ALS Memasa and another *v* UBS AG
[2012] SGHC 30

Case Number	: Suit No 935 of 2010 (Registrar's Appeal Nos 233 and 234 of 2011)
Decision Date	: 09 February 2012
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: N Sreenivasan and Sujatha Selvakumar (Straits Law Practice LLC) for plaintiffs/appellants; Hri Kumar Nair, SC, Benedict Teo and Charmaine Chiu (Drew & Napier LLC) for defendant/respondent.
Parties	: ALS Memasa and another — UBS AG

Banking

9 February 2012

Woo Bih Li J:

Introduction

1 The plaintiffs are customers of the defendant bank UBS AG ("UBS"). The present action ("Suit 935/10") is a claim by the plaintiffs for an account of all transactions carried on by UBS for the plaintiffs on three accounts and for damages to be assessed.

2 UBS applied to strike out the Statement of Claim ("SOC"). Consequently, the plaintiffs filed an application to amend the SOC. Eventually, an Assistant Registrar ("AR") dismissed the plaintiffs' application to amend the SOC and granted UBS' application to strike out the SOC.

3 The plaintiffs appealed against both these decisions. I dismissed both the appeals with costs. The plaintiffs have filed an appeal against my decisions.

The background

4 The first plaintiff, ALS Memasa ("AM") is the daughter of the second plaintiff, Tjo Bun Khai ("Tjo"). AM is about 65 years old and Tjo is about 95 years old. It is said by the plaintiffs that both of them do not speak, read or write English.

5 Tjo is a wealthy retired Indonesian businessman who started and ran his own manufacturing business. AM manages a company in the family business.

6 The plaintiffs were customers of a local bank Overseas Chinese Banking Corporation Limited ("OCBC") for over 40 years.

7 In late 2004 or early 2005, their accounts with OCBC came under the care of one Gary Yeo ("Gary"). About six months later, Gary informed the plaintiffs that he would be moving to UBS. In or around late 2006, the plaintiffs agreed to move their bank accounts worth about US$8 million to UBS. Three accounts were opened with UBS. Two of them were joint accounts and the third was a sole account of Tjo.

8 Over time, various transactions were executed by UBS for the plaintiffs. Losses were incurred on some of them. The plaintiffs' claim appeared to be in respect of all the transactions.

The pre-action discovery application

9 The plaintiffs first filed an application on 26 November 2009 in Singapore seeking pre-action discovery against UBS, *ie*, they were seeking documents before filing a claim against UBS. This was Originating Summons No 1358 of 2009 ("OS 1358/09"). The application sought discovery of a wide range of documents:

(a) all confirmation slips;

(b) all instruction notes;

(c) all attendance notes;

(d) all telephone memos;

(e) all recommendations and advices given;

(f) all information memos;

(g) all analyses in relation to transactions recommended to the plaintiffs;

(h) all documents given to the plaintiffs in relation to transactions recommended to them;

(i) access to listen to all telephone logs; and

(j) all other documents evidencing transactions.

10 In written submissions before me, UBS summarised the application in OS 1358/09 and contended as follows:

...

23 Significantly, the Plaintiffs alleged in their affidavits filed in OS 1358 that:

(a) they were led to believe their accounts with [UBS] were **fixed deposit** accounts, which was what they maintained with OCBC before moving to [UBS] ... [emphasis in original]

(b) they did not know how they had lost money as they were unaware that their **deposits** were "*high risk investments*" and "*don't understand how that came about*" ... [emphases in original]

(c) they did not authorise the investments made in the Accounts and did not give instructions on the investments ...

24 They further alleged that they needed discovery of, among other things, the subject documents in order to understand how they suffered losses in the Accounts, and to formulate their cause of action against [UBS] ...

25 There was no basis for the Plaintiffs' pre-action discovery application. The Plaintiffs already had the monthly statements and other transactional documents which they received as customers, and which set out all the transactions in the Accounts. What they really wanted were the [UBS]'s internal documents. However, if their case was they did not authorise the transactions in the Accounts, and were led to believe that they had fixed deposit accounts and not investment accounts, they obviously could formulate their cause of action against [UBS] without the documents.

11 It is undisputed that on 8 March 2010, the court dismissed OS 1358/09 with costs. The plaintiffs did not appeal against this decision.

Suit 935/10 and the relevant applications and appeals

12 On 17 December 2010, about nine months after OS 1358/09 was dismissed, the plaintiffs filed Suit 935/10.

13 On 11 January 2011, UBS filed its Defence.

14 On 11 February 2011, the plaintiffs filed their Reply.

15 On 14 February 2011, UBS filed Summons 613 of 2011 for an order to strike out the SOC and to dismiss the action.

16 On 21 June 2011, an AR indicated that she was inclined to allow the striking out application in part. However, she was prepared to allow the plaintiffs to try to amend para 19 of the SOC in so far as it related to an allegation by the plaintiffs about pre-contractual misrepresentation.

17 The plaintiffs then filed an application to amend on 5 July 2011 by way of Summons 2942 of 2011. The proposed amendments went beyond what was contemplated by the AR.

18 According to counsel for UBS, the plaintiffs' counsel had accepted at the continued hearing before the AR that the SOC as pleaded was unsustainable.

19 Eventually, on 19 July 2011, the AR dismissed the plaintiffs' application to amend and granted UBS' application to strike out the SOC and dismiss the action.

20 The plaintiffs filed RA No 233 of 2011 against the decision to strike out the SOC and to dismiss

the action. They filed RA No 234 of 2011 against the decision to dismiss the plaintiffs' application to amend.

21 In the course of the hearing of the appeals, the plaintiffs sought to make further amendments to the SOC as I shall elaborate below. As mentioned above, I dismissed both appeals.

The court's reasons

22 UBS' application for an order to strike out the SOC and to dismiss the action was based on various grounds, *ie*, that the SOC:

(a) disclosed no reasonable cause of action;

(b) was scandalous, frivolous and vexatious;

(c) may prejudice, embarrass or delay the fair trial of the action; and/or

(d) was otherwise an abuse of the process of the court.

23 For present purposes, I need focus only on the allegation about an abuse of the process of the court.

24 In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*"), the High Court said:

> 34 The instances of abuse of process can therefore be systematically classified into four categories, *viz*:
>
> (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
>
> (b) proceedings where the *process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way*;
>
> (c) proceedings which are *manifestly groundless or without foundation* or which serve no useful purpose;
>
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.
>
> [emphases in original]

25 UBS' counsel Mr Hri Kumar, SC submitted that the plaintiffs had abused the process of the court by putting forward a false case.

26 He highlighted the plaintiffs' application for pre-action discovery. Mr Kumar submitted that that application was really an attempt by the plaintiffs to construct their case by tailoring their case to suit the evidence which they hoped to obtain from discovery, whereas the plaintiffs ought to know the basis of their claim (or claims) against UBS without such discovery if their allegations about unauthorised transactions were true.

27 The crux of the SOC was pleaded in paras 12, 18 and 19 thereof:

12. To the best of the Plaintiffs recollection, other than signing various documents presented to them from time to time by Gary Yeo or Donna Teo, they have not given any direct instructions to the Defendants on the management of the accounts nor were any instructions sought from them.

18. By reason of how the accounts were managed the Plaintiffs have suffered loss. Such loss must have occurred through the negligence, breach of duty, lack of skill and or diligence as banker in managing the said accounts. In the alternate there would have been dishonesty. The Plaintiffs are unable to provide particulars until discovery and particulars of the management of the accounts are provided by the Defendants.

19. If, which is denied, the accounts were managed on the Plaintiffs' instructions, the Plaintiffs alternatively aver that they relied on the representations by [UBS]' servants or agents Gary Yeo and/or Donna Yeo that the Plaintiffs' accounts were akin to safe deposit accounts and thus capital safe, that such representation was false and or such representation was made fraudulently or negligently and had caused them loss.

28 AM's first affidavit to oppose UBS' application to strike out reiterated the plaintiffs' allegations that they were told that their accounts with UBS were akin to fixed deposit accounts just as what the plaintiffs previously had with OCBC and that the plaintiffs did not give instructions for the various trades executed for their accounts. However, there was also a qualification in her first affidavit that if UBS had documents which show that AM did authorise the transactions, she wanted to have discovery of such documents and also documents on any advice UBS had given before the transactions were executed.

29 According to Mr Kumar, the affidavits filed for UBS in response to AM's first affidavit adduced undisputed evidence which demolished the primary position of the plaintiffs that they had believed that their accounts with UBS were akin to fixed deposit accounts (as was allegedly the case when the accounts were with OCBC) and that the plaintiffs did not authorise the transactions executed for their accounts with UBS. Mr Kumar elaborated in the manner stated below.

External Securities transferred to UBS from other bank accounts of the plaintiffs

30 Mr Kumar submitted that not all the investments in the accounts with UBS were transacted by UBS. The plaintiffs had in fact authorised the transfer of investments from their accounts with other banks, including OCBC, to UBS. Mr Kumar referred to these investments (see para 43 of his submission) as:

(a) the Mandiri bonds;

(b) Bank Rakyak bonds;

(c) RBS Notes; and

(d) the Amgen Shares.

31 The above information demonstrated that not all investments held in the accounts with UBS were derived from transactions executed by UBS. Moreover, it also demonstrated that the plaintiffs' accounts with OCBC were not akin to fixed deposit accounts only as the plaintiffs had alleged.

Investments made through UBS – Constant Maturity Swap ("CMS") notes

32 Mr Kumar submitted that the plaintiffs had instructed UBS to acquire CMS notes which Mr Kumar described in para 48 of his submission as:

(a) Lloyds Dual Range Accrual Note; and

(b) ANZ note.

33 Mr Kumar submitted that the plaintiffs had signed purchase confirmations to purchase the Lloyds Dual Range Accrual Note and to debit their accounts accordingly. There was also a transcript of a recorded telephone conversation between AM and a UBS officer showing that she had instructed UBS to purchase the ANZ Note.

Investments made through UBS – Bonds

34 A transcript of a recorded telephone conversation on or about 3 September 2008 showed that UBS' Audrey Kua ("Kua"), one of its client advisor assistants had informed AM of a purchase of Russian Standard Bank ("RSB") bonds for the first account and AM confirmed her approval of the transaction. This showed that the plaintiffs had authorised the transaction.

Investments made through UBS – Dual Currency Investments ("DCI")

35 Mr Kumar submitted that the plaintiffs had authorised four DCIs. This was evidenced by transcripts of recorded telephone conversations between AM and officers of UBS.

The plaintiffs' conduct post-margin call

36 Mr Kumar submitted that the plaintiffs' conduct after UBS made a margin call was consistent with UBS' position that the plaintiffs had authorised the various transactions in their accounts with UBS. For example:

(a) On or about 8 October 2008, when AM was informed by UBS of a margin call ("the Margin Call conversation") AM did not question why a margin call was being made.

(b) On or about 8 October 2008, after the Margin Call conversation, AM had asked which investment she should sell and admitted that she should not have engaged in so many transactions.

(c) On or about 17 October 2008, AM offered more collateral.

(d) On or about 18 December 2008, AM had asked for an update and discussed her investments. A course of action was proposed to her which she agreed with.

(e) On or about 6 February 2009, AM agreed to mortgage one of her Indonesian properties to UBS as further collateral.

(f) On or about 11 February 2009, a UBS' officer orally informed AM that UBS would liquidate the RSB Bond if she failed to cover the shortfall that day. AM tried to persuade UBS to withhold this step by, among other things, saying that she would transfer some funds from OCBC to UBS and that she would provide two properties as collateral.

37 As mentioned above, the plaintiffs sought to amend the SOC in the course of arguments before the AR by filing Summons 2942 of 2011 on 6 July 2011. The main proposed amendments then (for present purposes) were as follows:

11. The Plaintiffs were thus at all material times customers of [UBS] and maintained a banker-customer relationship. [UBS], as bankers, owed the Plaintiffs a duty to act only to act upon instructions and owed a duty of care to act honestly and with reasonable skill and diligence as banker, in advising the Plaintiffs, in giving complete and accurate information to the Plaintiffs and in taking instructions from the Plaintiffs and generally managing the accounts of the Plaintiffs only as instructed by the Plaintiffs. The Plaintiffs aver that some investments were made without instructions and that some investments were made after instructions were obtained without giving proper and complete advice.

12. [UBS], in breach of their duties as bankers acted and advised the Plaintiffs negligently with regard to the nature and risk of the investments and also acted without instructions. Full particulars of such negligent acts, omissions and advice will be given after discovery. At this stage, the best particulars that the Plaintiffs are able to give are as follows:

(a) [UBS], on or about 3 September 2008, purchased Russian Bank bonds (the "Russian Bonds") for the account of the Plaintiffs, without instructions from the Plaintiffs. After doing so, [UBS] negligently represented to [AM] that the Russian Bonds were low risk, when they were not low risk. As a result of the purchase of the Russian Bonds, the Plaintiffs eventually lost a few million US dollars on this "investment".

(b) [UBS] arranged for leveraged purchased of high risk investments even though [UBS] had represented to the Plaintiffs that only low risk investments akin to fixed deposits would be purchased. By leveraging the purchases, the risks were significantly increased.

The discovery that the Plaintiff require, to give particulars, would be purported instructions and telephone recordings which set out the conversations between the Plaintiffs and [UBS]' representatives.

...

15 Sometime in October 2008 the Plaintiffs were informed that they had lost over US$2 million. The Plaintiffs do not know or understand how the money was lost. The Plaintiffs believe several of the transactions were carried out by [UBS] without mandate or instruction by the Plaintiffs. Full particulars will be given after discovery.

...

20 The Plaintiffs suffered an estimated loss of about US$5,000,000.00 The losses occurred because transactions were carried out in relation to the Accounts, without instructions or

mandate and/or because the Plaintiffs relied on the representations by [UBS]' servants or agents Gary Yeo and/or Donna Teo that the investments made in the Plaintiffs' accounts were akin to safe deposit accounts and were low risk and thus capital safe. The Plaintiffs aver that such representation was false and made negligently and had caused them loss.

38 The plaintiffs alleged that they had no knowledge of the English language and at times they were presented with only the signing page of a document to sign. The plaintiffs also alleged that in or about April 2009, they had travelled to Singapore to meet Gary and/or his assistant Donna Teo to understand how and why the alleged losses had been incurred. Eventually UBS' Ms Ling-Ly Loh, instead of Gary or Donna, met with the plaintiffs on 9 April 2009. At the end of the meeting, she said that she would raise the plaintiffs' concerns with UBS. On 13 April 2009, UBS wrote to say that they were investigating and anticipated providing a formal response in due course. However, no explanation was provided by UBS thereafter.

39 On the other hand, it was not disputed that the plaintiffs had received various documents from UBS such as:

(a) monthly current account statements;

(b) monthly statements of account which provided, among other things, an overview of their asset allocation, evaluation of the performance of their investments and detailed position according to asset type;

(c) trade advices/confirmations. The last category provided the plaintiffs with details of each transaction executed; and

(d) confirmations for the DCI transactions.

40 As mentioned above, the AR dismissed their application to amend and granted UBS' application to strike out the SOC on 19 July 2011.

41 I was of the view that notwithstanding the plaintiffs' lack of knowledge of the English language, they were not as naive or ignorant as they wanted the court to believe. Moreover, with all the documents which they had already received from UBS, they would know or be able to obtain advice to ascertain every transaction executed on any of their accounts with UBS. Consequently, they must know which transaction was unauthorised and which exceeded their authority and which was based on negligent representation or advice from UBS.

42 The plaintiffs' counsel Mr Sreenivasan submitted that at times it was difficult to say if a transaction was executed without authority or in excess of authority. For example, if UBS bought an investment for one of the plaintiffs' accounts at a price higher than what was authorised, was that a case of lack of authority or excess of authority?

43 It seemed to me that this submission did not help the plaintiffs. Theirs was not a case of a difficulty in categorising their claims. In para 12 of the SOC (see [27] above), the plaintiffs were asserting categorically that they had not given any direct instructions on the management of the

accounts nor were any instructions sought from them.

44 Although para 18 of the SOC alleged "By reason of how the accounts were managed ... loss must have occurred through the negligence, breach of duty, lack of skill and or diligence as banker in managing the said accounts", this allegation was not pleaded as an alternative to para 12. In view of the reference to how the accounts were managed by UBS, it appeared to flow from the allegation in para 12 about an absence of instruction from the plaintiffs.

45 Furthermore, as already mentioned, the position of the plaintiffs as asserted in the supporting affidavit for the pre-action discovery and in AM's first affidavit to oppose the application to strike out was that the plaintiffs had not been given instructions for the transactions.

46 The evidence which UBS produced showed that the plaintiffs had lied. In so far as the transactions had been executed by UBS, many, if not all, were executed on instructions from AM or affirmed by her after she was informed of the transactions.

47 In addition, the plaintiffs' accounts with OCBC were not simple fixed deposit accounts or the like as the plaintiffs had said.

48 I reiterate that the plaintiffs must know, without the need for discovery for the time being, which transaction was unauthorised (in the sense of absence of instruction) and which was authorised but based on negligent representation from UBS. Likewise, they must also know which transaction was executed in excess of authority in the sense, for example, when UBS made purchases at a higher price than was instructed by AM. I agreed that they were hoping to obtain evidence first and then construct and tailor their claims accordingly in order that they would not be caught out. However, they first had to say what their main allegation or allegations were and, as it turned out, they were caught out on this.

49 It seemed to me that what the plaintiffs had done could arguably come within the first or second category mentioned in *Chee Siok Chin* (see [24] above). Even if it did not, I was of the view that the four categories in *Chee Siok Chin* were not exhaustive and what the plaintiffs had done still amounted to an abuse of process. They had pleaded a cause of action which they knew must be untrue for many, if not all, the transactions executed by UBS.

50 Even after UBS had produced evidence to show that many, if not all, the transactions had been executed with prior instruction or had been affirmed after the transactions had been executed, the plaintiffs were still alleging in para 20 of their first set of proposed amendments (set out at [37] above) an absence of instruction "and/or" reliance on UBS' representations.

51 I agreed that an allegation of reliance on UBS' representations was contrary to an allegation of an absence of instruction. The plaintiffs had to decide which of the allegations they were relying on and in respect of which transaction especially when they were seeking liberty from the court to amend the SOC.

52 No reason was given by them as to why they made the sweeping allegation that they did in the SOC about an absence of instruction when they must have known otherwise. Neither did they explain why they still could not identify which transaction was made without authority at all and which was made in reliance on representations. Indeed, there was no supporting affidavit initially to support the application to make the proposed amendments.

53 Nevertheless, there was some evidence that as regards one transaction, UBS might have

purchased RSB bonds without instruction and AM then affirmed the purchase after a discussion with a UBS officer. In that discussion, some representations were made by the UBS officer.

54 However, Mr Kumar submitted that even if it was true that the RSB bonds were purchased without instruction initially and some representations were then made by a UBS officer after which AM affirmed the purchase, the plaintiffs would still be precluded by contractual terms on relying on any such representation. He relied on *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566 to support this point.

55 Mr Kumar's written submissions set out the relevant contractual terms as follows:

> 157. Clause 7.1 of Section 1 (Account Mandate) of the Account Terms and Conditions states:
>
> > 7.1 The Client accepts all risks arising from its opening and maintenance of the Account and acceptance of any of the Services made available by the Bank, including but not limited to, any loss suffered as a result of entering into any investment, trading or other transaction. The Client's attention is drawn to and the Client acknowledges that he has read and fully understood the Risk Disclosure Statement and all documents referred to therein (as evidenced by his signature thereto or in the Account Opening Form). In accepting Services made available by the Bank (other than discretionary investment or management services), the Client acknowledges that it makes its own assessment and relies on its own judgment. The Bank is not obliged to give advice or make recommendations and, notwithstanding that the Bank may do so on request by the Client or otherwise, such advice or recommendations are given or made diligently, and with reasonable care based on analyses and available alternatives the Bank should reasonably know to exist (and the Client acknowledges and agrees that it is so given or made) without any responsibility on the part of the Bank and on the basis that the Client will nevertheless make its own assessment and rely on its own judgment.
>
> 158. Clause 1 of Section 6 (Risk Disclosure Statement) of the Account Terms and Conditions states:
>
> > 1. **General Conditions**
> >
> > a. The terms and conditions in this Section 6 are applicable to transactions involving equities, foreign exchange, precious metals, bonds, commodities, interest rates, securities, market indices and any combination of these, and any spot, forward contracts, swaps, options and other derivatives transactions thereof including any structured products incorporating any or any combination of the preceding (the "Transactions").
> >
> > b. Due to the volatile nature of the Transactions and the underlying assets therein, participation in a Transaction involves a certain degree of risk. The Client's attention is hereby drawn to such risks (which can be substantial). The Client should consult his advisors on the nature of such Transactions and carefully consider whether the kind of Transaction is appropriate for him in the light of his experience, objectives and personal and financial circumstances. The Client carries the burden of all risks involved in such Transactions and the Bank is not responsible for any losses whatsoever or howsoever arising from the Transactions.
> >
> > ...

d. By entering into any Transaction with the Bank, the Client confirms that he has read and fully understood this Risk Disclosure Statement and all product term sheets, annexures and supplements pertaining to the Transaction, and that he fully understands the nature of the Transaction and the terms and conditions governing the said Transaction, including the Bank's margin requirements (if applicable).

...

e. By entering into any Transaction with the Bank, the Client acknowledges that he makes his own assessment and relies on his own judgment in relation to any and all investment or trading or other decisions in respect of such Transaction and accepts any and all risks associated therewith and any losses suffered as a result of entering into any Transaction.

f. The Bank is not obliged to give advice or make recommendations and, notwithstanding that it may do so on request by the Client or otherwise, such advice or recommendations are given or made (and the Client acknowledges and agrees that it is so given or made) without any responsibility on the part of the Bank and on the basis that the Client will nevertheless make his own assessment and rely on his own judgment.

159. Clause 22 of Section IV (Exchange Traded Option Trading Facility) of the Investment Terms and Conditions provides:

22 **Acknowledgement of Risk**

The Client confirms that he has received, read and understood the content of the Risk Disclosure Statement and in entering into any transaction, the Client has decided to do so based on the Client's personal judgment, and independent of any advice or recommendation of the Bank, and will calculate and do accept the risk involved.

56 To avoid the application of these terms, the plaintiffs relied on *non est factum* for the same reasons, *eg*, that they did not understand English, that the documents they signed were not explained to them and that only the signing page of some documents was shown to them.

57 At the first hearing of both appeals before me on 16 September 2011, I indicated to counsel that it was for the plaintiffs to specify clearly what they were alleging and for which transaction. For example, it was for them to specify which transaction was entered into without instruction and which was entered into because of misrepresentation from UBS. Since they were not able to do so, except perhaps for the RSB bond transaction, I might allow the plaintiffs to amend the SOC to claim against UBS in respect of this transaction only. I directed their counsel to prepare a draft of a new set of proposed amendments which would confine their claim to the RSB bond transaction. I also directed counsel for both sides to see if they could agree on the new proposed amendments if my eventual decision was indeed to allow a claim for the purchase of RSB bonds to continue.

58 Consequently, the plaintiffs' solicitors sent a letter dated 27 September 2011 to UBS' solicitors, Drew & Napier, with an enclosed draft of their proposed amendments to the SOC ("the 2nd Draft SOC"). However, Drew & Napier did not agree on the new proposed amendments.

59 At the next hearing before me on 1 November 2011, Mr Kumar reiterated the point that there was no supporting affidavit for the first set of proposed amendments before the AR or any new proposed amendments in the 2nd Draft SOC before me. Mr Kumar stressed that the plaintiffs had not

explained their contradictions and had advanced a false case about absence of instructions. Accordingly, Mr Sreenivasan orally applied for an adjournment to file a supporting affidavit which Mr Kumar did not object to. In the meantime, Mr Kumar also criticised certain aspects of the proposed amendments in the 2nd Draft SOC. I granted the adjournment with directions for the filing and service of an affidavit for the plaintiffs and of their latest draft of proposed amendments to the SOC.

60 AM filed her next affidavit on 8 November 2011. She alleged that as regards the bonds purchased by the plaintiffs through OCBC (see [30] above) those bonds were low risk and issued by Indonesian banks. She had equated them with fixed deposits.

61 As regards a point previously taken by UBS that transcripts of conversations with her showed that she was using phrases and acronyms in respect of CMS and DCI products, AM said that she was merely repeating words used by UBS without understanding what most of them meant.

62 This affidavit of AM also exhibited the latest draft of the proposed amendments to the SOC ("the 3rd Draft SOC"). The material part of the latest draft for present purposes was as follows:

> 12. At all material times the Plaintiffs believed that their Accounts would be managed by Gary Yeo and Donna Teo, as agents or servants of [UBS], and that these persons would act as relationship managers whose duties would include the general handling of the accounts, proposing investments and giving correct and complete information in relation to such investments and the accounts and taking and executing the Plaintiffs' instructions correctly and with proper mandate. In taking instructions, [UBS] were at all times obliged to give correct and complete information that would properly and accurately represent the nature of the investments being recommended and to properly and accurately represent the risks involved in the investments. The Plaintiffs aver that instructions given where the nature of and risks involved in investments were improperly or inaccurately represented by [UBS] were not instructions that [UBS] could act or rely on and to do so is tantamount to acting without instructions. Further, the Plaintiffs aver that Gary Yeo and Donna Teo, the agents or servants of [UBS] owed the Plaintiffs a duty of care to act honestly and with reasonable skill and diligence in carrying out these duties in relation to the Plaintiffs' accounts.
>
> 1 3 . [UBS], in breach of their duties acted without instructions and advised the Plaintiffs negligently with regard to the nature and risk of the investments.
>
> Particulars
>
> a. [UBS], purchased bonds of the [RSB] having a face value of US$4 million, at a cost of about US$3.8 million, on or about 3 September 2008, on account of the Plaintiffs, without instructions from the Plaintiffs. The [RSB] bonds were purchased on leverage, thereby significantly adding to the risks.
>
> b. After the purchase, [UBS] informed [AM] of the purchase. Intending the Plaintiffs to act on their representations, [UBS] represented to [AM] that the investment in the [RSB] bonds were low risk, when they were not low risk, by *inter alia* making the following statements to [AM]:
>
> (i) "No there are no ups and down. For bonds, there are no ups and down."
>
> (ii) "For this one, it is not bad, because it is not involved in those risky businesses. It only does normal banks in Russia, so the risk is not very big."

(iii) "Ya, BBB minus" and "For that, I think it is of little consequence."

c. Relying on the representations set out in sub-paragraph (b) above, the Plaintiffs continued to hold and did not sell the [RSB] bonds. The said representations were false in that the price of the [RSB] Bonds could go up and down; did go down and it was false that the risks was not very big and that the BBB minus rating was of little consequence. [UBS] were negligent in making the said representations and had thereby caused loss and damage to the Plaintiffs.

...

63 In response, UBS filed an affidavit from Kua. She said that the Indonesian bonds purchased by the plaintiffs through OCBC, *ie*, the Mandiri bonds and the Bank Rakyat bonds were highly speculative according to certain ratings. In contrast, the RSB bonds (purchased through UBS) had a higher investment grade. Furthermore, Kua said that AM did not elaborate on the other investments in the plaintiffs' accounts with OCBC and yet another bank, *ie*, Coutts Bank. According to Kua, documents exhibited in an earlier affidavit of Nor Azman Bin Hamid, an Executive Director of UBS' Legal and Compliance department, filed on 14 April 2011, showed that the plaintiffs had a Yen loan and an investment in CMS on a leveraged basis with OCBC and had borrowed Yen to purchase US Dollars with Coutts Bank.

64 Kua also alleged that in fact the RSB bonds were purchased with AM's instruction after she had been provided with three sheets of information on the RSB bonds. So, it was, after all, not a case of AM having affirmed the purchase after it was effected.

65 According to the plaintiffs, the RSB bonds were purchased at a face value of US$4 million at a cost of about US$3.8 million on or about 3 September 2008 for the account of the plaintiffs. It was apparently the largest transaction (in value) executed by UBS for them. Surely by the time the plaintiffs commenced the action, they must have a position on what had transpired in respect of this transaction. For example:

(a) did AM give an instruction to buy and if so, was her instruction based on alleged misrepresentation from UBS or

(b) was the purchase made initially without instruction but affirmed thereafter by AM and, if so, was her affirmation based on alleged misrepresentation from UBS? or

(c) was there no instruction (and no affirmation) whatsoever?

66 It will be re-called that initially when the plaintiffs had applied for pre-action discovery, their position was that there was no instruction whatsoever for all the transactions (including the one for the RSB bonds) executed by UBS.

67 By the time of the first hearing of the appeals before me on 16 September 2011, their position in respect of the purchase of the RSB bonds was that this purchase was made initially without instruction but affirmed thereafter by AM based on alleged misrepresentation from UBS.

68 This was apparently their position at the second hearing before me on 1 November 2011. It was also their position at the third hearing before me on 10 January 2012.

69 Consequently, at the third hearing before me, Mr Kumar pressed home the point about the contractual terms which precluded the plaintiffs from relying on any alleged misrepresentation from

UBS. In response, the plaintiffs continued to rely on their arguments that they did not understand English and so on. They still relied on the defence of *non est factum*.

70 However, the Court of Appeal recently issued a timely reminder in *Soon Kok Tiang and others v DBS Bank Ltd and another matter* [2011] SGCA 55 on 2 November 2011. At [63], Chan Sek Keong CJ said:

> In view of our decision in this appeal, we think it apposite and timely to remind the general public that under the law of contract, a person who signs a contract which is set out in a language he is not familiar with or whose terms he may not understand is nonetheless bound by the terms of that contract. Illiteracy, whether linguistic, financial or general, does not enable a contracting party to avoid a contract whose terms he has expressly agreed to be bound by. The principle of *caveat emptor* applies equally to literates and illiterates in such circumstances.

71 Besides, this was not really a case of *non est factum*. The plaintiffs were not saying that the nature of the UBS documents which they had signed were *per se* different from what they thought the nature was. Instead, Mr Sreenivasan was arguing that the terms which UBS was relying on made the documents in question so markedly different that the plaintiffs could rely on *non est factum*. He gave the following example. If a client engaged a solicitor to give advice and if the client signed a letter of engagement which stated that the client was relying on his own judgment and not on any advice from the solicitor, then that would be a case of *non est factum*.

72 While I was of the view that it may be that a solicitor in such a situation could not escape liability for negligent advice entirely, it would not be on the ground of *non est factum*. In my view, the plaintiffs' attempt to avoid the contractual terms was not a case of *non est factum*. Furthermore, the plaintiffs did not exhibit the contractual terms which they had with OCBC or with any other bank to make their point about UBS' terms being so markedly different from what one would expect from such banking documents.

73 It may be arguable that UBS' contractual terms should not apply in situations if in fact misrepresentation was made by UBS in view of the Unfair Contract Terms Act (Cap 396 1994 Rev Ed). However, the plaintiffs were not relying on this point even though it was mentioned by Mr Kumar and by this court.

74 Sensing that the plaintiffs' claim in respect of the RSB bonds might not survive UBS' contractual terms, Mr Sreenivasan then said that in fact the plaintiffs' case on this purchase was that there was no instruction whatsoever to purchase, or affirm the purchase, of the bonds. However, he was constrained by the 3rd Draft SOC he had tendered.

75 Para 12 thereof is set out above at [62]. It asserted that instructions given based on improper or inaccurate representation from UBS were not instructions on which UBS could act and to do so was tantamount to acting without instructions. This qualification therefore applied to the subsequent paragraphs of the latest draft where an allegation was made of there being no instruction.

76 It is useful to remember that when the 3rd Draft SOC was tendered, it was meant to be confined to one transaction, *ie*, the purchase of the RSB bonds. If the plaintiffs' position was that there was no instruction whatsoever, then the qualification in para 12 of that draft was meaningless. Either there was no such instruction or any instruction given was based on misrepresentation from UBS. It could not be both.

77 Mr Sreenivasan sought to extricate the plaintiffs from their predicament. He argued that if

consent was given and that consent was based on a lack of information or misrepresentation, then it was not informed consent. In my view, that was not the point. The plaintiffs had to make up their mind first as to whether they were, as a fact, asserting that consent had not been given. If they accepted, as a fact, that consent had been given then they could assert that it was not informed consent. However, if they were asserting that, in fact, no consent had been given, then the question of informed consent was irrelevant. Counsel was conflating the two.

78 The plaintiffs were taking the latter position, *ie*, that consent was given but that it was based on misrepresentation. For present purposes, it did not matter whether the consent was given before the purchase was effected or was an affirmation after the purchase. The plaintiffs were precluded from relying on any misrepresentation because of the contractual terms. That was why Mr Sreenivasan reverted to the argument about there being no consent/instruction whatsoever, but when he was reminded about the substance of the 3rd Draft SOC and in particular, para 12 thereof, he sought to raise the argument about lack of informed consent. In my view, his analogy about lack of informed consent was, in substance, the same argument he had already raised, *ie*, that there was no instruction in the sense that the instruction was based on misrepresentation.

79 Mr Sreenivasan also suggested that the 3rd Draft SOC had included alternative positions. First, an absence of consent whatsoever. Alternatively, an absence of informed consent in that the consent was based on misrepresentation.

80 However, in my view, there was no alternative plea in the latest draft. If counsel had really intended to plead the plaintiffs' case in the alternative, it would have been a simple matter for him to do so clearly. He had been given more than sufficient time to try and present proposed amendments ever since the hearing before the AR.

81 Besides, AM had to assert in her affidavits which position she was taking. It was one thing to try and plead contradictory facts (assuming the plea was clearly made). It was another to assert contradictory facts in an affidavit especially when the deponent had personal knowledge of the facts.

82 Mr Sreenivasan referred to the third affidavit of AM filed on 8 November 2011. She said at para 13:

> [UBS] have picked on the fact that I stated that I did not know that the transactions were being done. I would like to state that there is a discrepancy as to what was being done and what I thought was being done, as they were different things. In relation to the [RSB] bonds, the key conversation and transcript will be the conversation, if any, where I am purported to have given instructions; to show whether what was told to me and what I said, amounted to instructions for the leveraged purchased of [RSB] bonds.

83 Mr Sreenivasan submitted that AM's reference to "the conversation, if any ..." showed that AM was suggesting that no instructions had been given to purchase the RSB bonds. In my view, that phrase should not be considered in isolation. When para 13 was considered in its entirety, it was clear to me that AM was taking the position that she had given the instructions to purchase (or affirm the purchase) but such instructions were based on what UBS had represented to her. Why else would AM refer to "a discrepancy as to what was being done and what I thought was being done" and "to show whether what was told to me and what I said, amounted to instructions ...". Again, if she had simply wanted to say that no instruction was given, all the qualifications would be irrelevant. The reference to "the conversation, if any ..." was just another attempt to hedge her position. Notwithstanding her position that her instruction was due to misrepresentation from UBS, she still wanted to reserve a possible recourse to a contradictory position, *ie*, that there was no instruction at all.

84 Furthermore, one of AM's earlier affidavits reinforced the point that she was asserting that instruction had been given but based on misrepresentation. She said in her affidavit filed on 18 May 2011 at paras 23 and 24:

> 23. ... Further, it is not that I did not know that a transaction was being done; my main complaint is that the nature and risk off [*sic*] the transaction was not explained to me and/or was misrepresented to me.
>
> 24. From the limited transcripts given, I can identify one key misrepresentation. I refer to page 45 of Elaine's 1st Affidavit. [Kua] says that there are "*no ups and down*" for the [RSB] bonds. [Kua] went on to say that a BBB minus rating is of little consequence. This occurred after I had bought the bond but shows that [UBS] were not honest with me. [UBS] did not advise me as to the risks and often misrepresented the risk level of these investments. The conversation where I was advised to buy the bonds, in July 2008, I was told by Gary that the investment in [RSB] is a low risk, short term investment. However, no transcripts have been transcribed or provided by [UBS} in their Affidavits thus far of this conversation.

85 Hence, in view of the 3rd Draft SOC and the affidavits of AM, it was too late for the plaintiffs to revert to a position of no instruction at all.

86 I should mention one other point. The 3rd Draft SOC stated, at para 13(a), that the RSB bonds were purchased on leverage, thereby significantly adding to the risks. Yet there was no allegation beside this bare fact. The plaintiffs were not alleging that the purchase on leverage was made without instruction. Neither were they alleging that their use of leverage was based on the same or some other misrepresentation from UBS. If they had sought to rely on misrepresentation in the context of purchasing on leverage, they would again have been caught by the contractual terms.

87 Accordingly I dismissed the appeal against the AR's decision to dismiss the application to amend the SOC and I also dismissed the appeal against the AR's decision to strike out the SOC. I fixed the quantum of costs for the appeals on an indemnity basis at $50,000 plus reasonable disbursements which were agreed.