

HONG KONG / JUDGMENT

EAA SECURITIES LTD v. CHAN LIN MUI AND ANOTHER

COURT

Court of Appeal

DECIDED

20 March 2007

CASE / FILE NUMBER

CACV277/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj CACV 277/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 277 OF 2006 (ON APPEAL FROM DCCJ NO. 4015 OF 2003)

BETWEEN EAA SECURITIES LIMITED Plaintiff CHAN LIN MUI 1st Defendant FATTYDAD ALICE PUI YAN 2nd Defendant

Before: Hon Tang VP and Chung J in Court Date of Hearing: 20 March 2007 Date of Judgment: 20 March 2007

J U D G M E N T

Hon Tang VP: The plaintiff is a securities dealer. One So Tai Fai Anita (Anita So) was, at the material time, one of the plaintiff s dealing directors. Anita So is the stepmother of the 2nd defendant. The 1st and 2nd defendants were customers of the plaintiff under what the plaintiff has described as a Joint Cash Account . The defendants counterclaimed against the plaintiff for 3,100 units of the Tracker Fund and 500 shares of MTR which according to the defendants, were either subscribed to or bought through the plaintiff. On the other hand, the plaintiff sued the defendants for the sum of \$493,770.10, said to be the debit balance of the defendants Joint Cash Account with the plaintiff. In para. 8 of the Statement of Claim, it is pleaded: Commencing from February 2000, the 1st and 2nd Defendants from time to time traded securities through the Joint Account by giving instructions to the Plaintiff. Presumably, the said instructions were given through Anita So; there is no evidence that it might have been anyone else. In para. 10: As at 31st July 2001, there was a debit balance of HK\$438,640.83 for the Joint Account and the 1st and 2nd

Defendants failed to settle the same pursuant to Clause 3.4 of the Agreement. In the Amended Defence and Counterclaim of the defendants, the defendants alleged at para. 2(m): At all material times, the said two subscriptions (for Tracker Fund and MTR shares respectively) and the purchase of the additional 1,000 units of Tracker Fund were the only shares dealings the Defendants had engaged in. It is the defendants case that they had paid for the shares, the subject matter of the counterclaim. In the Reply, the plaintiff denied that the defendants had ever requested the plaintiff to subscribe for 2,000 units of Tracker Fund, and that there had never been any deposit of those shares into the cash account. It is, however, accepted and pleaded in para. 1(c) of the Amended Reply and Defence to Counterclaim:

- (c) The Plaintiff avers that since the opening of the Cash Account, the 1st and 2nd Defendants had from time to time given instructions to the Plaintiff to buy and sell shares including but not limited to shares of Tracker Fund (2800) and shares of MTR Corporation (66) through the Cash Account. The Plaintiff further avers that on or before 13th October 2000, the 2nd Defendant had given instruction to the Plaintiff to buy 1,000 shares of Tracker Fund and a cheque was issued to the Plaintiff by the 2nd Defendant. As at 17th April 2003, there were a debit balance of HK\$493,770.10 and 100 shares of Tracker Fund (2800) in the Cash Account. Then it is alleged in paras. 2 and 3:
2. On or about 13th March 2001, the 1st and 2nd Defendants jointly signed a repayment schedule (the Schedule) and sent to the Plaintiff. The Schedule contains, inter alia, that the 1st and 2nd Defendants promised to repay the outstanding balance of HK\$385,927.41 as at 28th February 2001 plus interest to the Plaintiff by installment and the Schedule was duly accepted by the Plaintiff.
3. The 1st and 2nd Defendants did pay the installment as per the Schedule from June to September 2001 but failed to pay the balance without any lawful excuse. By a Rejoinder dated 11 August 2005, the defendants have denied that they had signed the Schedule or made any payment to the plaintiff. They alleged that the signatures on the Schedule were forgeries. On 3 May 2005, the defendants filed a witness statement by Anita So dated 30 April 2005 (the witness statement). By a summons dated 23 August 2005, the plaintiff applied to have paragraphs 4 to 24 and 26 to 28 of the witness statement struck out. Those paragraphs were struck out by Deputy District Judge K W Wong at the conclusion of the hearing of the plaintiff's summons on 23 January 2006. The reasons for decision is dated 25 April 2006. The judge refused leave to appeal on 11 July 2006. Leave to appeal was given by Le Pichon JA on 3 August 2006. This is the defendants appeal. Essentially, the judge struck out those paragraphs on the basis that they were not relevant to the defence as pleaded. In para. 4 of the witness statement, Anita So claimed that her supervisor, one Elson Wong, asked her to use her clients accounts to trade in order for the plaintiff to survive the financial crisis , and that she was asked by Elson Wong: whether I had any available accounts of my clients which the Plaintiff could use to buy/sell orders coming from some listed companies or from other brokerage firms. This meant that the Plaintiff needed to use these available accounts to carry out trading without the knowledge and consent of the clients concerned. In para. 5, she said

she did so because of the pressures put on her by the plaintiff and that she had used the account of 27 of her clients for that purpose. She said: I would say that without the Plaintiff's financial support, this trading could not be sustained. Presumably, because credit had been extended by the plaintiff to these accounts. In para. 6, she said: no monthly statement of account was ever sent to any of [the clients]. It was the practice of the Plaintiff until year 2001 to give the monthly statement to their account executives who were to send it onwards to their clients. In other words, if the account executives did not send them on, the clients would not have received them. She had withheld sending monthly statements to any of her 27 clients: for obvious reason. As my clients did not receive any monthly statement, they did not know their accounts had been used to place orders without their authorization. para. 7. However, she said, in 2001, because of the requirement of the Securities and Futures Commission (), the plaintiff had begun to mail the monthly statement to the clients directly. However, she said: Therefore, in order to conceal the trading carried out in their account, I asked the 2nd defendant to open the P.O. Box No. 71 for me without telling her the real purpose behind and gave this P.O. Box to the Plaintiff as the new correspondence address of the Defendants. para. 8 Therefore, according to her, the defendants never received any of the monthly statements. She then said that after Elson Wong left in March 2000, one Suzanne Choo became her immediate supervisor, who enquired about the debit balance in her clients accounts, and asked her to issue demand letters to them to chase for payment. (para. 10). In para. 11, she said she was held responsible for the debit balance in each of her clients accounts by Ms Suzanne Choo. In para. 13, she said using clients accounts to trade without authorization was a widespread practice/phenomenon in the Plaintiff. In para. 14, she said that the total debit balance of all her clients accounts in 2002 amounted to more than \$20 million. Her service was terminated in or about February 2002 and she was asked to sign a letter of guarantee, and then she explained why she did so under pressure. (paras. 15 and 16) Then she went on to explain how she managed to pay some of the debit balances and how her terminal payments including long service pay, salary in lieu of notice, as well as provident fund of just over \$500,000 was used to settle the debit balance in her clients accounts. (paras. 17, 19, 20 and 21) In para. 23, she explained how she made payments in respect of various accounts including the joint account of the defendants to the plaintiff. In para. 24, she claimed to have made payments into the defendants accounts with the plaintiff without the defendants knowledge. In para. 26, she accepted that apart from the instructions to subscribe for Tracker Fund and the MTR and one more purchase of 1,000 units of Tracker Fund: [the defendants] did not give any instructions to any person to carry out any other transactions in their account. I admit that all other transactions as appeared in the monthly statement were carried out by me for the purpose of generating income by way of commission for the Plaintiff without the knowledge and consent of the Defendants. Due to my unauthorized trading, I had caused loss to their account. In para. 27, she said she had been arrested by the police and questioned about false accounting, and produced a police statement. She was put on bail, but eventually the bail money was returned to her. In para. 28, she mentioned the fact that: the Securities and Futures Commission had severely reprimanded the Plaintiff for internal control failure allowing me to carry out unauthorized

trades in clients accounts and the dispatch of forged statements to clients thereby causing the Plaintiff to write off bad debts of about 27.3 million. And then she produced a copy of the reprimand dated 7 September 2004. In the reprimand, the misdeeds said to have been facilitated by the plaintiff included the conduct of unauthorised trades in clients accounts and the dispatch of forged instruments to clients . The judge had correctly understood the defence to be that the defendants had traded securities on three occasions only. And that:

14. Implicit in such allegation is that all other trading was carried without their knowledge and consent and the Defendants were therefore not liable for whatever loss under the account. The judge found the evidence of Anita So objectionable because:

15. However by the evidence of Anita So, a positive case amounting to illegality and/or fraud and/or serious misconduct on the part of the Plaintiff is sought to be established. It was Anita So s evidence that the trading, which was upon the request of the Plaintiff s executive director, was for the purpose of prop up or to dump the price of particular shares in the market for the purpose of fulfilling buy/sell orders from some listed companies/brokerage firms without drawing much attention (paragraph 4 of her statement). Although no further particulars are contained in her statement, her evidence discloses a case of serious illegal activities on the part of the Plaintiff, amounting to possibly, false trading under the Securities and Futures Ordinance, Cap 571 (). It is a serious offence punishable by heavy fine and imprisonment term under the SFO. The defendants complained that the application to strike out the evidence was part of a delaying tactic on the part of the plaintiff to prevent the case from going to trial as expeditiously as possible by starting satellite litigation which was wholly unnecessary and misconceived. Further, by the letter dated 19 August 2005, from the defendants solicitors, Messrs Fairbairn Catley Law & Kong (Fairbairn) to the plaintiff s solicitors Messrs Woo, Kwan, Lee & Lo (WKLL), they had clearly explained that the defendants had not pleaded any fraud as they had no knowledge of the same but theirs was a positive case of unauthorised trading carried out in the defendants account. The judge seemed to think, as he said in para. 14 of the judgment: In other words the defence of unauthorized trading simply put the Plaintiff to strict proof of the Defendants liability and quantum. Of course, the burden is on the plaintiff to prove that the tradings were authorised by the defendants. But that would not stop the defendants, apart from their own evidence to such effect, from calling Anita So to testify that there were no tradings apart from those the subject matter of the counterclaim. The evidence of Anita So supports their case. Mr Simon K M Lui, who appears for the defendants, does not dispute that the judge had the correct principles in mind. His complaint is that the judge had misapplied them to the facts of this case. The matter can be tested in this way. On the pleadings the defendants were entitled to testify that apart from the three transactions, they had authorised no other transactions in the Joint Cash Account. No doubt they would call Anita So to corroborate them. I do not believe it can be said that such evidence was irrelevant or in any way scandalous. No doubt Anita So would be subject to cross-examination. She would be asked, if those three transactions were the only ones authorised by the defendants, why other transactions were also put through the defendants account. Surely, she would be entitled to explain why and

how those transactions were put through the defendants account. Presumably, the plaintiff will contest that. Then, surely, Anita So would be entitled to say that, the defendants account was not the only account in which there had been unauthorised trading, and that the unauthorised trading was transacted with the knowledge of or at the instigation of her immediate supervisor and for the benefit of the plaintiff. I have no doubt about the importance of pleading fraud when that is one's case. *ADS v Wheelock* [1994] 2 HKC 264 provides clear guidance on that. The judge seemed to think that the defendants were trying to prove an unpleaded case of fraud. The defendants have not pleaded fraud. Nor is that their case. Their case is that the other transactions were unauthorised. They would call Anita So in support. She will explain how and why the unauthorised transactions came to be made. For the purpose of the defendants, all that they need to show (and I have not forgotten that the burden is on the plaintiff) is that the transactions were unauthorised. It is not critical to the defendants case that Anita So's explanation as to why she caused unauthorised transactions to be put through the defendants account, was believed. Leaving aside for present purpose any provisions in the Joint Cash Account to the contrary (which may or may not survive scrutiny) all that the defendants need to show is that they had not authorised the other transactions. It does not matter whether the plaintiff was aware that Anita So had no authority to put through the other transactions. With respect to the judge, it is not clear how he thought the plaintiff would prove its case, apart from the cross-examination of the defendants and Anita So. Obviously, the plaintiff would not call Anita So. Presumably, the plaintiff will rely on the sending of the monthly statements, the facts that some payments had been made, and the Schedule. The defendants would then be entitled to call Anita So in an attempt to answer those matters. I will not repeat what I have said above. It is correct that Anita So's evidence, if accepted by the court, might amount to a case of fraud on the part of the plaintiff against the defendants. But it is unnecessary for the defendants to go so far, hence they have not pleaded a case of fraud. However, that would not mean that if they were to call Anita So, she would not be allowed to explain how the unauthorised trading came about. As noted, the defendants account was supposed to be a cash account. It seemed that the account was not maintained on a cash basis. One could perhaps test the matter in another way. Had Anita So's statement contained no more than a bare statement that apart from the three transactions, the other transactions were unauthorised, and then when she was cross-examined, she were to explain how it was that there were other unauthorised transactions in her account, and on being pressed in cross-examination, then she were to explain that according to her, that was part of a system in which not only the defendants account, but all her other accounts also involved unauthorised trading, in that case, the plaintiff could legitimately complain that they had been taken by surprise, and certainly they would be entitled to invite the court to disbelieve Anita So on the basis that none of these had been covered in her witness statement. But her above testimony would still be relevant and therefore admissible nevertheless. In any event, having regard to the circumstances of this case, one would have thought that the plaintiff's witness statement would have to go into how it was that the defendants account was allowed to have incurred a debit balance of over \$400,000. But we have not seen the witness

statements filed on behalf of the plaintiff, so we do not know how much of that had been covered. There are also matters which cried out for an explanation, I would give some examples. In para. 5 of the Fairbairn's letter dated 3 June 2004 to WKLL, it referred to a total of 13 payments into the cash account, and in para. 6, 13 payments out of the joint account. In WKLL's reply, dated 16 June 2004, so far as the first 9 transactions were concerned, similar information was given, and I would only refer to one for illustration purposes: 5 (i) This was not an actual transaction of making payment into the Joint Account but was a way that our client handled its clients accounts before August 2000. Please refer to the corresponding debit record of the same amount of \$93,033.86 on the same date under our client's reference no. PM030108 in the relevant Statement of Account. As it was not a deposit into the Joint Account, there was no document proving deposit of the said sum could have ever existed. In relation to the inquiries regarding para. 6, regarding all the withdrawals, similar replies were given and I would only cite one of them for illustration:

6. (a) This was not an actual transaction of withdrawal from the Joint Account but was a way that our client handled its clients accounts before August 2000. Please refer to the corresponding credit record of the same amount of \$7,144.64 on the same date under our client's reference no. RC030960 in the relevant Statement of Account. As it was not a withdrawal from the Joint Account, there was no document proving withdrawal of the said sum could have ever existed. These matters might directly or indirectly support Anita So's evidence. I do not know. Presumably, there will be explanation from the plaintiff. As for SFC's reprimand, insofar as the SFC was able to conclude that Anita So had been involved with unauthorised trading and the sending of forged accounts to her clients, the evidence available to the SFC are obviously relevant, though strictly speaking, the reprimand itself may not be admissible evidence to prove the truth of its content. But I can see no real objection to Anita So's reference to it in her statement. If the statement in the reprimand that unauthorised trades by Anita So in her clients accounts caused the plaintiff to write off bad debt of about \$27.3 million is correct, that would of course support, to a certain extent, unauthorised tradings on the part of Anita So in other accounts as well. And that may be relevant to the plaintiff's claims against the defendants, if it be the plaintiff's case, that in relation to the other clients accounts, there had been unauthorised trades, but in relation to the 1st and 2nd defendants accounts, the trades were not unauthorised by the defendants. Mr Maurellet, who appears on behalf of the respondent, complained that because the defendants had not pleaded fraud or any positive case in their defence, the plaintiff has been put at a disadvantage because the plaintiff is not in the position to seek further and further particulars, for example, of the various allegations, made by Anita So in her statement. That may be so, but I do not believe that the defendants could be forced to plead a case which they do not wish to rely on. Their case is a simple one: the other transactions were unauthorised. They are entitled to call Anita So. In the preparation of the Anita So's statement, Anita So must be given the opportunity and be permitted to give a full explanation which may or may not be entirely true, but it would not be right to insist, that Anita So should give a truncated statement. For these reasons, I will allow the appeal. Hon

Chung J: I agree. Hon Tang VP: The appeal is allowed with costs here and below to the defendants. The defendants own costs to be taxed in accordance with the Legal Aid Regulations. (Robert Tang) Vice-President (Andrew Chung) Judge of the Court of First Instance Mr Jos -Antonio Maurellet, instructed by Messrs Woo, Kwan, Lee & Lo, for the Plaintiff. Mr Simon K M Lui, instructed by Messrs Fairbairn Catley Law & Kong, assigned by Director of Legal Aid, for the 1st and 2nd Defendants. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K 1udk 1udk Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=56454
CASE PAGE	https://chat.esheria.ai/case-law/hong-kong/eea-securities-ltd-v-chan-lin-mui-and-another-2007

Prepared on 27 October 2026 · Esheria