IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 17

Suit No 124 of 2013

Between

STANLEY TAN POH LENG

… *Plaintiff*

And

UBS AG

… *Defendant*

J U D G M E N T

[Contract] – [Contractual Terms]
[Tort] – [Negligence] – [Duty of Care]
[Banking] – [Lending and Security] – [Stocks and Shares]
[Banking] – [Derivatives] – [Accumulators]

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Tan Poh Leng Stanley
v
UBS AG

[2016] SGHC 17

High Court — Suit No 124 of 2013
Belinda Ang Saw Ean J
8-10,14-17, 21-24, 28, 30 April; 4, 6 May 2015; 14 October 2015.

10 February 2016 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Stanley Tan Poh Leng ("ST"), was a private wealth client of the defendant, UBS AG ("the Bank"). Between October 2007 and August 2008, ST invested in 16 equity accumulators ("the Accumulators") on a margin trading basis. At one time, ST owned equity stocks with a combined market value in excess of S$100 million in his account with the Bank ("the Account"). In October 2008, during the global financial crisis that caused a massive increase in volatility in the equity markets which ST had positions in, the Bank gave written notice on 22 October 2008 requiring ST to remedy the margin shortfall in his Account. As this was not done, ST's required margin was not restored. The Bank liquidated the Account by closing out ST's positions therein; it terminated and unwound the Accumulators and sold off the shares in the Account, all of which were pledged as collateral ("Collateral

Shares") to secure ST's liabilities to the Bank under various credit facilities. At the end of the liquidation of the entire portfolio, there was still a shortfall of US$6.7m in the Account. The other liability was the sum of S$25,461,800 that ST was required to pay the Bank as the cost of unwinding the Accumulators ("the Unwinding Costs"). The Unwinding Costs and the remaining shortfall formed ST's total liabilities owed to the Bank after the liquidation of the Account, the payment of which was the subject of a work out agreement dated 21 March 2009 ("the Work Out Agreement"). ST paid off his total liabilities to the Bank sometime in April 2011.

2 In this action, ST disputes the Bank's entitlement to act as it did way back in October 2008. His grounds for doing so threw up a variety of distinct issues, but the issues are now streamlined following ST's confirmation at the trial that his entire case related to the unwinding of the Accumulators and not to the sale of the Collateral Shares. Of the remaining issues, one relates to the interpretation of the International Swap Dealers Association ("ISDA") Master Agreement ("ISDA Master Agreement") in the light of other existing agreements and arrangements between the parties. In particular, the question raised is whether the Bank was contractually entitled to terminate and unwind the Accumulators without issuing a notice (as stipulated in the ISDA Master Agreement) upon ST's failure to maintain the margin required by the Bank and address the margin shortfall in his Account. The main point taken by ST in these proceedings is that the Bank was obliged to give notice as stipulated under the 2006 version of the ISDA Master Agreement ("the ISDA Notice") before it could lawfully terminate and unwind the Accumulators. ST argues in the main that he would have had sufficient assets to salvage the shortfall in his Account and preserve his positions in the Accumulators. ST's claim is thus for

damages for breach of the 2006 version of the ISDA Master Agreement ("2006 ISDA"). ST assessed his loss to be S$33,778,163. The bulk of this figure is for the Unwinding Costs (*ie*, S$25,461,800).

3 A distinct area of dispute that is central to the Bank's case that it was entitled to act in the way it did is the issue of whether ST had consented to or authorised the unwinding of the Accumulators and the sale of his Collateral Shares. This raises a question of objective construction of the documents and the contemporaneous exchanges between the parties to show what was agreed (or otherwise), and questions of fact as to the conduct of the parties and/or the understanding of the parties in the context of consent or estoppel. Indeed, the present case turns on whether there was an agreement, as it is a common ground that the existence of a separate oral agreement between ST and the Bank to unwind the Accumulators would render the issue relating to the ISDA Notice moot. The Bank referred to ST's separate oral agreement as "exit instructions". For convenience and where expedient, I will adopt the same expression in this Judgment.

4 Separately, the Bank said that it was entitled to unwind the Accumulators without notice pursuant to the multiple agreements that governed the banker-customer relationship (listed at [35] – [38] below and collectively referred to in [39] as "the Account Agreement"). According to the Bank, the Account Agreement complemented rather than contradicted the Bank's rights in the 2006 ISDA. Principal to the Bank's case is the Credit Services Notification Letter ("CSNL") that ST's attorney, Mr Yeo Cheng Boon ("YCB"), signed to signify ST's acceptance of the Bank's credit facilities for the margin trading. To the Bank, no ISDA Notice was needed

since it was entitled to terminate and unwind the Accumulators by virtue of the terms of the accumulator confirmation issued for each of the Accumulators ("Accumulator Confirmation") read with the terms of the CSNL dated 11 February 2008 ("2008 CSNL"). In short, this Judgment will consider whether the Accumulator Confirmation incorporated the termination rights arising from the failure to maintain margin requirements under the 2008 CSNL.

5 The undisputed fact is that ST borrowed money from the Bank to invest in the Accumulators and ST did not satisfy the margin call letter of 22 October 2008 requiring him to address the margin shortfall in the Account. At the material time, the Account was in negative equity. Therefore, an important consideration in this Judgment is how the overall contractual relationship of a lender and borrower overlays and becomes aligned with ST and the Bank's counterparty relationship in derivatives transactions which are subject to the ISDA Master Agreement. This Judgment will examine whether the Bank was obliged to give the ISDA Notice on the facts of this case.

6 The Bank's fallback argument is that even if there were no exit instructions, and it is held that the Bank's rights of termination had not legitimately arisen as no Early Termination Date in respect of the transactions (*ie*, Accumulators) had been designated by way of the ISDA Notice, ST had not shown that the omission to give the ISDA Notice had prejudiced him in any respect whatsoever. The Bank argues that, in practical terms, ST's position would be no different even if the ISDA Notice had been given for ST would not have been able to avoid the liquidation of his Account, especially since: (a) ST's Account was in negative equity; (b) ST was facing a margin shortfall of S$43.2m in his Account on 22 October 2008 and the movements in

a plummeting market would inevitably deteriorate the shortfall beyond S$43.2m; (c) ST was required, contractually, to continue purchasing shares under the Accumulators at prices higher than the prevailing market price and that would, inevitably, have increased his mark-to-market ("MTM") losses; and (d) ST was facing liquidity problems and was in no position to stave off a close out of the Account.

7 Other areas of dispute concern, *inter alia*, ST's assertions that the Bank did not conduct the close out in a manner that was consistent with the exercise of reasonable care, and that the Bank did not provide him with statements of calculation as required in the ISDA Master Agreement. A threshold question in relation to the first point is whether the Bank had a duty of care both in contract and tort to conduct the close out exercise competently and with reasonable care. The Bank submits that ST's arguments in relation to the alleged duty were misconceived; no contractual or tortious duty of care arose in relation to ST's specific allegations. According to the Bank, the "strategy" adopted in unwinding the Accumulators was reasonable as it was in accordance with market practice and minimised ST's losses.[1] Hence, there was nothing that the Bank could have done differently on 23 and 24 October 2008.

8 During cross-examination, YCB agreed to make available his computer for a search to be conducted for e-mails that were relevant to the alleged exit instructions. Both sides in their respective reply submissions differ on the question of whether the "e-discovered" e-mails ("the New E-mails") shed light on the alleged exit instructions. I will address their opposing views in my Judgment.

[1] Bank's Closing Submissions, para 22.

9 Mr Ng Lip Chih ("Mr Ng") appeared for ST and Mr Hri Kumar SC ("Mr Kumar") appeared for the Bank. The parties each appointed an expert witness from the Panel of Recognized International Market Experts in Finance ("P.R.I.M.E Finance") to assist this court on issues relating to the ISDA Master Agreement. Mr Christopher Jonathan Ross ("Mr Ross") was ST's expert witness and Mr Schuyler Henderson ("Mr Henderson") was the Bank's expert witness (collectively called "the ISDA Experts").

The financial crisis of 2008

10 The financial crisis of 2008 saw the financial markets shut down on an unprecedented global scale. Investors swung from euphoria to fear and factions of the global market that were once known for their deep liquidity dried up overnight. Many investors who were "bullish" (*ie*, optimistic about the prospects of the market) found themselves unprepared and exposed to huge downside risks.

11 With asset values across the board rapidly plummeting at the peak of the financial crisis in September and October 2008, investors who held leveraged positions in equity stocks ("shares") found their portfolios in negative equity and faced margin calls. Typically, the value of the collateral that supported the leveraged position had to be revised downwards to track the fall in market prices. Again, the financial haemorrhage was exacerbated in cases where the investor used leverage to trade in derivatives such as accumulators.

12 An accumulator is a structured transaction under which an investor agrees to buy fixed quantities of a certain share ("the underlying share") over

the counter through a counterparty (normally a bank) each day at a forward price or strike price ("the Strike Price") set at a discount to the market price/spot price at the time when the investor enters into the transaction to purchase the accumulator ("the accumulator transaction") of the underlying share ("Transaction Spot Price"). The accumulator transaction runs for a predetermined period of time (normally up to 12 months). The investor pays for the shares delivered to him on a monthly basis. When an investor enters into the accumulator transaction, he normally holds the directional view that the market price of the underlying share would rise and, consequently, stay above the Strike Price.

13 However, the investor can only continue "accumulating" the underlying share (*ie*, buying the share at the Strike Price instead of its market price) if the relevant market price for the underlying share stays below a contractually-stipulated barrier, typically five per cent more than the Transaction Spot Price ("the Knock-Out Price"). If the relevant market price of the underlying share exceeds the Knock-Out Price, the accumulator transaction will "knock out". This means that the accumulator transaction is terminated. The investor, in such a case, keeps the shares he has purchased but cannot buy any more shares at the Strike Price.

14 In a hypothetical scenario where the market price of the underlying share stays above the Strike Price ("Profit Scenario"), the investor makes a profit from purchasing the underlying share at a "discount" (*ie*, at the Strike Price instead of the market price). The profits made by the investor under the Profit Scenario would naturally be magnified if the transaction is leveraged.

15 Conversely, where the market price of the underlying share falls below the Strike Price ("the Loss Scenario"), the investor is required to "step-up" his obligation to purchase shares. This means that if the market price for the underlying share falls below the Strike Price, the investor is obligated to purchase between two and five times the number of the underlying share that he would otherwise be obligated to purchase under the Profit Scenario. The investor would, therefore, continue purchasing the underlying share at the Strike Price that would be higher than the market price, "putting good money to bad".

16 When the accumulator transaction is leveraged, the losses suffered by the investor in the Loss Scenario are magnified (apart from the fact that the "step-up" feature that is inherent in the accumulator already "magnifies" the losses of the investor). In a falling market, the investor who purchases Accumulators on margin also suffers another form of loss known as MTM losses (which reflect the market price of unwinding the position). The investor might then have to pledge more collateral or provide cash to cover the MTM losses. Even though MTM losses are unrealised, they would affect the value of an investor's investment account and any margin requirements. Therefore, in a falling market, an investor, like ST, will face successive margin calls, *inter alia*, because of rising MTM losses resulting in higher margin requirements.

17 In this context, the accumulator transaction is normally expected to run its full course. The counterparty in the accumulator transaction normally takes the risk of the price of the underlying shares moving above the Strike Price. To manage that risk, the counterparty would typically acquire some of the underlying shares in the accumulator ("the Delta Shares"). An accumulator

transaction can, however, be terminated prematurely. The phrase "to unwind" is a colloquial expression used by derivatives traders to describe this premature termination.

Margin call notification letter dated 22 October 2008 and the Work Out Agreement dated 29 March 2009

18 Against the backdrop of the financial crisis in 2008, ST received a margin call letter dated 22 October 2008 from the Bank ("the margin call letter"). The margin call was in relation to the Account where ST traded shares and the Accumulators utilising the credit facilities granted by the Bank.

19 As noted, between October 2007 and August 2008, ST invested in a total of 16 Accumulators. The details of the Accumulators are set out in Table 1 below:

Table 1: ST's Accumulators

S/No	**Transaction Date**	**Underlying Share**
1	24 October 2007	SembCorp Marine Ltd
2	26 October 2007	Singapore Petroleum Co Ltd
3	9 November 2007	SembCorp Marine Ltd
4	15 November 2007	Singapore Post Ltd
5	12 November 2007	Singapore Petroleum Co Ltd

6	13 December 2007	City Developments Ltd
7	14 December 2007	City Developments Ltd
8	14 December 2007	City Developments Ltd
9	14 December 2007	City Developments Ltd
10	25 April 2008	Singapore Petroleum Co Ltd
11	21 May 2008	DBS Group Holdings Ltd
12	26 May 2008	DBS Group Holdings Ltd
13	1 July 2008	Singapore Press Holdings Ltd
14	5 August 2008	DBS Group Holdings Ltd
15	5 August 2008	Singapore Petroleum Co Ltd
16	7 August 2008	Singapore Petroleum Co Ltd

For ease of reference, each of the Accumulators will be referred to by its respective "S/No" as set out in Table 1 above.

20 Notably, ST bought Accumulators S/No 10 to S/No 16 even though the Account was from time to time in margin shortfall of variable amounts. The credit facilities from the Bank facilitated ST's ability to trade in the Accumulators.

21 A table of chronology, prepared by the Bank for the trial,[2] showed that prior to 22 October 2008, the Bank had made a number of margin calls between November 2007 and September 2008. On those occasions, no formal letters were issued unlike the last margin call on 22 October 2008 where the Bank issued the margin call letter to ST. When there was a margin shortfall, ST would top-up the Account with additional collateral or pay down the liabilities in the Account. ST also deleveraged by selling assets in the Account purchased on margin. The picture that emerged is that between November 2007 and September 2008, ST acted to reduce the margin shortfall in his Account through a combination of top-ups (by way of cash and shares to the Account) as well as through selling Collateral Shares. The frequency of the margin calls during this period (*ie*, November 2007 to September 2008) was a result of a confluence of the following circumstances:

(a) the value of the shares posted as collateral in the Account falling along with the market;

(b) the mark-to-market losses (*ie*, MTM losses) resulting from the Accumulators; and

(c) the revision of the loanable value ("LV") in respect of the collateral in the Account.

22 On 21 October 2008, the already volatile market fell further. In this context, Ms Amy Tee ("Amy"), the Bank's relationship manager in charge of ST's account with the Bank, e-mailed ST to inform him that his "portfolio [was] in negative equity" and requested him to top-up the Account.[3] By the

[2] Exhibit D1.

time the margin call letter was issued, the margin shortfall in the Account was in excess of S$43.2m. Since it was the first time a margin call letter was sent to ST, Amy was naturally anxious to receive ST's plan of action in relation to the Account. It is noteworthy that ST had stopped top-ups by way of cash and shares to the Account after 7 October 2008, and on 16 October 2008, ST drew down on the mortgage loan he had with the Bank in order to transfer S$1.8m to partially cover the margin shortfall. Amy called ST at 5.10pm on 22 October 2008 ("the 1710hrs Call"). This 1710hrs Call is important and I will discuss it in greater detail below. Suffice for present purposes, ST agreed to sell down certain shares he held in Barclays Bank, which were worth about S$12.29m, and at the end of the call, Amy was informed that either ST or YCB would revert to her with a plan to address the remaining shortfall in ST's Account. Amy informed ST that she would wait for his plan.

23 Subsequently, YCB and Amy met on 22 October 2008 at a café in Bukit Timah ("the 22 October 2008 Meeting"). ST's case is that YCB did not provide Amy with any action plan for the Account.[4] This entire case turns on whether YCB instructed Amy to unwind the Accumulators and liquidate the Collateral Shares in the Account during the 22 October 2008 Meeting.

24 On 23 October 2008, the Bank unwound eight of the Accumulators and the remaining eight Accumulators were unwound on 24 October 2008. The unwinding costs for these Accumulators stood at S$25,461,800 (*ie*, the Unwinding Costs). At the same time, the shares in the Account, which served

[3] DCB 283.

[4] ST's Closing Submissions, para 9.

as collateral (*ie*, the Collateral Shares), were sold to reduce the margin shortfall.

25 On or around 30 October 2008, after the Accumulators were unwound, ST and the Bank started to discuss the repayment of ST's liabilities. ST wanted five years to repay all his outstanding liabilities which included the Unwinding Costs ("the Total Liabilities"). The Bank was initially unwilling to give ST a long repayment timetable. ST issued threats of litigation through YCB and one Mr Andrew Tay. YCB, in particular, threatened legal action if the Bank did not give ST five years to repay the Total Liabilities. Apart from the threats of legal action, the Bank was not given details of the alleged cause(s) of action.

26 The Bank eventually gave ST time to discharge the Total Liabilities covered in the Work Out Agreement. ST repaid the Total Liabilities around April 2011.

27 On 11 June 2010, ST filed for pre-action discovery against the Bank ("the Pre-action Discovery Application") to obtain documents and information relating to the manner in which the Accumulators were unwound. The Pre-action Discovery Application was dismissed on 2 September 2010. ST then commenced the present proceedings on 8 February 2013.

ST's claim is for financial loss in relation to the unwinding of the Accumulators and not for the sale of Collateral Shares

28 As stated, ST confirmed at the trial that his entire case related to the unwinding of the Accumulators and not the sale of the Collateral Shares.[5]

[5] Transcript dated 9 April 2015, pp 177 – 178; Transcript dated 14 April 2015, p 59.

With this confirmation, ST abandoned a large claim of S$100,230,519. On another level, what does ST's decision not to take issue with the sale of the Collateral Shares mean in the context of the close out? Also, how would this position impact the overall evidence and, consequently, in what manner would it simplify the issues and arguments? Simply put, the upshot of dropping his challenge to the sale of the Collateral Shares is significant because ST unequivocally accepts and acknowledges the following matters:

(a) The margin shortfall in the Account was addressed in part by the sale of the Collateral Shares leaving a shortfall of US$6.7m in the Account. ST paid the remaining outstanding shortfall as at 21 March 2009 in the Work Out Agreement.

(b) The Bank was entitled to and did lawfully sell the Collateral Shares.

(c) The sale of the Collateral Shares was carried out and conducted competently and with reasonable care.

29 The conclusion in point (c) puts an end to the initial complaint on how the Bank sold the Collateral Shares as well as the argument pursued before the trial that the Bank had depressed the price of the shares and could not get the best price for ST because of its lack of care in the sale of the same.

30 As regards point (b), ST agreed that the sale of the Collateral shares was not unlawful and confirmed in cross-examination that he was not claiming damages arising from the sale of the Collateral Shares. Furthermore, seeing that ST could not meet the margin call of 22 October 2008, he decided to go along with the Bank's sale of the Collateral Shares. ST's consent is evident

from the e-mail that YCB sent to the Bank at 12.04am on 23 October 2008 ("the Margin Call Response E-mail"), and I so hold. First, ST clarified in the witness stand that YCB's e-mail sent after midnight (*ie*, the Margin Call Response E-mail) covered not only the Barclays shares but also any sale that the Bank "takes on [his] behalf".[6] Second, although YCB denied that the Margin Call Response E-mail covered the unwinding of Accumulators, his use of the words "we entrust" is telling as it was conveyed in the context as a reply to the margin call letter. Those words conveyed the message that YCB and ST were agreeable to the Bank selling the shares and they wanted the sale of all the shares to be done in a professional and orderly manner. YCB also agreed in cross-examination that the shares he was referring to in his e-mail were all the shares that ST had in the Account. The shares would include those that were delivered to him on a monthly basis and credited to ST's Account.[7] Finally, ST would not have wanted a forced sale of the Collateral Shares if he could avoid one as such an outcome might affect his banking relationship with other banks. ST accepted in cross-examination that if the Bank were to call an event of default and sold assets pursuant to a forced sale, that development would be of relevance to other banks. I start by observing ST's conduct during the 1710hrs Call. In that call, ST was informed of the margin call letter and the possibility of the Bank closing out the Account. ST immediately decided to sell the Barclays shares by agreement. ST told Amy it was "only right" for him to do so. This is, in my view, clear evidence that ST would have wanted to avoid a forced sale. All this must be viewed in light of the fact that ST had, one month earlier, reminded YCB that their financial position had to be managed gingerly as they "need[ed] all the banks". As noted at [57] below, ST

[6] Transcript dated 9 April 2015, p 142.

[7] Transcript dated 15 April 2015, p 162.

was conscious of the fact that he needed all the Banks to be on board in order for him to tide over the crisis. Notably, as at 20 October 2008, an Australian bank had withdrawn part of the facilities which allowed ST to draw down for personal use. News of a forced sale by the Bank would have only exacerbated the situation. By ST's evidence, the Margin Call Response E-mail could only be construed to mean that ST gave the Bank the right to sell all the shares in his portfolio (*ie*, the Collateral Shares). This piece of evidence is affirmation of ST's reluctance to see a forced sale scenario. There are additional points which I will come to when I next consider the matter of Option 2 below.

31 A corollary to ST's decision not to dispute the sale of the Collateral Shares in the Account is its effect on the question of whether the Bank's unwinding of the Accumulators was with ST's consent and authority (or otherwise). This question will be discussed below; the answer to this question will bear on the issue of the exit instructions. It is not disputed that all the shares in the Account were pledged to the Bank as collateral, and that their combined market value was S$107,352,497.05 on 22 October 2008. Put another way, ST's decision to sell the Collateral Shares was the same thing as agreeing to liquidate his entire portfolio of over S$100m.

32 At the trial, ST's position on the Accumulators is that he did not agree to unwind the Accumulators; Amy was mistaken when she wrote to her superiors in the Bank that ST had given the exit instructions to unwind the Accumulators; and the unwinding was done without the issuance of the ISDA Notice contrary to s 6 of the 2006 ISDA. ST's case – at its core – relates to the Bank's failure to give the ISDA Notice before it proceeded to unwind the Accumulators. In this action, ST wants the Bank to return the Unwinding

Costs to him. The parties accept that a separate oral agreement between ST and the Bank to unwind the Accumulators would render the issue relating to the ISDA Notice academic. Therefore, the present case turns on whether there was indeed an agreement.

33 ST claims to have suffered financial loss because the Bank:

(a) did not give him the ISDA Notice before unwinding the Accumulators;

(b) did not give him the statement of calculation under s 6(d) read with s 12 of the 2006 ISDA ("Statement Clauses") after unwinding the Accumulators;

(c) was negligent in unwinding the Accumulators in the absence of his instructions; and

(d) unwound the Accumulators in a negligent manner.

34 The Bank refutes ST's claims. Its defence is as follows:

(a) as ST instructed the Bank to unwind the Accumulators through YCB in the 22 October 2008 Meeting and the Bank accepted his instructions ("Alleged Agreement to Unwind Accumulators"), it was under no obligation to issue the ISDA Notice;

(b) even if there was no Alleged Agreement to Unwind Accumulators, the Bank, under, *inter alia*, each of the Accumulator Confirmations which incorporated the rights relating to collateral under the 2008 CSNL, was entitled to unwind the Accumulators without giving the ISDA Notice;

(c) even if the ISDA Master Agreement was the only document to be looked to in relation to the Accumulators, the Bank, without notice, was entitled to unwind the Accumulators that were governed by the 2008 ISDA;

(d) the Bank was not negligent in unwinding the Accumulators;

(e) the Bank complied with the Statement Clauses;

(f) ST has suffered no loss on account of the Bank's failure to issue the ISDA Notice;

(g) even if ST suffered a loss, he has agreed that the Bank is not liable for his losses under cl 5.1 of the 2008 Accounts Agreement ("Exemption Clause"); and

(h) ST is estopped from pursing this claim and/or ST has compromised his claim by entering into the Work Out Agreement ("Compromise Argument").

Multiple agreements

35 As stated, ST was a private wealth client of the Bank. On 6 May 2006, ST signed the following account opening documents in relation to the Account:

(a) Account Mandate;

(b) Risk Disclosure Statement;

(c) General Power of Attorney by Individual/Joint Account Holder(s) appointing YCB as his attorney;

(d) Exchange Traded Option Trading Facility Agreement;

(e) Request for Subscription of Equity Linked Notes and Blocs;

(f) Risk Acknowledgement for FX enhanced (Accrual) Forwards;

(g) Letter of representation addressed to the Bank captioned "Account no. 128882 and 128887"; and

(h) The Charge over Assets.

36 It was not disputed that ST received, at or about the same time the Account was opened on 9 May 2006, documents for the opening of the Account from the Bank ("the 2006 Account Agreement"). The 2006 Account Agreement included the Account Mandate and the Risk Disclosure Statement (referred to in [35(a)] and [35(b)] above), Terms and Conditions – General Conditions; and Terms and Conditions – Product Conditions.

37 I pause to note that by a letter dated 23 June 2008 addressed to the "valued clients" of the Bank (which, at that point, included ST) and entitled "Revision of Account Agreement" ("the 2008 Revision Letter"), the Bank revised the 2006 Account Agreement with a revised agreement that came into force with effect from 23 July 2008 ("the 2008 Account Agreement"). The 2008 Account Agreement included the Account Terms and Conditions ("the

2008 Account T&Cs") and the Investment Services Terms and Conditions ("the 2008 Investment Services T&Cs").

38 I alluded at [4] above to the Credit Services Notification Letter (*ie*, the CSNL). On 16 May 2006, YCB in his capacity as ST's attorney, executed the CSNL ("the 2006 CSNL") under which ST accepted the credit facilities from the Bank ("the Facilities") in relation to the Account. The 2006 CSNL was subsequently superseded by the CSNL dated 13 July 2007 and 11 February 2008 (*ie*, 2008 CSNL). The parties accept that the 2008 CSNL is the document to be referred to in relation to the various discussions on all the Accumulators and the transactions in ST's Account. As such, I will be referring to the 2008 CSNL in the course of this Judgment.

39 It is common ground that as at 23 July 2008, the Account and the Facilities were governed by the terms of the Account T&C, the Investment Services T&C and the 2008 CSNL (collectively, "the Account Agreement").

40 As stated, between October 2007 and August 2008, ST invested in a total of 16 equity accumulators purchased on a margin trading basis (*ie*, using leverage, pursuant to the Facilities that were accepted pursuant to the CSNL). A central document in relation to the present dispute is the ISDA Master Agreement (which, unless otherwise stated, refers to the 1992 Form). On 16 May 2006, ST accepted the version of the ISDA Master Agreement then in force, which was the 2006 ISDA, including the accompanying schedules to the 2006 ISDA ("the 2006 Schedule"). I note that it is the Bank's case that the 2008 Revision Letter referred to at [37] above, had the effect of bringing into force the accumulator transactions entered into after 23 July 2008 the ISDA in

force at that date ("the 2008 ISDA") and the accompanying schedules in force at that date ("the 2008 Schedule").

41 The ISDA Experts accept that ST and the Bank could effectively agree that the Accumulators could be unwound otherwise than in accordance with the terms of the 2006 ISDA. I reproduce the relevant portions of their joint report ("the ISDA Experts' Joint Report"):

> *Parties may agree to terminate Accumulators outside terms of Master Agreements*
>
> 9. The parties to a 1992 ISDA Form as well as the Master Agreements may agree that its Transactions may be terminated and closed out otherwise than in accordance with the terms of the 1992 ISDA Form or Master Agreement. This is a matter of contract.
>
> 10. The 1992 ISDA Form and the Master Agreements do not contain a provision dealing with a mutually agreed termination and close-out of Transactions, which by its nature is, at the date of execution of the 1992 ISDA Form or Master Agreement, only a potential future occurrence under then unknown circumstances.
>
> 11. lf the parties agreed by way of a separate and effective agreement that the Accumulators were to be terminated and the Bank acted in reliance and in accordance with that agreement, the provisions of the Master Agreement dealing with designation of an Early Termination Date and its consequences would not be applicable.

42 The views expressed by the ISDA Experts are uncontroversial and, in this regard, I have no difficulty accepting them. The 2006 ISDA does not state whether the parties may terminate their outstanding obligations by mutual agreement. The reason this is not stated is because the termination provisions in the ISDA Master Agreement deal with *unilateral* termination. A mutually agreed termination therefore falls outside of the ISDA Master Agreement. It is settled law that parties may terminate a contract by a subsequent agreement

and this case is about whether there was a mutual agreement to terminate the Accumulators. I also accept Mr Henderson's argument that, on the facts of this case, "it would be contractually and practically superfluous to [one party] to give notice of the termination, a fact of which the parties would clearly have been aware [in the case of termination by mutual agreement]".[8]

Was there an oral agreement to liquidate the entire Account on 22 October 2008 or at all?

Overview

43 The key issue of the Alleged Agreement to Unwind Accumulators (*ie*, the exit instructions) turns essentially upon the credibility of both Amy's and YCB's evidence, assessed in the light of the contemporaneous documents and the commercial probabilities. Questions of fact as to the conduct of ST and YCB prior to and post–22 October 2008 and/or the understanding of the parties in the context of this issue of the exit instructions will be examined. Isolating and finding the real option(s) open to ST when he was faced with the margin call letter would more likely than not serve as objective evidence to negate or support the existence of the Alleged Agreement to Unwind Accumulators. ST's liquidity problems and his struggles to keep up with the ever increasing size of the margin shortfall in the Account against the backdrop of a falling market that caused the Account to go into negative equity are relevant considerations.

44 On 22 October 2008, there was a high level of uncertainty in the financial markets. Faced with a margin shortfall in excess of S$43.2m on 22 October 2008, the pressure was on ST to find a solution to the crisis and to

[8] Mr Henderson's AEIC, p 23 (Mr Henderson's Report, para 17).

salvage the state of his Account which was by then also in negative equity. ST would have to decide on what options to pursue in the crisis. As explained earlier, the Account was in margin shortfall since November 2007 but, at that time, ST was able to deal with those margin shortfalls by injecting cash and shares into the Account. However, the financial markets continued on a downward trajectory and that decline caused the market value of the Collateral Shares to decrease on the one hand and the MTM losses on the Accumulators to increase on the other. The Bank reduced the loanable value ("the LV") of some of the Collateral Shares thereby contributing to the margin shortfall in the Account. Despite ST's cash injections into the Account, the margin shortfall remained. He then started to sell some shares in the Account. He also borrowed money, so to speak, to cover the shortfall, by utilising the mortgage loan he had with the Bank on a property at Tanglin Hill. Other attempts were to obtain from the Bank a term loan or to sell down his investments to deleverage the Account if he did not secure a term loan.[9] The prospective term loan would have to be secured by fresh assets which ST did not advise or apprise the Bank of. In the end, no term loan was formally offered or agreed upon. By the end of September 2008, ST began to deleverage the Account. The question is whether he eventually realised that servicing the loans granted under the Facilities was unsustainable in light of the volatile and plummeting market and whether this led to the decision to liquidate the entire portfolio. I will elaborate on this matter under the heading "ST's investment strategy".

45 ST's inability to keep up and address in a financially meaningful way the margin shortfall levels and the negative equity in the Account, which were the result of, *inter alia*, the MTM losses on the Accumulators, continued to

[9] ST's AEIC, para 46; Transcript dated 8 April 2015, p61.

unfold during the month of October 2008. After 7 October 2008, ST stopped making any cash or asset top-ups to the Account. As matters got worst, the option to liquidate the Account was adopted on 22 October 2008.

46 Amy and her assistant, Clara Chew ("Clara"), sent ST regular updates on the status of the Account including spreadsheet tables showing his total liabilities, the value of his Collateral Shares and the required margin. Between 8 and 22 October 2008, Amy wanted YCB to follow up with ST to put forward a plan to resolve the margin shortfall. On 9 October 2008, she warned YCB that it was going to be tough for her to delay the Bank from taking action as the Account was at a "closed out position".[10]

47 There was even, on 13 October 2008, a discussion on what would happen to the Account in the event the Account was entirely closed out. On that date, Amy and YCB discussed the option of liquidating the entire portfolio which included terminating the Accumulators and the consequence of that course of action on ST's position. In fact, ST would still owe the Bank US$2m after liquidating the entire portfolio at that time. Importantly, YCB understood Amy's use of the word "shortfall" in the discussion and the Account's "negative equity" to have taken into consideration the Accumulators; that unwinding the Accumulators would involve unwinding costs; and that the MTM margin would reflect the cost of unwinding the Accumulators. I now set out the relevant parts of the transcript of that conversation:[11]

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[10] 16 AB 71 – 72.

[11] 16 AB 197 – 198.

Cheng Boon	But when you say shortfall you are taking including accumulators right.
Amy	Yes because
Cheng Boon	You are counting accumulators as well right when you said you have a negative.
Amy	Correct yes
Cheng Boon	Ah OK
Amy	Yes
Cheng Boon	Mm.
Amy	Ok the reason why of course we have been arguing about the mark to market right
Cheng Boon	Mm.
Amy	What they saying is that if I have to unwind today.
Cheng Boon	Mm hmm
Amy	Ok. That is the cost of unwinding.
Cheng Boon	Mm.
Amy	So that's the reason why they say that you cannot exclude the unwinding costs.

48 By 14 October 2006, the margin shortfall had grown to US$21m and by 21 October 2008 the Account went into negative equity. The market continued to drop and the Bank was not willing to give ST time to sell down his portfolio. I agree with Mr Kumar that ST was selling his assets in a depressed market because of his liquidity problems. Indeed, Mr Ng clarified that it was not ST's case that the latter had no liquidity issues; ST like everyone else was facing liquidity problems at that time. Mr Ng's point is that had the ISDA Notice been given to terminate and unwind the Accumulators, notwithstanding ST's liquidity problems, ST would have come up "with a plan, satisfactory to the [Bank] to stop the unwinding". On the overall

evidence, Mr Ng's point is not only speculative but incongruous. His statement – "regardless of the liquidity problems [ST] was facing, a wholesale dumping of all [ST's] shares and the unwinding of the Accumulators when the market was at an all-time low, was a course of action which [ST] would never [have] agreed to" – is riddled with unproven facts and is also not borne out by the Bank's unchallenged evidence on the way the Collateral Shares were sold and the manner in which the Accumulators were unwound. Notably, ST is no longer suing the Bank for the manner in which the Collateral Shares were sold.

49 After the margin call letter on 22 October 2008, ST had not asked the Bank for additional time accommodation. Although ST said that the Bank had earlier given him time to attend the margin shortfalls, ST is not suing the Bank for reneging on any previous promises to give him time to remedy the margin shortfall and redress the negative equity in the Account. In this regard, there is no need to dwell on the peripheral arguments such as whether the Bank had earlier on 16 October 2008 given ST four weeks to sell down at least US$15m of his shares in his Account per week and on the condition that he should "sell faster" if the market further deteriorated.[12] The Bank's view was encapsulated in an e-mail sent by Mr Heinz Braeggar ("Mr Braeggar") from the Bank's Credit Review Committee ("CRC"). In the e-mail, Mr Braeggar "strongly recommend[ed] to unwind some [of the Accumulators]" due to the high exposure and MTM loss.

50 The ongoing debate focuses on the Alleged Agreement to Unwind Accumulators (*ie*, the exit instructions). ST's grievance was with the allegedly unauthorised unwinding of the Accumulators; ST did not agree or consent to

[12] DCB 264.

the unwinding of the Accumulators on 22 October 2008 without which the Bank was obliged to give the ISDA Notice before it could lawfully unwind the Accumulators. The position taken at the trial was that ST had assets available to meet the successive margin calls; there was no need for him to therefore agree to the liquidation of the entire Account including the unwinding the Accumulators (*ie*, Option 1 at [51] below). I will elaborate on Option 1 based on the evidence before the court in due course. Suffice to say for now that Option 1 was not feasible at all in the prevailing market conditions where price movements in a volatile market would inevitably: (a) widen the margin requirements; and (b) increase the MTM losses on the Accumulators. It is in the context of the options that were realistically open to ST that the Alleged Agreement to Unwind Accumulators (*ie*, the exit instructions) has to be evaluated and determined. As will be explained below, ST found his liabilities in relation to the Account to far exceed his assets and the Bank argues that the only realistic option that ST could have pursued was Option 2 which was to unwind the Accumulators (at [51] below). After ST decided to sell all his shares in Barclays Bank, the Bank's spreadsheet sent to ST and YCB at 6.59pm of 22 October 2008 showed a margin shortfall of S$43.2m. If Option 2 was the singular option that ST was faced with, this fact would more likely than not serve as objective evidence to support the existence of the exit instructions.

51 The two options that were allegedly "open" to ST when the Bank issued to ST the margin call letter on 22 October 2008 in a falling market were as follows:

> (a) to draw from ST's liquid assets and continue to meet the (successive) margin calls ("Option 1"); or

(b) to mutually agree with the Bank that it is time to draw a line under his losses by unwinding the Accumulators and selling the Collateral Shares in his Account so as to avoid a forced sale ("Option 2").

November 2007 to 21 October 2008

52 It is convenient at this juncture to explain the need to repeat certain facts in various parts of this Judgment; for instance, repetition of facts has occurred in the introduction, in the overview of a section and again in the main argument itself. Repetition of facts is used, generally, for expediency to aid in the reading of the Judgment and, on other occasions, the same facts are raised for the purpose of argument in different parts of the Judgment.

53 Earlier, I have given a snap shot of the state of the Account at [43] – [49] above. As noted at [21] above, there were many instances before 22 October 2008 where ST had to address the margin shortfall in the Account. On 19 November 2007, for example, ST's Account suffered a margin shortfall which he remedied by remitting S$18m to the said account. As the market continued to deteriorate during November 2007, the market value of the Collateral Shares dropped and the MTM losses on the Accumulators increased. Additionally, the LV of some of the Collateral Shares was also reduced. This part of the Judgment narrates in greater detail the various actions taken by ST to manage his Account. However, the relentless movements in the equity markets were against him.

54 The markets had become increasingly turbulent by the time July and August of 2008 approached. ST continued pumping cash into what appears to

be a market-induced abyss – the Account continued to be in margin shortfall notwithstanding ST's efforts to remedy the situation. ST then took other actions to remedy the margin shortfall: he (a) started selling some shares in the Account; and (b) started borrowing money from the Bank to remedy the margin shortfall *viz*, ST drew down on the mortgage loan he had with the Bank in relation to a property at Tanglin Hill to address the shortfall.

55 As revealed in the New E-mails, ST was, as early as 8 September 2008, already planning to "sell most of [his] stake so as to improve [his] position with the [B]ank."[13] This plan was in relation to one of the Collateral Shares *viz*, LMIR Trust.

56 Included in the New E-mails is an e-mail dated 19 September 2008 where YCB was proposing on an *exploratory* basis how ST could move certain assets to Nomura Bank "for sheltering it away from [OCBC] and the [Bank]". In another e-mail dated 21 September 2008 entitled "Nomura, YP and Imir" YCB stated as follows:[14]

> I do not trust RBS Coutts … but given [the] current situation[,] it is still for you to take a loan with [the property at Ladyhill] as collateral …

57 After hearing YCB's proposals, ST left him with a short reply on 21 September 2008. ST wrote:[15]

> Let you take the lead. *Just remember we need all the banks currently*. [Thank you].
>
> [emphasis added].

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[13] Defendant's Bundle of New E-mails ("DBNE") 26.

[14] DBNE 47.

[15] DBNE 46.

58 ST also got his brother to help out. Mr Freddie Tan, ST's brother, provided security for the Account by way of a third party pledge of about US$2.5m on 17 September 2008. Notwithstanding the above, a margin shortfall of about S$2.79m remained as at 26 September 2008.

59 In the face of the successive margin calls, ST sought to convert part of the Facilities into a term loan so as to avoid the frequency of the margin calls. ST and YCB met the senior representatives of the Bank *viz*, Ms Kathy Shih ("Ms Shih"), the Chief Executive Officer of the Bank's Asia Pacific Wealth Management division; Ms Yeong Phick Fui ("Ms Yeong"), the Head of Key Clients in the South Asia Wealth Management division; Mr Reto Von-Atzigen ("Mr Von-Atzigen"), the Head of Credit in the Wealth Management division; and Mr Benjamin Cavalli ("Mr Cavalli"), the Head of Key Clients in Singapore in the Wealth Management division, to discuss ST's proposal on 29 September 2008. Amy was also present at the meeting. I note from Amy's evidence that Mr Cavalli was then her immediate superior. At the meeting, ST proposed "to convert part of [his] Facilities into a term loan" in order to "avoid the hassle of having to arrange a top-up to the Account every week." The Bank left this meeting agreeing to come back with a response in relation to the feasibility of ST's proposal. Unfortunately, the market continued its downward spiral.

60 Significantly, from 7 October 2008, ST stopped addressing the margin shortfall with cash or further collateral. At the same time, ST, as can be gleaned from the New E-mails, was anxious about his financial position with other banks. For example, in an e-mail dated 8 October 2008, YCB informed

ST of a shortfall in one of his daughter's account with OCBC. YCB's update to ST was as follows:[16]

> …
>
> Also, trying to shift a little more cash occasionally now to OCBC to keep them at bay and comfortable to protect [the properties].

61 On 9 October 2008, the margin shortfall in the Account ballooned to close to S$30m. At this point, Amy contacted YCB and informed him that the Account was at a "close out position".

62 ST initially talked about topping up his Account with US$14m in cash during a call with the Bank on 10 October 2008. In the same call, ST opined that the Account needed to be restructured after the said cash top-up as he "had limited capacity for top-ups on short notice".[17] However, ST did not provide any cash in the end.

63 On 13 October 2008, ST committed himself to selling S$20m worth of shares in his Account *viz*, his shares in Singapore Post and Singapore Press Holdings, between 13 and 17 October 2008 to reduce the margin shortfall in the Account. It is also apparent from an e-mail sent by Amy to Ms Shih that ST had proposed using S$11m of cash he held in Australia if it was "absolutely necessary". Nothing came out of that proposal. I highlight that ST had been selling his shares in Singapore Post, Singapore Press Holdings and/or DBS on 13, 14, 15, 16, 17, 20, 21 and 22 October 2008. The cumulative value of the shares sold during the aforementioned dates amounted to S$30,127,260.

[16] DBNE 49.

[17] DCB 222.

The margin shortfall in the Account at the end of 13 October 2008 stood at about S$36.8m.

64 I referred earlier at [47] above to the important call on 13 October 2008 between YCB and Amy. In that call YCB was told that *if the entire portfolio was liquidated including the unwinding of the Accumulators* there would still be a shortfall of US$2m (see [47] above for the transcript of the conversation). This potential liability of US$2m ballooned over the next seven days in the deteriorating market.

65 YCB's evidence at trial was that he did not know that Accumulators could even be unwound. I am unable to accept his testimony in the face of contemporaneous evidence gathered from the transcript of the telephone call (at [47] above) that Accumulators could be unwound and that the MTM losses would be realised on the unwinding. I find that YCB was aware that Amy's use of the word "shortfall" and her computation of "negative equity" factored in the Accumulators and the relevant MTM losses. I further find that YCB was aware that reference to the Bank "clos[ing] everything out now" meant the liquidation of the entire portfolio (the Collateral Shares and the Accumulators) and realising the Unwinding Costs. The net proceeds from the sale of the Collateral Shares would then be deducted from ST's loans to determine how much he would owe the Bank.

66 By 14 October 2008, ST had not pumped in cash or shares into the Account to address the shortfall for more than a week. The Bank started getting concerned about the Account and Amy called YCB on 14 October 2008 to advise that the US$21m shortfall in the Account had to be covered by 17 October 2008. This also followed the day after whereby Amy informed

YCB that the Account was in "close out position" and that the Bank was "not agreeable to let the shortfall stay past [20 October 2008]".[18]

67 ST's Account took a turn for the worst on 21 October 2008. At the end of that day, the shortfall in the Account stood at S$41.8m. Mr Braeggar's e-mail dated 21 October 2008 captured the dire state of the Account as the market had turned against ST:[19]

> Hi [A]my,
>
> What do you mean by the client was very cooperative? We have a 100% margin erosion and unless the client does not send in some cash, we could face a problem. I don't think that we should argue about LV etc. as it does not make a difference as we are close to [being] unsecured. [CRC] made it very clear in terms of selling and what are our expectations. *To sell the portfolio within the next few weeks is not anymore an option in my opinion, immediate close out is required.*
>
> [emphasis added]

68 On 21 October 2008, Amy spoke to YCB on the telephone. She informed him that "unfortunately [,] things changed again" because the position of ST's Account had not improved despite selling some of the Collateral Shares, [20] and that the portfolio was now in negative equity. I note from Amy's call that the Bank wanted an undertaking that ST would cover the Bank's losses. Otherwise, the Bank wanted to "close out the entire position".

69 What is clear from the narrative is that ST had in fact stopped providing the Account with cash or shares to address the margin shortfalls, but had, instead, started to sell some of the Collateral Shares in the Account. This

[18] DCB 158.

[19] DCB 281.

[20] Defendant's Bundle of Transcripts, p 195.

conduct, of course, suggests that he stopped adopting Option 1 from 7 October 2008. It nevertheless leaves unanswered the next question of whether he could have adopted Option 1 if he wanted to. I will now turn to this question.

ST did not have the liquid assets to adopt Option 1

70 ST's position at trial was that he was in a financial position to address the margin call on 22 October 2008. At trial, ST explained that he would be relying on the evidence of Professor Ho Yew Kee ("Prof Ho"), a professor at the Department of Accounting in the Business School of the National University of Singapore, to testify that ST did have the assets in October 2008 to meet successive margin calls. I now turn to Prof Ho's Affidavit of Evidence-in-Chief ("AEIC").

71 In his AEIC, Prof Ho stated that ST had four sources of funds that he could draw on to meet the shortfall in the Account, which was then confirmed at trial to be S$41,187,466. The funds ST had, in Prof Ho's view, amounted to S$69,293,504, and a breakdown of this figure (as set out by Prof Ho) is shown in the table below.[21]

ST's assets listed in Prof Ho's AEIC

Assets	**Value**
Three properties owned by [ST's] daughters	S$22,173,095

[21] Prof Ho's AEIC, p 70.

"Unrecognised" asset value of the assets of [ST] with the Bank	S$37,256,010
Cash in the Coutts Bank	S$1,864,399
Pledge from Mr Freddie Tan	S$8,000,000
Total	**S$69,293,504**

72 Prof Ho conceded in cross-examination that he accepted without verification ST's claim that he had 36-months' worth of liquid assets.[22] He also conceded that he did not know what liquid assets ST had to address the margin shortfall. Prof Ho observed that ST decided to stop topping up the Account with cash after 7 October 2008 as "he was just struggling to look at where [there is] the possible cash".[23]

73 Mr Kumar submits that Prof Ho's evidence is unreliable. He had made a number of assumptions (which were not verified) on the loanable value *ie*, LV, of the properties owned by ST's daughters. Prof Ho also conceded that the properties were not liquid assets and, at the same time, accepted the view point that their asset value was dependent on whether the Bank was willing to lend ST money against them, and if so, how much. The largest item, by quantum, in Prof Ho's list of ST's assets was the "unrecognised" asset value of the assets in ST's Account. It was shown at trial that Prof Ho was advancing what was, essentially, a fanciful proposition in relation to this item.

[22] Transcript dated 28 April 2015, p 52.

[23] Transcript dated 28 April 2015, p 56.

He was suggesting that an individual faced with a margin call could tell a bank that it should not issue a margin call because there were already assets (*ie*, the same Collateral Shares) in the account, which could be liquidated to meet the margin call. Prof Ho conceded that his proposition made no sense. Prof Ho also conceded that the value assigned to Mr Freddie Tan's assets was overstated. The sum of all this is that Prof Ho conceded in the round that ST did not have liquid assets to meet the margin call on 22 October 2008.[24]

74 Prof Ho also made further concessions:

> Q. And we have agreed that what he needs to therefore pay to UBS in terms of cash or liquid assets as of 22 October is $41.3 million.
>
> A. Yes, if he puts the $41 million into it, you'll realise basically that the accounts will never run into negative.
>
> Q. And he did not have 41.3 million of cash or liquid assets as of 22 October to meet that margin call.
>
> A. Yes, agree on that point.
>
> Q. Thank you. If you go to therefore your conclusion, and just to make sure we understand your evidence, paragraph 29, let me just read:
>
> "This report quantifies the value of Stanley's assets at the close of October 22, 2008, the last business day before UBS commenced unwinding actions against Stanley's accumulator contracts on October 23, 2008. The assets are identified and valued based on the documents provided by Stanley. The purpose is to determine whether Stanley has access to sufficient assets to meet the margin shortfall that precipitated the unwinding."
>
> Do you see that?
>
> A. Yes.

[24] Transcripts dated 28 April 2015, pp 140 – 141.

> Q. The conclusion we have reached just two minutes ago is that he did not have the assets.
>
> A. Yes. Liquid assets.
>
> Q. Agree? He did not have access to sufficient assets to meet the margin shortfall. He did not have, right?
>
> A. In the context of liquid assets and cash, he did not have.

75 In fact, Prof Ho's eventual concession resonates with ST's communications to the Bank on 17 December 2008 that he needed to "pick up" what was left and rebuild himself to repay the Bank his outstanding liabilities (*ie*, the Total Liabilities). The net effect is that at the end of the trial, ST's expert witness accepted that ST could not meet the margin call on 22 October 2008.

76 Mr Ng introduced a new point in closing submissions, which is that ST could have met the margin call with the assets listed in Prof Ho's AEIC, assets pledged under the Work Out Agreement and the funds he would be able to raise from his business associates. Mr Ng compiled these assets in a new schedule that was annexed to his closing submissions. ST also relied on Amy's opinion evidence at trial to support the new point in closing submissions on ST's ability to raise funds from his business associates; that the properties listed in Prof Ho's AEIC were available for offering to the Bank; and that ST would have been able to cover a shortfall of S$10m.

77 Plainly, no evidence was led on the new schedule and it was not tested in cross-examination. Amy was a factual witness whose opinion evidence is inadmissible. Prof Ho was cross-examined on all the assets that ST informed him that ST had available at the time of the margin call and the clear

conclusion that emerged from the cross-examination of Prof Ho is that ST was not able to meet the margin call on 22 October 2008.

78 Additionally, as noted from the communications leading up to the Work Out Agreement, ST himself admitted that he needed more time to recover and repay the Total Liabilities. Therefore, the conclusion that follows from ST's own expert's evidence is that Option 1 was not opened to ST, and I so hold.

ST went for Option 2

79 As mentioned, 22 October 2008 was an extremely significant day in these proceedings. I find that ST adopted Option 2 (see [51] above) and in doing so consented to unwind the Accumulators. The main reason is that Option 2 suited ST when one bears in mind ST's liquidity problems discussed above and the deteriorating state of the Account. By then, the loans from the Bank to invest in, *inter alia*, the Accumulators had become "unsustainable" (to use ST's description) to an experienced businessman and sophisticated investor like ST. I will elaborate on this point when I discuss ST's investment strategy. Above all, ST's confirmation that he agreed to the sale of the Collateral Shares *via* YCB's Margin Call Response E-mail put paid to his contention that he did not consent to the termination and unwinding of the Accumulators. I will elaborate on this shortly.

80 I pick up from the events on 21 October 2008. ST's Account had not improved despite the selling of shares,[25] and the portfolio was now in negative equity. I note from Amy's call to YCB on that day that the Bank wanted an

[25] Defendant's Bundle of Transcripts, p 195.

undertaking that ST would cover the Bank's losses. Otherwise, it would "close out the entire position".[26] That night, Amy e-mailed ST and YCB at 11.52pm to inform them in writing that the "current position is in closed out as the portfolio is in negative equity" and requested a top-up of the Account soonest.

81 At about 4pm of 22 October 2008, Amy, on behalf of the Bank, sent an e-mail to ST and YCB informing them that "the portfolio is in negative equity" and advised that the shortfall was in excess of US$30,288,400. Attached to the e-mail was the margin call letter. It reads as follows:

> **NOTICE FOR MARGIN CALL – ACCOUNT NO. 128882**
>
> Please note that the Collateral provided by you or other collateral provider(s) to the Bank is no longer sufficient to meet the Required Margin in respect of your obligations. As at 21 October 2008, there is a shortfall of USD30,288,400/-. Please also note that this shortfall amount may suffer additional increases without further notice to you.
>
> Pursuant to Clause 11.5 of Section 2 and Clause 4(1) of Section 5 of the Account Terms and Conditions, we kindly ask you to immediately deposit additional Collateral or, if applicable, terminate or deal with transactions booked in your account, in each case in order to restore the Required Margin.
>
> This notice and any action the Bank or you may take in furtherance of this notice shall not prejudice the Bank's right at its sole discretion to (i) request further Collateral, (ii) change the level of Required Margin; (iii) realise any part of all of the Collateral without further notice or consent, and/or (iv) terminate or otherwise deal with any or all transactions booked in your accounts. Any balance owing to the Bank as a result of any action referred to in this paragraph will remain your exclusive liability.
>
> Capitalised terms have the meaning defined in UBS Account Terms and Conditions.

[26] Defendant's Bundle of Transcripts, p 196.

82 In a subsequent call between Amy and YCB, Amy requested an action plan. YCB informed her that the decision on the Account had to be made by ST. YCB told Amy that he was no longer in a position to decide for ST. Amy informed YCB that it was not possible for her to wait until the next day for an action plan.[27] Amy then decided to call ST. This brings me to the 1710hrs Call. ST acknowledged at trial that the issuance of the margin call letter was a "serious development [in relation to the Account]."[28]

83 In the 1710hrs Call, Amy started the conversation by informing ST that if the entire Account was liquidated, there would still be a shortfall which needed to be covered and that the Bank that "[had] the right at any time right now to close out the entire Account". Amy informed ST that the Bank had not given instructions and hence was *not yet at the position where it would close out the Account*; however, she stressed the importance of ST reverting to her with an action plan by the end of that day. He was to inform her whether: (a) he was able to support the Account through shares or cash; or (b) he was giving the Bank "liberty to sell down the portfolio". It was made clear to ST that when liberty was given to the Bank to sell, it would sell until it felt comfortable with the state of the Account. ST informed Amy the following: (a) for a start, he would agree to the Bank selling his Barclays shares and, as for the sale price, the Bank was to "do the best under the circumstances"; and (b) he would call and meet YCB and either one of them would revert with ST's action plan. The transcript of the telephone call discussed the following[29]:

[27] Defendant's Bundle of Transcripts, p 213.

[28] Transcript dated 9 April 2015, p 84.

[29] 16AB 219

Stanley	But. Yah. I mean I will need your help and Cheng Boon's help to manage and warn me about what is the status. How to you know. I mean what happens. Let's just say, let's just we sell we everything, sell everything right---
Amy	Ok
Stanley	---and then er since I have got a few minutes, I chat with you on it---
Amy	Mm
Stanley	---and then you are short of 12 million or whatever right---
Amy	Ok
Stanley	---and then does the 12 million then er also wipe out the house or the house is there.
Amy	The house is there.
Stanley	So okay. So then we then go through the process of liquidating the house and cover your 12. Or I find money to cover the 12. Right.
Amy	We typically will give you time to cover the 12.

84 The scenario which was discussed between ST and Amy above related to the liquidation of the entire portfolio *viz*, the sale of the Collateral Shares and the unwinding of the Accumulators. ST was therefore seeking more information on the consequences that would flow from giving the Bank the liberty to liquidate the portfolio. ST then heard from Amy that the Bank wanted to liquidate the portfolio in the afternoon that day as an action plan from ST was not forthcoming. She also informed him that the Bank wanted to sell his Barclays shares for a start if there was no action plan. At this point, *ST reacted by asking Amy to sell off all his Barclays shares with his agreement*.[30] ST informed Amy that he and YCB would figure out the rest. The relevant parts of the transcript are as follows:

[30] 16AB 220.

Stanley	Ya. I think for a start ah.
Amy	Ya
Stanley	Tell them to sell off Barclays. At least with my agreement, …. I think it is only fair lah. I think it is only fair.
Amy	Ok.
Stanley	Ya lah. Tell them to sell off Barclays
Amy	We sell off Barclays ah.
Stanley	Ya. Ya.
Amy	Okay. So I will take that first. As first step to sell off the entire Barclays.
Stanley	Ya ya. And then tonight we will figure out the rest. I mean, then at least ah. Ya let's work something out lah.
Amy	Okay.
Stanley	Okay.
Amy	Okay. Do you want me? Can I proceed now to sell off Barclays first?
Stanley	Proceed to sell off Barclays.
Amy	Okay. So I will sell off Barclays now average is 2.39.
Stanley	Ah
Amy	let me ask them to sell on best effort to close the position for Barclays tonight.
Stanley	Ya lah. Yah
Amy	Ok.
Stanley	Too bad. Too bad.
Amy	Alright.
Stanley	Thanks Amy.
Amy	Okay. No problem. Talk to you later. Bye.

85 During the 1710hrs Call, ST made clear that either he or YCB would revert to Amy with an action plan. ST was also completely aware of the steps that would flow from giving the Bank the liberty to sell down his entire portfolio (including the Accumulators). Amy substantially narrowed the scope of any "plan" ST had to revert to her by the end of the day to two options: (a) whether he was able to support the Account through shares or cash; or (b) whether he was giving the Bank "liberty to sell down the portfolio". There was no third option set out by Amy.

86 This takes me to the 22 October 2008 Meeting. The cast of characters of this meeting is small. Only YCB and Amy attended this meeting. The meeting took place at a café at Bukit Timah. While both parties agree that the meeting took place on the night of 22 October 2008, each alleges that it took place at different times. Nothing turns on the precise timing of the meeting. I note that the meeting took place after YCB spoke to ST.

87 The parties have put before this court divergent accounts of what happened at the meeting. I will start with Amy's evidence. I pause to note that Amy's evidence throughout the trial was concise and firm. She was composed and assured throughout the cross-examination and her account of events was at the very least internally consistent with her written testimony and the documentary evidence referred to therein. Amy's recollection was that the meeting was set up so that YCB could communicate ST's anticipated plan of action to her. Her evidence in this regard was that YCB told her that ST decided to close out the entire Account. Amy said she was surprised at ST's decision as, prior to this, she thought that ST would have produced cash or shares to top-up the Account. Amy also stated that she discussed with YCB

the unwinding of the Accumulators. She also asked YCB several times if he would like to manage the liquidation of the portfolio; YCB declined, preferring to let the Bank manage the liquidation.

88 ST's version of events at trial was that he did not instruct YCB to convey any action plan during the 22 October 2008 Meeting. He saw no need to come up with an action plan because he thought he still had time. What brought about this belief that he still had time is curious and inexplicable in light of the 1710hrs Call that showed his full understanding and promise to convey an action plan to Amy that same night. It was also clear that Amy told ST that she would wait for his response and there was no doubt that ST appreciated the gravity of the situation.

89 I now move on to address YCB's version of events. I note at the outset that YCB's testimony was not helpful at all. He had no memory of what was said during the 22 October 2008 Meeting save for some unimportant matters. His evidence at trial was that he met with Amy to discuss "general market things".[31] He stated that he could not remember if he discussed ST's portfolio with Amy. Yet Mr Ng submitted in closing submissions that YCB and Amy had a "general discussion about market outlook and ST's portfolio, including possible actions which ST and the Bank could take respectively."[32]

90 YCB went so far as to claim that he did not even know that Accumulators could be unwound. I have already rejected YCB's evidence on this matter. It is obvious from the Margin Call Response E-mail that he and Amy talked about liquidation of the portfolio at the 22 October 2008 Meeting,

[31] Transcript dated 15 April 2015, p 147.

[32] ST's Closing Submissions, para 105 (a).

which was no ordinary meeting. As I alluded to earlier, YCB *replied* to Amy's e-mail attaching the margin call letter. The Margin Call Response E-mail was sent after the 22 October 2008 Meeting and it was copied to ST, Ms Yeong and Mr Cavalli. Significantly, the Margin Call Response E-mail was *sent as a reply to the margin call letter of 22 October 2008.* It was not the last e-mail sent by the Bank such that YCB was conveniently using the last e-mail thread to reply the Bank. There was another e-mail sent by the Bank to YCB after the margin call letter. The Margin Call Response E-mail therefore unequivocally sets out ST's position in relation to the margin call letter. The contents of the Margin Call Response E-mail are as follows:[33]

> Hi Amy,
>
> We entrust UBS to sell the shares in a professional and orderly manner. In a reasonable time frame, without depressing the price unreasonably, especially on illiquid stocks such as Cdl nccps, United Engineers, Lmir, etc.
>
> Regards,
>
> Cheng Boon

91 I make three points. First, YCB and ST's asserted at trial that the Margin Call Response E-mail could only be construed to mean that ST agreed to the Bank selling the shares in his portfolio (*ie*, the Collateral Shares) and not to the unwinding of the Accumulators. This concession is consistent with one reading of YCB's response in the Margin Call Response E-mail stating that "we entrust" the Bank to sell the shares. Reference to shares in the Margin Call Response E-mail, on ST's testimony, encompassed all the shares in the Account including the shares that were accumulated under the Accumulators. I pause here to remind that ST accepted that shares accumulated under the

[33] 4 AB 967.

Accumulators also formed part of the collateral in the Account. The use of the words "we entrust [the Bank] to sell" conveys the meaning in the context of the background facts that ST gives responsibility for the sale of the shares to the Bank.

92 Second, the Margin Call Response E-mail goes further than YCB and ST's assertion at trial. When viewed in the context where ST and YCB had no other plan, the inexorable conclusion is that ST had, through YCB, agreed in the 22 October 2008 Meeting and the Margin Call Response E-mail to the Bank liquidating ST's portfolio and closing out *the Account including the Accumulators*. This conclusion is buttressed by ST and YCB's utter lack of protest or surprise whilst the Accumulators were being unwound on 23 and 24 October 2008. If, as YCB and ST now say, the Margin Call Response E-mail was limited to the Collateral Shares and not Accumulators, it is inexplicable that, and there is no satisfactory answer as to why, YCB did not object and try to halt the unwinding of the Accumulators when Amy's assistant, Clara, spoke to YCB on 23 October 2008 at 9.44am and informed him that the Bank would start selling the shares and unwinding the Accumulators. This call preceded the selling of the shares and the unwinding of the Accumulators. YCB did not deny receiving Clara's call but had simply no recollection of what the call was about. Notably, it is not his evidence that he objected to the unwinding of the Accumulators during the telephone call. YCB's inability to recall what was discussed did nothing to refute Clara's evidence on the nature of the call and what was conveyed to him. Clara's evidence contradicted YCB's evidence that he only learnt of the unwinding after receiving Clara's e-mail on 23 October 2008 at 6.51pm.

93 Third, the clincher here is an e-mail sent almost a year later by YCB on 29 October 2009. In that e-mail YCB stated in no uncertain terms that his instructions in the Margin Call Response E-mail were applicable to both the shares and the Accumulators ("the Concession E-mail"). I reproduce the relevant portions of the Concession E-mail:[34]

> UBS had always advised us when we do accumulator and or decumulator that UBS need to hedge at least 50% of the volume before it can be done. As an example, if we want to do a 12 months accumulator with 1 time gearing and 10,000 shares daily delivery, UBS will need to hedge by buying from the market about 1.25m shares (50% of 10,000 shares x about 250 trading days) before the order for 10,000 shares can be achieved. In the case of decumulator, UBS will need to have the stock of the 1.25m shares on hand before the order can be taken and final order that we can achieved is then still dependant on UBS being able to sell into the market the 1.25m shares.
>
> ***It is thus inconceivable from the representations of UBS from the past that all outstanding accumulators were unwound by UBS within just TWO days. And even if it had been unwound by UBS, it was done in an unprofessional manner and in manner that not is not orderly nor reasonable, contrary to my [Margin Call Response Email] of 23 October 2009 0004 hour*** (re-produced below after the end of this email) to Amy Tee and cc to Phick Fui and Benjamin Cavalli.
>
> [emphasis added in underlined bold italics]

94 The Margin Call Response E-mail when read with the Concession E-mail (see [93] above) makes it abundantly clear that YCB's assent to the Bank liquidating the Account related not only to the Collateral Shares but applied also to the Accumulators. YCB's attempt in cross-examination to simply claim that the Concession E-mail was a mistake, a position he had never taken until then, is neither believable nor persuasive.

[34] 8 AB 2340.

95 I return to the e-mails that Amy sent to her colleagues at the Bank after the 22 October 2008 Meeting. The contents of the e-mails resonate with that of the Margin Call Response E-mail, and evinced what YCB and Amy must have discussed and ST's consent to closing out his entire Account. The first e-mail was sent to the Bank's trader, Mr Koh Kong-Guan ("Mr Koh") and Mr Braeggar at 1.15am on 23 October 2008. In that e-mail, Amy informed Mr Koh that "[ST] has decided to liquidate his entire portfolio" and the shares in the Account were to be sold and the Accumulators were to be unwound. She also sent an e-mail to her assistants Ms Elmira Vadamana ("Elmira") and Clara at 1.42am on 23 October 2008. Amy had to brief Elmira and Clara in the e-mail as she was travelling to Japan the next morning. In that e-mail, she asked Elmira and Clara to give their "urgent attention" to the closing out of the Account.

96 After sorting out the procedure that would have to be adopted for the liquidation of ST's portfolio, Amy went on to update the senior management of the Bank and summarised the 22 October 2008 Meeting and the decisions made by YCB thereat in an e-mail sent at 1.53am on 23 October 2008 ("Summary E-mail on 22 October 2008 Meeting"). At trial, Amy gave evidence that the Summary E-mail on 22 October 2008 Meeting was exactly what happened in the 22 October Meeting. The contents of the Summary E-mail on 22 October 2008 Meeting are set out below:[35]

> Met with client this evening to evaluate the close out position and client *has decided to allow the bank to liquidate the entire portfolio*. Client has come to realise that there is [*sic*] no more fundamentals left and no reason to hold on to the shares and do [*sic*] not want to put any more good money to bad. He understands that *there may be negative equity after selling the*

[35] DCB 293.

> *entire portfolio and would like to deal with the mode of repayment once the liquidation has been crystallized.*
>
> I have instructed DAC to proceed with the liquidation as per other email to [Mr Koh] who is client's DAC account manager. [Mr Braeggar], would appreciate if you could help guide [Elmira] and [Clara] on the speed required for the liquidation especially for the less liquid stocks and [the Accumulators]. As I will be away tomorrow, [Elmira] and [Clara] will cover for me.
>
> [emphasis added]

97 I pause to note that the Summary E-mail on 22 October 2008 Meeting is largely consistent with the Margin Call Response E-mail, where YCB expressly entrusted the Bank to sell of the shares, and the 1710hrs Call, where ST enquired if he would be given time to cover any negative equity once his losses are crystallised after the liquidation of the Account. I also note from the transcripts of the conversation between YCB and Amy in the days preceding the liquidation of the Account that YCB repeatedly expressed the view that "there were no more fundamentals" in the market at that point of time. This sentiment is also indicative of the lack of sustainability of the loans for margin trading and why ST and YCB decided on the exit instructions on the night of 22 October 2008.

98 At trial, Clara testified that Amy had also called her either in the night of 22 October 2008 or the early hours of 23 October 2008 to inform her of YCB's instructions to the Bank in the 22 October 2008 Meeting. Clara also mentioned that Amy informed her that ST wanted to liquidate the Account as he did not want to top-up the Account.

99 I must point out that in my analysis of the events following the unwinding of the first batch of Accumulators in the morning of 23 October 2008, there was never any protest by either ST or YCB then, and at any point

thereafter (even during negotiations in relation to the Work Out Agreement), to the Bank's unwinding of the Accumulators or that they were unwound without giving them the ISDA Notice. Most of the unhappiness raised by them was about the sale of certain Collateral Shares that were not so easily traded and hence considered as "illiquid" (see [102] below).

100 On 23 October 2008, Clara called YCB at 9.40am to inform him that the Bank would be selling the shares and unwinding the Accumulators. It is not YCB's evidence that he protested to the unwinding of the Accumulators.

101 At the close of the day, Clara sent YCB an e-mail to update him on the trades executed in relation to the Account. Of interest is the fact that eight of the 16 Accumulators were unwound on 23 October 2008 and the Unwinding Costs were S$10,935,500. I note that YCB did not call or send any e-mail to protest to the unwinding of the Accumulators. YCB and ST kept silent and allowed the Bank to unwind the remaining Accumulators on 24 October 2008. At trial, ST suggested that he had called Ms Yeong to protest the unwinding of the Accumulators. The Bank was not able to refute this allegation as Ms Yeong has since passed away. However, I am left with no doubt that there was in fact no protest to the unwinding of the Accumulators as ST and YCB had agreed to it. The fact is that YCB expressed his unhappiness with the manner in which some of the Collateral Shares were sold on 24 October 2008. By the same token, YCB could and would have sent an e-mail if he felt that the Accumulators were being unwound without the consent of ST. The fact of the matter is that there was no protest by ST or YCB to the unwinding of the Accumulators. All in all, the conduct of ST and YCB is consistent with the existence of the exit instructions, and I so hold.

102 As noted, on 24 October 2008, the Bank continued to unwind the rest of the Accumulators and sold more of the shares in the Account. In relation to those Accumulators, the Unwinding Costs were S$14,526,300. YCB was separately unhappy with the way two of the Collateral Shares *viz*, LMIR and Bukit Sembawang ("the Illiquid Shares"), were sold and felt that the Bank was depressing the prices of those counters. He therefore sent an e-mail to Mr Cavalli and Amy at 8.18pm on 24 October 2008 stating this and also indicated the prices on his screen for all the shares that were sold that day and the Accumulators ("the Share Price E-mail").

103 At the close of 24 October 2008, even after selling the shares in the Account and unwinding the Accumulators, there was still a shortfall of about US$6.7m. Amy replied to the Share Price E-mail on 27 October 2008. She informed YCB that the Bank was doing its best given the illiquidity of the Illiquid Shares. YCB replied to this e-mail on 28 October 2008. In his e-mail, he informed Mr Cavalli and Amy that he felt that the way the Illiquid Shares were sold was not appropriate. He then requested the Bank to suspend the sale of shares on 28 October 2008, as he felt it was "not a right day to sell [shares]".[36] Amy thereafter replied to the e-mail. In the e-mail, she apologised to YCB and stated that the Bank could not accede to his request unless ST provided a cash top-up of US$6.7m to address the shortfall in the Account.[37]

104 Notably, notwithstanding ST's argument that he was in a position to salvage the entire Account including the Accumulators, ST did not put up US$6.7m to suspend the sale of shares for one day. It is noted from a

[36] DCB 361.

[37] DCB 366.

subsequent wealth management call report filed by Amy, in relation to a call with YCB on 28 October 2008, that YCB was "disappointed over the rejection of [the request to suspend the sale of shares]" and because Ms Yeong could not be reached when ST or YCB sought to contact her on that day.[38] It thus became clear that the reason why Ms Yeong was contacted was to seek her assistance in obtaining a suspension of the sale of the Collateral Shares.

105 The New E-mails discovered after the trial confirmed that ST and YCB did not protest to the unwinding of the Accumulators. One of the New E-mails was sent by ST on 25 October 2008 to YCB after YCB sent the Share Price E-mail. I reproduce the e-mail in full:[39]

> How much left and balance of loans? Anyway of working out or too hard at this stage? Thanks for managing this.

106 ST was asking in the above e-mail whether the Bank would enter into a work out agreement with him in relation to his outstanding liabilities. The tone of the ST's e-mail also was inconsistent with a long-term investor who was "extremely surprised"[40] or "shocked" at the Accumulators being unwound. YCB replied to this e-mail. In his reply, he highlighted that there might be a possibility that Mr Freddie Tan's assets might be affected when the Bank decides to address the negative equity in the Account.[41]

107 This lack of protest is stark and the silence is consistent with my reading of the Margin Call Response E-mail (with the Concession E-mail). I

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[38] DCB 377.

[39] DBNE 13.

[40] ST's AEIC, paras 66 – 68.

[41] DBNE 13.

am satisfied that the agreement to unwind the Accumulators must have been formed during the 22 October 2008 Meeting. In this regard, I accept the evidence of Amy. Amy's *detailed* e-mails following the 22 October 2008 Meeting are consistent with her Account at trial that YCB informed her that they were letting the Bank liquidate the Account as they did not wish to top up the Account with any cash of shares. Amy's evidence was also corroborated by Clara's testimony. In my view, the totality of the evidence before me strongly supports the Bank's case that ST gave his consent to the Bank to sell the Collateral Shares and unwind the Accumulators in the Account.

108 While I find that ST had pursued Option 2 on the weight of the evidence, I also wish to make the point that ST would not have sat back and allow a forced sale by the Bank. Indeed, there is clear evidence that ST wanted to avoid a forced sale. ST's sentiment must be viewed in light of the fact that ST had, one month earlier, reminded YCB that their financial position had to be managed gingerly as they "need[ed] all the banks". As noted at [57] above, ST was conscious of the fact that he needed all the Banks to be on board in order for him to tide through the crisis. As at 20 October 2008, an Australian bank had withdrawn part of the facilities which allowed ST to draw down for personal use. A further forced sale by the Bank would have plausibly exacerbated the situation. I therefore agree with the Bank's submissions that it would be relevant to the other bankers of ST if the Bank force-sold his assets as it might have triggered a series of cross-default clauses. However, I am not left only with the Bank's submissions on this point. It was also ST's evidence at trial that it would be relevant whether the Bank sold his assets pursuant to a forced sale.

109 ST also did admit that the last thing that he would have wanted in a situation where banks were withdrawing facilities from him without giving reason was to make the banks nervous of his financial position. I also point out that ST did allude to "other considerations" (primarily relating to his status in society and reputation) that would factor in any decision he takes in relation to the Account because of his role as a full-time volunteer.

110 These additional points only serve to reinforce my conclusion that ST selected Option 2 and focussed on repayment of liabilities. As stated, there was an e-mail dated 25 October 2008 from ST to YCB that focussed precisely on repayment (see [105] above).

111 In light of the above, I find that ST had given exit instructions the Bank to sell the Collateral Shares and unwind the Accumulators through YCB in the 22 October 2008 Meeting and had confirmed those instructions in the Margin Call Response E-mail sent by YCB. This option that he had selected imminently made sense given the circumstances at the material time.

Amy's alleged mistake

112 Mr Ng submits that Amy misread and misunderstood the Margin Call Response E-mail as instructions from ST to liquidate his entire portfolio. Amy then sent off three e-mails to other officers of the Bank leaving her instructions for the liquidation of ST's portfolio.

113 Initially, ST said in cross-examination that Amy acted fraudulently when she wrote to her superiors informing them that ST had agreed to liquidate his entire portfolio. ST cannot seriously believe in the truth of his

testimony given that he continued to use Amy as his relationship manager after she left the Bank for another. ST subsequently changed his story to suggest that Amy must have been mistaken that he had agreed to liquidate his entire portfolio. He tried to suggest reasons for this mistake: that Amy was prone to making mistakes; that she was under tremendous pressure to revert to the Bank with ST's plan of action; that she was rushing as she was about to go on vacation; and that her mistake was in thinking that the Margin Call Response E-mail was a confirmation from ST that he wanted to liquidate his entire portfolio including his Accumulators. In sum, her mistake arose from "misinterpreting" the Margin Call Response E-mail. I have already commented that the Margin Call Response E-mail does not bear out ST's case theory. I find the assertion of a mistake on Amy's part to be fanciful and ST's suggested reasons for the mistake to be entirely speculative. Amy sent out several e-mails after the 22 October 2008 Meeting, and judging from the contents and syntax, the e-mails were well composed with little or no typographical errors to reveal tell-tale signs of the sender's haste and stress.

114 Mr Kumar makes the point in his reply submissions that the allegation of Amy's mistake was made up. At the trial, Mr Ng put to Amy that she realised her "mistake" and made up her account of the 22 October 2008 Meeting after the suit started, but later changed ST's case in closing submissions to assert for the first time that Amy realised her mistake "shortly after" the Bank proceeded with the liquidation of the Account. In short, his version was not the case put to Amy in cross-examination.

115 This allegation of Amy's mistake does not sit well with the evidence. At the trial, ST and YCB maintained that the Margin Call Response E-mail

could only be construed to mean that ST gave the Bank the right to sell all the shares in his portfolio (*ie*, the Collateral Shares but not the Accumulators). The position taken at trial contradicts the e-mail sent to the Bank by YCB on 29 October 2009 (*ie*, the Concession E-mail). In this e-mail, YCB told the Bank that the Margin Call Response E-mail referred to the Collateral Shares *and* the Accumulators. Accordingly, there is hardly any cogent evidence to support ST's contention that Amy was mistaken when she informed the Bank that ST had agreed to close off the Account by selling the Collateral Shares *and* unwinding the Accumulators.

116 ST's further contention is that when the Bank realised Amy's mistake, it nonetheless continued to liquidate ST's portfolio by treating it as a forced close out. I make two points. First, even if, for the sake of argument, there was an operative mistake that led to the unwinding of the Accumulators, I agree with Mr Kumar that the Bank would be entitled to unwind the Accumulators without issuing the ISDA Notice pursuant to the CSNL Enforcement Procedure. I will be discussing the CSNL Enforcement Procedure at [136] below.

117 Second, as regards the position that ST had called Amy and Ms Yeong on 23 October 2008 to complain about the Bank's liquidation of the Account without waiting for ST to come back with a plan and that the Bank had by then realised Amy's mistake, I note that ST did not at any time follow up with a formal protest to stop the liquidation after he failed to speak to Ms Yeong directly. The most natural thing to do – which he omitted to do – would be to e-mail the Bank to stop the liquidation. A reasonable person in his position

would have done that, especially when his S$100m portfolio was being closed out by mistake and without his authority.

118 Mr Kumar rightly commented that since YCB could not remember what was communicated to Amy *viz*, the details of their discussion during the 22 October 2008 Meeting, ST would be hard pressed to challenge and contradict Amy's version of what transpired at the 22 October 2008 Meeting.

ST's investment strategy

119 Mr Ng submits that ST had no reason to agree to a "wholesale liquidation" of his entire S$100m portfolio with the Bank, or the unwinding of the Accumulators by the Bank. ST's grouse is that the Bank's insistence that he reverted between 5.10pm (*ie*, the time of the 1710hrs Call) and the next morning with his plan of action for a portfolio of S$100m was "really unfair".[42] ST also maintains that it would not be logical for him to allow the Bank to close out his entire portfolio. He said:[43]

> A: … [i]n that period, not getting back for a few hours in that financial turmoil is not bizarre at all. It's very normal. It's very normal. You take time and you think about it. In fact, if I have come back in a few hours, probably I'm being very careless.

120 Mr Ng submits that given ST's relationship with the Bank, ST was assured by Amy that the Bank would not foreclose his position even if he took a few days to get back to them. ST believed he had time because the Bank was still talking to him, and Amy had told him that the Bank had not come to a point where it was giving instructions to close out the Account. ST also said

[42] Transcript dated 9 April 2015, pp 103 – 104, pp 146 – 149.

[43] Transcript dated 9 April 2015 pp 134 – 136.

that he was under the impression that the Bank would still give him a term loan. In the premises, Mr Ng argued that the Bank was wait for ST's plan of action in relation to his portfolio.

121 I find no merit in ST's argument that it was factually not possible for him to have agreed to liquidate the portfolio as he had a dinner function to attend on the night of 22 October 2008 and that, because he was a sophisticated investor with a long-term view, he would not have agreed to liquidate his entire portfolio including the Accumulators. In particular, as of 22 October 2008, his portfolio had a market value of S$107,352,497.05. As regards ST's argument here, I make a few points. First, contrary to what ST wants this court to believe (*ie*, that he would not agree to liquidate his entire portfolio on 22 October 2008), I find that ST was most clearly alive to the prospect of liquidating his entire portfolio well before the margin call letter was issued on 22 October 2008. ST had started to deleverage the Account after he stopped topping up the Account with cash or further shares *ie*, on 7 October 2008. I highlight that ST had sold his shares in Singapore Post, Singapore Press Holdings and/or DBS on 13, 14, 15, 16, 17, 20, 21 and 22 October 2008. The cumulative value of the shares sold during the aforementioned dates amounted to S$30,127,260. The shortfall in the Account at the end of 13 October 2008 stood at about S$36.8m. In the 1710hrs Call, ST agreed *on the spot* to sell all his Barclays shares. Deleveraging had not managed to stem or kept pace with the margin shortfall.

122 Second, there was an argument raised by ST that it did not make strategic sense for him as a long-term investor to agree to the unwinding of the Accumulators, as unwinding them would result in him realising the hitherto

unrealised Unwinding Costs. There are two problems with this *ex post facto* argument. The first problem is that it assumes that ST had a choice and that he did have liquid assets to salvage the Accumulators. In reality, if he were to salvage any part of the Account (*ie,* the Accumulators), he needed to come up with a plan to address the entire margin shortfall of S$43.2m. Second, ST did not have the liquid assets to do so, and it made eminent sense for ST to draw a line under his losses and focus on repaying his Total Liabilities.

123 Notably, the Bank had been asking ST for a plan for some time. Between 8 and 22 October 2008, Amy was in contact with YCB to follow up with ST for a plan to resolve the shortfall. By 21 October 2008, the Account went into negative equity. On 22 October 2008, during the 1710hrs Call with ST, Amy asked ST for his plan. The Bank was still willing to listen to ST's proposal because, at that time, the Bank still wanted to see if ST had devised a plan to save his portfolio. Clearly, ST never asked about the availability of the term loan in his conversation with Amy in the 1710hrs Call, nor did he ask the Bank for time; instead, he decided to sell his Barclays shares for a start and promised to revert later in the night with his decision on the plan of action.

124 Curiously, it appears from ST's testimony that he expected the Bank to wait indefinitely in a volatile market for his plan of action:[44]

> Q: Mr Tan, the bank was giving you until that night to change their minds. That was the whole point, wasn't it? The margin call letter had come at 4.00pm, you agreed the Barclays shares would be sold, and Amy says, "Tell me you plan tonight, then I can hold them off, wait" and the bank was giving you until that night to change their minds with a formal plan. So what

[44] Transcript dated 9 April 2015, p134.

> other formalities were you requiring or were you expecting from the bank?
>
> A: That, your Honour, they wait for me to come back with a plan. That's what I'm expecting. Yes, it may not have come by that night, but I would assume the years of relationship and the performance and the size of the account and the complexity of it.
>
> Q: Right, so was your instruction to Mr Yeo for him to go to the bank and ask for more time to come up with a plan? … Ms Tee was waiting for a plan that night. You discussed the matter with Mr Yeo. You instructed Mr Yeo to contact Ms Tee. So was your instruction to Mr Yeo to go back to Ms Tee and ask for more time to come up with a plan?
>
> A: The short answer is no ….
>
> Q: Mr Tan, I am asking you …
>
> A: I am saying I did not tell Mr Yeo to share my plan with Amy. …

125 Mr Ng further argues that if ST had wanted to liquidate his entire portfolio, ST would have: (a) gone to meet Amy or other senior bank officers to negotiate the time frame over which the liquidation was to take place as well as the time accommodation he would get to repay the crystallised losses; (b) requested an estimate of the losses which would be crystallised based on the market opening prices of shares on 23 October 2008; and (c) wanted YCB to manage the liquidation by "controlling which counters to sell for the day, the volume of each counter to be sold, and to make strategic decision to withhold selling on certain days where the market was not performing as well."[45] All these three points described by Mr Ng would have been ST's ideal liquidation strategy where market volatility is minimal and, above all, the luxury of time was on his side. Besides, during the 1710hrs Call, ST talked about selling everything in the Account (*ie*, the Collateral Shares and

[45] ST's Closing Submissions, para 152.

Accumulators) and queried Amy on his losses and what would happen to the Tanglin Property in that scenario. I reproduce the transcript of the conversation:[46]

Stanley	… Let's just say, let's just we sell we everything, sell everything right---
Amy	Ok
Stanley	---and then er since I have got a few minutes, I chat with you on it---
Amy	Mm
Stanley	---and then you are short of 12 million or whatever right---
Amy	Ok
Stanley	---and then does the 12 million then er also wipe out the house or the house is there.
Amy	The house is there.
Stanley	So okay. So then we then go through the process of liquidating the house and cover your 12. Or I find money to cover the 12. Right.
Amy	We typically will give you time to cover the 12.

…

126 As noted from the 1710hrs Call, liquidating his entire portfolio was an option that ST was considering, and he wanted information on the consequences of taking that option.[47] Mr Kumar argues that ST is trying to now deny that he took the option of liquidating the entire Account when he actually did so on 22 October 2008. The 1710hrs Call was not the first time the option of liquidating the entire Account was discussed. Rather, there were

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[46] 16 AB 219

[47] Bank's Closing Submissions, para 152.

similar discussions on various occasions between ST/YCB and the Bank between 13 and 21 October 2008.

127 Mr Kumar makes the point that ST's strategy at that time was to exit the portfolio in the absence of a term loan from the Bank. This submission is based on ST's disclosure made during Mr Kumar's cross-examination of ST :[48]

> A: Correct, your Honour, but we have also disputed already at that point some of those non-loanable values, like the UE shares and so on. We already, prior to this, questioned: how do they arrive at their calculation on the OTC margin? We have never fully mutually agreed on what's the answer, but we have already moved on, where *I have already given them a position that I want a term loan, or I don't want to continue in the margin account.*
>
> Q: Right. You –
>
> A: So it's in the context of –
>
> Q: Sorry, *you want the term loan or you don't want to continue the margin account?*
>
> A: I – as I said, my management of the portfolio is dependent on sustainability of the loan.
>
> Q: No, Mr Tan, you didn't say that. *You said*, and I want to be accurate with you, *that you want the term loan, and I think you said you don't want to continue with the margin account. That's what you said.*
>
> A: *Yes, I did say that … I mean … okay. This … you are very good.*
>
> Q: That's exactly the point, Mr Tan, isn't it? This is why we are here today.
>
> A: Your Honour, I feel like the counsel is saying my whole life is within UBS. I'm saying how I manage UBS does not necessarily mean how I managed the full portfolio. And surely, to just narrow it down like this is inaccurate description of how I would act according to my portfolio. So I am very clear with UBS at that point

[48] Transcript dated 8 April 2015, pp156 – 158.

already, in fact months before that, I cautioned against market volatility, that the only way forward is to manage it on a sustainable basis, otherwise deleveraging was my proposed idea in the first place. But as a bank they want a large account. They don't want a small account you know? And the way I take the approach is that overall it must be a sustainable portfolio. The whole life of managing a portfolio like this is to be able to survive in a situation exactly like that.

Q: Mr Tan, you can't wriggle out of this one. We have your answer. You see, you can talk about all your other portfolios. We are not interested in that. I am interested in what you were going to do with this account with UBS, and we have established and it is quite clear, *I put it to you, that if it's not the term loan, get out. That was your strategy. If you don't get the term loan, you get out of the account.*

A: Again*, I can accept the counsel's phrasing of that if his definition of getting out, your Honour, is that I will manage it somewhere else. Out of UBS does not get out of the portfolio.*

[emphasis added]

128 As Mr Kumar correctly argues, ST would not be able to make an exit with his portfolio intact without first paying off the Bank. I also note ST's evidence that the management of the portfolio is dependent on his ability to manage the loans in a sustainable manner. In this case, after selling all the shares in the Account, ST would have to put up fresh assets as collaterals to hold on to the Accumulators, which would have elevated MTM margin requirements in a falling market. In this sense, his notion of holding on to the Accumulators to wait for an upswing in the market ignores an important dimension *viz*, that he would need fresh liquid assets to support the increasing MTM losses of the Accumulators. On the evidence, ST was hard pressed to put up US$6.7m to suspend the sale of the Illiquid Shares.

129 I now come to Mr Ng's submissions that to a sophisticated investor like ST, market risk may not be a bad thing for his options were: (a) to hold on to the Accumulators and wait for the "inevitable" price rise; or (b) to unwind the Accumulators and eliminate the market risk, but crystallise his losses at S$25,461,800. Mr Ng argues that a long-term investor like ST would have chosen the first of the two options because if he liquidated the Accumulators, he would suffer an immediate loss of S$25,461,800, but if he waited, he would have been better off as the market could turn in his favour. The premise of his argument is that ST's investment time horizon was long term, making ST different from those who sold during the October 2008 financial crisis. Needless to say, the contention that ST would have chosen to hold on to the Accumulators is based on speculative optimism, not evidence.

130 The reality remains that October 2008 was a time of unprecedented and extreme turmoil in the global financial markets, and the higher the level of volatility, the greater the downside. Against this backdrop and in the context of ST's financial well-being, the arguments that ST now makes – that he would be "careless" to liquidate his entire portfolio worth S$100m – are illusory and hallow in light of the concession he made at the trial on his agreement to sell the Collateral Shares. I pause here to point out that ST's position prior to the concession made at trial was completely the opposite. ST's affidavit filed in support of the Pre-Action Discovery Application, almost two years after YCB's contemporaneous e-mails, stated categorically that he did not agree to the sale of the Collateral Shares and the unwinding of the Accumulators on 22 October 2008, or at any time thereafter. This denial continued and found its way into the pleadings and his Affidavit of Evidence-in-Chief. ST's evidence is that his concession made at trial was limited to the

fact that he agreed to the sale of the Collateral Shares only; it is still his case that he did not agree to unwind the Accumulators.

131 ST's concession at trial exposes the flaw in his argument that he would not have agreed to close out a portfolio worth over S$100m without giving it more thought. First, it is worth noting that ST's expert, Prof Ho, confirmed in his AEIC that the Collateral Shares were in fact all the shares in ST's Account that were worth over S$100m. Second, there is no credence to ST's claim that it would have been "unfair" and indeed "careless" of him to make a snap decision to close out his entire Account between 5.10pm of 22 October 2008 (*ie*, the time of the 1710hrs Call) and the next morning. The point here is that by his concession at trial, he did decide to sell the Collateral Shares worth over S$100m, and his decision was confirmed in writing to the Bank *via* the Margin Call Response E-mail.

132 A sale of the Collateral Shares would address the margin shortfall only, and certainly not the MTM losses which continued to increase especially where, as in this case, the Strike Price of the Accumulators was higher than the market price of the underlying shares that ST was obliged to buy under the Accumulators. As Mr Kumar rightly observed, the concern is that if the Accumulators run their full course, ST would have to continue to accumulate shares at a price that is higher than the market price. I agree with Mr Kumar's observation that by holding on the Accumulators, ST "would be digging a deeper hole for himself". Not only would he have to keep injecting fresh assets (which he did not have) to maintain the margin on the Accumulators, he would have to continue borrowing to pay for the shares being delivered under the Accumulators and paying a price for those shares far higher than their market

value."[49] Even if the Bank granted ST time to wait for the market to turn in his favour, the issue of unaddressed MTM losses does not fall away. ST would have to address the increasing MTM losses (which is reflected in the MTM margin) unless there is termination and unwinding of the Accumulators. With the market deteriorating on a daily basis, the MTM losses (and margin) would increase and ST would have to provide more collateral. He would have to keep pumping in liquid asset, which he did not have to begin with, into the account.

133 For all the reasons stated above, Mr Ng's contention that ST could have chosen to hold on to the Accumulators and wait for the "inevitable" price rise makes no sense and is a fallacy. This contention also assumes that ST would have cash or assets to sustain the Account to keep the Accumulators running. Mr Ng's view of matters is that ST needed only to pay S$12.2m to cover the negative equity (as proposed by Amy) following which the Bank promised to allow ST more time to: (a) deleverage by selling other Collateral Shares in his Account; and (b) provide the Bank with other assets as collateral to address the margin shortfall. Mr Ng's argument rested on the premise that the shares accumulated before the expiry of the Accumulators would recover from their battering as they were largely blue chip shares. I make three points. First, the suggestion to ST to cure the negative equity was made by Amy in an attempt to assuage the Bank's fear that ST was not doing something to address the negative equity in the Account. Second, ST did not offer, let alone inject, cash or assets to address the negative equity at any time. Third, based on Prof Ho's analysis, ST did not have the cash or unencumbered shares to make good the negative equity on 22 October 2008.

[49] Bank's Closing Submissions, para 300.

134 Given the state of ST's overall finances, once the decision to sell the Collateral Shares was taken, the logical thing that an experienced, savvy and, at the material time, illiquid investor like ST would do is to stop the MTM losses from ballooning. He would have to unwind the Accumulators and eliminate any further market risk but, at the same time, crystallise his losses at S$25,461,800. He knew from Amy that he will be given time to satisfy that liability as was the case here. To emphasise, the whole point of unwinding the Accumulators was to crystallise ST's liability and focus on repayment. I make the point that drawing the line under his losses would (and did) salvage ST from bankruptcy as what remained was for him to work out a schedule for repayment. Exposing himself to further market risk might have left ST in an irreparable financial state. ST chose the former and his choice was well-made.

Conclusion on the existence of the oral agreement

135 For the reasons stated, I hold that ST agreed to not only the sale of the Collateral Shares but also to the unwinding of the Accumulators through YCB on 22 October 2008. My finding is reinforced by ST's conduct and that of YCB during 23 and 24 October 2008. As stated, I find ST's inaction to be conduct that is consistent with the existence of the exit instructions. The Bank unwound eight of Accumulators on 23 October 2008 and the remaining eight were unwound on 24 October 2008. YCB was informed of the unwinding on 23 and 24 October 2008. ST's argument that Amy misread the Margin Call Response E-mail in informing the Bank to unwind the Accumulators does not sit well with the fact that there was no query and protest on 23 October 2008 by ST and/or YCB in relation to the unwinding of the Accumulators. The complaint on 24 October 2008 had to do only with the way the Illiquid Shares were being sold. Nothing was done to stop the unwinding of the remaining

Accumulators on 24 October 2008. All in all, the exit instructions were premised on a mutual termination and, on the evidence, are clearly supported by sufficient consideration at law.

CSNL Enforcement Procedure giving the Bank the right to unwind the Accumulators without issuing the ISDA Notice

136 Having reached the conclusion that the unwinding of the Accumulators was agreed to by ST, and that the unwinding of the Accumulators on 23 and 24 October 2008 was done pursuant to the exit instructions, it is not really necessary to decide on the issue of the ISDA Notice. However, given the submissions by counsel and the evidence of the ISDA Experts on the ISDA Master Agreement and its inter-relationship with the Account Agreement, I propose to highlight a few points in this Judgment.

Overview

137 The 2006 ISDA requires notice to be given in order for an accumulator to be unwound. I reproduce the provisions relating to the ISDA Notice that have been highlighted by ST's counsel, Mr Ng:

> 6. Early Termination
>
> (a) Right to Terminate Following Event of Default. If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent

> analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with respect to such party or an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).
>
> (b) Right to Terminate Following Termination Event.
>
> (i) Notice. If a Termination Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the nature of that Termination Event and each Affected Transaction and will also give such other information about that Termination Event as the other party may reasonably require.
>
> …

138 The events of default in relation to s 6(a) of the 2006 ISDA are set out in s 5(a) of the 2006 ISDA and Part 5 of the 2006 Schedule. If required, the Bank, on a balance, would have to issue a notice under s 6(a) of the 2006 ISDA because of the existence of either a credit support default (s 5(a)(iii) of the 2006 ISDA), or a deterioration of margin to a level not acceptable to the Bank (s 5(a)(xiii) of the 2006 ISDA read with Part 5 of the 2006 Schedule).

139 There is another termination event *viz*, the "Additional Termination Event", that is perhaps relevant to the present discussion. I note from Part 1 of the 2006 Schedule that an Additional Termination Event constitutes "an issue of Notice by [the Bank] to [ST]". The Notice is in turn a document in writing that "[the Bank] may at any time at its absolute discretion" issue to ST to designate an Early Termination Date to terminate all or any part of all or any Transaction. It is also noted that for the purposes of the Additional Termination Event, ST is the only Affected Party. Therefore, the relevant provision in relation to the issuance of notice for an Additional Termination Event is not that set out in s 6(b)(i) of the ISDA, but is actually that set out in Part 1(h) of the 2006 Schedule which states as follows:

> ***Additional Termination Event.*** The following shall constitute an Additional Termination Event:
>
> For the purpose of Section 5(b)(v) of this Agreement, Party A may at any time and at its absolute discretion, by notice in writing ("Notice") to Party B, designate an Early Termination Date to terminate all or any part of all or any Transaction (the "Relevant Transaction").
>
> The issue of the Notice by Party A to Party B shall constitute an "Additional Termination Event" under Section 5(b)(v) of this Agreement, where:-
>
> (i) the Relevant Transaction shall be the only Affected Transaction; and
>
> (ii) Party B shall be the only Affected Party.

140 It is worth noting at the outset that the provisions relating to notice in s 6(a) of the 2006 ISDA and Part 1 of the 2006 Schedule ("ISDA Notice Provisions") are both framed permissively in that they both suggest that the Bank *may* give notice. I will elaborate on this aspect of the provisions in due course.

141 I now come to the 2008 ISDA that allows for termination without notice. The relevant clause ("the Without Notice Clause") states as follows:

> 1h. Additional Termination Event will apply. The following shall constitute an Additional Termination Event:
>
> …
>
> ii. The termination by Party A, without prior notice, of all or any part of all or any outstanding Transactions ("Relevant Transactions"). For the purposes of this Additional Termination Event, the Relevant Transactions shall be Affected Transactions and Party B shall be the only Affected Party.
>
> If the Additional Termination Event in Part 1(h)(ii) above shall occur, an Early Termination Date in respect of the Relevant Transactions will be deemed to have occurred immediately upon the termination by Party A of such Transactions.

Hierarchy of clauses

142 The Bank's ISDA expert, Mr Henderson, has published a textbook entitled *Henderson on Derivatives* (LexisNexis, 2nd Ed, 2012) ("*Henderson on Derivatives*"). Mr Henderson opined in para 16.2 therein that the ISDA Master Agreement could be viewed as an "umbrella" agreement for a series of unspecified transactions that might be entered into in the future. The ISDA Master Agreement itself does not impose on the parties an obligation to enter into transactions. The parties can, subsequently, either orally or in writing, agree to enter into transactions. In both cases, there would have to be "documents and other confirming evidence" to appropriately confirm each transaction that was entered into between the parties. Such a confirming document is defined in the preamble to the ISDA Master Agreement as "a Confirmation".

143 Accordingly, there are three documents that are relevant to any transaction: the standard printed provisions in the body of the ISDA Master Agreement, the Schedules and a Confirmation. The hierarchy in relation to the consistency between these three documents is set out in s 1(b) of the 2006 ISDA which provides as follows:

> In the event of any inconsistency between the provisions of any Confirmation and [the ISDA Master Agreement] (including the Schedule), such Confirmation will prevail for the purpose of the relevant Transaction.

144 The contractual elevation of the Confirmation, as a matter of hierarchy, makes entire commercial sense as the parties may wish to provide for special and other additional terms in the Confirmation to reflect their obligations and rights in their overall contractual relationship. Indeed, the ISDA Master

Agreement allows parties to do this by way of the Schedules or the Confirmation. The Confirmation is, however, most flexible as it allows parties to work on their arrangements on a transaction-by-transaction basis.

145 Given this hierarchy of clauses, it makes sense to study the parties' relationship first from the view point of the Confirmations in relation to the Accumulators. I have earlier referred to them as the Accumulator Confirmations. I propose to analyse whether the parties through the Accumulator Confirmations have contemplated and included, through the legal mechanism of contractual incorporation of clauses by reference, an additional clause in the 2008 CSNL that provides for a right to terminate transactions without notice. If such a right is incorporated in the Accumulator Confirmations, ST's arguments in relation to the ISDA Notice Provisions all fail *in limine* as he would have agreed to give the Bank the right to terminate without notice in a document that contractually ranks higher than the 2006 ISDA and the 2006 Schedule. I would then move on to consider whether there is any "inconsistency" between the rights the Bank had given itself to unwind the Accumulators under, *inter alia*, 2008 CSNL and other documents on the one hand (which I have termed as "the CSNL Enforcement Procedure" (see [174] below)) and the ISDA Notice Provisions. I would lastly consider if the Without Notice Clause is applicable to any of the Accumulators.

The Confirmation incorporates the right to unwind the Accumulators without notice

146 I will briefly set out the law in relation to the incorporation of a clause into another contract by reference before applying it to the present facts.

The law on incorporation of a clause by reference

147 Mr Ng cites cases including the decision of the Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 ("*Lufthansa Systems*") as highlighting the general approach that the court should take in deciding whether a clause from one contract had been incorporated by reference into another contract.

148 In *Lufthansa Systems*, Lufthansa Systems Asia Pacific Pte Ltd ("Lufthansa") and Datamat Public Company Ltd ("Datamat") entered into an agreement where Lufthansa was to supply, deliver, and commission a new maintenance, repair and overhaul system to Datamat. The system provided by Lufthansa was a component part of the overall system that Datamat had contracted to provide Thai Airways. This was referred to as the "Cooperation Agreement for Applications and Services Implementation" ("the Cooperation Agreement"). The said agreement included an arbitration clause ("the Arbitration Clause"). After Datamat ran into financial difficulties, Lufthansa insisted on ceasing work. Lufthansa, Datamat and International Research Corporation PLC ("IRC") entered into supplemental agreements ("the Supplemental Agreements") where Datamat would transfer monies it received from Thai Airways to IRC and IRC would in turn pay Lufthansa. The parties also agreed that the monies owed to Lufthansa will be deducted directly from IRC's bank accounts. After payment disputes arose between the parties, Lufthansa filed a notice of arbitration naming Datamat and IRC as respondents. IRC argued before the arbitral tribunal that it was not a party to the arbitration agreement as the Arbitration Clause was not incorporated in the Supply Agreements. The arbitral tribunal ruled that it had jurisdiction over IRC. IRC applied to the High Court to set aside that determination. The

application was dismissed by the High Court and IRC then appealed to the Court of Appeal.

149 The Court of Appeal noted (at [34]):

> We agree. The strict rule [that clear and express reference to an arbitration clause was required before it could be satisfactorily incorporated into another contract] has been overextended impermissibly from its original application in the context of bills of lading and charterparties. It clearly should not be taken as a rule of general application. The question in general is one of construction: did the parties intend to incorporate the arbitration agreement in question by referring, in their contract, to it or to a document containing it? In our judgment, the analysis of whether a particular case is a "one contract" or a "two-contract" case as that notion has developed in English law, while possibly useful in some aspects, is not helpful for our purposes. It is ultimately a matter of contractual interpretation; and in undertaking this exercise, as we held in *Zurich Insurance* ([12] supra), the task is one which must be done having regard to the context and the objective circumstances attending the entry into the contract. As the Judge rightly noted, "[b]e it incorporation or construction, the court is always seeking to ascertain the parties' objective intentions" (see the Judgment at [48]).

150 To give context, I set out what is meant by "one contract" and "two contract" cases with reference to the decision of the English High Court in *Habaş Sinai Ve Tibbi Gazlar Isthisal Endüstri AŞ v Sometal* SAL [2010] Bus LR 880 ("*Habaş Sinai*"). The "one contract" cases are as follows (*Habaş Sinai* at [52]):

> (1) A and B make a contract in which they incorporate standard terms. …
>
> (2) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties.

151 The "two contract" cases are as follows (*Habaş Sinai* at [52]):

> (3) A and B make a contract incorporating terms agreed between A (or B) and C. …
>
> (4) A and B make a contract incorporating terms agreed between C and D. Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category..

152 The so called strict rule in English law was that a stricter standard should apply to the "two contract" cases such that clear and express reference to an arbitration clause was required before it could be satisfactorily incorporated into another contract ("the strict rule"). The Court of Appeal has noted that the strict rule should not be taken as a rule of general application under Singapore law. However, in my view, the strict rule remains relevant in the context of bills of lading and charterparties where it was originally applied. The decision of the Court of Appeal well accommodates this qualification. A proper pronouncement on this point after full arguments is best reserved for a future forum.

153 The Court of Appeal also held (at [34]) that the question of incorporation by reference is a matter of contractual interpretation. It took the view that the court should in undertaking this exercise have regard to the context and the objective circumstances attending the entry into the contract in accordance with the approach in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

154 Ultimately, the Court of Appeal ruled (at [49]) that the Arbitration Clause had not been incorporated because there was, *inter alia*, no sufficient overlap between the obligations covered in the Supplemental Agreements and the Cooperation Agreement. This and other factors pointed to the conclusion

that the parties did not intend to incorporate in the Supplemental Agreements the Arbitration Clause.

155 Indeed, an overlap of obligations between the two contracts would be in some circumstances a very important factor that the court would have to consider in deciding whether a clause had been incorporated.

Application to the facts

156 Each of the Accumulator Confirmations in relation to the Accumulators entered into by ST and the Bank states as follows:

> **Collateral**
>
> [ST] shall provide to [the Bank] on or before the Trade Date such collateral to secure [ST's] obligations under the Transaction as set out in the [CSNL] as *amended from time to time*, the *Transaction being within the OTC equity and index options trading facility granted pursuant to the CSNL*. …
>
> [emphasis added].

157 The above quoted words in italics provide the link or reference point that draws the rights in the 2008 CSNL to the Accumulator Confirmations. The effect of the Accumulator Confirmations is to clearly recognise that ST and the Bank are not purely derivatives counterparties and that ST is drawing under the OTC facility granted to him pursuant to the most recent version of the CSNL *viz*, the 2008 CSNL (see [38] above). The Accumulator Confirmations also makes the Accumulators a transaction "within" the CSNL.

158 The next step is the inquiry is to ascertain what the relevant rights in the 2008 CSNL are. I wish to particularly highlight cl 5.6 in the 2008 CSNL:

> …
>
> Additional collateral shall be deposited with the Bank if at any time the Initial Margin amount less any loss and/or marked-to-market unrealised loss of the relevant transaction(s) falls below the Top Up Margin. If (i) such Collateral is not deposited with the Bank upon the Bank making a margin call or (ii) the Initial Margin amount plus the loanable value if any additional collateral provided less any loss and/or marked-to-market unrealised loss of the relevant transactions falls below the Close Out Margin, *the Bank has the unrestricted right (but not the obligation) to sell or otherwise realise (as the case may be) the Collateral or to conclude such transaction to close out the relevant transactions and offset all proceeds net of expense against any outstanding amount, losses and costs resulting from such close out*. The Client would be responsible solely and shall bear all losses and costs, whatsoever and howsoever, in respect of such close out and/or actions referred to above. The Client undertakes to remit immediately to the Bank an amount to cover any and all shortfall.
>
> [emphasis added].

159 Clause 5.6 of the 2008 CSNL gives the Bank the *unrestricted right* to do two things when there is a MTM loss in a transaction that causes the deterioration of margin below the Bank's requirements under the 2008 CSNL and additional collateral is not deposited:

(a) to sell or realise the collateral that has already been deposited; or

(b) to close out any transactions which give rise to such losses.

160 The question that I have to answer is whether ST and the Bank intended to incorporate, *inter alia*, an *unrestricted right* to close out any of the Accumulators if there is a MTM loss that causes the deterioration of margin below the Bank's requirements under the 2008 CSNL and ST refuses to

provide additional collateral ("the 2008 CSNL Without Notice Right of Termination") in the Accumulator Confirmations.

161 Applying the approach in *Lufthansa Systems*, I find significant overlap between the obligations of ST in the 2008 CSNL and the Accumulator Confirmations. Both the documents require ST to provide collateral to support the Accumulators purchased. A necessary corollary of and the flipside to the obligation to provide collateral under the 2008 CSNL is the Bank's right to terminate transactions pursuant to the 2008 CSNL Without Notice Right of Termination if ST does nothing to address an MTM loss and that loss causes the deterioration of margin below the Bank's requirements under the 2008 CSNL. In the process of stating in no uncertain terms that ST was obliged to provide collateral under the 2008 CSNL, the Accumulator Confirmations also declare the Accumulator as a "Transaction" within the OTC facility in the 2008 CSNL. This cross-referencing also shows very clearly that the Without Notice Right of Termination in the 2008 CSNL is incorporated into the Accumulator Confirmations. It makes absolutely no commercial sense for the parties to incorporate the obligation to provide collateral without incorporating the corresponding right of termination *viz*, the 2008 CSNL Without Notice Right of Termination.

162 In the present case, ST and the Bank were not just derivative counterparties. There concurrently existed between them a lender-borrower relationship by reason of, *inter alia*, the OTC facility. It appears to me that the parties therefore intended that the Accumulator Confirmations should be used to align the rights of the Bank as lender in the 2008 CSNL to the Accumulators as that reflected the reality of the parties' relationship where ST

was borrowing money from the Bank to buy the Accumulators. When the parties decided that the Accumulators were "Transactions" within the CSNL, they further recognised the position of the Bank as lender and ST as borrower. Therefore, I am satisfied that the parties commercially intended to extend the rights of the Bank in the 2008 CSNL as lender to the Accumulators.

163 This hook, so to speak, coupled with the identical obligation to provide collateral in the 2008 CSNL and the Accumulator Confirmations, in my view, unequivocally evinces that the parties intended to incorporate the 2008 CSNL Without Notice Right of Termination, which attaches to the obligation to provide collateral, into the Accumulator Confirmations. The effect of the Accumulator Confirmations incorporating the 2008 CSNL Without Notice Right of Termination is that the Bank could close out any of the Accumulators if there is a MTM loss that causes the deterioration of margin below the Bank's requirements under the 2008 CSNL and ST refuses to provide additional collateral.

164 The ISDA Notice Provisions found in the 2006 ISDA (at [137] above) suggest that there is a need for the ISDA Notice to be given before the Bank can unilaterally terminate any transaction. However, as the parties had stipulated that the Accumulator Confirmations were to rank ahead of the body of the 2006 ISDA and the 2006 Schedule, the incorporation of the 2008 CSNL Without Notice Right of Termination into each Accumulator Confirmation has, therefore, the effect of elevating it over any other right in the 2006 ISDA and the 2006 Schedule.

165 Having found that the parties had agreed to incorporate the 2008 CSNL Without Notice Right of Termination into the Accumulator

Confirmations, the Bank would have nevertheless the right to unwind the Accumulators without issuing the ISDA Notice to ST (as it did) even if this right was inconsistent with the ISDA Notice Provisions. I will explain (at [167] – [200] below) why there is no inconsistency between the 2008 CSNL Without Notice Right of Termination and similar rights of without notice termination in other documents (which I have termed below as “the CSNL Enforcement Procedure” (see [174] below)) on the one hand and the ISDA Notice Provisions in the 2006 ISDA on the other.

166 I will address the parties’ arguments on whether there is any inconsistency between the CSNL Enforcement Procedure and the ISDA Notice Provisions in the 2006 ISDA before turning to the other question, namely, which of the Accumulators are governed by the 2008 ISDA such that the Without Notice Clause applied.

There is no inconsistency between the CSNL Enforcement Procedure and the ISDA Notice Provisions

167 This was the most important point of law that the ISDA Experts gave evidence on. Both experts took different positions in relation to the Bank’s ability to rely on its rights in documents other that the ISDA Master Agreement. It is unclear if this point is as controversial as it has been presented to be. The ISDA Experts readily agreed that ST and the Bank could agree independently to terminate the Accumulators by way of a separate agreement. There was no argument that the terms of that separate oral agreement, that is to say, to unwind the Accumulators without the need for a requisite notice, would be inconsistent with the 2006 ISDA. It is thus unclear as to exactly why Mr Ross takes the position that any additional right to

terminate that is derived from another mutual agreement would be inconsistent with the 2006 ISDA. Such rights would only be additional rights that the parties had agreed on. I note that Mr Ross makes many corollary arguments which, with respect, are not relevant to the issue that is to be decided. Therefore, for the purposes of this section, I deal only with the main arguments.

The Bank had the right to unwind under the CSNL Enforcement Procedure

168 The ISDA Experts said that the ISDA Master Agreement (*ie*, the 1992 ISDA Form) was designed for use in wholesale markets between corporate entities. Therefore, the ISDA Master Agreement was not drafted with individual counterparties in mind. Consequently, substantial amendments and additions needed to be made should the ISDA Master Agreement be used by individual counterparties.

169 The ISDA Experts also agreed that the ISDA Master Agreement was a standalone agreement unless otherwise agreed between the parties. If so agreed between the parties, the ISDA Master Agreement would form part of the overall contractual relationship between parties.

170 I first refer to cl 1 of section 2 of the Account T&Cs (General Conditions of the 2008 Account Agreement). The definition of the term "Securities" there includes "all derivatives" over, *inter alia*, equities. It is undisputed that the Accumulators were derivatives over equities. This definition must then be read with cl 1.8 of section 3C of the same, which states as follows:

> The Client shall charge all the Securities deposited with the Bank from time to time as Collateral for the discharge of the Total Liabilities. The Bank shall not be obliged to release any of the Securities unless the Total Liabilities have been fully paid and discharged. If the Client fails fully to pay the Total Liabilities due to the Bank upon demand, *the Bank may, without prior notice to or consent from the Client, sell or dispose of all or part of the Securities in such manner as it thinks fit and apply the net proceeds received, after payment of all expenses incurred, towards discharge of the Total Liabilities.*

171 I also note that pursuant to cl 1 and 2.1 of Account T&Cs (Charge over Assets), the Accumulators (which fall within the definition of "Securities") were to be "Charged Assets" that were to be charged to the Bank by ST. I also highlight that cl 6.1 of section 5 of the Account T&Cs (Charge over Assets) states as follows:

> If:
>
> …
>
> e. a Default Event occurs in respect of any of the Facilities made available to the Borrower, the Bank shall be entitled to enforce this Charge and may, without prior notice to the Chargor, retain, apply, realise, sell or otherwise dispose of all or any part of the Charged Assets and apply the proceeds thereof in or towards the discharge of the costs thereby incurred and of the Secured Indebtedness in such manner as it in its absolute discretion thinks fit.

172 The Accumulators were purchased by ST on a margin basis using the credit facilities under the CSNL. I have already concluded in [163] above that the Accumulator Confirmations incorporate the 2008 CSNL Without Notice Right of Termination.

173 Lastly, I also note cl 2(d) of section 6 of the Account T&Cs (Risk Disclosure Statement) and it states as follows:

> d. If the Bank, in its absolute discretion, determines that the margin cover is inadequate at any time, the Bank may take such action as the Bank in its sole discretion deems fit, including without limitation:
>
> i. calling upon the Client at short notice to provide such additional Collateral as is determined by the Bank in its sole discretion. This amount may be substantial and may exceed the amount originally committed as initial margin;
>
> ii. realising such part or all of the Collateral as the Bank deems necessary to satisfy the liabilities of the Client without notice to or consent from the Client or the party providing the Collateral; and/or
>
> iii. closing out, liquidating, setting off (notwithstanding that any of the same has not yet matured), realising or otherwise dealing with any or all outstanding Transactions (whether or not any additional loss may thereby arise) by such time and by such means or in such manner as the Bank in its sole discretion thinks appropriate without notice to or consent from the Client. In the event the Transactions are liquidated at a loss and the loss exceeds the aggregate margin deposited, the Client will be liable for any shortfall.

174 The rights set out at [170] – [173] above that flow from the 2008 Account Agreement and the 2008 CSNL have been collectively referred to as the "CSNL Enforcement Procedure" by Mr Henderson.

175 The entire agreement clause in s 9(a) of the 2006 ISDA, read with Part 5(b)(vii) of the 2006 Schedule("the Entire Agreement Clause") states:

> Without prejudice to the Account Agreement entered into by Party B with Party A comprising the Account Mandate and Terms and Conditions and all other documents executed ancillary or in connection thereto, including any Security Document and Services Document (as such terms are defined in the Terms and Conditions) (collectively referred to herein as the "Account Agreement") which shall continue to be in full force and effect, this Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto. Provided that if there are

> inconsistencies between the Account Agreement and this Agreement, this Agreement will govern.

176 I also note that all the Accumulator Confirmations also make reference to ST's obligations to provide collateral under the CSNL and the Charge Over Assets. Additionally, the Accumulator Confirmations make clear that:

> [ST] shall provide to [the Bank] on or before the Trade Date such collateral to secure [ST's] obligations under the Transaction as set out in the [CSNL] as amended from time to time, the Transaction being within the OTC equity and index options trading facility granted pursuant to the [CSNL]. …

177 As the 2006 ISDA read with the 2006 Schedule expressly operates without prejudice to the 2008 Account Agreement and the Accumulator Confirmations expressly recognise the 2008 CSNL and, flowing from that, the 2008 CSNL Without Notice Right of Termination, the only argument that logically remains to be resolved is whether there is any inconsistency between the rights set out in the CSNL Enforcement Procedure and the 2006 ISDA (with reference to the ISDA Notice Provisions). I point out that this exercise is entirely academic as, even if there was such inconsistency, the 2008 CSNL Without Notice Right of Termination that is incorporated in the Accumulator Confirmations would prevail.

178 The position Mr Ross took in his expert report is as follows:[50]

> … Put another way, the *enforcement* rights that the Bank had in the 2006 Account Agreement and in the February 2008 CSNL, for failure to maintain margin in relation to the Accumulators do not prevail in relation to the Accumulators as they are inconsistent with the 2006 ISDA. …
>
> [emphasis in original].

[50] Mr Ross' AEIC, p 53(Mr Ross' Report, Schedule 6, para 6.10(l)(x)(B)).

179 Put another way, Mr Ross accepts that the CSNL Enforcement Procedure applies to the Accumulators, but it does not prevail against the 2006 ISDA because they are inconsistent with the ISDA Notice Provisions. However, I note that Mr Ross took another position when he made the following additional points at trial:

(a) the CSNL Enforcement Procedure cannot be derived from the CSNL alone;

(b) the documents which set out the CSNL Enforcement Procedure only give the Bank the right to exercise its rights under the ISDA Master Agreement;

(c) an Accumulator does not constitute a Collateral or a Charged Asset under the 2008 Account Agreement or the Charge Over Assets respectively; and

(d) the Entire Agreement Clause is only intended to preserve the disclaimers in the 2008 Account Agreement.

180 I propose to deal with the pertinent points only. I begin with the wording of cl 5.6 of the 2008 CSNL (see [158] above), which states clearly that the Bank would have the right to close out any transaction (which includes Accumulators) without notice. At trial, Mr Ross agreed that on a literal interpretation, the Bank would have a right to close out the Accumulators without notice *via* the 2008 CSNL:[51]

MR KUMAR: So let's take it step-by-step. So you agree there is a business or commercial purpose for the

[51] Transcript dated 6 May 2015, p 72.

	bank wanting to give itself the right to close out without notice, we are agreed on that?
MR ROSS:	I am agreed on that.
MR KUMAR:	The bank gave itself that right -- reading the CSNLs strictly, the bank gave itself that right and the customer agreed to that, every time it signed the CSNL.
MR ROSS:	Literally that is correct.
MR KUMAR:	So when the bank included that right in the 2008 ISDA master agreement, and we can talk about whether it successfully incorporated it but assuming it successfully incorporated it, the bank gave itself the right in 2008, it was giving itself a right which it already had in 2006 by way of the CSNLs. There was nothing different the bank was not giving itself additional rights?
MR ROSS:	No, not necessarily, I agree with that.
MR KUMAR:	So as Mr Henderson rightly says, what the 2008 amendment does in relation to closing out without notice is really to align the ISDA agreement with rights the bank already has in its other documents; wouldn't you agree with that?
MR ROSS:	I agree that is what the bank does. It doesn't change my opinion or my advice to the court.

181 The "advice to the court" was simply that the court should not adopt a literal interpretation of the words in the 2008 CSNL. Mr Ross suggested that an "iterative" approach adopted in England should be used in the interpretation of the 2008 CSNL and all rights comprising the CSNL Enforcement Procedure. In Mr Ross's submissions, the iterative approach – which requires the court to check each of the rival meanings against other clauses in the document, and investigate the commercial consequences – must be adopted to ensure that the words of the contract are interpreted in a manner that conforms to business common sense. Mr Ross cited a series of English

cases. The principal case he relied on was *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 ("*Rainy Sky*").

182 In that case, Lord Clarke noted (at [23]) that "[w]here the parties have used unambiguous language, the court must apply it". He also observed as follows at [21]:

> The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is *essentially one* ***unitary*** *exercise* in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.
>
> [emphasis added in italics and bold italics]

183 In *Rainy Sky*, the UK Supreme Court analysed the role business common sense in construing the intention of the parties as reflected in the terms of the contract. The court there had to interpret a certain clause in an advance payment bond. That clause was capable of two meanings. The buyer and the bond issuer in that case each advanced a rival interpretation. The court held that it ought to adopt the interpretation which was most consistent with business common sense. Ultimately, the buyer's construction was to be preferred because it was consistent with the commercial purpose of the advance payment bond; on the other hand, the bond issuer's construction was not. *Rainy Sky* and other English decisions relating to contractual interpretation were recently considered by the Court of Appeal in *Y.E.S. F&B*

Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd) [2015] SGCA 55 ("*Soup Restaurant*"). The Court of Appeal took the view (at [57]) that the approach to the construction of the bond in *Rainy Sky*, which has also been advanced in other English decisions, is consistent with principles that underpin contractual interpretation in Singapore law. That is to say, the task of the court in interpreting a provision in a contract, particularly a commercial contract, is to determine what the parties meant by the language used, and that involves ascertaining what a reasonable person, with all the background knowledge that was available to the parties, would have understood the parties to have meant. As the Court of Appeal in *Soup Restaurant* put it (at [35]), while text as well as context is important and depending on the facts of the case, text and context often interact with each other. In *Soup Restaurant*, the contractual text was ambiguous and the court therefore considered the context to determine the reasonable and probable expectations that the parties would have had. However, the Court of Appeal issued a salutary warning that this approach could not be utilised as an excuse by the court concerned to rewrite the terms according to what the court thinks the result ought to be in the case at hand. A commercially sensible interpretation based on business common sense may not always save the day if the objective evidence shows a nexus between the absurd consequences on the one hand and the intention of the parties at the time of contracting on the other.

184 Notably, the wording in cl 5.6 of the 2008 CSNL is unambiguous and it clearly provided the Bank with a right to close out the Accumulators such that there is no further need to assess what "business common sense" would

demand in this context. In any case, "business common sense" would equally lead to the same conclusion for the following reasons:

(a) The ISDA Master Agreement has to be interpreted in a manner that allows parties to customise their rights by amending the relevant agreement or by way of separate agreements. This must be the case as the ISDA Master Agreement often forms part of a broader transaction relationship. The Bank and ST are not only counterparties in a derivatives transaction but are also, for example, Chargor and Chargee in relation to the Charge Over Assets.

(b) The Bank's ability to engage contractually outside the ISDA Agreement is specifically recognised in the Entire Agreement Clause in s 9(a) of the 2006 ISDA. It is therefore not possible to argue that the contracting parties would have expected the provision giving the right to close out the Accumulators to reside only in the 2006 ISDA and nowhere else when s 9(a) of the 2006 ISDA itself envisages, *inter alia*, that such a right may both exist in other agreements and be exercisable.

185 I note that Mr Ross makes two further points:

(a) the CSNL Enforcement Procedure is *not complete* and therefore should not apply; and

(b) the Entire Agreement Clause only preserves some but not all of the rights in the Account Agreement.

186 In relation to the first point, Mr Ross accepts that even though the CSNL Enforcement Procedure was less detailed than the procedure for closing

out in the 2006 ISDA, terms may be implied in fact to deal with post–termination matters such as valuation method.

187 In relation to the second point, Mr Ross took the view that the without prejudice language in the Entire Agreement Clause "intended objectively to preserve the exclusions and disclaimers that are contained in the Account Agreement".[52] In the absence of a clear reason why the court should even consider his strained interpretation, I prefer Mr Henderson's views on the entire agreement clause:

> MR HENDERSON: I agree that the entire agreement clause should be strictly construed. I also believe that an amendment or alteration of it should be analysed on what it says. I do not see how you can say without prejudice to the account agreement and all of these other documents is to some limited part of those documents. I mean it's picking and choosing. It says it's without prejudice to these documents.
>
> In our joint report, the agreed bit, an ISDA form can be part of a broader transaction or relationship between the parties. The applicable account agreement, the applicable charge over assets, the applicable CSNL accordingly form part of the overall contractual relationship. Why is it just the exculpatory clauses that are referred to here? Further, and I think when we talk about what the subject matter of this agreement is, it is transactions. Does that include the close-out provisions? Yes. Are the close-out provisions very important? Yes. It just doesn't go to the point.

[52] Transcript dated 6 May 2015, p 43.

188 In light of the above, my view is that the CSNL Enforcement Procedure found in the 2008 Account Agreement and 2008 CSNL are applicable to the Accumulators. I now turn to analyse whether the CSNL Enforcement Procedure, which allows the unwinding of the Accumulators without giving notice, is inconsistent with the ISDA Notice Provisions in the 2006 ISDA.

CSNL Enforcement Procedure is not inconsistent with the 2006 ISDA

189 Before examining if there is any inconsistency between the CSNL Enforcement Procedure and the 2006 ISDA, I propose to set out the law in relation to inconsistent terms in a contract. The cases I will refer to deal with inconsistencies within a contract. However, I am of the view that they apply with equal force in relation to various terms that are contained within contracts that form the overall relationship between the parties. The possible objection to this would be that this approach does not account for the fact that the parties may have attached greater significance to one or more of those contracts. Such an objection is misguided seeing that the question of hierarchy of clauses only arises after it has been resolved that there indeed is an inconsistency between the clauses.

The legal principles applied in other jurisdictions

190 There is no Singapore case that is directly on point. I therefore propose to review the decisions in other jurisdictions.

191 I would start with the decision of the Privy Council in *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1989] 2 HKLR 639 ("*Yien Yieh*"). In that case, the Privy Council had to analyse if an

exemption clause in a contract was inconsistent with a clause in the contract that imposed a positive obligation to deliver goods only on surrender of a godown warrant or against a delivery order ("Positive Obligation Clause"). It was argued that to give effect to the exemption clause in circumstances where no godown warrant or delivery order had been surrendered was to deprive the Positive Obligation Clause of all effect. The Privy Council (by a majority) rejected that interpretation. It held (at 645) that the Positive Obligation Clause must be sensibly read as doing no more than indicating the requisite document to be presented by the bailor when requesting redelivery. Lord Goff who delivered the judgment of the majority was of the opinion that it was preferable to give the Positive Obligation Clause this construction as opposed to one that would produce a direct conflict. His Lordship also set out a general principle (at 645):

> … to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth irreconcilable. … where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction. …

192 A case that is also directly on point is the decision of the United Kingdom Supreme Court in *Geys v Société Générale, London Branch* [2013] 1 AC 523 ("*Geys*"). In that case, the plaintiff was employed by the defendant-bank ("the defendant"). The employment contract provided under the header "Notice" the following terms: "Your employment can be terminated on the expiry of three months' written notice of termination given by you to the company or by the company to you." The plaintiff was also given a staff handbook together with the employment contract. The handbook stated at

section 8.3 that the defendant had the right to terminate the plaintiff's employment "at any time with immediate effect by making a payment to [the plaintiff] in lieu of notice". The plaintiff's argument before the UK Supreme Court was that there was a conflict between the terms of the employment contract and section 8.3 of the handbook. Since the employment contract should prevail in these circumstances (as that was the contractual hierarchy determined in that case) the plaintiff should be entitled to three months' written notice. This argument was rejected by the UK Supreme Court.

193 Lord Hope who delivered the leading judgment opined as follows:

> [24] It is not obvious that these two provisions are inconsistent with each other. Paragraph 13 of the contract set out one way of terminating the contract, but it did not say that it is the only way. It used the word "can", which suggests that it is a course of action that the bank might take if it wants to. But the bank reserved the right, as paragraph 8.3 of the handbook put it, to use the PILON method. The provision in the handbook can be read as qualifying the provision which is set out in the contract. In any event the court's duty, when confronted with two provisions in a contract that seem to be inconsistent with each other, is plain. It must do its best to reconcile them if that can conscientiously and fairly be done: *Pagnan SpA v Tradax Ocean Transportation SA* [1986] 2 Lloyd's Rep 646, 653, per Steyn J. That approach, which was endorsed by Bingham LJ in the Court of Appeal [1987] 2 Lloyd's Rep 342, 350, does not seem to me to give rise in this case to any difficulty.
>
> [25] I would therefore hold that this case must be approached on the basis that it was open to the bank to use the PILON method which it had reserved to itself by paragraph 8.3 of the handbook, and that this was what it was seeking to do when the claimant was called to the meeting on 29 November 2007 at which he was handed a letter which had been written on the bank's behalf.

194 The legal principles expounded by the UK Supreme Court in *Geys* are eminently sensible and commercial. Reduced to its core, the approach that

should be taken by a court in Singapore when a contract or a series of contracts which form part of the transactional relationship of the parties provide alternative means/rights to terminate a contract is to:

> (a) Ask itself if any of the provisions are framed mandatorily or permissively. In the latter case, the court can conclude that the use of permissive language in one document amounts to a reservation of that party's rights to provide for alternative means in other documents or within the same contract; or
>
> (b) Do its best to see if the seemingly inconsistent provisions can be reconciled.

195 As noted at [140] above, the ISDA Notice Provisions are framed permissively, as was the clause under the header "Notice" in the employment contract that was construed in *Geys*. This was pointed out by Mr Henderson in his Expert Report. The ISDA Master Agreement does not anywhere state that the parties cannot mutually agree on additional rights of enforcement.[53] Both experts also agree that it is possible to terminate a transaction in the ISDA by mutual agreement.

196 I also note that cl 5.6 of the 2008 CSNL (see [158] above) which allows the Bank to terminate the Accumulators without notice has also been phrased permissively. As the rights set out in the 2008 CSNL and the ISDA Notice Provisions are both framed permissively, there is less scope to argue that these rights cannot exist in parallel, especially in the face of the Entire

[53] Mr Henderson's AEIC, pp 35 - 37(Mr Henderson's Report, paras 68 – 69, 72 – 73).

Agreement Clause, which expressly keeps afoot other agreements between ST and the Bank.

197 There is business common sense in parties deciding on provisions that would enable termination without notice. Such without notice provisions can potentially salvage an investor from financial haemorrhage if the counterparty acts in their *mutual interest* to terminate the transaction *immediately* in a rapidly plummeting market without having to wait for the designated Early Termination Date which, by definition, cannot be the date of the relevant ISDA Notice. Indeed, there are legitimate reasons for parties to provide alternative means of terminating a transaction outside the ISDA.

198 The thrust of Mr Ng's submissions seems to be that there is inconsistency between the CSNL Enforcement Procedure and the ISDA Notice Provisions and that ST would be able to decide upon receiving the ISDA Notice "what is best for his account"[54]. Mr Ng here suggests that the ISDA Notice would have given ST the chance to decide whether he would want to remedy the event of default. I note, however, that this argument is misplaced. The ISDA Notice Provisions cannot be said to be intended to give an individual a chance to remedy an event of default. I note that s 6(c)(i) of the ISDA makes this point amply clear in the following manner:

> c. Effect of Designation
>
> i. If notice designating an Early Termination Date is given under Section 6(a) or (b), the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.

[54] ST's Closing Submissions, para 428.

199 This changes completely the complexion of Mr Ng's argument. The ISDA Notice Provisions were not intended to serve as a notice to remedy the default as the 2006 ISDA itself allows termination of transactions after the notice had been served regardless of whether the event of default persists. One might then question the purpose of the ISDA Notice Provisions. Like the Positive Obligation Clause in the case of *Yien Yieh,* the ISDA Notice Provisions in the 2006 ISDA merely state the contents of and the way the notice should be given to an individual if one party should decide to give notice under the ISDA Master Agreement before terminating a transaction.

200 To conclude, in my view, there is no inconsistency between the ISDA Notice Provisions and the CSNL Enforcement Procedure.

Accumulators S/No 14 – 16 were governed by the 2008 ISDA

201 I turn to the remaining broad issue *viz*, that the Accumulators were governed by two versions of the ISDA Master Agreement, the 2006 ISDA and the 2008 ISDA. The determination of this point resolves the debate as to which of the Accumulators the Without Notice Clause applied to.

202 As a starting point, I note that the experts shared different views on which Accumulators were governed by the 2008 ISDA. Mr Henderson took the position that the 2006 ISDA applied to Accumulators S/No 1 – 13 ("the Pre–23 July 2008 Accumulators") and the 2008 ISDA to apply to Accumulators S/No 14 – 16 ("the Post–23 July 2008 Accumulators").

203 Mr Henderson cites two reasons in support:

(a) The Accumulator Confirmations that were issued on entry of the Post–23 July 2008 Accumulators ("the Post–23 July 2008 Accumulator Confirmations") stated that those accumulators were governed by the ISDA Master Agreement as at that date.[55]

(b) Additionally, the 2008 Revision Letter also had the effect of subjecting transactions entered into after 23 July 2008 to the 2008 ISDA.[56]

204 The position taken by Mr Ross is as follows:

(a) The 2008 Revision Letter did not make the 2008 ISDA applicable to the Post–23 July 2008 Accumulators as the 2008 ISDA may be viewed as an "amendment", a "supplement" or a "wholly new agreement" to the 2006 ISDA. If it was an amendment, then relying on section 9(b) of the 2006 ISDA, the 2008 ISDA had to be executed by ST in order for it to be effective.[57]

(b) Even if the 2008 ISDA was applicable to the Post–23 July 2008 Accumulators, the Without Notice Clause was an onerous term that was not validly incorporated.

(c) If the court finds that the 2008 ISDA governs the Post–23 July 2008 Accumulators then the 2008 ISDA would govern all the Accumulators.

[55] Mr Henderson's AEIC, p 47 (Mr Henderson's Report, paras 113 – 115).

[56] Mr Henderson's AEIC, p 47 (Mr Henderson's Report, paras 116 – 117).

[57] Mr Ross' AEIC, p 36 (Mr Ross' Report, Schedule 6, para 6.1).

205 I note that Mr Ross did not address the effect of the Post–23 July 2008 Accumulator Confirmations.

The 2008 Revision Letter made the 2008 ISDA applicable to the Post–23 July 2008 Accumulators

206 The 2008 Revision Letter states as follows:

> Section III of the Investment Services Terms and Conditions shall replace any ISDA Master Agreement ("Existing ISDA Master Agreement") and any Foreign Exchange, Precious Metals and Options Margin Trading Agreement ("Existing FXMT Agreement"), and shall apply to transactions entered into on or after the Effective Date. Outstanding transactions entered into prior to the Effective Date shall continue to be governed by the Existing ISDA Master Agreement or the Existing FXMT Agreement, as the case may be, whether or not the agreements were actually signed by you.

207 The 2008 Revision Letter stated that the 2008 Account Agreement and the 2008 ISDA come into effect from 23 July 2008. The 2008 Revision Letter was received by YCB on behalf of ST. In fact, the question of whether the Revision Letter seeks to amend, supplement or replace the 2006 ISDA is a red herring. This is because, as noted above, the 2008 Revision Letter expressly states by way of confirmation that the 2006 ISDA will continue to apply to all outstanding transactions (*ie*, the Pre–23 July 2008 Accumulators). There is therefore no question of amending the 2006 ISDA. The 2008 Revision Letter purports to make the 2008 ISDA apply to transactions entered into after 23 July 2008.

208 Mr Ross relies on s 9(b) of the 2006 ISDA (and, more generally, the ISDA Master Agreement) which provides as follows:

> b) Amendments. No amendment, modification or waiver in respect of this Agreement will be effective unless in writing

> (including a writing evidence by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or electronic messages on an electronic messaging system.

209 In my view, the section does not in any way assist Mr Ross as it deals with the situation where the 2006 ISDA is amended. The application of the 2008 ISDA to future transactions is very different from amending the 2006 ISDA. I therefore see no merit in this line of argument.

210 Mr Ross then suggests that the 2008 ISDA needs to be signed by both parties before it takes effect. At the outset, I highlight an important point made by Mr Henderson in the ISDA Experts' Joint Expert Report. Mr Henderson stated at para 62:

> Mr Ross contends in paragraph 53 that a 1992 ISDA Form, or a Master Agreement based on it, in principle cannot come into effect between two parties unless each party manually signs it. Not only do basic principles of contract interpretation permit parties in one document to agree that an agreement in an identified form will come into effect between them, this is common practice in the global OTC derivatives market. ISDA has even published a form of confirmation that provides for this. Exhibit 1 to the 2000 ISDA Definitions, as an alternative paragraph, and Exhibit I to the 2006 ISDA Definitions, in a footnote, each contain a provision to be used in a Confirmation for a Transaction entered into without an existing master agreement in place between the parties. This represents a time-honoured, oft-used and significant clause in the global OTC derivatives market. This provision states that, until and unless the parties execute a master agreement, the Confirmation, and all Confirmations with similar language, will be subject to a master agreement in the form published by ISDA. A finding that parties could not establish a master agreement between them by reference to a clearly identified external source would invalidate in Singapore a practice common in the global OTC derivatives market and subject an indeterminate number of outstanding transactions to enforcement uncertainties.

> a. I would also note the extensive use of protocols by ISDA in the global OTC derivatives markets. These protocols have the effect of thousands of parties agreeing to new agreements, modifications to existing agreements (some extensive), and a host of other documents creating rights and obligations, all without the parties manually signing any agreement other than the adherence letter deeming the new document to come into effect. It would be a disaster to the Singapore OTC derivatives market if the principles underlying these protocols were rejected in Singapore.

211 In response to this, Mr Ross clarifies that his view that a new ISDA Master Agreement cannot come into effect between two parties unless each party manually signs it is limited to the context of the present proceedings. However, this concession is contrary to Mr Ross' broader argument that s 9(b) of the ISDA Agreement "contemplates" formal execution and dating by the parties.

212 As rightly pointed out by Mr Henderson, it accords with basic principles of contractual interpretation that parties can agree that an agreement in an identified form will come into effect between them. In fact, in the present case, ST and the Bank have expressly agreed that this principle would be applicable *vis-à-vis* their dealings. In this regard, I highlight cl 5.2 of the 2008 CSNL:

> In respect of any derivative transactions permitted by the Bank from time to time which are subject to the ISDA Agreement and where the client has not signed such agreement with the Bank, the terms of the ISDA Agreement will apply to such transactions as if the Client had signed and entered into the ISDA Agreement with the Bank. A copy of the ISDA Agreement will be forwarded to the Client upon request.

213 I must also point out that it was ST who agreed in cl 14.1 of the 2006 Account Agreement that the Bank will be able to amend or supplement the T&Cs of the 2006 Account Agreement by notice to him and that such

amendment or supplement shall apply with effect from such date as the Bank may stipulate.

214 The first of the Post–23 July 2008 Accumulators was entered into after 5 August 2008. The applicable ISDA Master Agreement at that time was the 2008 ISDA and ST received the 2008 ISDA with the 2008 Revision Letter. Therefore, it is quite clear that the 2008 Revision Letter had the effect of making the 2008 ISDA applicable to the Post–23 July 2008 Accumulators.

215 Mr Ross's alternative argument is that the Without Notice Clause was not validly incorporated even if the 2008 ISDA applied to the Post–23 July 2008 Accumulators as this was an onerous clause to which ST's attention had to be drawn to. However, before I proceed to analyse whether the Without Notice clause is onerous, I propose to deal with one other point made by Mr Henderson *viz*, the Accumulator Confirmations provide that the 2008 ISDA would apply to the Post–23 July 2008 Accumulators.

The Accumulator Confirmations make the 2008 ISDA applicable in relation to the Post–23 July 2008 Accumulators

216 I turn to the wording used in the relevant Accumulator Confirmations for both the Pre–23 July 2008 Accumulators and the Post–23 July 2008 Accumulators. Each of the Accumulator Confirmations for the Pre–23 July 2008 Accumulators states as follows:

> This Confirmation supplements, forms part of, and is subject to, the ISDA Master Agreement dated as of 16 May 2006 as amended and supplemented from time to time (the "Agreement"), between you and us. All provisions contained in the Agreement govern this Confirmation except as expressly modified below.

217 Each of the Accumulator Confirmations for the Post–23 July 2008 Accumulators on the other hand states as follows:

> This Confirmation supplements, *forms part of, and is subject to, the ISDA Master Agreement dated as of the Agreement Effective Date* as amended and supplemented from time to time (the "Agreement"), between you and us. All provisions contained in the Agreement govern this Confirmation except as expressly modified below.
>
> [emphasis added].

218 The definition of "Agreement Effective Date" in turn is as follows:

> … the trade date of the first Transaction entered into under this Agreement pursuant to the Account Agreement.

219 The "Account Agreement" referred to is the 2008 Account Agreement, which came to effect pursuant to the 2008 Revision Letter. Therefore, the difference between the language in the Accumulator Confirmations makes clear that the 2008 ISDA would be applicable to the Post–23 July 2008 Accumulators. In this regard, I accept Mr Henderson's testimony and hold that the Post–23 July 2008 Accumulators are governed by the 2008 ISDA.

220 However, the following clause on the scope of agreement in Part 5.f of the Schedule to the 2008 ISDA ("the Scope of Agreement Clause") has been brought to my attention by both Mr Ross and Mr Henderson:

> f. Scope of Agreement
>
> Upon the effectiveness of this Agreement and *unless the parties otherwise agree in writing, by specific reference to this Agreement, that this provision does not apply*, all Derivative Transactions (as defined below) then outstanding, or which may be entered into thereafter, between the parties, including Transactions entered into by the parties through Offices, if any, listed in Part 4(d), are deemed to be Transactions governed by this Agreement and any confirmation or other

> confirming evidence of the Transaction is deemed to be a Confirmation.
>
> [emphasis added]

221 Mr Ross takes the position that if I should find that the Post–23 July 2008 Accumulators are subject to the 2008 ISDA, then I would have to find that all the Accumulators are subject to the 2008 ISDA as the 2008 Revision Letter does not sufficiently exclude the Pre–23 July 2008 Accumulators as ST did not "agree" to the position set out in the 2008 Revision Letter "in writing" as stated in the Scope of Agreement Clause.

222 Mr Henderson suggests that the 2008 Revision Letter is sufficient to exclude the operation of the Scope of Agreement Clause in relation to the Pre–23 July 2008 Accumulators. However, should I find that the 2008 Revision Letter is not effective in relation to the Pre–23 July 2008 Accumulators, all the Accumulators would be governed by the 2008 ISDA.

223 I do not think it can be argued that the 2008 Revision Letter was not a document "in writing". In any case, as noted at [213] above, ST agreed in the 2006 Account Agreement that the Bank by notice to him could, *inter alia*, form a supplemental agreement. The clear words of the 2008 Revision Letter make the 2008 ISDA only applicable to the Post–23 July 2008 Accumulators. As a result, the Pre–23 July 2008 Accumulators were not governed by the 2008 ISDA. The Post 23–July 2008 Accumulators were governed by the 2008 ISDA.

224 In addition, the Accumulator Confirmations for the Post–23 July 2008 Accumulators would support the Bank's argument that the 2008 ISDA had become effective in relation to the Post 23–July 2008 Accumulators.

The Without Notice Clause was validly incorporated

225 I come back to Mr Ross's final argument in relation to the 2008 ISDA *viz*, even if the 2008 Revision Letter had the effect of making the 2008 ISDA applicable to any of the Accumulators, the Without Notice Clause was unreasonable and therefore not validly incorporated.

226 I note that in the ISDA Experts' Joint Report, Mr Ross made the point that even if the Without Notice Clause was incorporated, the Bank was required to given notice pursuant to s 6.b.i of the 2008 ISDA which states as follows:

> 6.b. Right to Terminate Following Termination Event.
>
> i. Notice. If a Termination Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the name of that Termination Event and each Affected Transaction and will also give such other information about that Termination Event as the other party may reasonably require.

227 I note that Mr Ng has abandoned (and rightly so) this point in his closing submissions. The abovementioned clause only requires an "Affected Party" to give notice under the 2008 ISDA. Having regard to the wording of the Without Notice Clause, ST (who is identified as Party B therein) is the only Affected Party for the purposes of the operation of the Without Notice Clause. Therefore, if the Without Notice Clause is validly incorporated, there is no need for the Bank to give notice under the 2008 ISDA before it decides to unwind any accumulator which is subjected to the 2008 ISDA.

228 Mr Ng argues that the Without Notice Clause is onerous and unusual and therefore must have been drawn to ST's notice if he were to be bound by it. The question of whether a clause in a contract in unusual is a question of

fact. As noted in *United Overseas Bank Ltd v The Asiatic Enterprises (Pte) Ltd* [1999] 2 SLR(R) 671 at [41], the court would have to assess all circumstances including the experience of the parties in deciding if the clause in question in onerous or unusual.

229 Notably, ST is a sophisticated investor with a large portfolio. In multiple documents, such as the Accumulator Confirmations, the CSNL (including its reference to the Risk Disclosure Statement) and the ISDA Master Agreement, ST had acknowledged that he entered into the Accumulators with a full understanding of the terms and conditions and the risks relating to them. There is also no question that a sophisticated investor like ST would have no difficulty in understanding those terms with legal advice. Therefore, it is curious that ST would even choose to mount such a spurious argument.

230 The Bank called David M. Ellis ("Dr Ellis") to give evidence on, *inter alia*, the closing out process. Dr Ellis, in his written testimony stated that the standard clauses in the ISDA Master Agreement are reasonable.[58] There is no need for counsel to lead expert evidence on this point; whether or not a clause in a contract is reasonable in the circumstances is a question of fact which the court is well-placed to decide. In any case, Dr Ellis was not a satisfactory witness. He was more interested in advocating the Bank's position when he was on the stand and did not assist the court as an expert.

231 In any case, I am of the view that given the context of derivatives transactions, there are many legitimate reasons why a Bank might have to look

[58] Dr Ellis' AEIC, pp 60 –61 (Dr Ellis' Report, para 8.10).

towards the Without Notice Clause to act urgently in the client's interest. Mr Ross conceded in the trial that the Without Notice Clause was reasonable. I reproduce the relevant portions of the evidence:

MR HENDERSON:	… assuming that the account agreement is a reasonably acceptable account agreement in Singapore, I think these clauses just flow right with it and there's absolutely nothing unreasonable about them.
MR ROSS:	Thank you. I say, and I think this is correct, one of these additional termination events are unusual. I accept the proposition that a bank entering into margined or leveraged derivatives with clients would want the right to terminate and close out at short notice. So in that respect I'm inclined to say, your Honour, that there is a reasonability to these additional termination events. They are unusual. I can point you since writing my report and indeed writing our joint report, there's English authority which is again in this Deutsche Bank v Sebastian Holdings case where the judge says, in effect, that an additional termination event which was applied to all transactions and not to some or any part of a transaction and which said that the bank would use its reasonable endeavours to give notice, obviously ex post, retrospectively, the judge said that in his opinion, his view, that that made business sense. That's helpful, your Honour, to the argument that the without notice additional termination event is, in Singapore terms, reasonable. I would just point out that the one in the Deutsche Bank case did contain a reasonable endeavours obligation to give notice but obviously the horse would have bolted.

> …
>
> MR ROSS: So I think that's probably as much as I can say about that, your Honour. I don't think I'm essentially disagreeing in any great way with Mr Henderson.

232 I therefore find no merit in ST's argument that the Without Notice Clause was not incorporated as it was an onerous clause to which his attention had to be drawn to.

233 Nevertheless, I note for completeness that even if I had found that the Without Notice Clause was onerous, I would have held that it had been incorporated as the Bank had brought it to the specific attention of ST's attorney, YCB. I note that the Revision Letter highlighted the "key changes" to the Account Agreement in an attached schedule in addition to attaching the 2008 ISDA. I reproduce the relevant portion of para 7 of the said schedule below:

> Section III of Investment Services Terms and Conditions: OTC Derivatives and Foreign Exchange, Precious Metals and Options Transactions Trading Facility
>
> … Additional Termination Event provision has been amended to align with other standard documents such that Early Termination Date may be deemed to have occurred upon termination of the relevant Transactions by the Bank without notice. …

234 The Without Notice Clause was therefore specifically drawn to the attention of ST in the 2008 Revision Letter. When confronted with the above paragraph, Mr Ross conceded that the Without Notice Clause had been highlighted. I reproduce the relevant portions of the evidence:

> MR ROSS: I think the tone of the letter is very important, your Honour.

COURT: Can we look at the letter then.

MR KUMAR: It is in the bundle I have tendered at tab 4, page 57.

COURT: Yes. Yes, Mr Ross.

MR ROSS: So in the first paragraph the changes and implications are summarised below for you: "No further action on your part is required. This information is for information purposes only."

…

Then we go over the page, your Honour, to paragraph 3:

"Although you should refer to the revised Account Agreement for full details, we have described the key changes in the attached Schedule."

…

Then we go over the page again to the schedule and the only change mentioned on page 2, paragraph 7, is a reference to additional termination event. It has been amended to align -- paragraph 7 of the schedule, your Honour, it says in the second sentence:

"Additional Termination Event provision has been amended to align with other standard documents such that Early Termination Date may be deemed to have occurred upon termination of the relevant Transactions by the bank without notice."

It refers to other changes which I'm bound to say are anodine [*sic*]. So the pause that I took, your Honour, was very much driven by the tone of this letter.

MR HENDERSON: Wait, don't they point out that change?

MR ROSS: Yes they do, they do point it out but there are other changes as well.

235 In light of the above, I find that the 2008 ISDA applied to the Post 23-July 2008 Accumulators and the Without Notice Clause was reasonable and,

in any case, incorporated in the 2008 ISDA. Therefore, the Bank would have had the right to unwind the Post 23-July 2008 Accumulators without issuing a notice under the 2008 ISDA. However, I note that this point is moot given that I have found that ST had instructed the Bank to unwind the Accumulators and, in any case, agreed to the incorporation of the 2008 CSNL Without Notice Right of Termination into each Accumulator Confirmation.

Statement Clause in Section 6(d)(i) of the 2006 and 2008 ISDA

236 ST alleges that the Bank has breached the Statement Clause in s6(d)(i) of the ISDA Master Agreement. I first set out the clause:

> Calculations.
>
> (i) Statement. On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including all relevant quotations and specifying any amount payable under Section 6(e)) and (2) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation obtained in determining a Market Quotation, the records of the party obtaining such quotation will be conclusive evidence of the existence and accuracy of such quotation.

237 Under s 12(a) of the 2006 ISDA, the Statement Clause may not be given "by facsimile transmission or electronic messaging system". I now set out the relevant portion of the ISDA Experts' Joint Report that deal directly with this issue:

> 39. Assuming that the Termination Provisions are applicable, the Bank's e-mails to [YCB] on 23 and 24 October 2008 referred to above, and its e-mail to [YCB] on 2 December 2009 appear broadly to contain information that meet the requirements under Section 6(d) of each Master Agreement.

> The final determination is as much a commercial as a legal one (e.g., whether the information was provided in "reasonable detail").

238 The e-mails sent by Clara to YCB on 23 October 2008 and 24 October 2008 after the unwinding of each batch of Accumulators do provide reasonable details required by the Statement Clause seeing that they state the price at which the respective Accumulators were unwound and the Unwinding Costs. In addition, they were obviously sent as "soon as reasonable practicable". ST subsequently sought further details on the unwinding of the Accumulators and the Bank provided the information in an e-mail on 2 December 2009. In this regard, the ISDA experts accept that the information pursuant to the Statement Clause had been provided to ST.

239 However, there is still the question of whether the information sent by e-mail contravened s 12(a) of the 2006 ISDA which prohibits the use of "facsimile transmission or electronic messaging system". The short query is whether the precise terms of the 2006 ISDA would apply when the parties have agreed to unwind the Accumulators outside of the 2006 ISDA as in the present case.

240 On its face, s 6(d)(i) of the 2006 ISDA applies on the occurrence of an "Early Termination Date". Therefore, when the parties agree to unwind the Accumulators outside the ISDA Master Agreement, s 6(d)(i) is *prima facie* inapplicable, as an "Early Termination Date" within the meaning of the 2006 ISDA has not occurred.

241 Mr Henderson takes the position that if the parties had agreed to unwind the Accumulators outside the ISDA Master Agreement, then none of

the terms of the ISDA Master Agreement would apply. He adds that "[t]o imply additional terms would introduce uncertainty into the common practice of agreed oral terminations in the Singapore OTC derivatives market and reduce the liquidity of those markets."[59]

242 Mr Ross, on the other hand, takes the following position:[60]

> it is sensible to imply a term in that agreement that:
>
> > (a) the Bank was required in terms of Section 6(d) of the applicable Master Agreement to provide a statement of its calculations as soon as reasonably practicable; and
> >
> > …

243 However, it is trite that a term is only implied in the face of "necessity" and not "sensibility" (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101]). In this regard, Mr Ross conceded that it was not necessary to imply a term that the Statement Clause should apply to the oral agreement between the Bank and ST to unwind the Accumulators.[61]

244 I am, however, of the view that it is of course necessary to imply a term that the Bank informs ST of the Unwinding Costs and the price at which the Accumulators were unwound; however, I see no reason why such information cannot have been – as in the present case – provided to ST *via* e-mail. It makes no commercial sense to suggest otherwise. In any case, it has not escaped notice that the Bank did send ST notices on 24 October 2008[62]and

[59] ISDA Experts' Joint Report, para 76.

[60] ISDA Experts' Joint Report, para 75.

[61] Transcript dated 6 May 2015, pp 105 – 108.

[62] 4 AB 1095 – 1102.

28 October 2008[63] (which comply with s 12(a) of the 2006 ISDA) that stated the amount payable on unwinding of each Accumulator. When read with the e-mails on 23 and 24 October 2008, it appears to me that the Bank would have, in any case, satisfied the requirements of the Statement Clause if it was applicable.

The Accumulators were not unwound negligently

245 ST makes two arguments in relation to the Bank's duty of care in both contract and tort. The first argument is that the Bank breached its duty of care by unwinding the Accumulators without ST's instructions or without verifying his instructions. This argument falls away completely as I have found (at [111] above) that ST had agreed (through YCB) to unwind the Accumulators.

246 ST then argues that the Bank breached its duty of care in the manner it unwound the Accumulators. The Bank unwound the Accumulators as follows. The Bank first disposed of positions that it had taken in the underlying shares as a result of entering into the Accumulators (*ie*, the Delta Shares). The Delta Shares were then sold over the course of the day at close to the Volume Weighted Average Price ("VWAP") of the underlying shares ("the VWAP Method").

247 The Bank called Mr Ho Tze Leung ("Mr Ho") and Ms Chia Huey Ping ("Ms Chia") to testify on this aspect of the case. Mr Ho's evidence was that the VWAP Method generally had the effect of minimising the impact of any sale on the market price of the shares. In his view, it was a reasonable method of disposing of shares and a standard practice in the industry, in particular,

[63] 4 AB 1149 – 1156.

when disposing of a relatively large block of shares. Ms Chia concurred with Mr Ho's views in relation to the VWAP Method being reasonable.

248 ST did not adduce any evidence to: (a) contradict Mr Ho and Ms Chia's evidence; or (b) suggest that the VWAP Method was not reasonable. His position at trial was that the Bank should have used the spot price instead ("Spot Method"). ST adduced no evidence to support his contention that the Spot Method was the standard practice. Tellingly, in Mr Ng's closing submissions, he was not able to point out why the Spot Method would have been more advantageous to ST. He was also not able to point out why the VWAP Method was not reasonable.

249 ST next argues that the Bank was negligent in unwinding the Accumulators on 23 and 24 October 2008 when the markets were depressed. Again, ST adduced no evidence in support of this assertion that the Bank's timing was negligent. There is a fair amount of *ex post facto* reasoning in ST's argument that the Bank should have waited and should not have unwound the Accumulators on 23 and 24 October 2008 because the market supposedly recovered thereafter.

ST has suffered no loss even if the Bank had breached an obligation in relation to the Account

250 The whole of ST's case is that he was in a position to meet any margin call issued by the Bank and, consequently, salvage the Accumulators and avoid paying the Unwinding Costs. Therefore, he argues that the Bank should have served him the ISDA Notice, which would have prompted action on his part. It is worth bearing in mind s 6(c)(i) of the 2006 ISDA – the ISDA Notice does not afford an opportunity to remedy a default and the Bank can unwind

the Accumulators after the issuance of the ISDA Notice even if the event of default is not continuing.

251 In any case, and most crucially, ST's expert, Prof Ho, during cross-examination made various concessions in relation to the state of ST's financial affairs. I have set them out in detail at [71] – [75] above. On Prof Ho's evidence, ST did not have the necessary liquid assets to meet the margin call on 22 October 2008. There was also no controversy that the position would not have been different a few days later had the Bank issued the ISDA Notice; the Accumulators would have had to be unwound in any case.

Other matters

252 Given the clear finding that ST has suffered no loss, there is no need, and I do not intend, to analyse *in vacuo* the question whether the Bank could successfully invoke the Exemption Clause (at [34] above). It is also not necessary to deal with the Bank's Compromise Argument (at [34] above) that ST could not sue the Bank, having compromised his rights in the Work Out Agreement.

Conclusion

253 For all the reasons stated in this Judgment, ST's action fails and is accordingly dismissed.

254 The declarations the Bank seeks in its Counterclaim have been and are best advanced as defences to ST's action. Now that the Bank has succeeded in its defences, the Counterclaim for declaratory relief has no useful purpose and is superfluous. The court will not – as a general rule – grant declarations that

serve no useful purpose. In this regard, I refer to Woolf & Woolf, *Zamir & Woolf – The Declaratory Judgment* (Sweet & Maxwell, 4th Ed, 2011) at para 4–99 which states as follows:

> If it can be shown that a declaration would not serve any practical purpose, this will weigh heavily in the scales against the grant of declaratory relief. If… the grant of declaratory relief will be likely to achieve a useful objective, the court will be favourably disposed to granting relief. The question of whether or not any useful purpose would be served by granting declaratory relief is therefore of prime importance in determining how discretion should be exercised. The issue as to utility is closely related to the theoretical issues discussed in the previous section. A declaration which would serve no useful purpose whatsoever can be readily treated as being academic or theoretical and dismissed on that basis…"

255 I make no order on the declaratory relief that the Bank seeks in paragraphs (1) and (2) of the Counterclaim, but will hear parties on the costs of the main action and the Counterclaim for which the Bank is seeking indemnity costs on a contractual basis.

Belinda Ang Saw Ean
Judge

Ng Lip Chih and Jennifer Sia (NLC Law Asia LLP) for the plaintiff;
Hri Kumar Nair *SC*, James Low, Harsharan Kaur Bhullar and Ben Tan (Drew & Napier LLC) for the defendant.