upon an account shortfall.
>
> 22. *Therefore, the Defendant became entitled to close my account once there was an account shortfall of USD610,000 on 7th October 2008*.
>
> [emphasis added]

The reference to USD 610,000 in para 19 and 22 of the plaintiff's AEIC was taken from the defendant's fax dated 7 October 2008. However, the plaintiff claimed that the assertions in his AEIC were made only with reference to the Service Agreement. While it is true that the plaintiff did not refer to the Master Agreement in this context, his omission to do so is most telling. Clearly, the plaintiff did not regard that the defendant's right to close out the FX positions under the Service Agreement was curtailed in any way by cl 2.6 of the Master Agreement. If it was otherwise, the plaintiff would have raised it. It is simply not open to the plaintiff to "blow hot and cold".

(b) Following the fax dated 7 October 2008, Cynthia Chin spoke to the plaintiff at around 4.59pm. The plaintiff then instructed the defendant to place a "Limit Order" to sell AUD 10,000,000 for CHF at the AUD/CHF exchange rate of 0.8413 for the purpose of reducing the shortfall. This was acknowledged by the plaintiff under cross-examination:

Q: This is the phone conversation we were just looking at paragraph 107. Having done the calculation, Cynthia calls you at 4.59pm and tells you that liquidating AUD8 million would reduce your shortfall by about USD430,000 correct?

A: Yes.

Q: Then you say that at paragraph 108, you actually told Cynthia that you wanted to place a limit order to sell Australian dollars for Swiss franc, correct?

A: Yes.

Q: And not a spot trade, correct?

A: Correct.

Q: So, then you discuss, and Cynthia tells you that the Australian dollar, Swiss franc exchange rate was 0.8219 at present, and hit a high of 0.8309 that day.

A: Yes.

Q: Then you place a limit order to sell 10 million Australian dollars for Swiss franc, at the exchange rate of 0.8413, which would expire on 8 October 2008 at 5.00pm, correct?

A: Yes.

Q: *And basically you were doing these things, Mr Lam, to, in a way, trade yourself out of the account shortfall correct?*

A: *Yeah*.

[emphasis added]

(c) Similarly on 8 October 2008 after receipt of the fax from the defendant, Cynthia Chin again spoke to the plaintiff and received instructions to place a "Limit Order" to sell NZD for JPY with a view to resolving the shortfall.

Q: (a) is sell NZD10 million for Japanese yen and then sell another 10 million Japanese yen at this other rate. There are two different rates?

A: Yes.

Q: There were limit orders, not spot transactions; right?

A: That's correct.

Q: *So it's correct for me to say, Mr Lam, that you were taking all these steps to reduce your account shortfall; right?*

A: *Yeah*

Q: The bank could have closed you out immediately on 8 October, but they let you carry out these trades so that you can try to reduce your account shortfall; correct?

A: The bank would have served me a formal notice and closed my accounts, yeah.

Q: Mr Lam, whether the bank needs to serve you a formal notice, we will come to that and I can refer to that in the submissions later as to what the service agreement says.

A: Okay.

Q: *But my point is, instead of closing you out immediately, on 8 October the bank was allowing you to do these standing or limit orders for you to try to reduce your shortfall; correct?*

A: *Yeah*.

[emphasis added]

(d) While the defendant may not have expressly informed the plaintiff to clear the margin shortfall, by the plaintiff's own conduct, he was left in no doubt that his account was in margin shortfall on 7 and 8 October 2008 and that he was required to take steps and in fact took steps with a view to clearing the shortfall by trading himself out of it. After all, the plaintiff was a seasoned FX investor. He knew exactly what he was required to do when his account fell into margin shortfall.

(e) The validity of the margin call must be determined at the time when it was made. On 7 October 2008 when the defendant sent the fax, there was no doubt that the plaintiff's Advisory Account was in margin shortfall of USD 610,000. The fact that the shortfall resolved itself later in the day at 3.28pm did not change the fact that it was a valid margin call when it was made.

24 Based on the evidence, I find that the defendant made a valid margin call on 7 October 2008 when the plaintiff was informed that his account was in margin shortfall to the tune of USD 610,000. A s the margin shortfall deteriorated further, the defendant made further margin calls on 8 and 10 October 2008. The plaintiff knew he was required to clear the margin shortfall but unsuccessfully tried to resolve it with his "Limit Orders". On this finding alone, the plaintiff's claim must fail irrespective of whether cl 2.6 of the Master Agreement or the 48-hour grace period was applicable.

Whether the transactions were governed by the Master Agreement

25 For completeness I shall also examine the plaintiff's case assuming that the only valid margin call was made on 10 October 2008. In this regard, it is relevant to consider whether the margin call of 10 October 2008 was made in breach of cl 2.6 of the Master Agreement.

26 The Master Agreement, together with the Service Agreement and the Security Agreement, were all signed by the plaintiff on 28 November 2007 when he opened the Advisory Account and the FX Gem Account with the defendant. There is no dispute that the FX positions which were closed out by the defendant on 10 October 2008 were under the Advisory Account.

27 The defendant denied that the Master Agreement applied to transactions under the Advisory Account. The defendant submitted that the Master Agreement only applied to options and derivatives trading under the FX Gem Account where the defendant was a counterparty to the plaintiff in the transactions.

Cl 9 of the Master Agreement defined the transactions which are governed by the agreement:

9. TRANSACTIONS UNDER THIS AGREEMENT

The bank and the Counterparty may enter into such Transactions under this Agreement as they may from time to time determine. Such Transactions include, without limitation, the following:

(a) FX Transactions and Currency Option Transactions

The definitions and provisions contained in the 1998 FX and Currency Option Definitions (as published by the International Swaps and Derivatives Association, Inc. the Emerging Markets Traders Association and the Foreign Exchange Committee), as revised, amended, supplemented or replaced from time to time (the "FX and Currency Definitions"), shall be incorporated into any Transaction specified to be an FX Transaction or a Currency Option Transaction in the relevant Confirmation.

(b) Equity Option and Equity Swap Transactions

The definitions and provisions contained in the 2002 Equity Derivatives Definitions (as published by the International Swaps and Derivatives Association, Inc.) as revised, amended, supplemented or replaced from time to time (the "Equity Derivatives Definitions"), shall be incorporated into any Transaction specified to be an Equity Option Transaction or Equity Swap Transaction in the relevant Confirmation.

(c) Swap Transactions

The definitions and provisions contained in the 2000 ISDA Definitions (as published by the International Swaps and Derivatives Association, Inc.) as revised, amendment, supplemented or replaced from time to time (the "2000 ISDA Definitions") shall be incorporated into any Transaction specified to be a Swap Transaction in the relevant Confirmation.

(d) Other Transactions

The parties may enter into such other Transactions apart from those specified in sub-Clauses (a) to (c) above, and which may incorporate such other definitions and provisions, as may be further described in the relevant Confirmation.

The FX and Currency Definitions, the Equity Derivatives Definitions, the 2000 ISDA Definitions and such other definitions and provisions referred to in sub-Clause (d) shall together be known as the "Product Specific Definitions". In the event of any inconsistency between the Product Specific Definitions and the provisions of the Confirmation, the Confirmation will prevail. [emphasis added]

28 The defendant submitted that for transactions under the Advisory Account, the defendant was not the counterparty to the plaintiff and therefore the Master Agreement did not apply to those

transactions. Furthermore, Cynthia Chin testified that if the plaintiff did not wish to engage in options and derivatives, there would be no necessity to sign the Master Agreement. This was not challenged by the plaintiff.

29 On the other hand, the plaintiff correctly submitted that the applicability of the Master Agreement is not dependent on the type of account but rather the type of transaction.

30 It appears to me that the defendant's submission is neither supported by the terms of the Master Agreement nor by its own conduct:

(a) Clause 10 of the Master Agreement specifically stipulated that the Master Agreement shall apply to all Derivatives Transactions. The Master Agreement is not restricted only to transactions under the FX Gem Account. Cl 10 provides, *inter alia*, as follows:

> Upon the execution of this Agreement and unless the parties to this Agreement otherwise agree in writing by specific reference to this Agreement that this provision does not apply, all Derivatives Transactions (as defined below) then outstanding, or which may be entered into thereafter, between the Counterparty and the Singapore branch and/or Hong Kong branch (as the case may be) of the Bank including, without limitation, any transactions entered into *pursuant to the Bank's Collateralised Trading Agreement*, ISDA Master Agreement *and/or any other agreement* are deemed to be Transactions governed by this Agreement and any confirmation or other confirming evidence of the Transaction shall be deemed to be a Confirmation. *"Derivatives Transaction" means any transaction* (including an agreement with respect thereto) which is a rate swap transaction, a swap option, basis swap, forward rate transaction, commodity swap, commodity option, equity or equity index swap, equity or equity index option, bond option, interest rate option, *foreign exchange transaction* … or other financial instrument or interest, or any other similar transaction (including any option with respect to any of these transactions) and any combination of these transactions.
>
> [emphasis added]

Under cl 10, the Master Agreement applied to "any transactions entered into pursuant to the Bank's Collaterised Agreement…and/or any other agreement". This would include the Service and Security Agreements. Furthermore, it expressly applied to any "Derivatives Transaction" which by definition in cl 10 would include any foreign exchange transaction.

(b) Even if there is some ambiguity as to whether the foreign exchange transactions referred to in the definition of "Derivatives Transaction" under clause 10 should be confined to derivatives involving foreign exchange, counsel for the plaintiff helpfully pointed out that the standard form draft board resolution for corporate clients who wish to enter into the Master Agreement clearly contemplates that foreign exchange transactions are distinct from derivatives:

> (2) That *all foreign exchange and/or derivative transactions* entered or to be entered into by the Company with the Bank shall be governed by and subject to the terms and conditions set out in the Master Agreement
>
> [emphasis added]

It is therefore not restricted to only FX options or derivatives as alleged by the defendant.

(c) FX transaction is not specifically defined in the Master Agreement. Unless otherwise stated, it should be given its ordinary meaning and should encompass any transaction involving foreign currencies. The principal activity of the plaintiff under the Advisory Account was "Carry Trade Investment Strategy". The plaintiff's deposits with the defendant were in Australian Dollars ("AUD"), NZD, and USD. His loan currencies with the defendant were JPY and CHF. In the absence of a contrary definition, I accept the plaintiff's submission that his deposits and loans in foreign currencies with the defendant would amount to FX transactions within the meaning of cl 10 of the Master Agreement.

(d) From the evidence, it is clear that in managing his "Carry Trade Investment Strategy", the plaintiff would place "Limit Orders" with the defendant to sell various currencies at specific exchange rates for other currencies to pay down the loan currencies. This is a clear characteristic of an FX transaction.

(e) The defendant has also brought a counterclaim against the plaintiff in this action for losses arising from the FX positions which were closed by the defendant on 10 October 2008 under the Advisory Account. In bringing the counterclaim, the defendant had in effect treated the plaintiff as the counterparty in respect of the margin call transactions.

(f) Finally and perhaps most significantly, the defendant in its letter dated 10 October 2008 referred to both the Master Agreement and the Service Agreement in requiring the plaintiff to take immediate steps to restore the margin shortfall. By a subsequent letter dated 13 October 2008, the defendant also referred to the Master Agreement and the Service Agreement when it informed the plaintiff that it had closed the plaintiff's FX positions on 10 October 2008. The defendant has not provided any explanation to reconcile their reliance on the Master Agreement in their letters dated 10 and 13 October 2008 with their submission that the Master Agreement was not applicable to the transactions under the Advisory Account. No evidence was led by the defendant to explain away their reference to the Master Agreement in the two letters.

31 It may well be that the plaintiff was not required to sign the Master Agreement if he did not wish to engage in options or derivatives trading. However, the undeniable fact remains that the defendant did require the plaintiff to sign and it was so signed. Furthermore, it provides no explanation for the defendant's own reliance on the Master Agreement in the two letters to the plaintiff in respect of the FX positions under the Advisory Account.

32 In these circumstances, it was hardly surprising when counsel for the defendant acknowledged the sheer all encompassing width of the Master Agreement in his Opening:

> [T]hat *if you read clauses 9 and 10, it's so wide in its usual manner that it can include all sorts of things*
>
> [emphasis added]

Did cl 2.6 of the Master Agreement apply to the margin calls

33 Cl 2.6 provides as follows:

> 2.6 The Bank shall at its absolute discretion prescribe the amount of margin or collateral that the Counterparty or any Credit Support Provider must provide to the Bank in order to secure the Counterparty's obligations to the Bank under the Transactions, and may from time to time amend or add to such margin or collateral requirements. Such margin or collateral requirements may be notified by the Bank to the Counterparty in writing or verbally. *If the Bank shall for any reason*

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

The plaintiff maintained that cl 2.6 was applicable to the margin call since the Master Agreement applied to all FX transactions. However, that alone does not inexorably lead to the conclusion that the margin call made by the defendant on 10 October 2008 was necessarily governed by cl 2.6.

34 To understand the purport of cl 2.6, a close examination of the clause is essential:

> (a) It entitled the defendant to require the plaintiff to deliver additional collateral if the defendant should deem for any reason that the existing collateral was insufficient.
>
> (b) The entitlement to require additional collateral was to cover present or future obligations of the plaintiff to the defendant.
>
> (c) The one business day notice was for the plaintiff to deliver additional collateral of a type and in an amount as required by the defendant.
>
> (d) Failure to deliver the additional collateral would constitute an event of default which would entitle the defendant to terminate all of the plaintiff's transactions at its discretion without further notice.

35 On the face of cl 2.6, the defendant was entitled to require the plaintiff to deliver additional collateral even if the account was not in a margin shortfall. This is clear from cl 2.6 which entitled the defendant to require the plaintiff to bring in additional collateral if the defendant should deem that the existing collateral was insufficient for whatever reason. Furthermore, the fact that the additional collateral to be delivered is to satisfy future obligations lends support to the construction that cl 2.6 is applicable even if the account is not in margin shortfall. When cl 2.6 was dissected in this manner, counsel for the plaintiff candidly accepted that cl 2.6 would apply even when the account was not in margin shortfall.

36 It follows that when the plaintiff's account fell into margin shortfall between 7 and 10 October 2008, there was no necessity for the defendant to rely on cl 2.6. It is important to recognise that cl 2.6 is not designed to give the plaintiff time before the defendant could close the FX positions when the account is in margin shortfall. Instead, cl 2.6 confers a right on the defendant to require the plaintiff to deliver additional collateral in such an amount if the defendant so requires. The one business day notice only comes into play if the defendant should decide to invoke cl 2.6 and not

otherwise. Counsel for the plaintiff submitted that while cl 2.6 would apply even if the account was not in margin shortfall, it is nevertheless wide enough to cover a situation when the account was in such shortfall.

37 The defendant submitted that it was contractually entitled to close out the plaintiff's FX positions under the Advisory Account at any time and without notice. The defendant relied, *inter alia*, on the Service Agreement which provides as follows:

> Credit banking and foreign exchange facilities
>
> 1. We may (but need not) grant you credit banking and foreign exchange facilities ("Facilities") in accordance with the terms of this Service Agreement and other terms as may be agreed. All Facilities are made available on an uncommitted basis and subject to the provision of adequate collateral. We may at any time and from time to time vary, suspend or terminate any or all Facilities without prior notice. In such event, all your Liabilities under the Facilities shall become immediately due and payable.
>
> 2. Any payment relating to the Facilities not made when due shall bear interest at such rate as we may reasonably determine. Such interest shall accrue and be calculated daily from and including the due date until but excluding the actual payment date. Such interest may be capitalised by us monthly, and itself bear interest.
>
> 3. We have the right to determine the total value of collateral we consider acceptable ("Collateral Value").
>
> 4. We may assign a lower Collateral Value to collateral denominated in currencies different from the currencies of our exposure to you to take into account our currency exchange rate risk.
>
> 5. The Collateral Value must not be less than 100% of the Total Exposure [as defined below] at any time…
>
> 6. If at any time, the Collateral Value is less than 100% of the Total Exposure, we may exercise our Rights on Termination. We may (but need not) allow you time to restore the Collateral Value to more than 100% of the Total Exposure.

38 It is clear that under the Service Agreement, the plaintiff was required to ensure that the Collateral Value, which is the value of the plaintiff's collateral as determined by the defendant, must not be less than 100% of his Total Exposure and if it is less than the requisite 100%, the defendant may terminate the transactions under the Advisory Account without providing any time to the plaintiff to restore the shortfall. This was not only undisputed by the plaintiff but was admitted to be so in his AEIC and under cross-examination.

39 Although the defendant's letter dated 10 October 2008 referred to both the Master Agreement and the Service Agreement, it is clear from the language of the letter that the defendant's notice to the plaintiff to clear the shortfall (not to deliver any specific additional collateral) was made pursuant to the Service Agreement:

> (a) It specifically referred to the requirement for the plaintiff "to maintain the value of the Collateral pledged to us at not less than 100% of your Total Exposure to us". This mirrors the requirement under cl 5 (Credit banking and foreign exchange facilities) of the Service Agreement.

(b) Clause 2.6 would apply in a situation when the defendant invokes the right to direct the plaintiff to deliver additional collateral of a type acceptable and in an amount required by the defendant. Not only was cl 2.6 not referred to, the letter did not specify any amount which the plaintiff was required to deliver. It merely required the plaintiff to clear the shortfall by either providing additional collateral or reducing his Total Exposure to the defendant.

40 On 10 October 2008, the plaintiff's margin shortfall reached a critical level. His account was then in negative equity of about USD 1,054,612.74. This meant that if all the plaintiff's foreign currency deposits were liquidated, the proceeds would be insufficient to repay the plaintiff's foreign currency loans which he owed to the defendant. In other words, on 10 October 2008, the defendant's ability to recover their foreign currency loans from the plaintiff was at risk. This is to be contrasted with the plaintiff's margin shortfall between 7 and 9 October 2008 which were still in positive equity. Although it is not disputed that the defendant did not have additional rights when the account fell into negative equity, it does not alter the fact that the defendant was entitled to close out the plaintiff's FX positions on 10 October 2008 without giving time to the plaintiff since his account had been in margin shortfall since 7 October 2008, be it negative or positive equity.

41 Accordingly, on a true construction of cl 2.6 read together with the defendant's letter of 10 October 2008, I find that none of the margin calls including the letter of 10 October 2008 was governed by cl 2.6 of the Master Agreement. In this connection, it should be recalled that cl 2.6 was originally pleaded by the plaintiff's previous solicitors to the effect that he should have been given one business day to clear the margin shortfall. It was then deleted by way of an amendment in February 2009. However, it was restored by way of a further amendment on the first day of the trial by his current solicitors. Under cross-examination, the plaintiff was not able to provide any coherent explanation for his inexplicable "about-turns" on the applicability of cl 2.6.

Clause 2.6 would not have assisted the plaintiff in any event

42 As I have already found that cl 2.6 did not govern any of the margin calls, it is strictly not necessary to deal with this issue. However, even if cl 2.6 was held to have been applicable, it would not have changed the outcome.

43 Under cl 2.6, time begins to run when the defendant requires the plaintiff to deliver additional collateral in an amount required by the defendant. It is important to note that the one business day under cl 2.6 is intended for a specific purpose i.e. time to deliver the required additional collateral. The time allowed under cl 2.6 was not to prevent the defendant from closing out the FX positions prior to the expiry of the one business day notice. While the defendant did inform the plaintiff of the shortfall and that he was required to clear it, it did not expressly direct the plaintiff to deliver any specific additional collateral. It was for the plaintiff to clear the shortfall which could be achieved by either delivering additional collateral or by reducing his Total Exposure. The choice was the plaintiff's. He elected to reduce his Total Exposure with his "Limit Orders" but they were insufficient to do so. In fact, the shortfall deteriorated significantly in spite of the "Limit Orders".

44 The plaintiff was in fact given more than one business day to deliver additional collateral. Assuming that the margin call was only made on 10 October 2008 as alleged by the plaintiff and taking his case at its highest, it is not disputed that after the plaintiff received the letter of 10 October 2008, Cynthia Chin informed him that the defendant would allow him to deliver additional collateral by the following Tuesday on 14 October 2008 if he could provide a commitment that he would do so:

CYNTHIA:	So, so now it's negative, I calculated and calculated, it's already about 1 million.
DAVID:	Wah! Go to this extent already huh?
CYNTHIA:	Yes, yes, the Yen is really very strong, so, nah, have this type of – nah, actually our er, credit –
DAVID:	Yes.
CYNTHIA:	– he is okay, he does not – does not require it to be closed off.
DAVID:	Yes.
CYNTHIA:	He requires that if it can be done –
DAVID:	Yes.
CYNTHIA:	– to remit to cover, *then we can wait until next Tuesday then come and – come and close off slowly. So their policy is not to close off straightaway, as long as you, okay, give a commitment (to) remit how much, then we will hold it lor*.
DAVID:	"*Orh, now it is not possible* because now my those – my those er, BOC those now it's also – there is er, 3 over million US dollar, plus 700 plus (clear the throat) 3 over million Kiwi everything have been remitted to you already, right?

[emphasis added]

In this way, the plaintiff was effectively granted more than two business days to deliver the additional collateral. The fact that the extension of time was conditional on the plaintiff's commitment did not alter the fact that it was an extension nonetheless. After all, the one business day notice under cl 2.6 was to enable the plaintiff to deliver the additional collateral. If the plaintiff's intention was to use the one business day to deliver additional collateral, there would be no sensible reason for him not to give the commitment. It was not unreasonable for the defendant to enquire whether the plaintiff had any intention to do so. The plaintiff could well have given the commitment to the defendant but to his credit, he testified that he would only have done so if he was "hundred per cent sure" that he could deliver the additional collateral. Since the plaintiff knew that he would not be able to do so, the commitment was not provided to the defendant.

45 Finally, the one business day notice under cl 2.6 was to allow the plaintiff time to provide the additional collateral. By his own evidence, he confirmed that he was unwilling and/or unable to do so even if the time was extended to 14 October 2008. This was admitted by the plaintiff under cross-examination:

Cross-Examination of David Lam

Q: On 10 October 2008, three days later, with a US$5.4 million shortfall, the bank is asking you nicely, please put in some monies to give them some assurance; right?

A: Yes.

Q: *Your response is very clear. You don't have money; right?*

A: *Yes*.

Q: *Even if you do have money, you are not going to put it in because every account is like an independent ship; correct?*

A: Yes.

[emphasis added]

46 The plaintiff was reluctant to top up his collateral because in his view the fresh collateral would be "doomed too":

CYNTHIA:	Then is there a chance to say remit a bit---
DAVID:	No, because now the---the situation no matter how much I bring in, it will be doomed also, right? Can only do it in this way first, then in future---

47 In the light of the evidence, there was no breach of cl 2.6 by the defendant even if it had applied. Ultimately the one business day notice was to give the plaintiff time to deliver the additional collateral. From the evidence, it is clear that the plaintiff had categorically informed the defendant in no uncertain terms that he did not require the time to do so.

The 48-hour grace period

48 As I have already determined that a valid margin call was made on 7 October 2008, proof of promise to extend a 48-hour grace period to the plaintiff would have been inconsequential. As submissions were made by both parties, I shall deal with this issue nonetheless.

Promissory Estoppel

49 The plaintiff relies on promissory estoppel to preclude the defendant from relying on the terms of the Service Agreement to close out the plaintiff's FX positions without notice.

50 Counsel for the defendant submitted that three elements must be satisfied to raise the defence of promissory estoppel:

(a) a promise or representation;

(b) reliance; and

(c) detriment.

The Court of Appeal decision of *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 ("*United Overseas Bank Ltd*") was cited in support.

51 Counsel for the plaintiff, however, submitted that for promissory estoppel, it is strictly not

necessary to prove detriment. It is sufficient for the plaintiff to prove that it would be inequitable to allow the defendant to act in a manner inconsistent with the promise: see *Chitty on Contracts* vol 1 (Thomson Reuters (Legal) Limited, 30th Ed, 2008), para 3–094 cited with approval in *Abdul Jalil bin Ahmad bin Talib and Others v A Formation Construction Pte Ltd* [2006] 4 SLR 778 at [43] and [44] (*"Abdul Jalil"*). In *Abdul Jalil*, Prakash J held:

> As for the third element, there has been some discussion as to whether there must be "detriment" suffered by the debtor before the creditor is estopped from going back on his promise. In this respect, *Chitty on Contracts* ([42] *supra*) at para 3–135, asserts that *the better view is that detriment of the kind required for the purpose of estoppel by representation is not an essential requirement and all that is necessary is that the promisee should have acted in reliance on the promise in such a way as to make in inequitable to allow the promisor to act inconsistently with it*. *Chitty on Contracts* also states that by making the payment, a debtor would act in reliance on the creditor's promise and so make it *prima facie* inequitable for the creditor to peremptorily go back on his promise.
>
> [emphasis added]

The Court of Appeal upheld her decision (judgment reported at [2007] 3 SLR(R) 592) but on the issue of detriment, it left the question open when it observed:

> In this appeal, counsel for the appellants has not challenged the correctness of the Judge's ruling on the third condition. It is therefore not necessary for us to enter into this controversy without the benefit of arguments to the contrary.

52 The leading case referred to by *Chitty on Contracts* (30th Ed) para 3–094 for the proposition that the doctrine can apply in the absence of detriment is *W J Alan & Co Ltd v E L Nasr Export & Import Co* [1972] 2 QB 189 at 213 ("*W J Alan*"). In *W J Alan*, the sellers agreed to sell two lots of coffee FOB Mombasa at the price of "shs262/-...per cwt". At that time, Kenya shilling and sterling shilling were of equal value. The buyers opened an irrevocable letter of credit ("L/C") in sterling shilling for the first shipment which the sellers accepted. When the cargo of coffee was loaded for the second shipment, the sterling devalued. The sellers rejected the L/C for the second shipment on the ground that Kenya shilling was the currency of account for the contracts. The buyers, however, claimed that their payment obligation had been discharged because the currency of account was sterling and even if it was Kenya shilling, the sellers had agreed to vary and/or waive the payment term by accepting sterling. The Court of Appeal in *W J Alan* held that the sellers by accepting payment under a sterling L/C had irrevocably waived their right to receive payment in Kenyan currency. Waiver and promissory estoppel were treated in the same vein. The following passage from the judgment of Lord Denning in *W J Alan* is often cited in support of the proposition that detriment is not essential for promissory estoppel:

> A seller may, by his conduct, lead the buyer to believe that he is not insisting on the stipulated time for exercising an option: *Bruner v. Moore* [1904] 1 Ch. 305. A buyer may, by requesting delivery, lead the seller to believe that he is not insisting on the contractual time for delivery: *Charles Rickards Ltd. v. Oppenhaim* [1950] 1 K.B. 616, 621. A seller may, by his conduct, lead the buyer to believe that he will not insist on a confirmed letter of credit: *Plasticmoda* [1952] 1 Lloyd's Rep. 527, but will accept an unconfirmed one instead: *Panoustsos v. Raymond Hadley Corporation of New York* [1917] 2 K.B. 473; *Enrico Furst & Co. v. W. E. Fischer* [1960] 2 Lloyd's Rep. 340. A seller may accept a less sum for his goods than the contracted price, thus inducing him to believe that he will not enforce payment of the balance: *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130 and D. & C. *Builders Ltd. v. Rees* [1966] 2 Q.B.

617, 624. *In none of these cases does the party who acts on the belief suffer any detriment. It is not a detriment, but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless, he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it*.

[emphasis added]

53 In *W J Alan*, the buyers had relied on the sellers' implied promise that he could pay in sterling shilling. Consequently, the buyers did not purchase Kenya shilling prior to the devaluation. In a sense, the buyers would have suffered a "detriment" if the sellers were permitted to go back on their promise since they would have to purchase Kenya shilling at a higher exchange rate. Lord Denning sought to reconcile the previous decisions on the basis that the parties in those cases did not suffer any detriment but were instead deprived of the benefit if the promisor was permitted to resile from his promise. It has been commented that Lord Denning was using the word "detriment" in the narrow sense of either incurring a liability or an expenditure: see Spencer Bower, *The Law Relating to Estoppel by Representation* (LexisNexis UK,4th Ed, 2004) ("Bower") at p 481, para XIV.2.41.

54 *W J Alan* was referred to by Grimberg JC in *Fu Loong Lithographer Pte Ltd v Mun Hean Realty Pte Ltd* [1989] 1 SLR(R) 194 at 204. The learned Judicial Commissioner observed that there has been "a divergence of judicial opinion as to whether the alteration in the position of the party seeking to set up estoppel need result in detriment to him". After referring to Spencer Bower & Turner, the learned Judicial Commissioner equated detriment to mean "injustice to the promisee which would result if the promisor were allowed to recede from his promise".

55 The principal reason for the divergence of judicial and academic opinion about the requirement to establish a detriment is because the term "detriment" has not been used consistently: see Bower at p 481. It has been used to describe:

(a) Expenditure of money and time

In *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532, the court held that the plaintiff was estopped from relying on the correct version of the arbitration clause because the defendant had commenced arbitration proceedings under the ICC Rules and had paid the sum of US$30,000 to the ICC based on an outdated version of the general conditions which was provided by the plaintiff. The court found that the payment of the US$30,000 constituted "detriment". Similarly in *Hartley v Hymans* [1920] 3 KB 475, the buyer was found to be estopped from exercising his right to terminate because by his conduct he had led the seller to believe that the contract was still valid (even though the delay would have justified termination) and the seller had incurred expenditure in preparation for future deliveries.

(b) Incurring a liability

In *Fenner v Blake* [1900] 1 QB 426, the tenant represented to the landlord that he wanted to vacate the premises midway during the tenancy. Relying on the representation, the landlord sold the premises to a third party. The tenant subsequently refused to vacate the premises and claimed there was no consideration for his promise to quit the premises. The court had no hesitation in finding that the tenant was estopped from resiling from his promise to vacate the premises because the landlord had incurred a liability in relying on the tenant's promise by entering into the sale and purchase agreement for the premises. In so doing, the landlord had rendered himself liable to an action at the suit of the purchaser if he was unable to provide vacant possession.

(c) Change of position

The *locus classicus* of this species of detriment is none other than *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 ("*Hughes*"). In that case, the owner of the freehold gave six months notice to the lessee to repair the premises. The lessee, however, made an offer to purchase the owner's leasehold interest. Unfortunately, the negotiations which went on for some time did not result in the sale whereupon the owner gave the lessee notice of ejectment for failing to complete the repairs on time. The court found that the owner was estopped from enforcing its strict legal rights because the lessee had changed his position by relying on the owner's implied promise that he would not be required to repair the premises while the negotiations were underway.

(d) Deprivation of benefit

This has already been covered in *W J Alan* in para 52–53 above. In *W J Alan*, the buyers through the sellers' conduct was led to believe that payment could be made in sterling shilling. The court found that the sellers had irrevocably waived the right to receive payment in Kenyan currency. If the sellers were permitted to withdraw from the promise, the buyers would be deprived of the benefit to pay in sterling shilling which by that time had devalued against Kenya shilling.

56 Expenditure of money/time and incurring a liability have often been described as "detriment" in the narrow sense because in both these situations, the promisee *had already* suffered the "detriment" in reliance on the promise. However as for change of position and deprivation of benefit, the promisee *would only* suffer the "detriment" if the promisor is permitted to resile from his promise. This is commonly described as "detriment" in the broader sense.

57 In my view, it will not be helpful to attach labels to properly characterise "detriment". The overarching principle in each of these categories is that the doctrine has consistently been held to apply in circumstances when it was inequitable either in the narrow or broader sense of "detriment" for the promisor to resile from his promise and to enforce his strict legal rights. This was after all the foundation of the doctrine as developed in *Hughe*s:

> if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, *the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties* - per Lord Cairns at 448 [emphasis added]

58 Accordingly, I will examine whether, on the facts of the present case, it would be inequitable for the defendant to enforce its strict legal rights under the Service Agreement if the plaintiff was in fact promised a 48-hour grace period to respond to the margin call.

59 Curiously, in spite of the submission by the plaintiff's counsel that there is no requirement to prove detriment, in the Reply and Defence to Counterclaim the plaintiff alleged that he had suffered detriment:

> c. The Plaintiff *suffered detriment* when the Defendant reneged on this promise/agreement as the Plaintiff was denied more time to restore the alleged Shortfall and the benefit of more favourable exchange rates anticipated by the Plaintiff to be the result of the G7 meeting which

was to take place over the weekend on11 to 12 October 2008. The Plaintiff reiterate that paragraph 14B(b) of the Statement of Claim (Amendment No. 2) and says that as at 13 October 2008, there would not have been any alleged Shortfall. [emphasis added]

60 Before analysing each of the three elements, I should perhaps first deal with the defendant's submission that the defence only applies "as a shield and not a sword". The plaintiff's reliance on the doctrine was to preclude the defendant from relying on their contractual right to close out without notice under the Service Agreement. Viewed in this way, there can be no dispute that it was indeed raised as a "shield".

Was the promise made

61 The plaintiff claimed that he was promised by the defendant's managing director, Mr Torsten Linke ("Mr Linke") some time in July 2008 that the defendant would grant him a 48-hour grace period to "respond to a margin call". According to the plaintiff, he was extended the preferential term of a 48-hour grace period because he was regarded as an important client of the defendant. This accords with the defendant's call report dated 8 May 2008 in which the plaintiff was described as a "key client" of the defendant when he first met Mr Linke. Given the size of the plaintiff's deposits and his loans with the defendant, he would indeed be aptly described as a "key" or "important" client of the defendant. This is also in line with the fact that the plaintiff was granted other preferential terms by the defendant such as attractive loan spread and deposit rates.

62 I accept the plaintiff's submission that the promise was made:

(a) Although the 48-hour grace period was specifically pleaded and asserted in the plaintiff's AEIC, the plaintiff was not challenged on this point in cross-examination. In para 33 of the plaintiff's AEIC, he asserts, *inter alia*, as follows:

> I was surprised by the unreasonably short deadline that the Defendant gave me which contradicted what the Defendant represented to me and agreed that I would be given the 48-Hour Grace Period to do so. I recalled that in or about July 2008, in an official meeting in the defendant's office with the Defendant's senior officers, Mr. Torsten Linke ("Linke"), managing director, in the presence of Ms Chin and 3 other senior officers (2 directors and 1 senior vice present) *(sic)* of the Defendant, Linke promised me that the Defendant would grant me a grace period of 48-hour to respond. It should be noted that the said 48-hour grace period was not a conditional grace period (namely, no need to undertake or promise to remit funds).

The rule in *Browne v Dunn* (1896) 6 R 67 would preclude the defendant from submitting otherwise. See also *Britestone Pte Ltd v Smith Associates Far East Ltd* [2007] 4 SLR(R) 855 at [17].

(b) The plaintiff also referred to the promise of the 48-hour grace period during his conversations with Cynthia Chin on 8 and 10 October 2008. Clearly the promise was not a fiction of the plaintiff's imagination or a "fabrication" as alleged by the defendant:

DAVID:	Isn't it at that time you all said I have 48 hours of–
CYNTHIA:	Yes.
DAVID:	-- grace period mah?

CYNTHIA: Yes.

(c) This was admitted as much by Cynthia Chin under cross-examination though she sought to make an irrelevant distinction between granting and promising the 48-hour grace period to respond to a margin call:

Q. Yes, and you agreed that there was this 48-hour grace period, right?

A. That's right.

Q. He says:

"Then okay, that means to say you give me 48-hours for me to reply, correct?"

…

Let's stick just to the 48-hour grace period. You confirmed that Mr Lam is entitled to a 48-hour grace period for a margin call; right? In this conversation."

A. It was an indulgence that the bank granted to Mr Lam on 48 hours.

Q. Yes, but it was granted, right, Ms Chin?

A. Granted at which point in time, but I don't understand.

Q. Let's not talk about the point in time, but Mr Lam was granted a 48-hour grace period by the bank; right?

A. In the past.

Q. In the past?

A. Yeah, I mean the past few days.

Q. Yes, in the past – as in the bank promised him a 48-grace period to respond to a margin call; right, Ms Chin?

A. The bank did not promise, but the bank granted or indulged him by granting him 48 hours to respond to the margin call.

(d) The defendant did not call Mr Linke to rebut the plaintiff's case. No explanation was furnished by the defendant for not calling Mr Linke. In these circumstances, the court is entitled to draw an adverse inference that his evidence would not be favourable to the plaintiff on this issue: see *Teng Ah Kow & Anor v Ho Sek Chiu & Others* [1993] 3 SLR(R) 43.

Was it inequitable for the defendant to enforce its strict legal rights – Detrimental Reliance

63 The burden of proving detrimental reliance remains throughout on the party raising the estoppel. In this connection, the plaintiff alleged:

(a) that he relied on the promise and cancelled his plans to remit deposits to other banks and in fact remitted additional funds to his account with the defendant on 12 September 2008; and

(b) that he suffered "detriment" in that he was denied more time to restore the margin shortfall and the benefit of anticipated favourable exchange rate over the weekend of 11 and 12 October 2008.

64 The inquiry is not simply whether the plaintiff had relied on the promise but whether the reliance had rendered it inequitable for the defendant to go back on its promise and to enforce its strict legal rights under the Service Agreement.

65 For promissory estoppel, the reliance must be linked to the "detriment". In the present case, I agree with the defendant's submission that there is an obvious disconnect between the pleaded reliance and the alleged detriment. The plaintiff alleged that he remitted additional funds to the defendant some two to three months after the promise. However, the plaintiff is not alleging that he suffered detriment in transferring the additional funds. It was for the plaintiff to decide how and what he wished to do with his deposits including the additional funds which were remitted in September 2008. The plaintiff instead alleged that he suffered detriment in that he was denied more time to restore the margin shortfall.

66 It is not the plaintiff's case that if the defendant had not resiled from its promise, he would have been ready, willing and able to deliver additional collateral to clear the shortfall within the 48-hour grace period. If that had been the plaintiff's case, at least there would be a causal link and a legal platform to mount a case on promissory estoppel. However, the plaintiff did not pursue his case in this manner because he knew it was against the weight of the evidence.

67 How could the plaintiff allege that it was inequitable for the defendant to enforce its rights under the Service Agreement (which has the effect of withdrawing the promise of the 48-hour grace period) given his own evidence that he was unwilling and/or unable to do so even if the grace period was extended to 72 hours up to 14 October 2008. The truth is the plaintiff was given time to respond. His response was clear and unequivocal:

> Q: Your response is very clear. You don't have money; right?
>
> A: Yes.
>
> Q: Even if you do have money, you are not going to put it in because every account is like an independent ship; correct?
>
> A: Yes.
>
> [emphasis in bold]

68 The plaintiff was aware and accepted that the defendant was indeed entitled to close his FX positions on 10 October 2008:

> *Q*: *Otherwise, if the bank wants to lose off, then go ahead?*
>
> *A*: *Yes*.

Q: *Close off everything, then go ahead; right?*

A: *Yeah, that's what I told them. Yeah*.

[emphasis added]

69 Having accepted that the defendant was entitled to close his FX positions on 10 October 2008 and the positions were in fact closed on 10 October 2008, it would in fact be unfair for the plaintiff to now raise promissory estoppel to challenge the validity of the margin call transactions. This is all the more so on the facts of this case since it is the plaintiff's own evidence that the right to close out had accrued on 7 October 2008 and that the defendant should have done so some three days earlier. Accordingly on the evidence before me, I find that it was not inequitable for the plaintiff to rely on the terms of the Service Agreement to close out the plaintiff's FX positions on 10 October 2008.

Counterclaim

70 Following the closing out of the plaintiff's FX positions under the Advisory Account on 10 October 2008, a balance sum of USD 1,135,239.43 is due and owing by the plaintiff to the defendant.

71 Counsel for the plaintiff accepts that if the defendant had the right to close out the FX positions under the Advisory Account on 10 October 2008, it follows that the defendant's counterclaim must be allowed and I so order.

Conclusion

72 Although the action started with several pleaded causes of action, when the present counsel for the plaintiff took over conduct, he elected to focus on what he perceived to be the plaintiff's "best shot". This was probably a sensible approach. However, the plaintiff, despite adopting a clinical approach to his remaining case, cannot ignore the evidence before the court. In particular, he cannot disregard his own evidence that he was aware of the margin shortfall since 7 October 2008 and that the defendant's right to close out his FX positions had accrued on that day.

73 By reason of the above findings, I hold that the plaintiff's claim fails at every level. First, at the threshold level, I find that the defendant did make a valid margin call on 7 October 2008. On that ground alone, the plaintiff's claim must stand dismissed with costs. Secondly, even if the margin call was only made on 10 October 2008 and not 7 October 2008 (contrary to my finding), cl 2.6 of the Master Agreement did not govern the margin call and even if it did, it would nonetheless not have assisted the plaintiff in the light of his own unequivocal confirmation that he was unable and or unwilling to deliver additional collateral to clear the margin shortfall even if time was extended to 14 October 2008. Finally, and even though I found that the 48-hour grace period was promised to the plaintiff, the case based on promissory estoppel would suffer the same fate for the same reason given the plaintiff's confirmation that he would not have been able to deliver the additional collateral even if the grace period was extended beyond the 48-hour grace period.

74 The plaintiff's claim is therefore dismissed with costs to be taxed. The defendant's counterclaim in the sum of USD 1,135,239.43 is allowed together with interest and costs.

75 As there is some overlap between the defendant's counterclaim and the plaintiff's claim, I will only allow one set of costs to the defendant to be taxed, if not agreed.