TMT Asia Limited *v* BHP Billiton Marketing AG (Singapore Branch) and another [2015] SGHC 21

Case Number	: Suit No 580 of 2013 (Registrar's Appeal Nos 55 and 56 of 2014 and Summons No 1710 of 2014)
Decision Date	: 28 January 2015
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Deborah Barker SC, Ushan Premaratne and Priscilla Shen (KhattarWong LLP) for the plaintiff; Francis Xavier SC and Derek On (Rajah & Tann LLP) for the defendant.
Parties	: TMT Asia Limited — BHP Billiton Marketing AG (Singapore Branch) and another

Civil procedure – Summary judgment

Civil procedure – Pleadings – Amendment

Tort – Misrepresentation – Fraud and deceit

28 January 2015 Judgment reserved.

Judith Prakash J:

Introduction

1 The parties are participants in a market on which forward freight agreements ("FFAs") are traded over-the-counter ("OTC"). The Plaintiff claims that the Defendants abused their alleged market dominance to manipulate the market for FFAs and that it suffered loss as a result of this manipulation. The Plaintiff bases its claim on three alternative grounds:

(a) Breach of statute under s 208 read with s 234 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA");

(b) The tort of deceit; and/or

(c) A new tort of market manipulation that it argued ought to be recognised/developed.

2 TMT Asia Ltd ("the Plaintiff"), is a shipping company. The first and second defendants (collectively referred to as "the Defendants") are members of the BHP Billiton Group ("BHPB"). BHPB comprises a group of companies engaged in the discovery, acquisition, development and marketing of natural resources. The Defendants operate the Marketing Head Office and the Minerals Exploration Head Office of BHPB in Singapore.

The claim

3 In its Statement of Claim, the Plaintiff contends that BHPB was and continues to be in a "dominant purchasing position in the 'Downstream Capesize Market'". The Downstream Capesize Market refers to the single global market for the chartering of Capesize bulk carriers (which are large

vessels above 150,000 DWT) for the transportation of dry bulk cargoes. It is alleged that BHPB occupies this dominant position due to the fact that it is one of the three largest iron ore producing companies in the world. Its iron ore production operations are mainly in Australia and it exports extensively to China which is the world leading importer of iron ore. The Plaintiff avers that BHPB was responsible for 40% of the Capesize vessel charters from Australia in 2009. Therefore, it occupies a dominant position in the market for Capesize C5 route ("C5 route") which covers voyage charters for a specific route in the Pacific, namely, Western Australia to Qingdao, China.

4 The Baltic Capesize Index ("BCI") provides an assessment of freight costs of Capesize vessels on various routes and is issued daily by the London-based Baltic Exchange Limited. The market for Capesize C10 route ("C10 route") covers time charters for the Pacific. The Plaintiff alleges that, therefore, freight prices on the C5 route influence the freight prices on the C10 route. The Baltic Exchange Limited uses freight prices on the C8, C9, C10, and C11 routes to compute the Baltic Capesize Index Time Charter Basket Average 4 Routes ("4TC BCI"). Therefore, the Plaintiff alleges, freight prices on the C5 route indirectly affect the 4TC BCI.

5 The Plaintiff purchased various FFAs based on the 4TC BCI between September and November 2012. FFAs are forward contracts on freight. One party agrees to pay a fixed rate of notional freight while the other party agrees to pay a rate derived from an index. One of the indices published by the Baltic Exchange Limited is commonly chosen. The BCI is one such index. The difference at the end of a specified period is payable by one party to the other depending on the movement of the index as compared with the fixed rate under the FFA. Therefore, parties are essentially betting on whether the actual rate for the specified charter will be higher or lower than the rate specified in the FFA.

6 It should be evident from the above that FFAs are purely financial agreements and do not involve any actual freight or ships. They are derivative products which can be traded. A useful definition of derivatives is that found in *Lomas & Ors (together with the Joint Administrators of Lehman Brothers International (Europe) v JFB Firth Rixson Inc & Ors* [2012] EWCA Civ 419 at [2]:

> [A] transaction under which the future obligations of one or more of the parties are linked in some specified way to another asset or index, whether involving the delivery of the asset or the payment of an amount calculated by reference to its value or the value of the index. The transaction is therefore treated as having a value which is separate (although derived) from the values of the underlying asset or index. As a result, the parties' rights and obligations under the transaction can be treated as if they constituted a separate asset and are typically traded accordingly.

7 The Plaintiff alleges that in October 2012, BHPB, through the Defendants who manage BHPB's freight needs, abused its market dominance by procuring contracts for fixtures of Capesize vessels in such quantity as to cause the freight rates on the C5 route and consequently the 4TC BCI to rise sharply. This caused the price of iron ore reported on iron ore indices to rise as well because the iron ore reference price includes the price of freight. The Plaintiff contends that BHPB did not charter these vessels to service its legitimate business needs (*ie*, to transport iron ore and/or coal from Australia to China) as there was, at best, weak demand in China for these products between 30 September 2012 and 7 October 2012 due to the long national holiday there. According to the Plaintiff, BHPB chartered the vessels, through the Defendants, in order to cause freight prices to artificially rise. By so doing, the Defendants manipulated the price of FFAs based on the 4TC BCI in contravention of s 208(*a*) of the SFA which provides:

> **Manipulation of price of futures contract and cornering**

208. No person shall, directly or indirectly —

(*a*) manipulate or attempt to manipulate the price of a *futures contract* that may be dealt in on a *futures market*, or of any commodity which is the subject of such futures contract …

[emphasis added]

The Defendants' manipulative conduct caused the Plaintiff to suffer loss in the sum of US$70,000 on the positions it held on the FFAs it purchased between September and November 2012.

8 The Defendants have pleaded the following in their Defence:

(a) BHPB is not and was not at the material time in a dominant purchasing position in the Capesize market, including the market for the C5 route;

(b) BHPB and the Defendants did not manipulate freight prices, iron ore prices and prices of the FFAs; and

(c) The Defendants have not contravened s 208(*a*) of the SFA because FFAs are neither "futures contract[s]" nor are they dealt in on a "futures market".

The applications before me

9 The Defendants took out two interlocutory applications seeking to have the Plaintiff's claim dismissed. By way of Summons No 4064 of 2013 ("Sum 4064"), they sought summary determination of the following questions of law pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"):

(a) Are FFAs "futures contract[s]" for the purpose of s 208(*a*) read with s 2 of the SFA?

(b) Are FFAs dealt on a "futures market" for the purpose of s 208(*a*) read with s 2 and Part I of the First Schedule of the SFA?

The Defendants submitted that if either of these questions was answered in the negative, the claim should be dismissed.

10 By way of Summons No 4852 of 2013 ("Sum 4852") the Defendants sought the whole of the Plaintiff's claim to be struck out pursuant to O 18 r 19 and/or the inherent jurisdiction of the court on the basis that it disclosed (a) no reasonable cause of action; (b) was frivolous or vexatious; and/or (c) was an abuse of process.

11 Both summonses were heard by an AR on 31 December 2013. In the course of the hearing, the Plaintiff's counsel stated that in addition to the Plaintiff's statutory claim under s 208(*a*) of the SFA, the Plaintiff had two tortious claims against the Defendants, namely, claims for deceit and market manipulation.

12 The AR delivered judgment on 11 February 2014. In respect of Sum 4064 she held that the questions set out at [9] were suitable for summary determination. She answered the first question in the negative and hence found it unnecessary to decide the second question. She also ordered the Plaintiff's statutory claim premised on s 208(*a*) of the SFA to be struck out. In respect of Sum 4852, she ordered the whole of the Plaintiff's claim to be struck out on the ground that there was no

reasonable cause of action:

(a) The Plaintiff's statutory claim failed because FFAs were not futures contracts for the purpose of s 208(*a*) read with s 2 of the SFA.

(b) The Plaintiff's claim that the Defendants had committed the tort of market manipulation failed because that was not a tort recognised by law.

(c) The Plaintiff's claim under the tort of deceit failed because it was not expressly pleaded. Further, amendment to the pleading would not cure the defect because of the inherent difficulties in classifying market manipulative conduct under the tort of deceit.

13 The Plaintiff appealed against both decisions. Registrar's Appeal No 55 of 2014 ("RA 55") is its appeal against the summary determination, and Registrar's Appeal No 56 of 2014 ("RA 56") is its appeal against the striking out.

14 Some two months after filing its appeals, the Plaintiff made an application for leave to amend its Statement of Claim (Summons No 1710 of 2014 ("Sum 1710")). By means of the proposed amendments, the Plaintiff seeks to:

(a) clarify its claim against the Defendants in the tort of deceit and/or market manipulation;

(b) state that the FFAs the Plaintiff bought between September and November 2012 were purchased on the OTC market through brokers utilising multilateral trading facilities ("MTFs") and cleared on the Singapore Exchange ("SGX"); and

(c) correct an error that it had made in its earlier pleading to clarify that it sought US$70,000 in compensation under s 234 of the SFA and not S$70,000.

I heard both appeals and Sum 1710 and now give my decision.

Issues

15 Various matters were argued on the basis that the issues before the Court are:

(a) Whether the questions raised in RA 55 are suitable for summary determination.

(b) Assuming that the above question is answered in the affirmative, whether FFAs are "futures contract[s]" dealt on a "futures market" for the purpose of s 208(*a*) read with s 2 of the SFA.

(c) Whether the Plaintiff's claim in the tort of deceit is conceptually flawed.

(d) Whether a new tort of market manipulation ought to be recognised/developed.

Are FFAs "futures contract[s]" dealt on a "futures market" for the purpose of s 208(*a*) read with s 2 of the SFA?

16 Section 2 of the SFA provides two definitions for the term "futures contract". The first applies only to Part I of the First Schedule of the SFA. For present purposes, the parties are agreed that the relevant definition is that which defines a "futures contract" as one under which the contracting parties agree to:

… discharge their obligations under the contract by settling the difference between the value of a specified quantity of a specified commodity agreed at the time of the making of the contract and at a specified future time, such *difference being determined in accordance with the business rules or practices of the futures market at which the contract is made*. [emphasis added]

Parties are further agreed that the critical question for present purposes is whether settlement of the FFAs (*ie*, determination of the quantum that is payable by one party to the other) occurs in "accordance with the business rules or practices of the futures market at which the contract is made". This in turn raises the issue of whether the FFAs can be considered to be made on a "futures market" for the purpose of the SFA. Therefore, the two questions raised in RA 55 and set out in [9] above are interlinked.

17 The SFA defines a "futures market" in the following terms (this definition is contained in the Part I of the First Schedule of the SFA):

Definition of futures market

2.—(1) In this Act, "futures market" means a place at which, or a facility (whether electronic or otherwise) by means of which, offers or invitations to sell, purchase or exchange futures contracts are regularly made on a centralised basis, being offers or invitations that are intended or may reasonably be expected to result, whether directly or indirectly, in the acceptance or making, respectively, of offers to sell, purchase or exchange futures contracts (whether through that place or facility or otherwise).

(2) For the purposes of this Act, *"futures market" does not include* —

(*a*) a place or facility used by only one person —

(i) to regularly make offers or invitations to sell, purchase or exchange futures contracts; or

(ii) to regularly accept offers to sell, purchase or exchange futures contracts; or

(*b*) *a place or facility that enables persons to negotiate material terms (in addition to the price) of, and enter into transactions in, futures contracts, where the material terms (in addition to the price) of futures contracts are discretionary and not predetermined by the rules or practices of the place or facility*.

[emphasis added]

Therefore, a market must possess the following characteristics in order to qualify as a "futures market" for the purpose of the SFA:

(a) It must be a place or facility (electronic or otherwise);

(b) Offers or invitations to sell, purchase or exchange futures contracts must be regularly made on a centralised basis at this place or facility;

(c) The material terms (other than price) of the futures contracts that are traded at this place or facility must not be discretionary, but rather be predetermined by the rules or practices of the place or facility; and

(d) The only negotiable material term for transactions involving futures contracts must be the price.

Plaintiff's case

18 The Plaintiff submits that the questions raised in RA 55 are not suitable for summary determination because (a) issues of fact are interwoven with the issues of law; and (b) the questions raise issues of public importance.

19 Nevertheless, the Plaintiff also makes submissions on why FFAs are "futures contract[s]" traded on a "futures market". The Plaintiff contends that the usual manner in which FFAs are currently concluded and traded shows that they are "futures contract[s]" traded on a "futures market" for the purpose of the SFA. The Plaintiff highlights three distinct features concerning the manner FFAs are currently concluded and traded.

The manner FFAs are currently concluded and traded

(1) Involvement of brokers and the use of centralised electronic facilities

20 A party interested in buying or selling FFAs approaches a broker. The broker is responsible for matching the market positions of buyers and sellers. Today brokers utilise online dealing screens or MTFs to match buyers with sellers. FFAs themselves can also be traded OTC on these centralised electronic facilities.

21 Baltic Exchange Derivatives Trading Limited ("BEDT"), which is a wholly owned subsidiary of the Baltic Exchange Limited, operates one such MTF (called "Baltex") for dry freight derivatives. Baltex provides live FFA prices. Baltex members can use this online dealing screen to conclude and trade FFAs.

(2) FFAs are documented in the form of a standard form contract

22 According to the Plaintiff, all FFAs are documented in the form of a standard form contract published by the Forward Freight Agreement Brokers Association ("FFABA Agreement"). Each FFABA Agreement also incorporates by reference the standard terms of the International Swaps and Derivatives Association Master Agreement version 1992 ("ISDA MA"). The main terms of an FFABA Agreement are:

(a) The agreed route;

(b) The day, month and year of settlement;

(c) Contract quantity; and

(d) The Contract Rate at which differences will be settled.

Clause 6 of the FFABA Agreement states that the Settlement Rate "shall be the unweighted average of the rates for the Contract Route(s) published by the Baltic Exchange over the Settlement Period". Clause 7 of the FFABA Agreement states that the Settlement Sum is "the difference between the Contract Rate and the Settlement Rate multiplied by the Quantity by Contract Month".

(3) FFAs are settled through a clearing house

23 The FFAs are settled through a clearing house (*eg*, the SGX) and not directly between buyers and sellers. The Plaintiff submits that the use of clearing houses as counterparties became widespread after the 2008 financial crisis when prices in the physical dry freight market "collapsed completely and many FFA market participants were … concerned that their counterparties would not be able to meet their obligations". Leaders of the G-20 Nations called for sweeping reforms to improve the OTC derivatives markets. They issued a statement calling for the following changes to be implemented:

> All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements.

As a result, there was a gradual shift to clearing houses acting as a central counterparty to minimise the counterparty risk. Under cleared OTC FFAs, the sellers and buyers both end up having the clearing house as their counterparty. The clearing house obtains collateral from buyers and sellers to mitigate the risk of party default. The use of clearing houses allows for multilateral netting of transactions and thus reduces counterparty credit risk in the OTC derivative market.

Significance of the manner FFAs are currently concluded and traded

24 Having explained the manner in which FFAs are usually concluded and traded, the Plaintiff makes the following submissions:

(a) The MTFs or online dealing screens are electronic facilities on which offers or invitations to sell, purchase or exchange futures contracts are regularly made on a centralised basis.

(b) The material terms of FFAs are "predetermined" since all FFAs are documented in the form of the FFABA Agreement which in turn incorporates the standard terms of ISDA MA.

(c) The terms that vary from one FFA to another are the Contract Route, Contract Rate, Contract Quantity and Contract Month. However, these terms are "not discretionary and/or negotiated by the buyer and seller. They are determined in accordance with the business practices of the relevant futures market". The broker matches the buyer and seller who never meet. In fact, MTFs ensure the anonymity of the buyer and seller.

(d) The introduction of MTFs and the increased use of clearing houses as counterparties have "revolutionised the market". Materials such as the Monetary Authority of Singapore ("MAS") Guidelines on the Regulation of Markets dated 1 July 2005 ("2005 MAS Guidelines") and the MAS Consultation Paper 10-2003: Policy Consultation on Amendments to the SFA and FAA published in September 2003 ("2003 MAS Consultation Paper") which the Defendants rely on were issued/published before the aforementioned changes became widespread in the market. These two documents in effect exclude derivatives which are traded OTC from the definition of "futures contract[s]" and markets on which derivatives are traded OTC from the definition of "futures market[s]" for the purpose of the SFA. However, it is not surprising that MAS took this position then because before the 2008 financial crisis, FFAs were not (a) traded on a centralised trading system or facility; (b) cleared by clearing houses; or (c) based on standard form contracts. Since then, the manner in which FFAs are concluded and traded has changed considerably as outlined above. Therefore, the two documents should be disregarded.

Defendants' case

Defendants' case

25 The Defendants argue that the questions raised in RA 55 are suitable for summary determination because the issues of fact and law are not interlocked and the answers to the questions are not dependent upon undecided issues of fact.

26 The Defendants also object to the Plaintiff's arguments related to the use of MTFs to conclude FFAs because the Plaintiff has not pleaded that the FFAs in issue in the present proceedings were transacted on an MTF.

27 The Defendants contend that the definition of "futures contract[s]" for the purpose of the SFA means an exchange-traded futures contract and does not include any derivatives that are traded OTC (which includes FFAs). The Defendants rely on the following material to support their case: (a) MAS Consultation Paper P003-2012: Proposed Regulation of OTC Derivatives published in February 2012; (b) 2003 MAS Consultation Paper; and (c) 2005 MAS Guidelines.

The Decision in respect of RA 55

Preliminary issue 1: Effect of the Plaintiff's failure to specifically plead that FFAs are traded on MTFs such as Baltex

28 The Plaintiff's contention that the OTC market on which the FFAs in issue in the present proceedings were traded is a "futures market" for the purpose of the SFA rests upon the trades having been transacted by means of an MTF such as Baltex. However, initially the Plaintiff only pleaded that the FFAs were traded OTC and cleared on the SGX. It was not pleaded that an MTF such as Baltex was used. This is a material fact necessary to establish the Plaintiff's statutory cause of action under s 208(*a*) of the SFA and, therefore, ought to have been pleaded: O 18 r 7 of the ROC. The fact that the Plaintiff failed to plead this point would preclude it from presenting its case on this point: *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd* [1992] 2 SLR(R) 382 at [24].

29 However, as stated above at [14(b)], one of the amendments that the Plaintiff wishes to make to its Statement of Claim by way of Sum 1710 is to explicitly state that the FFAs were purchased using an MTF. The Court may grant leave to a party to amend his pleadings at any stage of the proceedings on such terms as may be just: O 20 r 5 of the ROC. Even new arguments may be made in an appeal from an O 14 determination since an O 14 determination is conducted on the basis of affidavit evidence: *Olivine Capital Pte Ltd v Chia Chin Yan and another matter* [2014] 2 SLR 1371 ("*Olivine*") at [21]–[22]. Therefore, an appellate court would be in as advantageous a position as the court below to adjudicate on new submissions. The principle of finality in litigation does not apply. However, it was also stated in *Olivine* that parties are bound by the four corners of their pleadings during an O 14 determination and, therefore, they have to amend their pleadings if they wish to argue a new point which they had hitherto not pleaded (at [43]).

30 Concerning amendments to pleadings, the guiding principle is that such amendments ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined.

31 In my judgment, the amendment to the Statement of Claim to explicitly state that the FFAs were purchased using an MTF should be allowed because it enables the real question in controversy between the parties (*ie*, whether an MTF on which FFAs are traded OTC qualify as a "futures market" for the purpose of the SFA) to be determined. It would not cause any prejudice that is not capable of being compensated by costs since it has always been the Plaintiff's case that FFAs are currently traded on MTFs and in fact the Defendants have expressly addressed the Plaintiff's arguments on this

point.

Preliminary issue 2: Are the questions raised in RA 55 suitable for summary determination?

32 The second preliminary issue that arises is whether the questions raised in RA 55, set out at [9] above, are suitable for summary determination pursuant to O 14 r 12 of the ROC. There are three requirements for a question to be summarily determined:

(a) The question or issue for determination must involve a question of law or construction of any document;

(b) The question must be suitable for determination without a full trial of the action; and

(c) The determination must fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

In *ANB v ANF* [2011] 2 SLR 1 ("*ANB*"), Steven Chong J made clear at [54] that the Court retains the discretion to decide whether it is appropriate to proceed with summary determination even if the above factors are satisfied. The overriding consideration in deciding when the discretion should be exercised appears to be whether summary determination would fulfil the underlying purpose of O 14 r 12 (*ie*, to save time and cost for the parties) given the facts of the case: *ANB* at [61].

33 It is also clear that the mere fact that the question raises a complex question of law is not a bar to summary determination. The fact that the point of law is a difficult one or that the defendant had raised a serious question as to how that point of law should be decided ought not to be an impediment to summarily determine the question: *ANB* at [20]–[28]. Complex legal questions simply require "a full hearing, involving prolonged arguments on points of law" and there is no reason why this cannot be done pursuant to an O 14 r 12 application: *Payna Chettiar v Maimoon bte Ismail* [1997] 1 SLR(R) 738 at [36]. Therefore, the fact that the question raises a complex question of law is, on its own, insufficient to make it unsuitable for summary determination.

34 However, the Court of Appeal in *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR(R) 540 ("*Obegi*") at [42] has held that a question that raises factual issues requiring findings of fact would not be suitable for summary determination. Similarly, the Court in *ANB* noted that the phrase "suitable for determination" in the second of the three requirements mentioned at [32(b)] above has been interpreted by English Courts to exclude all questions that can only be answered with reference to disputed facts: at [32]. Therefore, a question that raises disputed factual issues would be inappropriate for summary determination.

35 Additionally, novel questions of considerable public importance are also not suitable for summary determination. This is evident from the Court of Appeal's decision in *Obegi*. The case involved the question of whether a party (the respondents in that case) which had discarded certain documents from its office unit could be regarded to have abandoned and thus relinquished ownership of those documents and their contents. If that were so, another party (the appellants in that case) which had retrieved those documents from the rubbish collection point of the building where the office unit was located and had used the information contained therein would not be liable for conversion or theft. The Court of Appeal declined to summarily dispose of the question under O 14 r 12 of the ROC because it raised issues related to the protection of privacy of individuals and business entities which the Court regarded as a matter of considerable public importance.

36 I think that the questions raised in RA 55 are unsuitable for summary determination pursuant to

O 14 r 12 for two reasons. First, the questions raise matters of considerable public importance. The Defendants themselves acknowledged the points of public interest that this matter raises when they applied to transfer this action which had been begun in the District Court to the High Court on the basis of s 54B of the then existing Subordinate Courts Act (Cap 321, 2007 Rev Ed) which provided:

> **General power to transfer from subordinate courts to High Court**
>
> **54B.**—(1) Where it appears to the High Court, on the application of a party to any civil proceedings pending in a subordinate court, that the proceedings, by reason of its involving some important question of law, or being a test case, or for any other sufficient reason, should be tried in the High Court, it may order the proceedings to be transferred to the High Court.

In the affidavit that was filed in support, Ms Rachel Agnew made arguments on all three limbs. Specifically, she stated:

> 13. … it would be in the public interest for these important issues to be decided by the High Court. Such a decision will provide guidance to the financial industry, specifically the consumers and financial institutions in the derivatives sector, on the status of the law in respect of market manipulation as well as the ambit of futures regulation under the SFA.
>
> …
>
> 16. … the resolution of these issues would be critical to the derivatives industry because this would determine (for the very first time) whether FFAs are subject to the regulatory regime of the SFA.
>
> 17. … FFAs are a commonly used method of hedging against market fluctuations and of managing freight price risk. If FFAs were caught within section 208 of the SFA, this would impact trading decision on an industry-wide basis.

37 The present case is a test case which will resolve the issue of whether FFAs are "futures contract[s]" and whether the MTFs on which they are traded are "futures market[s]" for the purpose of the SFA. As Ms Agnew points out in her affidavit, other market participants will be affected by this decision. Furthermore, quite apart from market participants, it ought also to be noted that if the court decides that these MTFs are "futures market[s]", then there will be an issue as to whether foreign operators of these facilities would have to apply to MAS to be recognised as "an approved exchange" or "a recognised market operator" pursuant to ss 6 and 7 of the SFA or to be exempted from regulation pursuant to s 14 of the SFA. There would be complications if MAS takes a different view concerning the issue of whether these MTFs constitute a "futures market" for the purpose of the SFA. Given the range of third party interests at stake, I am of the view that this is a matter of sufficient public importance and it ought not to be summarily determined.

38 Second, there are a number of important factual findings that need to be made before the questions raised in RA 55 can be answered. One of the crucial issues is whether the material terms (other than price) of the FFAs that are traded OTC are "predetermined by the rules or practices" of the MTFs on which they are traded. Parties have made some submissions on the trading rules of Baltex. However, there is insufficient evidence as to the trading practice of MTFs in general and Baltex in particular. The Plaintiff has also argued that the lack of expert evidence on industry practice leaves the Court ill-equipped to answer the questions raised in RA 55. I agree with the Plaintiff's submission.

39 Therefore, RA 55 must be allowed so that the matter can go to trial. Having come to this conclusion, it is not necessary for me to express any views on the substantive legal issues raised by RA 55. These are best left to the trial judge after the full fact finding exercise has been undertaken.

RA 56: Tort of deceit

40 As was mentioned above at [12], the AR struck out all the Plaintiff's claims on the basis that none of them was sustainable. Concerning the tort of deceit, she noted that it was not expressly pleaded. Moreover, she was of the view that amendment to the pleading would not cure the defect because of the inherent difficulties in classifying market manipulative conduct under the tort of deceit. In the present proceedings, one of the amendments that the Plaintiff wishes to make to its Statement of Claim by way of Sum 1710 is to clarify its claim against the Defendants in the tort of deceit.

41 Apart from the principle stated in [30] above, it should be noted that leave to amend would not be granted if the matter the proposed amendment seeks to introduce can be struck out on the application of the other party pursuant to O 18 r 9 of the ROC: *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR(R) 337 at [4]. Therefore, the issue that arises in the present case is whether the Plaintiff's amended claim for the tort of deceit discloses a reasonable cause of action: see O 18 r 19(1)(*a*). *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1998] 1 SLR 374 at [20], describes a reasonable cause of action as being:

> … a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or *raises some question fit to be decided at the trial*, the mere fact that the case is weak is not likely to succeed is no ground to striking it out. … [emphasis added]

Therefore, the threshold the Plaintiff needs to meet is a low one. On the other hand, the Defendants face an uphill task in convincing the Court that the amendment should not be allowed on the basis that it discloses no reasonable cause of action. *Singapore Civil Procedure*, vol 1 (Sweet & Maxwell, 2013) at para 18/19/6 states:

> The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out.

Claim in tort of deceit is not conceptually flawed

42 The essential elements of the tort of deceit are set out in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [14] as being:

> … First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

43 Each of these elements is made out in the Plaintiff's amended claim for the tort of deceit. The Plaintiff's case is that the Defendants, by their conduct in making contracts for fixtures of Capesize vessels which were not meant to service the legitimate business needs of BHPB, caused the following representations to be made:

(a) High reported freight prices for Capesize vessels for the C5 route reported on the BCI;

(b) High reported prices for the 4TC BCI; and

(c) High reported prices of iron ore on the The Steel Index (TSI) Iron Ore Index.

The Plaintiff further contends that Defendants knew that the representations were false in the sense that they were aware that the price was not "determined by the natural interplay of supply and demand of contracts for fixtures of Capesize vessels". It is the Plaintiff's pleaded case that the "Defendants intended for the world at large and/or FFA market participants and/or persons in the shipping industry, including the Plaintiff, to rely on the Representations" and the Plaintiff in fact relied on them to "close out and/or change its positions" thus suffering loss and damages in the sum of US$70,000.

Market manipulative conduct can amount to a representation of fact

44 The Defendants in essence argue that a party's market manipulative conduct cannot be taken to amount to any representation of fact. The Defendants rely on *Salaman v Warner* (1891) 65 LT 132 ("*Salaman* (CA)"), an English Court of Appeal case, and an article by Assoc Prof Alexander FH Loke ("Prof Loke"), "Common Origins, Different Destinies: Investors' Rights against Market Manipulation in the UK, Australia and Singapore" (2007) <http://www.clta.edu.au/professional/papers/conference2007/2007AL_CODD.pdf> to support their position.

45 In *Salaman* (CA), claims for conspiracy and fraud were brought against brokers on the London Stock Exchange who were promoting a limited liability company. It was the plaintiff's pleaded case that the defendants conspired together to make large purchases of shares in the said company so that persons who contracted to short-sell shares in the company would be compelled to purchase such shares from the defendants at an inflated price set by them. The defendants procured a prospectus to be issued to the public which stated that two-thirds of the shares were offered for public subscription. The defendants' nominees then made applications to the directors for a large number of the shares. The directors were misled into believing that the applications were *bona fide* ones made by independent members of the public. The defendants had also made certain representations to the Stock Exchange so that the contracts for the purchase of shares could be concluded. The bulk of the shares were allotted to the defendants' nominees. Therefore, the defendants had cornered the market for the shares of the company. The plaintiff had short-sold shares of the company in question under the belief that the bulk of the shares had been allotted to the public in accordance with the prospectus. As a consequence of the corner, the plaintiff had to pay inflated prices for the shares. The plaintiff claimed its loss against the defendants.

46 The Defendants in the present case make the point that both the English High Court (whose judgment is reported at *Salaman v Warner* (1891) 64 LT 598 ("*Salaman* (QBD)") and the English Court of Appeal were of the view that only the representations contained in the prospectus and the representations made to the directors and the Stock Exchange could in any way be regarded as representations of fact. They point out that the averment contained in paragraph 11 of the Statement of Claim (which is reproduced in *Salaman* (QBD) at 599) that the defendants had made large purchases of shares through their brokers or otherwise to induce the plaintiff and the public to make contracts to short-sell was not regarded as a representation of fact. They take this to mean that the act of purchasing shares on the market cannot amount to any form of representation.

47 However, neither the English High Court nor the Court of Appeal expressly considered the issue

of whether market conduct in purchasing shares can amount to a form of representation. Furthermore, it is doubtful whether the plaintiff even argued that the bulk purchase of shares was a form of fraudulent representation. It appears from the relevant paragraphs of the Statement of Claim that the plaintiff was presenting the purchase of shares only as a step in the conspiracy which the defendants had perpetrated and not as a fraudulent representation in and of itself. I reproduce these paragraphs as they appear in *Salaman* (QBD) at 599:

> …
>
> 6. In order to increase the profits to be made by them in connection with the formation of the company the defendants conspired together to make large purchases of shares in the said company, knowing that they would be able to control the allotment, and intending so to control it that they would hold the bulk of the shares in their own hands, and thus the persons who should contract to sell shares would be unable to obtain shares to enable them to fulfil their contracts either by subscription, or by purchase in the open market, and would be compelled to purchase such shares from the defendants themselves at such price as they might choose to fix.
>
> …
>
> 10. In order to facilitate their said designs the defendants…caused certain purchases and sales of such shares to be made and publicly announced. … Such purchases and sales were not *bona fide* dealings inasmuch as the brokers who purchased the same were acting on behalf of the defendants and the persons selling the same were procured to sell the same by the defendants who supplied them with the said shares.
>
> 11. … The defendants proceeded to make through their brokers or otherwise large purchases of such shares, … and to induce the plaintiff and the public to make contracts to sell.
>
> …

The language in these paragraphs can be contrasted with the express allegations of fraud and concealment which are made in relation to certain incontrovertible representations of fact:

> 12. … [The defendants made] applications for very large number of the shares. Such applications were fraudulently made in the names of persons other than the defendants (all such persons being mere nominees, and having no interest in the said application for shares), in order to conceal the fact that such applications were in truth made by the defendants, and to enable the defendants fraudulently to represent to the directors and to lead them to believe that these applications were bona fide and independent applications from members of the public.

Thus, *Salaman* (CA) is not authority for the proposition that a party's market manipulative conduct cannot be taken to amount to any representation of fact.

48 I am also of the view that Prof Loke's article does not support the Defendants' case. While it is true that Prof Loke expresses some reservation as to whether market manipulative conduct can amount to a representation of fact, he does not preclude it categorically. He states at pp 11–12:

> … The difficulty with catching market manipulative conduct under the tort of deceit lies in this: deceit is fundamentally about representations. *It targets purposeful transmission of fraudulent messages*. Conduct, in its nature, tends to be more ambiguous in the message it conveys (if there is one at all). Take the instance of one bidding up the price of a stock. Is any message

intended? Is it not possible to argue that the message is merely incidental to the conduct? In other words, at issue is first the fundamental question of whether there is a representation, and secondly, whether the injured party is an intended recipient of the message. *In theory, it is possible to characterize conduct as a representation; however, pinning market manipulative conduct down as a misrepresentation is probably practicable only where the message conveyed is clear in its context.* Absent that, the theoretical possibility of conduct amounting to a misrepresentation does not readily translate into effective protection for investors injured by market manipulative conduct. The market manipulator may hide behind the difficulty of penetrating the mixed messages conveyed by his conduct. *Market manipulative conduct that does not involve any intended representation will not be caught by the law on misrepresentation.* A market squeeze or corner is market abuse by reason of one's cornering the supply of the commodity, less a matter of misleading messages. Such market manipulative conduct is, from a conceptual perspective, arguably outside the realm of misrepresentation. [emphasis added]

49 It appears to me that an artificially inflated price can amount to a representation of fact that the price is naturally high. However, the question is whether the market manipulator intended for the artificially inflated price to be reported; or whether the fact that a higher than usual price was reported was purely incidental to whatever other motivations he may have had for his actions. Translated to the present case, the question is whether the Defendants intended for artificially inflated freight prices to be reported on the BCI by their conduct in making contracts for fixtures of Capesize vessels for which they had no legitimate business need; or whether the fact that higher than usual freight prices were reported on the BCI was purely incidental to their conduct. This is a question that should be decided at trial. The Plaintiff's case is that the Defendants intended for freight prices to be inflated because they stood to benefit from the consequent rise in price of iron ore as they were one of the three largest iron ore producing companies in the world. It is for the Plaintiff to prove this at trial.

Specific reliance on market manipulative conduct is not necessary

50 The Defendants rely on another excerpt from Prof Loke's article to make an argument concerning the reliance element in the tort of deceit. The Defendants argue that the Plaintiff's claim for the tort of deceit is ill-founded because it can only succeed if it can prove that it was aware of and specifically relied on the Defendants' market manipulative conduct in deciding to close out and/or change its positions on the FFAs it held. It is not sufficient if it had only relied on the distorted freight and iron ore prices to make its decision. Indeed, it is not the Plaintiff's pleaded case that it relied on the Defendants' conduct specifically. The Defendants argue that this is a defect in the pleadings which cannot be cured because if the Plaintiff had known of the Defendants' alleged conduct, the knowledge could only have reasonably operated to warn the Plaintiff against entering into the FFAs in the first place.

51 However, it is not the Plaintiff's case that it entered into FFAs it would not otherwise have entered into. Rather, it claims that the Defendants' market manipulation compelled it to close out and/or change its positions on the FFAs it held. Nevertheless, I shall consider the Defendants' argument that specific reliance on market manipulative conduct is necessary.

52 In his article, Prof Loke states at pp 8–11:

C. Market Manipulation and Torts

Like common law crimes, the role of tort law in protecting investors against market manipulation

has also been less than holistic. Investor compensation for fraud has primarily to rely upon the tort of deceit. In its nature, deceit involves fraudulent representations and statements. *In the context of business investments, the example that readily comes to mind is one in which an investor is induced to purchase a large stake in a company by reason of a false representation about its operations and financial affairs*; by and by, the investments come to grief when the true state of affairs comes to light. In the securities market, *manipulators might issue baselessly optimistic comments on internet chat rooms about the financial or operational health of the issuer to ratchet up the traded price of a stock*. Alternatively, *the company itself might, in response to a developing scandal, issue false statements to maintain the trading price of its stock*. In such instances, it is conceivable that investors who have bought at a higher price can claim under the tort of deceit.

…

The reliance element in the tort of deceit requires the claimant to demonstrate that he has acted upon the misrepresentation. At first glance, it is an unimpugnable requirement – for it would appear strange that, without acting upon the misrepresentation, the claimant can sue the representator. Transposed onto an information sensitive market where investors expect integrity in the price formation process, the element becomes a stumbling block to realizing such investor interest. The practical implication, then, is that *investors who transacted at the manipulated prices are only able to claim if they knew of the statement and acted upon it. For those who merely relied on the integrity of the price formation process without more, their claims fail by reason of the lack of specific reliance.* One does not have a claim merely because of the price distortion produced by the manipulation; one needs to show that one has relied on the statements or acts that generated the price distortion. Here therefore is where the tort of deceit does not map investors' interest in a fair and efficient market. It is probably unfair to fault the tort of deceit for failing to do so; after all, its purport is provide redress for injury directly arising from fraudulent statements. …

[emphasis added]

53 Prof Loke's article does not appear to support the Defendants' argument. His remark about the need for specific reliance must be read in its proper context. It appears that he was concerned with a situation where the market is manipulated by means of misleading statements. Hence, it is only when the Plaintiff's case is that the market had been manipulated by means of misleading statements that the Plaintiff would have to plead and prove specific reliance on those statements. In such a case, the Plaintiff cannot simply rely on the integrity of the price formation system. This would go some way towards protecting the market manipulator against indeterminate liability.

54 For the abovementioned reasons, I am of the view that it cannot be said that market manipulative conduct can never be classified under the tort of deceit. Therefore, the amendments the Plaintiff seeks to make to its Statement of Claim to clarify its claim against the Defendants in the tort of deceit should not be disallowed on the ground that it discloses no reasonable cause of action. While the Plaintiff has an uphill task, it is not impossible that the Plaintiff may succeed at trial.

RA 56: Tort of market manipulation

55 The Plaintiff seeks to base its claim in a new tort of market manipulation on the same set of facts that it has pleaded in support of its claim in the tort of deceit. The Plaintiff invites the Court to not foreclose this avenue but rather to leave it open so that the trial judge may be able to fill any lacuna in the law by finding an appropriate tortious remedy to prevent the injustice which it alleges

would otherwise occur (assuming the SFA is not applicable to the present facts). I am not inclined to accept the Plaintiff's invitation. The Plaintiff was not able to show any judicial endorsement of its new tort from any quarter. The Court cannot act in a vacuum, establishing new torts just because it considers certain types of damage deserve a remedy.

56 In the present case, assuming the SFA does not apply, it may be considered that there exists a lacuna in the existing legislative framework which ought to be filled by way of a new tort of market manipulation. However, I do not think this should be done by the Court. It is clear that the Legislature has adopted a calibrated approach to the regulation of derivatives. A Court should be slow to develop a tort that would exist alongside the current regulatory framework especially since this is a matter of economic policy which is fraught with many imponderables. Furthermore, the Plaintiff has not cited any case which may provide a principled basis for the development of the tort. As the AR noted, the Plaintiff makes no submissions on even very rudimentary issues such as the elements of the tort.

Conclusion

57 For the reasons given, I make the following orders:

(a) RA 55 is allowed and the determination of the question of law by the AR is set aside.

(b) Summons No 4064 of 2013 is dismissed.

(c) RA 56 is allowed in part. The striking out order made by the AR in Summons 4852 of 2013 is set aside except in respect of the claim in the alleged tort of market manipulation.

(d) The costs orders made by the AR in Summons No 4852 of 2013 are set aside.

(e) Summons No 1710 of 2014 is allowed and the Plaintiff shall file and serve its amended statement of claim on or before Thursday, 5 February 2015.

58 I will hear the parties on the issue of costs and on any further consequential orders that may need to be made.