Tan Chin Yew Joseph *v* Saxo Capital Markets Pte Ltd
[2013] SGHC 274

Case Number : Suit 872 of 2012

Decision Date : 18 December 2013

Tribunal/Court : High Court

Coram : Vinodh Coomaraswamy J

Counsel Name(s) : Mr Siraj Omar and Mr See Chern Yang (Premier Law LLC) for the plaintiff; Mr Harish Kumar and Mr Jonathan Toh (Rajah & Tann LLP) for the defendant.

Parties : Tan Chin Yew Joseph — Saxo Capital Markets Pte Ltd

Contract – Contractual terms – Implied terms

Equity – Estoppel – Promissory estoppel

Tort – Negligence – Breach of duty

18 December 2013

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff seeks damages from the defendant, a futures broker, for wrongfully closing out his open futures contracts at a loss. The defendant says that it had the right to do so because the plaintiff failed to fulfil his margin obligations. The plaintiff alleges that he would not have been in breach of those margin obligations if the defendant had credited his incoming funds to his trading account in a timely and expeditious manner. The plaintiff therefore seeks damages from the defendant not only for the capital he lost when the defendant closed out his positions but also for the profits he would have made if the defendant had allowed him to keep those positions open until he could close them out voluntarily.

2 For the reasons which follow, I find the plaintiff's claim to be wholly unmeritorious. I have no hesitation in dismissing it in its entirety.

Facts

3 The plaintiff, Mr Joseph Tan Chin Yew, holds a finance-related degree and is qualified as a certified financial analyst. He has 12 years of experience in the financial services sector. [note: 1] Until 30 June 2012, he was employed by Credit Suisse AG as Asian Chief Economist. [note: 2]

4 The defendant, Saxo Capital Markets Pte Ltd, is a broker which allows its clients to trade on a wide variety of international exchanges in a wide variety of financial products using a "fully self-directed trading model." Under this model, the defendant provides execution-only services to its clients through its electronic trading platform at discounted brokerage fees. [note: 3] The financial products which the defendant enables its clients to trade in this way include futures contracts for commodities such as precious metals.

The plaintiff opens a trading account

5 On 18 May 2011, the plaintiff walked into the defendant's office in Raffles Place to inquire about its services. One of the defendant's sales managers, Mr Eoh You Loong ("Loong"), attended to the plaintiff. After speaking to Loong, the plaintiff decided to open a trading account with the defendant. Like all other trading accounts with the defendant, the plaintiff's was an execution-only account.

6 As part of the defendant's account-opening procedures, the plaintiff signed various documents. These included a client application form ("the Application Form") and a trading checklist ("the Checklist"). The plaintiff also received from Loong the defendant's standard account-opening documentation. This documentation included the defendant's General Business Terms ("the GBT").

The Application Form

7 Part 8 of the Application Form said:

> **I/We declare by my/our signature(s):**
>
> …
>
> To understand and accept that the General Business Terms and any other relevant terms and conditions (as amended from time to time) apply to my/our entire trading relationship with Saxo Capital Markets.
>
> …
>
> **Furthermore I/we confirm:**
>
> …
>
> That I/we specifically acknowledge and agree that Saxo Capital Markets will provide me/us execution only services and no financial advisory services…

8 By signing the Application Form, the plaintiff acknowledged two things. First, he acknowledged that the terms of the GBT formed part of the contract that governed his relationship with the defendant ("the Contract"). Second, he acknowledged that the defendant was going to provide him execution-only services. It is true that the plaintiff was what the defendant calls a "Premium Account Holder". There was also some suggestion by the plaintiff that the defendant agreed to make arrangements for him to execute his trades by speaking to a representative of the defendant rather than on his own through its electronic platform. [note: 4] None of this changes the fact that his account was an execution-only account.

The General Business Terms

9 The following terms of the GBT are of particular relevance to the plaintiff's claim:

(a) Cl 5.1 under the heading "Money Transfers to the Client's Account at Saxo Capital Markets":

> 5.1. When the Client transfers money from an account in another bank, the money is normally

booked on the Client's Account on the first Business Day after Saxo Capital Markets has received the money…

(b) Cl 6.3 under the heading "Margins, Collateral, Payments and Delivery": [note: 5]

6.3 Payments into the Client's Account are deposited by Saxo Capital Markets on the condition of Saxo Capital Markets receiving the amount in question… The Account will only be cleared for trading when the funds are credited into the Client's Account. This shall apply irrespective of whether it has been explicitly stated in receipts or other notices of or requests for payment.

(c) Cl 6.10 under the heading "Margins, Collateral, Payments and Delivery": [note: 6]

6.10 If the Client fails to provide any margin, deposit or other sum due under the [GBT] in respect of any transaction Saxo Capital Markets *may close any open position without prior notice to the Client* and apply any proceeds thereof to payment of any amounts due to Saxo Capital Markets…

[emphasis added]

(d) Cl 7.2 and 7.3 under the heading "Margin Trades" of the GBT: [note: 7]

7.2 Saxo Capital Markets' margin requirement shall apply throughout the term of the Margin Trade. *It is the Client's responsibility to continuously ensure that sufficient margin is available on the Account at any time.* The Client further acknowledges that losses can be far greater than the amount of funds placed in the Account for margin Trade. If practicable Saxo Capital Markets shall notify the Client if the margin requirements are not met. *If, at any time during the term of a Margin Trade, the margin available on the Account is not sufficient to cover Saxo Capital Markets margin requirement, the Client is obliged to reduce the amount of open Margin Trades or undertake such other adequate action to immediately satisfy the margin requirements. Even if the Client takes steps to reduce the size of open Margin Trades or undertakes any other action to satisfy the margin requirements, Saxo Capital Markets may close one, several or all of the Client's Margin Trades or part of a Margin Trade and/or liquidate or sell securities or other property at the Client's account at its sole discretion without assuming any responsibility towards the Client for such action.*

7.3 If Saxo Capital Markets, due to insufficient margin, closes one, several or all of the Client's Margin Trades, *the Client shall expect, unless otherwise agreed and confirmed by Saxo Capital Markets that all of the Client's open Margin Trades will be closed*.

[emphasis added]

The plaintiff implements a trading strategy

10 In or around May 2011, the plaintiff formed a view that the price of platinum was going to rise while the price of gold was going to fall. [note: 8] He intended to profit from this by implementing a sophisticated and aggressive trading strategy called a "spread trade". A spread trade involves taking a position on the price difference (known as the "spread") between two commodities by simultaneously purchasing long futures contracts for the commodity which the trader expects to go

up in price (in the plaintiff's case, platinum) and short futures contracts for the commodity which the trader expects to go down in price (in the plaintiff's case, gold). A long futures contract is a contract to *buy* a specific amount of the commodity at a specified price on a specified date in the future. A short futures contract is a contract to *sell* a specific amount of the commodity at a specified price on a specified date in the future. When the spread between platinum and gold had widened sufficiently in the plaintiff's favour, his plan was to take his profit by closing out his trading positions.

11 On 29 June 2011, the plaintiff credited SGD 200,000 to his trading account. On the next day, 30 June 2011, he credited a further USD 95,837.30 to the account.

12 On 30 June 2011, the plaintiff corresponded with Loong in a series of emails about the maximum long platinum and short gold positions which he could hold based on the funds in his account. [note: 9] I return to this email correspondence again at [22].

13 On 18 July 2011, the plaintiff executed the spread trade described above (at [10]). He instructed one of the defendant's account managers, Ms Christin Tan ("Christin"), to purchase 24 long futures for 50 troy ounces of platinum each on the New York Mercantile Exchange ("NYMEX") and 12 short futures for 100 troy ounces of gold each on the Commodity Exchange ("COMEX").

14 Both NYMEX and COMEX are futures exchanges based in the United States. Both exchanges have electronic trading platforms which operate virtually 24 hours per day, six days a week. Anyone who trades on these markets anywhere in the world is therefore exposed to the risk of adverse market movements at any time.

Trading on margin

15 The plaintiff acquired these 36 futures contracts on margin. That meant that the capital which the plaintiff had to put up in his trading account to buy these 36 futures contracts was a small fraction of his total exposure under them. Trading on margin thus allowed the plaintiff to use a small amount of capital to take a large position on the relative price movements in these two commodities. A small increase in the spread between the price of platinum and gold would amplify his profits. But margin-trading is a double-edged sword: a small decrease in the spread would amplify his losses. And his losses were not in any way limited by the capital he had staked in his account.

16 The plaintiff's 24 platinum contracts had a margin requirement of USD 3,500 each. His total margin requirement for the platinum contracts was therefore USD 84,000. His 12 gold contracts had a margin requirement of USD 4,500 each. His total margin requirement for the gold contracts was therefore USD 54,000. His total margin requirement for all 36 contracts was USD 138,000.

17 This USD 138,000 was just the plaintiff's minimum margin requirement. So long as his positions remained open, the plaintiff had to ensure that his account had funds which exceeded what the defendant called the "total margin requirement". At any given time, the plaintiff's margin situation was captured in a ratio – which the plaintiff was familiar with – called the margin utilisation ratio ("MUR"). MUR was calculated in real time by the following formula:

$$\text{Margin Utilisation Ratio} = \frac{\text{Total Margin Requirement}}{\text{Net Equity for Margin}}$$

Net Equity for Margin is calculated by taking the funds standing to his credit in the account, adding to that all unrealised gains arising from his positions, subtracting from that all unrealised losses arising from his positions and finally subtracting from that certain transaction costs.

18 If the plaintiff's positions sustained losses, his MUR would be exactly 100% when the funds standing to his credit in his account less his unrealised losses and transaction costs equalled exactly the total margin requirement. If his positions continued to sustain losses from that point, his Net Equity for Margin would diminish and his MUR would exceed 100%.

19 If the plaintiff's MUR equalled or exceeded 100%, the plaintiff would immediately be subject to a "margin call", *ie* a contractual obligation immediately to reduce his MUR either by either (a) depositing more funds into his account or (b) closing out some of his open positions. On the face of the Contract, the consequence of being on margin call was severe. Pursuant to Cl 7.2 and 7.3 of the GBT (see [9(d)] above) a margin call triggered the following consequences: [note: 10]

(a) The defendant had the right unilaterally to "close one, several or all of the [plaintiff's] Margin Trades… at its sole discretion without assuming any responsibility towards the [plaintiff] for such action".

(b) If the defendant "closes one, several or all of the [plaintiff's] Margin Trades, the [plaintiff] shall expect… that all of the [plaintiff's] open Margin Trades will be closed."

20 In reality, however, the defendant allowed each client, including the plaintiff, a grace period to bring his MUR below 100%. This grace period was 47 hours or until his MUR reached 150%, whichever was sooner.

21 Cl 7.2 of the GBT further provided that although the defendant would, "if practicable", notify the plaintiff if his margin requirements were not met, it was the plaintiff's "responsibility to continuously ensure that sufficient margin is available on the Account at any time." The plaintiff understood this well: [note: 11]

Q. … If you look at … [the] client application form, part 8. If you go to the last bullet point just above your signature, again you acknowledge and agree that Saxo's only providing you execution services and no financial advisory services; correct?

A. Yes, that's correct.

Q. So you had the responsibility of making your own trading decisions?

A. Yes, correct.

Q. You had the responsibility of monitoring your own margin?

A. Yes, correct.

The plaintiff takes his positions

22 As I have mentioned above, the plaintiff executed his spread trades on 18 July 2011. The plaintiff clearly knew the risks of spread trading on margin. Before taking his positions, the plaintiff initiated an email correspondence (see [12] above) with Loong to find out how many platinum and gold futures he could purchase in a 2:1 ratio based on the funds in his account. [note: 12] Loong

initially gave the plaintiff a conservative estimate, suggesting that he could purchase 20 platinum futures and 10 gold futures (*ie* a total of 30 futures contracts). Based on the available funds in his account, this position could withstand an unrealised loss of about USD 119,250 before the plaintiff's MUR would reach 100% and trigger a margin call. Loong expressly caveated his suggestion by saying that "the above case is just purely my view and not an [*sic*] suggestion on what to trade". [note: 13] The plaintiff, however, wanted to maximise his risk to maximise his reward. He asked Loong how many contracts he could buy "when pushed to the limit of my funds in the account." [note: 14] The plaintiff asked whether he could go up to a total of 42 contracts (14 gold and 28 platinum) or 45 contracts (15 gold and 30 platinum). To this, Loong replied as follows: [note: 15]

> When seriously push [*sic*] to the limit of your funds in your account, it should be 24 lots of platinum contracts and 12 lots of gold contracts with 45 points gap difference [USD 90,000] set aside as buffer before hitting margin call.

23 Thus, when the plaintiff bought these 36 futures contracts, he was taking the view that, while he waited to take his profit, his worst-case scenario was an unrealised loss of USD 90,000. With that in mind, he bought 36 contracts to maximise his potential gain based on the capital he had staked as margin. He was deliberately implementing a high-risk trading strategy (spread trading) in a high-risk manner (on margin) to maximise his rewards (by maximising his contracts). He piled risk upon risk upon risk. That necessarily meant that he left no margin for error if his assumed worst-case scenario turned out to be overly-optimistic. That is precisely what happened in August 2011.

The plaintiff's positions deteriorate on 4 Aug 2011

The lead-up to the margin calls

24 In early August 2011, the US financial markets experienced turmoil. This led to a narrowing of the spread between platinum and gold. The plaintiff sustained unforeseen losses on his open positions, albeit unrealised losses. The plaintiff's prediction had been defeated, at least at this point in time. This led to severe upward pressure on his MUR.

25 On 4 August 2011 at around 15:16, the plaintiff called the defendant to enquire about his MUR ("the 4 August 15:16 Conversation"). One Mr Gavin Tay ("Gavin") attended to the plaintiff. I set out the relevant portions of the 4 August 15:16 Conversation: [note: 16]

Plaintiff:	I just want to check my position. Because there is quite of bit compression in term [*sic*] the biggest position I am running. I just wondering how I am on margin side and trigger margin call.
Gavin:	Are [*sic*] you received any margin call right now?
Plaintiff:	I have not got any information…
…	
Gavin:	Okok. I will check. Currently your [MUR] is only 78%.
Plaintiff:	78% meaning what?
Gavin:	You have not reached margin call. Margin call means 100% utilisation of the margin
Plaintiff:	Okok.

Gavin: Now is 78%. For your two future contracts Nymex and Comex.

Plaintiff: It is still open, the position is not closed.

Gavin: Yes. Still open. But if market worsen and reached 100%, it will not be stop out immediately. There is about 47 hours… or 150% whichever comes earlier before we close out the position for you.

Plaintiff: Ok, understand, so I will get a email or phone call lah. Some one call me.

Gavin: Ahhh…not necessary. But pop-out will appear on your platform. Email I do not know your account manager will send to you.

Plaintiff: Actually I do not have the platform you see.

Gavin: Ah… I will inform Christin.

Plaintiff: Ya, ask Christin to watch the position for me. If there is any pop-out let me know. I do not want to close the position.

…

26 In this conversation, Gavin tells the plaintiff that notwithstanding Cl 7.2 of the GBT, the plaintiff's positions will not be closed out automatically when his MUR reaches 100% but that he will be allowed a grace period of 47 hours or until his MUR reaches 150%, whichever is earlier.

27 Later the same day at 17:02, the plaintiff called the defendant again. This time he spoke to Christin ("the 4 August 17:02 Conversation"). The plaintiff wanted to check his MUR. Christin told the plaintiff that his MUR had reached 80%. Like Gavin, she went on to inform the plaintiff of the defendant's policy on clients whose MUR reached 100%: [note: 17]

Christin: … I do not want you to get there… I mean if you do get there[,] you will get an email notification that you are on 100%. And your concern about the further loss. There is a circuit breaker goes out at 150%. Compulsory circuit breaker.

Plaintiff: The compulsory circuit breaker at 150% is it?

Christin: That is right. But at 100% you are already on the call. That means you still have to [fulfil] the 47 hours. That means continuously at 100% or above 100% below 150%, you are on 47 hour clock.

Plaintiff: Ok.

Christin: If that happens, the 47 hours clock…

Plaintiff: Ok. I got two days to put in money lah.

Christin: Exactly maybe one, just one day.

Plaintiff: Ok can.

…

28 Once again, the defendant made crystal clear to the plaintiff the conditions on which his positions would be closed out automatically.

The margin calls

29 The platinum and gold markets remained volatile throughout the day on 4 August 2011 (New York time). At 22:44 that day in Singapore, the plaintiff's MUR reached 100% for the first time. At 23:39, the defendant's automated system sent the plaintiff an email to inform him of a margin call. The email contained the following warning: [note: 18]

> You should either reduce your positions and/or transfer sufficient funds to support your open positions. Funds via cheque payments will only be booked to your trading account once the cheque has been cleared and the funds are made available *and booked* into your trading account.
>
> [emphasis added]

30 Market volatility meant that the plaintiff's MUR hovered around 100% throughout the night of 4-5 August 2011 (Singapore time). Each time his MUR dipped below 100% and then went back above it, he received another margin call email. In all, he received 12 more margin call emails that night.

The plaintiff is closed out on 5 August 2011

The plaintiff's margin position deteriorates

31 On 5 August 2011 at 08:30, Christin called the plaintiff ("the 5 August 08:30 Conversation"). She told him that his MUR had reached 102% and that he was subject to a margin call. The defendant had no contractual obligation to make this call, and the plaintiff knew it (see [21] above). This was a wake-up call. The plaintiff would have done well to heed it, and to do so with alacrity.

32 In response, the plaintiff told Christin that he was going to remit SGD 40,000 to his account that day to reduce his MUR: [note: 19]

Plaintiff:	I'm going to move about forty thousand SGD into the account today.
Christin:	Ok, alright. So you're going to do a [telegraphic transfer] over right?
Plaintiff:	mmm.
Christin:	Ok, will do. Let me know once you get down to the bank and do this and I will just let my cash management know that this is coming in. But *otherwise you are still expose[d] to anything that goes up at 150 ok*? So, ehm, let me know, ok as soon as possible.
Plaintiff:	Ok.

[emphasis added]

33 It is clear that Christin was making three points to the plaintiff in this phone call:

(a) that she would inform the defendant's cash management team of the plaintiff's incoming funds to try to speed up the process of giving the plaintiff the benefit of those funds;

(b) even though the plaintiff had spoken to Christin and told her to expect his funds, the plaintiff was nevertheless subject to the defendant's automatic close out procedure; and

(c) although the defendant was giving him 47 hours to meet the margin call, he was still exposed to the risk of an immediate, automatic close out if his MUR reached 150% at any time within those 47 hours.

34 At 09:41 that day, the plaintiff called Christin to ask for the defendant's settlement instructions ("the 5 August 09:41 Conversation"). At 09:49, Christin sent to the plaintiff by email the defendant's standard settlement instructions ("the Settlement Instructions") which set out how clients could fund their trading accounts through the defendant's account at The Hongkong and Shanghai Banking Corporation ("HSBC").

35 At 09:54, the plaintiff forwarded the Settlement Instructions to his bank, Standard Chartered Bank ("SCB"), with instructions to transfer SGD 40,000 to HSBC for credit of the defendant and further credit to his account. At around 11:00 – two and a half hours after Christin warned the plaintiff of the risk of an immediate automatic close out if his MUR reached 150% – the plaintiff visited the Battery Road branch of SCB to sign the remittance form which had been prepared for him. [note: 20] At 11:41, the plaintiff received an email from SCB confirming that they had carried out his remittance instructions. [note: 21]

The defendant automatically closes out the plaintiff's positions

36 The plaintiff's trading positions deteriorated dramatically from 13:00 onwards. At 13:20, the defendant sent the plaintiff a margin-call email which stated that his MUR was 126%. [note: 22] Six minutes later, at 13:26, the plaintiff called Christin ("the 5 August 13:26 Conversation") to inform her that he had already effected the transfer of SGD 40,000 by a telegraphic transfer: [note: 23]

Plaintiff:	Christin, hi, it's Joseph. I've already sent in 40 thousand.
Christin:	Ok, Sin? Right?
Plaintiff:	Ya, SGD ya.
Christin:	Will do. Via [telegraphic transfer] right? This is via [telegraphic transfer].
Plaintiff:	Via [telegraphic transfer], correct, from my Standard Chart account. Sorry, that should help with things a little.
Christin:	Yeah that's right.
Plaintiff:	For now.
Christin:	I'm just gonna call you once I sight this funds. Ok?
Plaintiff:	Yeah.
Christin:	Alright.

37 At 13:29:27 – 1 minute 55 seconds after she ended the 5 August 13:26 Conversation – Christin emailed the defendant's cash management team to inform them that they should expect a remittance by telegraphic transfer of SGD 40,000 from the plaintiff through SCB and that they should inform her "when the funds [are] sighted and booked". [note: 24]

38 At around 15:00, Christin noticed that the plaintiff's MUR had shot up to 138%. Concerned for

the plaintiff, she called the cash management team to check if the SGD 40,000 had arrived. They told her that the funds had not yet come in.

39 At 15:08:52, Christin called the plaintiff ("the 5 August 15:08 Conversation"). She encouraged him to close out some of his trading positions in order to bring down his MUR. As was the case all along, she had no obligation to monitor the plaintiff's margin position let alone to call him about it (see [21] above). The 5 August 15:08 Conversation lasted a total 4 minutes 5 seconds. Two critical events occurred during this phone call. First, at 15:11:23, the plaintiff's MUR exceeded 150%. As a result, the defendant's automated system immediately closed out all his open positions. Second, 1 minute and 16 seconds later, the defendant booked the plaintiff's SGD 40,000 to his account. Because this conversation is of critical importance, I reproduce it in its entirety, with the time stamps: [note: 25]

Time	Person	Content
15:08:59	Christin:	Hi Joseph, your [MUR] is at 142%, you know. You want to do something about it first because I am worried the fund wont comes in time for…
	Plaintiff:	It sure comes in already because I have already placed the instructions before 2pm.
	Christin:	I understand but I have just checked before I call you. That is why I am asking whether you want to reduce some first. [Your MUR] is at 140% and Euro is really taking this really badly.
	Plaintiff:	Yeah. But No.
	Christin:	No?
	Plaintiff:	The funds are coming in.
	Christin:	The thing is that I cannot guarantee. You see. If the fund is coming in, as long as it not booked. You are still subject to margin stop-out.
	Plaintiff:	Yeah. But you can scale back some? Does the whole position will be closed?
	Christin:	Ah, I am sorry?
	Plaintiff:	Does the whole position will be closed out?
	Christin:	Yes! The whole position which is why I am so worried for you, right?
	Plaintiff:	I still got 142%. [The funds have already transferred]. [note: 26]
	Christin:	En?
	Plaintiff:	Where is the 150?
	Christin	150?
	Plaintiff:	How tight is the spread…
	Christin:	It is now 1657-1689, current price right? Gold is 1657… Platinum is 1689.
	Plaintiff:	No. 1694, [P]LV1 [Note: Reference to a platinum long futures contract], right?
	Christin:	Sorry? Nymex platinum, right? 1687.

Plaintiff: Stay calm. Stay calm.

Christin: I don't want you to get stopped out, man. That is 142% as I am looking at this…

Christin: Oh no, 146%. I tell you what Joseph. Either we had better clear down some first. How about one one for each side?

15:10:57 Plaintiff: One Contract for each side?

Christin: Yes.

Plaintiff: En…

15:11:08 Christin: Wait wait, 149% hurry up, hurry up! Quick, quick!

Plaintiff: Two for platinum, one for gold.

15:11:14 Christin: So, wait, wait, GCV1 [Note: Reference to a gold short futures contract] you are short. Buy back two.

15:11:22 Plaintiff: Two one.

15:11:23 Christin: Wait wait hang on. Hold hold hold. Joseph, you are totally cleared out by the system, already. You are already triggered stop out.

Plaintiff: But the funds are in, isn't it?

Christin: No. It is not in yet. Which is why I called you to tell you it is not in yet. It triggers 151%. And everything is cleared out.

Plaintiff: So the whole loss taken at hundred and…

Christin: Yes. The whole loss has been taken already.

Plaintiff: It is ok. Don't worry.

Christin: Ok. Basically, after everything factored in is 88,000 left in your account. 88,298.

Plaintiff: Dollars?

Christin: USD.

Plaintiff: Ok. All right.

Christin: I am sorry man. I really try to help. That is why I told you it might be better for you to clear some But… as we're talking, everything went out.

Plaintiff: Yeah yeah that is not your problem. Just stay calm.

Christin: Ok. Do you want going to some positions or you need time to think something first

Plaintiff: We will just hold for now. Ok? Then we will just… yeah. How the funds come in?

Christin: Actually the 40,000 comes in and it did not help, you know.

Plaintiff: The 40,000 should help because it not possible to trigger the 150%. Can you please recheck your system please?

Christin:	Er. Yes I just saw your trigger came in at…
Plaintiff:	It is very strange ah. If I wire this money in, it should be in by now.
Christin:	But the thing is if it don't pop to us, we still don't get it. And we work through HSBC, you see. So if it don't pop to us, we don't be able to book it.
Plaintiff:	Come on. I have already put the cash in. We do see the 140%. You got quickly thinking whether you can put positions back on again. Just talk to Pamela.
Christin:	But it is STP. You see. So everything is traded through exchange. So not likely we can put back on.
Plaintiff:	Just see what you can do, ok?
Christin:	Ok, ok. Thanks.
Plaintiff:	Thanks bye.

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40 The 5 August 15:08 Conversation must be viewed against the backdrop of the precise sequence of events which occurred between 14:47 and 15:13 on 5 August, none of which are disputed:

(a) At 14:47, SCB debited SGD 40,000 from the plaintiff's account at SCB pursuant to his instructions given earlier that day and further to the confirmation it sent at 11:41 that morning. [note: 27]

(b) At 15:05:15, HSBC acknowledged SCB's SWIFT message crediting the defendant's account with SGD 40,000. [note: 28]

(c) At 15:07, HSBC credited SGD 40,000 to the defendant's segregated trust account with HSBC. [note: 29]

(d) At 15:08:56, HSBC sent a SWIFT message to the defendant reporting that it had credited SGD 40,000 to the trust account. [note: 30]

(e) At 15:09:20, the defendant's cash management team accessed the trust account to validate the transfer of SGD 40,000. [note: 31]

(f) At 15:11:18, the plaintiff's MUR reached 151% and all his positions were automatically closed out. [note: 32]

(g) At 15:12:25, after conducting its standard anti-money laundering checks, the defendant's cash management team directed the SGD 40,000 to the plaintiff's Account. [note: 33]

(h) At 15:12:34, the defendant's system booked the SGD 40,000 into the plaintiff's trading account.

41 So the defendant booked the plaintiff's SGD 40,000 to his account 3 minutes 38 seconds after

the defendant received the SWIFT confirmation from HSBC, and 1 minute 16 seconds after the defendant's system automatically closed out the plaintiff's positions. [note: 34] The plaintiff says, therefore, that it is the defendant who is responsible for his loss and not himself.

Summary of the parties' cases

The plaintiff's case

42 In his closing submissions, counsel for the plaintiff, Mr Siraj Omar, contends that the defendant was obliged to give the plaintiff the benefit of the SGD 40,000 at 15:08:56 [note: 35] (the point at which HSBC notified the defendant that HSBC had received the plaintiff's remittance of SGD 40,000), and not at 15:12:34 (when the defendant in fact booked the SGD 40,000 into the plaintiff's account). Mr Omar submits further that this obligation arises from an implied term of the Contract that the defendant would provide its services to the plaintiff in a timely and expeditious manner; alternatively because it owed him a duty of care in tort to the same effect. In breach of this implied term, alternatively this duty of care, the defendant gave the plaintiff the benefit of the SGD 40,000 only at 15:12:34. If not for this breach, Mr Omar's argument goes, the plaintiff's MUR would have been well below 150% at 15:11:18, and the automatic close-out would not have been triggered at that moment. On that basis, Mr Omar submits the defendant wrongfully closed out the plaintiff's trading positions at 15:11:18. Thus, says Mr Omar, the defendant is liable to compensate the plaintiff not only for the SGD 214,000 or so which he lost when his positions were automatically closed out but also for the profit of SGD 322,000 or so he would have achieved on his positions when the markets for platinum and gold eventually recovered in his favour, as they did. [note: 36]

43 Even if all this is correct, it still leaves the fact that the plaintiff's MUR, although below 150% at 15:11:18, would have been above 100% at that time. Mr Omar does not deny that the defendant had a contractual right to close out the plaintiff's positions immediately and without warning upon the plaintiff's MUR crossing 100% under Cl 6.10, 7.2 and 7.3 of the GBT (see [9(c)] and [9(d)] above). However, Mr Omar argues that the defendant is estopped from relying on these provisions by virtue of Gavin and Christin's assurances that his positions would not be closed out unless his MUR remained above 100% for more than 47 hours or his MUR reached 150%.

44 Mr Omar also does not deny that Cl 5.1 and 6.3 of the GBT (see [9(a)] and [9(b)]) gives the defendant the contractual right to book incoming funds to the plaintiff's account at any time up to one business day after the defendant receives the funds in the trust account. However, Mr Omar argues that the defendant is estopped from relying on Cl 5.1 and 6.3 of the GBT by the defendant's clear and unequivocal promise to the plaintiff that he would be entitled to the benefit of the SGD 40,000 as soon as it was credited to the trust account.

45 The plaintiff's case which I have outlined above was his case in closing. This case was significantly different from the one advanced in his pleadings. Below are examples of how his position changed over the course of the proceedings:

(a) In his pleadings, the plaintiff alleged that by closing out his positions, the defendant breached the express terms of the Contract to act according to his instructions. [note: 37] The plaintiff abandoned this allegation in his closing submissions.

(b) In his pleadings, the plaintiff alleged that the defendant negligently handled his funds at 15:08:56 on 5 August 2011 because a fault in the defendant's automated system occurred at that time which required manual intervention. The delay occasioned by that manual intervention,

the plaintiff said, is why the system failed automatically and immediately to attribute his funds to his account before the automatic close-out. [note: 38] The plaintiff had no basis for these assertions. Indeed the evidence at trial showed them to be untrue: the defendant did not have an automated system as alleged; and the automated system which it actually did have handled his remittance without error. [note: 39] The plaintiff abandoned these allegations in his closing submissions.

(c) Related to (b), the plaintiff pleaded that the defendant was negligent in failing to have a straight-through processing system that would credit funds to its clients immediately upon receipt at HSBC. [note: 40] However, the plaintiff later conceded that it was not part of his case that the defendant had an obligation to have such a system. [note: 41] The plaintiff abandoned this allegation in his closing submissions.

(d) In his pleadings, the plaintiff alleged the defendant breached its duty to exercise due care and skill in providing its services because a reasonable holder of a capital markets licence in the defendant's circumstances would have suspended the automatic process for closing out the plaintiff's positions and would have managed them manually and/or closed them out individually instead of all together. [note: 42] However:

(i) The plaintiff adduced no evidence whatsoever to support this allegation; [note: 43]

(ii) The plaintiff quickly conceded in cross-examination that a financial institution with a capital markets licence did not have an obligation to suspend an automatic close-out; [note: 44] and

(iii) Any such a duty would be inconsistent with Cl 7.2 and 7.3 of the GBT (see [9(d)] above).

(a) The plaintiff abandoned this allegation in his closing submissions.

(e) In his pleadings, the plaintiff alleged that the assurances given by Gavin and Christin that his positions would not be automatically closed out unless his MUR was above 100% for more than 47 hours amounted to a representation that he would have a grace period of two Singapore business days after his MUR crossed 100% to bring his MUR down below 100%. [note: 45] In cross-examination, however, he accepted that the grace period was in fact 47 consecutive hours by the clock. He accepted also that there was no sense in talking about "Singapore business days" because platinum and gold futures were traded on NYMEX and COMEX virtually around the clock and around the world. [note: 46]

(f) The plaintiff's primary position in his pleadings was that he was entitled to the benefit of the funds at 15:05 (when HSBC received the SWIFT message from SCB). [note: 47] In cross-examination, however, he changed his position and alleged that the defendant ought to have given him the benefit of the funds at 15:07 (when HSBC credited the funds to the trust account). In support, he tried to rely on the Checklist which stated that "your trading account will not be credited until funds are received and booked to *your account*" (see [70] below). According to him, the phrase "your account" was a reference to the defendant's trust account with HSBC, not to a customer's trading account with the defendant. [note: 48] On that basis, he reasoned that his account ought to have been credited immediately when HSBC booked the funds

to the trust account at 15:07. However, he had to admit eventually that this interpretation was simply nonsensical. The Checklist is addressed to a client of the defendant. "Your account" in this context is clearly a reference to a *client's* trading account with the *defendant*. [note: 49] It simply cannot refer to the *defendant's* account with *HSBC*. In light of this, the plaintiff's position shifted once more. After accepting that it made no sense to argue that the defendant had to give him the benefit of the funds *before* HSBC had even communicated the receipt of the funds to the defendant, he argued instead that the defendant should have given him the benefit of the funds as soon as the "transfer was effected". To him, this meant the point at which HSBC notified the defendant that HSBC had received the plaintiff's remittance of SGD 40,000 *ie* 15:08:36.

46 None of these changes of position inspires me with any confidence about the plaintiff's conviction in his own case as it was finally formulated or with his credibility as a witness.

The defendant's case

47 Counsel for the defendant, Mr Harish Kumar, argues that Cl 5.1, 6.3, 6.10, 7.2 and 7.3 of the GBT provide a complete defence to the plaintiff's claims because Mr Omar's implied term and duty of care in tort are not sustainable in the face of these express provisions of the Contract.

48 Mr Kumar further contends that, in any event, the defendant acted in a timely and expeditious manner by booking the funds into the plaintiff's account within 3 minutes 38 seconds of being notified of their receipt.

49 Finally, Mr Kumar denies that the defendant is estopped from relying on Cl 5.1, 6.3, 6.10, 7.2 and 7.3 of the GBT.

No scope for implied term

50 I start with Mr Omar's submission that there was an implied term in the Contract that the defendant had to provide its services to the plaintiff in a "timely and expeditious manner". In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*"), the Court of Appeal at [101] set out a three-step process to ascertain whether a particular term could be implied into a contract:

(a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.

(b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.

(c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

51 The first step requires the court to ascertain, as a preliminary point, whether there is indeed a gap in the parties' contract for an implied term to fill. After all, it is only to fill a gap in the contract and thereby to give effect to the parties' presumed intentions (*Sembcorp* at [29]) that the court, in certain situations, will hold a term to be implied.

52 The first hurdle which the plaintiff has to surmount is Cl 4.10 of the GBT, which states:

> *In general, Saxo Capital Markets shall act according to instructions as soon as practically possible* and shall, as far as practically possible and shall, as far as trading instructions are concerned, act consistent with the bank's Best Execution Policy. However if, after instructions are received, Saxo Capital Markets believes that it is not reasonably practicable to act upon such instructions within a reasonable time, Saxo Capital Markets may defer acting upon those instructions until it is, in Saxo Capital Markets' reasonable opinion, practicable to do so or notify the Client that Saxo Capital Markets is refusing to act upon such instructions.
>
> [emphasis added]

53 Mr Omar submits that there is a gap in the Contract because the phrases "[in] general" and "shall act according to instructions *as soon as practically possible*" are vague. The former fails to identify the specific situations in which this obligation arises and the latter fails to identify what is the standard expected of the defendant. Implying a term that the defendant will provide its services to the plaintiff in a timely and expeditious manner, Mr Omar argues, would fill this gap. [note: 50]

54 The first argument is a non-starter. Cl 4.10 deals with situations where a client of the defendant gives instructions to the defendant – such as trading instructions – which the defendant is in a position to carry out without further intervention from the client. This clause is not apt to cover a situation where a client of the defendant tells the defendant to expect incoming funds after he initiates a funds transfer involving a number of intermediate steps. In any event, the phrase "in general" when read in context clearly means that Cl 4.10 applies unless there is some other more specific or more apt provision in the Contract. As for the second argument, the phrase "as soon as practically possible" has to be read together with Cl 5.1 and 6.3 of the GBT which contemplate that it will normally take up to one business day for the defendant to give its clients the benefit of any funds received in its trust account. The Contract, and in particular Cl 5.1 and 6.3, therefore provide specifically for the situation at hand: when a client can expect the defendant to give him the benefit of an inward remittance of funds, even if the client has told the defendant to expect those funds.

55 Mr Omar also submits that the term that the plaintiff seeks to imply does not contradict the express terms of the Contract because nothing in the GBT says that the defendant does not owe a duty to its client to provide its services in a timely and expeditious manner. I do not agree. To the extent that the formula "timely and expeditious" is used to argue that the defendant is under a contractual obligation to book funds into a client's trading account in less than one business day, that is, in substance, *directly contradicted* by Cl 5.1 of the GBT. The effect of Cl 5.1 is that it *cannot* be a breach of the Contract for the defendant to book funds into a client's account at any time up to one business day after receipt. It may even be possible to argue that Cl 5.1 allows the defendant in certain cases to take *more* than one business day to book funds to a client's account. But the defendant did not push its argument on Cl 5.1 that far and did not need to do so.

56 For the same reasons, the plaintiff fails to surmount the second step of the three-stage process set out in *Sembcorp*. Cl 5.1 of the GBT gives the Contract clear business efficacy without any need to imply an overarching term that the defendant will provide its services to the plaintiff in a timely and expeditious manner.

57 This is sufficient to dispose of the plaintiff's case based on an implied term. However, for the sake of argument, even if I accept that there is an implied term that the defendant will provide its services to the plaintiff in a timely and expeditious manner, I am satisfied that the defendant did not breach any such term. Mr Omar submits that the defendant breached the term because the plaintiff

did not get the benefit of the funds at 15:08:56 but only at 15:12:34, 3 minutes 38 seconds later. However, the plaintiff himself accepted that the defendant did not have – and had no obligation to have – an automated processing system which would book the funds into his Account *immediately* upon receipt of the funds into the trust account. That concession means that, if any such implied term existed, the defendant came under an obligation to comply with it only at 15:08:56. This in substance boils down to an allegation that the 3 minutes 38 seconds which the defendant took between 15:08:56 and 15:12:34 was neither timely nor expeditious.

58 Mr Omar submits that every second was crucial to a customer subject to a margin call and it was therefore necessary for the defendant to give the plaintiff the benefit of incoming funds as soon a s possible. He submits further that, because the plaintiff was subject to a margin call, the defendant's cash management team should have immediately credited the plaintiff's incoming funds to his account and postponed its anti-money laundering checks. It was those checks which were being completed when the defendant automatically closed out the plaintiff's positions. In support of this submission, Mr Omar relies on the concession by Mr Eugene Low, a senior officer in the defendant's cash management team, that the defendant had the ability to postpone its anti-money laundering checks in a margin call situation so that funds could be made available more quickly to a client who was subject to a margin call. This submission, in my opinion, conflates the defendant's *ability* to postpone anti-money laundering checks in a margin call situation with its *obligation* to do so. The defendant had no obligation to postpone the anti-money laundering checks.

59 In truth, taking the implied term argument to its logical conclusion exposes the weakness of the plaintiff's case. The defendant automatically closed out the defendant's positions at 15:11:18. Even if the defendant had credited the funds to the plaintiff's account at 15:11:19, his positions would still have been automatically closed out. So the logical conclusion of the plaintiff's argument is that even if the defendant had taken just 2 minutes and 23 seconds to book the funds into his account (at 15:11:19 instead of 15:12:34), the defendant would still be in breach of this implied obligation. Thus, the implied term contended for by the plaintiff amounts to an argument that the defendant is in breach of its duty to act in a timely and expeditious manner so long as a client fails to receive the benefit of funds before his positions are closed out. The plaintiff's argument effectively subjects the defendant to a deadline for booking the funds into a client's account which varies from day to day with the particular circumstances of each client. Implying such a term gives the Contract commercial absurdity rather than commercial efficacy. I would expect the plaintiff, with his background in the financial services sector, to understand that. The defendant included Cl 5.1 in the GBT precisely to avoid such an imprecise and ever-shifting obligation. In rejecting this implied term and its logical conclusion, I also bear in mind that:

(a) The defendant was not in control of when the plaintiff's MUR would reach 150% since this depended purely on market forces;

(b) The defendant was not in control of the time that HSBC would receive the funds from SCB (the plaintiff in fact accepted in cross examination that he had to take the risk of HSBC failing to receive the funds from SCB in time); [note: 51]

(c) The defendant was not in control of the moment HSBC chose to book these funds into the trust account; and

(d) The defendant did not have – and the plaintiff accepted that it had no obligation to have [note: 52] – an automated system that automatically and immediately attributed sums credited to the trust account to the trading account of a particular client of the defendant.

60 Even if I were to assume that such a term could be implied into the Contract, the plaintiff produced no evidence to show that the booking of funds to a client's trading account within 3 minutes and 38 seconds of receiving notification of receipt in its trust account was in breach of any industry norm. On the contrary, on the evidence before me, HSBC also took around the same time to book the SGD 40,000 into the trust account and inform the defendant of this by SWIFT after it received the funds from SCB (see [40] above).

61 Therefore, even if there was an implied term that obliged the defendant to book incoming funds to the plaintiff's account in a timely and expeditious manner, I found that the time of 3 minutes 38 seconds taken to do so did not amount to a breach of that implied term.

The defendant was not negligent

62 The content of any duty of care in tort which required the defendant to provide its services to the plaintiff in a timely and expeditious manner is shaped by the contractual framework governing the parties' relationship, including Cl 5.1 and 6.3 of the GBT: *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [46(c)]. In fact, Mr Omar clarified that the duty of care which the plaintiff sought to impose on the defendant was on the same terms and scope as the implied contractual term. [note: 53] The plaintiff's alternative claim in tort therefore did not add anything to his claim in contract. Nevertheless, I assume in the plaintiff's favour that such a duty of care exists. Even on that assumption, I find that the defendant did not breach any such duty of care. I bear in mind that:

(a) The defendant would not be in breach of the Contract if it booked the funds within one business day by virtue of Cl 5.1 of the GBT;

(b) I cannot imply a term into the Contract that the defendant is obliged to provide its services to the plaintiff in a timely and expeditious manner, if that is a contractual duty more onerous than the Contract already provides for; and

(c) Even assuming there were such an implied term, the defendant did not breach it when it took 3 minutes 38 seconds to book the funds into the plaintiff's account.

63 There is therefore no room left to find any breach of any duty of care by the defendant.

The defendant is not estopped

64 This left the plaintiff's case resting entirely on the doctrine of promissory estoppel and the doctrine of estoppel by convention. The doctrine of promissory estoppel is often described as a "shield" because it allows a promisee to prevent a promisor from insisting on enforcing his strict legal rights. A promisee cannot use promissory estoppel as a "sword" to found a free-standing cause of action, at least on the orthodox view: *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 ("*Catalla*") at [82]. The same can be said of the doctrine of estoppel by convention: *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 2 SLR 311 at [90]. The plaintiff lacks a sustainable cause of action arising from an implied term in contract or a duty of care in tort for the reasons I have given above. That is fatal to the plaintiff's case in estoppel. If the plaintiff has no sword in contract or tort, it is abundantly clear that he is attempting to use estoppel impermissibly as a sword.

65 However, even if the plaintiff is permitted to raise the estoppel arguments as a sword, his claim still fails for the reasons below.

Promissory estoppel: the law in general

Promissory estoppel: the law in general

66 A promisee who relies on the doctrine of promissory estoppel must establish three elements: first, that the promisor made a clear and unequivocal promise, whether by words or conduct; second, that the promisee relied on the promise; and third, that the promisee suffered detriment as a result of the reliance: *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [37]. It is also said that a promisor is estopped by promissory estoppel only if it is "inequitable" for him to resile from his promise: *Catalla* at [38]; *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter and others* [2013] 2 SLR 193 at [134(c)]; *Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896) at [57].

67 The question of whether a promise is sufficiently clear and unequivocal is a factual inquiry that must take into account the exact contractual provision which is sought to be enforced and the exact promise made in relation to that provision: *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR(R) 1 at [60].

Defendant made no unequivocal promise to the plaintiff

68 Mr Omar's case is that the defendant was estopped from relying on Cl 5.1 and 6.3 of the GBT. I reproduce those clauses again:

> 5.1. When the Client transfers money from an account in another bank, the money is normally booked on the Client's Account on the first Business Day after Saxo Capital Markets has received the money…
>
> …
>
> 6.3 Payments into the Client's Account are deposited by Saxo Capital Markets on the condition of Saxo Capital Markets receiving the amount in question… The Account will only be cleared for trading when the funds are credited into the Client's Account.…

69 Cl 5.1 and 6.3 of the GBT make two things clear. First, the defendant estimated that it would normally take one business day for funds to be booked into a client's trading account after the defendant had received the funds. It was therefore implicit that it *cannot be a breach* of the Contract if funds are booked to an account within one business day of receipt. Second, the plaintiff would not have the benefit of inward remittances of funds until those funds were received by the defendant and booked to his account.

70 The second point was repeatedly brought to the plaintiff's attention. For example, the Checklist contained the following statement:

> Account Trading Conditions [note: 54]
>
> …
>
> Funding Methods – your trading account will not be credited until funds are received *and booked* to your account. Saxo Capital Markets does not accept 3rd party funding.
>
> [emphasis added]

71 On 29 June 2011, when the plaintiff funded his account for the first time, the defendant sent

him an email confirming receipt. This email contained the following words of caution: [note: 55]

> Dear Joseph Tan Chin Yew,
>
> We are pleased to advise you that your funds have arrived and you can now proceed with the activation of your live Saxo account.
>
> …
>
> Before you commencing trading with us, it is of utmost importance that you review the information below carefully.
>
> …
>
> **Please note:**
>
> Funds will need to be cleared first before they are available and Margin stop-outs cannot be postponed based on any incoming funds until they are cleared *and booked* into your account.
>
> [emphasis added]

72 Mr Omar relies on several facts to support his submission that the defendant made a clear and unequivocal promise to the plaintiff that he would be entitled to the benefit of the SGD 40,000 as soon as the defendant received notice from HSBC at 15:08:56 that the funds had been received in its trust account. I deal with each of them in turn.

73 First, Mr Omar refers to the 4 August 17:02 Conversation (see [27] above). He submits that in this phone call:

> (a) Christin informed the plaintiff that his positions would not be closed out if he transferred sufficient funds into his account within one day of a margin call; and
>
> (b) Christin did not, at any time during this conversation, inform the plaintiff that there would be a time lag between the time the defendant received the funds and the time he would be given credit for the funds, let alone that the time lag could take up to one business day.

74 I fail to see how these two facts support Mr Omar's conclusion that Christin thereby promised the plaintiff, unequivocally or otherwise, that the defendant would give him the benefit of the SGD 40,000 as soon as HSBC informed the defendant that it had credited the funds to the trust account. When the plaintiff suggested to Christin that what she had told him meant that he had "two days to put in money" to beat the 47-hour deadline, he was clearly thinking in terms of the total time he had available in which to satisfy the margin call. Seen in this context, it was clear to me that when Christin responded "[e]xactly maybe one, just one day", she was giving the plaintiff an estimate of the time which he had to *initiate* a telegraphic transfer of funds in order for plaintiff to give him the benefit of the funds before the 47-hour deadline elapsed. And all of this was subject to her express qualification that there was still a compulsory close-out when his MUR reached 150%. This was a point for, not against, the defendant: it supported the defendant's position that the plaintiff knew that he had to allow up to one day (or to be precise, 23 hours out of the 47-hour grace period) after initiating a transfer for all intermediate steps to be completed, subject always to an automatic close-out at 150% MUR even before the 47 hours expired.

75 I was also satisfied that no promise, let alone an unequivocal promise, could be inferred from Christin's failure to advise the plaintiff about the time lag. To my mind, the defendant had no positive duty to provide the plaintiff with advice of this nature because the potential time lag was already made clear in Cl 5.1 of the GBT.

76 Second, Mr Omar points out that the defendant did not mention any time lag in:

(a) any of the margin call notification emails received by the plaintiff overnight from 4 August 2011 to 5 August 2011 (see [29] above);

(b) the 5 August 08:30 Conversation (see [31] above),

(c) the 5 August 09:41 Conversation (see [34] above)

(d) the 5 August 13:26 Conversation (see [36] above); and

(e) the 5 August 15:08 Conversation (see [39] above).

77 In none of these communications did the defendant make any promise, let alone an unqualified promise, that the defendant would give the plaintiff the benefit of incoming funds as soon as HSBC informed the defendant that it had credited those funds to the trust account. Furthermore, for the same reasons as those given in [75], there can be no promise arising from the defendant's silence on the issue when the GBT provides expressly for a time lag.

78 Third, Mr Omar refers to the 5 August 08:30 Conversation and the following words said by Christin:

> … Let me know once you get down to the bank and do this and I will just let my cash management know that this is coming in. But otherwise you are still expose[d] to anything that goes up at 150 ok? So, ehm, let me know, ok as soon as possible.

79 Mr Omar submits that Christin gave the plaintiff "the clear message… that he would still be at risk of being closed out as long as… [the defendant] had not received the funds." [note: 56] The basis for this submission is that "[g]iven that Christin wanted to ensure that the plaintiff would be transferring via Telegraph Transfer as the quickest way to obtain the benefit of the funds, she must know that [the plaintiff] would certainly have wanted to know of any such time lag." [note: 57] To my mind, this argument is misconceived. Christin certainly did tell the plaintiff clearly that he continued to be at risk until the funds came in. But that is not the same thing as promising him unequivocally that he would *cease* to be at risk *as soon as* the funds came in. Christin's point in this conversation was not whether there would or would not be a time lag. All she was doing was pointing out to the plaintiff the three points I have already referred to in [33] above in order to urge him to act quickly. I would have expected the plaintiff to have grasped these points for himself and not to need any such urging.

80 I also gave little weight to this submission as it appears to be an after-thought. At no time after his positions were closed out on 5 August 2011 and before he filed his Reply (Amendment No 2) [note: 58] in the current proceedings on 10 June 2013 did the plaintiff allege that he had relied on this promise by Christin. It was also telling that this allegation did not appear anywhere in the plaintiff's description of the 5 August 08:30 Conversation in his affidavit of evidence in chief.

81 Fourth, Mr Omar relies on the Settlement Instructions. They say this about payment by

telegraphic transfer and internet banking: [note: 59]

> **Telegraphic Transfer and Inter-Bank Internet Banking Transfer**
>
> …
>
> *No Postponement of Margin Stop-Outs*
>
> **Margin stop-outs cannot be postponed** based on funds that have been debited from your account with your bank. Payments into your account are deposited only on the condition that such funds have been cleared and received by Saxo Capital Markets.

82 The Settlement Instructions also say this about payment by cheque: [note: 60]

> **SGD and USD Local Clearing Cheques**
>
> …
>
> **7. Margin stop-outs cannot be postponed** based on funds that have been debited from your account with your bank, as the cheque needs to be cleared and funds made available and booked into your trading account.
>
> [emphasis in bold and bold underline in original]

83 Mr Omar contends that the Settlement Instructions provide that the defendant's customer meets a margin call if funds transferred by telegraphic transfer are "cleared and received" by the defendant. He points out that there is no express requirement that the funds need to be "booked into" a trading account before a client receives the benefit of such funds. He contrasts this with the instructions concerning payments by cheque which make express mention of booking as a separate step. Mr Omar also points to the fact that the Settlement Instructions do not say that there will be a time lag between the defendant's receipt of funds and its booking of funds.

84 This argument is flawed. The advisory in relation to telegraphic transfers clearly says: "Payments into *your account* are deposited only on the condition that such funds have been *cleared and received* by Saxo Capital Markets." [emphasis added]. The reference to "Payment into your account" is clearly a reference to the funds being booked into a client's account. The purpose of this provision is clearly to protect the defendant against payments into the trust account which HSBC later reverses, whether because the payment was mistaken or otherwise, but which the defendant has already credited to a trading account. In relation to the lack of any warning about the time lag, it was clearly not the purpose of the advisory on the Settlement Instructions to warn clients about this. The reasons set out at [75] apply with equal force.

85 Fifth, Mr Omar relies on the 5 August 13:26 Conversation (see [36] above). He submits that Christin had this conversation with the plaintiff to ensure that he had transferred the SGD 40,000 *via* telegraphic transfer and assured him that it would "help with things". He submits, further, that it could "help with things" only if the defendant gave the plaintiff the benefit of it on the same day, 5 August 2011. But, he points out, Christin did not tell the plaintiff that there would be a time lag between when the defendant received the funds and when the plaintiff would get the benefit of those funds. Again, I cannot divine from this conversation any unequivocal promise to the plaintiff that the defendant would give the plaintiff the benefit of the funds as soon as HSBC informed the defendant that it had credited the funds to the trust account. Quite the contrary, insofar as Christin

assured the plaintiff that he would get the benefit of the funds on the same day, that is precisely what happened. Insofar as Mr Omar relies on Christin's failure to tell the plaintiff that there would be a time lag, I repeat the point set out at [75] above.

86 Sixth, Mr Omar relies on the 5 August 15:08 Conversation (see [39] above), and in particular, this part of the conversation:

> Plaintiff: The funds are coming in.
>
> Christin: The thing is that I cannot guarantee. You see. If the fund is coming in, as long as it not *booked*. You are still subject to margin stop-out.
>
> [emphasis added]

87 Mr Omar argues that in this context, Christin's use of the word "booked" can only mean booked into the trust account and not booked into the plaintiff's account.

88 Contrary to his submissions, however, it is clear that Christin used the word "booked" in the manner that this word was used in the Checklist (see [70] above) and the email confirming receipt of the initial funds (see [71] above). In both these documents, the reference to "booked" is a reference to an act by the defendant (not by HSBC) of crediting funds into a client's trading account (not the defendant's trust account with HSBC). The portion of the conversation after the plaintiff's positions had been automatically closed out makes this clear:

> Plaintiff: It is very strange ah. If I wire this money in, it should be in by now.
>
> Christin: But the thing is if it don't pop to us, we still don't get it. And we work through HSBC, you see. So if it don't pop to us, *we don't be able to book it.*
>
> [emphasis added]

89 Christin was clearly drawing a distinction between the defendant booking funds to a particular client's trading account and HSBC informing the defendant that funds had been received in the trust account. She was also pointing out to the plaintiff that the former cannot happen until the latter. This argument was therefore without any merit.

90 Finally, Mr Omar pointed out that the plaintiff did not read the GBT (or any other provision of the GBT). This was grasping at straws. The fact that the plaintiff did not read the GBT did not make the contractual term any less binding him – the plaintiff accepted this in cross-examination. [note: 61] By signing the Application Form, he accepted that the GBT applied to his trading relationship with the defendant (see [6] above). In fact, his own pleaded case stated that the GBT formed part of the Contract. He even relied on certain provisions of the GBT in support of his claim. [note: 62]

91 For these reasons, and subject to [64] above, I reject the plaintiff's contention that the defendant is estopped under the doctrine of promissory estoppel from relying on Cl 5.1 and 6.3 to argue that it was entitled it to take up to one business day to book the plaintiff's SGD 40,000 into his account.

Estoppel by convention

92 In the alternative, Mr Omar seeks to argue that the defendant is prevented from relying on Cl 5.1 by way of an estoppel by convention. However, the plaintiff did not refer to estoppel by convention in his pleadings. It was another afterthought. Assuming it is open to the plaintiff to rely on estoppel by convention, I find that there is no such estoppel.

93 An estoppel by convention operates if the following requirements are met:

(a) The parties act in their course of dealing on an assumed and incorrect state of fact or law.

(b) The assumption is either shared by both parties pursuant to an agreement or something akin to an agreement, or is assumed by one party and acquiesced to by the other.

(c) It is unjust or unconscionable to allow the parties (or one of them) to go back on that assumption.

94 Mr Omar relies on the same facts at [73] to [90] above to establish the estoppel by convention. I reject the submission. I assume in the plaintiff's favour that those facts led him to act on an assumed and incorrect understanding of the defendant's obligations under the Contract. Even so, the plaintiff was the only party who was labouring under any incorrect assumption. The evidence at trial showed that his assumption was neither shared by the defendant nor acquiesced in by the defendant. Christin proceeded throughout the course of her dealings with the plaintiff on the basis that while the defendant would try to give him the benefit of any remitted funds as soon as possible, the funds would not be booked to his account instantaneously. And as far as the third requirement is concerned, it took some audacity for the plaintiff to allege that it was unconscionable for the defendant to falsify on his purported assumption. The only reason he arrived at this assumed (and incorrect) understanding of the defendant's obligation under the Contract in the first place was because he had, in his complacency, failed to the read the GBT.

Closing out the plaintiff's positions once his MUR crossed 100%

95 In light of my findings at [68] – [94] above, it is unnecessary for me to consider whether the defendant is estopped from relying on Cl 6.10, 7.2 and 7.3 of the GBT to close out the plaintiff's open positions immediately and without warning upon the plaintiff's MUR crossing 100%. The plaintiff's case based on estoppel requires the defendant to be estopped *both* from relying on (i) Cl 6.10, 7.2 and 7.3 of the GBT and on (ii) Cl 5.1 and 6.3 of the GBT.

96 For what it is worth, however, it does appear to me that the defendant is estopped from relying on these clauses. The defendant did promise clearly to the plaintiff through several conversations that his positions would not be closed out automatically once his MUR reached 100% but that he would have a grace period of 47 hours or until his MUR reached 150% in which to meet a margin call. It is also clear that the plaintiff relied on these promises, at least immediately after the 4 August 15:16 Conversation, to let his MUR rise above 78% and approach 100%. But none of this assists the plaintiff because the defendant fulfilled this promise: it closed the plaintiff's positions out *only* when his MUR crossed 150%. It did not rely on Cl 6.10 to close out his positions as soon as his MUR crossed 100% overnight from 4 August 2011 to 5 August 2011. The position would be different, of course, if the defendant had been in breach of an express or implied term of the Contract or in breach of its duty of care by booking the funds to the plaintiff's account at 15:12:34 and had to rely on Cl 6.10 to justify its close-out.

Costs

97 The plaintiff, having succeeded in this action, is entitled to an order for its costs of and incidental to the action. Mr Kumar argues that this is an appropriate case for me to award the defendant costs on the indemnity basis. He does not assert a contractual entitlement to indemnity costs. Instead, he invites me to exercise my discretion to award the defendant indemnity costs under O 59 r 27 of the Rules of Court (Cap 322, R5, 2006 Rev Ed). This discretion though unfettered must be exercised judicially. An order for indemnity costs is appropriate only in exceptional circumstances: *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [32]. The burden on a party who seeks an order for indemnity costs as a matter of discretion is therefore a high one.

98 Order 59 r 5 sets out several factors which a court should take into account in considering whether it is "appropriate" to make an exceptional award of indemnity costs. These factors include the conduct of the paying party before and during the proceedings. However, the list in Order 59 r 5 is not exhaustive. In *Macmillan Inc v Bishopsgate Investment Trust plc* (10 December 1993, unreported), Millett J held:

> The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'.

The English Court of Appeal approved these *dicta* in *Munkenbeck & Marshall (a firm) v McAlpine* (1995) 44 Con LR 30 at 33. The recent Singapore High Court decision of *Wong Meng Cheong and another v Ling Ai Wah and another* [2012] 1 SLR 549 at [199] ("*Wong Meng Cheong*") has also adopted these dicta.

99 In *Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm), Tomlinson J (as he then was) gave some useful practical guidance on how the discretion to award indemnity costs ought to be exercised (at [25]):

> (1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.
>
> (2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.
>
> (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.
>
> (4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.
>
> (5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) A fortiori, where the claim includes allegation of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross-examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings:

(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, and national and local media;

(d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;

(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.

100 I agree with Mr Kumar that the plaintiff's case was thin and ultimately irreconcilable with the contemporaneous documents and indeed with the law. In fact, much of the plaintiff's case was merely an afterthought which was dispatched quickly during cross-examination. A plaintiff in that position, as Tomlinson J said, is taking a high risk and can ordinarily expect to pay indemnity costs when his claim fails. However, on balance, I conclude in the circumstances of this case that the plaintiff's conduct as a whole does not rise to the level necessary to make it appropriate to award indemnity costs against him. I say this for two reasons:

(a) First, I accept that the plaintiff had no ulterior motive in bringing these proceedings. He brought the action, misguided though it was, in a good faith attempt to secure compensation for his trading losses to which he genuinely, though perhaps optimistically, thought he was entitled.

(b) Second, I am not satisfied that the plaintiff conducted his case in an oppressive or unreasonable manner or caused costs to be incurred irrationally or disproportionately. Mr Omar on the plaintiff's behalf conducted the plaintiff's case with economy (as of course did Mr Kumar for

his client). Mr Omar did not protract the cross-examination of the defendant's witnesses by pursuing hopeless aspects of his client's case or side issues of marginal relevance. As a result, Mr Omar was able to finish his cross-examination of the four defence witnesses very efficiently in a little over a day.

101 For the reasons above, I order that the plaintiff pay the defendant the costs of this action assessed on the standard basis, such costs to be taxed if they cannot be agreed.

Conclusion

102 The plaintiff was clearly the author of his own misfortune. He did not foresee the exceptionally volatile market conditions from 4 August 2011 to 5 August 2011 which led to his positions deteriorating so badly and so quickly that his MUR almost doubled from 78% to 150% in less than 24 hours. So he took his own time – almost two and a half hours – to initiate the transfer of SGD 40,000 to his account despite Christin's call at 08:30 that morning.

103 The defendant for its part made the SGD 40,000 available to the plaintiff to reduce his MUR in a timely and expeditious manner: 3 minutes and 38 seconds after being notified of receipt at HSBC. The mere fact that the plaintiff's MUR went above 150% within those 3 minutes and 38 seconds cannot, in itself, mean that the defendant breached its obligations in contract or breached any obligation it might have had in tort.

[note: 1] NE 13 August 2013 at Page 50 Lines 1-7.

[note: 2] Joseph Tan AEIC at [3].

[note: 3] Tony Lim AEIC at [5].

[note: 4] Joseph Tan's AEIC at [5] and [6].

[note: 5] AB-1.

[note: 6] AB-1.

[note: 7] AB-1.

[note: 8] Joseph Tan AEIC [8]; Statement of Claim (Amendment No 1) at para 11 (BP-29).

[note: 9] AB-69 to 75.

[note: 10] AB-1.

[note: 11] NE 13 August 2013 Page 66 Line 21 to Page 67 Line 8.

[note: 12] AB-70.

[note: 13] AB-70.

[note: 14] AB-69.

[note: 15] AB-69.

[note: 16] AB-86.

[note: 17] AB-90.

[note: 18] AB-99.

[note: 19] AB-117.

[note: 20] Joseph Tan AEIC at [25].

[note: 21] Joseph Tan AEIC at [26].

[note: 22] Joseph Tan AEIC at [27].

[note: 23] AB-141.

[note: 24] AB-143.

[note: 25] AB-151.

[note: 26] NE 13 August 2013 Page 131 Line 6 – 12.

[note: 27] Joseph Tan's AEIC at [50(b)]; AB-176; AB-223.

[note: 28] Joseph Tan's AEIC at [50(c)]; JT-21 at p 222.

[note: 29] AB-180.

[note: 30] Tony Lim's Affidavit at [47]; THI-2 at p 104.

[note: 31] Tony Lim's Affidavit at [47].

[note: 32] AB-94.

[note: 33] AB-94.

[note: 34] AB-94.

[note: 35] Plaintiff's closing submissions, para 3(e) and para 33.

[note: 36] Joseph Tan's AEIC at [57].

[note: 37] Statement of Claim (Amendment No 1) at para 5 and 19 (BP 24, 25 and 19).

[note: 38] Statement of Claim (Amendment No 1) at para 17.8-17.10.

[note: 39] NE 13 August 2013 Page 24 Line 11-20.

[note: 40] Statement of Claim (Amendment No 1) at para 20.9.

[note: 41] NE 13 August 2013 Page 31 Line 23 to Page 32 Line 11.

[note: 42] Statement of Claim (Amendment No 1) at para 20.2 and 20.3.

[note: 43] NE 13 August 2013 Page 49 Line 11-23.

[note: 44] NE 13 August 2013 Page 53 Line 6-17.

[note: 45] Statement of Claim (Amendment No 1) at para 11A.2 and 16.

[note: 46] NE 13 August 2013 Page 72 Line 10 to Page 75 Line 1.

[note: 47] Statement of Claim (Amendment No 1) at para 17.7, 18A, 20.5 and 20.7.

[note: 48] NE 13 August 2013 Page 13 Line 25 to Page 14 Line 8.

[note: 49] NE 13 August 2013 Page 18 Line 22 to Page 22 Line 17.

[note: 50] Plaintiff's Reply Submissions at para 72 and 73.

[note: 51] NE 13 August 2013 Page 82 Line 4-6.

[note: 52] NE 13 August 2013 Page 24 Line 15-20; Page 34 Line 1-8.

[note: 53] Plaintiff's closing submissions at para 100.

[note: 54] AB-41.

[note: 55] AB-47.

[note: 56] Plaintiff's closing submissions at [45].

[note: 57] Plaintiff's closing submissions at para 44 and 45.

[note: 58] Reply (Amendment No 2) at para 2.1.5.

[note: 59] AB-125 and AB-130.

[note: 60] AB-125 and AB-130.

[note: 61] NE 13 August 2013 Page 12 Line 13-18; NE 13 August 2013 Page 16 Line 23 to Page 17 Line 9.

[note: 62] Statement of Claim at para 4 and 5; BP-4.

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