ABN AMRO Clearing Bank NV *v* 1050 Capital Pte Ltd
[2015] SGHC 271

Case Number : Suit No 13 of 2015, (Registrar's Appeals Nos 217 and 218 of 2015)

Decision Date : 20 October 2015

Tribunal/Court : High Court

Coram : George Wei J

Counsel Name(s) : Benedict Teo Chun-Wei and Elaine Lim (Drew & Napier LLC) for the plaintiff; Aqbal Singh (Pinnacle Law LLC) for the defendant.

Parties : ABN AMRO CLEARING BANK NV — 1050 CAPITAL PTE LTD

Banking – Statement of account – Verification clauses

Contract – Contractual terms – Rules of construction

20 October 2015 Judgment reserved.

George Wei J:

1 There are two Registrar's Appeals before me, both of which are appeals against the Assistant Registrar's ("the AR") decision in Summons No 1460 of 2015 ("SUM 1460/2015"). In brief, the AR ordered:

(a) that final judgment be entered against the defendant for outstanding charges in the sum of S$28,118.23, together with interest levied on this sum at the rate of 10% per annum compounded on a daily basis from 2 December 2014 until the date of full payment of this sum to the plaintiff;

(b) that the defendant be granted leave to defend the plaintiff's claim for the sum of S$907,408.16 on the condition that it pays this sum into court by 4 pm on 4 August 2015; and

(c) the costs of SUM 1460/2015 be costs in the cause.

2 Registrar's Appeal No 217 of 2015 ("RA 217/2015") is the plaintiff's appeal. The plaintiff seeks the following orders:

(a) that the AR's decision ((b) and (c) above) be set aside;

(b) that final judgment be entered against the defendant for the sum of S$907,408.16 together with interest levied on this sum at the rate of 10% per annum compounded on a daily basis from 2 December 2014 until the date of full payment of this sum to the plaintiff; and

(c) that the costs of SUM 1460/2015 and this appeal be paid by the defendant to the plaintiff on an indemnity basis.

3 Registrar's Appeal No 218 of 2015 ("RA 218/2015") is the defendant's appeal. It appears that the defendant is appealing the whole of the Order: (a) entry of final judgment for S$28,118.23; (b) conditional leave to defend the claim for S$907,408.16; and (c) costs. In short, based on the Notice

of Appeal, it appears that the defendant seeks unconditional leave to defend the plaintiff's entire claim. That said, as will be seen, the defendant did not contest the claim for S$28,118.23 in the arguments in the appeal.

Facts

4 The plaintiff's principal business activity is the provision of various financial services. [note: 1] The defendant was a Singapore-incorporated company whose principal business was the trading of futures and options on the Osaka Stock Exchange ("OSE"), the Tokyo Stock Exchange ("TSE") and the Singapore Stock Exchange ("SGX"). [note: 2] The defendant's trading activity was conducted primarily by Mr Jerome Andrew Moutonnet ("Mr Moutonnet").

Relationship between the parties

5 On 12 October 2010, the defendant entered into a Standard Client Agreement ("the Agreement"), a Multicurrency Credit Facility Agreement ("the Facility Agreement") and a Security Deed, with the plaintiff. [note: 3] For ease of narration, I shall hereinafter refer, collectively, to them as "the Contracts".

6 Under the Contracts, the plaintiff agreed to provide the defendant with the following services:

(a) direct market access ("DMA") to various exchanges, namely the OSE, the TSE and the SGX; [note: 4]

(b) execution, clearing and/or settlement of all trades conducted through the defendant's client account; [note: 5] and

(c) an uncommitted multicurrency credit facility ("the Facility") with an upper credit limit US$50m (the "Credit Limit") for the purpose of funding the defendant's trades through its client account. [note: 6] The defendant's credit limit was subsequently reduced to US$35m. [note: 7]

7 As part of its DMA services, the plaintiff permitted the defendant to utilise its exchange and/or clearing house memberships to place electronic orders for the derivatives traded on the OSE, the TSE and the SGX. As a result of the defendant's placement of such electronic orders, the plaintiff was directly liable to the relevant clearing houses (*ie*, the Japan Securities Clearing Corporation ("JSCC") and the Singapore Exchange Derivatives Clearing ("SGX-DC")) for the following sums which it paid in the first instance on the defendant's behalf: [note: 8]

(a) the costs of, among other things, the derivatives purchased on behalf of the defendant; and

(b) the daily margins imposed on the defendant's portfolio, being the amount of monies the plaintiff was obliged to maintain in its clearing accounts in order to execute further trades and maintain its existing positions.

8 In the event that the plaintiff failed to meet the daily margins, it would be prevented from executing any further trades. [note: 9] Moreover, its entire portfolio of securities and derivatives, purchased on behalf of all its customers, was liable to be liquidated by the JSCC and SGX-DC in order to meet its liabilities. [note: 10] Insofar as the plaintiff paid the aforesaid sums and the defendant had

insufficient monies in its accounts to reimburse the plaintiff, the defendant was deemed to have requested a drawdown of an advance on the Facility. [note: 11]

9 As part of its services, the plaintiff was required to supply the defendant daily reports of, *inter alia*: [note: 12]

(a) the trades conducted through the defendant's client account which have been executed, settled and cleared;

(b) the financial products held on trust by the plaintiff for the defendant;

(c) the sums payable by the defendant to the plaintiff (and *vice versa*) in connection with the trades conducted through the defendant's client account; and

(d) the defendant's net liquidation value ("NLV") as defined in cl 2 of Schedule 1 of the Agreement.

Material events

10 The defendant's portfolio with the plaintiff comprised trades in futures and options in the Nikkei 225 Index. [note: 13] Under cl 14.2(d) of the Agreement, an event of default would arise if the defendant's NLV fell below the Risk Amount. [note: 14] The Risk Amount was set at US$750,000. [note: 15]

11 At 9.52 am on 5 November 2014, the defendant was informed that the NLV of its portfolio had fallen below the Risk Amount and stood at S$30,313. [note: 16] At 11.34 am on the same day, the plaintiff declared the deficit cleared with the NLV of the defendant's portfolio at S$2.3m. [note: 17] Later that day, things took a turn for the worse. By the close of business on 5 November 2014, the defendant's NLV reflected a deficit of S$663,157. [note: 18] This constituted an event of default under cl 14.2(d) of the Agreement. The defendant was informed of the deficit by way of a haircut report ("5 Nov Haircut Report") issued at the close of business on the same day. [note: 19] There is no evidence that the defendant disputed the contents of the 5 Nov Haircut Report.

12 On 6 November 2014, at 7.50 am, the plaintiff's officers informed Mr Moutonnet over the telephone that, at the close of business the previous day, the defendant's NLV reflected a net deficit of approximately S$600,000. [note: 20] They further requested that the defendant top up its client account to meet the Risk Amount. [note: 21] Mr Moutonnet replied that the defendant was unable to do so. [note: 22] Consequently, on that same day, the plaintiff sent a Notification of Default to inform Mr Moutonnet that it would be exercising its right to liquidate the defendant's portfolio. [note: 23] The proceeds of the liquidation actions were to be applied to discharge all liabilities of the defendant's portfolio. [note: 24] In the event the proceeds were insufficient for that purpose, the defendant was obliged to pay the deficit immediately upon receiving notice of said amount from the plaintiff. [note: 25]

13 On the same day, the plaintiff decided to liquidate the defendant's entire portfolio by way of auction. To this end, the plaintiff obtained an independent valuation of the defendant's portfolio from a third party, Eclipse Options. Eclipse Options valued the defendant's portfolio at approximately JPY 19,589,340,106 and opined that, given the market volatility, any bid within a JPY 50m range of its

indicative valuation would be reasonable. [note: 26]

14 Soon after, the plaintiff identified three parties which might be willing and able to acquire the defendant's positions, namely, Liquid Capital, IMC Financial Markets and Asset Management and Optiver Australia Pty Ltd ("Optiver"). These parties were established global market traders. These parties were invited to bid for the defendant's portfolio. Optiver's bid proved to be the best and fell within the indicative price range provided by Eclipse Options. [note: 27] The portfolio was sold to Optiver.

15 In the evening of 6 November 2014, ABN informed the plaintiff that its portfolio had been sold to Optiver by auction. [note: 28] The sale and the amount of sale proceeds were brought to the defendant's attention on 7 November 2014 through the daily trader report issued on or around that date ("7 Nov Daily Trader Report"). [note: 29] Again, there is no evidence that the defendant raised any objections to the sale of its portfolio or the 7 Nov Daily Trader Report.

16 The defendant's trading positions were fully closed out by 11 November 2014. The cash position report issued to the defendant ("11 Nov Cash Position Report") showed that the final net liabilities in its client account were in the sum of S$907,408.18 ("the Loan Monies").

17 On 20 November 2014, the cash position report that was issued to the defendant ("20 Nov Cash Position Report") reflected outstanding liabilities in the sum of S$935,526.39 ("the Outstanding Sum"). [note: 30] The sum comprised two components: (i) final net liabilities in its client account in the sum of S$907,408.16 ("the Loan Monies") and outstanding DMA charges for the months of April to September 2014 in the sums of S$5,282.91 and S$22,835.32 after conversion from the relevant currencies ("the DMA Charges"). [note: 31]

18 On 2 December 2014, TSMP Law Corporation ("TSMP") on behalf of the plaintiff sent a letter to the defendant, demanding payment of the Outstanding Sum within five days of the letter ("the Letter of Demand"). TSMP also confirmed on the plaintiff's behalf, in the same letter, the quantum of the Outstanding Sum. The defendant did not respond to the 20 Nov Cash Position Report or the Letter of Demand. [note: 32]

Application for summary judgment

19 On 6 January 2015, the action of the plaintiff was instituted by a writ endorsed with a statement of claim. On 31 March 2015, the plaintiff took out an application for summary judgment under Order 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the O14 Application"). The AR entered final judgment for S$28,118.23 (the DMA charges) but granted the defendant conditional leave to defend the main claim.

20 At the hearing of the O14 Application, there was no quarrel over whether ABN had established a *prima facie* case for judgment. The real issue before the AR was whether there were any triable defences. In so far as the claim for DMA Charges was concerned, no defence was advanced. Accordingly, judgment was entered against the defendant for the sum of S$28,118.23.

21 I pause to note that whilst the defendant has appealed against the whole of the AR's decision, no defence was advanced at the appeal in respect of the DMA claim.

22 In so far as the claim for Loan Monies was concerned, the defences were broadly characterised as: (1) the negligent lending argument; and (2) the improper liquidation argument. The AR found that

only the improper liquidation argument raised triable issues. However, the AR declined to grant unconditional leave to defend as she took the view that some sign of true commitment to defend the claim was called for. First, the defence was only raised after the O14 Application was taken out. Second, the defendant's position had shifted in the course of the hearing with respect to the improper liquidation argument. Third, there were various defences and counterclaims that were carelessly advanced and not seriously pursued. In this regard, the AR observed that two other defences or claims – an allegation of misrepresentation and breach of a collateral contract which were pleaded in the defence had been abandoned for the purposes of the O14 Application.

Decision below

Appeal

23 To recapitulate, the plaintiff seeks a summary judgment against the defendant whereas the defendant seeks unconditional leave to defend. The defendant's submissions, both written and oral, focus only on the improper liquidation argument, and its response to the plaintiff's estoppel argument. For the purposes of this appeal, counsel for the defendant clarified that he would not be pursuing what the AR characterised as the negligent lending argument but will instead leave the issue to be pursued in relation to the counterclaim. This leaves the following issues for determination:

(a) whether the defendant is estopped from asserting its defences pursuant to the conclusive evidence clauses; and

(b) whether there is a triable issue arising from the plaintiff's alleged breach of cl 15 of the Agreement by liquidating the defendant's portfolio in the way it did.

Estoppel argument

24 The plaintiff argued that the defendant is contractually estopped from denying its liability for, and the quantum of, the Loan Monies by dint of cl 2.3 of Schedule 5 of the Agreement and/or cl 21.4 of the Facility Agreement. This argument warrants some attention because if contractual estoppel applies, the defendant would be precluded from raising the defences that it did.

25 Clause 2.3 of Schedule 5 of the Agreement provides:

If the Client does not notify ABN of any error within one Business Day, ABN [is] entitled to treat the report or file as having been approved by the Client.

26 Clause 21.4 of the Facility Agreement provides:

Each confirmation or determination made or certificate issued by ABN under this Agreement of a rate or amount under any Finance Document shall, in the absence of manifest error, be conclusive and binding on the Client and shall be promptly notified to the Client provided that any failure or delay in such notification shall not in any way relieve the Client of its obligation to pay any amounts in accordance with the terms of this Agreement.

The AR's decision

27 The AR held that the above clauses were not sufficiently broad to preclude challenges to the propriety of the liquidation actions taken by the plaintiff. [note: 33] In arriving at her conclusion, the AR drew a distinction between determinations by the bank in relation to rates and amounts, and

determinations by the bank as to whether the client is legally liable under the contract. The AR cited the decision of V K Rajah J (as he then was) in *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR(R) 345 ("*Standard Chartered Bank*") at [23] for the proposition that conclusive evidence clauses might not always preclude challenges to the legal propriety of the demand.

28 On a construction of the precise words of the clauses, the AR determined that the conclusive evidence clauses were not sufficiently broad to encompass challenges to the bank's determination as to whether the defendant is legally liable under the Contracts.

29 The AR found that cl 2 of Schedule 5 of the Agreement imposed a duty on the client to check its reports on a daily basis and promptly inform the bank of any errors so that they may be rectified with the relevant exchange. The transactions listed in the reports are deemed to have been approved by the client if there is no objection. There was no "error" in the report provided by the bank as the Settlement Amount correctly reflected the net cash position in the defendant's account following the liquidation actions. Rather, the defendant was saying that the plaintiff was not entitled to carry out the liquidation in the way it did and thus cannot be taken to have approved the liquidation actions merely because it raised no objections to the final sum stated in the reports. The AR was further of the view that a similar reasoning could be applied to cl 21.4 of the Facility Agreement.

The parties' positions

30 On appeal, the plaintiff maintains its position that the defendant is contractually estopped from denying its liability for, and the quantum of, the Loan Monies. In so far as cl 2.3 of Schedule 5 of the Agreement is concerned, the plaintiff argues that the effect of the clause is that the defendant has approved the entire contents of the report or file in question. In this case, the contents of the relevant reports include:

(a) the NLV deficit;

(b) the sale of the portfolio to Optiver; and

(c) the Loan Monies.

Thus, the plaintiff argues that the defendant is deemed to have approved the sale of its portfolio to Optiver at the stated value as well as the Loan Monies which are due and owing to the plaintiff thereafter.

31 In so far as cl 21.4 of the Facility Agreement is concerned, the plaintiff argues that the clause operates to render the quantum of the Loan Monies conclusive and binding on the defendant unless the defendant proves a manifest error on the face of the 20 Nov Cash Position Report which reflected outstanding liabilities in the sum of S$935,526.39.

32 Against that, the defendant adopts and reiterates the AR's reasoning on the question of contractual estoppel [note: 34]. The defendant also stresses that the whole of its case stands as a challenge to the validity and propriety of the plaintiff's claim. [note: 35]

Analysis

33 Contractual clauses such as cl 2.3 and cl 21.4 are broadly known as "conclusive evidence clauses" and are commonly found in banking documents. The legal effect of such clauses is to render a certification by a bank as to the amount owed conclusive as between the bank and the customer:

Poh Chu Chai, *Law of Banker and Customer* (LexisNexis, 5th Ed, 2004) ("*Law of Banker and Customer*") at p 209. Generally, in the absence of fraud or patent error on the face of the statement, the statement is binding on the customer: *Law of Banker and Customer* at p 210. That said, the precise effect of the conclusive evidence clause may vary depending on how broadly (or narrowly) the clause is drafted.

34 The widespread use of conclusive evidence clauses was noted by Yong Pung How J (as he then was) in *Bangkok Bank Ltd v Cheng Lip Kwong* [1989] 2 SLR(R) 660 at [18]-[19]:

> The widespread use by banks of "conclusive evidence" clauses has arisen simply because of the dictates of commerce, and has been supported by the assumption that money institutions, which are themselves closely regulated by the law, are completely honest and reliable. In *Bache & Co (London) Ltd v Banque Vernes et Commercials De Paris SA* [1973] 2 Lloyd's Rep 437 Lord Denning MR said at 440:
>
> > I would only add this: this commercial practice (of inserting 'conclusive evidence' clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a 'conclusive evidence' clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.
>
> What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a "conclusive evidence" clause is conclusive of both the liability and the amount of the debt.

35 That said, whether a clause is properly to be regarded as a "conclusive evidence clause" and what the clause is conclusive in respect of must depend on the facts of each case. The plaintiff referred me to the Court of Appeal decision in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273 ("*Pertamina*"). There, Pertamina failed to object to a wrongful drawdown of US$8m that was reflected in its bank statements. Credit Suisse argued that it was exonerated from liability in respect of acting on the forged documents leading to the drawdown by reason of the following conclusive evidence clause:

> 1.3 The Customer hereby agrees:
>
> …
>
> (b) To examine all statements of account, bank statements, printed forms, deposit slips, credit advice notes, transaction advices and other documents (hereinafter in this Clause referred to collectively as "statements") supplied by the Bank setting out transactions on any of the Accounts and agrees that unless the Customer objects in writing to any of the matters contained in such statement within 14 days of the date of such statement, *the Customer shall be deemed conclusively to have accepted all the matters contained in such statement as true and accurate in all respects* …
>
> [emphasis added]

36 The Court of Appeal was satisfied that the ambit of the phrase "unless the Customer objects in writing to any of the matters contained in such statement … the customer shall be deemed conclusively to have accepted *all* the matters contained in such statement" was wide enough to exonerate the respondent from the consequences of a fraud perpetrated on Pertamina, if the latter fails to notify the respondent of the relevant discrepancy within the stipulated period (at [69]).

37 It is significant to note that *Pertamina* did not concern the fraud or misconduct of the bank's officers or employees. The question before the Court of Appeal was whether the consequences of a fraud perpetrated on the appellant by a third party ought to be visited on the respondent bank. In the case at hand, the defendant has sought to challenge and dispute the method or manner in which the defendant's portfolio was "liquidated" by the plaintiff bank. The focus in this sense is on the bank's conduct rather than the conduct of some third party. The question that the defendant wishes to raise as a defence is the assertion that the bank had breached its duties by taking liquidation steps that were capricious and irrational.

38 The plaintiff also referred me to *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 ("*Jiang Ou*"). In that case, the plaintiff suffered substantial losses from unauthorised transactions carried out by the bank's employee. The defendant argued that conclusive evidence clauses operated to protect the bank from liability. The relevant clauses state:

> 3.1 Subject to paragraph 3.2, the Bank shall send the Client periodic confirmations or advices of all Transactions carried out by the Client and/or the Authorised Representative and all deposits placed with, and cleared by, the Bank for the account of the Client, and periodic statements reflecting such Transactions and balances in the Account. The Client undertakes to carefully examine and verify the correctness of each confirmation, advice and statement of account and agrees that reliance may only be placed upon original confirmations, advices, and/or statements of account issued by the Bank. The Client further undertakes to inform the Bank promptly in writing and in any event within fourteen (14) days from the date of any such confirmation or advice, and within thirty (30) days from the date of such statements of account, of any discrepancies, omissions, incorrect or inaccurate entries in the Account or the contents of any confirmation, advice or statement of account or the execution or non-execution of any order, failing which the Bank may deem the Client to have approved the original confirmations, advices or statements of account as sent by the Bank to the Client, in which case *they shall be conclusive and binding upon the Client without any further proof that the Account is and all entries therein and the execution of all Transactions are correct*, and the Client shall be deemed to have *waived all Claims* against the Bank in respect of the Account and all such Transactions, *even if the Bank had not exercised the usual diligence in relation thereto*.
>
> 3.2 A Transaction Confirmation in respect of each Transaction concluded will be sent to the Client in the same manner as any other confirmation no later than the end of the next Business Day after the date upon which the relevant Transaction is entered into. *The details contained in the Transaction Confirmation shall be evidence of the particulars of the Transaction concluded between the Bank and the Client and shall be binding and conclusive on the Client.* The Client must notify the Bank in writing within fourteen (14) Business Days after the date of the relevant Transaction of any claimed discrepancy between the Instructions and the Transaction Confirmation. The Bank may deal with the matter in such manner as the Bank may in its sole and absolute discretion consider appropriate, and if no such notification is received by the Bank in writing within the time stipulated, *the Client will be deemed to have waived all further rights to raise any objection or query thereto, and to have waived all Claims against the Bank in respect of the relevant Transaction, even if the Bank had not exercised the usual diligence in relation thereto.*

[emphasis added]

39 After an extensive survey of the existing body of case law on conclusive evidence clauses, Steven Chong J ("Chong J") held that whilst the conclusive evidence clauses in that case precluded the plaintiff from challenging the correctness of the bank statement (at [60]), they did not extend so far as to protect the bank from liability where unauthorised transactions were carried out (at [102]). In particular, Chong J was of the view that *Pertamina* (together with a host of other cases) could be easily distinguished on the basis that the court in each of the cases was concerned with situations where at the time when the transactions were executed, the banks believed in *good faith* that they were acting in accordance with the customers' mandate or instructions: at [103]. None of those cases concerned the fraud and forgery of the bank's employee or the bank acting in the absence of instructions.

40 It may be inferred from Chong J's holding that, in appropriate cases, a distinction can be drawn between the correctness of the figures in relation to a transaction reflected on the bank statement and the propriety of the bank's conduct in carrying out that transaction. Further support for this distinction may be found in the case of *Nitine Jantilal v BNP Paribas Wealth Management* [2012] SGHC 28. In that case, the plaintiff commenced the action against the defendant bank when he discovered that his account with the defendant bank had been reduced in value. The plaintiff sought two remedies: (a) an account of all transactions, investments, loans, purchases and sales on his account from its inception to the time the account was closed; and (b) damages for breach of various duties owed to him by the defendant.

41 The defendant bank relied on conclusive evidence clauses to say that the plaintiff was barred from pursuing his claim (at [12]). The conclusive evidence clause stated *inter alia*:

> If the Customer fails to (i) advise the Bank of non-receipt of an account statement, advice or confirmation within fourteen (14) days of the date on which that account statement, advice or confirmation should have been received by the Customer or (ii) notify the bank in writing of any Statement Error or Advice Error within the periods referred to in Clause 3.9(B) above, the Customer shall be deemed to have agreed (subject to Clause 3.9(E)):
>
> > (i) that the relevant account statement, advice or confirmation is binding upon him;
> >
> > (ii) that all debits, credits and other transactions and entries and the balance of the Customer's account(s) recorded in such account statement, advice or confirmation are true and correct and shall be conclusive without further proof as against the Customer; and
> >
> > (iii) to waive any rights to raise objections or to pursue any remedies against the Bank in respect of the account statement, advice or confirmation
>
> except in the case of manifest error.

42 In that case, Choo Han Teck J held that the defendant could not rely on the conclusive evidence clause to prevent the plaintiff from pursuing his claim with respect to the alleged breach of duties. He said at [12]:

> The effect of the clause is a question of construction. Various principles of contract law apply here, the first being the *contra proferentum* rule. The High Court in *Jiang Ou* commented at [71] and [89] that conclusive evidence clauses generally are conclusive of the correctness of a transaction, rather than being capable of operating as retrospective authorisation of the

transaction. *I agree with this and thus find that the clause was conclusive evidence of the identity and value of assets in the FIS account. Clause 3.9(B)'s reference to "unauthorised transactions" does not prevent the plaintiff from claiming that the specific asset transactions and swap transactions were unauthorised.* Rather, it meant that if the plaintiff did not dispute the identity and value of the assets in the FIS within the prescribed period, he would not be able to challenge the statement of account later on, regardless of the reasons why the statement is inaccurate and even if the transaction which caused the inaccuracy or error was unauthorised. The plaintiff, however, was not saying here that the identity and value were inaccurate. Indeed, he accepted that the transactions were made and the FIS account now stands at a diminished value. *Instead, his claim is that the transactions were done without his authorisation and in breach of the duties owed to him, so that the defendant was liable to him in damages.* The defendant asserted that the conclusive evidence clause of the 2005 Terms and Conditions applied even though the plaintiff did not have actual notice, by virtue of the hold mail arrangement. Given my construction of the conclusive evidence clause such that it did not bar the plaintiff's claim, it was not necessary for me to deal with this issue.

[emphasis added]

43 With that distinction (above at [40]) in mind, where a party is seeking to rely on conclusive evidence clauses as a defence against challenges to both the correctness of the transaction and the propriety of the bank's conduct that gave rise to the said transaction, it is incumbent on that party to provide for it in clear and unambiguous language. In *Jiang Ou*, Chong J held:

108 The risk of fraud by the bank's employee is a unique risk that typically resides with the bank. If EFG Bank had intended to shift such risk to its customers including Mdm Jiang, in my view, *nothing short of express reference in the relevant clause to such a risk would have sufficed*. Clauses 3.1 and 3.2 clearly did not expressly or impliedly cover unauthorised transactions carried out fraudulently by its employee in the absence of instructions. …

[emphasis added]

44 The question that follows is whether the same principles apply in situations where no fraud exists on the bank's part, but the propriety of the bank's conduct is nevertheless called into question. In other words, does case law suggest that nothing short of clear and unambiguous reference to misconduct of the bank is required to bring such misconduct within the relevant conclusive evidence clause? Misconduct (as opposed to fraud), refers to allegations that the bank has been negligent or has otherwise acted in a manner in breach of its duties to the client.

45 The strict interpretation of conclusive evidence clauses is not limited to the situation where a party is limiting its liability for its own misconduct. Instead, it may be traced back to the Privy Council's decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 ("*Tai Hing Cotton Mill*"). In that case, a company had current accounts with three banks. An accounts clerk (of the plaintiff) forged the signatures on approximately 300 cheques totalling approximately HK$5.5m. The banks honoured the cheques on presentation and debited them against the company's accounts. The company brought an action against the banks seeking to recover the respective amounts which had been debited to its accounts. Leaving aside the question as to whether a customer owed a duty to the bank to take reasonable care to prevent forged cheques being presented, the key issue was whether the express terms of the banking contracts (the alleged conclusive evidence clauses) applied such that the plaintiff was estopped from asserting that the accounts had been debited without lawful authority.

46 Lord Scarman, delivering the judgment of the Board, said at 109–110:

> Their Lordships agree with the views of the trial judge and Hunter J as to the interpretation of these terms of business. They are contractual in effect, but in no case do they constitute what has come to be called 'conclusive evidence clauses'. Their terms are not such as to bring home to the customer either 'the intended importance of the inspection he is being expressly or impliedly invited to make', or that they are intended to have conclusive effect against him if he raises no query, or fails to raise a query in time, upon his bank statements. *If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the objection and of the sanction imposed must be brought home to the customer.* In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is not express agreement is limited to the Macmillan and Greenwood duties. Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.
>
> [emphasis added]

47 In *Tai Hing Cotton Mill*, the relevant provision of the agreement made with the first bank provided:

> A monthly statement for each account will be sent by the bank to the depositor by post or messenger and the balance shown therein may be deemed to be correct by the bank if the depositor does not notify the bank in writing of any error therein within 10 days after the sending of such statement … .

48 That with the second bank stated:

> The bank's statement of my/our current account will be confirmed by me/us without delay. In case of absence of such confirmation within a fortnight, the bank may take the said statement as approved by me/us.

49 The agreement made with the third bank provided:

> A statement of the customer's account will be rendered once a month. Customers are desired: (1) to examine all entries in the statement of account and to report at once to the bank any error found therein, (2) to return the confirmation slip duly signed. In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed.

50 In spite of language such as "may be deemed to be correct", "may take the said statement as approved" and "the account shall be deemed to have been confirmed", the Privy Council held that those clauses did not satisfy the rigorous test that it laid down. Whilst the Privy Council in *Tai Hing Cotton Mill* was not concerned with any misconduct on the bank's part (fraud, negligence or otherwise), it nevertheless brought home the point that there is a rigorous test that must be satisfied where conclusive evidence clauses are concerned. Specifically, clear and unambiguous language is

critical where the banks are relying on such clauses to restrict their counterparty's right to question their bank statements. Put the other way round, the Privy Council's conclusion at 109H was that the clauses were not in fact conclusive evidence clauses. The clauses did not make clear that the statements are intended to have conclusive effect against the company, if it raised no query within the time allowed.

51 It follows that where the bank relies on "conclusive evidence clauses" to relieve itself from liability for its own misconduct, nothing short of clear and unambiguous language to that effect would suffice.

52 The test in *Tai Hing Cotton Mill* was considered and adopted by L P Thean J in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 at [20].

53 The rigorous standard laid down in *Tai Hing Cotton Mill* dovetails with the application of the *contra proferentum* rule. In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") (at [131]), the Court of Appeal endorsed the following statement in Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007):

> Seventhly, where a particular species of transaction, contract, or provision is one-sided or onerous it will be construed strictly against the party seeking to rely on it.

54 Under cl 2.3 of the Schedule 5 of the Agreement, the defendant is only given *one* business day to object to the contents of the file/report. Under cl 21.4 of the Facility Agreement, the defendant is only entitled to complain where there is a manifest error on the face of the determination/confirmation. Should the court accept the plaintiff's interpretation of the conclusive evidence clauses, the defendant would be deprived of recourse if he failed to object within one business day. This would be so even in a situation where there is clear evidence that the plaintiff had acted irrationally, perversely and/or capriciously. Having only one day to check figures is one matter. But to check, verify, accept both the legal propriety of the bank's steps or actions that lie behind them and the figures, and the entire contents of the file including steps taken to liquidate is quite another.

55 It is also noted that the clauses in the present case stand in stark contrast to those in the cases discussed above. In *Pertamina*, the appellant was given 14 days to object to the contents of the bank statements. In *Jiang Ou*, the plaintiff was given 14 business days to object to or query transaction confirmations. In *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA* [2015] 1 SLR 338, the plaintiff was allowed up to 30 days to complain about periodic statements of accounts and portfolio valuations, and five days to complain about advices or notices.

56 That said, no evidence is before me as to whether a one day notice period is common-place or unusual in cases where the banker-customer relationship arises in connection with credit facilities provided in connection with the provision of direct market access for the customer at the stated stock exchanges. Indeed, it is noted that under the arrangements, the plaintiff is directly liable to the relevant clearing houses for the cost of derivatives purchased by the defendant and daily margins imposed. It appears that in the event that the plaintiff fails to meet margin calls, the consequence is very serious as the plaintiff is prevented from executing further trades. [note: 36] It may be that a very brief time frame for objections is common in this area as compared to regular bank account statements, *etc*. Indeed, the very fact that the defendant must have been aware of the short one day notice period suggests that it would also have been aware of the time-sensitive nature of the

matter. The problem, however, is that neither party made any submission on this particular aspect of the clauses.

57 In view of the preceding analysis, the defendant is not precluded from challenging the propriety of the bank's conduct *vis-à-vis* the liquidation actions unless it is clear and unequivocal that "misconduct" on the part of the bank (in respect of the liquidation actions) fell within the ambit of the conclusive evidence clauses.

58 Returning to the facts of the present case, it bears repeating that the effect of a conclusive evidence clause depends on the precise words used and is ultimately a question of construction. In this connection, I note that the Court of Appeal in *Pertamina* at [58] stressed the importance of interpreting the words and language of the clause as a whole rather than to "approach the task of construction with too nice a concentration upon individual words." In my judgment, the ambit of the contractual estoppel created by the conclusive evidence clauses in the Agreement and the Facility Agreement is not sufficiently wide to contractually estop the defendant from challenging the propriety of the plaintiff's liquidation actions.

59 First and foremost, the plain words of the clauses do not appear to envisage a situation where the propriety of the bank's conduct is disputed. Clause 2.3 of Schedule 5 of the Agreement provides that ABN is entitled to treat a report or file that is provided to the client as having been approved if the client does not notify ABN of *any error*. The purpose of cl 2.3 is clearly stated in the following clauses:

> 2.2 The Client must give ABN notice of any errors in sufficient time to allow ABN to notify the Exchange of those errors within one Business Day after the time ABN received those details from the Exchange
>
> …
>
> 2.4 If the Client gives ABN notice of any errors in such report or file within the specified time, ABN must:
>
> (a) immediately notify the Exchange; and
>
> (b) take such action in relation to the Exchange as is reasonably practicable, in order to correct any such errors or to provide the Client with the necessary details.

60 I agree with the AR that a challenge to the way in which liquidation was conducted would not constitute an "error" contemplated by cl 2.3. Rather, what would fall more comfortably within the ambit of the clause are mistakes such as computational or clerical errors (*ie*, errors that need to be corrected with the relevant exchange). There was certainly no mistake in the way the liquidation was conducted; the bank intended to sell the defendant's portfolio within a given price range and had sold the said portfolio within that price range. What is in dispute is whether the bank had acted reasonably or irrationally, perversely or capriciously in selling the portfolio in the way it did. Accordingly, the defendant was not obliged to inform the plaintiff of its objections to the way in which its portfolio was sold. In the same tenor, cl 21.4 of the Facility Agreement which makes reference to "manifest error", is insufficient in its scope to encompass the present situation.

61 Secondly, it is unclear what "the report or file [is treated] as having been approved by the Client" (cl 2.3 of Schedule 5 of the Agreement) means. The same applies for "rate or amount… shall… be conclusive and binding on the Client" (cl 21.4 of the Facility Agreement). In this regard, the

clauses in the present case may be contrasted to that in *Citibank NA v Lim Tiong Hee* [1994] 2 SLR(R) 203 ("*Citibank NA*"). In that case, the relevant clause provided:

> For all purposes, including any legal proceedings, a certificate by any of the bank's officers as to the *sums and liabilities* for the time being due or owing to the bank by me/us shall be conclusive evidence against me/us.
>
> [emphasis added]

62 In *Citibank NA*, Amarjeet Singh JC held that the certification under the conclusive evidence clause in an agreement is conclusive of *both the liability and the amount of the debt* in respect of a customer of a bank save in cases of fraud or obvious error on the face of the record (at [26]). That must be correct since the clause in dispute made express reference to both "sums and liabilities". In contrast, there is clearly doubt in the present case as to whether the clauses extend so far as to mean that the client (*ie*, the defendant) is deemed to have assented to both liability (in the sense of the legal propriety of the liquidation actions) and quantum as set out in the relevant report/file. The clauses are therefore insufficient to bring home the significance of the duty to check and verify, as well as the sanction that arises from a failure to object.

63 For clarity, I should add that even if the conclusive evidence clauses in the present instance are given a limited and restrictive interpretation (in the sense of not foreclosing a challenge to the method and manner in which the bank took the liquidation steps) the fact remains that the defendant had received the notices, was aware of what was going on and did not object to the method of sale at the time or even in the immediate aftermath. The defendant and its officer, Mr Moutonnet, are clearly seasoned and experienced traders. In particular, there is no evidence or suggestion that Mr Moutonnet was unaware of cl 2.3 and the one-day notice period or indeed the liability of the plaintiff to the clearing houses for costs of derivatives purchased by the defendant. The failure to object at the relevant time is, at the very least, a clear indication that its current defences are mere afterthoughts, a point to which I will return to below.

Improper liquidation argument

Threshold to be met

64 The consequences of an event of default are spelt out in cl 15 of the Agreement. As cl 15 of the Agreement forms the core of the parties' dispute, I will first set out the relevant provisions.

> **15. DEFAULT – CONSEQUENCES**
>
> **15.1 Default in Relation to the Client**
>
> If the Client commits a Default, AB is entitled with immediate effect and without any prior notice, *at its reasonable discretion without prior consultation with the Client* and without prejudice to any other right or remedy which may be granted to it under the Rules or any applicable law, immediately or at any time thereafter, to do any of the following:
>
> …
>
> (c) take the Liquidation Actions in clause 15.3 as if on the instructions of the Client; or

...

15.3 Liquidation Actions

The Liquidation Actions are:

(a) such actions as ABN, where clause 15.1 applies, considers reasonable in relation to the Client Portfolio to realise any asset or to discharge any liability in the Client Portfolio; …

[emphasis added]

65 In essence, cl 15.1 sets out what the plaintiff may do *at its reasonable discretion* where there is a default by the client. This includes the taking of Liquidation Actions in cl 15.3. Clause 15.3(a) goes on to define the relevant Liquidation Action as such actions as *the plaintiff considers reasonable* in relation to the client portfolio to realise any asset or to discharge any liability in the client portfolio. The key issue, as raised by the parties, is whether the reasonableness of the plaintiff's actions should be assessed objectively or subjectively.

The AR's decision

66 The AR proceeded to analyse this argument on the basis of a contractual duty. The assumption was that all references to a duty of care and skill in the pleaded defence stemmed from cl 15 of the Agreement. The AR held that a plain reading of the clause ran against the grain of the objective standard that the defendant argued. That said, the defendant accepted or argued that in any case, the discretion, even if subjective, was not an unfettered one. A term should be implied to impose a threshold standard by reference to whether the exercise of the discretion was irrational or capricious.

67 The AR found that the question of whether the liquidation actions were irrational raised triable issues of fact that can only be determined with the assistance of full expert evidence. She pointed to Mr Moutonnet's affidavits where it was stated that the plaintiff had acted in an arbitrary and non-transparent manner and that it was utterly irrational for the plaintiff to sell the portfolio as a whole without appreciating the nature of the portfolio. In the absence of independent expert evidence, the AR did not think it safe to enter summary judgment against the defendant.

The parties' positions

68 As a starting point, it is common ground between the parties that the above clauses do not confer upon the plaintiff an unfettered or absolute discretion to dispose of the defendant's assets in the event of default. [note: 37] However, the parties disagree on the threshold that has to be met to impugn the plaintiff's conduct.

69 The plaintiff asserts that it is entitled to take such liquidation actions as it *subjectively* considers reasonable, subject to an implied term that its discretion cannot be exercised arbitrarily, capriciously, perversely, irrationally and/or in bad faith. [note: 38]

70 The defendant's case is two-fold. First, the defendant appears to argue that the standard of reasonableness applicable is an objective one. [note: 39] In its view, the fact that the plaintiff did not reserve for itself absolute or sole discretion in taking liquidation action leans in favour of an objective standard. [note: 40] Secondly, even if a subjective standard of reasonableness were to be adopted,

the defendant argues that the plaintiff's actions fell short of that standard. [note: 41]

71 It seems to me that there are in fact numerous ways in which the clause might be interpreted. These include the following: first, the bank must act in accordance with the standards of a reasonable commercial man; second, the bank must act in accordance with a reasonable banker placed in the same position as the bank; third, that the bank must exercise the discretion reasonably in the sense that it is not exercised arbitrarily, capriciously, perversely, irrationally and/or in bad faith. Thus, whilst the bank is expressly not required to consult the client prior to taking steps to realise assets and discharge liabilities under the client's portfolio, the actions taken must be rational.

72 The distinction between the threshold of reasonableness and rationality has been clearly explained (albeit in a different context: to determine whether the defendant was liable for harassment) by Lord Sumption in *Hayes v Willoughby* [2013] 1 WLR 935 at [14]:

> Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions … A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.

73 With that, I turn to consider *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 ("*Edwards Jason Glenn*"), a case on which both parties relied. In *Edwards Jason Glenn*, the issue was whether a contractual right permitting the bank to assess security in its *sole discretion* was an unfettered one. The court held that the bank did not have untrammelled discretion; the exercise of its discretion was subject to an implied term that the discretion should be exercised in good faith and not arbitrarily, capriciously or irrationally (at [101]). In coming to this conclusion, the court cited the following observations made in *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [105]-[106]:

> In *JML Direct v Freesat UK Ltd* [2009] EWHC 616, Blackburn J referred to *Socimer* and *Horkulak* as authority for the proposition that discretion conferred on one party by the other is not wholly unfettered contractual discretion. As Rix LJ observed in *Socimer*, the concern is that the discretion is not abused. Hence, the courts will impose an implied term that the discretion should be exercised in good faith and not arbitrarily, capriciously or irrationally. "Irrationally" in this connection, (Blackburn J accepts the explanation in *Socimer*) is not an objective test of reasonableness but is used in an analogous sense to the Wednesbury unreasonableness (see *Socimer* at [66]).
>
> The courts will not intervene so long as the contractual "discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can be properly categorised as perverse" (see *Ludgate Insurance Co Ltd v Citibank* [1998] Lloyd's Rep IP 221 at [35] summarising the principles drawn from cases like *Weinberger v Inglis* [1919] AC 606; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896; *Docker v Hymans* [1969] 1 Ll R 487; and *Abu Dhabi National Tanker Company v Product Star Shipping Company Limited* [1993] 1 Lloyd's Rep 397).

74 In *Socimer International Bank Limited (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116 ("*Socimer*"), cited in *Edwards Jason Glenn*, where there was a default on the part of the

plaintiff, the defendant had the right to liquidate or retain assets and to apply the sale proceeds to satisfy the amounts payable to the defendant. The relevant clause further provided:

> The Seller may in its *sole and absolute discretion* sell the Designated Assets at such time, in such manner and at such price as it deems reasonable and appropriate. The value of any Designated Assets liquidated or retained and any losses, expenses or costs arising as a result of the termination or sale of the Designated Assets shall be determined on the date of termination by Seller.
>
> [emphasis added]

75 The plaintiff defaulted. The defendant did not carry out such a valuation but sold what assets it could from time to time and credited the proceeds to the claimant. The claimant claimed that the defendant was obliged to have carried out such a valuation at the date of termination and that if it had done so, then, pursuant to an implied term, it should have acted with reasonable care in carrying out the valuation. The English Court of Appeal held that the only restraint on the exercise of the contractual power to value the Designated Assets was a duty to act rationally, that is to say, a duty not to exercise the power arbitrarily, capriciously, or perversely.

76 The decisions in *Edwards Jason Glenn* and *Socimer* do not bring us very far in the present case. Those cases were concerned with the situation in which there was a sole and/or absolute discretion expressly conferred upon one contracting party. Here, given the absence of an express conferment of absolute or sole discretion, the issue is whether the clauses may be construed to have similar effect.

77 The English courts have answered this question in the affirmative. Recently, in *Peregrine Fixed Income Ltd v Robinson Department Store Public Co Ltd* [2000] All ER (D) 1177, the issue was whether the meaning of a clause which provided for a settlement amount to include "loss" if a market quotation could not be determined or would not (*in the reasonable belief of the party making the determination*) produce a commercially reasonable result. Moore-Bick J stated (at [39]):

> Leaving aside cases where there is or may be a lack of honest belief, when the court is asked to decide in a case of this kind whether a person has acted in breach of contract it should in my view adopt a similar approach to that taken in the well-known case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. It should not regard any act done by him honestly and in good faith as unjustified or involving a breach of contract unless it is clear that the belief in which he acted was flawed in one of the ways identified in that case.

78 I note in passing that *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, referred to above, concerned judicial review and an application for a declaration that certain acts taken by a local authority under a statutory discretion were ultra vires. Lord Greene MR held that the question was whether the authority had acted unreasonably in the sense that it had taken into account matters that ought not to be or disregarded matters that ought to be taken into account. Once that had been decided in favour of the local authority, liability might still arise even though they kept within the four corners of the matters which they ought to consider, if the local authority has nevertheless come to a conclusion that no reasonable authority could ever have come to. In *Hayes v Willoughby*, Lord Sumption at [14] referred to the latter as the "broader category of Wednesbury unreasonableness: a legal construct referring to a decision lying beyond the furthest reaches of objective reasonableness".

79 Likewise, in *Barclays Bank Plc v Unicredit Bank AG* [2014] 2 All ER (Comm) 115, the guarantor in respect of credit default swaps was required to determine certain matters "in a commercially

reasonable manner". Despite the lack of words conferring absolute/sole discretion on the guarantor, the English Court of Appeal held that the standard imposed was the *Wednesbury* standard of unreasonableness. Longmore LJ made the following observations:

> 15 The critical factor in the present case is that the person who has to act in a commercially reasonable manner in determining whether consent is to be given is 'the Guarantor' namely Barclays itself. It is from Barclays that consent is to be obtained and it is Barclays who has to determine whether that consent is to be given, albeit in a commercially reasonable manner. *It is the manner of the determination which must be commercially reasonable; it does not follow that the outcome has to be commercially reasonable although, if it is not, that would no doubt cause one to look critically at the manner of the determination.*
>
> 16 One then has to ask whether, in determining whether or not to consent to early termination, Barclays can take account of its own interest in preference to the interest of Unicredit. To my mind the answer is that it can, because any commercial man whose consent to a course of action is required but to whom the determination (whether to give that consent) is entrusted would think it commercially reasonable to have primary regard to his own commercial interests.
>
> 17 Mr Robin Knowles QC for Unicredit submitted that the purpose of requiring the determination to be made by Barclays in a commercially reasonable manner was to require Barclays to have regard to the interests of Unicredit as its counterparty in order that a mutual (or a mutually satisfactory) outcome could be achieved. Attractively as the submission was put, it is impossible to see how it could work in practice. *Bankers, as commercial men, have a keen instinct for where their own interests lie.* But if they are asked to have regard to the interests of the other party to the contract, how do they begin to assess what those interests are, let alone weigh those interests in comparison to their own interests? If the clause is to work in the way Mr Knowles suggests, there would have to be some method of discovering and assessing the counterparty's interests. The obvious way to do so would be to ask the counterparty what their interests were. But is Barclays to be expected to take the answer at face value? That might be beneficial to the counterparty but not be a balanced or accurate assessment of the counterparty's interest. Could Barclays ask that the counterparty's account of its own interests be backed up with documentary evidence? *If so, it might be a long process; if not, it might lead to an unfair result. If this sort of exercise were envisaged, one would expect a neutral third party to be allotted the task of determining whether consent should be given but that is not what the clause says*.
>
> [emphasis added]

80 It is clear from the cases above that the word "reasonable" in a clause conferring a contractual discretion does not necessarily bring with it an objective standard of reasonableness. It all depends on the clause as a whole and as interpreted against the contract as a whole. In this connection, it is also significant to note that, during the hearing, counsel for the defendant candidly admitted that there was no authority to support his argument that the said clauses imposed an objective standard of reasonableness.

81 It is well-established that the aim of the exercise of construction of a contract is to ascertain the meaning which it would convey to a reasonable business person: *Zurich Insurance* at [131]. What matters here is the intention of a person, as objectively assessed, and not his or her actual intentions.

82 In the present case, I agree with the AR's conclusion that a plain reading of the clauses ran

against the grain of the objective standard that the defendant argued for. The clauses were couched in subjective language. It is apparent that the focus of the inquiry under cl 15.3(a) is whether the plaintiff considered its actions reasonable. What is relevant is the plaintiff's subjective state of mind; there must be some evaluation of the reasonableness of a particular course of action from the standpoint of the bank. Why did they act as they did: for what reason? The court will not interfere in this evaluative exercise unless it can be shown that the bank had conducted itself in a capricious and irrational manner.

83 From a policy standpoint, there are sensible reasons why the court should give effect to such clauses. The clauses are designed to protect the bank's interest by allowing them the latitude to act fast to close its position so as to cut losses. This is especially pertinent in the context of the provision of DMA services. As a DMA service provider, the bank is placed in a position where it retains full responsibility for the trades executed by its customer (*ie*, the defendant). As observed above at [8], the plaintiff's entire portfolio of securities and derivatives, purchased on behalf of *all its customers*, was liable to be liquidated by the clearing houses if the plaintiff failed to meet its daily margins. In view of such dire consequences, the bank must surely be able to act fast to protect its own position. Indeed, it bears repeating that the defendant must have been aware of the importance of the clause given the very short time frame for objections. In the overall scheme of things, it must have been obvious that the bank would have to act quickly to resolve positions bearing in mind the daily margins imposed by the respective exchanges. It also bears underscoring that the clause expressly stated that the bank was *not* under a duty to consult the client. Speed of action is clearly contemplated. The clause is clearly for the purpose of protecting the position of the bank.

84 Viewed in this light, it is not for the court, with the advantage of hindsight, to substitute its opinion for that of the bank. This is so even if the bank's exercise of judgment subsequently turns out badly.

85 For the foregoing reasons, I am of the view that the plaintiff's construction of the clauses is to be preferred. The court will be loath to intervene in the absence of arbitrariness, capriciousness, perversity and irrationality.

Whether the threshold was met

86 I shall now turn to examine whether there is any merit to the defendant's claim that the plaintiff's actions were "utterly irrational" and "completely unacceptable and unreasonable". [note: 42]

Incorrect assumption that the defendant's portfolio was short

87 The defendant alleges that the plaintiff had failed to appreciate the nature of the defendant's portfolio. In this regard, the defendant submits that the plaintiff proceeded on an unreasonable and incorrect assumption that the defendant's portfolio was short on the Nikkei Index; the defendant argues that the portfolio was effectively hedged at that stage.

88 In my view, the plaintiff's assessment of the defendant's portfolio was neither incorrect nor unreasonable. The defendant's portfolio was indeed short in respect of the Nikkei 225 Index.

89 First, the sole basis for the defendant's claim that its portfolio was hedged against movements in the Nikkei Index is the spreadsheets it has provided. The source of the data contained in the spreadsheets is questionable. There is no evidence that the defendant generated them contemporaneously, or on the basis of objective market data. On the contrary, the spreadsheets did not reflect the actual spot values at the relevant dates. This is clear from a comparison of the spot

values contained in the defendant's spreadsheets and publicly available data on the spot values for the relevant period.

Date	Publicly Available Spot Values [note: 43]		Spot values in the defendant's spreadsheets
	High	Low	
31 October 2014	16,533.91	15,817.14	16,780
4 November 2014	17,127.66	16,720.99	16,680
5 November 2014	16,995.02	16,778.28	17,080

90 From the table above, it is apparent that the Nikkei 225 Index was never at the level of 16,780, 16,680 and 17,080 on the relevant dates. This casts doubt on the reliability of the figures that were proffered by the defendant.

91 Even assuming that the data in the spreadsheets constitute credible evidence, it did not in any way support the defendant's assertion that its portfolio was effectively hedged against movements in the Nikkei 225 Index. As explained by the counsel for the plaintiff, a portfolio would only be hedged effectively where the delta value was zero. [note: 44] A positive delta indicates that the price of the portfolio increases as the index rises, thus depicting a long position on the index. A negative delta, on the other hand, indicates that the price of the portfolio falls as the index rises, thus depicting a short position on the index. Counsel for the defendant did *not* dispute this.

92 The following table shows the relevant delta values extracted from the defendant's spreadsheets. [note: 45]

Date	Delta
31 October 2014	210
4 November 2014	413
5 November 2014	- 16

93 It is clear from the table that the delta values were never zero on the relevant dates. Thus, on the defendant's own evidence, the portfolio was not hedged against movements in the Nikkei 225 Index.

94 Secondly, had the defendant truly believed that its portfolio was hedged against movements in the Nikkei 225 Index, one would expect it to have objected at the earliest opportunity to the contrary characterisation of its portfolio. But it did not. In my view, this puts it beyond argument that the defendant's portfolio was never hedged against movements in the Nikkei 225 Index.

Propriety of Liquidation Actions

95 The defendant argues that the liquidation actions taken by the plaintiff were utterly irrational and completely unacceptable and unreasonable. [note: 46] To this end, the defendant relies on Mr

Moutonnet's "sworn assertions regarding the utterly unacceptable mode of liquidation actions". [note: 47] These assertions relate to Mr Moutonnet's suggestion of the course of action that the plaintiff ought to have adopted. [note: 48] According to Mr Moutonnet, the defendant's portfolio was structured in such a way that effective remedial action could have been taken to stabilise the entire portfolio. More specifically, Mr Moutonnet averred that the reasonable solution in view of the events of 5 November 2014 was to engage voice brokers to purchase 400 call options and 400 put options at the strike price of 17,000 expiring on 15 March 2015. [note: 49] In his view, after the portfolio had been stabilised, the plaintiff could have used broker quotes to properly value the portfolio and to allow the process of liquidation to proceed in a reasonable and orderly manner. Whilst Mr Moutonnet seems to accept the possibility of auctioning as an alternative, his complaint is that an auction carried out without the true value of the portfolio, and under a false sense of time pressure is completely unacceptable and unreasonable. [note: 50]

96 I am of the view that given the market conditions then prevailing, the plaintiff's liquidation actions were not arbitrary, capricious, perverse, and irrational and/or in bad faith. At this juncture, it must be borne in mind that this is a high threshold to satisfy.

97 Firstly, I am unable to agree with the defendant's contention that the plaintiff had sold the defendant's portfolio under a "*false* sense of time pressure". From the material placed before the court, it is clear that time was of the essence in liquidating the defendant's portfolio. The NLV of the defendant's portfolio fell from more than $4m to a deficit of $663,157 in the span of three business days. There was a real possibility that the Nikkei 225 Index would continue to rise. Given my finding above that the defendant's portfolio was indeed short with respect to the Nikkei 225 Index, there was every possibility that the NLV of the defendant's portfolio would continue to slide and that the defendant's indebtedness to the plaintiff would increase. This was a valid concern since Mr Moutonnet had said on 5 November 2014 that the defendant was not in a position to top up its account when invited to do so (above at [12]).

98 Secondly, an independent valuation of the defendant's portfolio was obtained. The eventual price obtained met what the valuer, Eclipse Options, considered to be reasonable. It would not suffice for the defendant to claim that it would have preferred an alternative mode of liquidation or that some other mode of liquidation would have yielded better returns. What the defendant must demonstrate is that the plaintiff's conduct rose to the level of arbitrariness, capriciousness or was based on reasoning so outrageous in its defiance of logic as to be perverse.

99 In *Marex Financial Ltd v Creative Finance Ltd and another* [2014] 1 All ER (Comm) 122, the claimant-broker sued two of its clients for monies owed on a foreign exchange trading account, being the outstanding liabilities in the account after the claimant had closed out the defendants' positions following their default. One of the defences raised was that the claimant had closed out the defendants' position in an irrational manner. The English High Court held (at [152]) that the claimant's failure to consider the closing out strategy postulated by the defendants did not, by itself, render the manner of the claimant's close-out irrational. The crucial question was whether the defendants' closing out strategy was so obviously significantly superior to the claimant's that it was perverse of the claimant not to have adopted it (at [153]). Since there were significant upsides and downsides involved in the defendants' proposed strategy, Fields J found that there was no irrationality in how the claimant closed out the defendants' positions.

100 It will be convenient to now turn to examine the defendant's proposed alternative strategy. In this regard, it is noted that there is no independent evidence to support the effectiveness of the defendant's proposed liquidation actions (summarised at [95] above). Instead, at the hearing, counsel

for the defendant urged me to take Mr Moutonnet's word for it given his expertise and experience in the field. Whilst it does appear that Mr Moutonnet has considerable experience in derivatives trading, [note: 51] mere assertions by Mr Moutonnet, the defendant's director, are not sufficient to raise a triable issue. These assertions run the risk of being inherently self-serving.

101 It is trite that the summary judgment procedure exists for situations where the strength of the plaintiff's case is such that it would be unfair to compel the plaintiff or defendant to wait until the trial before his unchallengeable rights are recognised and enforced: *Singapore Court Practice 2014* (Jeffrey Pinsler gen ed) (LexisNexis, 2014) ("*Singapore Court Practice 2014*") at para 14/1/1. To stave off a summary judgment application, the defendant must satisfy the court that there is a question in dispute "which ought to be tried, or that there ought for some other reason to be a trial of the claim or part of the claim": *Singapore Court Practice 2014* at para 14/4/1.

102 It is also well established that the court is not bound to accept at face value every assertion that there is a dispute on an issue that merits a trial on the matter. In this connection, the following passage in *Singapore Civil Procedure 2015* vol I (G P Selvam gen ed) (Sweet and Maxwell, 2015) at para 14/4/2 is highly illuminating:

> O.14 proceedings are not decided by weighing two affidavits … However, this does not mean that the judge is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporaneous documents or other statements by the same deponent, or inherently improbable in itself it may be. Instead the judge will need to exercise his discretion so as to determine, in the first instance, whether the statements contained in the affidavits have sufficient *prima facie* plausibility to merit further investigation as to their truth …

103 A "triable issue" founded wholly on bald assertions and mere surmise cannot be allowed to proceed to trial. The standard to be applied was articulated with acuity by Laddie J in *Microsoft Corporation v Electro-Wide Limited* [1997] FSR 580, where he said (at 593 to 594) that:

> [I]t is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. The court must look at the complete account of events put forward by both the plaintiff and the defendants and … look at the whole situation. *The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate.* If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief.
>
> [emphasis added]

104 Thirdly, the defendant's own actions cast doubt on the effectiveness of its suggested course of action. Contrary to what it has suggested (*ie*, to purchase 400 put options and 400 call options), the defendant sold 400 of its put options on 5 November 2014. Where a party has conducted itself contrary to the basis of its alleged defence, this is a factor that is to be considered when determining the existence of a triable issue: *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd and others* [1998] 1 SLR(R) 53 ("*Prosperous Credit*") at [15].

105 As a final point, I note that the defendant failed to protest the liquidation actions that the plaintiff had taken at every step of the way until the O14 Application. The defendant did not raise

any objections when it was informed of the auction results after completion of the same. The defendant also did not protest the liquidation actions when it received the 7 Nov and 11 Nov cash position reports which depicted the sale and transfer of the defendant's position. The defendant failed to protest at numerous junctures: when it received the 20 Nov Cash Position Report setting out the loan monies outstanding, when it received the letter claiming the Outstanding Sum, as well as in its defence and counterclaim, and in its first amended defence and counterclaim. The defendant's objections only surfaced after the O14 Application was filed. If the defendant had felt so strongly about the method by which its portfolio was liquidated, why did it not say so then? The defendant's deafening silence at the relevant time indicates that the defence was merely conjured up as an afterthought to stave off the O14 Application.

106 The failure to object is a factor that should be taken into account in assessing the *bona fides* of the defence to the plaintiff's claim. Indeed, in *Prosperous Credit*, the third defendant failed to raise the alleged defence at the earliest opportunity and only raised the defence much later on by way of a police report made and an affidavit filed after an application for summary judgment was taken out. Judith Prakash J considered the third defendant's failure to raise the defence earlier to be a factor that cast doubt on the *bona fides* of the defence (at [16]).

107 Whilst the AR's reservation about entering final judgment against the defendant is perfectly understandable, this is not a case where there is even a shadowy defence that merits granting conditional leave to defend. On the contrary, the weight of the evidence indicates that there was no reasonable possibility that the defendant had a *bona fide* defence against the plaintiff's claim. The defendant's portfolio was indeed short in respect of the Nikkei 225 Index. Further, the defendant has not tendered any credible evidence in support of its assertion that the plaintiff's actions were utterly irrational, completely unacceptable and unreasonable.

108 For the foregoing reasons, I find that the plaintiff has successfully proved its case with respect to the Loan Monies on a balance of probabilities. Further, as the defendant has not raised any defences to the DMA Charges, I affirm the AR's decision to enter final judgment against the defendant in relation to the plaintiff's claim for DMA Charges.

109 Accordingly, I order final judgment for the sum of S$935,526.39 to be entered against the defendant with interest levied on this sum at the rate of 10% per annum compounded on a daily basis from 2 December 2014 until the date of full payment of this sum to the plaintiff.

Costs

110 In view of my decision above, the plaintiff is entitled to an award of indemnity costs as provided for in cl 11.1 of the Agreement. The provision states:

> The Client agrees to indemnify ABN against all reasonable costs or liabilities for costs (including legal costs and expenses on a solicitor and own client basis) incurred by ABN:
>
> (a) in any proceedings or dispute between the Client and ABN in which judgment is awarded against the Client.

111 As such, I order indemnity costs for the proceedings here and below, to be agreed or taxed, to be paid by the defendant to the plaintiff.

[note: 1] Plaintiff's submissions, para 9.

[note: 2] Plaintiff's submissions, para 10.

[note: 3] Plaintiff's submissions, para 12.

[note: 4] 1st Affidavit of Robert Sim, para 8(b).

[note: 5] 1st Affidavit of Robert Sim, para 8(a).

[note: 6] 2nd Affidavit of Robert Sim, para 70.

[note: 7] 2nd Affidavit of Robert Sim, para 70.

[note: 8] 2nd Affidavit of Robert Sim, para 50(b).

[note: 9] 2nd Affidavit of Robert Sim, para 52.

[note: 10] 2nd Affidavit of Robert Sim, para 54.

[note: 11] 2nd Affidavit of Robert Sim, para 57.

[note: 12] 1st Affidavit of Robert Sim, para 8(d).

[note: 13] 1st Affidavit of Robert Sim, para 17.

[note: 14] 2nd Affidavit of Robert Sim, para 17.

[note: 15] 2nd Affidavit of Robert Sim, para 17.

[note: 16] 1st Affidavit of Jerome Andrew Moutonnet, para 65(a).

[note: 17] 1st Affidavit of Jerome Andrew Moutonnet, pp 56 and 82.

[note: 18] 1st Affidavit of Robert Sim, para 19.

[note: 19] Plaintiff's written submissions, para 37.

[note: 20] 1st Affidavit of Robert Sim, para 20.

[note: 21] 1st Affidavit of Robert Sim, para 20.

[note: 22] 1st Affidavit of Robert Sim, para 20.

[note: 23] 1st Affidavit of Robert Sim, para 21.

[note: 24] 2nd Affidavit of Robert Sim, para 19.

[note: 25] 2nd Affidavit of Robert Sim, para 19.

[note: 26] 2nd Affidavit of Robert Sim, para 113.

[note: 27] 2nd Affidavit of Robert Sim, para 114.

[note: 28] 1st Affidavit of Robert Sim, para 22.

[note: 29] 2nd Affidavit of Robert Sim, para 23.

[note: 30] 2nd Affidavit of Robert Sim, para 25.

[note: 31] 2nd Affidavit of Robert Sim, para 25.

[note: 32] 1st Affidavit of Robert Sim, para 29.

[note: 33] AR decision on this point is found in certified transcript, p 9.

[note: 34] Defendant's Written Submissions, para 57.

[note: 35] Defendant's Written Submissions, para 52.

[note: 36] See [8] above.

[note: 37] Defendant's Written Submissions, para 1; Plaintiff's Written Submissions, para 141.

[note: 38] Plaintiff's Written Submissions, para 141.

[note: 39] Defendant's Written Submissions, paras 2–7.

[note: 40] Defendant's Written Submissions, paras 4–5.

[note: 41] Defendant's Written Submissions, para 2.

[note: 42] Defendant's Written Submissions, para 8.

[note: 43] Plaintiff's Core Bundle, Tab 5.

[note: 44] Plaintiff's Written Submissions, para 147.

[note: 45] Plaintiff's Written Submissions, para 148

[note: 46] Defendant's Written Submissions, para 8.

[note: 47] Defendant's Written Submissions, para 10.

[note: 48] 2nd Affidavit of Jerome Andrew Moutonnet, paras 68 to 71.

[note: 49] 2nd Affidavit of Jerome Andrew Moutonnet, para 63.

[note: 50] 2nd Affidavit of Jerome Andrew Moutonnet, para 71.

[note: 51] See Reply and Defence to Counterclaim (Amendment No1) which at [7] sets out the curriculum vitae of Mr Moutonnet.