Chandra Winata Lie *v* Citibank NA
[2014] SGHC 259

Case Number	: Suit No 370 of 2013 (Registrar's Appeal Nos 407 and 412 of 2013)
Decision Date	: 03 December 2014
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Mr Eddee Ng, Mr Michael Ng and Ms Alcina Chew (Tan Kok Quan Partnership) for the plaintiff; Mr Hri Kumar Nair SC and Ms Uni Khng (Drew & Napier LLC) for the defendant.
Parties	: Chandra Winata Lie — Citibank NA

Civil procedure – Pleadings – Striking out

3 December 2014

Vinodh Coomaraswamy J:

1 A principal suspects that he did not authorise his agent to enter into certain transactions on his behalf, but his memory does not allow him to be certain that the agent acted without his authority. In his suit against the agent, the principal therefore stops short of asserting positively that he did not authorise the agent's acts. Instead, he invites the court to draw from the surrounding circumstances the inference that the agent acted without his authority.

2 Do the principles of pleading permit the principal to plead his claim against his agent in this way? The Assistant Registrar held that they do not. He rejected the principal's attempt to amend his pleadings and struck out this portion of the principal's claim. I agreed with the Assistant Registrar and dismissed the principal's appeal. There is to be a further appeal to the Court of Appeal. I therefore set out the reasons for my decision.

The background

The parties

3 The defendant is a well-known international bank. Through its private banking arm in Singapore, it provides wealth management services for high net worth individuals resident in Singapore and in the region. The plaintiff is one such high net worth individual. He resides in Indonesia. He opened, maintained and operated [note: 1] three investment accounts with the defendant's private bank in Singapore. Two of his accounts are in his own name. The third account is in the name of his offshore personal investment trust company.

4 It is common ground that under the contract between the plaintiff and the defendant, all three of his accounts were advisory accounts. In other words, these accounts were not discretionary accounts: the plaintiff did not grant to the defendant any discretion to enter into a transaction on any of these accounts without his specific authority for each such transaction. Both parties accept also that the defendant was not contractually obliged to obtain the plaintiff's authority for any given transaction in writing and was entitled to act on his authority even if given orally. [note: 2]

5 The defendant's practice in dealing with the plaintiff was to obtain his oral authority to transact on his behalf. It followed up by sending him two documents either shortly before or shortly after executing the transaction he had authorised. [note: 3] The first document was called a "tailored investment proposal". This document described the transaction that the plaintiff had authorised the defendant to enter into on his behalf, its objectives and its associated risks. The second document was called a "trade confirmation". The trade confirmation set out, amongst other things, the principal terms of the transaction and the plaintiff's confirmation that he: (i) had capacity to evaluate the transaction in question; (ii) understood the terms of the transaction; and (iii) was willing to assume the risks of the transaction. The plaintiff was expected to countersign and return the trade confirmation to the defendant.

6 It is common ground that, because the defendant was contractually entitled to act on the plaintiff's oral authority, neither the absence of a trade confirmation for a particular transaction nor the plaintiff's failure to countersign a trade confirmation for a particular transaction is capable of suggesting that the defendant had no authority to enter into that particular transaction.

7 All of the plaintiff's mail relating to his three accounts was held by the defendant at its office in Singapore for him to collect personally – as he did from time to time – pursuant to a hold-mail agreement between the parties. The mail so held included tailored investment proposals, trade confirmations and monthly statements intended for the plaintiff arising from his accounts.

8 Between May 2007 and October 2008, the plaintiff's accounts saw significant activity in fairly sophisticated derivatives transactions in foreign exchange and equities. These transactions entailed substantial potential liability for the plaintiff. That potential liability became a reality when, as a result of the financial crisis of 2008/2009, the plaintiff's accounts recorded significant losses on transactions entered into in or after March 2008. [note: 4]

9 The plaintiff's case in these proceedings is that the defendant is liable to compensate him for those losses.

The plaintiff seeks documents voluntarily from the defendant

10 In March 2010, the plaintiff engaged an expert with a view to commencing suit against the defendant to recover compensation for these losses. The expert analysed the documents in the plaintiff's possession arising from his accounts. In August 2010, the expert informed the plaintiff that he had discovered a number of transactions on the plaintiff's accounts which could not be matched to a trade confirmation. [note: 5] That led to the plaintiff asking the defendant for copies of all trade confirmations relating to all transactions on his accounts without limitation in time, as well also for documents in six other categories. [note: 6]

11 The defendant initially took the position that it had already furnished all trade confirmations to the plaintiff. [note: 7] Eventually, however, the defendant relented and sent the plaintiff a CD-ROM said to contain copies of the trade confirmations for all transactions on his accounts for the period January 2007 to December 2008. [note: 8] The plaintiff's expert reviewed these trade confirmations and discovered that there remained a number of transactions on the accounts which could not be matched to any trade confirmation. [note: 9]

12 Mr Eddee Ng of Tan Kok Quan Partnership ("TKQP") represents the plaintiff. TKQP wrote to the defendant in July 2011. [note: 10] Its letter noted that there were 14 transactions which still could not

be matched to a countersigned trade confirmation nor indeed to any other supporting documents. It therefore asked the defendant for trade confirmations for these 14 transactions and also for other supporting documents to show that the plaintiff had authorised these 14 transactions, including recordings of telephone conversations and call reports. TKQP gave as the reason for seeking these documents the fact that the plaintiff did not remember authorising those transactions and therefore required the documents in order to "ascertain whether or not proceedings should be taken out" against the defendant for trading without authority on his accounts. TKQP concluded by informing the defendant that if the documents sought were not produced within two weeks, the plaintiff would apply for pre-action discovery to compel the defendant to produce them.

13 Mr Hri Kumar SC of Drew & Napier LLC ("D&N") represents the defendant. D&N's response to TKQP's letter rejected the plaintiff's allegation of unauthorised trading. It informed TKQP that the defendant declined to disclose voluntarily the tape recordings and call reports for the 14 transactions because they were the defendant's property and because the defendant had no obligation to supply copies to the plaintiff. D&N did, however, enclose trade confirmations for 13 of the 14 transactions which TKQP had listed in its July 2011 letter. None of these 13 trade confirmations had been countersigned by the plaintiff.

The plaintiff seeks pre-action discovery from the defendant

14 Not satisfied with the defendant's disclosure, the plaintiff applied in December 2011 for pre-action discovery against the defendant. As he explained in his affidavit in support of this application: [note: 11]

> In or around August 2010, as the [plaintiff's] expert was studying the statements, he highlighted to me that there were many trades … which he could not match to trade confirmations sent to me by the Defendant. Unfortunately, I could not recall either giving the Defendant instructions to enter into or authorising many of these transactions. …

Because "the Defendant did not provide [him] with any further documents to prove that [he] had in fact given instructions for and had authorized the trades as alleged" by the defendant, [note: 12] the plaintiff sought discovery of the defendant's internal documents to "verify if [his] suspicions that these trades were unauthorised are correct". [note: 13]

15 The plaintiff's application for pre-action discovery failed. At the primary hearing, the Assistant Registrar held that whether the plaintiff did or did not authorise the 14 transactions identified was a matter within the plaintiff's own knowledge. She was therefore of the view that he was seeking pre-action discovery not because the documents he sought were necessary for him to know whether he had a claim against the defendant for unauthorised trading but because he wanted, impermissibly, to assess the chances of such a claim succeeding. [note: 14] The plaintiff's appeal to a judge in chambers too failed. The plaintiff appealed further, to the Court of Appeal, but withdrew his appeal shortly after filing it.

The plaintiff commences suit against the defendant

A summary of the plaintiff's original statement of claim

16 On 23 April 2013, the plaintiff commenced this suit against the defendant. His original claim comprises his statement of claim filed on 23 April 2013 as amended on 14 August 2013. It asserts that the defendant is liable to compensate him for the losses which he suffered on transactions on his

accounts on the basis of three causes of action: (i) the defendant's culpable failure to advise; (ii) the defendant's negligent misrepresentation; and (iii) the defendant's unauthorised trading.

17 The plaintiff's case on failure to advise is that the defendant breached a duty of care in tort or an obligation under the parties' contract to advise the plaintiff when it failed to advise the plaintiff, even after the financial markets turned volatile in 2008, that: (i) the risk/reward profile of his existing positions and the further transactions entered into on his accounts were skewed against him and in favour of the defendant; [note: 15] (ii) that the scale of those positions and those further transactions rendered his accounts very sensitive to market volatility, thereby exacerbating the risk of margin calls; [note: 16] and (iii) that he should take steps to diversify his risks. [note: 17] Arising from this breach of duty, the plaintiff claims compensation from the defendant for: (i) losses of US$709,126 he suffered on the positions which he held on 31 March 2008 (listed in Schedule C to his statement of claim); [note: 18] and (ii) losses of US$1,351,434 which he suffered on further transactions entered into on or after 31 March 2008 (listed in Schedule D to his statement of claim). [note: 19]

18 The plaintiff's case on negligent misrepresentation is that the defendant's representatives, in breach of a duty of care in tort or in breach of an implied term of the parties' contract, induced him not to close out the positions held in his accounts in August 2008 [note: 20] and induced him to enter into further transactions after August 2008 [note: 21] by negligently misrepresenting to him in August 2008: (i) that everything was fine with his accounts; (ii) that the accumulating losses shown in his monthly statements were merely "mark-to-market" losses which would be recouped by the time the transactions were closed out; (iii) that his accounts would be back to normal by December 2008; and (iv) that he should continue to hold on to his positions. Arising from this breach of duty, the plaintiff claims compensation from the defendant for: (i) losses of US$4,965,813 suffered on the positions which he held on 31 July 2008 (listed in Schedule E [note: 22] to his statement of claim); and (ii) losses of US$481,376 which he suffered on further transactions entered into on or after 31 July 2008 (listed in Schedule F [note: 23] to his statement of claim).

19 I will, for convenience, refer to the plaintiff's claim for failure to advise and for negligent misrepresentation compendiously as his breach of duty claim.

20 The plaintiff's case on unauthorised trading is that the defendant engaged in unauthorised transactions [note: 24] on his accounts, as a result of which those transactions do not bind him and the defendant is obliged to compensate him for the losses on those transactions for which it has wrongly held him to be liable. Arising from this unauthorised trading, the plaintiff claims compensation from the defendant: (i) in the sum of US$1,000,581 for losses which he suffered on transactions for which the defendant has produced trade confirmations which are not countersigned by him (listed in Schedule G [note: 25] to his statement of claim); and (ii) in the sum of US$885,178 for losses which he suffered on transactions for which the defendant has produced no trade confirmations at all, whether signed or unsigned [note: 26] (listed in Schedule H1 [note: 27] and Schedule H2 [note: 28] to his statement of claim).

21 In summary, the plaintiff's original claim asserts as his primary claim that he is entitled to compensation for the defendant's breach of duty in respect of each transaction listed in Schedules C, D, E and F. It asserts, as an alternative claim, that the defendant entered into the transactions listed in Schedules G, H1 and H2 without his authority.

Three difficulties with the plaintiff's alternative claim for unauthorised trading

22 The plaintiff's original claim for unauthorised trading poses three difficulties. The first and most fundamental difficulty is that he pleads it without an unqualified, positive assertion that he did not authorise the transactions listed in Schedules G, H1 and H2 (see [37] below). Whether the plaintiff authorised those transactions is a matter within his personal knowledge. But instead of taking a position on that issue and pleading as a fact that he did not authorise these transactions, the plaintiff's original pleading merely invites the court to draw the inference from surrounding circumstances (described in more detail at [36] below) that he did not authorise the transactions set out in Schedules G, H1 and H2.

23 The second difficulty is that plaintiff's breach of duty claim overlaps with his unauthorised trading claim in respect of 96 transactions. Thus, in Schedule D, the plaintiff lists 96 transactions which he also lists in Schedules G, H1 and H2. Twelve of these 96 transactions also appear in Schedule E. Thirty-two of these 96 transactions also appear in Schedule F. [note: 29] There is something odd about the plaintiff – who should have personal knowledge of whether he did or did not authorise these overlapping transactions – asserting in the same pleading that they are both authorised and unauthorised, even as alternatives.

24 The third and least serious difficulty with the plaintiff's original claim for unauthorised trading is the sequence in which he pleads it. The question of whether a particular transaction is authorised is logically anterior to the question of whether that transaction is the result of a breach of duty. Yet, the original statement of claim presents the question of breach of duty as the primary and anterior question, to be determined *before* the court considers the plaintiff's alternative claim that the defendant lacked his authority to enter into the overlapping transactions. Again, there is something odd about the plaintiff telling the court *first* that he was misled into authorising the overlapping transactions as a result of the defendant's breach of duty and then, if the court finds that there was no breach of duty, telling the court in the alternative that he did not authorise the overlapping transactions at all.

The defendant applies to strike out the plaintiff's original statement of claim

25 The defendant's initial strategy in this suit was to attack the plaintiff's original statement of claim on the overlapping transactions alone. Mr Kumar thus applied by way of Summons No 4984 of 2013 to strike out the plaintiff's unauthorised trading claim only in respect of the overlapping transactions. However, in his written submissions filed for the hearing and in oral argument before the Assistant Registrar, Mr Kumar broadened his attack to argue that the plaintiff's entire claim for unauthorised trading – even in respect of transactions for which there was no overlap between Schedules D, E and F on the one hand and Schedules G, H1 and H2 on the other – ought to be struck out. He advanced the following reasons:

(a) The plaintiff's claim for unauthorised trading discloses no reasonable cause of action because the plaintiff had failed to plead an essential element of his cause of action, *ie*, that he did not authorise the Schedule G, H1 and H2 transactions; and

(b) The law does not permit a plaintiff to advance alternative claims which rest on inconsistent positions on a question of fact when that fact – in this case, whether the plaintiff authorised the Schedule G, H1 and H2 transactions – is a matter within the plaintiff's own knowledge.

26 The Assistant Registrar accepted both of Mr Kumar's submissions. [note: 30] However, he did not immediately strike out the plaintiff's unauthorised trading claim. Instead, he allowed the plaintiff an

adjournment to see if he could propose amendments to cure the deficiencies in his pleadings. [note: 31]

The plaintiff proposes amendments to his statement of claim

27 Mr Ng duly produced a proposed amended statement of claim. In it, he sought to address the deficiencies found by the Assistant Registrar by amendment in two principal ways. The first set of amendments proposes to reverse the sequence of the plaintiff's breach of duty claim and his unauthorised trading claim. The amended statement of claim thus pleads as his primary claim that the Schedule G, H1 and H2 transactions were unauthorised. It then pleads, as an alternative, that the defendant breached its duties to the plaintiff in respect of the Schedule C, D, E and F transactions. The second set of amendments proposes to insert a new paragraph which asserts positively that the defendant engaged in unauthorised trading (see [59] below). [note: 32]

28 Before the Assistant Registrar, Mr Kumar submitted that the amended statement of claim did not address the fundamental flaw in the plaintiff's claim for unauthorised trading. First, he argued that the plaintiff was precluded from pleading a positive assertion of unauthorised trading because that was inconsistent with his own evidence in his application for pre-action discovery and in these proceedings acknowledging that he may well have authorised the Schedule G, H1 and H2 transactions but had forgotten doing so (see [14] above and [61] below). Further, Mr Kumar argued, even if the new plea were permissible, it still did not in truth rest on a fact asserted from the plaintiff's own knowledge but upon a conclusion drawn from nothing more than the very same surrounding circumstances which the plaintiff had previously pleaded as his factual basis for inviting the court to draw an inference of unauthorised trading. Finally, he submitted that the surrounding circumstances pleaded in support of the unauthorised trading claim were incapable of establishing it because it was common ground that the defendant did not require any sort of trade confirmation at all – whether signed or unsigned – in order to have the plaintiff's authority to transact on his behalf.

29 The Assistant Registrar again accepted Mr Kumar's submissions. [note: 33] He held that the plaintiff's assertion of unauthorised trading based on missing or unsigned trade confirmations was unsustainable because trade confirmations have no necessary correlation to the issue of authority. [note: 34] He therefore made an order which, amongst other things, disallowed entirely the plaintiff's unauthorised trading claim and struck out Schedules G, H1 and H2. The result is to leave the plaintiff entirely unable to pursue any sort of unauthorised trading claim. Given that result, the Assistant Registrar did not have to rule on the defendant's original and narrower application to strike out the plaintiff's unauthorised trading claim in respect of the overlapping transactions. He thus made no order on that application.

30 The plaintiff appealed against the Assistant Registrar's order. The defendant cross-appealed in order to preserve its right, in the event that the plaintiff's appeal were allowed, to revert to its original and narrower application to invite the court to strike out the plaintiff's unauthorised trading claim only in respect of the overlapping transactions. Both the appeal and cross-appeal came before me.

The plaintiff's appeal

Was the plaintiff's claim for unauthorised trading correctly struck out?

31 On appeal before me, Mr Ng does not argue that the Assistant Registrar ought to have permitted the original statement of claim to proceed to trial without amendment. Instead, he argues

that the Assistant Registrar's holding summarised at [29] above is not a sufficient reason to strike out the plaintiff's unauthorised trading claim entirely because that claim relies on more than the mere fact that there are missing or unsigned trade confirmations for the Schedule G, H1 and H2 transactions. His submission is that the plaintiff's unauthorised trading claim relies also on the defendant's deviation from its usual practice in procuring the plaintiff's countersignature on trade confirmations, the piecemeal manner in which the defendant disclosed trade confirmations after the plaintiff's initial request for documents and the grudging manner in which the defendant explained why certain trade confirmations were not countersigned and why certain trade confirmations were completely missing. [note: 35]

32 In response, Mr Kumar submits that:

(a) The law requires a plaintiff who commences suit claiming relief for unauthorised trading to assert in substance and as a fact that he did not authorise the transactions in question. A plaintiff cannot commence proceedings based, whether in form or in substance, on an equivocal plea inviting the court to infer unauthorised trading and hope that he can secure the necessary positive evidence of unauthorised trading through discovery or otherwise to make out his case at trial; and

(b) The plaintiff cannot now be permitted to assert as a fact that he did not give authority for the Schedule G, H1 and H2 transactions because that would be a false assertion on his own evidence: he has consistently and repeatedly accepted the possibility that he did in fact authorise those transactions.

33 I accept Mr Kumar's submissions. In my view:

(a) The plaintiff cannot commence suit against the defendant for unauthorised trading unless he is now able to plead and particularise his claim for unauthorised trading and point to proof which has some rational connection to the essential elements of that claim.

(b) The amended statement of claim does not amount to a properly-pleaded claim for unauthorised trading:

(i) If one disregards the form and considers the substance, the proposed amendments still fail to assert as a fact that the plaintiff did not authorise the Schedule G, H1 and H2 transactions;

(ii) Indeed, the plaintiff is precluded from making any such assertion because that is inconsistent with the plaintiff's own version of the facts.

(c) The plaintiff is attempting impermissibly to run two inconsistent alternative cases.

It is the plaintiff's burden to plead, particularise and prove his claim for unauthorised trading

34 A plaintiff who commences a suit takes on, by that very act, the burden of pleading, particularising and proving every essential element of each cause of action which he chooses to pursue against the defendant in that suit. A plaintiff who is unable to discharge any one of these three burdens will fail at trial. More importantly for present purposes, a plaintiff who is not in a position to plead, particularise and point to the necessary proof from the very outset of his suit is at risk of having his suit struck out under O 18 r 19 of the Rules of Court (Cap 322, R5, 2014 Rev Ed).

35 A plaintiff can resist such an application: (i) by demonstrating that he has pleaded every essential element of a known cause of action; (ii) by showing that he has furnished sufficient particulars for the defendant to have reasonable notice of the case he has to meet and not thereby to be embarrassed at trial; and (iii) by pointing to proof for each element of his cause of action. The proof which a plaintiff points to on a striking-out application can be nothing more than his own uncorroborated and self-serving testimony as to facts within his personal knowledge. Whether it is *sufficient* evidence for the plaintiff ultimately to succeed is, of course, a matter to be determined at trial after weighing all the evidence, including evidence obtained during discovery. But a plaintiff cannot get past the striking-out stage if either: (i) he fails properly to plead a cause of action; or (ii) the proof he points to in support of an essential element of his cause of action in fact has no rational connection to it.

The plaintiff's original pleading failed to discharge this burden

36 To understand whether the Assistant Registrar was correct to disallow the plaintiff's amendments, it is necessary to start by analysing the plaintiff's original statement of claim. The plaintiff starts his original unauthorised trading claim by pleading the contractual provisions which oblige the defendant to transact on the plaintiff's accounts only with the plaintiff's authority, whether given in writing or orally. [note: 36] He then pleads the defendant's usual practice of issuing trade confirmations to him either before or shortly after executing an authorised transaction. [note: 37] Next, he pleads that his expert has discovered transactions which could not be matched to a signed trade confirmation. Finally, he pleads his unsuccessful attempts in 2010 and 2011 to get from the defendant a signed trade confirmation for each such transaction.

37 The plaintiff then pleads the core of his unauthorised trading claim. The precise plea is important and so I set it out:

> 71. The Plaintiff avers that the matters set out … above give rise to the inference that the Defendant … breached the terms of the [parties' contract] … in engaging in unauthorised transactions as particularised at Schedule G, Schedule H1 and Schedule H2.

38 This pleading is defective for two reasons. First, it fails to set out an essential element – indeed *the* essential element – of the plaintiff's cause of action for unauthorised trading. To run that cause of action, the plaintiff must plead, particularise and prove at trial that he did not give the defendant authority to enter into the Schedule G, H1 and H2 transactions. This paragraph fails even to make an assertion that he did not authorise those transactions. Without that assertion, an essential element of the plaintiff's cause of action is missing from his pleadings.

39 The second reason this pleading is defective is because it rests on a total *non sequitur*. The plaintiff asserts that he will invite the court to infer from the three sets of surrounding circumstances pleaded in the preceding paragraphs that he did not authorise the Schedule G, H1 and H2 transactions. Those three sets of circumstances are: (a) the absence of signed trade confirmations for each of the Schedule G, H1 and H2 transactions; (b) the defendant's deviation from its usual practice of issuing trade confirmations and procuring the plaintiff's countersignature on them; and (c) the defendant's piecemeal approach in disclosing trade confirmations to the plaintiff and its grudging explanations for not having a signed trade confirmation for every Schedule G, H1 and H2 transaction.

40 None of these three sets of surrounding circumstances – whether taken alone or together – can have any rational connection to the issue of authority. I take first the absence of a trade confirmation or the absence of the plaintiff's signature on a trade confirmation. Even the plaintiff

accepts that this can have nothing to do with the question of authority, given that there is no requirement for authority to be in writing. [note: 38] Further, even if one takes the second and third sets of circumstances and the inferences which can be drawn from them at their absolute highest, all that that would mean is that the defendant deliberately: (i) failed to issue certain trade confirmations or failed to get the plaintiff to countersign certain other trade confirmations at the time the transactions were entered into; (ii) concealed that fact from the plaintiff in 2010 and 2011; and (iii) concealed from the plaintiff that the true reason for all of this was that the Schedule G, H1 and H2 transactions were unauthorised. But even in that most extreme of situations, these acts cannot have any rational connection to whether the plaintiff authorised the transactions listed in Schedule G, H1 and H2 several years earlier in 2008. These acts cannot even be used to mount the argument that the defendant's conduct is an acknowledged of wrongdoing, for that argument assumes the very fact it is trying to prove.

41 I can put it another way. Even if at trial the plaintiff proves all three sets of surrounding circumstances, he will be no closer to discharging his burden of proving unauthorised trading. The plaintiff himself knew all of these surrounding circumstances when he filed his application for pre-action discovery. Yet, he stated on affirmation then – and must be taken to accept now – that these circumstances operate on his mind only to raise a *suspicion* [note: 39] of unauthorised trading (see [14] above). If, on the crucial issue of authority, the plaintiff himself can only *suspect* unauthorised trading in the light of these surrounding circumstances, he has no rational basis on which to invite the court at trial to arrive at a *conclusion* of unauthorised trading on these same circumstances. Given that the plaintiff foreshadows no direct evidence from him personally that he did not authorise these transactions, there is only one way in which he can hope to convert mere suspicion into conclusion: by raiding the defendant's cupboards for evidence in discovery. That is wholly impermissible.

42 For the plaintiff's unauthorised trading claim to survive a striking out application, he must point now to some proof with a rational connection to unauthorised trading. That requirement does not cause undue hardship to the victims of unauthorised trading. It is easily satisfied in the typical case by the victim's assertion to that effect in his pleadings. That plea suffices because it is founded on the victim's own personal knowledge and operates as a promise to the court to adduce, at the very least, his personal testimony in support of it. But this plaintiff, by his very form of pleading at para 71 (see [37] above), disavows any personal knowledge of unauthorised trading and disavows any intention to stake his personal credibility on that allegation at trial.

43 A hypothetical plaintiff who acknowledged and accepted his burden to plead, particularise and prove a claim for unauthorised trading would not have pleaded his claim as this plaintiff originally did. Instead, he would simply plead as follows:

> 71. The plaintiff did not authorise the transactions particularised in Schedule G, Schedule H1 and Schedule H2.

This hypothetical plaintiff would not need to plead the missing or unsigned trade confirmations, or indeed any of the other sets of surrounding circumstances relied on by the plaintiff. His unequivocal, positive plea asserting the absence of authority as a fact suffices to discharge his burden to plead the essential elements of this cause of action. And this plea being a denial, it would only be in exceptional circumstances that a defendant would be able to argue that he would be embarrassed without further particulars of this plea.

Failure of memory does not relieve the plaintiff of his burdens

44 Mr Ng submits that the plaintiff is excused from the requirement that he must be in a position to

plead, particularise and point to proof of his claim when he commences suit because he genuinely cannot recollect whether or not he authorised the Schedule G, H1 and H2 transactions. Mr Ng is not, however, able to cite any authority which establishes that this failure of memory, even if it is assumed to be genuine, relieves the plaintiff of the usual burdens which fall on every other plaintiff who commences suit.

45 Quite the contrary: Mr Kumar cites three cases which satisfy me that it is an abuse of the process of the court for a plaintiff to commence suit when he is unable properly to plead his cause of action, particularise it or to point to some proof which is rationally connected to each essential element. That is so whether the plaintiff's inability arises because: (a) the essential elements of his cause of action are entirely unknowable; (b) they are knowable but were never within his knowledge; or (c) he once knew them but is unable to recollect them.

46 The English case of *Nomura International plc v Granada Group Limited and others* [2007] EWHC 642 (Comm) ("*Nomura*") establishes that it is an abuse of process for a plaintiff to commence suit when he cannot plead, particularise or point to proof of the essential elements of his cause of action even if those elements are entirely unknowable at that time. Nomura found itself the subject of a claim by a bank. The bank and Nomura entered into a standstill agreement pursuant to which, subject to certain conditions, the bank agreed not to commence suit against Nomura and Nomura agreed to suspend the limitation period applicable to the bank's claim. That claim triggered a potential back-to-back claim by Nomura against Granada. Nomura therefore invited Granada to enter into a back-to-back standstill agreement and to suspend the limitation period for Nomura's potential claim against Granada. Granada rejected the invitation. To avoid its claim against Granada becoming time-barred, Nomura commenced suit against Granada within the limitation period alleging unspecified breaches of duty.

47 Nomura could not yet properly plead, particularise or point to proof of its claim against Granada. That was because its claim against Granada depended entirely on how, if at all, the bank would at some unknown point in the future frame its claim against Nomura. That was entirely unknowable to Nomura. Despite that, Cooke J agreed with Granada that Nomura's claim was an abuse of process and struck it out. The abuse was that Nomura had commenced proceedings when, by its own admission, it could not point to any breach of duty by Granada. Nomura was therefore "seeking an illegitimate benefit, namely the prevention of further time running under the Limitation Acts for a claim which it cannot properly identify or plead" (at [41]). As Cooke J put it (at [47]–[48]):

> [47] … In my judgment, if a claimant cannot point to any particular … breach of duty … at the time of the issue of the Claim Form, he cannot have any valid basis for his claim at that point and had no business issuing a Claim Form to stop the running of time in respect of some claim which he hopes in the future to be able to formulate. That is the key element of abuse in his case. …
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> [48] … [I]t is the absence of knowledge of any basis for a claim and the inability properly to formulate a claim at the time of the issue of the Writ/Claim Form which is decisive. If there is insufficient knowledge to begin the process of putting together Particulars of Claim, without the need for "something to turn up", there is no known or valid basis for a claim to be made. …

48 It is also an abuse of process for a plaintiff to commence suit when he cannot plead, particularise and point to proof of the essential elements of his cause of action even if he does not know those elements and has never known them. In the Hong Kong case of *The New China Hong Kong Group Limited (In Creditors' Voluntary Liquidation) and another v Ng Kwai Kai, Kenneth and others* [2011] HKCFI 78 ("*New China*"), two insolvent companies acting by their liquidators commenced suit to set aside a pre-liquidation transfer of property under a restructuring agreement. The liquidators'

claim was founded on s 60 of the Hong Kong Conveyancing and Property Ordinance, a provision virtually identical to s 73B of our Conveyancing and Law of Property Act (Cap 61, 1994 Ed). That provision renders void a voluntary conveyance of property which is made with intent to defraud creditors. To establish an intention to defraud, which is an essential element of their claim, the liquidators relied on a common law rule which permits the requisite intention to be inferred whenever an insolvent entity enters into a disposition of property which prejudices its creditors and which is unsupported by consideration. The liquidators, however, did not plead positively that the disposition to the defendants was unsupported by consideration. Indeed, they could not do so because that was not a fact which they could honestly assert to be true. They had no direct knowledge of the circumstances of the disposition pre-liquidation and could not arrive at a conclusion that consideration was absent from their post-liquidation examination of the company's records. Instead, all they could plead in all honesty was a negative: that they were "unable to verify whether any consideration at all was received [by the company] in return for the transfer of [its assets]".

49 The defendants applied to strike out the liquidators' claim as an abuse of process. The Hong Kong Court of First Instance agreed with the defendants and held that the liquidators' plea was too speculative to form the basis of a claim (see [68] and [71]). Applying *Nomura*, it said:

> [70] In this context, the [defendants] rely on the proposition that a party should know his case and be in a position to identify the relevant evidence when he starts a claim. It is an abuse of the court's process to start a case without a solid foundation, hoping that something will turn up in the course of the proceedings, for example at the stage of discovery or on cross-examination, or to stop time from running: *Nomura International plc v Granada Group Ltd* [2008] Bus LR 1 at §37, *Re a Company, ex parte Burr* [1992] BCLC 724 at 736d-f and *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 15 at pp 21d-22e.
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> [71] In my opinion, the … [liquidators'] plea is … liable to be struck out. The burden of showing that the requisite intention exists lies upon the person who is asserting that the disposition is voidable under s.60, in this case, the liquidators or the plaintiffs. The … paragraphs do not positively assert that the transfer was unsupported by consideration. On the contrary, on its face, the [transfer of property] was supported by consideration. The liquidators' assertion that they cannot ascertain if the [consideration] given in exchange for the [company's property] had any value at all is, in my opinion, simply too speculative to be allowed to form the basis of a claim to set aside a transaction under s.60.

The first instance decision was upheld on appeal (see *The New China Hong Kong Group Limited (In Creditors' Voluntary Liquidation) and another v Ng Kwai Kai, Kenneth and others* [2011] HKCA 201).

50 Finally, it is an abuse of process for a plaintiff to commence suit if he cannot plead, particularise and point to proof of the essential elements of his cause of action which he once could but can no longer recall. In *Emma Carey v HSBC Bank plc* [2009] EWHC 3417 (QB) ("*Carey*"), a debtor sought a declaration that the English Consumer Credit Act 1974 rendered a credit card agreement he had entered into with a bank irredeemably unenforceable. The effect of the Act was that, if the bank had failed to comply with any one of a suite of statutory formalities when entering into the agreement with the debtor, the Act rendered the agreement *prima facie* unenforceable, but it could nevertheless be enforced with the court's leave. However, if the bank had failed to comply with a specific statutory duty to ensure that the debtor signed the agreement, the Act rendered the agreement irredeemably unenforceable (at [22]).

51 The debtor did not plead positively that he did not sign the agreement. Instead, he put forward a hypothetical plea. He pleaded that *if* the bank were unable to prove that he signed the agreement,

then he would contend that the Act rendered the agreement irredeemably unenforceable. Judge David Waksman QC (sitting as a judge of the English High Court) applied *Nomura*, held that the debtor's claim was speculative, and struck it out as an abuse of process. He said (at [201]):

> It is also said that [the debtor's] claim is an abuse of process because it is speculative, in that on the face of it, *[the debtor] would appear (at best) not to know whether he can show [an improperly executed agreement] or not*. The approach seems to have been to leave it to [the bank] to see if it can produce a copy of the actual executed agreement. If it can, and it is properly executed, the claim will presumably not be pursued. If it cannot, then the Court is to be invited to say that there was no properly executed agreement. In other words, the success of the claim does not depend on any input from the [debtor] on the issue but only on what (a) [the bank] may or may not be able to show and (b)what the Court should infer from that. The object of the exercise is to achieve, if possible the "goal" of preventing enforcement of the agreement. In my judgment, this case falls within the situation referred to by Cooke J albeit in a different kind of case when dealing with abuse of process, namely *Nomura v Granada* … .
>
> [emphasis added]

52 I see no distinction between the position of the plaintiff in the present case and the position of the plaintiffs in *Nomura* and *New China* and, in particular, *Carey*. It makes no difference that the plaintiff in the present case intends to prosecute his claim unlike the plaintiff in *Nomura*. The plaintiffs in *New China* and in *Carey* also intended immediately to prosecute their claims too, but were held to be abusing the process. Indeed, Judge Waksman QC in *Carey* expressly rejected this point of distinction between *Carey* and *Nomura* (at [202]).

53 It makes no difference also that the reason the plaintiff puts forward for his inability to plead positively that he did not authorise the Schedule G, H1 and H2 transactions is that he cannot recollect whether he did so. In *Carey*, it was assumed in the debtor's favour that the reason he had failed to plead a positive assertion that he did not sign the credit card agreement was because he did not remember whether he had signed it and not because he did remember signing it but wished for tactical reasons not to acknowledge that fact. That is the significance of the words "at best" in the phrase italicised in the passage quoted at [51] above. Despite that assumption, the debtor's claim was struck out as being speculative. The outcome in *Carey* would thus have been no different if the debtor had put forward a failure of memory as the reason for his impermissibly speculative pleading.

54 So too in this case, the plaintiff knew at one time whether he did or did not authorise the Schedule G, H1 and H2 transactions. If he did authorise the transactions, he would have known that fact at the time he authorised them. If he did not authorise them, then at one time he would have been sufficiently confident to say, on the basis of an absence of any memory of having authorised them, that he did not authorise them. Just like in *Carey*, the fact that the plaintiff cannot remember whether he authorised the Schedule G, H1 and H2 transactions does not relieve him of the burden at this stage of the proceedings to plead properly and to point to proof for of each element of his cause of action.

55 The plaintiff's plea of unauthorised trading in the original statement of claim (see [37] above) is in truth indistinguishable from the pleading which was struck out in *Carey*. His plea at para 71 amounts to nothing more than saying that he will contend at trial that there has been unauthorised trading unless the defendant produces evidence to the contrary. The only difference between this plea and the one which was struck out in *Carey* is one of form. The plaintiff in the present case has left implicit what the plaintiff in *Carey* made explicit. This difference of form cannot disguise that the plaintiff's plea amounts in substance to a wholly illegitimate reversal of the burden of proof.

56 The result is that the Assistant Registrar rightly held that the plaintiff's original statement of claim was defective. The plaintiff failed, for whatever reason, to plead a positive assertion that he did not authorise the Schedule G, H1 and H2 transactions. Further, his pleading did not point to any facts which have a rational connection to the crucial element of his cause of action for unauthorised trading. His original statement of claim was an abuse of process. It was rightly held liable to be struck out unless redeemable by amendment. Mr Ng must be taken to have accepted that conclusion by his decision on appeal before me not to justify his original statement of claim but to focus instead on the Assistant Registrar's decision to reject his draft amended statement of claim.

The plaintiff's amended pleading suffers from the same defect

57 In my view the Assistant Registrar was correct to reject Mr Ng's draft amended statement of claim also. The amendments proposed do not address the substance of the fundamental defects in the original statement of claim. The amended claim for unauthorised trading rests on precisely the same *non sequitur* as his original claim. Even if the amendments were allowed, it would be insufficient to save the plaintiff's unauthorised trading claim from being struck out.

58 Once again, the precise amended plea of unauthorised trading is important, and so I set it out. The section dealing with the unauthorised trading claim now begins with an entirely new paragraph:

> 52. In light of the matters set out in paragraphs 53 to 58 below, the Plaintiff avers that the trades … particularised in Schedule G, Schedule H1 and Schedule H2 are unauthorised.

59 The factual basis foreshadowed in this plea and which appears in paras 53 to 58 of the draft amended statement of claim are the very same paragraphs from the original statement of claim which set out *verbatim* the very same three sets of surrounding circumstances which I have summarised at [36] above. The amendments then round off this section with a new paragraph at 59 as follows:

> 59. The Defendant has therefore breached the terms of the [parties' contract] … in engaging in unauthorised transactions as particularised in Schedule G, Schedule H1 and Schedule H2.

In form, this now appears to contain the crucial but heretofore missing unqualified positive assertion of fact: that the Schedule G, H1 and H2 transactions are unauthorised.

60 This amendment is insufficient to save the plaintiff's unauthorised trading claim for two reasons. First, like the old pleading, the amended plea of unauthorised trading does not rest on the plaintiff's personal assertion of the crucial fact: that he did not authorise the Schedule G, H1 and H2 transactions. Instead, like the original plea, it rests on precisely the same *non sequitur* arising from precisely the same three sets of surrounding circumstances. As I have pointed out, even the plaintiff accepts that the absence of trade confirmations has nothing to do with the question of authority. [note: 40] The other surrounding circumstances have even less of a rational connection to a conclusion of unauthorised trading than they did to an inference of unauthorised trading (see [39]–[41] above). What the plaintiff seeks to do by this amendment is still to rest his case on nothing more than an inference of unauthorised trading, but to state the inference as a conclusion so that the court is not troubled by the effort of having to draw the inference for itself. The new positive assertion in para 59 is nothing more than the same inference taken from the original para 71, couched as a pleading of fact, stated as a conclusion and founded on the same old *non sequitur*. It makes no change of substance to the original pleading.

61 The second reason this pleading does not save the plaintiff's unauthorised trading claim is that, even if para 59 can be read as an unqualified positive assertion of unauthorised trading, that

assertion is contradicted by the plaintiff's own evidence. As Mr Ng submitted to me, the "plaintiff has consistently maintained from the early correspondence, through pre-action discovery to this application to strike out that he cannot recollect whether he gave instructions for these transactions or not". [note: 41] It suffices to quote the following examples:

(a) In his initial letter dated 13 December 2010 to the defendant asking for documents, he says: "There are certain transactions recorded in the monthly statements of account that [the plaintiff] cannot remember having entered into ..." [note: 42]

(b) In his solicitors' letter dated 21 July 2011 to the defendant which asked for evidence of authorisation of the 14 transactions now listed in Schedule G, they say: "Our client does not recall authorising several transactions that are recorded in the statements for the Accounts." [note: 43]

(c) In para 24 of his first affidavit filed in his pre-action discovery application on 6 December 2011, the plaintiff says: "It is true that I am unable to state with certainty that the trades evidenced by the Unsigned Trade Confirmations were unauthorized simply on account of the Unsigned Trade Confirmations. However, this is precisely the reason that I have requested … the documents that will allow me to verify if my suspicions that these trades were unauthorized are correct."

(d) In para 8 of his second affidavit filed in his pre-action discovery application on 19 January 2012, the plaintiff gives the following reason for needing pre-action discovery:

> "As I am unable to recall whether I had indeed authorised the said trades, it is necessary that I obtain the Documents, which are relevant documentary evidence which will either confirm or dispel my suspicions that the Defendant … carried out unauthorised trading on the Accounts."

(e) At the hearing of his pre-action discovery application on 2 March 2012, Mr Ng submitted on behalf of the plaintiff that:

(i) the plaintiff "does not know whether the transactions on which he is seeking discovery were authorized by him"; [note: 44] and

(ii) the "Plaintiff's position has been consistent that Plaintiff cannot recollect and so need[s] the trade confirmations to know whether transactions [were authorised] or not". [note: 45]

(f) In his second affidavit filed in this suit on 10 October 2013 to resist the defendant's striking out application, the plaintiff says at para 11 that he "[does] not know for certain whether the transactions with unsigned trade confirmations, or at the time, with no trade confirmations at all, were authorised".

62 The plaintiff's own evidence therefore acknowledges that he might have authorised the Schedule G, H1 and H2 transactions and forgotten having done so. That acknowledgement, which he does not resile from even when he puts forward para 59 of his draft amended statement of claim, means (at best) that the plaintiff is pleading a fact which he does not know to be true or (at worst) that he is pleading a fact which he knows to be false. His acknowledgment of the underlying truth on penalty of perjury outside his pleadings precludes him from making the necessary unqualified positive

assertion of unauthorised trading of the type I have set out at [43] above.

63 Parties cannot freely change their case, let alone their evidence, and amend their pleadings to keep up. Thus, where a party's case is that her predecessor in title took possession of property pursuant to an agreement with a lessee who in turn was in possession of the property with the agreement of the head lessor, that party will be refused leave to plead by amendment an entirely inconsistent case asserting adverse possession against the head lessor's mortgagee (see *Win Supreme Investment (S) Pte Ltd v Joharah bte Abdul Wahab (Sjarikat Bekerjasama Perumahan Kebangsaan Singapura, third party)* [1996] 3 SLR(R) 583 at [31]). So too, where a party advances a case that it granted an extension of time for contractual performance and leads evidence in support of that case, it will be refused leave to plead by amendment that there was no such extension of time (see *Vallipuram Gireesa Venkit Eswaran (t/a Builders Merchants) v Razik Fareed Marketing (S) Pte Ltd* [1997] SGHC 92 at [14] and [17]).

64 The plaintiff's own evidence is therefore a separate reason justifying the Assistant Registrar's decision to disallow the amended para 59 and, with it, the plaintiff's entire unauthorised trading claim.

The defendant's cross appeal

65 In view of my decision that the Assistant Registrar correctly struck out the plaintiff's entire claim for unauthorised trading, it is not necessary for me to consider the defendant's cross-appeal on the narrower question of whether the plaintiff's claim in respect of the overlapping trades only ought to be struck out (see [23] above). However, since the issue was fully argued before me, I will express my views on it.

66 The plaintiff's original statement of claim gives no indication of how his breach of duty claim and his unauthorised trading claim are related to each other for the overlapping transactions, which are the subject-matter of both claims. The only slight clue is the sequence in which they appear in the pleading. The breach of duty claim appears first and thus appears to be the primary claim; the unauthorised trading claim appears second and appears to be the alternative claim. This gives rise to the logical difficulty identified at [24] above.

67 The plaintiff's draft amended statement of claim deals with this problem by inverting the order of the pleading – with the unauthorised trading claim now preceding the breach of duty claim – and by explicitly pleading that the plaintiff's primary claim for the overlapping transactions is his unauthorised trading claim. I set out the precise form of words which the plaintiff uses:

> 61. … To the extent of the overlap, the Plaintiff primarily claims that these trades are unauthorised, and in the alternative that the Defendant … breached its contractual duty to advise and/or its duty of care in tort.

68 Inverting the sequence of the two claims, identifying the unauthorised trading claim as the primary claim and pleading the breach of duty claim explicitly as the alternative claim does not address the latent inconsistency at the heart of this plea. What the plaintiff maintains in this one plea, albeit as alternatives, is both: (i) that he *did not* authorise the overlapping transactions at all; and (ii) that he *did* authorise the overlapping transactions, but was induced to do so by the defendant's breach of duty.

69 A plaintiff is entitled to plead inconsistent causes of action in the alternative so long as the inconsistency does not offend common sense. The archetypal situation where common sense finds itself offended is where the pleader asserts two inconsistent versions of the facts where he knows or

must know that one version is false. In *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 ("*Ng Chee Weng*"), the Court of Appeal followed *Brailsford v Tobie* (1888) 10 ALT 194 and held as follows (at [37]):

> … While the pleader should be free to plead inconsistent causes of action in the alternative, the inconsistency cannot – particularly in relation to the facts pleaded – offend common sense. One obvious example of an inconsistency which will offend common sense is when the pleader has actual knowledge of which alternative is true, as was the case in *Brailsford*.

70 Mr Ng accepts this proposition. But he submits that an alternative pleading does not fall foul of this rule unless the impugned alternative version *positively* pleads facts which contradict the facts pleaded in the other version. An implicit contradiction, in his submission, does not suffice to make the impugned alternative an abuse of process. For this proposition, Mr Ng relies heavily on the Queensland case of *Le Neve Ann Groves v Edmund Stuart Groves and others* [2011] QSC 411 ("*Groves*"). In that case, a wife ostensibly guaranteed the debts owed by her husband to certain creditors and pledged her shares in their family company as security for her guarantee. The creditors eventually called on her guarantee, exercised their power of sale over her shares, and applied the proceeds of sale to reduce her husband's indebtedness to them. She then sued her husband and the creditors alleging, amongst other things, that she had no recollection of signing the documents relied upon by the creditors and therefore did not believe that she had. Much later, after extensive discovery and when the parties were closer to trial, she sought leave to amend her pleadings to advance an alternative case. Her alternative case was that, in the event the court found that she had in fact signed the documents, she did so as a result of a history of sustained domestic violence against her by her husband throughout their marriage.

71 Boddice J granted the wife leave to make the amendment, holding (at [16]–[18], footnotes omitted) that:

> 16. A party is able to advance inconsistent allegations or claims, if pleaded as alternatives. Accordingly, that fact, of itself, is no basis to refuse leave to amend. However, the [creditors] submit the proposed pleading does not merely advance inconsistent cases in the alternative. It pleads inconsistent factual allegations, with the plaintiff's primary case … being based on the plaintiff having no recollection of signing the documents, and not believing that she did, and the proposed amendments relying on allegations that the plaintiff did sign the documents. It is submitted that this breaches the rule that a pleading [must] not contain inconsistent factual allegations. The rule applies whether or not the inconsistent facts are pleaded as alternatives. The [creditors] contend that the plaintiff is required to elect between these inconsistent positions.
>
> 17. Viewed as a whole, the proposed amendments do not involve making inconsistent factual allegations in the one claim. The plaintiff seeks to plead an alternate case in the event the defendants succeed in their allegation that the plaintiff signed the guarantees as alleged. Whilst such a position will provide significant challenges, particularly where the plaintiff's credit is already squarely in issue having regard to the lack of expert evidence to support her primary case, the pleading does not offend the pleading rules.
>
> 18. The proposed pleading pleads an alternate case in the event the defendant's case succeeds. It does so by relying upon a history of relationship rather than pleading facts specific to the circumstances of the actual signing of the particular guarantee. As such, it does not plead, positively, facts inconsistent with the primary case. It would be a different matter if the plaintiff sought, by way of alternate case, to plead that she recalled the circumstances in which

she signed the particular guarantee. That form of plea would breach the rule as it would amount to pleading inconsistent sets of facts in the alternative in circumstances where one of those versions must be known to be false.

72 Mr Ng argues that just as in *Groves*, the plaintiff's alternative cases on the overlapping transactions is not an abuse of process because his breach of duty case does not plead positively that the plaintiff did in fact authorise the overlapping transactions. He says, therefore, that it is not an abuse of process to plead as his primary case that the plaintiff did not authorise the overlapping transactions (assuming that that is what para 59 amounts to) and then to plead as his alternative case that, if the court finds that he did so, he entered into the overlapping transactions because of the defendant's breach of duty. Even though it is latent in the alternative plea that he authorised the overlapping transactions, *Groves* is authority that that is insufficient to trigger the rule.

73 I cannot accept this submission. The approach which found favour in *Groves* is unduly narrow and, more importantly for me, inconsistent with the binding authority of *Ng Chee Weng*. The Court of Appeal in that case put the rule of pleading at a level of generality which obliges me to look at the substance of the plea rather than its form. An inconsistent alternative pleading is an abuse of process if the inconsistency offends common sense. The precise form of the plea is not determinative. While *Groves* may accurately represent Queensland law on this issue, I consider that *Ng Chee Weng* precludes me from adopting its approach.

74 The plaintiff's alternative plea of breach of duty carries by necessary implication an assertion that he authorised the overlapping transactions. It is as offensive to common sense for the plaintiff to assert that he authorised those transactions by necessary implication as it would be if he had asserted it positively. It does not save the plea to cast it as a hypothetical plea: one which does not involve the plaintiff in saying anything about the underlying facts but which merely sets out a plea which the plaintiff intends to call in aid only *if* the court makes an adverse finding of fact on the question of authority. An alternative plea may be cast as a hypothetical where the hypothetical turns on a contested issue of fact which has never been within the pleader's knowledge and on which the court will have to make a finding; or where it rests on a contested issue of law on which the court will have to make a holding. But where the hypothetical rests on a factual issue which is or was within the pleader's knowledge, this rule of pleading requires the pleader to take a position on that issue. Once again, there is no exception to this rule of pleading for a pleader who finds himself unable to take a position on the issue because of a failure of memory.

75 Thus, even if I were wrong in holding that the plaintiff's entire unauthorised trading claim was correctly struck out, I would have allowed the defendant's original narrower striking out application in respect of the overlapping transactions.

Concluding remarks

The combined effect of these principles of pleading

76 The combined effect of these principles of pleading on the plaintiff's unauthorised trading claim is profound. It means that he cannot plead a claim for unauthorised trading in any way which will escape a striking out application. His original pleading is an abuse of process for being speculative. His proposed amended pleading is an abuse of process either because it too is speculative or because it asserts a fact inconsistent with his own evidence. He cannot now even plead his case in the straightforward way I have suggested at [43] above – an unqualified, positive assertion in the active voice. That is quite different from his amended pleading at para 59 and would be even more at odds with his previous evidence, giving rise to an even stronger case that it is an abuse of process.

Why a plaintiff must be in a position to plead, particularise and prove his claim

77 While these rules of pleading set a high bar for plaintiffs, they serve at least three essential purposes.

78 First, the rule that a plaintiff must be in a position, at the time he commences suit, to plead, particularise and point to proof of his claim from his own knowledge deters speculative litigation and supresses litigiousness. A lawsuit is not a boundless and roving commission of inquiry into suspicions or broad allegations about a defendant's overall conduct. It is a focused forensic process whose purpose it is to determine whether a plaintiff has established on the balance of probabilities a reasonably specific claim of a reasonably specific breach of duty which he asserts against a defendant. This rule of pleading ensures that every lawsuit is from its inception governed by a set of well-defined parameters which keep the inquiry within reasonable bounds. This in turn leads to a savings of costs and time.

79 Second, the effect of these rules of pleading prevents a plaintiff from circumventing the allocation of the burden of proof by pleading allegations which cannot be falsified. Every plaintiff who commences suit seeks the court's assistance to force a change in the *status quo* over the defendant's objections. Our procedural law places the burden on the plaintiff to prove why the *status quo* should be changed. These rules of pleading require the plaintiff to assert in his pleadings from the very outset of his suit the essential facts on which he relies. The court will then, at trial, test those assertions of fact one by one against the evidence and determine if the plaintiff has in fact discharged his burden of proof on each of them. The court cannot do that unless the plaintiff's assertions are falsifiable.

80 In this case, the substance of the plaintiff's plea on unauthorised trading is simply to assert that he may or may not have authorised the Schedule G, H1 and H2 transactions. That type of assertion is not falsifiable because it is, as a matter of logic, inevitably true: those transactions either were or were not authorised. The plea takes no position on unauthorised trading and instead incorporates within it the only two possible findings the court can make on the issue of authority. The result is a plea which carries no forensic meaning and which fails to advance a case on unauthorised trading one jot. Its only effect, if it is allowed to stand, is to cast on the *defendant* the burden of taking a position in response and trying to prove that position: that the transactions were authorised. That outcome circumvents entirely the plaintiff's burden of proof and is impermissible.

81 Third, requiring a plaintiff to state his case by a series of falsifiable assertions of essential fact ensures that he has an incentive to take the necessary care to be accurate in his assertions. When a plaintiff makes a falsifiable assertion which is in fact falsified at trial, his case loses forensic credibility. When the falsified assertion is an issue of fact of which the plaintiff has or ought to have personal knowledge, the plaintiff loses personal credibility. A plaintiff who pleads his claim as this plaintiff has, does not put his personal credibility at stake and avoids – or evades – the loss of credibility which would follow if the court were to find that the Schedule G, H1 and H2 transactions were in fact authorised. Because his original pleading acknowledged both of the only two outcomes on that issue of fact, he can claim that his credibility is unaffected because his pleading is truthful no matter what the court's finding on authority.

What can a plaintiff who cannot remember do?

82 Even though these rules of pleading rest on a sound foundation, it caused me concern that they might operate harshly against a plaintiff who is genuinely unable to recall an essential element of his cause of action. There could be any number of genuine reasons why a plaintiff might be in that

position. To take this case as an example, a plaintiff might not be able to remember whether he gave his agent authority to enter into a particular transaction on his behalf because there were a large number of transactions, because the transactions were complex, because they took place too long ago or because he might lack the necessary sophistication to understand and retain the details of the transactions he recalls authorising and match them up with the transactions he is alleged to have authorised.

83 Assume a plaintiff in that position who suspects that he did not give the agent authority for a particular transaction. Assume also that that plaintiff is honest and is therefore not prepared to assert in his pleadings a fact that he does not know to be true. That plaintiff will (like the plaintiff in the present suit) fail in any attempt to get pre-action discovery of documents evidencing authority and will also fail in any attempt to plead unauthorised trading. He will fail even if his grounds for suspecting that he did not authorise the agent's acts are cogent and even if the agent has and could, if required to do so, easily produce evidence of authority.

84 Two consequences follow. First, a plaintiff who merely suspects that he has suffered a wrong is denied recourse for it, no matter how strong or well-founded the suspicion. Second, an honest plaintiff who candidly acknowledges his suspicion and the infirmities of his memory is in a worse position than a dishonest one who is prepared to assert in his pleadings facts which he does not know to be true. The honest plaintiff will either not sue or be struck out. The dishonest plaintiff will get discovery and make it to trial.

85 When I put this point to Mr Kumar, his response was that, if at all the procedural law were to accommodate such a plaintiff, it should be by modifying the principles on which it grants pre-action discovery rather than by relaxing these fundamental rules of pleading.

86 I agree with Mr Kumar. Pre-action discovery, like every other form of discovery, has necessity as its touchstone. The principles on which pre-action discovery is allowed in Singapore are most recently set out in the decision of the Court of Appeal in *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185 ("*Ching Mun Fong*"). In that case, the Court of Appeal held that our test of necessity as applied in pre-action discovery is somewhat narrower than in English law (at [31] and [34]). Thus, in Singapore law, pre-action discovery is allowed on the following principles:

> 9 … every application for discovery must meet the test of necessity as provided under O 24 r 7, which also defines the scope of the court's discretion. Necessity has to be understood in the light of the purpose for which pre-action discovery is sought, which is to assist a plaintiff, who suspects that he has a case against the other party, to obtain the necessary information to allow him to commence proceedings.
>
> 10 … pre-action discovery would only be granted where the would-be plaintiff did not know if he had a basis on which to bring a claim. On this approach, pre-action discovery would appear to apply only for the limited purpose of allowing a potential plaintiff to obtain the facts and materials needed to mount a claim. It would not be granted if the plaintiff already knows his cause(s) of action and is not otherwise constrained from commencing proceedings. Nor would an application be granted if its purpose is to enable a potential plaintiff to assess or augment the strength of his claim.

87 In *Ching Mun Fong*: (a) the plaintiff was well able to plead every essential element of her cause of action from personal knowledge without pre-action discovery; and (b) the plaintiff did not suggest that the information comprised in the documents she sought was information which she once knew but could no longer remember. On those facts, the Court of Appeal held that pre-action discovery is

necessary only where the party seeking it does not now *and has never had* access to the information comprised in the documents sought. As the Court of Appeal observed (at [42]):

> … Cases in which pre-action discovery has been ordered have invariably concerned documents which were, from their inception, within the exclusive possession of the respondent. The applicant was from the outset never privy to such evidence …

88 If the procedural law is to make any accommodation for a plaintiff in the situations I have posited at [82] above, it is by refining the law on pre-action discovery to distinguish between a plaintiff who once knew and *still remembers* the information comprised in the documents sought and a plaintiff who once knew but *now cannot remember* that information. The principle set out at [42] of *Ching Mun Fong* holds only that pre-action discovery is not necessary for the former class of plaintiff, which was the only class of plaintiff under consideration in that case. *Ching Mun Fong* says nothing about a plaintiff who argues that pre-action discovery is necessary because he cannot remember an essential element of his cause of action at all.

Conclusion

89 At the heart of this case is the question whether the rules of pleading permit a plaintiff to avoid pleading positive and falsifiable assertions of fact to establish each element of his cause of action simply because he cannot now remember the facts even though he once knew them. The short answer is no. A plaintiff in that position cannot simply invite the court to infer an essential element of his cause of action from surrounding circumstances. That is all the more so when those surrounding circumstances can have no rational connection to the essential element of his cause of action which he can no longer remember. The plaintiff's entire claim for unauthorised trading is an abuse of process. So too, in the alternative, is his narrower claim for unauthorised trading with respect to the overlapping transactions. The Assistant Registrar was correct to have rejected the plaintiff's amendments and thereby, in effect, to have struck out his entire unauthorised trading claim.

90 I therefore dismissed the plaintiff's appeal with costs and gave leave to the defendant to withdraw its cross-appeal.

[note: 1] Plaintiff's Statement of Claim (Amendment No. 1) ("SOC (Amendment No. 1)") at para 2.

[note: 2] See the proposed Amended Statement of Claim at paras 49–50.

[note: 3] SOC (Amendment No. 1) at para 65.

[note: 4] SOC (Amendment No. 1) at para 31.

[note: 5] SOC (Amendment No. 1) at para 66.

[note: 6] 1st affidavit of the plaintiff in OS1056/2011 at p 109.

[note: 7] 1st affidavit of the plaintiff in OS1056/2011 at p 110.

[note: 8] 1st affidavit of the plaintiff in OS1056/2011 at p 123.

[note: 9] 1st affidavit of the plaintiff in OS1056/2011 at para 15.

[note: 10] 1st affidavit of the plaintiff in OS1056/2011 at p 139.

[note: 11] 1st affidavit of the plaintiff in OS 1056/2011 at para 12.

[note: 12] 1st affidavit of the plaintiff in OS 1056/2011 at para 23.

[note: 13] 1st affidavit of the plaintiff in OS 1056/2011 at para 24.

[note: 14] Notes of Arguments dated 2 March 2012 at pp 21 and 22.

[note: 15] SOC (Amendment No. 1) at paras 32–36 and 54–57.

[note: 16] SOC (Amendment No. 1) at para 37.

[note: 17] SOC (Amendment No. 1) at para 37.

[note: 18] SOC (Amendment No. 1) at p 60.

[note: 19] SOC (Amendment No. 1) at p 76.

[note: 20] SOC (Amendment No. 1) at paras 44–45 and 58–61.

[note: 21] SOC (Amendment No. 1) at paras 46 and 58–61.

[note: 22] SOC (Amendment No. 1) at p 77.

[note: 23] SOC (Amendment No. 1) at p 90.

[note: 24] SOC (Amendment No. 1) at para 72.

[note: 25] SOC (Amendment No. 1) at p 97.

[note: 26] SOC (Amendment No. 1) at para 70.

[note: 27] SOC (Amendment No. 1) at p 99.

[note: 28] SOC (Amendment No. 1) at p 112.

[note: 29] 2nd affidavit of Ng Kim Kim, Audrey filed on 23 September 2013 at pp 21–23.

[note: 30] Notes of Arguments dated 1 November 2013 at p 5, lines 1 to 5.

[note: 31] Notes of Arguments dated 1 November 2013 at p 5, lines 7 to 12.

[note: 32] *Cf* SOC (Amendment No. 1) at para 69.

[note: 33] Notes of Arguments dated 29 November 2013 at p 4, lines 10 to 12

[note: 34] Notes of Arguments dated 29 November 2013, at p 4 lines 10 to 12.

[note: 35] Plaintiff's Written Submissions dated 17 January 2014 at para 36.

[note: 36] SOC (Amendment No. 1) at para 63.

[note: 37] SOC (Amendment No. 1) at para 65.

[note: 38] Notes of Argument dated 2 March 2012; page 3, lines 10 to 12; page 16, lines 11 to 16.

[note: 39] 1st affidavit of the plaintiff in OS1056/2011 at para 24.

[note: 40] Notes of Arguments dated 2 March 2012; page 3, lines 10 to 12; page 16, lines 11 to 16.

[note: 41] Notes of Arguments dated 20 January 2014 at p 7, lines 13 to 16.

[note: 42] The plaintiff's first affidavit in OS1056/2011, p 135.

[note: 43] The plaintiff's first affidavit in OS1056/2011, p 139.

[note: 44] Notes of Arguments dated 2 March 2012 at p 3, lines 30 and 31.

[note: 45] Notes of Arguments dated 2 March 2012 at p 7, lines 24 to 26.