# Wee Soon Kim Anthony v UBS AG
# [2003] SGHC 305

**Case Number** : Suit 834/2001/R

**Decision Date** : 08 December 2003

**Tribunal/Court** : High Court

**Coram** : Kan Ting Chiu J

**Counsel Name(s)** : Lim Chor Pee and Ms M Rani (Chor Pee and Partners) for plaintiff; Davinder Singh SC, Hri Kumar and Kabir Singh (Drew and Napier LLC) for defendant

**Parties** : Wee Soon Kim Anthony — UBS AG

*Civil Procedure – Pleadings – Whether issues set out in plaintiff's Closing Submissions were pleaded.*

*Banking – Advice – Whether customer had been informed of the consequences of closing out a forward contract before its maturity date.*

*Tort – Misrepresentation – Whether bank's officers had made misrepresentations regarding the rate of interest being earned by a customer in his leveraged deposit – Whether customer suffered loss as a result of the misrepresentation.*

1. The defendant, a bank, is sued by the plaintiff, its customer. It arose from the plaintiff's complaints over foreign exchange transactions that he made through the defendant.

2. The plaintiff is 74 years old and is retired lawyer. Before he retired from practice in 1997 he had his own practice, with a bank as a major client. He is a wealthy man, and he agreed with counsel for the defendant, that he is not one to suffer in silence when he feels he has been wronged.

3. The plaintiff amended his statement of claim three times, the last at the beginning of the hearing. The main events in the customer-banker relationship pleaded are –

(i) in August 1997 the plaintiff became a private banking customer of the defendant;

(ii) on 28 August the plaintiff instructed the defendant to enter into a one-month forward contract with the defendant to buy MYR35,000,000 from the defendant at the rate of MYR2.8818 to US$1 for value 2 October;

(iii) on 18 September the plaintiff entered into another one-month forward contract to buy MYR5,000,000 from the defendant at MYR3.022 to US$1 for value 20 October;

(iv) in October the plaintiff took delivery of the MYR40,000,000 using US$ borrowed from the defendant, and

(v) the MYR40,000,000 was placed in one-month deposit as security for the loan ("the leveraged deposit");

(vi) in December the plaintiff adopted the "DFF Strategy" by (i) converting the whole leveraged deposit of MYR48,806,173.83 (inclusive of accrued interest) into US$ and investing that in a fund named the SBC Dynamic Floor Fund ("the SBC Fund"), a US$ denominated fund, and (ii) entering into a 12-month forward selling US$10,439,832.63 and buying MYR41,493,114.79 "at 3.87 (spot + 0.1045 (swap) i.e. 39745 for value 6 Jan 1999";

(vii) on 14 May 1998 when the prevailing spot exchange rate was MYR3.84 to US$1, the

plaintiff instructed the defendant to sell MYR and buy US$3,000,000. The defendant completed the transaction, at the rate of MYR4.20 to US$1 after taking into account swap points. When the plaintiff objected the transaction was reversed at a cost of US$63,500 to him;

(viii) on 27 July 1998 the plaintiff sold his investment in the SBC Fund and received proceeds of US$11,361,215.57 including a profit of US$816,984.61 or MYR915,245.71;

(ix) on 27 July the defendant unwound the 12-month forward contract and incurred a loss of MYR2,442,561.03; and

(x) after the Malaysian government imposed foreign exchange measures on 1 September and fixed the spot exchange rate at MYR3.80 to US$1, the defendant converted the plaintiff's deposit on the exchange rate of MYR4.00 to US$1.

4. The plaintiff's main complaints are that –

(i) the defendant's officers, namely Shirreen Sin Meng Mei ("Sin"), associate director/client adviser and the relationship manager assigned to him, and Colin Koh Tse-Ming ("Koh"), director/investment adviser, misrepresented to him when they proposed the DFF Strategy that

(a) his MYR deposit was earning 3.25% interest and he was incurring a negative interest rate differential as he was paying higher interest on his US$ loan,

(b) he could unwind the 12-month MYR contract at any time at the prevailing spot rate, without informing him that swap points may be involved, and how they operate, and

(c) he would retain his MYR leveraged deposit when he entered into the DFF Strategy;

(ii) the defendant converted his leveraged deposit to invest in the SBC Fund contrary to his instructions;

(iii) on 2 September the defendant misrepresented to him that the foreign exchange market in Malaysia was closed;

(iv) the defendant converted MYR44,163,832.51 in the plaintiff's accounts to US$11,040,956.13 at the exchange rate of MYR4 to US$1 instead of the rate MYR3.80 to US$1 fixed by the Malaysian government;

(v) the defendant charged the plaintiff handling, custody and safe-keeping and other charges in breach of an agreement that the transfer of his assets were to be transferred from his previous bankers to the defendant "free of payment"; and

(vi) the defendant has made the aforesaid charges without the plaintiff requesting for safe custody services from the defendant.

***The issues***

5. The trial ran for 42 days in three tranches. The plaintiff was in the witness box for 30 days, but for the morning sessions only, because of health problems. In the midst of the trial his solicitors Engelin Teh Practice LLC discharged themselves and Chor Pee & Partners were appointed. The plaintiff applied for leave to make substantial amendments to his re-re-amended statement of claim after the change of solicitors, but failed to obtain leave (see *Wee Soon Kim Anthony v UBS AG (No 2)*

[2003] 2 SLR 554).

6. The plaintiff's opening statement set out the issues as

(a) Whether the Defendant had misrepresented to the Plaintiff the nature of the DFF Strategy recommended to him;

(b) Whether the Defendant was negligent and/or in breach of its implied contractual duty of care in its advice on the DFF Strategy to the Plaintiff;

(c) Whether a fiduciary duty of a banker to its customers arises on the facts of this case and if so, whether the Defendant was in its breach of such fiduciary duty;

(d) Whether a collateral contract between the Plaintiff and the Defendant arises on the facts of the case under which the Defendant undertook that the adoption of the DFF Strategy would not prevent the Plaintiff from trading or closing out his "original purchase" on the spot market if a suitable opportunity to do so should arise;

(e) If so, whether the Defendant breached the said collateral contract;

(f) Whether the Defendant acted in breach of instructions or mandate in converting the Plaintiff's leveraged deposit into US$ for investment in the SBC Fund;

(g) Whether the Defendant's conversion of the Plaintiff's MYR deposits at the arbitrary rate of MYR4.00 to US$1 instead of the official Bank Negara Malaysia's rate of MYR3.80 to US$1 in September 1998 was wrongful;

(h) Whether the Defendant's imposition of the various "safe custody charges" and other debits from the Plaintiff's accounts were wrongful;

(i) Whether [there should be] an account of all debits made by the Defendant to the Plaintiff's Hong Kong and Singapore accounts; and

(j) What is the legal effect of the exclusion, exemption and/or limitation clauses in the documentation which the Plaintiff signed on the opening of his accounts with the Defendant.

7. During the hearing when the facts in dispute were dealt with, and the emphasis on and treatment and identification of the issues evolved. At the close of the case the plaintiff restated the issues as

(1) Whether the defendant had exercised reasonable care and skill in advising the plaintiff on the MYR contracts of 28 August and 18 September;

(2) Whether by the fax of 12 September 1997, the defendant had failed to advise the plaintiff of the risks involved in the forex transaction and to advise him to close out the forward contract maturing on 2 October instead of taking delivery of the MYR;

(3) Whether the defendant had misrepresented to him in mid-December 1997 that he was paying 6.8% interest on his US$ loan and receiving 3.25% interest on his MYR leveraged deposit; and

(4) Whether the defendant had misrepresented to him that the DFF Strategy allowed him to

exit his MYR position, without informing him that swap points would be involved if he closed out before the maturity date.

8. The issues in a case must be formulated carefully. Any issue raised must arise out of the pleaded case. After the proper issues have been set out at the start of the case, there is still some room for change for the issues to be restated for greater clarity and specificity. A plaintiff can also reduce the issues at the close of his case if he wants to. He may decide not to proceed with an issue upon examination of his own case or after considering the evidence and arguments of the defence, or for any other reason. When an issue is dropped, it is not dealt with any more (the plaintiff's closing submissions, for example, made no references to the MYR4 to US$1 conversion and the custody charges).

9. Issues (1) and (2) in the plaintiff's closing submissions did not come within his re-re-amended statement of claim. The letter of 12 September was not referred to. No assertions about those breaches of duty were pleaded. The plaintiff did not depose to these matters in his affidavit of evidence-in-chief. The first solicitors for the plaintiff were right not to identify them as issues.

10. Those issues were brought out in the application for the fourth amendment to the statement of claim made after the change of solicitors. As that application was refused, issues (1) and (2) are not proper issues in this action. Issues (3) and (4) are proper issues to be considered.

***Whether the defendant's officers had represented to the plaintiff in mid-December 1997 that he was paying 6.8% interest on his US$ loan and receiving 3.25% interest on his MYR leveraged deposit.***

11. The plaintiff recounted in para 45 of his affidavit of evidence-in-chief that

> In early December 1997, Shirreen drew my attention to the fact that because of the short-term volatility of the prevailing foreign exchange market, the MYR one-month deposit interest rate had dropped to a very low rate of about 3.25% per annum. Meanwhile, the US$14,040,572 loan taken to "purchase" the leveraged deposit was accruing interest at about 6.8% per annum. I was badly distressed by that news. I was at that time already shell-shocked by the deteriorating MYR position and was alarmed to learn that I now faced a "double whammy", i.e. having to face *the prospect of my borrowing costs in US$ exceeding the interest received on my MYR deposit* in addition to the risk of a worsening spot exchange risk in the US$/MYR foreign exchange rate. Shirreen then arranged for me to meet Colin Koh and herself on 19 December 1997. (Emphasis added)

12. Koh deposed in his affidavit of evidence-in-chief that when he and Sin met with the plaintiff on 19 December

> At this meeting, Sin and I pointed out that the Plaintiff's LD was incurring a loss for him as he was paying more in interest on the USD loans than he was receiving on his MYR deposits. In fact, at the time, the Plaintiff was paying an interest rate of about 6.8% per annum on his USD loans while *his MYR deposits were only earning him interest at the rate of about 3.25% per annum.* (Emphasis added)

and Sin confirmed that.

13. The plaintiff's MYR deposits were actually earning higher interest than that on 19 December. The MYR35,000,000 deposit was earning 8.8% interest up to 5 January 1998 when it was rolled over

on 3 November 1997 for two months to 5 January 1998, and the MYR5,000,000 deposit was earning 7.37% interest up to 22 December when it was rolled over on 20 November 1997 for one month.

14. When confronted with that, Sin and Koh conceded that they were mistaken. They tried to redeem themselves by explaining that when they had the discussion on 19 December, they knew that the defendant would face a negative interest rate differential if he rolled over the deposits again.

15. While that was correct, it was not what they had deposed to, that on 19 December they told the plaintiff that he was *already* experiencing negative interest on his deposits.

16. By Koh and Sin's admissions, the answer is yes, the representation was made, but that does not dispose of the matter. The plaintiff's claim is that he suffered loss as a result of the representation.

17. Was the distinction between being already in negative interest, or going in negative interest if the deposits are rolled over material to the plaintiff's decision? In his affidavit the plaintiff acknowledged that he was warned about negative interest rate differential and the worsening exchange rate before the meeting of 19 December, and was alarmed by the prospect of being in that position. When he met Sin and Koh on 19 December, they were still speaking of the negative interest rate differential, though they overstated the case in saying that he was already in that position when he was actually facing the prospect of being in that position.

18. By his own account, he was sufficiently alarmed at the *prospect* of negative interest to want to avoid the "double whammy". The prospect was as real whether or not he was already in negative interest, whether he was told "You are in negative interest" or "You will be in negative interest if you roll over the deposits."

19. There was no question that if the deposits were rolled over, they would yield reduced interest at around 3.25%. As the plaintiff subscribed to the SBC Fund to avoid negative interest, and had avoided that, he cannot complain about the advice, the mistake notwithstanding. He had benefited from the decision. The plaintiff has not shown that the representation caused him loss.

***Whether the defendant's officers misrepresented to the plaintiff that the DFF Strategy allowed him to exit his MYR position before maturity at market rates without applying swap points***

20. The issue arose because when the plaintiff wanted to close out his forward MYR position on the prevailing spot rate in May 1998, he found that he could not do that, and had to transact on a less favourable rate to him. It is important to note that he entered into the transaction to close out his existing 12-month forward MYR position, as contrasted to engaging in a stand-alone spot transaction, because for the latter the spot price would apply.

21. When a purchaser buys currency on a forward contract, e.g. buy MYR with US$ on a 12-month forward contract, he does not pay the spot exchange rate. As the two currencies would pay interest at different rates, swap points worked out on the difference between the rates have to be factored into the applicable forward exchange rate. When the transaction is to buy a higher interest currency with a lower interest currency, the swap points will be in favour of the purchaser. The swap points in such a situation can be described as a discount on the purchase price, or a premium to the purchaser. When the purchaser decides to close out the forward position before time, he enters into a reverse transaction, to sell the same amount of MYR and buy US$ on the same forward date to cancel the earlier transaction. It is another forward transaction (albeit for a shorter period), to buy and sell the two currencies in the reversed order. This second transaction, being a forward

transaction, is not transacted on the prevailing spot rate. Swap points will also have to be worked out on the different interest rates then prevailing. If that works out to the disadvantage of the buyer he has to pay above the spot rate.

22. As he wanted to buy to close a forward position swap points would apply. The question is whether Sin and Koh had informed him of that. The plaintiff claimed that Sin and Koh represented to him that if he adopted the DFF Strategy by investing in the SBC Fund and entering into a 12 month forward MYR position, he could exit his MYR at the spot rate at any time. It was also his case that Sin and Koh did not advise him on swap points.

23. He claimed that he had little or no knowledge or experience in foreign exchange transactions, and did not know about forward contracts, swap points and the consequences of closing out forward contracts before time. Although he was prepared to buy MYR35,000,000 on a tip that the currency was undervalued, he had no knowledge of the rudiments of foreign exchange transactions. He said that when he made the first MYR35,000,000 purchase the terms "spot" and "forward" were Greek to him. That implied that the defendant executed and reported on the transaction without instructions from him on the tenor of the transaction. If it was done it would be cause for complaint, but he did not complain. To the contrary the plaintiff pleaded in para 16 of his statement of claim that "(o)n 28 August 1997, the Plaintiff gave instructions to the Defendant to enter into a short term one-month forward contract with the Defendant wherein the Plaintiff would sell US$12,145,187.04 to the Defendant and would buy MYR35,000,000 from the Defendant at the prevailing rate of MYR2.8818 to US$1 as at 28 August 1997." This contradicted his plea of ignorance directly.

24. In the unsuccessful application filed on 6 May 2003 to amend the statement of claim for the fourth time, the plaintiff sought to delete para 16 entirely and plead instead that his intention was to make a "simple purchase" of MYR35,000,000 and that it was his first foray into foreign exchange contracts. During the hearing, it was established as a fact that the MYR35,000,000 transaction was not the plaintiff's first experience with foreign exchange contracts. The plaintiff also alleged that he had instructed his previous solicitors to amend para 16, but they refused to carry out his instructions. Mr Thomas Sim Yuan Po of Engelin Teh Practice LLC who was in charge of the statement of claim gave evidence that the draft statement of claim had been discussed and approved by the plaintiff before it was filed, and that the plaintiff had specifically instructed that para 16 be in the form pleaded in the statement of claim when it was filed on 4 July 2001. He also explained that there was no refusal to carry out the instructions to amend. The instructions were not carried out because they were received on 4 June 2002, just before notice was given on 8 June to the plaintiff to appoint new solicitors to act for him.

25. Before committing to the DFF Strategy, he had received a letter where Koh set out a proposal to purchase MYR on a forward basis against the US$. On the next day he had a meeting with Koh and Sin when the DFF Strategy was explained to him. The plaintiff recounted in his affidavit of evidence-in-chief that "Colin Koh proceeded to give a vague explanation of the workings of the DFF Strategy which left me confused."

26. This meeting was followed up by a letter from Koh and Sin to him dated 23 December. In this letter the DFF Strategy was explained in the following terms

> SBC Dynamic Floor 100% (USD). This will be the underlying asset for the strategy. The SBC Dynamic Floor is a USD denominated Fund. It targets a benchmark return of USD 12-month Euro-bid rate. (This is 5.82% at the moment). In Ringgit terms, adjusted for costs, this translates to 8.15% at a spot USD/MYR rate of 3.80 on expiry of the 12-month period. The Fund is traded on a daily basis and can be liquidated theoretically any time. In practice, it is advisable to hold the

fund for a medium term period of 6-12 months. This is because of the 1% transaction cost and the fact that the capital preservation structure is contingent on a 12 month holding period. The fund historically has delivered a superior net return relative to money market. It is a conservative structure and has historically had a relatively smooth profile of return. On December 31st , the Floor of the Fund is raised to the Net Asset Value of the fund, this is a defensive feature of the Fund for investors timing their entry at the beginning of a New Year. In considering the Fund, the investor has to make the subjective judgement that Ringgit interest rates will not be above the benchmark target return of 8.15% in Ringgit terms on a sustainable basis for the full year. (reference: SBC Dynamic Floor 100% Presentation handout)

USD/MYR forward foreign exchange contracts: This is the second part of the strategy. On the subscription to the SBC Dynamic Floor Fund which is in USD, a 12-months forward foreign exchange contract buying Malaysia Ringgit and selling USD is entered into. This forward foreign exchange contract may be unwound anytime. 12-month forward Malaysian Ringgit trades at approx 3% premium to the spot or current rates. This structure enables us to benefit from this as the forward premiums imply 12-month Malaysian deposit rates are higher than the present short term Ringgit deposit rates. The basis strategy in using the forward foreign exchange in combination with the SBC Dynamic Floor is to actively manage the Ringgit exposure against the USD, i.e. protecting the principal in Ringgit terms when the currency is perceived cheap, and taking the underlying USD exposure when the Ringgit is perceived expensive.

The precise timing of selling the Ringgit (or unwinding the original purchase) will be done in consultation with yourself Selling the Ringgit would leave open the underlying USD exposure of the SBC Dynamic Floor Fund. A suggested tentative strategy might look like: Sell MYR 10 million at 3.60, Sell MYR 10 million at 3.55, Sell MYR 10 million at 3.50, Sell MYR 10 million at 3.40. Each time we sell MYR, we would be squaring off and hence assuming the underlying USD exposure of the Fund. In a trading environment where the Ringgit trades in a range of 3.30 to 3.90, there will be opportunities to buy back the Ringgit at lower levels perhaps in the 3.80 area. Effective management of the Ringgit exposures will have the effect of improving the original 2.90 approx cost of your initial Ringgit position.

27. The plaintiff deposed that the explanation of the 12-month forward trading on a 3% premium to the spot rates was gobbledygook to him. The letter appeared to be telling him that "(t)he second part of the DFF Strategy was to engage in a 12-month forward hedge buying MYR and sell US$ which could be unwound anytime" and that "(i)n a trading environment where the MYR trades in a range of 3.30 to 3.90, I would be able to take advantage of opportunities to sell my MYR and buy it back at lower levels which would have the effect of improving the cost of my initial MYR position amounting to approximately MYR2.90 to US$1."

28. There is nothing remiss in his understanding because he could unwind the forward position at anytime he wanted to. When the letter referred to the MYR trading in a range of 3.30 to 3.90, it was referring to the market rates, which would be the spot rate for a spot transaction, or the adjusted rates where swap points are involved, in forward transactions. Even he did not say that he thought it meant that he can close out a forward position by buying at spot prices.

29. But the consultations did not stop there. On 24 December Koh and Sin had a further discussion with him, and it was only at this discussion that he finally agreed to adopt the DFF Strategy.

30. After the defendant took the steps to engage him into the DFF Strategy, Sin wrote to report to him on 29 December that

> We have converted your MYR deposit of MYR40,806,173.83 to USD10,544,230.96 at 3.87 for value Jan 5, 1998. As discussed previously, there is a 1% one time transaction cost. Thus the amount of USD10,439,832.63 will be invested in the SBC Dynamic Floor Fund USD 100%.
>
> At the same time, we have done a forward for one year at 3.9745, the breakdown being: Client sells USD10,439,832.63 buys MYR41,493,114.79 at 3.87 (spot) + 0.1045 (Swap) i.e. 3.9745 for value 6 Jan 1999.

expressly spelling out the existence and the application of swap points in the transaction.

31. She still did not leave matters at that. She went to speak with him a few days later. The plaintiff recounted in his affidavit

> Shirreen visited me sometime soon thereafter (to the best of my recollection, this was just after the New Year). Richard [the plaintiff's son] was also present. Shirreen told Richard and I that I had benefited from a "premium" when entering into the 12-month forward contract. She further said that I would have to "pay back proportionately" this "premium" if I decided to terminate the 12-month forward contract. *I was quite mystified by this "premium".* However, as Shirreen did not seemed to be at all concerned by this "premium" that she was talking about, *I did not enquire further*. (Emphasis added)

32. Despite all that, it was asserted in the closing submissions that "at no time in December 1997 or even months thereafter did Shirreen Sin or Colin Koh explain to him that unwinding a twelve month forward contract would involve swap points."

33. That ran counter to his affidavit and the defendant's letter of 29 December which showed that he was informed that he had the benefit of 0.1045 swap points when he bought MYR 12-months forward.

34. The defendant's case was that the plaintiff was advised on that. Koh's evidence that not only swap points were explained, but the effect of swap points was also explained in layman's terms when these were discussed on 16, 19, 23 and 26 December with the aid of a presentation handout.

35. The plaintiff denied that the presentation handout was shown or explained to him. Under cross-examination he relented and conceded that it may have been explained to him on 19 December, but he did not understand it.

36. It was not disputed that the plaintiff, Sin and Koh met in December and discussed the predicament that he was in and the options available for him to mitigate his losses. At that time, the plaintiff was very concerned at the position he was in. The meetings they had were not casual gatherings. There were serious matters to be discussed and decisions to be taken. Koh elaborated at the trial that "(t)here are about six hours worth of meetings on the 16th, 19th, 23rd and also on the 26th in addition after [the letter of 23 December] was written. And those six hours or meetings, there was very, very full discussion on the operation of the forward in conjunction with the Dynamic Floor Fund."

37. It was also clear that the plaintiff only committed himself to the strategy after the discussions, and he was informed of the transactions after they were made. His own evidence was not that there were no explanations of the premium/swap points and the consequences of closing out a forward position before maturity, but that he did not understand them. But he did not inform Koh or Sin that or that he still needed more explanation. After the discussions, he confirmed that he

accepted the strategy proposed.

38. Much was said by his counsel that in the letters, visit reports and the transcript of telephone conversations produced at the trial, there was no explicit statement that the premium/swap points may have to be paid back. Koh said that that was covered in the discussions they had and I accept that. Sin had also referred to that to the plaintiff and his son. The plaintiff's reply was that the discussions and Sin's explanation on premium and spot rates were gobbledygook to him. But he is not diffident or tongue-tied, and he was a big client. If he needed further explanation, he kept that to himself and gave instructions to enter into the strategy instead. The evidence was that whenever he sought explanations and clarifications from Sin or Koh, they would provide them.

39. In these circumstances it cannot be said that Sin or Koh had not informed about the consequences of an early close-up. He had been advised. If he had not understood the advice fully, or did not seek clarification, or had forgotten it, he cannot blame it on the defendant or its officers.

***Conclusion***

40. The plaintiff's case commenced with a wide array of allegations and complaints. In the course of the trial, each of them was examined. After the change of counsel, an attempt was made to amend the re-re-amended statement of claim by deleting substantial portions of it and replacing them with new matters.

41. When leave to amend was refused, the plaintiff redrew the issues. Of the four issues, two were outside the pleaded case. The other two were factual in nature – whether the defendant's officers had made the alleged misrepresentations.

42. I find that there was a misrepresentation that the plaintiff was in negative interest in mid-December 1997 when he was not. However the advice rendered was fundamentally sound, and the plaintiff had not suffered any loss when he acted on it.

43. On the other issue whether it was represented to the plaintiff that he could close the forward MYR position before maturity at the market rates without applying swap points, I find that there was no representation of this nature. If the plaintiff really believed that he was assured that he could do that, he was mistaken.

44. For the foregoing reasons, the plaintiff's claim is dismissed with costs, which are to be taxed for two counsel.

***Costs of Engelin Teh Practice LLC***

45. In the course of the cross-examination of the plaintiff, it was shown to him on several occasions that his evidence was inconsistent with his pleaded case and his affidavits. The plaintiff's explanations were that the inconsistencies had arisen because the pleadings and affidavits were drafted by Mr Thomas Sim of Engelin Teh Practice LLC, and did not accurately reflect his instructions, and that he had instructed Mr Sim to amend para 16, but he refused to comply with the instructions.

46. The plaintiff did not call Mr Sim as his witness and did not agree for him to give evidence, except on his terms. Subsequently, after he dropped those conditions and agreed to waive solicitor-client privilege, Mr Sim appeared as a witness.

47. Mr Sim's attendance in court was necessary. First, it could provide a better basis for

assessing the plaintiff's contention that the inconsistencies should not be taken against him. Secondly, it was not right for allegations to be made of a solicitor's competence at drafting and his refusal to carry out a client's instructions without giving him the opportunity to respond to them.

48. When Mr Sim attended court, he had prepared a statement and a voluminous set of documents to respond to the allegation. A bill for costs for the attendance was also produced.

49. Counsel for both parties accept that costs are payable. The plaintiff's solicitors contended that it should follow the event (which I take to mean the losing party should pay the costs), or be borne by the defendant, while the defendant's solicitors argued that it should be paid by the plaintiff in any event.

50. It was proper and reasonable for Mr Sim to respond and to attend court. In the present case the costs should not be borne by either the plaintiff or the defendant in any event. They should follow the result in that the losing party shall pay them. These costs are to be borne by the plaintiff.

51. The costs are not claimed by Mr Sim himself but by Engelin Teh Practice LLC in which he practices. The costs claimed are for work done by him and Ms Engelin Teh SC, disbursements and GST.

52. The costs to be paid should be confined to Mr Sim's work, disbursements and GST. The allegations were made against him, and he was called to respond to them. Ms Teh, being the head of the practice, would be concerned over the plaintiff's allegations. She attended court when Mr Sim gave evidence, but did not give evidence or take a significant part in the proceedings at that stage. While I accept that she would have spent time to assist or supervise the preparation of Mr Sim's response, no costs are recoverable for that from the plaintiff. The parties are to revert to me if they cannot agree on the quantum of the costs the plaintiff is to pay to Engelin Teh Practice LLC.