IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 113

Suit No 315 of 2013

Between

Asia-American Investments Group Inc. (British Virgin Islands)

… *Plaintiff*

And

(1) UBS AG (Singapore Branch)
(2) Amy Tee

… *Defendants*

GROUNDS OF DECISION

[Contract] — [Warranty of Authority]

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Asia-American Investments Group Inc
v
UBS AG (Singapore Branch) and another

[2017] SGHC 113

High Court — Suit No 315 of 2013
Quentin Loh J
20–23, 26–30 September; 21 October 2016; 23 March 2017.

15 June 2017

Quentin Loh J:

1 This is an action by an investment-holding corporation, Asia-American Investments Group Inc. (the "Plaintiff"), a private banking client, against its banker, UBS AG (Singapore Branch) (the "Bank"), and its relationship manager, Amy Tee ("Amy") (collectively, the "Defendants"). Amy was a director and employee of the Bank who was the client adviser assigned to the Plaintiff. Amy is no longer working with the Bank.

2 I delivered my oral judgment on 23 March 2017. I dismissed all of the claims of the Plaintiff against the Defendants. The Plaintiff has appealed and I now set out the reasons for my decision.

Introduction

3 The Plaintiff is incorporated in the British Virgin Islands ("BVI"). It is beneficially owned by Lucas (who goes by only one name) and his wife, Lenny

Patricia Halim Liem ("Lenny").[1] At all material times, Lucas and Lenny were the authorised representatives of the Plaintiff.[2]

4 The Plaintiff had a number of accounts with the Bank, the material ones of which are Singapore Dollar Account No 128560 (the "Account") and a discretionary management account (the "DAMA").

5 Prior to opening their accounts with the Bank, the Plaintiff had maintained an investment account with OCBC Bank ("OCBC") in Singapore. Amy was then with OCBC and was the relationship manager of the Plaintiff's account with OCBC.[3] After Amy moved to the Bank in 2006,[4] the Plaintiff opened the Account and the DAMA with the Bank.

The parties and their witnesses

6 The Plaintiff called two factual witnesses, *viz*, Lenny and Lucas. Its expert witness was Mr Yashwant Bajaj ("Bajaj").

7 The Defendants also called two factual witnesses, *viz*, Amy and Zane William Pritchard ("Pritchard"), the head of compliance of the Bank. Their expert witness was Mr Tan Boon Hoo ("Tan").

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1 Lucas' AEIC at p 69

2 SOC(3) at [1]

3 22.9 p 29

4 Amy's AEIC [4]

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Account-opening framework

8 On 12 April 2006, the Plaintiff signed an Account Agreement that contained, *inter alia*, an Account Mandate.[5]

9 Clause 1.3 of the Account Mandate authorised the Bank to act on the oral and telephone instructions, as well as instructions through electronic mail ("email"), of the Plaintiff.

> All oral, telephone, telex and facsimile instructions and Instructions through electronic mail (where specifically authorised by the Client in writing and agreed to by the Bank) must be confirmed in writing to the Bank immediately following such Instruction being given, if so required by the Bank. *Notwithstanding the foregoing, the Bank is authorised to act on such Instructions prior to receipt of the written confirmation, and the Bank shall not be liable for so acting even if such confirmation is not received by the Bank.*
>
> [emphasis added]

10 Clause 2.1 of the Account Mandate obligated the Plaintiff to check and verify the correctness of all confirmations and advices in relation to transactions carried out in the Account as well as of statements of account, and to inform the Bank of discrepancies within 14 days of the date of each confirmation or advice and within 90 days of each statement. After the expiry of these time periods, the Plaintiff was deemed to have approved and be bound by such confirmations, advices, and statements. Clause 2.1 reads:

> The Bank shall send the Client periodic confirmations or advices of all transactions carried out by the Client and/or the Authorised Representative and statements reflecting such transactions and balances in the Account. The Client undertakes to carefully check, examine and verify the correctness of each such confirmation or advice and each such

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5 1AB92

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> statement of account. The Client agrees that reliance can only be placed upon original confirmations, advices and/or statements. The Client further undertakes to inform the Bank promptly and in any event, with regard to such confirmation or advices, within fourteen (14) days from the date of such confirmations or advices, and, with regard to such statements, within ninety (90) days from the date of such statements, of any discrepancies, omissions, credits or debits wrongly made to or inaccuracies or incorrect entries in the Account or the contents of each confirmation, advice or statement or the execution or non-execution of any order; failing which, upon the expiry of the fourteen (14) days, the Bank may deem the Client to have approved the original confirmations or advices and upon the expiry of the ninety (90) days, the Bank may deem the Client to have approved the original statements as sent by the Bank to the Client, in which case they shall be conclusive and binding upon the Client …

11 Clause 3.2 of the Account Mandate authorised the Bank to treat all correspondence placed in the Plaintiff's Hold Mail Folder as having been duly delivered to and received by the Plaintiff on the date of the relevant correspondence.

> The Client acknowledges and authorises the Bank to treat all Correspondence placed in the Hold Mail Folder as having been duly delivered to and received by the Client. The date of the relevant Correspondence shall be deemed to be the date of receipt of the same by the Client.

12 On 1 February 2007, the Plaintiff executed the Request for Hold Mail Service "to request that the Bank provide to me/us Hold Mail Service in accordance with … the Account Agreement."[6]

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6 2AB912

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The dispute

13 The Plaintiff pleaded four causes of action: (a) fraudulent and negligent misrepresentation; (b) unauthorised entry into various accumulator transactions; (c) breach of fiduciary duty; and (d) breach of duties as the Plaintiff's banker not to enter into transactions which had not been validly authorised by the Plaintiff.

14 In its closing submissions, however, the Plaintiff cast the issues somewhat differently:

(a) Whether there was a requirement that the Defendants could only act on the written authorisation of the Plaintiff (Statement of Claim (Amendment No.3) ("SOC(3)") at [7] and [9]);

(b) Whether there was in fact any such authorisation;

(c) Whether there was in any event even oral authorisation by the Plaintiff;

(d) Whether there was fraud or inequitable conduct by the Defendants;

(e) Whether the Defendants had breached their fiduciary obligations to the Plaintiff (SOC(3) at [35]–[36]); and

(f) Whether the Defendants were negligent in taking any of the orders for the accumulator transactions.

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15 The Plaintiff's closing submissions also contained the following allegations:[7]

> (a) that Amy, through her words and conduct during the opening of the Account in April 2006, had represented that she would only act upon the prior written approval of the authorised representatives of the Plaintiff when she knew at all times that she was misrepresenting the position as the Account Mandate provided that oral instructions were sufficient; and
>
> (b) that the Defendants engaged in fraudulent or inequitable conduct in that the Defendants entered into the accumulator transactions without authorisation from Lucas and/or Lenny, and Amy went on a frolic of her own.

16 That said, the Plaintiff confirmed both in the evidence of Bajaj[8] and through its counsel, Mr Gabriel,[9] that: (a) it was not making a claim for mis-selling; and (b) these proceedings concerned essentially the question of whether the accumulator transactions in question had been authorised by the Plaintiff. Moreover, the question of whether the Defendants had breached their duties as fiduciary or as banker, as framed by the Plaintiff, was premised on the Defendants having entered the Plaintiff into the accumulator transactions without the authorisation of the Plaintiff.

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7 PCS at [7] – [8]

8 26/9 p 13

9 28/9 p 89

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17 It should be noted that Bajaj and Tan gave expert evidence primarily on the standard banking practice in relation to the sale of accumulator investments to customers.[10] Their opinions were therefore of limited assistance to the issues at hand. This was borne out by the scant reference made in the parties' submissions to the expert evidence.

18 The essential issue was whether the accumulator transactions in question had been authorised by the Plaintiff; and whether Amy had represented to the Plaintiff, through her words and conduct during the opening of the Account in April 2006 that she would only act upon the prior written approval of the authorised representatives of the Plaintiff.

19 As set out in the endorsement of claim and as reflected in the reliefs claimed in SOC (3), these proceedings involved claims that the Bank purchased share accumulators for the Account without the authorisation of the Plaintiff.

20 The transactions in question are as follows: [11]

(a) on 1 March 2007, an accumulator in the shares of DBS Group Holdings Ltd ("DBS") (the "1 March DBS AT");

(b) on 16 April 2007, an accumulator in the shares of DBS (the "16 April DBS AT");

(c) on 15 May 2007, an accumulator in the shares of Bank of China Limited ("BOC"): (the "15 May BOC AT");

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[10] Bajaj's AEIC at p 7; Tan's AEIC at p 61

[11] PCS [2]

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(d) on 2 November 2007, an accumulator in the shares of Keppel Corp Ltd ("Keppel") (the "2 November Keppel AT"); and

(e) on 2 November 2007, an accumulator in the shares of Singapore Petroleum Corporation Ltd ("SPC") (the 2 November SPC AT")..

I adopt the Plaintiff's description of the 1 March DBS AT, the 16 April DBS AT and the 15 May BOC AT as the "3ATs", and the 2 November DBS AT and 2 November SPC AT as the "2 November ATs".

21 The terms of the 3ATs and the 2 November ATs were:

	Forward Price	**Barrier Price**	**Shares per Observation Date**
1 March DBS AT	S$18.7845	S$22.0500	500
16 April DBS AT	S$19.7269	S$23.3100	500
15 May BOC AT	HK$3.6712	HK$4.2105	10,000
2 November Keppel AT	S$12.6348	S$14.8920	2,000
2 November SPC AT	S$7.3644	S$8.6700	1,500

Each of the 3ATs and the 2 November ATs was undertaken on the basis of a gearing (or leverage) of two times. This meant that the Plaintiff would purchase the prescribed number of shares per observation date as long as the market price of the share remained between the Forward Price and the Barrier Price. However, on each observation date where the market price fell below the Forward Price, the Plaintiff would have to purchase two times (*ie*, double) the prescribed number of shares.

22 It is important to note that the Plaintiff's claims of unauthorised accumulator transactions were pleaded as claims in contract: that the

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Defendants had breached their representation and warranty that they would deal with or invest the Plaintiff's monies and assets only with the prior approval of the Plaintiff.[12] The Plaintiff did not plead any case in tort.

My decision

The credibility of the Plaintiff's witnesses

23 Given the limited documentary evidence in this Suit, which was brought by the Plaintiff approximately six years after the disputed accumulator transactions that form its subject matter, the Plaintiff's case turned primarily on the veracity of witnesses.

Lenny

24 I found Lenny's evidence to be unreliable and self-serving. She even evaded the basic question of whether she was an authorised representative of the Plaintiff in relation to the Account.[13] She claimed not to know whether Amy was the Plaintiff's relationship manager at OCBC. She claimed also that she did not remember whether the Plaintiff had entered into accumulator transactions although Lucas testified that Lenny had signed the contracts to enter into those transactions.[14] These episodes were startling in light of Lenny's rather accomplished tertiary educational qualifications: a bachelor's degree in law and master's degree.[15]

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12 SOC(3) [7(b)]

13 20/9 p 11

14 20/9 p 66–68, 72, 73, 75 (*cf* 22/9 p 39)

15 20/9 p 7

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25 Lenny met much of the cross-examination on the basis that she did not know all that much about the Plaintiff's bank accounts and that Lucas was the main person dealing with them. I find that this was not true and that Lenny was also actively involved in the transactions entered into between the Plaintiff and the Bank, and I accepted the evidence of Amy in this regard. Lenny also claimed that she had signed various documents only because Lucas instructed her to do so. Yet, she relied on 17 of these documents in her affidavit, and the Plaintiff agreed to the inclusion of another seven documents signed by Lenny in the agreed bundle at trial.[16] I thus found that she signed the Bank's account opening forms with full knowledge of the terms therein. Even if, as she claimed, she had not read the documents but just signed them, they were no less binding on her and on the Plaintiff.

26 I set out but two excerpts of her exchanges with Mr Cavinder Bull, SC, the counsel for the Defendants, to illustrate the unreliable nature of her evidence.

(a) First, Lenny asserted that she only found out about the disputed accumulator transactions on or around 6 May 2016, subsequently claimed that she had learnt of them by January 2008, but later backtracked:[17]

Mr Bull	So if I understand you correctly, you only found out about the specific accumulator transactions on 6 May 2016. Is that correct?
Lenny	Around then.

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16 20/9 p 70

17 20/9 p 26-27

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Mr Bull	So you only found out about the specific accumulators about eight years later? That's your evidence?
Lenny	Because I was not involved in this matter, so I didn't know.
Mr Bull	Ms Lenny, that's a lie, isn't it?
Lenny	I don't know.
Mr Bull	You're lying about your lack of knowledge about the specific accumulators, isn't that right?
Lenny	Only when it became a problem, then I found out about the transactions.
Mr Bull	When was that?
Lenny	In January 2008.
Mr Bull	So in January 2008, you knew about the Keppel accumulator that was transacted on 2 November 2007, correct?
Lenny	I don't know.
Mr Bull	You don't know or is the answer "no"?
…	
Lenny	I do not know.

(b) Secondly, Lenny accepted that she had signed many documents in her capacity as an authorised representative of the Plaintiff. However, she insisted that she had simply signed those documents on Lucas' instructions. Nevertheless, she eventually agreed that when she had signed those documents, she did so "on behalf of the [P]laintiff":[18]

Mr Bull	Ms Lenny, I'd like you to look at your affidavit of evidence-in-chief again, please … see paragraph 11 at the bottom of the page. There, you list out certain documents which you had executed in

[18] 20/9 pp 57–

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	your capacity as an authorised representative of the plaintiff, right?
Lenny	All this?
Mr Bull	Yes. At paragraph 11 you say: "I executed the following documents in my capacity as an authorised representative of the plaintiff ..." And then you list documents from (a) to (q). These are documents you signed on behalf of the plaintiff, right?
Lenny	Yes.
Mr Bull	It's quite a lot, would you agree?
Lenny	Yes.
Mr Bull	Yet you say it is Mr Lucas who was the main person in charge of this account. That's not true, right?
Lenny	Yes, he was the main person in charge of this account.
Mr Bull	But you were signing the documents, right?
Lenny	He asked me to sign. He approved them and asked me to sign.
Mr Bull	I see. And when you sign, you're agreeing on behalf of the plaintiff, right?
Lenny	Yes.

27 There was little or no evidence around any alleged representation by Amy, through her words and conduct during the opening of the Account in April 2006, that she would only act upon the prior written instructions of the authorised representatives of the Plaintiff. There is also ample objective evidence that the Plaintiff operated the Account otherwise and drew out sums of money that were made on various accumulator trades that it had been entered into where there was no evidence of such prior written approval by Lenny or Lucas. This issue can accordingly be disposed of at the outset; I reject any allegation of such a representation by Amy as it has not been established.

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28 Lenny also testified that she had no knowledge of the ownership of an email account, "j3_onasis@indosat.net.it" (the "J3 Account"). Amy, however, testified that she had been told by Lenny that the J3 Account was her email account and that emails sent to the J3 Account were also received by Lucas on his Blackberry mobile phone. I accepted the account of Amy and rejected that of Lenny. The name, "j3_onassis", coincides with the first alphabet and the common names of each of the three children of Lucas and Lenny at the time when the J3 Account was created, *viz*, Jessica Rachel Onasis, Jesseline Karen Onasis, and Joshua Lucas Onasis.[19] More importantly, the Plaintiff disclosed some of the emails sent to this email address during discovery.

29 Finally, Lenny insisted that one Erlina Ong ("Erlina"), whose name appeared as a sender and a recipient on emails between the Plaintiff and the Defendants, was just a mere "helper" who assisted only in the personal affairs of Lucas and herself. She claimed that all that Erlina did was "carrying documents, picking up mails."[20] However, Lucas gave evidence that Erlina was a "clerk" to Lenny and himself and helped in matters connected with the bank accounts of the Plaintiff. As Lucas testified, such assistance entailed "Erlina helping Ms Lenny in personal affairs, in relation to matters connected to bank accounts. For example, there is a document to be signed, Erlina would collect, she would prepare, and for Lenny to sign."[21]

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19 20/9 p 41

20 20/9 p 22

21 21/9 pp 86, 92

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Lucas

30 I found the evidence of Lucas to be even more unreliable. Lucas put himself out on the website of his law firm as an experienced trial lawyer with some 20 years' experience. On this website, he claims to have handled complex banking disputes and disputes over derivative products since 1997. I also found that Lucas could speak and understand English, despite his insistence otherwise at trial. In quite a few instances, he answered questions put to him in cross-examination without waiting for the translation. Moreover, he listed English as one of the languages in which he was "fluent" on the website of his firm[22]. Yet he insisted on having an interpreter when giving his evidence.

31 Lucas repeatedly insisted that all the disputed accumulator transactions had been entered into without the authorisation of the Plaintiff. During cross-examination he put forward a completely new set of facts that had neither been pleaded nor set out in his AEIC. He claimed that the persons who had committed the Plaintiff to the unauthorised trades were Erlina acting in concert with Amy. He added that Erlina had confessed this to him, upon his promise not to take any action against her if she told the truth. He continued that he kept to his promise by not filing any police report against Erlina.[23] I found this to be quite incredible. Lucas had kept emphasizing during his earlier cross-examination that he had wanted to find out the "truth" about this whole affair. What "truth" he hoped to find out escapes me because from his new non-pleaded story, he already knew what had allegedly happened.

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[22] 22/9 p 36

[23] 22/9 p 96

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32 Lucas claimed in support of his allegation of a conspiracy between Erlina and Amy that Robin, his brother who assisted him with matters concerning the Account,[24] had told him not to ever trust Erlina and Amy. Lucas added that Robin, who was a trained accountant, had cautioned him that accumulators were dangerous investments. Lucas thus maintained that there was no way he could have agreed to commit the Plaintiff to accumulator transactions. However, this conversation between Robin and Lucas was not mentioned in Lucas' AEIC. When questioned on this omission, Lucas testified that notwithstanding Mr Gabriel's advice, he had made a conscious decision not to include all of his evidence in his AEIC, and that "[l]ater I will explain more."[25]

Bajaj

33 Bajaj opined that the entry into the disputed accumulator transactions by the Plaintiff was carried out in a fashion inconsistent with the practice of the private banking industry, and that accumulators were in fact a product unsuitable for the investment profile of the Plaintiff.[26] He also took issue with the way that the Bank unwound the accumulator transactions, and the costs incurred as a result.[27]

34 I found it difficult to accept Bajaj's opinion. In cross-examination, Bajaj confirmed that the disputed accumulators had been purchased in a *non-discretionary* management account, in relation to which investments were

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24 7AB3355

25 23/9 pp 17–19, 22

26 Expert Report of Bajaj marked YB-1 in his AEIC ("Expert Report of Bajaj")[35]–[41]

27 Expert Report of Bajaj [42]–[44]

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ultimately decided by the Plaintiff. However, Bajaj appeared to have prepared his opinion on the basis that the Account was a *discretionary* management account, where "the [B]ank could decide for itself what products to purchase on behalf of the [P]laintiff."[28] This was evident from the numerous references to "discretionary management" in his expert report. During his oral examination-in-chief, Bajaj attempted to correct his expert report during his oral examination-in-chief but did so only to the extent of deleting the word "discretionary" from some (but not all) the references to a "discretionary management" account. This was a belated retraction, and one that I could not accept as a mere oversight or a mistake. Bajaj had at other segments of his report referred expressly to "non-discretionary accounts", as distinct from discretionary management accounts. More importantly, Bajaj went on to suggest in his report that the Plaintiff had entered into accumulators in an account the operation of which appeared to be a discretionary account (with the reference to a "discretionary management agreement" not corrected by Bajaj during his oral examination-in-chief):[29]

> Although the investor in this case had a discretionary management agreement with the [Bank] with [Amy] as his private banking account executive which permits the verbal acknowledgment of orders if backed up with written confirmation of that trade, in this case purchase of different accumulator contracts for more than one stock, it is normal practise [sic] for orders that are given verbally to be recorded.

35 Further undermining the credibility of Bajaj's evidence were the many other errors and omissions in his report. I set out a few examples:

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[28] 26/9 p 14

[29] Expert Report of Bajaj at [35]

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(a) Bajaj took as the basis of his opinion an accumulator transaction where the investor was to purchase the leveraged number of shares on every observation date *once* the market price fell below the Forward Price, rather than simply on every observation date where the market price fell below the Forward Price. The latter, in fact, was the basis of the disputed accumulator transactions between the Plaintiff and the Bank.

(b) Bajaj used an interbank interest rate of 8% to illustrate (hypothetically) the large potential losses on an accumulator transaction. When questioned, he explained that he had used the US Dollar rate. However, it was undisputed that the disputed accumulator transactions were all denominated in Singapore Dollars, and the relevant rate was that of the Singapore Dollar interbank rate of approximately 3% at the material time. In any event, the US Dollar interbank rate was only 5–6% at the material time. The use of these lower rates would have produced smaller (hypothetical) losses than those arrived at by Bajaj.

(c) Bajaj failed to state various sources of information on which he claimed at trial to have relied on in the preparation of his report. This was in breach of O 40A r 3(2)(*b*) of the Rules of Court (R5, Cap 322, 2014 Rev Ed) ("Rules of Court"), which requires an expert to "give details of any literature or other material which the expert witness has relied on in making the report".

36 Given these errors, I accorded little, if any, weight to the report of Bajaj.

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Time bar

37 At the outset, I note that the Plaintiff's claims in relation to the 1 March DBS AT are time barred under s 6(1)(a) of the Limitation Act (Cap 163, 1996 Rev Ed), which provides that an action founded on a contract "shall not be brought after the expiration of 6 years from the date on which the cause of action accrued". A claim in contract accrues from the date of the alleged breach of contract: Andrew McGhee, *Limitation Periods* (Sweet & Maxwell, 2014, 7th Ed) at para 10.002. The Plaintiff filed its writ of summons on 11 April 2013. This is more than six years after the entry by it into the 1 March DBS AT on 1 March 2007.

38 I did not accept the Plaintiff's submission that the six-year limitation period started only when its demand for repayment was refused by the Bank.[30] This could be so when the claim involves a breach by the bank of a promise to repay on demand monies deposited by a customer with it, as in the authorities relied upon by the Plaintiff. In such a case, the breach occurs at the time of the refusal of repayment. Here, however, the breach occurred (and the Plaintiff's cause of action accrued) when it entered into the allegedly unauthorised accumulator transaction, or in any event, after the Plaintiff discovered that it had entered into the transaction. The Plaintiff was sent the term-sheet for the 1 March DBS AT on 2 March 2007,[31] and a notification that it had received securities pursuant to the 1 March DBS AT on 27 March 2007.[32] Further, Lucas, Lenny, and Erlina had attended monthly meetings with Amy, at which Amy

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30 PCS [42]

31 3AB1017

32 3AB 1099

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updated them on the investments made by the Plaintiff (see [52] below). These were more than six years before the Plaintiff filed its writ of summons. There was no pleaded case in tort that the Defendants were negligent in taking orders for the accumulator transactions.

39 Accordingly, the Plaintiff's claims in relation to the 1 March DBS AT are time-barred. Nevertheless, as much time was spent on the main and other issues, I will consider whether the 1 March DBS AT had in fact been authorised by the Plaintiff.

Mode of authorisation

40 I do not accept the Plaintiff's submission, and Lucas' evidence to the same effect, that the Plaintiff "had always dealt with [Amy] on the basis that there must be written authorisation for any transaction".[33] Through Clause 1.3 of the Account Mandate (see [9] above), the Plaintiff had authorised the Defendants to act on its oral instructions, irrespective of whether written confirmation of those oral instructions was subsequently received by the Defendants.[34] I also found that Lucas and Lenny have failed to make out their case that when they opened the Account in April 2006, Amy represented to them that she would only act on their prior written approval. On the contrary, as set out below, the evidence shows otherwise.

41 As Amy explained, due to the time sensitivity of the market, written instructions are never expected for the execution of such trades. This is unlike

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33 PCS [5]

34 1AB60

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the case of instructions to remit client moneys out of the Bank, which are not time sensitive.[35] Tan confirmed that Singapore banking practice is that "oral instructions are accepted for the purposes of execution of … accumulator contracts".[36]

42 Further, Lenny conceded that no one from the Bank had promised that the Defendants would not act on oral instructions.[37] Ironically, as Lucas conceded, there was no written instruction that the Bank could act only on written instructions.[38]

43 There were further difficulties with the Plaintiff's case. Lucas testified in cross-examination that: (i) the Bank would fax him an agreement setting out the details of a proposed accumulator transaction, (ii) he would sign the agreement and fax it back, then (iii) the Bank would call him to make a voice log of the transaction.[39] However, this was inconsistent with Amy's evidence that Lucas had never given such instructions to enter into any accumulators.[40] Moreover, the Plaintiff did not produce any of these faxes, and could not coherently explain its failure to do so. I did not believe Lucas' claim, made belatedly in re-examination, that he had sent the original facsimile back to the Bank by post.[41]

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35 28/9 p 75

36 30/9 p 38

37 20/9 p 105

38 21/9 p 103

39 22/9 p 67

40 28/9 pp 63, 75, 83; 29/9 p 12

41 23/9 p 46

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44 I note that Amy admitted that the statement in her AEIC, *viz*, that "[o]n occasion, investments would be discussed between [her] and Lucas at a face-to-face meeting and instructions would be given by Lucas to enter into the investments"[42] was not true. However, the true position was also not as the Plaintiff submitted: that all of Lucas' dealings with the Defendants had been "by way of fax and voice log and then handing over the written fax to the [Bank]".[43] Rather, as Amy went on to explain, Lucas would approve share counters at meetings, Amy would go down to the specifics with Erlina, and the trades would eventually be executed via voice log with Lenny and Erlina.[44] Amy candidly admitted to the mistake in her AEIC and was forthright in her clarification. I saw no reason to disbelieve her or to reject all her evidence simply on account of this error. Unfortunately, due to the lapse of time between the Plaintiff's entry into the disputed accumulator transactions and its bringing of this Suit, the Bank's voice logs were no longer available.

j3_onasis@indosat.net.id and Erlina

45 I found that the Plaintiff had, through Lucas and Lenny, access to the J3 Account, through which correspondence was sent between the Plaintiff and the Bank.

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42 28/9 p 38

43 PCS [7]

44 28/9 pp 40–42

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46 As noted above, Amy deposed that she had been told by Lenny that the J3 Account belonged to Lenny, and that the emails sent to the J3 Account were automatically forwarded to Lucas' Blackberry mobile phone.[45]

47 Lucas admitted that Erlina had passed him various documents that had been sent, via email, to the J3 Account. These included a credit transfer advice reflecting the Plaintiff's withdrawal of S$1.62m shortly after 14 January 2008.[46]

48 I did not accept Lenny's evidence that she did not know the identity of the registered owner of the J3 Account. First, as noted above, the name of the J3 Account coincided with her children's names at the time when the J3 Account was created.[47] Secondly, she offered no convincing explanation for why the Plaintiff had not investigated the matter of the Bank sending the Plaintiff's banking documents to an unknown email account.[48] Thirdly, Robin, who was copied on an email to the J3 Account,[49] did not raise any alarm as to the sending of the Plaintiff's banking documents to the J3 Account.[50]

49 I found Lucas' evidence as to the J3 Account implausible. In his affidavit filed in response to interrogatories (the "Interrogatories Affidavit"), Lucas deposed that he did not know the identity of the registered owner or the

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45 Amy's AEIC [47(a)] and [50]

46 23/9 p 67; 7AB3099

47 21/9 p 84

48 20/9 pp 49–50, 53

49 7AB3355

50 23/9 pp17–28

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persons with access to the J3 Account.[51] However, Lucas testified when cross-examined that "within [his] heart, [he] knew" who had access to the J3 Account.[52] Lucas then came forth with his evidence that the J3 Account was created as part of a conspiracy by Erlina and Amy to deceive him.[53] However, Lucas did not lodge a police report or write to the Bank to complain about the alleged conspiracy. When Lucas was subsequently shown an email sent from Erlina to Amy where Erlina reminded Amy to update him on various transactions in the Account, Lucas feebly replied that he had not discovered the email previously.[54] This allegation of conspiracy to defraud was first raised by Lucas only during cross-examination, and there is no reference to it in the Plaintiff's pleadings. Every allegation of fraud must be specifically pleaded: O 18 r 12(1)(*a*) of the Rules of Court. In any case, Lenny made no mention of any such conspiracy in her AEIC or her oral evidence. Accordingly, I was unable to accept Lucas' contention of a conspiracy to defraud him and rejected the same.

50 I note that Amy accepted, in relation to the J3 Account, that "until the dispute arose, there was not a single email that [she] had addressed directly to Lenny and Lucas", as opposed to Erlina.[55] Amy explained that Erlina was the administrative person for the Account of the Plaintiff, and that Erlina would

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51 DBD335

52 21/9 p 70

53 21/9 pp 78–83

54 21/9 p 87

55 28/9 pp 92–93

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print the emails out for Lenny.[56] The Plaintiff did not challenge this explanation, and I accept it. Erlina was a trusted assistant to Lenny and Lucas, who made her a director of Supreme Securities Limited, the director of the Plaintiff.[57] This was notwithstanding the Plaintiff's pleadings that trivialised Erlina's role by claiming that she was a mere helper to Lenny.[58]

The 3ATs

51 I found that the 3ATs were undertaken with the authorisation of the Plaintiff.

52 I accepted Amy's evidence that Lenny had authorised the 1 March DBS AT and the 16 April DBS AT. Lenny had confirmed the 1 March DBS AT and the 16 April DBS AT on 1 March 2007 and 16 April 2007 respectively, and Amy had updated Lucas, Lenny, and Erlina on the investments made by the Plaintiff at monthly meetings.[59] Amy's evidence in this regard was clear and unwavering. More importantly, it accorded with the contemporaneous documentation of the meetings and transactions, and the absence of any objections raised by the Plaintiff at or around that time. Indeed, up until it filed its Statement of Claim (Amendment No. 1) ("SOC(1)") on 18 October 2013, the Plaintiff never identified the 1 March DBS AT and the 16 April DBS AT as transactions that had been entered into without its authorisation.

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56 Amy's AEIC [47]; 28/9 p 92

57 20/9 p 25

58 Reply(3) [3]

59 Amy's AEIC [99] and [111]; 27/9 p 113; 28/9 p 169

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53 I accepted also Amy's evidence that the Plaintiff had authorised the 15 May BOC AT. It was undisputed that the Plaintiff had consciously sold the shares that it had been allocated pursuant to the 15 May BOC AT, and made a profit of HK$210,456 on the transaction. Even if the 15 May BOC AT had been entered into without its authorisation (which I did not find to have been the case), the Plaintiff had in any event ratified and adopted the 15 May BOC AT.

54 I did not accept Lenny's evidence that she had not authorised the 3ATs. Lenny could not give a coherent account of her communications with Amy.

55 As noted above, Lenny was not a credible witness. Her oral evidence was often at odds with the objective documents and even her own depositions.

56 The attempts by Lenny to distance herself from the dealings of the Plaintiff were not credible. She stated in her skeletal submissions to resist an application by the Defendants for interrogatories that she had "ceased to be an 'authorised representative' [of the Plaintiff] since June 2008",[60] and maintained the position in her oral evidence at trial.[61] However, she stated at the very first paragraph of her AEIC, which was sworn on 8 August 2016, that "I *am* an authorised representative of the Plaintiff [emphasis added]".[62] Moreover, Lenny had signed documents on behalf of the Plaintiff on various occasions, and claimed that she had attended meetings with Amy where she had advised Amy to be conservative and preserve the assets in the Account.[63]

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60 DBD489

61 20/9 p 12

62 1.Lenny [1]

63 1.Lenny [11] and [14]

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57 Further, I found that the documents relating to and confirming the 3ATs had been sent via Email to the J3 Account and/or placed in the Hold Mail of the Plaintiff at or within a month of the Plaintiff's entry into each of the 3ATs:

(a) For the 1 March DBS AT:

(i) Term-sheet for 1 March DBS AT that was sent via email on 2 March 2007;

(ii) Expiry Advice dated 22 March 2007 that was placed in the Hold Mail folder (advising that the security was to expire and that the Bank would withdraw it from the Account on 3 March 2008);

(iii) Receipt of Securities dated 27 March 2007 that was placed in the Hold Mail folder (reflecting the receipt of the shares purchased); and

(iv) Statement of Account dated 31 March 2007 that was placed in the Hold Mail folder and also sent via Email on 4 April 2007.

(b) For the 16 April DBS AT:

(i) Term-sheet for 16 April DBS AT that was sent via email on 16 April 2007;

(ii) Expiry Advice dated 7 May 2007 that was placed in the Hold Mail folder;

(iii) Receipt of Securities dated 10 May 2007 that was placed in the Hold Mail folder; and

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(iv) Statement of Account dated 31 May 2007 that was placed in the Hold Mail folder and also sent via Email on 6 June 2007.

(c) For the 15 May BOC AT, which was processed not by Amy but another trader from the Bank:

(i) Term-sheet for 15 May BOC AT that Amy deposed was sent via email immediately after the 15 May 2007, which evidence was not challenged by the Plaintiff;[64]

(ii) Notifications of assignments of shares received pursuant to the 15 May BOC AT sent via emails in June and July 2007;

(iii) Receipts of Securities dated 20 June 2007 and 12 July 2007 that were placed in the Hold Mail folder; and

(iv) Statements of Account dated 30 June 2007 and 31 July 2007 that was placed in the Hold Mail folder.

58 Pursuant to Clause 2.1 of the Account Mandate, confirmations and advices as well as statements of account were deemed to be conclusive and binding on the Plaintiff if no objections were taken to them within 14 days and 90 days respectively of their sending (see [10] above). The first time that the Plaintiff alleged that the 3ATs were unauthorised was on 18 October 2013, in SOC(1). This was over six years after they had received confirmations, advices, and statements of account in respect of the 3ATs. Moreover, the Plaintiff has not challenged Clause 2.1 of the Account Mandate. Accordingly, I found that the confirmations, advices, and statements of account in respect of the 3ATs are

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[64] Amy's AEIC [126]

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conclusive and binding on the Plaintiff, and preclude the Plaintiff from challenging the validity of the 3ATs reflected therein.

59 More generally, I found it difficult to believe the Plaintiff's claims in relation to the 3ATs because of the many changes in its case, and the fact that it did not particularise the reliefs that it sought in relation to the 3ATs in SOC(3) and did so only in its closing submissions.[65] Through the course of these proceedings, the Plaintiff advanced five different versions of its case:

(a) first, no accumulators were mentioned in the original statement of claim dated 15 July 2013;

(b) secondly, only the 2 November ATs were identified when the Plaintiff proposed to amend the original statement of claim via a letter to the Defendants dated 24 September 2013;[66]

(c) thirdly, only the 3ATs and 2 November ATs were identified in the SOC(1) dated 18 October 2013;

(d) fourthly, eight different accumulators were identified in Lucas' AEIC; and

(e) fifthly, the Plaintiff claimed in its opening statement that it had never authorised any accumulators at all.

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65 PCS [47(a)]

66 DBD19

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These belated and inconsistent complaints, coupled with the absence of any convincing explanation for long lapses of time, revealed the lack of credibility in the Plaintiff's case.

The 2 November ATs

60 I find that the 2 November ATs were undertaken with the authorisation of the Plaintiff.

61 Lucas authorised the 2 November ATs at a meeting with Amy at the Mercantile Club in Jakarta, Indonesia on 2 November 2007 (the "Meeting"). At the Meeting, Lucas and Amy discussed the Plaintiff's portfolio and possible investments. Thereafter, Amy called her assistant, Clara Chew ("Clara"), in the presence of Lucas to place the orders for the 2 November ATs.[67] An audio recording as well as a written transcript of this call was exhibited by the Plaintiff at trial.[68]

62 The Plaintiff pleaded in its Reply (Amendment No 3) dated 11 May 2015 ("Reply(3)") that the Meeting "did not cover the matter of any accumulator share transactions, including the [2 November ATs]" and that "Amy had mentioned certain hot stocks."[69] Lucas clarified in the Interrogatories Affidavit that, at the Meeting, "[Amy] did not give names. She just said Oil & Gas as well as Coal stocks."[70] I did not accept these contentions. Both the

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67 Amy's AEIC [138]–[146]

68 28/9 p 49

69 Reply(3) [17]

70 DBD346

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transcript and the recording of the call show that Lucas and Amy discussed the 2 November ATs, as well as China Shenhua stocks and Yanzhou Coal stocks.[71] Moreover, Lucas can be heard:

(a) saying "Yah, yah" in response to Amy's question whether he wanted to purchase Keppel and SPC shares through accumulators;

(b) saying "Okay, okay, you do" in the same context; and

(c) not raising any objections when Amy instructed Clara to purchase the Keppel and SPC shares through accumulators.

63 Lucas insisted that the call was not on speakerphone, as Amy contended, and maintained that Amy had simply held a "direct phone conversation" with Clara with her mobile phone to her ear. Because he was seated across a table from Amy, he could not hear the contents of her conversation with Clara.[72] On balance, however, I was unable to accept this evidence. Lucas can be heard clearly on the audio recording of the call, particularly given the table between himself and Amy. Indeed, when it was put to Lucas that the conversation must have been on speakerphone because his voice was recorded, Lucas simply replied that did not know that the conversation was recorded.[73]

Mr Bull	Mr Lucas, all this must have been on speakerphone. That's why your voice is recorded, as reflected in this transcript. Do you agree or disagree?
Lucas	I disagree because I didn't know it was recorded.

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71 Lucas' AEIC at p 108

72 22/9 p 62

73 22/9 p 52

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I found this kind of answer, like quite a few of his answers given in cross-examination, to be evasive especially given his experience as a trial lawyer.

64 Mr Gabriel picked on a part of the audio recording to show that Lucas did not understand accumulators when he seemed to say "Cannot take it, I get interest."[74] However, I accepted the evidence, which was more credible, from Amy that she had discussed equity-linked notes and accumulators before the call with Lucas, and that Lucas had at the material time been seeking clarification as to the kind of investment that was being discussed on the call. Furthermore, Lucas was cross-examined about another case then-pending before this court, between another bank, Société Générale Bank & Trust ("SocGen"),[75] where another of Lucas' and Lenny's BVI companies had allegedly entered into accumulators. This case was eventually decided in favour of SocGen, and can be found at *First Asia Capital Investments Ltd v Société Générale Bank and Trust and another* [2017] SGHC 78.

65 More importantly, the Plaintiff received confirmations, advices, and statements of account reflecting the 2 November ATs as early as on 2 November 2007,[76] and raised no objection to them until the market turned and a margin call was made on the Account on 16 January 2008.

66 On 2 November 2007 itself, Clara sent an email to Lenny and Erlina, copying Amy, and attaching the term-sheets for the 2 November Keppel AT and

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74 Lucas' AEIC at p 111

75 20/9 p 66

76 Amy's AEIC [164]–[188]

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the 2 November SPC AT. Lucas admitted in cross-examination that Erlina "should have forwarded" the emails to him.[77]

67 I also found that Erlina worked closely with, Lenny in particular, as well as Lucas. She remains a director of Supreme Securities, which is a director of the Plaintiff. The Plaintiff has not given any reason why Erlina was not called by it as a witness. In fact with the new "story" of a "conspiracy" made up, as I found, by Lucas during his cross-examination, it would seem she was even more beholden to them for not taking any action against her. All she had to do was to come to this court and "tell the truth". Her absence speaks volumes.

68 On 5 November 2007, Amy called Lenny and Erlina to update them about the Plaintiff's entry into the 2 November ATs. The call report records not only Amy informing Lenny of the trades done, but also Lenny saying that Amy should not do trades with Lucas because (a) Lucas would get upset when his investments are out of the money; and (b) Lucas gets excited when others tell him about their profits but realistically he does not have the time to monitor his investments.[78] When asked if the call report was accurate, Lenny did not say "No" and answered only "I don't remember", despite having been cautioned that there is a difference between the answers "No" and "I don't remember".[79]

69 Amy deposed that "A few days after [her] meeting with Lucas, he SMS-ed [her] to ask about the [2 November ATs] and [she] confirmed to him that the

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77 22/9 p 80

78 Amy's AEIC p 2077

79 20/9 p 86, 90–96

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trades had been executed."[80] These SMSes were also referred to in a handwritten note that she had sent to Lucas and Lenny on 17 January 2008. However, Amy was, by the time of the trial, "no longer able to retrieve these SMSes." Nevertheless, the Plaintiff did not cross-examine Amy on her evidence on these SMSs. Accordingly, I accepted it.

70 I note too that pursuant to the Meeting, the Plaintiff purchased China Shenhua stock and Yanzhou Coal stock, and was sent an email on 2 November 2007 attaching settlement notifications relating to the purchases of these stock. The Plaintiff has at no time challenged these purchases.

71 Most crucially, on 8 January 2008, the Plaintiff sold the entire allocation of the Keppel shares and approximately half of the SPC shares that it received on 3 December 2007 and 7 January 2008 pursuant to the 2 November ATs. It is undisputed that the Plaintiff made a profit on these sales. It is also undisputed that, on 14 January 2008, the Plaintiff withdrew S$1.62m from the Account, leaving a balance of S$220,326.90. Even if, (which I do not so find), the 2 November ATs had been entered into without its authorisation, the Plaintiff had by its conduct in selling the shares that it was allocated pursuant to the 2 November ATs adopted the transactions. Indeed, Lucas admitted that Erlina had given him a copy of a document reflecting a withdrawal by the Plaintiff of $1.62m from the Account a few days after 14 January 2008;[81] and (b) the email from Clara to Erlina and the J3 Account attaching this document.[82]

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80 Amy's AEIC [156]

81 7AB3099

82 23/9 p 66–68

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72 I also accept Amy's evidence and the submission of the Defendants that there is nothing in the Plaintiff's complaint that the strike price (*ie*, purchase price) of the 2 November Keppel AT was $12.6348 per share rather than $12.6000 per share. The Plaintiff did not take issue with the price at which the 2 November Keppel AT had been entered into in its pleadings, and raised this only belatedly when cross-examining Amy. Even so, the Plaintiff did not question Tan on this price differentia. In any event, instructions were to enter the market at the prevailing price, which meant that the purchase price was, as Amy testified, "plus-minus 12.60".[83] The prices and availability of shares change constantly, and if every relatively small difference in the price requires a confirmation from the customer, it is unlikely that any such trade can be done. Moreover, as Amy explained, the essence of an accumulator is the purchase of agreed quantities of shares by an investor at a *percentage* discount to the prevailing market price of the shares at the time of entry into the accumulator. The knock-out and knock-in prices in relation to the accumulator are also set as a *percentage* of this prevailing market price.[84] Accordingly, very slight variances in the strike price of the shares have little impact on the profitability of the investment. That said, such a practice has its limits and if prices vary by too much, which will usually be due to a change in the market conditions, then the confirmation should be sought once again from the customer. Each case must turn on its own facts. Here the instructions were clear and the difference was not significant enough given the circumstances of the case and the customer's approach.

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83 28/9 p 82

84 28/9 pp 82–83

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73 Accordingly, I found that the 2 November ATs were authorised by and entered into upon the instructions of the Plaintiff.

74 Amy provided a table in her AEIC that listed seven other accumulator transactions (apart from the 3ATs and the 2 November ATs) which the Plaintiff had entered into through the Bank. All of these seven accumulator transactions were profitable; the only unprofitable accumulator transactions were the 1 March DBS AT and the 16 April DBS AT, which had to be force-sold on 22 January 2008 after the account went into margin call.[85] The Plaintiff did not cross-examine or challenge Amy on this table, and did not explain why there was no complaint in respect of these seven accumulator transactions. I also note that other financial investments were entered into by the Plaintiff, *viz*, 15 Dual Currency Investments ("DCI") trades in 2006 and 3 DCI trades in 2007, all of which generated profits, as well as 12 investments in Equity Linked Notes ("ELNs") in 2006 and 22 investments in ELNs in 2007.[86] These too were not challenged by Lucas and Lenny.

75 Lucas' assertion that there was no claim in respect of some of these seven accumulators because there was no loss is at odds with the Plaintiff's case that:

(a) it did not know what accumulators were (but as noted above it was happy nonetheless to take the profits);

(b) the Bank could not enter into any accumulator transactions unless it was authorised in writing by Lucas or Lenny, given that there

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85 Amy's AEIC [85]

86 Amy's AEIC [86]

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were no such documentary records for these seven other accumulators; and

(c) it never complained about these accumulator transactions, entered into allegedly without Lucas or Lenny's written authorisation, from the time they were entered into until 2013 (having allegedly only known of them in June 2008).

76 At this juncture, I note that the Plaintiff's case that it only knew of these accumulator transactions in June 2008 is contradicted by documentary evidence which shows that in January 2008, a solicitor from the law firm DLA Piper, Mr Jeffrey Ong, was authorised to collect documents from the Bank on behalf of Lucas and Lenny. Accordingly, on its own evidence, the Plaintiff must have, at the very least, known of these transactions in January 2008, when Mr Jeffrey Ong collected the documents. I also disbelieve the story of Lucas and Lenny that Robin died whilst allegedly helping Lucas investigate these transactions and Lucas was too upset to think of commencing proceedings.

The discrepancies in the Bank's records

77 I pause to observe that there were quite a number of discrepancies in the Bank's internal records, some of which had been reviewed and approved not only by Amy and her team but also by senior officers of the Bank. First, the Client Order Processing System ("COPS") tickets stated that the instructing party was "Erlina" rather than "Lucas" or "Lenny". Secondly, the Direct Access Clients ("DAC") forms were filled up inconsistently, with a tick beside the box for "EQ derivative products" despite a handwritten annotation of "no structured products". Thirdly, the sophistication of the Plaintiff was erroneously marked

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as "low" in the Client Profile and Acceptance Checklist,[87] whereas Amy deposed in her AEIC that it was "medium"[88] and stated at trial that it was "high".[89] Fourthly, a Risk Compass that was supposed to be prepared by the Bank to assess the risk appetite and sophistication of the Plaintiff was missing.

78 Although Erlina was identified as the "client" on the COPS tickets, it is clear that the true party with whom the Defendants dealt in relation to the 3ATs and the 2 November ATs was the Plaintiff. As the trusted assistant of Lucas and Lenny (see [50] above), Erlina was simply the conduit through which Lucas and Lenny, the authorised representatives of the Plaintiff, conveyed their investment decisions to the Defendants. All transactions instructions that Erlina conveyed to the Defendants were conveyed with the authority of the Plaintiff and/or its authorised representatives. The Plaintiff received and did not object to the confirmations, advices, and statements of the transactions that they had entered pursuant to these instructions (see [58] above). Finally, Lucas' allegation of a conspiracy by Erlina to defraud him was implausible, and I rejected the same (see [49] above).

79 Nevertheless, the discrepancies suggest that the Defendants were, in the words of Amy and Tan, regrettably "sloppy" and "loose in [their] documentation", and lend some force to the Plaintiff's contention that it was a client of low sophistication whom the Bank should never have allowed to enter accumulator transactions.[90] Even so, I did not find they went as far as to show,

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87 1AB228

88 Amy's AEIC [30]

89 27/9 p 85

90 PCS [14]

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on a balance of probabilities, that the Plaintiff was in no position to have authorised the 3ATs and the 2 November ATs. By the time the Plaintiff entered into the 1/3 DBS AT, which was the first of the 3ATs and the 2 November ATs, it had considerable experience in accumulators, having traded accumulators with OCBC.

80 Lucas exhibited in his AEIC a letter dated 17 January 2008 from Amy to Lenny and him, in which Amy asserted that "I did not explain the margin requirements [for the 2 November ATs] because we have done accumulators many times since your account with OCBC when I explained then."[91] This letter was written after Lucas had complained to the Bank about the 2 November ATs on 16 January 2008. Lucas confirmed that he had read the letter from Amy, and did not object in writing to the statement therein that Lenny and he "ha[d] done accumulators many times since [their] account with OCBC."[92] Neither did Lucas dispute the statement in his AEIC.

81 There is no suggestion by the Plaintiff that the features of the 3ATs and the 2 November ATs differed, and that the 3ATs and the 2 November ATs were of a different sophistication from those that had been previously entered into by Lucas and Lenny with OCBC. Rather the Plaintiff took the all-or-nothing position that Lucas and Lenny "never understood such products", referring to accumulators.[93] Having found that Lucas and Lenny had previously traded accumulators, I thus conclude that the Plaintiff, despite discrepancies in the DAC forms, Client Profile and Acceptance Checklist, and the Risk Compass,

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91 Lucas' AEIC at p 125

92 22/9 p 31

93 PCS [14]

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had sufficient sophistication to have authorised the 3ATs and the 2 November ATs.

Conclusion

82 For the reasons above, I dismissed the Plaintiff's claims against the Defendants.

83 Clause 5.2 of the Account Mandate provided for the Plaintiff to fully indemnify the Bank and the officers and employees of the Bank against all costs that they may suffer or incur in connection with the Account, save in cases of gross negligence, wilful misconduct, or fraud.[94] This was not disputed by Mr Gabriel at the hearing on costs on 23 March 2017.[95] Accordingly, I ordered the Plaintiff to pay the costs of the Defendants in this Suit on an indemnity basis, to be taxed if not agreed.

Quentin Loh
Judge

Peter Gabriel, Roxanne Low, Selwyn Tan (Gabriel Law Corporation)
for the plaintiff;

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94 1AB94

95 23/3/17 Minute Sheet

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Cavinder Bull, SC, Kong Man Er, Darryl Ho, Gerald Tay
(Drew & Napier LLC) for the defendants.

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