Jurong Shipyard Pte Ltd v BNP Paribas
[2008] SGHC 86

Case Number : OS 1727/2007

Decision Date : 06 June 2008

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Davinder Singh SC, Hing Shan Shan Blossom, Lim Pei Hoon Joan, Lin Yan Yan (Drew & Napier LLC) for the plaintiff; Sundaresh Menon SC, Kam Su Cheun Aurill, Sim Jek Sok Disa, Tammy Low Wan Jun (Rajah & Tann) for the defendant

Parties : Jurong Shipyard Pte Ltd — BNP Paribas

Agency – Third party and principal's relations – Contractual relations – Agent of company entering into alleged unauthorised transactions with bank – Bank having actual or constructive notice of agent's lack of authority – Bank colluding with agent – Whether company liable in respect of unauthorised transactions

Civil Procedure – Originating processes – Hearsay evidence by affidavit – Originating summons for injunction against winding up – Whether originating summons qualifies as interlocutory proceeding under O 41 r 5 Rules of Court (Cap 322, R 5, 2006 Rev Ed) – Whether hearsay evidence admissible

Contract – Contractual terms – Contractual estoppel – Representations made in Master Agreement that transactions entered into with proper authority – Third party having actual or constructive notice of agent's lack of authority – Third party colluding with agent – Whether representing party contractually estopped

Insolvency Law – Winding up – Agent of company entering into alleged unauthorised transactions with bank – Bank issuing statutory demand against company for alleged debt – Company denying liability – Use of winding-up process to recover a disputed debt – Company seeking injunction to restrain winding up pursuant to statutory demand – Test for granting injunction – Whether injunction should be granted

6 June 2008 Judgment reserved.

Lee Seiu Kin J:

1 Jurong Shipyard Pte Ltd ("JSPL") is a company incorporated in Singapore. It has been in the marine engineering business for four decades. In or around 2002, it ventured into rig building and this aspect of JSPL's business expanded rapidly. Today, JSPL is a renowned "one-stop" shipyard, offering a comprehensive range of services in ship repair, shipbuilding, ship conversion, rig building and offshore engineering, and employing almost 2000 workers. Rig building represents a substantial part of JSPL's business. Its immediate holding company is SembCorp Marine Ltd ("SCM"), a leading global marine engineering group.

2 BNP Paribas ("BNPP") is one of the world's largest international banking networks with a strong position in Asia and a significant presence in the United States. In 2007, it was sixth in the banking industry and first out of the French companies in the Forbes Global 2000 rankings.

3 On 23 November 2007, JSPL took out the present originating summons No 1727 of 2007 ("the present originating summons") for an injunction to restrain BNPP from commencing winding-up proceedings subsequent to a statutory demand by BNPP for US$50,723,070 ("the alleged debt"), dated 20 November 2007.

Interlocutory applications

4 On 23 and 26 November 2007, I heard an opposed *ex parte* application in Summons No 5245 of 2007 for BNPP to be restrained from presenting any summons or other application for the winding up of JSPL based on the statutory demand. This application was settled by BNPP's undertaking not to present any winding-up petition until the disposal of the originating summons or until further order of the court.

5 From 4 to 6 February 2008, I heard three applications regarding the admission of various affidavits: Summons No 329 of 2008 ("SUM 329/2008"); Summons No 294 of 2008 ("SUM 294/2008"); and Summons No 5493 of 2007 ("SUM 5493/2007").

6 In SUM 329/2008 JSPL sought, *inter alia*, that "leave be granted to [JSPL] to file the fourth affidavit of Heinz Riehl and the sixth affidavit of Tan Cheng Tat" ("prayer 1"). Heinz Riehl is an expert witness for JSPL and his affidavit exhibited signed copies of an expert report and supplemental expert report that had been annexed to his earlier affidavits but not signed due to an oversight. Tan Cheng Tat is the financial controller of JSPL and his affidavit exhibited a press report which was published after JSPL's affidavits were filed on 4 January 2008. BNPP did not object to the application and I gave an order in the terms of prayer 1.

7 In SUM 5493/2007, BNPP sought, *inter alia*, to expunge and strike out certain paragraphs and exhibits in the affidavit of Tan Kwi Kin (a director of JSPL) filed on 23 November 2007 on the grounds that they are scandalous, irrelevant and/or otherwise oppressive ("prayer 1"); to expunge and strike out certain paragraphs in the affidavit of Tan Cheng Tat filed on 23 November 2007 on the same grounds ("prayer 2"); as well as to expunge and strike out certain paragraphs and/or words in the affidavit of Tan Cheng Tat filed on 4 December 2007, again on the grounds that they are scandalous, irrelevant and/or otherwise oppressive ("prayer 3"). The evidence sought to be struck out broadly pertained to negotiations between the parties on the procedure to be used for the close-out on 31 October 2007 (see [24] and [25] below) and drafts of an agreement to be exchanged and executed by the parties in respect of this procedure ("the Close-out Agreement": see [25] below), as well as the fact that BNPP had heard in the market that another bank, Societe Generale ("SG"), had received a conditional payment from JSPL and that a "without prejudice" meeting between BNPP and JSPL had been held. BNPP submitted that the evidence pertained to privileged discussions that were expressly stated to be made without prejudice. JSPL submitted that the evidence was admissible to show a collateral contract that JSPL would only pay after BNPP had brought an action and obtained judgment against it for the alleged debt; that BNPP was estopped from claiming privilege as it had represented to JSPL that it would not need to make an upfront payment of the alleged debt, which induced JSPL to enter into the Close-out Agreement; that the evidence was relevant for the purposes of rectification, if the court should find that the Close-out Agreement did not require JSPL to make such an upfront payment; and that the evidence was admissible if the court should find that the Close-out Agreement was ambiguous on this issue. I accepted JSPL's submissions in respect of collateral contract and estoppel and declined to strike out the evidence relevant for the purposes of those arguments. Accordingly, I granted an order in terms of prayer 1 only in respect of para 90 of Tan Kwi Kin's affidavit (pertaining to the conditional payment to SG) and exhibits at pages 130 and 132 (pertaining to the without prejudice meeting), and dismissed prayer 1 in respect of the other evidence; I also dismissed prayers 2 and 3.

8 In SUM 294/2008, BNPP sought, *inter alia*, to expunge and strike out from the court records the affidavit of Ajaib Haridass (a director of SCM and also a member of its Audit Committee and Chairman of the Board Risk Committee) and certain parts of the fourth affidavit of Tan Cheng Tat as well as the second affidavit of Tan Kwi Kin, both filed on 4 January 2008 ("prayer 1") which broadly pertained to

negotiations between JSPL and BNNP leading up to the close-out on 31 October 2007 (see [24] and [25] below). This was on the grounds that they are scandalous, irrelevant and/or otherwise oppressive. BNPP also sought leave to file an affidavit in response to certain parts of the second affidavit of Tan Kwi Kin, the second affidavit of Lee Yeok Hoon, the second affidavit of Wong Weng Sun, the second affidavit of Yu Ching Ong (all directors of JSPL) and the affidavit of Tan Boon Hoo (an expert witness for JSPL), all filed on 4 January 2008 ("prayer 2") which pertained to an alleged BNPP suspense account (or sundry account) in which there was a credit standing in JSPL's name: see [45] below. As an alternative to prayer 2, in the event that leave was not granted to file an affidavit in response as prayed for in prayer 2, BNPP sought for the parts of the affidavits enumerated in prayer 2 to be expunged and struck out from the court records on the grounds that they are scandalous, irrelevant and/or otherwise oppressive ("prayer 3"). JSPL's submissions were the same as for SUM 5493/2007. It had no objection to prayer 2 but sought the leave of court to reply to BNPP's reply affidavit. For the same reasons as for SUM 5493/2007, I dismissed prayer 1. I granted an order in terms of prayer 2, with no further order as to JSPL's application to file a further reply. No order was given in respect of prayer 3.

9 I now turn to the background of the present originating summons.

Background facts

JSPL's forex transactions with BNPP

The facility letters

10 Under the charge of its then-Chief Financial Officer, Wee Sing Guan ("Wee"), JSPL started forex hedging activities in 2002 in line with the expansion of its rig-building business. As most of the rig-building contracts were denominated in US dollars ("USD"), JSPL's primary foreign currency inflows or receivables were denominated in USD (and this remains the situation today). JSPL also had some foreign currency inflows or receivables in Euro. On the other hand, most of JSPL's expenses were in Singapore dollars ("SGD"), USD, Japanese Yen ("JPY") and some Euro. Thus, the net USD foreign currency exposure was and is the largest financial risk that JSPL faces.

11 In order to hedge this risk, JSPL entered into forex transactions with a number of banks, including BNPP. It is not in dispute that BNPP and JSPL entered into various facility letters pursuant to which BNPP extended credit facilities to JSPL in relation to these forex transactions. JSPL has produced copies of several of these facility letters ("the facility letters"):

(a) A facility letter dated 9 October 2002, which began:

> We are pleased to inform you that BNP Paribas, Singapore Branch (the "Bank") has agreed to make available to Jurong Shipyard Pte Ltd (hereinafter referred to as "the Counter-Party") an uncommitted forward exchange facility *that shall be used for your hedging requirements* subject to the conditions stated herein and also the Standard Terms and Conditions Governing Bank Facilities…annexed thereto.
>
> [emphasis added]

(b) A facility letter between JSPL and BNPP dated 26 August 2003 ("the 26 August 2003 facility letter") which provided credit lines for uncommitted forward foreign exchange and uncommitted foreign exchange options, and stated that "[t]he Facilities shall be used for hedging purposes".

(c) A facility letter between JSPL and BNPP dated on 26 July 2004 ("the 26 July 2004 facility letter") which provided a $25m multicurrency line for a short term loan and/or banker's guarantee, as well as lines of credit for uncommitted forward foreign exchange, an uncommitted foreign exchange option and an uncommitted interest rate swap. The 26 July 2004 facility letter contained a purpose clause which stated:

> PURPOSE
>
> (a) The Short Term Loan Facility shall be used solely to finance the Borrower's working capital requirements.
>
> (b) *The Forward Foreign Exchange Facility and Foreign Currency Option Facility shall be used for hedging the Borrower's foreign exchange exposure only*.
>
> (c) The Interest Rate Swap Facility shall be used for hedging the Borrower's interest rate exposure on its medium term loan(s) ("MTLs").
>
> [emphasis added]

(d) A letter from BNPP dated 19 September 2005 which amended the terms of the 26 July 2004 facility letter such that the maximum tenor of forex options was extended to 12 months. Some of the standard terms and conditions were also amended. However, it was not disputed that there was no amendment to the purpose of the facilities as stated above.

It can be seen therefore that each of the facility letters contained a provision that the facilities would be used for hedging.

The 1 November 2004 resolution and the Master Agreement

12 Some time after the 26 August 2003 facility letter, BNPP and JSPL commenced negotiations on an International Swap Dealers Association ("ISDA") Master Agreement. An ISDA Master Agreement is an international standard form agreement of the ISDA, used by derivative market participants. As a matter of convention, where variations are negotiated and agreed between parties, these variations are encapsulated in a schedule which would then be read together with the ISDA Master Agreement.

13 For the purposes of entering into the proposed ISDA Master Agreement, BNPP required a board resolution of JSPL authorising the execution of the ISDA Master Agreement and approving the entry into forex transactions under the ISDA Master Agreement. On 23 July 2004, one Saniza Othman from BNPP's documentation department sent an e-mail to Hardy Saat, a former officer with BNPP's fixed income division who was acting as a go-between for BNPP and JSPL, attaching a draft ISDA schedule. Part 3(b) of this schedule stipulated that a board resolution of JSPL "in a form acceptable to [BNPP]" should be furnished to BNPP. Sample forms were attached as Exhibits Ia and Ib. From the e-mail communications between Saniza Othman and Hardy Saat, it appears that although JSPL initially requested that the board resolution be in the form of Exhibit Ib, BNPP clarified that the correct form of the board resolution to use was Exhibit Ia and JSPL ultimately acquiesced to this.

14 Thus, on 1 November 2004, a JSPL board resolution ("the 1 November 2004 resolution") was passed, which read:

> **1992 ISDA MASTER AGREEMENT**

IT WAS RESOLVED THAT:

1 The Company enters into the 1992 ISDA Master Agreement (Multicurrency-Cross Border) with BNP Paribas ("the Agreement"), a copy of which together with its Schedule is annexed hereto. BNP Paribas may, as its dole [*sic*] discretion, allow the Company to enter into Transactions (as defined in the Agreement) under the terms of the Agreement.

2 It is in the interests of the Company to enter into the Agreement and the Transactions.

3 The Company has full authority and capacity to enter into such Transactions from time to time for the purpose of hedging or on a speculative basis.

4 The terms and conditions of the Agreement be and are hereby approved and Mr Yu Ching Ong and Mr Wee Sing Guan are hereby authorized to sign the Agreement.

5 That any one of the following persons ("Authorised Signatories") be the persons authorized and empowered to execute and deliver confirmations of any Transactions entered into pursuant to the Agreement, on behalf of the Company.

Wong Weng Sun

Yu Ching Ong

Wee Sing Guan

Lee Yeok Hoon

15 The 1 November 2004 resolution was duly signed by JSPL's directors, namely Tan Kwi Kin, Yu Ching Ong, Heng Chiang Gnee, Wong Weng Sun and Lee Yeok Hoon. The proposed ISDA Master Agreement was then executed by Wee and Yu Ching Ong on the same day and, after the 1 November 2004 resolution was furnished to BNPP, executed by BNPP's authorised signatories on BNPP's behalf on 3 January 2005 ("the Master Agreement"). According to BNPP, in accordance with the convention for ISDA documentation, the Master Agreement was dated "as of" an earlier date of 29 April 2004 to ensure that it would extend to the earliest dated derivative transaction which was still outstanding at the date of execution of the Master Agreement.

The transactions under the Master Agreement

16 Pursuant to the 1 November 2004 resolution and the Master Agreement, Wee entered into various forex transactions with BNPP. For each transaction, Wee would execute a trade confirmation. It should be noted that according to Clause 1(c) of the Master Agreement, each of these transactions were entered into on the basis that these trade confirmations and the Master Agreement formed a single agreement between JSPL and BNPP and that the parties would not otherwise enter into any transactions. Furthermore, some of these trade confirmations expressly incorporated a provision stating:

This Confirmation supplements, forms part of, and is subject to the ISDA Master Agreement dated as of 29 April 2004 as amended and supplemented from time to time (the "Agreement") between [BNPP] and [JSPL]. All provisions contained in the Agreement shall govern this Confirmation except as expressively modified herein.

17 The transactions entered into by Wee in 2006 and 2007 ("the Alleged Unauthorised Transactions") included exotic instruments called "extendable snowball deliverable forwards", "target redemption forward strips" and "target dragon knock-out forwards". In these transactions there were also various knock-out features at various prices, as well as straddles and strangles. By October 2007, the losses accumulated as a result of transactions confirmed by Wee with BNPP amounted to some US$50 million, out of which US$49 million was caused by a single pair of USD/Euro "snowball" transactions ("the Key Transactions").

Discovery of Alleged Unauthorised Transactions

18 In or around October 2007, JSPL discovered that substantial losses had been incurred purportedly on its account, as a result of what they claim were unauthorised transactions confirmed by Wee with BNPP, including the Key Transactions. The discovery was made in part due to the fact that Wee had arranged for a payment of US$83 million to be made to SG, with whom Wee had also engaged heavily in alleged unauthorised forex transactions. This payment sparked off a chain of inquiry which eventually led to the discovery of the Alleged Unauthorised Transactions with BNPP.

19 Shortly thereafter, JSPL and SCM appointed Drew & Napier LLC ("D&N") jointly with Ernst & Young ("E&Y") to investigate the Alleged Unauthorised Transactions, their nature and the full circumstances under which they came to be transacted and to work with a special committee of the SCM Board.

20 On 22 October 2007, SCM announced *inter alia* that Wee had entered into various unauthorised transactions purportedly for the account of JSPL and had misled JSPL and SCM in relation to these transactions. On the same day (*ie*, 22 October 2007), JSPL sent a letter (signed by Tan Kwi Kin) to each of its bankers, including BNPP, *inter alia* putting them on notice that Wee had been relieved from all his positions in JSPL and that he was not authorised to represent JSPL in any capacity whatsoever. JSPL also revoked all instructions and standing instructions which Wee may have given to the banks in relation to forex transactions which had not yet been concluded or effected. The banks were informed of JSPL's position that Wee had conducted unauthorised trades and the matter was being investigated.

21 On 23 October 2007, JSPL sent a further letter (also signed by Tan Kwi Kin) to each of its bankers, including BNPP, inviting them to close out the outstanding forex transactions but without prejudice to the banks' and JSPL's respective right to maintain their positions as to whether the forex transactions were authorised or not. The letter to BNPP stated:

> We refer to our letter of 22 October 2007.
>
> As you are aware, it is JSPL's position that the foreign exchange transactions purportedly effected by Mr Wee Sing Guan on JSPL's account were unauthorised and are not binding on us.
>
> We understand that you take the position that these transactions are valid and binding on JSPL. We disagree.
>
> It appears to us that it would be in both our interests, pending the resolution by the courts of the issue whether the said transactions are binding on JSPL, to avoid any further deterioration of the positions and to therefore immediately close out all the outstanding said foreign exchange transactions which were effected by Mr Wee purportedly on JSPL's account.
>
> We therefore invite you to agree, without prejudice to our respective positions set out above, to

immediately close out all the said foreign exchange transactions on the basis that the agreement will not under any circumstances be deemed or said to be an adoption or ratification of the said foreign exchange transactions by JSPL and will not affect or in any way derogate from either party's rights and ability to continue to maintain its present position in Court.

The sole purpose of this proposal is to limit the loss to be incurred by whichever party is ultimately held to be liable.

Please let us urgently know whether you agree.

22 On the same day (*ie*, 23 October 2007), BNPP replied to JSPL's letters dated 22 and 23 October 2007, stating *inter alia* that its position was that the transactions were legally valid and binding on JSPL and purporting to agree to close out the outstanding forex transactions, subject to BNPP receiving evidence of Tan Kwi Kin's authority to give "instructions" for a close-out. JSPL replied on 25 October 2007 stating that it had given no such "instructions" and that its letter of 23 October 2007 merely contained the proposal that the parties agree:

[W]ithout prejudice to their respective positions, to immediately close out all the said foreign exchange transactions on the basis that that agreement will not under any circumstances be deemed or said to be an adoption or ratification of the said foreign exchange transactions by JSPL and will not affect or in any way derogate from any party's right and ability to continue to maintain its present position in Court.

23 Also on 25 October 2007, SCM announced, *inter alia* that, in the interests of good corporate governance and to enable SCM and JSPL to obtain legal advice with respect to possible claims against them, as well as any claims by JSPL, it had appointed PricewaterhouseCoopers ("PwC") as independent investigating accountants, to work jointly with D&N to investigate all the unauthorised transactions, their nature and the full circumstances under which they came to be transacted.

The Close-out Agreement and aftermath

24 BNPP and JSPL then began negotiations for the close-out of the outstanding forex transactions between them, including the terms of the Close-out Agreement. On 30 October 2007, BNPP's Tan Eng Cheok outlined the procedure envisaged by BNPP. He stated that once JSPL confirmed to him that JSPL wished to close out all the outstanding trades at a price which he would provide based on the exchange rate at that point in time, he would ask JSPL two questions, both of which its representatives had to answer in the affirmative. The two questions were: whether JSPL confirmed that it wished to close out the outstanding transactions (which were to be listed in the schedule to the Close-out Agreement); and whether JSPL confirmed that there would be a payment by JSPL to BNPP of the sum arising from the close-out on 1 November 2007.

2 5 JSPL's representatives refused to agree to answer the second question in the affirmative and thus the attempt to close out fell through. BNPP's lawyers ("R&T") and D&N then exchanged e-mail through the wee hours of the morning of 31 October 2007, in which D&N clarified and R&T noted that JSPL would not agree to any request for confirmation that there would be payment by a certain date after the close-out. After more negotiations, at or around 12am on the morning of 1 November 2007, the parties executed and exchanged the following Close-out Agreement:

Dear Sirs

FOREIGN EXCHANGE TRANSACTIONS

We refer to the foreign exchange transactions listed in the Schedule attached hereto ("the Transactions"). The parties hereby confirm that the following has been agreed between both parties.

Your position is that the Transactions are authorised and that we are liable for the same under the ISDA Master Agreement made between BNP Paribas and Jurong Shipyard Pte Ltd ("JSPL") dated as of 29 April 2004 ("the Master Agreement"). Our position is that the Transactions are unauthorised and that we are not liable for the same and that we are not bound by the Master Agreement. We have agreed, without prejudice to our and your position, to consensually close out the Transactions in the following manner:

1. Tan Cheng Tat is authorised and will be calling you to give oral instructions for and on behalf of JSPL to terminate all the Transactions;

2. You are authorised to accept all oral instructions from Tan Cheng Tat to terminate the Transactions; and

3. It shall be a condition of your acceptance of such oral instructions to terminate the Transactions that:

(a) your representative and Tan Cheng Tat will, during their telephone conversation, agree on our respective behalves an amount as your net in-the-money value of the Transactions (the "Agreed Value"); and

(b) on and with effect from your acceptance of such oral instructions in such telephone conversations, the Transactions shall be Terminated Transactions for the purposes of the Master Agreement (as if an Early Termination Date had occurred on the date of such telephone conversation and as a result of a Termination Event) provided that:

(i) there shall be no Affected Party or Non Affected Party; and

(ii) in place of the amount to be calculated and stated or notified as contemplated in Sections 6(d) and (e) of the Master Agreement, such amount shall, for all the purposes of the Master Agreement be the Agreed Value, effective as of the date of such telephone conversation.

The instructions in this letter do not constitute ratification or adoption by us of the Transactions and the carrying out by you of these instructions shall not be regarded or deemed by either party as a waiver, release, compromise, abandonment or extinguishment of either party's rights and/or obligations under the Master Agreement and/or at law. These instructions as well as any acts or conduct pursuant to them will not affect or derogate from either party's right and ability to continue to maintain its present position in commencing or defending proceedings in court in the event of non-settlement on the value date or otherwise at law or pursuant to the Master Agreement save that the parties agree that in any such proceedings, no issue shall be raised as to the Agreed Value.

…

26 The Schedule attached to the Close-out Agreement listed the transactions which were to be the subject of close-out ("the outstanding forex transactions"). These comprised 27 spot/outright/FX (*ie*, forex) swap transactions; 14 vanilla FX option transactions; and four FX structured transactions.

One of the four structured transactions was a re-structure of one of the Key Transactions mentioned above: see [17].

27 Tan Cheng Tat and Tan Eng Cheok proceeded to close out the transactions in a telephone conversation. This was followed by an e-mail from Tan Eng Cheok at 1.57am on 1 November 2007 ("the 1.57am e-mail"), stating:

> Dear Cheng Tat and Maureen [another of JSPL's representatives],
>
> as instructed and agreed, all outstanding transactions between Jurong Shipyard Pte Ltd and BNP Paribas have been terminated in accordance with the letter of instructions dated 31 October 2007 [*ie*, the Close-out Agreement] by you to us.
>
> The "Agreed Value" for the termination is USD 50,723,070.
>
> Settlement of the "Agreed Value" will be in accordance with the letter of instructions dated 31 October 2007 *[ie*, the Close-out Agreement] by you to us.

28 Another e-mail from Tan Eng Cheok followed at 2.41pm on the same day (*ie*, 1 November 2007), stating:

> Dear Cheng Tat, Maureen,
>
> following the termination of the transactions below (email [the 1.57 am e-mail] below) please note the following settlement details of BNP Paribas Singapore's USD agent account:
>
> Agreed Value : USD 50,723,070
> Value Date : 05 November 2007
> To : BNP PARIBAS, NEW YORK
> [Bank account details]
>
> Our official confo [*sic*] will follow.

29 Finally, the official confirmation was sent on the same day (*ie*, 1 November 2007) ("the 1 November 2007 confirmation letter"), stating:

> Dear Sirs
>
> TERMINATION OF TRANSACTIONS BETWEEN JURONG SHIPYARD PTE LTD AND BNP PARIBAS
>
> 1. We refer to your instruction letter dated 31 Oct 2007.
>
> 2. Given that the telephone conversation between our representative, Mr Kenneth Tan and your representative, Mr Tan Cheng Tat, took place on 1 November 2007, *the payment date, as determined in accordance with Section 6(d)(ii) of the Master Agreement, for payment of the Agreed Value of USD50,723,070 is 5 November 2007.*
>
> 3. For the purposes of settlement, details of the relevant account of BNP Paribas are as follows: ....
>
> [emphasis added]

30 On 6 November 2007, JSPL responded to the 1 November 2007 confirmation letter and stated:

> 1. We refer to your letter of 1 Nov 2007.
>
> 2. As we have indicated to you in our previous correspondence, JSPL's position is that it is not responsible nor liable for the unauthorised foreign exchange transactions effected by [WSG] purportedly on JSPL's account ("the Transactions"). We are therefore not liable to you for the sum of US$50,723,070.
>
> 3. In any event, there is no basis for you to ask that payment of the sum of US$50,723,070 be made to you before the Court has determined the issue. As our letter of 31 Oct 2007 makes clear, we have mutually agreed, without prejudice to our respective positions, to close out the Transactions so as to crystallise and fix the quantum of the loss and expense falling to the party which is ultimately held to be responsible or liable for the same.
>
> 4. All our rights are fully reserved.

31 On 7 November 2007, BNPP issued a statutory demand pursuant to s 254(2)(a) of the Companies Act (Cap 50, 2006 Rev Ed) to JSPL, for the alleged debt to be paid within 21 days from the date of the statutory demand. This statutory demand was retracted on the same day in view of ongoing discussions between the parties but without prejudice to BNPP's right to issue a fresh statutory demand.

32 On 19 November 2007, SCM announced that it had subscribed for 300 million redeemable preference shares amounting to $300m in the capital of JSPL and that part of the funds from the recapitalisation would be used by JSPL to make an unconditional payment to SG of US$115,450,000. This led to a response from R&T on the same day stating:

> ...
>
> 2. Your clients [*ie*, JSPL] were obliged to pay our clients [*ie*, BNPP], the agreed net value arising from the close out, two local business days after the close out, in accordance with the ISDA Master Agreement entered into between our respective clients and dated as of 29 April 2004.
>
> 3. We have understood your clients' position to be that all the transactions entered into with all bank counterparties are "unauthorised" and hence do not engage your clients' liability. We have further understood this to be a position common to all bank counterparties.
>
> ...
>
> 4. ... [O]ur clients had, at all material times, and continue now, to have a legitimate expectation that they will be treated no less favorably than any other bank counterparty.
>
> ...
>
> 6. In this regard, we note from the 19 November 2007 announcement that payment will be made to one of the bank counterparties today. Our clients welcome this on the basis of the expectation stated above.
>
> ...

8. If, contrary to the impression conveyed by the said statements and announcements, it now emerges that the directors of SCM either did not or could not have believed that the positions of the bank counterparties were common at the time of the 1 Nov 2007 statements, it would follow that the said statements and announcements made on or about 1 Nov 2007 were, at the very least, false and misleading in material respects.

9. Our clients would be surprised if this was found to be the case.

10. In the meantime, our clients continue to reserve all their rights.

33 On 20 November 2007, in an effort to assure BNPP that it would be able to make payment if it was ultimately proved in court that it was liable to pay BNPP the alleged debt, JSPL offered to put an equivalent sum in escrow, making it a condition of the offer of escrow that BNPP would have to commence legal proceedings against JSPL to recover the alleged debt. JSPL gave BNPP up to 23 November 2007 to consider the offer of escrow. BNPP rejected the offer on the same day. On 20 November 2007, BNPP served a fresh statutory demand on JSPL for the alleged debt, which *inter alia* stated:

> We are instructed by our clients that, pursuant to the close out of all outstanding foreign exchange transactions between you and our clients, carried out in accordance with your instruction letter [*ie*, the Close-out Agreement] dated 31 October 2007 to our clients, the sum of USD50,723,070 is due and owing by you to our clients.

On 23 November 2007, JSPL filed the present originating summons.

The applicable law

34 The law regarding the grant of an injunction to restrain a winding-up application is not in dispute. It is well-established that it is an abuse of process for a creditor to try to use the winding-up process to recover a disputed debt and that such an attempt will usually be restrained by the courts. In *Woon's Corporations Law* **(**Walter Woon, LexisNexis 2006), the relevant principles are succinctly laid out at [754], [755]-[800] and [854]:

> [754]
>
> **S254(2)(a) disputed debts** A company has not 'neglected to pay' the debt if the debt is disputed on substantial rounds: Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd [1985] 1 MLJ 84 (High Court, Malaysia). Where a creditor becomes aware that a debt is bona fide disputed, he should file an action, obtain judgment and then make a winding-up application….A winding-up application is not an appropriate means of collecting a disputed debt. It must not be used to bring improper pressure to bear on a company. The proper course is to have the matter adjudicated upon in an action for a debt.
>
> [755]-[800]
>
> **Abuse of process by filing application to enforce debt** A winding-up application instituted for the purpose of enforcing a disputed debt is an abuse of process of the Court and will be dismissed with costs: Re Ban Hong Co Ltd [1959] MLJ 100; Re Mechanised Construction Pte Ltd [1989] 3 MLJ 9, 12. See also Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd [1986] 1 CLJ 493 where the petition was dismissed with costs as it was not a bona fide attempt to obtain the relief sought but was for the collateral purpose of embarrassing the defendant."

[854]

Injunctions to restrain the making of an application, etc A winding up application may damage a solvent company's reputation and the Court may order an injunction, stay or dismiss the proceedings if it is not satisfied as to the bona fides of the application: Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58. A respondent company may apply for an injunction even before the winding-up application is made, if it receives a statutory demand for payment that it disputes: Instrumech Engineering Sdn Bhd v Sensorlink Sdn Bhd [2001] 1 MLJ 127 (High Court, Malaysia); Dynaworth Shipping Sdn Bhd v Ling Chung Ann [2001] 3 MLJ 399 (High Court, Malaysia); Malayan Resources Corp Bhd v Juranas Sdn Bhd [2002] 3 MLJ 169 (High Court, Malaysia)

35 Both parties accepted the authority of *Pacific Recreation Pte Ltd v S Y Technology Inc and Anor Appeal* [2008] SGCA 1 ("*Pacific Recreation*") (though it should be noted that in that case the application for winding up had already been made; still, the principles apply). In that case, the Court of Appeal agreed with the following statement of principle by the appellants (at [16]):

> The appellants argued that the learned judge had wrongly applied the discretionary principles relevant to the granting of a winding-up order. *Case law, they argued, had clearly established that a winding-up petition was not an appropriate means of enforcing a disputed debt, and that it would be an abuse of the process of the Court to allow a creditor to wind up a company on the basis of a disputed debt.* It was also submitted that a winding-up Court was generally not in the best position to adjudicate on the merits of a commercial dispute without a proper ventilation of the evidential disputes through a trial. The appellants further stressed that a winding-up order was often the "death knell" for a company and was a "draconian order" to make. Thus, a Court should proceed cautiously in deciding whether to grant a winding-up application."
>
> [emphasis added]

36 The threshold test for determining the existence of a substantial and *bona fide* dispute is that of a *prima facie* case. In other words, the applicable standard is no more than that for resisting a summary judgment application, *ie*, the alleged debtor-company need only raise triable issues. In *Pacific Recreation*, the Court of Appeal confirmed (at [23]) that:

> With regard to the applicable standard for determining the existence of a substantial and *bona fide* dispute, it was our view that the applicable standard was no more than that for resisting a summary judgment application, *ie*, the debtor-company need only raise triable issues in order to obtain a stay or dismissal of the winding-up application.

37 Several other principles should be borne in mind. First, a company cannot merely assert that there is a substantial and *bona fide* dispute but rather must adduce evidence in support of it. As the Court of Appeal stated in *Pacific Recreation* at [17]:

> [A] company [cannot] stave off a winding-up application merely by alleging that there is a substantial and *bona fide* dispute over the debt claimed by the applicant-creditor. It is up to the court to evaluate whatever evidence the company has raised and come to a conclusion on whether the alleged dispute exists.

Similarly, at [19]:

> We also found the following passage from Andrew R Keay, *McPherson's Law of Company*

Liquidation (Sweet & Maxwell, 2001) at para 3.67, p 122 helpful:

> Whether or not there is a dispute on substantial grounds is a matter to be decided in each case. The dispute envisaged is one where there is a dispute which involves to a substantial extent disputed questions of fact which demand *viva voce* evidence. Of course, there must be evidence adduced which supports the contention of the company that there is a substantial dispute. The courts will be alive to the situation where a company seeks to raise a cloud of objections to a petition in order to claim that a debt is disputed if the objections are not able to be determined on affidavit evidence and without cross-examination.

38 Secondly, there is no obvious dividing line demarcating when a court has moved from merely asking itself whether a substantial and *bona fide* dispute exists to actually deciding the dispute itself: *Pacific Recreation* at [20]. There the Court of Appeal at [20] referred approvingly to the following passage in *Brinds Ltd v Offshore Oil NL (No 3)* (1985) 10 ACLR 419 ("*Brinds*") at 424:

> It seems to me that in every case it becomes necessary for the court to exercise its discretion as to how far it will allow the question whether or not the dispute is *bona fide* to be explored. In some cases it may be very easy to decide this question on the petition and affidavits in reply. In other cases however it may be difficult to determine whether or not the dispute is *bona fide* without determining the merits of the dispute itself. In some such cases convenience may require that the court decide the question whether or not a debt exists, but in other such cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard.

3 9 *Pacific Recreation* is a useful example of how these principles apply in practice. In that case, the respondent applied to wind up the appellant companies for failure to comply with statutory demands. The debt in the statutory demands arose out of financing arrangements which were based on various agreements entered into amongst the parties and the appellant's managing director. One of the material documents was a deed of indemnity which did not contain a clause on the governing law. After the statutory demands had been issued, arbitration proceedings were initiated by the appellant's managing director. The appellant argued that the outcome of the arbitration would have an impact on its liability under the deed of indemnity and that it was therefore premature and inappropriate for the respondent to pursue its purported claim under the deed until after the arbitration had been resolved. The High Court did not agree with the appellants that there was a substantial and *bona fide* dispute as to whether it was liable to pay the respondent the amount demanded and ordered the immediate winding up of the appellant. The Court of Appeal dismissed the appeal. The appellant had failed even to satisfy the low threshold test of a *prima facie* case that a dispute existed. This was because the only substantial question was whether the governing law of the deed of indemnity was Chinese law or Singapore law. This was simply a matter of construing the relevant documents which were before the learned judge. The court held that as further evidence, apart from the documents themselves, would not have assisted the court, it was in all the circumstances appropriate that the judge, having heard arguments from both sides on the applicable governing law, then proceeded to decide the issue.

40 I now turn to the parties' submissions.

The parties' submissions

In respect of the Master Agreement

41 JSPL argued that there are triable issues in respect of its obligation to pay the alleged debt under the Master Agreement. In particular, it highlighted various documents (*viz*, SCM annual reports,

JSPL's financial statements and the facility letters referred to in [11] above) evincing JSPL's and SCM's policy of limiting forex transactions to hedging and argued that further inquiry was needed into the circumstances under which, in spite of BNPP's awareness of this policy, the final form of the 1 November 2004 resolution authorising JSPL to enter into the Master Agreement and carry out forex transactions "for the purpose of hedging or on speculative basis" was decided upon.

42 JSPL further submitted that, even if the 1 November 2004 resolution is proper and binding on its face, it does not cover the Key Transactions as "speculative" transactions do not encompass exotic instruments. Thus, even at this stage, a triable issue arises as to whether the Key Transactions are covered by the terms of the 1 November 2004 resolution. More importantly, the Key Transactions are not binding on JSPL because BNPP knew or ought to have known that Wee did not have authority to enter into those specific transactions. JSPL painted two scenarios: at best, there were circumstances that put BNPP on actual or constructive notice that Wee did not have authority for such transactions; at worst, BNPP's officers were colluding with Wee to carry out transactions beyond the scope of his authority.

43 As evidence of these dual scenarios, JSPL relied firstly on the fact of the exotic or even "toxic" nature of the Alleged Unauthorised Transactions. As evidence of their "toxicity", JSPL pointed to the fact that almost the entirety of the alleged debt was incurred as a result of the Key Transactions. JSPL also relied on Heinz Riehl's evidence that the Alleged Unauthorised Transactions basically allowed Wee to temporarily cover up losses on unauthorised speculative trades by the sale of a deep in-the-money option to BNPP for a large up-front option premium in cash. If market conditions did not change, the sale of the deep in-the-money option would at maturity cause an additional loss to JSPL, on top of the losses from the speculative "long" position maintained. JSPL argued that BNPP must either have encouraged Wee to enter into these exotic transactions in order to capitalise on the fact that he was effectively a "captive customer" so as to earn higher profit margins, or that the nature of these exotic transactions should have put BNPP on notice of Wee's lack of authority to enter into them.

44 Secondly, JSPL relied on what they deposed was Wee's unsigned statement (see details below in [62] *et seq*), in which he asserted that the Alleged Unauthorised Transactions (see [17] above) were offered by BNPP's officers (including Hardy Saat and Tan Eng Cheok) when he indicated, as far back as 2006, that he did not want to pay cash on the close-out of a loss-making forex transaction but desired to defer the loss instead. The statement details various meetings between himself and BNPP's officers, including one on 12 September 2007 in which Tan Eng Cheok persuaded him to switch from an existing JPY/USD structure into the pair of "snowball" transactions which ultimately accounted for the loss leading to the alleged debt (see [17] above).

45 JSPL also relied on the existence of a suspense account ("the suspense account") of which JSPL apparently only became aware on 29 October 2007 when BNPP e-mailed a marked-to-market ("MTM") statement (as at 26 October 2007) to JSPL which included the following statement:

> NOTE: We note that there is a balance of SGD513,469.61 currently standing to the credit of the suspense account held in your name "Jurong Shipyard Pte Ltd."

JSPL submitted that there was no directors' resolution in respect of the opening of the suspense account and BNPP did not disclose its existence to JSPL's external auditors. It argued that through the suspense account, BNPP provided Wee with a place to park the funds from his unauthorised trading activities without being detected.

46 JSPL further argued that there is evidence from various documents to show that BNPP worked

with Wee to tailor the information and documents to be provided to the external auditors by sending information to Wee for his review before sending the information to the external auditors. Those documents show that Wee was giving instructions to BNPP as to the type of information to be given to the external auditors. In this regard, he instructed BNPP not to provide MTM information to the external auditors for the purposes of the 2006 audit confirmation process but to give only notional values instead. These notional amounts showed only the face value of the transactions but were meaningless as they did not show how much profit or loss had been made or incurred at that particular point of time. (In contrast, a MTM valuation of a portfolio gives an indication of the fair value price of that portfolio if all the outstanding transactions were closed out at the market spot/forward/option pricing rates at that point in time.)

47 JSPL also highlighted the backdating of the Master Agreement and argued that BNPP's own evidence (see [15] above) showed that this was done to cover up speculative trades that Wee had entered into with BNPP prior to the 1 November 2004 resolution. JSPL referred me to an e-mail dated 31 August 2004 in which Saniza Othman wrote to Hardy Saat:

> Re: PROPOSED ISDA MASTER AGREEMENT BETWEEN BNP PARIBAS AND JURONG SHIPYARD PTE LTD
>
> ...
>
> Please be reminded that this has been placed this [*sic*] as a prioirty [*sic*] one file upon business' [*sic*] request so I would be grateful for your assistance in finalising ISDA negotiations asap.

JSPL argued that this showed that BNPP was in a rush to finalise the Master Agreement because there were ongoing unauthorised speculative trades. I was also referred to an e-mail dated 12 October 2004 from Saniza Othman to Hardy Saat and Lisa Chang which stated: "Lisa. Please advise what the earliest trade date is for this name [*ie*, JSPL]." JSPL argued that the reason BNPP wanted this information was because it wanted to backdate the Master Agreement to cover that date.

48 JSPL submitted that the Key Transactions were of such an exotic nature (see [43] above) that BNPP could not reasonably have believed that they were either in the commercial interests of the company or that the company could have understood those transactions. BNPP had a duty to raise this with JSPL's senior management. JSPL argued that the fact that BNPP failed to do so raised a triable issue in respect of whether the Key Transactions were binding upon JSPL.

49 BNPP submitted that the argument that Wee did not have authority to enter into the Key Transactions cannot stand. BNPP argued that the present case is one where the actual and apparent authority of Wee to transact on behalf of BNPP coincided. The 1 November 2004 resolution embodied the actual authority conferred on Wee (among others) in relation to his capacity to transact with BNPP on behalf of JSPL. This was the same document given by JSPL to BNPP which contained the representation JSPL gave to BNPP as to Wee's authority. At all material times, this was the only document or instrument that embodied Wee's authority to transact on JSPL's behalf with BNPP. BNPP submitted that the terms of the 1 November 2004 resolution are indubitably clear. Wee was authorised to enter on behalf of JSPL into any forex transactions pursuant to the Master Agreement and this expressly included transactions entered into both "for the purpose of hedging and on a speculative basis". Each of the confirmations for the forex transactions entered into by Wee form a single agreement with the Master Agreement: see [16] above. R&T submitted that JSPL is accordingly bound by each of these transactions.

50 BNPP also rejected JSPL's submission that, even if accepted on its face, the terms of the 1 November 2004 resolution cannot be relied upon where the transactions are alleged to be highly toxic or exotic. BNPP contended that JSPL is contractually estopped by the representations in the Master Agreement from arguing *inter alia* that:

(a) The terms of the 1 November 2004 resolution were untrue, incomplete or inaccurate or otherwise varied or qualified in any way by any other document;

(b) BNPP had any duty to inquire into the purposes for which JSPL was entering into the Alleged Unauthorised Transactions and whether they were appropriate or proper for JSPL; and

(c) The Master Agreement or any of the Alleged Unauthorised Transactions were entered into without proper authority or that JSPL had not taken all necessary action to authorise the execution or performance of the Master Agreement and the transactions taking place thereunder.

51 BNPP's main arguments were: first, s 4(a)(ii) of the Master Agreement read with Part 3(b) of the schedule preclude JSPL from denying the truth, completeness or accuracy of the 1 November 2004 resolution. Section 4(a)(ii) of the Master Agreement provides that:

Each party agrees with the other that, so long as either party has or may have any obligation under this Agreement or under any Credit Support Document to which it is a party…[i]t will deliver to the other party…any other documents specified in the Schedule or any Confirmation.

Turning to Part 3(b) of the Schedule, it specifies as one of the documents to be delivered by "Party B" (*ie*, JSPL) a "Board resolution of Party B authorising the execution of this Agreement and approving the entering into of the Transactions hereunder in a form acceptable to Party A [*ie*, BNPP]". It is expressly stated in Part 3 of the Schedule that the said board resolution would be "covered by Section 3(d) Representation"; and under section 3(d), JSPL is taken to have represented to BNPP on each date on which each of the transactions under the Master Agreement is entered into, that the information in the 1 November 2004 resolution is "true, accurate and complete in every material respect".

52 Secondly, BNPP referred me to the representations in Part 5(e) of the schedule to the Master Agreement. The relevant parts read:

(e) Representations. Each party will be deemed to represent to the other party on the date on which it enters into a Transaction that (absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary for that Transaction):

(i) **Non-Reliance**. It is acting for its own account and *it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper* for it is [*sic*] based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanations related to the terms and conditions of a Transaction shall not be considered investment advice or a recommendation to enter into that Transaction. It has not received from the other party any assurance or guarantee as to the expected results of the Transaction.

(ii) **Evaluations and Understanding.** It is *capable of evaluating and understanding (on its own behalf or through independent professional advice), and understands and accepts the terms,*

conditions and risks of that Transaction. It is also *capable of assuming, and assumes, the financial and other risks of that Transaction.*

(iii) **Status of Parties.** The other party is not acting as a fiduciary or an adviser for it in respect of that Transaction.

(iv) **Acting as Principal.** It is acting as principal and not as agent or in any other capacity, fiduciary or otherwise.

[emphases added]

BNPP submitted that any assertion by JSPL as to the unsuitability of the Alleged Unauthorised Transactions should be examined in the light of these representations. On a plain reading of these provisions, JSPL represented and agreed on each of the dates that it entered into the Alleged Unauthorised Transactions that:

(a) BNPP owed it no duties, whether as a fiduciary or as an advisor to it, as JSPL expressly represented that BNPP was not acting as a fiduciary or an advisor;

(b) JSPL was capable of evaluating and understanding the terms, conditions and risks of each transaction;

(c) JSPL cannot and would not assert that it did not understand and accept (or was not capable of understanding) the terms, conditions and other risks of each transaction;

(d) JSPL was capable of assuming and did in fact assume the financial and other risks of each transaction;

(e) JSPL made its own decision to enter into each transaction;

(f) JSPL made its own decision as to the appropriateness or propriety of each transaction; and

(g) JSPL did not rely on any communication of any sort from BNPP.

53 BNPP also relied on s 3(a)(ii) of the Master Agreement:

3. Representations

Each party represents to the other party (which representations shall be deemed to be repeated by each party on each date on which a Transaction is entered into…) that:

(a) ***Basic Representations.***

…

(ii) ***Powers.*** It has *the power to execute this Agreement and any other documentation relating to this Agreement to which it is a party*, to deliver this Agreement and any other documentation relating to this Agreement that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and *has taken all necessary action to authorise such execution, delivery and performance*.

[emphases added]

BNPP submitted that this representation applies in and of itself as an assurance of due authorisation in relation to each forex transaction that was entered into by Wee on behalf of JSPL under the Master Agreement. Further, by virtue of the explicit representation by JSPL that it has taken all necessary action to authorise such execution and performance, this is a representation that the 1 November 2004 resolution which had been provided to BNPP was sufficient in every respect to authorise JSPL's entry into the Master Agreement and into each transaction under the Master Agreement. BNPP concluded that JSPL is precluded from contending that it had not authorised the Key Transactions, whether on the ground that they were not for hedging purposes, or on any other grounds.

54 BNPP's response to D&N's theory that BNPP had colluded with Wee to cover up losses from unauthorised speculative trades was *inter alia* that there was nothing sinister about the backdating of the Master Agreement which had been done merely to confirm with ISDA convention and that, in any case, on JSPL's own evidence, the earliest confirmed instance of speculative trading only took place in 2006. BNPP had disclosed the Alleged Unauthorised Transactions to E&Y when E&Y approached BNPP to provide information for JSPL's 2006 year-end audit confirmation ("the 2006 audit confirmation"). BNPP pointed out that it was nowhere suggested that E&Y did not understand the information given by BNPP in the 2006 audit confirmation and that E&Y itself had come back to say that it was satisfied with the information and found it in order. The data provided by BNPP made it clear that JSPL had outstanding contracts with BNPP which comprised (a) spot exchange contracts; (b) forward exchange contracts; and (c) options contracts. The options contracts comprised (a) options under a pivot target redemption forward transaction and (b) options under a target redemption forward transaction. R&T clarified that the suspense account (see [45] above) was an internal general ledger account of BNPP's in which debit and credit entries arising from forex transactions with JSPL were booked as JSPL itself did not have a bank account with BNPP at the material time. It argued that there was no evidence whatsoever that the internal general ledger account could be or was used to assist Wee to conceal his gains or losses, as these moneys were in fact paid out to JSPL's bank accounts or on its instructions on four separate occasions.

In respect of the Close-out Agreement

55 BNPP's alternative case was that an independent obligation to pay the alleged debt arises from the Close-out Agreement. This is based on the paragraph numbered 3(b) in the Close-out Agreement, which provides that BNPP's agreement to accept JSPL's instructions to terminate the outstanding forex transactions was conditional upon these transactions being "Terminated Transactions for the purposes of the Master Agreement (as if an Early Termination Date had occurred on the date of such telephone conversation and as a result of a Termination Event)".

56 The effect of the occurrence of an Early Termination Date is provided for by s 6(c)(ii) of the Master Agreement:

> Upon the occurrence or effective designation of an Early Termination Date, no further payments or deliveries [required by the trade confirmations or any default interest payable] in respect of the Terminated Transactions will be required to be made, but without prejudice to the other provisions of this Agreement. The amount, if any, payable in respect of an Early Termination Date shall be determined pursuant to Section 6(e).

By the paragraph numbered 3(b)(ii) in the Close-out Agreement, the amount calculated as being payable under s 6(e) of the Master Agreement was the Agreed Value, *viz*, the alleged debt (see the

1.57 am e-mail in [27] above).

57 Section 6(d)(ii) further provides that:

> An amount calculated as being due in respect of any Early Termination Date under Section 6(e) will be payable ... two Local Business Days after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event).

Notice of the amount payable was in fact given in 1 November 2007 confirmation letter and two local business days after that was 5 November 2007.

58 BNPP emphasised that the outstanding forex transactions were Terminated Transactions "on and with effect from [BNPP's] acceptance of [JSPL's] oral instructions" in the telephone conversation of 31 October 2007, *ie*, triggering an independent obligation of JSPL to pay the alleged debt on 5 November 2007 ("the independent obligation to pay under the Close-out Agreement"), without the need for BNPP to first establish JSPL's liability under the Master Agreement. This echoed the position that BNPP had asserted in its 1 November 2007 confirmation letter (see [29] above). It further submitted that, if there was no independent obligation to pay under the Close-out Agreement, the words "[i]t shall be a condition of [BNPP's] acceptance of [JSPL's] oral instructions to terminate..." would be superfluous.

59 BNPP submitted that the "reservation provisions" (*viz*, the second unnumbered paragraph from the top ["the first reservation provision"] and the penultimate paragraph ["the second reservation provision"] of the Close-out Agreement) do not derogate from the independent obligation to pay under the Close-out Agreement. The first reservation provision merely reiterates the parties' respective positions on JSPL's liability for the alleged debt under the Master Agreement. In fact, the second reservation confirms the existence of the independent obligation to pay under the Close-out Agreement, because it contemplates litigation in three scenarios: "in the event of non-settlement on the value date", "otherwise at law" and "pursuant to the Master Agreement". BNPP argued that litigation "pursuant to the Master Agreement" must refer to litigation brought by BNPP since the position reserved by JSPL under the Close-out Agreement was that it is not bound by the Master Agreement and hence JSPL could not have contemplated bringing proceedings pursuant to the Master Agreement. Litigation "otherwise at law", on the other hand, clearly included proceedings commenced by JSPL and this in turn would have included proceedings such as the present as well as proceedings commenced by JSPL to recover any money paid over to BNPP. Therefore, if JSPL is correct that BNPP could only seek payment of the alleged debt pursuant to the Master Agreement, that would mean that the first scenario "in the event of non settlement on the value date" would have to be regarded as wholly superfluous as the only scenario in which BNPP could commence litigation is in "proceedings in court … pursuant to the Master Agreement". BNPP urged me to reject a construction of the Close-out Agreement that would render any of its words meaningless or superfluous.

60 JSPL's primary position was that BNPP did not discharge its burden of showing that the express terms of the Close-out Agreement created an independent obligation to pay under the Close-out Agreement. Its view was that the reservation provisions made clear that both parties were preserving their respective positions with regard to liability, such that the issue of liability was very much alive. The purpose of the close-out was merely for quantum to be fixed so that proceedings at a later stage under the Master Agreement would only be on liability. JSPL's interpretation of the words "in the event of non-settlement on the value date" was perhaps unsurprisingly diametrically opposed to BNPP's – it submitted that this phrase clearly contemplated that JSPL had an *option* of paying the alleged debt on the value date (*ie*, 5 November 2007) , but not an *obligation*. Should JSPL fail to do

so, BNPP could commence proceedings but its claim would still be under the Master Agreement, in relation to which various triable issues had been raised by JSPL.

61 JSPL further submitted that, even if the Close-out Agreement is interpreted as creating an independent obligation to pay the alleged debt, it also expressly acknowledges JSPL's right to make a claim against BNPP to recover the alleged debt in subsequent proceedings. In other words, JSPL and BNPP had agreed that JSPL has a cross-claim for the monies. JSPL argued that, if that is correct, BNPP's claim under the Close-out Agreement is fundamentally flawed because where a party has a genuine cross-claim against the potential petitioner based on substantial grounds, an injunction will be granted to restrain winding-up proceedings.

The unsigned statement of Wee

Background facts

62 Before proceeding to my decision proper, I shall first deal with the issue of the admissibility of Wee's unsigned statement ("the unsigned statement"), which as mentioned above was relied on by JSPL to show that BNPP had colluded with Wee to carry out the Alleged Unauthorised Transactions.

63 The facts regarding the provenance of Wee's unsigned statement are as follows: Wee first met with Tan Kwi Kin, Chong Shee Sai (JSPL's company secretary) and Wong Peng Kin (Director, Group Human Resources of JSPL) on 23 November 2007 to discuss a draft of the unsigned statement. After these discussions, Wee requested that some changes be made which were handwritten onto the draft by Wong Peng Kin and later incorporated into the draft. Following a letter from Wee's lawyers, M/s Lee & Lee, alleging that the draft of the unsigned statement as it then stood did not accurately reflect Wee's views and recollections in several material respects, Wee met with the same JSPL officers again on 2 January 2008. At this meeting, Wee made some handwritten amendments to the draft and confirmed that apart from these changes, he accepted the draft as true and accurate. I noted that these handwritten amendments had not been incorporated into the unsigned statement which was sought to be admitted as evidence. M/s Lee & Lee sent a further letter to D&N on 21 January 2008 in which it registered its objections to JSPL's initiation of the two meetings with its client Wee without its knowledge and asserted Wee's position that his acts and forex transactions were at all material times authorised and mandated by JSPL.

The parties' submissions

64 BNPP submitted that the unsigned statement constitutes hearsay, which under O 41 r 5 of the Rules of Court (Cap 322 R 5, 2006 Rev Ed) is inadmissible in affidavit evidence except in the case of an affidavit sworn for the purpose of being used in "interlocutory proceedings": see O 41 r 5(2), set out below at [67].

65 BNPP argued that the present originating summons is not interlocutory in form as an originating summons should be distinguished from an ordinary summons; the former being a summons for commencement of proceedings (*ie*, an originating process) and the latter being a summons for a pending course or matter. BNPP further submitted that it is settled law that proceedings which seek an injunction to restrain a party from winding up a company are not "interlocutory" in nature as they decide with finality the right of the creditor to present the winding-up process and do not merely seek to preserve the *status quo* between parties. BNPP relied on *Bryanston Finance Ltd v De Vries (No 2)* [1975] 2 WLR 41 ("*Bryanston Finance [No 2]*"), which it claimed was cited with approval in *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* [1992] 2 SLR 1114 ("*Tang Choon Keng Realty*").

66 JSPL argued that the court should not focus on the form of the application as an originating summons. I was referred to *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR 268, in which it was said that it is well-established that where a company disputes a debt claimed by a creditor,

> the court will restrain a creditor from filing a petition to wind up the company, or if the petition has been filed, to [*sic*] stay or dismiss it on the ground that the *locus standi* of the petitioner as a creditor is in question, and it is an abuse of process of the court for the petitioner to try to enforce a disputed debt in this way.

If JSPL had applied for a stay of winding up or summary judgment, the unsigned statement would be admissible because those are interlocutory proceedings. JSPL argued that the unsigned statement should not become inadmissible simply because it had instead filed the present originating summons, when the relief is in effect the same and the test for whether the relief should be granted (*ie*, whether there is a disputed debt) is identical. It submitted, relying on *Savings & Investment Bank v Gasco Investments (No 2)* [1988] 2 WLR 1212 ("*Savings Bank [No 2]*"), that the key test for an interlocutory proceeding is whether the court is being asked to keep matters in the *status quo* until the final rights of the parties are decided.

My decision

67 The relevant provision in Singapore governing the admissibility of hearsay evidence by affidavit is O 41 r 5 of the Rules of Court, which states:

> **Contents of affidavit** (O 41, r 5)
>
> (1) Subject to the other provisions of these Rules, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

68 There is no definition of "interlocutory proceedings" in the Rules of Court. In the explanatory note to O 41 r 5(2) in para 41/5/2 of *Singapore Civil Procedure 2007* (GP Selvam ed, Sweet & Maxwell Asia 2007), it is stated that:

> Proceedings are not "interlocutory proceedings" within this rule *merely because* they are seeking an interlocutory order and not a final order. *A distinction is drawn between interlocutory proceedings generally and interlocutory proceedings where an issue has to be determined, the latter class falling outside this rule.* "For the purposes of this rule those applications only are considered interlocutory *which do not decide the rights of the parties*, but are made for the purposes of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause of [*sic*] the purpose of enabling the court ultimately to decide upon the rights of the parties": *Gilbert v Endean* (1878) 9 Ch.D 259 at 269.
>
> [emphases added]

69 It is important at this point to distinguish between the form and the substance or nature of an application. After the amendments to the Rules of Court in 2006, all interlocutory applications are made in the mode of a "summons", which is defined in O 1 r 4 of the Rules of Court to mean "every

summons in a pending cause or matter". Thus, it appears that proceedings are interlocutory in form if they are brought in the context of a pending cause or matter. I accept that originating summonses are not interlocutory in form. As explained in *Singapore Civil Procedure* at 28/0/2:

> The originating summons should not be confused with an ordinary summons (such as a summons in chambers). The ordinary summons is used for interlocutory applications in pending proceedings whereas an originating summons, as its name suggests, is an originating process (*ie*, a mode for the commencement of proceedings). Order 1, r.4 succinctly captures this distinction: "originating summons means every summons other than a summons in a pending cause or matter."

70 However, in my view, the more important questions are: first, whether the present originating summons which seeks to restrain a future winding-up application based on an existing statutory demand is interlocutory in nature; and secondly, whether the exception in O 41 r 5(2) can encompass such an originating summons.

71 In respect of the first question, a test for determining whether a given application is interlocutory in nature must first be found. Unfortunately, most of the authorities cited to me involved decisions where the court found that the applications were interlocutory in form but should not be treated as such for the purposes of admitting hearsay affidavit evidence because they determined the rights of the parties which were the subject of the pending cause or matter. In other words, they were cases involving "interlocutory proceedings generally", but where the particular proceeding "fell outside this rule [*ie*, O 41 r 5(2)]": see para 41/5/2 of *Singapore Civil Practice* (quoted in [68] above). However, where the application in question is an originating process, the test of whether the rights of the parties in the pending cause or matter are being finally determined is clearly inapplicable. Thus, these authorities do not, except in a most oblique manner, shed light on the question of whether the present originating summons, which is in form an originating process, may in the light of the surrounding circumstances be of an interlocutory nature.

72 For this reason, I did not share JSPL's faith in *Savings Bank (No 2)* as support for its submission that the present originating summons is interlocutory in nature. In *Savings Bank (No 2)*, the plaintiff bank had brought two actions to recover moneys lent to the five defendant companies ("the main actions"). On the actions being stayed pending proceedings in the Isle of Man, one of the companies gave an undertaking that it would not dispose of its assets so as to leave less than £7 million in the United Kingdom. Subsequently, the bank by notice of motion sought the sequestration of that company's assets and the committal of two of its directors for contempt of court for procuring, aiding and abetting the company's breach of its undertaking. The bank sought to introduce affidavits referring to hearsay evidence in support of the motion under R.S.C., Ord 41, r 5(2) which is *in pari materia* with O 41 r 5(2) of our Rules of Court. The judge ruled *inter alia* that committal proceedings were not interlocutory proceedings so that Ord 41, r 5(2) could not apply. The Court of Appeal allowed the bank's appeal. Purchas LJ reasoned (at 1224-25) that:

> In the present case the undertakings which were offered and accepted to preserve the assets in this country clearly fell within the concept of interlocutory proceedings to protect what would be the fruits of victory *in the main suit* if not the property which was the subject matter of the action itself. I think that here lies the crucial distinction between interlocutory and final proceedings. The fact that such an order can be enforced by a motion to commit for contempt of court in the breach, if its true purpose is to enable the proper conduct of the trial and the final resolution of the issues between the parties, then it is nonetheless an interlocutory proceedings [*sic*].
>
> [emphasis added]

73 The motion for committal, being brought in order to enforce an undertaking which in turn was aimed at protecting the potential fruits of victory in a pending cause or matter ("the main suit"), was interlocutory in form: see [69] above. However, on the facts in the present originating summons, no such main suit exists, as no application for winding up has yet been brought; indeed, the very purpose of the originating summons is to prevent such an application from being brought. As such, *Savings Bank (No 2)* provides little support for D&N's submissions.

74 The facts of *Bryanston Finance (No 2)* bear more resemblance to those in the present originating summons and thus I propose to examine it at some length. The defendant, who held only 62 out of some seven million issued shares in the plaintiff company and had a personal animosity against the company's chairman, was dissatisfied with the answers he received to questions he had asked concerning loans made by the company to the chairman and companies under his control. He wrote two letters to the chairman seeking further information and stated that, if he received no reply, he would present a petition, under s 222(f) of the UK Companies Act 1948, for the winding up of the company. The company issued a writ ("the first action") for an injunction to restrain the defendant from petitioning to wind it up on the ground of failure to answer the questions or any ground connected therewith. The defendant filed two affidavits containing allegations of fraud, misfeasance and impropriety on the part of the company. On 18 March 1975, the company was granted an injunction pending trial of the first action in terms of the injunction claimed in the writ. Following an announcement that another company was to make an offer for the minority shareholders' shares in the plaintiff company, the defendant served notice of motion to discharge the injunction in the first action on the ground that the offer constituted a change of circumstances justifying discharge of the order and he filed two further affidavits containing allegations against the company. On 30 April 1975, Oliver J dismissed the motion. On 1 May 1975 the defendant issued an abortive petition and on 2 May 1975 the company issued a writ ("the second action") for an injunction restraining the defendant from petitioning for the winding up of the company on any of the grounds contained in the four affidavits filed in the first action. In accordance with the procedural requirements of the time, the plaintiff company then issued a motion for an interim injunction in the terms of the injunction claimed in the writ in the second action and, although contending that the matter had to be decided on the balance of convenience and the evidence showed that a petition would be an abuse of the process of the court, conceded that the defendant might in the second action succeed in establishing that some of the grounds for presenting a petition were not an abuse of the process of the court. On 15 May 1975, Oliver J granted the interim injunction. The defendant appealed against the court's refusal to discharge the injunction in the first action and the granting of the injunction in the second action. I shall focus on the second appeal.

75 It should be noted that *Bryanston Finance (No 2)* was actually about the test to be used in deciding whether to grant an injunction against winding up and not about whether proceedings in respect of applications for such injunctions are interlocutory for the purpose of admitting hearsay affidavit evidence. However, in giving their reasons for the test to be applied, the judges had to consider the nature of the injunction in question and whether it could be considered interlocutory (such that the balance of convenience test in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 ("*American Cyanamid*") applied). Ultimately, the judges allowed the appeal because the plaintiff company had failed to show that the petition was *prima facie* bound to fail.

76 Turning first to Buckley LJ's reasoning, he stated (at 51 to 52):

> The action in the present case is of an exceptional and rather different character. The only relief claimed in the writ in this action is the injunction which I have already mentioned. This is admittedly based on an assertion that the presentation of a petition of the kind sought to be restrained would be an abuse of the process of the court. Whether this would be so would be the

only issue to be determined in the action. The issues which might arise for decision upon the hearing of such a petition, if the defendant were permitted to present it, would not arise as substantive issues and might not arise at all on the trial of the action. *In relation to such a petition the action as a whole is in the nature of an interlocutory proceeding.*

If it be asked what legal right the plaintiff company relies on in the second action from a violation of which the plaintiff company is seeking temporary protection pending the trial of the action, the answer must be, it seems to me, the right not to be involved in litigation which would constitute an abuse of the process of the court. But the plaintiff company cannot assert such a right in respect of any particular anticipated litigation without demonstrating that, at least prima facie, that litigation would be an abuse.

If it could now be said that, on the available evidence, the presentation by the defendant of such a petition as is described in the injunction would prima facie be an abuse of process, the plaintiff company might claim to have established a right to seek interlocutory relief. Otherwise I do not think it can.

[emphases added]

The judge reasoned that the plaintiff company could not be allowed to restrain the defendant from presenting his winding-up petition because, first, it was clear that some, if not all, of the allegations mentioned by the defendant, if they were to be substantiated, could lead to a winding-up order. Secondly, counsel for the plaintiff had conceded that the defendant might succeed in establishing that the presentation of a petition on grounds asserted in the four affidavits would not be an abuse of the process.

77 Buckley LJ concluded (at 53) with a reference to *American Cyanamid*:

In his speech in the *American Cyanamid* case [1975] A.C. 396 Lord Diplock recognised that there might be special factors to be taken into consideration in the particular circumstances of individual cases. In my judgment, the fact that the second action is an action designed to prevent the commencement of proceedings in limine is such a special factor. In such a case the court should not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish prima facie that the plaintiffs will succeed in establishing that the proceedings sought to be restrained would constitute an abuse of process. In the present case, in my opinion, this has not been achieved.

78 Significantly, Buckley LJ's reasoning is completely contrary to the proposition for which BNPP claims *Bryanston Finance (No 2)* is authority. Buckley LJ's view was that, where an action – *ie*, including an originating process like a writ or originating summons – had been brought in which the sole relief sought is the restraint of a potential winding-up petition, the action is viewed as interlocutory *vis-à-vis* the petition. Thus, Buckley LJ did not cast the second action out of the category of interlocutory proceedings to which *American Cyanamid* applied. However, he reasoned that *American Cyanamid* envisaged the presence of "special factors", in the instant case being that the second action would prevent the commencement of winding-up proceedings *in limine*, such that it was necessary for the evidence to show *prima facie* that the threatened winding-up proceedings would be an abuse of process.

79 Stephenson LJ, on the other hand, reached his conclusion on the basis that *American Cyanamid* did not apply to injunctions against winding up, because these were not interlocutory injunctions at all. He stated (at 54):

[Counsel for the plaintiff company] sought support for the judge's approach and order in the concluding sentence of the judgment of Sir George Jessel M.R. in *Niger Merchants Co. v. Capper* (1877) 18 Ch.D. 557, 559. He claimed support there for his submission that the injunction he prayed for was only interlocutory, that there was a serious issue to be tried after it had been granted or refused, and that at this stage the balance of convenience had therefore to be considered and the *American Cyanamid* case applied. But the hearing to which the sentence in the *Niger Merchants* case refers was clearly a hearing of conflicting evidence on the question whether Mr. Capper did threaten the company with winding up, which he denied, and that case is no authority for the proposition that a plaintiff company, which moves for an injunction to restrain the presentation of a petition to wind it up as an abuse of the process of the court, can rely on a balance of convenience and reserve its evidence to prove the abuse until the question whether it is an abuse is finally decided at the trial of the action. I agree with Sir John Pennycuick, whose judgment I have had the privilege of reading, that it is finally decided at this stage and there is nothing left to try.

This is not

> *"an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right,"*

but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the *American Cyanamid* case which Buckley L.J. quoted do not apply to such an application as this.

[emphasis added]

80 Finally, Sir John Pennycuick reasoned (at 55 to 56):

The issue between the intending petitioner and the company which would arise upon presentation of the petition is whether or not the company shall be compulsorily wound up. The motion seeks a summary order restraining the defendant from starting the process which would raise this issue for litigation in the Companies Court. The order sought upon the motion, if made, will from its very nature conclude once and for all, so far of course as concerns the ground upon which the petition is based, the summary issue raised by the motion: that is to say, the defendant is either free to present his petition or he is prohibited from doing so. *It is no doubt procedurally necessary under the present practice to bring the application for an injunction before the court by way of motion in an action commenced by writ seeking the same relief, the order sought upon the motion being expressed in interlocutory form. But whether the application succeeds or fails, the order upon it is the end of the action. The only issue in the action has been determined once and for all upon the motion and there can be no question of the action itself being brought on for a hearing at some later date on the same issue*. The notion of a full hearing with oral examination and cross-examination of an application to stop proceedings in limine is altogether at variance with the principles upon which the court acts. The decision in the *American Cyanamid* case was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action: cf. per Lord Diplock. He said, at p. 405: "The grant of an interlocutory injunction is a remedy that is both temporary and discretionary." and at p. 406:

> When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when

> ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.
>
> I do not think that the decision should be read as applicable to motions which, *though interlocutory in form, seek relief which will finally determine the issue in the action and more particularly motions seeking to stop proceedings in limine.*
>
> [emphases added]

81 Sir John Pennycuick's reasoning in fact reveals two different arguments: the first is that since the order sought upon the motion will determine once and for all the issue raised in the motion of whether the defendant is free to present his petition on the grounds in the four affidavits or not (*ie*, it seeks to stop proceedings *in limine*), it is not an interlocutory proceeding (see underlined portion of his reasoning above). The second argument must be viewed in light of the procedural requirement at the time, that a company seeking relief of this kind must file a writ claiming an injunction to restrain presentation of a petition followed immediately by a motion expressed to claim an interlocutory injunction in the same terms. Sir John Pennycuick argued that the motion, though interlocutory in form, was in fact not interlocutory in nature because it determined the issue in the action itself (see italicised portions of his reasoning above). As explained above at [73], this line of argument does not shed much light on the question I have to determine, *viz*, whether an originating summons seeking to restrain a future winding-up application based on an existing statutory demand is interlocutory in nature.

8 2 Far from demonstrating that it is settled law that proceedings which seek an injunction to restrain a party from winding up a company are not interlocutory in nature, therefore, *Bryanston Finance (No 2)* evinces differing judicial opinions about the nature of such proceedings. One view, propounded by Buckley LJ, is that they should in fact be viewed as interlocutory *vis-à-vis* the petition for winding up. The second, propounded by Sir John Pennycuick (though it is not clear why he took two alternative lines of reasoning to reach his conclusion) is that they should not be viewed as interlocutory because they determine once and for all the would-be petitioner's right to present his petition on the grounds threatened. There has been no determinative ruling on the issue as yet, either by the English House of Lords or by our courts. Although *Bryanston Finance (No 2)* was cited with approval in *Tang Choon Keng Realty*, that case did not in fact endorse the particular proposition which BNPP had cited *Bryanston Finance (No 2)* for. In fact, the following reasoning by Buckley LJ was cited (in *Tang Choon Keng Realty* at 1127):

> If it be asked what legal right the plaintiff company relies on in the second action from a violation of which the plaintiff company is seeking temporary protection pending the trial of the action, the answer must be, it seems to me, the right not to be involved in litigation which would constitute an abuse of process of the court.

The court then went on to cite Stephenson LJ's reasoning, without addressing the conflict between the two judges' approaches in respect of the interlocutory nature (or otherwise) of the proceedings.

83 In my view, the nature of the present originating summons is interlocutory. The full context must be considered. By the statutory demand, BNPP has asserted its right to the alleged debt; BNPP argues that its right arises out of the Master Agreement and, in the alternative, the Close-out Agreement; JSPL, on the other hand, denies that BNPP has this right based on the arguments in [41] *et seq* and [60] *et seq* above. This is not a case like *Brinds* (see [38] above) where there was extensive cross-examination before the trial court and all the evidence needed to decide the question before the judge was already adduced. This is a case involving the arcane world of forex trading, and

in which allegations and counter-allegations have flown thick and fast. Thus, in the present originating summons, it is not for me to decide the merits of the parties' arguments; all I need to decide is whether JSPL has raised triable issues in respect of the alleged debt. If I should decide that there are triable issues, BNPP will have to bring an action against JSPL for the alleged debt and the merits of the parties' arguments will be decided at trial. If I should decide that there are no triable issues, BNPP will still have to file an application for winding up and the merits of the parties' arguments will again be decided in the winding-up proceedings. Whichever way it goes, my decision will not mean there is "nothing left to try": see Stephenson LJ's reasoning in [79] above – the merits of the parties' arguments remain undetermined.

84 In the meantime, JSPL wants to ensure that no winding-up application is brought since this would have severe consequences for the company. It is difficult to imagine a clearer case of an application being sought to preserve the *status quo* in respect of the parties' rights and interests. It is true that the rights sought to be preserved are not in a pending cause or matter; to borrow Buckley LJ's reasoning, JSPL is merely seeking to protect its right to be protected from litigation which is an abuse of process: see [76] above. However, this is more a result of the timing at which JSPL chose to act, which also determined the form of proceedings it had to use. As pointed out by JSPL, if it had waited for an application for winding up to be presented and then applied for a stay on the same ground of a disputed debt, that application would have had to be brought in the form of a summons and would have been interlocutory in form. I agree that the nature of the relief sought in the present originating summons is the same as that in the case of a stay.

85 This leaves the question of whether the present originating summons may be considered as an "interlocutory proceeding" for the purposes of O 41 r 5(2). I note again that there is no definition of "interlocutory proceeding" in the Rules of Court and thus there is nothing that expressly precludes an extension of the term to cover the present proceedings. On the other hand, the policy considerations as well as the general justice of the case weigh in favour of its inclusion. The rationale for the admissibility of hearsay affidavit evidence in interlocutory proceedings was articulated by Jessel MR in *Gilbert v Endean* (1878) 9 Ch D 259 (at 266):

> No doubt in the case of interlocutory applications the Court as a matter of necessity is compelled to act upon such evidence when not met by denial on the other side. In applications of that kind the Court must act upon such evidence, *because no evidence is obtainable at so short a notice, and intolerable mischief would ensue if the Court were not to do so*. *The object of these applications is either to keep matters as they are or to prevent the happening of serious or irremediable mischief,* and for those purposes the court has been in the habit of acting upon this imperfect evidence.
>
> [emphasis added]

86 Similarly, Peter Gibson J stated in *Savings and Investment Bank v Gasco* [1984] 1 WLR 271 at 282:

> The purpose of [the exception] is to enable a deponent to put before the court in interlocutory proceedings, *frequently in circumstances of great urgency*, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief.
>
> [emphasis added]

87 Each of these justifications is present on the facts of the present originating summons. At the

time of the application, the investigations by JSPL, D&N and PwC were still ongoing. It was not possible to uncover all the facts pertaining to the circumstances under which the unauthorised transactions were entered into by Wee between the time when they were discovered and the time the alleged debt became due under the statutory demand. It was not disputed that a winding-up application might trigger "Event of Default" or "Potential Event of Default" clauses in JSPL's line of credit facilities with various banks as well as its current contracts with its customers. Nor was it denied that a winding-up application would cause grave concern among its current customers and undermine its ability to secure new contracts, with serious commercial implications on JSPL's business and putting the livelihood of some 2,000 JSPL employees at stake. Thus, the present originating summons is a prime example of an application where the circumstances are of great urgency and evidence is not obtainable at short notice, and the object is either to keep matters as they are or to prevent the happening of serious or irremediable harm.

88 The statutory demand clearly envisaged that an application for winding up might be made if payment of the alleged debt was not made within 21 days from the date of the statutory demand. In my view there is no justification for making an alleged debtor wait for at least 21 days to and face an application for winding up before it acts to protect its interests, nor is there justice in punishing him for choosing to take a more pro-active approach. For all these reasons, I admitted Wee's unsigned statement into evidence in the present proceedings. I have taken into account the doubts expressed by Wee's lawyers, M/s Lee & Lee , as to its reliability although, as JSPL's had pointed out, M/s Lee & Lee could be expected to do so in order to protect their client's position pending prosecution by the Commercial Affairs Department.

The alleged obligation under the Close-out Agreement

89 I shall deal first with the alleged independent obligation to pay under the Close-out Agreement, since if BNPP succeeds in establishing this it will no longer need to rely on the Master Agreement for its right to the alleged debt. BNPP's case hinges on what is meant by the parties' agreement that the outstanding forex transactions would be "Terminated Transactions for the purposes of the Master Agreement". BNPP's submission based on the phrase "[o]n and with effect from your acceptance of such oral instructions" merely begs this question; as does its argument that, if there is no independent obligation to pay under the Close-out Agreement, the words "[i]t shall be a condition of [BNPP's] acceptance of [JSPL's] oral instructions to terminate…" become superfluous. Essentially, this court has been invited to infer from the parties' agreement that the outstanding forex transactions would be "Terminated Transactions for the purposes of the Master Agreement" that the attendant consequences of termination (*viz*, obligation to pay in accordance with ss 6(c)(ii) and 6(d) of the Master Agreement) follow. The provisions of the Close-out Agreement itself do not explicitly provide for this. They merely provide that the transactions which were the subject of close-out should be terminated transactions "as if" an Early Termination Date had occurred as a result of a Termination Event. This wording in fact recognises that the close-out is not a termination ordinarily covered under the Master Agreement. Furthermore, the phrase "for the purposes of the Master Agreement" equally supports JSPL's proposition that the Close-out Agreement merely fixed the quantum of loss suffered in respect of the transactions which were the subject of the close-out, while JSPL's liability in respect of this sum (*ie*, the alleged debt) remained to be pursued under the Master Agreement.

90 Further, s 6(d)(ii) of the Master Agreement, upon which BNPP relies to make its case that JSPL is obliged to pay the Agreed Value within two business days, is not unequivocal. I set out the entire provision below:

> An amount calculated as being due in respect of any Early Termination Date under Section 6(e) will be payable on the day that notice of the amount payable is effective (in the case of an Early

Termination Date which is designated or occurs as a result of an Event of Default) and on the day which is two Local Business Days after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event).

This provision contemplates two payment dates: (i) where an Early Termination Date is designated or occurs as a result of an Event of Default, payment shall be made on the day that notice of the amount payable is effective; and (ii) where an Early Termination Date is designated as a result of a Termination Event, payment shall be made two business days after the day on which notice of the amount payable is effective. BNPP relies on (ii). Section 6(b)(iv) contemplates that situation where a Termination Event has occurred, in which situation a party, after giving not more than 20 days notice to the other party, has the right to designate a day as an Early Termination Date. However the Close-out Agreement merely provides that "the Transactions shall be Terminated Transactions for the purposes of the Master Agreement (as if an Early Termination Date had occurred at the date of such telephone conversation and as a result of a Termination Event)". It does not provide for that Early Termination Date to be deemed to be "designated as a result of" the Termination Event.

91 As for the reservation provisions, I find that they did not determine either way whether JSPL had an obligation or option to pay the alleged debt on 5 November 2007. It will be recalled that BNPP had identified three independent categories of causes of action: "in the event of non-settlement on the value date", "otherwise at law" or "pursuant to the Master Agreement": see [59] above. This interpretation suffers from the somewhat odd arrangement in the phrase "proceedings in court in the event of non-settlement on the value date or otherwise at law or pursuant to the Master Agreement" ("the reservation clause"). The category "otherwise at law" becomes nonsensical when it follows the category "in the event of non-settlement on the value date" and is linked by the word "or". This is because the one is simply not in opposition to the other, as is demanded by the word "otherwise". BNPP's interpretation would be more supportable if the clause read instead: "proceedings in court in the event of non-settlement on the value date or pursuant to the Master Agreement *or otherwise at law* [emphasis added]".

92 In my view, the only sensible reading of the reservation clause is as follows: "proceedings in court *in the event of non-settlement on the value date or otherwise,* at law or pursuant to the Master Agreement [emphasis added]". JSPL would then argue that this shows that proceedings may be brought regardless of whether settlement is made on value date or not; in other words, the words "proceedings in court" are to be read together with "at law or pursuant to the Master Agreement", such that the Close-out Agreement envisaged the possibility of proceedings in court at law or pursuant to the Master Agreement, "in the event of non-settlement on the value date or otherwise". However, another possible reading is for "proceedings in court" to be read with "in the event of non-settlement on the value date or otherwise" (and indeed, this would be in accordance with the grammatical rule of proximity), such that the possibility of proceedings being brought in the event of and as a response to the non-settlement itself is not precluded. Ultimately, the only thing that can be stated with certainty is that the reservation provisions were the result of hasty and haphazard draftmanship. I find that they cannot and do not determine the issue of whether JSPL has an obligation or option to pay the alleged debt on 5 November 2007. Any independent obligation to pay under the Close-out Agreement therefore depends on the interpretation of para 3(b), which I have already canvassed above at [89].

93 Ultimately, the tussle over the existence or otherwise of an independent obligation to pay under the Close-Out Agreement boils down to whether such an important obligation (*viz*, to pay a sum of some US$50 million within two business days) has been imported into the Close-out Agreement on the basis of a few words in para 3(b) of the Close-out Agreement. It is difficult to imagine any

circumstances under which such a major undertaking would not have been the subject of an express provision in the Close-out Agreement. Its absence in the circumstances cannot be explained by any other reason than the fact that the parties had not contemplated it. The focus of the negotiations between the parties had been to stop further losses and this is the primary theme of the Close-Out Agreement. On the other hand, BNPP has to rely on an obtuse argument to support its claim that JSPL had undertaken such a large obligation. For these reasons, I find that no independent obligation to pay arises under the Close-out Agreement. It is thus unnecessary for me to deal with JSPL's submission in respect of its alleged cross-claim: see [61] above.

The alleged obligation under the Master Agreement

94 Turning to the parties' submissions in respect of the Master Agreement, I find that JSPL has raised no triable issues in respect of the binding effect of the 1 November 2004 resolution and the Master Agreement. The 1 November 2004 resolution was signed by no less than five of JSPL's directors, each of whom averred that he had read the terms of the resolution before signing it. There was no evidence of any undue influence, duress or misrepresentation such as might vitiate these directors' consent to the terms of the resolution. Nor did the argument that they thought the words "or on a speculative basis" did not apply to JSPL hold much water as the directors' subjective intent at the time they signed the 1 November 2004 resolution is irrelevant if on an objective view they intended to be bound by its terms: see among numerous authorities *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828 at 838; *Reardon Smith Line Ltd v Hansen Tangen* [1976] 1 WLR 989 at 996.

95 However, even on the basis that the 1 November 2004 resolution and the Master Agreement are binding on their terms, I find that JSPL has raised triable issues in respect of whether BNPP knew or ought to have known that Wee lacked authority to carry out the Key Transactions, and the effect of such actual or constructive notice (if proved) on JSPL's obligation to pay the alleged debt.

96 The authorities relied on by BNPP to support their submissions based on contractual estoppel did not contemplate the two scenarios posited by JSPL: *viz*, BNPP's officers colluding with Wee to carry out transactions beyond the scope of his authority or BNPP having actual or constructive notice that Wee was carrying out such transactions. The doctrine of contractual estoppel may be traced back to *Colchester Borough Council v Smith and others* [1992] Ch 421 ("*Colchester*"). In that case, a tenant ("T") had occupied certain land adversely to the freehold owner, a borough council, for a period exceeding 12 years. The council initiated correspondence with the T's solicitors, seeking to regularise T's occupation by granting him a licence for a fee, but his solicitors initially maintained that he had acquired the freehold title to the land by adverse possession. After threats by the council to institute proceedings for possession, an agreement ("the agreement") was concluded for a lease of the land by the council to T. In cl 4 of the agreement, T stated that he acknowledged the council's title to the land and that he had not gained any right, title or interest to or in it by adverse possession. In subsequent possession proceedings the council claimed, *inter alia*, declarations that it was the freehold owner of the land and that T had no estate or interest in the land except as a tenant pursuant to the agreement. The judge held, *inter alia*, that T was estopped from asserting any title to the land except that under the agreement. T's appeal was dismissed.

97 Dillon LJ referred with approval to *Binder v Alachouzos* [1972] 2 QB 151 ("*Binder*"), which concerned a moneylending dispute. The defendant had borrowed money from the plaintiff and in several actions by the lenders, he pleaded that the sums claimed were in respect of moneylending transactions by unregistered moneylenders and so were irrecoverable by virtue of the Moneylenders Act. Just before the original actions were due for trial, an agreement of compromise was made between the parties. That agreement was made between parties who had been advised by lawyers,

and the defendant admitted that the Moneylenders Act did not apply to the transactions which were the subject of the actions. By the compromise agreement the defendant agreed to pay the plaintiff a specified sum with interest by agreed instalments and it was expressly provided that, in any action on the compromise agreement by the plaintiff, it should not be open to the defendant to raise any defence other than as to the quantum of moneys paid. The defendant failed to keep the terms of the compromise agreement and the plaintiff issued his second writ claiming payment thereunder. The defendant again pleaded the Moneylenders Act and contended that because the plaintiff was an unlicensed moneylender the compromise agreement was unenforceable and illegal. Summary judgment for the moneys due under the compromise agreement was granted to the plaintiff by the master and an appeal was dismissed by the judge. The defendant's appeal was dismissed.

98 Dillon LJ quoted Lord Denning MR's reasoning (in *Binder* at 158) (at 429):

> In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable. It should not be reopened.

99 Dillon LJ then stated: "I see no reason why that reasoning should not also apply where the dispute was as to whether or not the defendant had acquired a title to land by adverse possession." He concluded (at 435):

> In my judgment this was a bona fide compromise of a dispute and Mr. Tillson [the tenant], who had the advice of his solicitors and signed the agreement through them, is estopped by the terms of the agreement he made from going behind it and litigating the antecedent dispute. That is as the judge held, and whether it be labelled estoppel by agreement or estoppel by convention is a matter of indifference.

100 Both *Colchester* and *Binder* pertained to a situation in which one party was dealing directly with another and had in the contract between them agreed to certain terms. In the absence of the normal vitiating factors such as duress, undue influence and misrepresentation, those terms were binding and contractually estopped the parties from advancing arguments in contradiction thereof. *Colchester* and *Binder* provide no guidance on whether a party to the contract could rely on those terms to raise an estoppel if an agent had been given authority to act for the other party pursuant to the contract, and the first party had itself colluded with the agent in acting beyond the scope of his authority or had actual or constructive notice that the agent was doing so.

101 BNPP sought to rely on *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 ("*Peekay*"). In that case, RB, an officer of the defendant bank ("the bank"), asked the claimant's *alter ego*, P, whether he would like to invest in a Russian structured deposit without telling him that it was linked to some Russian Government bonds called GKO or that in the event of sovereign default investors would have no control over how the investment would be liquidated. P replied that he was interested. RB then e-mailed an attachment to P containing the final terms and conditions ("FTCs") relating to a hedged Russian Treasury bill. The FTCs described the investment as a deposit and set out various terms relating to it, including the maturity date and the projected rate of return. The FTCs were accompanied by a document described as an "Emerging Markets Risk Disclosure Statement". Later, RB faxed copies of all the documents to P for signature on behalf of the plaintiff. P looked over the documents but did not read them, assuming that they reflected what RB had told him about the investment. He signed the documents, returned them to the

bank with instructions to buy US$250,000 "Russian GKO Note as per attached document".

102 Subsequently, the Russian government announced a moratorium on its debt obligations under the GKO Notes, as a result of which the claimant only recovered US$5,918.06 from the deposit. The claimant claimed damages from the bank under s 2 of the Misrepresentation Act 1967 alleging that RB had misrepresented the nature of the investment by giving P the impression that it would have a proprietary interest of some kind in the GKO, and that P had been induced to invest in it on its behalf. The High Court found for the claimant. However, the Court of Appeal reversed the decision on the ground that although RB had given P that impression, the terms of the FTCs were sufficient to make it clear to P, if he had read them, that the nature of the investment was fundamentally different from that which he had been given to understand. The Court of Appeal also held that P signed the documents by his own assumption that the investment product to which they related corresponded to the description he had previously been given, and not as a result of any inducement by RB.

103 More relevantly for our purposes, the Court of Appeal addressed an application made by the bank's counsel in the course of the hearing of the appeal to amend the notice of appeal to raise an alternative argument that the claimant was estopped from alleging that it had been induced to enter into the contract by misrepresentation on the part of RB. The argument was based on the following two passages in the Risk Disclosure Statement:

> You should also ensure that you fully understand the nature of the transaction and contractual relationship into which you are entering.

and

> The issuer assumes that the customer is aware of the risks and practices described herein, and that prior to each transaction the customer has determined that such transaction is suitable for him.

which P on behalf of the claimant confirmed by his signature that he had read and understood. Counsel for the bank submitted that as a result of having done so, P and the claimant were estopped from asserting that they had not understood the nature and effect of the FTCs and so could not maintain that they had been induced by misrepresentation to enter into the contract. Lord Justice Moore-Bick stated (at [56], [58] and [60]):

> There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. *Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel*: see *Colchester Borough Council v Smith* [1991] Ch 448, affirmed on appeal [1992] Ch 421.
>
> …
>
> Insofar as the argument in this case turns on the true construction and effect of the contractual documents (including the Risk Disclosure Statement) and is one to which no further findings of fact might have been relevant, [the bank] should, in my view, be allowed to advance it. I would therefore grant the bank permission to amend its notice of appeal to raise the issue of

contractual estoppel, but I would not allow it at this stage to contend that there was an estoppel by representation since the judge was not asked to consider that question and did not make findings in relation to it. *The question then is whether, in the light of [P's] signature of the declaration at the foot of the Risk Disclosure Statement, the claimant is precluded as a matter of contract from contending that it did not understand the true nature of the investment.*

…

The purpose of the Risk Disclosure Statement was both to draw to the attention of the investor the need for caution when investing in emerging markets and to make it clear that [the bank] was only willing to enter into a contract with him on the assumption that he had satisfied himself that the transaction was suitable for him. By confirming that he had read and understood the statement and returning it with his instructions to make the investment P offered to enter into a contract with [the bank] on behalf of [the claimant] on those terms and that offer was accepted by [the bank] when it implemented his instructions. As a result it was part of the contract between them that [the claimant] was aware of the nature of the investment it was seeking to purchase and had satisfied that it was suitable for its needs. *In those circumstances, and since it is not suggested that [the bank] misrepresented to [P] the effect of the documents, I do not think that it is open to [the claimant] to say that it did not understand the nature of the transaction described in the FTCs*; and if that is so, it cannot assert that it was induced to enter into the contract by a misunderstanding of the nature of the investment derived from what [RB] had said about the product some days earlier.

[emphases added]

104 I do not doubt the logic of Lord Justice Moore-Bick's reasoning, but have my doubts about whether he contemplated the extreme scenarios propounded by JSPL in the present originating summons: see [42] above. In *Peekay*, there was no question about P's authority to enter into the contract with the bank on the claimant's behalf. Certainly, there was no suggestion that the bank had colluded with P in any acts beyond the scope of his authority, or had actual or constructive notice of such acts. Thus, in the absence of the normal vitiating factors such as duress, undue influence and misrepresentation, P's signature on the Risk Disclosure Statement estopped the plaintiff from advancing arguments in contradiction of the representations therein. The question remains open whether the bank would have been able to rely on those representations to raise an estoppel if, for instance, the bank had been colluding with P in acting beyond the scope of his authority when entering into the contract, or had actual or constructive notice that P was doing so.

105 Another case relied on by BNPP was *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR 566 ("*Orient Centre*"), in which one Teo Song Kwang ("Teo") and his nominee and *alter ego* Orient Centre Investments Ltd ("Orient") ("the appellants") undertook a multitude of investments through an investment account ("the Investment Account") they had opened with Societe Generale ("SG"). Later, the appellants commenced an action against SG and one Kenneth Goh ("Goh"), their investment advisor and an employee of SG at the material time for losses suffered by Orient in the Investment Account. They alleged that they had been induced to undertake the investments by certain representations made by Goh, namely that: (a) SG was rated one of the top five banks in the world and (b) SG had a special strategy that would ensure preservation of Teo's capital and a guaranteed return of 10% per annum on Teo's deposits. SG applied to the court to strike out the appellants' claims and the assistant registrar granted the application in part. SG appealed; the judge allowed its appeal partially and struck out the appellants' claim for losses arising from its investments in the structured products and more specifically the first four (the Bangkok Bank Equity Linked Deposit, the Tiger Note 2, the Tokyo Deposit and the Tokyo Plus Deposit) as the fifth (the USD/4

Funds Deposit) was purchased after Goh left SG's employment. The appellants then appealed, which appeal was dismissed.

106 The Court of Appeal referred to several representations and warranties contained in the general agreements executed by Orient when opening the Investment Account as well as the specific agreements governing the acquisition of the individual products. For example, cl 12 of the Standard Terms and Conditions Governing Foreign Exchange Margin Trading/Option Investment ("the FX facilities") provided that:

> The Customer represents and warrants that:
>
> …
>
> (f) it is exercising its own business judgment independently of the Bank in entering into the FX facilities and each Contract. …
>
> (h) the Bank is not acting as a fiduciary for or as an advisor to it in respect of the Contracts.

107 The Bangkok Bank Equity Linked Deposit was purchased subject to the terms of an Equity Linked Deposit Master Agreement, in which Art 4 provided that:

> The Depositor hereby represents and warrants to SG that:
>
> …
>
> 4.11 it has not relied upon any representations (whether written or oral) of SG, other than the representations expressly set forth in the relevant facility letters and security documents and in any guarantee or other credits support document and is not in any fiduciary relationship with SG;
>
> …
>
> 4.13 it is aware that this is not a capital guaranteed product. In a worse case scenario, it could sustain an entire loss of its investment and should therefore reach an investment decision on this product only after careful consideration with its own advisers as to the suitability of this product in light of its particular financial circumstances.

108 In the case of Tiger Note 2, it was subject to the Tiger Note 2 Indexed Deposit Agreement ("IDA"), Art 4.2 of which provided that the depositor represents and warrants for the benefit of SG that, *inter alia*:

> it has concluded the present transaction after having carried out its analysis of the transaction, particularly in the light of its financial capacity and its objectives; …
>
> [emphasis in bold in original]

Articles 4.2 of the Tokyo Deposit and the Tokyo Plus Deposit were in the same terms as Art 4.2 of the Tiger Note 2 IDA.

109 The Court of Appeal concluded (at [50] to [51]):

> In our view, the combined effect of the express general and specific terms and conditions applicable to the structured products provides an insuperable obstacle to any claim by the

appellants against SG based on the alleged breach of representations or duties, fiduciary or contractual or on negligence on the part of Goh. In the face of Orient's own representations and warranties with respect to each of the structured products, it is not possible for the appellants to argue that Orient had relied on any alleged representation on the part of Goh that he would ensure that the appellants' capital would be preserved and that it would earn a return of 10% per annum on each deposit…

In our view, even if Goh had made the representation concerning capital preservation and income return, it would not have assisted the appellants in relation to the structured products, as they have represented and warranted that they did not rely on any representation given by any of SG's officers. Moreover, Teo could not have misunderstood the clear and specific terms governing the structured products. An analogous case is that of the English Court of Appeal in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 ("*Peekay*"), which was recently affirmed in *Bottin International Investments Limited v Venson Group plc* [2006] EWHC 3112 (Ch).

110 The factual resemblance between *Orient Centre* and the present originating summons in respect of the nature of the transactions and the representations made should not blind us to the fact that *Orient Centre* was simply not on all fours with the facts in the present originating summons. My remarks in respect of *Peekay* apply in full to *Orient Centre*.

111 Instead, we may find more guidance in the well-established principles of agency. Ordinarily, JSPL would be bound by any acts of Wee, its agent, within the scope of his actual or ostensible authority. The scope of Wee's authority in turn depends on the scope of the 1 November 2004 resolution. I find that a triable issue already arises in respect of whether the Key Transactions could be viewed as transactions "on speculative basis" under the 1 November 2004 resolution. This question, which involves an exegesis of the complex lexicon and practices of the forex trade, is eminently a question of fact which is best resolved at trial with the evidence and cross-examination of expert witnesses.

112 Furthermore, where an agent acts in excess of his actual authority and the third party has notice that the agent is exceeding his authority, the principal is not bound by the acts of the agent: see Article 73 of *Bowstead & Reynolds on Agency* (18th Ed, 2006) at 361. If the third party knows that the agent does not have actual authority to carry out the act, any apparent authority is negatived as well: *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28. I find that JSPL has raised triable issues of fact in respect of whether BNPP knew or had notice of Wee's lack of authority, *viz*, by its arguments based on Wee's unsigned statement, the suspense account and the evidence that BNPP was working with Wee to tailor the information to be provided to the external auditors. Several of BNPP's responses did not prevent such triable issues from arising. For example, it was not enough to assert that the suspense account was an internal general ledger account and therefore not disclosed to the external auditors, in the absence of any evidence regarding the authorisation, setting up and operation of this account, and in the face of evidence that the risks associated with suspense accounts have resulted in regulatory guidelines on their authorisation, setting up and operation. It was also not explained why Wee would instruct BNPP to disclose only the notional values of the outstanding forex positions and not their MTM values which would have been a more accurate reflection of the profits or losses at the particular time. Furthermore, the circumstances under which the E&Y auditors accepted only a simulated spreadsheet of MTM profits and losses in the 2006 audit confirmation remained obscure. Barely any response has been given in respect of JSPL's allegations as to the exotic and even "toxic" nature of the transactions. Finally, the allegations made in Wee's unsigned statement clearly raise a plethora of triable issues.

Conclusion

113 For the reasons above, I will allow the application in the present originating summons. I will hear counsel on the question of costs.

Copyright © Government of Singapore.