Kim Eng Securities Pte Ltd *v* Goh Teng Poh Karen
[2011] SGHC 201

Case Number	: Suit No 1037 of 2009
Decision Date	: 07 September 2011
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Danny Ong, Jansen Chow and Andrea Baker (Rajah & Tann LLP) for the Plaintiff; Adrian Tan and Joseph Yeo (Drew & Napier LLC) for the 2nd Respondent.
Parties	: Kim Eng Securities Pte Ltd — Goh Teng Poh Karen

Contract

7 September 2011

Tay Yong Kwang J:

1 The plaintiff is a stockbroker and a member of the Singapore Exchange Securities Trading Limited. From 26 January 2000 to 30 June 2009, the defendant was a dealer with the plaintiff, holding the designation of Vice-President (Dealing). The plaintiff brought this action against the defendant to enforce her obligation to indemnify the plaintiff for losses arising out of share trades dealt with and/or executed by or through her on behalf of her clients.

2 At the conclusion of the trial, I gave judgment for the plaintiff on its claims, amounting to more than $1.2m, but not on all the grounds on which it relied. I therefore awarded the plaintiff only 70% of its costs on an indemnity basis. The defendant has appealed against the whole of my decision.

The plaintiff's case

3 The plaintiff appointed the defendant as a dealer by way of a letter of appointment dated 26 January 2000 ("the letter of appointment"). At that time, the plaintiff had not yet merged with Ong & Company Private Limited ("Ong & Co"). The merger took place in February 2002. The terms contained in the letter of appointment were subsequently varied by the plaintiff's letters dated 11 July 2003 ("the 2003 letter"), 1 August 2006 ("the 2006 letter") and 18 July 2007 ("the 2007 letter"). The defendant ceased to be employed by the plaintiff on 20 June 2009.

4 The plaintiff engages both dealers and remisiers for the purpose of its business (collectively referred to as Trading Representatives). Dealers may deal in share trades for clients who maintain trading accounts with the plaintiff (known as client trades). They may also deal in proprietary share trades for themselves through a brokerage company's stock account (known as proprietary trades). Dealers earn a basic monthly salary coupled with a commission based on profit sharing arrangements with the plaintiff. Dealers are required generally to furnish security in the form of cash or bank guarantees, the amount of which depends on the trading limit accorded to the dealer and the client in question. Dealers may also be engaged to carry out share trades for the plaintiff's clients on the plaintiff's account. Such are called house dealers.

5 Unlike dealers, remisiers are not employees of the plaintiff. Remisiers deal in client trades but not proprietary trades. They do not earn any salary and are paid by way of commissions instead of

salary. They are also required to furnish security to secure their trading limits.

6 Other than house dealers, both dealers and remisiers are therefore required to provide security to the plaintiff. They are also generally liable to indemnify the plaintiff for all outstanding losses arising from client trades dealt with by them as well as interest on late settlement by the clients. This is because brokerage companies assume a substantial risk of losses arising from client trades should the clients delay or default in payment. At all material times, the plaintiff required all its Trading Representatives (other than house dealers) to furnish security and to indemnify the plaintiff against losses.

7 Since the merger of Ong & Co and the plaintiff in early 2002, it has been the practice that the obligation to indemnify be set out in writing by way of a letter of appointment, an indemnity agreement and/or the Handbook (see below at [11] to [14]). After the merger, an exercise was carried out to have all the dealers at the Market Street office sign a template indemnity. Due to an administrative oversight, when the defendant moved office from Suntec City to Market Street in or about March or April 2002, the plaintiff did not ask the defendant to sign the template indemnity. This was because she went over to the Market Street office after all the dealers there had signed.

8 The letter of appointment stated the defendant's designation as Vice-President (Dealing) and provided for a salary of $4,500 per month. One of the defendant's duties was to "comply with all reasonable requests, instructions and regulations made by the management (or by anyone authorised by the management) and give to the management such explanations, information and assistance as the management may reasonably require". The other salient terms were:

> **Security**
>
> Upon joining the Company, you shall furnish the Company with cash or a guarantee of Singapore Dollars Thirty Thousand (SGD30,000) to secure a net trading limit of Singapore Dollars Three Million (SGD3,000,000) for your clients' accounts.
>
> If, at any time, the Company considers the security to be inadequate by reason of the volume of business transacted by you, or in the event that the outstanding cumulative losses in the stock account allocated to you as detailed hereunder exceed S$40,000 at any point in time, the Company shall be entitled to require you to provide additional security and you shall do so within seven days of the Company's request.
>
> Any guarantee furnished to the Company shall be issued by a bank operating in Singapore acceptable to the Company and shall be in form and content acceptable to the Company.
>
> **Stock Account**
>
> A stock account will be allocated to you to carry out proprietary trading.
>
> …
>
> In the event that:
>
> (a) the total positions in the stock account allocated as aforesaid to you exceed Singapore Dollars One Million (SGD1,000,000) at any point in time without the approval of a director of the Company, and/or

(b) the total value of open positions in the stock account allocated to you at the end of any trading day exceed Singapore Dollars One Hundred Thousand (SGD100,000) without the prior approval of a director of the Company,

the Company may (in its sole discretion as to which stock or stocks to sell off, the volume to be sold as well as the timing of the sale or sales), sell off any stock in the stock account allocated as aforesaid to you, to bring the balance to or below the approved level. You will be personally liable for any and all losses incurred as a result. Any profits derived as a result will be wholly confiscated by the Company and will not be taken into account for the purposes of calculating the profits which would be due to you from the Company in accordance with the terms of this letter of appointment.

Profit-Sharing

Profit-sharing will be paid quarterly. Your share of profit will be computed as shown in the Appendix to this letter of appointment.

…

You may carry forward the deficit outstanding in your account at the end of any quarter ("first quarter") to the next quarter ("subsequent quarter"), provided always that you are required to pay the Company for 100% of any deficit outstanding in your account at the end of:

a) the subsequent quarter, and

b) the Company's financial year-end which falls on 31 March.

The Company reserves the right to withhold your profit share to set off overdue amounts due from your clients. For the avoidance of doubt, all amounts due to the Company remaining unpaid for thirty days or more are considered overdue.

9 The Appendix referred to above sets out the profit sharing arrangement as follows:

Share of 40% of Gross Commission net of Foreign Fee Paid

Add/(Less): 100% of Stock Account Profit/(Losses)

Less:Salary

0.1% of value of turnover in your stock account

Provision for diminution in value of stocks in stock account

Interest on stock account positions

Interest on clients' late settlement

Loss on dealing errors

Bad and doubtful debts

Medical expenses not covered by insurance

All direct costs not covered under the Company's Incentive Package for remisiers and not specifically enumerated above

Net Amount Payable to you/Net Deficit Receivable from you___

Note:

All expenses paid for by the Company under the Remisiers' Incentive Package, as may be amended from time to time, shall be borne by the Company if you meet the applicable targets in the Incentive Package, failing which the expenses will be deducted from the Net Amount Payable to you or added on to the Net Deficit Receivable from you, as the case may be.

10 Pursuant to the letter of appointment, the defendant furnished and maintained security in the form of banker's guarantees and cash collateral in the amounts of $30,000 and $60,000 to the plaintiff from April 2001 and throughout her employment. The defendant was therefore employed on the terms applicable to remisiers and she performed the role of a remisier while enjoying the benefits applicable to a dealer. In the stock broking industry, she would be described as a dealer on remisier's terms.

11 In May 2002, the first edition of the merged entity Kim Eng Ong Asia Securities Pte Ltd's "Handbook for Trading Representative" ("the Handbook 2002") was published. The Handbook 2002 declared that it:

has been written to enable you to have a better understanding of your Company, Kim Eng Ong Asia Securities Pte Ltd. This Handbook is not an all-encompassing information kit nor should it be considered as constituting conditions of employment/agency. The programme and benefits laid out in this Handbook for Trading Representatives are designed in your interest and it is hoped that through this you will be able to pursue a rewarding career with us.

12 The Handbook 2002 also provided for a Pink Receipt system as follows:

The Company operates a Pink Receipt system for collateralisation of client's debt.

Pink receipts are issued to Trading Representatives for monies received to collateralise a debt due to the Company, generally from a client. The debt will remain as a receivable from the debtor, and statements will continue to be sent to the debtor. Interest will continue to accrue on the outstanding principal amount until payment is received from the debtor.

When the debtor pays the principal and interest owing, the principal paid and any additional interest received by the Company, will be refunded to the Trading Representative holding the pink receipt for such debt.

13 Under 'Recovery of Contra Losses', the Handbook 2002 stated:

Trading Representatives shall exercise due diligence in reviewing clients' contra losses and in recovery of these losses.

The Company adopts the following recovery procedure:-

- Demand letter will be sent 14 days after the date of contra

- Reminder demand letter will be sent 7 days after 1st demand letter

- Account will be made delinquent 7 days after the 2nd demand letter

- Legal proceedings will be instituted against client

> The Company has sole discretion in the course of actions to be taken against clients.
>
> Trading Representatives shall indemnify the Company for his/her clients' contra losses in full, interest expenses, as well as other expenses incurred in the recovery process.

14 The second edition of the Handbook was published in March 2004 ("Handbook 2004"). The relevant clauses cited at [11] to [13] above are not different in the Handbook 2004 other than the opening words in the Handbook 2004 regarding the pink receipt system stating:

> The Company operates a Pink Receipt system for payment of client's debt by the Trading Representative.

15 Pursuant to the 2003 letter from the plaintiff to the defendant, which was stated to be a "settlement agreement", the defendant acknowledged that $678,497.70 (the total losses and interest due in five clients' accounts) was due and payable by her to the plaintiff. The plaintiff accepted 50% of this amount from the defendant in full and final settlement of her debt. The defendant undertook to remain in the plaintiff's employment until 21 July 2006. She also accepted the following conditions:

> … you hereby irrevocably and unconditionally agree to on demand indemnify the Company and keep the Company indemnified fully and completely against any and all losses/contra losses damages costs and expenses whatsoever (including legal costs on a fully indemnity basis) and all other liabilities of whatsoever nature or description (including any deficit balances under your profit and loss/stock accounts) which may have been incurred as at the date of the this (*sic*) Settlement Agreement and/or which may be incurred or suffered by the Company in connection with or in any manner arising from any and all transactions dealt by or through you or accepted by you or allocated/designated under your code or under any of your aforesaid accounts including any interests whatsoever thereon charged by the Company.
>
> …
>
> Save as varied above, all terms and conditions of your Letter of Appointment dated 26 January 2000 shall apply and have full force and effect, and each and every reference to your Letter of Appointment dated 26 January 2000 … shall mean and refer to your Letter of Appointment dated 26 January 2000 as supplemented, amended or varied herein, or as may from time to time be further supplemented, amended or varied.

16 By 31 December 2007, losses amounting to $2,029,378.61 were incurred in the accounts of Ho Kah Leong ("Ho"), Chiang Mun Kit Julian ("Julian") and Goh Wui Jiet ("Goh") arising from share trades or transactions executed in these accounts individually and/or through the defendant on their behalf ("the 2007 losses"). Of these three, Julian's account was the only one which also appeared in the 2003 letter as an account with outstanding losses.

17 As a result of the 2007 losses, the trading limits under these three accounts were suspended. The defendant's global trading limit was also initially suspended totally but it was subsequently reinstated on an *ad hoc* basis upon her request and the plaintiff's approval for much lower amounts.

In early 2008, the plaintiff's representatives met with the defendant a number of times to discuss the issue of the 2007 losses. It was impressed upon her that if the 2007 losses were not paid for, the plaintiff would be forced to take legal action against the clients and/or the defendant on the basis of her personal liability to indemnify the plaintiff. The defendant assured the plaintiff that payment for the 2007 losses would be made.

18 Later, the defendant informed the plaintiff that the clients in question had difficulty making payment and she would have to settle the 2007 losses first but needed some time to raise the money. She offered her apartment at Emery Point condominium in Ipoh Lane as security. Accordingly, the plaintiff lodged a caveat against the said apartment.

19 Around May 2008, the defendant informed the plaintiff that she would sell the apartment to her friend and use the net sale proceeds towards part payment of the 2007 losses. The net sale proceeds amounted to $817,939. Out of the said $817,939, the defendant directed that $517,177.34 be paid for the full outstanding contra losses (without including interest) in Ho's account. The balance of $300,761.66 was paid into her pink receipt account. With such payment, although interest on the debt would continue to accrue where the debtor was concerned, the defendant's liability for such interest ceased. If and when the debtor paid the plaintiff the debt due, the plaintiff would return to the defendant any surplus from the amount deposited in the pink receipt account.

20 In September 2008, the defendant requested to withdraw the $300,761.66 in her pink receipt account to make part payment for the losses in Julian's and Goh's accounts. The plaintiff acceded to her request. Accordingly an amount of $150,380.83 each was paid to the said accounts and an internal memorandum dated 10 September 2008 was signed by the defendant. In this memorandum, she acknowledged that "all payments made by me by way of pink receipts will be payment to the Company towards the satisfaction of my obligation to indemnify the Company in full for losses and amounts due under the terms of my Letter of Appointment/Agency Agreement and/or other related contractual documents".

21 In September, October and November 2008, the defendant made further payments amounting to $12,000 for Julian's and Goh's accounts. In February 2009, she paid $100,000 for Julian's account. In 2008, the plaintiff commenced legal action against Julian and Goh and they were eventually adjudicated bankrupts in May 2009. Subsequently, the plaintiff applied the balance of the money held in the defendant's trust account amounting to $73,148.66 (which included the security of $60,000 furnished by her) towards part payment of the 2007 losses.

22 Sometime in June 2009, at a meeting between the plaintiff and the defendant, it was proposed that she pay $500,000 over five years in consideration of which the plaintiff would not proceed against her for payment of the rest of the 2007 losses and would withdraw its claims against Julian's and Goh's estates in bankruptcy. By August 2009, the negotiations broke down.

23 As at 31 October 2009, the losses (including contractual interest of 9% per annum) in Julian's account were $512,004.89 and those in Goh's account were $703,878.65. The costs incurred in respect of the legal proceedings against them were $8,043.14 and $8,731.70 respectively. These amounts were not in dispute.

24 The plaintiff's representatives did not threaten or coerce the defendant into making the part payments. They merely informed her that they would have no choice but to take legal action for the recovery of the 2007 losses. No one threatened to destroy or to ruin her reputation and to ensure that she would not be able to work in the stock broking industry. The defendant was a capable and intelligent career woman with a degree in accounting from an American university. She had been

working in the finance industry since 1994 as a foreign exchange trader and an investment analyst. She was paid over $2.38m during her employment with the plaintiff. In August 2006, when her employment was extended by another three years, she had negotiated for a retention bonus of $150,000 to be paid to her (subsequently agreed at $100,000).

25 Due to the "inadvertent oversight" on the plaintiff's part explained earlier, it did not cause the defendant to execute a separate dealer's indemnity agreement on the plaintiff's template. The omission was discovered only in 2009 when the plaintiff was contemplating legal proceedings against her. It was and is a standard requirement for all Trading Representatives (save for house dealers) to indemnify the plaintiff for their clients' trading losses and there was no reason at all why such a requirement did not apply to the defendant just because she did not sign an indemnity agreement. She was at all material times obliged to indemnify the plaintiff for her clients' trading losses by virtue of the 2003 letter and the standard requirement and practice of the plaintiff as evidenced in the Handbook. Further, the defendant had repeatedly acknowledged her obligation by way of the internal memorandum (see [20]) and by the various part payments made by her in respect of the 2007 losses.

26 Based on the above facts, the plaintiff submitted that the central issue to be determined was whether the defendant was liable for the outstanding losses in Julian's and Goh's accounts together with interest, costs and other expenses by reason of the letter of appointment as amended by the 2003 letter and/or the Handbook. The plaintiff also relied on its standard requirement, practice and custom prevailing at all material times that its dealers participating in a commission-based profit sharing scheme and executing share trades for their own clients indemnify the plaintiff.

27 The plaintiff submitted that the defendant had agreed under cross-examination that the plaintiff was entitled to apply the surplus in her profit and loss account to pay off any overdue amounts in her clients' accounts. Although the defendant sought to qualify her position subsequently by saying that the surplus could be set-off against the losses in the clients' accounts only if such losses were reflected in her profit and loss account, there was no term specifying that such losses had to be reflected in her profit and loss account. The 2007 losses were not shown as "bad and doubtful debts" in her profit and loss account as there was prospect of recovering them in 2008 and 2009, with payment from the sale proceeds of the defendant's apartment and the continued negotiations for a settlement of the 2007 losses taking place until August 2009. The losses would only be included as "bad and doubtful debts" upon specific instructions from the plaintiff's management that the losses were irrecoverable.

28 The defendant also provided security to the plaintiff under the terms of the letter of appointment throughout the period of her employment with the plaintiff. This, the plaintiff argued, was pursuant to her indemnity obligation because if she was not personally liable for her clients' losses, there would have been no need for her to furnish security for the trading limits of her clients.

The defendant's case

29 The defendant, born in 1967, is presently unemployed. She is still residing in the Emery Point apartment which she sold as the buyer (a friend of the defendant) allowed her to continue living in it without having to pay rent or any of the expenses.

30 Although the letter of appointment provided for the positions of proprietary trader and dealer, she started out working in the former position only. She therefore did not provide the plaintiff with any security. By March 2000, she had incurred losses of approximately $200,000 in her stock account and was told to focus on working as a dealer instead. In June 2001, at the plaintiff's suggestion, she ceased being a proprietary trader and worked exclusively as a dealer from then onwards.

31 When she began working as a dealer, the plaintiff made it clear to her that if the clients incurred losses, the plaintiff would look to them to recover the losses and that it was her duty to assist the plaintiff in doing so. She was never told that a dealer would be liable for the clients' losses. It was also not the industry practice that a dealer would be responsible for such. The dealer therefore did not have any obligation to indemnify the plaintiff for such losses.

32 The five clients who incurred heavy losses and who were mentioned in the 2003 letter were the defendant's family and close friends. Two of them were her parents, two were her very close friends and Julian was her former fiancé. They had relied on the defendant for investment advice.

33 In February 2001, the plaintiff asked the defendant to furnish a banker's guarantee as security. If she failed to do so, her global trading limit would be suspended and she would not be able to conduct any trades as a dealer. At the same time, she was doing trades for a larger number of clients and so needed a higher global trading limit from the plaintiff which would only be granted if she provided the guarantee sought. If she provided the guarantee, she "would also be able to buy time for the 2003 Clients to raise money to repay the losses in their accounts". The plaintiff's chairman and managing director, Ronald Ooi, informed her that the plaintiff would not call on the guarantee.

34 In April 2001, the defendant furnished a guarantee for $30,000. Between 26 April 2001 and 14 April 2003, she provided a total of eight guarantees to the plaintiff, either for $30,000 or for $60,000.

35 For the 2003 letter, it was never discussed nor agreed that the defendant indemnify the plaintiff for the defendant's clients' losses subsequent to the date of that letter (11 July 2003). If the issue about such future losses had been raised, she would certainly not have agreed "to be liable for all losses incurred by all my clients forever". It would make no business sense and it was not the industry practice. However, the plaintiff made it clear to her that if she did not agree with the terms of the 2003 letter, it would take legal action against those clients and suspend her global trading limit.

36 The defendant wanted to protect those clients as they were family and close friends. She felt that she owed "a moral obligation to [them] to prevent the plaintiff from bankrupting them". She also wanted to help them with their financial difficulties. Further, she thought that a 50% discount on the outstanding losses was a favourable deal. She therefore readily agreed to the settlement terms in the 2003 letter although she had to borrow money to "protect" the clients. She did not mind paying the $339,248.85 on their behalf as she knew that they would return her the money in the future. For this settlement, the plaintiff never threatened to sue her for the clients' losses as she was not obliged to make good those losses.

37 The 2003 letter was passed to her to sign on a trading day. It took less than a minute for her to sign. She did not see any drafts before that and was not given a copy after signing. There was no mention of indemnity. She did not have legal representation during the signing of the 2003 letter. A few days after she signed the 2003 letter, she paid the plaintiff whatever was due under that settlement and, accordingly, the 2003 letter was discharged save for the agreement for her to remain in the plaintiff's employment for 3 years.

38 After July 2003, the defendant began to perform very well and became of the plaintiff's best dealers. Between 2003 and 2007, her average income was $320,000 per year.

39 The last guarantee that she furnished to the plaintiff was in April 2003. As there were hardly any losses in her clients' accounts after the 2003 letter, she did not need to renew the guarantee.

40 The defendant was conducting trades on behalf of more clients and therefore needed a higher global trading limit. The plaintiff wanted a guarantee or cash as collateral before granting her the higher limit. She then provided $60,000 cash as collateral to the plaintiff in July 2004.

41 On 1 August 2006, the plaintiff issued the 2006 letter. On 18 July 2007, the plaintiff issued another letter (the 2007 letter) to amend the profit sharing formula so that the different versions of the formula which existed would use substantially consistent wording. The letter of appointment, the 2006 letter and the 2007 letter formed the entire agreement between the plaintiff and the defendant and they made no mention of the 2003 letter or of any indemnity.

42 In December 2007, some of the defendant's clients incurred heavy contra losses as a result of the global financial crisis. Among them were two very close friends (Ho and Goh) and Julian, her then fiancé ("the 2007 clients"; see [16] above). She felt partly responsible for their losses because she had encouraged them to trade and given them investment advice. The two friends were also having their own family problems. Together, these three clients accumulated losses totalling more than $2m. Although she was her family's sole breadwinner, it was not in her character to abandon good friends.

43 In January 2008, the plaintiff suspended her global trading limit, effectively stopping her from working as a dealer. In March 2008, the plaintiff reduced her salary from $4,500 to $1,500. The plaintiff's then executive director, Ong Seng Gee ("Ong"), threatened to destroy her three clients (in [42] above) by making them bankrupts if the losses were not made good. He also threatened to destroy the defendant if she did not settle the losses by making sure that she could no longer work in the stock-broking industry. Vulgarities were uttered by him, sometimes in jest and sometimes in anger. At all material times, he was hostile and unreasonable towards her. The defendant was "terrified of Ong as [he] was known to be an aggressive and violent man with an uncontrollable temper". Ong was also known to have assaulted an employee in public. To the defendant, he was basically a bully.

44 Subsequently, the plaintiff informed the defendant that if she managed to substantially reduce or collaterise the losses, it would grant her a global trading limit and allow her to resume working. As she was eager to start working again, she arranged a meeting with the 2007 clients to discuss the issue of the losses. She informed them that the plaintiff had threatened to make them bankrupts. She wanted to help them and told them that she would assist in settling the losses on their behalf. They agreed to repay her the money once they were in a position to do so. As they were her close friends and then fiancé, she had no doubt that they would keep their word.

45 The defendant then sold her apartment and used the proceeds of sale to reduce the losses owed by the 2007 clients. In March 2008, she also took a loan of $300,000 from her retired aunt. One account was fully settled as a result. In addition, she gave the plaintiff a cheque for $38,000 in July 2008 to reduce the losses in one of their accounts. However, despite having reduced the losses by about 40%, the plaintiff did not keep to the promise to restore her trading limit. Disappointed with this, she stopped going to work from around July 2008.

46 The plaintiff told the defendant that it would offer the remaining 2007 clients some form of instalment plan. However, instead of resolving the matter amicably, the plaintiff commenced legal action against those clients and obtained judgment against them in July 2008 for the outstanding amounts still owing in their accounts.

47 Around August 2008, Ong proposed an instalment plan for the remaining two 2007 clients to pay the plaintiff $2,000 each every month for three months and to pay $100,000 every fourth month. The $2,000 per month cycle would then start again. It was thus that the two 2007 clients paid $2,000

each to the plaintiff in September, October and November. They were not able to make the payment scheduled for the fourth month.

48 In January 2009, Ong threatened to make the two 2007 clients bankrupt and said to the defendant that after he was done with them, he would "come after" her. She understood Ong as saying that he would ruin her professional reputation as a dealer and destroy her ability to work in the industry. As she was not able to work as a dealer, she ran out of financial resources to help the two 2007 clients. She was at a complete loss as she was terrified that the "absolutely ruthless" Ong would carry out his threats. He did so when he made the two 2007 clients bankrupt in May 2009.

49 Subsequently, the plaintiff proposed to settle the losses by accepting $500,000 as full and final settlement. It would also withdraw its proof of debt in the estates of the said clients. As the plaintiff was the only creditor for one account and the largest creditor for the other, if it withdrew its proof of debt, the likelihood of discharge from bankruptcy would be greatly increased. During the negotiations for this, the plaintiff never claimed that the defendant was under an obligation to indemnify it against the clients' losses.

50 On 1 June 2009, the defendant wrote a letter to the plaintiff requesting earnestly that she be allowed to resign immediately. She claimed in that letter that she had assisted her clients to clear their debts "as a gesture of goodwill" towards them as they had given her business in the past and had promised to repay her when their financial situation improved. She repeated this request by email on 31 August 2009. She decided to resign because she could not trust the plaintiff's words anymore.

51 On 4 September 2009, the plaintiff replied stating that it would accept the defendant's letter of 1 June 2009 as a one-month's notice of resignation. Her last day of employment with the plaintiff was therefore 30 June 2009.

52 The defendant reiterated that the only employees who had an express indemnity obligation imposed on them were the remisiers. Such an obligation was imposed on a dealer only if the dealer had signed the Trading Representative Indemnity and she had not signed such although the plaintiff had the opportunity to ask her to do so when she was first employed or when she moved from being a proprietary trader to a dealer. Neither the 2006 letter nor the 2007 letter mentioned an indemnity and while both made reference to the letter of appointment, they did not refer to the 2003 letter at all. It was therefore clear that the 2003 letter was never part of the appointment letters. It had been fully discharged and was a "dead issue".

53 The 2003 letter did not impose a general obligation to indemnify the plaintiff for future losses. Its purpose was limited to the matters relating to the losses in the clients' accounts in question. It varied the terms of engagement only to the extent that the defendant agreed to remain in the plaintiff's employment until 21 July 2006. Although clause 3 of the 2003 letter stated "and/or", that was a mistake. It should have read as "and" only. Adding the word "or" would not make any sense as she would then be effectively indemnifying the plaintiff for all losses suffered irrespective of whether they were incurred by her clients or not. It was illogical for her to expose herself to "such onerous terms". The plaintiff was in a much better position to bear the losses. If an indemnity was imposed on dealers, the potential liability that they would be exposed to "would be gravely out of proportion when compared to the salary and commission they earn". If there was a prior indemnity obligation, the plaintiff would not need to offer a discount of 50%. Further, clause 3 of the 2003 letter would have been redundant if there was in existence such an obligation. The 2003 letter no longer had effect and it did not cover the losses incurred by the 2007 clients.

54 The guarantees were not given pursuant to an indemnity obligation. Other than the cash

collateral of $60,000 given in July 2004 (to secure a higher global trading limit and not because of an indemnity obligation), all the guarantees were furnished before the 2003 letter. The maximum amount involved at any one time was only $120,000 while the losses in 2003 ran into hundreds of thousands of dollars. It would be ridiculous for the plaintiff to accept $120,000 as good security for such huge losses. The defendant's understanding was that if she offered the plaintiff some form of security, it would hold back taking legal action against the clients of 2003. The guarantees were furnished in order "to buy more time for the 2003 clients to repay the losses in their accounts". The security clause in the letter of appointment was included therein because it was market practice for a dealer to provide some form of collateralization in order to secure a net trading limit.

55 The Handbooks were never part of the terms of the defendant's employment with the plaintiff. The plaintiff has conceded this during earlier summary judgment proceedings. The defendant did not use the pink receipt system at all and had never paid money into any pink receipt account. It was more convenient for the defendant to pay the plaintiff direct and settle the losses that way rather than to pay money into a pink receipt account. She helped to pay for the losses of the 2007 clients out of a moral obligation and out of coercion and fear of Ong's threats.

56 The defendant testified that her sole purpose in negotiating the June 2009 settlement was to help the two 2007 clients' discharge themselves from bankruptcy out of her moral obligation to them. She would therefore "naturally consider paying $500,000 to procure the discharge". The draft of the proposed 2009 settlement sought to impose an indemnity obligation on her and that strengthened her case that the 2003 letter and the Handbook were never part of the terms of her appointment. If the plaintiff had wanted her to indemnify the plaintiff for all losses suffered by all clients, she would have "flatly refused" as it was ridiculous.

The decision of the court

57 While the letter of appointment had a provision on security (see [8] above), it did not expressly impose an indemnity obligation on the defendant (other than in respect of the stock account; see [8] above). It merely required the defendant to provide cash or a guarantee to secure the net trading limit of $3m for her clients' accounts. Clearly, the security was furnished to collateralize losses in the clients' accounts even though the value of the security was only a small fraction of the trading limit. That was why the security could become "inadequate by reason of the volume of business transacted", thereby entitling the plaintiff to demand additional security to be given. That meant that the defendant was personally liable for such losses but only up to the value of the security given if the letter of appointment was considered in isolation. A party could decide to ask for security that does not cover 100% of losses.

58 The defendant claimed that she provided the security to secure a higher global trading limit or to buy more time for her clients out of her moral obligation to them. Securing a higher global trading limit by giving security naturally meant that the two were linked to each other and that the security was to help cover any losses incurred as a result of the trades. Further, she furnished security throughout the period of her employment with the plaintiff and not only during the crisis periods when her clients' accounts were showing excessive losses.

59 It was highly improbable that anyone in the plaintiff would assure the defendant that the demand guarantees would not be called upon. The first time such an assertion was made by the defendant was during her cross-examination in court despite having filed several affidavits before that. At first she said she could not recall the person who gave the assurance but subsequently recalled that it was Ronald Ooi, the Chairman and managing director of the plaintiff (see [33] above). It seemed to me illogical that security would be asked for by the plaintiff just for paper comfort.

60 Despite the defendant's educational background and professional training, she professed not to know what the security given by her was for and what the triggering event for liability was. As the plaintiff has submitted, she was no simpleton but was an astute and experienced professional in the world of finance.

61 As stated at [8] above, one of the defendant's duties specified in the letter of appointment was to "comply with all reasonable requests, instructions and regulations made by the management (or by anyone authorised by the management) …". The plaintiff contended that this clause incorporated the Handbook and the indemnity obligation contained therein notwithstanding the express disclaimer in the Handbook that "This Handbook is not an all-encompassing information kit nor should it be considered as constituting conditions of employment/agency" (see [11] above).

62 However, there was nothing in the letter of appointment that made clear reference to the Handbook such that it would be justifiable to treat the Handbook as part of the contract of employment. In the absence of clear words in the letter of appointment, it would be incorrect to assert that the Handbook was incorporated into the terms of the defendant's employment in spite of the express disavowal at the front section of the Handbook that it did not constitute conditions of employment.

63 The plaintiff relied on *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 where the High Court held that terms expressed as guidelines or non-binding in nature could acquire contractual effect upon incorporation. In that case, a dispute arose between an employee and his employer and one of the issues for determination was whether the employee was entitled to rely on the employer's Human Resources Policy Manual on disciplinary procedures which stated that it was "non-contractual and for guidance only". It was accepted by the parties that the employer's disciplinary procedures were incorporated into the employment contract which provided as other terms and conditions those "laid down in the … Human Resources Homepage, the terms of which may be amended from time to time". It was accepted that the disciplinary procedures were published on that homepage. However, as the incorporated term was inconsistent with the express terms of the employment contract, the court held that the express terms ought to prevail over the incorporated term. The plaintiff argued that there was nothing in the letter of appointment here which was inconsistent with the indemnity clause in the Handbook and the latter should therefore apply to the defendant.

64 It can be seen from the above summary that incorporation did take place in that case as clear reference was made to the homepage and the disciplinary procedures appeared therein. In our situation, the letter of appointment made no reference at all to any Handbook or similar guidebook on employment in the plaintiff. If it had, I would agree that incorporation of the terms stated in the Handbook by reference was a tenable proposition despite the disclaimer in the Handbook itself. On the facts, I therefore held that the Handbook, read with the letter of appointment, could not impose an indemnity obligation on the defendant. If it had been the defendant relying on the Handbook to sue the plaintiff, I believe the plaintiff would have argued assertively that the Handbook could not be "considered as constituting conditions of employment".

65 The defendant claimed that she had no knowledge about the Handbook despite having signed an acknowledgement of receipt of Handbook 2002. I did not accept her assertion of ignorance here. If she had forgotten about the Handbook or had simply ignored it, that was not the fault of the plaintiff.

66 The plaintiff submitted that in any case, the indemnity obligation constituted an implied term of the employment based on the facts here, especially by reason of the standard requirement, practice and custom that was in place since 2002 or so. It submitted, on the authority of *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [21], that the only question to ask is what the

instrument, read as a whole against the relevant background, would reasonably be understood to mean. It also cited *Duke v Reliance Systems Ltd* [1982] ICR 449 for the proposition that a policy adopted by management unilaterally cannot become a term of the employee's contract on the grounds that it is an established custom and practice unless it is shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period.

67 On this issue, I agreed with the plaintiff. The evidence showed that the requirement of an indemnity was applied to everyone in the plaintiff performing the same tasks as the defendant. Such a practice was obviously known to the defendant and complied with by her when she provided the security, when she accepted the terms of the 2003 letter and when she signed the internal memorandum in September 2008 as mentioned at [20] above.

68 The defendant must have known throughout her employment with the plaintiff that she was under an indemnity obligation and hence readily agreed to settle the losses incurred by her clients. I doubt very much that she would feel such a heavy moral obligation for her close friends (leaving aside her parents) that she was willing to undertake liability for their huge debts in 2003 and in 2007 and even to sell her home and take a loan of $300,000 in 2008 from her aunt in order to help discharge their debts. I have no hesitation in rejecting her allegation that she also felt compelled to settle the debts because of the verbal threats by the plaintiff to destroy her clients and her reputation in the stock-broking industry. She did not appear to me to be a person who would crumble under such threats and agree to bear a burden that was never hers.

69 The 2003 letter (see [15] above) set out in express terms the defendant's indemnity obligation to the plaintiff. Its importance in this case was underscored by the defendant's attempts to restrict its scope and to even deny reading any draft thereof or the terms or having a copy of the said letter. She knew precisely when the three-year term of employment stated in the 2003 letter would end and decided to negotiate for a retention bonus which was eventually agreed at $100,000. She was acknowledging personal liability for some $678,000 and was undertaking to pay 50% of that amount in full and final settlement thereof. These facts made her assertions in court quite unbelievable. No one would have been indifferent to the signing of such a letter, particularly someone like the defendant.

70 The unambiguous language of the 2003 letter created an indemnity obligation for losses accrued at the date of the settlement agreement as well as prospective losses. The defendant's attempt at rewriting the terms must therefore be rejected. It was not inconceivable that the plaintiff would want to reiterate the indemnity obligation in the 2003 letter although there was already in existence an underlying obligation to indemnify the plaintiff.

71 The defendant criticised the contention that the 2003 letter created a continuing indemnity obligation. According to her, if the plaintiff "wanted to have an indemnity forever and ever, then the easiest thing to do would be to import the language of the Dealer's Indemnity Form wholesale … ". The defendant then asked, "Why would [the plaintiff] resort to half measures by inserting a highly ambiguous clause as the last condition of a settlement agreement?"

72 Clause 3 of the 2003 letter, although rather wordy, is capable of bearing a clear and rational meaning once the words are properly dissected into their appropriate sections, as the plaintiff did during cross-examination of the defendant, as follows:

> … you hereby irrevocably and unconditionally agree to on demand indemnify the Company and keep the Company indemnified fully and completely against any and all losses/contra losses damages costs and expenses whatsoever (including legal costs on a fully indemnity basis) and all

other liabilities of whatsoever nature or description (including any deficit balances under your profit and loss/stock accounts)

which may have been incurred as at the date of the this (*sic*) Settlement Agreement and/or

which may be incurred or suffered by the Company

in connection with or in any manner arising from any and all transactions:-

(i) dealt by or

(ii) through you or

(iii) accepted by you or

(iv) allocated/designated under your code or

(v) under any of your aforesaid accounts including any interests whatsoever thereon charged by the Company.

73 It could not be objectionable that the indemnity obligation went beyond the issue at hand as the evidence showed that it was indeed the common understanding of all parties that dealers in the defendant's position had an underlying obligation to indemnity the plaintiff against clients' losses. Further, the 2003 letter was meant to supplement, amend or vary the letter of appointment and would from 11 July 2003 be read as one with the letter of appointment. Although the defendant contracted to remain with the plaintiff for another three years, she extended her contract and the letter of appointment (read as one with the 2003 letter) continued to apply to her accordingly.

74 As the defendant had undertaken to indemnify the plaintiff against all losses and liabilities which may be incurred or suffered by the plaintiff in connection with transactions dealt by or through or accepted by the defendant or allocated or designated under *her code*, I concluded that she was liable for the losses incurred in the accounts of Julian and Goh as they fell within those words. I was originally of the view that she was also liable for the losses in Julian's account under the limb "or under any of *your aforesaid accounts*" in the 2003 letter since Julian's account was one of the clients' accounts mentioned specifically in the 2003 letter. Upon further reflection, the words "*your aforesaid accounts"* do not refer to the clients' accounts but to the defendant's "profit and loss/stock accounts" mentioned in the earlier portion of the said clause 3.

75 Accordingly, I gave judgment for the plaintiff for $512,004.89 (in respect of Julian) and for $703,878.65 (in respect of Goh) and for continuing interest on the principal amounts owing by both of them at the contractual rate of 9% per annum from 1 November 2009 until payment. I also awarded judgment for the legal costs incurred by the plaintiff in pursuing its claims against them in court at $8,731.70 (for Julian) and $8,043.14 (for Goh).

76 As the plaintiff did not succeed on every ground that it relied on, I ordered the defendant to pay the plaintiff 70% of its costs on an indemnity basis for this trial.