

AmFraser Securities Pte Ltd v Goh Chengyu
[2014] SGHCR 14

Case Number : Suit No 88 of 2014 (Summons No 2025 of 2014)
Decision Date : 29 July 2014
Tribunal/Court : High Court
Coram : Colin Seow AR
Counsel Name(s) : Low Chai Chong, Zulkarnain Abdul Rahim, Alvin Liong and Ian Ong (Rodyk & Davidson LLP) for the plaintiff; Philip Fong and Nicklaus Tan (Harry Elias Partnership LLP) for the defendant.
Parties : AmFraser Securities Pte Ltd — Goh Chengyu

Contract – Contractual Terms – Conclusive Evidence Clauses

Civil Procedure – Summary Judgment

29 July 2014

Judgment reserved.

Colin Seow AR:

Introduction

1 This is a summary judgment application taken out by AmFraser Securities Pte Ltd (“the Plaintiff”) for final judgment to be entered against Mr Goh Chengyu (“the Defendant”) in Suit No 88 of 2014. At the end of the hearing for the application, I reserved judgment as interesting questions of law pertaining to the use of conclusive evidence clauses in a securities trading context which merit closer analysis were raised in the course of submissions by counsel. I now give my decision with grounds attached.

Background of the dispute

2 The Plaintiff is a company which provides *inter alia* stockbroking services in retail and institutional securities. On 18 January 2013, by way of an account opening document (the “application form”) entitled “Application for Opening of Trading Account (Individual)”, [\[note: 1\]](#) the Defendant applied to the Plaintiff requesting the opening of a securities trading account under which the Plaintiff was to provide trading and dealing services to the Defendant. Pursuant to paragraph 10 of the application form, the Defendant agreed to be bound by *inter alia* the Plaintiff’s standard terms and conditions contained in a separate document entitled “Terms and Conditions for Operation of Securities Trading Account” (hereafter “the OSTA Terms and Conditions”). In the application form, one Mr Heng Gim Teoh (“HGT”) was named as the “trading representative” under the proposed securities trading account. Following the Plaintiff’s approval of the Defendant’s application, the Defendant’s securities trading account (“the trading account”) was opened on 22 January 2013.

3 Following a dispute between the parties, the Plaintiff filed Suit No 88 of 2014 on 22 January 2014 against the Defendant claiming *inter alia* a sum of \$1,888,954.60 which the Plaintiff avers was outstanding as at 13 December 2013 (hereafter “the sum claimed”). According to the Plaintiff, the sum claimed accrued as a result of “various dealings in investments and transactions made by the

Plaintiff on behalf of the Defendant”. [\[note: 2\]](#) It is not disputed that the “investments and transactions” referred to were purchases of shares in Blumont Limited, Asiasons Capital Limited and International Healthway Corporation Limited on or around 2 October 2013 (hereafter “the Disputed Investments”). With respect to the Disputed Investments, the Plaintiff claims that they had been properly carried out on behalf of the Defendant.

4 The Defendant denies the Plaintiff’s claim. In his Defence and Counterclaim, the Defendant avers *inter alia* that the Disputed Investments were carried out without his prior knowledge and authority. [\[note: 3\]](#) In particular, the Defendant claims that he only came to know about the Disputed Investments on 5 October 2013 when he was perusing a contract note which he received from Singapore Exchange Limited (SGX) indicating that purchases of shares in Blumont Limited, Asiasons Capital Limited and International Healthway Corporation Limited have been booked under the trading account on or around 2 October 2013. [\[note: 4\]](#) Following the Defendant’s alleged discovery of the Disputed Investments, the Defendant arranged for a meeting (“the First Meeting”) with HGT to take place on 7 October 2013 at the Defendant’s office, allegedly for the purpose of making inquiries regarding the Disputed Investments.

5 The First Meeting was attended by the Defendant, HGT, one Mr Goh Yee Gee (the Defendant’s uncle) (“GYG”) and one Mr Goh Rong Cheng (the Defendant’s paternal cousin, who is also known as Lucas Goh) (“GRC”). According to the Defendant, HGT admitted during the First Meeting that (a) he had increased the trading account limit without the Defendant’s authorisation, instruction or knowledge and (b) he had without the Defendant’s authority or instructions used the trading account to book the Disputed Investments on behalf of one Mr Lim Lin Ken (“LLK”). HGT also allegedly assured the Defendant during the First Meeting that the Defendant would not have to be responsible for the losses which have been incurred under the Disputed Investments.

6 After the First Meeting, the Defendant arranged for another meeting (“the Second Meeting”) to take place – this time at the Plaintiff’s office premises on 10 October 2013 – to “discuss” the Disputed Investments. [\[note: 5\]](#) The Second Meeting was attended by the Plaintiff’s executive director Mr Lim Wing How (“LWH”), one of the Plaintiff’s compliance officers Mr Chen Moh Yong (“CMY”), the Defendant, GYG, GRC and HGT. At the Second Meeting, the Defendant informed LWH that the Disputed Transactions were entered into without the Defendant’s authority, and HGT allegedly admitted once again that he had carried out the Disputed Investments for LLK without the Defendant’s knowledge. [\[note: 6\]](#) The Defendant further avers that at one point during the Second Meeting, HGT was cut off by LWH while he (HGT) was making his admission, because LWH did not want HGT to finish giving his explanation. [\[note: 7\]](#)

7 The Plaintiff does not appear to deny that the First Meeting and the Second Meeting did in fact take place. However, the Plaintiff disputes the Defendant’s account that HGT had made admissions in relation to the Disputed Investments. At this juncture, I pause to observe that HGT has since the time the dispute has arisen between the Plaintiff and the Defendant formally affirmed a statutory declaration pursuant to the Oaths and Declarations Act (Cap 211, 2001 Rev Ed) stating that at no point in time has he ever admitted to carrying out the Disputed Investments without the Defendant’s prior authorisation. In his statutory declaration, HGT stated as follows: [\[note: 8\]](#)

...

4 ... I wish to state that I have never stated that the [Disputed Investments] were carried out without the explicit authorisation of [the Defendant]. As is the case with all my clients, I will

verify the caller's name and NRIC number whenever a client calls me and requests that I execute a transaction on his behalf.

5 Practically speaking, I will definitely require the caller's full name and NRIC number in order to know which trading account the client is talking about.

6 In fact, on previous occasions, I have obtained similar instructions from [the Defendant] via telephone as well.

...

8 For completeness, it should be pointed out that HGT's statutory declaration, which was tendered before this court in the hearing, was affirmed on pain of potentially severe criminal penalties should it ever transpire that he has made a false statutory declaration (see section 14(1) of the Oaths and Declarations Act (Cap 211, 2001 Rev Ed)).

9 The Plaintiff also disputes the Defendant's account of what had actually transpired during the Second Meeting. LWH, for instance, has deposed in an affidavit denying having cut off HGT during the Second Meeting. [\[note: 9\]](#) In fact, LWH categorically refutes the Defendant's allegation that HGT has admitted to carrying out the Disputed Investments without the Defendant's knowledge and authority. [\[note: 10\]](#) In this last regard, I should also add that CMY has also deposed in an affidavit corroborating the position taken by LWH. [\[note: 11\]](#)

10 At the hearing before me, there was nothing on record which objectively confirms or denies the existence of LLK.

The case theories and arguments

11 In the course of the hearing, two competing case theories emerged from counsel's arguments. The Plaintiff's case theory, simply put, paints the Defendant as a bad client who is trying to evade his contractual obligations to pay the Plaintiff for its services by disclaiming investments which although were properly made on his behalf, had gone south. In support of this case theory, Plaintiff's counsel drew this court's attention to the trading account statements showing that the Defendant has been investing profitably in shares in Blumont Limited, Asiasons Capital Limited and International Healthway Corporation Limited for several months before the Disputed Investments were made. [\[note: 12\]](#) It was pointed out to this court that no issues of knowledge and authority in respect of those investments were raised by the Defendant when those investments were making gains; by contrast, the Disputed Investments which the Defendant is complaining about are investments that have suffered severe losses. [\[note: 13\]](#) By raising this point to the court, I take Plaintiff's counsel to be suggesting that the Defendant's complaints regarding the lack of his knowledge and authorisation in respect of the Disputed Investments are an afterthought.

12 The Defendant's case theory, as can already be gleaned from above, is principally that the Disputed Investments were entered into by HGT without the Defendant's prior knowledge or authorisation. Regarding the Plaintiff's suggestion that the Defendant is now complaining about the Disputed Investments only because those investments have made severe losses, Defendant's counsel countered by alluding to parts of the trading account statements showing that the Defendant has previously on occasion also made some losses that were not insubstantial in the months preceding the Disputed Investments. Yet, the Defendant did not raise any issue over his knowledge and authorisation in respect of those other loss-making investments. Defendant's counsel argues that if

the Defendant is indeed a client whose motive is that ascribed by the Plaintiff, why would the Defendant not also have complained about those other investments as well? This – so the argument goes – together with HGT’s alleged admissions in the First Meeting and Second Meeting raise issues which ought to be tried before a judge. Accordingly, Defendant’s counsel submits that summary judgment should not be granted in favour of the Plaintiff.

13 Admittedly, the application before me could have been much more straightforward if not for the reliance placed by the Plaintiff on *inter alia* several contractual provisions found in OSTA Terms and Condition which sparked a rather spirited debate between Plaintiff’s counsel and Defendant’s counsel in the hearing before me. The key contractual provisions relied on are clauses 10.1, 11, 17.1, 27.1 and 29.1 of the OSTA Terms and Conditions which are reproduced below:

10.1 The [Defendant] shall on demand pay to [the Plaintiff] such sums of money to enable [the Plaintiff] to discharge any liability incurred or to be incurred in connection with Transactions effected or to be effected for the Account(s) and shall on demand reimburse [the Plaintiff] all costs, charges, and expenses incurred by [the Plaintiff] in connection therewith including legal costs on a full indemnity basis.

[...]

11 The [Defendant] agrees to pay interest on all amounts owed by the [Defendant] to [the Plaintiff] after as well as before judgment at such rate or rates and on such periodic rests as [the Plaintiff] shall determine from time to time, from the due date of payment of such amounts until receipt of payments thereof by [the Plaintiff].

[...]

17.1 The [Defendant] hereby agrees to indemnify and hold harmless [the Plaintiff] in full and upon demand from and against all actions, claims, liabilities, losses, damages, costs and expenses (including without limitation legal fees and costs on a full indemnity basis) whatsoever arising directly or indirectly out of (a) any action taken (or omitted to be taken) in good faith by [the Plaintiff] pursuant to any instruction, notice or request by the [Defendant] and/or the Authorised Person or pursuant to the Agreement; (b) claims of third parties which may be brought or asserted in respect of any Securities deposited with [the Plaintiff], or against [the Plaintiff] by reason of its holding or having received or held such Securities from the [Defendant] under or pursuant to the Agreement to (c) the enforcement of any of the [Defendant’s] obligations and liabilities under the Agreement and/or the recovery of any sums owed by the [Defendant] under or relating to the Agreement.

[...]

27.1 The [Defendant] confirms that in the purchase and/or sale of any Securities under the Account(s) by **any representative** on the [Defendant’s] and/or the **Authorised Person’s** instructions or though without their instructions but with their consent and/or authority (expressed, implied or otherwise) and/or knowledge, such **representative** shall be *deemed to be the [Defendant’s] agent* whether or not such **representative** is deemed to be engaged or employed by the [Defendant] in law. *The [Defendant] will, as between [the Plaintiff] and the [Defendant], be liable for all purchases and sales of Securities executed by the **representative** for the Account regardless of whether the **representative** would also be liable to [the Plaintiff] for the same and the [Defendant] shall be liable to [the Plaintiff] for all costs, expenses, damages, losses, fees, charges, rates or duties which may be incurred by [the Plaintiff] in*

*respect of all such Securities transacted. In addition, the [Defendant] confirms that in the purchase and/or sale of any Securities under the Account(s) by any **representative**, such **representative** shall be deemed to be the [Defendant's] agent and [the Plaintiff] is entitled to assume that as between [the Plaintiff] and the [Defendant] (i) any order said by the **representative** to be intended to be executed for the [Defendant] is so intended; and (ii) every order executed by the **representative** for the [Defendant] is the order intended to be executed by the [Defendant].*

[...]

29.1 [The Plaintiff] will provide the [Defendant] with a written contract note/statement of each Securities Transaction effected in relation to the Account(s). *Such contract note and/or statement shall be conclusive and binding against the [Defendant] unless objection in writing addressed to the General Manager of [the Plaintiff] is received from the [Defendant] to [the Plaintiff] within 7 calendar days from the date of such contract note/statement.*

[emphasis in italics and bold added]

14 The Plaintiff relies heavily on clause 27.1 in the present application, arguing that it is entitled to deem HGT to be the Defendant's agent under the Disputed Investments. On this argument, it would follow that the Plaintiff is also entitled to assume that the Disputed Investments carried out by HGT were in fact intended to be carried out by the Defendant. Accordingly, the Defendant is responsible for the purchase of securities made under the Disputed Investments, and hence liable to pay the Plaintiff "all costs, expenses, damages, losses, fees, charges, rates or duties which may be incurred by [the Plaintiff] in respect of all such Securities transacted" (*ie*, the sum claimed in Suit 88 of 2014). In this regard, Plaintiff's counsel has urged this court to consider the case of *Fraser Securities Pte Ltd v Seet Ai Kiang and Others* [2004] SGHC 9 ("*Fraser Securities Pte Ltd v Seet Ai Kiang*") where contractual clauses substantially identical to *inter alia* clause 27.1 of the OSTA Terms and Conditions were favourably examined and upheld by the High Court (see *Fraser Securities Pte Ltd v Seet Ai Kiang* at [30]-[35]).

15 Plaintiff's counsel has also argued that in any event the conclusive evidence clause contained in clause 29.1 of the OSTA Terms and Conditions operates against the Defendant because the Defendant has failed to tender his objection to the Disputed Investments in writing within the stipulated seven calendar days.

16 The Defendant's specific arguments in response to the Plaintiff's application are as follows. Defendant's counsel argues that there is a threshold issue as to whether HGT is an "Authorised Person" or a "representative" under clause 27.1 of the OSTA Terms and Conditions. This issue, Defendant's counsel avers, involves a question of fact. [\[note: 14\]](#) Defendant's counsel also argues that in construing the OSTA Terms and Conditions, any ambiguity arising therefrom must be construed *contra proferentum* against the Plaintiff given that the Plaintiff is the drafter of the OSTA Terms and Conditions. [\[note: 15\]](#)

17 In respect of the conclusive evidence clause contained in clause 29.1 of the OSTA Terms and Conditions, Defendant's counsel advanced two arguments. First, it is argued that the conclusive evidence clause does not operate in the present case because the Plaintiff has waived the requirement for objections to be made in writing within the contractually stipulated seven days when it agreed to meet the Defendant at the Second Meeting to discuss the Defendant's complaint about the Disputed Investments (see [6] above). In this regard, Defendant's counsel points out that LWH has stated in his own affidavit that, upon hearing the Defendant's complaint during the Second

Meeting, he (LWH) informed the Defendant that “more time would be needed to establish full facts”. [\[note: 16\]](#) Defendant’s counsel argues that by virtue of this statement made by LWH during the Second Meeting, the Plaintiff is now estopped from denying that the Defendant did not properly object to the Disputed Investments under clause 29.1 of the OSTA Terms and Conditions because it had “made a clear and unequivocal representation that it would not enforce its rights to have the Defendant’s objection in writing”. [\[note: 17\]](#)

18 Second, it is argued that as a matter of law it would be unreasonable and contrary to public policy for the Plaintiff to rely on the conclusive evidence clause to shift the risk and liability of unauthorised transactions made by HGT to the Defendant. In support of this argument, Defendant’s counsel relied principally on *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 (“*Jiang Ou v EFG Bank*”) where Steven Chong J stated *inter alia* at [122]:

122 Individuals and corporations entrust banks and employees of banks with their savings and investments. Public confidence in the banking system is therefore fundamental to the integrity of the system and is no doubt founded upon mutual trust and a reasonable expectation of honest dealings by employees of banks. *Shifting the attendant risk and liability for the fraud or wilful misconduct of employees of banks by way of conclusive evidence clauses, strikes at the very heart of the presumed integrity of the system. The negative impact on public confidence and trust in the modern banking system would, in my view, render such clauses to be unreasonable under [the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed)] as well as void as a matter of public policy.*

[emphasis added]

19 Mindful that *Jiang Ou v EFG Bank* was decided in the context of a *bank-customer* relationship, Defendant’s counsel further argues that the same considerations ought to apply to conclusive evidence clauses in the securities trading industry as well, citing the case of *Kwek Hock Hee and Another v Tat Lee Securities Pte Ltd and Another* [1999] SGHC 143 (“*Kwek Hock Hee v Tat Lee Securities Pte Ltd*”) where Warren Khoo J made the following observations in relation to the securities trading industry framework:

[...] I think it is legitimate to have regard for the public interest aspect of the laws and regulations governing the operation of the stock exchange and member companies. Trading in securities is regulated by the Securities Industry Act and the rules, bye-laws and regulations of the stock exchange. *These laws and regulations are designed to create an environment in which the public can trade in shares and securities in safety and with confidence. The Act, in s 16 requires that the exchange have rules to ensure that only people with integrity and who conduct their business fairly and honestly be allowed to be members. The bye-laws of the exchange in turn require that only persons of integrity and competence may be appointed as dealer’s representatives. A dealer’s representative must also be licensed under the Act. There is a disciplinary committee to inquire into infractions of the rules and regulations of the exchange and complaints of conduct “unbecoming or inconsistent with just and equitable principles of trade or detrimental to the interests of the exchange or the investing public.” The aim is obviously to instil professionalism and good discipline in the industry.*

The bye-laws of the exchange contain elaborate rules to ensure that the business of a member company is conducted in accordance with best business practice. They require member companies to diligently supervise all accounts handled by their dealer’s representatives. In the case of remisiers, the standard agency agreement between them and the company allow the company to give directions for the proper conduct of the remisier’s trading activities. The bye-

laws also require member companies to conduct regular checks, verifications and reconciliations of accounts and stock positions. *All these are to ensure that irregularities within the organisation, whether by a company's direct employees or by remisiers, can be prevented or detected, and the investor's interests safeguarded.*

In the light of the purpose and object of the legislative and regulatory framework [...] it seems to me to be quite against public policy to allow member companies of the exchange, by whatever means, to shift the responsibility for any fraud (be it by a direct employee or a remisier) to the investor. I would be surprised if such a device would ever be allowed. [...]

[emphasis added]

The decision

20 The law pertaining to applications for summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") is well settled and need not be restated here. In the light of the arguments canvassed by the parties, I find that the critical issue in the present application is whether clauses 27.1 and 29.1 of the OSTA Terms and Conditions preclude a finding by this court that the Defendant "has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence" (see *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21]), or a finding by this court that "there is an issue of question in dispute which ought to be tried or that there ought for some other reason to be a trial" (see O 14 r 3(1) ROC).

Clause 27.1 of the OSTA Terms and Conditions

21 I deal first with Defendant's counsel's contention that there is a threshold question of *fact* as to whether HGT is an "Authorised Person" or a "representative" under clause 27.1 of the OSTA Terms and Conditions (see [16] above). On a plain construction of the application form and the OSTA Terms and Conditions, I find that there is no ambiguity as to where HGT falls under clause 27.1 of the OSTA Terms and Conditions. "Authorised Person" is defined under clause 1 of the OSTA Terms and Conditions as "any person(s) authorised in writing by the [Defendant] to perform any Transaction in the Account". "Transaction", in turn, is defined in the same clause as:

[...] a transaction on or in respect of the [Defendant's] Securities trading account carried out in connection with *any request made by the [Defendant] or Authorised Person* orally or in writing to buy, sell or otherwise deal in Securities or deal with the monies in the Account or perform any transaction relating to the Account, and includes any transaction carried out by the [Defendant] using the DMA Services. [emphasis added]

22 The fact that a "Transaction" is carried out in connection with "any request" *emanating* from either the Defendant or an "Authorised Person" makes it plain to me that an "Authorised Person" under the OSTA Terms and Conditions is a person whose control over all trading activities under the trading account is contemplated to be in theory as autonomous as that of the Defendant's. What this means is that an "Authorised Person", once appointed by the Defendant, is permitted to make "any request" to the Plaintiff to engage in trading activities under the Defendant's trading account without any reference to the Defendant. That any request of such nature made by an "Authorised Person" would be binding on the Defendant is clearly provided for in clauses 3.1 and 3.2 of the OSTA Terms and Conditions which provide as follows:

3.1 The [Defendant] or any of its Authorised Persons may request [the Plaintiff] orally or in writing to buy or sell or otherwise deal with Securities or deal with monies in the Account(s) or

perform any other Transaction relating to the Account(s).

3.2 The [Defendant] shall be fully responsible and liable for any and all (a) acts and omissions of its Authorised Person(s) and (b) instructions and/or communications given by or purportedly given by an Authorised Person(s) on the [Defendant's] behalf so long as [the Plaintiff] reasonably believes such instructions and/or communications to be genuine. [The Plaintiff] shall be entitled to assume that any such Authorised Person is fully authorised to act on the [Defendant's] behalf and [the Plaintiff] is requested and authorised to rely upon and act in accordance with any instruction or communication which may from time to time be or purport to be given by the Authorised Person(s) on behalf of the [Defendant]. [The Plaintiff] shall be entitled to treat such instruction or communication as fully authorised and binding upon the [Defendant] and [the Plaintiff] shall be entitled (but not bound) to act on or carry out such instruction or communication and to take such steps in connection with or in reliance upon such instruction or communication as [the Plaintiff] may in good faith consider appropriate. For the avoidance of doubt, [the Plaintiff] shall not be obliged to verify with the [Defendant] or any other person the instructions or communications given by or purportedly given by the Authorised Person(s) purportedly on behalf of the [Defendant].

23 On the facts of the present case, it is common ground that HGT did not exert the same level of autonomy of control over the Defendant's trading account which an "Authorised Person" would possess under the OSTA Terms and Conditions. Neither party to the dispute has accepted that HGT could directly make "any request" to the Plaintiff to engage in trading activities using the Defendant's trading account without any reference whatsoever to the Defendant. In complaining that HGT had entered into the Disputed Investments without the Defendant's prior knowledge and authorisation, the Defendant is taking the position that such prior knowledge and authorisation ought to have first been given before the Disputed Investments could be considered as having properly been made on the Defendant's behalf. Likewise, in claiming that the Disputed Investments were in fact made by HGT only after having received specific instructions from the Defendant, [\[note: 18\]](#) the Plaintiff is in effect acknowledging that HGT did not at any point in time possess the autonomy to perform any transaction on the Defendant's behalf without any reference whatsoever to the Defendant. Accordingly, by process of elimination, since HGT is evidently not an "Authorised Person", I find that the irresistible conclusion to be drawn in respect of HGT's status must be that the only alternative hypothesis in the present case is true, *ie*, HGT is a "representative".

24 Given that HGT is a "representative" under clause 27.1 of the OSTA Terms and Conditions, the efficacy of clause 27.1 in advancing the Plaintiff's case for summary judgment may now be evaluated accordingly. By operation of clause 27.1, for any transaction made by HGT under the trading account, HGT as the Defendant's "representative" is "deemed to be the [Defendant's] agent whether or not such representative shall be deemed to be engaged or employed by the [Defendant] in law". The Plaintiff is also "entitled to assume that as between [the Plaintiff] and the [Defendant] (i) any order said by the representative to be intended to be executed for the [Defendant] is so intended; and (ii) every order executed by the representative for the [Defendant] is the order intended to be executed by the [Defendant]". This is however provided that the transaction in question was made "*on the [Defendant's] and/or the Authorised Person's instructions or though without their instructions but with their consent and/or authority (expressed, implied or otherwise) and/or knowledge*" (emphasis added) (see [13] above).

25 In my view, herein lies the problem with the Plaintiff's reliance on clause 27.1 in seeking summary judgment to be entered against the Defendant. First, the Plaintiff has not adduced any objective documentary evidence in its supporting affidavits putting beyond question the assertion that the Disputed Investments were made by HGT "on the Defendant's [...] instructions". Similarly, the

Plaintiff also does not adduce any objective documentary evidence to demonstrate in the alternative that the Disputed Investments were made by HGT with the Defendant's "consent and/or authority (express, implied or otherwise) and/or knowledge". Absent any such objective documentary evidence at hand, this court is confronted with at best contested factual issues which although may be pertinent to the Plaintiff's underlying action, are nevertheless issues that this court cannot attempt to resolve in a summary judgment proceeding as if it were a trial. On this ground, I therefore find that clause 27.1 of the OSTA Terms and Conditions does not warrant summary judgment to be entered against the Defendant at this current stage of the proceedings.

26 For completeness, it is apposite for me to also point out that the Court of Appeal's decision in *Als Memasa and another v UBS AG* [2012] 4 SLR 992 supports the above conclusion that I have arrived at. In that case, the appellants' action against the respondent, UBS AG, claiming *inter alia* that UBS AG had without their authorisation or valid affirmation purchased some Russian bonds under one of the appellants' UBS accounts (which bond value subsequently depreciated) was struck out by the High Court on UBS AG's application. In allowing the appellants' appeal against the striking out order, the Court of Appeal held (at [19]-[20]):

19 Counsel for UBS [...] conceded that *UBS did not produce any telephone transcripts or internal documents evidencing [the first appellant] authorising the purchase of the Russian bonds.*

[...]

20 *We are of the view that the Appellants' limited claim based on the losses arising from the purchase of the Russian bonds should be allowed to go to trial, given the lack of documentary evidence showing that [the first appellant] had authorised the purchase of the Russian bonds.*

[...]

[emphasis added]

27 At this juncture, it is necessary for me to also deal with the case of *Fraser Securities Pte Ltd v Seet Ai Kiang* which Plaintiff's counsel has placed considerable reliance on in the course of submissions (see [14] above). In *Fraser Securities Pte Ltd v Seet Ai Kiang*, Fraser Securities Pte Ltd ("Fraser") commenced an action against Seet Ai Kiang ("Seet") claiming a sum of money which Fraser alleged was payable to them for stockbroking services which they had provided in respect of trading accounts opened under Seet's name. In her defence, Seet claimed that she was a mere nominee holder of the trading accounts (*ie*, although the trading accounts were opened in her name, the trading accounts were in reality operated by certain third parties). Fraser applied and obtained summary judgment against Seet before an assistant registrar, and Seet appealed. In upholding the assistant registrar's decision ordering that summary judgment be entered against Seet, Judith Prakash J held that Seet was contractually bound to pay Fraser the amount claimed on the basis of *inter alia* a contractual provision which I note is substantially identical to clause 27.1 of the OSTA Terms and Conditions. The relevant contractual provision in that case read as follows:

21.1 The Client confirms that in the purchase and/or sale of any securities under the Account(s) by any dealer's representative on the Client's and/or the Authorised Person's instructions or though without their instructions but with their consent and/or authority (expressed, implied or otherwise) and/or knowledge, such dealer's representative shall be deemed to be the Client's agent whether or not such dealer's representative is deemed to be engaged or employed by the Client in law. The Client will, as between Fraser and the Client, be liable for all purchases and sales of securities executed by the dealer's representative for the Account regardless of whether

the dealer's representative would also be liable to Fraser for the same and the Clients shall be liable to Fraser for all costs, expenses, damages, losses, fees, charges, rates or duties which may be incurred by Fraser in respect of all such securities transacted. In addition, the Client confirms that in the purchase and/or sale of any securities under the Account(s) by any dealer's representative who is a remisier, such dealer's representative shall be deemed to be the Client's agent and Fraser is entitled to assume that as between Fraser and the Client (i) any order said by the remisier to be intended to be executed for the Client is so intended; and (ii) every order executed by the remisier for the Client is the order intended to be executed by the Client.

28 Having examined the learned Judge's grounds of decision in *Fraser Securities Pte Ltd v Seet Ai Kiang*, I find no reason to depart from the conclusion which I have arrived at in [25] above. In that case, the relevant contractual provision was invoked under circumstances quite different from the circumstances in the present case – the relevant contractual provision in that case was invoked to defeat Seet's attempt to adduce parol evidence showing that because of certain alleged informal arrangements which have been entered into with Fraser, it was the third parties, not her, who should be directly held responsible for the amount claimed by Fraser. The learned Judge held (at [32]):

It is plain from the [contractual provision] that the defendant had agreed to pay the plaintiffs all costs, charges and expenses incurred by the plaintiffs in relation to her accounts with them. She had further agreed that, in placing orders for trades on her account, the remisier in the plaintiffs' company would be acting as her agent and not as the agent of the plaintiffs. *Having agreed to these terms as part of written contract, it was not open to the defendant to seek to vary the contract by adducing parol evidence of an alleged oral agreement between the plaintiffs, acting through the remisier, and herself, that whilst the account was to be held in the name of the defendant, the third parties would be responsible to the plaintiffs for all transactions carried out in the account and the defendant would not have to pay for any liabilities in the account. [...]* [emphasis added]

29 For completeness, I note that arguments in respect of Seet's personal knowledge or authorisation were also raised in *Fraser Securities Pte Ltd v Seet Ai Kiang*, and that those arguments ultimately failed in raising any triable issue. However, this result was obtained only because the learned Judge noted that even on Seet's own version of the facts, Seet "was aware that trading activities in the accounts would be carried out by the remisier on the instructions of the third parties and she was well content that it should be so" (see *Fraser Securities Pte Ltd v Seet Ai Kiang* at [33]). By contrast, there are no similar factors in the present case. I therefore do not find that *Fraser Securities Pte Ltd v Seet Ai Kiang* assists the Plaintiff in the present application in this regard.

Clause 29.1 of the OSTA Terms and Conditions

30 I come now to consider the conclusive evidence clause contained in clause 29.1 of the OSTA Terms and Conditions:

29.1 [The Plaintiff] will provide the [Defendant] with a written contract note/statement of each Securities Transaction effected in relation to the Account(s). *Such contract note and/or statement shall be conclusive and binding against the [Defendant] unless objection in writing addressed to the General Manager of [the Plaintiff] is received from the [Defendant] to [the Plaintiff] within 7 calendar days from the date of such contract note/statement.*

[emphasis added]

31 With respect to the Defendant's argument that the Plaintiff has waived the requirement for

objections to be made in writing within the contractually stipulated seven days (which the Defendant now claims has given rise to an estoppel against the Plaintiff (see [17] above)), Defendant's counsel asserts that the estoppel requirements of (i) clear and unequivocal representation, (ii) detrimental reliance and (iii) inequity (see *Orchard Central Pte Ltd v Cupid Jewels Pte Ltd (Forever Jewels Pte Ltd, non-party)* [2013] 2 SLR 667 at [44]) are satisfied in the present matter. [\[note: 19\]](#) I am not so sure that such a conclusive finding on estoppel can be made in the current stage of the proceedings given the current state of the evidence that has been made available to the court. Take for instance LWH's deposition in his own affidavit stating that, upon hearing the Defendant's complaint during the Second Meeting, he informed the Defendant that "more time would be needed to establish full facts" (see [17] above). [\[note: 20\]](#) On a literal assessment of this statement made by LWH, this statement can hardly be said to amount to a *clear and unequivocal* promise or representation by the Plaintiff that it will not insist on its strict legal rights under clause 29.1 of the OSTA Terms and Conditions.

32 The question might then be asked whether the requirement of clear and unequivocal representation may nevertheless still be satisfied under a *contextual* assessment of LWH's statements, given that in the law of estoppel "[i]t is enough if the promise induces the promisee *reasonably* to believe that the other party will not insist on his strict legal rights" (emphasis added) (see *Chitty on Contracts* vol 1 (Sweet & Maxwell, 21 Ed, 2012) at [3-089]). On this, I will state as a matter of general proposition that a court presiding over a summary judgment proceeding should generally be slow to venture into any contextual assessment of words and/or conduct encompassed in a claim of estoppel. Few if any contextual assessments can truly be safe if made without the benefit of a full inquiry into all the relevant facts and evidence surrounding the claim. Thus in a summary judgment proceeding, I am inclined to hold that it will ordinarily be sufficient once the court finds that nothing short of a contextual assessment will properly validate a claim of estoppel, for that claim to proceed to trial.

33 This, however, is not to say that unconditional leave to defend will be granted as a matter of course every time a claim of estoppel is raised. A bare, unsubstantiated or incoherent claim of estoppel, for instance, will generally not make any significant headway in raising triable issue(s) or demonstrating any probability of a *bona fide* defence at all. It bears emphasising that every claim must ultimately be assessed on the strength of its own merits, bearing in mind that the court is not bound to accept all averments affirmed or sworn in an affidavit to be the unquestionable truth. The averments must at least have the ability to demonstrate to the satisfaction of the court that the defendant in question "has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence" (see *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21]).

34 In my assessment, I am satisfied that the Defendant has adequately shown cause in respect of his claim of estoppel by making reference to the statement made by LWH during the Second Meeting which actually forms part of the Plaintiff's case (see [17] above). However, without the benefit of a full inquiry into all relevant evidence surrounding the statement made by LWH, I am not prepared to embark on a contextual assessment to validate the Defendant's claim of estoppel vis-à-vis clause 29.1 of the OSTA Terms and Conditions. For this reason, I find that the proper forum for validating the Defendant's claim of estoppel is that of a trial.

35 Alternatively, I find that there may also be a triable question as to whether the Defendant's *oral* objection to the Disputed Investments during the Second Meeting constitutes a viable defence to clause 29.1 of the OSTA Terms and Conditions. In *Fraser Securities Pte Ltd v Seet Ai Kiang* (see [27] above), the contract in question contains a substantially similar conclusive evidence clause providing that contract notes and statements sent by Fraser in respect of transactions effected in relation to

Seet's account "shall be conclusive unless an objection in writing" from Seet was received within a contractually stipulated seven days (see *Fraser Securities Pte Ltd v Seet Ai Kiang* at [35]). Although the court there upheld the assistant registrar's decision granting summary judgment on the basis of *inter alia* the conclusive evidence clause, it nevertheless seems to me that there was some hint of a possibility that the court might otherwise not have been so quick to do so had the facts indicated that Seet had at least orally objected to the transactions in question within the contractually stipulated seven days (at [35]):

35 [Seet] admitted receiving all the contract notes and *contra* statements which [Fraser] sent her. She did not contest any of the trades nor notify [Fraser] that any of the trades were unauthorised. Clause 21.1 of the Terms and Conditions provided that the contract notes and statements set by [Fraser] in respect of transactions effected in relation to the account "shall be conclusive unless an objection in writing" from the customer was received within seven days from the date of the same. [Seet] had never objected in writing or even orally to these documents, much less within seven days of their issue. The contract notes and statements were therefore binding on her.

[emphasis in underline added]

36 In the present case, the Defendant apparently did orally communicate his objection against the Disputed Investments to the Plaintiff during the Second Meeting. As such, there may therefore be a triable question as to whether such oral objection constitutes a viable defence to the conclusive evidence clause found in clause 29.1 of the OSTA Terms and Conditions.

37 Finally, I will address the Defendant's argument attacking clause 29.1 of the OSTA Terms and Conditions on grounds of unreasonableness and public policy (see [18]-[19] above). In this specific regard, the questions that arise are twofold: whether the legal proposition enunciated in *Jiang Ou v EFG Bank* on conclusive evidence clauses in a banking context similarly applies to conclusive evidence clauses in the securities trading industry, and if so, whether clause 29.1 of the OSTA Terms and Principles is unreasonable and/or contrary to public policy applying *Jiang Ou v EFG Bank* to the present case.

38 By way of brief explication, *Jiang Ou v EFG Bank* stands for the legal proposition that "conclusive evidence clauses which purport to exclude liability for the fraud of banks' employees would [...] stand contrary to public policy considerations and would run foul of the reasonableness test under [the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed)]" (see *Jiang Ou v EFG Bank* at [108]). It must however be appreciated that this legal proposition was enunciated with an important qualification that the reasonableness of conclusive evidence clauses in a *non-commercial context* (ie, where the counterparty to a conclusive evidence clause is either an individual or a non-corporate entity) was an open question to be "revisited when the appropriate occasion arises" (see *Jiang Ou v EFG Bank* at [116]-[117]). In its ultimate analysis, however, the court took the view that in any case it is "plainly unreasonable that a bank should be able to shift the risk of unauthorised transactions by a fraudulent employee (within its own sphere of control) to an *innocent* customer by way of a conclusive evidence clause" (emphasis added) (see *Jiang Ou v EFG Bank* at [118]).

39 On the basis of the judicial observations made by Khoo J in *Kwek Hock Hee v Tat Lee Securities Pte Ltd* (reproduced at [19] above), I am drawn to the view that the legal proposition in *Jiang Ou v EFG Bank* should apply in the securities trading industry as well. The securities trading industry, like the banking industry, is a professional industry principally founded on the precepts of honesty, integrity and reliability that all financial services providers in the industry are assumed and expected to comport with. The integrity of the securities trading system, like the banking system, is therefore

inextricably dependent on public confidence and trust in the system. As such, the integrity of the securities trading system can in theory be seriously undermined if the law were to be such that the public is unable to find any security in the knowledge that financial services providers in the industry can be prevented from employing conclusive evidence clauses to shift the risk of unauthorised transactions made by a fraudulent employee to an innocent customer.

40 It would however be remiss of me not to also point out at this juncture one very important implication of adopting the legal proposition in *Jiang Ou v EFG Bank* in a securities trading industry context. As Khoo J remarked in *Kwek Hock Hee v Tat Lee Securities Pte Ltd*:

In the light of the purpose and object of the legislative and regulatory framework [...] *it seems to me to be quite against public policy to allow member companies of the exchange, by whatever means, to shift the responsibility for any fraud (be it by a direct employee or a remisier) to the investor. I would be surprised if such a device would ever be allowed.* [...] [emphasis in italics and underline added]

41 What this means is that when applying the legal proposition in *Jiang Ou v EFG Bank* in a securities trading industry context, the law will not only have the effect of preventing a securities services provider from shifting the risk of unauthorised transactions made by a fraudulent *direct employee* to an innocent customer by way of a conclusive evidence clause; the law will also have the effect of preventing a securities services provider from shifting the risk of unauthorised transactions made by a fraudulent *remisier* (who is not an employee) to an innocent customer as well.

42 With that, I now consider the application of the legal proposition in *Jiang Ou v EFG Bank* to the present case. To the extent that there is likely to be a dispute as to whether or not HGT (who claims in his affidavit to be "a remisier who works with the [...] Plaintiff" [\[note: 211\]](#)) was at the material time a direct employee of the Plaintiff, such dispute will not *per se* give rise to any triable question(s) under the argument that the legal proposition in *Jiang Ou v EFG Bank* will not have any bite on clause 29.1 of the OSTA Terms and Conditions in the event that HGT is found *not* to be a direct employee of the Plaintiff. As analysed in [39]-[41] above, the legal proposition in *Jiang Ou v EFG Bank* as applied in a securities trading context will cover *both* a case where unauthorised transactions were made by a direct employee and a case where the same were made by a remisier.

43 However, I find that there are nonetheless two key factors which militate against any conclusive finding by this court as to whether the Plaintiff's reliance on clause 29.1 of the OSTA Terms and Principles is or is not unreasonable and/or contrary to public policy. First, factual questions as to whether the Defendant was at all material times an *innocent* customer and whether HGT had acted *fraudulently* (regardless of whether in truth he was at the material time a direct employee of the Plaintiff) are vigorously contested by both parties in the present case (see [11]-[12] above). These are clearly issues of fact which ought to be tried before a judge. Second and perhaps more fundamentally, neither counsel in the present application has made significant legal submissions on whether and if so how the court, in assessing the reasonableness of conclusive evidence clauses, should draw a distinction between a case arising from a *commercial* context and another arising from a *non-commercial* context. In my view, this distinction may actually have some bearing on the outcome of the present dispute since the Defendant is a private individual and not a corporate entity (*cf* Chong J's remarks in *Jiang Ou v EFG Bank* at [116]-[117], referenced at [38] above). Unless and until significant and substantive legal submissions are made in this specific regard, it would be inappropriate for this court to delve into its own legal analysis on this potentially dispositive point at this stage of the proceedings.

44 In sum, I find no cogent reason at the current stage of the proceedings for this court to hold

that clause 29.1 of the OSTA Terms and Conditions precludes a finding that the Defendant “has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence” (see *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21]), or a finding that “there is an issue of question in dispute which ought to be tried or that there ought for some other reason to be a trial” (see O 14 r 3(1) ROC). On the contrary, I find that there are serious questions that need to be tried and addressed before a trial judge in order for the dispute between the parties to be disposed of properly.

Conclusion

45 For the reasons given above, the Plaintiff’s application for summary judgment is therefore dismissed. Accordingly, the Defendant shall have unconditional leave to defend Suit 88 of 2014 in a trial.

46 I will hear parties on the issue of costs.

[\[note: 1\]](#) Plaintiff’s Bundle of Documents Tab 8, p 30.

[\[note: 2\]](#) Statement of Claim (22 January 2014), para 7.

[\[note: 3\]](#) Defence and Counterclaim (27 February 2014), para 7.

[\[note: 4\]](#) Defence and Counterclaim (27 February 2014), para 8.

[\[note: 5\]](#) Defence and Counterclaim (27 February 2014), para 9.

[\[note: 6\]](#) Defendant’s affidavit (7 May 2014), paras 19-21.

[\[note: 7\]](#) Defendant’s affidavit (7 May 2014), para 21.

[\[note: 8\]](#) HGT’s affidavit (23 April 2014), p 8.

[\[note: 9\]](#) LWH’s affidavit (28 May 2014), para 8.

[\[note: 10\]](#) LWH’s affidavit (23 April 2014), para 12.

[\[note: 11\]](#) CMY’s affidavit (28 May 2014), para 5.

[\[note: 12\]](#) Plaintiff’s Bundle of Documents Tab 5, pp 46-62.

[\[note: 13\]](#) Plaintiff’s Bundle of Documents Tab 5, p 63.

[\[note: 14\]](#) Defendant’s Written Submissions, para 25.

[\[note: 15\]](#) Defendant’s Written Submissions, para 18.

[\[note: 16\]](#) LWH’s affidavit (28 May 2014), para 6.

[\[note: 17\]](#) Defendant's Written Submissions, paras 30, 32.

[\[note: 18\]](#) HGT's affidavit (23 April 2014), para 6.

[\[note: 19\]](#) Defendant's Written Submissions, paras 31-35.

[\[note: 20\]](#) LWH's affidavit (28 May 2014), para 6.

[\[note: 21\]](#) HGT's Affidavit (23 April 2014), para 1.

Copyright © Government of Singapore.