# Tiang Ming Sing v Datuk Ambrose Joseph Lee and Others
# [2000] SGHC 95

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| **Case Number** | : Suit 2379/1998 |
| **Decision Date** | : 26 May 2000 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Lai Siu Chiu J |
| **Counsel Name(s)** | : Davinder Singh SC, Hri Kumar & Blossom Hing (Drew & Napier) for the plaintiff; Philip Jeyaretnam & Paul Wong (Helen Yeo & Partners) for the first defendant; Alvin Yeo SC, Sim Bock Eng & Tan E-Fang (Wong Partnership) for the second and third defendants |
| **Parties** | : Tiang Ming Sing — Datuk Ambrose Joseph Lee; Kay Hian Private Limited; Wong Teck Kui |

**JUDGMENT:**

This is a case involving very substantial claims of Malaysian ringgit 57,620,000 and 44,620,000 which was tried over twelve (12) days before me, with no less than nine (9) witnesses being called.

*The facts*

1. Tiang Ming Sing (the plaintiff) is a wealthy businessman from Sarawak; he is the managing-director of Lee Ling Timber Sdn Bhd (Lee Ling), a logging company which owns large timber concessions in Sarawak; he also has other business interests including a timber company in the Solomon Islands and a company in Singapore called Active Timber Agencies (Active Timber) which was set up for the purpose of marketing sawn timber, plywood and other related products for his company in the Solomon Islands. Although he resides in Kuching, the plaintiff has had a residence in Singapore at No. 105, Cairnhill Circle #14-107, Hilltops Apartments (the flat) since 1982-83 which flat served as accommodation for his children when they were studying in Singapore.

2. The first defendant Joseph Lee (Lee) is a businessman residing in Kota Kinabalu, Sabah. Prior to 1993, he practised law in Kota Kinabalu for about 12 years, following his graduation from Preston Polytechnic (now known as University of Lancashire) in England and after being called to the Malaysian Bar in 1982.

3. The second defendants Kay Hian Private Limited (Kay Hian) are a stockbroking company in Singapore while the third defendant Wong Teck Kui (Wong) is a dealer's representative or, as it is more commonly known in the industry, a remisier. Wong has been a remisier with Kay Hian since 1980 and by all accounts is a very successful if not their most successful, remisier. In his written testimony, Wong deposed he has had about 350 clients in his 18 or more years in the industry. By training, Wong is an engineer with a degree in mechanical engineering from the University of London.

4. Wong was introduced to Lee sometime in 1992-93. At a subsequent dinner at which Lee was the host and Wong a guest, Lee introduced Wong to the plaintiff telling the latter Wong was a very successful remisier. According to the plaintiff, the day after his introduction to Wong, both Lee and Wong invited him to tea and suggested that he opened a share trading account with Kay Hian. The plaintiff said that Wong made various representations to him to persuade him to open such an account with Kay Hian. Wong however denied he had sought to impress the plaintiff either with his clientele or with his good connections with banks but he did not mention a tea meeting in his written

testimony. What is not disputed is that on 10 June 1993, the plaintiff opened a trading account with Kay Hian. Wong said the plaintiff's Malaysian lawyer one Basil Chai accompanied the plaintiff to Kay Hian's office and vetted the forms before the plaintiff signed them. A week earlier (on 3 June 1993), Lee opened a trading account with Kay Hian.

5. The plaintiff alleged that in accordance with his promise to procure banking facilities for the plaintiff if the plaintiff opened a trading account with Kay Hian, Wong arranged credit facilities for the plaintiff with Commerzbank (South East Asia) Limited (Commerzbank) shortly thereafter. Wong also arranged for the plaintiff to open accounts with United Overseas Bank (UOB) and Standard Chartered Bank (Standard Chartered); this was denied by Wong. The plaintiff appointed Wong as his attorney in respect of the operation of his accounts with all three (3) banks and said he left it to Wong to manage the accounts. The plaintiff already had an account with Banque National De Paris (BNP) at the material time.

6. The plaintiff claimed that thereafter, Wong handled all his trades transacted on the Stock Exchange of Singapore (SES); Wong also gave advice on and recommended, stocks to him. The plaintiff was pleased with Wong's recommendations as they invariably resulted in his making substantial profits. Consequently, the plaintiff began to rely on Wong's advice. He said Wong was very knowledgeable about Malaysian shares and his sources/information were very reliable. Over the years, the plaintiff estimated he traded in shares worth approximately Malaysian ringgit (RM) 150 million through Wong. The plaintiff said he and Wong also became firm friends who met regularly for social functions; this was however denied by Wong who said he had only invited the plaintiff once to his home for a barbecue party and their relationship did not go beyond that of remisier and client; Wong's evidence in this regard was corroborated by his wife Pauline Cheong (Pauline). However, whenever the plaintiff was in Singapore, Wong said he would 'chauffeur' the plaintiff to wherever the latter wanted to go.

7. The plaintiff further alleged that from time to time, Wong encouraged him to purchase shares in North Borneo Timber Bhd, (NBT) an East Malaysian company which, at the material time, was quoted on both the Kuala Lumpur Stock Exchange (KLSE) and the SES (as a CLOB counter). Wong allegedly assured the plaintiff that the price of NBT would rise within a short period of time. The plaintiff followed Wong's advice and indeed he was rewarded by a rise in the price with resultant profits.

8. The plaintiff said that in 1995-96, he was told by Wong that Lee was looking to sell a parcel of NBT shares at RM10-12 each but the price would rise to RM15-17 within 1-2 months; Wong recommended the plaintiff to buy over the shares. The plaintiff took his recommendation, bought the NBT shares from Lee and predictably sold the lot off at a profit within 1-2 months.

The first agreement

9. One morning in early October 1997, Wong picked the plaintiff up from the flat after which Wong picked Lee up from the Marina Mandarin Hotel before all three proceeded to a Rangoon Road venue for breakfast. As the plaintiff and Wong disagreed on how and why that meeting came about, I shall set out their differing versions at a later stage. Suffice it to say for present purposes, that by the time the breakfast was over, a deal had been struck between Lee and the plaintiff (the first agreement) as detailed in the following paragraphs.

10. Lee offered to the plaintiff a parcel of 1 million NBT shares at RM30 which Lee undertook to re-purchase at RM40 on or before 7 January 1998. At that time the share was trading at about RM26.

The plaintiff who claimed to be unfamiliar with such share buy-back arrangements said he was concerned and sought Wong's advice; the latter purportedly assured him that Lee's offer was a 'Put and Call' option which in effect was a guaranteed buy-back with no risk to the plaintiff. Apparently, Wong said he had previously put together similar transactions for Lee and he undertook to arrange the necessary financing (in this case amounting to RM30m) for the plaintiff. Wong explained to the plaintiff that Lee needed to support the price of NBT shares as Lee held a controlling interest in the company. Re-assured by Wong, the plaintiff (in his written testimony) said he agreed to and accepted Lee's proposal.

11. A few days later, the plaintiff received a fax from Lee dated 7 October 1997 (see 1AB69) to evidence the agreement they had reached on the Put and Call Option As the fax (henceforth referred to as the Option) is central to the dispute between the parties, it is necessary to set out its text in full:-

> As set forth below this confirms the following Put and Call Option Confirmation. Please confirm this agreement by executing at the below [sic] at the appropriate section:
>
> | | |
> |---|---|
> | Buyer: | TIANG MING SING<br><br>(IC No. K130192)<br><br>Lot 172, Section 63,<br>Padungan Road,<br>93100 Kuching, Sarawak |
> | Seller: | DATUK JOSEPH LEE |
> | Trade date: | 7 October 1997 |
> | Underlying stock: | NORTH BORNEO TIMBERS BERHAD |
> | Option style: | Put and Call |
> | Underlying shares: | 1,000,000 |
> | Strike price: | RM30.00 |
> | Put Option Price: | RM40.00 |
> | Exercise convention: | Automatic exercise applicable on Expiration Date |
> | Settlement Date: | As per normal KLSE rules |
> | Expiration Date: | 3 months from date of contract commencing 7 October 1997 to 7 January 1998 |
>
> Signed and agreed on this day……1997
>
> By: (illegible signature) By:…….

The illegible signature was presumably Lee's.

12. The plaintiff did not know that before it was faxed to him, Lee had faxed the Option to Wong requesting Wong to obtain the plaintiff's signature to the document. Wong (in his written testimony) said he told Lee to liaise directly with, the plaintiff who had returned to Kuching. However, Wong on

his part also faxed the Option to the plaintiff. On or about 18 May 1998 (before the plaintiff commenced these proceedings), the plaintiff and his Sarawak lawyer Francis Wee visited Wong's office and requested Wong to confirm the plaintiff's and Lee's signatures on the Option.

13. Between 7 October 1997 and 2 December 1997, the plaintiff said he arranged for payments/remittances totalling RM11m to Kay Hian's account with UOB. These were requested by Wong as payments for the NBT shares under the first agreement. He did not know how Wong utilised the monies nor did Wong explain to him.

14. The plaintiff discovered very much later (after he had commenced these proceedings) that Kay Hian purchased on his behalf from Kim Eng Securities Pte Ltd (Kim Eng) 1 million NBT shares on 10 October 1997; Wong arranged for the payment as follows:

> (i) the cost of 500,000 shares were debited to the plaintiff's account with Commerzbank;
>
> (ii) the cost of 400,000 shares were debited to the plaintiff's UOB account;
>
> (iii) the cost of 100,000 shares were debited to the plaintiff's account with Kay Hian of which 60,000 shares were eventually transferred out and debited to the plaintiff's account with the Republic National Bank of New York (RNBNY).

As far as the plaintiff was concerned, Kay Hian initially financed the last block of 100,000 shares and later paid for 40,000 of the same. This was denied by Kay Hian who claimed that the shares were financed partly (60,000) by RNBNY and partly by UOB.

15. Subsequently, the plaintiff also discovered that the 500,000 shares put into his Commerzbank account were actually credited to the account of Wong's wife Pauline with the same bank and that she was debited RM15,095,051 for the shares. The plaintiff claimed he had no dealings with Pauline (whom he had not even met) and he did not know why she paid for his shares.

16. The plaintiff subsequently sold 590,000 of the 1 million NBT shares (allegedly on Wong's advice) for which he netted RM 23,052,885.20 with an average price of RM39.073 per share, thereby giving him a profit of RM5,352,885.20 (RM23,052,885.20 … RM17,700,000 @ RM30 x 590,000).

17. Wong had a different version (which I shall set out later) of how the first agreement came about and how the plaintiff paid for the shares. He also denied he had recommended the sale of 590,000 NBT shares; he had merely carried out the plaintiff's instructions to sell those shares.

The second agreement

18. According to the plaintiff, Wong telephoned him on or about 17 November 1997 on behalf of Lee saying the latter needed immediate funding for which reason Lee was prepared to offer the plaintiff another 500,000 NBT shares at RM45 per share or a total consideration of RM22.5m; the other terms of the offer were:

> a. Lee would procure a buyer for the shares or re-purchase them himself from the plaintiff on or before 31 December 1997 at RM51 per share for a total consideration of RM25.5m;

b. in the event Lee was able to procure a buyer at a price above RM51 per share, Lee would pay the plaintiff an additional sum equivalent to 40% of the difference between RM51 and the higher price;

c. to allay the plaintiff's concerns, Lee would transfer an additional 500,000 shares to the plaintiff as a 'performance bond' to secure Lee's promise to re-purchase the 500,000 shares.

Apparently Wong told the plaintiff Lee needed funds in order to support the price of Sugar Bun Bhd (another company controlled by Lee) which was then about to be listed on the KLSE.

19. Wong complied with the plaintiff's instructions and 500,000 NBT shares were bought for the plaintiff's account with Commerzbank at the price of RM45 through Kim Eng (whose actual role only emerged at the trial). Wong did not concern himself with the other 500,000 shares since there was no consideration involved. I should point out at this juncture that the shares under both agreements were transacted as 'off market' or 'married' deals which, according to Kay Hian's manager (of its margin department) Vincent Goh (2DW1) meant transactions which were made between broker and broker, and not through the open market of the SES.

Subsequent events

20. Wong was away in Europe when the regional markets in Asia underwent a turmoil in December 1997. He was therefore happily unaware, unlike the plaintiff, that the price of NBT shares fell drastically, when its suspension was lifted after 23 December 1997. By the close of trading on 31 December 1997, the price of NBT shares had fallen to RM4.60 per share from a high of RM55 on or about 7 November 1997 (according to information extracted from Reuters), prior to its suspension at end November 1997.

21. The plaintiff said he did not receive any notice from Lee of the latter's intention to redeem the 1.5 million NBT shares on 31 December 1997. Accordingly, he requested his lawyer Francis Wee (Wee) to ascertain from Wong the status of the re-purchase. Wee was assured by Wong (who denied it) that Lee was attempting to get fund managers to raise funds so that he could use the monies to prop up the price of NBT shares. However, nothing happened and the plaintiff's anxiety increased as he was already in default with Kay Hian and on his accounts with his various banks. Both the plaintiff and Wee pressed Wong repeatedly on the telephone stressing the importance of getting Lee to abide by the buy-back arrangement. The plaintiff claimed Wong assured him that he (Wong) would get Lee to regularise the plaintiff's accounts with Kay Hian. As Wong was ultimately responsible for any outstanding sums on the plaintiff's account with Kay Hian, the plaintiff thought that Wong would have the incentive to make the necessary arrangements with Lee to resolve the plaintiff's delinquent accounts not only with Kay Hian but also with the banks. Wong kept his word as the plaintiff received a copy of Wong's fax dated 31 December 1997 to Lee requesting Lee to remit RM1.2m to Kay Hian's Kuala Lumpur account in payment of the plaintiff's contra losses. Further, Wong forwarded to the plaintiff a copy of Lee's letter dated 3 January 1998 to Kay Hian wherein Lee undertook to advance payment for the plaintiff's contra losses on or before 14 January 1998.

22. After Wong's return to Singapore in early January 1998, the plaintiff asked to and did meet, him. At the Shangri-La Hotel lounge, the plaintiff (who was with Wee) accused Wong of manipulating and trading on his bank accounts without the plaintiff's knowledge … he said he wanted Wong to be arrested by the Singapore authorities. Wong was shocked … the plaintiff had made profits as well as

losses since he commenced trading with Kay Hian and had never complained about Wong's conduct. Wong reminded the plaintiff that he merely followed the plaintiff's instructions in whatever trades which were carried out. The plaintiff then handed Wong a typed statement prepared by Wee which he wanted Wong to sign. Wong refused as the statement implied that Wong was collaborating with Lee to cheat the plaintiff by using the plaintiff's account to trade in NBT shares. The plaintiff told Wong he would not pursue the matter of the two (2) agreements with Wong if Wong signed the statement; Wong still refused.

23. In an attempt to persuade Wong to sign, Wee amended the statement, removing those portions which related to Wong. Wong however was still reluctant to sign whereupon the plaintiff broke down, said he was in serious financial trouble, the matter was actually between the plaintiff and Lee but, the plaintiff needed Wong's assistance to recover the debt owed by Lee and vowed his entire family would die should he get Wong into trouble. Wong said the plaintiff applied pressure on him for several hours until eventually Wong caved in and signed the revised statement. Needless to say, when he was in the witness stand, the plaintiff denied he applied any pressure on Wong. Wong was given a copy of the revised statement he signed (see 1AB349-351) but not the original statement Wee had prepared.

24. After signing the revised statement, Wong regretted his decision. He consulted his friend and solicitor Bernard Doray (Doray) of M/s Bernard Rada & Lee (BRL) who then wrote a lengthy letter to Wee's firm (Si & Wee) on 11 February 1998 referring to various paragraphs of the revised statement and giving Wong's comments on each and every one. Surprisingly, two (2) days later, on 13 February 1998, before they had even received a response to their earlier letter, BRL wrote again to Si & Wee to say:

> We refer to our letter of 11.2.1998. We have been advised by our client to withdraw paragraph 4 of our said letter.

On the same day, BRL wrote to Wong separately as follows:

> We refer to our teleconversation yesterday afternoon (12.2.1998) and our meeting this morning (13.2.1998).
>
> We write to record that Tiang Ming Sing (TMS) has threatened to report you to the Singapore authorities and put you into trouble if you do not withdraw paragraph 4 of the letter dated 11.2.1998 to M/s Si &Wee.
>
> We note your instructions to withdraw the said paragraph in order to avoid unnecessary trouble from TMS. A copy of our letter of even date to M/s Si & Wee is enclosed herewith for your information.

Paragraph 4 of BRL's letter dated 11 February 1998 reads:

> The other aspect of the statement is that our client seems to have been compelled to sign a statement notwithstanding his request that he take independent legal advice and further at the emotional outbursts and pressure of your client, to assist him in embellishing his case against one Datuk Ambrose Joseph Lee.

25. In his affidavit evidence (para 145), Wong explained his volte face … the plaintiff had called him on 12 February 1998 to say that Wee was furious when the latter received BRL's letter dated 11

February 1998; the plaintiff then threatened that if Wong did not withdraw para 4 (which stated that Wong did not sign the revised statement willingly), the plaintiff would report him to the Singapore authorities; this allegation was however denied by the plaintiff when he testified.

The visit to Kota Kinabalu

26. The plaintiff was unhappy with Lee's letter to Kay Hian dated 3 January 1998 as it described Lee's intended payment to Kay Hian of RM1.2m as an advance to him. Accordingly, on 6 January 1998, the plaintiff (accompanied by Wee) visited Lee at Kota Kinabalu. Wong and Wee were present when Lee assured the plaintiff that he would try to raise funds from American fund managers. At a lunch hosted by Lee, the plaintiff said he was introduced to a remisier from Ipoh known as Mr Chiu who also told the plaintiff he was trying to arrange for funds. The plaintiff however wanted a more concrete re-payment proposal for the RM65.5m which Lee owed to him under both agreements. He therefore handed to Lee an undated payment schedule (the payment schedule) which had been drafted by Wee to which Lee indicated he would respond by 12 January 1998. Under the payment schedule, Lee was required to pay Kay Hian RM1.2m on the plaintiff's behalf on or before 14 January 1998 followed by payment of RM3m to UOB on or before 15 January 1998.

27. On 8 January 1998, Wee reminded Lee of the deadline. As Lee did not respond by 12 January 1998, Wee wrote to him again on 12 January 1998. On the same day UOB made a demand on the plaintiff for S$3.5m (equivalent to RM6m) to regularise his account. The plaintiff in turn faxed UOB's demand to Lee. There was no response from Lee to either Wee or the plaintiff.

28. Wong also wrote to Lee on the plaintiff's behalf to request payment; in a fax dated 14 January 1998 he requested Lee to transfer 500,000 Sugar Bun shares to the plaintiff's Commerzbank account. On 23 January 1998, Wong received and showed the plaintiff, a fax from Lee stating Lee would transfer RM2m worth of Sugar Bun shares to the plaintiff's Kay Hian account on 27 January 1998, which transfer however did not materialise. The plaintiff received further demands from UOB and Commerzbank and also from BNP in February 1998. UOB eventually sued the plaintiff and his wife (Ha Ai Ling) after their solicitors' letter of demand dated 16 February 1998 produced no payment, although the action was eventually discontinued on 27 July 1998 (see 1AB275). The plaintiff showed the said banks' demands to Wong and inquired why Lee had not paid, prompting Wong to send a fax to Lee on 27 February 1998. Lee replied on the same fax as follows:

> I always have him in mind but he should not lie his way and try to get us through improper means. We are not running away from our obligations.

When he took the witness stand, Lee clarified that by the word '*obligations*', he meant 'moral' obligations.

29. On the eve of Chinese New Year, Wong told Wee that Lee had threatened to lodge a police report against the plaintiff for extortion. As the allegation was untrue, the plaintiff said that on Wee's advice, he himself lodged a police report in Kuching on 6 February 1998. Cross-examined, the plaintiff denied he lodged the police report to put pressure on Lee to settle his claim. Lee in his written testimony deposed that he gave a statement to the police on 2 March 1998 (1AB212) relating to the plaintiff's complaint in his police report that Lee had cheated him.

30. Lee did not at any time honour his 'moral obligations' to assist the plaintiff, even up to late September 1998, when Wong called him to say he (Wong) had received a demand from the plaintiff'

lawyers. Lee then explained to Wong that the plaintiff's claim was without merit as Lee had (in November 1997) agreed to transfer to the plaintiff 500,000 NBT shares free of charge and sold him another 500,000 NBT shares at RM45 a share, to release Lee from his obligations under the first agreement to buy back the 1 million NBT shares from the plaintiff.

31. The plaintiff's solicitors sent letters (3) of demand dated 25 September 1998 to all three (3) defendants giving each of them seven (7) days in which to admit liability for their client's claim failing which they gave notice they would commence proceedings. Through their respective solicitors, the defendants denied liability.

The pleadings

32. Consequently, on 30 December 1998, the plaintiff commenced these proceedings. In the (amended) statement of claim against Lee, the plaintiff alleged that:-

> a. the transactions under the first and second agreements were recommended to the plaintiff by Wong who acted for himself and on behalf of Lee;
>
> b. Wong made various representations to the plaintiff for himself and on behalf of Lee as Lee's remisier and broker, which induced the plaintiff to accept Lee's proposals under both agreements;
>
> c. Wong owed a duty to but failed to inform, the plaintiff of Lee's financial difficulties and or precarious financial position.

33. The plaintiff raised many more allegations against Wong in the statement of claim including the following:-

> a. Wong persuaded the plaintiff to open a trading account with Kay Hian by stating that he (Wong) had a very wealthy and influential clientele which included Datuk Joseph Chong Chek Ah and Joshua Lim Kuok Hua from East Malaysia;
>
> b. Wong represented to the plaintiff he was well connected with banks in Singapore and could procure bank financing for his clients who had trading accounts with Kay Hian;
>
> c. the plaintiff was induced by Wong's representations to open a trading account with Kay Hian;
>
> d. Wong and the plaintiff established a close relationship such that Wong assumed the role of a fiduciary to the plaintiff who relied heavily and solely on Wong for investment advice for approximately RM150m worth of shares that the plaintiff traded in, between 1992-3 and 1995;
>
> e. Wong undertook to and did arrange for the plaintiff, to obtain facilities with various banks including Commerzbank, UOB and Standard Chartered Bank for which the plaintiff appointed Wong as his attorney;
>
> f. as a fiduciary, Wong's duties to the plaintiff included the duty -

(i) to make full and frank disclosure of any risks in securities transactions before making any recommendation;

(ii) to act bona fide in the plaintiff's best interests;

(iii) to protect the plaintiff's interests;

(iv) not to put himself in a position where his interests and or those of Kay Hian conflicted with the interests of the plaintiff;

(v) to account for any loss suffered by the plaintiff caused by a breach of the fiduciary duty;

g. as a result of Wong's breach of his fiduciary duties/his negligence (inter alia) in failing to advise the plaintiff of, the true nature and effect of a Put and Call option, Lee's creditworthiness and the consequences if Lee defaulted on the agreements, the plaintiff suffered losses totalling RM57,620,000 when Lee failed to re-purchase the shares under the first and second agreements.

34. As against Kay Hian, the plaintiff pleaded that Wong was their agent and Wong had actual or implied or apparent authority, to act on Kay Hian's behalf. In the alternative Kay Hian ratified Wong's authority by financing part of the NBT shares under the first agreement. The plaintiff alleged that Kay Hian were under a duty to exercise skill, care and diligence and to act in good faith in his interests. If it was held that the first and or second agreements are unenforceable as being moneylending transactions, the plaintiff alleged that Kay Hian failed to exercise the necessary skill, care and diligence and failed to act in good faith in the plaintiff's interests by not advising or ensuring that Wong advised, the plaintiff of such risks.

35. The plaintiff further alleged that Kay Hian was aware of the plaintiff's long-standing and close relationship with Wong and that he regarded Wong as a friend and investment advisor in whom the plaintiff reposed complete trust and confidence on any issue relating to the sale or purchase of stocks and shares. Consequently, Kay Hian owed a duty of care to him to ensure inter alia that, it established and implemented a system of checks and controls to assess the performance and or to supervise Wong in his dealings with the plaintiff and that, Wong complied with the system.

36. The plaintiff pleaded that Kay Hian breached their duty of care to him and caused him to suffer loss in the sum of RM57,620,000 which breakdown is as follows:-

| | | RM |
|---|---|---|
| (i) | *under the first agreement* | |
| (a) | the re-purchase price of RM40 per share for 1m NBT shares | 40,000,000 |
| (b) | less: market value of shares on 7.1.98 @ RM3.28 | 3,280,000 |
| (c) | net loss: | 36,720,000 |
| (ii) | *under the second agreement* | |
| (d) | the re-purchase price of RM51 per share for 500,000 shares | 25,500,000 |
| (e) | less: market value of shares on 31.12.98 @ 4.60 | 2,300,000 |
| (f) | less market value of shares under the performance bond | 2,300,000 |

(g) loss: 20,900,000

Total loss under both agreements (c) + (g):- 36,720,000 + 20,900,000 = RM57,620,000

37. In the alternative the plaintiff pleaded that he suffered losses in the amount of RM44,620,000 being the net purchase price of the NBT shares (RM52.5m less RM 3,280,000) and RM2,300,000 being the market value of the said shares at their respective re-purchase dates. The plaintiff claimed damages against Lee in the amount of RM57,620,000 and from Kay Hian and Wong in the amount of RM44,620,000, alternatively for damages to be assessed against all three (3) defendants.

38. In the (amended) defence filed for him, apart from admitting he had introduced the plaintiff to Wong sometime in 1992-1993 and he and Wong met the plaintiff on or about 7 October 1997, Lee disclaimed all knowledge of the relationship between the plaintiff and Wong/Kay Hian and denied that he (Lee) was a party to or responsible for any representations made by Wong.

39. Lee admitted to the first agreement which he contended in truth and substance was a loan of RM30m by the plaintiff to him repayable at RM40m on or before 7 January 1998, which loan was secured by 1 million NBT shares (the security). Lee alleged that without his knowledge and authority, the plaintiff disposed of or part of, the security and would have been unable to return the same to Lee. Accordingly, Lee contended, the plaintiff was not entitled to judgment under the first agreement.

40. As for the second agreement, Lee averred that in November 1997, when the price of NBT was RM50 per share, the plaintiff telephoned him to request for more NBT shares. Lee acceded to the request and agreed to sell to the plaintiff 500,000 shares at RM45 per share as well as give him another 500,000 free shares. Lee denied that the second agreement was the subject of any Put and Call option or buy-back arrangement. Further, the second agreement was a release and discharge of Lee's buy-back obligation under the first agreement.

41. In the alternative, if there was a second agreement (which he denied) Lee alleged it was also in truth and substance a loan of RM22.5m to him repayable to the plaintiff on or before 31 December 1997 at RM25.5m for which the security was again 1 million NBT shares. Unknown to and without Lee's authority, the plaintiff disposed of or part of, the security and was therefore unable to return the security to Lee. In the premises, the plaintiff was not entitled to judgement under the second agreement.

42. Lee raised the defence of moneylending for both agreements and alleged that the plaintiff was an unlicensed moneylender residing and carrying on the business of moneylending in Singapore within the meaning of s 5 of the Moneylenders Act Cap 188.

43. Kay Hian and Wong filed a joint (amended) defence wherein they admitted that the plaintiff opened a trading account with Kay Hian which account was very active (in terms of value and volume) until end 1997 and, Wong was his remisier but, they denied that they had a fiduciary relationship with the plaintiff as alleged or, that they acted as Lee's agents in relation to the first and second agreements or, that they procured the plaintiff to enter into the same. Wong denied that he had other than a business relationship with the plaintiff, that he had acted as the plaintiff's advisor generally as well as for the first and second agreements and that he made representations to the plaintiff as alleged or at all. Wong admitted he did introduce the plaintiff to bank officers of Commerzbank, Standard Chartered and UOB but contended he dealt with the plaintiff's bankers only as and when, instructed by the plaintiff.

44. Wong averred that the plaintiff was a skilled and experienced player of shares on both the SES and KLSE and was familiar with transactions like the first and second agreements. The plaintiff had always exercised his own judgment in respect of trades done on his account. Wong admitted there was a meeting between the plaintiff and Lee on 7 October 1997 at which the first agreement was made. He was aware of an oral agreement being made between the plaintiff and Lee on or about 17 November 1997 for the second agreement but he was not told the terms. He played no part in either agreement, did not recommend the agreements to the plaintiff but merely followed the plaintiff's instructions to purchase, 1 million NBT shares from Lee under the first agreement (at RM30 per share) and 500,000 NBT shares under the second agreement (at RM45 per share) together with taking delivery of another 500,000 shares on the plaintiff's behalf without payment.

45. Wong denied he had breached any duty of care/fiduciary duty to the plaintiff. He further averred that by an oral agreement made in or about January 1998 between himself and the plaintiff, the plaintiff agreed to forgo his claim if any, and or to forbear any action, against Wong in respect of the first and second agreements in consideration of Wong signing a written statement prepared by the plaintiff. Pursuant to the agreement, Wong did sign a written statement and the plaintiff accepted it in satisfaction and discharge of his cause of action, if any.

46. Kay Hian and Wong denied that the plaintiff suffered the alleged or any loss and damage and that his loss was occasioned by their alleged negligence or breach of, duty of care or fiduciary duties. They pointed out that the plaintiff sold 590,000 of the 1 million NBT shares under the first agreement in October-November 1997 for RM23,052,885.20 through Wong and had also benefited from the transfer to him by Lee of 500,000 shares without consideration under the second agreement, which transfer they subsequently discovered, was in full and final settlement of the plaintiff's claim under both agreements. Kay Hian counterclaimed the balance sum of RM139,659.54 for trading losses incurred by the plaintiff on his trading account.

47. Before I go into the evidence, I should point out that before commencement of trial, counsel for the plaintiff administered Interrogatories to Lee and Wong and similarly counsel for Kay Hian administered Interrogatories to the plaintiff. I shall return to some of the Answers filed for these Interrogatories later.

*The evidence*

*(i) the plaintiff's case*

48. I have in the above narrative (paras 4 to 29) set out in the main the plaintiff's version of events. I shall now focus on his testimony adduced under cross-examination. Questioned by counsel for Lee, the plaintiff revealed he had bought from Lee 200,000 NBT shares on or about 30 June 1997 at RM37 per share which (according to Lee) was at a RM2 discount from the market price. The plaintiff said he could not recall the price let alone the discount but denied he was given the discount of RM2 per share because Lee had expected him to hold onto the shares for long term; he admitted however to making a profit when he sold the shares through Wong. He had similarly bought another parcel (200,000) of NBT shares from Lee in early August 1997 although he could not remember if the price was RM36 per share or whether it was at a discount of RM1 to the market price. Again he had sold the shares shortly thereafter at a profit. Besides buying from Lee, the plaintiff said he also bought 20,000-30,000 NBT shares 'just for fun' (N/E10) through brokers other than Kay Hian/Wong, both before and after the two agreements. The plaintiff said he knew that Lee was doing well at the time as Lee had several listed companies in Malaysia and 'he was really good at share speculation' (N/E14).

49. The plaintiff acknowledged he would have made 33*f* % profit within 3 months on the 1 million shares he bought under the first agreement. His version was that it was Lee who offered the shares to him at RM30 against the then market price of RM25-26; he denied he approached Lee for an opportunity to make back substantial losses (RM10m) he had incurred on the stock market. The plaintiff said he refused Lee's initial offer as he felt the gross profit he could make (RM5) was not much, given he had to pay bank interest and brokerage (1%); Lee finally agreed to the price of RM40 by way of the Option; the plaintiff denied he had asked Lee for RM40 as the buy-back price instead of RM35. He further denied he had spoken to Lee over the telephone before their meeting on 7 October 1997 to initiate the first agreement and that he had also called Lee (on 18 November 1997) to initiate the second agreement. In fact he had told Wong he had insufficient funds to pay Lee for the first 1 million shares whereupon Wong said he would make the necessary arrangements; Wong had also guaranteed that Lee would buy back, otherwise the plaintiff would not have agreed to the transaction.

50. After his return to Kuching in October 1997, the plaintiff said he received via fax the Option from Wong which he signed and faxed back to Wong either on the same day or 1-2 days later. Not long after, the plaintiff came to Singapore and Wong then handed the original Option to him to sign which he did but, he did not take the original copy. Shown the copy of the Option in court (at 1AB69), the plaintiff confirmed that the date 10 October 1997 was the date he received the document from Wong but, he could not recall why there was a second date (27 December 1997) printed thereon nor whether he had telephoned Wong around that date. However, the plaintiff denied he faxed the Option to Wong only on 27 December 1997 after the price of NBT collapsed, when it was relisted on 23 December 1997.

51. Although the plaintiff denied counsel's suggestion that he had allowed Lee to use his investment account with Kay Hian temporarily in order to enable Lee to obtain financing, the plaintiff agreed that in the payment schedule (1AB344) which he handed to Lee at Kota Kinabalu on 7 January 1998, he had referred to Lee's *'temporary use of his investment account'*. However, claiming to be illiterate in English, the plaintiff said the letter was drafted by Wee which he signed without asking for a translation. The plaintiff agreed he had requested Lee to redeem 2 million NBT shares at RM65.5m even though he only had 1.6 million shares at the material time. He had sold 590,000 shares under the first agreement (some at RM51.90 and RM52.49) as recommended by Wong, who told him he could buy them back later at a lower price for return to Lee in January 1998; he would wait until the last minute to buy back (N/E 25). He denied the second agreement was a release of Lee from the buy-back obligation under the first agreement, in consideration of his receiving 500,000 free shares and that Lee had so informed him on 7 January 1998.

52. Although Wong had asked Lee on 31 December 1997 to pay RM1.2m for the losses incurred on the 30,000 NBT shares the plaintiff bought from the market (in November 1997), the plaintiff agreed he did not ask Lee to redeem the 1 million shares under the second agreement; he only told Wong he wanted his money back. In fact, the first time the plaintiff requested Lee to redeem the 1 million shares under the second agreement was by the payment schedule where he put the redemption date as 7 January 1998.

53. Cross-examined, it transpired that Lee was introduced to the plaintiff back in 1992 by the general manager (Joseph Ling) of Bank Utama. The plaintiff agreed he had then extended a loan of RM5m to Lee by buying 5 million CASH shares from the latter; he denied his loan was secured by 15 million CASH shares. He further denied he initially refused to allow Lee to redeem the 15 million CASH shares after its market price rose but that he eventually agreed (reluctantly) to allow Lee to redeem 10 million shares at RM5.7m.

54. Questioning by counsel for Kay Hian/Wong revealed that the plaintiff did not trade exclusively through Wong … he had dealt with another of Kay Hian's remisiers (Mary Ann Yeap) and had also traded through other stock-brokers in Johor Baru, Sarawak and Penang. Although his other remisiers also gave him advice, the plaintiff claimed he largely relied on Wong who carried out the bulk of his trades. It bears noting at this juncture that in his written testimony (both affidavit and supplementary affidavit), the plaintiff made no mention of these three (3) factors which were only adduced from him under cross-examination:…

> (i) that he had insufficient funds to pay for the 1 million shares under the first agreement;
>
> (ii) he had assured Wong he would send money in 2 weeks' time (from the time the agreement was concluded) to pay for the shares;
>
> (iii) he had imposed a condition that Wong was to make all the necessary (financial) arrangements for him to pick up the shares.

55. Before I go on to consider the defendants' evidence, I will touch on the testimony which Wee gave on the plaintiff's behalf. Wee's evidence centred on three (3) aspects:-

> (i) the statement signed by Wong;
>
> (ii) his visit to Lee at Kota Kinabalu on 7 January 1998, and
>
> (iii) the letter dated 18 May 1998 (at 1AB230) which he/the plaintiff requested Wong to sign.

56. Wee (called to the Borneo Bar in May 1987), who is a partner of the firm of Si & Wee in Kuching explained that the plaintiff requested him (in December 1997) to prepare a statement for Wong to sign because there was nothing in writing on the second agreement. Accordingly, he prepared the statement in Kuching and brought it with him to Singapore on 31 December 1997 (initially he had thought the trip was on 24 December 1997 because of the festive atmosphere at the Shangri-La Hotel); Wong and the plaintiff met him at the airport (this was denied by Wong). Wee testified that the statement which Wong signed incorporated amendments Wong had requested. Wong's statement was then re-typed at the hotel's Business Centre for his signature; no pressure was exerted on him to sign. For that reason, when Wee received the letter of BRL dated 11 February 1998 alleging that Wong had signed the statement under duress, he telephoned Doray to express his unhappiness; Doray indicated he would take Wong's instructions after which he received BRL's second letter dated 13 February 1998 retracting the allegation.

57. As for the plaintiff's own draft statement (see 4AB15-17), Wee said he made the amendments himself after taking into account Wong's comments, so as to make the plaintiff's statement consistent with Wong's; in any event the plaintiff was present and did not object to Wong's request for amendments to be made. As the plaintiff was in a hurry to go to Kuala Lumpur that day, there was no time to have his statement re-typed at the Business Centre for his signature. Instead, Wee brought the plaintiff's original statement, with his hand-written amendments, to his relative's house and arranged for it to be re-typed there. He handed a copy of the re-typed but unsigned statement of the plaintiff to Wong the following day and returned to Kuching. The plaintiff however did not and was unwilling to, sign the re-typed statement because the amended statement effectively meant there was no responsibility on the part of Wong for the second agreement. Questioned on why he was able to produce the plaintiff's statement containing his amendments made at Wong's request but not

Wong's (original) statement containing Wong's amendments, Wee explained it was because Wong requested for the original statement to be destroyed.

58. Wee's version of the meeting with Lee on 7 January 1998 accorded with the plaintiff's version. He said it was at the meeting that the plaintiff handed to Lee the (undated) payment schedule which had been vetted by Wong after Wee drafted it; Lee indicated he would respond to the terms therein by 12 January 1998. At no time did Wee hear Lee say that he was no longer liable to the plaintiff because the second agreement had discharged Lee's liabilities under the first. Cross-examined, Wee agreed he made no reference to the Option in the payment schedule; he only became aware of the Option's existence in December 1997 when the plaintiff explained his need for a statement from Wong; he understood from the plaintiff that Wong was involved in the drafting of the Option. Wee said he had no knowledge when the plaintiff faxed the Option back to Wong or Lee. Questioned by the court (N/E 193), Wee could not explain the presence of two (2) different copies of the Option in his file especially as he was not given a copy when the plaintiff showed the document to him in December 1997. Neither could Wee remember whether he had obtained one or both file copies of the Option from Wong on 18 May 1998. When his attention was drawn to the fax transmission date (27 December 1997) on one (1AB69) of the copies of the Option, Wee said it did not cross his mind. I shall revert to the differences between the two (2) copies of the Option and its significance later.

59. In his written testimony, Wee did not mention the visit to Wong's office to obtain the latter's signature to the letter dated 18 May 1998 (see para 12 above) which Wee drafted and which was then typed out by Wong's staff. Cross-examined, Wee testified that the purpose was to obtain Wong's verification of Lee's signature on the Option to confirm that the transaction was completed in Singapore, in order to found jurisdiction against all the defendants (notwithstanding that Wong and Kay Hian are Singapore residents). Questioned further, Wee admitted his explanation was not strictly correct because of para 2 of that letter (which text I shall set out later). However, he denied the letter's real purpose was to generate evidence to conceal the date when the plaintiff actually faxed back the Option to Wong.

60. Wee's written testimony also did not touch on the loan deed (dated 12 December 1997) made between the plaintiff and one Loh Tung Sing which he had drafted; the deed evidenced a loan of RM2,226,000 from the plaintiff to Loh Tung Sing secured on 159,000 shares in a public company known as Timberwell Berhad. As he was told by the plaintiff to do so, Wee said he took his instructions from Mathew Lau, the plaintiff's remisier with Sarawak Securities, on its preparation; Matthew Lau provided him with particulars of the loan and its terms but not the reasons therefor. Hence he was unaware of the true nature of the shares involved nor whatever deals they were attached to.

*(ii) Lee's case*

61. Lee's first business dealing with the plaintiff was in November 1992 when he wanted to take over a public company Construction and Supplies House Berhad (CASH). He sought financing from Bank Utama who could not lend to him but introduced him to the plaintiff. The plaintiff agreed to lend Lee RM5m secured by 15 million CASH shares which were registered in the names of four (4) companies. The shares were delivered by Lee to the plaintiff's lawyers Michael Ong Advocates. However when the price of CASH shares rose, the plaintiff wanted to keep the shares. It was with great reluctance that the plaintiff eventually returned 10 million of the 15 million CASH shares to Lee in exchange for payment of RM5.7m.

62. Lee said he not only introduced the plaintiff to Wong in 1993 but also to other remisiers as well. After 1993, the plaintiff wanted to purchase more CASH shares from Lee but negotiations between them were inconclusive. Lee then entered into an agreement with an Indonesian company called Barito to 'swap' shares of CASH with those of Barito. The price of CASH shares then rose. The plaintiff, accompanied by some 'gangsters' (a description used by the plaintiff's own counsel) allegedly confronted Lee at a hotel in Kuala Lumpur and accused Lee of not honouring his agreement to sell CASH shares to him. Lee said he realised then that the plaintiff was capable of using strong-arm tactics to obtain what he wanted and, rather than offend the plaintiff, Lee sold 4 million CASH shares to the plaintiff at RM3.50 per share against the prevailing market price of RM8 per share. I should point out however that this episode was challenged by counsel for the plaintiff (N/E 269) when he cross-examined Lee, as having been concocted.

63. Although Lee said the foregoing unpleasant episode made him wary of the plaintiff, he nevertheless felt it was better to have the plaintiff as a friend than as an enemy. Consequently and although he avoided any business dealings with the plaintiff for about a year thereafter, Lee continued to meet the plaintiff socially on occasions. However from about late 1994 onwards, Lee said the plaintiff would telephone him from to time to ask whether there were any opportunities for the plaintiff to make money and, Lee sold small parcels of shares to him. These transactions included two (2) sales of 200,000 NBT shares, the first in June 1997 and the second in August 1997 at a discount of RM2 and RM1 respectively to the then market prices. Lee had hoped (which hope did not materialise) to take control of NBT eventually and he wanted long term investors for the company.

Lee's version of the two agreements

64. In early October 1997, the plaintiff telephoned Lee claiming he had lost RM10m in the stock market which he wanted to recoup. The plaintiff said his luck with Lee had always been good. Lee offered the plaintiff 2 million NBT shares at RM30 per share with a buy-back price of RM35. The plaintiff was only willing to take 1 million shares (to which Lee agreed); it was also agreed that the parties would meet in Singapore on 7 October 1997.

65. The parties did meet but it was not on 7 October 1997. When he was recalled to the witness stand, Lee clarified that the October breakfast meeting with the plaintiff did not take place on 7 but probably on 4 October 1997 … his passport entries showed he entered and then left, Singapore on 2 and 5 October 1997 respectively. In Wong's car on the way to the breakfast venue, the plaintiff kept badgering Lee to increase his buy-back price by RM5 to RM40 saying he needed to make back his RM10m loss; Lee eventually agreed. Lee denied Wong guaranteed Lee's buy back to the plaintiff let alone that Wong assured the plaintiff he (Wong) had done similar deals previously. After his return to Kota Kinabalu, Lee received a call from the plaintiff requesting written confirmation of the agreement reached in Singapore. Lee accordingly faxed the Option to Wong thinking the plaintiff was still in Singapore. Lee never received the plaintiff's confirmation/signature on the Option. Lee surmised it was because, if the price of NBT continued to rise (as it did) after 7 October 1997, the plaintiff could simply tear up the Option and keep the shares and profit for himself. Lee was unaware and the plaintiff (and Wong) certainly did not apprise him, that the plaintiff had sold 590,000 of the 1 million shares under the first agreement.

66. In early November 1997 the price of NBT shares exceeded RM50; indeed, on 18 November 1997, the share traded to a high of RM58.50. The plaintiff telephoned Lee on or about 17 November 1997 and asked for more NBT shares. Lee decided it would be best to close his deals with the plaintiff. Accordingly, he offered the plaintiff 500,000 NBT shares at RM45 per share and another 500,000

shares for free on the understanding that they cancelled Lee's buy-back obligation under the first agreement, the plaintiff agreed. Wong was not privy to the discussion between the plaintiff and Lee. Lee only told Wong much later about the transaction and even then, it was only to tell Wong to arrange for the transfer of 1 million NBT shares to the plaintiff' account.

67. On 21 November 1997 the counter was suspended from trading, pending an announcement by Lee of his purchase of a controlling stake through a company called Suniwang. Unfortunately, Lee's plans were frustrated by the Malaysian government who, in early December 1997, announced a series of fiscal measures which included credit tightening by a reduction of bank borrowings. Lee nevertheless proceeded with his take-over offer and an announcement was made to the KLSE on 22 December 1997. Trading in NBT shares resumed the following day but its price fell and continued to slide until it was only RM4.60 on 31 December 1997. The result was that on 3 January 1998, Lee was visited by a visibly agitated Wong who told Lee that the plaintiff had incurred substantial losses on his trading account with Kay Hian and Wong sought Lee's help as a friend of the plaintiff. Thinking that the Asian financial crisis would not be prolonged and that the stock market would rebound in due course, Lee handed Wong his letter dated 3 January 1998 agreeing to bear the plaintiff's contra loss of RM1.2m as *'an advance to the plaintiff'*.

The visit to Kota Kinabalu and subsequent events

68. Lee's version of the visit by the plaintiff and Wee differed greatly from the plaintiff's version. Upon being handed the payment schedule by the plaintiff, Lee said he had a private discussion with the plaintiff reminding the latter that the second agreement effectively discharged the first. The plaintiff however still insisted that Lee had a moral obligation to help him. As he wanted the plaintiff to leave, Lee was polite to the plaintiff but made no firm commitment. However, thereafter Wong telephoned Lee repeatedly and even asked Lee to transfer some shares of Sugar Bun Bhd to the plaintiff's Commerzbank account to help reduce the plaintiff's outstanding balance; Lee ignored Wong's pleas. Finally, Lee 'blew his top' on 15 January 1998 as evidenced in Wong's fax to him the following day. Despite Lee's negative reaction, Wong continued to press Lee on the plaintiff's behalf. In court, Lee recalled that the plaintiff visited him for the second time about that time. Eventually, Lee did send a fax response to Wong on 23 January 1998 agreeing to transfer RM2m worth of Sugar Bun shares to the plaintiff's UOB account in Kuala Lumpur, but he failed to do so. In re-examination, Lee explained it was because the plaintiff exerted pressure on him by having the Deputy Inspector General of Police one Datuk Jasmil Johari from Bukit Aman Commercial Crime headquarters in Kuala Lumpur telephone him). Wong continued to press Lee for payment. Although he viewed it as his 'moral' not 'legal' obligation to help the plaintiff (as he was the one who had procured the plaintiff to buy NBT shares), Lee did not discharge his moral duty in any event. When he was told by Wong that the plaintiff had lodged a police report against him (although he was not aware it alleged he had cheated the plaintiff) Lee went to the police himself on 2 March 1998 to give a statement (see 1AB212) of how the two agreements came about. He showed the police contract notes (not in his name) to support his claim that the plaintiff transacted an off-market deal with him.

69. Rigorous cross-examination by counsel for the plaintiff took almost two (2) full days. Lee denied he was colluding with Wong so as to make their evidence consistent with each other's. He explained that the reason he did not mention the profit-sharing arrangement (which the plaintiff had alleged formed part of the second agreement) was because it was not definite. It was just a 'gesture' which came from the plaintiff who said to him in Mandarin "I won't forget you" when Lee handed him the second lot of (free) 500,000 shares. Had there been a firm agreement as the plaintiff alleged, Lee said he would have asked the plaintiff for his share of the profits. Similarly, had there not been a discharge

of the first agreement by the second agreement, Lee said he would also have demanded that the plaintiff sign the Option when the latter failed to fax it back to Lee after 7 October 1997. Lee elaborated on his earlier surmise why the plaintiff did not sign and fax back to him the Option … the plaintiff could use the Option to deny the existence of the Option if the price of NBT rose beyond or (as did happen), to enforce the buy-back provision when the price fell below, the buy-back price.

70. It was only during cross-examination (N/E 301) that Lee revealed that apart from the fax copy, he had couriered the actual Option (the original Option) to the plaintiff after signing. Unfortunately, Lee did not include a covering letter for his courier cover. Recalled to the witness stand, he produced a statement (see 3DB1) of his office telephone charges for the period 7-16 October 1997 which showed he sent two faxes to Wong's fax number on 7 October and he believed the first transmission (at 4.36pm) related to the Option. Lee also produced an invoice of Worldwide Express Sdn Bhd (see 3DB2) which showed he sent two (2) despatches by courier service to Kuching once on 7 October and, the other occasion, on 9 October 1997; he believed one of them was the original Option he sent to the plaintiff. He attributed his difficulty in obtaining such documents to the fact that he had closed down the share trading department in his office sometime ago and, due to the passage of time, he was unable to obtain any supporting documents from the aforesaid courier company. I should point out however, that counsel for the plaintiff accepted without formal proof the authenticity of the two documents as well as others in the bundle marked 3DB1-26.

71. Lee also revealed that it was the plaintiff who suggested that Lee 'give' to him the 1 million shares under the first agreement. Lee said he thought over the request and subsequently, called Wong to inquire whether the plaintiff had the capacity to take another 1 million shares; Wong said he would and did, contact the plaintiff to call Lee. Lee then told the plaintiff that if he wanted the first 1 million NBT shares as a gift, he had to buy another 500,000 shares from Lee at RM45 per share; the plaintiff asked for a discount and Lee agreed saying the price was reduced to RM22.50 taking into consideration that Lee had to pay (net) RM10m to the plaintiff under the Option to re-purchase the first 1 million share. The plaintiff's purchase price for the second lot of 1 million shares was effectively RM32.50 per share although his actual cash outlay was only RM22.5m. An off-market transaction for such a substantial quantity needed approval of the KLSE when the price of the share was more than 20% below market price, the plaintiff, in order to circumvent the exchange's ruling, (through Wong) structured the transaction such that he paid RM22.50 for 500,000 shares whilst the balance was transferred to his account free of payment. That was how the second agreement came into being. Questioned why the details he had narrated were not deposed to in his affidavit, Lee blithely said it never occurred to him that the details were needed. He also said that he never consulted a lawyer because he never expected the plaintiff to bring this case to court (N/E 242). Equally amazing (coming from a trained lawyer) was his statement that he did not depose in his written testimony to the fact that he had couriered the original Option to the plaintiff because it never crossed his mind it was relevant (N/E 303)!

72. Lee revealed under cross-examination that he had purchased the 1 million shares he sold to the plaintiff (for the first agreement) from his brother Gabriel Lee's company Merpati Mashyur Sdn Bhd (Merpati) at a lower price (RM30). Counsel for the plaintiff suggested but which he denied, that the reason was because Lee was actually "rolling over" through Merpati, an earlier buy-back arrangement which redemption date was due. Lee had, in his Answer no. 17 to the plaintiff's Interrogatories (filed on 27 August 1999) deposed that Ke-Zan Nominees (Asing) Sdn Bhd (Ke-Zan) was the registered owner of the shares. This was found to be incorrect when Kim Eng's operations manager Lilian Soong (PW2) testified. She said Ke-Zan was her company's custodian and settlement agent for all Malaysian shares bought and sold by their customers through the KLSE (but not on CLOB). For the plaintiff's purchases, the shares were delivered to Ke-Zan by the seller and Ke-Zan in turn delivered them to Kay Hian.

*(iii) Wong's case*

*The two agreements*

73. On the first agreement, Wong said Lee contacted him to inquire if he knew the plaintiff's whereabouts; Lee wanted to discuss some matter relating to the sale of 1 million NBT shares. Wong located the plaintiff for Lee but he was unaware of what subsequently transpired between them. Contrary to the plaintiff's claim that there was no discussion, Wong said the plaintiff and Lee had a heated argument in his car over the buy-back price for the NBT shares in the 20 minute ride to the breakfast venue. He recalled that the plaintiff was begging Lee (which Wong said was out-of-character with the plaintiff's tendency to brag) for a buy-back price of RM40 against Lee's offer of RM35. The plaintiff persisted over breakfast, asking for a chance to make back his stock market losses of RM10m until Lee eventually relented.

74. According to Wong, of the 1 million shares purchased under the first agreement, he was eventually left 'stranded' with 300,000 shares as, apart from UOB agreeing to pay for 400,000 shares, the plaintiff failed to carry out his promise to arrange for BNP to accept and pay for the balance shares. Subsequently, the plaintiff was also unable to pay for or finance the remaining 200,000 shares and again they landed up with Wong. Had he known that the plaintiff did not have the financial capacity to pick up all the 1 million shares, Wong testified (N/E 417, 424) he would not have crossed the first deal.

75. As the plaintiff's bankers and the plaintiff himself failed to pay for 500,000 shares, Wong would ultimately be responsible for their payment if Kay Hian was not paid. The plaintiff approached Wong for help to tide him over his financial difficulties as a temporary measure, until the plaintiff received funds from his timber operations in the Solomon Islands. Although Wong had also seen the violent side of the plaintiff's character (in the 1994 incident relating to the CASH transaction with Lee), he also viewed the plaintiff as a valued customer, one with means and, who had previously always been a good paymaster in respect of losses; consequently he agreed. He arranged with Commerzbank (after consulting her) to use Pauline's account and the bank's margin financing facility, to pay for and 'warehouse' the shares. Eventually, the plaintiff instructed Wong to sell 290,000 of the 500,000 shares while the balance were transferred out to the plaintiff's own account with Commerzbank. The plaintiff netted RM4m from his sales (3) and all that he had to do and did, was to reimburse Pauline the interest charges she incurred on her account for making payment on his behalf for the 500,000 shares. The plaintiff thanked Wong profusely for the favour the latter did for him.

76. As for the second agreement, the plaintiff told Wong that he had reached agreement with Lee whereby Lee would sell 500,000 NBT shares to the plaintiff at RM45 per share and buy them back at RM51 per share. The plaintiff also told Wong that he would receive another 500,000 shares free of payment from Lee. Although the plaintiff sought his views on the transaction, Wong declined to make any comment as he felt it was a commercial decision best left to the plaintiff himself. The plaintiff instructed Wong to ascertain from Commerzbank how much additional collateral was required of the plaintiff should he purchase 500,000 shares. Wong checked and reverted to the plaintiff to say Commerzbank required an additional margin of RM2m. Later the plaintiff called Wong to say he would remit RM2m to his Commerzbank account to enable Wong to purchase 500,000 NBT shares on his behalf from Lee. As with the shares under the first agreement, the 500,000 shares were transacted through Kim Eng.

77. Wong had in his Answer to the Interrogatories (question 24) administered by the plaintiff (as well

as in his affidavit) identified Kim Eng as Lee's broker. This was found to be incorrect when Lilian Soong took the stand. She testified that Kim Eng in fact acted for Kay Hian for both 'married' transactions.

The statement

78. Wong's version of what transpired between him, the plaintiff and Wee at the Shangri-La Hotel meeting on 31 December 1997 was also vastly different from theirs. Not unexpectedly, he was cross-examined at length by counsel for the plaintiff on that episode. Wong on his part accused Wee of false testimony (N/E 383-385). Wong testified that after the plaintiff had pressurised him to withdraw his allegation (in BRL's letter dated 11 February 1998) that Wong had signed the statement prepared by Wee under coercion, Wong had telephoned Wee to ask why Wee had done what he did; Wee apparently broke down saying it was difficult to make a living in Sarawak, Wee depended on the plaintiff and Wee's livelihood was at stake. Wong also alleged that Wee lied when he said the plaintiff left for Kuala Lumpur immediately after the Shangri-La meeting and, it was Wee who arranged to have the plaintiff's revised statement typed out at a relative's house which was then handed to Wong the following day. Wong said the revisions were done at the Business Centre of the Shangri-La Hotel and, by the time Wong received the revised statement from the plaintiff, it was near to midnight. Wong questioned how Wee could have contacted him the following day if the plaintiff was indeed absent from Singapore. Contrary to the claim made by Wee and the plaintiff, Wong revealed he was not shown a copy of the plaintiff's statement at 4AB15-16 (containing Wee's handwritten amendments) let alone that (as they both alleged) he had requested of Wee/the plaintiff for amendments to be made to the same so as to make it consistent with his own statement.

*The trip to Kota Kinabalu*

79. Wong had initially claimed (and indeed his counsel so put it to the plaintiff and to Lee) that he was not present at the meeting on 7 January 1998; he was in Kuala Lumpur that day. To support his contention, Wong's counsel produced his passport to prove there was no endorsement by Sabah immigration authorities. It was only after counsel for the plaintiff produced a statement (2PB130) from Promenade Hotel, Kota Kinabalu as well as Wong's credit card imprint (2PB133) evidencing that Wong stayed at the said hotel on 6 January 1998 (N/E 246) and, Lee produced his diary entries (**D3**) that Wong, when questioned by the Court (N/E 339), accepted that he was indeed in Kota Kinabalu on 6-7 January 1998, having flown there via Kuala Lumpur. As he took a domestic flight, there was no endorsement by Sabah immigration authorities in Wong's passport when he entered Kota Kinabalu.

80. Wong testified that as at 7 January 1998, he had a done a rough calculation that the plaintiff's paper loss on NBT shares approximated RM19.9m. However the plaintiff forbade him to say anything to Lee about the plaintiff's sale of 590,000 shares. Wong did not participate in the discussion between the plaintiff and Lee and had he done so, he would be cheating Lee as RM19.9m was a lot less than the RM65.5m the plaintiff claimed in the payment schedule. Wong pointed out (N/E 396) that it was only <u>after</u> he had disclosed the sale to the plaintiff's solicitors (in denying Wee's claim of having vetted the payment schedule before the plaintiff handed it to Lee on 7 January 1998) that the plaintiff admitted his sale. Wong was not shown or handed a copy of the payment schedule until 8 January 1998 (N/E 332/373). Like Lee, Wong denied he made any representations to the plaintiff let alone that he induced the latter to enter into the two (2) agreements. As a remisier, Wong said he was prohibited from making recommendations on behalf of his company; which fact Kay Hian's Vincent Goh confirmed under cross-examination (N/E 451). Under cl 12.2 of Wong's agency agreement with

Kay Hian dated 1 August 1996 (see 1AB36-42), any recommendations he did make to clients were given in his own personal capacity.

81. Wong revealed that his brokerage for the NBT trades under both agreements totalled RM92,250 then equivalent to S$51,660 which sum was a small fraction of his annual income; it was a small deal to him as compared with others he had done. Why then he asked, would he risk his entire career in making representations to the plaintiff or in putting together the two deals as the plaintiff alleged?

82. Cross-examined why he would get so involved (to the extent of visiting Lee in Sabah to obtain payment for the plaintiff) if he was only a 'pure broker' as he claimed, Wong revealed the extraordinary lengths he would go to for his clients. In one instance he had even bought goat's milk formula (N/E 428) to send to his clients in Kuala Lumpur when they told him it was not available there. He had also acted as a courier for the plaintiff when he went to Kuala Lumpur on one occasion to take delivery of 1 million shares of PanGlobal Bhd as instructed. Wong testified that he had also on two (2) other occasions used his wife's Commerzbank account to 'house' 10 million Pilecon shares worth RM55m and Wing Teik shares worth RM13m on his clients' behalf. He was still stuck with 4.5m Pilecon shares in his wife's Commerzbank account, as at the date of trial.

(iv ) Kay Hian's case

83. Vincent Goh (Goh), their margin department manager, testified for Kay Hian. Goh was obviously nervous in the witness stand but I attribute his behaviour to nothing more sinister than first time nerves in a court of law. He said his company considered the plaintiff an exceptional client and they therefore gave him a further grace period of three (3) days over and above the 7 days for settlement stipulated under the KLSE, in which to pay for his purchase of shares; sometimes the grace period was even longer. For the plaintiff's purchase of 100,000 NBT shares on 16 October 1997, Kay Hian extended the grace period by 10 days, presumably because Wong asked for and was granted an extension, by the company's managing-director (Wee Ee Chao). Goh explained that for the plaintiff's purchase of 30,000 NBT shares in November 1997, Kay Hian could not/did not force sell immediately when the plaintiff failed to pay within the grace period given because the counter was suspended end November until 22 December 1997.

84. Goh testified that his company would give a client a trading limit based on Kay Hian's evaluation of his creditworthiness. In the plaintiff's case, his trading limit was S$5m. Even so, for transactions in excess of S$1m, remisiers had to seek approval from the top and approval was given by the managing-director and his deputy respectively, for the NBT shares transacted under the first and second agreements. For purchases exceeding S$1m which involved bank financing, Goh had to receive confirmation from banks before the transaction could be 'booked' in the name of the bank concerned. Otherwise, if the bank subsequently refused to accept a transaction for its account, Kay Hian had to reverse the contract and put it in the client's name. Goh testified that the second scenario was what happened for the first 1 million NBT shares the plaintiff bought in October 1997. As Wong could only give him confirmation of acceptance from Commerzbank, Goh contacted UOB, BNP and RNBNY. UOB (Noreen Chua) confirmed that the bank would pay for 400,000 shares, BNP indicated they would speak to the plaintiff while RNBNY refused (in their fax dated Wong dated 10 October 1997 at 1AB87), claiming they had not given any instructions to Kay Hian for the deal. Cross-examined, Goh revealed he was unaware until he saw Wong's Answers to the plaintiff's Interrogatories, that the 500,000 shares accepted by Commerzbank were 'housed' initially in Pauline's account.

85. Referring to the plaintiff's allegations against Kay Hian in his statement of claim, Vincent Goh

opined that it was simply not practicable for his company to have an internal system of checks and controls to ensure that Wong and their other remisiers did not act as de-facto investment advisors or make representations to their clients. He/Kay Hian were not aware of the Option or the two agreements at the material time.

*The findings*

86. I start with my observations on the plaintiff's testimony. First, his allegation that Lee recommended Wong to him as a very successful remisier cannot possibly be true. If Lee himself only opened an account with Wong a week earlier than the plaintiff, how could Lee have recommended Wong? Further, if indeed he and Wong were such close friends as the plaintiff claimed, how was it he did not know Wong's wife was called Pauline, even if he can be excused for not knowing her surname? If indeed Wong also initiated the second agreement as he did the first, how would Wong know beforehand that the plaintiff would be concerned about being over-exposed to NBT shares and would offer another 500,000 shares as a performance bond by Lee? The plaintiff's answer to this question under cross-examination (N/E 144) was most unsatisfactory … that Wong would know *because he is a dealer who has handled many deals,* an implausible explanation which I reject outright.

87. I also noted that the plaintiff had a different version for the 'extra' 500,000 shares in the statement which Wee prepared for him … para 4 of the plaintiff's (revised unsigned) statement (see 1AB352) reads:-

> In the course of trying to arrange for funds to finance the "purchase" of 500,000 NBT shares, Datuk Joseph Lee said he actually needed more money and agreed on a gentlemen's basis to allow a further 500,000 NBT shares free of payment to be placed under my investment account in Singapore so that the margin of my borrowings would be increased. Owing to the inducement by Datuk Joseph Lee on the profits, I allowed the borrowings from Commerz Bank (South East Asia) Ltd Singapore to take place…

When he was cross-examined on the discrepancies between his two (2) versions, the plaintiff claimed his affidavit version was correct … because Wee had not interpreted the statement to him. Again that is not a credible explanation since, as was noted by counsel for Wong (N/E 54), the plaintiff understood and could answer counsel's questions even before the court interpreter translated the questions to him. In any case, Wee's testimony contradicted the plaintiff's. I would also point out that in his police report (see 1AB198), the plaintiff said he let Lee make use of his accounts in Singapore to obtain cash with Lee's NBT shares as security, there was no mention of the 500,000 million shares being used as a performance bond.

88. Although he denied the suggestion under cross-examination (N/E 75) there is also no doubt in my mind that the plaintiff speculated in volatile Malaysian counters, not 'blue chips'. This was apparent from the records of his transactions produced in court as well as from his own testimony. He traded in such shares as PanGlobal, Westmont Land, CASH, Red Box, Union Paper Holdings, Tenco, Mamee-Double, Mycom, Pilecon, Wing Tiek Holdings, Timberwell, Hicom and the like including NBT; hardly the sort of shares serious investors and or fund managers would consider as part of their investment portfolios. By his own admission the plaintiff liked to speculate big (N/E 140). The plaintiff was actually a gambler or as Wong described him, a risk-taker … instead of gambling tables at a casino, the plaintiff gambled on the SES and KLSE and, instead of putting gambling chits on games of blackjack or baccarat or roulette, the plaintiff placed his bets on volatile and speculative counters.

89. Equally undeniable is the fact that the so-called buy-back agreements euphemistically described as Options were nothing more than moneylending transactions in disguise. Although his counsel sought to distinguish earlier similar transactions the plaintiff had entered into (with Richard Wong and Loh Tung Sing) from the two (2) agreements on the basis that the former did not have the same magnitude in terms of value and that the plaintiff did not have to hold the shares for three (3) months in the earlier transactions, I find that the plaintiff was familiar with and had entered into similar agreements with Lee and others who needed substantial funds in a hurry but could not/would not go to banks to borrow by conventional methods; these parties included the above-mentioned two persons. In this regard, I fully agree with the observations on the plaintiff's conduct (in paras 31 to 49) set out in the closing submissions filed on behalf of Wong and Kay Hian.

90. Counsel for Lee had cross-examined the plaintiff at length on whether he had a place of business and residence in Singapore. Presumably, counsel's purpose was to bring the two agreements within the definition of 'moneylending' under s 3 and the plaintiff within the definition of a "moneylender" under ss 2 and 5(1) of the Moneylenders Act Cap 188 (the Act). The definition section states that a moneylender:

> includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money…..

Section 3 of the Act states:

> Save as excepted in paragraphs (a) to (e) of the definition of "moneylender" in section 2, any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proved to be a moneylender.

while section 5(1) states:

> Every moneylender residing and carrying on the business of moneylending in Singapore whether as principal or as agent shall take out a licence annually.

91. I had, in *Bhagwandas v Brooks Exim Pte Ltd* [1994] 2 SLR 431 pointed out (at p 441) that to give a literal and narrow interpretation to s 5(1) of the Act as the Court of Appeal did in *Lorrain Esme Osman v Elders Finance Asia Ltd* [1992] 1 SLR 369 would deprive a person borrowing from a moneylender who resides outside Singapore, of any protection afforded by the Act. It would then follow that any person may carry on the business of moneylending without licence with impunity in Singapore, so long as he is not a resident of Singapore, using the test of residence in revenue cases. The Court of Appeal in *Brooks Exim Pte Ltd v Bhagwandas* [1995] 2 SLR 13 agreed with my observations and stated (per curiam) that the narrow interpretation given in *Lorrain Esme Osman's* case was obiter which required modification. Counsel for the plaintiff had, in their submissions contended that the Court of Appeal did not overrule *Lorrain Esme Osman's* decision nor the earlier case of *Vernes Asia Ltd v Trendale Investment Pte Ltd* [1988] 1MLJ 357 where, it was held that for s 5(1) of the Act to apply, the plaintiff who made the loan must be a resident of Singapore. All that I need to say is, that the Court of Appeal's pronouncement in *Brooks Exim Pte Ltd v Bhagwandas* is the latest position on the law on the applicability of s 5 (1) of the Act. Accordingly, it follows that even if a person, be it a body corporate or natural person, does not reside in Singapore and does not fall within any of the exceptions (a) to (e) to the definition of 'moneylender' under the Act, any 'moneylending' transactions such person enters into would be subject to the Act. Therefore, for the above sections of the Act to operate, it would not matter whether the plaintiff is or is not, a resident

of Singapore. I find that to all intents and purposes, he acted as a moneylender towards Lee and other persons who 'borrowed' shares from or, sold shares to or 'swapped' shares with, him. However, as my decision is not dependent on this finding, I need say no more on this subject.

92. The plaintiff is not (as he claimed), a novice who totally relied on Wong for investment advice. Rather, as Wong said in his written testimony, the plaintiff is a shrewd and hard-driving investor, notwithstanding his lack of formal education and limited knowledge of the English language. Indeed, I would go so far as to say that he is just as if not more, business savvy than Lee notwithstanding that Lee is better educated. The plaintiff was a man who did not concern himself with details, his style was to leave it to other people to handle his affairs (N/E 183). In other words he chose not to know the details of what other people did for him be it Wong or others by choice, not that he was deliberately kept in the dark. In any case he could not claim to be ignorant of Wong's trades on his account as Kay Hian forwarded to him contract notes as well as quarterly statements of account. Statements pertaining to his transactions effected using bank financing were also sent to him. In fact UOB's representative (Noreen Chua) went further to say that although Wong would occasionally contact her to inquire whether various shares could be purchased using the plaintiff's account with UOB, the plaintiff himself would either contact her to inform her of his intended trades first or, in the event that Wong contacted her first, she would contact the plaintiff to confirm Wing's instructions.

93. The fact that the plaintiff had his legal advisor Basil Chai accompany him to Kay Hian's office when he opened his account (and to witness his and Lee's signatures to the memorandum of loan dated 10 June 1993 for his advance of RM10m to Lee) and, he had another Sarawak lawyer (Charles Ling) sitting in court throughout the period he testified speak volumes of the plaintiff's character … he is no fool and he knows when and how to protect his own interests if the occasion calls for it. Another reason why I doubted his professed heavy reliance on Wong is because the plaintiff also had Henry Law (Law), a former bank officer, to handle his financial matters, as reflected in the correspondence exchanged between Law and Wong (an example being 1AB67) or with banks; he also had another advisor Cheng Ah Teck according to Wong's unchallenged testimony. Moreover, the plaintiff did not trade solely/exclusively through Wong but had other brokers and remisiers, both in Malaysia and in Singapore. Accordingly, it lies ill in the mouth of the plaintiff to claim (see para 14 above) that he only discovered after these proceedings had commenced, how Wong had arranged for financing for his purchase of NBT shares. In any case, his professed ignorance of Wong's use of Pauline's Commerzbank account to 'house' his 500,000 shares was contradicted by his own answer under cross-examination (N/E 142) that Wong had agreed to put the shares in the wife's name.

94. By Singapore standards, the plaintiff was considered a high net-worth individual. He was courted by banks' private banking departments to be their customer, including UOB and Commerzbank. Indeed, UOB estimated that the plaintiff's net worth was in excess of S$100m (see D6). The plaintiff certainly did not need Wong to arrange banking facilities for him, after Wong had made the initial introductions to the banks which subsequently granted the plaintiff facilities. These banks made their own inquiries, if they had Sarawak branches as in the case of UOB. Noreen Chua had, in her written testimony said UOB was aware of the plaintiff's reputation as a Malaysian businessman in the timber trade and knew who he was when Wong introduced him to UOB in 1997, which was well after the plaintiff opened his trading account with Kay Hian. In the case of Commerzbank, their representative (Patricia Lim) had confirmed that the plaintiff was introduced by Wong but, the bank did their own assessment of his creditworthiness. Contrary to the plaintiff's claim that he gave a *carte blanche* to Wong to manage all his bank accounts, the plaintiff was only able to produce a restricted power of attorney (at 1AB16) he had given to Wong for his Commerzbank account (and even then it was later, in May 1995 and was a standard document used by Commerzbank's customers) while UOB produced a letter dated 10 September 1997 from the plaintiff which authorised Wong to inquire into his share portfolio and to obtain copies of his statements of account. These measures as Wong testified, were for the plaintiff's

own convenience.

95. I also believe the plaintiff to be a person capable of strong arm tactics and, in a small place like Kuching numerous people must be 'beholden' to a man of his means, including Wee. Equally, he is a person capable of resorting to less than legal means to achieve his ends. Hence, when he visited Lee on 7 January 1998, the plaintiff had no compunction in bringing along with him a person called Sunny Ong (who Lee identified as the accused in *PP v Ong Khoon Seng* (1982) 1 MLJ 351 charged with customs duty evasion) and Datuk Lee Siong Mai the former Special Branch director of Sabah, with the intent of intimidating Lee. Consequently, I have no doubt that the plaintiff exerted pressure on Wong to sign the statement Wee prepared, despite his and Wee's denials to the contrary; I accept Wong's testimony in this regard. There is however, no necessity for me to go further to determine whether the plaintiff's claim against Wong had been compromised by the statement as it is not a factor in my findings. I should add that because of the plaintiff's previous conduct in relation to the first CASH transaction, it is difficult to believe that he would (as he claimed) be so generous as to give Wong RM3m from the profits he made on his purchase (through Wong) of Red Box shares in June 1993, even if his gross profit exceeded RM8m.

The option

96. For a business tycoon who controlled several public companies, had done at least five (5) buy-back deals prior to October 1997 (involving equally if not more speculative counters such as MBF Capital and Sri Hartamas as well as NBT) and for a qualified lawyer who handled government matters when he was in practice for eleven (11) years, one would have expected Lee to have done a better job than what he did in drafting the Option. That document was open to any number of interpretations due to the poor drafting; indeed Lee himself did not seem to understand his own drafting (N/E 308) as he suggested that the strike price of RM30 meant that so long as the market price of NBT shares reached RM30, the plaintiff was entitled to call upon him to buy-back at RM40. That is totally incorrect and inconsistent with Lee's own case. What the document should have stated was RM30 was the purchase, <u>not</u> the strike price. Another obvious mistake was the reference to KLSE rules under the column *settlement date …* as Wong himself testified, what has the KLSE got to do with this off-market transaction not to mention that it did not trade in options (N/E 396). Equally incorrect was the usage of the words *expiration date* to refer to the <u>period</u> when Lee was obliged to buy-back the shares at RM40; it should have been described as the exercise date as there cannot be an exercise period in a true Put and Call option. In view of the shortcomings in the document, I cannot imagine a seasoned remisier like Wong would have been the draftsman of the Option as counsel for the plaintiff suggested.

97. Counsel for the plaintiff had attacked Lee's credibility by saying it was inconceivable that Lee would forgo his redemption rights under the first agreement (as he claimed) by the second agreement on top of giving away half (' ) million free shares then worth RM26.5m. Further, Lee had admitted that it took him almost ten (10) months (N/E 276) from December 1997 to September 1998, for him to first contend that the second agreement was a discharge of the first. On top of that, his letters to Wong/Kay Hian prior thereto were inconsistent with that stand. Why was that the case? I believe the answer also came from Lee's own testimony … he never expected the Asian economic crisis to last so long. Had the crisis been resolved with regards to Malaysia, Lee may well have taken the stand that there was nothing in writing to say the second agreement discharged the first agreement. His relationship with the plaintiff was based on what counsel for the plaintiff described as 'sheer opportunism'; they scratched each other's back (N/E 325) … the plaintiff made use of Lee to earn huge profits from the stock market and Lee made use of the plaintiff as a convenient source of

funding with no questions asked. Although the plaintiff was capable of strong arms tactics to get his way, it did not stop Lee from entering into more transactions with him when it suited Lee to do so; according to Lee, the plaintiff forgot everything if he made money (N/E 280). Moreover the plaintiff had apologised to Lee for the unpleasant incident regarding CASH shares and he was also exceptionally friendly to Lee after the incident. Lee had explained his then 'generosity' to the plaintiff as follows:-

> a. in 1996-7 he was doing extremely well both in business and in the stock market. It was so easy to make money in shares from the 1993-4 bull run. Besides the plaintiff, he had also given free shares to other people who all made money;
>
> b. NBT only had 66 million issued shares which is a very small capitalisation. This meant that its share price could be easily manipulated; it was also illiquid, with a daily trading volume of 200,000-1,000,000 shares. The consequence was, banks lent less than half of its market value for margin financing and sometimes put a c a p on its market price (according to the testimony of Commerzbank's representative). Hence the price could increase from RM26 to RM51 within 1' months. The plaintiff therefore took a risk in paying for 1' million shares as he could just as well have lost a lot of money thereon; it would take him a long time to dispose of 2 million shares in the open market;
>
> c as the plaintiff had returned (some) CASH shares to him through Wong after holding them for 7 months, he impressed Lee as a long term investor and, Lee wanted a long term investor for NBT when he mounted a take-over for control which unfortunately did not come to fruition.

98. The following calculation would show the benefit to the plaintiff and Lee if the first agreement was cancelled by the second, using RM50 as the market price of NBT shares as at 17 November 1997:-

| | | |
|---|---|---|
| (i) | Buy-back price on 1 million shares @ RM40 a share | RM40,000,000 |
| (ii) | Market price on 1 million shares @ RM50 a share | RM50,000,000 |
| (iii) | Difference between (i) and (ii) | (RM10,000,000) |

If Lee bought back the 1 million shares, he would make a paper profit of RM10m but, he had first to come up with RM40m to finance the buy-back which was not easy. On the plaintiff's part, he had sold 590,000 of the 1 million shares (which fact Lee only discovered in the course of this trial). It would have been costly exercise for him had Lee insisted on redeeming the 1 million shares as, the plaintiff would have had to buy back 590,000 shares from the market; this would have cost him a hefty RM29.5m @ RM50 per share. Even taking into account his profit of RM5,352,885.20 from that sale, it was still to the plaintiff's advantage to have the first agreement cancelled as, he would otherwise suffer a net loss of RM6,447,114.80, as can be seen from the following computation:-

| | |
|---|---|
| Market price of 590,000 shares @ RM50 a share | RM29,500,000.00 |
| Cost price of 590,000 shares from Lee @ RM30 | RM17,700,000.00 |
| Loss to the plaintiff (i) - (ii) | RM11,800,000.00 |
| Less: profit from sale | RM 5,352,885.20 |
| Net loss: | (RM 6,447,114.80) |

By Wong's calculation, the plaintiff would suffer a loss of RM13,570,000 should he buy back the shares from the open market to sell to Lee.

99. On the other hand, if the plaintiff kept the shares, his paper or realisable profit was even higher, it would be RM20m based on the following computation:-

| | | |
|---|---|---|
| (i) | market price on 1 million shares @ RM50 a share | RM50,000,000 |
| (ii) | original purchase price on 1 million shares @ RM30 a share | RM30,000,000 |
| (iii) | plaintiff's profit = (i) - (ii) | RM20,000,000 |

Consequently, it was to the parties' mutual advantage to rescind the first agreement and I am of the view it was so rescinded by the second agreement.

100. If indeed the first agreement was a separate transaction altogether and not discharged by the second, then it would appear that the plaintiff breached the Option when he sold part of the shares (590,000) without Lee's knowledge. In a true Put and Call option, the party who buys (Put) the shares cannot dispose of any of the shares until after the expiry of the Call date and, the other party failed to comply with the Call and re-purchase the shares. I disbelieve the plaintiff's claim that he sold on Wong's advice on the assurance he can always buy back the shares before the due date of 7 January 1998. Wong did not strike me as a person who would be so foolish as to render such ill advice to the plaintiff whose only motive in selling the shares was greed. As Wong said, the reason he was such a successful remisier was because he did not proffer gratuitous advice to his customers.

101. As to the controversy surrounding who faxed which copy of the Option, I find that the version given by Lee and Wong was more credible. I have determined that the following sequence of events took place:-

a. after his return to Kota Kinabalu, Lee prepared two (2) copies of the Option. He faxed the original to Wong and to the plaintiff which he had signed. He also signed but kept in his file the duplicate copy; the original was couriered to the plaintiff in Kuching. Lee expected the plaintiff to sign and return the fax as well as the, original Option;

b. the copy at 1AB69 produced by the plaintiff was not the copy which he had received from Lee. His counsel had produced the original fax the plaintiff claimed to have received from Lee; it was completely illegible as it was on thermal paper but I have no doubt in my mind that the plaintiff did not sign or fax back that copy to Lee. He kept it just as he kept the original Option which Lee so foolishly couriered to him without a covering letter; I accept that the plaintiff did it for the reasons Lee postulated.

c. the plaintiff (accompanied by Wee) obtained the Option shown in 1AB69 from Wong on 18 May 1998. The purpose and the letter dated 18 May 1998 (1AB230) was not, as Wee said, to found Singapore jurisdiction but to create false evidence.

d. the first transmission date *10/10/97* shown on 1AB69 was not the date the plaintiff received the fax from Lee; that was when Wong received it and re-faxed to the plaintiff on 10 October 1997. The plaintiff wrote Wong's name on the fax and transmitted it back to Wong on 10 October 1997. That would explain why Wong's fax number and code (KHJC-T K Wong) appeared on 1AB69. My view is reinforced by the plaintiff's own exhibit (P4) where he produced his company's (Lee Ling) fax bill for the month of October 1997. It showed he sent 3 faxes to Wong's fax number **5356033** on 10 October 1997 but there was no record of any fax transmissions to Kota Kinabalu before or after that date. Wong had also produced Kay Hian's bill for October 1997 (D7) pertaining to his fax number. It showed that on 10 October 1997 at 10.06am and at 11.42am respectively, Wong had sent faxes to the plaintiff's fax number **2230169;** I believe the earlier transmission related to the Option at 1AB69 as the plaintiff received it at 10.10am and re-faxed it to Wong.

e. the second transmission date *27-12-1997* on the fax was when the plaintiff faxed it back to Wong with his signature, that being the date (which was not a coincidence) three (3) days after NBT was re-listed following its suspension, with a drastic price drop. (Although he could not recall the exact date, Wong had testified that the plaintiff faxed him the signed copy much later). The plaintiff, realising that he had to hold Lee to the buy-back arrangement due to the price drop, faxed it back to Wong but not to Lee. Counsel for the plaintiff had suggested that Wong had faxed 1AB69 to the plaintiff at the latter's request on 27 December 1997; I discount that possibility altogether because, as Wong said (N/E 391), he was not even in Singapore on that day. Further, why would the plaintiff ask for a copy from Wong if he had his own signed copy?

f. On 18 May 1998, the plaintiff took away Wong's only copy of the signed Option at 1AB69 and obtained Wong's signature to the letter at 1AB230 drafted by Wee. That letter reads:-

To Whom It May Concern

Re: Put and Call Option Confirmation dated 7/10/97

With reference to the above, I, Wong Teck Kui SRIC 0130520/D hereby confirm that the signature appearing as Datuk Joseph Ambrose Lee is his and that the signature appearing as Tiang Ming Sing is also his on the said document.

I hereby confirm that upon receipt of the said document which was faxed back to me after being executed by Tiang Ming Sing, the transaction was then completed at my end.

Dated this 18th day of May 1998

Signed:- Wong Teck Kui

102. The underlined sentence was misleading to say the least; at best it was a half-truth. It omitted the material dates when the plaintiff received the fax Option and when he actually faxed it back to Wong. It was a clever but dishonest attempt by the plaintiff aided by Wee, to conceal the fact that he counter-signed and returned the fax to Wong not in October but in December 1997. The plaintiff and/or Wee realised and tried to cover up, the telling date of 27 December 1997. In this regard I refer to Wee's testimony where he was asked to but he said he could not, explain the presence of two (2) copies of the Option in his file; my belief is that he did not want to not that he could not, explain, for fear of jeopardising the plaintiff's case and thereby his own livelihood. The fax at 1AB69 was Wong's copy (hence his name appeared on it) whereas the Option at 1AB70 which bore no transmission dates was a copy of the original which Lee couriered to the plaintiff who did not return it to Lee; Wong had testified that the plaintiff handed 1AB70 to him on 18 May 1998 (N/E 430). How was that possible unless (as Wong surmised) the plaintiff received the original from Lee? I have no doubt Wee was the draftsman for 1AB230 and, were he a practitioner at the Singapore Bar, I would direct the Law Society to inquire into his conduct which I find reprehensible, of a member of the legal profession.

103. As for the relationship between Wong and Lee, no evidence let alone credible evidence, was presented by the plaintiff to establish that the former was an agent of the latter. I had already pointed out (para 86) that Lee opened his account with Kay Hian a week earlier than the plaintiff, how could an agency relationship be established in that short interval? Further, as was pointed out by counsel in their closing submissions, the plaintiff was seeking to make Wong, who was a third party to the two (2) agreements, liable for Lee's alleged representations, an uphill task indeed. On the evidence, I find that the plaintiff has not made out his case of agency against Wong let alone that representations were made by the latter on Lee's behalf. I make the same finding on the plaintiff's claim against Wong based on a fiduciary relationship and in negligence.

104. Turning next to Kay Hian's position, I agree with Goh that it would not be practical for any broker in the securities industry to implement let alone enforce, an internal system of checks and controls to supervise remisiers like Wong in their dealings with the company's clients. As the plaintiff did not, either in his pleadings or in his testimony elaborate on what sort of checks and controls Kay Hian should have had in place or suggest them to Goh, I have no basis to make any finding on this issue. Granted that at law, Wong is an agent of Kay Hian but, there is an express prohibition in cl 12.2 of Wong's agency agreement against making recommendations to Kay Hian's clients The express prohibition is reiterated in cl 3(f) of Bye-law V of the SES which states:

No Remisier shall have the authority to give or volunteer investment advice or

> recommendation with respect to securities or the stock market generally on behalf of the Member Company. A Remisier who gives or volunteers investment advice or recommendation to his client shall inform the client that such investment advice or recommendation is given by him in his own personal capacity and is not given on behalf or in the name of the Member Company.

Consequently, the plaintiff would have to prove that notwithstanding the express prohibitions contained in cl 12.2 of Wong's agency agreement and clause 3(f) of the SES Bye-laws, Kay Hian knew for a fact that Wong did make recommendations to their/his clients and took no steps to stop such practice; the plaintiff failed to discharge this onus of proof. Accordingly, the plaintiff's claim against Wong based on breach of warranty of authority is not sustainable.

105. As for the plaintiff's claim that Kay Hian is vicariously liable for Wong's acts, it is trite law that such liability can arise only if Wong is an employee of Kay Hian. In this regard cl 3(e) of Bye-law V of the SES is relevant, it states:

> No Remisier shall be employed as an employee by Member Company and no Remisier shall be entitled to receive the benefits and entitlements that the Member Company gives or extends to its employees, whether such benefits or entitlements are required to be given or extended to employees by law or otherwise.

Coupled with cl 12.1 of Wong's agency agreement with Kay Hian which states:

> The Remisier shall at all times be an agent of the Company in dealing in securities. Nothing in this Agreement shall be construed as creating an employer-employee relationship between the Company and the Remisier and accordingly the Remisier shall not be entitled to or claim any employment benefits whatsoever.

the plaintiff's claim under this head is again not sustainable against Kay Hian.

106. On the facts, it would also be difficult to believe that a seasoned speculator like the plaintiff would rely on Kay Hian to take care of his interests let alone to the extent he claimed … for that matter, why would any stockbroker assume such a heavy responsibility, even for a good client?

107. From the evidence adduced during this lengthy trial, these are my other findings:-

> a. the plaintiff had concluded with Lee the first agreement in principle before 4 October 1997. The breakfast meeting that day was only to resolve the dispute between them on the buy-back price for the 1 million NBT shares. The Option evidenced the terms already agreed and Wong merely explained the terms to the plaintiff;
>
> b. the plaintiff had had several business dealings with Lee (which included buying parcels of NBT shares albeit in smaller quantities) before 4 October 1997. Even if Wong did make the alleged representations (which I find he did not) pertaining to Lee's financial position, the plaintiff could not possibly have relied on them (let alone be thereby induced to enter into the first agreement), because he knew Lee better than Wong;

c. there was no evidence of collusion between Lee and Wong to protect one another;

d. the second agreement was to discharge Lee's obligation to re-purchase the 1 million shares under the first agreement; the plaintiff's conduct subsequent to the first agreement (including his purchase of 30,000 NBT shares from the market on 18 November 1997 before NBT share price took a tumble), is consistent with this finding. Such conduct puts paid to the plaintiff's claim that he was worried about over-exposure to NBT shares (because he already had 1 million shares under the first agreement) and hence Wong and Lee offered him a 'performance bond' of 500,000 shares under the second agreement. His version of the second agreement (which itself was modified to varying degrees under cross-examination) was clearly an afterthought;

e. Kay Hian was not a party nor did they know about the agreements until after the event; the plaintiff did not adduce any evidence to the contrary;

f. Kay Hian, in its discretion, was entitled to grant the plaintiff a longer grace period in which to pay for the NBT shares but, that did not mean they financed his purchase under the first agreement (apart from the industry norm that the buying broker must pay the selling broker [Kim Eng] when the shares are delivered);

g. Wong did not make any amendments to the plaintiff's draft statement as prepared by Wee in order to make it consistent with his own statement (also drafted by Wee).

108. In the submissions filed on his behalf, counsel for the plaintiff did a detailed analysis of the inconsistencies in the testimony of Wong as well as Lee which, they asserted, showed that neither were truthful witnesses. My review of the evidence suggests that the same criticism can be levelled against the plaintiff and Wee. Consequently it was necessary to verify the evidence of each witness against the relevant documents, giving due allowance for lapses of memory owing to the passage of time. In carrying out the exercise, I looked for material inconsistencies. In so doing, I find that the evidence adduced in court was not only inconsistent with but also contradicted, the plaintiff's pleaded case; he did not speak the truth at all.

109. Accordingly, I dismiss the plaintiff's claim against all three (3) defendants with costs. As the plaintiff did not challenge Kay Hian's counterclaim, I also award judgement to Kay Hian on the counterclaim with costs, in the sum of RM139,659.54 for the losses incurred on his trading account.

LAI SIU CHIU

JUDGE