IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 7

Suit No 6 of 2020

Between

Judah Value Activist Fund

… *Plaintiff*

And

Open Faith Investment Limited

… *Defendant*

JUDGMENT

[Contract] — [Breach] — [Causation]
[Contract] — [Remedies] — [Quantum]

TABLE OF CONTENTS

Judah Value Activist Fund
v
Open Faith Investment Ltd

[2021] SGHC(I) 7

Singapore International Commercial Court — Suit No 6 of 2020
Sir Henry Bernard Eder IJ
22-25 February, 12 March 2021

2 July 2021 Judgment reserved.

Sir Henry Bernard Eder IJ:

Introduction

1 The plaintiff, Judah Value Activist Fund, is an exempted company incorporated in the Cayman Islands. It is an activist hedge fund which targets mainly Singapore and Hong Kong listed companies. Activist hedge funds typically seek to make a large investment in a company so as to be able to participate in or influence the management and decision-making of the company invested in. Activist hedge funds are also different from traditional funds in that they usually have a less diversified portfolio.

2 The plaintiff's Chief Investment Officer ("CIO") is Mr Roland Jude Thng Qida ("Mr Thng"). His role was to monitor the plaintiff's portfolio of assets and liaise with investors. He was the individual in charge of making decisions on behalf of the plaintiff. Mr Thng is also a shareholder of the plaintiff

(through Judah Group Limited) together with a number of other corporate and individual investors. The plaintiff is also managed by Swiss-Asia Financial Services Pte Ltd ("Swiss Asia") under an investment management agreement. The fund administrator is the Apex Group ("Apex").

3 At the relevant time, *i.e.* end-December 2019, the plaintiff's portfolio of shares comprised 157,995,000 shares in Agritrade Resources Limited ("Agritrade"), a company listed on the Hong Kong Stock Exchange. Agritrade International Pte Limited ("APIL") was the controlling shareholder of Agritrade, holding approximately 55.7% of the issued shares of Agritrade. In turn, APIL was owned in proportions of 40.1% by Mr Ng Say Pek, chairman of the Board and the executive director of APIL, and 59.9% by his son, Mr Ng Xinwei, (sometimes referred to as "Xman"), the executive director and Chief Executive Officer of Agritrade.

4 The plaintiff had a margin loan facility ("MLF") with Maybank Kim Eng Securities Pte Ltd ("Maybank") under which, according to the plaintiff, the plaintiff was required to maintain a Loan-to-Value Ratio ("LTV Ratio") below 70%. The terms of the MLF were contained in a letter dated 22 November 2018 (the "MLF Letter") which provided in material part as follows:

> We are pleased to inform you that your application for a Margin Facility has been approved, subject to the terms and conditions governing the Margin Facility (the "Margin Facility Terms") and the terms and conditions set out below … The Margin Facility Terms is available on our website …
>
> 1. Your initial Margin Limit shall be S$ 4,000,000
>
> […]
>
> 5. A Margin Call occurs if and when the Margin Ratio falls below 140% or the Margin Limit is exceeded.
>
> 6. We may sell all or any part of the Securities in your Account immediately without prior notice to you if and when (i) a Margin Call is not satisfied by taking such actions required

> by us within 5 days of the occurrence of the margin call or (ii) the Margin Ratio falls below 130%.

5 During the trial, there was a dispute between the parties concerning what were, in fact, the relevant and applicable "Margin Facility Terms" stated to be "available on [Maybank's] website" as referred to in the letter extracted above. I was told by the plaintiff's Counsel that the plaintiff did not have a copy of those terms. Certainly, none had been disclosed by the plaintiff. However, the defendant's expert, Mr Kon Yin Tong ("Mr Kon"), had sourced a copy of what he considered to be the relevant terms from Maybank's website (as referred to in the MLF Letter). He appended those terms to his report and referred to them extensively in the body of his report. I shall refer to these as Maybank's T&Cs. In the course of Mr Kon's cross-examination, it was suggested by the plaintiff's Counsel, for the first time, that these terms were not, or at least might not be, the relevant terms applicable to the MLF; such suggestion subsequently developed into a forceful submission by Counsel on behalf of the plaintiff in the course of closing arguments at the end of the trial that these terms were inapplicable. Given that Mr Kon's report had been served some four weeks before the trial, and further that the parties' experts had been in communication and produced a Joint Statement ("JS") without any suggestion that these terms were or might be inapplicable, that belated suggestion and subsequent submission by Counsel on behalf of the plaintiff were, to say the least, somewhat surprising. If those terms were neither relevant nor applicable, this could and should have been raised much earlier: trial by ambush is inappropriate in modern commercial litigation.

6 By way of riposte, it was the defendant's submission that the Court should draw an adverse inference against the plaintiff that the plaintiff had failed, refused, or neglected to disclose the Maybank T&Cs because its contractual provisions are applicable to how the Margin Ratio was to be

computed and would show that Mr Kon's approach is correct. In support of that submission, I was referred to illustration (g) of s 116 of the Evidence Act (Cap 97, 1997 Rev Ed.), *Evidence and the Litigation Process* (Jeffrey Pinsler, 7th ed) (LexisNexis, 2020), and several guiding principles set out by the Court of Appeal in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha Natrajan*").

7 In my view, Maybank's T&Cs were plainly highly material to this case. As appears below, the issue of causation (which is important in this case) turns on how the Margin Ratio is computed, and the Maybank T&Cs are potentially critical to that issue because they contain the relevant provisions to compute the Margin Ratio. I find it surprising that the plaintiff did not have a copy of the Maybank T&Cs. But, even if that is correct, it seems to me that it would have been entitled to request a copy from Maybank and, as such, the Maybank T&Cs would have been within the plaintiff's "control" and therefore discoverable in these proceedings. At the very least, it seems to me that it would have been very easy indeed for the plaintiff to ask Maybank for a copy of the Maybank T&Cs, and there is no reason to suppose that Maybank would not have complied with such a request. In my view, it is no answer that the defendant might itself have requested Maybank to provide a copy of the Maybank T&Cs, particularly since I was told that they were, in any event, publicly available on the Maybank website and, as I understand, no objection had been raised by the plaintiff to the fact that Mr Kon had exhibited a copy of the Maybank T&Cs to his report and made extensive reference to them in the body of his report.

8 Be all this as it may, the plaintiff has not pointed to a different set of terms as it could easily have done if different terms were applicable. In these circumstances, I accept Mr Kon's evidence that he had sourced Maybank's

T&Cs from Maybank's website as referred to in the MLF Letter and proceed on the basis that these were the applicable terms.

9 As to the relevant terms of the contractual relationship between the plaintiff and Maybank, I note the following:

(a) The MLF Letter itself provided on its face that (i) the Margin Ratio must at all times be maintained at a ratio of at least 140%; (ii) a Margin Call occurs if and when the Margin Ratio falls below 140% or the Margin Limit is exceeded; and (iii) Maybank had the right to sell all or any part of the Securities without prior notice if and when, *inter alia*, the Margin Ratio fell below 130%.

(b) Maybank's T&Cs (as referenced in Mr Kon's report) provided in material part as follows:

(i) In Clause 1 (Definitions):

- "Collateral" means "all the Approved Securities and other Securities that are or will be provided by way of security to [Maybank] pursuant to the Security Document"

- "Collateral's Security Value" means "the sum of the Security Value of each Collateral"

- "Loan-to-Value" means "… the percentage of the Market Value that [Maybank is] prepared to finance; the percentage determined by [Maybank] from time to time may vary depending on the type of Approved Securities."

- "Security Value" means "… an amount determined using [an Approved Security's] Loan-to-Value; and for any other Collateral, an amount as may be determined by [Maybank]"

- "Margin Ratio" means "the percentage determined by [Maybank] based on the following formula:

$$\frac{\text{Collateral's Security Value}}{\text{(Outstanding Amount – cash in Account, if any)}}$$"

(ii) In Clause 14.1 (Margin Calls): "A Margin Call occurs if we determine at any time and on any day that the Margin Raito [*sic*] has fallen below a certain ratio prescribed by us." The remainder of Clause 14 set out what Maybank may request its counterparty to do in the event of a Margin Call and the consequences of non-compliance with such a request.

(iii) In Clause 17 (Event of Default), a list of events of default and the consequences of an event of default, including a right by Maybank to sell property subject to the security interest, is set out.

(iv) In Clause 27 (Rights and Waivers): "[Maybank has] absolute discretion as to what we do or do not do under or for the purposes of any Finance Document. We do not have to give any reasons for doing or not doing something under or for the purposes of any Finance Document."

As appears below, the plaintiff's pleaded case is that Maybank was entitled to make a margin call when the LTV Ratio exceeded 70%. The LTV Ratio is, of course, different from the Margin Ratio although the two are related. So far as relevant, I consider this further below.

10 The defendant is a company incorporated in the British Virgin Islands. It is in the business of consultancy and investment holdings. The defendant's sole director and shareholder is Mr Tay Jing Yi Joseph ("Mr Tay").

11 Before this dispute, Mr Thng and Mr Tay had known each other for about 3 years. They were friends. They share the same Christian faith, went to the same church, and had common interests in investment and fund management. They also periodically met up for coffee. As appears below, they frequently communicated by WhatsApp.

12 At the relevant time, *i.e.* at the end of 2019, the defendant had a portfolio of approximately 160 million Agritrade shares made up of:

(a) 100,005,000 Agritrade shares in its brokerage account with Bluemount Securities Limited, out of which approximately 80 million Agritrade Shares were encumbered pursuant to a loan agreement with a company known as Wealthy Hero Holdings Limited ("Wealthy Hero");

(b) 50,063,016 Agritrade shares in its brokerage account with Hong Kong Stock Link Securities Limited ("HKSLS"); and

(c) An anticipated further transfer of 14,705,000 Agritrade shares into its brokerage account with HKSLS.

13 The present case concerns disputes arising out of a contract consisting of a Subscription Application Form ("SAF") and a Private Placement Memorandum ("PPM") signed on 11 December 2019 between the plaintiff and the defendant (hereinafter referred to collectively as the "subscription agreement" or "SA") whereby (as is common ground) the defendant agreed to subscribe for a number of Class B shares in the plaintiff by way of a transfer *in specie* by the defendant to the plaintiff of 60 million Agritrade shares (the "Agritrade Shares").

14 In essence, it is the plaintiff's case that (a) pursuant to the SA, the defendant was obliged to transfer the Agritrade Shares to the plaintiff by latest 31 December 2019; (b) in breach of that obligation, the defendant failed to effect such transfer by that date or at all; and (c) as a result, the plaintiff's LTV Ratio exceeded 70%, causing a margin trigger event under the MLF and thereby entitling Maybank to issue a margin call to the plaintiff, which Maybank did on 20 January 2020 (the "margin call"). Shortly thereafter, between 20 and 23 January 2020, Maybank force sold the plaintiff's entire holding of Agritrade shares in three tranches to clear off the margin loan at an average price of HK$ 0.1957 per share. It is uncontested that Maybank was entitled to force sell the said Agritrade shares.

15 The plaintiff says that such forced sale would not have occurred if the defendant had effected the share transfer on 31 December 2019 as it was obliged to do under the SA, and that, as a result of the defendant's breach, it has suffered a loss of S$ 5,389,734.91 (alternatively US$ 4,466,463.02, being the value of the Agritrade Shares as of 31 December 2019) which it is entitled to recover against the defendant together with interest and costs.

16 The defendant does not dispute that it entered into the SA. However, it is the defendant's case that the SA did not specify a date when the share transfer was to be made and, in particular, did not impose any obligation on the defendant to transfer the Agritrade Shares by 31 December 2019. In further support of the foregoing, the defendant says that in the weeks leading up to 31 December 2019, there were no reminders sent by the plaintiff that the defendant had to transfer the Agritrade Shares by 31 December 2019, and, following that date and with knowledge that the Agritrade Shares had not been transferred, the plaintiff also did not highlight that the defendant had been remiss, nor did it seek to enforce the transfer of the Agritrade Shares without delay.

17 Further, the defendant has raised a number of specific defences which are, in summary, as follows:

(a) It was an implied term of the SA that the share transfer need not be effected before the due diligence and subscription application process were completed, and such process had not yet been completed by 31 December 2019.

(b) The plaintiff was entitled to, and did in fact, exercise its discretion to change the day upon which the obligation to transfer the Agritrade Shares to the plaintiff fell due to a date after 31 December 2019.

(c) If (contrary to the defendant's case) the SA obliged the defendant to transfer the Agritrade Shares by 31 December 2019, the plaintiff, by its words and conduct after 31 December 2019, had waived its right to insist on strict compliance with such deadline; alternatively, the plaintiff is estopped from insisting on strict compliance with that date.

18 In any event, it is the defendant's case that any breach of contract on its part did not cause the loss now claimed by the plaintiff and/or the plaintiff's alleged loss was not reasonably foreseeable and too remote. In very broad summary, the defendant says that the stock market is unpredictable; that funds (like the plaintiff's fund) seek to capitalise on such unpredictability; that they can make a lot of money if they get it right; but they can also face serious losses if they get it wrong. Here, the defendant says that the present case is a cautionary tale of the latter scenario, where the plaintiff essentially "backed the wrong horse" by concentrating its entire portfolio in Agritrade; that the price of Agritrade shares was on a steady and inexorable decline between December 2019 and January 2020; that the plaintiff, with a concentrated portfolio in this single company, was going to bear the brunt of this decline; that the plaintiff was eventually confronted with a margin call by its financier, Maybank, when the share price of Agritrade tanked in early January 2020; that the plaintiff is wrong to pin the blame of its losses on the defendant; that even if the defendant had transferred its 60 million Agritrade Shares to the plaintiff before 20 January 2020, the plaintiff would still have been faced with a margin call from Maybank; that this would in all likelihood have precipitated the same events that unfolded on 20 to 23 January 2020; and that, in other words, the plaintiff's loss was inevitable irrespective of any breach by the defendant.

The Evidence

19 In addition to the documentary material put in evidence, the parties relied on the evidence contained in the affidavits of evidence-in-chief of the following individuals, all of whom gave evidence and submitted themselves for cross-examination:

(a) On behalf of the plaintiff:

(i) Mr Thng. As stated above, he was the plaintiff's CIO. His role was to monitor the plaintiff's portfolio of assets and liaise with investors. He was an experienced investor.

(ii) Mr Ee Swee Yee ("Mr Ee", also referred to in the evidence as "Andy"). He was the plaintiff's Portfolio Manager from June 2019 to March 2020, which included the relevant period. He was also Mr Thng's assistant and worked closely with him. He was responsible for facilitating investors' subscriptions with the plaintiff, including conducting analysis on companies, working closely with the investors to obtain the required information, and ensuring that the investors executed the required documentation.

(iii) Ms Ho Seok Hua ("Ms Ho"). She is the General Counsel of Swiss-Asia. Her duties included Swiss-Asia's compliance matters, including conducting client due diligence and know-your-client checks ("CDD") on the plaintiff's investors. Ms Ho was called as a witness and confirmed under oath the contents of her affidavit of evidence in chief. However, the defendant's Counsel elected to forego any cross-examination. Accordingly, Ms Ho's evidence stands unchallenged.

(b) On behalf of the defendant: Mr Tay. As stated above, he is the director and sole shareholder of the defendant. He is also an experienced investor with numerous business interests and travels frequently between Singapore and Hong Kong.

20 In addition, the parties adduced in evidence the following expert reports:

(a) On behalf of the plaintiff, the report of Mr Tan Kah Leong ("Mr Tan"), currently the Head of Business Development & Education at IG Asia Pte Ltd.

(b) On behalf of the defendant, the report of Mr Kon, Managing Partner at Foo Kon Tan LLP.

21 The main issues addressed by these experts were as follows:

(a) Whether prior to the defendant's intended subscription, the plaintiff's MLF with Maybank already had a high LTV Ratio;

(b) Whether it was the defendant's failure to transfer the Agritrade Shares by 31 December 2019 or the plaintiff's own trading activities that caused the margin call on the plaintiff's account;

(c) Whether the continuous share price drop from 2019 to January 2020 was the cause of the plaintiff's margin call;

(d) Whether the plaintiff's losses that arose as a result of the margin call were the type of loss which would ordinarily have been in the contemplation of the plaintiff and defendant at the time when the SA was entered into;

(e) What was the quantum of the plaintiff's loss as of 31 December 2019, being the date that (as asserted by the plaintiff) the defendant was obliged to transfer the Agritrade Shares;

(f) What was the quantum of the plaintiff's loss as of 20 January 2020, being the date of the margin call; and

(g) What was the market practice for a subscriber to transfer its shares to the Fund pursuant to the subscriber's execution of a subscription application form, where payment is to be made wholly *in specie*.

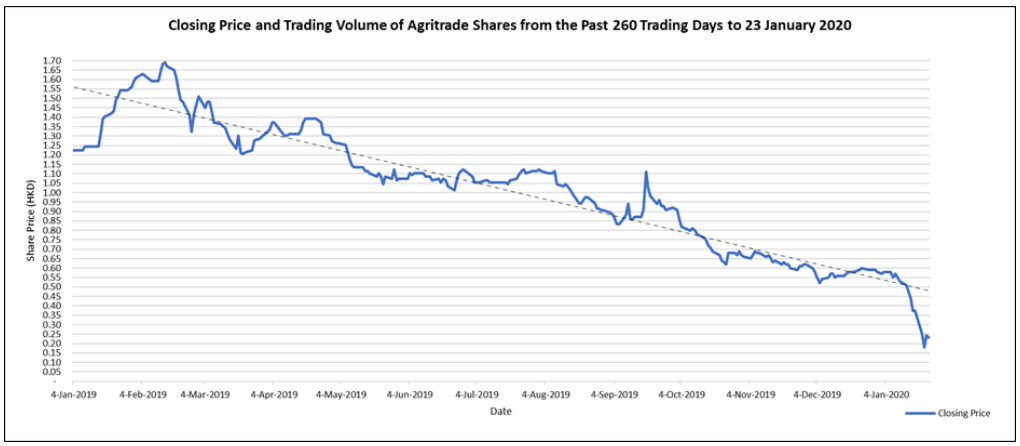
Pursuant to the Court's order, the experts held without prejudice conference calls on 25 and 27 January 2021 and thereafter prepared a JS setting out points of agreement and disagreement. The Court is grateful to these experts for their assistance in highlighting the points of agreement and narrowing the areas of disagreement. Both experts gave oral evidence and were cross-examined.

The Relevant Facts

22 Before turning to consider the main issues, I set out below a summary of the relevant facts.

23 As stated above, the plaintiff had an MLF with Maybank under which, according to the plaintiff, the plaintiff was required to maintain an LTV Ratio below 70%. It was originally part of the defendant's case that the plaintiff had a "high" LTV Ratio in the latter part of 2019 and that the margin calls made by Maybank were simply due to the plaintiff's own trading activities.

24 As appears from the chart below, there is no doubt that the market value of Agritrade shares fell in the course of 2019 from a high of approximately HK$ 1.70 per share in February 2019 to a low of approximately HK$ 0.55 per share in early December 2019 before a moderate pick up in the course of December 2019 and early January 2020, followed by a very steep fall thereafter.



25 However, both the expert witnesses, Mr Tan and Mr Kon, agreed that the plaintiff's MLF with Maybank did not have a high LTV Ratio prior to 11 December 2019, and that the plaintiff's own trading activities did not cause the margin calls. In passing, I should note that there was some dispute between the experts as to the precise figure for the plaintiff's Margin Ratio and LTV Ratio during the relevant period. According to Mr Kon, the plaintiff's Margin Ratio ranged from approximately 274 to 204% and its LTV Ratio from 36% to 48% between 30 September 2019 and 11 December 2019, whereas Mr Tan calculated slightly lower figures ranging from approximately 393% to 296% and 25% to 33% respectively during that same period. This difference between the experts was due primarily to a difference of methodology. in particular with regard to the method of calculating what was referred to as "collateral value". However, the difference is of little, if any, relevance in the present context because, as stated above, both experts agreed that the plaintiff's MLF with Maybank did not have a high LTV Ratio prior to 11 December 2019. However, the difference in methodology and in the method of calculating the appropriate "collateral value" is important (and potentially crucial) when considering later events in January 2020, which I consider further below.

26 Although (as is now common ground between the parties) the plaintiff's LTV Ratio was not high in the latter part of 2019, it was the evidence of Mr Thng (which I accept) that, out of prudence, he began exploring two possible options concerning the plaintiff's margin loan with Maybank *viz.* (a) the plaintiff could sell off a sufficient amount of its Agritrade shares so that it had sufficient funds to clear the margin loan and have some cash left over as a buffer (the "First Option"); or (b) the plaintiff could strengthen its buffer against a potential margin call by acquiring even more Agritrade shares (the "Second Option"). In the event, Mr Thng decided (at least initially) to pursue the First Option by selling 75 million out of the plaintiff's holding of Agritrade shares so as to raise approximately S$ 7 million.

27 Sometime in or around October 2019, Mr Thng found a willing buyer to acquire the plaintiff's 75 million Agritrade shares. The buyer, known as "Saurav", is Mr Thng's friend and a fund manager in New York. Saurav was going to acquire the plaintiff's 75 million Agritrade shares through Power One Limited, a company that he (Saurav) controlled.

28 At about the same time, it was Mr Thng's evidence that he had discussions with Mr Tay concerning what he referred to as the plaintiff's margin issues. That this was indeed the case appears, for example, from a WhatsApp exchange between Mr Thng and Mr Tay on 11 October 2019.

29 Before Mr Thng finalised the proposed trade with Saurav, sometime in or around October 2019, Mr Thng shared with Mr Tay during one of their meetings his plan for the plaintiff to pursue the First Option by selling 75 million Agritrade Shares to Saurav. According to Mr Thng, when Mr Tay learnt of this, he (*i.e.* Mr Tay) asked whether Mr Thng would be willing to forego the First Option and give the defendant and Alliance East Asia Limited (*i.e.* a company

that Mr Tay allegedly had control and/or influence over) the opportunity to collectively sell 75 million Agritrade shares to Saurav. Mr Tay explained that, as the defendant and Alliance East Asia Limited were facing some financial difficulties, they needed this opportunity to raise funds. Mr Tay indicated that he could raise funds by having the defendant and Alliance East Asia Limited sell off 13 million and 62 million Agritrade shares (a total of 75 million Agritrade shares) to Saurav respectively.

30 According to Mr Thng, in exchange for Mr Thng and the plaintiff forgoing the First Option, Mr Tay proposed the following:

(a) The defendant would subscribe to the plaintiff and transfer 60 million Agritrade shares before the end of the year, using the Net Asset Value ("NAV") as of 31 December 2019; and

(b) Mr Tay would arrange for his friend, one "William", who controlled Eagle Eye Group Limited, to subscribe to the plaintiff and transfer 40 million Agritrade shares to the plaintiff sometime in early 2020.

31 According to Mr Thng:

(a) The net effect of Mr Tay's proposal was that the plaintiff would essentially be foregoing the First Option for the Second Option. Mr Thng explained that the reason why he agreed to take the Second Option instead was that the plaintiff would receive 100 million Agritrade shares in total, thus increasing its buffer against a potential margin call.

(b) Mr Thng thus agreed to Mr Tay's proposal on the basis that, after the defendant and Alliance East Asia Limited had sold their shares to Saurav:

(i) The defendant would subscribe to the plaintiff and transfer 60 million Agritrade shares before the end of December 2019 so the defendant's 60 million Agritrade shares would be valued using the NAV as of 31 December 2019; and

(ii) Eagle Eye Group Limited would subscribe to the plaintiff and transfer 40 million Agritrade shares sometime in January or February 2020.

In support of the foregoing, Mr Thng referred to various exchanges including a WhatsApp exchange on 10 December 2019.

32 Mr Tay's evidence presented a different picture. In summary, his evidence was as follows:

(a) In or around October 2019, Mr Thng learnt that the defendant held shares in Agritrade.

(b) Thus, Mr Thng and Mr Tay started discussing the possibility of the defendant investing in the plaintiff's fund. Mr Tay understood from his discussions with Mr Thng that the plaintiff was looking to build up its portfolio of Agritrade shares with an aim of eventually making an en-bloc sale of the Agritrade shares at a high value as part of its investment strategy. In particular, Mr Thng informed Mr Tay that the plaintiff was hoping to eventually structure a sale or placement with or through an acquaintance of his – an individual named "Saurav".

(c) Mr Thng's pitch was attractive to the defendant since the defendant was seeking to raise funds to pay down a HK$ 20 million loan from Wealthy Hero. The loan from Wealthy Hero was secured by the defendant pledging 80 million of its Agritrade shares.

(d) The defendant was thus motivated to subscribe to the plaintiff as it hoped to benefit from the plaintiff's intended strategy of making an en-bloc sale of Agritrade shares.

(e) In order to give the defendant some comfort about putting its Agritrade shares with the plaintiff and the subsequent sale or placement with Saurav, Mr Thng assisted the defendant in structuring a trade with Saurav as a "trial run". The plaintiff thus helped the defendant arrange a transaction to sell 13 million Agritrade shares to Saurav, through an entity known as Power One Limited.

(f) In or around end-November 2019, Mr Thng and Mr Tay began discussing the defendant's potential investment into the plaintiff's fund. Through these discussions:

(i) Mr Thng offered Mr Tay a seat on the plaintiff's board, and the terms of this were being negotiated.

(ii) While Mr Thng did mention that the defendant's Agritrade shares could help the plaintiff with its margin issues, this was only mentioned in passing and was not elaborated on. In the light of Mr Tay's discussions with Mr Thng and matters stated in certain presentation slides which, according to Mr Tay, were given to him by Mr Thng during one of their meetings at the end of November 2019, Mr Tay believed that the plaintiff had little or no leverage.

(iii) Mr Thng was aware that a good number of the defendant's Agritrade Shares were pledged to Wealthy Hero. Importantly, the defendant needed to maintain a suitable buffer of Agritrade shares against a potential call for more security, or as a pledge to secure an extension of time for repayment. The timing and ease with which the defendant could transfer its Agritrade shares would depend on the defendant's ability to deal with Wealthy Hero.

33 So far as relevant, I address the differences between the evidence of Mr Thng and Mr Tay further below.

34 In any event, it is common ground that, in or around end-November 2019, Mr Thng handed the SAF, PPM and the plaintiff's Articles of Association to Mr Tay.

35 It is the plaintiff's case that on 29 November 2019, Mr Thng handed Mr Tay the relevant contracts for the defendant and Alliance East Asia Limited to sell a total of 75 million Agritrade shares to Saurav, through Power One Limited. The sale went through a few days later on or around 4 December 2019. On 6 December 2019, the defendant and Alliance East Asia Limited collectively received approximately S$ 7 million as consideration for the sale of their Agritrade shares. I note for completeness that Mr Tay denies having control and/or influence over Alliance East Asia Limited.

36 In final submissions, Counsel on behalf of the defendant made forceful submissions with regard to the foregoing and, in particular, the "unenviable task" facing the Court of having to decide between what were said to be the "competing accounts" of how the SAF and PPM came to be signed *viz.* whether,

on the defendant's case, the SAF and PPM were signed because the defendant was persuaded to subscribe on the prospect of an eventual sale and "cash out" of Agritrade shares or, as the plaintiff claims, the defendant's subscription was a *quid pro quo* for the plaintiff giving up an arrangement with Saurav, by which the plaintiff would have been able to sell 75 million Agritrade shares for S$ 7 million. On behalf of the defendant, it was said that deciding the correct account is important because it informs the factual context in which the parties entered into the SAF and PPM, and, consequently, addresses the question of whether the defendant was obliged to transfer its shares by 31 December 2019. As formulated, I do not accept that submission. Whilst I readily accept that the factual matrix and the parties' conduct may be relevant, the question whether the defendant undertook a contractual obligation to transfer its shares by 31 December 2019 depends primarily on the proper construction of the SAF and PPM – or at least that is the starting point.

37 Be all this as it may, it is common ground that on 11 December 2019, the plaintiff and the defendant signed the SAF and PPM (together, the "contract documents"). As stated above, it is the plaintiff's case that it was an express term of these contract documents that the defendant was obliged to transfer the Agritrade Shares to the plaintiff by 31 December 2019. In support of that submission, the plaintiff relies upon the following express provisions:

(a) The recital on page 2 of the SAF, which stipulated that the defendant was to transfer the consideration for subscription (*i.e.* the defendant's Agritrade Shares) by the "Subscription Day", which was defined as the first business day of each month at page 15 of the PPM.

(b) Page 35 of the PPM, where it was stipulated that that the subscription consideration must be received by the plaintiff by the

"Subscription Dealing Deadline", which was defined as two business days before the proposed Subscription Day.

(c) Page 36 of the PPM, where it was further stipulated that the directors of the plaintiff had the absolute discretion to accept the subscription consideration (*i.e.* the defendant's Agritrade Shares) after the "Subscription Dealing Deadline".

38 It was on the basis of these provisions that the plaintiff submitted that, (a) under the SAF and PPM, the defendant was obliged to subscribe to the plaintiff and transfer the Agritrade Shares to the plaintiff by the "Subscription Day", which was the first business day of each month – *i.e.* in this case, 2 January 2020 since the SAF and the PPM were executed after 1 December 2019; and that (b) since the defendant's Agritrade Shares would have to be transferred in accordance with the "Subscription Dealing Deadline" – *i.e.* 2 business days before the "Subscription Day", the said transfer had to be made by 30 December 2019. However, the plaintiff says that it exercised its contractual discretion to allow the defendant to transfer its lion Agritrade Shares a day later, *i.e.* on 31 December 2019. Alternatively, the plaintiff submits that on a true construction of the SAF and PPM, the defendant was contractually required to transfer the Agritrade Shares to the plaintiff by 31 December 2019.

39 For present purposes, it is sufficient to note that the defendant disputes that these provisions have the effect contended by the plaintiff. In particular, as stated above, although the defendant accepts that it was obliged to transfer the Agritrade Shares to the plaintiff, it denies that there was any obligation to transfer those shares by 31 December 2019. As to this dispute, I deal with the parties' respective submissions below.

40 For the sake of completeness, I should mention that the plaintiff also submitted in the alternative that it was an implied term of the SA that the defendant was obliged to transfer the Agritrade Shares to the plaintiff as a matter of urgency and as soon as possible in order to avoid the margin call by Maybank, the potential for which was known to Mr Tay. Again, this is disputed by the defendant and, so far as relevant, I deal with this issue below.

41 Another main issue between the parties concerns the *purpose* for which the defendant agreed to subscribe to the plaintiff's fund by transferring the Agritrade Shares *in specie* and the state of Mr Tay's knowledge with regard to such purpose in the period up to and as at the date of the SA i.e. 11 December 2019. This topic is important – indeed crucial - with regard to the issue of remoteness which I consider further below.

42 In essence, it was Mr Thng's evidence that, as Mr Tay well knew, the purpose of the SA was both to increase the plaintiff's buffer against a potential margin call and, in line with the plaintiff's investment strategy as an activist fund, for the plaintiff to have a larger stake in Agritrade which would allow the plaintiff to have a larger say in management with a view to structuring a 250 million share placement with Saurav in the future.

43 The evidence of Mr Tay with regard to this topic and, in particular, whether he (Mr Tay) was aware of the plaintiff's margin issues and that at least one of the purposes for the agreement to transfer the Agritrade Shares was to provide the plaintiff with an increased buffer against a potential margin call was, at least in part, both contradictory and confusing. In particular:

(a) In paragraph 10 of his affidavit of evidence-in-chief ("AEIC"), Mr Tay accepted that in or around early October 2019, he learnt from

Mr Thng that the plaintiff was looking to raise approximately US$ 1.3 million and that he understood that this was because the plaintiff had some margin issues with Maybank.

(b) In cross-examination, Mr Tay also accepted that he initially offered to assist the plaintiff by acquiring some Agritrade shares from the plaintiff to help with the plaintiff's margin issue because Mr Thng was a friend.

(c) However, in paragraph 14 of his AEIC, Mr Tay stated that he learned that the plaintiff eventually raised certain funds by selling some of its Agritrade shares to other buyers and that he "surmised" that the plaintiff had sorted out its issues with Maybank. In cross-examination, Mr Tay explained that the basis of this statement in his AEIC was an exchange of WhatsApp messages between himself and Mr Ee on 16 October 2019 when Mr Ee told him of a sale of 2.5m shares at HK$ 0.74; and, in further cross-examination, Mr Tay maintained his position that as of late October 2019, his personal knowledge was that the plaintiff had "cleared" its margin issue with Maybank. I do not accept that evidence. The sale referred to by Mr Ee on 16 October 2019 would only have generated about US$ 250,000 i.e. only a small portion of the US$ 1.3 million which Mr Thng was looking to raise as Mr Tay acknowledged. Thus, in my view, the evidence of Mr Tay that he "surmised" on the basis of this sale that the plaintiff had sorted out its margin issues with Maybank is without any proper justification.

(d) In reaching this conclusion, I also bear in mind that the market price of Agritrade shares continued its downward trend during the remainder of October and November as appears from the above table. If

anything, that downward trend would have exacerbated the risk of a margin call by Maybank at some stage in the future.

(e) In passing, it is fair to say that in the middle of his cross-examination, Mr Tay suggested out of the blue for the first time that his "surmise" that the plaintiff had cleared its margin issues was based not only on his WhatsApp exchange with Mr Ee but also on a conversation with Mr Thng. I do not accept that suggestion. If Mr Thng had indeed told Mr Tay at any stage that the plaintiff's margin issues had been cleared, that would have been very important evidence. As such, it is impossible or at least difficult to understand why this was not mentioned by Mr Tay in his AEIC. Indeed, any such suggestion would seem to be inconsistent with what Mr Tay does say in his AEIC i.e. that he simply "surmised" that the plaintiff's margin issues had been cleared. Moreover, it was never suggested to Mr Thng in cross-examination that he (Mr Thng) had told Mr Tay that the plaintiff's margin issues had been cleared.

(f) In paragraphs 27(b) and (c) of Mr Tay's AEIC, I note that he states that Mr Thng shared with him some marketing presentation slides touting the plaintiff's track record and that he (Mr Tay) noted that these reflected the plaintiff's investment risk management as "Zero leverage". At trial, he said these slides were shared with him around end-November 2019. On this basis, it was submitted on the defendant's behalf that these would have led the defendant to understand and believe that the plaintiff was not facing any margin issues in end-November 2019. However, as submitted on behalf of the plaintiff, it seems that the particular slide referred to by Mr Tay was not up to date and, if that is right, it cannot

(at least by itself) refer to the position as it was in the last quarter of 2019.

(g) In any event, Mr Tay's evidence that his personal knowledge was that the plaintiff's margin issues had been cleared by late October 2019 also seems difficult to square with the evidence in paragraph 27(d) of his AEIC where he refers to discussions between Mr Thng and himself around a month later in or around end-November 2019 and states that Mr Thng did mention in the course of such discussions that the defendant's Agritrade Shares could help the plaintiff with its margin issues although, according to Mr Tay, this was only "mentioned in passing and was not elaborated." In particular:

(i) As stated above, it was (at least initially) Mr Tay's evidence as stated in his AEIC that as of late-October 2019, he "surmised" that the plaintiff had "cleared its margin issue with Maybank".

(ii) When cross-examined with regard to what he had stated in paragraph 27(d) of his AEIC, Mr Tay's initial evidence was that by end-November 2019, he "knew [the plaintiff] had margin. Not margin issues".

(iii) However, under further cross-examination, Mr Tay initially accepted that (contrary to the evidence he had just given) he did know that the plaintiff had margin issues as of end-November 2019 and that the defendant's shares could help with such margin issues. However, when it was then put to Mr Tay that the defendant had knowledge of the plaintiff's margin issues

all along up to the execution of the SA on 11 December 2019, he said: "I do not agree."

(iv) In my view, if, as Mr Tay accepted, he knew as of end-November 2019 that the plaintiff had margin issues and that the defendant's shares could help with such margin issues, there is no basis for suggesting otherwise only 11 days later when the SA was signed. Nothing of significance appears to have happened during that very short period to change the position other than perhaps the further decline in the market price of Agritrade shares from HK$ 0.620 on 29 November 2019 to HK$ 0.570 on 11 December 2019 which, at least if that downward trend continued, would only have exacerbated the risk of a potential margin call by Maybank.

(v) That both parties understood that the intention behind the agreement to transfer the Agritrade Shares was, at least in part, to help the plaintiff "protect against the margin call" also appears from an audio recording recorded during a meeting between Mr Thng and Mr Tay at a coffee shop on 23 January 2020.

44 It is equally fair to say that the evidence of Mr Thng with regard to the plaintiff's supposed margin issues towards the end of 2019 and what he supposedly told Mr Tay with regard thereto prior to 11 December 2019 is also somewhat limited. There is no contemporaneous documentary evidence to indicate that Mr Thng told Mr Tay that the plaintiff had margin issues either in a general sense or, more specifically, exactly what those margin issues were. Even putting Mr Thng's evidence at its highest, he does not suggest that such supposed margin issues were specified or explained in any detail to Mr Tay. To

that extent, this would seem to tally with the evidence of Mr Tay that any margin issues were only mentioned in passing but not elaborated upon by Mr Thng.

45 Further, it is important to note that although the defendant had initially pleaded (in paragraph 12(a) of the Defence) that prior to the defendant's intended subscription, the plaintiff's MLF already had a high LTV Ratio, this was subsequently deleted by way of Amendment No. 1. I have already touched on this point earlier in this Judgment. Although there were differences between the experts (essentially depending on the amount attributed to the "collateral value") as to the correct figure for the LTV Ratio in the last quarter of 2019 ranging from, according to Mr Tan, approximately 25% in September 2019 to 33% in December 2019 and, according to Mr Kon, approximately 36% to 48% during that same period, both experts agreed in the Joint Statement that these figures did not amount to a high LTV Ratio.

46 In light of the foregoing, I find it impossible to reach a conclusion on the evidence as to exactly what Mr Thng said to Mr Tay with regard to the plaintiff's margin issues in the period immediately before Mr Tay signed the SA and Mr Tay's state of knowledge with regard thereto. For present purposes, it is sufficient to say that it is my conclusion that (a) Mr Tay was well aware that at least one of the purposes for the defendant agreeing to transfer the Agritrade Shares was to help the plaintiff with its margin issues so that the plaintiff would have an appropriate buffer to prevent a margin call; and (b) as an experienced trader Mr Tay would also have been well aware that (i) if the market price of Agritrade shares continued to fall, the plaintiff's LTV Ratio would obviously rise and the Margin Ratio would obviously fall; (ii) in that scenario, the potential for a margin call by Maybank would increase; and (iii) if the defendant did not transfer the Agritrade Shares into the plaintiff's fund and the share price fell, it was at the very least not unlikely that Maybank would make a margin call which

the defendant could not meet and then effect a forced sale of the plaintiff's existing portfolio of Agritrade shares (whether in whole or in part) causing the plaintiff potential substantial losses. This conclusion is important in the context of the defendant's case that the losses now claimed by the plaintiff are too remote in law, which I consider further below.

47 On 11 December 2019, following signing of the contract documents, Mr Thng immediately sent an email to Swiss-Asia (copying Mr Tay) to provide the team with a copy of the contract documents to get the defendant's onboarding process started. He also informed the team at Swiss-Asia to liaise directly with Mr Tay if additional documents were required. Shortly thereafter, Mr Thng also introduced Mr Tay to Mr Daniel Kwek ("Mr Kwek") from Maybank by email to coordinate the transfer of the defendant's Agritrade Shares.

48 Also on 11 December 2019, after Mr Tay was introduced to Swiss-Asia and Maybank, Ms Marilyn Chao ("Ms Chao"), a staff member of Swiss-Asia, emailed Apex to inform them that the expected Subscription Day would be 2 January 2020. According to Mr Thng, Ms Chao did this because the parties involved in facilitating the transaction knew and operated on the basis that the Subscription Dealing Deadline under the contract documents was 30 December 2019 (*i.e.* 2 business days before 2 January 2020) although, according to Mr Thng, the deadline was shifted back one day by the plaintiff to 31 December 2019.

49 Following the signing of the contract documents, the evidence of Mr Thng was that Mr Tay "rushed" to get the bought-sold note ("BS Note") signed so that the transfer could be done by 31 December 2019. By way of clarification, the BS Note was the agreed form for the transfer of the defendant's Agritrade

Shares. According to Mr Thng, the urgency arose because, as appears from a WhatsApp exchange between Mr Thng and Mr Tay on 16 December 2019, they were both due to go overseas for their year-end vacation. Mr Thng's account was that Mr Tay rushed to make the necessary arrangements for Mr Thng to sign the BS Note on 16 December 2019 so that he (Mr Tay) could hand the same over to HKSLS, the defendant's broker in Hong Kong. The BS Note required both Mr Thng's signature and Mr Tay's signature to be effective. According to Mr Thng, the fully executed BS Note would in turn enable the defendant to transfer the Agritrade Shares by 31 December 2019 even though Mr Tay was on vacation. In order to effect the said transfer, all Mr Tay had to do was to simply instruct HKSLS to make the said transfer. In the event, the BS Note was duly signed on 16 December 2019. On the following day *i.e.* 17 December, Mr Tay brought the BS Note with him to Hong Kong and paid the requisite stamp duty in Hong Kong amounting to approximately HK$ 67,200. Mr Tay's affidavit evidence was that he had been intending to fly to Hong Kong on other business, and "felt that it would be convenient" to have the BS Note executed and stamped on the same trip.

50 On behalf of the plaintiff, it was submitted that the fact that Mr Tay and Mr Thng "rushed" to get the BS Note signed supports the conclusion that the transfer of shares was required to be done by 31 December 2019 and that Mr Tay well understood that this was the case. This was disputed by the defendant. In particular, it was submitted on behalf of the defendant that the fact that steps were taken by Mr Tay to sign the BS Note and pay the stamp duty on 17 December 2019 was done "purely as a matter of convenience" because he (Mr Tay) was going away for his year-end vacation and it was convenient to arrange for the BS Note at the time. Indeed, as Mr Tay explained in evidence, if the transfer deadline were imminent, he would not have then dropped everything

after 17 December 2019 and gone on holiday. Insofar as may be relevant, I consider this further below.

51 Meanwhile, on 16 December 2019, Mr Thing sent an email to Mr Tay stating: "Can u chase swissasia n ask when u can transfer the shares? U have investor power now. Haha."

52 To further expedite the onboarding process, Mr Thng followed up with an email (copying Mr Tay) to the Swiss-Asia team and Mr Kwek from Maybank instructing them to receive the defendant's transfer of the Agritrade Shares after CDD had been cleared:

> Hi Swissasia team
>
> Once the subscription is approved, proceed to receive the shares in my fund's maybank kim eng account. I have signed the bought sold note and Mr Tay is holding on to it.
>
> cc: Andy [Mr Ee], please see to it.
>
> Thanks all.
>
> Regards […]
>
> [Emphasis added]

53 On 17 December 2019, there were further WhatsApp communications between Mr Tay, Mr Ee and Mr Kwek regarding what Mr Tay described as the "incoming transfer".

54 Meanwhile, immediately after the contract documents were signed, both Swiss-Asia and Apex also commenced CDD on the defendant. That process was described and explained in detail by Ms Ho in her AEIC. As there stated, Ms Ho confirmed that:

(a) Swiss-Asia's CDD clearance is the only requirement for the transfer of the shares. Apex's CDD clearance is not a pre-requisite for the transfer of the shares.

(b) Mr Tay was forthcoming and expeditious in responding to Swiss-Asia's requests for documents and information. He was also responsive and would provide the required documents or information within very short timeframes.

(c) By 18 December 2019:

(i) Swiss-Asia's due diligence process had been completed.

(ii) The defendant had cleared Swiss-Asia's CDD process for the transfer of the Agritrade Shares by the defendant to the plaintiff.

(iii) Apex had also completed a sufficient portion of the CDD process to enable the transfer to be effected.

(d) From 18 December 2019, the defendant was able to transfer the Agritrade Shares by 31 December 2019.

So far as relevant, Mr Thng and Mr Ee both gave evidence to similar effect.

55 In contrast, it was submitted on behalf of the defendant that from 17 December 2019 to 31 December 2019, Swiss-Asia and Apex were still conducting due diligence checks on the defendant and processing the defendant's subscription application. Mr Tay's evidence was that even after the BS Note was signed and Swiss-Asia had cleared its CDD on 18 December 2019, it was still not possible to immediately transfer the Agritrade Shares to the plaintiff. However, Mr Tay could not give any satisfactory explanation as to

why there was any difficulty or other impediment in so doing after 18 December 2019. In its pleaded case, the defendant suggested that the transfer could not be completed until Apex had performed its own checks. In particular, the defendant had specifically amended its pleaded Defence to assert that it was obliged to transfer the Agritrade Shares only after the necessary due diligence was completed by the plaintiff, Swiss-Asia "*and/or Apex*" and the necessary approvals obtained. It was thus only *after* the commencement of proceedings that the defendant even suggested that completion of checks by Apex, as opposed to just the plaintiff and Swiss-Asia, was necessary. However, Mr Tay could not give a satisfactory explanation as to why this was so: indeed, I found Mr Tay's evidence in this context both evasive and not credible. As referred to above, Ms Ho's unchallenged evidence (which I accept) was that as long as Swiss-Asia's CDD is cleared, an investor in the plaintiff can proceed to provide the relevant consideration to the plaintiff as stated in the contract; and that this is so even if the fund administrator, such as Apex had not cleared CDD. In light of the foregoing, I reject Mr Tay's evidence to the contrary. I note for the avoidance of doubt that my analysis here relates to *whether* the shares *could* have been transferred following the clearance of Swiss-Asia's CDD, and does not touch on the precise state of Mr Tay's *knowledge* of what was possible at the material point in time.

56 Thus, it is my conclusion that from 18 December 2019, the defendant was able to transfer the Agritrade Shares to the plaintiff and that there was no difficulty or impediment in so doing.

57 After the defendant had cleared Swiss-Asia's CDD process, Mr Ee immediately informed Mr Tay by WhatsApp message dated 18 December 2019 at 10.29am that the defendant's know-your-client requirements had been approved "on our side". The result was that the plaintiff was permitted under

the Monetary Authority of Singapore's Notice SFA04-N02 (the "MAS Notice") to onboard the defendant and accept the defendant's Agritrade Shares.

58 Thereafter, Mr Thng sent a number of WhatsApp messages chasing or reminding Mr Tay to effect the transfer, including the following:

Date: 20.12.2019 Time	**Name**	**Message**
3.55pm	Mr Thng	Bro, u overseas? Possible to complete documentation?
4.36pm	Mr Tay	Yeah I'm away. Need time to prepare the rest
4.58 pm	Mr Thng	Ok. Then when you back?
8.10pm	Mr Tay	Jan
8.10pm	Mr Tay	Or earliest 27
8.32pm	Mr Thing	Ok. Your guys are preparing the required docs?

Date: 26.12.2019 Time	**Name**	**Message**
9.24pm	Mr Thng	Bro, what docs are required on your side still?
10.07pm	Mr Tay	Tml I'll head back to office
10.08pm	Mr Thng	Cool. After that might need your help with william side.

Date: 28.12.2019 Time:	**Name**	**Message**
8.47pm	Mr Thng	Anyway, your subscription done?
9.20pm	Mr Tay	Left ctc on Thur
9.42pm	Mr Thng	Steady bro

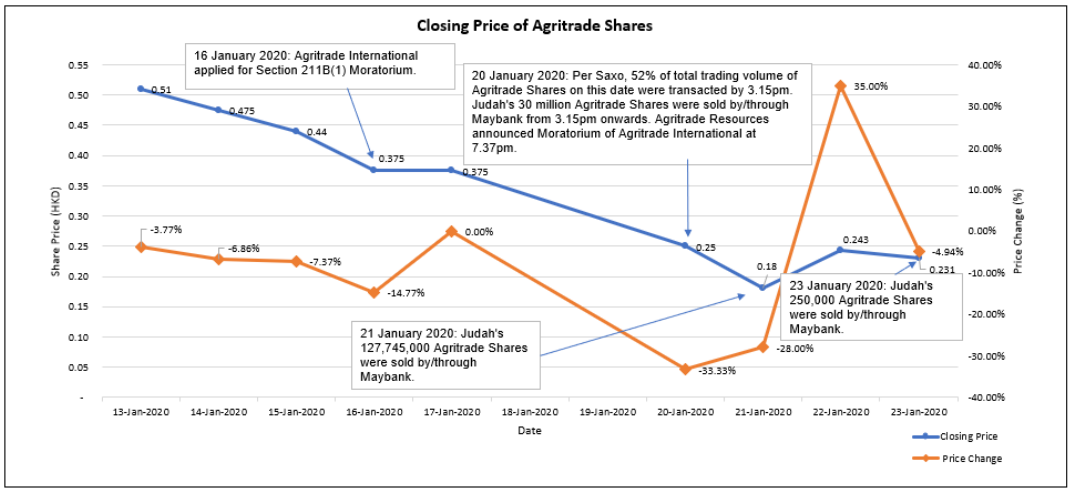
59 Notwithstanding the above messages, it is important to note that the defendant relies heavily on the fact that there were no reminders sent by the plaintiff stating expressly and specifically that the defendant had to transfer its Agritrade Shares by 31 December 2019. In cross-examination, Mr Thng suggested somewhat tentatively for the first time that he had in fact called Mr Tay to remind him "verbally" of the 31 December 2019 deadline. However, if this had been the case, it is surprising that it was not mentioned previously in Mr Thng's AEIC; in these circumstances, I do not consider that there is sufficient evidence to conclude that Mr Thng did in fact speak to Mr Tay to tell him specifically of the deadline.

60 It is common ground that the defendant did not transfer the Agritrade Shares to the plaintiff on 31 December 2019, or at any time thereafter.

61 At the beginning of 2020, the closing share price of Agritrade shares was HK$ 0.570. Thereafter, the share price hovered at around that level for the first few days of January 2020 and then, from about 9 January 2020, declined quite rapidly, as appears from the following table:

Date	Closing price (HK$)	Trading volume
2 January 2020	0.570	2,219,048
3 January 2020	0.580	4,050,000
6 January 2020	0.580	3,716,890
7 January 2020	0.550	10,675,000
8 January 2020	0.570	2,780,000
9 January 2020	0.550	2,625,000
10 January 2020	0.530	2,175,000
13 January 2020	0.510	3,055,000
14 January 2020	0.475	6,322,000
15 January 2020	0.440	9,315,000
16 January 2020	0.375	34,350,000
17 January 2020	0.375	14,080,000
20 January 2020	0.250	129,640,000
21 January 2020	0.180	333,320,000
22 January 2020	0.243	53,038,330
23 January 2020	0.231	21,000,000

62 This decline in the share price of Agritrade shares, in particular from 13 January 2020, also appears from the following chart which formed part of Mr Kon's expert report:



63 Meanwhile, it is important to note that it is the defendant's case that even after the alleged "deadline" of 31 December 2019 and with knowledge that the Agritrade Shares had not been transferred, the plaintiff did not highlight that the defendant had been remiss, nor did it seek to enforce the transfer of the Agritrade Shares without delay; and that such silence or inaction by the plaintiff is significant because the plaintiff was under a "duty to speak". This is disputed by the plaintiff. The plaintiff says that it did chase the defendant for the shares after 31 December 2019. In that context, the plaintiff relies, in particular, on the following communications between the parties:

Date & Time	Name	Message
9.1.2020 11.45am	Mr Ee	Good morning bro, when u free u check ur email, Sheryl need some info from u for the shares transfer. Thanks.

13.1.2020 3.14pm	Mr Ee	Bro, u back from HK? Sorry to disturb u, my side need info on your brokerage. Do reply on the email from Sheryl. Thanks.
13.1.2020 3.15pm	Mr Tay	Ok let me get the info
13.1.2020 3.15pm	Mr Ee	Thanks very much
16.1.2020 2.07pm	Mr Ee	Bro how is it going? managed to get the info for Sheryl?
16.1.2020 2.42pm	Mr Tay	Answering some queries on my end. Once cleared I'll provide the details for you.
16.1.2020 2.43pm	Mr Ee	got it. thanks for the update bro.

Date & Time	Name	Message
16.1.2020 7.11pm	Mr Thng	Shares coming in? If not, the subscription need to delay till feb bro.
16.1.2020 7.11pm	Mr Thng	Ok
16.1.2020 7.12pm	Mr Thng	This one how?
16.1.2020 8.14pm	Mr Thng	Bro, your shares coming in? MBKE might force sell shares if not coming in.
16.1.2020 8.17pm	Mr Tay	Yes coming. Meeting Xman first once green light I can do it in a day

64 By this stage, *i.e.* 16 January 2020, it can be seen from the table above at [61] that the Agritrade share price had fallen to HK$ 0.375 per share.

65 At 8.37pm on 16 January 2020, Mr Ee sent a message to Mr Tay stating: "Bro. Swiss asia side will be using end jan Nav. They said it will be too late as Dec Nav already out. Subscription will be done in Feb." According to Mr Thng and Mr Ee, this was a mistake which Mr Thng clarified in the course of a further WhatsApp exchange with Mr Tay the following day *i.e.* 17 January 2020:

Date: 17.01.2020 Time	Name	Message
4.47pm	Mr Thng	Bro
4.47pm	Mr Thng	Mbke needs your broker details for to take in the shares.
4.47pm	Mr Thng	Urgent.
5.49pm	Mr Tay	Bro. Swiss asia side will be using end jan Nav. They said it will be too late as Dec Nav already out. Subscription will be done in Feb. From Andy?
5.58pm	Mr Thng	I told them to squeeze back for dec nav.

On behalf of the defendant, it was submitted that the assertions by Mr Thng and Mr Ee that the message at 8.37pm on 16 January 2020 was sent mistakenly by Mr Ee were untrue. So far as relevant, I deal with this further below.

66 That evening, *i.e.* Friday 17 January 2020, the closing price for Agritrade shares was HK$ 0.375 per share. Following that weekend, on the market opening on Monday 20 January 2020, the price had fallen to HK$ 0.370 per share. Thereafter, during the day, it continued a further steep decline, closing at 4.00pm at HK$ 0.250 per share. I set out at Annex 1 to this Judgment a table showing the opening prices and trading volumes of Agritrade shares at 15 minute intervals from 16 January 2020 to 23 January 2020.

67 Meanwhile, on 16 January 2020, AIPL (*i.e.* the controlling shareholder of Agritrade) had filed an application in the Singapore High Court pursuant to s 211B(1) of the Companies Act (Cap 50, 2006 Rev Ed) of Singapore for a moratorium for the purpose of precluding, among other things: (a) the commencement or continuation of legal proceedings against AIPL or its assets; (b) appointment of a receiver or manager; (c) taking steps to enforce any security over any property of AIPL; and (d) winding up of AIPL, for a period

of six months from the date of the moratorium (the "Moratorium Application"). I bear well in mind that the Moratorium Application was directed at APIL rather than Agritrade. However, given that APIL was, as stated above, the majority shareholder in Agritrade, there can, in my judgment, be no doubt that, in the ordinary course, the making of such an application and *a fortiori* a moratorium order would (if and when made public) have created a significant downward pressure on the Agritrade share price.

68 In that context, it is certainly interesting to note that before 16 January 2020, the volume of shares traded daily on the market was relatively low; but on that day *i.e.* Thursday 16 January 2020, the number of shares traded then spiked to some 34,350,000 shares, falling back on Friday 17 January 2020 to 14,080,000 before spiking hugely after the weekend during Monday 20 January 2020 to a much higher figure of 129,640,000 shares. It is important to note that these trades occurred before the release of the public notice of the Moratorium Application (and accompanying automatic moratorium) at 7.34pm on 20 January 2020 (the "Moratorium Announcement"), after the market had closed that day. The timing is important for reasons which I address later in this Judgment. It is also important to note that Mr Tay's evidence was that he was not aware of the Moratorium Application until sometime after the issuance of the public notice, and probably not until the following day *i.e.* 21 January 2020.

69 Meanwhile, at 8.11am on Monday 20 January 2020 *i.e.* before the opening of the market, Maybank's representative, Morris Teo, told Mr Thng of a margin call for S$ 235,000 over WhatsApp. Shortly thereafter, the opening price at 9.30am was HK$ 0.370. By 10.30am, the share price had fallen approximately 20% to HK$ 0.300 per share. A few minutes later, at 10.35am, Morris Teo sent Mr Thng a further WhatsApp message stating: "… immediate margin call now as price tanked today. S$1.3m" .

70 The plaintiff's pleaded case is that on 20 January 2020, its LTV Ratio reached 70.87%, crossing the margin trigger threshold. However, it is important to note that the plaintiff did not adduce evidence in these proceedings from Morris Teo (or anyone else from Maybank) to explain (a) how Maybank had calculated the initial margin call of S$ 235,000, or the later margin call of S$ 1.3 million, or even the figure of 70.87% just mentioned; or (b) what Maybank would have done in the counter-factual situation *i.e.* if the defendant had transferred the Agritrade Shares to the plaintiff at any time prior to 20 January 2020. The failure by the plaintiff to call any evidence from Morris Teo or anyone else from Maybank relating to these matters was the subject of robust criticism by Counsel of behalf of the defendant. So far as relevant, I address such criticism below.

71 For present purposes, it is sufficient to note that although both experts agreed that the margin trigger threshold had been triggered on 20 January 2020 so as to entitle Maybank to make a margin call and to force sell at least some of the plaintiff's Agritrade shares, there was a significant difference between them as to the extent to which the LTV Ratio had been exceeded and the Margin Ratio breached on that day. Further, and perhaps more important, there was also a significant difference between them as to what the counter-factual position would have been *i.e.* on the assumption that the defendant had transferred the Agritrade Shares to the plaintiff.

72 In paragraph 4.9 of his original report, the defendant's expert, Mr Kon, summarised his calculations with regard to what he called Scenario A (*i.e.* the actual position) and Scenario B (*i.e.* the counter-factual position assuming that the defendant had transferred the Agritrade Shares to the plaintiff) as at 3.15pm on 20 January 2020 in Table 3, which I set out below:

Table 3: Judah's Margin Ratio and Loan-to-value Ratio Before Commencement of Sale by / through Maybank at 3:15pm 20 January 2020

	[A]	[B]	[C] = [A] * [B]	[D] = [C] * 70%	[E]	[F] = [D] / [E]	[G] = [E] / [D]
	Price of Agritrade Shares Before Sale at 3:15pm 20 January 2020	Total Agritrade Shares Held by Judah Number of shares	Market Value of Agritrade Shares Held by Judah	Collateral Value of Agritrade Shares Held by Judah	Outstanding Amount	Margin Ratio	Loan-to-Value Ratio
	HKD/Share		HKD	HKD	HKD	%	%
Shares not transferred by Open Faith ("Scenario A")	0.285	157,995,000	45,028,575	31,520,003	31,002,770	101.67%	98.36%
Shares transferred by Open Faith ("Scenario B")	0.285	217,995,000	62,128,575	43,490,003	31,002,770	140.28%	71.29%

As appears from this table, in the case of Scenario B (Column F), the Margin Ratio was, on the basis of Mr Kon's calculations, *above* 140%. On this basis, Mr Kon stated in paragraph 4.11 of his original expert report, that in Scenario B (*i.e.* the counter-factual situation), a margin call would not have been triggered on 20 January 2020. This was the same conclusion (albeit on different figures) as that reached by the plaintiff's expert, Mr Tan, and in line with the plaintiff's case. However, in the course of the trial shortly before Mr Kon was due to give evidence, he (Mr Kon) explained in a further AEIC that he had made a mistake *i.e.* whereas he had originally used a share price of HK$ 0.285 per share to calculate the Margin Ratio as set out in the original Table 3, he had inadvertently failed to notice that the share price had in fact fallen below that figure to HK$ 0.280 per share at 2.15pm on 20 January 2020; that recomputing the figures using that lower figure, his conclusion was that the Margin Ratio would have fallen below 140% in the counter-factual situation at that time; and that, on this basis and contrary to his original conclusion, Maybank would *in any event* have been entitled to make a margin call even if the defendant had

transferred the Agritrade Shares to the plaintiff. If correct, that conclusion is of considerable importance when considering the plaintiff's claim for damages. I consider this further below. For present purposes, I would simply note that this *volte face* by Mr Kon was hotly disputed by the plaintiff's expert, Mr Tan, and by Counsel on behalf of the plaintiff.

73 Be all this as it may, it was, as I have said, common ground that (a) Maybank was entitled to make the margin calls which it made on 20 January 2020; (b) the plaintiff was unable to meet those margin calls; and (c) accordingly, from about 3.15pm onwards, Maybank force sold (as it was entitled to do) some 30 million of the plaintiff's Agritrade shares at an average price of HK$ 0.1957 per share, which was slightly above the closing price of HK$ 0.250 per share at 4.00pm on that day.

74 Meanwhile, during that day, there were various increasingly frenetic WhatsApp exchanges between Mr Thng and Mr Tay both before and after the sale of these Agritrade shares by Maybank:

Date 20.01.2020 Time	**Name**	**Message**
11.26am	Mr Thng	Bro broker details
11.27am	Mr Thng	If not they will force sell
11.27am	Mr Thng	Quick
11.27am	Mr Thng	I have less than 15mins
11.34am	Mr Thng	[Missed voice call]
11.35am	Mr Thng	[Image omitted] I NEED THIS AND BROKER DETAILS
11.43am	Mr Thng	Bro, details quick. Tks.

11.54am	Mr Thng	How bro?
11.54am	Mr Thng	Got details?
11.57am	Mr Tay	Settlement information: Broker name : Hong Kong Stock Link Securities Limited CCASS Participant ID : B01404 Contact Person : Mr. Sam Cheung Contact No. : 25226817 Direct / 25302213 General Contact Email : sam@hongkongstocklink.com.hk
11.59am	Mr Thng	Ok. Tks. I coming over. U in office?
12.03pm	Mr Tay	Maybe later in the afternoon?
12.03pm	Mr Thng	[Missed voice call]
12.04pm	Mr Thng	Bro
12.05pm	Mr Thng	How many shares u all have that is unencumbered?
12.10pm	Mr Thng	Bro
12.10pm	Mr Thng	Sam cheung knows of the transfer?
12.12pm	Mr Thng	I can make the shares come back
12.12pm	Mr Thng	But I need speedy responses to help. If not all die.
12.55pm	Mr Tay	[Image omitted]
12.55pm	Mr Tay	The Starbucks opposite capita green
[…]		
2.31pm	Mr Thng	Bro, what's the plan?
2.49pm	Mr Thng	Transfer in the shares. If not MBKE will force sell.
2.49pm	Mr Tay	He got no plan bro
3.39pm	Mr Thng	Bro

3.39pm	Mr Thng	Since all dead, let's come for coffee.
7.53pm	Mr Thng	How bro? Any plans?

75 As also stated above, later that evening after trading closed on 20 January 2020, notice of the Moratorium Application was released and made public by a formal notice.

76 At 8.56am on the next day, 21 January 2020, Maybank issued a further immediate margin call for S$ 1.27 million. Again, I note that there is no evidence from Maybank as to how this figure was calculated. Shortly thereafter, the opening price at 9.30am fell further to HK$ 0.240. As appears from Annex 1, the price then continued to decline during that day, closing at 4.00pm at HK$ 0.180 per share. In the course of that day, Maybank force sold a further 127,745,000 shares in two tranches, *viz* 20,000,000 shares at HK$ 0.170 and a further 107,745,000 shares at HK$ 0.18344, equivalent to an average price of HK$ 0.1813 per share. The precise timings of these sales are uncertain, but the prices achieved would seem to indicate that such sales must have occurred at least some time after opening, when the market price was still HK$ 0.240.

77 During that day *i.e.* 21 January 2020, there were further WhatsApp messages exchanged between Mr Thng and Mr Tay:

Date & Time	**Name**	**Message**
21.01.2020 9.01am	Mr Thng	Bro, my issue is solved. Got some cash transferred from taiwan. But if u can honor the transfer, will be good. Tks.
21.01.2020 9.14am	Mr Tay	[Sent a 2 page document]
21.01.2020 9.15am	Mr Thng	Saw this. But the trf is outside this order ma
21.01.2020	Mr Thng	Bro, coffee later?

4.39pm		
21.01.2020 6.34pm	Mr Thng	U in HK bro?
21.01.2020 6.36pm	Mr Tay	Sorry man too ashamed to face you
21.01.2020 6.39pm	Mr Thng	Dont say so bro
21.01.2020 6.39pm	Mr Thng	We r still friends.
21.01.2020 6.40pm	Mr Thng	So how? Wanna coffee?
21.01.2020 6.55pm	Mr Thng	Let me sort out some mess first. I'll look for you
21.01.2020 6.56pm	Mr Thng	Ok
21.01.2020 7.14pm	Mr Thng	I managed to clear my issues. Brought back money from taiwan. Dont be guilty bro.
21.01.2020 7.15pm	Mr Tay	Not my intention to f[***] you like this
21.01.2020 7.16pm	Mr Thng	Dont worry la. I got many of my trader/fund mgr friends to absorb the shares. Good thing is I've no more margin! Haha. Praise the Lord.
21.01.2020 10.09pm	Mr Thng	Bro, 60m shares really cannot transfer?
21.01.2020 10.28pm	Mr Tay	Really cannot
21.01.2020 10.48pm	Mr Thng	Put in share class A. I'm fine with it.

78 On 22 January 2020, there were yet further exchanges between Mr Thng and Mr Tay via WhatsApp:

Date & Time	Name	Message
22.01.2020 1.57am	Mr Thng	Please put the shares in the fund. Will let u withdraw anytime at zero costs. If u have no use for the shares yet, we can still cash out for u at much higher price because we want to start some action. My margin has been cleared so u don't have to worry that the shares will be gone.
22.01.2020 10.26am	Mr Thng	[Image omitted] Bro, do me the favour pls? The fund has zero margin. The shares r safe n will be intact.
[…]		
22.01.2020 10.55am	Mr Tay	I meet you tomorrow
22.01.2020 10.55am	Mr Thng	Today? Sorry super urgent.
22.01.2020 11.14am	Mr Tay	No margin alr right? But still urgent?
22.01.2020 11.49am	Mr Thng	No margin at all bro
22.01.2020 11.50am	Mr Thng	Urgent because fund admin n swissasia ask a lot of questions.
[…]		
22.01.2020 1.19pm	Mr Thng	Raymond is doing more n more work to average his cost. The fund is a source of cash out for your shares bro. Especially since your shares are on standby. My impending issues are not monetary but lawsuits from investors if your shares dont come in. U all already put me in a position where I might be stoned. I should hv done the trade with saurav myself. The least u all can do is inject the shares as promised.

[…]		
22.01.2020 4.21pm	Mr Thng	When have I screw u bro?
22.01.2020 4.22pm	Mr Tay	It's not about screwing it's about math
22.01.2020 4.22pm	Mr Thng	I know the math more than anyone.
22.01.2020 4.22pm	Mr Thng	I'm not here to use people to make money
22.01.2020 4.22pm	Mr Tay	Bro, it make sense to everyone else except me
22.01.2020 4.23pm	Mr Tay	As an investor.. how is putting in beneficial for me?
22.01.2020 4.23pm	Mr Tay	Tell me putting in make me more $ than leaving it outside
[…]		
22.01.2020 4.31pm	Mr Thng	Theres a reason y price went up today. N ray will only place shares for saurav, fund n himself. The more shares commingled in the fund, the tighter we are, the higher we can get out.
22.01.2020 7.44pm	Mr Thng	What time should we meet tmr? I worked the math. We worked together for so long. U know I never F anyone. But truth is I kena F this time round. But still, I have a solution that xw always maintain 60m shares until a placement is done. Let's meet early n resolve.

79 On 23 January 2020, Maybank sold the last relatively small tranche of the plaintiff's Agritrade shares *i.e.* 250,000 shares at an average price of HK$ 0.2211 per share.

80 On that same day *i.e.* 23 January 2020, there was also an important face-to-face meeting in a coffee shop between Mr Thng and Mr Tay. The meeting was partially recorded by Mr Thng, and included the following exchange:

Name	Transcript
Mr Thng	Okay, so they told me your investor is legally binded [*sic*] to get in on 31 December NAV, correct or not?
Mr Tay	Hmm
Mr Thng	Okay, so bro, I'm telling you this, when you are legally binded [*sic*] to get in. (Mr Tay: Hmm) On 9th January at Swiss Asia we had a board resolution saying that okay special, we let Open Faith come in for December 31 NAV. And from that time, they have been chasing you for the share transfer.
Mr Tay	Hmm
Mr Thng	Because the shares are already ready. (Mr Tay: Right.) Right?
Mr Thng	But you intentionally don't want to transfer. Correct or not?
Mr Tay	Hmm Hmm
Mr Thng	You don't want to transfer because you feel that the margin point is coming. You want everybody to die first then you come in.
Mr Tay	Correct.
Mr Thng	Right? But do you know that that is actually illegal because you already signed for 31 December, right? That is legally binding. And you know all along that the intention of having this fund, err your 60 million shares in the fund is to protect against the margin call, right? (Mr Tay: Hm) Which, if your 60 million shares came into the fund, today the number of shares that will be retained in the fund is easily still about 138 million shares, even after clearing the margin, right?

Mr Tay	No what, if I put in, I will die also. We will all die together.
Mr Thng	No! Because (for) the margin call, we don't have to clear everything, we just have to clear only above the breach ratio, you get what I mean?
Mr Tay	No, the price drop until like that you can calculate one. (If) you want, we can work out the math together. It is not going to be the same.
Mr Thng	Correct but you signed the document, you legally binded [*sic*] yourself to come on 31 December. So I have no choice from a fund manager's perspective and from a director's perspective…
Mr Tay	Okay, then I tell you what. I am going to put in, I will redeem the next day. I just transfer you 7 million and we offset the rest.
Mr Thng	I mean that is … ah okay, so that is possible. I am telling you that is possible, but …
Mr Tay	Okay lor, then we will do that ah, I am not going to put it in.
Mr Thng	Okay, but let me see what Swiss Asia wrote…
Mr Tay	Obviously I thought I am going to take a loss…

81 On 28 January 2020, Mr Tay and Mr Thng had a heated exchange over WhatsApp culminating in Mr Tay observing that it seemed that he was "losing at the start" and that he should be "calling the investigation and querying". Mr Thng replied to point out that it could be proved that, had Mr Tay's shares "c[o]me in, there will be no margin call". Mr Thng asked what Mr Tay intended to do, emphasising that he (*i.e.* Mr Thng) was "really trying to settle cordially". With no response from Mr Tay, Mr Thng pointed out that he believed Mr Tay's conscience still spoke to him, and that Mr Tay knew that he "screwed everyone

in the fund" on 21 January 2020. Mr Thng suggested that they cordially mediate the matter with Swiss-Asia thereafter, but Mr Tay did not reply.

82 On 29 January 2020, the plaintiff sent a letter of demand to the defendant demanding payment for the loss it had suffered from the forced sale of its Agritrade shares.

83 On 3 February 2020, this Suit was commenced.

The Issues

84 Against that background, I turn to consider the main issues. There was some dispute between the parties as to the precise formulation of these main issues. However, I would summarise them as follow:

(a) Issue 1: Was there an agreement between the parties that the defendant was obliged to transfer the Agritrade Shares to the plaintiff by 31 December 2019?

(b) Issue 2: Was there an implied term that the defendant's obligation to transfer the Agritrade Shares only arose after the due diligence and subscription application process had been completed?

(c) Issue 3: Did the plaintiff waive the requirement for the defendant to transfer the Agritrade Shares by 31 December 2019 and/or is the plaintiff estopped from so contending?

(d) Issue 4: Did the defendant's breach (if any) cause any, and if so what, loss to the plaintiff, and is any such loss irrecoverable because it is too remote?

Issue 1: Was there an agreement between the parties that the defendant would transfer the Agritrade Shares to the plaintiff by 31 December 2019?

85 I have already summarised the plaintiff's case with regard to this central issue and the particular provisions of the SAF and PPM relied upon.

86 Before considering the defendant's case, it is necessary to deal briefly with one minor issue *viz.* whether the relevant date was 30 December 2019 or 31 December 2019. At the end of the day, this does not seem to me to be crucial because it was common ground that the plaintiff was entitled to exercise its discretion to change the subscription date so that if, on the plaintiff's case, the original date was 30 December 2019, it was open to the plaintiff to exercise that discretion and change the date to 31 December 2019. The evidence of Mr Thng was that as the plaintiff and defendant had agreed that the Agritrade Shares were to be transferred using the NAV on 31 December 2019, the plaintiff therefore exercised its contractual discretion under the contract documents to allow the defendant to transfer its Agritrade Shares by 31 December 2019 as it was the plaintiff's usual practice to allow investors to transfer the shares on the last business day of the month, corresponding to the date of the NAV that would be used for the valuation of the Agritrade Shares. I accept that evidence.

87 However, there was, at least initially, a dispute between the parties as to whether the defendant had been *informed* that the plaintiff had exercised its contractual discretion. The evidence in relation to that issue was somewhat confusing although, again, I do not think that this issue is crucial. In cross-examination, Mr Tay admitted that he understood that the subscription date was in fact changed to 31 December 2019. However, it is not easy to fit that evidence in with the rest of the defendant's case. Be that as it may and subject to the defendant's other submissions, I proceed on the basis that, at least on the

plaintiff's case, the subscription date had been extended from 30 December to 31 December 2019.

88 In summary, it was the defendant's case that with the proper appreciation of the factual context leading up to the signing of the SAF and PPM, 31 December 2019 was not the agreed deadline for the defendant to transfer the Agritrade Shares.

89 As to the applicable legal principles, the defendant relied upon the following:

(a) The Court may consider the factual context when interpreting a contract: see *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170, in particular at [19]:

> … (a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
>
> (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).
>
> (c) The reason the court has regard to the relevant context is that it places the court in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context" (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).
>
> (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear *(see, eg, Yap Son On v Ding Pei Zhen [*2017] 1 SLR 219 at [31]).

(b) Singapore law has consistently affirmed the relevance of the context when interpreting the terms of a contract: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [34], which states that when the text of a contract is ambiguous "… it is clear that the relevant *context* will *generally* be of the *first importance* …" (emphasis original).

(c) The Singapore Courts are open to relying on prior negotiations and subsequent conduct to interpret a contract. In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, the Court of Appeal stated at [132(d)] that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements [of relevancy, clarity, and availability to the parties]".

90 I accept the foregoing as a brief summary of the relevant applicable principles at least with regard to matters existing prior to the contract. Turning to the position under Singapore law with regard to subsequent conduct, I was referred by Counsel on behalf of the plaintiff to *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 (*"MCH International"*) at [20] and *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 *("Hewlett-Packard Singapore"*) at [56], where the Court of Appeal refused to express a definitive view on the admissibility of subsequent conduct for the purposes of contractual interpretation. In *Hewlett-Packard Singapore*, the Court of Appeal noted at [55]–[56] that in the event that subsequent conduct was to be admitted, the court also had to bear the following criteria in mind *viz* (i) the evidence of the

subsequent conduct must be relevant, reasonably available to all the contracting parties, and relate to a clear and obvious context; (ii) the principle of objectively ascertaining contractual intention(s) remains paramount; and accordingly, (iii) the subsequent conduct must always go toward proof of what the parties, from an objective viewpoint, ultimately agreed upon.

91 Since the decision in *Hewlett-Packard Singapore,* I should note that there have been some further cases dealing with this topic. Thus, in *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] 2 SLR 627 ("*Ngee Ann Development*"), the Court of Appeal referred to subsequent conduct to determine the parties' agreement on the meaning of a term of the contract at [86], observing that these events "reflect[ed] the parties' understanding" of how a particular term was to be put into effect. The position in *Ngee Ann Development* applying subsequent conduct as an aid to contractual interpretation was later highlighted in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 at [51], where the Court of Appeal observed that subsequent conduct in contractual interpretation was permissible, but is "in general only of relevance if the subsequent conduct provides *cogent evidence* of the parties' agreement at the time when the contract was concluded" (emphasis original). Finally, in *Solomon Alliance Management Pte Ltd v Pang Chee Kuan* [2019] 4 SLR 577 at [73] and *Tembusu Growth Fund II Ltd and another v Yee Fook Khong and another* [2020] SGHC 104 ("*Tembusu*") at [81] *et seq*, the High Court also directly applied post-contractual conduct as an aid in contractual interpretation. The appeal against the High Court's decision in *Tembusu* was dismissed by the Court of Appeal.

92 Consistent with these authorities, the starting point is the language which appears in the Contract. As to the contractual language here, I have already

summarised the particular provisions relied upon by the plaintiff in support of its case that the defendant undertook to transfer the Agritrade Shares by 31 December 2019. In summary, it was the defendant's case that the wording was not clear; that a plain reading of the terms relied upon by the plaintiff does not give the reader a clear understanding of what the obligations were; that these same clauses can suggest that the deadline for transferring the Agritrade Shares need not necessarily be the end of the same month in which the SAF and PPM are signed; and that the use of the words "relevant" and "proposed" leave it open to parties to stipulate any month in a year for the subscription to take place.

93 In particular, it was submitted on behalf of the defendant as follows:

(a) Under the section titled "Where payment is to be made wholly or partly in specie", it is stated that the subscriber "will transfer the assets described below to the Company on or before the Closing Date or (as the case may be) before the relevant Subscription Day, free of any mortgage, charge, pledge, lien, share, option or other encumbrance prior to any Shares being issued" (emphasis added).

(b) "Subscription Day" is defined as "the first Business Day of each month and/or such other day or days in addition thereto or in substitution therefor, as the Directors may from time to time determine, either generally or in a particular case".

(c) "Subscription Dealing Deadline" is defined in the PPM as "…a Business Day which is two (2) Business Days before the proposed Subscription Day, or such other period or day as the Directors may from time to time determine, either generally or in any particular case"(emphasis added).

(d) There is no entire agreement clause in the SAF and PPM.

94 For these reasons, it was submitted on behalf of the defendant that the factual context leading up to the signing of the SAF and the PPM on 11 December 2019 therefore plays an important role in interpreting these contracts.

95 In my view, the contractual provisions relied upon by the plaintiff are clear, *i.e*. the effect of those provisions (in the events which occurred as summarised above) is, as submitted on behalf of the plaintiff, that the defendant was obliged to transfer the Agritrade Shares by 31 December 2019 at the latest. There is no question of ambiguity. In such circumstances, I am doubtful that it is permissible to look outside of the Contract to determine the defendant's obligation. However, insofar as that exercise may be permissible and relevant, I consider briefly the main points relied upon by the defendant.

96 First, it was submitted on behalf of the defendant that there was, at the very least, a serious question of credibility with regard to Mr Thng's evidence concerning what he described as the "First Option" and the alleged involvement of Saurav; that an adverse inference should be drawn against the plaintiff because of its failure to produce its messages with Saurav and to call Saurav to give evidence to corroborate Mr Thng's account; and that the Court should prefer the defendant's version of what happened. As I have already stated, it is my view that the evidence concerning the potential arrangement with Saurav is peripheral to the main issues which I have to decide for the purposes of the present case, and that it is unnecessary to reach any final determination with regard to that aspect of the case. In particular, I do not consider that such evidence ultimately assists either the plaintiff or the defendant with regard to the proper construction of the SAF and the PPM.

97 Second, of greater potential significance is the submission made on behalf of the defendant that out of the defendant's holdings of some 160 million Agritrade shares, about half (*i.e.* 80 million shares) were encumbered; and that the defendant could not transfer the remaining unencumbered shares because it had to maintain a sufficient number of unencumbered Agritrade shares to address its liabilities to Wealthy Hero. In a sense, that submission proves too much because if, in truth, the defendant could not transfer the remaining unencumbered shares to the plaintiff, it is difficult, if not impossible, to understand why the defendant decided to sign the SAF and the PPM at all. However, in my view, that submission misstates or at least overstates what Mr Tay actually said at [40] of his AEIC. In particular, Mr Tay did not say that he "could not" transfer the unencumbered shares. All he said was that the Wealthy Hero Agreement complicated the ease and timing with which the defendant could transfer its Agritrade Shares to the plaintiff. In particular, it was submitted on behalf of the defendant that these shares had to be unencumbered and readily available in case Wealthy Hero needed more security. However, the transfer of the shares into the plaintiff's fund would not have constituted any encumberment in the ordinary sense of that term: in return for such transfer-in, the defendant would have been entitled to receive and would have received shares in the plaintiff's fund which should have been of equal value. So it is difficult, if not impossible, to understand the defendant's submission that the defendant *could* not transfer the unencumbered shares into the plaintiff's fund. Be all this as it may, and putting Mr Tay's evidence at its highest, any potential complications (if they existed) are, in my view, of little, if any, assistance in determining the defendant's obligations under the SAF and PPM.

98 Third, the defendant contended that the subsequent conduct of the parties after 11 December 2019 was further corroboration that the parties did

not consider that the defendant was contractually obliged to transfer the Agritrade Shares by 31 December 2019. In particular, the defendant relied on the fact that there were no reminders or messages to Mr Tay specifically mentioning the 31 December 2019 deadline. As formulated, that is factually correct. However, even on the assumption that subsequent conduct is admissible, absent some form of variation, waiver, or estoppel, such conduct in the present case did not, in my view, affect whatever contractual obligations were undertaken by the defendant in the SAF and PPM. There is no pleaded case by the defendant of any contractual variation; and I deal briefly with the defendant's case of waiver and estoppel below.

99 Nor does such conduct, in my view, necessarily inform the proper construction of the provisions of the SAF and PPM. Although the documents do not show a specific reference to the deadline of 31 December 2019, the messages exchanged between Mr Thng, Mr Tay, and Mr Ee do, in my view, indicate that, on its side at least, the plaintiff was dealing with the arrangements for the transfer as a matter of urgency, and also chasing the defendant to transfer the shares. In particular, I bear in mind the interactions with Swiss-Asia, the arrangements made concerning the signing of the BS Note, and the various WhatsApp messages on 16, 20 and 28 December 2019 and 8, 9, 13, 16, 17, 20 and 28 January 2020. I have already quoted the relevant exchanges above and do not propose to repeat myself. In passing, I should mention that it was submitted on behalf of the defendant that the signing of the BS Note was only a matter of convenience. I do not accept that submission. In my view, it is at least consistent with the plaintiff's case that Mr Tay was well aware that the transfer was to be completed by 31 December 2019.

100 With regard to subsequent conduct, the defendant relied, in particular, on the WhatsApp message sent by Mr Thng to Mr Tay on 16 January 2020 at

7.11pm ("Shares coming in? If not, the subscription need to delay till feb bro.") and the WhatsApp message sent by Mr Ee to Mr Tay later that same evening at 8.37pm ("Bro. Swiss asia side will be using end jan Nav. They said it will be too late as Dec Nav already out. Subscription will be done in Feb." Mr Tay forwarded Mr Ee's message to Mr Thng on 17 January 2020 and Mr Thng replied: "I told them to squeeze back for dec nav." In my view, these WhatsApp messages provide no assistance to the defendant for at least three reasons. First, the reference in the first message to the need to "delay" the subscription is , if anything, consistent with the plaintiff's case that the subscription was, by the date of that message, late and should have been completed earlier. Second, the reference in the second message that it was "…too late as Dec Nav already out..." is also consistent with the plaintiff's case that the subscription should have been made by 31 December 2019. Third, the reference in the messages to the effect that the subscription would have to be delayed or done in February is not inconsistent with the defendant's obligation under the SAF and PPM to effect the transfer by 31 December 2019, nor does it suggest that there was any waiver by the plaintiff of such obligation. Properly read, those messages simply recognise that the defendant was late in performing its contractual obligation and, unsurprisingly, seek to explain what would have to happen as a result of the defendant's delay in failing to transfer the Agritrade Shares.

101 In support of its case, the plaintiff relied upon a number of what it said were certain "admissions" by Mr Tay that the defendant had breached the SAF and the PPM – in particular, the statements made in the WhatsApp messages referred to above *i.e.* "Sorry man too ashamed to face you" (6.36pm, 21 January 2020); "Not my intention to f[***] you like this" (7.15pm, 21 January 2020) and "Precisely. But it seems that I'm losing at the start. So shouldn't I be calling the investigation and querying" (6.49pm, 28 January 2020). In this context, I

was referred to the decision of the High Court in *Qingdao Bohai Construction Group Co, Ltd and others v Goh Teck Beng and another* [2016] 4 SLR 977 as to what constitutes an admission in law. I am prepared to assume that, as submitted on behalf of the defendant, these statements by Mr Tay do not constitute formal admissions in law. However, they do, in my view, provide further support for my conclusion that Mr Tay was well aware that the transfer of the shares was to be completed by 31 December 2019. To that extent and on the basis that such evidence is admissible as an aid to the proper construction of the Contract, such evidence supports the plaintiff's case.

102 In my view, that conclusion is further fortified by the audio recording of the conversation between Mr Thng and Mr Tay at a coffee shop on 23 January 2020. I have already quoted the most important parts of that recording above although, as submitted on behalf of the defendant, I fully recognise that the parts quoted above have to be understood as representing only a small portion of the conversation that day, particularly bearing in mind that the meeting lasted some 45 minutes and was dominated by discussions and calculations about Mr Thng's intended new "cash out" plan. Nonetheless, as submitted on behalf of the plaintiff, I agree that that recording is important for a number of reasons. First, it serves to explain why Mr Tay did not transfer the Agritrade Shares *i.e.* because he "fe[lt] that the margin point is coming" and "want[ed] everybody to die first" before "com[ing] in". Second, as submitted on behalf of the plaintiff, it makes plain that (a) the defendant's understanding was that the value of the shares in the agreement for the transfer of the Agritrade Shares was to be calculated based on the 31 December 2019 NAV; (b) Swiss Asia had been chasing Mr Tay to make the share transfer; (c) both parties understood that the intention behind the agreement to transfer the Agritrade Shares was to help Judah "protect against the margin call"; and (d) the shares were ready to be transferred, but the

defendant had intentionally decided not to transfer the shares because "the margin point is coming".

103 For all these reasons, it is my conclusion that (so far as may be admissible and relevant) the conduct of the parties both before and after 11 December 2019 confirms that the defendant was obliged to transfer the Agritrade Shares by 31 December 2019 or, at the very least, such conduct was not inconsistent with such contractual obligation.

Issue 2: Was there an implied term that the defendant's obligation to transfer the Agritrade Shares only arose after due diligence and the subscription application process had been completed?

104 The second issue may be addressed fairly swiftly.

105 Turning first to the law, it is common ground that the applicable principles were authoritatively set out by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101] which envisages a three-step analysis in relation to implied terms:

(a) The first step is to ascertain whether there is a gap in the contract and how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.

(b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.

(c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "*Oh, of course!*" had the proposed term been put to them at time of the contract (*i.e*. that the term was necessary in the business sense to give efficacy to the contract). If it is not possible to find such a clear response, then, the gap persists, and the consequences of that gap ensue.

106 In summary, it was the defendant's case that, on close analysis of the language of the SAF and PPM, there was a "gap" in the SAF and PPM with regard to subscriptions *in specie;* that it was therefore "necessary and efficacious" to fill the "gap" by implying a term that the defendant's obligation to transfer the Agritrade Shares only arose after the due diligence and subscription application process had been completed; and that such implication is consistent with how the plaintiff, in fact, treated the defendant's subscription to the plaintiff's fund.

107 This was disputed by the plaintiff. In particular, it was submitted on behalf of the plaintiff that the term which the defendant sought to imply fails at all 3 steps.

108 For present purposes, I am prepared to assume in favour of the defendant the existence of the alleged implied term. However, as stated above at [56] and based on the unchallenged evidence of Ms Ho, it is my conclusion that the relevant due diligence and subscription application process had been completed by 18 December 2019; that from that date, the defendant was able to transfer the Agritrade Shares to the plaintiff; and that there was no difficulty or impediment in so doing.

109 For these reasons, the implication of the alleged term (if such implication could be made) does not assist the defendant.

Issue 3: Did the plaintiff waive the requirement for the defendant to transfer the Agritrade Shares by 31 December 2019 and/or is the plaintiff estopped from so contending and/or did the plaintiff exercise a contractual discretion to change the Subscription Day to a date after 31 December 2019?

110 Issue 3 embraces three sub-issues which to a large extent overlap with each other as well as the matters that I have already addressed (and which I do not propose to repeat) in considering the question of whether the parties' conduct after 11 December 2019 informs the proper construction of the SAF and the PPM. For these reasons, I can deal briefly with these three sub-issues in turn.

Waiver

111 As for the defendant's submission that the plaintiff had waived the requirement to transfer the Agritrade Shares by 31 December 2019, there was no dispute as to the applicable principles as summarised in *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 at [115]. As for the facts, the defendant's case rested on two main pillars.

112 First, the defendant relied upon a number of WhatsApp messages, *viz*:

(a) On 16 January 2020 at 7.11 pm, Mr Thng told Mr Tay, "Your shares coming in? If not, the subscription need to delay till feb bro."

(b) On 16 January 2020 at 8.14 pm, Mr Thng then told Mr Tay, "Bro, your shares coming in? MBKE might force sell shares if not coming in." To this, Mr Tay then replied at 8.17 pm to say "Yes coming. Meeting

Xman first once green light I can do it in a day". Mr Thng's reply (at 8.17 pm) was merely "Ok. Think he very stressed. Help him."

(c) On 16 January 2020 at around 8.37pm, Mr Ee then messaged Mr Tay to say, "Bro. Swiss asia side will be using end jan Nav. They said it will be too late as Dec Nav already out. Subscription will be done in Feb." Mr Tay forwarded this message to Mr Thng on 17 January 2020, and Mr Thng replied to say, "I told them to squeeze back for dec nav."

113 I have already dealt with some of these messages and do not propose to repeat what I have already stated. For present purposes, it is sufficient to say that I do not consider that any of these messages constituted a waiver of the requirement to transfer the Agritrade Shares by 31 December 2019 or, equally important, the defendant's breach of such obligation. At the risk of repetition, properly read, these messages simply recognise that the defendant was late in performing its contractual obligation and, unsurprisingly, seek to explain what would have to happen as a result of the defendant's delay in transferring the Agritrade Shares.

114 Second, it was submitted on behalf of the defendant that the plaintiff's silence or inaction since 31 December 2019 was significant because, in the circumstances, the plaintiff was under a "duty to speak". In that context, the defendant relied upon *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [61] and *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR (R) 1. I am prepared to assume in favour of the defendant that the plaintiff was under a "duty to speak". Even so, I do not consider that this assists the defendant because I do not accept the characterisation by the defendant that there was "silence" or "inaction" on the part of the plaintiff after 31 December 2019. The WhatsApp messages (which I do not propose to repeat) speak for

themselves. It is fair to say that the plaintiff did not in those WhatsApp messages assert that the defendant was in breach of its obligation in those specific terms. However, in my view, there is no doubt that the plaintiff continued to press for the transfer of the shares.

115 For these brief reasons, I reject the defendant's case that the plaintiff had waived the requirement to transfer the Agritrade Shares by 31 December 2019.

Estoppel

116 Again, there is no dispute as to the applicable principles *viz.* (a) there must be an unequivocal representation by the plaintiff that it will not insist upon its legal rights against the defendant; (b) the defendant must rely on such unequivocal representation; and (c) it must be inequitable for the plaintiff to go back on such unequivocal representation. As submitted on behalf of the defendant, I readily accept that the requirement for an unequivocal representation does not mean that the promise must always be express; such promise could be implied by words or conduct. Even so, I do not consider that there was any unequivocal representation by words or conduct that the plaintiff would not insist on its strict legal rights. Once again, the defendant relied upon what it said was the plaintiff's duty to speak and the distinct lack of reminders and chasers from the plaintiff that the 31 December 2019 deadline had been breached. I do not accept that submission for reasons already stated and which I do not propose to repeat. Further, so far as may be material, I do not accept that the defendant relied on any such alleged representation. On the contrary, as appears from the audio recording of the meeting between Mr Thng and Mr Tay at the coffee shop (and the other WhatsApp messages relied upon by the plaintiff referred to at [101] above) it would seem that the defendant was well aware that it had failed to comply with its obligation to transfer the Agritrade Shares and

that this was the result of its own deliberate decision. For the sake of completeness, I do not consider that the plaintiff is acting inequitably in pursuing the defendant for its breach of its contractual obligation.

Exercise of Contractual Discretion to Delay the Subscription Date

117 As previously stated, it was common ground that the plaintiff had the power to shift the Subscription Day. Relying primarily on the WhatsApp messages on 16 and 17 January 2020, it was the defendant's submission that the plaintiff had indeed exercised its contractual discretion to shift the date to a date in February 2020. I do not accept that submission. At the risk of repetition, it is my view that, properly read, those messages simply recognise that the defendant was late in performing its contractual obligation and, unsurprisingly, seek to explain what would have to happen as a result of the defendant's delay in failing to transfer the Agritrade Shares. They do not constitute or reflect the exercise of the contractual discretion to shift the original Subscription Day so as to nullify the defendant's original contractual obligation (as I have concluded) to transfer the Agritrade Shares to the plaintiff. Accordingly, given the foregoing, the defendant's failure to transfer the 60 million Agritrade Shares by 31 December 2019 or at all constituted a breach of contract on its part.

Issue 4: Did the defendant's breach (if any) cause any, and if so what, loss to the plaintiff, and is any such loss irrecoverable because it is too remote?

Summary of the Plaintiff's Case

118 In summary, the plaintiff's pleaded case on this issue is as follows:

(a) As a result of the defendant's breach of contract in failing to transfer the Agritrade Shares, the plaintiff's LTV Ratio hit 70.87%, triggering a margin call by Maybank.

(b) Accordingly, on 20 January 2020, the plaintiff received a margin call from Maybank and thereafter, from about 3.15pm on that day, Maybank force sold all of the plaintiff's Agritrade shares in three tranches (i) on 20 January 2020, 30 million shares at an average price of HK$ 0.2571 per share; (ii) on 21 January 2020, 127,745,000 shares at an average price of HK$ 0.1813 per share; and (iii) on 23 January 2020, 250,000 shares at an average price of HK$ 0.2211 per share.

(c) If the defendant had transferred the Agritrade Shares, the plaintiff would not have exceeded an LTV Ratio of 70% and received any margin calls on its portfolio.

(d) The fall in the price of Agritrade shares from 20 to 23 January 2020 was a result of the force-selling of the Agritrade shares from the plaintiff's portfolio.

(e) After the forced sale of the plaintiff's entire portfolio of Agritrade shares, the plaintiff's fund was worth S$0.

(f) Had the forced sale not occurred, and had the defendant transferred the Agritrade Shares, the plaintiff's fund would have been worth S$ 5,389,734.91.

(g) Accordingly, the plaintiff has lost that sum *i.e.* S$ 5,389,734.91.

(h) Alternatively, the plaintiff claims damages on the basis that it suffered loss and damages of US$ 4,466,463.02, being the value of the defendant's Agritrade Shares as of 31 December 2019.

119 In support of the foregoing, the plaintiff submitted that it is trite law that the but-for test of causation in tort also applies in ascertaining whether there has

been factual causation for the purposes of contract law. In that context, the plaintiff relied upon the decision of the Court of Appeal in *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd and another appeal* [2012] 1 SLR 427 (*"Anti-Corrosion Pte Ltd")*. In particular, by reference to that decision, it was the plaintiff's case that what must be established is that but for the breach, the plaintiff would not have suffered losses; that the applicable test is not for the plaintiff to show that the defendant's breach was the only possible cause; that although the legal burden is on the plaintiff to prove that the defendant's breach had caused the plaintiff's loss, once the plaintiff leads evidence to logically demonstrate that the defendant's breach had caused the plaintiff's loss, the "tactical burden" would shift to the defendant to show that this was not correct on a balance of probabilities; and that what is needed in any particular case to assess whether this burden has been discharged is a fact-centric exercise circumscribed by common sense.

120 Here, it was submitted on behalf of the plaintiff that the defendant had failed to discharge its tactical burden to show that the plaintiff would have suffered loss even if the defendant had transferred the Agritrade Shares by 31 December 2019. In particular, it was submitted on behalf of the plaintiff that the defendant's expert (Mr Kon) had failed to show that all of the plaintiff's Agritrade shares would have been force sold by 23 January 2020, even if the defendant had transferred the Agritrade Shares by 31 December 2019. On the contrary, it was the plaintiff's case that the evidence of its own expert (Mr Tan) demonstrates that the force selling on 20 January 2020, 21 January 2020 and 23 January 2020 would not have occurred if the defendant had transferred the Agritrade Shares to the plaintiff by 31 December 2019. In this regard, even if the plaintiff's Agritrade shares would have been force sold by 23 January 2020 notwithstanding the defendant's transfer of the Agritrade Shares by 31

December 2019, it was the plaintiff's position that the defendant must *also* necessarily show that the plaintiff would not have taken mitigating measures to reduce its losses.

121 Further, it was the plaintiff's case that the Court should reject the defendant's position that the margin call by Maybank was caused by the general drop in the market value of Agritrade Shares, in particular because of the Moratorium Application or the Moratorium Announcement, rather than because of the defendant's breach. According to the plaintiff, that case was a "red herring" and falls away entirely in particular because (a) the Moratorium Application was made by AIPL *i.e.* the parent company of Agritrade, on 16 January 2020; (b) the Moratorium Announcement was made on 20 January 2020 at 7.34pm, which is after trading hours in Hong Kong; and (c) the traders who were monitoring the Agritrade share price, even the most experienced traders such as Mr Tay and Mr Thng, would not have known about the Moratorium Application on 16 January 2020 until after the Announcement on 20 January 2020 after trading hours. In this regard, the plaintiff also relied on the evidence of Mr Tay that he knew of the Moratorium Application only on 21 January 2020, even though he was good friends with Mr Ng Xinwei, also known as "Xman", who was a 59.9% shareholder of AIPL.

122 As for the alternative claim of US$ 4,466,463.02, this was advanced by the plaintiff on the basis of the market value of the Agritrade Shares as at 31 December 2019 (*i.e.* HK$ 0.58 per share).

Summary of the Defendant's Case

123 As for the plaintiff's primary claim for S$ 5,389,734.91, it was the defendant's case that such claim must be rejected for two main reasons *viz* (i) it

was too remote; and/or (ii) the defendant was not causally responsible for the events that took place from 20 January 2020. In particular, it was submitted on behalf of the defendant that in order to succeed on this claim for the entirety of the loss, the plaintiff must establish that (i) the defendant knew of the circumstances which would have led the plaintiff to suffer a loss (*i.e.* it was not a loss that is too remote); and (ii) the defendant was responsible for the entirety of this loss, in that there was no other event that had such a causative impact to break the chain of causation.

Remoteness

124 As to the plea that the loss claimed was too remote, the defendant submitted that the Court should ascertain (i) what would have been within the reasonable contemplation of the contracting parties, and what damages flow naturally from this (*i.e.* general damages); and (ii) whether the defendant had knowledge of the special circumstances which resulted in the plaintiff's loss, and what damages flow from this (*i.e.* special damages). In support of that submission, the defendant relied upon *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [81]–[82]; affirmed in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 ("*Out of the Box*") at [15]–[17].

125 Here, the defendant submits that (i) the alleged loss of S$ 5,389,734.91 was not within the reasonable contemplation of the parties; and (ii) the defendant also did not have special knowledge of the circumstances that led to this loss. In support of the foregoing, the defendant relies on two main points.

126 First, it was submitted on behalf of the defendant that an investor to a fund does not contemplate itself being liable for all of the fund's losses but

rather makes the investment expecting that his contribution to the fund might make him money. Further, it was the defendant's case that an investor does not make an investment to the fund on the premise that his contribution is expected to save the fund from financial distress: this would be entirely antithetical to the ethos of investing. In support of the foregoing, the defendant relied, in particular, on the following:

(a) The evidence of Mr Tay that "[a]n investor into a fund did not typically expect to be liable for the fund's entire loss. An investor would at best expect to lose his investment, but not to also have to cover the losses of the other investors".

(b) The expert opinion of Mr Kon that generally, it is atypical for an investor to expect to bear all the losses suffered by a fund on a margin call, and that such losses as claimed by the plaintiff would not be within the normal contemplation of the parties unless the defendant was specifically told of this information.

127 Further, in considering the question of remoteness, it was submitted on behalf of the defendant that it is necessary to consider the defendant's knowledge as at the date of the contract: *Out of the Box* at [16]. Here, at the time that the defendant executed the SAF and PPM (i.e. 11 December 2019), the defendant would not have known, or been under the impression, that the plaintiff was facing an impending margin call or major margin issues. Instead, it was submitted on behalf of the defendant that at the time when the SAF and PPM were executed, the defendant was under the impression that the plaintiff had little to no margin issues in the light of the interactions between Mr Tay and Mr Thng prior to the execution of the SAF and PPM, including (i) Mr Tay's discussions with Mr Thng in October 2019; (ii) the marketing presentation

slides provided by Mr Thng to Mr Tay in November 2019; and (iii) the WhatsApp exchanges between them in October and November 2019. According to Mr Tay, the first time that Mr Thng mentioned the risk of a forced sale by Maybank was on 16 January 2020.

Causation

128 The defendant accepted the application of the "but-for" test but submitted that the burden of proving causation on the balance of probabilities lies on the party claiming damages, and that even if the "but for" test may show some causal connection, the Court will also have to determine whether any "intervening events can be said to be so significant causally as to break the causal link to be regarded as a novus actus interveniens… The court therefore has to decide whether the defendant's wrongful conduct constituted the 'legal cause' of the damage. This recognises that causes assume significance to the extent that they may assist the court in deciding how best to attribute responsibility for the claimant's damage" (emphasis added): *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [54].

129 On the facts, it was submitted on behalf of the defendant that, even if the defendant had transferred the Agritrade Shares, Maybank would still have been entitled to make a margin call on 20 January 2020 as the Margin Ratio would have fallen below 140%; that this would in all likelihood have led to the same events that transpired – *i.e.* the plaintiff would have liquidated and realised (or had to liquidate and realise) its entire portfolio of Agritrade shares between 20 and 23 January 2020 given the declining share price; and that the defendant was thus not responsible for causing the plaintiff's loss in any event.

130 Further, it was submitted on behalf of the defendant that even if the Court rejected that point, it is also clear that, by the morning of 21 January 2020, the price of Agritrade Shares would have fallen to a point that would have entitled Maybank to force sell the plaintiff's shares (*i.e.* below a Margin Ratio of 130%); and that the defendant would at most be liable for the loss of the plaintiff's 30 million Agritrade shares which were sold on 20 January 2020. This would amount to around HK$ 8,550,000, or approximately S$ 1,487,700 (*i.e.* 30 million shares x HK$ 0.285). In support of the foregoing, the defendant relied upon two main points. First, the defendant relied upon the evidence of its expert, Mr Kon, and in particular his analysis that any share price below HK$ 0.2642 would have resulted in a Margin Ratio below 130%, even if the defendant had transferred its Agritrade Shares and the plaintiff had a portfolio of 217,995,000 Agritrade shares. According to Mr Kon, falling below the Margin Ratio of 130% would then entitle Maybank to force sell the plaintiff's assets. Second, it was submitted on behalf of the defendant that it was inevitable, even if there had been no force-selling on 20 January 2020, that the price of Agritrade Shares would have fallen to at least HK$ 0.2640 (at opening) and HK$ 0.175 (at 9.45 am) on 21 January 2020; and that, therefore, even if the defendant had transferred its Agritrade Shares by 20 January 2020 and the plaintiff was not made to sell its 30 million Agritrade shares on that date, Maybank would have been entitled to force sell the plaintiff's shares anyway on the morning of 21 January 2020.

131 In summary, it was the defendant's case that the decline in the price of Agritrade shares on 21 January 2020 was not a matter that the defendant was in a position to avert or prevent: there was a clear declining trend in the price of Agritrade shares across January 2020 which was exacerbated by certain events which took place on 16 January 2020 and 20 January 2020. The share price

would have fallen below HK$ 0.264 on 21 January 2020 regardless of what the defendant did or could not do. On this basis, the defendant argues that even if this Court finds that it was in breach and had knowledge of the plaintiff facing the risk of a margin call, any liability on its part must, at best, be confined to the 30 million Agritrade shares which were sold on 20 January 2020; and that the quantum of such liability would be at most HK$ 8,550,000 or approximately S$ 1,487,700 (based on a share price of HK$ 0.285).

132 As for the alternative claim of US$ 4,466,463.02 advanced by the plaintiff, it was the defendant's case that the plaintiff had failed to properly elaborate the legal basis of such claim. The defendant suggested that one possibility was that the plaintiff was "akin to the buyer of shares"; that this "best coheres with the present case, as it most correctly reflects the true nature of the contractual bargain between parties"; and that, on this basis, the measure of damages ought to be the market price of the Agritrade Shares less their contract price as at 31 December 2019. Here, the defendant submitted that the Agritrade Shares were publicly traded; that there was a significant "float" of shares on the market; that the plaintiff could have gone into the market to buy Agritrade shares on or shortly after 31 December 2019; and that if that had been done, any loss would have been minimal or nil given that the market price was HK$ 0.580 per share on 31 December 2019, HK$ 0.570 per share on the next trading day *i.e.* 2 January 2020 and HK$ 0.580 per share until 6 January 2020 when it fell and thereafter stayed below HK$ 0.560 per share, compared with what the defendant referred to as the "presumptive contract price" of HK$ 0.560 per share based on the BS Note. Thus, the defendant submitted that it would have been cheaper for the plaintiff to go into the market to acquire replacement Agritrade shares than to insist on the transfer as per the SAF and PPM.

Analysis and Conclusions

133 So far as I am aware, this is the first case in which a fund, like the plaintiff, has sought to claim damages for breach of a subscription agreement against a party which has agreed to subscribe for shares in that fund by way of a transfer-in of shares *in specie*. As such, the exercise of assessing damages in the present case raises issues which are unusual and far from straightforward.

134 The starting point must be that in principle, damages should be awarded on the same basis as any claim for damages for breach of contract in accordance with the compensatory principle *i.e.* to put the plaintiff in the same position as it would have been in if the contract had been performed. That general principle is, of course subject to certain qualifications, including most notably (i) that the claimed losses must have been caused by the breach; and (ii) the rule that any losses must not be too remote in law, having regard to the principles originally laid down in *Hadley v Baxendale* (1854) 9 Exch 341 ("*Hadley v Baxendale*") and endorsed by the Court of Appeal in *Out of the Box* at [15]–[18]. As there stated, damages will not be too remote if either (i) they flow naturally from the breach once regard is had to the sort of knowledge of the relevant surrounding circumstances that the contract breaker would generally be taken to have had ("Limb 1") or (ii) where losses arise in the context of special facts and circumstances, "hey are foreseeable as not unlikely given the defendant's knowledge of those special facts and circumstances ("Limb 2").

135 In passing, I should note that in England, it now seems that a claimant will not be able to recover even for losses that were not unlikely to occur in the usual course of things, if the defendant cannot reasonably be regarded as having assumed responsibility for such losses: see *Chitty on Contracts* (Sweet & Maxwell, 33rd Ed, 2019) ("*Chitty on Contracts*") at [26-137]. However, as both

parties accepted, the assumption of responsibility principle is inapplicable because it has been rejected by the Court of Appeal in Singapore: see *MFM Restaurants Pte Ltd and another v Fish & Co. Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 and *Out of the Box.* As submitted on behalf of the plaintiff, Singapore adopts the *Hadley v Baxendale* approach, which remains the governing principle in relation to the doctrine of remoteness of damage in Contract Law in Singapore.

136 It is convenient to deal first with the plaintiff's alternative case based on the value of the Agritrade Shares as at 31 December 2019. In one sense, such a claim might be said to have a superficial attraction *viz*, the defendant promised to transfer to the plaintiff the Agritrade Shares; the defendant failed to do so; thus, the plaintiff has "lost" the market value of the shares as at that date i.e. 31 December 2019. However, in my view, this analysis is flawed because it fails to have proper regard to the particular nature and characteristics of the particular transaction entered into between the parties. In particular, the plaintiff was not a "buyer" of shares in the ordinary meaning of that term. Nor do I accept the defendant's suggestion that the plaintiff stood in a position which is "akin to [a] buyer of shares". At best, that description is over-simplistic and potentially misleading.

137 Rather, it seems to me important to bear in mind that the transaction entered into by the parties was, in effect, a "swap" of a very particular kind *i.e.* pursuant to the SAF and PPM, the defendant agreed to transfer the Agritrade Shares to the plaintiff in return for shares in the plaintiff's fund. If the transfer had taken place, the value of the plaintiff's fund would have increased by the value of the Agritrade Shares transferred into the plaintiff's fund. In that scenario, the value of the shares in the plaintiff's fund that the defendant would have received would have reflected the value of the the plaintiff's fund as a

whole, including the Agritrade Shares newly transferred into the fund by the defendant.

138 Thus, this is not a case where it might be said that the parties contemplated that if the defendant did not comply with its contractual obligations and transfer the Agritrade Shares to the plaintiff, the plaintiff might be able simply to go out into the market and buy the same number of shares to fill the gap. It follows that the *prima facie* measure of damages which applies, for example, in sale of goods cases for non-delivery, cannot sensibly be applied in the present circumstances – quite apart from the fact that it is well established that shares are not "goods" for the purposes of the Sale of Goods Act (Cap 393, 1999 Rev Ed). For these brief reasons at least, I would reject the plaintiff's alternative claim for damages.

139 So, I return to the plaintiff's primary claim for damages. At the risk of repetition, the defendant submitted that such a claim was fundamentally flawed for two main reasons. First, the losses claimed were too remote and therefore irrecoverable as a matter of law. Second, the losses suffered by the defendant were not caused by the defendant's breach. I deal with each of these points in turn. The issue of remoteness is most often best considered after the issue of causation. However, in the light of my findings of fact, this issue can, in my view, be dealt with quite briefly and I therefore deal with it at the outset.

Remoteness

140 The applicable principles were not in dispute. In essence, losses will not be too remote provided they fall within either Limb 1 or Limb 2. Further, it was common ground that the time for ascertaining the relevant knowledge for the

purposes of either Limb 1 or Limb 2 was the date of the contract – see *Out of the Box* at [20] – in the present case, 11 December 2019.

141 I have already summarised at [123] and [124] above the two main points relied upon by the defendant in support of its submission that the damages claim as formulated by the plaintiff is too remote.

142 As to the first point, I readily accept (or at the very least am prepared to assume in the defendant's favour) that, absent special circumstances or special knowledge, it would not be within the reasonable contemplation of an ordinary investor that any breach of that investor's agreement to subscribe in that fund would or might cause a margin call on the fund's assets and thereby cause loss to the fund of a type as now alleged by the plaintiff in the present case. To that extent, I proceed on the basis that the loss now claimed by the plaintiff would be irrecoverable under Limb 1.

143 However, as to the second point, I have already summarised my conclusions as to the special facts in the present case and the knowledge of Mr Tay (and therefore the defendant) as set out at [43] above. It is unnecessary to repeat the entirety of what is there stated. For present purposes, it is sufficient to note my conclusion *viz* that, in the special circumstances of the present case, Mr Tay (and therefore the defendant) would have been well aware that if the defendant did not transfer the Agritrade Shares into the plaintiff's fund and the share price fell, it was, at the very least, not unlikely that Maybank would make a margin call which the defendant could not meet, and then effect a forced sale of the plaintiff's existing portfolio of Agritrade shares (whether in whole or in part), causing the plaintiff potential substantial losses. In light of the foregoing, it is my conclusion that the losses claimed by the plaintiff plainly fall within Limb 2 and are not irrecoverable on the basis that they are too remote in law.

Causation

144 The issue of causation bristles with difficulties in the present case for the following reasons.

145 First, it was common ground that the determination of the causation issue depends on a comparison between (i) the losses that the plaintiff in fact suffered and (ii) the position which would have existed if the defendant had performed its contractual obligations and duly transferred the Agritrade shares by 31 December 2019. The latter hypothetical counterfactual exercise was the subject of detailed evidence by the experts (Mr Tan and Mr Kon) which (so far as relevant) I consider further below. At this stage, it is sufficient to note that there was a sharp disagreement between these experts with regard to the methodology and assumptions in performing such counterfactual exercise.

146 Second, the counterfactual exercise (see above at [130] and [131], for instance) and the assumptions made by the experts depend, at least in part, on an assessment as to what Maybank was contractually entitled to do *and* what it would or would not have done in practice if the defendant had transferred the Agritrade Shares. In particular, in that counterfactual scenario, (a) would Maybank have issued one or more margin calls and, if so, when, and (b) if so, would Maybank have force sold the plaintiff's portfolio of Agritrade shares and, if so, how many and when? To a very large extent, such assessment was somewhat speculative, because no evidence was adduced in the course of the trial from any witness from Maybank. In this context, Counsel on behalf of the defendant relied upon the decision of the Court of Appeal in *Sudha Natrajan,* in particular at [20] where some broad principles were set out with regard to absent material witnesses:

> […] (a) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the matter before it.
>
> (b) If the court is willing to draw such inferences, **these may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness**.
>
> (c) There must, however, have been some evidence, even if weak, which was adduced by the party seeking to draw the inference, on the issue in question, before the court would be entitled to draw the desired inference: in other words, there must be a case to answer on that issue which is then strengthened by the drawing of the inference.
>
> (d) **If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn.** If, on the other hand, a reasonable and credible explanation is given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or annulled. […]
>
> [emphasis added]

In addition, my attention was drawn to certain further observations in that case at [26] with regard to the link between the drawing of an adverse inference from the failure to call a witness and the best evidence rule that "the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be superior in respect to the fact to be proved". Bearing these principles in mind, it was submitted on behalf of the defendant that the party best placed to give evidence as to whether Maybank would have made a margin call is Maybank itself; that the burden is on the plaintiff to prove causation; that the plaintiff was also the party with the direct contractual relationship with Maybank; that it appears that in the lead up to the trial, the plaintiff was in communication with Maybank; and that the plaintiff could easily have arranged for Maybank to give evidence. However, the plaintiff did not call any witness from Maybank, and has not provided any good reason for Maybank's absence.

On this basis, it was submitted on behalf of the defendant that the Court should draw the appropriate adverse inference, and specifically infer and conclude that Maybank's testimony would have corroborated Mr Kon's explanation, and that a margin call would still have taken place on 20 January 2020 even if the defendant had transferred its Agritrade Shares by that day. On behalf of the plaintiff, it was submitted that no such adverse inference should be drawn if only because there is no reason why the defendant could not itself have called a witness from Maybank if it had so wished and that bearing in mind that (as the plaintiff submitted) the burden of proof was on the defendant to prove that in the counterfactual scenario the plaintiff would have suffered the same loss, any adverse inference should, if anything, be drawn against the defendant. So far as relevant, I consider further these rival submissions below.

147 Third, the issue as to what Maybank was entitled to do depends on the terms of the Contract between the plaintiff and Maybank. I have already addressed what were the relevant terms of such Contract from [4] to [8] of this Judgment which I do not propose to repeat save to note my conclusion that the terms of that contract were contained in the MLF Letter subject to Maybank's T&Cs as identified by Mr Kon from Maybank's website.

148 Fourth, a critical issue arises with regard to the *reasons* why the market price of Agritrade shares fell in the latter part of January 2020 and, in particular, the cause of such fall following the issuance of the Moratorium Announcement after trading hours on 20 January 2020. It is impossible to know whether one or more individual traders in the market were aware of the original Moratorium Application on 16 January 2020 or before the issuance of the Moratorium Announcement. The possibility of information leaks cannot be excluded. But that is entirely speculative. There is no evidence to show that any such possible leaks occurred prior to the Moratorium Announcement itself or to contradict Mr

Tay's evidence that he was unaware of the Moratorium Application until sometime after the issuance of the Moratorium Announcement, and probably not until the following day *i.e.* 21 January 2020. In this context, the crucial question is: In the counterfactual scenario, would the market price of Agritrade shares have fallen to the extent it did, in any event triggering one or more forced sales by Maybank even if the defendant had transferred Agritrade Shares to the plaintiff on (or even after) 31 December 2019? Further, in considering that question, where lies the burden of proof?

149 Although I have already summarised the parties' respective cases with regard to the counter factual exercise, it is necessary to drill down further to explain the main areas of disagreement between the two experts and the parties' respective submissions with regard thereto.

150 On behalf of the plaintiff, it was submitted that, based on the MLF Letter, when the Margin Ratio falls below 140%, Maybank would make a margin call; and that when the Margin Ratio falls below 130%, Maybank may then commence the force selling of the plaintiff's Agritrade shares at its discretion. That analysis was not disputed by the defendant. However, the critical difference between the parties (and the experts) concerned the proper way of computing the Margin Ratio. Needless to say, this is important because it determines when and whether Maybank would have been entitled to make a margin call or consequently to force sell the plaintiff's shares.

151 In summary, the plaintiff's case based on the evidence of its expert, Mr Tan, was that, in computing the Margin Ratio, it is the LTV Ratio which is relevant; and that this is computed as the loan amount divided by the full market value of the secured assets. The Margin Ratio is then expressed as:

1

LTV Ratio

According to Mr Tan, the "margin call trigger threshold of 70% LTV Ratio is typical in share trading brokerages with margin financing facility".

152 In contrast, the defendant's case based on the evidence of its expert, Mr Kon, was that the Margin Ratio is as defined in the Maybank T&Cs *viz.*

$$\frac{\text{Collateral's Security Value}}{\text{(Outstanding Amount – Cash in Account if any)}}$$

Mr Kon's evidence was that the Collateral's Security Value of the Agritrade Shares should be a percentage of the market value (*i.e.* based on the "*Loan-to-Value*"); that it is this Collateral's Security Value that should be applied in computing the Margin Ratio; and that, in the circumstances of the present case, the LTV Ratio was 70%. In support of that figure of 70%, Mr Kon relied on the following:

(a) First, in a WhatsApp exchange between Mr Ee and Maybank's Mr Teo on 31 January 2020, Mr Teo expressly said that the plaintiff's account had an LTV Ratio of 70% "when the account was set up":

Mr Ee	12.36pm	Hi Morris, this is Andy from Judah.
Mr Teo	12.37pm	Hi Andy

Mr Ee	12.37pm	As spoken with u the other day, can I confirmed [sic] that our margin account loan to value ratio is at 70%?
Mr Ee	12.37pm	Many thanks
Mr Teo	12.38pm	Yup. LTV was 70% when the account was set up.
Mr Ee	12.38pm	Thanks very much Morris

(b) Second, the monthly margin statements disclosed by the plaintiff show that, every month, Maybank would calculate a "Collateral Value" for the Agritrade Shares at 70% of their Market Value, as appears in the following table prepared by Mr Kon:

Date of Statement	Market Value (HK$)	Collateral Value (HK$)	Percentage
30 June 2019	198,134,200.00	138,693,939.99	70%
31 July 2019	196,380,800.00	137,466,560.01	70%
31 August 2019	159,559,405.26	111,691,579.98	70%
30 September 2019	158,520,603.45	110,964,420.02	70%
31 October 2019	105,856,653.16	74,099,655.01	70%
30 November 2019	97,956,900.00	68,569,829.99	70%
31 December 2019	91,637,096.84	64,145,969.99	70%

153 In further support of this analysis, it was submitted on behalf of the defendant that the approach of Mr Tan and the plaintiff was inconsistent with the definition of Margin Ratio in Maybank's T&Cs and the Margin Ratio(s) of 140% and 130% stated in the MLF. In particular, as to the latter, it was submitted on behalf of the defendant that Mr Tan's approach of using the purported "industry definition" of an LTV Ratio of 70% translates into an imprecise 142% (based on LTV Ratio = 1 / Margin Ratio), and completely fails to account for the important threshold of 130%; that applying Mr Tan's approach will mean that there will be scope for uncertainty or error (*i.e.* of at least 2%) when determining whether Maybank would be entitled to make a

margin call, and perhaps even more when determining when Maybank can force sell the plaintiff's assets; and that such uncertainty or error surely cannot be acceptable, especially when the consequence of breaching a threshold is the risk of a forced sale.

154 Moreover, it was submitted on behalf of the defendant that it was Mr Kon's approach and not Mr Tan's approach which was consistent with what actually happened at the material time. In particular, on Mr Tan's calculation, the trigger price for a margin call would be when the share price of Agritrade shares fell below HK$ 0.2747. However, at the time when the margin calls were made on 20 January 2020 *i.e.* at 8.11am and 10.35am on that day, the share price was above HK$ 0.2747 *viz.* HK$ 0.380 and 0.300 respectively. On the other hand, applying Mr Kon's calculation, the trigger price for a margin call would be when the share price of Agritrade shares fell below HK$ 0.3925 which is consistent with the fact that Maybank made the two margin calls on 20 January 2020.

155 As for the counterfactual exercise, the evidence of Mr Kon was that if the plaintiff had received the Agritrade Shares, it would then have had an increased portfolio of 217,995,000 Agritrade shares; that according to his (Mr Kon's) calculations, the trigger price for a margin call would then have been HK$ 0.2844; and that, on this basis and given the fall in the share price to HK$ 0.280 at 2.15pm on 20 January 2020 (*i.e.* even before any actual forced sale by Maybank), a margin call on that day would have been inevitable even in the counterfactual scenario. The relevant figures as calculated by Mr Kon appear from the following table.

Date	Start time	[A] Opening price per Saxo HKD	[B] Number of Agritrade Shares	[C] = [A] * [B] Market Value of Agritrade Shares HKD	[D] = [C] * 70% Collateral Value HKD	[E] Outstanding Amount HKD	[F] = [D] / [E] Margin Ratio	[G] = [E] / [D] Inverse of Margin Ratio
20/01/2020	2:15pm	0.280	217,995,000	61,038,600	42,727,020	31,002,770	137.82%	72.56%

156 Further, it was submitted on behalf of the defendant that the margin call would have meant that the plaintiff would in all likelihood have had no choice but to start selling its portfolio of Agritrade shares; that this was what the plaintiff did when it could not meet the margin call on 20 January 2020, and subsequently on 21 January 2020; and that, as stated by Mr Thng in re-examination, any sale of Agritrade shares was likely to create a "negative vicious cycle" where "[t]he more [the plaintiff] sell[s], the more the share price goes down, the more [the plaintiff] sell[s], the more the share price goes down, the more [the plaintiff] need[s] to top-up the margin call".

157 Continuing with this counterfactual exercise, it was submitted on behalf of the defendant that Maybank would in any event have been entitled to force sell the plaintiff's shares on the morning of 21 January 2020 because by that time the share would likely have fallen further to HK$ 0.264 thereby causing (on Mr Kon's calculation) the Margin Ratio to fall below 130%. As acknowledged by Mr Kon and accepted by the defendant, the difficulty with this analysis is that although the actual share prices on 21 January 2020 are known, the sale of the first tranche of 30 million shares by Maybank on 20 January 2020 would have had a distorting impact on the share price. Thus, for the purposes of the counterfactual exercise and to take this possible distortion into account, Mr Kon applied a blockage discount methodology to reverse the impact that the sale of the 30 million Agritrade shares would have had on the

share price, and thus calculate the hypothetical price of Agritrade shares on 21 January 2020.

158 The actual historical data shows that on 20 January 2020, the closing price of Agritrade shares was HK$ 0.250 at about 4.00 pm. However, by then, Maybank had had already force sold 30 million of the plaintiff's Agritrade shares. On 21 January 2020, the opening price of Agritrade shares was HK$ 0.240, which further fell to HK$ 0.175 (at 9.45 am). In order to ascertain what the hypothetical price of the Agritrade shares would have been on 21 January 2020 if the plaintiff's 30 million Agritrade shares had not been sold on 20 January 2020, Mr Kon sought to "reverse engineer" this hypothetical price by applying a "reverse" blockage discount of 9.08% (estimated based on the Black-Scholes Model) to the historical prices on 21 January 2020. In summary, Mr Kon's conclusion was that the price of Agritrade shares would have been at least (by which I understand, at most) HK$ 0.2640 (at opening) and HK$ 0.175 (at 9.45 am) on 21 January 2020, which would *still* cause the Margin Ratio to fall below 130% and thereby entitle Maybank to force sell at least some, if not all of the plaintiff's shares.

159 In support of this analysis, it was submitted on behalf of the defendant that Mr Kon's approach of applying a "reverse" blockage discount was both sensible and logical. In particular, it was submitted on behalf of the defendant that such an exercise was not esoteric and had been recognised as appropriate by the Singapore High Court in *Oei Hong Leong and another v Chew Hue Seng* [2020] SGHC 39. Moreover, it was submitted on behalf of the defendant that the 9.08% blockage discount applied by Mr Kon was "generous" when tested with other data points.

160 As to these submissions and putting aside the questions of burden of proof and what, if any, adverse inferences are to be drawn by reason of the absence of any witness from Maybank, my observations and conclusions with regard to this counterfactual exercise are as follows.

161 First, it seems to me that, in principle, the methodology adopted by Mr Kon in calculating the Margin Ratio is correct because it is consistent (or at least more consistent) with the provisions of the Maybank T&Cs which, as I have held and together with the MLF, governed the relationship between the plaintiff and Maybank. That notwithstanding, I readily acknowledge that there are wrinkles (or at least potential wrinkles) in that conclusion. Thus, as submitted on behalf of the plaintiff, it is, I accept, noteworthy that the "Loan-to-Value" definition in the Maybank T&Cs does not itself identify any absolute figures which are to be ascribed to the collateral value. Whilst that is correct, the evidence referred to at [152] above and relied upon by Mr Kon strongly suggests that the collateral value was taken by Maybank to be 70%.

162 Perhaps more important is the evidence of Mr Tan to the effect that using Mr Kon's methodology, (a) a margin call would (or at least should) have occurred well before 20 January 2020 *i.e.* on 16 January 2020 and (b) force selling should have occurred much earlier than it did *i.e.* at 9.45am instead of 3.15pm on 20 January. It is uncontested that Maybank did not in fact make a margin call on 16 January 2020 or commence force selling earlier than it did on 20 January 2020. I agree that this might seem to undermine Mr Kon's approach. However, there is no doubt that a possible explanation is that, for whatever reason, Maybank decided in its discretion not to make a margin call or force sell immediately – as it was entitled to do under clause 27.1 of the Maybank T&Cs.

163 Second, even accepting Mr Kon's analysis with regard to the counterfactual exercise on 20 January 2020 as summarised at [156] above and putting the defendant's case at its highest, the best that the defendant could say in its closing written submissions was that (a) Maybank would have been entitled to serve a margin call at 2.15pm on that day and (b) that the plaintiff would in all likelihood have had no choice but to start selling its portfolio of Agritrade shares. However, while I accept that on Mr Kon's evidence, Maybank would have been entitled to serve a margin call in that counterfactual scenario, I do not accept that, on a balance of probabilities, the plaintiff would have had no choice but to start selling its portfolio of Agritrade shares, and still less that the plaintiff would, in that counterfactual scenario, have itself actually started selling its portfolio of Agritrade shares. At [37] of its closing written submissions, the defendant asserted that this was what the plaintiff did when it could not meet the margin call on 20 January 2020 and subsequently on 21 January 2020. However, that is, at least in part, incorrect. The plaintiff did not itself initiate or effect any sale of its shares on 20 January 2020. Rather, it was Maybank who force sold the shares. The important point is that, even putting the defendant's case at its highest, Maybank would not have been entitled immediately to force sell the plaintiff's shares until the Margin Ratio fell below 130% and, even on Mr Kon's analysis in the counterfactual scenario, this would not have occurred on 20 January 2020.

164 For these reasons, it is my conclusion that the plaintiff has satisfied the burden of establishing that the defendant's breach in failing to transfer the Agritrade Shares was the cause of the forced sale of the 30 million Agritrade Shares by Maybank on 20 January 2020. Further, I reject the defendant's case that such sale (whether forced or otherwise) would have occurred in any event

even if the defendant had fulfilled its contractual obligation to transfer the Agritrade Shares.

165 However, it seems to me that there is no basis on which the plaintiff can claim any loss in respect of this initial forced sale of 30 million Agritrade Shares on 20 January 2020. I say this because, in my view, the plaintiff has not, in the particular circumstances of the present case, suffered any proven loss by virtue of the forced sale with regard to this tranche of shares. The plaintiff was certainly deprived of and therefore "lost" the 30 million Agritrade Shares which were force sold by Maybank. However, at the same time, the plaintiff received what was the market price for those shares at the time of sale. Thus, this tranche of shares was, in effect, replaced by the money equivalent of the value of those shares at that date. I am prepared to assume that the plaintiff might theoretically have a claim for damages in respect of that tranche of shares if the position had been that, following the forced sale of that tranche of shares on 20 January 2020, the market had risen above the price at which those shares were sold and the plaintiff's case were that, in such circumstances, it would have been entitled (somehow or other) to take advantage of that increased price. However, the market price never did rise above the price at which this tranche of shares was sold.

166 For these reasons, I do not consider that the plaintiff can recover any substantial damages in respect of the forced sale of this initial tranche of shares on 20 January 2020. (Indeed, it might be said that because of the subsequent dive in the market, the forced sale of this tranche of shares prevented the plaintiff from losing much more money than it actually did. However, that is not relevant for present purposes.)

167 It remains to consider whether the plaintiff is entitled to recover any losses in respect of the subsequent sales on 21 and 23 January 2020. As the records show, the market price dropped slightly from the closing price of HK$ 0.250 on 20 January 2020 to HK$ 0.240 on opening at 9.30am on 21 January 2020, before plummeting at 9.45am to HK$ 0.175, losing almost 30% in the space of the first 15 minutes of trading. Thereafter, the market price hovered between about HK$ 0.173 and HK$ 0.204, albeit recovering to some extent over the course of 22 and 23 January 2020. At these prices, there is, in my view, no doubt that Maybank would have been entitled to make a margin call and force sell the *entirety* of the plaintiff's Agritrade Shares on 21 and 23 January 2020 *even if* the defendant had transferred the Agritrade Shares to the plaintiff.

168 The result is that, in my view, the plaintiff cannot succeed in recovering the losses now claimed in respect of the later sales on 21 and 23 January 2020 unless it can establish on a balance of probabilities that the fall in the price of Agritrade shares from 21 January 2020 was caused (in the relevant legal sense) by (as I have found) the defendant's breach of contract in failing to transfer the Agritrade Shares and, more specifically as a result of that failure, by the forced sale of the 30 million Agritrade shares on 20 January 2020.

169 I readily accept the general notion that a significant sale of Agritrade shares (indeed any shares) would have the potential for depressing the market price and creating the negative vicious cycle referred to by Mr Thng in evidence. However, the much more difficult question is whether the plaintiff has established on a balance of probabilities that the forced sale of the 30 million Agritrade shares from 3.15pm onwards on 20 January 2020 had any and, if so, what effect on the subsequent market price of Agritrade shares.

170 In summary, it was the plaintiff's case that the defendant's failure to transfer the Agritrade Shares itself caused the further depression of the share price and thereby the further margin calls and force selling of the plaintiff's Agritrade shares on 21 and 23 January 2020. In support of that case, the plaintiff advanced a number of points at [97] of its closing written submissions, which I summarise as follows:

(a) The records show that there was a large drop in the share price from HK$ 0.285 to HK$ 0.250 from 3.15pm to 4pm on 20 January 2020 – this coincides with the time that Maybank had commenced the force selling of the plaintiff's 30 million Agritrade shares.[1]

(b) Mr Tan had also set out the 15-min trading volume of the Agritrade shares being traded on the open market on 20 January 2020 and 21 January 2020.

(c) The plaintiff's 30 million Agritrade shares were sold sometime from 3.15pm to the close of the market at 4pm over a 45 minute period and formed a large proportion of the trading volume in that 45 minute period.

(d) Mr Kon also takes the view that the 30 million Agritrade shares being force sold also formed a large proportion of the trading volume of Agritrade shares on 20 January 2020.

---

[1] While the plaintiff submitted that the price of Agritrade shares at 3.15pm was HK$ 0.285, it appears to have in fact been HK$ 0.280. This difference does not, however, change my analysis, and I use the plaintiff's own higher figures in the Judgment to demonstrate this.

171 In addition, it was submitted on behalf of the plaintiff that the Moratorium Announcement had a small or negligible effect on the share price as compared to Maybank's force selling of 127,745,000 of the plaintiff's Agritrade shares on 21 January 2020 for the reasons set out at [98] of its written closing submissions, which I summarise as follows:

(a) According to the record, the total selling volume of Agritrade shares in the open market on 21 January 2020 was 149,211,090. This means that the plaintiff accounted for approximately 85.61% of the total selling volume on 21 January 2020.

(b) There was a large drop from the opening price of HK$ 0.245 to HK$ 0.170.[2] This means that there was a drop of HK$ 0.075/share, and the plaintiff was responsible for 85.61% of the said HK$ 0.075/share drop in share price. This would mean that the price of HK$ 0.064/share of the drop in share price is attributable to the plaintiff's force selling.

(c) This would mean that a maximum of HK$ 0.011 out of the HK$ 0.075 decrease in share price would be attributable to other factors, such as the Moratorium Announcement on 20 January 2020. The actual effect of the Moratorium Announcement is likely to be lower than this figure, as there would also be other investors who would not know about the Moratorium Announcement, but who may nonetheless have decided to sell their Agritrade shares for any other reason. For example, it is

---

[2] The opening price for Agritrade shares on 21 January 2020 appears to have been HK$ 0.240 rather than HK$ 0.245 as the plaintiff had contended. Nonetheless, whether one takes the actual figure or takes the plaintiff's claim at its highest, that does not change the analysis. I again adopt the plaintiff's own (higher) figures in my analysis to demonstrate this.

common for other traders who noticed that the share price is dropping to decide to sell their shares in order to cut their losses.

172 Further, the plaintiff relied on the following facts and matters:

(a) The share price of the Agritrade shares before the margin call was approximately HK$ 0.285.[3] In the counterfactual scenario that the defendant had transferred the Agritrade Shares before 20 January 2020 and there was no effect of Maybank's force selling of the plaintiff's Agritrade Shares on the share price, then if the Moratorium Announcement's HK$ 0.011 effect is taken into account, then the share price would be approximately HK$ 0.274.

(b) In that (counterfactual) case, there would not be any force selling of the plaintiff's Agritrade shares as the share price would be well above the Margin Call Trigger Price of HK$ 0.2146 and the force sell trigger price of HK$ 0.1993 as calculated by Mr Tan.

(c) In any case, the contract breaker (*i.e.* the defendant) will continue to be liable for the plaintiff's loss as long as its breach of contract continues to be the effective cause of the plaintiff's loss. In that context, the plaintiff relied upon the legal principles set out in *Chitty on Contracts* at [26-075] and [26-076], in particular the following passage:

> An intervening event which could reasonably be expected will not excuse the defendant for loss caused by the combined operation of the defendant's breach of contract and the intervening event … If a breach of contract is one of two causes, both co-operating and both of equal efficacy in causing loss to the claimant, the party responsible for the breach is liable to the claimant for that loss. The contract-breaker is liable so

[3] Refer to Footnote 1.

> long as his breach was "an" effective cause of his loss: the court need not choose which cause was the more effective.

On the facts, the effective cause of the force selling of the plaintiff's shares on 21 January 2020 is attributable to the defendant's failure to transfer the Agritrade Shares, which subsequently caused the depression in the share price resulting from the force selling of the plaintiff's Agritrade shares on 20 January 2020.

(d) In any event, the possibility of the existence of any other intervening cause of the margin call and force selling of the plaintiff's Agritrade shares on 23 January 2020 is put beyond doubt, as the share price had instead *increased* from 22 January 2020 to 23 January 2020. Accordingly, the failure to transfer the Agritrade Shares to the plaintiff was the cause of the margin call and force selling of the plaintiff's shares on 23 January 2020, and the defendant should accordingly be liable for the same.

173 As for these submissions, my observations and conclusions are as follows.

174 First, it is right that the records show that there was a drop in the market price of Agritrade shares from around HK$ 0.285 to HK$ 0.250 from 3.15pm to 4pm on 20 January 2020 and that this coincides with the time during which Maybank was force selling the plaintiff's 30 million Agritrade shares. However, as noted by Mr Kon, prior to the commencement of the sale of those shares on that day, it appears that the trading volume of Agritrade shares already amounted to 65,780,000 from 9.30am to 3.00pm. Thereafter, the records show that a further 60,655,000 Agritrade shares were sold by the time of closing at 4pm. Thus, the forced sale of the plaintiff's 30 million Agritrade shares on 20

January 2020 constituted only about 33% of the total volume of shares traded on that day and about 50% of the shares traded between 3.15pm and 4.00pm. One of the uncertainties (which, no doubt, a witness from Maybank might have clarified) is that it is unknown exactly *when* during the 45 minute period between 3.15pm and 4.00pm Maybank force sold the 30 million Agritrade shares. This would seem to be a potentially important part of the jigsaw since it appears from the records that the large drop in share price from HK$ 0.280 to HK$ 0.255 occurred between 3.15pm and 3.30pm when some 20,615,000 shares were sold. Whether these shares formed part of the shares force sold by Maybank or by some other traders is unknown. Plainly, at least some of the 30 million Agritrade shares force sold by Maybank must have been sold *after* 3.30pm; and it would seem at least possible that all of these shares were sold in the last half hour of trading after 3.30pm, by which time the share price had, as I have said, already dropped to HK$ 0.255. In light of the above, whilst I readily accept that it is at least *possible* that the fall in price from HK$ 0.280 to HK$ 0.255 was attributable at least in part to the sale of the 30 million Agritrade shares, I find it impossible to conclude on a balance of probability that this was indeed the case, let alone whether the whole of such drop was so caused or, if any part, what part.

175 Second, whilst I readily accept that (i) as a matter of arithmetic, the sale of 127,745,000 of the plaintiff's Agritrade shares on 21 January 2020 represented 85.61% of the total number of Agritrade shares sold on that day; and (ii) there was a large drop from the opening price of HK$ 0.245 to HK$ 0.170 (*i.e.* a drop of HK$ 0.075) in the first 15 minutes of trading on 21 January 2020, I first note that the opening price on 21 January 2020 was in fact HK$0.240, but even taking the plaintiff's numbers, I do not accept the plaintiff's submission that it follows that this means that the plaintiff was responsible for

85.61% of the said HK$ 0.075 (equivalent to HK$ 0.064) drop in share price or that this would mean that HK$ 0.064 of the drop in share price was attributable to the force selling by Maybank. In my view, that submission is flawed for three main reasons.

(a) According to the records, a total of 149,211,090 Agritrade shares were sold on the market on 21 January 2020. Of these, 127,745,000 were the plaintiff's Agritrade shares. Thus, as a matter of arithmetic, the balance *i.e.* 21,466,090 Agritrade shares must have been sold by third parties. In the present context, the difficulty is that it is unknown which of these shares (*i.e.* the plaintiff's shares or the shares belonging to third parties) were sold when – and, in particular, what shares were sold during that crucial 15 minute period in the first 15 minutes of trading on 21 January 2020. The records show that some 53,740,000 Agritrade shares were sold during those 15 minutes of trading. Plainly, again as a matter of arithmetic, of these 53,740,000 Agritrade Shares, *at least* 32,273,910 must have belonged to the plaintiff (*i.e* 53,740,000 – 21,466,090) and I readily accept that it is certainly *possible* that even all of the Agritrade shares sold during this short period belonged to the plaintiff. However, on the evidence, it is impossible to conclude on a balance of probabilities that it was the forced sale of the plaintiff's shares that caused the drop of the share price on 21 January 2020. Again, it is perhaps unfortunate that there was no evidence from a witness from Maybank, which might have been able to clarify the position. However, on this issue, the burden of proof falls squarely on the plaintiff. Be all this as it may, it seems to me that the plaintiff's submission that 85.61% of the drop of HK$ 0.075 (*i.e.* HK$ 0.064) is attributable to the force selling of the plaintiff's shares is flawed.

(b) Second, with regard to the exercise carried out by Mr Kon in attempting to compute mathematically what the likely price of Agritrade shares would have been if Maybank's forced sale of 30 million Agritrade Shares on 20 January 2020 and another trade (referred to as the "fat-finger trade") on 21 January 2020 had not taken place, it seems to me that the plaintiff's criticisms of Mr Kon's usage of the block discount model (in particular because the present case involves a force selling event and not a block trade) as well as the blockage discount of 9.08% for the 20,000,000 shares and 12.91% for the 107,745,000 shares, which form important planks of his analysis, were forceful and highly persuasive. In light of those criticisms, it is sufficient to state my conclusion that, had the tactical or evidential burden shifted to the defendant, it may well have failed to satisfy that tactical or evidential burden with regard to such exercise. However, neither Mr Tan nor the plaintiff advanced any of their own calculations other than those referred to above from [170] to [172] which, as I have said, are, in my view, flawed. Thus, ignoring Mr Kon's computations, and at the risk of repetition, it is my conclusion that the plaintiff's own calculations fall short of establishing on a balance of probabilities that the defendant's failure to transfer the Agritrade Shares *itself* caused the further depression of the share price and thereby the further margin calls and force selling of the plaintiff's Agritrade shares on 21 and 23 January 2020. Accordingly, the issue of whether the tactical or evidentiary burden shifts to the defendant does not even arise.

(c) Third, it is necessary to consider the plaintiff's submission that the Moratorium Announcement had only a small or negligible effect on the share price as compared to Maybank's force selling of 127,745,000 of the plaintiff's Agritrade Shares on 21 January 2020. The premise of

> that submission was that (i) 85.61% of the drop of HK$ 0.075 (i.e. HK$ 0.064) was attributable to the force selling of the plaintiff's shares; (ii) that therefore a maximum of only HK$ 0.011 out of the HK$ 0.075 would be attributable to other factors such as the Moratorium Announcement; and (iii) the actual effect of the Moratorium Announcement is likely to be lower than this figure, as there would also be other investors who did not know about the Moratorium Announcement but who may nonetheless decide to sell their Agritrade Shares for any other reason. In my view, each of these is flawed. As for (i), for reasons which I have already explained, the figure of HK$ 0.064 is flawed. As for (ii), it necessarily follows that the figure of HK$ 0.011 (being the difference between HK$ 0.075 and HK$ 0.064) is equally flawed. As for (iii), contrary to the plaintiff's submission, it seems to me that any investor would be well aware of the Moratorium Announcement at the latest by opening on 21 January 2021, if not before.

176 Third, I readily accept the plaintiff's submission that a contract breaker (*i.e.* here the defendant) will continue to be liable for the plaintiff's loss as long as his breach of contract continues to be the effective cause of the plaintiff's loss, as well as the legal principles summarised in the passage from *Chitty on Contracts* cited by the plaintiff. However, in my view, the present case is not one which involves consideration of whether the loss caused to the plaintiff was the result of some other co-operating cause or intervening act. In my view, the plaintiff has simply failed on the evidence to establish that its loss was caused by the defendant's breach.

Conclusion

177 For all these reasons, it is my conclusion that the plaintiff's damages claim must be rejected. As a matter of form, a question may arise as to the precise formulation of the Court's order in light of the prayers (including, *inter alia*, a prayer for declaratory relief) which appear at the end of the Statement of Claim. I hope that this may be agreed between the parties but, if not, the parties are directed to serve brief submissions within 21 days of delivery of this Judgment.

178 As for costs, I have already received certain submissions from the parties as part of their written closing submissions, and had originally intended to deal with costs at the same time as this Judgment. However, on reflection, it seems to me that the better course is to allow the parties a little time to put in any further brief supplementary submissions with regard to any costs order that I should make. Accordingly, I hereby order that any further supplementary costs submissions be exchanged within 21 days of delivery of this Judgment.

179 It remains for me to thank Counsel and the experts who gave evidence in this case as well as all concerned.

Henry Bernard Eder
International Judge

Zhulkarnain Bin Abdul Rahim, Tan Yiren Leon, Chen Siang En Sean and Cheong Wei Wen John (Dentons Rodyk & Davidson LLP) for the plaintiff;
Tnee Zixian Keith (Zheng Zixian), Chan Michael Karfai and Lim

Weisheng Joseph (Tan Kok Quan Partnership) for the defendant.

Annex 1 – Opening prices and trading volumes of Agritrade shares at 15 minute intervals from 16 January 2020 to 23 January 2020

Open Faith Investment Limited
Opening Prices and Trading Volume of Agritrade Shares at 15-minute Intervals in a Day from 16 January 2020 to 23 January 2020 on Saxo

Date	Time	Volume	Opening Price (HKD)
16-Jan-2020	9:30am	360,000	0.435
16-Jan-2020	9:45am	1,220,000	0.425
16-Jan-2020	10:00am	525,000	0.420
16-Jan-2020	10:15am	1,030,000	0.420
16-Jan-2020	10:30am	2,595,000	0.410
16-Jan-2020	10:45am	1,940,000	0.390
16-Jan-2020	11:00am	1,480,000	0.390
16-Jan-2020	11:15am	2,005,000	0.390
16-Jan-2020	11:30am	1,005,000	0.390
16-Jan-2020	11:45am	175,000	0.390
16-Jan-2020	1:00pm	520,000	0.390
16-Jan-2020	1:15pm	1,090,000	0.385
16-Jan-2020	1:30pm	1,715,000	0.380
16-Jan-2020	1:45pm	1,040,000	0.380
16-Jan-2020	2:00pm	3,340,000	0.385
16-Jan-2020	2:15pm	1,545,000	0.390
16-Jan-2020	2:30pm	1,395,000	0.385
16-Jan-2020	2:45pm	1,395,000	0.385
16-Jan-2020	3:00pm	2,680,000	0.380
16-Jan-2020	3:15pm	1,730,000	0.385
16-Jan-2020	3:30pm	1,275,000	0.370
16-Jan-2020	3:45pm	3,605,000	0.370
16-Jan-2020	4:00pm	-	0.375
17-Jan-2020	9:30am	1,270,000	0.385
17-Jan-2020	9:45am	3,330,000	0.380
17-Jan-2020	10:00am	1,370,000	0.365
17-Jan-2020	10:15am	1,975,000	0.365
17-Jan-2020	10:30am	320,000	0.370
17-Jan-2020	10:45am	410,000	0.370
17-Jan-2020	11:00am	125,000	0.370
17-Jan-2020	11:15am	110,000	0.370
17-Jan-2020	11:30am	1,100,000	0.370
17-Jan-2020	11:45am	25,000	0.370
17-Jan-2020	1:00pm	1,180,000	0.375
17-Jan-2020	1:15pm	100,000	0.370
17-Jan-2020	1:30pm	180,000	0.370
17-Jan-2020	1:45pm	110,000	0.370
17-Jan-2020	2:00pm	25,000	0.370
17-Jan-2020	2:15pm	1,055,000	0.370
17-Jan-2020	2:30pm	20,000	0.375
17-Jan-2020	2:45pm	115,000	0.375
17-Jan-2020	3:00pm	85,000	0.370
17-Jan-2020	3:15pm	395,000	0.375
17-Jan-2020	3:30pm	120,000	0.380

Source: SaxoTraderGO

Open Faith Investment Limited
Opening Prices and Trading Volume of Agritrade Shares at 15-minute Intervals in a Day from 16 January 2020 to 23 January 2020 on Saxo

Date	Time	Volume	Opening Price (HKD)
17-Jan-2020	3:45pm	300,000	0.380
17-Jan-2020	4:00pm	-	0.375
20-Jan-2020	9:30am	6,540,000	0.370
20-Jan-2020	9:45am	2,655,000	0.345
20-Jan-2020	10:00am	3,390,000	0.340
20-Jan-2020	10:15am	11,300,000	0.325
20-Jan-2020	10:30am	3,385,000	0.300
20-Jan-2020	10:45am	3,785,000	0.300
20-Jan-2020	11:00am	3,755,000	0.300
20-Jan-2020	11:15am	2,715,000	0.300
20-Jan-2020	11:30am	1,475,000	0.295
20-Jan-2020	11:45am	1,975,000	0.300
20-Jan-2020	1:00pm	5,710,000	0.305
20-Jan-2020	1:15pm	3,600,000	0.290
20-Jan-2020	1:30pm	1,120,000	0.290
20-Jan-2020	1:45pm	3,160,000	0.285
20-Jan-2020	2:00pm	2,090,000	0.285
20-Jan-2020	2:15pm	1,970,000	0.280
20-Jan-2020	2:30pm	1,750,000	0.280
20-Jan-2020	2:45pm	2,905,000	0.280
20-Jan-2020	3:00pm	2,500,000	0.290
20-Jan-2020	3:15pm	20,615,000	0.280
20-Jan-2020	3:30pm	21,460,000	0.255
20-Jan-2020	3:45pm	18,580,000	0.249
20-Jan-2020	4:00pm	-	0.250
21-Jan-2020	9:30am	53,740,000	0.240
21-Jan-2020	9:45am	45,650,000	0.175
21-Jan-2020	10:00am	11,180,000	0.198
21-Jan-2020	10:15am	10,500,000	0.204
21-Jan-2020	10:30am	21,525,000	0.198
21-Jan-2020	10:45am	29,410,000	0.184
21-Jan-2020	11:00am	12,105,000	0.190
21-Jan-2020	11:15am	1,905,000	0.188
21-Jan-2020	11:30am	8,935,000	0.190
21-Jan-2020	11:45am	40,670,000	0.186
21-Jan-2020	1:00pm	21,085,000	0.184
21-Jan-2020	1:15pm	7,540,000	0.176
21-Jan-2020	1:30pm	9,990,000	0.176
21-Jan-2020	1:45pm	3,675,000	0.180
21-Jan-2020	2:00pm	5,160,000	0.179
21-Jan-2020	2:15pm	2,410,000	0.178
21-Jan-2020	2:30pm	4,845,000	0.179
21-Jan-2020	2:45pm	2,215,000	0.182
21-Jan-2020	3:00pm	6,920,000	0.177

Source: SaxoTraderGO

Open Faith Investment Limited
Opening Prices and Trading Volume of Agritrade Shares at 15-minute Intervals in a Day from 16 January 2020 to 23 January 2020 on Saxo

Date	Time	Volume	Opening Price (HKD)
21-Jan-2020	3:15pm	8,990,000	0.173
21-Jan-2020	3:30pm	8,070,000	0.174
21-Jan-2020	3:45pm	9,460,000	0.175
21-Jan-2020	4:00pm	-	0.180
22-Jan-2020	9:30am	1,405,000	0.182
22-Jan-2020	9:45am	1,955,000	0.180
22-Jan-2020	10:00am	1,580,000	0.175
22-Jan-2020	10:15am	720,000	0.170
22-Jan-2020	10:30am	365,000	0.169
22-Jan-2020	10:45am	245,000	0.169
22-Jan-2020	11:00am	800,000	0.174
22-Jan-2020	11:15am	1,305,000	0.175
22-Jan-2020	11:30am	1,755,000	0.178
22-Jan-2020	11:45am	3,475,000	0.188
22-Jan-2020	1:00pm	855,000	0.191
22-Jan-2020	1:15pm	1,230,000	0.189
22-Jan-2020	1:30pm	1,905,000	0.197
22-Jan-2020	1:45pm	4,150,000	0.201
22-Jan-2020	2:00pm	7,245,000	0.210
22-Jan-2020	2:15pm	2,078,330	0.228
22-Jan-2020	2:30pm	8,985,000	0.229
22-Jan-2020	2:45pm	4,400,000	0.247
22-Jan-2020	3:00pm	3,070,000	0.240
22-Jan-2020	3:15pm	1,825,000	0.237
22-Jan-2020	3:30pm	905,000	0.239
22-Jan-2020	3:45pm	2,700,000	0.236
22-Jan-2020	4:00pm	-	0.243
23-Jan-2020	9:30am	3,070,000	0.243
23-Jan-2020	9:45am	3,290,000	0.265
23-Jan-2020	10:00am	2,120,000	0.255
23-Jan-2020	10:15am	2,225,000	0.247
23-Jan-2020	10:30am	660,000	0.241
23-Jan-2020	10:45am	1,275,000	0.235
23-Jan-2020	11:00am	440,000	0.224
23-Jan-2020	11:15am	125,000	0.232
23-Jan-2020	11:30am	230,000	0.233
23-Jan-2020	11:45am	425,000	0.229
23-Jan-2020	1:00pm	925,000	0.225
23-Jan-2020	1:15pm	145,000	0.220
23-Jan-2020	1:30pm	1,060,000	0.217
23-Jan-2020	1:45pm	435,000	0.218
23-Jan-2020	2:00pm	265,000	0.224
23-Jan-2020	2:15pm	1,380,000	0.219
23-Jan-2020	2:30pm	105,000	0.221

Source: SaxoTraderGO

Open Faith Investment Limited
Opening Prices and Trading Volume of Agritrade Shares at 15-minute Intervals in a Day from 16 January 2020 to 23 January 2020 on Saxo

Date	Time	Volume	Opening Price (HKD)
23-Jan-2020	2:45pm	320,000	0.220
23-Jan-2020	3:00pm	50,000	0.228
23-Jan-2020	3:15pm	395,000	0.229
23-Jan-2020	3:30pm	790,000	0.235
23-Jan-2020	3:45pm	855,000	0.240
23-Jan-2020	4:00pm	-	0.231

Source: SaxoTraderGO