IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 66

Suit 1362/1997, 1363/1997, 1364/1997

Between

RHB-Cathay Securities Pte Ltd

… Plaintiff

And

Ibrahim Khan and Other Actions

… Defendant

GROUNDS OF DECISION

Equity — Estoppel; Financial and Securities Markets — Securities — Trading; Financial and Securities Markets — Securities — Trading; Financial and Securities Markets — Securities — Trading

Version No 1: 20 Nov 2026 (00:35 hrs)

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RHB-Cathay Securities Pte Ltd v Ibrahim Khan and Other Actions

[1999] SGHC 66

Suit 1362/1997, 1363/1997, 1364/1997
Chan Seng Onn JC
22 March 1999

Judgment:

1.**CHAN SENG ONN JC**

Background

The plaintiffs are stockbrokers and a member of the Stock Exchange of Singapore (`SES`). Each of the defendants in the abovenamed three suits (hereinafter referred to as `the defendants` collectively) had opened and maintained a share trading account with the plaintiffs at the material time. They traded through the plaintiffs` dealer, Shapy Khan bin Sher Khan (`Shapy`), who is the brother of two of the defendants, Ibrahim Khan (`Ibrahim`) and Said Khan bin Sher Khan (`Said`). The third defendant, Zolkepli bin Karim (`Zolkepli`), is a friend of Ibrahim.

2.The plaintiffs` case was that the defendants had traded in their accounts with the plaintiffs through Shapy in the months of April 1997 to May 1997 and incurred substantial contra trading losses. Ibrahim and Said sustained losses

amounting to RM1,024,195.58 and RM1,063,110 respectively, whereas Zolkepli`s losses totalled RM923,404.47 and S$16,593.84.

3.In their respective defences, the defendants basically pleaded that all the trades in their accounts were unauthorised and were transacted by Shapy without their knowledge, with the exception of the 10,000 PM DATA shares purchased on 17 February 1997 by Ibrahim. It was averred by Ibrahim and Said that the plaintiffs had failed to conduct their business in a proper and regular manner, thus enabling the fraud to be perpetrated by Shapy. As such, the defendants could not be held liable by the plaintiffs for the fraud of their own employee.

4.The plaintiffs however averred that the defendants had full knowledge of all the trades and hence, they were estopped from denying the trades in their accounts. A total of 124 contract notes for purchase and sale transactions between April and May 1997 giving rise to the present claim had been sent to Ibrahim. Fifty-nine contra statements forming the contra losses claimed by the plaintiffs were also sent to him. In the case of Said, 121 contract notes and 56 contra statements were sent to him relating to the contra losses in his account. Zolkepli should have received 105 contract notes and 45 contra statements pertaining to the trades in his account for those two months, which were the subject matter of the plaintiffs` claim against him.

5.Prior to that, the defendants were also sent numerous other contract notes and contra statements between January 1997 and March 1997, evidencing the voluminous trades done in their accounts.

6.Additionally, the plaintiffs sent to them quarterly statements ending 31 March 1997 and 30 June 1997, which listed all the transactions carried out in their accounts for those quarters.

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7.The plaintiffs sent the contract notes, contra statements and quarterly statements to the defendants` residential addresses as reflected in their account opening forms. There was no denial of receipt of these documents.

8.The defendants did not dispute any of the trades until the present proceedings were commenced by the plaintiffs, whereupon the defendants alleged for the first time that they were not liable for the trades and that they were all unauthorised. This was despite the clause in the contract notes stating that if any information was incorrect, they were to notify the plaintiffs immediately of the discrepancies and return the contract notes for cancellation.

9.The plaintiffs further relied on the fact that Ibrahim signed six authorisation forms between 6 March 1997 and 8 April 1997 authorising the plaintiffs` in-house cheques for contra profits to be used to set off contra losses in the other trades in his account. Official receipts to evidence these set-offs pursuant to the defendant`s instructions in his authorisation forms were sent to him.

10.Said signed ten authorisation forms between 5 February 1997 and 14 April 1997 for the same reason. Again official receipts were sent to his residential address. Fifteen crossed cheques in Said`s name for contra profits totalling S$95,636.65 were issued by the plaintiffs between 17 January 1997 and 24 March 1997. They were presented and cleared into Said`s POSBank savings account No 081-11847-7, which was the account stated in his trading account opening form. Said also provided Shapy with pre-signed blank cheques, which facilitated Shapy`s withdrawal of the contra profits from his bank account.

11.Zolkepli signed five authorisation forms between 6 March 1997 and 2 May 1997. Official receipts evidencing the set-offs from the in-house cheques for

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contra profits against the contra losses for other trades were also sent to his residential address as stated in his account opening form.

12.However, there was evidence that Shapy had intercepted many of these official receipts by instructing the plaintiffs` backroom staff to give them to him so that he could hand them to his clients, which Shapy never did. Shapy conveniently discarded these receipts. I believed that Shapy obtained these receipts fairly readily and hence, I did not rely on this evidence in relation to the estoppel issue.

13.I accepted the evidence of Shapy that the plaintiffs` dealers as a matter of practice did ask their clients to sign in-house cheque authorisation forms. There were two reasons: first, with the authorisation forms, the cheques issued by the plaintiffs could be used immediately to set off losses incurred in their clients` trading accounts, and second, it was for the clients` convenience as it would save them a trip to the company`s premises to sign the in-house forms each time they needed to set off profits against losses incurred earlier. Although Esmond Choo denied in his evidence that there was such a practice, I believed that the plaintiffs probably turned a blind eye to it and did not actively seek to stop their dealers from having their clients pre-sign those in-house cheque authorisation forms. They were satisfied so long as they received the authorisation forms duly signed and they were not particularly concerned if they had been pre-signed.

14.However, I did not think that this was a material fact affecting my finding that the defendants were estopped from denying the trades in their accounts. Pre-signing these authorisation forms would not have alerted the defendants to the fact that their accounts had subsequently been used by Shapy for trades which the defendants never expressly authorised Shapy to transact.

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15. ***Ibrahim`s evidence***

Ibrahim testified that he was `disturbed` on receiving the contract notes. He queried Shapy about the numerous contract notes and trading documents he received. Obviously he knew that those were not the share transactions he had made. Otherwise, there would be no reason for him to make those queries.

16.Shapy assured him that there had been a mistake on the part of the plaintiffs and that he would have them sorted out. To placate Ibrahim, Shapy even told Ibrahim to give him all the contract notes, some of which Ibrahim did obediently deliver to Shapy in accordance with Shapy`s instructions. Ibrahim said that he believed what Shapy told him because Shapy was an employee of the plaintiffs. According to Ibrahim, he did not suspect that his own brother would lie to him. Shapy told Ibrahim not to worry. After being reassured, he worried no longer.

17.Ibrahim pre-signed the in-house authorisation forms because he was told by Shapy that they were for administrative purposes. It was submitted that no inference should be drawn that Ibrahim had knowledge of the transactions for which the forms were used. As Ibrahim was educated only up to primary 6, he hardly understood English and counsel submitted that he probably did not understand what he was signing.

18.However, in the course of cross-examination, Ibrahim admitted unequivocally that he knew that the trades had been effected without his authorisation. He further admitted knowing that Shapy was buying the shares under his name. Such evidence in my view was very damaging.

19. ***Said`s evidence***

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Said pleaded in his defence that Shapy had assured him that the voluminous contract notes he received were a mistake on the part of the plaintiffs in respect of the dealings in the shares in his account. He too believed Shapy as he was an employee of the plaintiffs. He did not suspect that his brother would lie to him.

20.Shapy pestered him for pre-signed blank cheques from his POSBank account. Said reluctantly gave them to Shapy after being assured that he would not take any of his money. Shapy avoided explaining why he needed those pre-signed blank cheques. Said admitted looking at his bank statements and noticing that deposits put in were soon taken out. Obviously, Said knew that those large deposits of money were not his. He thought that the deposits were made by Shapy but he did not know their origins. He presumed that Shapy used the pre-signed blank cheques to withdraw those amounts belonging to Shapy himself.

21.I did not think that Said had seen those contra profit cheques before they were deposited into his POSBank account as Shapy had instructed the plaintiffs` backroom staff to bank them directly into Said`s bank account. Apparently, Said had tried to question Shapy about the flow of funds into his account and the immediate withdrawals thereafter, but Shapy would cut him off with words to the effect that Said should not worry since his money was not touched and that he should not ask too much of what was happening.

22.From this evidence, counsel submitted that Said could not have known that contra profits were being banked into his account. Counsel conceded that Said perhaps should have suspected on hindsight.

23.However, I did not believe that Said was so nave that he could not make the connection between the voluminous contract notes in his trading account, the flow of large sums of money in and out of his bank account and the blank

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cheques given to Shapy, which had been used to withdraw moneys from his bank account. Further, if all those voluminous contract notes were a big mistake on the part of the plaintiffs, surely those large deposits of money into his account were real and could be drawn out by Shapy. If indeed the moneys were mistakenly banked into his account as a result of the numerous mistaken or erroneous trades, why had the plaintiffs not asked Said to return the money? Any honest and reasonable person would have realised that whatever Shapy was saying about a mistake, was too good to be true.

24.It must have dawned on Said that Shapy was using his account to trade and those deposits were in relation to the trades that Shapy had made. I noted that Said was well educated and he had a degree in Bachelors of Business. Although he appeared to me to be a soft spoken and relatively quiet person, he did not appear to me to be stupid.

25. ***Zolkepli`s evidence***

Zolkepli testified that he had raised objections and expressed his concerns to Shapy on receipt of the contract notes, contra statements and SES`s quarterly statements. However, as with the others, Shapy had assured him that he should not worry and that he would sort things out. He believed Shapy.

26.It was submitted on behalf of Zolkepli that he was lowly educated in the Malay language. Being simple minded, he could not envisage that the contract notes were the result of unauthorised trading by Shapy in his account.

27.But in cross-examination, Zolkepli admitted knowing that someone was using his account to buy and sell shares which he did not order. Zolkepli was not so innocent after all.

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28. ***Submissions***

Counsel for Ibrahim and Said submitted that both defendants had protested to Shapy as the representative of the plaintiffs when they received the contract notes for the trades not carried out by them. It was natural for them to protest to their dealer, who was also their brother. Both defendants, it was contended, were simple men who did not know anybody else working for the plaintiffs to whom they could report about the unauthorised transactions. Obviously, Shapy who was practising the fraud on both the plaintiffs and the defendants never reported the matter. Counsel described Shapy as having a dominant personality and he had influenced the defendants into believing that everything was alright and that things would get sorted out. The defendants were thus reassured.

29.Counsel for Ibrahim and Said further contended that the plaintiffs were vicariously liable for the fraud against them of their own agent and servant. Accordingly, the plaintiffs should not be allowed to make a claim against the defendants. The proper recourse was for the plaintiffs to look to Shapy for their losses.

30.In the written submissions, counsel referred to the fact that the Commercial Affairs Department had charged Shapy for conducting unauthorised trades in respect of three clients, namely, Jeffrey Lim, Yap Chin Kok and Wee Boo Kuan. From the charges, it would appear that the unauthorised trades were conducted from as early as 23 April 1997, 2 May 1997 and 28 April 1997 respectively for those three clients. They also never called another representative of the plaintiffs to complain. Why then were they not sued?

31.Esmond Choo, the executive director of the plaintiffs, explained in his evidence that these three clients had complained at the first instance, which

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differentiated their cases from those against the defendants here. However, counsel pointed out that Jeffrey Lim complained only after a letter of demand was sent to him on or about 29 May 1997, which was more than a month after the first unauthorised trade.

32.I was not concerned about the reasons why the plaintiffs took no action against these three clients. They were irrelevant. The only relevance would be the dates when complaints of unauthorised trades of a reliable nature were first received from other clients of Shapy, which ought to have alerted the plaintiffs sufficiently to suspend Shapy from further acting as a dealer pending their investigations. If the plaintiffs did nothing and had acted unreasonably in allowing Shapy to continue trading despite widespread complaints against him of unauthorised trading, then I would be inclined to hold that the plaintiffs would have to bear all losses resulting from Shapy`s unauthorised trades themselves.

33.The equitable estoppel principle should not be stretched too far to push all liability to the parties, when the plaintiffs have, through their own unreasonable conduct, taken unnecessary risks to allow Shapy to continue trading and hence, arm him with the facility to commit further unauthorised transactions in his clients` accounts.

34. ***First complaint of unauthorised trades against Shapy on 29 April 1997***

From Esmond Choo`s evidence, the first complaint received was on 29 April 1997 from Mok Weng Sun, Shashinathan and Hussain Inam about unauthorised trades in their respective accounts which began as early as 12 March 1997, 20 February 1997 and 14 March 1997 respectively.

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35.It did not appear that the plaintiffs were going to cover up the matter as Esmond Choo stated, in his memorandum dated 30 April 1997 of the meeting that he had with Bill Ng, Shapy and the three clients, that the company intended to notify the SES of the clients` letters of complaint within the ensuing 24 hours and that a report would be made on 2 May 1997 if the clients did not withdraw their complaints. The memorandum then stated that these three clients withdrew their complaints on 30 April 1997. The matter was settled when Shapy signed letters dated 30 April 1997 undertaking to pay for all the losses incurred in their accounts save for the sum of $30,000 each in respect of Shashinathan and Hussain Inam, and $50,000 in respect of Mok Weng Sun but it was to be without any admission of any wrong doing on Shapy`s part. After these clients withdrew their complaints, the plaintiffs took no further action on the matter.

36. ***Did Shapy inform the plaintiffs on 22 April 1997 of his unauthorised trades even before the first complaint against him had surfaced?***

Shapy said that he had informed Bill Ng and Esmond Choo during a meeting on 22 April 1997 that he was conducting unauthorised trades in the defendants` accounts. He alleged that the plaintiffs were willing to overlook his indiscretions provided that he made good the trading losses. Esmond Choo denied that saying that it was an outright lie. Esmond Choo said that he found out about Shapy`s admission only much later in September 1997 after Shapy filed an affidavit in respect of the plaintiffs` summary judgment proceedings against the defendants.

37.What really happened on 22 April 1997 was that Esmond Choo instructed all the dealers, including Shapy, to chase for payment of the contra losses. He set a time table for each of the dealers to collect contra losses from their clients. He and Bill Ng met each dealer individually on that. The follow-up letter dated 22 April 1997 from Bill Ng to Shapy clearly substantiated what Esmond Choo

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said. That letter instructed Shapy to refrain eight of his clients from taking further trading positions, and reminded Shapy to collect RM2m by 30 April 1997 and RM2.5m by 31 May 1997. It was not targeted specifically at the defendants` accounts. According to Esmond Choo, it was part of his instructions to all dealers as a result of the downturn in the market. But the trades left over from the prior Malaysian trades which took a few days for registration had to be accepted.

38.I was inclined to believe that the plaintiffs at that stage were unaware of any unauthorised trades in the defendants` accounts. It was not something which the defendants would have expected its own dealers to do. According to Esmond Choo, this was the first instance on record of unauthorised trading.

39. ***Shapy`s revocation of his undertakings to the three clients on 13 May 1997***

On 13 May 1997, Shapy wrote to the three clients, namely, Mok Weng Sun, Shashinathan and Hussain Inam, denying their allegations of unauthorised trading in their accounts and asserted that all the trades were made pursuant to their instructions or their agents` instructions. Shapy alleged that he was pressured into signing those letters dated 30 April 1997 and he revoked his undertakings to them.

40.This subsequent behaviour of Shapy indicated to me the extent to which Shapy was prepared to be forthcoming with his confessions. The non-admission of wrongdoing in the accounts of the three clients and the retraction letter dated 13 May 1997, where he insisted that the trades were authorised, indicated to me that it was not likely for Shapy to have been so ready to confess of his own accord to the unauthorised trades in the defendants` accounts on 22 April 1997, and risk being suspended and sacked from his dealer`s position with the

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plaintiffs, for which he was getting a substantial basic salary of $8,000 per month plus commissions. Why should Shapy volunteer any information of his wrongdoing when no one had even spilled the beans yet, so to speak?

41.On the totality of the evidence, I was inclined to believe Esmond Choo that Shapy never confessed to the unauthorised trades on 22 April 1997. It was unbelievable that the plaintiffs would have permitted Shapy to continue to conduct unauthorised trades in the defendants` accounts had Shapy admitted to them. He would have been immediately suspended. I accepted Esmond Choo`s evidence that if a client stood by his complaint that the trades in his account were unauthorised, the plaintiffs would suspend the client`s trading account even though the dealer might insist that the trades were authorised. A fortiori, when there was a confession, I did not think that the plaintiffs would have any hesitation in imposing an immediate suspension.

42. ***Letter dated 13 May 1997 to Esmond Choo***

Shapy wrote a letter dated 13 May 1997 to Esmond Choo pleading for help and requested that he be given a second chance. In that letter, Shapy tried to demonstrate his future earning potential. I was inclined to think that the letter was written because he wanted the plaintiffs to retain him and he was worried that the three clients might reinstate their complaints after he revoked his undertakings in his letter to them on the same day.

43.I did not believe that this letter was written because Esmond Choo and Bill Ng had been told by Shapy as early as 22 April 1997 of the unauthorised trades in the defendants` accounts, and that they had overlooked his `indiscretion` and asked him for a proposal to make good the losses. If so, then why was it that Shapy`s proposal was forwarded three weeks later? I would have imagined that

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Esmond and Bill Ng would not have waited so long for Shapy`s repayment proposal if that was true.

44.What was more incredible was the implication that Esmond Choo and Bill Ng were allowing more unauthorised trades in the defendants` accounts and increasing the losses instead. Surely if Shapy`s allegations were to be believed, it was more likely in my opinion for Shapy to be constrained to repay through proper commissions safely earned from authorised trades rather than be allowed to take very risky positions in the market through unauthorised trades under the nose of and with the sanction of the plaintiffs. I disbelieved Shapy`s evidence that he had informed Esmond Choo and Bill Ng of his unauthorised trades in the defendants` accounts as early as 22 April 1997.

45.I rejected the submission by counsel that Shapy was thereafter allowed to continue to trade to recover and reduce the contra losses that had been sustained. With the proven track record of substantial losses in the defendants` accounts from trades undertaken by Shapy, what could be the basis for Esmond Choo and Bill Ng to think that luck would change for Shapy if he were allowed to continue with his contra-trading, whether on a special account of his or by further unauthorised use of the defendants` accounts, and that he could now generate contra-profit gains with certainty to make up for the losses sustained so far ? Further, it was incredible that the plaintiffs, as a member of the SES, would have connived in any illegal acts of Shapy so that he could continue unauthorised trades to make back the losses. I found this submission by defendants` counsel to be without merit.

46. ***Action taken by plaintiffs after reinstatement of the withdrawn complaints by three clients of Shapy on 13 May 1997***

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When the clients received the retraction letter from Shapy dated 13 May 1997, they relodged their complaints against him for unauthorised trading in their accounts. According to Esmond Choo, they immediately suspended all of Shapy`s accounts without informing him. Shapy`s terminal was locked off and the plaintiffs` broker in Kuala Lumpur was told not to accept further trades from Shapy. Shapy was immediately told to go on long leave on 14 May 1997 and the keys to the office were requested back from him. Shapy was questioned. When his response was not adequate, Shapy was officially suspended on 26 May 1997. The plaintiffs also wrote to the SES on the same day to inform them of all the allegations made against Shapy of unauthorised trading and his suspension pending investigations. This was done in compliance with the reporting requirements of the member companies of the SES.

47.In the light of the above, I also rejected defence counsel`s submissions that the plaintiffs were in fact aware of the unauthorised trades as at 29 April 1997 but did nothing to stop him until they felt that he could not recover the contra losses by about 15 May 1998, which showed the plaintiffs condoning and acquiescing in the unauthorised actions of Shapy. This submission ignored the fact that the complaints were withdrawn by the complainants on the very next day. Whatever might have been the settlement between Shapy and the clients, the clients had agreed to bear some of the losses in that settlement arrangement of significant value. So it was not that clear if the trades were unauthorised because the clients would not likely agree to bear any part of the losses at all if the trades were indeed unauthorised. Further, Shapy had settled with these three clients on the basis of no admission of liability.

48.I noted Esmond Choo`s evidence that in a downturn in the market, clients in a typical situation, where they reneged on the trades, would say that the trades were unauthorised. In this case, the company took the view that the clients were

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complaining some two to three weeks after the transactions when the market had already collapsed. Under these circumstances, should the plaintiffs have taken drastic measures to suspend Shapy after the complaints were withdrawn? Suspending Shapy on the basis of withdrawn complaints might well have been unreasonable in my opinion.

49.Since the last unauthorised trades in the three defendants` accounts were on or about 5 May 1997, which was before the plaintiffs` notice of the reinstatement of the complaints by those three clients, I found that there was no need to examine whether there was any undue delay by the plaintiffs in suspending Shapy upon receipt of the reinstated complaints. Even if there was to be any delay, there were no more unauthorised trades in the defendants` accounts after the date the complaints were relodged by the three clients. In any event, I found on the evidence that immediate action was taken to suspend Shapy when the relodged complaints were received.

50. ***Whether plaintiffs breached the SES rules and Bye-Laws, and the conditions governing the defendants` trading accounts.***

Counsel for Zolkepli submitted that the plaintiffs had contravened the rules and bye-laws of the SES, and breached the terms and conditions governing the account opening. He relied on cl 5 of the plaintiffs` Terms and Conditions Governing Account Opening which states that all transactions shall be `... in accordance with and subject to and be governed by the Rules, Bye-Laws and Regulations of the Stock Exchange of Singapore Limited.` Clauses 1, 2, 4(a) and 7(a) of Bye-Law III of the SES provide that:

1 Business Practices

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> Every Member Company shall at all times adhere to the principles of good business practices in the conduct of its business affairs.
>
> 2 Compliance By Personnel
>
> Each Member Company shall ensure that all its employees, directors, officers and Remisiers comply with Exchange`s Rules, Bye-Laws and Requirements.
>
> …
>
> 3 Transactions in Securities
>
> (a) No business shall be transacted on account of an employee or for an account in which an employee has any interest either direct or indirect, except with the prior and separate consent in writing of a director of the Member Company for each transaction.
>
> …
>
> 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 dealer`s representatives;

51.Counsel cited to me the following Rules of the SES:

> *Rule 18.8:*
>
> *It shall adhere to the principles of good business practices in the conduct of its business and shall take all reasonable steps to ensure that the Rules, Bye-Laws and Requirements of the Exchange and any decision or direction of the Committee as may be imposed on the Member Company from time to time are complied with, both in letter and in spirit.*
>
> *Rule 18.10*
>
> *It shall exercise reasonable supervision over its employees and Dealer`s Representatives with a view to preventing any violation*

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> *of the Act and Regulations and the Rules, Bye-Laws and Requirements of the Exchange. For this purpose, a Member Company shall be deemed to have complied with this Rule if:*
>
> (a) it has established proper procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect any such violations by its employees and Dealers` Representatives; and
>
> (b) the Member Company`s Directors, officer, employee or other person who has been entrusted with the responsibilities of carrying out or enforcing such procedures, has reasonably discharged his duties and obligations, without reasonable cause to believe that such procedures and system were not complied with.
>
> *Rule 51*
>
> *Each Member Company shall comply with the Financial Accounting and Conduct of Business Bye-Laws, including any Bye-Laws concerning the adjusted net capital and aggregate indebtedness of the Member Company and any Bye-Laws concerning the maintenance of a Reserve Fund by the Member Company.*
>
> *Rule 52.1*
>
> *The appointment of Dealer`s Representatives shall be subject to the Bye-Law on Dealer`s Representatives.*
>
> *Rule 52.2*
>
> *It shall be a term of the registration of a Dealer`s Representative in the appropriate Register maintained by the Exchange pursuant to the Bye-Law on Dealer`s Representatives that the Dealer`s Representative shall be deemed thereby to have agreed that he shall observe, comply with and be bound by the Rules, Bye-Laws and Requirements of the Exchange, any decision or direction of the Committee and such conditions as may be imposed on Dealer`s Representatives for registration from time to time.*

52.One of the conditions stated in the Dealer`s Representative`s license issued by the Monetary Authority of Singapore to Shapy is `that the licensee shall not use or permit the use of fictitious name or names of other persons to trade for the licensee`s own account or for the accounts of his/her clients.`

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53.Counsel submitted that the plaintiffs had failed to ensure that Shapy had complied with the SES Rules and Bye-Laws, in particular para 2 in Bye-Law VI - Code of Conduct for Dealers in Securities, which provides, inter alia, that a dealer`s representative when acting as an agent 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. Thus the plaintiffs had, in breach of cl 2 of Bye-Law III, failed to protect their clients from the fraud committed by their dealer.

54.Facilities were available to detect the fraud by observation of the Risk Control Report and the Daily Contra Loss/Gain Reports. Yet the plaintiffs failed to take account of the limited annual incomes of the three defendants and allowed them to trade beyond their means. The unusually large volume of trades reflected in the defendants` accounts ought to have alerted the plaintiffs to the unauthorised trades and hence, steps ought to be taken to stem the losses immediately. Having had such notice, the plaintiffs failed to exercise reasonable supervision and proper control over Shapy in breach of r 18.10 of the SES Rules.

55.Counsel also faulted the lack of proper procedures to prevent and detect violations. The over-reliance on the contract notes did not amount to reasonable supervision. It was submitted to be bad business practice to rely exclusively on the system of contract notes to detect violations.

56.It was contended that the plaintiffs had allowed Shapy to continue trading despite being aware of circumstances which would have indicated to them that Shapy was conducting unauthorised trades in his clients` trading accounts. Counsel for Ibrahim and Said relied on the fact that the defendants were given a default limit of only $100,000. It was not disputed that the plaintiffs` computer

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would automatically prevent execution of trades on the SES when the default limit was exceeded.

57.However, for the trades on the Kuala Lumpur Stock Exchange (`KLSE`), Esmond Choo said that it was not electronically linked to trigger the default limit set. The plaintiffs would only know of the successful execution of the orders placed on the KLSE after a period of some one to three days. Thus, if a client exceeded his default limit when trading on the KLSE, the dealer would be reprimanded only upon discovery of those trades. If the dealer continued to trade despite the warning, then the dealer might be suspended. Nevertheless defendants` counsel submitted that the plaintiffs had failed to properly monitor the defendants` trading accounts in respect of the default limits and such failure was contrary to prudent business practice. Hence, there was a breach of cl 1 of Bye-Law III of the SES requiring its member companies to adhere to the principles of good business practices in the conduct of its business affairs.

58.According to Esmond Choo, such default limits were internal to the plaintiffs and were not made known to the clients. It was for the plaintiffs` own protection in case the clients ran up debts which they could not repay. The mere fact of such internal controls being breached was, in my view, more a question of disciplinary action to be taken against the plaintiffs` staff and employees who failed to observe those internal confidential financial controls. But I could not see how any trading beyond the internal confidential default limits, which the clients were in any event ignorant of, could help them to avoid liability. If clients knowingly or unknowingly traded beyond their own financial means, that was their own folly. But it could never be a legal basis upon which to vitiate or set aside the trades that they had entered into contractually.

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59.Counsel cross-examined Esmond Choo extensively in an attempt to show that the plaintiffs were reckless in allowing the defendants to trade in such voluminous amounts far beyond what the defendants could afford as could be seen from the annual incomes declared by them in their account opening forms. Esmond Choo explained that up until March 1997, the defendants had a good track record for payments. The market was going up at that time. Further, the plaintiffs had other clients like retirees and housewives with no known sources of income. Yet they were able to pay for large trading losses. It would be presumptuous to think on the basis of the defendants` annual income that they would not be able to afford the trades.

60.It must be remembered that a client could buy a large quantity of shares with a view to contra off the trade a few days later. He might not have the financial means to pay for the shares in full. But it would not matter if he never intended to pick up the shares and pay for them. So the actual purchase price for the shares would not be a good indicator as to whether he could afford that purchase in the case of contra trading. Therefore, I did not think it was unreasonable for Esmond Choo or the plaintiffs to adopt the view that a good record for payments was more important.

61.In my view, there was insufficient evidence to indicate to the plaintiffs, merely from the large trades in the defendants` accounts, that those trades must necessarily have been unauthorised. Large trades could well have been authorised trades if the clients chose to take extraordinary risks. Hence, I could find no basis to impute negligence to the plaintiffs for failing to discover from the pattern of active and voluminous trading that the transactions in the defendants` accounts were in fact unauthorised.

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62.In essence, the defence was simply that the lack of proper supervision from the plaintiffs as required under the SES rules and bye-laws enabled Shapy to conduct unauthorised trades with impunity in the defendants` trading accounts. What the defendants were attempting to do was to accuse the plaintiffs of various breaches of the SES Rules or Bye-Laws in the hope of exonerating themselves of liability for the trades in their names, should they be estopped from denying those trades.

63.The short answer to this line of defence would be that even if such breaches existed, they might attract penalties imposed by the SES on the member company, the remisier or dealer`s representative. But they would not render void or illegal the contractual obligations validly entered into between the member company and clients arising out of the share trading transactions: **Theresa Chong v Kin Khoon & Co** [1976] 2 MLJ 253 . The position would not be any different if on the evidence, the defendants were estopped from denying the validity of the transactions in their trading accounts.

64.Counsel further submitted that the plaintiffs had not come with `clean hands` as they had knowledge or ought to be deemed to have knowledge of the unauthorised trades by Shapy due to the stringent requirements imposed by the Rules and Bye-Laws of the SES. Hence, they could not rely on the principle of estoppel, which is both one of law and equity. This submission failed as I found no evidence on which I could impute to the plaintiffs any knowledge at the material time of the unauthorised trades.

65. ***Illegality***

Shapy had pleaded guilty to criminal charges under s 102(b) of the Securities Industry Act (Cap 289) for engaging in a practice of unauthorised trading in the

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defendants` accounts, which operated as a fraud upon the company. Although the conviction following his plea of guilt was not conclusive evidence, it was nevertheless strong admissible evidence before me in these civil proceedings that the trades had not been expressly authorised by the defendants and that Shapy had used their accounts for his own trades.

66.Counsel for Zolkepli contended that the transactions for which Shapy had been convicted were illegal contracts. He relied on **Tesco Supermarkets Ltd v Nattrass** [1972] AC 153[1971] 2 All ER 127 in submitting that Shapy`s criminal acts were attributable to the plaintiffs, who were thus also guilty of the offences committed by Shapy because the guilty mind of the plaintiffs` servant, representative, agent or delegate, ie Shapy, was also the guilty mind of the plaintiffs.

67.I did not think this contention had any merit. ***Tesco*** `s case did not bear out counsel`s submission at all as could be seen from the following passage of the judgment of Lord Reid [at p 131] cited by counsel himself, the relevant parts of which I have highlighted:

> *I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person which acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable.* ***He is not acting as a servant, representative agent or delegate. He is an embodiment of the company*** *or, one could say, he hears and speaks through the persona of the company within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.*

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68.Clearly, Shapy as a mere dealer`s representative was very far from being the embodiment of the plaintiffs. The plaintiffs` directors and senior management did not know of the fraudulent transactions. It could not be said that the plaintiffs were in pari delicto with Shapy. Hence, there was no question whether the court was lending assistance to the plaintiffs relying on his own illegal act. Neither were the plaintiffs relying on any illegality in order to establish their claim as evidenced by the contract notes.

69.On the facts, I found to the contrary that the defendants themselves had knowingly turned a blind eye to the transactions in their name which they knew were unauthorised. They further knew that Shapy was using their accounts for his own trades. By keeping silent and refraining from informing the plaintiffs, they must, by their conduct, be taken vis-a-vis the plaintiffs to have authorised or adopted these trades although they might not have given Shapy any express instructions for them.

70. ***Whether the plaintiffs were vicariously liable for Shapy`s fraud.***

I turn next to the defence submissions that the plaintiffs must be held vicariously liable for Shapy`s fraud. Counsel for Zolkepli argued that the acts of Shapy were within his ostensible authority because Shapy as the dealer`s representative was authorised to make contracts, accept orders and bind the company. Shapy was given wide discretion in the scope of his duties. Hence, the plaintiffs would be vicariously liable for the fraudulent trades of Shapy. Counsel relied on the following passage in 1(2) Halsbury`s Laws of England, para 147:

> *Where, in the negotiation of any contract by an agent, the agent while acting within the scope of his authority is guilty, whether or not the principal is privy thereto, of fraud, undue influence or innocent misrepresentation, or of concealment of essential facts which ought to be disclosed to the other contracting party, the contract is voidable, and the other party thereto may rescind it*

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> *and recover any benefit which has passed thereunder to the principal. If sued, the other party may successfully resist any action brought upon the contract whether for specific performance or otherwise.*

71.In **Chien Chung Ming v Kay Hian & Co Pte & Anor** [1992] 1 SLR 242 , the first defendant stockbroking company was held liable for the fraud of the second defendant, who was a remisier with the first defendant. Shares belonging to the plaintiff placed as security for the plaintiff`s margin trading account were released to the second defendant purportedly for transmission to the plaintiff. But these shares were sold under the second defendant`s account and the proceeds were paid over to the second defendant. Some of them were relodged under the accounts of other clients of the second defendant and sold. The proceeds were set off against moneys owing to the first defendant by these other clients. Shares bought by the plaintiffs and given to the second defendant as security for his margin trading account or for registration in the plaintiff`s name were later sold by the second defendant and the proceeds paid to the second defendant or to the account of other clients. The plaintiff`s claim for the return of the certificates or alternatively, damages for their loss was allowed by Goh Joon Seng J who held and I quote from the headnotes in that case that:

> (1) Implied in the remisier`s agreement was the authority to collect from and deliver to clients on behalf of the first defendant certificates in respect of shares bought or sold or kept as security for any account. Alternatively, the first defendant had held the second defendant out as having such authority.
>
> (2) It was plain that where a master permitted a servant to represent himself as having authority, and, with the knowledge that the servant was doing so, accepted the benefit of what the servant had done, then the holding out of himself by the servant as having authority was a holding out for which the master was responsible. It is not necessary that the master make direct representations before there is holding out.

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72.Counsel relied extensively on the case of **Lloyd v Grace, Smith & Co** [1912] AC 716, which was followed in Singapore in **Chien Chung Ming v Kay Hian & Co Pte & Anor** [1992] 1 SLR 242 , **Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd** [1992] 1 SLR 296 , ***Lee Feng Steel Pte Ltd v First Commercial Bank*** [1997] 1 SLR 280 and **United Overseas Finance Ltd v Victor Sakayamary & Ors** [1997] 3 SLR 211 to name a few. In ***Lloyd*** `s case, a conveyancing clerk in a solicitors` firm fraudulently induced a client to convey to him the title to two properties and moneys from a mortgage. The employers were held liable for the fraud of their clerk because he had acted within the scope of his authority when he committed the fraud. Earl Loreburn stated at pp 724 and 725:

> *The managing clerk was authorized to receive deeds and carry through sales and conveyances, and to give notices on the defendants` behalf. He was instructed by the plaintiff, as the representative of the defendant`s firm, - and she so treated him throughout - to realize her property. He took advantage of the opportunity so afforded him as the defendant`s representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. ...*
>
> *Willes J cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that. ...*
>
> *If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it ...*

At p 731, Lord Macnaghten stated:

> *... in the opinion of the court a principal must be liable for the fraud of his agent committed in the course of his agent`s employment and not beyond the scope of his agency, whether the fraud be committed for the principal`s benefit or not.*

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73.On the question of the scope of the agent`s authority, Lord Macnagthen quoted what Sir Montague Smith had said in his judgment in **Barwick v English Joint Stock Bank** [1867] LR 2 Exch 259:

> *... it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently, frauds are `beyond the scope of the agent`s authority` in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried.*
>
> *...*
>
> *In all cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in.*

74. ***Lloyd*** `s case was cited to me basically for the proposition that a principal must be liable for the fraud of his agent committed in the course of his agent`s employment and not beyond the scope of his agency, whether the fraud be committed for the principal`s benefit or not.

75.I did not for a moment doubt that the law as stated in ***Lloyd*** `s case was good law. Provided that the defendants on the facts could be brought within the principles as laid down in that case, then they would not be liable. But the factual situation here was different although it could not be disputed that Shapy was the servant of the plaintiffs, and Shapy had indeed committed fraud by his unauthorised trades using the accounts of the defendants. I accepted the

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evidence of the defendants that they had not expressly authorised Shapy to enter into those trades.

76.It was pertinent however to observe what Lord Shaw had to say at p 740 of his judgment in ***Lloyd*** `s case:

> *The bulk of mercantile dealings are not direct, but are conducted through agents vested with an ostensible authority to act for their employers.* ***When the authority is of a limited kind, the person transacting with such an agent is bound to assure himself that the limits are not exceeded, - a familiar instance of which is the case of bills signed per procuration.*** *But when the authority does ostensibly include within its scope transactions of a particular character, then quoad a third party dealing* ***in good faith*** *with such an agent, the apparent authority is, as is well settled, equivalent to the real authority and binds the principal. [Emphasis added.]*

77.Was the discretion and authority of Shapy in dealing with his clients` accounts unfettered and unlimited? Common sense dictated that it was not. Following what Lord Shaw had said, the defendants were bound in good faith to assure themselves that the limits of Shapy`s authority were not exceeded and on the evidence, they had ample information on which they could ascertain that.

78.The SES had required and the plaintiffs had given detailed information to the defendants of those trades. The evidence was clear that the defendants in fact knew that those were not their trades. After having had full notice of those unauthorised trades in their accounts, the defendants could not be said to have acted in good faith if they chose not to assure themselves that Shapy was not using their accounts to trade when it was so apparent in the face of the voluminous transactions. The defendants attempted to portray that their trust in Shapy had blinded them into believing that the transactions were all a mistake. The defendants preferred to do nothing more, even after the purported mistakes

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kept repeating transaction after transaction and continued inexplicably for some two months.

79.I found it quite unbelievable that they had been misled by Shapy into thinking that it was all a big mistake on the part of the plaintiffs in sending them those contract notes and contra statements reflecting numerous wrong trades in their name. The mistakes continued relentlessly despite Shapy`s repeated assurances that he would get them resolved. Any honest and reasonable person would have known that they could not be mistakes. The defendants chose to make no enquiry with the plaintiffs although they had ample reason to suspect that Shapy was using their accounts to trade for himself. No reasonable person would have been satisfied with the empty promises given by Shapy that he would take care of those alleged erroneous contract notes.

80.I was of the view that the defendants knew as a fact that Shapy had been using their accounts for trading but they simply did nothing about it because they trusted Shapy and thought that he would be responsible for them. Even if the defendants were both nave and negligent in not perceiving that Shapy was lying to them and that he was in reality the person executing those trades, nevertheless they knew for a fact that the voluminous trades were in any event not trades executed by them.

81.Consequently, there was no room under the circumstances for the application of the principle of vicarious liability of the principal for acts of its agent acting within his actual, implied or ostensible authority. It would have been clear to the defendants that if indeed Shapy was executing the trades, he would be doing so without their authorisation and thus, Shapy could never be acting within any actual, implied or ostensible authority of the plaintiffs because the scope of his duties obviously never extended to trading in clients` accounts without their

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express instructions. The defence could not show any express or implied representation from the plaintiffs that Shapy was ever held out to be authorised or entitled to do that. Under the circumstances, no question of actual, implied or ostensible authority could arise. In fact, Shapy was prohibited by law from executing any trades without clients` instructions. This was a class of acts which Shapy was never employed to perform at all. It was totally outside the scope of Shapy`s employment by the plaintiffs, which on the evidence, the defendants had or ought to have knowledge of.

82. ***Whether the defendants benefited from Shapy`s wrongdoing***

I found that the defendants had not obtained any benefit from the trades of Shapy. There was no distribution or sharing of the contra profits as Shapy withdrew all these profits using the pre-signed cheques in the exact amounts of the contra profits paid into Said`s POSBank account. Shapy was simply using Said`s bank account as a conduit to receive the contra profits for himself. Said allowed him to do so by issuing to him signed blank cheques on his POSBank account.

83.From the fact that Said had borrowed $4,000 from Shapy to pay for his son`s hospital bills and his own tuition fees for his part time degree course, it appeared that Said looked upon Shapy as owing him a favour for allowing him the use of his trading account, and so he felt that his brother was in a way obliged to lend that sum of money to him. But that loan was to be returned. If that interest free loan was to be a benefit, then to that extent, Said could be said to have benefited from allowing Shapy to trade using his account. But I did not give much weight to this incidental benefit.

84. ***Are defendants estopped from denying the transactions in their accounts?***

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Before dealing with the issue of estoppel, it would in my view be appropriate to examine some of the implied obligations of the member companies in hiring their dealers, the nature of the stockbroking business where share trading transactions by clients are conducted normally through the telephone, and the corresponding need for a system of confirmation by contract notes and notification by clients of discrepancies and errors.

85.Member companies of the SES hiring persons whether as dealers or otherwise have a duty to screen all such persons to ensure that they are persons of integrity. By the very nature of the stockbroking business, large sums of money are involved in the daily share transactions executed through the member companies. The potential and opportunities for fraud are always present and must be guarded against.

86.If they hire rogues, then they must be held responsible for all their fraudulent activities and losses vis-a-vis their clients, who have opened accounts with them. This would of course be subject to any estoppel which might operate against the clients. If without the clients` knowledge, the employees and dealers of the member company fraudulently use clients` accounts to trade and losses are incurred, the member company is not entitled to recoup their losses from these unknowing clients. It is a risk that the member companies have to take and it is open to them to secure insurance against such risk. Between the principal who placed the rogue dealers and employees there and the innocent clients who have no voice in selecting these rogues, it is obvious that the liability for the fraud and the loss resulting therefrom must be borne by the principal.

87.So in the light of such risks, member companies of the SES have operated a notification system to minimise the risk to themselves of such fraudulent activities, including that of genuine errors in executing trades. This is the system

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of rendering contract notes and contra statements immediately after the respective trades and the issuing of regular quarterly statements of transactions to inform and confirm with their clients the transactions that were to have been authorised by them.

88.If their clients, as in this case, knowing that unauthorised transactions had been carried out in their accounts, failed to notify the company or turned a Nelsonian eye to what was happening in their accounts, they would do so at their own peril. For there would come a time when their failure would be sufficient to attract the application of the estoppel principle, and the transactions would then be deemed to have been authorised or adopted/ratified by them. The clients would be held liable to the member company for these transactions because their blameworthy conduct had allowed the fraudulent transactions to continue to the detriment of the member company. The actual or imputed knowledge of the fraudulent transactions would have tainted these clients and removed their cloak of innocence. Consequently, the balance of liability as between the two `innocent parties` (ie the member company versus them) would be tilted against them. Of course the clients would not be precluded from filing a claim against the fraudulent dealer or employee for the loss caused to them.

89.I might pause here to add that notifying the rogue himself under the circumstances would not amount to any notification to the member company as it could not be expected that the rogue would inform the company of his own fraud. To avoid being estopped after discovery of the fraudulent transactions, the notification by the clients must be to someone who could reasonably be expected to bring the matter to the attention of the relevant persons in the member company for the necessary action to be taken.

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90.It must be further recognised that instructions for share trading by clients to the dealers or remisiers of a broking house are given normally over the telephone. The transactions to buy or sell at a particular price are put into the SES electronic trading system by the dealer or remisier upon receipt of those oral instructions. Confirmation of trades done are usually over the phone to the client and thereafter followed by the contract notes. It is well-nigh impossible for the broking house to track the validity of each and every oral instruction over the phone by their clients to their dealers or remisiers.

91.For the purpose of executing such trades, the remisier or dealer`s representative is acting as the agent of the client to input such trades for him into the electronic share trading system of the SES. Such trades punched into the system amount to representations made by the client to buy or sell shares as the case may be at a specific price. Vis-a-vis the member company, the remisier or dealer`s representative will be acting within his authority when he executes trades on behalf of his clients.

92.The member company provides the computers and the facilities for the remisier or dealer`s representatives for linking with the SES electronic trading system and also manages the administration of such trades by the expeditious issuing and despatch of the necessary contract notes confirming the trades, including the sending out of contra statements, quarterly statements and other necessary documentation to help the clients monitor their trades. As I stated earlier, the contract notes sent directly to the clients are essentially to confirm that the transactions ordered by them have been properly and successfully executed.

93.I did not regard the reliance on a system of contract notes to surface any discrepancies, errors or unauthorised trades as being insufficient or unreliable

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as to amount to bad business practice. There is a legal duty imposed on the clients, having opened a trading account in which trading instructions are accepted orally, to protest and to surface any discrepancies, errors or unauthorised trades reasonably promptly upon discovery. There is an associated duty to use reasonable diligence to check contract notes sent to them. These are implied duties arising out of the trading account being opened by the client, the close proximity of their contractual relationship and the forseeability of damage were there to be no feedback to the member company of any unauthorised trades after discovery.

94.Subject to the exception where the member company itself is already aware of the unauthorised trades, a client failing to perform his implied duties will be estopped from denying that the unauthorised trades are not his because the member company is entitled to assume that those trades are authorised and are correctly executed according to his instructions in the absence of any protest or objections from him. He must be taken to have tacitly admitted that those are his trades vis-a-vis the member company, although as between the errant agent and the client, they remain unauthorised because the agent knows of it and no estoppel can arise. The client must be taken to know that his silence and inaction will mislead and facilitate the wrongful continuance of the unauthorised trades to the detriment of the member company. He is thus liable to the member company for the loss suffered as his conduct of total silence and inaction in the circumstances will in my view constitute an implied representation to the member company that the trades in his name are in order. Consequently, he will be estopped from contesting the validity of those trades vis-a-vis the member company. The only recourse left for the client is against the errant agent.

95.I found support for the above principles in 16 ***Halsbury`s Laws of England*** (4th Ed) (Estoppel) at para 1618:

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> ***Effect of silence or inactivity when duty to speak or act.*** *In the absence of a duty to speak, mere silence or inaction is not such conduct as amounts to a representation. If a person`s consent to a particular act is required he may be under a duty, when he knows that it has been done without his consent, not to stand by for so long that others are induced thereby to do that from which otherwise they might have abstained; and he cannot afterwards question the legality of the act to the prejudice of those who have so given faith to the fair inference to be drawn from his conduct.*
>
> *A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest in property in ignorance of his title to it. It is the duty of a person who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay. Thus the receipt of an invoice indicating that a tradesman has been supplying goods in the erroneous belief that the recipient has authorised their purchase imposes on him the duty of at once correcting the error. A fortiori it is the duty of a person who by his own mistake has led another into an erroneous belief to correct it as soon as the mistake has been discovered, and one who culpably stands by and allows another to hold himself out to the world as the owner of property, and thereby to sell it to a buyer in good faith, cannot afterwards assert his title against the buyer.*

96.The Court of Appeal in **Pan-Electric Industries Ltd (in liquidation) v Oversea-Chinese Banking Corp Ltd & Anor** [1994] 3 SLR 695 quoted with approval the following passage at para 181 in ***The Law Relating to Estoppel by Representation*** by Spencer and Turner (3rd Ed, 1977):

> *Holding out as agent ...*
>
> *181 The application of the doctrine of estoppel to this species of representation results in the following well-established rule. Where A, by words or act, or by* ***silence or inaction (if there is a duty on him to speak or act)****, represents to B, or to the public or a class of which B is a member, that X is his (A`s) agent, or has his authority, either generally, or for the purposes of a particular transaction or type of business, and B is induced by such representation to alter his position for the worse, A is estopped from afterwards disputing, as against B, that X was invested with such agency or authority at the time at which he was so accredited. Illustrations of the operation of this rule are abundant and can readily be found in eg ... company cases, in*

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> *which the owner of shares or similar securities hands them or other documents of title to a broker together with a transfer executed in blank (for which the following cases were footnoted:* ***Bentinck v London Joint Stock Bank*** *[1893] 2 Ch 120;* ***Fuller v Glyn, Mills, Currie & Co*** *[1914] 2 KB 168, at pp 175-177;* ***London Joint Stock Bank v Simmons*** *[1892] AC 201, HL). [Emphasis added.]*

97.In **Greenwood (Pauper) v Martins Bank Ltd** [1933] AC 51, the essentials for an estoppel by representation were laid down by Lord Tomlin at p 57 as follows:

> *The essential factors giving rise to an estoppel are I think:*
>
> (a) representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made;
>
> (b) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made;
>
> (c) detriment to such person as a consequence of the act or omission.

98.LP Thean JA delivering the judgment of the Court of Appeal in **Fook Gee Finance Co Ltd v Liu Cho Chit and another action** [1998] 2 SLR 121 referred to the English Court of Appeal decision in **Lowe v Lombank Ltd** [1960] 1 All ER 611; 1960] 1 WLR 196, which stipulated the following three requirements for an estoppel by an acknowledgment: (a). the acknowledgment must be clear and unambiguous;

(b). the party acknowledging the fact must have conducted himself such that a reasonable man in the other party`s position would take it to be true and believe that it was meant that he should act on it; and

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(c). the party relying on the acknowledgment made by the other party must in fact have believed it to be true and be induced by such belief to act on it.

99.The representation or acknowledgment giving rise to an estoppel need not be express and may be implied. It may be also be made by conduct, which includes negligence, silence and inaction when there is a duty to speak or to act. Whether it is sufficiently clear, unequivocal and unambiguous must be looked at from the point of view of a reasonable recipient of that representation or acknowledgment having regard to the purpose and context under which it is made, the relationship of the parties and the circumstances in which they find themselves in. Next, that representation or acknowledgment must have induced or caused the other party to act on it or omit to take necessary remedial or protective action, leading to his eventual detriment or prejudice. It is no answer to say that if the recipient had bothered to check it out, he would have discovered or would have known that the representation or acknowledgment must have been untrue or incorrect.

100.It is very much a question of fact to be decided in the particular circumstances of each case whether the plaintiffs have succeeded in establishing on a balance of probability that the defendants are estopped by their conduct in denying the trades in their names.

101.I had imputed to the defendants the knowledge that Shapy was using their accounts to trade. They were content to let Shapy do that. Shapy must have promised them that he would settle those trades of his and they must have thought that they would not be involved. I did not believe that the defendants thought that the company was making so many mistakes.

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102.The defendants` stunning silence after receiving the voluminous contract notes, contra statements, quarterly statements and official receipts relating to trades under their account, which they knew had not been authorised by them, would constitute an estoppel at law which precluded their denial of those trades now. The necessary ingredients for an estoppel as laid down by the above authorities were satisfied on the evidence.

103.By not disputing the trades after receiving the contract notes, the defendants had by their conduct induced the plaintiffs to allow Shapy to continue as their dealer executing the trades in their names, which subsequently led to the huge losses and damage suffered by the plaintiffs. Knowing that Shapy was the one responsible for all the unauthorised trades, the protests to Shapy, even if true, would not, I reiterate, constitute effective notification to the company of those unauthorised trades. Common sense dictated that they should complain to persons in the plaintiffs other than the perpetrator himself. They must be taken to have known that Shapy would not communicate their protestations to the relevant persons-in-charge in the plaintiffs. The defendants` own evidence that they kept on receiving voluminous contract notes despite Shapy`s constant reassurances to them that he would fix the mistakes made in the trades, should have indicated to them that Shapy was not communicating their protestations to the plaintiffs. Hence, the protestations to Shapy could not be deemed to be protestations to the plaintiffs although Shapy might be their common agent. Neither could the knowledge of the perpetrator of the unauthorised trades be deemed to be knowledge of the plaintiffs by virtue of the fact that the perpetrator was employed by the plaintiffs.

104.On the totality of the evidence, I found that the defendants were estopped by their inaction and silence from denying the authority of the trades in their account. On the defendants` own case, they had turned a blind eye to what was

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happening in their accounts and had simply allowed the very unsatisfactory situation to continue. Despite all the contract notes, contra statements and the SES`s quarterly statements and the knowledge that those were Shapy`s trades and not theirs, they were content to let Shapy do whatever he wanted to their accounts and trade in their names. Unfortunately for the defendants, they must be held liable for the losses arising from those trades.

105. ***Estoppel from the terms of the contract***

Further and in the alternative, the defendants were also estopped from denying the authority of their trades by way of the estoppel arising out of the terms of the contract itself. Each contract note has a clause stipulating that:

> *If any of the information stated above is incorrect, please notify immediately and return the contract note for cancellation and claim for refund of stamp duty paid.*

106.Clearly, there would be an obligation on the defendants to notify the plaintiffs of any discrepancies immediately. It must be implied from the above clause that if no objections were made by the defendants, the plaintiffs would be contractually entitled to assume that the trades were in order and have been duly authorised.

107. ***Was the estoppel being used as a cause of action?***

The oft-quoted maxim that `estoppel may be used as a shield but not a sword` did not necessarily mean that the plaintiffs could never have recourse to it. The true nature of the doctrine was stated by Lord Russell of Killowen in ***Dawsons Bank v Nippon Menkwa Kabushiki Kaisha*** LR 62 Ind App 100 as follows:

> *Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the*

> *cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.*

108.Thus, a plaintiff would be able to employ the doctrine of estoppel as a shield to protect his cause of action from destruction by the evidence which the defendant might otherwise have been able to rely on.

109. ***Affirmation of contract due to unreasonable delay in notification***

Unreasonable delay in notification may also result in the defendants being prevented from disaffirming the contracts on the ground of fraud: **Tan Hood Keng v Aroonasalam Chetty** [1934] MLJ 166 . Delvin J in **Kwei Tek Chao v British Traders and Shippers Ltd** [1954] 2 QB 459 followed the test laid down in **Clough v London & North Western Rly** [1871] LR 7 Exch 26:

> *... we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. ... We think that so long as he has made no election he retains the right to determine it either way. ...* ***And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined****. [Emphasis added.]*

110.In dealing with the facts in that case, Delvin J went on to say:

> *In all the circumstances of the present case, having regard to the fact that the goods had been dealt with, and if anything was to be made of them at all they would have to be marketed and markets might be falling and changing, the lapse of time, which amounts to nearly 15 months, is so great as to be conclusive,* ***even if fraud were proved****, that an election had been made to affirm the contract. [Emphasis added.]*

111.In the circumstances of this case, even after the defendants discovered that the contracts were not made by them, no notification to the plaintiffs was forthcoming. It was only after legal proceedings were commenced against the

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defendants that they decided to refute the trades in their respective accounts. As the delay was so long, I could find no good grounds to allow the defendants to disaffirm the contracts made in their names, even if it were true that they were misled by Shapy into believing that the notes were all a big mistake on the part of the plaintiffs, which thus caused them to be lackadaisical in notifying the plaintiffs of the discrepancies or mistakes in the contract notes.

112.Obviously, the system of immediate notification would be instrumental to combat fraud. It serves to protect both the interests of the clients and the plaintiffs. Where the opportunities and avenues for fraud exist, all contractual parties have to fulfil their notification obligations so that the system designed to combat fraud will be able to operate effectively. Anyone ignoring their part of the responsibility would do so at their own peril. This would accord with the broad general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it: **Lickbarrow v Mason** [1787] 2 Term Rep 63.

113.If the defendants did not wish to have this contractual notification obligation, then they should inform the plaintiffs and the plaintiffs would then have to consider if they would want to operate on a new and different contractual relationship, where the defendants would be free of such an obligation. Not having objected to this contractual obligation, it was too late now in my opinion for the defendants to say that they did not have such an obligation.

114. ***Conclusion***

For the reasons given, I allowed the plaintiffs` claims in the three separate suits against the defendants with costs.

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115.By virtue of cll 4 and 7 of the plaintiffs` terms and conditions for operating the trading accounts, the defendants had agreed to pay late payment charges at the plaintiffs` prevailing rate on all outstanding amounts not paid within five days of the due state specified. This included contra losses. The defendants undertook to pay all fees, charges, commissions, service fees and duties and all outstanding amounts relating to the transactions in their trading accounts, including all legal fees and disbursements incurred by the plaintiffs on a solicitor and client basis in the enforcement of their obligations and liabilities.

116.Accordingly, I gave judgment for the full amounts claimed by the plaintiffs. Costs were awarded on a solicitor and client basis as these had been contractually provided for. However, I only allowed interest computed until payment at 8% pa for the judgment sums in MR and 6% pa for the judgment sums in S$ instead of the 11% pa contractual interest rate prayed for.

Chan Seng Onn JC

Andrew Ong and Habib Anwar (Rajah & Tann) for the plaintiffs
Rey Foo (KS Chia Gurdeep & Param) for the defendants in Suit Nos 1362 and 1363 of 1997
Khoo Guan Chuan (Khoo Aeria & Partners) for the defendant in Suit No 1364 of 1997

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