Lam Chi Kin David *v* Deutsche Bank AG
[2010] SGCA 42

Case Number	: Civil Appeal No 41 of 2010
Decision Date	: 01 December 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Christopher Chong, Kelvin Teo and Jasmine Kok (MPillay) for the appellant; Ang Cheng Hock SC, Paul Ong, Goh Zhuo Neng and Nakul Dewan (Allen & Gledhill LLP) for the respondent.
Parties	: Lam Chi Kin David — Deutsche Bank AG

Contract

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 2 SLR 896.]

1 December 2010 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by Lam Chi Kin David ("the appellant") against the decision of the Judicial Commissioner ("the JC") in Suit No 834 of 2008 in dismissing his claim against Deutsche Bank AG, Singapore branch ("the respondent") for damages for breach of contract, and in giving judgment for the respondent for the sum of US$1,135,239.43 for its counterclaim against the appellant for payment of his outstanding liabilities with interest and costs (see *Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896 ("the GD")).

2 The material facts are as follows. In November 2007, the appellant became a private banking client of the respondent. He signed the following agreements with the respondent:

(a) an agreement called "Deutsche Bank Master Agreement for Foreign Exchange Transactions and Derivatives Transactions" dated 28 November 2007 ("the Master Agreement");

(b) an undated document called "Service Agreement" ("the Service Agreement");

(c) a Risk Disclosure Statement dated 28 November 2007, for all types of accounts; and

(d) a Security Agreement dated 28 November 2007 ("the Security Agreement").

Subsequently the appellant signed two other documents, *viz*:

(e) a Short Term Facilities/Foreign Exchange Facility dated 21 July 2008 ("the Short Term/Foreign Exchange Facility"); and

(f) a Declaration of Pledge (First Party) dated 28 August 2008.

3 The Master Agreement is intended to apply to all transactions between the respondent (referred to therein as "the Bank") and the appellant (referred to therein as the "Counterparty") as the recital states that the respondent and the appellant "have entered and/or anticipate entering into one or more transactions (each a "Transaction") that are or will be governed by this Master Agreement". Clause 9 of the Master Agreement provides that the respondent and the appellant may "enter into such Transactions under this Agreement as they may from time to time determine" and that such Transactions include, without limitation, the following: (a) FX Transactions and Currency Option Transactions; (b) Equity Option and Equity Swap Transactions; (c) Swap Transactions; and (d) Other Transactions.

4 Clause 2.5 of the Master Agreement provides that each Transaction shall not become effective until the Counterparty has signed the respondent's Service Agreement and other documents requested by the respondent from time to time (see [23] below for the text of cl 2.5). The Service Agreement provides, *inter alia*, for the granting of credit facilities to the customer. Pursuant to this provision, the respondent granted to the appellant a credit line of United States Dollar ("USD") 200,000,000 on the terms of the Short Term/Foreign Exchange Facility (see [2(e)] above). The credit facilities granted to the appellant under the Short Term/Foreign Exchange Facility were secured (or collateralised) by the appellant's currency deposits held by the respondent under the Security Agreement.

5 In connection with or pursuant to these two agreements, the appellant opened two accounts with the respondent: (a) a Private Wealth Management Account (Account No 6017180) ("the Advisory Account"); and (b) a Foreign Exchange Gem Account (Account No 2658540). In this appeal, only the Master Agreement and the Service Agreement are material to the issues raised by the parties. As will be seen, the legal relationship between the Master Agreement and the Service Agreement is crucial to the determination of the issues arising in this appeal.

The appellant's Transactions with the respondent

6 The Transactions that the appellant entered into with the respondent that are relevant to this appeal were foreign exchange ("FX") contracts made under a "Carry Trade Investment Strategy". This strategy involved the appellant in arbitraging on the interest rate differentials between different currencies. The appellant would buy currencies carrying low interest rates and convert them into other currencies carrying higher deposit interest rates, and thereby lock in a guaranteed gain from these differences in interest rates. However, as is common knowledge, this kind of carry trade also carries with it the risks associated with fluctuations in the exchange rates of the currencies involved.

7 The appellant is a knowledgeable and sophisticated currency arbitrageur. As will be seen, he appeared to have a better understanding of how foreign exchange market worked than the respondent's officers who were servicing his trading account (*ie*, the Advisory Account). The currencies which the appellant was allowed to trade in under the Short Term/Foreign Exchange Facility covered 23 currencies. However, in this appeal, the relevant currencies are Australian dollars ("AUD"), Swiss Francs ("CHF"), Japanese Yen ("JPY") and New Zealand dollars ("NZD").

The material events

8 In early October 2008, the foreign exchange market became very volatile and the relevant exchange rates of the currencies of the appellant's Transactions started to move against him. On 7 October 2008, the respondent faxed to the appellant a letter ("the 7 October 2008 letter") informing him that his "collateral availability" in relation to his currency deposits in AUD and NZD were "*Negative* USD610,000". This collateral shortfall increased the next day. On 8 October 2008, the

respondent faxed another letter ("the 8 October 2008 letter") to the appellant informing him that based on that morning's rates of AUD 0.7084, NZD 0.6248, JPY 101.30 and CHF 1.1416, there was "a shortfall in [the appellant's] account approximating USD2.3mil". Both letters contained the following note:

> This is not an official bank's statement or advice and is not a substitute for our official statements or advices. This summary is prepared for you as a service to provide account information and is intended for discussion purposes only. ...

The meaning of the note is clear beyond any doubt. Thus, the two letters were not demands for additional collateral or for any action to be taken by the appellant *vis-à-vis* his financial position with the respondent. They were intended for information and discussion purposes only.

9 It is not disputed that while there was a collateral shortfall in the appellant's account on 7 and 8 October 2008, his account remained in "positive equity" (*ie*, the mark-to-market value of his liabilities to the respondent was less than the market value of his collateralised assets). However, on 10 October 2008, the shortfall increased further to around USD 5,460,370.02, resulting in the appellant's account having "negative equity" of USD 1,054,612.74 as well (*ie*, the mark-to-market value of his liabilities exceeded the market value of his collateralised assets). In other words, if the appellant's assets were liquidated on 10 October 2008, the proceeds from the liquidation would not have been sufficient to cover his liabilities to the respondent. This was not the case between 7 and 9 October 2008 when the appellant's account remained in positive equity.

10 This led to the respondent faxing another letter to the appellant dated 10 October 2008 ("the 10 October 2008 letter") which stated, *inter alia*, as follows:

> We refer to the ... Master Agreement ... and the ... Service Agreement ... (together, "the Agreement") ...
>
> Under the terms of the Agreement, you have agreed to maintain the value of the Collateral pledged to us at not less than 100% of your Total Exposure to us. We wish to advise you that there is a current shortfall of **USD5,460,370.02** between the Collateral Value and your Total Exposure.
>
> Accordingly, we request that you take immediate steps to restore the shortfall in the Collateral Value **by 5pm Singapore time today**. You may either provide additional security to us or reduce your Total Exposure. Notwithstanding the foregoing, we would also like to bring to your attention that during this interim period when the shortfall is outstanding, we reserve all our rights under the Agreement, which include without limitation the right without prior notice to terminate early and close out your outstanding contracts and sell any or all of your property or collateral and apply the sale proceeds (after deduction of costs) to discharge your liabilities.
>
> [emphasis in bold in original]

11 The said letter was faxed to the appellant at about 11.15am (reflecting the appellant's collateral position with the respondent at around that time). At 4.32pm, the respondent's relationship manager, Ms Cynthia Chin Mei Lin ("Ms Chin") telephoned the appellant. During this conversation, Ms Chin told the appellant that the respondent would not close out his account immediately, but only that he should give a commitment to remit additional funds (to his account) to cover the negative equity by 13 October 2008. Ms Chin also estimated that the loss which the respondent would suffer if all of his FX contracts were closed out on that day would be about USD 1 million.

12 At 5.06pm, Ms Chin telephoned the appellant and told him that she had no authority to "sit on this one million" negative equity position overnight, unless the appellant made a commitment to remit additional funds to his account by 13 October 2008. During this conversation, the appellant protested that the respondent had no right to ask for such a commitment as he had been promised a 48-hour grace period ("the Grace Period") for any margin call by the respondent. Ms Chin acknowledged that such a promise had been made, but replied that the respondent could close his account immediately if it did not want to do business with him. The appellant refused to give the commitment Ms Chin wanted because (as he later candidly admitted in his evidence) he knew that he would not be able to honour the commitment by 13 October 2008 (because even if he had funds in other banks, he would not be able to remit the funds as it needed two business days to do so: see [42] below). At 7.19pm, the appellant informed Ms Chin that he was unable to remit any money to cover the negative equity. He proposed to Ms Chin that his FX positions be closed out partially on that day, and the rest on 13 October 2008 (which was the next business day for trading in the foreign exchange market) to reduce his Total Exposure temporarily. At 7.53pm, Ms Chin telephoned the appellant to inform him that his proposal had been rejected and that the respondent would close out the various FX contracts in his account.

13 On 13 October 2008, the respondent faxed the appellant a summary of the Transactions it had done on 10 October 2008 to close out his FX contracts, and followed it up with a letter of demand dated 13 October 2008 which read as follows:

> We refer to the ... Master Agreement ... and the ... Service Agreement ... (together, the "Agreement").
>
> Pursuant to the terms and conditions of the Agreement and our rights thereunder, and following our notice of demand dated **10 October 2008**, we have executed various foreign exchange conversion with respect to your cash deposits and have applied proceeds from the foreign exchange conversion towards reducing your outstanding liabilities.
>
> Notwithstanding the above, we would like to inform you that as at **13 October 2008**, there is still an outstanding amount of **USD1,135,239.43** unpaid. Interest shall continue to accrue on the said amount until full repayment.
>
> Please take immediate steps to repay the amount ... by **14 October 2008** failing which we shall take such steps as are necessary ... including, commencement of legal proceedings against you ...
>
> [emphasis in bold in original]

14 The appellant rejected the demand and instead commenced the present proceedings against the respondent for damages for breach of duty in not closing out some of his FX contracts in a timely manner as he had instructed Ms Chin to do and also in closing out all his FX contracts on 10 October 2008. The respondent countered by filing a counterclaim for the amount of USD 1,191,779.27 (later amended to USD 1,206,738.59) being the net amount due from the appellant. The appellant denied liability on the ground the respondent was estopped from closing out his FX contracts on 10 October 2008 during the Grace Period.

The decision below

15 The material issues which came before the JC for decision were as follows:

(a) whether the three letters dated 7, 8 and 10 October 2008 were margin calls under the Master Agreement and/or the Service Agreement; and

(b) whether the respondent had given the Grace Period to the appellant, and if so, whether it was bound by it, and therefore estopped from closing out his FX contracts until the expiry of the Grace Period.

16 On the basis of the evidence adduced before him, the JC found as a fact that the respondent did (through the respondent's managing director, Mr Torsten Linke ("Mr Linke")) give the appellant the Grace Period to decide how to respond to any margin call. However, he also held that the letters dated 7 and 8 October 2008 were in the nature of margin calls and that therefore the Grace Period expired on 10 October 2008 when the respondent closed out all of the appellant's FX contracts. At [15]–[16] of the GD, the JC addressed the legal issues, hypothetically or provisionally, in this way:

> 15 If the only valid margin call by the [respondent] occurred on 10 October 2008 (which was a Friday) as alleged by the [appellant], then the earliest the [respondent] was entitled to close out the [appellant's] FX positions would be either first thing in the morning of 13 October 2008 (if the 48-hour grace period applies) or after 11.15am on 13 October 2008 (if cl 2.6 applies).
>
> 16 However, if the [respondent] had made an earlier valid margin call on either 7 or 8 October 2008, the [appellant's] submission would be rendered moot because even if either or both the 48-hour grace period or cl 2.6 had applied, the FX positions which were closed out at 8.00pm on 10 October 2008 would have been validly closed in any event.

17 After analysing the terms of the Master Agreement and the Service Agreement as well as hearing the evidence of the witnesses, the JC made the following findings at [73] of the GD:

> By reason of the above findings, I hold that the [appellant's] claim fails at every level. First, at the threshold level, I find that the [respondent] did make a valid margin call on 7 October 2008. On that ground alone, the [appellant's] claim must stand dismissed with costs. Secondly, even if the margin call was only made on 10 October 2008 and not 7 October 2008 (contrary to my finding), cl 2.6 of the Master Agreement did not govern the margin call and even if it did, it would nonetheless not have assisted the [appellant] in the light of his own unequivocal confirmation that he was unable and or unwilling to deliver additional collateral to clear the margin shortfall even if time was extended to 14 October 2008. Finally, and even though I found that the 48-hour grace period was promised to the [appellant], the case based on promissory estoppel would suffer the same fate for the same reason given the [appellant's] confirmation that he would not have been able to deliver the additional collateral even if the grace period was extended beyond the 48-hour grace period.

It should be noted that although this passage made no reference to the 8 October 2008 letter, the JC had found, at [24] of the GD, that the Grace Period in relation to the 8 October 2008 letter would also have expired on 10 October 2008.

Issues on appeal

18 The issues for our decision are the same as those set out at [15] above. We will now address them.

Were the letters dated 7, 8 and 10 October 2008 margin calls?

19 The first issue is whether the three letters were, or in the nature of, margin calls under the Master Agreement and/or the Service Agreement. The JC held that all three letters were margin calls for the following reasons (see the GD at [23]):

(a) the appellant admitted that because of the shortfall of USD 610,000, the respondent was entitled to close the Advisory Account on 7 October 2008;

(b) the appellant had instructed Ms Chin at 4.59pm on 7 October 2008 to place a "Limit Order" to sell AUD 10 million for CHF at the AUD/CHF exchange rate of 0.8413 for the purpose of reducing the shortfall;

(c) the appellant gave similar instructions to Ms Chin on 8 October 2008 with respect to selling his NZD for JPY for the same purpose; and

(d) the appellant's own conduct showed that he, as a seasoned FX investor, knew exactly what he was required to do when his account fell into margin shortfall.

20 With respect, we are unable to agree with the JC's approach in determining the legal rights of the respondent under the letters dated 7 and 8 October 2008. In our view, these two letters were clearly not margin calls and were not intended as margin calls. They were notifications, to the appellant, of his "collateral availability" (the 7 October 2008 letter) and his Advisory Account shortfall (the 8 October 2008 letter), and were "for discussion purposes only". Having regard to the note contained in each letter (see [8] above), the contents of the letters were self-explanatory. We do not agree that the appellant's admissions and instructions referred to at [19] above are capable of conferring rights on the respondent under the 7 and 8 October 2008 letters if the letters themselves carry no such rights. The appellant's admissions or instructions to Ms Chin to take action on his FX contracts cannot change the meaning or purport of the said letters. The instructions given to Ms Chin on 7 and 8 October 2008 could only have been given pursuant to the invitation to discuss the appellant's FX positions. Hence, those instructions were not an admission of the respondent's contractual rights to close his FX positions without notice, and those letters were not notices. Furthermore, as will be seen, the admission said to have been made by the appellant occurred during the various conversations between the appellant and Ms Chin after he had received the 10 October 2008 letter which requested him to "take immediate steps to restore the shortfall in the Collateral Value by 5pm Singapore time [that day]". The transcripts of these conversations show clearly that the appellant denied that the respondent was entitled to close his FX positions until the expiry of the Grace Period to respond to the margin call. The instructions of the appellant to Ms Chin to close some of his FX positions were an attempt to meet the respondent's request to reduce his Total Exposure, nothing more. A seasoned currency arbitrageur, like the appellant, would be expected to act in that way, even in the absence of any margin call, if he felt that the exchange rates were moving against him. Even the respondent itself did not consider the 7 and 8 October 2008 letters to be margin calls because the letter of demand dated 13 October 2008 (see [13] above) made no reference to the 7 and 8 October 2008 letters but only to the 10 October 2008 letter as the basis for closing out all of the appellant's FX positions. The JC's findings were clearly inconsistent with the express words of the 7 and 8 October 2008 letters.

21 On the other hand, we agree with the JC that the 10 October 2008 letter was a margin call as it was expressed to be so (the appellant does not dispute this). This letter would have been entirely superfluous if the previous two letters had been margin calls. It was an express notice to the appellant to "either provide additional security" or to "reduce [his] Total Exposure", then amounting to USD 5,460,370.02, which was the shortfall between the Collateral Value of the appellant's securities and his Total Exposure (the expressions "Collateral Value" and "Total Exposure" are defined in the

Service Agreement under the section "*Credit, banking and foreign exchange facilities*"). Although the 10 October 2008 letter gave the appellant until 5pm to respond to it, he did so by telephoning Ms Chin to discuss the steps needed to be taken by him to meet the request. His proposal of a partial closing out of his FX positions (involving NZD 20 million), and the rest on 13 October 2008, in order to reduce his Total Exposure was rejected. According to him, he was hopeful (from his experience) that after the G7 meeting scheduled for that weekend (*ie*, 11 and 12 October 2008), of which the respondent was aware, the currency market would turn in his favour. He was proven correct, as the exchange rates of the currencies he traded in did move in his favour on 13 October 2008.

Is cl 2.6 of the Master Agreement applicable to the 10 October 2008 letter?

22 The next issue is whether cl 2.6 of the Master Agreement applied to the 10 October 2008 letter. If it did, the appellant would only be obliged to deliver any additional collateral requested by the respondent "within one business day's notice". It is not disputed that the 10 October 2008 letter would not comply with cl 2.6 as it only gave the appellant up to 5pm to provide additional collateral or to reduce his Total Exposure. In the event, the JC held that cl 2.6 did not apply to the 10 October 2008 letter. His reasons are set out in the GD at [34]–[39]. But before we examine these reasons, it is necessary that we first examine cl 2.6 (as well as cl 2.5) of the Master Agreement to see what they expressly provide.

23 Clauses 2.5 and 2.6 of the Master Agreement provide as follows:

> 2.5 In relation to each Transaction, it is a condition precedent to the obligations of the Bank in relation to that Transaction becoming effective that the Counterparty enter into the Bank's Service Agreement or other agreement (together, "the Service Agreement"), the Bank's Risk Disclosure Statement and any Credit Support Document as requested by the Bank from time to time in its absolute discretion. The Bank may in its absolute discretion waive such condition precedent for a particular Transaction or Transactions. ...
>
> 2.6 The Bank shall at its absolute discretion prescribe the amount of margin or collateral that the Counterparty or any Credit Support Provider must provide to the Bank in order to secure the Counterparty's obligations to the Bank under the Transactions, and may from time to time amend or add to such margin or collateral requirements. Such margin or collateral requirements may be notified by the Bank to the Counterparty in writing or verbally. *If the Bank shall for any reason deem that there is insufficient collateral held pursuant to the terms of the Credit Support Documents that is available to satisfy the Counterparty's present or future obligations under this Agreement or the Counterparty's present or future obligations under any other agreement or arrangement between the Counterparty and the Bank, the Counterparty shall* ***within one business day's notice*** *thereof deliver additional collateral of a type acceptable to the Bank in its sole discretion* (which collateral shall be delivered and secured pursuant to any existing Credit Support Document or other arrangement in a form satisfactory to the Bank in its sole discretion) in an amount as may be required by the Bank. The margin or collateral provided to the Bank as security for the Counterparty's obligations to the Bank under the Transactions is in addition to and without prejudice to any other collateral or margin which the Bank may now or hereafter hold from the Counterparty. ... For the avoidance of doubt, *if the Counterparty fails to deliver such additional collateral*, such failure shall constitute an Event of Default in respect of the Counterparty pursuant to Clause 5 below and *the Bank may proceed to terminate some or all of the Transactions at its discretion pursuant to Clause 5 without further notice* to the Counterparty other than the notice of termination to be provided under Clause 5.4.

[emphasis added in italics and bold italics]

24 The Master Agreement, as its name implies, is intended to apply to foreign exchange trading and derivatives transactions. *Prima facie* therefore, it applies to the appellant's FX contracts. But, as stated in cl 2.5, no Transaction (defined as any transaction between the respondent and the counterparty under the Master Agreement) is effective *vis-à-vis* the respondent until and unless the Service Agreement has first been signed – the signing of the Service Agreement is a condition precedent to the respondent's obligations under the Master Agreement. In other words, the Service Agreement becomes part and parcel of the Master Agreement, or vice versa with respect to any Transaction made under the Master Agreement. There is no room to read the Service Agreement as an agreement completely divorced from the Master Agreement.

25 Under cl 2.6, the respondent has the absolute discretion to prescribe the amount of the margin and the collateral that the appellant must provide at any time and from time to time, and *if the respondent deems the collateral to be insufficient*, the appellant must deliver additional collateral "within one business day's notice". The appellant is entitled to be given one business day's notice to meet such an obligation – this is implicit or inherent in cl 2.6. The expression "business day" is not defined in the Master Agreement, but in the Service Agreement, it is defined (under the section "*Bank statements*") as "a day other than Saturday or Sunday on which banks and/or foreign exchange markets are open for business in Singapore and/or such other financial centres as [the respondent] may choose". Clause 2.6 also provides that a failure to provide additional security shall constitute an Event of Default under cl 5 of the Master Agreement, on the occurrence of which the respondent may terminate any one or more or all outstanding Transactions at its sole discretion on the date specified. An "Event of Default" in cl 5 refers to six events, including "any Event of Default (as defined in the Service Agreement)" as provided by cl 5.1(c). These cross-references reinforce the conclusion that the Master Agreement and the Service Agreement have to be read together with respect to each Transaction.

26 The JC accepted the appellant's argument that the Master Agreement was applicable to all of the appellant's Transactions, but he nevertheless held that this legal fact did not "inexorably lead to the conclusion that the margin call made by the [respondent] on 10 October 2008 was necessarily governed by cl 2.6" (see the GD at [33]). He held that cl 2.6 of the Master Agreement did not apply to the 10 October 2008 margin call because it was not made pursuant to cl 2.6, but under the Service Agreement, and therefore the appellant was not entitled to the one business day's notice to meet the margin call in the 10 October 2008 letter.

27 Let us now examine the JC's reasons, which he set out at [34]–[39] of the GD as follows:

> 34 To understand the purport of cl 2.6, a close examination of the clause is essential:
>
> > (a) It entitled the [respondent] to require the [appellant] to deliver additional collateral if the [respondent] should deem for any reason that the existing collateral was insufficient.
> >
> > (b) The entitlement to require additional collateral was to cover present or future obligations of the [appellant] to the [respondent].
> >
> > (c) The one business day notice was for the [appellant] to deliver additional collateral of a type and in an amount as required by the [respondent].
> >
> > (d) Failure to deliver the additional collateral would constitute an event of default which would entitle the [respondent] to terminate all of the [appellant's] transactions at its

discretion without further notice.

35 On the face of cl 2.6, the [respondent] was entitled to require the [appellant] to deliver additional collateral even if the account was not in a margin shortfall. This is clear from cl 2.6 which entitled the [respondent] to require the [appellant] to bring in additional collateral if the [respondent] should deem that the existing collateral was insufficient for whatever reason. Furthermore, the fact that the additional collateral to be delivered is to satisfy future obligations lends support to the construction that cl 2.6 is applicable even if the account is not in margin shortfall. When cl 2.6 was dissected in this manner, counsel for the [appellant] candidly accepted that cl 2.6 would apply even when the account was not in margin shortfall.

36 It follows that when the [appellant's] account fell into margin shortfall between 7 and 10 October 2008, there was no necessity for the [respondent] to rely on cl 2.6. It is important to recognise that cl 2.6 is not designed to give the [appellant] time before the [respondent] could close the FX positions when the account is in margin shortfall. Instead, cl 2.6 confers a right on the [respondent] to require the [appellant] to deliver additional collateral in such an amount if the [respondent] so requires. The one business day notice only comes into play if the [respondent] should decide to invoke cl 2.6 and not otherwise. Counsel for the [appellant] submitted that while cl 2.6 would apply even if the account was not in margin shortfall, it is nevertheless wide enough to cover a situation when the account was in such shortfall.

37 The [respondent] submitted that it was contractually entitled to close out the [appellant's] FX positions under the Advisory Account at any time and without notice. The [respondent] relied, *inter alia*, on the Service Agreement which provides as follows:

> Credit banking and foreign exchange facilities
>
> 1. We may (but need not) grant you credit banking and foreign exchange facilities ('Facilities') in accordance with the terms of this Service Agreement and other terms as may be agreed. All Facilities are made available on an uncommitted basis and subject to the provision of adequate collateral. We may at any time and from time to time vary, suspend or terminate any or all Facilities without prior notice. In such event, all your Liabilities under the Facilities shall become immediately due and payable.
>
> 2. Any payment relating to the Facilities not made when due shall bear interest at such rate as we may reasonably determine. Such interest shall accrue and be calculated daily from and including the due date until but excluding the actual payment date. Such interest may be capitalised by us monthly, and itself bear interest.
>
> 3. We have the right to determine the total value of collateral we consider acceptable ('Collateral Value').
>
> 4. We may assign a lower Collateral Value to collateral denominated in currencies different from the currencies of our exposure to you to take into account our currency exchange rate risk.
>
> 5. The Collateral Value must not be less than 100% of the Total Exposure [as defined below] at any time. ...
>
> 6. If at any time, the Collateral Value is less than 100% of the Total Exposure, we may exercise our Rights on Termination. We may (but need not) allow you time to restore the

Collateral Value to more than 100% of the Total Exposure.

38 It is clear that under the Service Agreement, the [appellant] was required to ensure that the Collateral Value, which is the value of the [appellant's] collateral as determined by the [respondent], must not be less than 100% of his Total Exposure and if it is less than the requisite 100%, the [respondent] may terminate the transactions under the Advisory Account without providing any time to the [appellant] to restore the shortfall. This was not only undisputed by the [appellant] but was admitted to be so in his AEIC and under cross-examination.

39 Although the [respondent's] letter dated 10 October 2008 referred to both the Master Agreement and the Service Agreement, it is clear from the language of the letter that the [respondent's] notice to the [appellant] to clear the shortfall (not to deliver any specific additional collateral) was made pursuant to the Service Agreement:

(a) It specifically referred to the requirement for the [appellant] "to maintain the value of the Collateral pledged to us at not less than 100% of your Total Exposure to us". This mirrors the requirement under cl 5 (Credit banking and foreign exchange facilities) of the Service Agreement.

(b) Clause 2.6 would apply in a situation when the [respondent] invokes the right to direct the [appellant] to deliver additional collateral of a type acceptable and in an amount required by the [respondent]. Not only was cl 2.6 not referred to, the letter did not specify any amount which the [appellant] was required to deliver. It merely required the [appellant] to clear the shortfall by either providing additional collateral or reducing his Total Exposure to the [respondent].

28 To summarise the reasoning in the above passages, the JC essentially took the position that cl 2.6 was "not designed to give the [appellant] time before the [respondent] could close the FX contracts when the account [was] in margin shortfall" (see the GD at [36]). Rather, "cl 2.6 [conferred] a right on the [respondent] to require the [appellant] to deliver additional collateral in such an amount if the [respondent] so [required]" (see the GD at [36]). The one business day's notice only applied where the respondent decided to invoke cl 2.6. In his view, the 10 October 2008 letter was a request to clear the shortfall under the Service Agreement because it mirrored the language of the Service Agreement in referring to maintaining not less than 100% of the appellant's Total Exposure. Accordingly, cl 2.6 of the Master Agreement did not come into play. On the other hand, cl 6 of the "*Credit, banking and foreign exchange facilities*" section in the Service Agreement provides that if at any time, the "Collateral Value is less than 100% of the Total Exposure, [the respondent] may exercise [its] Rights *on* Termination" [emphasis added].

29 With respect, we again are unable to agree with the JC's approach in interpreting the 10 October 2008 letter as having been given under the Service Agreement and not the Master Agreement for the following reasons:

(a) First, as both the Master Agreement and the Service Agreement apply to each Transaction (cl 2.5 of the Master Agreement provides for it expressly), cl 2.6 of the Master Agreement would apply to the 10 October 2008 letter unless it has been excluded by the Service Agreement. There is nothing in the Service Agreement which excludes the operation of cl 2.6 of the Master Agreement.

(b) Second, the Service Agreement does not *expressly* authorise the respondent to terminate the appellant's account or to close out his FX positions *without giving any notice* to the appellant, even in a situation where "the Collateral Value is less than 100% of the Total Exposure". The Service Agreement provides (under the "*Remedies*" section) that it is only on the occurrence of an Event of Default that the respondent may:

> 1. Terminate this Service Agreement whereupon all [the appellant's] Liabilities will become immediately due and payable
>
> 2. Terminate early and close out ... all outstanding contracts
>
> ...

Clause 1 (under the "*Security*" section) provides that "[the respondent] may require [the appellant] to provide security for [the appellant's] Liabilities (sometimes at very short notice in view of market movements)". Clause 9 (under the "*Events of Default*" section) provides that it is an Event of Default if there is any "[f]ailure to provide any additional collateral when [the respondent] require[s]". It is implicit or inherent in this provision that prior notice must first be given to the appellant to provide additional collateral, as otherwise no failure to provide security could arise. This raised the question of how much notice is required to invoke the right of termination. There are only two possibilities. First, if cl 2.6 of the Master Agreement applies, a failure to comply with a one business day's notice is sufficient to cause an Event of Default. If cl 2.6 of the Master Agreement does not apply, then cl 9 (of the Service Agreement) would require, according to established principles of interpretation, reasonable notice. This approach is consistent with the structure of the Master Agreement read with the Service Agreement with respect to each Transaction they apply to. It also accords with commercial sense, as it would be surprising if, in the business of wealth management, banks could give themselves the right to close their clients' accounts without giving any notice at all.

(c) Third, the respondent served the 10 October 2008 letter on the basis that both the Master Agreement and the Service Agreement applied to the margin call because it referred to them expressly.The fact that no reference was made specifically to cl 2.6 of the Master Agreement was neither here nor there: it did not make cl 2.6 any the less applicable, as there was no need to mention the clause itself. If the respondent intended to make the margin call under the Service Agreement only, it would not have referred to the Master Agreement. The respondent should know under which agreement it was invoking its rights to make the margin call.

(d) Fourth, the 10 October 2008 letter expressly required the appellant to "take immediate steps to restore the shortfall in the Collateral Value **by 5pm Singapore time today**", and to do so by providing "*additional security to [the respondent] or [by reducing] [his] Total Exposure*" [emphasis added]. The letter expressly requested additional collateral in terms of the ambit of cl 2.6. No doubt, the Service Agreement also refers to the reduction of his Total Exposure. But there is no difference in substance between reducing the shortfall and providing additional security to reduce the shortfall – one is only the means to achieve the other. In the present case, cl 6 of the "*Credit, banking and foreign exchange facilities*" section (reproduced at [27] above) does not refer to a "shortfall" but to the restoration of "the Collateral Value to more than 100% of the Total Exposure", and this can only be done by providing additional collateral. We see no inconsistency between cl 2.6 of the Master Agreement and any of the provisions of the Service Agreement in this regard.

(e) Finally, if there is any doubt as to whether cl 2.6 of the Master Agreement was applicable to the 10 October 2008 letter, there is no reason why the court should not apply the *contra proferentum* rule of construction for the benefit of the appellant. The respondent cannot be allowed to rely on any ambiguity in its own documentation to its own advantage to deny the appellant any rights at all in this respect. This rule of construction applies not only to the interpretation of contractual terms within a single document but also across two or more documents if they are both connected with the transaction in question, as in the present case.

30 For these reasons, we are of the view that cl 2.6 applied to the 10 October 2008 letter, and under that clause, the appellant was entitled to one business day's notice to restore the state of his account to the satisfaction of the respondent, either by providing additional collateral or by reducing his Total Exposure. Accordingly, we find that the respondent was in breach of its obligations to the appellant in closing out all his FX positions on 10 October 2008.

31 We should add, just to put the appellant's conduct in its proper perspective, that the evidence shows that the appellant was trying very hard to comply with the terms of the 10 October 2008 letter by seeking to stagger the closing out of his FX positions. He had four conversations with Ms Chin after receiving the said letter and had wanted Ms Chin to reduce his Total Exposure by closing out some of his FX positions first and the rest on the following Monday, 13 October 2008. However, Ms Chin was not authorised to agree to carry out the appellant's suggestions as the respondent had already made up its mind to close out all of his FX positions on that day because of the deteriorating situation in the foreign exchange market. For example, the telephone conversation recorded at 7.19pm is as follows: [note: 1]

DAVID:	Then now if we (do) it this way, if --- if er, er, close off, close off *20 million* first, based on the present rate come and close off *20 million*, the rest let me place then --- that is you trust me for one week --- one week --- you trust me for one Friday lor, or it will be next --- next Monday then start to close off everything lor.
CYNTHIA:	If ---
DAVID:	You speak to the big boss lah.
CYNTHIA:	No, if *under margin call status* ---
DAVID:	Yes.
CYNTHIA:	--- then to discuss in this way won't be a problem because normally, like the other day I told you because (when) it reaches *margin call*, that is have *margin call* but ---
DAVID:	Mm.
CYNTHIA:	--- but still have that one called *positive equity* ---
DAVID:	Yes.
CYNTHIA:	--- still can discuss.
DAVID:	Ah.
CYNTHIA:	But now it's already *negative equity*.

[emphasis in original]

What was the legal effect of the respondent's promise of the Grace Period?

32 As we have stated earlier, the JC found that Mr Linke had promised the appellant, at a meeting between them sometime in July 2008, that the appellant would have the Grace Period to respond to any margin call, but he concluded that, in law, the promise did not operate as an estoppel against the respondent insisting on its strict contractual rights as the appellant had not relied on the promise to his detriment such as to make it inequitable for the respondent to resile from that promise. The respondent has not appealed against the factual finding of the existence of the promise, but the appellant has appealed against the legal finding that there was no promissory estoppel. Therefore, the issue before us is whether the JC's decision on this issue is correct in law.

33 In coming to this finding, the JC examined the divergent case law on the subject and concluded that the main reason for this state of affairs was that the courts had given different meanings to the requirement of detrimental reliance. He referred to Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham et al eds) (LexisNexis UK, 4th Ed, 2004) ("*Bower*") at p 481 where detriment was described to mean: (a) incurring expenditure of money and time; (b) incurring a liability; (c) change of position; and (d) deprivation of a benefit (see [55]–[56] of the GD). At [57] of the GD, the JC stated the following overarching principle of promissory estoppel which he was able to distil from the divergent case law and academic opinions:

> In my view, it will not be helpful to attach labels to properly characterise "detriment". The overarching principle in each of these categories is that the doctrine has consistently been held to apply in circumstances when it was inequitable either in the narrow or broader sense of "detriment" for the promisor to resile from his promise and to enforce his strict legal rights. This was after all the foundation of the doctrine as developed in [*Thomas Hughes v The Directors of the Metropolitan Railway Co* (1877) 2 App Cas 439] (*per* Lord Cairns at 448):
>
>> [I]f parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, *the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties*.
>
> [emphasis in original]

34 Applying the overarching principle he identified, the JC held that the appellant had failed to prove that he had suffered any detriment in relying on the respondent's promise of the Grace Period so as to make it inequitable for the respondent to resile from its promise. He held that the appellant's remittance of additional funds to the respondent to secure his FX contracts was not detrimental to him, as he had not alleged that he had suffered any financial loss or other detriment in transferring the additional funds (see the GD at [65]). He also held that the appellant had not suffered any detriment in having been denied the Grace Period as he had not been willing and able to deliver additional collateral, and that would have been the case even if 72 hours had been given to him to meet the margin call. The JC's reasons are set out at [64]–[67] of the GD as follows:

> 64 The inquiry is not simply whether the [appellant] had relied on the promise but whether the reliance had rendered it inequitable for the [respondent] to go back on its promise and to enforce its strict legal rights under the Service Agreement.
>
> 65 For promissory estoppel, the reliance must be linked to the "detriment". In the present case, I agree with the [respondent]'s submission that there is an obvious disconnect between the

pleaded reliance and the alleged detriment. The [appellant] alleged that he remitted additional funds to the [respondent] some two to three months after the promise. However, the [appellant] is not alleging that he suffered detriment in transferring the additional funds. It was for the [appellant] to decide how and what he wished to do with his deposits including the additional funds which were remitted in September 2008. The [appellant] instead alleged that he suffered detriment in that he was denied more time to restore the margin shortfall.

66 It is not the [appellant]'s case that if the [respondent] had not resiled from its promise, he would have been ready, willing and able to deliver additional collateral to clear the shortfall within the 48-hour grace period. If that had been the [appellant]'s case, at least there would be a causal link and a legal platform to mount a case on promissory estoppel. However, the [appellant] did not pursue his case in this manner because he knew it was against the weight of the evidence.

67 How could the [appellant] allege that it was inequitable for the [respondent] to enforce its rights under the Service Agreement (which has the effect of withdrawing the promise of the 48-hour grace period) given his own evidence that he was unwilling and/or unable to do so even if the grace period was extended to 72 hours up to 14 October 2008. The truth is the [appellant] was given time to respond. His response was clear and unequivocal:

> *Q*: *Your response is very clear. You don't have money; right?*
>
> A: Yes.
>
> *Q*: *Even if you do have money, you are not going to put it in because every account is like an independent ship; correct?*
>
> A: Yes.

[emphasis in original]

35 With respect, we are unable to agree with the JC's decision and his reasoning as set out in these passages. In our view, the JC took an overly narrow view of detrimental reliance in the present context of promises made by bank officers when soliciting private banking clients. The appellant was the respondent's "private banking" client, a description that signifies the importance of the appellant to the respondent as a desirable source of its business (and revenue). The appellant's business was not insignificant for an individual in the wealth management industry in Singapore. The respondent had given him a credit line of USD 200 million to enable him to engage in the carry trade. The buying and selling of currencies is a profitable business. Further, according to the appellant, he had traded more than 10 currency options through the respondent, [note: 2] and the respondent would have earned considerable fees for executing them. The respondent would also have benefitted considerably from the large cash deposits which the appellant had placed with the respondent as security for his Transactions. His Total Exposure on 10 October 2008 was equivalent to NZD 88 million. [note: 3] In our view, the respondent's word should be its bond in the context of this case.

36 It is trite that under a system of floating currencies, exchange rates are unstable as they are determined by many factors, and therefore the FX market can become very volatile at times. For this reason, the more time given to the customer to close out any outstanding FX positions the better for him, and conversely, the worse it might be for the respondent. A 48-hour grace period (which could be stretched to mean two business days) for such purposes is thus a very valuable right or privilege to a sophisticated customer like the appellant, as it gives him more time to decide what to do – to

take his losses immediately, to average down his investment by buying more FX contracts, or as in the present case, to maintain his FX positions until the next business day.

37 In the present case, the appellant wanted to partially close out his FX contracts (*ie*, NZD 20 million on 10 October 2008 and the balance of NZD 68 million on 13 October 2008) in order to reduce his Total Exposure as requested by the respondent. He explained that, from his own experience in FX trading, the foreign exchange market was more likely than not to move in his favour because the next business day would be after the conclusion of the G7 meeting scheduled for that weekend. It would seem that the respondent was fearful that the appellant's FX positions would deteriorate further, thus increasing his exposure to the respondent. Hence, the respondent was determined to close out all his FX positions on 10 October 2008 after the 5pm deadline, which it did. As it turned out, the appellant's reading of the FX market after the G7 meeting was correct – the market did move in favour of the appellant on 13 October 2008 – in contrast to the apparent panic exhibited by the respondent.

38 The JC held that the appellant's transfer of funds from other banks to the respondent as security did not constitute a "detriment" to him in the context of promissory estoppel. However, the appellant did more than that. In our view, there was sufficient detrimental reliance by the appellant as he changed his position: (a) by obtaining a very substantial credit line from the respondent to give business to the respondent; and (b) by providing collateral (which he had to transfer from his accounts with other banks) to the benefit of the respondent. Without the benefit of the Grace Period to allow him to decide on the best course of action if and when a margin call is made, he might not have exposed himself to such large FX positions. In the present case, the respondent made the wrong move in closing out the appellant's FX positions prematurely and against his wishes, and caused a substantial loss exceeding USD 1 million in his net FX positions, which the respondent has now claimed from him. In our view, there was sufficient detrimental reliance by the appellant that made it inequitable for the respondent to resile from its promise to honour the Grace Period.

39 We are also unable to agree with the JC's view that because the appellant was unwilling and/or unable to provide additional collateral for the shortfall, even if the Grace Period had been extended to 72 hours (*ie*, up to 14 October 2008), it was not inequitable for the respondent to enforce its strict rights under the Master Agreement and the Service Agreement (assuming that cl 2.6 was not applicable). In our view, the appellant's refusal in this respect would not affect his legal rights. If he was entitled to the Grace Period to respond to the 10 October 2008 letter, he was under no obligation to give the commitment that Ms Chin required. Furthermore, the appellant had also explained why he could not have fulfilled his commitment, even if he had the funds, as at least two business days' notice was required to transfer such funds. Indeed, in retrospect, the respondent's insistence on a commitment by the appellant made little practical or commercial sense. The appellant could have easily given a commitment without having any intention of honouring it in the knowledge that he would not be able to do so since by 13 October 2008, as explained by him (see [42] below), he could only effect transfer of funds from another bank (assuming he had such funds) on two business days' notice. Thus, the commitment served no purpose whatever because the respondent would not have been better off even if the appellant had given the commitment. The respondent would not have gained anything from it. We do not see why the appellant's candour and honesty in this regard should prejudice his right to insist on the Grace Period in order to provide additional collateral or to reduce his Total Exposure. In fact, as we have stated earlier, the appellant did the only thing that was feasible before the close of 10 October 2008 (*ie*, to *reduce* his Total Exposure by closing out partially his FX positions, but not to *crystallise* his Total Exposure by closing out all his FX positions on that day). Indeed, for this reason, it is arguable that the appellant had complied with the terms of the 10 October 2008 letter, but the respondent was in breach of it by rejecting a partial closing out of his FX positions to reduce his Total Exposure. The respondent, in requesting additional security by 5pm that day, was imposing a requirement that could not be fulfilled in practical terms, and it had to resort

to the excuse of a commitment to crystallise the appellant's Total Exposure instead of reducing it. As this point was not argued, we do not need to rule on it. Nevertheless, we do find the respondent's conduct in this case rather surprising, given its own acknowledgement that it had given the Grace Period to the appellant.

40 Furthermore, in our view, even if it is arguable that there was no detrimental reliance on the facts on this case, we would hold that the appellant is entitled to succeed in this appeal on the broader principle set out at para V.5.17 of *Bower*, where it is stated: [note: 4]

> However, even adopting such a broad definition of detriment, an exception may be suggested to the rule that detriment is required. It is strongly arguable that a representor may be estopped from denying a representation because it is inequitable for the representor to resile from it, although the representee has suffered no detriment, where the representor has obtained an *advantage* by the reliance of the representee on the representation, as has been held in relation to constructive trusts, by reasoning equally applicable to the doctrine of estoppel. [emphasis in original]

The principle is that where the promisor has obtained an advantage from giving a promise to the promisee, he should not be allowed to resile from his promise on the basis of promissory estoppel. We are of the view that this principle is particularly relevant in the context of private banking where if the banks and financial intermediaries engaged in the business of wealth management cannot be trusted with their words, they should not be allowed to be in this business. The courts should not allow a bank to claim that "my word is not my bond", and should be sufficiently astute to find inequity, and where it is possible to do so within legal limits, to hold the promisor to his word in a case, such as the present, where the respondent has obtained an advantage from his promise at the expense of the promisee. In the circumstances, we find that the respondent was estopped from making the margin call in the terms of the 10 October 2008 letter.

Did the appellant accept that the respondent was entitled to close out his FX positions on 10 October 2008?

41 The JC also held that the Grace Period could not prevent the respondent from closing out the appellant's FX positions as the appellant had accepted the respondent's right to do so. This finding is set out at [68]–[69] of the GD as follows:

> 68 The [appellant] was aware and accepted that the [respondent] was indeed entitled to close his FX positions on 10 October 2008:
>
> > *Q*: *Otherwise, if the bank wants to lose off, then go ahead?*
> >
> > *A*: *Yes*.
> >
> > *Q*: *Close off everything, then go ahead; right?*
> >
> > *A*: *Yeah, that's what I told them. Yeah*.
>
> [emphasis in original]
>
> 69 Having accepted that the [respondent] was entitled to close his FX positions on 10 October 2008 and the positions were in fact closed on 10 October 2008, it would in fact be unfair for the [appellant] to now raise promissory estoppel to challenge the validity of the margin call

transactions. This is all the more so on the facts of this case since it is the [appellant]'s own evidence that the right to close out had accrued on 7 October 2008 and that the [respondent] should have done so some three days earlier. Accordingly on the evidence before me, I find that it was not inequitable for the [appellant] to rely on the terms of the Service Agreement to close out the [appellant]'s FX positions on 10 October 2008.

42 With respect, we do not think that the appellant's answers quoted in this passage were an acceptance that the respondent was entitled to close his FX positions without giving him the Grace Period. The appellant's answers came at the end of a long cross-examination in which he expressed the opposite view on many occasions. The relevant portions of the questions and answers start at Record of Appeal ("ROA"), Vol III (Part C) at pp 1020–1023 as follows:

Q: Then you accept the situation and you say that the bank -- if you want to close off, there is nothing you can do; correct?

A: Yes, because money and deposits were with the bank.

Q: Right. So you accept that the bank is entitled to close off your positions immediately; right?

A: *Disagree. It is just because deposit with the bank. They have got the money in physical possession of my money and deposits*.

Q: Mr Lam, you are an experienced investor; right? Correct? You have experienced margin call situations before; correct?

A: Yeah.

Q: You are in the fourth day in a row of account shortfall; correct?

A: Yes.

Q: That is why you say that you were fully aware that the bank was entitled to close you out in such situations?

A: *No, I only received the formal notice on 10 October, and I will say the notice is defective, because the notice did not remind me of my right under the base document to wait until the expiration of one business day, so the notice was defective per se. It did not remind me of my legal right under the documents*.

Q: Mr Lam, even if you start counting on 10 October, I put it to you that it would not have made a difference because you told the bank, even if you wait for one business day or wait for 48 hours until Monday --

A: Yes.

Q: -- I still cannot remit any money. Do you agree or disagree?

A: Because I told you earlier --

Q: Do you agree or disagree first, then explain?

A: Yeah, agree. Yeah.

Q: Do you want to explain?

A: I told you earlier, that would at least take two business days to remit funds in foreign currency from one bank to another. At that time -- at that juncture, already past 5 o'clock in the afternoon, so it would take at least three work -- business days from that time, because already 5 o'clock pm. So it would take two plus one, three business days to remit funds into Deutsche Bank at that time.

Q: So your point is the bank should just wait for you to -- wait, even though you haven't given a commitment, just wait and see whether or not you were actually going to remit funds on Tuesday or Wednesday?

A: I had to wait the 48-hour -- so it will be --

Q: You did not tell the bank within 48 hours you would put in money; correct?

A: That's correct, yeah.

Q: Thank you.

A: But it was my right.

Q: Look at page 526. This is what you say at the top:

"If you all trust me enough, then I close off 20 million Kiwi then the balance, whatever amount, then you let me place the positions like that, *otherwise if you all want to close off, then close off, but the outcome is really very bad lah*."

Right?

A: Yes.

Q: So what you are saying is that, look, please trust me. Please close off NZD 20 million only, then the balance -- the balance is about 68 million; right?

A: Yes.

Q: The balance, let me place my three limit orders?

A: Yes.

Q: That's what you are saying to the bank; right?

A: Yeah.

Q: Otherwise, if the bank wants to close off, then go ahead?

A: Yes.

Q: Close off everything, then go ahead; right?

A: Yeah, that's what I told them. Yeah.

[emphasis added]

43 In our view, the appellant's answer (italicised in the extract above at [42]) makes it very clear that his other answers were not intended to suggest that he accepted that the respondent had the legal right to close out all of his FX positions without any notice. The appellant's defence all along had been that first, he was entitled to be given one business day's notice to provide additional collateral; and secondly, he had, in any case, been promised 48 hours to respond to any margin call (whether it arose out of a negative equity position or a shortfall in his collateral position in relation to his Total Exposure). In saying that the respondent could close his account, the appellant was acknowledging a physical fact – that he could not prevent the respondent from closing out his FX positions and offsetting his security deposits since it had custody and control of his funds. But this was a far cry from saying that he accepted that the respondent had the legal right to do so. This can be seen in the questions and answers in the earlier stage of his cross-examination which are reproduced below:

ROA, Vol III (Part C), at p 982

Q: Do you not say in your affidavit, Mr Lam, that on 7 October 2008 the bank could have closed you out?

A: Yes.

Q: Right.

A: But subject, of course, to the terms of the agreed -- of the documents.

Q: So on 10 October 2008, when you received this letter --

A: Yes.

Q: -- right at AB 186 --

A: Yes.

Q: -- you must have realised and understood the case to be that the bank can close you out immediately, now?

A: No. They should have wait until the required one business day or 48-hours' grace period, as the case may be.

ROA, Vol III (Part C), at pp 994 to 996

Q: What you are saying, Mr Lam, is that you realised that the bank has a right to close off so you are telling the bank, I will not remit money. I will leave it as it is. If you want to close off, then just close off accordingly; right?

A: No. I did not know whether the bank has the right to close off but I do feel that the bank has the desire to do so.

Q: You see, Mr Lam, you are telling the bank, if you want to close off, then close off, so be it;

correct?

A: Yes.

Q: You never said to Cynthia Chin, no, you cannot close off. You must give me 48-hours' notice, then you can close off; right?

A: No, I did mention the 48 hours later.

Q: Yes, I will come to that later, but at this stage you never [t]old Cynthia Chin, no, you cannot close off. You must give me 48-hours' notice, sit there and wait -- even though you're not going to remit any money -- and then close off. You never said that; right?

A: At that time, yes.

Q: And the reason why you did not say that, Mr Lam, is because you knew that the bank had every right to liquidate your positions immediately and close you off; correct?

A: Disagree.

Q: That's why you are saying there is nothing you can do; correct? Mr Lam?

A: Disagree.

Q: You see, then you asked the bank, can you close off half my positions only; right?

A: Yes.

Q: You asked the bank, can it be done; right?

A: Yes, correct.

Q: So what you are saying is, I know you can close off everything now but do me a favour, close off only half. Can you agree to that? That's what you are telling the bank, correct?

A: I suggested that the bank should close half.

Q: Yes. That is because you knew that the bank has the right to close off everything, but you are suggesting to the bank, why don't you consider just closing off half; right?

A: Disagree.

ROA, Vol III (Part C), at p 1005

Q: Even if you do have money, you are not going to put it in because every account is like an independent ship; correct?

A: Yes.

Q: So basically your position is that you expect the bank to continue being exposed; right?

A: No. I expect the bank to wait until the lapse of the 48-hours' grace period.

Q: Mr Lam, you already told the bank, even if you wait till 48 hours, I'm not going to give you any money; correct?

A: But the exchange --

Q: Is that's right?

A: -- rate -- the exchange rates could be improved substantially on Monday.

Q: Mr Lam, similarly, the exchange rates could move against you even worse; right?

A: No. On balance of probabilities, whenever there is G7, there is a possible reverse of the exchange rate; that is, both Aussie and Kiwi would be in my favour, but the yen will drop as well. That is basically the experience of past G7 meetings or similar meetings, yeah.

ROA, Vol III (Part C), at pp 1008 to 1009 and p 1011

Q: Unless you gave a commitment that you would remit money to cover the negative equity; correct?

A: Yes.

Q: This is when you say:

"Isn't it at that time you all said I have 48 hours of --

Cynthia: Yes.

David: -- grace period mah?

Cynthia: Yes.

David: Then okay, that means to say you give me 48 hours for me to reply, correct?"

A: Yes.

Q: This is what Cynthia says:

"Yes. What you say is correct, 48 hours is (for) margin call. It's (for) margin call. That means huh, but now it is close out already, so actually I -- if credit wants to do anything, if they don't want to consider the relationship, they can straightaway close out, just like the last time BOC didn't inform you and (they) just close out straightaway.

David: Yes."

Correct?

A: Yes.

Q: So you see, Cynthia Chin told you, Mr Lam, that this 48-hours' grace period is for margin call. You had already been in a margin call situation since 7 October 2008?

A: Disagree.

Q: Mr Lam, on 7 October 2008, you've agreed with me, that you had an account shortfall and you also stated in your affidavit of evidence-in-chief that the bank can close you out on 7 October 2008; right?

A: As I say, the bank must serve me a formal notice. They didn't.

Q: Your account shortfall just got worse every day; right?

A: No. On 13 October it reversed, so not every day.

Q: From 7 to 9 to 10 October, it got worse every day; correct?

A: On those days, yes.

Q: Because it got worse every day, now coming on 10 October --

A: Up to that -- yeah. Not every day. As I said, reversed on 13 October.

Q: So that's for you to prove; all right, Mr Lam. So on 10 October, the bank was now going to close you out, right, unless you could give a commitment that you would remit money; right?

A: Yeah.

Q: So this was all explained to you by Cynthia, about this 48-hours' notice, that it applies to a margin call situation, but now this is a situation where the bank is really going to close you out; right?

A: Only after the 48 hours --

Q: I'm saying, Mr Lam, this is what Cynthia explained to you; correct? She explained to you 48 hours is for margin call. You are now in a situation where they can close you out because you are in negative equity; correct?

A: That's what she told me. I might or might not agree, but at that juncture, I did not want to argue with her.

[emphasis added]

44 In our view, these passages show beyond any doubt that the appellant was holding the respondent to the promise of the Grace Period to respond to the margin call. Ms Chin's statement that the 48 hours were for margin calls "*but now [the appellant's account] is close out already*" was either incoherent or an acknowledgement that it was too late to give the appellant 48 hours to meet the margin call.

45 For the above reasons, we find that the JC's conclusion that the appellant had accepted that the respondent had the legal right to close out his FX positions on 10 October 2008 is not supported by the evidence.

46 Finally, in addition to the defence of promissory estoppel, there was, in our view, another ground on which the appellant would have succeeded in his claim against the respondent if he had

pleaded it. In our view, the respondent's promise of the Grace Period constituted a variation of cl 2.6 of the Master Agreement (see [23] above) as well as cll 5 and 6 under the section "*Credit, banking and foreign exchange facilities*" of the Service Agreement (see [27] above), with respect to each Transaction of the appellant. The law requires consideration to vary the terms of a contract. The appellant provided consideration when he agreed to do, and did, business with the respondent on those terms – by entering into the relevant FX contracts, which gave both a factual and legal benefit to the respondent (see *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305 and *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332). This made the respondent's promise binding and had the effect of varying the relevant terms of the Agreements relating to margin calls.

47 In reliance on the respondent's promise of the Grace Period, the appellant had also transferred very substantial deposits to the Advisory Account to secure the credit facilities he obtained from the respondent to enter into the very substantial FX contracts. At [6] of the GD, the JC found as follows:

> By 11 September 2008, the [appellant] had remitted a total of New Zealand Dollars ("NZD") 120,101,937.38 and USD3,040,000 to his Advisory Account with the [respondent]. A total of Japanese Yen ("JPY") 4,168,423,696 and Swiss Francs ("CHF") 36,027,548.42 in loans were transferred from the [appellant's] accounts with Overseas Chinese Banking Corporation and BNP Paribas Private Bank respectively to the [respondent].

The JC held that the transfer of the additional funds did not constitute a detriment for the purpose of promissory estoppel (it was also not pleaded as such). However, this is a question of law, and in our view, the transfer of the funds constituted only one element in the appellant's decision to become or remain as a private banking client of the respondent and to do business with it on the basis of the Grace Period to meet any margin call. The respondent's promise of the Grace Period to the appellant was an inducement to him to engage in FX business. The appellant accepted the promise by transferring the funds to provide the requisite security for such trades. In our view, this would be sufficient consideration to make the Grace Period a contractual term of every FX transaction entered into by the appellant, and to that extent, would constitute a valid variation of the relevant terms of the Master Agreement and the Service Agreement in relation to the time required to make a margin call when it is necessary for the respondent to do so. For these reasons, the appellant's appeal would also have succeeded on this ground.

Summary of findings

48 To summarise our findings:

> (a) the 7 and 8 October 2008 letters were not margin calls;
>
> (b) the 10 October 2008 letter was a margin call but it was given in breach of cl 2.6 of the Master Agreement (which was part of the Service Agreement with respect to every Transaction of the appellant) in that the respondent failed to give one business day's notice to the appellant to provide additional collateral to meet the shortfall in his Advisory Account;
>
> (c) in any event, promissory estoppel was applicable to the respondent's promise of the Grace Period, and in consequence, the respondent was estopped from resiling on its promise to allow the appellant the Grace Period to respond to the 10 October 2008 letter; and
>
> (d) in *obiter*, the promise of the Grace Period constituted a binding undertaking by the respondent to give the appellant 48 hours to meet any margin call, which varied the terms of the

Master Agreement and the Service Agreement accordingly.

Conclusion

49 For the above reasons, we allow the appellant's appeal with costs here and below, with the usual consequential orders. The appellant is entitled to damages, if any, to be assessed by the Registrar on the basis that the respondent was only entitled to close out his FX positions on 13 October 2008 at the earliest.

[note: 1] Record of Appeal ("ROA"), Vol III (Part B), at p 800-801.

[note: 2] ROA, Vol III (Part C), p 1033.

[note: 3] ROA, Vol III (Part C), p 1044.

[note: 4] Appellant's Case, at para 74.