Kim Eng Securities (Pte) Ltd v Ong Eng Poh
[2001] SGHC 18

Case Number	: Suit 1412/1999
Decision Date	: 31 January 2001
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Joseph Ang & Marina Chin (Tan Kok Quan Partnership) for the plaintiffs; Tan Cheng Han (as counsel) and Oommen Mathew (Tan Peng Chin & Partners) for the defendants
Parties	: Kim Eng Securities (Pte) Ltd — Ong Eng Poh

JUDGMENT:

Cur Adv Vult

Introduction

1. Kim Eng Securities Pte Ltd (the plaintiffs) are a company incorporated in Singapore and were/are at all material times a member of the Stock Exchange of Singapore Ltd (SES) and a dealer in securities quoted on the SES.

2. Ong Eng Poh (Ong) the defendant in Suit No. 1412 of 1999 (the first suit) and a chartered accountant by training was, at the material time, a partner with the accounting firm of Ernst & Young (EY) and was its audit manager. Ong had joined EY's predecessor Arthur Young (AY) in 1985; after its merger with Ernst & Whinney, AY became EY. While he was with AY in or about 1983, Ong had as a colleague one Charles Chua Kuan Lim (Charles) who was the firm's administration manager and later its financial controller.

3. Chu Li Fuen (Chu) the defendant in Suit No 600265 of 2000 (the second suit) is the wife of Ong while Ching Sok Gek (Ching) the defendant in Suit No 600266 of 2000 (the third suit) was secretary to Ong while he was with AY and for less than a year, after he joined EY.

The facts

4. After becoming the financial controller of AY, Charles changed jobs and profession. He became a dealer's representative (remisier) some time in 1987. In or about 1991, he joined the stockbroking firm of Lee & Company (Lee & Co) after joining and leaving two (2) other securities firms. According to Charles, while he was with Lee & Co in 1998 (which office was in the same building as AY), Ong approached him to open a trading account. Ong's version was, that it was Charles who wanted his business to which Ong's response was, if Charles wanted his business, then Charles must be prepared to grant Ong a (longer) credit period of 10 days which grace period another remisier at Lee & Co used to extend to Ong. Charles agreed to Ong's condition and the latter opened a trading account with Lee & Co. Ong traded with the firm through Charles until Charles left Lee & Co in December 1998.

5. According to Charles, when he joined the plaintiffs in January 1999, he did not inform Ong but the latter tracked him down and requested to open an account with the plaintiffs. Ong's version was, that he was told by Charles that the latter would be joining the plaintiffs and in addition to the extended 10 days' credit period, Charles offered to grant to Ong (if he became a client) an additional 2 days' credit period by not booking out any purchase of shares until the third day through the plaintiffs' 'suspense' account. Accordingly, Ong opened an account with the plaintiffs on 25 January 1999 under trading account no. 21/26/170148. Besides that account, Charles said Ong also opened a margin account no. 21/26/170221 with the plaintiffs; this was denied by Ong. Charles understood from Ong that the latter did not trade exclusively through the plaintiffs as, Ong had trading accounts

with other broking houses. This part of the testimony was confirmed by Ong.

6. In early January 1999, Ong requested Ching to open an account with the plaintiffs. Ching filled in her particulars on the plaintiffs' application form at home, signed it and handed it to Ong together with a copy of her identity card. Ong in turn handed the documents to Charles. Ong said Ching did not meet Charles or liaise with him on her account until after July 1999.

7. As he was busy with his work at EY, Ong said he relied on Charles for advice to trade. In his affidavit, Ong described Charles as a conservative broker who sometimes advised Ong against investing in counters which other stockbrokers recommended. Before May-June 1998, Ong's trading volume was low. However, as was reflected in the plaintiffs' statements of accounts produced in court, Ong's trading volume increased dramatically from about mid-1998 onwards, after he left EY in May 2000. In particular, Ong concentrated on and traded in large quantities in, a number of counters amongst which were Hotung and Labroy.

8. Some time in April 1999, Ong (who had made a huge profit on the stock market) decided to make a gift to his wife of about $250,000. Rather than give the sum to her in cash, Ong decided to buy some 'blue chip' shares in her name. To that intent and purpose, Ong (after consulting Charles) decided to buy the foreign (F) shares of Overseas Union Trust (OUT) which were apparently undervalued. Chu opened a trading account with the plaintiffs on 20 April 1999 under account no. 21/26/170281 (Chu's account) by signing the plaintiffs' account opening form at home as requested by Ong, which he then passed back to Charles together with a photocopy of Chu's identity card. Charles bought 66,000 OUT (F) shares on Ong's behalf in May 1999 and the same were deposited into Chu's Central Depository Pte Ltd (CDP) account.

9. In mid-1999 (according to Ong), Charles asked Ong for some shares to be pledged to the plaintiffs so that Ong's credit facilities could be increased. Ong acceded to the request and his credit facilities were indeed increased. To facilitate the pledge, Ong said he pre-signed blank share transfer forms to enable the plaintiffs to transfer to themselves Ong's shares in his CDP account. Ong also claimed that Charles assured him that he/the plaintiffs would not use the pre-signed forms without Ong's prior consent and authority which assurance Charles/the plaintiffs apparently breached subsequently.

10. On or about Wednesday 7 July 1999, the stock market took a sudden turn for the worse. A few days prior thereto, Ong had purchased through Charles substantial quantities of Labroy and Hotung shares which however were not booked into his but into, Chu's account and Ching's with the plaintiffs, for reasons which will be set out in the next paragraph. The stock market worsened the next day causing anxiety to Ong. However, on Friday 9 July 1999, the stock market recovered reasonably strongly and Charles advised Ong to wait until the following week to gauge the market sentiment before closing out his outstanding positions, save for those shares which Ong had bought earlier and on which he had already made a profit.

11. 600,000 Hotung shares and 200,000 Labroy shares were booked into Chu's account because, according to Ong, Charles said the plaintiffs would not allow Ong an extended credit period for those few counters he had purchased in such large quantities; it was at Charles' suggestion that those trades were booked into Chu's account. For the same reason, Ong's purchase of 600,000 Hotung shares on 8 July 2000 were booked into Ching's account. However, neither Chu nor Ching were aware of these purchases until well after their execution.

12. I should add that when he was with AY and Charles was with Lee & Co, Ong had also asked Ching to open a trading account which he used for his own trades. He explained that the nominee account was opened for 'sensitive reasons' on Charles' recommendation as Ong did not want his friends/acquaintances to know he was a substantial shareholder in certain public companies -- otherwise his name would appear in annual reports if he was one of the companies' top 20 shareholders. Hence, Ong would use Ching's account with Lee & Co to trade whenever he did not want his name to be featured. It was Ching's testimony however that only 2 small trades (in Inchcape and KepFel shares) were done by Ong on her account with Lee & Co.

13. According to Ong, he telephoned Charles on Monday 12 July 1999 to check on market conditions. He was told that the market was trading sideways and was a bit volatile. However, Charles advised Ong not to be hasty and assured him that he (Charles) would negotiate a financial arrangement for Ong with the plaintiffs just as he had done for Ong when Ong bought shares in Inchcape Marketing (Inchcape) which counter became the subject of a take-over offer. Ong alleged that Charles represented to him there would be a standstill arrangement (the standstill agreement) whereby the plaintiffs would allow Ong a

certain grace period in which to sell the shares on his outstanding positions at a higher price.

14. Ong claimed that later that same day, Charles reverted to say he had discussed the matter with the plaintiffs' finance director Ms Gee Gek Leng (Gee) who had agreed to hold Ong's outstanding positions (including those purchases which Charles had booked into the accounts of Chu and Ching) until such time as the market turned around. This claim was denied by both Charles and Gee.

15. Ong said he met Charles on Saturday 17 July 1999 and they discussed the grace period for the standstill agreement. While Ong felt that the market might rebound around end September 1999, Charles thought it would only do so at end November 1999. It was at this meeting that Charles, upon being informed by Ong that the latter would receive his 1999 profits from EY, proposed that Ong should effect an assignment to the plaintiffs of those profits; Ong agreed to assign half of his profits (after tax) provided that the plaintiffs substantiate the outstandings due from him. Charles suggested a letter of undertaking (the letter of undertaking) from Ong to that effect; Ong agreed provided that the same was not disclosed to EY as he did not want his partners there to know about his financial affairs. Ong alleged (but which was denied) that Charles agreed the letter of undertaking would not be revealed to EY; he said Charles assured him (which was also denied) that the letter of undertaking was unlikely to be called upon in any event because with the standstill arrangement, Ong should be able to realise higher prices on the shares on his outstanding positions and the sale proceeds would be sufficient to settle Ong's outstandings, together with the shares which Ong had pledged to the plaintiffs.

16. There then followed a meeting between Ong, Charles and Gee on 19 July 1999 at which the outstanding positions of Ong, Chu and Ching were discussed. Ong alleged that after the meeting, he was told by Gee and Charles that they would speak to the plaintiffs' managing-director (Ronald Ooi) to finalise the standstill agreement; this too was denied by them.

17. On 20 July 1999, Charles purportedly informed Ong that Ronald Ooi had agreed to the standstill agreement subject to three (3) conditions, namely that:-

a. Ong gave the letter of undertaking;

b. Ong signed two (2) guarantees (in terms to be prepared by the plaintiffs' solicitors) for shares bought/booked under Chu's and Ching's accounts;

c. Ong, Chu and Ching opened margin financing accounts with the plaintiffs.

18. Although Ong had misgivings on item (c) vis a vis his wife and Ching (as they were not involved in his purchase of shares under their accounts), he nevertheless brought Ching to the plaintiffs' office that same evening as requested by Charles. Upon their arrival, Ong and Ching were told by Charles that the draft guarantees were not ready and it was also not necessary for them to open margin financing accounts at that juncture. However, the draft letter of undertaking was produced and Ong noted therefrom that the terms did not accord with what he had discussed with Charles as:-

a. it did not refer to the standstill agreement;

b. it related to 100% instead of 50% of Ong's share of profits from EY and was not net of tax;

c. Ong had to notify EY if required by the plaintiffs.

Charles however advised Ong not to make any changes to the draft as they would not be accepted by the plaintiffs' lawyers. However after many discussions, Charles agreed to para c of the letter of undertaking being amended. Eventually, Ong signed the letter of undertaking on 21 July 1999.

19. At about this time (Ong alleged), Charles proposed that Ong surrender the log-book of Chu's Mercedes Benz S-class car as a goodwill gesture for the plaintiffs to comply with some internal procedure, with an assurance that Charles would not use it for

any other purpose. Ong not only did not object to Charles' request but even volunteered to give to the plaintiffs the log-book of his own car (an Audi).

20. Notwithstanding the standstill agreement, the plaintiffs started selling Ong's shares from 20 July 1999 onwards. Indeed, on 15 July 1999, Charles also sold off Chu's 66,000 OUT (F) shares. By late July 1999, according to the CDP statements and the plaintiffs' statements, Charles had sold off, without Ong's prior knowledge or consent, his 350,000 Golden Agri shares pledged with the plaintiffs. When Ong received the plaintiffs' statements evidencing the forced sales, he queried Charles who explained that he had sold those counters which did not have strong fundamentals, pointing out that their prices may deteriorate further if Ong held on to them. He asked Ong to identify those counters which Ong felt should not be sold as they were fundamentally strong. When Ong protested pointing out there was the standstill agreement, Charles told Ong (in his letter dated 2 September 1999) that there was no standstill but only a 'relief period' which he had obtained from Ronald Ooi. Although Ong was not satisfied with Charles' explanation, he felt he was at the plaintiffs mercy. Ong identified Hotung, ASA Ceramics and GES as counters which were financially strong, in line with Charles original 'buy' recommendation to him. Even so, Charles continued selling Ong's shares (including Hotung) until 31 August 1999. Charles also told Ong that Ronald Ooi had queried why Ong had not sold his GES shares when the price had risen. Charles then insisted on selling and did sell, Ong's GES shares (1.2m) despite the latter's protests. Thereafter, according to Ong, Charles continued to apply pressure on Ong to raise more cash or collateral.

21. One form of collateral Ong offered was, a charge to the plaintiffs of CLOB shares in the CDP account of one Teng Seok Eng (Teng). Although Ong's offer was accepted by Charles (in exchange for not taking any action against Ong on his contra losses), there were subsequent disagreements between Ong and Charles on the wording of the charge documentation on which both the plaintiffs and Teng sought legal advice. Charles apparently threatened Ong he would reveal to EY the letter of undertaking if the charge documentation was not signed. Eventually (on 17 September 1999), Teng did sign a charge in favour of the plaintiffs and notice of which was given to the CDP. Ong said he did not know what the plaintiffs did with the charge documentation but, he understood that once the charge was executed, in accordance with the wording, the plaintiffs would not take any action against him, at least for a reasonable period of time. The plaintiffs denied this contention. Gee, in her written testimony, pointed out that contrary to what had been agreed, Ong changed the wording in the memorandum of charge. In the plaintiffs' draft, the indulgence granted to Ong would be for so long as the plaintiffs saw fit but the words *'for so long as you may think fit'* were omitted from the memorandum executed by Teng; hence the charge was unacceptable to the plaintiffs.

22. A few days after Ong had signed the letter of undertaking, Charles suggested that Chu's and Ong's cars be used as collateral to raise funds to pay for some of the shares in Ong's outstanding positions. Despite Ong's protests, Charles arranged for a used car salesman to look into the matter. Ong on his own accord, was able to obtain financing of $140,000 for both cars from a credit finance company. Charles then insisted that Ong sell the Mercedes, despite Ong's protests. However, as the stock market was still weak and the shares on his outstanding positions had not increased in value, Ong agreed. The car was eventually sold on 8 August 1999 for $197,000 through Ong's own newspaper advertisement. Initially, the $20,000 deposit paid by the buyer was credited to Chu's account (by mistake according to Charles). However, the entire sale proceeds were eventually credited to Ong's account despite a letter to the plaintiffs from Chu (dated 13 August 1999) requesting that the monies should be credited to her account as she used the car exclusively and was its beneficial owner (although it was registered in Ong's name for insurance purpose in order to obtain a higher no claim bonus). At the same time, Charles collected from Ong the two guarantees dated 10 August 1999 Ong had signed (based on drafts previously given by Charles) wherein Ong guaranteed the liability of Chu and Ching. According to Charles, Ong 'volunteered' to give the guarantees and he saw no reason to refuse them as they were additional comfort. Although Chu wrote to the plaintiffs on 20 August 1999 enclosing Ong's confirmation that the sale proceeds of the Mercedes should be credited to her account, the plaintiffs did not heed her instructions. Instead, on 24 August 1999, Gee wrote to Ong to say that as he was the vehicle's registered owner, the sale proceeds were credited to his account; Gee asked for proof of Chu's ownership of the Mercedes. Ong replied to Gee on 1 September 1999 enclosing a declaration that the Mercedes belonged to Chu. Gee rejected Ong's declaration in her letter dated 3 September 1999.

23. On 26 August 1999, a meeting took place between Charles, Ong, Gee and Pauline See (Pauline) who is Chu's god-sister. Pauline requested and was given a list of Ong's outstanding positions as at 25 August 1999; they included those in Chu's and Ching's account. Ong claimed that Charles told him that as he (Ong) had failed to deliver the charge documents to the plaintiffs, Charles had sold the 600,000 Hotung shares booked into Ching's account. Charles on the other hand said he told Ong that the

plaintiffs would commence selling the remainder of Ong's shares the following day unless Ong could come up with additional collateral of $600,000-$700,000. Pauline said that profits (of not less than $700,000) were due to Ong (some time in October 1999) from EY whereupon Charles asked for an assignment of the same. Ong said that was not possible as it would jeopardise his arbitration proceedings against EY for wrongful dismissal. In the event, after a private discussion between Pauline and Ong, Charles and Gee were told that Ong could not offer any more collateral. Charles responded that the plaintiffs had no alternative but to start selling shares that very afternoon itself. Pauline and Ong pleaded that the plaintiffs accept less collateral to which Charles agreed, provided it was at least $400,000 (20% of the outstanding sum of $2m) and, it was furnished by 30 August 1999. Charles' proposal was subsequently approved by his managing-director. However, on 30 August 1999, Ong reverted to Charles to say that he was unable to furnish any more collateral.

24. Charles called Chu four (4) days later to say he had also sold the 600,000 Hotung shares booked into her account by Ong. Finally, on 2 September 1999, Charles informed Ong that the Hotung shares booked into Ong's own account had also been force-sold. Ong's protests to Charles on these forced sales were of no avail. In this regard, the plaintiffs produced and Charles testified on, the hand-written notes he had made of his telephone conversations with Ong (principally), Chu and Ching between 8 and 31 August 1999. No telephone records outside that period were kept by Charles, which omission I shall touch on later. The main thrust of those telephone conversations was, that Charles pressed all three (3) persons to sell the Hotung shares under their respective accounts. When Charles was unsuccessful in his attempts to contact the 3 persons or, they failed to give him their instructions, he proceeded to and did, force-sell their Hotung shares as set out in para 20 above. The plaintiffs also produced tapes (and transcripts) of telephone conversations in their office between Ong and Charles on 6 August 1999. The parties however held a 'without prejudice' meeting on 9 September 1999 to discuss a repayment plan for Ong.

25. On 13 September 1999, the plaintiffs' solicitors made a formal demand on Ong for S$2,130,990.50 and US$285,740.46 (excluding interest). On 12 November 1999, their solicitors demanded payment of S$141,130.79 from Chu and S$42,566.70 from Ching (excluding interest). On 1 October 1999, the plaintiffs reported Chu's and Ching's accounts to the SES as delinquent accounts. However, in January 2000, after the lawyers for Chu and Ching threatened action if the same were not withdrawn, the plaintiffs withdrew their reports of delinquent accounts. Through their common solicitors, Chu and Ching denied liability contending that the plaintiffs through their agent Charles, had agreed with Ong that Ong would be solely responsible for their accounts.

26. The plaintiffs commenced the first suit against Ong in September 1999 and the second and third suits against Chu and Ching in November 1999. In view of the sums involved, the claims against Chu and Ching were initially filed in the district and magistrates' courts respectively. On the application of the plaintiffs made in OS 659 of 2000 (wherein Ong, Chu and Ching were named as defendants), the proceedings against Chu and Ching were transferred to the High Court and all three suits were consolidated.

A. The first suit

27. A few days before commencement of the trial, counsel for Ong gave notice to the plaintiffs' solicitors that Ong would no longer contest their clients' claim in the first suit. Accordingly, on 12 September 2000, I awarded consent judgment to the plaintiffs against Ong in the sums of US$285,740.46 and S$1,722,823.09 with interest (of S$72,571.18 and further interest at 9% per annum on both sums from 14 September 2000 to date of payment) and costs. The judgment sum was the net principal sum owing to the plaintiffs after they had sold all of Ong's unpaid shares as well as those shares in his CDP account (save for one counter) which the plaintiffs had transferred to their own account, using the blank share transfer forms which Ong had previously pre-signed. Trial was therefore confined to the second and third suits.

B. The second suit

The pleadings

28. In the statement of claim, the plaintiffs relied on cll 3 and 5 of the application form signed by Chu as well as on cll 4.7 and 5.2 of the Bye-laws of the SES to found their claim against her for $141,130.79, which comprised of payments they had made on her account, losses arising from forced selling of securities, contra losses, commissions earned and interest payable to the plaintiffs.

29. In the (re-amended) Defence, Chu admitted opening an account with the plaintiffs in April 1999 but contended that she had never met nor dealt directly with or at all, with any agent of the plaintiffs in respect of her account and, the shares booked under her account were purchased by Ong. The purchases were booked under Chu's account for the plaintiffs' own internal purpose when Ong's credit limit for his own account with the plaintiffs was exceeded. The arrangement was proposed and put into effect by the plaintiffs and or their agent Charles on the clear understanding between Charles and Ong that, Ong would be solely responsible for all the transactions booked by the plaintiffs under Chu's account.

30. Chu further alleged that the plaintiffs had assured/represented to Ong that, under the standstill agreement reached in or about July 1999, they would not force sell Ong's shares either under his account or under her account up to October 1999, if Ong agreed (which he did) to give the letter of undertaking and the letter of guarantee relating to her account. In breach of the standstill agreement and their representations, Chu alleged that the plaintiffs liquidated Ong's outstanding positions under his and her accounts and force-sold his purchases including 600,000 Hotung and 200,000 Labroy shares. Chu averred that but for the standstill agreement, Ong would have closed his outstanding positions including those booked under Chu's trading account and thereby reduced his losses.

31. In the alternative, Chu alleged there was an oral agreement reached on or about 10 August 1999 whereby the plaintiffs forbore to sue Ong and or Chu until the conclusion or final disposal of Ong's arbitration proceedings with EY, in consideration of Ong furnishing a third party charge over CLOB shares to the plaintiffs which he did, through Teng.

32. Chu also alleged that the plaintiffs as stockbrokers owed her and Ong a duty of care/fiduciary duty under Bye-law Vl cl 2 of the Bye-laws of the SES to act in good faith in their best interests. She averred that the plaintiffs breached their duty of care to her when they failed to credit her account with the sale proceeds of her Mercedes car, against her express instructions. Hence she counter-claimed those sale proceeds as well as the sale proceeds for her 66,000 OUT (F) shares the plaintiffs sold without her consent and which sale proceeds they wrongfully credited to Ong's account.

33. Yet another alternative defence raised by Chu was that the plaintiffs had contravened the provisions of the Moneylenders' Act Cap 188 and were precluded from claiming under the contract with her as it was void for illegality.

34. In the (amended) reply, the plaintiffs admitted that none of their dealers or remisiers had met Chu. They averred that Charles was her agent for dealing in securities at the material time and that in all cases, he confirmed to Chu at the end of each trading day all trades executed by him on her behalf under her account. The plaintiffs contended that instructions to trade were given on Chu's behalf by Ong and she never disputed those transactions. They denied that the transactions were Ong's but booked into Chu's account. The plaintiffs contended that even if Chu had a private arrangement with Ong in that she permitted him to use her account, this was not known to the plaintiffs and Chu remained liable to them. The plaintiffs pointed out that contract notes, contra statements, quarterly statements and other documents were sent to Chu in the usual course and, as she did not object to any of the transactions, Chu was now estopped from doing so.

35. The plaintiffs denied there was a standstill agreement (whether oral or written) and that they had made any representations to Ong but admitted that Ong had executed the letter of undertaking and a guarantee for Chu's liabilities. They also admitted that they sold out Chu's outstanding positions (which were not Ong's) as they were entitled to but they were not obliged to inform either her or Ong nor render her an account of those sales. Chu had full knowledge of those sales in any case as, Charles contacted her and informed her of the intended sales including the proposed prices, before they were carried out. The plaintiffs contended they were under no duty to sell Chu's shares at a time when they could have fetched a higher price.

36. The plaintiffs admitted Teng had executed a charge of CLOB shares in their favour but contended that the charge was not

effective and, they did not agree to or approve the terms of, the charge. They averred they had at all times carried out their duties in respect of Chu's account under Bye-law Vl cl 2 of the SES and, acted in her best interests. They inter alia, denied that the transactions were illegal by reason of the Moneylenders' Act and that they had financed Chu's purchases in a manner contrary to that Act.

C. The third suit

The pleadings

37. The plaintiffs' claim against Ching was similar to their claim against Chu; it was based on the same clauses (3 and 5) in the application form she signed for the opening of her account as well as on the same Bye-laws (4.7 and 5.2) of the SES. Similarly, Ching raised the same defences to the plaintiffs' claim as Chu, including the contention that Ong used her account to book his purchases and, it was done by Charles for the plaintiffs' own internal purposes.

The plaintiffs' case

38. I start my review of the evidence with the testimony of Charles (PW1) who was the plaintiffs' principal witness for both suits. In para 94 of his affidavit of evidence in chief, Charles deposed that at no time did he treat Chu's account as Ong's or that he agreed Ong would be responsible for amounts owed on her account. He asserted that Ong conveyed her instructions on Chu's behalf and he always contacted her at the end of the day to report on the transactions done and, she never told him that he need not call her nor that the transactions were not hers. To support this statement Charles' handwritten notes for 20 and 30 August 1999 were produced by the plaintiffs wherein he had recorded:

> August 20 Called 4680120; GO'S house and spoke to his wife about selling Hotung shares. She said she had given full authority to GO to sell them (approximately 12.15 before lunch).
>
> August 30 .Called GO's house at 5.25pm and spoken to his wife and informed her that her shares were sold. She asked if GO knew about it and I confirmed 'yes'. She asked the price it was sold. I replied US$ x 0.44061.

I should point out that the initials 'GO' stood for George Ong, George being Ong's Christian name. Chu however testified that Charles had never contacted her at the end of the day to report on the trades done for her.

39. Questioned by counsel for Chu whether he had received any documents authorising Ong to give instructions on Chu's account, Charles merely said that was besides the point as, if the trades he carried out on Chu's behalf were not hers, she could easily have disputed them which she did not. He explained he force-sold her 600,000 Hotung shares on 30 August 1999 more than 1 month after their due date because he was busy with Ong's own account -- in any case, Chu did not call him to say she wanted him to sell the shares earlier. When counsel pointed out that if indeed Ong had nothing to do with Chu's account, then Charles should have no difficulty in selling her shares, Charles replied that Ong had pleaded with him to make an exception for his wife as she (Chu) was unstable and apparently had had a nervous breakdown at one time; he had overheard Chu screaming at Ong on one occasion when he telephoned their house. To counsel's and then the court's question whether he had obtained Chu's permission to extend the force-selling date, Charles prevaricated -- he said that he/the plaintiffs had the full discretion to sell and there was an agreement. In this regard, it was pointed out to Charles that he had furnished Answers to Interrogatories administered by Ong's counsel and his Answer to the first Interrogatory was as follows:

> To the 1st Interrogatory, namely how long, from the due date of the contract of

> purchase of shares, would the plaintiffs force sell the shares on behalf of customers to pay for the shares, that the plaintiffs would generally force sell these shares bought on behalf of customers on D + 4 days, D being the due date of the contract. However, approval may be granted for force selling to be delayed if there is an agreement between the plaintiffs and their customers to extend the date of force selling.

40. Shown his above Answer, Charles then said that because of Ong's plea and as he had a discretion whether or not to sell, he withheld selling until later although there was no agreement. He neither needed a client's approval to force-sell once the due date had passed nor to delay force-selling after that date. In Chu's case, the delay was also because she either avoided or did not return his, calls and, when she did call, she requested him not to sell. Moreover, he was monitoring the market price of Hotung shares and when they showed a down trend, he started his attempts to contact Chu.

41. Gee (PW2) also testified for the plaintiffs. Gee's testimony was confined to what transpired at the meetings on 26 August and 9 September, 1999. Cross-examined on the sale proceeds of the Mercedes, Gee confirmed that the logbooks of that car and the Audi were handed to the plaintiffs as collateral for Ong's account. Yet, when she rejected Chu's written request to credit the sale proceeds of the Mercedes to Chu's account, she did not give this as the real reason for her refusal because 'it slipped her mind'. She replied to Chu's letter to dispose of the nuisance factor because she understood from Charles that Ong had been harassing him on the matter. In re-examination, Gee testified that after her reply to Ong dated 3 September 1999 (rejecting his declaration that the Mercedes belonged to Chu), he did not raise the subject of the car's sale proceeds again.

42. Further cross-examination of Gee adduced the following evidence:-

> a. the settlement period of T+10 was only extended to certain clients of the plaintiffs and (by agreement) Ong was one of them;
>
> b. she was surprised that Chu's creditworthiness (and Ching's) was not verified when she opened an account with the plaintiffs. It was the plaintiffs' practice to check on a client's employment but not his, income status. The plaintiffs relied on the remisiers concerned for information on their clients as well as on their financial background, in the opening of accounts for retail clients. Even so, it was unusual for such credit to be given to a first time client like Chu, for her initial purchase of 200,000 KepFel shares @ $4.05 (and similarly to Ching for her initial purchase of 100,000 KepFel shares @ $4.67). Although she was unaware of the reasons for the plaintiffs' extending the credit/credit period to Chu/Ching, Gee denied that it was because Charles had agreed with Ong that the latter would be responsible for both their accounts.

43. The plaintiffs/Charles placed great store on taped telephone conversations which took place between Ong and Charles, on 6 August 1999, particularly on the vexed question of whether there was/was not a standstill agreement; the tapes were produced as an exhibit (P2) while the transcripts formed part of the agreed bundle (AB 394-401). The plaintiffs went to the extent of calling their electronic date processing assistant one Mohamed Suhaimi bin Abdul Hafidz (Suhaimi) to testify that he had made preparations for the taping of the conversations, on Gee's instructions, for both telephone lines of Charles. Suhaimi (PW4) testified that he tested the system by calling Charles after setting up the system, to ensure that it worked. In his testimony, Ong disputed the accuracy as well as completeness, of some of the transcripts. Counsel for the plaintiffs indicated to the court he was prepared not to rely on the disputed portions of those transcripts.

44. The defendants on their part, produced (also as part of the agreed bundle) the telephone bills for Ong's mobile telephone numbered 96179220 (as listed on the letterhead of his correspondence) covering the period 6 July-6 September 1999 (see 1AB151-201). Amongst the many incoming/outgoing calls were those from/to telephone numbers 8370853 and 8370715. According to the letter dated 27 April 1999 (1AB203) from the plaintiffs to Chu (after she had opened her account), those were

the telephone contacts of Charles. However, no evidence whatsoever was adduced on these telephone bills by the defendants nor did the plaintiffs question them. Hence, the only conclusion one can draw therefrom is, that Charles called Ong or vice versa.

45. Under cross-examination, Charles denied that the reason he required Ong to give the letter of undertaking and guarantees for Chu and Ching was because he knew that Ong was responsible for the losses in their accounts as well as his own. Counsel drew Charles' attention to the fact that at the meetings on 26 August and on 9 September 1999 (see minutes at exhibit P1), the total losses of Ong computed by the plaintiffs and estimated at $2m included Chu's (and Ching's). Charles explained that the total losses arising from all 3 accounts were given at Pauline's request. He asserted that Ong did not at the meetings say he would pay the losses in the other 2 accounts -- it was difficult enough to get Ong to commit himself to paying for his own losses let alone for the losses incurred by Chu and Ching. In any case, Ong's own outstanding account was in the region of $2m; it was only in his letters that Ong proposed settling all 3 accounts. Counsel then referred Charles to AB70 which was Pauline's computation (based on the plaintiffs' information) showing gross losses totalling S$2.315m and US$286,000 on all 3 accounts and net losses of S$2.154m (after taking into account and deducting therefrom Ong's after-tax profits from EY for 1999, the charged shares on CLOB and Ong's expected proceeds from his arbitration with EY). Charles said he could not remember any discussion on AB70 as his main concern at the meetings was to see how Ong could make additional payments. Equally, Charles asserted that it was Ong who insisted, not that he offered, a grace period of T + 10 (trade plus 10 days) for Ong to pay for his purchases, in place of the normal T + 5. He added that he had a number of clients who paid on T + 10 basis although that did not mean that they could not and did not pay, earlier. Pressed on whether those clients were in the minority, Charles said he never had occasion to tally the numbers who qualified for this privilege.

46. Charles said Chu had previously, purchased equivalent quantities of Hotung and Labroy shares; hence he did not consider her purchases in July 1999 to be unusually large. As she had bought shares up to the value of $1.4m and paid for them prior thereto, the plaintiffs used that factor as a benchmark to extend credit to her, notwithstanding that she was not gainfully employed. In any case, in her application form for opening her account, Chu had described herself as a director (see AB 242) in a consultancy (EPGO Consulting Pte Ltd). Charles said he was not aware that the plaintiffs required verification of a client's income and in Chu's case (as well as Ching's), it was not done. He would never open nominee accounts for clients as he felt it was morally/legally wrong; he denied that Chu (and Ching) were nominees of Ong. Otherwise he would not have gone to so much trouble to try to contact Chu on 20 and 24 August 1999 before selling her shares.

47. Contrary to Ong's allegations, Charles deposed that the pre-signed blank transfer forms could only have been used with Ong's specific prior consent and authority. Otherwise, the plaintiffs would not know the names and quantities of shares to be inserted in each transfer form. Consequently, it was with Ong's consent that 500,000 Hotung, 452,000 ASA Ceramics and 20,000 Low Keng Huat shares were transferred from Ong's CDP account to that of the plaintiffs.

48. As for the Mercedes, Charles asserted that in his telephone conversations with Ong (prior to his receipt of Chu's letter dated 13 August 1999), it was always understood/agreed that the sale proceeds would be utilised to settle the outstandings on Ong's, not Chu's account.

The second suit

Chu's case

49. In her written testimony, Chu (who is a chartered accountant by training but had ceased practice since 1987) testified that:

> a. she opened an account with the plaintiffs at Ong's request to facilitate his purchase in her name of OUT (F) shares as a gift; she did not know the price he paid for the 66,000 OUT (F) shares. Thereafter she had no further involvement in the account;

b. she did not instruct Charles or anyone else in the plaintiffs to purchase 600,000 Hotung shares or 200,000 Labroy shares; neither did Charles call her after their purchase to confirm the trades. She did not authorise the plaintiffs to take instructions from any third party/Ong for her account;

c. she had never met Charles (or anyone from the plaintiffs' office) and did not know who he was until he started calling her house to look for Ong in mid-July 1999;

d. Charles called her (unexpectedly and without warning) on 30 August 1999 to inform her of the sale. She was surprised and referred him to Ong as she had not purchased the shares in the first place. The very first time she spoke to him was when Charles called her soon after the sale of the Mercedes;

e. neither Charles nor anyone else from the plaintiffs called her when they sold the shares between 23 and 27 July 1999; she spoke to Charles (for the second time) after their sale;

f. she understood from Ong that it was actually at the suggestion of Charles that the Hotung and Labroy shares were booked into her account and, the plaintiffs were fully aware and agreed that Ong would be fully responsible for those trades;

g her belief that Ong was to be responsible for the Hotung and Labroy shares in her account was reinforced by the fact that Ong had given an unconditional guarantee dated 10 August 1999 to the plaintiffs (to pay her debts); she also did not see any contract notes or contra statements giving rise to the contra losses all of which documents were handled directly and solely by Ong. Neither was she present at any meetings between Charles and Ong nor was she party to any discussions relating to the contra losses.

50. As for the Mercedes, it was a gift to her from Ong notwithstanding that it was registered in his name; it was partly paid from the sale proceeds of her previous car while the hire-purchase instalments came from their joint account and, she used the car exclusively. She was persuaded by Ong to sell the car in early August 1999 when he told her there were potential losses on her account. She agreed to do so (albeit very reluctantly) in order to stave off further harassment from Charles who was calling Ong repeatedly, pestering him to sell the car. She requested Ong to handle the sale on her behalf. However, contrary to the specific instructions contained in her letter dated 13 August 1999 and reiterated in her letter dated 20 August, 1999, the plaintiffs credited the entire sale proceeds of $197,000 to Ong's account. In fact, the initial credit to her account of the $20,000 deposit paid by the buyer was reversed and credited to Ong's account. Even the sale proceeds of her 66,000 OUT (F) shares (which were sold without her prior knowledge) were wrongfully set off against Ong's losses arising from the Hotung and Labroy shares when the same should have been paid to her, in accordance with Ong's specific instructions to the plaintiffs/Charles.

51. Under cross-examination and re-examination, Chu testified that:-

a. besides the plaintiffs, she had opened an account with another broking house (Warburg) to purchase 110,000 KepFel shares in 1999 using her CPF funds;

b. Ong had used her account with the plaintiffs to purchase another 300,000 KepFel shares which were subsequently converted into 825,000 KepFEI shares. She only knew about this transaction after it was done when Ong requested her to accompany him to the CDP to transfer out 765,000 shares to his account;

c. prior to early August 1999, until Charles started calling her house (and she overheard some of the conversations between him and Ong), she had no knowledge that Ong had used her account for other trades and had incurred losses thereon;

d. although the CDP statements were sent to her house including those for July 1999 which showed the Hotung and Labroy purchases, Chu said she saw those statements only in August - September 1999 when Ong showed them to her. By April 1999, he had stopped going to EY's office and, being at home most of the time, he checked the mail -- he kept anything that related to shares, including CDP statements. Although Ong did not keep his files under lock and key, nevertheless she would not look at the files as she knew that Ong did not like anyone to touch them. Moreover, her twin sister from England was staying with her for the whole of July 1999. She was therefore very busy as, besides spending time with her sister, she had to take care of 3 young children;

e. when Ong received (and showed her) the plaintiffs' letter of demand dated 13 September 1999 for $141,130.79 relating to the contra losses on her account, Chu did not reply because Ong had assured her (which she believed) that he would handle the matter as they were his, not her losses; she was not aware of Ong's follow-up action however;

f. by the time she received the plaintiffs' solicitors' letter of demand dated 12 November 1999, the plaintiffs had already sued Ong and she therefore left the matter to his lawyers to handle;

g. she found out (when Charles telephoned her) that, prior to her letter dated 13 August 1999 to them (regarding the sale proceeds of the Mercedes), the plaintiffs had received a similar letter signed on her behalf by Pauline without her knowledge or consent (because Pauline did not want to upset her further). As Pauline' signature was not acceptable to Charles, Chu then signed another copy of that same letter, dated 13 August 1999; there was no discussion with Charles on the contents;

h. at the time the Mercedes was sold, she was not aware that there were actual, only that there were potential, losses in her account.

52. Although Ong had consented to judgment in the plaintiffs' favour for the first suit, he nevertheless appeared as a witness (DW3) for both Chu and Ching. He corroborated their testimony and common defence that the losses in their respective accounts were his responsibility, not theirs. Ong further testified:-

(i) he had earlier arranged for Ching to open a trading account with Lee & Co for his own use, on the suggestion of Charles;

(ii) it was again at Charles' suggestion that the Labroy and Hotung shares he purchased on 5 and 8 July 1999 respectively were booked into Chu's and Ching's accounts;

(iii) his state of mind when his telephone conversation with Charles on 6 August 1999 was taped was one of distress and near hysteria;

(iv) he was prompted to make a gift of OUT (F) shares to Chu because, besides having made a huge profit (in excess of $1m) in share trading, they were having marital problems at the material time;

(v) when he instructed Warburg to purchase (and later to sell) 8,000 OUT (F) shares for Chu, the company telephoned Chu to confirm the trades prior to execution notwithstanding that Chu had given him a power of attorney for the account;

(vi) besides being undervalued, OUT (F) was also an illiquid counter with no trading of the share on some days. Consequently, when he desperately needed to raise funds to pay for his trading losses, Ong approached the manager of a boutique fund to sell his OUT (F) shares; the fund manager declined as the latter found the quantity of shares too small. The only way Ong could persuade the fund manager to buy was to offer Chu's OUT (F) shares as well. The sale was done as a 'married deal' (off-market transaction) between Charles and the fund manager's stock broker. He could have effected the transaction through Warburg but he did it through the plaintiffs as a favour to allow Charles to earn the brokerage. Although he sold Chu's shares without her knowledge, he had obtained Charles' prior consent to pay Chu the sale proceeds of her OUT (F) shares at which juncture he thought he could explain to Chu why he had sold her shares. Chu did not have any contra losses as at the date of sale (15 July 1999 [see AB280]) apart from his potential losses on the Hotung and Labroy shares booked into her account. Had he entertained any doubts and had he known that Charles would renege on their agreement, he would not have sold his/Chu's OUT (F) shares through the plaintiffs. After the sale proceeds of her OUT (F) shares were credited to his account, Ong said he had still hoped to persuade Chu to lend those monies to him, in order to appease the plaintiffs.

The third suit

(i) Ching's case

53. Ching's testimony for the third suit echoed that of Chu's -- she (DW2) maintained that Ong was the true principal behind her account with the plaintiffs and she had never given the plaintiffs/Charles any instructions to trade in Hotung shares; neither had she authorised anyone to trade on her behalf. She corroborated Ong's testimony that she did not visit the plaintiffs' office to open her account; the requisite forms were brought to her home which she completed, signed and returned to Ong with a photocopy of her identity card. Like her previous account with Lee & Co, Ching asserted that Charles knew that her account with the plaintiffs would be used by Ong to trade and that, Ong would be solely responsible for all such trades. Indeed, she did not make a single trade on her account. Like Chu, Ching maintained that Ong's purchase of (600,000) Hotung shares was booked into her account on the suggestion of Charles. The only time she saw Charles or anyone from the plaintiffs was when she, at Ong's request (and accompanied by him) visited the plaintiffs' office on or about 20 July 1999 with a view to signing certain documents relating to some proposed share financing arrangements which documents she eventually did not sign. That was also the first time she learnt from Ong that there were potential losses on her account but, he also assured her that the plaintiffs were aware he was solely responsible for the trades and she had no liability whatsoever. Hence, she was not overly worried.

54. Ching repeated Chu's belief that Charles/the plaintiffs knew she was not liable for the losses on her account because they had requested from Ong the unconditional guarantee which he signed, assuming her liability. Further, the volume/value of trades carried out on her account were inconsistent with her financial status as, she was just a secretary when she first knew

Charles in the mid-1980s and, she had been a part-time property agent with Knight Frank Pte Ltd for less than a year when she opened her account with the plaintiffs -- Charles never even asked her for any financial statements relating to her creditworthiness. Her 1999 income, as assessed by the tax authorities, was only $20,427.04.

55. Cross-examined, Ching (who is currently a confidential secretary):-

a. said she believed Ong would be liable for all the trades he carried out on her account even though he had his own account with the plaintiffs because of her past understanding with Ong (and Charles) for her account opened with Lee & Co, that Ong would be liable therefor -- hence she never questioned Ong when he asked her to sign the account opening forms of the plaintiffs nor what he did on her account thereafter;

b. testified that when she opened her account with Lee & Co, Ong took her to see Charles; she was then no longer working for him;

c. denied that Charles had contacted her to confirm the trades done on her account after they had been executed. She recalled that he had tried to contact her in August 1999 but she did not recall returning his telephone call on one occasion or that she had instructed him not to sell the Hotung shares;

d. said that although statements relating to her accounts with Lee & Co and the plaintiffs were sent to her, she would normally pass them on to Ong, sometimes without first reading them. However, she did not see the plaintiffs' statements for June, July, September 1999, nor their letters of demand to her dated 29 October and 11 November 1999 for payment of her alleged contra losses and reporting hers as a delinquent account to the SES. She was only aware of the purchase of Hotung shares after the transaction had been executed;

e. explained that when the shares purchased on her account with Lee & Co were sold, she paid out the proceeds to Ong after they had been credited to her bank account. To substantiate this evidence, Chin produced her POSB passbook which showed a withdrawal of $350,000 on 9 July 1999 (after an earlier credit entry of $350,071.21);

f. revealed that the only share trading she did for herself was through her account with another broking house (Ong & Co);

g. explained that it was because she believed Ong was liable for her account that she took no action on receiving the plaintiffs' letters (and their solicitors') demanding payment of the contra losses on her account. As Charles left Lee & Co, joined the plaintiffs and Ong again asked her to open an account thereafter, she assumed that the same understanding the parties had regarding her account with Lee & Co would also apply to her account with the plaintiffs, namely, Ong not she, would be liable for whatever happened to the account. Accordingly, she passed the plaintiffs' and their solicitors' letters (and even the writ of summons for the third suit) onto Ong to handle but she was not aware (nor did she ask) what action he took thereon. She trusted Ong absolutely and even left it to him to appoint solicitors to act for her in this matter.

(ii) the plaintiffs' case

56. I have already set out the testimony of Charles in relation to the second suit. His written testimony pertaining to Ching's account echoed what he said about Chu's account -- he relied on cll 3 and 5 of the plaintiffs' account opening form and the relevant bye-laws of the SES. In his affidavit of evidence-in-chief, Charles went on to say (in para 111) that Ching gave him instructions directly when he was with the plaintiffs, but sometimes she instructed him through Ong in which case he would call her to confirm her instructions. He claimed that Ching never told him that he need not call her or that the transactions were not for her account. He deposed that at no time did he treat her account as Ong's or that he had agreed that Ong would be solely responsible for amounts due under her account and, denied counsel's suggestion that the latter was the case. What I found remarkable about Charles' written testimony was his total lack of details and particulars as regards both Chu's and Ching's purchase of the (large) quantities of Hotung and Labroy shares in their respective accounts (see paras 97 and 114 in his affidavit). Indeed, there was absolutely no mention in his affidavit of when and how Chu came to purchase 600,000 Hotung shares on 8 July 1999, in relation to the first or the second, suits.

57. Having reviewed all the relevant testimony, I turn now to consider the common issue which needs to be determined for the second and third suits namely:

Did Ong use Chu's and Ching's accounts to trade and was it done with the knowledge and consent of Charles and or the plaintiffs?

An affirmative answer to the above question means that neither defendant would be held liable to the plaintiffs.

58. Before a finding can be made, it is necessary to look at the relevant clauses in the plaintiffs' application form for the opening of accounts (the form) and the bye-laws of the SES, upon which the plaintiffs base their claims. The defendants on their part relied on the 'know your client' rule (as described by the Chief Justice in *Choo Pit Hong v PP* [1995] 2 SLR 255) encompassed in Bye-Law 111 cl 7(c). I start with cll 3 and 5 of the plaintiffs' form which state as follows:

> 3. I agree to abide by any condition the Company may impose from time to time for the operation of the Account including the demand for additional information and documentary proof for verification purposes and the prevailing Rules and Bye-Laws of the Stock Exchange of Singapore (SES) or any other regulatory body governing transactions in shares quoted on the SES or other stock exchanges.
>
> 5. I understand that the Company reserves the right to charge me interest at such rate or rates as the Company may from time to time decide on any outstanding amount owing by me to the Company.

59. The relevant bye-laws of the SES state:

> 4.7 Delivery to and payment by clients
>
> (a) If a purchaser not being a Member Company, fails to pay the amount due on the market day following the due date of the contract or in the case of a Time Bargain, fails to maintain the margin of cover prescribed by the Committee from time to time, it shall not be necessary for the Member Company selling such securities from its own account to, or buying such securities for the account of, the purchaser to tender the securities purchased, and the Member Company has the right, at any time after such failure to pay or maintain margin of cover, to force-sell the securities or any of the securities for which the purchaser has not made full cash payment. The Member Company may at any time thereafter sue

such purchaser for the difference and all losses and expenses consequent on such force-sell. It shall not be necessary for the Member Company to give notice of such force-sale to the purchaser and all damages which the Member Company may sustain in this connection shall be recoverable by the Member Company from the purchaser as liquidated damages.

(b) The close-off provision in (a) above will not apply where the Member Company has allowed the purchaser to effect a corresponding sale position subsequent to the purchase but not later than the due date of the purchase contract.

5.2 Member Company and Client

(a) Payment by Buying Client:-

> Buying clients may make payments at any time after the contract date but in any case payments must be made by the market day following the due date of the contract. Unless payment has been made in cash or delivery is made against the Delivery Order on a purchaser's Bankers, delivery of securities to the purchaser may be withheld at the Member Company's discretion until the purchaser's cheque in payment has been finally cleared and the proceeds fully in the possession of the Member Company. Payment shall be made promptly and all bank charges shall be borne by the buying client where the shares are paid on behalf of such client outside the Republic of Singapore

(b) ..

(c) When securities shall be sold out in accordance with these Bye-Laws the amount by which the net proceeds of sales after deducting brokerage and other charges shall be less than the contract price, including brokerage and other charges shall be a debt due by the defaulter to the Member Company and shall be payable immediately.

7. Clients' Accounts

(a)

(b) .

(c) Opening of nominee accounts

Where an agency account is carried by a Member Company its files should contain the name of the principal for whom the agent is acting and written evidence of the agent's authority to trade.

Where estate and trustee accounts are involved or where a husband is acting as agent for his wife, or a wife is acting for her husband, a Member Company should obtain advice from legal counsel as to the documents that should be obtained

before opening the account.

60. I am not certain how clause 3 of the form specifically applies to the second and third suits. As for the plaintiffs' right to charge interest under cl 5, that would depend on whether I find in their favour on both claims. The plaintiffs rely on Bye-Law 4.7 for their unrestricted right to force-sell the unpaid shares in Chu's and Ching's account at any time, which I agree was undoubtedly their right. However, it would be contrary to the evidence for them to rely on Bye-Law 4.7(a) when it is common ground that they granted Ong and the other two defendants, the grace period of T+10 for purposes of settlement. I understand their reliance on Bye-Law 5.2 to be for their right to claim the shortfall between the force-sale proceeds and the purchase price they advanced for those shares, and which forms the basis for the second and third suits. It is also an undisputed fact that neither the plaintiffs nor Charles had any express/written authority from Chu or Ching for their accounts to be operated by Ong and or, for Ong to give instructions on their behalf, apart from the bald assertion made by Charles in paras 94 and 111 of his affidavit evidence in chief; clearly, Bye-Law 7(c) was breached.

The findings

61. I turn now to my assessment of the testimony of the witnesses called for the plaintiffs and the two defendants, starting with Charles. I have already made some observations on parts of his testimony in paras 38 and 56 above. I would go on now to add to those earlier comments. I turn my attention first to the taped telephone conversation of 6 August 1999 between Charles and Ong; my view is that the tape is completely irrelevant in relation to the second and third suits. The transcript of that particular conversation suggests that Ong admitted there was no standstill agreement, as alleged in his Defence and written testimony. The issue of the standstill agreement became academic however, when Ong consented to judgement on the first suit at the commencement of trial. The only other comment I wish to make as regards the taped conversation is, while Charles knew that it was being taped, Ong did not; it would therefore not have been difficult for Charles to steer the conversation in the direction he wanted, to an unsuspecting Ong.

62. Next, I wish to touch on Charles' hand-written records of his various telephone conversations in August 1999 with Ong (mostly), Chu and Ching. Again, I am of the view that those notes have very little if any, probative, value. I consider them to be self-serving documents generated by Charles to fabricate evidence favourable to himself/the plaintiffs. I say that for the following reasons:-

> a. by August 1999, the purchases of the huge quantities of Labroy and Hotung shares debited to Chu's and Ching's accounts had already been completed a month earlier. The August conversations related to the fate of those shares, it did not answer the question of who authorised their purchase in the first place, on 5 and 8 July 1999 respectively. I would have been more impressed had Charles/the plaintiffs produced tapes or records of conversations of what transpired between Charles and Ong or Chu or Ching in early July 1999; their non-production (apart from the possibility they were not available) suggests 2 things:- (i) if produced, they would not have supported the plaintiffs' case/Charles' testimony or, (ii) far worse, they would have substantiated the defendants' consistent defence that Ong made the purchases and, the Hotung and Labroy shares were 'parked' in Chu's and Ching's account at the suggestion of Charles. The reason behind the suggestion is not relevant -- whether it was because Ong had reached the limit of his credit with the plaintiffs (as Chu/Ching thought or were told) or for other considerations;

b. Charles was assiduous in making those records because by then, he realised the gravity of the situation -- he was saddled with those shares and he had to find a solution. Hence, he made a pretence of contacting both Chu and Ching for their instructions (for the first time) when he well-knew that Ong was the actual buyer of those shares and, was unable to pay/take delivery.

63. I had already observed in para 56 that Charles made no mention of Chu's purchase of 600,000 Hotung shares at all in his written testimony. I believe this was not an inadvertent but a deliberate, omission on his part. While he was not prepared to depose on oath that Chu instructed him to purchase those shares, neither did he say on oath that she did not; a deliberate omission is no less reprehensible than a positive false assertion. In any case, I am of the view that Charles did lie on oath (in para 94 of his affidavit) when he deposed that Ong conveyed Chu's instructions to him and he always contacted her at the end of the day to report on the transactions done; that statement is only correct after July 1999 when he wanted to force-sell her (and Ching's) shares. The truth of the matter is, Charles met neither Chu nor Ching when they opened their respective accounts (not disputed) and, he did not speak to either one of them until August 1999. Indeed, Chu did not meet him until the first day of trial.

64. Even if I accept Charles' testimony (which I do not) that the plaintiffs did/do not require evidence of creditworthiness from a new client, I find it remarkable that the plaintiffs/Charles would allow Ching (whom Charles knew to be a secretary) to purchase 600,000 Hotung shares at US$361,905.50 (equivalent to S$615,239.35 @ S$1.70 to US$1.00). In cross-examination, she revealed her last drawn monthly salary with EY (in or about 1998) was S$2,000 while her 1999 income as a part-time property agent averaged out to S$1,702.25 per month (annual income of $20,427.04 12). Further questioning by counsel for the plaintiffs only made the situation worse for his clients -- Ching's past bonus entitlement (1 month's salary) did not boost her earnings to any great extent and it was not suggested to her that she was a woman of independent financial means or, one who had come into some substantial inheritance or, obtained a sudden windfall. The extracts which Ching exhibited (see **CSG-1**) of her POSBank passbook only served to confirm she was a person of modest means; save for the deposits and withdrawals of sums due to Ong in using her account to trade, the balances in her account for July 1999 did not even exceed $10,000 except for one large deposit of CDP dividends ($17,280) which she could not recall. The fact that Ching currently draws a monthly salary of $4,400 does not advance the plaintiffs' case any further. The only logical conclusion that can be drawn is, that Charles knew that Ching's account was operated by Ong and she was his nominee.

65. On the same issue of creditworthiness, I find Charles' explanation (that it sufficed that Chu described herself as a director of a corporate consultancy in the form) less than satisfactory. How does that help to determine her earnings or income capacity, which only emerged under cross-examination by counsel for the plaintiffs? In this connection, I recall that Charles was evasive (see para 45 above) when cross-examined on the number of his clients who were granted and the basis thereof, the privilege of T+10 settlement period. Gee however was more forthright; she said it was unusual to extend such a privilege to persons like Chu and Ching, who had no track record with the plaintiffs. I find that such non-verification of Chu's background and the automatic granting of T+10 settlement to her pointed to the fact that Charles knew Ong was the actual principal behind her account.

66. The plaintiffs made much of the fact that Chu (and to a lesser extent Ching) had received statements from the plaintiffs as well as from the CDP, pertaining to the Hotung shares. While that cannot be and indeed was not, denied by either defendant, the fact remains that the statements were received after the event; so it would be a question of reversing the transaction had either Chu or Ching challenged those transactions. It was Chu's testimony which I accept without reservations,

that for the whole month of July 1999, she was occupied by the visit of her twin sister from England on top of looking after 3 young children. Ong on the other hand, was almost always at home as he had already left EY a few months earlier; Ong therefore checked the daily mail, not Chu. Although it was not suggested that Ong deliberately hid her mail from her, I cannot imagine that Chu looked particularly at correspondence from either the CDP or the plaintiffs if left on the table for her, unless her attention was drawn to it. If she had not been buying or selling shares during the period (as she testified) and she was pre-occupied with other matters, she and other persons in her position I venture to add, would not be interested to look at mail received from either the CDP or the plaintiffs as, it would be reasonable to assume the correspondence contained periodic statements generated and sent out to account holders. I cannot see how the fact Chu is a qualified accountant would put a higher duty on her to check the nature of the documents sent to her house but, likely to have been received/seen by her husband Ong.

67. Ching's evidence which again I accept, was that she trusted Ong absolutely (albeit foolishly as it turned out). Her faith in Ong never wavered even when she was sued. She never questioned him when he assured her that he would take care of the problem when Charles contacted her in August 1999 and when the plaintiffs/their solicitors made demands for payment of the contra losses they now claim. As far as she was aware, Charles knew that Ong was the principal behind her account, as that was the arrangement when she opened her account with Lee & Co, when Charles worked there. Why should the modus operandi of her account with the plaintiffs be any different? Hence, she would normally hand the CDP statements and other correspondence to Ong, sometimes without looking at them. The plaintiffs did not challenge her testimony (under cross-examination) that for her own share trading, she used her account with another broking house.

68. Consequently, the cases upon which the plaintiffs placed heavy reliance to found estoppel, namely *Ong & Co Pte Ltd v Foo Sae Heng* [1990] SLR 186 and *RHB-Cathay Securities Pte Ltd v Ibrahim Khan* [1999] 3 SLR 464 have no application, being far removed in their factual matrix. I should add that *Ong & Co v Foo Sae Heng* was a decision which arose out of a Registrars' Appeal on an O 14 application, not as a result of a full trial. In any case the key ingredients required to found estoppel are missing as:

1. there was no representation on the part of Chu to the plaintiffs;

2. the plaintiffs did not act on such representation to their detriment.

The factual matrix in the third case cited by the plaintiffs was also very different. In *Tat Lee Securities Pte Ltd v Tsang Tsang Kwong & Anor* [2000] 1 SLR 1, the defendants gave their remisier a letter of authority to collect their share scrips from the plaintiffs for the transactions executed on their accounts. Based on the letter of authority, the remisier obtained some of their shares without the defendants' knowledge and appropriated the sale proceeds thereafter. The decision of the Court of Appeal arose out of an O 14 appeal to a judge in chambers; the appellate court held that the defence should proceed to a full trial and not be summarily dismissed as the plaintiffs sought to do and initially succeeded, before the Registrar.

69. In his closing submissions (para 10), counsel for the plaintiffs pointed to the (undisputed) fact that neither Chu nor Ching spoke to Charles about Ong being solely liable for their respective accounts. With respect, that submission is also misconceived -- why should she speak to Charles when Chu was unaware (until after the execution and she was told) that Ong had utilised her account to trade in Hotung and Labroy shares? Granted she was earlier informed by Ong that he had used her account to purchase 300,000 KepFel shares in May 1999 but that does not mean (as counsel for the plaintiffs submitted) that she must take steps to ensure that Ong did not act without her authority

again; after all they are husband and wife. In any case, when Ong revealed the purchases to her, he had told Chu they were his responsibility and indeed, in the case of the KepFel shares Ong kept his word, paid for and transferred out, those shares from her CDP account. Under those circumstances, there was nothing untoward in Chu informing him, when Charles called her in August 1999, that she had given full authority to Ong to sell the Hotung shares. That would explain why on 30 August 1999 (see transcript at AB 60) she did not object when Charles told her that her shares had been sold but she asked whether Ong know about it and was told he did. As for Ching, her reason was because she knew (from her previous experience with Charles/Lee & Co) that it was understood between Ong and Charles that Ong would be responsible for whatever happens to her account.

The sale proceeds of the Mercedes

70. Initially, it was Gee's testimony that the plaintiffs rejected Chu's claim to the sale proceeds because she was not the registered owner, despite Ong's declaration that Chu was the beneficial owner, of the vehicle. Under cross-examination however, Gee revealed that the true reason (why the plaintiffs credited the sale proceeds to Ong's account) was because Ong had delivered the logbooks of both the Mercedes and the Audi to the plaintiffs as collateral for his account. The plaintiffs' conduct was puzzling. On the one hand, they asserted that the sale proceeds should be credited to Ong's account and on the other, although there was a (belated) tacit admission that the vehicle's beneficial owner was Chu, they refused to credit the sale proceeds to her account even though they assert she is liable for the contra losses therein. In cross-examination, counsel had pointed out to Chu that as at the date of her letter (13 August 1999), there were no realised contra losses in her account for which she could be liable. That may be true but the fact remained that there were already potential losses.

71. Ong and Pauline on the other hand, had treated the losses on all three (3) accounts as Ong's, despite the denial by the plaintiffs/Charles to the contrary. Hence, at the meetings they had with the plaintiffs on 26 August and 9 September 1999, Ong and Pauline took into consideration in calculating what was owed to the plaintiffs, the losses on all three (3) accounts as well as all the payments made thereon, including the sale proceeds of the Mercedes.

72. My view that Ong was the person Charles looked to for payment on all three accounts is reinforced by the fact that Ong furnished the unconditional guarantees for both Chu's and Ching's accounts. I disbelieve Charles when he claimed the guarantees were 'offered' by Ong without any prompting on his part; it was Charles who pressed Ong to furnish those documents just as he badgered Ong for, the letter of undertaking, the logbook of the Mercedes and then to sell the Mercedes and hand the sale proceeds to the plaintiffs. The primary motive of Charles was to save himself and he was prepared to go to any lengths to do so. The more monies he could get from Ong the less Charles would be liable for. This was unlike the good days when (according to Ong's letter dated 20 September 1999 to the plaintiffs) Ong's trades generated commission of as much as $500,000 per annum to the plaintiffs/Charles. If Ong failed to pay, then, following the industry practice, the plaintiffs would hold Charles liable. Charles would either have to pay or, arrange with the plaintiffs to deduct and set-off Ong's losses against commission due to him. That was why Charles reneged on his word to Ong (whose testimony I accept) that the sale proceeds of the Mercedes and 66,000 OUT (F) shares would be credited to Chu's account. Otherwise, Ong would not have sold those shares through the plaintiffs but through Warburg.

73. It is apparent from the foregoing paragraphs that I was not impressed by Charles as a witness; he did not speak the truth and his conduct in opening nominee accounts for Ong through Chu and Ching,

was reprehensible to say the least. He lied to save himself although he was instrumental in getting Chu and Ching into their present predicament. Counsel for the plaintiffs focussed on certain portions of the testimony of Ong, Chu and Ching to say they were not truthful witnesses, I do not agree with his assessment. There may be some inconsistencies in the testimony of the defendants but more so in that of Charles, the plaintiffs' key witness. In evaluating the evidence, I prefer the testimony of the defendants to that of Charles. Chu was clearly and genuinely distressed when she testified, over the conduct of her husband who, aided and abetted by Charles, had caused her family financial ruin.

The conclusion

74. Consequently, the plaintiffs' claims in the second and third suits are dismissed with costs. I am allowing Chu's counterclaim with costs, relating to the unauthorised appropriation by the plaintiffs of the sale proceeds of both the Mercedes and her 66,000 OUT (F) shares. Once the Hotung and Labroy shares were removed therefrom, Chu's account was not in debit (see AB418). Accordingly, the plaintiffs are to refund to her those sale proceeds (totalling $362,913.31) with interest at 6% from the date of her counterclaim (16 December 1999). Ching's counterclaim for $86,819.80 however, is dismissed with costs. She cannot approbate and reprobate at one and the same time. If, as she asserted in her Defence, Ong was the principal and she his nominee, of her account which defence I accept, she cannot claim the benefit of any trades transacted, on the account. It is also unlikely that she could have afforded to purchase 16,000 F & N shares (at $7.60 per share) or 5,000 OUT (F) shares (at $2.48 per share) referred to in her counterclaim, given my finding of her modest financial means and her own evidence that she traded in penny stocks with Ong & Co. Not surprisingly, her counsel made no reference whatsoever to her counterclaim in his final submissions. In the light of my findings, there is no necessity for me to go on to consider the various alternative defences put forward by Chu and Ching in the second and third suits.

Lai Siu Chiu

Judge