

Banque Nationale De Paris v Tan Nancy and Another
[2001] SGCA 76

Case Number : CA 168/2000
Decision Date : 21 November 2001
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s) : Michael Hwang SC, Christopher Anand Daniel (instructed) and Herman Jeremiah (Helen Yeo & Partners) for the appellants; Philip Fong and Jenny Chang (Harry Elias Partnership) for the 1st respondent; Chiah Kok Khun and Simon Jones (Wee Swee Teow & Co) for the 2nd respondent
Parties : Banque Nationale De Paris — Tan Nancy; Tan Shee Chin

Judgment

GROUNDS OF DECISION

1. This appeal arises from the decision of the High Court dismissing the claims of the appellants, Banque Nationale De Paris (BNP), against the two respondents, Ms Tan Nancy (Nancy) and Mr Tan Shee Chin (Shee Chin), for sums of money as a result of transactions carried out in their respective accounts with BNP. The transactions in question were carried out by one Gary Hew Keong Chan (Gary), who at all material times was an employee of BNP. The claim was dismissed on the ground that the transactions in these accounts were carried out by Gary without the knowledge and authority of Nancy and Shee Chin respectively, and that they did not dishonestly assist Gary in carrying out the transactions.

Facts

2. The facts giving rise to this appeal are briefly these. Nancy is a senior manager in charge of corporate affairs of a large development and holding company in Singapore. She holds a degree of Bachelor of Science (Estate Management) from the National University of Singapore. Nancy was married to Gary in 1991, but they had ceased to live as husband and wife since 1995.

3. Shee Chin is Nancys elder brother and is a businessman. He holds a degree of Master of Business Administration. Until 1998, he ran the businesses of two companies, Oriental Sincere Printing Ltd, a company incorporated in Hong Kong, and Panasia Holdings Ltd, a company incorporated in the British Virgin Islands. Both companies unfortunately suffered considerable losses during the economic crisis in 1998, and were forced out of their businesses.

4. Gary was employed by BNP from 23 May 1988 as an organization and method officer, and in 1994 was transferred to BNPs Private Banking Department, holding the position of an Assistant Vice-President. He retained that position until he was dismissed for his role in the disputed transactions.

Share transactions in Shee Chins account

5. Shee Chin first became a customer of BNP on 9 May 1994, when he opened a Singapore dollar current account (Account No. 1) with BNP through Gary. In November 1994, Shee Chin applied for and was granted overdraft facilities up to S\$123,000 to finance the activities of his companies, which were secured by his fixed deposit of S\$250,000. On 16 April 1996, he opened a nominee account with

BNP nominee company (BNP Nominees) for the purpose of his share transactions and another Singapore dollar current account (Account No. 2) for the purpose of settling his share transactions. A Malaysian Ringgit current account (MYR Account) was also opened on the same day in Shee Chins name by Gary for the purpose of settling the share transactions. One month later, in May 1996, Shee Chin deposited 50,000 shares in United Overseas Bank Ltd (UOB) with BNP as security for his accounts.

6. Following the opening of these accounts, between April and July 1996 numerous share purchases were made by Gary in Shee Chins nominee account. These purchases were paid for by debiting the requisite sums to Shee Chins MYR current account, which eventually resulted in the account being overdrawn. Debit advices and acknowledgements of shares held by BNP Nominees for each share transaction were sent to Shee Chins residence at Toh Tuck Place. On 10 June 1996, a loan of S\$238,000 was drawn down in Shee Chins name in Account No. 1 to repay the overdrafts in Account No. 2 and the MYR account.

7. According to Shee Chin, upon checking the statements sent to him by BNP, he discovered in July 1996 that Gary had entered into various share transactions in his name without his authorization. He therefore confronted Gary on these transactions and Gary assured him that he would sell the shares purchased and cease to enter into further unauthorised transactions. Notwithstanding that, Gary continued to enter into further share transactions in Shee Chins name. In respect of these further share transactions, credit or debit advices, as the case may be, for each transaction were sent to Shee Chin at his address in Toh Tuck Place by BNP. In the case of share purchases, acknowledgements of the shares purchased by BNP Nominees were sent to Shee Chin by BNP. Shee Chin did not disclaim any of these transactions or make any complaint to BNP about them.

8. On 26 December 1996, Nancy opened a Singapore dollar current account with BNP. Her purpose of opening the account was to use it to secure the account of Shee Chin with BNP. Hence, on the same day, Nancy also signed a memorandum of charge/deposit of securities as security for the account of Shee Chin. No securities, however, were then deposited with BNP pursuant to the memorandum

9. On April 1997, BNP made a margin call on Shee Chin by a letter stating that the amount of the loan drawn down on his overdraft account had gone up to 90% of the market value of the deposited shares, and requiring him to regularise his position by either reducing the outstanding amount owing to 60% of the market value of the shares or depositing additional shares. Shee Chin claimed that as a result of this letter he discovered that Gary had continued to trade in shares in his name without his authorization. According to Shee Chin, when he confronted Gary the latter assured him once again that the unauthorised trading would cease and that he would sell off the shares. No complaint or protest, however, was made by Shee Chin to BNP. Instead, Shee Chin complied with the margin requirements by depositing further 219,613 UOB shares with BNP. On 29 April 1997, Nancy also in response to the margin call deposited 10,000 shares in United Industrial Corporation Ltd (UIC) and 55,588 UOB shares with BNP to secure Shee Chins account.

10. As a result of the transactions entered into by Gary in Shee Chins account, the latters MYR account went into overdraft. On 26 May 1997, a loan in the sum of MYR3,965,351.23 was obtained by Gary in Shee Chins name to repay the overdraft, thus regularising the MYR account. Credit and debit advices relating to this loan were sent by BNP to Shee Chin. No complaint or query was forthcoming from Shee Chin to BNP. Shee Chins MYR account went into overdraft yet again in June 1997 as a result of interest adjustments, and a further loan of MYR73,740 was obtained by Gary in Shee Chins name to repay the overdraft and regularise the account. Credit and debit advices relating to this loan were sent to Shee Chin by BNP. Again, Shee Chin did not disclaim the transactions or complain about

any of the credit and debit advices.

11. On 26 June 1997, these two MYR loans were converted into a loan in Swiss Franc (CHF) in the sum of CHF2,316,406.15 by Gary who subsequently converted the CHF loan into Malaysia Ringgit in the sum of MYR5,051,571.84. Confirmations of these two foreign exchange conversions were sent to Shee Chin by BNP. Again, no complaint or protest was made by Shee Chin about these transactions.

12. Further share transactions were entered into by Gary in Shee Chins account from July 1997. In addition to the monthly statements, credit or debit advice for each transaction, as the case may be, were sent to Shee Chin by BNP. In the case of share purchases, acknowledgements of the share purchased by BNP Nominees were also sent to Shee Chin by BNP. No query, protest or complaint was made by Shee Chin. Nor was any intimation given by him to BNP that any of these transactions was unauthorised.

13. On 10 July 1997, Gary put up a credit proposal for Shee Chin to BNP proposing, inter alia, an increase of the short term loan/overdraft facility to US\$2,000,000. That proposal was approved and on 13 August 1997, BNP wrote to Shee Chin a letter offering certain facilities for general investment purposes acceptable to BNP, and that letter appeared to have been sent by registered post to his address at Toh Tuck Place. Shee Chin himself accepted the proposal: he signed the acceptance on 20 October 1997 and returned it to BNP. As of that date, the outstanding amount of the short term loan/overdraft facility owing to BNP in Shee Chins account was US\$1,792,000.

14. On 22 October 1997, the loan of S\$238,000 taken in June 1996 together with interest was converted by Gary into a MYR loan amounting to MYR538,204.04. On 22 January 1998, Gary repaid this loan of MYR538,204.04 and the other loan of MYR5,051,571.84 by drawing down two further loans of MYR2,500,000 and MYR2,812,767.76 in Shee Chins name. Confirmation of these transactions were sent to Shee Chin, who raised no complaint about them. Then in July 1998, these two loans were merged and converted by Gary into a loan in Japanese Yen yielding a total sum of 169,307,681. This loan was repaid on 2 October 1998 by a drawdown of two new Japanese Yen loans, one in the sum of 100,000,000 and the other in the sum of 60,000,000. The credit and debit advices of all these transactions as well as the confirmations of these foreign conversions loans were sent to Shee Chin by BNP, and again no query or complaint was made by Shee Chin to BNP at any one time.

15. As of 31 March 1999, the outstanding amount on the short term loan/overdraft facility comprising the two loans denominated in Japanese Yen plus the interest amounted to a total sum of 161,033,593, which BNP is now claiming from Shee Chin. It is not disputed that this balance in Shee Chins account arose largely as a result of the share transactions and foreign exchange transactions. Shee Chin claims that these transactions were entered into by Gary solely for his own benefit and account and without Shee Chins authorization.

Forex transactions

16. We now turn to the trading in foreign exchange (forex) transactions. The account for trading in forex transactions was opened by Gary in Shee Chins name in or around April 1998. The form for such account was signed by Gary on Shee Chins behalf. There was no evidence that it was opened with the express authority of Shee Chin, verbal or in writing, or with his consent or knowledge. After the account was opened, Gary used the account for dealing in forex transactions. Again, there was no evidence that Shee Chin expressly authorised such transactions, verbally or in writing. The forex transactions started in February 1998 even before the account was opened and continued to early October 1998.

17. Similarly, Gary opened an account in Nancys name to trade in forex transactions. The account was opened also in or around April 1998. The form for such account was signed by Gary on her behalf. There was also no evidence that Nancy had expressly authorised the opening of this account, verbally or in writing; nor was there any evidence that she had any knowledge or had given her consent to such account being opened in her name. Gary used this account to carry out forex transactions. Here again, there was no evidence of any express authorization for such transactions by Nancy. Such forex transactions started in April 1998 and continued to early October 1998.

18. Thus, both Shee Chins and Nancys accounts to trade in forex transactions were opened by Gary in their respective individual names without any express authorization from them. Gary was able to do this, because BNPs procedure allowed existing customers to open additional accounts on the basis that they had signed the initial account opening form. Gary represented to BNPs officers that Shee Chin and Nancy had given instructions to open the forex trading accounts. All the forex transactions in their accounts were conducted by Gary.

19. After each forex transaction was made, BNP sent to Shee Chin and Nancy respectively confirmations of such transactions as well as confirmations for offsetting transactions, where applicable. Profits or losses from these transactions were also credited or debited, as the case may be, to the relevant current accounts and reflected in the monthly current account statements sent to the Shee Chin and Nancy respectively. None of these confirmations, advices and statements were queried or protested by Shee Chin or Nancy. During the period between April and October 1998, there were instances when Gary reported to them over the telephone of the profits he made from the forex trading in their respective accounts. In the case of the profits made in Shee Chins account, they were used to reduce the amounts he owed to BNP. In one of the conversation Gary told Shee Chin that he (Shee Chin) had to sign a written confirmation of two forex contracts as well as a risk disclosure statement. These documents were sent to him, and he duly signed and returned them to BNP. In the case of the profits made in Nancys account, they were transferred out from her account mainly to Shee Chins account, which were then used to reduce the amount owing to BNP. The instructions for the transfers drafted by Gary were faxed to her for signing; she signed them and sent them by fax to BNP.

The disputed forex transactions

20. In October Gary entered into large forex transactions amounting to some US\$9m in the names of Shee Chin, Nancy and two other parties. Like the previous transactions, Gary did these without any express authorization of Shee Chin and Nancy respectively, no doubt thinking that it was a good opportunity for him to recoup the losses sustained in their accounts. Instead, heavy losses were incurred, resulting in BNP closing all positions taken out by Gary in their respective names. This resulted in net losses of 90,662,000 and 32,365,000 in Shee Chins and Nancys accounts respectively, which are now the subjects of the claim. Shee Chin and Nancy were each advised of this by BNP and were required to meet the claims. Both Shee Chin and Nancy declined and claimed that Gary entered into the transactions without their authorization, and that they were not aware of these transactions entered into in their names, until Gary informed them on 8 October 1998. On 14 October 1998, Shee Chin faxed a letter to BNP saying that the transactions were entered into by Gary without his authority. Similarly, on 15 October 1998, Nancy faxed a letter to BNP informing BNP that she was not aware that Gary had entered into the transactions in her name, and that she had not authorised him to do so. Two days later, she lodged a police report.

21. Following investigations by the Commercial Affairs Department (CAD), Gary was charged with the offences under the Securities Industry Act (Cap 289) and Futures Trading Act (Cap 116). On 8

July 1999, Gary pleaded guilty to the charges and was sentenced to imprisonment for a term of 12 months. In pleading guilty to the charges, Gary admitted in court, inter alia, that he entered into the transactions in the names of Nancy and Shee Chin without their authorization.

Proceedings below

22 BNP initiated proceedings against, inter alios, Shee Chin and Nancy, claiming:

(a) from Shee Chin (i) a sum of 161,033,593 being the amount owing on the short term loan/overdraft facility extended to him, and (ii) a sum of 90,662,000 being the loss incurred in the forex transactions in October 1998; and

(b) from Nancy a sum of 32,365,000 being the loss incurred in the forex transactions in October 1998.

BNP claimed that Shee Chin and Nancy had given authority to Gary to enter into the forex transactions, and that Shee Chin had done so with respect to his share transactions. Alternatively, the bank claimed that they had by their respective conduct and actions ratified the unauthorised transactions. In the further alternative, the bank claimed that both of them were estopped from denying that the transactions were not authorised by them. In the event that the transactions were held to be unauthorised, BNP claimed the following: (i) that Shee Chin and Nancy had dishonestly assisted Gary in committing breaches of fiduciary duties to BNP or had been accessory to such breaches of fiduciary duties; (ii) that they wrongfully induced or procured Gary to commit a breach of his employment contract with BNP; and (iii) that Shee Chin and Nancy conspired with Gary to injure BNP by unlawful means.

23. The claims were resisted by Shee Chin and Nancy. Their main defence was that that they were not aware of the transactions carried out by Gary and did not authorise Gary to carry out those transactions. They denied that they dishonestly assisted Gary in committing breaches of fiduciary duties to BNP. They contended that it was Garys rogue trading activities and a series of control weakness and judgmental failures at various levels of BNP`s management, which were the primary causes of BNP`s losses arising from the unauthorised transactions carried out by Gary.

The Appeal

24. The main issues raised in this appeal are as follows:

(a) whether Shee Chin and Nancy (the respondents) knew that Gary was entering into the transactions that were entered in their respective accounts;

(b) whether the respondents had given authority in any way to Gary to enter into the forex transactions in their names and for their accounts respectively, and whether Shee Chin had done so with respect to his share transactions;

(c) if the transactions were unauthorised, whether the respondents had by their conduct and actions ratified the unauthorised transactions;

(d) whether, in the circumstances of the case, the respondents are in any event estopped from denying that Gary had no authority to enter into the transactions

for them in their names; and

(e) if the transactions were unauthorised, whether the respondents had dishonestly assisted Gary in committing breaches of fiduciary duties to BNP.

25. The first issue is crucial in this appeal. Before the trial judge, both the respondents testified that they were unaware that Gary was carrying out the transactions in their names and for their accounts, as they trusted Gary completely with the handling of their accounts, and that they were manipulated and deceived by Gary. The judge accepted their evidence and made findings in their favour. These findings are challenged before us.

Shee Chins knowledge of the share transactions

26. We turn first to consider the evidence relating to Shee Chins knowledge of the share transactions carried out by Gary in his name and for his account. There is no dispute that in April 1996, Shee Chin opened an account with BNP Nominees for his share transactions and a Singapore dollar current account for the purpose of settling his share transactions. The MYR Account was also opened on the same day for the purpose of settling the share transactions. One month after these accounts were opened, Shee Chin deposited 50,000 UOB shares with BNP as security for his accounts.

27. Following the opening of these accounts, numerous share purchases were made by Gary in Shee Chins name and for his account. Debit advices and acknowledgements of shares held by BNP Nominees for each share transaction were sent to Shee Chins residence at Toh Tuck Place. These purchases were paid by debiting the requisite sums to Shee Chins MYR current account, which eventually resulted in the account being overdrawn. On 10 June 1996, a loan of S\$238,000 was drawn down in Shee Chins name to repay the overdrafts in Account No. 2 and the MYR Account. According to Shee Chin, in July 1996, upon checking the statements sent to him by BNP, he discovered that Gary had entered into various share transactions in his name without his authorization. He said that, upon such discovery, he confronted Gary with respect to these transactions, and Gary then assured him that he would sell the shares purchased and cease to enter into further unauthorised transactions. Upon this assurance being given, Shee Chin did not proceed further, such as reporting or complaining to BNP of the unauthorised dealings by Gary, for fear that Gary might lose his job.

28. It seems to us that, if indeed Gary had given such assurance, he certainly did not abide by it, for he continued to enter into share transactions in Shee Chins name and for his account. Credit or debit advices, as the case may be, for these transactions and also monthly statements of Shee Chins accounts continued to be sent by BNP to Shee Chin at his residence at Toh Tuck Place. In the case of share purchases, acknowledgements of the share purchased by BNP Nominees were also sent to Shee Chin by BNP. Shee Chin on his part took no action to stop Gary from so doing; nor did he complain or report to BNP that the transactions were unauthorised. In fact, he did not at any time disclaim any of these transactions or make any objection or complaint to BNP about them.

29. On 10 July 1997, to regularise Shee Chins accounts with BNP, Gary put up a proposal for short term loan/overdraft facility in the aggregate sum of US\$2,000,000, which was approved by BNP, and the proposal was later sent to Shee Chin by registered mail. He must have received it soon thereafter, but he did not respond to it promptly. Only on 20 October 1997 did he sign the acceptance and return it to BNP, at which time the amount of loans drawn down in his account was US\$1,792,000.

30. It seems to us that by then Shee Chin must have known the extent of his liabilities to BNP. Unless he had been turning a blind eye to the voluminous contemporaneous documents, such as credit and debit advices, acknowledgments of shares, and monthly statements of his accounts, sent to him by BNP, he must have known that innumerable share dealings had been transacted by Gary in his name and for his account. He must have known also roughly the amount of loss he had sustained and the extent of his liabilities to BNP. The volume of share transactions entered into was certainly not insignificant. Between 17 April 1996 and 9 January 1998, there was a total of 116 share purchases and 120 share sales done in his account with BNP. From the events that unfolded, the clear inference is that Shee Chin knew that these share transactions were carried out by Gary in his name and for his account. The conclusion is irresistible that he allowed Gary to carry out, and to continue to carry out, the share transactions in his name and for his account. It appears to us that he was content to leave it entirely to Gary to handle his account at Garys discretion.

Shee Chins knowledge of the forex transactions

31. We now turn to the forex account of Shee Chin. The account was opened by Gary in Shee Chins name. Shee Chin did not have any personal involvement in the opening of the account, such as signing any form of authorization or instruction. There was no evidence that Shee Chin expressly authorised Gary to open the account, whether verbally or in writing. Nor was there any evidence that it was opened with his consent or knowledge.

32. After the account was opened, Gary used it for entering into forex transactions. After each forex transaction, a written confirmation of the transaction and off-setting transaction, where applicable, was sent to Shee Chin. Profits or losses from these transaction were credited or debited to the account, as the case may be, and credit and debit advices were sent to him. In addition, monthly statements of the account were also sent to him. None of these documents, namely, the confirmations, credit and debit advices and monthly statements, were queried by Shee Chin in any way. The forex transactions in his account started in February 1998 or thereabouts and continued until October 1998. Throughout this period, no disclaimer of any of the transactions was made by Shee Chin; nor did he raise any query or make any complaint or protest in respect of any of the transactions either to Gary or to BNP.

33. In the face of what had transpired, it is difficult to accept that Shee Chin did not know that Gary had carried out the forex transactions in his name and for his account. There were a couple of instances of telephone conversation between him and Gary which were recorded by BNP and which showed that he was informed by Gary of the forex transactions that the latter had transacted, and that he condoned and approved what Gary had done.

Telephone conversation

34. The telephone conversations between Gary and Shee Chin were recorded and the relevant transcripts were produced at the trial and were admitted in evidence. We now turn to the material transcripts of these conversations. On 5 March 1998, there was a long telephone conversation between Gary and Shee Chin and the material part of the transcript reads as follows:

Gary : Aiyah ok, soeh can I just erererlet you know ah, that erm, you see, what what happened was ah, did some erspeculative foreign exchange, ah

Shee Chin : Ah

Gary : weweforfor your account ah

Shee Chin : Ah

Gary: Ok, at the end of it ah, there is a net profit ah, of about ninety two erthousand Ringgit lah

Gary : Ok? Now, er but the prob the thing is er you did not previously have lines ah?

Shee Chin : Mmmh

Gary : eranderthis thing and er ..you

Shee Chin : Youyou have a line in my line what right?

Gary : Yah, that but that is on for share financing lah!

Shee Chin : Ah

Gary : Not for for foreign exchange lah. And then the other thing is is er because er wer had never talked of er foreign exchange ah, so thats why erm you did not sign the Risk Disclosure Form,

Shee Chin : Mmmh

Gary : Er but anyway ah, er this er the I I I took er I opened 2 contracts, which I closed, both today, ok? Because the dollar rally very quickly against the Ringgit

Shee Chin : Mmmh

Gary : So, one one there is a small loss of 62 thousand the other one there is a profit of one hundred and 53 over thousand, so er on a net-net basis there is still a 91 thousand er profit you see?

Shee Chin: Mmmh

35. Pausing here, we think that in this conversation Gary reported what appeared to be the first two forex deals he had made for Shee Chin, and that from these two deals, a net profit of about MYR91,000 was made. Here, Gary admitted that they had never talked about foreign exchange before, and that was why Shee Chin had not signed a risk disclosure statement. It seems to us that Shee Chin understood what Gary was saying. We note that, on Gary explaining the problem that he [Shee Chin] did not previously have lines for foreign exchange, Shee Chin promptly replied that he had, whereupon Gary corrected him by pointing out that the line was for share financing and not for forex trading. From this part of the conversation, it is clear to us that Gary entered into the two forex transactions without Shee Chins consent or knowledge. Those two deals were clearly unauthorised. However, Shee Chin on being informed of them was quite happy and he approved and adopted them, presumably because a profit had been made for him by Gary. Clearly, there was no sign of any objection from Shee Chin.

36. Further, in that conversation, Gary went on to explain that his office needed Shee Chin to sign

certain documents to regularise the forex transactions, and that a risk disclosure statement and letters acknowledging the loss on one contract and profit on the other would be sent to him for his signature. The following is what they said:

Gary : So, or on that basis (inaudible) pacify my er my credit risk people lah, because they notice that there was ersome exchanges you see, eralthough there was no line, so they erm you know, pressuring me to you know, regularise the documentation

Shee Chin : Mmmh

Gary : So, erm I tell you what ah? Can I send the fer

Shee Chin : Dont send, Im going back tomorrow .

Gary : Youre going back tomorrow ah? Ok, so I will just mail the the forms to your house lah

Shee Chin : Mmmh

Gary : Ok? The Risk Disclosure Form, with a letter to say that, ok there are these 2 contracts and then you know one is a loss one is profit, and then you know to credit the profit to a certain account lah. So erm I will need you to sign the from to erer I mean erto agree to these contracts you see. Because the nowadays the ererbank isisis very very ererwary lah, because er previously we had a lot of I mean some customers ah, in the good old days ah,

Shee Chin : Mmmh

Gary : when everything is well, you know then

Shee Chin : Yah yah yah yah

Gary : so no problem, no, the documentation not in order,

Shee Chin : Yah

Gary : you know its no problem you see, but when the market collapse and they start owing the bank a lot of money

Shee Chin : Ah

Gary : then they start to dispute and look for all kinds of technicalities lah, you know like, oh I didnt have line why did you do this, I didnt sign the from why did you allow, you know that kind of thing

Shee Chin : Ah

Gary : sosothats why the credit ererpeople have been on my back you know, because of this contract, but anyway theres no loss to you because you know thethethethere is a profit, ok? So I just need you to sign the form to regularise everything you know

Shee Chin : Mmmh"

The documents referred to were sent to Shee Chin, and on 6 March 1998, Shee Chin signed the confirmation of the forex contracts with the profit and loss figures stated there as well as the risk

disclosure statement relating to forex trading, all of which were then returned to BNP.

3 7 . Lastly, in that conversation, Gary explained to Shee Chin that the purpose of the forex transactions was to use the gains to pay off the loan owing to the bank. This is borne out by the following part of the conversation:

Shee Chin : So, ah hows the loan do hows the repayment ah going ah?

Gary : The repayment, er weve been working on it, thats why were doing this type of thing to

Shee Chin : Ah huh

Gary : generate some funds to help reduce it lah!

Shee Chin : Cash Ah huh

Gary : Erm the

Shee Chin : its not getting bigger is it?

Gary : Oh no no Im try I mean like

Shee Chin : (laughter)

Gary : Im using you know other funds to to

Shee Chin : Oh

Gary : To pay off the interest and all that, because I at this point in time, I want to reduce it, you know, as to as small as possible

Shee Chin : Yar lor, exactly ok lah ok lah

Gary : And and the the Ringgit is er weakening now, after it has weakened er er you know Im looking at er er its weakened beyond 4 or whatever it is, I may convert to another er currency a weaker currency, so that you know over time ah, you know

Shee Chin : You know we should have we should have

Gary : It will get smaller and smaller and smaller you see

Shee Chin : Actually last time you should asked Suharto and say eh! We convert to Rupiah! (Laughter) then we already pay off (laughter)

Gary : (Laughter) yah yah I mean, it would have been a wonderful idea! You know, you know immediately ah, the my my the the loan would have halved you know! (Laughter)

Shee Chin : Yah Yah (Laughter) exactly!

Gary : But the problem the problem, with the ok, there is some problem with borrowing Rupiah, because the interest rate is very high.

Shee Chin : Yah

Gary : Yah, because er even for a one ah, on a one month ah, its almost fifty over percent per annum you see?

Shee Chin : Whah thats bad.

Gary : Yah, unless ah, unless we were able to er er borrow it ah, when everything was very stable, the interest rate, even then ah, the interest rate was twenty over percent you know?

Shee Chin : Yah

Gary : Before anything happen, ok? We we we borrow long term ok, and we lock it in, ok? You get what I mean or not? So that lets say if you borrow say for one year or 6 months ah

Shee Chin : Ah

Gary : Even though the interest will go up and down ah, youre not affected, because you have already fixed it

Shee Chin : Oh

38. What has emerged from this entire conversation is this: Gary on his own did the two forex transactions in Shee Chins name in late February or early March 1998 without his knowledge. Only thereafter, did he inform Shee Chin by telephone on 5 March 1998, and Shee Chin appeared to be contented with the results and raised no query or objection to them. On the contrary, he approved them. The tenor of the entire conversation shows that Shee Chin understood what Gary was saying, and when the conversation turned to currency conversion Shee Chin even took part in it without expressing any surprise. It is significant that Shee Chin did not request or instruct Gary not to enter into any forex transaction without his (Shee Chins) consent in the future.

39. There was another material conversation on the telephone between Gary and Shee Chin and that took place on 29 July 1998. The conversation began with Gary informing Shee Chin of the dire state of his account. The relevant part of the transcript reads:

Gary : Ok, anyway, the reason I, I call, is because eh, you know, the account that you have here, erm because of the fall in the er er share prices in this couple of, in fact, you know it has been falling, and also because er er er Malaysia has been trying to go around, you know trying to borrow money and that all of the sudden because of the Moody downgrade and all that lah

.

Gary : very badly affected by Malaysia, even the merger by DBS and eh eh eh and POSB, the the the euphoria was very short lived lah

Shee Chin : Mmmh

Gary : It was just, on Monday, sorry on yah, on Friday and then on Monday the whole thing got fizzled out lah. So anyway, er so the utilisation margin eh, in in the, in the account ah

Shee Chin : Mmmh

Gary : is in excess of you know the previous agreed ratio, alright so Ive been telling the Bank, that you know, er er look we will try our best to to to pay off the loan lah

. .

Gary : OK? So anyway, I told them you know, that a, a, a grace period is required lah

Shee Chin : Ah hah

Gary : to regularise the account, and then er er er we will try to pay, you know maybe around ok, no commitment but, just try ok

Shee Chin : Ah

Gary : to pay maybe around you know 20 thousand US per month ah

Shee Chin : Wah, how am I going to do that?

Gary : We have to, you know, eh eh eh, do some you know currency trading to to to earn it lah

Shee Chin : Eh, yah

Gary : on a conservative basis, ah? So try to its not a, a, a big sum lah, so so

Shee Chin : Wah its a big sum man, looking at my own account, it is a huge sum

Gary : (laugh)

Shee Chin : (laugh)

. .

Gary : So I have drafted a letter, alright, eh well I mean, basically stating all these things lah, alright?

Shee Chin : Mmmh

. .

Gary : but of course if the er er opportunity you know er er , arise, and you know we can put more we put more lah. Because I think ultimately the best

thing to do is to pay off

Shee Chin : Yar lor

Gary : you know the entire loan and free up the shares lah

Shee Chin : Yah, you see, 20 thousand US is a big amount per month?

Gary : Eh, I think, eh that could be possible lah?

Shee Chin : Ah? Aiyo, sounds a bit high, I dont know whether, I mean, hows your confidence (laugh) in doing t man? Aiyah

Gary : Erm so anyway theres no firm commitment, you know Im sure, well try to you know raise this sum, and but like I said, you know of course well try to raise more lah, you know because we also want to speed up the repayment you see

40. It is plain that this telephone conversation centred on the problem as to how Shee Chin was going to repay the loans to BNP. He clearly understood what Gary was saying. He was not passive but participated in the conversation. In the course of their discussion, Gary referred to currency trading to generate profits to repay the loans. No protest or complaint was raised by Shee Chin to this suggestion; nor did he request Gary not to go into currency trading in the future. He was quite aware of what Gary was saying. In the course of the conversation, he merely questioned Garys confidence in procuring payment through forex trading.

41. Following the conversation, a draft letter was faxed to Shee Chin who approved it; he signed and sent it by fax to BNP on 29 July 1998. In it, Shee Chin said that he acknowledged that his account utilization margin was in excess of the agreed ratio and sought a grace period to regularise the account, and that in the meanwhile he proposed to pay BNP US\$20,000 per month with the first payment to be made in August 1998.

42. In our opinion, these telephone conversations indicate that, although Shee Chin might not have been aware of the actual transactions entered into by Gary in his name and for his account at the relevant times, he was fully aware that Gary was using his name to trade in forex transactions. Our conclusion is that he let Gary manage and operate his account in the way Gary had done, and allowed Gary to carry on trading in forex transactions in his name and for his account.

43. Lastly, there were two important telephone calls made by Shee Chin to Mr Hamery, then the head of the Private Banking Department of BNP, on 8 October 1998, which was after the loss was incurred as a result of the huge forex transactions carried out by Gary on his behalf. On both calls, Mr Hamery was not in, and Shee Chin left the following recorded message:

[Shee Chin] : Ah Mr Hamery, eh Im eh calling in reply to what eh Mr Gary Hew had told me. Umm Im out in the field right now, so Im unable to give you a phone number (kid wailing in background). So, anyway ahh, Gary, Mr Gary Hew (kid wailing in background) has advised me eh .. to say that, you know, eh want to close all the account, eh, close the position eh, please do so. Ill try to call in a few minutes time to eh, talk to you again, thank you.

In the second call, Shee Chin left the following message:

[Shee Chin] : Eh, Im Mr Tan here, Mr Tan Shee Chin, I called earlier and was unable to get through to you, eh, my previous message has eh including this one (kid wailing in background) now, will be umm that eh, Ive heard from Mr Gary Hew (kid wailing in background) and then eh, hed suggest that ah, I close the position, eh ask the bank to close the position whatever, so, I, basically I agree with his suggestion eh, please do so. Eh, Im unable to give you a telephone number to call back, because Im out in the field now. Eh, I, if you didnt get this message Im leaving on your message phone, eh, Ill try to call umm a few minutes later, ok?

44. A few days later, on 12 October 1998, Shee Chin spoke to Mr Billy Au-Yeung, the officer in charge of the matter at BNP regarding his accounts with BNP. There was no word of objection or protest from him for the massive loss incurred in the forex transactions. In fact, Mr Au-Yeung suggested discussing a settlement with Shee Chin. On 13 October 1998, Shee Chin instructed BNP to stop all transactions in his account; but even at that stage no protest was made by him. Nor was there any indication from him to the effect that he was unaware of the forex transactions. Only on 14 October 1998, did he fax a letter to BNP informing them that the transactions were entered into by Gary without his authority.

Nancys knowledge of forex transactions

45. We now turn to the issue relating to the extent of Nancys knowledge of the forex transactions carried out by Gary in her name and for her account. Nancy became a customer of BNP only in December 1996, when she opened an account with the bank. Her purpose for so doing was to provide security for Shee Chin, whose account with the bank was then overdrawn. In opening the account, Nancy also signed a memorandum of charge/deposit of securities to secure the indebtedness and liabilities of Shee Chin to BNP. It did not appear that at that time any stock or shares were deposited by her with the bank pursuant to the memorandum.

46. In April 1997, when the margin call was made on Shee Chin, she deposited with BNP 10,000 UIC shares and 55,588 UOB shares as security for Shee Chins account in addition to those provided by Shee Chin. Up to that stage she had not authorised Gary to carry out any trading either in stock and shares or in forex transactions. In fact, during the period between December 1996 and March 1998, no trading of any kind in her name was carried out by Gary.

47. Then in April 1998, Gary opened an account in her name with BNP to trade in forex transactions. Nancy also had no involvement in the opening of the account. Whatever form of authorization or instruction or other document required to be signed was signed by Gary. There was no evidence that she expressly authorised Gary to open the account, whether verbally or in writing. Nor was there any evidence that the account was opened with her knowledge or consent.

48. From April 1998, Gary made use of her account to enter into forex transactions and continued to do so until October 1998. It appears that Gary first made use of her account for the forex transactions entered into in mid-April 1998 or thereabouts. On 23 April 1998, shortly after two forex transactions were carried out in her name, and profits in the sums of 2 million Yen and a 1 million Yen respectively were made, Gary telephoned her and reported to her these transactions and the profits made. The transcript of the material part of this conversation reads as follows:

Nancy : Hello

Gary : Hello? Nan?

Nancy : Yup

Gary : Hi Gary here ah!

Nancy : Hi. Ya

Gary : Eh sorry are you busy?

Nancy : Er non, its ok, no problem

Gary : Ah ok, er just want to check ah, will you be in the office tomorrow ah?

Nancy : No.

Gary : Oh, youre youre not going to the office ah?

Nancy : Er I got, Im going in for a while only

Gary : Ah ha ah ha I see ok. Erm, alright, basically whats happened is this, er they .. there is going to be a 2 million Yen ah

Nancy : Mmmh

Gary : Hel Hello?

Nancy : Yah

Gary : Profit ah?

Nancy : Yah

Gary : Er er in your account, ok?

Nancy : Mmmh

Gary : That will be paid to you ah, on the 27th ah, which is next Monday

Nancy : Mmmh

Gary : Alright? And then there will be a 1 and a half million Yen profit that will be paid to you on the 30th ah

Nancy : Mmmh

Gary : Alright?

Nancy : Mmmh

Gary : So I will er prepare aaa note ah, to transfer this profit ah, to Ah Chins account.

Nancy : Ok

Gary : So ererer when when youre in the office you give me a call

Nancy : You want me to sign is it?

Gary : Yes. I need you to sign for the transfer of the funds ah, ererfrom your account to Ah Chins account.

Nancy : Ok lah, probably in the morning ah

49. Following the conversation, Nancy signed an instruction dated 23 April 1998 (which was faxed to her) to transfer certain profits in her account to Shee Chins account. The instruction bore the following bold underlined caption: "**TRANSFER OF FOREX PROFITS IN ACCOUNT 50-015684**" and contained clear instructions to BNP to transfer a sum representing the profits from Nancys account to Shee Chins account. A similar instruction dated 24 April 1998 (also faxed to her) was also signed by her. It is significant that Nancy did not raise any query on or objection or protest to Garys actions. She willingly signed the transfers and returned them to BNP. She must have realized then, if not earlier, that Gary had carried out certain forex transactions in her name; hence the profits were generated and credited to her account which she transferred to Shee Chin.

50. Soon after that date, Gary entered into another forex transaction in Nancys account, and on 27 April 1998 reported to her on the telephone the profit he made. The transcript of the material part of the conversation is as follows:

Gary : Hello

Nancy : Yah, sorry

Gary : Yah hi! AH, ok, eh er sorry to interrupt you,

Nancy : No problem

Gary : I just want to ermlet you knowertoday I made 1.3 million Yen.

Nancy : Ah

Gary : Ok? Its going through your account,

Nancy : Ok

Gary : Er I need er again, you know, to do the same thing we did the last time,

Nancy : Ok

.

Gary : Because the I the the the contract was just closed a few minutes ago I dont have all the numbers. The numbers will not be er available until it is keyed into the computer tomorrow evening.

Nancy : Mmmh

Gary : So, Ill I Ill just put in the rate lah. What rate it was bought, what rate it was sold

Nancy : Mmmh

Gary : What the and the profit and then Ill er Ill just say convert to to to Ringgit and then credit you know, Ah Ah Chins account lah. All the details, the rest, Ill I will sort it out later lah.

Nancy : Ok can.

By the expression the same thing we did the last time, Gary meant and Nancy understood that Gary would send her a form of transfer of the profit in her account to Shee Chins account and that she would sign and return it to the bank. Here again she must have realized that Gary had traded in a forex transaction in her name; otherwise it would be difficult to account for the profit he made on her behalf which was credited to her account.

51. On 18 May 1998, there was a conversation between Gary and Nancy dealing with Garys actions with respect to Nancys account. The material part of the transcript reads as follows:

Gary : Yah, did you send me back my the this thing ah, the er the the fax ah, the instructions to transfer the contra profits to Ah Chins account?

Nancy : Er actually I sent back, but I think dont know whether the fax go through or not, because you know, the the thing didnt come out. You didnt receive it is it?

Gary : No, I didnt receive it.

Nancy : Ok never mind, you fax to my office, can or not?

Gary : Ok. Ok lah

Nancy : Er then Ill fax back to you later, Im going back

52. There was a subsequent conversation between Nancy and Gary on the same day relating to the same fax instruction, because Nancy had failed to append her full signature to the form. The relevant part of the transcript reads:

Gary : Yah, eroh yah yahyoueryou always sign ah, just Nancy right? But on the er in your specimen card ah, its signed as Nancy Tan.

Nancy : Ive amended it already right?

Gary : You amended already, you re-fax to me is it?

Nancy : Er I told my secretary to fax to you what?

Gary : You hold on, let me check. Hello yah yah I got it.

Nancy : Yah, ok lor.

Gary : Ok, but it doesnt appear very clear. Anyway never mind lah er but but next time just sign in full lah, so that we dont have problem with signature verification.

52. Clearly, Nancy knew that Gary had used her account to trade in forex transactions. However, no objection or protest was raised by Nancy against Gary for having carried out such transactions without first consulting her and seeking her consent. Not even a query was raised. On the contrary, from the conversations between them, Nancy appeared to condone and approve what Gary had done. There appeared to be an understanding between them, in which Gary was allowed to enter into forex transactions in her name and for her account and upon any profit being made she would transfer such profit to Shee Chins account.

53. On 29 September 1998, Gary again informed Nancy of the forex transactions he made in her name and the need to remit these profits to Shee Chins account. The material part of the transcript of the conversation is as follows:

Gary Hello

Nancy Hai

Gary Hai, how are you, sorry am I interrupting anything

Nancy No, its ok, I am just walking to the _____

Gary Where are you working

Nancy Central Square

.

Gary : I see so how is business

Nancy : No good lah

Gary : No good hah, I see, ai I am calling you hah because ah ok you actually at the moment have 200 over thousand ok first and foremost your account is completely regularised already, there is no more overdraft in your account, ok, so in fact at this point in time hah there is 200 over thousand Yen ok credit in your account, ok almost 300 thousand, tomorrow there is going to be about 2 million dollar Yen going into your account, ok now part of this money has to be remitted out lah, ok

Nancy : Ok

Gary : Which means that because there are payment to be made alright, so what happens was that today there was a 2 million over Yen contract you know, which you know we put under your name lah, right, so what happened is that tomorrow I will need I mean I will prepare a letter then I will need to fax it to you to sign and then sent it back to me so that you know the payment can go out lah

Nancy : Ok lah can lah you fax to me first lah

. . .

Gary : I see, ok, ah so tomorrow, but morning you will be in is it

Nancy : Yah, morning I should be in

Gary : If thats the case hah, ah ah ah my secretary is Harni, HARNI, maybe what I can do is I can, you know what time will you be in the office hah

Nancy : 9.00 loh

Gary : 9.00 oclock hah, ok so I will ask my assistant Harni to give you a call alright make sure you are there and then fax the letter over to you loh

Nancy : Ok lah can

Gary : After that when you have sign the letter, alright you fax it back to us so that when I come in the afternoon I can settle I mean handle all the administration lah

Nancy : Sure sure ok no problem

Gary : You are sure that means you are going into the office in the morning lah definitely right

Nancy : Yah

Gary : I see ok then I will get my assistant to liaise with you in the morning

5 4 . Following this conversation, Nancy signed three letters of instruction to BNP which she returned to the bank. The first was an instruction to transfer the entire credit balance in her Yen account to Shee Chins account. The second expressly referred to two forex contracts and instructed the bank to offset the two forex contracts and convert the contra profit from Japanese Yen to Singapore Dollars [and] then remit the SGD proceeds to four specific named accounts by telegraph transfer. The third letter contained in substance the same instruction as the second, but in a slightly different style: it instructed the bank to debit a certain sum to her Singapore dollar current account and remit the sum to four specific named accounts.

55. These conversations between Gary and Nancy demonstrate that, during the period from April to September, Nancy not only knew that Gary was using her account to enter into forex transactions in her name, but willingly allowed him to do so. It was their understanding that, as and when profits were made on the forex transactions in Nancys account, they would be transferred to Shee Chins account. It seems to us that Nancy trusted Gary and was content to leave it entirely to Gary to operate her account at his discretion.

56. It is undisputed that Nancy, on no less than five separate occasions, signed a total of 7 letters instructing the bank to transfer the forex profits from her account to Shee Chins account. Admittedly, those instructions were drafted by Gary, but they were in clear terms and bore a caption of the subject matter in bold font which was also underlined. For example the instruction she signed on 23 April 1998 bore the following caption: **TRANSFER OF FOREX PROFITS IN ACCOUNT 50-015684** and

the 18 May 1998 instruction bore the caption: **OFFSET FX CONTRACT REF 20058439 AND 20060341**. In respect of these instructions which Nancy signed, the trial judge was of the opinion that one could not quadruple the fact that she knew that there were profits to be transferred out that she must have known of the forex deals in her name. With respect, we are unable to agree with the judge. On the basis of those instructions which she had signed and the evidence of the telephone conversations between her and Gary, we find that that Nancy knew that Gary traded in forex transactions in her name and that profits were generated by Gary from these forex transactions and credited to her account; otherwise, as we have said, it would be difficult to account for them. It should be noted that these profits were of relatively large sums, and what was made and credited to her account was not just one isolated instance, but several instances.

57. It is relevant to consider also the events that took place immediately after the huge loss was incurred as a result of the forex deals made by Gary on or just before 8 October 1998. Soon thereafter, on 9 October 1998, Mr Billy Au-Yeung telephoned Nancy and briefly discussed her account with BNP. There was no hint or slightest suggestion by Nancy that the transactions entered into by Gary were unauthorised. Apparently, at that time she was in a car with her colleagues. The relevant part of the conversation is as follows:

Billy : Ya, my name is Billy Au-Yeung. Im calling from BNP.

Nancy : Yes.

Billy : Im Garys colleague.

Nancy : Yup.

Billy : Ya, regarding Im calling regarding the 2 dollar yen contracts that you have done with him ah.

Nancy : Mm.

Billy : Now, we have cut the positions now.

Nancy : Mm.

Billy : And then, mm, at the rate of about one, one 40, yesterday.

Nancy : Mm

Billy : The 2 the losses on these 2 contracts are equivalent to yen, about 32 point 4 million.

Nancy : Mm.

Billy : Well, I would like to ask your ideas, how, how youre gonna settle these losses.

Nancy : Oh, I see. What are the various ways to be done?

Billy : Yes, maybe shall we meet sometime next week so, so that we can have a discussion?

Nancy : Ok. Ya because I am in a meeting right now so its not convenient. Can I call you or can I get Gary Hew to

Billy : No, maybe you call me.

Nancy : Eh, ok, ya.

Following that conversation, she called Mr Au-Yeung and suggested that they meet at lunch the following week. Immediately after this call, Nancy wrote to BNP to hold her account until she met up with Mr Au-Yeung. Only on 13 October 1998, did she write to BNP disputing liability for the loss incurred.

Correspondence

58. Like Shee Chin, Nancy also received voluminous documents from BNP during the material times when the forex transactions in her name were entered into. The documents included monthly statements of account, credit and debit advices and, most importantly, confirmation slips in respect of each and every forex transaction that was entered into. It is undisputed that these statements of account and confirmation slips reflected the transactions that had been effected in her name and for her account. It is also undisputed that she had never raised any query or objection or complaint against any of the statements.

59. In maintaining that they were not aware of Garys actions, both Shee Chin and Nancy claimed that they did not read or even open some of these statements from the bank. That appeared to be true with regard to some of the documents sent to them; however, whether it be true or not is immaterial. The fact that they did not open or read the statements or for that matter did not quite understand them cannot be a valid ground of denying knowledge of the statements. These statements were sent to them by BNP with a view to confirming the transactions that had been carried out, and if they chose not to open and read them, the statements would still have the effect intended and serve the purpose for which they were sent. The fact that they were not too concerned to read the statements and find out exactly what they were and what they contained gives rise to the inference that they each had implicit and unquestioning trust in Gary, and in his skill and ability in managing their accounts and effecting the deals for them. They were content to leave it to entirely Gary to operate their respective accounts wholly at his discretion.

Gary evidence

60. Gary was not called as a witness by either BNP or the respondents; both sides for obvious reasons refrained from calling him. That is perfectly understandable. Before us, both BNP and the respondents rely on a statement of agreed facts, which was admitted by Gary in the district court, when he pleaded guilty to the charges brought against him. This statement was admissible in court under s 45A of the Evidence Act (Cap 97, 1997 Ed) and was admitted by the trial judge. That statement was no doubt relevant. In the statement, Gary admitted, inter alia, that he opened a Singapore dollar account and a Japanese Yen account in Shee Chins name without the latters knowledge and consent. He went on to make the following admissions with regard to Shee Chins position in BNP:

9. The Accused [Gary] carried out his own share and foreign exchange trading in the other accounts of TSC, which were kept separate from TSCs own

transactions carried out in the SGD 41 account.

10. In respect of the 2nd charge (DAC 21811/99), the Accused carried out the share transactions as particularised at Annex 1, which is also the schedule to the 2nd charge, in his own behalf using account number 01 012617 002 38 SGD, in TSCs name.

11. In respect of the 5th charge (DAC 21814/99), the Accused carried out the leveraged foreign exchange transactions with BNP as particularised at Annex 2, which is also the schedule to the 5th charge, in his own behalf using account number 50 013656 006 70 JPY, in TSCs name.

12. TSC subsequently became aware that the Accused had opened other accounts in his name, which the Accused was using for trading. TSC then confronted the Accused, who assured him that he would sell off the shares and close the accounts. The Accused also took responsibility for all the unauthorised trades at that time. Therefore TSC allowed the Accused to continue trading in his accounts, in order to recover some of the losses incurred, and eventually to close out all the positions.

61. With respect to Nancys position with BNP, Gary admitted the following:

19. The Accused [Gary] had, in fact, opened a Japanese Yen account (number 50 015684 001 22 JPY) in Nancys name without her knowledge and consent. He then used this account to carry out his own leveraged foreign exchange trading, mainly buying US dollars against Japanese Yen.

20. The Accused carried out the leveraged foreign exchange transactions with BNP as particularised in Annex 3, which is also the schedule to the 7th charge, in his own behalf using account number 50 015684 001 22 JPY, in Nancys name.

21. Nancy subsequently became aware that the Accused was using her account to trade. However, she took no action, as the Accused assured her that he would be responsible for his transactions.

62. We have some reservations in accepting these admissions made by Gary. First, they are somewhat inconsistent with the evidence which we have discussed. Secondly, Gary himself had not been called and what he admitted in that statement had not been truly tested in cross-examination. We are therefor unable to place much weight on these admissions.

Authorization

63. We now come to the issue of authorization by Shee Chin and Nancy of the transactions carried out by Gary. The evidence we have considered leads inescapably to the following conclusions: that both Shee Chin and Nancy knew or were aware that Gary was trading in their respective accounts, in the case of Shee Chin, trading in shares and foreign exchange, and in the case of Nancy, trading in foreign exchange; that they knowingly allowed and continued to allow Gary to do so; and that they condoned and approved the transactions entered into by Gary in their respective names. They acquiesced in the way he traded in their names and for their accounts respectively. As counsel for

BNP submits and we agree, whatever might have been the position with regard to the initial transactions, Shee Chin and Nancy had by their conduct and actions authorised Gary to trade in their respective accounts, which he did. The following events or actions are only explicable on the basis that they had, in effect, authorised Gary to carry out the transactions in their respective accounts: the margin call made by BNP on Shee Chin on 10 April 1997 and his response thereto by the deposit of further shares and also Nancys response by the deposit of her own shares; Shee Chins acceptance on 20 October 1997 of the proposal for the loan/facility up to the aggregate sum US\$2,000,000 offered by BNP; the contents of the telephone conversations between Gary and Shee Chin on 5 March and 29 July 1998 respectively; Shee Chins signing of the letters of confirmation of the two forex transactions and the risk disclosure statement in March 1998; his proposal made in July 1998 for repayment to BNP of the amount owing by instalments of US\$20,000 per month; the contents of the several telephone conversations between Gary and Nancy; Nancys acceptance and signing of the transfers of the profits made from the forex transactions to Shee Chins account; and finally the flood of contemporaneous documents detailing the transactions entered into by Gary in their accounts received by them respectively and the complete absence of any query, objection or protest from them or either of them. In the circumstances, it can hardly be disputed that the transactions carried out by Gary in their names were authorised. In this case, the actual authority given to Gary, though not expressed, was implied from the conduct and actions of the parties and the circumstances of the case.

64. In *Hely-Hutchinson v Brayhead Ltd and Anor* [1967] 3 All ER 98 at 102; [1968] 1 QB 549 at 583, Lord Denning MR said:

[A]ctual authority may be expressed or implied. It is *express* when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their be managing director.

In that case, one Richards was the chairman of directors of the defendant company and was its chief executive or de facto managing director. He often committed the company to contracts on his own initiative and only disclosed them to the board subsequently. The board acquiesced in his manner of conducting business and was content to leave the running of the company to him. The defendant was then negotiating to take over another company (Perdio), in which the plaintiff was the chairman and managing director. An agreement was reached between the plaintiff and Richards whereby, among other things, Richards on behalf of the defendant gave two undertakings: one was to indemnify the plaintiff against the personal liability which he might incur by his having to honour a personal guarantee given to a merchant bank, and the other was to guarantee the payment of a certain loan from the plaintiff to the Perdio. Having given these undertakings, Richards did not report them to the board of the defendant. Subsequently, Perdio went into liquidation and the plaintiff was called upon by the merchant bank to honour his guarantee, which he did, and he sued the defendant on the undertakings. The defendant alleged that Richards had no authority to give the undertakings. Roskill J held that Richards had apparent authority to bind his company. The defendant appealed. The Court of Appeal, comprising Lord Denning MR, Lord Wilberforce and Lord Pearson, affirmed the decision of Roskill J, but on the ground that Richards had actual (and not apparent) authority to bind the company. Lord Denning MR said ([1967] 3 All ER 98 at 102, [1968] 1 QB 549 at 584):

It is plain that Mr Richards had no express authority to enter into these two contracts on behalf of the company: nor had he any such authority implied from the nature of his office. He had been duly appointed chairman of the company but that office in itself did not carry with it authority to enter into these

contracts without the sanction of the board. But I think that he had authority implied from the conduct of the parties and the circumstances of the case. The judge did not rest his decision on implied authority, but I think that his findings necessarily carry that consequence.

Lord Wilberforce and Lord Pearson also came to a similar conclusion.

65. This case was followed by this Court in *SPP Ltd v Chew Beng Gim and Anor* [1993] 3 SLR 393. There, two executive directors of the board of SPP Ltd, Chew Beng Gim and Leonard Cheng, were appointed as nominee directors on the board of another company, Flamco Pte Ltd. As directors of Flamco, they were asked to execute personal guarantees in respect of hire purchase financing obtained by Flamco. Chew and Cheng referred the matter to their superior, Ong Tiong Soon, the managing director of SPP Ltd. Ong authorised them to sign the guarantees, implicitly assuring them that they would be indemnified by SPP Ltd. Subsequently, Ong, Chew and Cheng were forced off the board of SPP Ltd. Flamco defaulted in repayment of the facilities and the finance company sued Chew and Cheng on their personal guarantees. They in turn sought an indemnity from SPP Ltd as nominee directors. SPP Ltd declined to indemnify them, on the basis that the board of SPP Ltd had not specifically authorised them to execute the guarantees. SPP Ltd further argued that Ong had no authority to give Chew or Cheng the assurance that they would be indemnified. The evidence was the Ong was the moving spirit behind SPP Ltd at the material time, and the management of the company was carried out informally. Ong was left very much to himself as far as running of SPP Ltds business was concerned. The trial judge held on these facts that Ong had the actual authority to assure Chew and Cheng that they should execute the guarantees. Accordingly, SPP Ltd was obliged to indemnify them. This Court affirmed the trial judges decision. The Court said at p 400:

It seems to us, and this is our inference, that in the context of these facts and from the way in which the appellants and their group were managed Ong was impliedly authorized to do what he did and, in particular, to authorize or approve the execution of the guarantees by the respondents.

The Court then referred to the case of *Hely-Hutchinson* and said at p 402:

In the instant case, Ong was the managing director and chief executive officer of the appellants. He it was who ran the appellant company and their group of companies. There was rarely any board meeting and decisions were made informally at discussions. In the words of the judicial commissioner, he seemed to have run the appellant company very much as a one man show. The board was content to let him manage and run the appellant company in the way he did and acquiesced in what he did. In the circumstances, in our judgment, Ong had the authority to do what he did, and, in this case, to authorize the respondents to execute the guarantees.

66. Reverting to the present case, we think that probably both Shee Chin and Nancy had implicit and unquestioning trust in Gary, and in his skill and ability in managing their accounts. They were content to let him manage and operate their accounts in the way he did, and they acquiesced in what he did. By their conduct and actions, they had each authorised Gary to trade in his or her account, as the case may be.

Apparent Authority

67. Even if it can be said that, at no stage, had Shee Chin and Nancy given any authority, express or implied, to Gary to carry out the transactions in their accounts respectively, by their conduct and actions they had held out Gary as having the necessary authority. They had allowed Gary to carry out the transactions and continue to do so, and in that sense they had equipped him with the necessary authority for the transactions that he carried out. In other words, vis--vis BNP, Gary had the apparent authority. *Bowstead & Reynolds on Agency* (16th edn) in Article 74 states as follows:

Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though the had no such actual authority.

68. The relevant case in point is *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and Anor* [1964] 4 All ER 630, [1964] 2 QB 480. The case involved one K, who held himself out to be the managing director of the company, Buckhurst Park Properties (Mangal) Ltd (Buckhurst), even though he was not appointed as the companys managing director. Everyone in the company acquiesced in K so doing. K engaged a firm of architects, Freeman & Lockyer, who carried out the works for Buckhurst but did not get paid for it. Freeman & Lockyer sued Buckhurst for payment of the works. Buckhurst later claimed that K did not have the authority to bind the company, as he was not properly appointed, and therefore the company was not bound by Ks act and was not liable to pay for the works. The court found in favour of Freeman & Lockyer, and held that Buckhurst was bound by Ks act even though K had no actual authority, because his act of engaging the architects was within his apparent authority as a managing director. In the course of his judgment, Diplock LJ said ([1964] 1 All ER 630 at 644, [1964] 2 KB 480 at 503):

An apparent or ostensible authority is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

69. Reverting to the instant case, we are of the opinion that there are two requirements which have to be satisfied, namely:

- (i) there must be a representation made by the respondents that Gary had authority to enter into the transactions on their behalf; and
- (ii) BNP must have relied on this representation

In relation to the first requirement, we find that by their conduct and actions Shee Chin and Nancy had represented that Gary had the authority to enter into the transactions on their behalf. Having had the knowledge that Gary was carrying on the transactions without their express authority, they

continued to allow him to enter into further transactions, and they approved the transactions which Gary had carried out, and this course of conduct continued until October 1998.

70. As to the second requirement, there is no question that BNP had relied on such representation. There had been no instance, where either Shee Chin or Nancy notified it that Gary had not been authorised to carry out the share or forex transactions which had been carried out. In addition to their silence and acquiescence with regard to Garys actions, they also did many positive acts consistent with their representation of Garys authority which BNP had accepted and on which it had relied. All these have been discussed above, and we do not find it necessary to repeat them here.

71. In our judgment, Gary had the authority, actual or ostensible, to enter into the transactions on behalf of Shee Chin and Nancy respectively, and accordingly they were bound by what he did. What we have decided is sufficient to dispose of the appeal, and it is not necessary to consider the remaining issues.

Conclusion

72. This appeal succeeds and is allowed. We set aside the judgment below and allow the claims of BNP against Shee Chin and Nancy with interest at 6% from the date of the writ to this date hereof.

73. Before we decide the question on costs, we wish to hear arguments from counsel. Counsel are invited to submit their written arguments within seven days from the date hereof.

Sgd:
YONG PUNG HOW
Chief Justice

Sgd:
L P THEAN
Judge of Appeal

Sgd:
CHAO HICK TIN
Judge of Appeal