IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 44

Suit 1130/1994

Between

OCBC Securities Pte Ltd

… *Plaintiff*

And

Yeo Siew Huan

… *Defendant*

GROUNDS OF DECISION

Contract — Contractual terms; Financial and Securities Markets — Securities; Tort — Negligence — Breach of duty; Tort — Negligence — Breach of duty; Tort — Vicarious liability

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OCBC Securities Pte Ltd v Yeo Siew Huan

[1998] SGHC 44

Suit 1130/1994
Lee Seiu Kin JC
16 February 1998

1 **Judgment:**

2 **LEE SEIU KIN JC**

3 The plaintiff is, and was at all material times, a member of the Stock Exchange of Singapore (SES) and a licensed dealer under the Securities Industry Act (Cap 289). The defendant was at all material times a customer of the plaintiff who traded in shares through the plaintiff.

4 2.The plaintiff claims that the defendant failed to pay for shares that she had instructed them to purchase on her behalf. This had resulted in the plaintiff incurring losses in the consequential forced sale of those shares. In this suit, the plaintiff sought to recover such losses, with interest, from the defendant. At the end of the trial on 5 December 1997, I gave judgment in favour of the plaintiff as follows: (i). the sum of $136,132.03 with interest at 6% from 12 July 1994;

5 (ii). the sum of $1,682,155.10 with interest at 6% from 12 July 1994;

6 (iii). the sum of $581,611.12 with interest of $9,752.23 and further interest at 3.5% above the OCBC prime rate from 17 August 1994;

7 (iv). the sum of $989,126.67 with interest of $6,813.41 and further interest at 3.5% above the OCBC prime rate from 17 August 1994; and

8 (v). costs.

9 The defendant has appealed and I now give my grounds of decision.

10 3.The defendant is, and was at all material times, a property agent with `Tahiti Home Enterprises`, a business she started in 1981. She was also a director of the following companies at various periods: (1). Pan Field Lines Pte Ltd, from 1976 to 1987;

11 (2). San Raku (S) Pte Ltd, from 1981 to 1983;

12 (3). Pitmac (SEA) Pte Ltd;

13 (4). Seadon Trading Pte Ltd, from 1985 to 1986;

14 (5). Joseph Ng Management Consultants (S) Pte Ltd, from 1986 to 1988;

15 (6). Gesterin Trading Pte Ltd, from 1986 to 1991.

16 4.In addition, the plaintiff produced a copy of the Registry of Companies and Businesses - People`s Profile Information (PPI) which showed that she was also a director of the following companies: (1). Careers by Design Pte Ltd, from January to December 1986;

17 (2). JBM Investments Pte Ltd, from March to April 1986; and

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18 (3). Motif Auto Pte Ltd, from 1993 to 1994.

19 The defendant was unable to recall whether she had been a director of these companies. But her counsel, Mr Yap Teong Liang, agreed to the admission of the PPI document, which also showed that she had been the owner or manager of four other businesses which have since been deregistered.

20 5. **The contract between the parties**

21 The first issue that I had to decide was the terms of the contract between the parties. According to the plaintiff`s credit manager, PW2, the defendant traded under four accounts as follows: (i). account no 10006/01, opened on or about 4 July 1989;

22 (ii). account no 10978/01, opened on or about 26 November 1992;

23 (iii). account no 39931/39, opened on or about 27 October 1993; and

24 (iv). account no 44521/39, opened on or about 9 December 1993.

25 The first two accounts, with the number `01` at the end, were serviced by Ho Seng Hock (PW1), a director of the plaintiff who also acted as a dealer`s representative. The last two accounts, with the number `39` at the end, were serviced by one Yap Eng Piow, a remisier with the plaintiff at the material time.

26 6.The defendant signed account opening forms in respect of only two of these accounts, viz. No 10006/01 (BA318) and no 39931/39 (BA320-321). The other two accounts were created by the plaintiff to facilitate trading through share margin trading accounts (SMTA) that the defendant opened with Oversea-Chinese Banking Corp Ltd (OCBC Bank). According to the PW2, when a

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customer opened a SMTA with OCBC Bank, the bank would advise the plaintiff of this whereupon the plaintiff would create a separate account. The customer`s trades financed by the bank would be booked into this new account, which was loosely called a `margin account`. No credit is extended by the plaintiff to the customer under this margin account. When a customer buys shares which he intends to be financed by his SMTA with OCBC Bank, the plaintiff would deliver these shares to the bank for acceptance and payment. Similarly if the shares are sold, payment is made to the bank. If the bank refuses to accept the shares for whatever reason, eg if the credit limit has been reached, the customer would have to pay for them from some other source.

27 7.The trading account no 10006/01, serviced by PW1, was opened in 1989. In 1992, the defendant applied to OCBC Bank to open a SMTA. Upon receiving notification of the creation of the SMTA for the defendant, the plaintiff then created account no 10978/01 for the purpose of booking the defendant`s trades financed by the SMTA and serviced by PW1. The trading account no 39931/39, serviced by Yap Eng Piow, was opened sometime in October 1993. On or about 9 December 1993 the plaintiff opened account no.44521/39 for the purpose of booking the defendant`s trades financed by the SMTA and serviced by Yap Eng Piow. The documents relating to the creation of these two accounts are found in BA319 (for account no 10978/01) and BA 323 (for account no.44521/39). These are internal documents of the plaintiff which the defendant had never seen before. I find that the creation of these 2 accounts is an internal procedure of the plaintiff and has no effect on the contractual relationship between the parties. This relationship is governed by the documents associated with the opening of the two accounts for which she had signed on the documents, ie: (i). in relation to account no 10978/01, it is

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governed by the terms of account no 10006/01, opened pursuant to application dated 4 July 1989 (BA318); and

28 (ii). in relation to account no 44521/39, it is governed by the terms of account no 39931/39, opened pursuant to application dated 26 November 1993 (BA320),

29 as well as by the practices and customs of the trade and any implied terms.

30 8.It is common ground that in respect of account no 10006/01, there are no terms and conditions annexed to the application form (BA318), unlike the application form in respect of account no 39931/39 (BA320) where the terms and conditions are printed on the reverse (BA321). In the latter form, BA320, there is the following statement:

> *I/We the abovenamed person(s) (the `customer`) request that you open account for me/us for the trading of stocks and shares with and through OCBC Securities Private Limited (the `company`) on the terms set out in the reverse side of this application form which terms I/we confirm having read and understood.*

31 There is no similar statement in the first form, BA318. I conclude therefore that the terms printed on the reverse of the form in respect of account no 39931/39 do not apply as express terms of contract to account no 10006/01.

32 9.However this does not preclude some of those terms, or a modification thereof, from being applicable by implication, having regard to the customs and practices of the trade. The parties agree that the contract between them is governed by the applicable rules and bye-laws of the SES. The duties and conditions imposed on the plaintiff by such bye-laws constitute, in part or in whole, the basis for implying certain terms. I find that the following are, inter

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alia, the implied terms of the contract between the parties: (i). the plaintiff has a duty to act in the interests of the defendant (see bye-law VI cl 2);

33 (ii). the plaintiff is to act only on the instructions of the defendant, including oral instructions, unless the defendant had given plaintiff discretionary powers of investment (see bye-law VI cl 2); and

34 (iii). the defendant is to pay for her purchases, or the net differences of her purchases and sales, within a certain period, failing which the plaintiff is entitled to sell those shares and recover any losses from her (see bye-law II cl 7(a).

35 10.For account no 39931/39, additional terms of the contract are contained in the terms and conditions printed on the reverse of the account opening form (BA321) and these state, inter alia:

> 3 Interest at the rate of 3.5% over the OCBC Bank`s prime lending rate per annum shall be paid on all moneys due and payable by the customer to the company.
>
> 5 No dealer`s representative (whether dealer or remisier) has authority to waive or adversely affect the company`s rights under these terms or to create any liability on the company`s part under these terms and where the dealer`s representative whose name appears above is a remisier, that such dealer`s representative is appointed by the customer to act on his behalf and is neither the company`s servant nor the company`s employee and all instructions of purchase or sale given by such dealer`s representative if given or purportedly given on the customer`s behalf shall be deemed to be instructions given by the customer on which the company can act in accordance with and look to the customer for responsibility thereof whether or not such dealer`s representative is also jointly, severally or distinctly liable.

36 11.Therefore any late payment under account no 39931/39 attracts a contractual interest of 3.5% above the OCBC prime rate per annum. The

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plaintiff contends that this also applies in respect of account no 10006/01. However there is no such term in the account opening form. Mr Yap submits that these terms apply only in respect of account no 39931/39 and not to the other accounts. I accept this submission in relation to account nos 10006/01 and 10978/01 and find that no such term exists in respect of those accounts. On the view that I have taken that transactions under account no 44521/39 are governed by the terms of account no 39931/39, the terms above would govern the transactions in account no 44521/39.

37 12.In her evidence-in-chief, the defendant said that she did not read the terms and conditions printed on the back of the account opening form for account no 39931/39, ie BA321. She claimed that these terms were not shown and explained to her at all. However she did not offer evidence of any special circumstances in her case that would entitle her to the plea of non est factum. Indeed given the fact that she had, since 1976, been appointed as directors of various companies and had, since 1981 incorporated and managed her own property business, it is not surprising that she was unable to do so. Accordingly, on the authority of **Saunders v Anglia Building Society** [1970] 3 All ER 961, she is precluded from denying that those terms had been incorporated in the contract.

38 13. **The plaintiff`s claim**

39 The plaintiff claims that the defendant instructed PW1 and Yap Eng Piow separately to buy certain shares, mostly Malaysian counters, over the period between late 1993 and early 1994. Unfortunately, on 12 January 1994 the Kuala Lumpur Stock Exchange (KLSE) counters took a severe beating due to certain events and the prices of the defendant`s shares plunged. The defendant was unable to pay for these positions on the due dates and the plaintiff sold them

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off at a loss and sought to recover these losses, with interest, in this action. It is not necessary for me to set out in detail the name, quantity and prices of these shares as Mr Yap did not challenge the quantum of the losses incurred by their sale. Neither did he dispute the plaintiff`s computation of interest on the losses. The dispute hinges purely on liability. The amounts claimed by the plaintiff under the various accounts and the interest claims are as follows:

10006/01	$ 136,132.03	$ 3,509.92
10978/01	$1,682,155.10	$42,115.05
39931/39	$ 581,611.12	$ 9,752.23
44521/39	$ 989,126.67	$ 6,813.41
Total	$3,389,024.92	$62,190.61

40 14.In addition, the plaintiff claims interest at the contractual rate from 17 August 1994 to the date of judgment.

41 15. **The defence**

42 The defence rests on two main planks, ie: (i). The plaintiff had breached various provisions of the SES bye-laws and thereby is not entitled to be paid or indemnified by the defendant in respect of its losses.

43 (ii). The plaintiff, through Ho Seng Hock (PW1) and Yap Eng Piow, had rendered negligent advice to the defendant in reliance of which she entered into the transactions that resulted in the losses.

44 (i) Breach of SES bye-laws

45 16.Mr Yap submits that the plaintiff had breached the following SES bye-laws: (i). bye-law III, cll 1, 2, 7, 8 and 16(g); and

46 (ii). bye-law VI, cll 2, 3 and 7.

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47 17.I first examine the question of the consequences of such breaches, ie whether the defendant`s liability to the plaintiff is extinguished by the plaintiff`s commission of such breaches. I should add that it is pleaded in the defence that the plaintiff had breached various provisions of the Securities Industry Act and Regulations as well. But these have not been taken up by Mr Yap in his submissions.

48 18.The SES is a company limited by shares incorporated under the Companies Act (Cap 50, 1994 Ed). Articles 112.1 and 113 of its articles of association provide for the making of rules and bye-laws and state as follows:

> *Rules*
>
> 112.1 The company has, from time to time, the power to make, vary and repeal rules, consistent with these articles relating to the management and control of the Stock Exchange, its member companies and to the relationships that may exist as between the member companies, the Exchange and non-members and for matters connected with the stock trade generally.
>
> *Bye-Laws*
>
> 113 The company may make, vary and repeal bye-laws as to the mode and conditions on and subject to which business on the exchange should be conducted and to the conduct of persons transacting those business.

49 19.It can be seen that the bye-laws are made for the purpose of regulating (a) the mode and conditions under which business on the Exchange should be conducted; and (b) the conduct of persons transacting those business. Given the nature of these bye-laws, they can only bind the members of the SES - see **Chong Theresa v Kin Khoon & Co** [1976] 2 MLJ 253 . There are nine bye-laws, namely: Bye-law I:. Definitions

50 Bye-law II:. Trading & Settlement

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51 Bye-law III:. Financial, Accounting and Conduct of Business Requirements

52 Bye-law IV:. Trading Floor

53 Bye-law V:. Dealer`s Representatives

54 Bye-law VI:. Code of Conduct for Dealers in Securities

55 Bye-law VII:. Advertising

56 Bye-law VIII:. Trading on SESDAQ Securities

57 Bye-law IX:. NASD-SES Market Linkage

58 20.Bye-law II specifies the securities that members may deal in and rates of brokerage, and sets out the conditions and procedure for delivery of securities and settlement. Bye-law III obliges every member company to adhere to the principles of good business practice and to ensure that its staff comply with the SES rules and bye-laws. It sets out the manner in which clients` accounts are to be opened and their transactions dealt with. This bye-law also deals with how margin accounts are to be operated and the extent of collateral that the member company should obtain from the client. There are provisions dealing with how much exposure the member company may have in relation to a single client and to a single security. It also sets out the requirements for accounting records. Bye-law IV relates to the procedure on the trading floor. Bye-law V sets out the requirements for and conditions of engagement of dealers` representatives. Bye-law VI sets out the `standards of ethical behaviour to be followed by dealers` representatives`. Bye-law VII stipulates the manner in which member companies may advertise their services. Bye-law VIII relates to trading on

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SESDAQ, the second board of the SES. And bye-law IX relates to trading on NASD securities.

59 21.I turn now to the specific bye-laws that the defendant alleges the plaintiff had breached. Bye-law III cl 1 states:

> *Business Practices*
>
> *Every member company shall at all times adhere to the principles of good business practices in the conduct of its business affairs.*

60 Clause 2:

> *Compliance by Personnel*
>
> *Every member company shall ensure that all its employees, directors, officers and remisiers comply with Exchange`s rules, bye-laws and requirements.*

61 Clause 7:

> *Client Accounts*
>
> (a) Opening of individual client accounts
>
> *Every member company is required through a designated director or officer reporting to the director to:*
>
> (1) use due diligence to learn the essential facts relative to every client, every order, every cash or margin account accepted or carried by the member company and every person holding power of attorney over any account accepted or carried by the member company;
>
> (2) diligently supervise all accounts handled by its dealers` representatives;
>
> (3) specifically approve the opening of an account prior to or promptly after the completion of any transaction for the account of or with a client. The designated director or officer approving the opening of the account shall, prior to giving his approval, be personally informed as to the essential facts relative to the client and to the nature of the proposed account and shall indicate his approval in writing on a document which shall become part of the permanent records of the member company.

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62 Clause 8:

Client`s Particulars

All essential particulars relative to every client shall be recorded and maintained up to date at the office of the member company. Such particulars shall include the identity card/passport numbers, residential address and telephone numbers, occupation and name and address of the employer.

63 Clause 16(g):

Margin Account

(a) A member company may extend credit facilities to approved clients for securities transactions subject to the margin account requirements of this section.

(b) Margin account arrangements must be evidenced in the form of a written agreement executed between the member company and the client.

(g) The member company shall cause daily review to be made of all margin accounts to ensure that credit is not over-extended beyond the approved facility and that the margin requirements prescribed above are met at all times. For the purpose of computing margin requirements in a margin account, the last done price of the security on the preceding market day shall be used. All transactions done on the same day shall be combined on a transaction date basis and the total cost of purchase or the net proceeds of sale including any commission charged and other expenses shall be taken into account for computing margin requirements.

64 Bye-law IV cl 2 states:

Acting as Agent

A dealer`s representative when acting as agent must carry out his client`s instructions and must exercise such skill, care and diligence as is usual or necessary for the proper conduct of the business. He must at all times act in good faith and in the best interests of the client and must make full disclosure to the client of all material circumstances and interests

65 Clause 3:

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> *A dealer`s representative should not encourage sales or purchases with the sole object of generating commission.*

66 Clause 7:

> *A dealer`s representative should keep, in respect of each client whose investments he is managing, sufficient records to enable the dealer`s representative at any time without undue delay to establish the client`s precise cash and investment position.*

67 22.Mr Yap seems to say that because the plaintiff had breached those bye-laws, the defendant is not liable to pay for the losses in question. However he does not explain how this consequence comes about. Paragraph 4 of the defence alludes to `public policy` but this is not developed at all in the closing submissions of counsel. What he did say in his submissions were the following points: (a). The plaintiff did not have the records required to be kept under bye-law VI cl 7. Had they complied with this requirement, `it would have been obvious that even prior to January 1994, the defendant`s trades were large. The plaintiffs should have found out more about the defendant then.`

68 (b). In view of the market plunge on 11 January 1994, the plaintiff `ought to have been more vigilant in supervising the defendant`s accounts The risk of the defendant in not being able to pay for the shares given the large trades [from 11 to 14 January 1994] must have been foremost in the plaintiffs` mind. The reason for this is that if the defendant could not pick up the shares, the plaintiffs would have to pay for the shares.`

69 23.My Yap contended that there was a general duty to ensure that the client did not overextend herself. With respect, I cannot see how the bye-laws could establish such a duty on the part of the plaintiff to a person of full age and sound mind such as the defendant. A, in dealing with B in a commercial situation, may extend credit to B if he considers that B is good for a certain sum.

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But having extended it, if A finds that B is unable to repay A has to face the consequences of his mistake. If A considers litigation worthwhile he proceeds with a suit to recover the sum owed and obtains and enforces judgment against B. If B does not have the assets to satisfy the judgment then A will have to write off the shortfall. A cannot be precluded from suing B for the debt because he had misjudged the credit-worthiness of B.

70 24.In the case of a member company of the SES, it is required under the bye-laws to carry out certain acts. Hence bye-law III cl 7(a) states that it must use due diligence to learn the essential facts relative to every client and cl 8 requires it to record particulars of the client which shall include identity card/passport numbers, residential address, telephone number, occupation and name and address of employer. These are duties owed to the SES and not to the client. Although there is no evidence from the SES as to the purpose of these clauses, presumably obtaining such information will, inter alia, enable the member company to detect and avoid fraud by the client. I cannot see how these requirements are necessary for the protection of the client. The position is clearer upon an examination of cl 16(g). This requires the member company to make a daily review of all margin accounts to ensure that credit is not over-extended and that prescribed margin requirements are met. This is for the protection of the member company, and by extension, the SES. Not the client. Indeed a client may be happy if his stockbroker extends more credit to him than his circumstances would permit. This would enable him to take on more positions and thereby he stands to make a higher profit should the market move in his favour. If he makes a loss it is the stockbroker who is left to bear the losses if he is unable to pay his debts. It is important to bear in mind that it is the client who instructs the broker to buy or sell shares; he need not make use of the credit extended to him if he does not want to.

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71 25.In relation to bye-law VI cl 2 which sets out the duty to exercise the necessary skill, care and diligence and to act in good faith and in the client`s interest, and to cl 3 which states that a dealer`s representative should not encourage transactions with the sole object of generating commission, I would agree that such duties are incorporated into the contract between the plaintiff and defendant.

72 26.I find that cl 7 of bye-law VI does not apply in respect of the defendant. It applies only to a client whose investments are managed by the dealer`s representative, which is not the case in respect of the defendant. Indeed the defendant`s position is that PW1 and Yap Eng Piow gave her recommendations and she gave her approval. There is no allegation from her that they were managing her investments. The situation is clearer when one looks at the preceding cl 6 which states:

> *A member company or a dealer`s representative who undertakes to manage the investments of a client (whether or not on a discretionary basis) should set out in writing his terms and conditions. This should include the following:*
>
> (a) The scope of the discretion and investment objectives.
>
> (b) The fees to be charged for management and the basis on which they are calculated.
>
> (c) Arrangements for the custody of securities and cash.
>
> (d) Any arrangements for the payment of interest on uninvested balances.
>
> (e) Arrangements for reporting and valuations.

73 There is no suggestion of such an arrangement and, it is clear that the PW1 and Yap Eng Piow were not managing the defendant`s investments. I have no doubt that it would startle everyone familiar with the industry if I held that dealers and remisiers were obliged to keep, in respect of their ordinary clients,

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such records as would enable them to know without delay their precise cash and investment position.

74 27.Therefore it is my view that, apart from cll 2 and 3 of bye-law VI, the provisions in the bye-laws cited do not relate to duties owed by the plaintiff to the defendant. Indeed if the defendant`s proposition that mere breach of such bye-laws could deprive the stockbroker of his right to recover the debt owed by a client is accepted, all a client who owes a debt to his stockbroker needs to do to absolve himself of the debt would be to find some breach by the stockbroker of the multitude of SES bye-laws.

75 28.I turn to the question whether the plaintiff was in breach of cll 2 and 3 of bye-law VI. On the view that I have taken on the defendant`s allegations that the plaintiff had rendered negligent advice which will be dealt with below, and in the absence of any other evidence, I do not find that the plaintiff had failed to exercise such skill, care and diligence nor that it had not acted in good faith and in the interests of the defendant as would amount to a breach of cl 2.

76 29.Clause 3 prohibits a dealer`s representative from encouraging transactions with the sole object of generating commission. Mr Yap contends that over 11 trading days in January 1994, her total buy and sell orders through all four accounts amounted to $13.262 million. This generated commissions for the plaintiff totalling $132,620. There was a further RM3.219m buy orders in respect of Malaysian shares, generating commissions totalling RM32,192. More than half of these transactions were done over the period 10 to 14 January. Mr Yap submits that this shows that the plaintiff was in breach of cl 3. However I do not see how the fact that the defendant had engaged in large transactions over a short period proves that the plaintiff`s dealer`s representative had encouraged those transactions with the sole object of generating commission. Obviously one

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of the objects of any dealer`s representative, if he should encourage a client to purchase or sell any securities, is to generate commission. That is his livelihood. A breach of cl 3 occurs only if he does it with this as the sole object. There is an element of subjective intention that has to be established and while it is possible to do it by way of circumstantial evidence, in my view the mere fact that large transactions were done over a short period falls far short of the evidence needed. I should add that PW1 had given evidence that the defendant carried out `contra trading`, ie that she sold her positions after a short period. At any time her total position outstanding would be much less than the aggregate of her transactions for the month.

77 30.Accordingly, the plaintiff is not precluded from recovering the losses from the defendant, even if it has breached the provisions complained of, apart from cll 2 and 3 of bye-law VI.

78 31.On the view that I have taken in respect of the consequences to the plaintiff of breaches of the other bye-laws (apart from cll 2 and 3 of bye-law VI), I would not have needed to consider whether they have in fact been breached. However, in case I should be wrong as to those consequences, I make the following findings of fact: (a). In relation to cl 1 of bye-law III, I find no evidence that the plaintiff had not adhered to the principles of good business practices in the conduct of its business affairs. The defendant`s counsel did not submit as to what these good business practices are. It is a very general duty and even if the plaintiff had committed various breaches of other bye-laws, it does not follow that the plaintiff is in breach of this clause.

79 (b). In relation to cl 2 of bye-law III, on the view that I have taken below in respect of cl 8 of bye-law III, it would follow that the plaintiff had failed to

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ensure that all its employees, directors, officers and remisiers comply with the bye-laws and is, as a result, in breach of this clause.

80 (c). In relation to cl 7(a)(1) of bye-law III, I find that the defendant had not proved that the plaintiff was in breach. The defendant had not established what are the `essential facts relative to each client`. Until that is established it is not possible to say that all such essential facts had not been obtained. I am aware that cl 8 requires recording of `all essential particulars relative to every client` and that these are stated to include identity card/passport number, address, telephone, occupation and employer. However the term used in cl 8 is `essential particulars` as opposed to `essential facts`. I am of the view that there is a material difference. Clause 8 deals with the particulars relating to the identity of the client and the means to locate or communicate with him, ie his residence and place of work and their telephone numbers. Clause 7 deals with the substantive aspects of the client`s standing, principally his credit worthiness. While some items in cl 8 are part of the essential facts in cl 7, eg occupation, others such as telephone numbers are not. PW1 had given evidence that he knew the defendant and the circles she moved in and had formed a view as to her credit-worthiness. In my view the defence had not proven that this fell short of the due diligence requirement in cl 7.

81 (d). In relation to cl 7(a)(2) of bye-law III, I find that the defendant had not established that the plaintiff had failed to diligently supervise all the accounts concerned. The defendant has failed to establish that the practice of the plaintiff, particularly in conducting review of the defendant`s trades only once or twice in the week of 10 to 14 January 1994 shows that the plaintiff had lacked diligence in its supervision of all accounts.

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82 (e). In relation to cl 8 of bye-law III, the plaintiff had not obtained the residential address and telephone number of the defendant in respect of account no 10006/01 - see BA318, although this information was obtained when account no 39931/39 was opened four years later - see BA320. As the plaintiff did not adduce any evidence to the contrary, I find that the plaintiff had contravened cl 8 in relation to account no. 10006/01 from July 1989 when this account was opened until October 1993 when it obtained this information upon the opening of account no 39931/39.

83 (f). In respect of cl 16(g) of bye-law III, I find that the accounts in question were not margin accounts and do not fall within this provision. The plaintiff did not extend any credit to the defendant; it was OCBC Bank that extended credit. While the bank had some arrangement with the plaintiff to facilitate transactions financed by the bank this hardly constitutes a margin account which is indirectly defined in cl 16(a) and under 16(b) requires to be `evidenced in the form of a written agreement`. I do not accept Mr Yap`s submission that they were margin accounts because `the characteristics of margin trading were prevalent`. A margin account is one whereby the plaintiff extends credit to the client - see cl 16(a). Apart from the normal settlement period, no credit is extended by the plaintiff. It is the bank which extends the credit and which undertakes the checks into the defendant`s background for assessment of her creditworthiness. Most importantly it is the bank that bears the losses should she fail to settle the amounts outstanding on her SMTA account. Clause 16 exists to regulate situations where SES member companies extend credit to their clients by way margin accounts in order to ensure that these members do not take on too much risk.

84 (ii) Negligent advice

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85 32.The defendant claimed that PW1 and Yap Eng Piow gave her negligent advice in reliance of which she had purchased the securities the subject of this action. She claimed that PW1 and Yap were in competition between them to obtain her business. Typically, they would call her several times a day and recommend to her shares to buy or sell. She said that she always agreed with their recommendations because she believed that they knew much more about the share market than she did. She herself was confused with all the hectic activities and lost track of which shares were being bought or sold, her role being reduced to saying `yes` to their recommendations. When share prices plunged in early January 1994 and she had incurred substantial losses she did not know what to do. She asked PW1 and Yap Eng Piow for advice and they separately advised that she should buy even more shares to `average` down the prices so that when the market recovered she would be able to reduce her losses. She accepted this advice as she did not see a better alternative. She claimed that neither PW1 nor Yap told her of the risks of this course of action.

86 33.PW1 denied that he had given her such advice. He said that the defendant had no need for advice from him because she moved in high business and financial circles, and in particular that she was the mistress of a person who was prominent in financial circles (which the defendant did not deny nor challenge). PW1 said that she generally appeared to be well-informed and had told him of her meetings with prominent Singaporean and Malaysian businessmen and her perception of their views on certain counters and on the market generally. PW1 cited an example where the defendant had informed him prior to the public announcement that PSC was going to issue bonus shares. He did not believe her at first, but the information turned out to be true and PSC had a bonus issue in 1994. PW1 said that the transactions he had executed on her behalf were done on her specific instructions and she told him that she had

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information that the prices of those counters would rise. From late 1993 through to mid-January 1994, the market was extremely busy and orders were incessantly coming in from his clients through the six telephone lines that he had. During that period he would not have the time to make recommendations even if he had wanted to. Moreover it wasnot in his nature to make recommendations to his clients because if prices should move contrary to his prediction, he would probably lose those clients.

87 34.On consideration of the evidence before me and the demeanour of the defendant and PW1 in cross-examination, I find that PW1 did not render the advice as the defendant had claimed. I find PW1, who was cross-examined for almost one and a half days, to be a co-operative witness and his evidence was consistent and forthright. The defendant, on the other hand, was somewhat evasive in various parts of her evidence and she changed her position several times, as follows: (i). She had said in her affidavit evidence-in-chief (para 50) that neither PW1 nor Yap Eng Piow told her, in advising her in January 1994 to buy more shares to `average out` the price of the shares, about the risks that she could be facing. However, under cross-examination she agreed that there was some discussion with PW1 and with Yap Eng Piow about the risks she was taking in this respect.

88 (ii). The defendant at first said that she did not receive confirmatory notes on transactions carried out by PW1 in respects of trades executed under her accounts with him until after January 1994. When confronted with a confirmatory note dated 11 January 1994, she changed her position and said that prior to that note, there was no confirmatory note from PW1.

89 (iii). In her affidavit filed on 30 September 1994 in opposition to summary judgment proceedings, she deposed that she believed that Yap Eng

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Piow had made a mistake. Under cross-examination, she said that it should have been PW1 and that her solicitors did not correct that mistake in her affidavit.

90 (iv). She was cross-examined on a bank deposit of US$110,000 she had in Hong Kong, which she explained was made because she had wanted to buy a property there at the time. When asked why she had deposited in US dollars (presumably instead of Hong Kong dollars), she at first said that as a foreigner she was not permitted to deposit it in any other currency in Hong Kong. Then she said that if she wanted an interest bearing account, it must be in US dollars. Finally she said that the bank officers had recommended her to put her money in US dollars.

91 35.As regards the defendant`s allegation that Yap Eng Piow rendered advice to her, there was no direct evidence to the contrary offered by the plaintiff, who did not produce Yap Eng Piow to give evidence. The defendant`s evidence was that both Yap Eng Piow and PW1 rendered the same advice to her, thereby painting PW1 with the same brush as Yap Eng Piow. Given the finding I make in respect of PW1, and given the totality of the evidence before me including the background of the defendant as a businesswoman and the circle she moved in, I would hold that on balance, her version that Yap also made those recommendations cannot be believed.

92 36.The next point is whether, even if the recommendations were made by either PW1 or Yap Eng Piow, she did rely on them and if she did, whether she can thereby avoid liability to the plaintiff. The defendant seems to say that the plaintiff is vicariously liable for the negligence of PW1 and Yap. In respect of PW1, by not making a submission on this, the plaintiff must be taken to have accepted that it is vicariously liable. In respect of Yap Eng Piow, the plaintiff submits that cl 5 of the conditions attached to the opening form (BA320)

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expressly states that a remisier (which Yap was) is the customer`s agent and is not the plaintiff`s servant or employee. PW2 gave evidence that Yap Eng Piow, as a remisier, was remunerated solely on the basis of commission on the volume of trade handled by him. This term of engagement is consistent with cl 5. On the view that I have taken that this clause applies in relation to the defendant`s transactions carried out by Yap Eng Piow under account no 39931/39 and 44521/39, I hold that the plaintiff is not vicariously liable for any negligent advice rendered by Yap to the defendant.

93 37.I next turn to the question of reliance. Although the defendant had painted herself as a person who knew little of business affairs and therefore relied heavily on the advice of PW1 and Yap Eng Piow, there is ample evidence that she is more sophisticated than that. From her performance on the witness stand, I do not find her to be that simple of mind; indeed she struck me as a person who is capable of holding her own in the rough and tumble world of business. And an analysis of the evidence supports this conclusion. She was in the housing agency business since 1981 and had been a director of nine companies. She had bought and sold several properties for herself since 1981 and had planned to buy a property in Hong Kong. She had been trading in shares since 1989 and had a trading account with another stockbroker, RHB Cathay, during the time she was trading with the plaintiff. She had seven bank accounts during the material time, and a US$110,000 deposit in Hong Kong. PW1 said that the defendant ran her account well and knew what she was doing. This evidence was not challenged by Mr Yap.

94 38.Furthermore, there was evidence that the defendant had a strong gambling streak, as the following parts of the evidence show: (i). Under cross-examination, she revealed that in 1993 she increased the credit facilities in her OCBC Bank SMTA account from $100,000 to $900,000 in order to pay for

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737,000 Kamunting shares that her brother, a `small-time` vegetable wholesaler, had ordered but was unable to pick up. The total cost was about $860,000. She said that her brother had told her that he had heard `rumours` about Kamunting, presumably about a forthcoming rise in the share price. But she did not check with her broker before committing herself to such large sum. Yet, her evidence throughout was that she was ill-able to afford to lose such large sums of money.

95 (ii). An analysis of the defendant`s transactions during the `hectic` period from late 1993 to January 1994 will show that, for a person of the defendant`s means, the transactions she had authorised PW1 and Yap Eng Piow to enter into, even if they had recommended them, required someone with strong nerves. As defence counsel Mr Yap had pointed out, the buy orders for January 1994 totalled $9.4m and RM3.2m.

96 (iii). Despite suffering such huge losses in 1994, the defendant was back in the stock market in a big way by September 1995 after she opened a trading account with Lee & Co, another stockbroker. In June 1996, she bought in 50,000 shares of Hock Seng Lee, a Malaysian counter, at a total cost of about $240,000 and made a contra loss of about $36,000. About the same time, she bought about $130,000 worth of shares in SAAG Corp, another Malaysian stock. That month she made a net loss of $106,000. When asked why she had bought those counters, she said that her broker had recommended them and she had `left it to him`. When asked how she had expected to pay for those shares, she said that her broker had told her that she could `contra` them. She agreed that those were speculative counters. When asked why she had paid up her losses when the transactions were done on the wrong recommendation of her broker, she said that she paid up because it was `a relatively small amount`.

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97 39.Therefore on the evidence before me, I conclude that the defendant was at least a fairly sophisticated investor and that she was a person who was willing to take considerable risks on the stock market in the hope of huge gains. I conclude that she could not have relied on any advice as she had claimed had emanated from PW1 or Yap to an extent that would render them liable to her if these were negligent.

98 40.Finally the defendant must still prove that, even if advice was given as alleged, such advice was negligent, i.e. the defendant must give evidence showing that the advice given was negligent, having regard to the circumstances prevailing at the time. To prove that it was negligent, the defendant relies solely on the fact that the advice turned out to be wrong. In **Stafford v Conti Commodity Services Ltd** [1981] 1 All ER 691, the plaintiff sued his broker for losses in the commodities market that he had suffered as a consequence of his reliance on the advice of the broker. The plaintiff relied on the losses incurred and the failure to realise profits to show that the broker`s advice was negligent. Mocatta J held that in such an unpredictable market, `it would require exceedingly strong evidence from expert brokers in relation to individual transactions to establish negligence` and said that the doctrine of res ipsa loquitur did not apply. I would respectfully agree. If anyone knew for certain the direction that the prices of certain stocks would take it would not be necessary for him to engage in any occupation other than the buying or selling such stocks. And he would not share this information. The stock market is well known to be unpredictable and any recommendation or advice therefore carries the inherent risk that it may be wrong. The fact that a recommendation turns out to be wrong does not mean it was negligent when it was given. Of course there may be situations in which no broker will advise a certain course of action and if any broker did, he could be negligent. But to establish negligence in this case

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it will be necessary for the defendant to produce evidence from experts in this field that the alleged advice was not one which ought to have been given in the circumstances. The defendant has not produced such evidence and therefore her allegation that the advice was negligent must fail.

99 41. **Conclusion**

100 Accordingly, I gave judgment for the plaintiff in respect of its claim for the losses in respect of the four accounts. In respect of the plaintiff`s claim for interest, having found that the accounts under PW1, ie 10006/01 and 10978/01 were not governed by the terms and conditions found in the application form for account no 39931/39 (BA321), it follows that there was no contractual right on the part of the plaintiff to recover interest from the defendant on outstanding payments at the rate of 3.5% above OCBC prime. In respect of the losses under these two accounts, I awarded interest from the date of the writ of summons at 6% per annum. In respect of the losses under the accounts operated through Yap Eng Piow, ie 39931/39 and 44521/39, I awarded interest at the contractual rate of 3.5% above OCBC prime from the date due of the various payments under these accounts. The parties are agreed that, up to 16 August 1994, such interest amount to $9,752.23 and $6,813.41 respectively. I also ordered the defendant to pay the plaintiff`s costs in this action.

Lee Seiu Kin JC

Michael Hwang SC, Andre Yeap and Ng Lip Chee (Allen & Gledhill) for the plaintiff

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Yap Teong Liang and Amarjit Singh (Salem Ibrahim & Partners) for the defendant

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